Client Alert

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The Ghosts of Litigation Holds Past

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Earlier this year, in the widely followed *In re: Actos (Pioglitazone) Products Liability Litigation* matter, a Louisiana federal jury ordered a drug manufacturer to pay $6 billion in punitive damages and $1.5 million in actual damages.[1] An adverse ruling and instruction from the judge regarding spoliation of evidence likely played an important role in the verdict. The spoliation ruling stemmed from a litigation hold imposed in a separate lawsuit almost ten years earlier. Below we suggest a number of steps that can help prevent a similar outcome for manufacturers in future cases.

THE SPOLIATION RULING

Even though the *Actos* MDL did not begin until 2011, the spoliation ruling focused on a litigation hold issued by the manufacturer in 2002 that involved the same drug. The broadly worded hold required the manufacturer to retain "any and all documents and electronic data which discuss, mention or relate to Actos." The hold had never been lifted and had been refreshed multiple times between 2002 and 2011.

The court held that the litigation hold created a duty to preserve evidence beginning in 2002, and that the manufacturer violated that duty by intentionally destroying documents subject to the hold and relevant to the *Actos* MDL. As a result, the court allowed the jury to hear evidence of spoliation. The court also issued an instruction allowing the jury to freely infer that the destroyed documents and files would have been helpful to the plaintiffs or detrimental to the manufacturer.[2]

The court further sanctioned the manufacturer by ordering the manufacturer to continue to reconstruct the deleted files at its own cost. Finally, the court stated that it would entertain a request by the plaintiffs to shift costs, including attorneys' fees, incurred for all third-party discovery that was required to establish the manufacturer's violations and that would not otherwise have been conducted.

LESSONS LEARNED

The *In re: Actos* ruling does not alter the protection that broad litigation holds provide to manufacturers in product liability litigation. But the ruling starkly exposes the underappreciated risk of maintaining a litigation hold for years.

Indeed, a never-ending litigation hold may create preservation duties that extend well after the original litigation has ended. For instance, an unending hold may impose a duty to ignore certain routine document destruction policies, such as cleaning out a former employee's mailbox after his or her departure, or permanently deleting emails after a certain period of time. Any failure to comply with the hold may lead to harsh sanctions years later.

[1] The jury also awarded $3 billion in punitive damages against the U.S. marketer of the drug.

[2] The sanctions were based on both the manufacturer's violation of Rule 37 and willful abuse of the judicial process, which the court has inherent power to sanction.

And in multidistrict litigation, the effect of such sanctions may be multiplied in future trials arising from the same MDL.

It is therefore critical to implement a continuous monitoring system that enables a manufacturer to know which holds are in place, which products are involved, and which custodians have preservation duties. The system must also enable the manufacturer to know the status of all pending and expected litigation so that the manufacturer can determine whether each hold remains necessary. In many cases, it may be possible to lift a hold as soon as the associated lawsuit ends. In other cases, this may not be possible because the hold may relate to other current or anticipated litigation (including litigation involving completely unrelated injuries), which means that the manufacturer has a continuing duty to preserve.[3] Either way, manufacturers should routinely take stock of their litigation holds and determine whether any can be lifted.

The Sedona Conference Journal has published useful guidelines regarding the termination of litigation holds.[4] It advises that organizations conduct a custodian and data cross-check when litigation ends, to determine whether there are any other ongoing preservation obligations. Once satisfied that the information is not subject to other duties, the organization should notify all recipients of the litigation hold notice and other relevant personnel that the litigation hold has been terminated.[5] This advice underscores the importance of *clearly and formally* lifting the hold, to avoid confusion about whether and when the hold ended.

The *In re: Actos* ruling also serves as a reminder of several other steps that manufacturers can take to ensure that broad litigation holds do not lead to the type of sanctions imposed in the *Actos* MDL.

First, when a litigation hold is in place, the manufacturer must make sure that all relevant custodians receive the hold and comply with it. It is not enough to assume that the recipients are following their obligations. The manufacturer instead needs to take steps to confirm and document compliance. When multiple related entities are involved in the lawsuit, compliance should be coordinated so that it is consistent across organizations, both domestic and foreign.

Furthermore, the manufacturer should monitor compliance on an ongoing basis, beyond the initial stages of the hold. This includes periodically reminding all relevant custodians that the litigation hold is in place (for instance, by reissuing the hold), taking steps to confirm and document compliance, and assessing whether routine document destruction measures may interfere with the duty to preserve.

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[3] In general, "whenever litigation is reasonably anticipated, threatened, or pending against an organization, that organization has a duty to undertake reasonable and good faith actions to preserve relevant and discoverable information and tangible evidence." *The Sedona Conference Commentary on Legal Holds: The Trigger & The Process* (The Sedona Conference Journal, Volume II, Fall 2010) at 267 (footnotes omitted), available at https://thesedonaconference.org/publication/The%20Sedona%20Conference%20Commentary%20on%20Legal%20Holds.

[4] The Sedona Conference is an organization that holds conferences and issues working group statements about various complex litigation issues, including best practices for e-discovery. It also publishes selections from these conferences and working groups in a journal. The *Actos* court referred generally to the 2003 and 2007 Sedona Conference Working Group publications on best practices for electronic document discovery.

[5] *The Sedona Conference Commentary on Legal Holds: The Trigger & The Process*, *supra* note 3, at 287.

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