88. 15 U.S.C. § 77p(b).
89. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71 (2006).
90. The *Stoneridge* Court's reference to "functioning and effective state-law guarantees" (slip op. 10) is in no way inconsistent with a broad application of SLUSA preclusion: SLUSA itself precludes state-law *class actions*, while preserving a variety of other actions premised on state law. *See* 15 U.S.C. § 77p(d), (e), & (f).

Qualcomm Court Imposes Multi-Million Dollar Sanctions for Electronic Discovery Failures

BY JASON FLIEGEL

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A U.S. District Court in California has fired a warning shot across the bow of corporate litigants everywhere: if you fail to produce relevant electronically stored information during litigation, there will be consequences.

The opinion, issued on January 7 from the Southern District of California, is the latest to come out of *Qualcomm Inc. v. Broadcom Corp.*[1] It establishes "a baseline for other cases"[2] regarding what steps must be taken to ensure compliance with ethical and discovery obligations related to electronic discovery.

The case arose when Qualcomm filed a patent infringement suit against Broadcom. Broadcom's defense was based on Qualcomm's alleged waiver through its participation in an industry group known as the JVT in 2002 and 2003. Qualcomm maintained that it did not participate in the JVT.

As the parties prepared for trial, Qualcomm's attorneys discovered 21 unproduced relevant emails from 2002 and 2003 that came from a JVT mailing list. Qualcomm did not apprise either Broadcom or the Court of the existence of the emails at that time despite the fact that they were, the Court later noted, evidence that Qualcomm employees had participated in the JVT.

As the Court explained, Qualcomm and its attorneys did not conduct an additional investigation to see if there were other relevant emails that had not been produced. To the contrary, during a sidebar discussion in court regarding the topic discussed in the newly discovered emails, they affirmatively represented that there were no relevant emails. Nonetheless, on cross-examination Broadcom was able to elicit testimony regarding the existence of the emails. Only then did Qualcomm admit to the existence of the emails and produce them.

In the end, Broadcom prevailed in the suit. The jury found that Qualcomm had waived its patents. During post-trial proceedings, however, the parties continued to argue about the 21 emails. For two months, Qualcomm insisted that it had acted reasonably in producing documents and that the 21 emails were not relevant. It nonetheless agreed to search the emails of five of its witnesses using relevant search terms such as "JVT." When it did so, Qualcomm discovered thousands of relevant documents that, in the words of one of its lawyers "revealed facts that appear to be inconsistent with certain arguments… made on Qualcomm's behalf at trial."

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In characterizing Qualcomm's discovery failures, the Court wrote that:

> **For the current "good faith" discovery system to function in the electronic age, attorneys and clients must work together to ensure that both understand how and where electronic documents, records and emails are maintained and to determine how best to locate, review, and produce responsive documents. Attorneys must take responsibility for ensuring that their clients conduct a comprehensive and appropriate document search. Producing 1.2 million pages of marginally relevant documents while hiding 46,000 critically important ones does not constitute good faith and does not satisfy either the client's or attorney's discovery obligations. Similarly, agreeing to produce certain categories of documents and then not producing all of the documents that fit within such a category is unacceptable.[3]**

In short, according to the Court, "Qualcomm had the ability to identify its employees and consultants who were involved in the JVT, to access and review their [electronic data] … and to produce in good faith all relevant and requested discovery."[4] Because Qualcomm chose not to do so, sanctions were needed.

In determining what those sanctions should be, the Court was guided by its conclusion that Qualcomm had "not established 'substantial justification' for its failure to produce the documents." It further explained that its conclusion

> **is bolstered by the fact that when Qualcomm "discovered" the [21] emails, it did not produce them and did not engage in any type of review to determine whether there were additional relevant, responsive, and unproduced documents. The conclusion is further supported by the fact that after trial Qualcomm did not conduct an internal investigation to determine if there were additional unproduced documents, but, rather, spent its time opposing Broadcom's efforts to force such a search and insisting, without any factual basis, that Qualcomm's search was reasonable.**
>
> **Qualcomm's claim that it inadvertently failed to find and produce these documents also is negated by the massive volume and direct relevance of the hidden documents.[5]**

These facts, the Court held, justified severe sanctions.

Accordingly, Qualcomm was ordered to pay all of the costs Broadcom incurred during the litigation – approximately $8.5 million – and the attorneys the Court characterized as the most culpable were reported to the California State Bar for ethics violation.

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Additionally, the Court ordered Qualcomm to create a comprehensive electronic discovery program, including:

- identification of the factors that contributed to the discovery violation;
- creation and evaluation of proposals, procedures, and processes that will correct the deficiencies;
- development and finalization of a comprehensive protocol that will prevent future discovery violations;
- application of the protocol to other factual situations;
- identification and evaluation of data tracking systems, software, or procedures that corpo-

rations could implement to better enable inside and outside counsel to identify potential sources of discoverable documents; and

- any other information or suggestions that will help prevent discovery violations.

This program is intended to "provide a road map to assist counsel and corporate clients in complying with their ethical and discovery obligations and conducting the requisite 'reasonable inquiry'"[6] in connection with electronic discovery.

The *Qualcomm* order offers several lessons to any attorney representing a corporation or other organization with large volumes of electronic data.

First, it teaches that counsel must take reasonable steps to ensure that relevant electronically stored information is located and produced. Had Qualcomm discovered the emails at issue during discovery instead of on the eve of trial, it would have been in a better position to assess whether it was in compliance with its discovery obligations.

[The *Qualcomm* order] teaches that counsel must take reasonable steps to ensure that relevant electronically stored information is located and produced.

Second, it serves as a stark reminder of the importance of candor, both with opposing counsel and with the Court. Much of the Court's concern in this case comes not from the fact that Qualcomm failed to produce a few dozen–or even several thousand–emails, but that Qualcomm was not frank with Broadcom and the Court about the existence of those emails and did not take steps to further investigate whether other responsive emails existed. While it is impossible to know what would have happened had Qualcomm come clean as soon as it discovered the emails, the Court's opinion suggests that the sanctions would have been considerably less severe.

Finally, the *Qualcomm* order should serve as yet another indication of the importance of implementing a comprehensive electronic discovery program. Such a program defines roles and responsibilities within the organization and sets forth policies and processes for the identification, location, preservation, collection, review, and production of electronically stored information. An electronic discovery program allows a corporation to approach electronic discovery in a consistent, efficient manner, minimizing the chances of failing to meet electronic discovery obligations.

Indeed, the very fact that the *Qualcomm* Court ordered Qualcomm to implement an electronic discovery program under court supervision should serve as notice that if companies don't implement such programs on their own, a court may well do it for them.

NOTES

1. *Qualcomm*, Case No. 05cv1958-B (BLM), 2008 WL 66932 (S.D. Cal. Jan. 7, 2008).
2. *Id.* at *20.
3. *Id.* at *9.
4. *Id.*at *12.
5. *Id.* at *10.
6. *Id.* at *20.

What to Consider in the 2008 Compensation Season

BY JEREMY L. GOLDSTEIN & DAVID E. KAHAN

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For many public companies, the beginning of the new year is compensation season. Setting pay and targets for the new year, determining achievement for the old year, and preparing the annual proxy all contribute to a busy first quarter for compensation committees and management teams working with them. As companies prepare for the upcoming compensation season, they should be mindful of the following considerations: