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Axinn Insights on U.S. Litigation for Japanese Companies: The Duty to Preserve Documents and Implement Litigation Holds in U.S. Civil Litigation

Summary

- Under U.S. law, when civil litigation is reasonably anticipated there is an obligation to preserve documents that are relevant to the claims and defenses of the dispute.
- Japanese companies involved in U.S. civil litigation are subject to these obligations.
- Companies that fail to adequately preserve documents or implement a litigation hold may be subject to sanctions in U.S. civil litigation, including adverse inferences, monetary sanctions and dismissal of claims.
- The risks to Japanese companies can be reduced by understanding and complying with the demands of the U.S. system, including implementing appropriate litigation holds at the appropriate time; re-evaluating those holds to reflect new events and to prevent excessive cost and business interference; and carefully tailoring the scope of preservation.
- Adopting a proper document preservation policy requires Japanese companies to take into account both the potential consequences of failure to preserve documents in U.S. civil litigation and the potential consequences of retaining documents in Japan.

Background

Due to the differences between civil litigation practices in Japan and the United States, Japanese businesses may be surprised by the broad obligations under U.S. law to preserve documents that come into effect even before a U.S. litigation is filed. But ignorance is no excuse; failure to comply with the duty to preserve documents can result in sanctions in U.S. litigation.

This article summarizes the preservation obligations to which parties are subject when they anticipate U.S. civil litigation, provides recent examples of cases involving Japanese corporations litigating these issues, and suggests best practices and tips for responding to actual or threatened U.S. civil litigation.

When Does the Duty to Preserve Documents Begin Under U.S. Law?

Assume that a Japanese company may be subject to civil litigation in the United States: when must the Japanese company implement procedures to preserve documents, and what are the consequences if it does not?

These questions have very significant consequences. Rule 37(e) of the Federal Rules of Civil Procedure provides for sanctions for the spoliation (destruction) of evidence "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." Such sanctions are not limited to monetary penalties. They can include the right of the opposing party to have the court instruct the jury to draw an "adverse inference" that the destroyed evidence would have undermined the claims of the party that destroyed it, which can deeply prejudice the jury or even effectively decide the case.

The obligation to preserve documents begins when a party could have "reasonably anticipated" litigation between the parties.[1] This obligation, however, is not triggered "if there [is] merely a potential for litigation."[2] Distinguishing between a "mere potential for litigation" and a "reasonable anticipation of litigation" is not easy: as described by one federal court judge, "[t]he determination of when a party anticipated litigation is necessarily a fact intensive inquiry, and a precise definition of when a party anticipates litigation is elusive."[3] The following cases illustrate some of the subtleties here, which generally counsel a party to take an aggressive approach to ensure that relevant documents are preserved:

- In *Sekisui Am. Corp. v. Hart*, Sekisui fired Hart, an employee, in October 2010 and at the same time notified him that Sekisui intended to seek damages for various alleged wrongs including breach of contract. But it was not until January 2012 that Sekisui issued a litigation hold. Before the litigation hold was issued, but after the notice of the intent to seek damages was provided, Sekisui deleted Hart's email folder. Hart claimed that Sekisui should have reasonably anticipated litigation in October 2010. Although the litigation hold was issued months before Sekisui filed a complaint (May 2012), the court agreed. After analyzing the other relevant factors on spoliation of evidence (relevance, prejudice, and culpable state of mind), U.S. District Court Judge Shira Scheindlin sanctioned Sekisui for spoliation, issuing an adverse inference jury instruction that (1) instructed the jury, as a matter of law, that Sekisui failed to preserve relevant evidence after its duty to preserve arose and (2) permitted the jury to presume that the lost evidence would have been favorable to Hart. Hart was also awarded his attorneys' fees incurred in bringing the motion.
- In *Apple Inc. v. Samsung Elecs. Co. Ltd.*, Samsung implemented a litigation hold notice when Apple filed its complaint in April 2011. But earlier, in August 2010, Apple executives had met with Samsung executives and "gave a presentation illustrating Samsung's infringement of Apple's patents."[4] U.S. Magistrate Judge Paul Grewal found that Samsung's duty to preserve commenced later that month, and thus Samsung's destruction of evidence between August 2010 and April 2011 constituted spoliation.[5] Judge Grewal found that this neglect warranted a jury instruction that the jury could presume that the lost evidence was favorable to Apple.[6] The trial judge, who was entitled to review the decision, upheld the sanction but changed the jury instruction to say that Samsung had failed to comply with its duty to preserve documents, and that the jury could consider "whether this fact is important for [it] in reaching a verdict."[7]

What Data and Documents Should Be Preserved?

