Viewpoint

BNA INSIGHT

An Ounce of Prevention . . . : The Preservation Subpoena ('Subpoena Conservo') to Non-Parties as a Litigation Tool

BY JAY L. HIMES AND ELIZABETH FRIEDMAN

In today's IT-driven world, paper as a way to preserve and transmit information is an endangered species. In its place, we have electronically stored information, or ''ESI,'' the product of electronic impulses, which can be stored on many devices—smartphones, personal computers and tablets, networks run by servers, to name a few.

In addition, we have ESI storage media, ranging from tapes to external hard-drives, to USB sticks, often called ''flashdrives,'' capable of storing, literally, a lifetime's worth of information.

Business users who enlist services from outside web-based IT providers can have their information stored in ''the cloud,'' as will everyday internet users who post on social network sites. That ''cloud'' is a metaphor for someone else's server—or more likely, server farm—that could be located in a building almost anywhere in the world.

Like paper and, even before that, stone tablets, all this ESI represents potential sources of proof for litigation attorneys, among others. The volume of ESI is, of course, ever increasing, and both finding it to begin with, and thereafter searching it, present significant challenges for litigants.

But once found and earmarked (increasingly, via software search technology) for possible use in litigation, ESI is much more easily copied, transmitted, and stored than the paper and stone tablets that preceded it.

At the same time, however, ESI is more easily altered, through normal editing or worse. And while ESI also seems easy to ''destroy,'' simply hitting the computer's ''delete'' key won't necessarily be enough—especially where the ESI is stored in the cloud. Indeed, for any version of the ESI transmitted elsewhere, tracking down and destroying all the copies is probably unrealistic.

After a lawsuit is begun—and probably even before that—the litigants themselves will have an obligation to preserve potentially relevant ESI.[1] Non-parties, however, are also important sources of proof in many cases. Litigants therefore have adopted a practice of sending ''litigation hold'' letters to non-parties soon after a case begins. But the legal duty that attaches to the recipient of a hold letter is unclear. As commentators have noted:

> [T]here is very little direct authority delineating (or even discussing) a third party's preservation obligations prior to the service of a subpoena, or in the absence of a statute, contractual obligation, court order, or other special relationship, including whether such a preservation obligation even exists.[2]

Something more is, therefore, needed to assure that litigants have a judicially-recognized ability to preserve non-party ESI.

Some Alternatives. In litigation governed by the Private Securities Litigation Reform Act (''PSLRA''), the courts have approved preserving ESI through the service of subpoenas, issued while discovery in the case is stayed pending the court's resolving a defense motion to dismiss.

The authors are, respectively, partner and associate at the firm of Labaton Scharow LLP, in New York City. Mr. Himes, who co-chairs the firm's Antitrust Practice Group, is the former Antitrust Bureau Chief, Office of the Attorney General of New York.

[1] *See generally Report of the Special Committee on Discovery and Case Management in Federal Litigation of the New York State Bar Association* 18-31 (Apr. 2, 2012), *available at* http://www.nysba.org/AM/Template.cfm?Section=Final_Report_of_the_Special_Committee_on_Discovery_and_Case_Management_in_Federal_Litigation.

[2] Thomas Y. Allman et al., *Preservation Obligations of a Third Party, inElectronic Discovery Deskbook* § 8:2.1 (Oct. 2011). *See also* Michael B. de Leeuw & Eric A. Hirsch, *The Phantom Menace: Non-party preservation obligations in New York are fairly clear cut*, N.Y.L.J., Mar. 22, 2010.

This same approach makes sense in other litigation settings as well. One example is multidistrict litigation where discovery typically is suspended while the Judicial Panel on Multidistrict Litigation (''JPML'') decides the venue for consolidated or coordinated pretrial proceedings, and while the judge to whom the case is assigned begins the early case management and organization process.

Another example is complex litigation such as antitrust, where discovery stays during the pendency of criminal proceedings, or protracted motions challenging the legal sufficiency of the complaint, are regular occurrences.[3]

Thus, as we discuss below, the seeds have been planted for a judicially-recognized ESI retention process directed to non-parties: the preservation subpoena. These seeds should take root and grow.

Preservation Subpoenas in the PSLRA Context and Elsewhere

The PSLRA provides:

> ''[i]n any private action arising under this chapter, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.''[4]

Accordingly, if a non-party may have ESI relevant to the securities case with a motion to dismiss pending, the PSLRA litigant seeking to assure the ESI's continued availability must apply to the court for relief from the automatic discovery stay. The litigant must request particularized discovery and demonstrate that such discovery is needed either ''to preserve evidence or necessary to prevent undue prejudice.''[5] The relief sought typically takes the form of a preservation subpoena.

