

Client Alert

July 2012

Litigation Hold Notices In Light of *Apple v. Samsung*

On July 25, 2012, in the case of *Apple Inc. v. Samsung Electronics Co., LTD., et al.*¹, the Magistrate Judge, Paul S. Grewal, for the Northern District of California, San Jose Division, issued an order granting Apple's motion for an adverse inference jury instruction based on the court's finding that Samsung did not suspend its automatic biweekly destruction of emails from its email system, that Samsung failed to issue sufficiently distributed litigation hold notices after it admitted the litigation was "reasonably foreseeable" and failed to follow up on such hold notices, and that Samsung failed to monitor its employees in their preservation efforts, to ensure compliance with the hold notices.

Background

Apple commenced litigation against Samsung and its affiliates on April 15, 2011; however, on August 4, 2010, in a meeting between the general counsel of Apple and the vice president and head of Intellectual Property for Samsung, Apple alleged that it gave a presentation to Samsung illustrating Samsung's infringement of the Apple patents. In emails on August 23, 2010, and September 3, 2010, Samsung sent litigation hold notices to 27 Samsung custodians. The notice read, in part, "[T]here is a reasonable likelihood of future patent litigation between Samsung and Apple unless a business resolution can be reached." The notice requested that the recipients "preserve any and all such documents that may be relevant to the issues in a potential litigation between Samsung and Apple until it is fully resolved," and listed 10 discrete categories of documents to be preserved. After these notices were sent, no significant further action was taken by Samsung, including verification of compliance with the litigation hold notice, until Apple commenced its litigation on April 15, 2011, and Samsung then sent new litigation hold notices on April 21, 2011 to 2,300 Samsung employees, which contained 15 discrete categories of documents. Over the next few weeks and thereafter Samsung sent additional amended litigation hold notices to these and other Samsung employees. After sending the litigation hold notices on April 21, 2011, Samsung's in-house and outside counsel educated the relevant employees about the litigation hold notice, its importance, and the necessity and methodology of preservation.

Samsung utilized a Samsung proprietary email system from 2001 to the present that deletes all emails after the passage of two weeks. Individual employees have the ability to save all emails by clicking a "Save All" button every two weeks and their emails will be saved on their hard drive or they can save individual emails or groups of emails to their hard drive. The Samsung proprietary email system does not have a system feature that automatically saves all emails directed to a specific individual or group of individuals. Instead, Samsung relied on the individual employees who received the hold notice to comply with the instructions of the hold notice, but "Samsung never checked whether even a single Samsung custodian was at all in compliance with the given directives," and there was no way for the Samsung email system to determine if documents were discarded.

Based on the production by Samsung of no emails or only a handful of emails from the custodial files of at least 14 key fact witnesses, Apple moved for an adverse inference jury instruction based on Samsung's spoliation of evidence.

¹*Apple Inc. v. Samsung Electronics Co., LTD., et al.*, CA ND, San Jose Division (Case No.: C 11-1846 LHK (PSG))

Implications

The court's order, its findings and its conclusions, while not yet final,² identify at least the following two areas that should be carefully considered by litigants, including intellectual property litigants, related to litigation hold notices:

1. Litigation hold notices sent prelitigation. The obligation to preserve evidence commences from the "moment litigation is reasonably anticipated."³ The Samsung prelitigation hold notice of August 23, 2010, that included the statement "[T]here is a reasonable likelihood of future patent litigation between Samsung and Apple unless a business resolution can be reached," which was sent to only 27 Samsung custodians, was an admission by Samsung that litigation was reasonably foreseeable.⁴ As a result the obligation to preserve evidence commenced on that date, and that litigation hold notice sent to 27 Samsung custodians was insufficient when compared to the more extensive hold notices sent to more than 2,300 Samsung employees after the litigation commenced.

Practice Point: Don't send any litigation hold notices prelitigation until a determination is made that litigation is reasonably foreseeable or anticipated. Once a determination is made that litigation is reasonably foreseeable or anticipated, the extent and scope of the litigation hold notices sent prelitigation should be substantially the same as those that would be sent immediately after the commencement of the litigation; i.e., the identified custodians and the categories of documents should be substantially the same.

2. Ensuring compliance with litigation hold notices. While Samsung issued the litigation hold notice prelitigation, it failed to monitor its employees' preservation efforts to ensure compliance with the notice. In effect, the court found that Samsung "simply *trusted* its custodial employees to save relevant evidence" (emphasis added), despite the fact that "Samsung kept the shredder on long after it should have known about this litigation" by its continuing the automatic destruction of emails after the passage of two weeks.

Practice Point: The mere sending of a litigation hold notice will not suffice without some affirmative action to ensure compliance with the instructions in the hold notice. For example, if email systems with automatic deletion features are utilized, the automatic deletion feature should be disabled for the identified custodians; hard drives should be imaged; periodic checks should be performed to verify compliance with the hold notice; etc.

² Pursuant to FRCP Rule 72(a), a party may object to the order within 14 days after being served with a copy. The Local Rules of the Northern District of California, Local Rule 72-2, provide the procedure for seeking relief from a nondispositive pretrial order and for when and how the district judge may rule.

³ See, e.g., *Silvestri v. Gen. Motors Corp.*, (271 F.3d 583), *Goodman v. Praxair Servs., Inc., Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec. LLC* (685 F. Supp. 2d 456); *Sampson v. City of Cambridge, Md.*, (251 F.R.D. 172)

⁴ The court held that the qualifier "unless a business resolution can be reached" is virtually true of all litigation among commercial competitors and held it not to be determinative.

Contact

Leonard C. Suchyta
lsuchyta@hunton.com

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