Once a party determines that it may be subject to a duty to preserve, a party must preserve data "it knows, or reasonably should know, is relevant to 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."[8] In essence, the question boils down to "whose data?" and "what data?"

1 *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216-18 (S.D.N.Y 2003).

2 *Lekkas v. Mitsubishi Motors Corp.*, No. 97 C 6070, 2002 WL 31163722, at *3 (N.D. Ill. Sept. 26, 2002).

3 *Shilan v. Shoppers Food Warehouse Corp.*, No. BPG-13-954, 2014 WL 1320102, at *5 (D. Md. Mar. 31, 2014) (quoting *Samsung Elecs. Co., Ltd. v. Rambus, Inc.*, 439 F. Supp. 2d 524, 542 (E.D. Va. 2006), *vacated on other grounds*, 523 F.3d 1374 (Fed. Cir. 2008)).

4 *Apple Inc. v. Samsung Elecs. Co. Ltd.*, 881 F. Supp. 2d 1132, 1142 n.59 (N.D. Cal., 2012).

5 *Id.* at 1145.

6 *Id.* at 1150-51.

7 *Apple Inc. v. Samsung Elecs. Co.*, 888 F. Supp. 2d 976, 995 (N.D. Cal. 2012).

8 *KRBL Ltd. v. Overseas Food Distrib., LLC*, No. CV 16-2431 PA (GJSx), 2016 WL 3748660, at *4, (C.D. Cal. 2016) (citing *William T. Thompson Co. v. Gen Nutrition Cor., Inc.*, 593 F. Supp. 1443, 1455 (C.D. Cal. 1984)).

Whose Data Should Be Preserved?

Federal Rule of Civil Procedure 26 permits discovery from anyone who is "likely to have discoverable information." Identifying "key players" at a company who are likely to hold discoverable information will prevent the unintentional deletion of relevant documents. Counsel must therefore conduct a reasonable inquiry to identify individuals who are likely to hold relevant information.[9] "This is not to say that counsel will necessarily succeed in locating all such sources, or that the later discovery of new sources is evidence of a lack of effort. But counsel and client must take some reasonable steps to see that sources of relevant information are located," and keep records documenting their efforts.[10]

What Type of Data Should Be Preserved?

Traditionally, efforts to preserve electronic data have focused on email and electronic documents residing on personal hard drives and shared folders. But the scope of evidence has increased in recent years. Parties have faced spoliation charges because of their failure to consider and preserve relevant evidence from new and non-traditional sources. Though the question of relevant document sources is necessarily company-specific, non-typical data sources such as social media pages, data stored on mobile devices, transactional records, databases, cloud data, personal files, text messaging, and voicemail need to be considered, along with more traditional data sources. For example, in *In re Pradaxa (Dabigatran Etexilate) Prod. Liab. Litig.*, the court ordered production of text messages, as "texting has become the preferred means of communication."[11] The court found that deletion of these text messages would warrant sanctions. [12]

Implementing a Litigation Hold

To ensure preservation of relevant documents, a company that reasonably anticipates U.S. civil litigation should implement a "litigation hold"—i.e., a directive to relevant employees to preserve documents relating to potential litigation. A party's obligation to preserve documents for U.S. litigation is not necessarily satisfied merely by issuing a litigation hold, even if the hold is sufficient in its scope and procedures to prevent destruction of potentially relevant evidence. The litigation hold must also be maintained and enforced to protect against destruction of potentially relevant evidence. Accordingly, the "hold" must be distributed and applied in a way sufficient to actually accomplish the purposes of the litigation hold.

Creating the Hold: Notice and Distribution

While there are no formal requirements for the contents of or distribution of a litigation hold notice, one court has observed that "orally requesting certain employees to preserve relevant documents concurrently with filing a lawsuit, is . . . very risky - to such an extent that it borders on recklessness."[13] A formal and comprehensive written litigation hold notice can prevent disputes about the scope of the hold, and even if spoliation occurs, courts will still consider the fact that a proper litigation hold was issued in determining whether a sanction is warranted.

