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Court Sanctions Party for Document Missteps

In *Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*, 2007 WL 684001 (D. Colo. Mar. 2, 2007), an animal-feed manufacturing company sued Land O'Lakes for trademark infringement. In the course of litigation, Cache La Poudre filed a motion seeking sanctions for Land O'Lakes' failure to discontinue its routine practice of deleting e-mail older than 90 days and erasing the hard drives of departing employees even after the complaint was filed. According to Cache La Poudre, relevant e-mails and other electronically stored information had been destroyed by these practices. The court granted the sanctions, in part, and imposed a \$5,000 penalty and costs on Land O'Lakes.

How and why to implement litigation

As most pork producers know, lawsuits often involve the exchange of relevant information and documents during the "discovery" process. Missteps in this process have become fodder for court decisions that have grabbed headlines and the attention of corporate lawyers and executives because cases can be won or lost depending on whether the litigants comply with discovery obligations.

This is often the product of failures to institute effective policies to retain documents relevant to litigation (also known as litigation-record holds). Such missteps could be avoided through communication, coordination and compliance monitoring, involving key litigation players, information technology professionals and legal counsel.

Early Attention to Detail

Often you can avoid discovery issues with thorough and strategic planning at the beginning of a case. For instance, once a suit is filed and the claims are identified, IT representatives can map the company's computer data infrastructure to help identify electronically stored information, which may or may not be relevant to the litigation. However, until those information stores are identified, the company won't be able to assess what information might have to be retained and produced.

Similarly, IT representatives, teamed with knowledgeable in-house and outside lawyers, can help develop defensible protocols to preserve and collect relevant information. Such efforts, as well as monitoring initiatives that ensure employees are retaining required documents, can reduce the likelihood that oversights and missteps will occur.

Creating a legally defensible and efficient litigation-record-retain process does not happen by chance. It requires the coordination of a "core team" of individuals from within and outside the company. The litigation's focus and scope, and the nature of relevant records will often dictate who's on that team. The following

individuals, however, are almost always indispensable players: responsible in-house counsel, outside counsel, company records manager, one or more IT representatives who are knowledgeable about the company's information systems, and members of relevant business units. Each plays an important role throughout the hold-notice process once a hold obligation is triggered.

Creating a Record of Reasonableness

The in-house counsel is often responsible for coordinating litigation-record-preservation efforts within a company — beginning with drafting and distributing the litigation-retain notice itself.

A litigation-record-retain notice should be created and distributed to employees within a reasonable time after an organization receives a credible litigation threat. It should provide sufficient detail about the hold obligation's scope, while being clear and understandable. Drafting such a litigation-record-retain notice begins by analyzing the anticipated (or pending) litigation to identify the hold obligation's scope.

Courts have recognized that, "[w]hile a litigant is under no duty to keep or retain every document in its possession . . . it is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request."

For example, if a suit alleges that a pork producer is responsible for injury resulting from someone consuming tainted meat, documents relating to the animal or animals from which the meat was processed would likely have to be preserved. This could include information about feed, veterinary care and the animals' purchase and sale.

When a pork production company is faced with an actual complaint, the allegations, coupled with the company's knowledge regarding the facts and issues

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it raises, are often the starting points to analyze the potential scope of the company's hold obligation and the notice that will follow. When litigation is only reasonably anticipated, and not actually pending, additional fact gathering may be necessary to evaluate the hold obligation's potential scope.

Articulating the hold obligation's scope is only part of the drafting process. The other — sometimes more challenging part — is providing employees with sufficient direction on how to comply with the hold notice, while they tend to their many other responsibilities. The corporate records manager and IT representatives should be consulted on this aspect of the drafting process.

For example, IT representatives and experienced counsel (in-house and outside) can develop defensible document-retention protocols and discuss deploying certain technologies that facilitate proper information retention. These protocols and technologies can be incorporated into the hold notice itself or supplemented as appropriate.

While the hold notice is being drafted, potential recipients must be identified. The duty to preserve extends to employees that are likely to have relevant information — the case's so-called "key players." In-house counsel and representatives from the relevant business units play an important role in identifying key players inside the company and possibly outside of the company, who may have records relevant to the substantive issues in the case. IT representatives usually need to be consulted, as well, because they are typically most knowledgeable about the location, nature and the technology involved with the company's electronically stored information. Sometimes, company data are not just stored on company computers or on company property. As a result, those people, whether they are on the core team or not, need to be made aware of the hold obligation and take measures to retain relevant information.

A party's discovery obligations do not end with implementing a "litigation hold" — to the contrary, that's just the begin-

ning. Communication and coordination need to continue throughout the life of the hold obligation. That means litigation-record-retention reminders need to be sent out periodically. As a particular case evolves, new issues surface and old issues disappear, the hold notice's scope should be reevaluated to ensure that it addresses the company's record-retention duty.

At the same time, compliance monitoring is needed to confirm that the hold notice is being followed. Monitoring can take several different forms depending on the case's circumstances. At minimum, it should involve input from in-house and outside counsel who have been tasked by some courts with a degree of responsibility in this area.

Monitoring compliance includes confirming that relevant employees:

- (1) Have received the hold notice;
- (2) Have reviewed and understand the hold notice;
- (3) Are continuing to comply with the hold notice's requirements with respect to both paper and electronic records;
- (4) Have been given an opportunity to ask questions regarding record retention; and
- (5) May include an audit of record-retention practices, as appropriate.

Following these steps will go a long way toward ensuring that litigation, which is stressful enough, does not result in avoidable sanctions or losses just because a document needed for litigation has not been properly preserved. PE

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