FOX | O'NEILL | SHANNON s.c.

THE LITIGATION LEADER

FOS's Litigation Newsletter

When push comes to shove. . .

Volume 1, Issue 1

Fall 2014

Editor: Diane Slomowitz

WELCOME TO THE LITIGATION LEADER!

Fox, O'Neill & Shannon is pleased to present the inaugural issue of *The Litigation Leader*, FOS's litigation newsletter. This newsletter supplements the firm's premiere newsletter, *FOS News*, and its estate planning newsletter, *The E.P. Express*.

We hope you find *The Litigation Leader* informative and entertaining. If you would like to see articles on particular subjects, let us know at info@foslaw.com. As always, your FOS attorneys remain ready to advise you regarding any and all litigation issues.

GETTING A GRIP ON LITIGATION HOLDS

By Michael J. Hanrahan

Five years ago, XYZ Supply established an electronic document retention plan pursuant to which emails which are six months old (and not saved otherwise) are automatically deleted from the email server, and the backup tapes for the company data server are kept for six months and then recycled. Yesterday, XYZ received a letter from a law firm representing a competing company which asserted that XYZ has stolen trade secrets, interfered with contractual relations and committed unfair trade practices.

Can XYZ simply continue with its "business as usual" electronic document retention program? Can the company wait to see if the competitor files a lawsuit before doing anything? Can the company avoid any potential problems by simply asking the IT department to refrain from deleting the 6-month old emails and recycling the backup tapes? No. No. And no.

While the rules of civil procedure have long required parties to preserve documents relevant to a lawsuit, the age of electronically-stored information (e.g., emails, text messages, Word files, Excel files, etc.) has created new challenges and considerations in regard to the preservation of documents that may be relevant to litigation.

The oft-cited *Zubulake* decisions of Judge Scheindlin (*Zubulake vs. UBS Warburg, LLC*, 217 F.R.D. 309 (S.D.N.Y.) ("Zubalake I") through *Zubalake vs. UBS Warburg, LLC*, 229 F.R.D. 422 ("Zubalake V")) discuss in detail the duties of a party to preserve electronic information and the penalties for failure to do so.

As the court in *Zubalake IV* stated: "Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to insure preservation of relevant documents." 220 F.R.D. 212, 218. If a party fails to take reasonable steps to preserve documents, a party can face a variety of severe sanctions, including monetary penalties, adverse jury instructions and possibly default judgment.

Continued on page 2

MANIAN "UP AND COMING"

FOS congratulates litigation associate Jacob Manian for being named one of the 2014 Up and Coming Lawyers by the *Wisconsin Law Journal*.

Jake was honored at a September 17, 2014 dinner at the Harley-Davidson Museum.

To access the *Wisconsin Law Journal's video* profile of Jake, go to www.youtube.com/watch?v=gugeEI9XUxQ

WISCONSIN'S NEW HEIGHTENED PLEADING STANDARDS

By Matthew W. O'Neill

Litigators, get your pens ready. Motion to dismiss practice just got a lot more interesting.

In *Data Key Partners v. Permira Advisors, LLC*, 2014 WI 86 (July 23, 2014), the Wisconsin Supreme Court adopted the federal *Twombly* standard and changed the fundamental nature of notice pleading.

Data Key involved a challenge by minority shareholders to the sale of a company. Plaintiffs alleged the majority shareholders and directors breached fiduciary duties by approving a sale when a second, more lucrative offer was seemingly on the table.

In what at the time was careful pleading, the plaintiffs specifically alleged the defendants were not entitled to the protection of the busi-

Continued on page 3

Litigation Holds, continued from page 1

Thus, a failure to preserve documents can be a game changer for companies threatened by or in litigation. The best way to avoid such problems is to have a well-conceived and well-executed litigation hold plan. A "litigation hold" is a written communication advising company employees to preserve potentially relevant documents and electronically stored information. The following are tips for handling litigation hold situations:

1. **PLAN AHEAD**: Senior management should discuss the concept of a litigation hold with its IT employees prior to the time that a litigation hold situation arises.

