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Insurer Spoliation Ruling Flags Continuing Duty To Preserve

By **Sergio Oehninger, Sandra Kaczmarczyk and Christopher Felton** (August 31, 2026, 2:06 PM EDT)

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In H.D. Smith Wholesale Drug Co. v. Cincinnati Insurance Co., a long-running insurance litigation addressing the availability of coverage for opioid-related lawsuits, the U.S. District Court for the Central District of Illinois imposed spoliation sanctions against the insurer for its failure to preserve documents.

The July 22 decision serves as a reminder that when insurance coverage litigation involves multiple underlying lawsuits, an insurer's preservation obligation may extend well beyond the particular underlying lawsuit that first gives rise to a coverage dispute. Where subsequent coverage litigation involving the same parties, policies, and similar coverage issues is reasonably foreseeable, the duty to preserve may continue even after the initial coverage action is resolved.

Litigation over Cincinnati's obligations to defend and indemnify H.D. Smith against opioid-related lawsuits began in 2012. The first coverage action concerned a single opioid lawsuit brought by the West Virginia attorney general. While that case was pending, H.D. Smith became the target of additional opioid-related lawsuits.

In 2022, H.D. Smith initiated a second coverage action seeking reimbursement for defense and settlement costs associated with those matters.

After a lengthy discovery dispute, Cincinnati reported to the court that certain custodial files were no longer available. H.D. Smith then moved for sanctions against Cincinnati, arguing that it intentionally failed to preserve relevant evidence by failing to suspend policies related to the automatic deletion of custodial and underwriting files.

The Central District of Illinois agreed in substantial part, finding that the insurer intentionally failed to preserve relevant electronically stored information — including emails and underwriting records — in violation of Rule 37 of the Federal Rules of Civil Procedure.

Intentional Spoliation and Rule 37(e) Sanctions

Under Rule 37(e), a court may sanction a party that fails to take reasonable steps to preserve electronically stored information that should have been preserved and cannot be restored or replaced.

If those requirements are met, the court then considers whether the loss prejudiced the other party and whether there was an intent to deprive that party of the information. Where there is prejudice but no intent, the court may impose curative measures; where there is intent to deprive, the court may impose more severe sanctions.

For purposes of future coverage disputes, the most significant aspect of the court's Rule 37(e) analysis was its determination of when Cincinnati's duty to preserve arose and how long that obligation continued. The court held that Cincinnati had a duty to preserve relevant evidence when the first coverage action was filed in 2012, because the first and second coverage cases were "strikingly similar."

The first coverage lawsuit concerned coverage under Cincinnati policies for the West Virginia enforcement action. The second concerned coverage under Cincinnati policies for underlying lawsuits brought by governmental entities, tribal entities and third-party payors. Both cases, the court explained "center around the same parties, similar subject matter, and similar issues." Because future litigation was reasonably anticipated, the duty to preserve was triggered.

The court held that Cincinnati, after its duty was triggered, failed to take reasonable steps to preserve documents. Cincinnati implemented only a single litigation hold during the first coverage case that failed to adequately preserve documents, including because it did not suspend Cincinnati's automatic deletion of emails and underwriting records.

Critically, the preservation problem was not confined to the first lawsuit. The court concluded that Cincinnati should have anticipated future litigation involving similar subject matter and the same parties, making evidence from the earlier dispute potentially relevant to later coverage litigation.

The court further held that Cincinnati destroyed electronically stored information with intent to deprive H.D. Smith of the information, including because Cincinnati did not take steps to preserve it even when events demonstrated the likely persistence of opioid-related coverage litigation and even after a second coverage lawsuit was filed.

According to the court, "This pattern of failure does not merely show negligence or even gross negligence. Cincinnati knew it needed to preserve relevant evidence. It chose not to do so by repeatedly failing to suspend auto-deletion procedures despite having every opportunity to do so for over 10 years."

As a result, the court ordered an adverse inference instruction requiring the jury to presume the destroyed evidence was unfavorable to Cincinnati and awarded H.D. Smith its reasonable attorney fees and costs incurred in bringing the sanctions motion.

The court declined to strike Cincinnati's knowledge-based affirmative defenses, however, concluding that an adverse inference instruction more appropriately addressed the prejudice because sufficient evidence remained for H.D. Smith to litigate its claims.

