10 Pitfalls to Avoid in Pre-Litigation Disputes

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Introduction - How Decisions and Actions in Audit Process Can Affect Future Claims

- Understanding rights and responsibilities that arise with commencement of audit process
- The things auditors say can bind the retailer in subsequent litigation
- Recognizing and responding to landlord tactics
- Importance of maintaining positive relationship with landlord during audit process
- Preserving confidentiality of documents and analysis
1. Don’t Accidentally Destroy Evidence

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1. Don’t Accidentally Destroy Evidence

- Obligation to preserve is triggered when litigation is:
  - “reasonably anticipated”
  - “pending, imminent or reasonably foreseeable”
- Identify relevant documents
- Identify relevant custodians
- Preserve emails (be careful about auto-delete)
- Send out litigation hold/preservation notice
1. Don’t Accidentally Destroy Evidence

- What happens if you make this mistake?
  - Monetary sanctions
  - Evidentiary sanctions
  - Terminating sanctions
  - Negative inferences drawn against your case
  - Criminal penalties for intentional acts (in some jurisdictions)
1. Don’t Accidentally Destroy Evidence

Examples of spoliation

- Not suspending routine destruction of electronic data
  - *Naaco Materials v. Lilly Group*

- Abandoning a server with relevant information
2. Don’t Delay – Waiting a While Longer for Landlord to Respond Couldn’t Hurt, Could it?

- Landlords typically follow the same “script”
  - Delay...then delay some more
  - Promise additional information...then don’t deliver
  - Promise to respond...then miss the deadline
  - Blame delay on something or someone
  - Delay some more
2. Don’t Delay – Waiting a While Longer for Landlord to Respond Couldn’t Hurt, Could it?

- Delay can affect litigation rights due to expiration of statute of limitations
- Landlords may rely on other legal doctrines, such as laches and waiver, in an effect to limit claims
- Protect yourself with lease language (“no waiver” provisions) and tolling agreements
  - Tests landlord’s good faith desire to work through the issues
  - Protects retailer from limiting claims due to passage of time
3. Emails: admissions, mistakes, or worse
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- Would you put that in a letter?
- Would you post it on a blog?
- What if your supervisor saw it? Your wife? Your children?
- Don’t write things if you do not know whether it is true.
3. Emails: admissions, mistakes, or worse


- Facts:
  - Property owner enters into a five-year oil and gas lease with a drilling company.
  - Lease automatically terminates after five years if drilling company fails to “commence a well” within the lease period
  - After 5 years, the drilling company had begun drilling but had not established a producing well
  - Case centers on interpretation of “commence a well”
3. Emails: admissions, mistakes, or worse

*Goodwill Hunting* continued . . .

- Owner’s Emails With Leasing Agents
  - Owner shares a case in which a court decided that a well was commenced upon the start of drilling
  - Leasing agent reply: “Very interesting and a little disturbing.”

- Other Emails
  - “[Drilling company] will most likely prevail in holding your lease unless you are proactive in efforts to delay them.”
  - “I believe that [drilling company] has the ability to prevail by concerted sequential efforts . . . .”
3. Emails: admissions, mistakes, or worse

*Goodwill Hunting* continued . . .

- Court’s Decision
  - Looks at e-mails, in conjunction with other statements
  - Holds the drilling company’s interpretation of the lease term was controlling
  - Tenant drilling company was allowed to continue its operations on the property
4. Don’t Waive the Privilege – Internal Communications

Attorney-Client Privilege

- Protects confidentiality of communications between client and lawyer where communications are for purpose of seeking or obtaining legal advice
- Encourages clients to communicate openly and honestly with their lawyers so legal advice is based on full and accurate information
4. Don’t Waive the Privilege – Internal Communications

- Elements
  - Person asserting privilege must be a client, or must have sought to become a client at the time of disclosure
  - Person connected to communication must be acting as a lawyer
  - Communication must be between lawyer and client exclusively – generally, no non-clients may be included in communication
4. Don’t Waive the Privilege – Internal Communications

- Elements
  - Communication must have occurred for purpose of securing legal opinion, legal services, or assistance in some legal proceeding, and not for purpose of committing a crime
  - Privilege may be claimed or waived by client only
4. Don’t Waive the Privilege – Internal Communications

- Internal communications pose special risks
  - In-house counsel don’t always act in their capacity as lawyers
  - Dual role complicates privilege determinations
  - Businesses attempt to filter internal communications through in-house counsel to involve privilege
  - Courts distinguish between counsel’s legal and business roles
4. Don’t Waive the Privilege – Internal Communications

- Adding in-house counsel to emails and other communications does not necessarily make communications privileged
- Courts look to “primary purpose” of communication to determine what role in-house counsel was playing. *In re Vioxx Products Liability Litigation*, 501 F. Supp. 2d 789 (E.D. La. 2007)
  - Court rejected argument that complex regulatory environment created legal issues in virtually all communications
  - Court required Merck to demonstrate a primary legal purpose for each communication to assert privilege
4. Don’t Waive the Privilege – Internal Communications

- Lease audits entail lease interpretation and other legal issues, but also involve non-legal considerations such as maintaining relationships with key Landlords and other business issue.
- Involve in-house attorneys as appropriate for legal issues, but recognize that their involvement on business issues does not magically make an e-mail string privileged.
4. Don’t Waive the Privilege – Internal Communications

- Documents that may actually be privileged can become discoverable due to company’s method of dissemination.
  - When communication is simultaneously sent to lawyers and non-lawyers, sender or recipient usually cannot claim that the primary purpose of the communication is legal simply because it “serves in both a business and legal capacity.”
  - Consider sending one email to in-house lawyer and one to non-lawyers
  - Limit dissemination to those who “need to know” the legal advice in order to perform their functions