2. **WATCH FOR HOLD TRIGGERS:** While there may be obvious events that trigger a company's duty to preserve documents (e.g., a letter threatening the imminent filing of a lawsuit), there may be other triggering events that are less obvious (*See e.g.*, *Arthur Andersen LLP vs. United States*, 544 U.S. 696 (2005) (an SEC investigation into a client's financial irregularities).

3. **IDENTIFY KEY PLAYERS:** When litigation is reasonably anticipated, the key players in the dispute should be identified and interviewed so that the company and the key players understand what electronic documents may exist, where they are located and what must be done to preserve them.

4. **TELL WHAT NEEDS TO BE PRESERVED AND WHERE IT MIGHT BE:** The litigation hold letter needs to say something more than "Don't delete your emails." The employees who receive the litigation hold letter should be encouraged to consider all of the places that they may have stored relevant information (e.g., thumb drives, laptops, home computers used for office work, text messages, etc.).

5. **IDENTIFY THE RISKS OF NON-COMPLIANCE:** The litigation hold letter should express that an employee's failure to immediately comply with the litigation hold may result in serious consequences for the company and the employee.

6. **BE PROMPT:** The issuance of a legal hold letter should not be delayed for weeks, or even days. Given that old emails may be deleted each day, a delay of even a few days could result in the loss of many key emails.

7. **FOLLOW-UP TO ENSURE COMPLIANCE:** It is not simply enough to send out the litigation hold letter to employees. The company's attorneys and the officers involved in instituting the legal hold must follow-up with employees to confirm that they have undertaken the required actions.

When a company reasonably expects litigation, it should immediately discuss a litigation hold letter with its counsel. The failure to undertake a litigation hold could lead to severe sanctions by a court, including jury instructions that allow the jury to assume that erased emails were adverse to the company's position. Such sanctions could make a winnable case into a loser.

FOS LITIGATORS HONORED

FOS litigation shareholder Bruce O'Neill has been named one of 2014's "Leader in the Law" by the Wisconsin Law Journal. FOS litigation shareholder Shannon Allen has been named one of 2014's "Women in the Law."

FOS litigation shareholder Diane Slomowitz was named one of 2012's "Women in the Law."

FOS'S LITIGATION ATTORNEYS

FOS Shareholder
Bruce C. O'Neill

FOS Shareholder
Diane Slomowitz

FOS Shareholder
Michael J. Hanrahan

FOS Shareholder
Matthew W. O'Neill

FOS Shareholder
Shannon A. Allen

FOS Shareholder
Laurna A. Jozwiak

FOS Associate
Jacob A. Manian

The Litigation Leader—*When push comes to shove. . .*

Volume 1, Issue 1

IDENTIFY THE FRUIT BEFORE BARKING UP THE TREE: PRACTICAL CONCERNS IN CHALLENGING AN ILLEGAL ARREST

By Jacob A. Manian

When we think of law enforcement officials hunting down a criminal suspect, images of barking blood hounds in hot pursuit come to mind; or perhaps a police officer tracking a trail of foot prints or blood to a suspect's door.

More commonly now, law enforcement can end up at a suspect's door by tracking that person's communications device. Take Bobby Tate.

Tate was convicted of fatally shooting a person in the head outside of a Milwaukee store. Tate purchased a pre-paid cell phone from inside the store just before the killing. Milwaukee police obtained a court order to collect cell site information from the phone provider, to learn which cell towers were connecting to his phone.

They then used a "sting ray" — a portable device that functions as a mobile cell phone tower, to help pinpoint the phone's location. Police ultimately tracked Tate's phone right to his mother's apartment, where they arrested him and seized bloody clothing.

Under a new law, § 968.373, Wis. Stats. (effective April 25, 2014), the police would have had to obtain a search warrant before they could track Tate's cell phone location.

To obtain a warrant to locate or track a communications device, police must demonstrate probable cause to believe that "criminal activity has been, is, or will be in progress and that identifying or tracking the communications device will yield information relevant to an ongoing criminal investigation." § 968.373(3)(e).

However, before litigators set out to challenge a potentially illegal arrest under § 968.373, or on any other ground for that matter, keep in mind that there may be nothing to suppress. Even if a suspect's cell phone is illegally tracked, or a suspect is arrested without a warrant or probable cause, you can't suppress the client himself.

