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The Cover Up is Worse than the Crime

In politics, the saying goes that “the cover up is worse than the crime.” In litigation, the corollary must surely be that the failure to preserve evidence is worse than its production. A recent decision of the Commercial Division of the New York County Supreme Court in *Einstein v. 357 LLC*, Index No. 604199/07 (Sup. Ct., New York County Nov. 4, 2009) illustrates the point.

Harold Einstein and Jennifer Boyd purchased a condominium (presumably for a substantial sum) in a transaction in which The Corcoran Group acted as broker. After the purchase, it was determined that there were serious water leaks at the property. An action was commenced against a host of defendants, including the broker and its representatives, alleging fraudulent inducement, fraudulent concealment, negligent misrepresentation and violation of the New York General Business Law’s prohibition against deceptive practices. Central to the claims was the assertion that Plaintiffs relied to their detriment upon statements and correspondence, including e-mail messages, sent by the broker’s representatives.

A proper demand for production of all e-mail on the relevant subject was served. Not surprisingly, full production was not made by the broker. The failure to produce was evident to the Plaintiffs because they had copies of e-mail messages that were not included in the broker’s document production. Motions were made, orders entered, discovery responses served, affidavits submitted, and a hearing held at which the broker’s Information Technology Director, Terence Thomas, testified (he had also submitted several affidavits prior to the hearing). The last of the affidavits was submitted by Thomas seven months after the Court directed the broker’s attorney to read his client “the riot act” about the need to be forthcoming with discovery.

In a blistering 31 page decision, the Court sanctioned the broker by assessing attorney’s fees and costs (which include the fees of a forensic computer expert). The Court then made a finding that the broker would be deemed to have known about the water problems and to have willfully misled the Plaintiffs by concealing that condition during the sales process. Absent an appeal, the only thing left for the Plaintiffs to prove is damages.

Why such a harsh sanction? Among the specific factual findings made by the Court (1) the broker and its counsel made false statements about the nature and degree of the production and made selective production; (2) the broker had no reasonable record retention or “litigation hold” policies and made no effort during the course of the litigation to prevent continued deletion of relevant e-mail messages which were required by individual users of the e-mail system; and (3) no effort was made to investigate the basic methods of business communication or identify the electronic communications devices used to communicate with the plaintiffs and others (e.g., the use of home computers and personal computing devices upon which relevant evidence could be found).

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This Court finds, upon a preponderance of the evidence, that the [broker] continued to delete emails according to [its] ordinary business practices even after the commencement of litigation, because neither Thomas nor counsel implemented any change in the manual deletion policy upon the commencement of litigation. The Court notes that none of the [broker's] affidavits or direct testimony aver that [the broker] ceased deleting emails related to this litigation after being put on notice of this litigation. Thomas candidly admitted that at no time did he speak to the [broker] about [its] email deletion policies, even though [its representatives] remained obligated to delete their own emails in order to continue to receive and send email.

Interestingly, the Court's opinion is silent as to any finding that any e-mail messages or documents were actually helpful to the Plaintiffs or harmful to the broker. In other words, extreme sanctions were imposed to rectify a flouting of court orders and a violation of expected litigation conduct as opposed to proof of liability or damages.

The broker could have avoided this sanction with the imposition of a properly documented "litigation hold" and a properly documented effort to obtain and produce relevant evidence. The key to success is proper documentation and the guiding principle must be "if it is not in writing, it never happened." The failure to document in the *Einstein* case was a key factor in the Court's decision to impose sanctions.

It is now standard practice to direct a "litigation hold" when litigation is commenced. Simply put, a "litigation hold" is a suspension of a company's routine document retention and destruction policy and the imposition of steps to collect and maintain relevant evidence. The better practice is to impose it when litigation can reasonably be anticipated.

Announcement of the "litigation hold" must be conveyed in a serious and complete manner to all persons who may be in a position to have potentially relevant evidence. Complete documentation of the announcement and any follow-ups must be maintained. The nature of the action may dictate from whom the "litigation hold" is sent and its specificity. For example, in a slip and fall action the announcement may come from a local manager whereas in an antitrust action the announcement may come from the company president.

Document collection and production must follow in a complete manner and the investigation process must itself be documented. The Court in *Einstein* was angered by the failure of the broker to reach out to all sources of relevant evidence and was particularly incensed that no effort was made to learn the manner and method by which the broker communicated to the Plaintiffs. In this age of portable electronic communication (Blackberries, iPhones and laptop computers gaining remote access to company servers), such an effort must be a standard part of any effort to preserve evidence.

The Courts prefer to decide disputes on their merits and do not relish the imposition of sanctions. However, when the Courts are faced with contentious litigation and determine that candor has been lacking in the very expensive and time-consuming discovery process, sanctions are a distinct possibility. Forewarned is forearmed. ■

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