Requirements. Under PSLRA case law, a preservation subpoena is sufficiently particularized if it is directed at specific persons and limits the type of documents to be preserved.[6] The other statutory element for relief—undue prejudice—requires showing ''improper or unfair treatment amounting to something less than irreparable harm.''[7]

Courts have lifted the discovery stay and granted preservation subpoenas where, for example, those sought to be served were accountants and auditors who likely did not have notice of the action and the plaintiffs demonstrated that the relevant ESI could be destroyed during routine backup procedures,[8] or where the non-party was liquidating in bankruptcy.[9]

Other Contexts. Preservation subpoenas are also appearing in non-PSLRA litigation. The Southern District of Ohio court granted one plaintiff's request to issue a non-party preservation subpoena prior to the Rule 26(f) conference of the parties.[10] There, the subpoenaed non-party was a payment processor for telemarketers who allegedly defrauded the plaintiff and members of the class.

According to the plaintiff, the non-party was a ''critical link'' between the telemarketers and various bank-defendants, who enabled the telemarketing fraud by providing banking services to the payment processor.[11] Because the payment processor's operations had been dormant for years, the plaintiff argued that a preservation subpoena was needed to preserve critical records and databases from loss or destruction.[12]

The court noted that, under Federal Rule of Civil Procedure 26(d)(1), discovery generally is not permitted before a Rule 26 conference,[13] but limited discovery may be allowed for good cause. A concern that data will be destroyed can meet that test.[14] Consequently, the court granted the plaintiff's motion for a preservation subpoena.[15]

Compare With Preservation Order? Where prior court authorization for service is needed, a preservation subpoena is the equivalent of the more commonly used preservation order. Courts generally apply one of two approaches to determine whether to issue a preservation order.

The first, adopted in *Pueblo of Laguna v. United States*,[16] requires the moving party to demonstrate that the order is necessary and not unduly burdensome, and rejects the notion that the elements required to issue a preliminary injunction must be met.

The second approach, articulated in *Capricorn Power Co. Inc. v. Siemens Westinghouse Power Corp.*,[17] balances:

> (1) the court's concern for the continued existence and maintenance of the evidence in question in the absence of an order;
>
> (2) irreparable harm likely to result absent an order; and
>
> (3) the capability to maintain the evidence and burden of ordering preservation.

These are the same considerations that courts use to decide whether to grant relief from an automatic discovery stay imposed under the PSLRA.

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[3] *See generally* Bradley S. Lui, Eugene Illoyosky & Jacqueline Bos, *Increased DOJ Intervention to Stay Discovery in Civil Antitrust Litigation*, 8 ABA ANTITRUST LITIGATOR 1 (Spring 2009) (''*DOJ Intervention*'').

[4] 15 U.S.C. § 78u-4(b)(3)(B).

[5] *See, e.g.*, *In re Nat'l Century Fin. Enters., Inc. Fin. Inv. Litig.*, 347 F. Supp. 2d 538, 541-42 (S.D. Ohio 2004).

[6] *Id.* at 541.

[7] *In re Vivendi Universal, S.A., Sec. Litig.*, 381 F. Supp. 2d 129, 130 (S.D.N.Y. 2003) (quotation marks omitted).

[8] *In re Tyco Inter., Ltd. Sec. Litig.*, No. 00MD1335, 2000 DNH 268 (D.N.H. Jul. 27, 2000).

[9] *Nat'l Century*, 347 F. Supp. 2d at 542.

[10] *Johnson v. U.S. Bank Nat'l Assoc.*, No. 1:09-cv-492., 2009 BL 260396 (S.D. Ohio Dec. 03, 2009).

[11] *Id.* at *1.

[12] *Id.*

[13] *Id.* at *2.

[14] *Id.* at *2.

[15] *Id.* at *2; *see also* Pretrial Order #5, ¶ II.C, *filed in In re:Pool Prods. Distribution Market Antitrust Litig.*, MDL No. 2328 (E.D. La. June 4, 2012) (authorizing issuance of preservation subpoenas to non-parties).

[16] 60 Fed. Cl. 133, 138, 138 n.8 (2004)

[17] 220 F.R.D. 429, 433-34 (W.D. Pa. 2004).

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All Writs Act. A preservation subpoena and a preservation order directed to a non-party each seem within a federal court's authority under the All Writs Act.[18] Each is closely analogous to an order to preserve an automobile, piece of machinery, or other injury-producing device that may be a source of proof in litigation.

