# Selected Recent Developments in Case Law - Document Retention or Document Destruction: You Decide

Aviation Insurance Association – CLE Session - 2017

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- In the aviation manufacturing/products arena, safe to assume that, rightly or wrongly, our clients will end up product liability litigation.
- This session will briefly discuss how to prepare clients for products litigation under the broad term, employee "Product Integrity" training, and highlight the business case for document retention.

- It will also review cases alleging abuses of document retention/destruction policies and programs, and review court sanctions for abuses of those policies and programs.
- Finally, the session will highlight selected court rules and ethical considerations regarding electronically stored information.

## From the Bench…

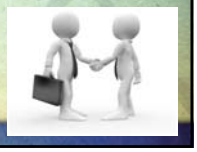
- Defense side of litigation: Document retention, or interest in document destruction?
- Plaintiff side of litigation: Discovery to build a case or sanctions?

- On the employee training side, build an awareness that communications, verbal or written, e-mails, social media (factual or non-factual) may affect the outcome of a products liability case.
- Develop a Response Plan to deal with and handle communications concerning any aviation incident or accident, and how the company will communicate with media, FAA, NTSB.

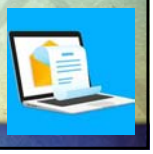
- Social media is best used for social and non-business purposes.
- The basics of product liability litigation and the breadth of "discovery," including electronic discovery.

- Duty to build a safe product.
- If there is a problem in the design or manufacture of a product, or anything that might affect the quality and integrity of the brand or a particular product – Speak Up.

- Utilize face to face communication. Think if you really need to send an e-mail to the person in the work space next to you.
- E-mail communications have different potential effects, and may require someone to "close the loop."



- Is there a need to keep that e-mail or document?
- Would you be comfortable testifying before a jury regarding its contents?



- Speculation (oral, e-mail, social media) deadly.
- Tweets, Facebook, Texts, E-mails.
- Discourage tweeting, facebooking, texting or e-mailing at time of a loss, or at any time regarding "company business."

## Best Legal Advice We Can Ever Provide…

- DON'T SAY NOTHIN' STUPID.
- Close The Loop On Bombshells.
- No Personal Files.

## The Business Case for Document Retention

- Preservation of documents, engineering studies, flight test results, component testing, etc.(design and certification requirements/decisions);
- Retention of documents for required local, county, state, and federal record retention purposes; and,
- Documents required for management of the business enterprise.

- Establish a written document retention policy minimally setting forth the purpose of the policy, identification of documents, proper destruction procedures and intervals, access to documents
- Establish a retention schedule, by company functions (legal, engineering, finance, HR, manufacturing, QC, facilities) how records are retained (electronic, hard copy, etc.), for how long, and where they are retained.

- A well-thought-out, written document retention program, that is adhered to without fail, is critical to respond to claims of spoliation of evidence and motions for sanctions.

## FRCP 37(e)

- Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

1) Upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

2) Only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

A. presume that the lost information was unfavorable to the party;

B. instruct the jury that it may or must presume the information was unfavorable to the party (the dreaded adverse inference); or

C. dismiss the action or enter a default judgment.

## *MICRON TECHNOLOGY, INC., v. RAMBUS INC.* 917 F.Supp.2d 300 (2013)

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B. instruct the jury that it may or must presume the information was unfavorable to the party (the dreaded adverse inference); or

C. dismiss the action or enter a default judgment.

- Patentee's document retention policy, pursuant to which documents were destroyed, was implemented in preparation for patent litigation;
- Patentee's document retention policy was executed selectively;

- Patentee acknowledged impropriety of its document retention policy;
- Patentee engaged in several instances of litigation misconduct;

- Patentee's spoliation of evidence prejudiced alleged infringer; and,
- Holding the patents-in-suit unenforceable against alleged infringer was appropriate sanction.

## *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003)

- Lead case on the duty to preserve and timely produce e-mails, documents, backup tapes, etc.