- Better safe than sorry!!
4. Don’t Waive the Privilege – Internal Communications

Work-Product Doctrine

- Rule 26(b)(3) of the Federal Rules of Civil Procedure: “Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent).”
4. Don’t Waive the Privilege – Internal Communications

- Different courts define the work-product doctrine differently (more or less expansively). Some courts only protect the attorney’s written materials, charts, notes of conversations and investigations, and other materials directed toward preparation of a case or other legal representation.
4. Don’t Waive the Privilege – Internal Communications

- Documents created by client (not lawyer) can be protected to work product if they are created in anticipation of litigation, rather than in the ordinary course of business.
5. Don’t Waive the Privilege – External Communications (Auditors/Experts)

- Client’s communications with auditors and expert witnesses with no lawyer involved are generally discoverable
- “Functional Equivalent” Doctrine may protect communications between company’s lawyer and independent contractor who acts as the “functional equivalent” of an employee

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5. Don’t Waive the Privilege – External Communications (Auditors/Experts)

- *In re: Bieter Company, 16 F.3d 929 (8th Cir. 1994)*
  - Court rejected strict distinction between employees and independent contractors
  - Looked to contractor’s role to see if extension of privilege would further public interests the privilege is supposed to protect
  - Natural extension of *Upjohn*, which extended privilege for corporations beyond the “control group”
5. Don’t Waive the Privilege – External Communications (Auditors/Experts)

- Allows counsel to have privileged communications with those who possess critical information
- Case-by-case analysis
- Growing body of cases, but not universally accepted
- May protect counsel’s communications with outside auditor in some circumstances

- Rule 26(b)(4) of the Federal Rules of Civil Procedure protects communications between a party’s attorney and an expert witness
5. Don’t Waive the Privilege – External Communications (Auditors/Experts)

- Rule 26(b) protect drafts of expert reports or disclosures, regardless of the form in which the draft is recorded.
- Rules 26(b)(3)(A) and (B) protect communications between party’s attorney and expert witnesses except to extent communications: (i) relate to expert’s compensation; (ii) identify facts or data attorney provided and expert considered in forming opinions; or (iii) identify assumptions attorney provided and expert considered in forming opinions.
5. Don’t Waive the Privilege – External Communications (Auditors/Experts)

- Rules in state courts may differ
- Consider having all communications with expert come through counsel
6. Don’t Neglect the Estoppel Process
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- **The Facts**
  - Tenant entered into lease providing for $220,000 TI allowance. Tenant performed improvements, but was not paid.
  - Original landlord sold property, and Tenant signed estoppel certificate providing “there [were] no uncured defaults by either Tenant or Landlord[.]”
  - Tenant sued new landlord for $217,000 in TI improvements.
6. Don’t Neglect the Estoppel Process

1st Commerce Bank continued . . .

- Court’s Decision
  - Summary judgment in favor of new Landlord.
  - “the allowance was an offset to rent and [Landlord’s] failure to pay the allowance when due constituted a default under the lease.”
  - By signing an estoppel certificate, a lessee “undertakes a responsibility to represent to a relying party all claims of which it knew or should have known.”
6. Don’t Neglect the Estoppel Process

- But, a “no waiver” provision may save you
  - “No waiver of any default hereunder shall be implied from any omission by either party to take any action on account of such default if such default persists or is repeated . . .”
7. Don’t Forget to Read the Lease . . . again, again and again
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- The plain language is paramount
- Plain language is read in the context of the entire lease
- The other evidence matters only to interpret the parties intent where there is an ambiguity
- Negotiation history
- Drafts
- Course of dealing
- Course of performance
- Industry practice
8. Don’t Forget Audit Requirements

- Before beginning audit, review lease provisions related to pass-through expenses and audits carefully
  - Notice requirements
  - Time deadlines
  - Confidentiality provisions
  - Limits on use of outside auditors
  - Location of audit
  - Audit fee provisions
  - Requirement to share results of audit with landlord
8. Don’t Forget Audit Requirements

- Follow provisions scrupulously
  - Don’t derail right to audit by failing to cross T’s and dot I’s
  - Don’t put yourself in position where audit work product cannot be used
9. Don’t Leave Money on the Table

- Landlords argue audit rights limitation effectively acts as a statute of limitation for claims
  - Lease may provide that Tenant has 12 months from receipt of annual statement to audit pass-through expenses
  - Landlords may refuse to consider claims outside the 12 month period
  - Absent very clear lease language waiving or extinguishing claims, an audit rights limitation is not a claim limitation

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9. Don’t Leave Money on the Table

- Applicable statutes of limitation determine what years are in issue. Example: Ohio (15 years)
- Several states have statutes that preclude enforcement of contractual provisions that purport to shorten statutes of limitation
- Claim for a lease year accrues at the earliest when Landlord sends reconciliation for that year
- Calculate claims back to the statute of limitation
9. Don’t Leave Money on the Table

- Include interest as part of claim
  - In overcharge claims, Landlord has obtained and had the use of Tenant’s money for years
  - When resolving claims, Landlords treat this as a no-interest loan
  - Lease may provide for interest on overcharges
  - Common law in many (all??) states recognizes that when one party has had the use of another party’s funds, interest is required in order to provide complete relief
10. Don’t forget the good stuff

- Document the facts
- Document your position and share it with the landlord
- Act consistently with your position
- Get key admissions from landlord
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