For example, the Northern District of Georgia invoked the All Writs Act to issue injunctions directing non-party domain registrars and Twitter to preserve electronic files that could assist plaintiffs in determining the identity of defendants alleged to have stolen confidential information, which they then uploaded to the domain registrars and Twitter.[19]

Applicable to Non-Parties? However, a preservation subpoena and a preservation order each also raise questions of the court's jurisdiction over the non-party on whom the duty to preserve is sought to be imposed. Federal Rule 45(a)(2) and (b)(2) prescribe a practice for issuing document production subpoenas that, if applied by analogy to preservation subpoenas, should obviate jurisdictional concerns.

In essence, the court hearing the action could authorize a preservation subpoena to be issued, and if the non-party to be served was outside the court's jurisdiction, the subpoena itself would issue from the court where the non-party is located or where preservation would occur.

The situation for a preservation order, on the other hand, would seem to require that the non-party be subject to the jurisdiction of the court issuing the order.[20]

Other Applications

Besides the PSLRA, there are other types of actions where discovery often is suspended temporarily at the outset of the litigation. Here, too, preservation subpoenas are a useful tool.

Multidistrict Litigation. One example is multidistrict litigation, characterized by the filing of cases in various federal district courts around the country, which arise, typically, from a common event or series of events. Under 28 U.S.C. § 1407, the JPML has authority to select a single district court and to transfer the related cases there for consolidated or coordinated pretrial proceedings.[21]Antitrust, consumer protection and products liability cases, often filed as class actions, are serial MDL participants. These proceedings virtually cry out for preservation subpoenas.

Time. The MDL transfer and consolidation process invariably takes time. Shortly after the individual case filings begin, one of the litigants generally files with the JPML a motion to transfer to a particular district.[22] The Clerk of the Panel then sends a notice of the filing to all potentially affected parties, together with a schedule for filing briefs supporting or opposing the transfer motion.[23]

After briefing is complete, the Panel hears argument of the motion on a given day in each quarter of the year, and thereafter issues its transfer order.[24]

While Panel Rule 2.1(d) provides that proceedings in the district courts in which the cases were originally filed are not stayed pending a motion to transfer, filing courts sometimes stay their proceedings (either formally or informally) while awaiting the Panel's decision.[25]

From the point of view of judicial administration, a district judge may opt to refrain from investing human resources and public funds to manage a case that may well be transferred elsewhere, at least absent particular facts that warrant going forward.Thus, as the Panel Chairman has noted, ''the time tolled by the stay between the filling of the § 1407 transfer motion and its resolution may amount to dead time that can delay the existing litigation.''[26]

The JPML transfer itself puts all the MDL cases before a single assigned judge. But ''[m]ore delays can occur after the Panel enters its transfer order while the transferee court organizes the new files and convenes the parties.''[27] Realistically, an MDL transfer can delay litigation by four-to-six months.[28]

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Recurring early matters in the transferee court include a motion to appoint interim lead counsel for the multiple plaintiffs and the class, service of a ''consolidated amended complaint'' to supersede the many individual case pleadings, and the virtually obligatory *Twiqbal* motion to dismiss, which will need to be

[18] 28 U.S.C. § 1651(a)(authorizing the court to ''issue all writs necessary or appropriate in aid of their respective jurisdictions and all agreeable to the usages and principles of law''), in addition, the court's inherent authority clearly permits preservation orders to the litigants themselves, and may also be applicable. *See generally Pueblo of Laguna ,supra* note 17.

[19] *Evans v. John Does 1-8*, 1:11-cv-0458-WSD (N.D.Ga. Mar. 1, 2011).

[20] *See In re Grand Casinos, Inc. Sec. Litig.*, 988 F. Supp. 1270, 1273 (D. Minn. 1997) (granting preservation subpoenas directed to non-parties, but denying a preservation order because ''we are aware of no authority which would subject third-persons to our jurisdiction''); *Asset Value Fund Ltd. P'ship v. Find/SVP, Inc.*, No. 97 Civ. 3977 (LAK) (S.D.N.Y. Sept. 19, 1997) (denying a preservation order directed to non-parties, in part, because neither ''ha[d] been served with any process, so it is far from clear that this Court has any jurisdiction over them.'').

[21] Once pretrial is completed, the individual MDL cases have to be remanded to the courts from which they originated for trial unless the parties themselves consent to trial before the transferee court or another means to finish the case is adopted (such as a full case transfer under 28 U.S.C. § 1404). *See Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998). In the real world, MDL cases are rarely remanded.

