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Opinion

Technology: Your company's legal hold obligations may not be a Dr. Seuss story

Judge Shira Scheindlin's Zubulake decision still allows exceptions that may swallow the "general rule"

By Gareth Evans

What do Dr. Seuss and legal hold obligations regarding backup tapes have in common? Quite a lot, it turns out.

Dr. Seuss's *Did I Ever Tell You How Lucky You Are?* describes a number of people we should be thankful we're not, one of whom is a bee-watcher watcher. Because a bee that is watched will work harder, a town decided to have a bee watcher watch a lazy bee. But the bee did not end up working much harder, so the townsfolk figured that the bee-watcher wasn't watching as well as he could. So, they assigned someone else to watch the bee-watcher. And then a watcher to watch the bee-watcher watcher. And so on, until all the townsfolk were watching the watchers.

Retaining backup tapes for legal holds can look a lot like a bee-watcher watcher. How did it come to be that, in implementing legal holds, we often end up preserving backup tapes, i.e., backing up the backups, as it were? And when do we really need to suspend the rotation of backups and preserve existing tapes?

Stating one of the basic tenets of legal holds in the *Zubulake* decisions ten years ago, Judge Shira Scheindlin wrote, "Must a corporation, upon recognizing the threat of litigation, preserve every shred of paper, every e-mail or electronic document, and every backup tape? The answer is clearly, 'no.' Such a rule would cripple large corporations[.]"

Specifically with respect to backup tapes, Judge Scheindlin wrote, "As a general rule, then, a party need not preserve all backup tapes even when it reasonably anticipates litigation." In other words, in general, the "litigation hold does not apply to inaccessible backup tapes." Consequently, such tapes "may continue to be recycled on the schedule set forth in the company's policy," even where the company is otherwise suspending its routine document deletion policy to implement a legal hold.

Sounds good, doesn't it? These general statements would suggest that we don't need to worry much about backup tapes in implementing a legal hold. Then why, ten years after *Zubulake*, are so many companies nevertheless feeling crippled by burdensome legal hold obligations, including preservation of backup tapes, which may require altering backup systems, removing tapes from rotation, and purchasing new tapes or hardware?

The problem is that the exceptions may swallow the "general rule." Judge Scheindlin's discussion of backup tapes in *Zubulake* was premised on the notion that a party should not be required to preserve multiple identical copies of the same documents. Where the relevant documents are likely to be found in active data, Judge Scheindlin stated that a party should not also have to preserve an extra copy in backup tapes. But where backups may contain the only copy of relevant information, it may present a different situation.

Consequently, Judge Scheindlin stated that it "makes sense" to recognize an exception to the general rule where a company can identify where particular employees' documents are stored on backup tapes. "If a company can identify where particular employee documents are stored on backup tapes, then the tapes storing the documents of 'key players' to the existing or threatened litigation should be preserved if the information contained on those tapes is

not otherwise available." Importantly, Judge Scheindlin's definition of "key players" is a broad one—i.e., any employee "likely to have relevant information."

Judge Scheindlin also asserted in *Zubulake* that the general rule only applies to *inaccessible* backup tapes—i.e., those maintained solely for the purpose of disaster recovery, and from which individual documents or files cannot be retrieved without time-consuming and costly restoration. But if backup tapes are "actively used for information retrieval," then Judge Scheindlin asserted that they "*would* likely be subject to the litigation hold."

Perhaps building on this sentiment—and focusing more on backups' use than on their accessibility—some have asserted that backups should be preserved if they are used not just for disaster recovery but also for archival purposes. Examples would include those kept for a relatively long time for the purpose of retaining files that may need to be accessed in the future, or to comply with record retention laws.

Although cases regarding the preservation of backup tapes are highly fact-specific and, like Dr. Seuss stories, idiosyncratic, various courts since *Zubulake* have held a duty to preserve backup tapes where they are the only likely source of relevant information. For example, if a company has otherwise short retention periods for email, then email backup tapes retained for a relatively long period of time may represent the only remaining copy of potentially relevant documents.

Additionally, some courts have found that the costs of restoring backups in certain circumstances were not sufficiently high to qualify them as "inaccessible data." New, more efficient and less expensive technologies for backup restoration may therefore impact that determination. Granted, the costs likely will be considerable when hundreds of backups are involved. *Zubulake* and other decisions have advocated the use of sampling to determine whether backup tapes actually are likely to contain enough relevant information to justify their restoration. Consequently, the question about whether to retain backups for legal holds has yielded more to whether the backups must be restored for search and review and, if so, whether the costs of doing so should be shifted to the requesting party.

Ultimately, many aspects of implementing a legal hold are about risk management, including decisions about backup tapes. For example, if a company has daily, weekly and monthly backups, must it retain all of them? At least one court has held, based on the facts before it, that it was only necessary to retain the monthly tapes. It's possible, of course, that another court could take a very different view.

If only the risks involved in deciding whether to, figuratively speaking, back up the backups were as insignificant as those involved in deciding whether to watch the watcher of a lazy bee. ■

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