



## Presentation Outline: “When a Company Learns About an Actual or Potential Claim”

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- I. Insurance coverage considerations
  - A. Insurance broker or agent should promptly be notified, receive a copy of the claim document (*i.e.*, letter or complaint), and asked to notify all primary relevant and excess carriers
    - Coverage is quite variable, completely dependent on policy terms; company should never assume that coverage is not triggered until litigation is formally initiated
    - Many policies require notice “as soon as practicable” or within a specified period after insured becomes aware of information or circumstances that could reasonably be expected to give rise to a claim; even in absence of prejudice, delays of less than two months can be fatal if policy requires notice “as soon as practicable”
    - Telephone call or letter may be sufficient trigger
    - Notice must be given in accordance with the notice reporting provisions of each specific policy; such provisions may differ from one policy to another
    - If policy renewal or application process is underway when company learns of or should reasonably be aware of potential or actual claim, information must be included in the renewal or application papers
    - Providing notice of potential claim does not eliminate need to provide timely notice of actual claim
  - B. Communications with broker and carrier should be captioned as privileged and work product but worded to account for possibility that they will later be determined not to come within attorney-client privilege or work product
    - To maximize possibility that privilege will attach, outside counsel should be copied on the notification and on all ensuing communications



## II. Document handling considerations

A. Settled law in United States in wake of the seminal *Zubulake* decisions (*Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003), and 229 F.R.D. 422 (S.D.N.Y. 2004)), is that duty to preserve evidence arises when company reasonably anticipates litigation; same principles are increasingly applied with respect to arbitration proceedings

- In pre-litigation context, notice of pending inquiry or investigation may trigger litigation hold obligations; in litigation context, plaintiff's document retention duty may arise before defendant's duty arises
- Routine document retention/destruction policy must immediately be suspended
- Written litigation hold must be promptly put into effect; it will likely not be regarded as acting in good faith to wait until contours of the situation are fully understood if partial litigation hold could have been put into place immediately and amended as necessary over time
- Notice of hold document should be treated as a privileged work product communication but may be discoverable so should be reasonably detailed as to what is required; hold notice must include specific instructions as well as name, number, and email of a contact person who can answer any questions recipients may have as to hold implementation
- After *Pension Committee of Univ. of Montreal Pension Plan v. Banc of America Securities LLC*, 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010), failure to meet "contemporary standards" of document preservation is gross negligence, will result in judicial sanctions of client and possibly of lawyer
- If litigation hold obligation is triggered by learning of claim or litigation, consideration should be given to working out details of hold with counsel for opposing party; documented agreement (*see, e.g., United States v. Louisiana Generating LLC*, M. D. La. Civil Action No. 09-100-RET-CN) as to what need not be preserved can avoid later spoliation claims

B. Written litigation hold must be periodically refreshed with written reminders to all recipients; compliance must be monitored both by company and by outside counsel

- Must identify key players, ensure identification and preservation of their relevant paper and electronic records
- Must disable email deletion function or copy historic files of relevant personnel in forensically correct fashion
- Need to determine existence of, locate, and save any relevant shared files and servers



- May need to cease recycling/overriding of back-up tapes
  - Need to consider location and preservation of relevant voicemail messages, text messages, external storage media, PDA materials
  - Need to address document preservation as to departed employees and non-employee agents of company
  - Good faith may be questioned if early use is not made of technology specialists; it will likely not be regarded as good faith data collection unilaterally to decide on and apply search terms without having first vetted those terms with the other side
  - If litigation hold steps are undertaken manually, through human rather than machine search and collection efforts, must be done under close outside attorney direction and supervision; steps taken should be documented
  - Failure to make timely disclosure of preservation errors will likely be regarded as evidence of bad faith
- C. Special consideration has to be given to collection of data maintained outside the U.S., to avoid placing non-U.S. company litigating in United States in violation of international privacy and blocking laws (*e.g.*, bank secrecy laws)

### III. Internal investigations

- A. Decision as to whether to investigate circumstances surrounding potential or actual claim cannot be made by management involved in matter at issue; where senior management is implicated, Board must make decision as to whether to investigate
- In heavily regulated or potential bribery settings, investigation is almost always required, may be necessary or highly desirable in order to forestall or to reduce severity of prosecutorial or regulatory action; various U.S. federal and state government and regulatory enforcement manuals consider voluntary investigation and disclosure by company as a key factor shaping governmental response
  - Where there is suggestion of senior or high-level management misconduct, investigation is almost always called for
  - Repeat problems similarly likely require investigation
- B. Early determination is needed as to whether in-house or outside counsel will manage investigation; if outside counsel is to be used, need to decide whether regular or special counsel will be utilized