- What must a lawyer do to make certain that relevant information—especially electronic information—is being retained?
- First, counsel must issue a "litigation hold" at the outset of litigation or whenever litigation is reasonably anticipated. The litigation hold should be periodically re-issued so that new employees are aware of it, and so that it is fresh in the minds of all employees.

- Second, counsel should communicate directly with the "key players" in the litigation, i.e., the people identified in a party's initial disclosure and any subsequent supplementation thereto.
- Finally, counsel should instruct all employees to produce electronic copies of their relevant active files. Counsel must also make sure that all backup media which the party is required to retain is identified and stored in a safe place.

## *UNITED STATES of America, v. PHILIP MORRIS USA INC.* 327 F.Supp.2d 21 (2004)

- High-ranking employees' noncompliance with a court order addressing evidence preservation, and with the company's document retention policies, resulting in the loss of e-mail records, did not warrant such a far-reaching sanction as the adverse inference sought by the government; but
- The noncompliance did warrant imposition of a sanction precluding all individuals who had failed to comply with the document retention program from testifying in any capacity at trial, as well as a monetary sanction of $2,995,000.

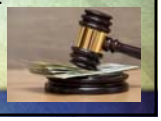
## *In Re Actos* (Pioglitazone) Products Liability Litigation, No. 11-md-2299 (W.D. La. Jan. 27, 2014)

- Lost, destroyed e-mails and records of key management personnel, adverse inference and spoliation sanctions.
- Reference to counsel's ethical duties regarding document retention prior to and during litigation.

- Jury Awards $9B In 1st MDL Actos Bladder Cancer Trial Against Takeda, Eli Lilly
- LAFAYETTE, La. — The first federal court Actos bladder cancer trial ended April 7 in a $9 billion verdict against co-defendants Takeda Pharmaceuticals USA Inc. and Eli Lilly & Co. Inc., according to Takeda. The jury awarded Terrence and Susan Allen $1,475,000 in compensatory damages, finding Takeda 75 percent liable and Lilly 25 percent liable. the jury awarded the Allens $6 billion in punitive damages against Takeda and $3 billion against Lilly.

***The ESTATE OF Candace H. SEAMAN, by Paul SEAMAN, Executor, v. HACKER HAULING and W.M. Harrington* 840 F.Supp.2d 1106 (2011)**

- Evidence established that plaintiff's counsel intentionally allowed driver's vehicle to be destroyed, and that he did so out of a desire to suppress the truth;
- It was appropriate and sufficient sanction to strike estate's expert's testimony and his report from evidence.



***Appellee, v. Union Pacific Railroad Company*, 354 F.3d 739 (2004)**

- Frank STEVENSON, Cross–Appellant/Appellee
- District Court was within its discretion when it imposed sanction of adverse inference jury instruction against defendant for its prelitigation destruction of tape-recorded voice radio communications between train crew and dispatchers on date of collision;

- District Court abused its discretion when it imposed sanction of adverse inference jury instruction against defendant for its prelitigation destruction of track maintenance inspection records;
- District Court was within its discretion when it imposed sanction of adverse inference jury instruction against defendant for its destruction of track maintenance inspection records after commencement of litigation;
- District Court abused its discretion when it did not permit defendant to offer reasonable rebuttal to adverse inference jury instruction.

### *Equal Employment Opportunity Commission v. Resources For Human Development, Inc.* 843 F.Supp.2d 670 (2012)

- Destruction or loss of contemporaneous notes employer's directors made regarding their frequent conversations with each other about employee's alleged job performance deficiencies was in bad faith;
- EEOC was prejudiced by bad faith destruction or loss of directors' contemporaneous notes; but
- bad faith and prejudicial destruction or loss of directors' contemporaneous notes warranted sanction of attorneys' fees and costs and striking of "reconstructed" notes, rather than sanction of adverse inference jury instruction.

