New York Law Journal
Technology Today
WWW.NYLJ.COM
An ALM Publication
VOLUME 247—NO. 7
TUESDAY, FEBRUARY 5, 2013

FEDERAL E-DISCOVERY

Expert Analysis

Third-Party Litigation Holds: 'Control' Can Be Complicated


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In anticipating litigation, one of the first items on a prudent litigator's checklist is ascertaining what documents must be preserved and putting a preservation plan in place. A duty to preserve arises when a party "knows or reasonably should know" that litigation is foreseeable.[1] Once the duty to preserve arises, a party must put a litigation hold in place to ensure that relevant documents are preserved.[2] Notably, "[t]he preservation obligation runs first to counsel, who has a duty to advise his client of the type of information potentially relevant to the lawsuit and of the necessity of preventing its destruction."[3] Consequences for failing to observe the duty to preserve can be serious, including spoliation and monetary sanctions.[4]

Federal Rule of Civil Procedure 34(a) provides that a party may request another party to produce documents within that party's "possession, custody, or control." Federal courts construe "control" broadly for Rule 34 purposes. Control may exist if a party has "the right, authority, or practical ability, to obtain the documents from a nonparty to the action."[5] Control is easy to establish when a party to the litigation has possession or custody of the documents ascertain. When third parties possess documents that may be relevant to an action, however, determining whether there is "control" can be more complicated.

The parameters of "control" have been explored in many cases. For example, parent corporations have sometimes been found to have control over their subsidiaries' documents.[6] Indeed, the Third Circuit has noted that where the relationship is "such that the agent-subsidiary can secure documents of the principal-parent to meet its own business needs and documents helpful for use in the litigation, the courts will not permit the agent-subsidiary to deny control for purposes of discovery by an opposing party."[7] A recent case illustrates an instance in which a contract between parties provides control, and finds that where such control exists, there is also a duty to preserve. In other words, a party may not only have "control" for discovery purposes, but also may have a duty to extend litigation holds to third parties in order to preserve documents.

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'Haskins'

In *Haskins v. First American Title Insurance*,[8] a case in the U.S. District Court for the District of New Jersey, plaintiffs sued First American for allegedly overcharging title insurance customers. Most of First American's policies were issued by "independent title agents." First American had entered into separate agency contracts with each agent, which addressed the agent's duties and responsibilities. Among those duties was maintaining their First American files.

Plaintiffs moved to compel First American both to provide copies of independent title agents' "closing files" and to direct these agents to preserve relevant documents. First American claimed that it could not produce the documents because they were owned by the independent agents and thus were not in its possession, custody, or control. It also argued that it could not extend a litigation hold to the independent agents because it could not force them to comply. The court rejected both arguments.

First, the court addressed whether First American had control over the independent agents' documents for Rule 34 purposes. First American's contracts with its independent title agents contained two provisions relevant to control. The contracts required the agents to maintain and carefully preserve documents for no less than 10 years and to "make all Documentation available for inspection and examination by [First American] at any reasonable time."[9] The contracts also provided that agents "shall forward all relevant information to First American when it learns of a legal claim as well as cooperate in a timely manner in the handling of any such claim." The court found that the first provision alone was sufficient for purposes of "control" because "a party has control of documents if a contractual obligation requires a non-party to provide the requested documents to the litigating party upon demand."[10] In short, because First American's contracts gave it the right to access and use its agents' files, it controlled the files within the meaning of Rule 34(a).

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After determining that First American had "control" over the independent agents' documents, the court addressed whether First American also had a duty to preserve them. The court stated:

> Since a spoliation inference is a possible sanction for failure to implement a litigation hold, it follows that a litigation hold only applies to documents within a party's possession, custody, or control.... [T]his includes documents that are not necessarily in the party's physical possession.[11]

The court thus reasoned that the duty to preserve extended to documents that are not in a party's possession, but nonetheless are within its control. Accordingly, the court required First American to serve litigation hold letters on its current and former independent title agents.

Haskins serves as a reminder that counsel must carefully consider whether there are third parties that might have documents of potential relevance to anticipated litigation. As *Haskins* demonstrates, contractual language may provide the requisite control for purposes of the Federal Rules. As a result, before entering into any contract that provides a right of access to documents in the possession of another, parties should evaluate whether they are signing up for an exponential expansion of their production and preservation obligations and, if so, whether the right of access is worth the risk.

Right/Authority to Exercise Control

Haskins suggests that where a party has a contractual right to obtain documents from a nonparty, it may be deemed to have "control" not only for purposes of production, but also for preservation.[12] In view of how expansively courts have interpreted the concept of "control"—at least for purposes of the obligation to produce documents—the prospect of a broad expansion of litigants' preservation obligations may seem daunting. The question that arises then is how far any such duty might extend. Significantly, any contract that provides for a right of access or that imposes cooperation obligations in the event of litigation may provide the requisite degree of "control" for purposes of Rule 34(a). Such language may be present in agency contracts as well as agreements concerning reorganizations of companies after a bankruptcy, a merger, or when subsidiaries are created or dismantled.[13] Employment severance agreements also

may contain language that provides such "control."