- Cost versus privilege considerations: in-house investigation may be less expensive in short run but will not be deemed independent, may have severe adverse privilege and work product consequences, and may not meet applicable standards for invocation of business judgment rule
  - In international setting, per April 29, 2010 Advocate General Opinion in *Akzo Noble Chemicals Ltd. and Akcros Chemicals Ltd. v. European Commission* (Case C-550/07 P), in EU (as opposed to national law) proceedings, scope of legal professional privilege may not extend to EU-based in-house lawyers; legal professional privilege may only extend to advice provided by external lawyers who are members of a bar association in an EU Member State; expert reports commissioned by lawyers may likewise only come within privilege if commissioned by external EU-qualified counsel
  - Investigation has to be explicitly undertaken for purpose of providing legal rather than business advice; in-house counsel may be more likely to blur boundaries or more susceptible to client pressure to do so
  - If matter implicates high-level executives, use of outside special counsel is likely essential
  - For U.S. based companies, even if operating abroad, critical need to ensure correct *Upjohn* warnings under principles laid out in *Upjohn Co. v. United States*, 449 U.S. 383 (1981) may favor using outside counsel; proper *Upjohn* representation disclaimer permits company to maintain attorney-client privilege even though counsel communicates with corporate officers and employees who are not the client; failure to provide and to document proper, detailed *Upjohn* warning at the outset of each interview and/or even inadvertently providing advice to employee on preliminary issues (“*Do I need a lawyer?*”) may lead to interviewed employees becoming joint clients, with ability to block company’s use of privileged materials (*see, e.g., United States v. Ruehle*, 583 F.3d 600 (9<sup>th</sup> Cir. 2009))
- C. Corollary issue is precise client identification; joint representation of corporation and individual officers can be treacherous in internal investigation setting
- This is especially difficult for in-house or regular outside counsel who may view executives as their clients; routine lines of communication may not be available during internal investigation
- D. Investigative process is just as important as substance, involves identification of scope and purpose of investigation, as well as determinations of what happened, who was involved, reasons for occurrence (*i.e.*, intent), appropriate remedial actions, and need for new or amended policies and/or procedures
- Need to decide who directs investigation, interacts with counsel: management, Board, or Board committee; reporting should be limited to that group



- Need to consider interrelationship with pending or possible governmental investigation, including possible criminal investigation or parallel criminal proceedings
- Need to consider whether joint defense or common interest agreements with officers and/or employees are necessary or appropriate and, if so, whether such agreements should be reduced to writing; mutuality of interests is necessary precondition for such agreements
- Should set time parameters, bearing in mind that timeliness of start of investigation and time spent on investigation will be important signals
- Need to consider what documents will be collected for review, the extent of review of electronically stored information ("ESI"), the need for outside assistance with ESI collection and review process so as not to alter historical metadata that may become important
- Should determine how to identify and interview relevant witnesses, with a view towards completeness; any written communications with employees must be carefully crafted so as not to be susceptible to later governmental charge of interference with governmental investigation or obstruction of justice
- Need to decide whether to prepare a written report; if so, drafting must be done with an eye to disclosure and privilege waiver issues

E. At conclusion of investigation, company will need to determine, with advice of counsel, whether to report investigation and/or finding to any regulatory or governmental authorities, whether to take any disciplinary steps *vis-à-vis* company personnel, whether to adopt new policies and procedures, whether to make any sort of public disclosure

- If disclosure to governmental agency is necessary or desirable, counsel should seek to negotiate regulatory commitment as to confidentiality and non-waiver of attorney-client privilege and work product protection
- Note that subsequent invocation of reliance on counsel defense will lead to privilege and work product waivers

#### IV. Significance of the business judgment rule

A. U.S. jurisprudence gives great weight to, will not look behind, determinations made by independent and disinterested (not conflicted as to matter at issue) directors acting on basis of reasonable investigation; once court determines lack of self-interest and reasonableness of investigation, it will not second-guess result; basic principle is that directors and officers are not guarantors of business success; exercise of honest business judgment shields management from liability for mistakes of judgment



- Director is deemed independent when he or she is in a position to base decision on merits rather than on extraneous considerations or influences
- B. Upon company's learning of possible or actual "derivative" claim that would be brought against management on behalf of the company, undertaking investigation that meets business judgment criteria can effectively short circuit litigation
- Unless statute provides otherwise, such claims must typically first be presented to Board, by making "demand" on Board
  - Special litigation committee ("SLC") of Board is effective claim management tool in derivative context (*see Zapata Corp. v. Maldonado*, 430 A.2d 779 (DE 1981)), but use must be carefully managed to meet business judgment criteria; not every Board-managed internal investigation will meet business judgment needs
  - SLC members must be disinterested in appearance and in fact, must devote significant time to the committee process, must select independent (not "regular") outside counsel to guide committee investigation and deliberations
  - SLC should proceed pursuant to written Board resolution delineating committee authority
  - Counsel performs the actual investigation under committee supervision; investigation must be of reasonable scope and thoroughness (examining all relevant facts and sources of information), utilizing same principles that govern conduct of internal investigations
  - Whether to have SLC make recommendation to full Board, which considers and presumably adopts recommendation or to have full Board delegate authority to committee has to be decided in specific context but at outset of process, will have privilege and work product ramifications
  - Committee or Board report must be meticulously prepared, with expectation that it will be disclosed in litigation, has to be carefully drafted to avoid privilege and work product waivers
  - If SLC or Board determines that claim is not in company's best interest, motion to dismiss can then be filed on basis of business judgment rule and can lead to early dismissal, with discovery limited to (i) inquiring into independence of SLC members and (ii) reasonableness of the scope of the SLC investigation



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