[22] 28 U.S.C. § 1407(c). Strictly speaking, the Panel itself can initiate transfer on its own, but that would be unusual.

[23] Rule 6.2(b) of Rules of Procedure of the United States Judicial Panel on Multidistrict Litigation effective July 6, 2011, *available at* http://www.jpml.uscourts.gov/sites/jpml/files/Panel%20Rules-Amended-7-6-2011.pdf.

[24] 28 U.S.C. § 1407(c).

[25] John G. Heyburn II, *A View From The Panel: Part of the Solution*, 82 TUL. L. REV. 2225, 2241 (June 2008).

[26] *Id.* at 2241-42.

[27] *Id.* at 2242.

[28] *See generally id.* at 2242-43.

briefed and heard by the court. Despite efforts to rein in delay, these threshold matters can easily consume another four-to-six months—and that without counting the time that the court needs to rule on the motion to dismiss.

Once that ruling issues, if part of the case survives, there may be yet another pleading—the ''SCAC,'' or ''second consolidated amended complaint''—and yet another motion to dismiss.

The math is not difficult. There is likely to be a year or more from the point that the first complaint comprising the eventual MDL litigation is filed to the point that the discovery phase of the MDL litigation begins.[29] Throughout this period, the litigants themselves should be meeting their preservation obligations.

But what about non-parties? How much confidence can we have that litigation hold letters, unilaterally issued and of uncertain legal effect, do in fact assure adequate preservation of ESI or of hard-copy documents in general?

DOJ Antitrust Actions. Another recurring situation arises in antitrust cases filed while the Department of Justice is conducting a criminal grand jury investigation or is prosecuting a criminal Sherman Act indictment. In these circumstances, the DOJ has sought orders staying discovery in the related civil litigation with increasing frequency.[30] Defendants under investigation or defending the criminal charges may similarly move to stay civil discovery.[31]

While courts do not always grant the stay sought, not infrequently they do. When that happens, discovery in the civil antitrust litigation can go into hibernation for an extended period.

DOJ criminal antitrust proceedings are not known for their alacrity. This, again, presents a circumstance where litigants should have more than a litigation hold letter to assure that non-parties will, indeed, have ESI available to be discovered when the court eventually lifts the civil stay. This mission is better performed by a preservation subpoena, backed up by the authority of the court, than by a letter from counsel.

These litigation circumstances are illustrative of ones where protracted early delay in civil discovery creates a real risk that, as time passes, valuable discovery materials and sources of proof at trial simply will cease to be available.[32] The use of preservation subpoenas to mitigate the risk seems well-advised.

Benefits and Costs

The benefits of serving a preservation subpoena are plain enough. First, the subpoena provides both the litigants and the non-party recipient with greater certainty regarding the non-party's duty to preserve than does a litigation hold letter. Simply put, a subpoena issued by a court is not to be ignored. Once served with a preservation subpoena, the non-party is under a legally enforceable duty to preserve the specified ESI or other material.[33]

This certainty is particularly important to plaintiffs in the scenarios described above, as they want to ensure that all relevant data is preserved until discovery commences. Equally important, however, non-plaintiff litigants can also have an interest in preserving ESI that they have generated, but that is held, for any of a variety of reasons, by a non-party.

A preservation subpoena only obliges the non-party to preserve, not to assemble, review, and produce relevant ESI.

Under Federal Rule 34, litigants must produce discovery items in their ''possession, custody or control,'' and that includes data that a party has the ''right, authority or practical ability'' to obtain from a non-party.[34] If a litigant is concerned that a non-party having its data may not preserve it, and that the failure may be imputed to the litigant, issuing a preservation subpoena could protect the litigant.[35]

Involving the Bench. Second, use of a preservation subpoena means that judicial oversight is available, both at the outset when a litigant applies to the court for permission to serve the subpoena and after service if the subpoenaed non-party seeks to raise matters of burden, cost or other prejudice. The fact of judicial involvement should create incentives for litigants to prepare

[29] *See, e.g.*, Docket in *In re: Fresh and Process Potatoes Antitrust Litig.*, Case No. 4:10-md-2186-BLW (D. Idaho) ((first) Notice of Transfer Order filed October 13, 2010 (Dkt. No. 1), while Order filed July 20, 2012 (Dkt. No. 222), directed discovery to commence on July 23, 2012, almost two years later).

[30] *See generally DOJ Intervention*, *supra* n. 4.

[31] *See, e.g., Walsh Secs., Inc. v. Cristo Prop. Mgmt., Ltd.*, 7 F. Supp. 2d 523 (D.N.J. 1998); *DOJ Intervention, supra* n. 4, at 20 & n. 14.