The legal right or authority to obtain documents upon demand also generally extends to agents, including current or former outside counsel. For example, in *MTB Bank v. Federal Armored Express*, the court held that documents in the possession of defendant's former outside counsel were in the control of defendant and should have been produced through the course of due diligence. Thus, when Federal Armored found a critical assignment agreement between itself and the bank after summary judgment had been entered, the court did not allow a new trial because, among other reasons, the assignment agreement had been in the files of its agent all along.[14] The court regarded this as the equivalent of the document residing in the files of Federal Armored itself. This case illustrates the importance of considering what documents nonparties might have not only for purposes of complying with discovery obligations, but also for purposes of timely obtaining relevant useful evidence.

Litigants are also often considered to have the ability to exercise control over documents in the possession of those who owe them legal duties, such as managing agents, accountants, and physicians.[15] Indeed, one court-issued litigation hold included "employees, agents, contractors, carriers, bailees, or other nonparties who possess materials reasonably anticipated to be subject to discovery in this action."[16] Moreover, as noted previously, courts will likely consider a parent corporation to have a sufficient degree of ownership and control over a subsidiary to find control.[17] Unlike parent and subsidiary corporate relationships, however, whether corporations have control over documents of sister corporations is generally a fact-specific inquiry.[18] Courts look at factors such as whether the sister corporation was the alter ego or whether the corporations had acted "as one."[19] Corporate relationships thus will not invariably give rise to "control" for Rule 34 purposes, but counsel should inquire into the nature of the relationships to determine whether control might exist.

Practical Ability to Control

In some cases, a party is considered to have control even absent any legal right or authority to obtain documents in possession of a third party because it has the practical ability to obtain them. For example, in *United States v. Kilroy*, a defendant charged with wire and mail fraud sought production of materials that had been in his office and were kept by his former employer, Standard Oil Company.[20] Although Standard Oil was not a party to the suit, it had been cooperating in the proceedings. As a result, the court required the government to use its "best efforts" to obtain from Standard Oil all documents in its possession taken from the defendant's former office. Although the government had no legal right or authority to the documents, the court seemed to think it had the practical ability to obtain them. As a general matter, courts will be more likely to find practical ability if the third party has already turned over documents and has cooperated in the litigation.[21]

Conclusion

Control for purposes of Rule 34(a) is an expansive concept.[22] As long as a party has the legal right or practical ability to obtain documents, they are considered to be within the party's control. As *Haskins* shows, having control in this sense may affect not only a party's duty of production, but also its obligation to preserve potentially relevant evidence.[23] Implementing an effective litigation hold over documents that a party does not possess obviously may present practical difficulties, and the law in this area continues to develop, but *Haskins* suggests that, at least in certain circumstances, a party may be required to make reasonable efforts to ensure the preservation of documents in the possession of another.

1. See *Mosaid Technologies v. Samsung Electronics*, 348 F. Supp. 2d 332 (D.N.J. 2004).
2. See *Zubulake v. UBS Warburg*, 220 F.R.D. 422 (S.D.N.Y. 2004).
3. *Gordon Partners v. Blumenthal (In re NTL Sec. Litig.)*, 244 F.R.D. 179, 197-198 (S.D.N.Y. 2007).
4. See id.
5. E.g., *Prokosch v. Catalina Lighting*, 193 F.R.D. 633, 636 (D. Minn. 2000), citing *Bank of New York v. Meridien BIAO Bank Tanzania*, 171 F.R.D. 135, 146 (S.D.N.Y. 1997).
6. *Maniscalco v. Brother Intern.*, 2010 WL 762194, *5 (D.N.J. 2010) (collecting cases).
7. *Gerling Intern. Ins. v. Commissioner*, 839 F.2d 131, 141 (3d Cir. 1988).
8. 2012 WL 5183908 (D.N.J. Oct. 18, 2012).
9. Id. at *2.
10. *Haskins*, 2012 WL 5183908 at *3.
11. Id. at *4.
12. See also *In re NTL Securities Litigation*, 244 F.R.D. 179 (S.D.N.Y. 2007) (holding an agreement that provided that the nonparty corporation would make available to the defendant corporation any documents it needed to be able to comply with its legal obligations provided sufficient "control").
13. See id.
14. Id., 1998 U.S. Dist. LEXIS 922, *16 (S.D.N.Y. Feb. 2, 1998).
15. *MTB Bank v. Federal Armored Express*, 1998 U.S. Dist. LEXIS 922, *12-13 (S.D.N.Y. Feb. 2, 1998) (collecting cases).
16. *In re Flash Memory Antitrust Litigation*, 2008 WL 1831668 at *1.
17. See *Ethypharm S.A. Grance v. Abbott Laboratories*, 271 F.R.D. 82, 94 (D.Del. 2010).
18. *Gerling Int'l Ins. v. Commissioner*, 839 F.2d 131, 141 (3d Cir. 1988).
19. Id.
20. 523 F. Supp. 206, 215 (E.D. Wis. 1981).
21. See, e.g., *Bank of New York v. Meridien Biao Bank Tanz.*, 171 F.R.D. 135, 149 (S.D.N.Y. 1997).
22. *Uniden Am. v. Ericsson*, 181 F.R.D. 302, 306 (M.D.N.C. 1998).
23. *Haskins*, 2012 WL 5183908 at *4; see also *Dietrich v. Bauer,* 2000 WL 1171132 (S.D.N.Y. Aug. 9, 2000).