
Third-Party Discovery: Who's in Control?

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If there were any litigants left who were in doubt as to whether they were under an obligation to preserve documents and electronically stored information when litigation is reasonably anticipated, Judge Shira Scheindlin's recent opinion in *Pension Comm. of Univ. of Montreal Pension Plan v. Bank of Am. Secs., LLC*, surely erased those doubts. 2010 U.S. Dist. Lexis 183412 (S.D.N.Y. Jan. 11, 2010) Indeed, as Judge Scheindlin stated, "[B]y now, it should be abundantly clear that the duty to preserve means what it says and that a failure to preserve records—paper or electronic—and to search in the right places for those records, will inevitably result in the spoliation of evidence." *Id.* at *1. Moreover, a litigant's failure to take certain actions to preserve documents can result in a finding of gross negligence, which can lead to sanctions, an award of costs, or an adverse inference jury instruction. Examples of such failures include a failure to issue a written litigation hold, failure to ensure that electronic and paper records of key players are preserved, and failure to cease the deletion of relevant e-mail. Although perfection from litigants is not required, "at a minimum, they must act diligently and search thoroughly at the time they reasonably anticipate litigation." *Id.* at *24. The obligation to preserve is clearly a serious one.

As clear as *Pension Committee* was concerning the duty to preserve documents, it did not speak directly to the scope of the duty to preserve documents in the possession of third parties. While it is clear that counsel must investigate thoroughly to determine who "key players" are and make sure that any relevant documents in their "possession, custody or control" have been preserved, there may still be some question as to whether or not a party has "control" of third-party documents and electronically stored information for purposes of preservation. For environmental litigators, this can be a particularly important issue.

Under Fed. R. Civ. P. 34, documents have been deemed to be under a party's "control" for purposes of third-party production when that party has "the right, authority, or practical ability to obtain the documents from a non-party to the action." *In re NTL Securities Litigation*, 2007 U.S. DIST. LEXIS 6198 (S.D.N.Y. 2007) quoting *Bank of N.Y. v. Meridien BIAO Bank Tanzania Ltd.*, 171 F.R.D. 135, 146-47 (S.D.N.Y. 1997). As discussed below, courts may differ on whether the "practical ability" test applies in the preservation setting, but it is clear that understanding and defining the relationship between the litigant and any third parties who may be "key players" and have relevant information is a critical part of counsel's necessary due diligence for preservation purposes. This inquiry may be even more important for environmental

litigators because environmental litigation is particularly likely to involve numerous independent third parties, such as environmental consultants, scientists, hydrogeologists, engineers, and others. Whether the environmental litigant has the right, authority, or practical ability to obtain the documents, and electronically stored information, of those third parties and be under a duty to preserve them depends on the specific nature of the relationship.

A recent case that analyzed the contours of a party's duty to preserve third-party documents is *Goodman v. PraxAir Services, Inc.*, 632 F. Supp. 2d 494 (D. Md. 2009), 2009 U.S. Dist. LEXIS 58263. *Goodman* involved a breach of contract claim in which the plaintiff alleged that the defendant PraxAir Services, Inc. (hereinafter Tracer/PSI, the successor in interest to Tracer Research Corp.) spoliated relevant information and violated the duty to preserve when it failed to implement a litigation hold on documents in the possession of its consultants. The failure resulted in a loss of data and information that was clearly relevant to the cases.

Tracer/PSI retained Goodman to help it in an effort to persuade the Environmental Protection Agency to waive testing requirements for certain of its products. About midway through the project, Tracer retained other third-party consultants to provide additional assistance in that process. Goodman was not included in discussion with the new consultants and was not part of their negotiations that eventually led to a positive outcome for Tracer/PSI, even though he offered his assistance. When Goodman sought to collect the fee promised him if the project was successful, disagreement arose as to whether he played any role in the success and was owed any additional money. Goodman filed suit, and when he deposed the other consultants retained by Tracer/PSI, he learned that they were never notified to retain or preserve documents related to the project and had, in fact, destroyed relevant information during the course of the litigation. Goodman sought sanctions against Tracer/PSI for spoliation arguing that the consultants' documents were in the "possession, custody and control" of Tracer/PSI.

United States Magistrate Judge Paul W. Grimm examined the relationship between Tracer/PSI and the third-party consultants and concluded that Tracer/PSI did not have sufficient legal authority or practical ability to ensure the preservation of documents prepared by the consultants. The letter in which the consultants accepted Tracer/PSI's offer to act as its representatives throughout the duration of the project was silent as to whether Tracer/PSI would have possessory rights, access to or control of any documents prepared and maintained by the third-parties, and there was no other evidence to suggest that the relationship included any agreement to share documents. The court declined to apply the "practical ability" test used by many courts in the Rule 34 production context. That test states, in essence, that if a party is able to ask for documents and receive them on request or routinely does so the documents are within its control for purposes of production. Instead, Judge Grimm followed the Fourth Circuit's decision in *Silvestri v. General Motors Corp.*, 271 F.3d 583 (2d Cir. 2001); 2001 U.S. App. LEXIS 24413, finding that,

while the practical ability test may be appropriate when assessing a party's obligations under Rule 34 for production, the "control" test was more appropriate for determining the trigger for a party's duty to preserve. Thus, since Tracer/PSI did not have the requisite control and was not under a duty to preserve the consultants' documents, the fact that relevant documents were destroyed did not lead to a finding of spoliation.

This decision raises two important points: (1) the facts and circumstances of the party/third-party relationship will determine whether the duty to preserve attaches and an investigation into that relationship is required, and (2) the degree of control required to trigger the preservation duty is not settled, may vary between jurisdictions, and may be interpreted differently than the duty to produce documents under Rule 34. Thus, for environmental litigators, it is important to identify the third parties who may have been retained by a client to work on issues or sites that are the subject of the litigation; to investigate and understand the relationship (contractual and factual) between the client and any third party; and to

understand how the jurisdiction views the correlation between the duty to produce and the duty to preserve, to examine the scope of those duties, and, where appropriate, to be sure that potentially relevant information is preserved.

While it is a party's responsibility to ensure that documents and electronic data are preserved, "the preservation obligation runs first to counsel, who has a duty to advise his client of the type of information potentially relevant to the lawsuit and of the necessity of preventing destruction." See *Heng Chan v. Triple 8 Palace, Inc.*, 2005 U.S. Dist. LEXIS 16520, at *16 (S.D.N.Y. 2005). This obligation must necessarily include the duty to advise the client that the preservation of third-party documents may be required and to identify and investigate third-party relationships that may require such preservation.

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