
white collar lawflash

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Government Sanctioned for Destruction of Documents

U.S. district court decision may now allow defendants in False Claims Act cases to obtain sanctions where potentially relevant documents are lost or destroyed due to the government's failure to issue a timely litigation hold.

In *United States ex rel. Baker v. Community Health Systems, Inc.*, the U.S. District Court for the District of New Mexico upheld Magistrate Judge Alan Torgerson's recommendation of sanctions against the federal government for failing to issue a timely and adequate litigation hold.¹ The court held that sanctions were appropriate because the government's actions resulted in the destruction of electronically stored information (ESI) that could have been helpful to Community Health Systems' defense.

Untimely Litigation Hold

On April 29, 2005, relator Robert Baker filed a qui tam lawsuit under the False Claims Act (FCA) alleging that the defendant hospitals had engaged in Medicaid fraud. The government investigated for several years before deciding to intervene, filing its notice of intervention on February 20, 2009. Although the government issued a notice to the defendants to preserve documents in 2005, the government did not issue its own litigation hold to safeguard its internal documents until the day it intervened, by which time certain relevant ESI had been deleted or destroyed.

Magistrate Judge Torgerson applied the general spoliation rule that the duty to preserve documents arises once a party "reasonably anticipates litigation."² Under this standard, he rejected the government's argument that it could not have reasonably anticipated litigation until it received permission from the Department of Justice to intervene in the case. Instead, Magistrate Judge Torgerson found that the "Government's intervention was reasonably foreseeable after receipt of defense counsel's letter rejecting the Government's offer of settlement on September 5, 2008."³ Giving the government the "benefit of the doubt," Magistrate Judge Torgerson came to the conclusion that litigation could be considered "imminent" on September 5, 2008, by applying the standard set forth by the U.S. Court of Appeals for the Tenth Circuit in *Burlington Northern and Santa Fe Railway v. Grant*.⁴ The court agreed with Magistrate Judge Torgerson's findings regarding the timing and adequacy of the government's litigation hold.⁵

As a result of the untimely and inadequate litigation hold, the ESI of two key employees at the Centers for Medicare and Medicaid Services (CMS) was allowed to be automatically deleted and destroyed. The court agreed with Magistrate Judge Torgerson that sanctions were warranted, finding "overwhelming evidence" that the defendants were prejudiced because the lost documents went "directly to . . . one of their strongest defense theories."⁶

1. *United States ex rel. Baker v. Cmty. Health Sys., Inc.*, No. 05-279 WJ/ACT (D.N.M. Oct. 3, 2012), available at <http://www.nmcourt.fed.us/Drs-Web/view-file?unique-identifier=0004769540-0000000000>.

2. *Baker*, slip op. at 7 (citing *Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003)).

3. *Id.* at 7.

4. *Id.* at 7 (citing *Burlington N. & Santa Fe Ry. v. Grant*, 505 F.3d 1013 (10th Cir. 2007)).

5. *Id.* at 8.

6. *Id.* at 11.

Sanctions

Magistrate Judge Torgerson rejected the defendants' harshest requests for sanctions, including an adverse inference that the destroyed documents would have been exculpatory, finding that, while the government's culpability was more than negligent, it did not amount to bad faith or intentional misconduct.⁷ However, Magistrate Judge Torgerson recommended sanctions that would require the government to produce certain documents withheld under work product or deliberative process privilege; to produce all emails from, to, or copying the CMS employees whose ESI was destroyed, regardless of any claim of work product immunity or privilege; to pay reasonable attorneys fees and costs associated with the defendant's motion for sanctions; and to show cause why it should not be required to conduct further forensic searching for the missing ESI.⁸ The court agreed that the recommended sanctions were appropriate, noting that the sanctions were "designed to prevent the Government to benefit from its apathetic conduct in preserving documents that were clearly meant to be preserved, when it had ample reason to believe the documents and ESI should have been preserved for some time prior to the litigation hold."⁹

Implications

It is clear that "[t]he duty to preserve material evidence arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation."¹⁰ *Baker* provides greater clarity on the question of when the government's duty to preserve documents arises in a qui tam action under the FCA. Exculpatory documents within the government's control may be particularly susceptible to being lost or destroyed in FCA cases because the complaint may remain sealed for several years while the government decides whether to intervene. The decision in *Baker* signals that litigation may be reasonably foreseeable to the government long before it receives approval to intervene in a case and even before it requests permission to intervene, thus requiring that the government take action to preserve its documents even sooner to avoid sanctions. *Baker* may pave the way for other defendants in FCA cases to obtain sanctions where potentially relevant documents are lost or destroyed because the government fails in its duty to issue a timely litigation hold.

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7. *Id.* at 22, 29.

8. *Id.* at 10.

9. *Id.* at 14 (citing *Reilly v. Natwest Mkts. Grp., Inc.*, 181 F.3d 253, 267–68 (2d Cir. 1999)).

10. *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001) (citing *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998)).

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