

Electronic Discovery & Records Management



Tip of the Month

Managing the Risks and Costs of E-Discovery in Class Actions

Scenario

A large manufacturing company is a defendant in a putative nationwide class action lawsuit. The putative class will most likely number in the thousands, or tens of thousands, of consumers, resulting in potentially significant damages and expensive electronic discovery costs for the company. The few named plaintiffs, on the other hand, are likely to have a relatively small number of documents. The company is confident in the merits of the case, but is concerned that it will not have sufficient leverage to negotiate reasonable limits to discovery and is considering settlement in order to avoid the costs and burdens of an extensive electronic discovery effort.

Understanding the Challenges of E-Discovery in Class Action Lawsuits

In class action lawsuits, discovery is typically one-sided. The defendants are frequently large organizations with significant volumes of electronic data, while the plaintiffs are frequently a large group of unnamed individuals represented by a few named plaintiffs with a small amount of electronic data. As a result, the potentially exorbitant costs associated with discovery in a class action lawsuit fall almost exclusively on the defendant. This situation can create disincentives for the parties to work together to resolve discovery disputes, and it poses the risk that class action defendants will face unfair pressure to settle even meritless claims to avoid those discovery costs. Electronic discovery magnifies the extent of the disproportionate impact on class action defendants.

In evaluating how best to manage discovery in class action lawsuits, it is useful to keep in mind the unique characteristics associated with those actions that impact discovery issues. First, with the exception of the few named plaintiffs, the putative class members are largely unknown and may be difficult to identify, especially prior to class certification. This is particularly true when the putative class is poorly defined and may encompass thousands of unknown employees or customers. Determining the scope of preservation in such circumstances can be challenging. For example, it may be difficult to identify and preserve communications with a putative class member if the identity of that putative class member is unknown. Second, pre-certification discovery may be necessary when facts relevant to the certification requirements are in dispute. Courts are often willing to bifurcate discovery related to class certification and discovery related to the merits of the case. Third, merits-related discovery may be unnecessary depending upon the outcome of the certification dispute. In fact, courts generally discourage merits discovery prior to class certification in order to avoid superfluous costs (unless, of course, the discovery also relates to the certification of the class).

Strategies for Managing E-Discovery in Class Action Lawsuits

Despite the inherent imbalance associated with e-discovery in class action lawsuits, there are

strategies that can help manage the scope and control the costs of such discovery.

- **Preservation:** The challenges associated with determining the scope of preservation for a class action lawsuit often lead counsel to submit to costly and burdensome over-preservation to avoid even the appearance of a failure to preserve. But the costs and risks (both legal and business-related) of over-preservation grow exponentially the longer the litigation persists, and there will always be some risk that, despite diligent efforts, an organization will inadvertently fail to preserve relevant information. The organization and its counsel should carefully weigh the costs and risks of extended over-preservation, and its impact on the organization's business, against the costs and risks of defending a process in which reasonable steps are taken to determine the scope of preservation based on the available information. In some cases, it may be prudent to consider raising preservation issues with opposing counsel or the court early in the litigation in an effort to narrow, or at least define, the scope of preservation.
- **Bifurcating Discovery:** The difficulties associated with attempting to preserve data for an unknown group of putative class members demonstrate the benefits of bifurcating class certification discovery and merits discovery. By conducting targeted discovery directed at enabling the court to define (or deny) class certification, the parties may be able to reduce or avoid costly and extraneous merits discovery. Even where merits-related discovery is permitted prior to class certification, the organization should consider advocating for restrictions that narrow the scope of early merits discovery to issues that are closely related to class certification or to groups, subjects or time periods that are the most likely to survive class certification.
- **Be Creative:** When the burdens of e-discovery fall almost exclusively on one party, it is easy to assume that negotiation and cooperation are not feasible. But by cooperating with opposing counsel to facilitate discovery and offering creative solutions to burdensome discovery problems, an organization can position itself to seek relief from the court should class plaintiffs prove to be unreasonable. Moreover, offering strategies that streamline and expedite discovery, while still providing the class plaintiffs with the information requested (if not every document containing that information), may even appeal to opposing counsel. For example, when it comes to class certification discovery, it may be more efficient and cost-effective to produce reports from an organization's structured databases summarizing the information requested than to attempt to find every individual electronic document relating to an undefined class of individuals.
- **Consider Cost-Shifting:** Typically, in federal litigation, the producing party bears its own costs of discovery. However, in some circumstances, courts have been willing to shift the costs of overly burdensome discovery requests to the requesting party. Cost-shifting may be particularly appropriate where the costs and burdens of discovery fall almost exclusively on one party. In fact, one federal court recently did apply cost-shifting to pre-class certification discovery where the court determined that the class plaintiffs' were seeking extensive and expensive additional discovery from defendant. If class plaintiffs seek to enforce extensive, burdensome and costly pre-certification discovery demands, it may be prudent to seek cost-shifting for at least a portion of those costs.

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