AN OUNCE OF PREVENTION IS WORTH A POUND OF CURE: MAKE SMART LITIGATION TACTICS A NEW YEAR’S RESOLUTION FOR 2011

Damian Capozzola

Understandably, businesspeople generally prefer to focus on their businesses and not become enmeshed in litigation, which often is costly and time-consuming, and can distract key employees from creative and productive tasks. Nonetheless, from time to time, even the most ethical and cooperative business finds it necessary to turn to the courts to enforce important rights or defend against unreasonable demands. As we turn the page on 2010, the savvy businessperson would be wise to take note of at least two key developments that bookended the national litigation landscape this year concerning the murky pre-trial process known as “discovery.” Heeding these relatively simple and straightforward lessons may help significantly if in 2011 your company finds itself entangled in a serious legal dispute.

2010 started out with a litigation bang on the electronic discovery front. In *The Pension Committee of the University of Montreal Pension Plan, et al v. Banc of America Securities, LLC, et al.*, 685 F.Supp. 456 (S.D.N.Y., 2010), a judge, who already was famous for giving structure to the rules that govern a company’s legal obligations to retain important electronic data and make it available to the other side in the course of litigation, made a point of revisiting these issues. She did so because she felt frustrated that many companies were still not getting the message: “By 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.”

Perhaps the most critical passage in the opinion for technology companies is the
Labor and Employment

Phil Mitchell
Intellectual Property

one that clarifies the types of procedural mistakes that can give rise to the harshest substantive litigation penalties – namely, the often unwitting errors made in the process of retaining, locating, and producing information in the pre-trial discovery process. In the judge’s own words, “when the duty to preserve has attached,” a finding of “gross negligence” is appropriate for failure to:

- issue a written litigation hold;
- identify all of the key players and ensure that their electronic and paper records are preserved;
- cease the deletion of email or preserve the records of former employees that are in a party's possession, custody, or control; and
- preserve backup tapes when they are the sole source of relevant information or when they relate to key players, if the relevant information maintained by those players is not obtainable from readily accessible sources.

All four of these factors contain language (in bold for emphasis) that will be particularly hard for a technology company to run away from in the event that a problem arises. Even if the business of a technology company actually has little to do with data storage and retrieval, the mere fact that it is a “technology company” will likely lead a court to presume that the company possesses a certain level of fluency with computers and the ability to retrieve, organize, and produce data on a dime. Thus, it is doubly important for technology companies to invest up front, and before litigation strikes, in effective document retention protocols and procedures.

2010 also concluded with a major development in litigation procedures, as a variety of new Federal Rules of Civil Procedure became effective on December 1, 2010. One of the most important of these new Rules for technology companies is the one that clarifies the need for additional specification in disclosing “expert” witnesses who might previously have remained undisclosed. The new Rule clarifies that, generally, retained experts, and even company employees who routinely testify as experts, need to prepare and disclose comprehensive pretrial reports, so that the other side might review those reports and depose the experts intelligently about their opinions. However, though company employees do not typically fall into this category unless they routinely testify as experts, the new Rule now requires that the company provide at least a summary of these employees’ expected testimony.

Perhaps more importantly, the new Rule highlights an issue that previously had often lurked under the surface. Frequently, company employees involved in a litigation matter view themselves as simply providing factual testimony about the case, rather than as “expert” witnesses. But in light of the high degree of complexity and scientific knowledge involved in the matters often litigated by and against technology companies, such an employee’s testimony is indeed likely to qualify as “expert” testimony in the eyes of the court. Accordingly, it is important that, early in the litigation process, the company, in conjunction with litigation counsel, identify which employees might likely be qualified to give such blended factual and expert testimony; ensure that these employees’ identities are properly and timely disclosed; and, at a minimum, provide the other side with an appropriate summary of the subject matter, underlying facts, and opinions expected in such testimony, as required by the new 2010 Rule.

Every company hopes that 2011 will bring peace and prosperity – and be litigation-free. But hope is not a strategy. The savvy technology company will have document retention and production protocols in place before the need arises. If your company lacks such policies and procedures, you may want to place their development high on your list of New Year’s resolutions. It just may be that proverbial ounce of prevention that saves your company a very costly pound of cure.
News from the Technology Team

Technology Team Members Speak


Damian Capozzola

On January 6, 2011, Damian Capozzola will lecture on effective use of real-time deposition technology at a Bridgeport Continuing Education seminar in San Francisco, California.

On December 13, 2010, Damian Capozzola was appointed by then-Governor Arnold Schwarzenegger to the California Law Revision Commission, which meets multiple times per year to suggest amendments to existing laws in order to keep pace with societal changes.

Betsy Johnson

On January 18, 2011, Betsy Johnson and the Precept Group, a California employee benefits and human resources consulting firm, will conduct complementary seminars entitled "What's New in Labor and Employment Law for 2011?" in Irvine, California.

On February 1, 2011, Betsy Johnson and the Precept Group will conduct a complementary webinar entitled "What's New in Labor and Employment Law for 2011?"

On February 2, 2011, Betsy Johnson will conduct a seminar entitled "Employee Privacy and Human Resources Issues Created by New Technology and Social Media" in Los Angeles, California.

On February 9, 2011, Betsy Johnson will conduct a seminar entitled "Employee Privacy and Human Resources Issues Created by New Technology and Social Media" in Costa Mesa, California.
What is the Technology Team?

The Technology Team is a multidisciplinary team of lawyers at Epstein, Becker & Green, P.C., who have dedicated themselves to serving the needs of technology companies—public and private, large and small. The Technology Team's members all have extensive experience representing technology companies—such as software companies, electronic device manufacturers, medical device producers, and wireless telecommunications companies—and bring their diverse skills and collective understanding of the needs of technology companies to the task of helping these clients solve a variety of matters and problems.

Working in a coordinated manner, the Technology Team is able to efficiently provide comprehensive legal services, across a broad spectrum of matters, including entity formation, securities, debt financing, acquisitions/divestitures, regulatory issues, employee benefits and executive compensation, labor and employment law, intellectual property, and commercial litigation. And because the members work as a team, they can tailor the type and level of legal services to the particular needs of the client in a cost-efficient manner.

Located in various offices across the Firm, the Technology Team’s members can address their clients’ needs across the country, whether the matter involves litigation or simply the need to understand how businesses operate in different locations. Team members routinely collaborate with each other and with other attorneys inside and outside the Firm, when necessary, in order to provide clients with effective and efficient legal services.

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