Unless there is "fruit of the poisonous tree," a term coined by Justice Frankfurter in *Nardone v. United States*, 308 U.S. 338 (1939) (such as the bloody clothes seized from Tate), there may be little or nothing to gain by challenging an illegal arrest.

In many cases, there may be plenty of fruit that the Government seizes and wants to use, such as incriminating text messages located in a tracked phone, a confession following the arrest or a suspected murder weapon recovered as a result of the arrest.

But thinking through the end game of what, if anything, there is to suppress will help litigators make wise use of their time.

It will also help manage clients' expectations, by not barking up a fruitless tree.

FOS LITIGATORS NAMED TOP LAWYERS

FOS litigation shareholder Michael Hanrahan was named a 2014 Top Rated Lawyer in labor and employment by American Lawyer Media and Martindale-Hubbell™. FOS litigation shareholder Matthew O'Neill was named a Top Rated Lawyer in commercial litigation.

Pleading Standards, continued from page 1

ness judgment rule because they "willfully failed to deal fairly with the minority shareholders, and have derived or will derive an improper personal benefit and/or have engaged in willful misconduct."

These are three of the four exceptions to the business judgment rule set forth in §180.0828(1), Wis. Stats.

Although neither party raised *Twombly* or suggested that Wisconsin's notice pleading standards need sharpening, the Court *sua sponte* held that a heightened "plausibility" standard will henceforth apply to complaints.

Specifically, the Court held that "the sufficiency of a complaint depends on substantive law that underlies the claim made because it is the substantive law that drives what facts must be pled." 2014 WI 86, ¶ 31.

Plaintiffs must now "allege facts that, if true, plausibly suggest a violation of applicable law." *Id.*, ¶ 21. This "plausibility" test is identical to the federal *Twombly* standard, which has a rich body of case law on how to attack loose pleadings.

This sea change in pleading rules affects Wisconsin practitioners in two important respects.

First, plaintiff's counsel must do more than plead a "short and plain statement of the claim," as § 802.02(1)(a), Wis. Stats., might lead you to believe. The complaint must allege sufficient facts to "plausibly" state a claim under controlling law, including potential affirmative defenses.

Second, defense counsel has a new arsenal to attack a complaint at the motion to dismiss stage. In zealously representing defendants, counsel must more frequently challenge potentially deficient pleadings.

FOX O'NEILL SHANNON s.c.

622 N. Water Street
Suite 500
Milwaukee, WI 53202

Phone: 414-273-3939
Fax: 414-273-3947
www.foslaw.com

Fox, O'Neill & Shannon, S.C. provides a wide array of business and personal legal services in areas including corporate services, litigation, estate planning, family law, real estate law, tax planning and employment law. Services are provided to clients throughout Wisconsin and the United States. If you do not want to receive future newsletters from Fox, O'Neill & Shannon, S.C. please send an email to info@foslaw.com or call us at (414) 273-3939.

Postage

Address label

IN THIS ISSUE

STRATEGY: THE EARLY DEPOSITION

By Laurna A. Jozwiak

It's not uncommon to serve interrogatories, requests to admit or requests for production of documents along with a summons and complaint in Wisconsin state courts.

But when was the last time that you served (or received) a notice of deposition along with your initial pleadings?

In litigation in Wisconsin state courts, parties often overlook the opportunity for early access to pertinent information.

Wis. Stat. § 804.05 states that, generally, anytime "after commencement of the action...any party may take the testimony of any person including a party by deposition upon oral examination."

This means that you can notice up the deposition of a critical player within days or weeks, not months, of the case being filed.

You do not have to wait for piles of discovery documents and carefully drafted objections and responses to interrogatories before gaining access to those with the real information.

Federal rules prevent litigants from taking depositions at such an early stage. Parties must wait until after conferring under Rule 26(f).

This could mean weeks after filing could pass before the opportunity arises to start taking depositions – and could make a critical difference to your case.

There are numerous strategic advantages to taking an early deposition. Memories are fresher. Defenses are not completely thought out.

It may also direct how you conduct other discovery. It also can have the effect of placing your opponent off-balance – they may have expected to have to appear for a deposition, but not so soon!

Because there is nothing in the Wisconsin statutes that prevents you from proceeding, it might even make the difference between staying put in state court or deciding to remove to federal court.