9 *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003).

10 *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004) (emphasis omitted).

11 *In re Pradaxa (Dabigatran Etexilate) Prod. Liab. Litig.*, 3:12-md-02385-DRH-SCW, 2013 WL 6486921, at *16-18 (S.D. Ill. Dec. 9, 2013).

12 *Id.* at *18-20.

13 *Scentsy, Inc. v. B.R.Chase, L.L.C.*, No. 1:11–cv–00249–BLW, 2012 WL 4523112, at *8 (D. Idaho Oct. 2, 2012).

For example, in *In re Hitachi Television Optical Block Cases*, the court declined to issue a monetary sanction against Hitachi even though one of its employees deleted relevant electronic files shortly before his scheduled deposition.[14] The court declined to issue the sanction because "Hitachi instituted a litigation hold" and the individual in question acknowledged that "he received document preservation instructions shortly after this suit was filed."[15]

A litigation hold should be in writing, clearly identifying: (1) the types and scope of files that should be preserved; (2) the consequences for not complying with the hold; and (3) the appropriate steps to be taken to comply with the notice, including any technical measures to preserve electronic data.[16] Further, a hold notice should be distributed to all identified relevant personnel and to anyone who has the ability to alter or destroy data related to those personnel or to the claims at issue. This includes the company's IT department. Ideally, both in-house and outside counsel should be involved in the process of developing and distributing the notice.

Maintaining the Hold

Even entities that effectively issue a satisfactory litigation hold can fall into non-compliance by failing to ensure its continued recognition, application and enforcement. Parties must ensure that key individuals and IT departments continue to comply with the hold. *In Apple v. Samsung*, for example, Magistrate Judge Grewal found that Samsung acted in "conscious disregard" of its preservation obligations by (1) failing to turn off the auto-delete function on its email servers; and (2) failing to verify with employees that the litigation hold instructions were followed. The magistrate judge found that these failures led to the improper destruction of numerous emails—and District Judge Koh agreed.[17] Similarly, in *In re Actos (Pioglitazone) Pro. Liab. Litig*., a company's widespread disregard for a distributed litigation hold led to a finding of spoliation.[18]

What If U.S. Rules Conflict With Japanese Laws and Practices?

Under U.S. law, a Japanese corporate entity "is not excused from an obligation to preserve evidence simply because it is a foreign company."[19] In order to adequately protect itself from charges of spoliation, a Japanese entity that is or should reasonably anticipate that it could be involved in U.S. civil litigation must understand the rules regarding the preservation of documents and discovery in the U.S. system.

But, that is only one side of the issue. The preservation of data for U.S. litigation may contradict Japanese practices, data protection regulations, and privacy laws, including Japan's Act on the Protection of Personal Information (Act No. 57 of 2003). U.S. courts will not necessarily exempt foreign companies from complying with U.S. legal requirements even where compliance with U.S. law would require the foreign company to violate the laws of the country where it is incorporated or has its principal place of business. Such situations raise complex legal issues that must be carefully navigated to avoid prejudicing a foreign company in both U.S. civil litigation and in the company's home jurisdiction. When the risk of such a conflict of obligations exists, it is important for a Japanese company to consult knowledgeable Japanese and U.S. counsel at the outset.

14 *In re Hitachi Television Optical Block Cases*, Civil No. 08cv1746 DMS (NLS), 2011 WL 3563781, at *15 (C.D. Cal. 2011).

15 *Id.*

16 *See generally* The Sedona Conference WG1, *The Sedona Conference Commentary on Legal Holds: The Trigger & The Process*, 11, Sedona Conf. J., 265, 282-86 (2010).

17 *Apple Inc. v. Samsung Elecs. Co. Ltd.*, 881 F. Supp. 2d at 1151; *Apple Inc. v. Samsung Elecs. Co.*, 888 F. Supp. 2d at 992.

18 *In re Actos (Pioglitazone) Pro. Liab. Litig.*, MDL No. 6:11-md-2299, 2014 WL 2921653, at *31-33 (W.D. La. June 23, 2014).

19 *Lunkenheimer Co. v. Tyco Flow Control Pacific Party Ltd.*, No. 1:11–cv–824, 2015 WL 631045, at *6 (S.D. Ohio Feb. 12, 2015).

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