

E-Discovery Failures Can Eliminate Tennessee Civil Justice Act Damage Limitations

There are two fundamental takeaways from Tennessee's recently enacted tort reform legislation from an e-discovery perspective/. To ensure that the non-economic and punitive damage limits apply, organizations especially health care providers must (1) develop document management policies and comply with them; and (2) issue litigation holds and take reasonable, legally defensible steps to ensure the preservation of evidence.

During its 2011 session, the Tennessee General Assembly enacted the Civil Justice Act. Similar to other tort reform measures enacted throughout the country, the Act caps non-economic and punitive damages in an effort to make the State of Tennessee more hospitable to business.

Under the Act, economic damages are recoverable without limitation. Non-economic damages are limited to \$750,000 per individual Plaintiff. Tenn. Code Ann. § 29-39-102(a)(2). If the loss or injury is catastrophic, the limitation is increased to \$1,000,000. Catastrophic losses or injuries include (1) spinal cord injuries resulting in paraplegia or quadriplegia; (2) amputation of two hands, two feet or one of each; (3) third degree burns over either 40% or more of the body as a whole or third degree burns up to 40 percent or more of the face; or (4) wrongful death of a parent leaving a surviving minor child or children for whom the deceased parent had lawful rights of custody or visitation. Tenn. Code Ann. § 29-39-102(c)-(d). Punitive damages are limited to greater of two times the compensatory economic damage award or \$500,000. Tenn. Code Ann. § 29-39-104(a)(5).

The limitation on the amount of non-economic damages for personal injury or wrongful death actions and for punitive damages does not apply if the Defendant intentionally falsified, destroyed, or concealed records containing material evidence with the purpose of wrongfully evading liability in the case. Tenn. Code Ann. § 29-39-102(h)(2); Tenn. Code Ann. § 29-39-104(a)(7)(B).

The Act does provide a safe harbor for not producing records pursuant to privileges and other laws applicable to discovery or to the management of records in the normal course of business or in compliance with a document retention policy or state or federal regulations. Tenn. Code Ann. § 29-39-102 _____. This safe harbor is consistent with t Rule of Civil Procedure 26 and decisions in leading e-discovery cases such as

There are two fundamental takeaways from this legislation from an e-discovery perspective. To ensure that the non-economic and punitive damage limits apply, organizations especially health care providers must (1) develop document management policies and comply with them; and (2) issue litigation holds and take reasonable, legally defensible steps to ensure the preservation of evidence.

Automatic email or electronic record deletion policies or processes that are not suspended through a litigation hold and the active efforts of the organization and/or its counsel, the failure to issue a proper litigation hold and monitor individual custodian compliance with it, and the failure to follow retention policies is the destruction of evidence.

The sad fact of the matter is that only about 50% of companies have document retention policies as reported in Symantec's recent survey. Further, the vast majority of organizations with document retention and management policies do not actively monitor compliance with these policies. The unfortunate result is that potential evidence is routinely lost. The Plaintiffs bar is well aware of this fact. Further, sanctions are on the rise as evidenced by the recent Duke Law Journal and Gibson, Dunn & Crutcher studies. Another unfortunate fact is that negligence by counsel in the area of e-discovery is rampant.

The failure of organizations to address these risks could result in the double whammy of monetary sanctions, adverse instructions and other penalties couple with the loss of non-economic and punitive damages protections intended by the Act.

Thus,
the need for proactive information management policies to prepare organizations for litigation and its e-discovery aspects and experience e-discovery counsel has never been greater in Tennessee.