

RECENT RULINGS ILLUSTRATE IMPORTANT NEED FOR E-DISCOVERY DOCUMENT PRESERVATION POLICY

As reported in our Spring 2010 Litigation Newsletter, there have been several recent decisions concerning electronic discovery obligations that illustrate the importance of having in place a proper document preservation policy. Two of these are particularly relevant and are discussed below. They both illustrate how failing to preserve relevant documents can severely impair a party's ability to defend or prosecute its case and can also lead to harsh monetary penalties.

PENSION COMMITTEE CASE BACKGROUND

A recent ruling by Judge Shira Scheindlin, in a case titled *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*, provides a timely reminder that a litigant who loses or destroys relevant documents and information – even unintentionally – can face serious consequences.

Pension Committee concerned an action by a group of investors to recover losses stemming from the liquidation of two offshore hedge funds. Before commencing litigation, 13 of the plaintiffs did not implement litigation holds, suspending the automatic deletion/destruction of electronic documents. They also did

not provide prompt, proper written notices to employees of the litigation hold when they implemented it, nor were employees adequately supervised in their document preservation and collection efforts.

PENSION COMMITTEE RULING

In a ruling on a motion for sanctions, the court held that 13 plaintiffs were found to have been at least negligent in their efforts to meet their discovery obligations and were required to pay monetary sanctions. The six worst offenders also received the severe sanction of an “adverse inference instruction” that is to be given to the jury – the jury will be told at trial that relevant evidence was destroyed after the duty to preserve arose and that the plaintiffs were grossly negligent. The jury will also then be permitted to find that the lost or destroyed evidence would have been favorable to the defendants.

THE BOTTOM LINE

We recommend instituting a document preservation policy that puts in place procedures that will protect your company from the possibility of sanctions.

EINSTEIN CASE BACKGROUND

In *Einstein v. 357 LLC*, Justice Ramos of the Commercial Division of the New York State Supreme Court recently sanctioned several parties, including the real estate brokerage firm, The Corcoran Group, for failing to have in place a reasonable retention policy after learning of the case. At issue on the e-discovery claim were internal

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emails at Corcoran potentially concerning a water leak in a condo unit that was bought by the plaintiff. The plaintiff was able to obtain through other co-defendants certain emails showing that there were internal emails at Corcoran that concerned the leak, but Corcoran produced no such emails, despite discovery requests seeking them.

After extensive discovery and several motions to compel, including a motion to compel the production of hard drives and an inspection of the hard drives which revealed no relevant emails, Corcoran's Head of IT for the first time informed the plaintiff and the court that its email retention policy required that all employees manually delete emails from their inbox on a regular basis as their inbox capacity was only 200 megabytes. No litigation hold was put in place to prevent the possible deletion of relevant emails from inboxes after the litigation was initiated. Additionally, no search was done by Corcoran of the employees' home computers or other devices (e.g., blackberries, pdas, etc.) to determine if they had responsive documents.

EINSTEIN RULING

Not only was an adverse inference given to Cocoran concerning their knowledge of the water leak and failure to disclose it to the plaintiff, but Corcoran and its counsel were also sanctioned for all costs incurred in connection with the dispute, including plaintiff's costs of conducting a useless inspection of hard drives.

CONCLUSION

Failing to preserve relevant documents can severely impair a party's ability to defend or prosecute its case and can also lead to harsh monetary penalties. Thus, as soon as a party reasonably anticipates litigation, it is critical that sources of potentially relevant documents be identified and a litigation hold be implemented. Employees who may have relevant information must be advised, in writing, of their preservation obligation and steps must also be taken to supervise and monitor the preservation process. There are costs associated with preservation, but efficient, cost-effective strategies can be developed for protecting potentially relevant information while minimizing cost and disruption to a company's day-to-day business. In addition to providing protection from claims of document destruction, timely and thorough preservation efforts can also result in substantial savings. It is important to develop protocols that are aimed at protecting a business while at the same time minimizing the costs and burdens involved in preservation.

E-DISCOVERY CHECKLIST

We have developed an E-Discovery checklist to help guide you through the steps to take when confronted with an E-Discovery preservation demand or obligation. If you would like to obtain a copy of our E-Discovery checklist, please contact one of the authors below.

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