[32] As an example of a complex litigation where discovery was subject to an extended delay, due not to MDL proceedings or a DOJ stay motion, but rather to motions to dismiss, *see* Docket in *In re Florida Cement and Concrete Antitrust Litig.*, Master Docket Nos. 09-23187-CIV, 09-23493-CIV (S.D. Fla.) (The first complaint was filed October 21, 2009 (Dkt. No. 1), while the first scheduling order filed January 12, 2011 (Dkt. No. 251) set commencement of fact discovery for February 2, 2011, over a year later).

[33] *In re Grand Casinos, Inc. Sec. Litig.*, 988 F. Supp. 1270, 1272 (D. Minn. 1997) (''[T]he Plaintiffs' purpose in serving the Subpoenas is to place the third-persons on notice that this action exists, and to impose an affirmative duty on those persons to preserve the sought-after evidence.''); *In re Tyco Int'l, Ltd., Sec. Litig.*, No. 00MD1335, 2000 DNH 268 (D.N.H. Jul. 27, 2000). (''[G]ranting a plaintiff leave to issue subpoenas that give specified third parties notice of the action and impose upon them only a duty to preserve certain relevant evidence in their possession is consistent with the purposes underlying the PSLRA.'').

[34] *Bank of New York v. Meridien BIAO Bank Tanzania Ltd.*, 171 F.R.D. 135, 146 (S.D.N.Y. 1997).

[35] There are many rulings arising from the failure of a non-party to retain evidence. Commonly an aggrieved litigant seeks to impose tort liability on the non-party. The case law is mixed on whether to recognize such a right of action. *See Superior Boiler Works, Inc. v. Kimball*, 292 Kan. 885, 259 P.3d 676 (2011), and *Gribben v. Wal-Mart Stores, Inc.*, 824 N.E.2d 349, 353-54 (Ind. 2005) (both analyzing the tort of non-party spoliation and the case law nationally); Michael B. de Leeuw & Eric A. Hirsch, *supra* note 3, for an analysis of New York law on the topic.

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subpoenas that appropriately specify the material covered.

Maintaining the Status Quo. Third, the preservation subpoena is intended to freeze the ESI status quo, something that should be achievable at a cost far less than that of responding to a Rule 45 subpoena duces tecum. A preservation subpoena only obliges the non-party to preserve, not to assemble, review and produce relevant ESI. To be sure, preservation itself will not be cost-free. However, techniques such as electronic ''imaging'' of networks, work-stations and similar devices can minimize the burden and inconvenience.[36] Approaches like this are less onerous than placing an ongoing obligation on a non-party to monitor and preserve parts of a continuously changing body of ESI.

Moreover, because the cost of preservation is less than that of production, courts in MDL proceedings may be more willing to direct preservation relief while transfer motions are pending.

Costs. Which brings us to the pink elephant in the room: costs, or even more precisely, who can be expected to bear them? As it is, Federal Rule 45(c)(1) provides that:

> A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

This rule recognizes that ''non-parties who have no interest in a litigation should not be required to subsidize the costs of a litigation.''[37] Litigants or attorneys who secure preservation subpoenas can probably expect to be subject to comparable responsibilities absent unusual circumstances.

Accordingly, a litigant seeking a preservation subpoena will need to tailor it so that subpoena does not overreach. And if the subpoena recipient asserts undue burden or cost, the subpoena proponent needs to be prepared to suggest cost-effective preservation options.

The courts also can be expected to import discovery meet and confer procedures to preservation subpoenas so as to minimize not only the burdens and costs on the non-party, but the need for judicial intervention as well. Either existing discovery rules can be construed to apply to preservation subpoenas.

Aternatively, the court permitting the subpoena to be served could condition its approval on the litigant's accepting a meet and confer responsibility, which the subpoena itself would describe so that the non-party has notice of the procedure.

Conclusion

In sum, preservation subpoenas can help to ensure that non-parties take effective steps to preserve relevant ESI for later discovery in litigation or for use as evidence at trial. Fast-forward 400 years to a time when the litigation attorney's tool-shed includes not only the subpoena duces tecum, but also the subpoena conservo—directed then to forms of information creation, transmission, and storage that we cannot even imagine today.

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[36] *See* http://en.wikipedia.org/wiki/Disk_cloning.

[37] *Broussard v. Lemons*, 186 F.R.D. 396, 398 (W.D. La. 1999); *see also In re Letters Rogatory*, 144 F.R.D. 272, 278 (E.D. Pa. 1992) (same).