Broader Lessons

Although the decision arises in the context of opioid coverage litigation, its implications extend well beyond that setting. The ruling provides practical guidance for parties involved in long-running and long-tail coverage disputes, particularly regarding document preservation, litigation holds and the potentially significant consequences of failing to preserve relevant evidence.

The broader issue is one of foreseeability. Coverage litigation often does not develop as a single, self-contained dispute. A claim involving one underlying action may be followed years later by additional claims implicating the same policies and similar alleged conduct. The court's analysis suggests that, in appropriate circumstances, insurers may need to consider whether further disputes with its policyholders can be reasonably anticipated when determining both the duration and scope of the insurers' preservation efforts.

That issue can arise in a range of coverage contexts. Long-tail environmental and toxic tort liabilities, for example, commonly arise in serial litigation filed in jurisdictions across the country over many years. The lawsuits may involve similar alleged conduct and implicate insurance issued over decades.

Product liability and mass tort exposures likewise can begin with one or a handful of underlying lawsuits before developing into broader litigation. Construction defect claims may involve recurring issues across projects, claimants or policy periods. Emerging liabilities may follow a similar pattern, with an initial coverage dispute preceding later claims arising from related facts or alleged conduct, leading to subsequent coverage disputes.

The decision does not mean that every earlier coverage dispute indefinitely requires preservation for every conceivable future claim. Rather, its significance lies in the court's focus on whether later litigation could be reasonably anticipated based on the relationship between the disputes. That makes the factual connections among claims, parties, policies, coverage issues and potentially relevant evidence important considerations when evaluating whether a litigation hold can appropriately be narrowed or released.

Practical Considerations for Coverage Disputes

Preservation obligations may extend beyond a single lawsuit.

The court's decision makes clear that preservation obligations do not always end when one coverage action concludes.

Where related claims involving the same parties and similar coverage issues are reasonably foreseeable, insurers must periodically reassess litigation holds and document retention protocols to ensure they remain effective. Policyholders may explore insurer's document retention decisions when challenging preservation failures in coverage disputes involving multiple underlying claims and lawsuits.

For insurers, this may require looking beyond the procedural endpoint of an individual action and considering whether the underlying exposure is continuing to generate claims that could implicate the same policies, document custodians, claims handling information and underwriting history. For policyholders, the decision may provide a basis to examine when an insurer first anticipated litigation involving a broader category of related claims, rather than focusing exclusively on when the particular coverage action before the court was filed.

Litigation holds must be actively implemented and maintained.

The decision underscores that issuing a litigation hold is only part of the equation. Parties to coverage litigation should confirm that routine document destruction, automatic email deletion, and other retention practices are suspended as necessary and periodically reviewed throughout the life of complex litigation, particularly where disputes span many years.

Long-running coverage matters also illustrate why preservation should be treated as an ongoing process rather than a one-time event. As new underlying actions are filed, additional policies are implicated, new coverage positions develop, or an initial dispute concludes, parties should consider whether existing holds remain appropriately scoped and whether a decision to release or narrow a hold could affect information relevant to reasonably foreseeable litigation.

That assessment may require coordination among legal, claims, underwriting and information technology personnel. A litigation hold that exists on paper may not be sufficient if routine deletion systems continue to eliminate custodial email, underwriting materials or other potentially relevant electronically stored information.

Intentional spoliation can significantly alter the course of coverage litigation.

An adverse inference instruction can materially affect trial strategy, settlement dynamics and the ultimate resolution of a coverage dispute. Although the court declined to strike the insurer's affirmative defenses, the decision demonstrates that courts are prepared to impose meaningful Rule 37(e) sanctions where the evidence supports a finding that an insurer intentionally deprived its policyholder of relevant information.

The consequences may be particularly significant where the lost evidence bears on an insurer's knowledge, underwriting decisions, claims handling or asserted coverage defenses. In those circumstances, a preservation dispute that initially appears collateral to the merits can ultimately affect how the merits themselves are presented to a jury.

The Bottom Line for Coverage Disputes

This ruling therefore offers a broader lesson for complex coverage disputes: Preservation decisions made at the beginning or apparent end of one case may have consequences years later.

Where an underlying exposure has the potential to generate successive, related claims, the question should not simply be whether the current lawsuit is over, but whether related coverage litigation remains reasonably foreseeable and whether information subject to an existing hold could be relevant to that litigation.

The decision underscores the importance of evaluating preservation obligations in light of the full life cycle of a developing coverage dispute, rather than treating each underlying claim or lawsuit in isolation.

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