

Take Note: *Failure to demonstrate a robust legal holds process found “at least grossly negligent,” grounds for adverse inference instruction, spoliation sanction, and attorneys’ fees and costs award*

In re NTL, INC. SECURITIES LITIGATION, 2007 WL 241344 (S.D.N.Y. Jan. 30, 2007)

Andrew J. Peck, United States Magistrate Judge

The Facts

- The dispute and litigation spanned from 2002 to 2007; litigation holds were only issued twice, in March and June 2002, to a small group of people with a note to “forward to your reports as you consider appropriate.”
- In September 2002, after these notices were issued, NTL, the original defendant, entered and emerged from bankruptcy proceedings as two new, separate entities.
- No reminders were issued, no collection to preserve information was conducted when the entities split, and no new holds were issued in the successor entities.
- Substantial server and email information were lost; particularly troublesome was the fact that systems were outsourced, transferred, and decommissioned without any communication to preserve relevant evidence.

Key Take-aways

Adopt the Zubulake standard for your legal holds processes

This decision leaves little doubt that legal holds must be proactively issued, monitoring of the hold is essential, and reminders are necessary especially in protracted litigation. The court relied heavily on Zubulake in finding NTL “at least grossly negligent,” concluding that “[t]he evidence, in fact, is that no adequate litigation hold existed.”

Having a “system of record” for legal holds is critical, especially in protracted litigation

Carefully consider the recordkeeping around your legal holds process – time is the enemy of informal record keeping. A rigorous process evidenced by a record of the effort would likely mitigate the sanctions issue. Without dedicated recordkeeping, information lost from company systems or departing employees over time could easily include the record of your legal holds!

Include people, systems, and related entities when scoping and communicating your legal holds

Some of NTL’s IT systems were outsourced to IBM during the litigation, but IBM was never notified of the hold and years of information were lost. The court also held re-organization into separate entities did not relieve discovery responsibilities. Lack of physical possession did not mitigate the duty to preserve or produce because NTL had the “practical ability to obtain the material.”

Proactive collection of data prior to a discovery request may be needed in some circumstances

Judge Peck did not assert that NTL had an obligation to proactively collect data to meet its preservation duties except where systems were decommissioned or transitioned to third parties and the duty to preserve had already attached.

Assume that your legal holds process will be scrutinized heavily in litigation

Your hold notices, the people you send them to, your monitoring and your reminder efforts will become a central element of litigation that unfolds over a long time. Departing employees, system transitions, and failing memories all put your litigation department at a real disadvantage – a demonstrable, robust holds process is the best offense and the best defense.

This case is an excellent resource on the case law relevant to legal holds and related sanctions. I hope you find it useful, and these take-aways instructive for your own processes.