### *Tod Wagner, Appellant, v. Huron County Board Of County Commissioners, et al., Appellees.* 2013 WL 5211473 (2013)

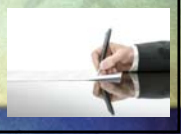
- Airport authority violated Public Records Act by destroying public records of measurements of fuel levels in airport's underground fuel tanks, even though records were allegedly destroyed in accordance with airport authority's record retention policy;


### *Tod Wagner, Appellant, v. Huron County Board Of County Commissioners, et al., Appellees.* 2013 WL 5211473 (2013)

- Requester did not have a right to production of requested e-mails of county board of commissioners; and
- Trial court's finding that requester failed to submit proper records request for audiotapes to airport authority was against the manifest weight of the evidence.

## *Francis Baez, V. Delta Airlines, Inc.*, 2013 WL 5272935 (2013)

- Even if a party's culpability is established, for sanctions to be imposed, the Court must find that relevant evidence "actually existed and was destroyed."
- Plaintiff has not proven that the allegedly spoliated evidence existed.



- Plaintiff has failed to demonstrate that Delta had an obligation to preserve the evidence at the time of the accident. "[A] party seeking an adverse inference instruction based on the destruction of evidence must establish (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a culpable state of mind; and (3) that the destroyed evidence was relevant to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense."

## *Jason M. Wandner, Plaintiff, v. American Airlines, et al., Defendants*. 79 F.Supp.3d 1285 (2015)

- If the well-known, vinyl era rock bands Bad Company and Blind Faith had merged to form a super group, then the hypothetical new band might have been called Bad Faith, which would satisfy Plaintiff's burden to obtain the spoliation sanctions he seeks.

- Plaintiff's request that the County be taken on an involuntary trip to the land of sanctions for its mishandling of his request to preserve video evidence begins, like many trips, at the airport, where Jason Wandner—a criminal defense attorney—went to meet his client.
- What is not in dispute, however, is that Wandner was arrested for disorderly conduct and was transported to jail, where he bonded out approximately seven hours later.

- The Undersigned concludes, after a multi-hour evidentiary hearing and supplemental briefing, that the County badly bungled Wandner's request to preserve the surveillance videos and is surely responsible for the videos' destruction. Nevertheless, the requested sanctions cannot be awarded because Wandner has not met his burden of proving that the County acted in bad faith. In addition, he has not sufficiently demonstrated that the videos contained any relevant evidence.
- County did not act in bad faith, and
- Passenger failed to establish that the video would be helpful.

- News & Press: IDC Quarterly – Sep. 22, 2014
- On May 29, 2014, the Illinois Supreme Court formally adopted rules relating to the discovery of electronically stored information (ESI). To accomplish this, the court amended Illinois Supreme Court Rules 201, 214, and 218. Illinois' new e-discovery rules (Rules) go into effect July 1, 2014.

- The amendment to Illinois Supreme Court Rule 218 includes a provision that encourages parties to use the initial case management conference to resolve issues concerning ESI.
- The Illinois Supreme Court made no changes to the sanctions available under Rule 219 addressing the loss of ESI.

- From TransPerfect Legal Solutions (TLS) – e-discovery manager
- California Ethics Rule on E-Discovery Competency (Formal Opinion No. 2015-193) adopted by California Bar, June 30, 2015.
- The Opinion notes that an attorney handling e-discovery matters, either by themselves or in association with competent co-counsel or expert consultants, should be able to:

- Initially assess e-discovery needs and issues, if any;
- Implement/cause to implement appropriate ESI preservation procedures;
- Analyze and understand a client's ESI systems and storage;
- Advise the client on available options for collection and preservation of ESI;
- Identify custodians of potentially relevant ESI;

- Engage in competent and meaningful meet and confer with opposing counsel concerning an e-discovery plan;
- Perform data searches;
- Collect responsive ESI in a manner that preserves the integrity of that ESI; and
- Produce responsive non-privileged ESI in a recognized and appropriate manner.

- This rule is cited in *HM Electronics v. R.F. Technologies*, 2015 WL 4714908 (S.D. Cal. 2015), wherein the court applied sanctions for failure to adhere.

## Thank you! Questions?

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