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The Government's Duty to Preserve Evidence in a Non-Intervened *Qui Tam* Case

by Stephen A. Wood

Every civil litigator and trial lawyer knows (or should know) that a party to litigation has a duty to preserve evidence and documents for use in discovery and trial. The rule applies to all litigants, whether public or private entities or persons. It may even be applied to non-parties in certain circumstances, although typically non-parties face more limited obligations.

The False Claims Act *qui tam* provisions present a unique set of challenges bearing on the government's duty to preserve. *Qui tam* complaints are filed under seal to facilitate the government's investigation after which it may elect to take the case over. When it declines to intervene in the *qui tam* case, the government typically considers itself to be a non-party, eschewing any duty to preserve evidence. Yet, for many reasons, the government should be treated as a party for purposes of the duty to preserve evidence in those cases in which it has declined to intervene. And in the face of a breach of that duty, both the government and the *qui tam* relator should face the prospect of sanctions as the circumstances warrant.

The Duty to Preserve—Background

While the precise triggering circumstances may vary from case to case, the common-law rule—that anticipation of litigation triggers preservation duties—controls throughout litigation in every jurisdiction in this country. The rationale for the duty to preserve should be fairly obvious. Without such a duty, a party in possession of unfavorable evidence could undermine the administration of civil justice by destroying the evidence. *In re Enron Corp. Securities and ERISA Litigation*, 762 F. Supp. 2d 942, 964 (S. D. Tex. 2010). What's more, the duty operates independent of any request or directive. *See Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 522 (D. Md. 2010).

Absent anticipated litigation, or other duty imposed by statute, regulation, or contract, there generally is no duty to preserve evidence. If the duty is breached, a court may impose a range of sanctions up to and including dismissal or default, depending on the circumstances. *See, e.g., Flury v. Daimler Chrysler Corp.*, 427 F.3d 929, 943-45 (11th Cir. 2005) (prejudice to defendant from plaintiff's failure to preserve evidence was incurable, justifying dismissal of the action).

The reach of the duty to preserve turns on two considerations, one temporal the other custodial. The duty to preserve arises when litigation is or should reasonably be anticipated. *See Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003). This is a flexible, case-specific

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standard that requires courts to consider the variety of circumstances bearing on the foreseeability of litigation. *See Bull v. United Parcel Serv., Inc.*, 665 F.3d 68, 78 (3rd Cir. 2012). The filing of an actual lawsuit and service of a complaint is usually more than sufficient to put a defendant on notice that it must undertake to preserve relevant evidence. Yet, even prior to the filing of a lawsuit, a person or organization may be subject to a duty to preserve. In *Zubulake*, for example, the court held that the duty to preserve attached nearly 5 months prior to the plaintiff's filing of a charge of discrimination with the EEOC because most of the defendant's executives testified that they saw the potential for litigation at that time. *Zubulake*, 220 F.R.D. at 216-17.

The duty extends to any unique evidence in the possession or control of a person who knows or reasonably should know the evidence would be relevant to a lawsuit. *See Consolidated Aluminum Corp. v. Alcoa, Inc.,* 244 F.R.D. 335, 339 (M.D. La. 2006) (duty extends to the "key players" in the litigation). This includes evidence a possessor may use to support its case, that could lead to the discovery of admissible evidence, or that may be requested by an opposing party. *Scalera v. Electrograph Systems, Inc.*, 262 F.R.D. 162, 171 (E.D.N.Y. 2009).

With regard to non-parties, the threshold for the duty to preserve evidence is typically higher. If nothing else, preserving evidence is burdensome and non-parties have no direct stake in the outcome of the litigation. Most courts would impose a duty only when non-parties are expressly put on notice that evidence in their possession is being sought or may be sought in pending or anticipated litigation. *See, e.g., Swick v. The New York Times Co.*, 815 A.2d 508, 512 (N.J. Super. 2003) (certified letter sent to non-party that evidence should be preserved sufficient to create duty).

The obligation on the part of non-parties to preserve can also be triggered by some special relationship or duty arising by virtue of an agreement, contract, statute, or other special circumstance. *Oliver v. Stimson Lumber Co.*, 993 P.2d 11, 20 (Mont. 1999); *accord Boyd v. Travelers Ins. Co.*, 652 N.E.2d 267, 269 (Ill. 1995).

Historically, the government has been treated the same as any private litigant when it is involved as a party in litigation. It too must preserve evidence when it reasonably anticipates litigation. *See, e.g., ABB Joint Venture v. United States*, 75 Fed. Cl. 432, 443 (2007) (government had duty to preserve documents including electronically stored information at the time litigation was or should have been anticipated); *United Medical Supply Co., Inc. v. United States*, 75 Fed. Cl. 257, 264 (2007) (government had duty to preserve from at least the point at which the plaintiff filed its complaint).

The government typically receives no special dispensation or exemption. This applies as well to False Claims Act *qui tam* cases in which the government becomes a party through intervention. *United States ex rel. Baker v. Community Health Sys., Inc.*, No. 05-279 WJ/ACT, 2012 WL 5387069 at *9 (D.N.M. Oct. 3, 2012) (sanctions imposed on federal government for failure to preserve evidence in False Claims Act case).

The Duty to Preserve—*Qui Tam* Litigation

Applying the duty-to-preserve rules to the government in False Claims Act litigation is more challenging, however, due to the statute's unique structure. For one, since the government often takes years to investigate these claims, the point at which litigation was reasonably anticipated may be more difficult to determine. If the action was commenced by a *qui tam* relator suing in the name

of the government under 31 U.S.C. § 3730(b), the government is likely to assert that it was only much later, at or near the time it chose to intervene in the case, that its duty to preserve arose. *See Baker*, 2010 WL 5387069 at *4.

This is especially problematic in *qui tam* cases since, although a complaint has actually been filed (under seal), the government may take years to investigate a relator's claims during which time the complaint remains under seal. *See, e.g., United States v. Baylor Univ. Med. Ctr.*, 469 F.3d 263, 266 (2d Cir. 2006) (seal extended for eight years pursuant to government's requests to facilitate investigation). It almost goes without saying that such an extended period of investigation is likely to lead to the loss of relevant documents and witnesses with knowledge relevant to the issues in the case.

As noted, the exact timing of the duty to preserve aside, where the government intervenes in a False Claims Act *qui tam* case, there is no dispute about whether it has a duty to preserve. But what duty does the government have to preserve evidence in a case in which it *declines* to intervene?

In those instances, the government considers itself to be a non-party, not subject to the Federal Rules of Civil Procedure. *See, e.g., United States ex rel. Sanders v. Allison Engine Co.*, 364 F. Supp.2d 716, 719 (S.D. Ohio 2005) ("[B]ecause it is not a party to the action, the Government is not bound by the Federal Rules of Civil Procedure as they relate to discovery."). Still, whether the government can be made to respond to interrogatories under Rule 33, for example, says nothing about whether, as a matter of objective fairness, it bears an independent duty to preserve evidence in a non-intervened *qui tam* case.

To begin with, the starting point for a duty-to-preserve analysis—the requirement that the possessor anticipate litigation—is clearly met. When a *qui tam* complaint is filed, the government is aware of actual, not merely anticipated, litigation. True, the government may rightly question the merits of the case, and many surely lack merit. *See, e.g.,* U.S. Chamber Inst. for Legal Reform, *The New Lawsuit Ecosystem*, at 63 (Oct. 2013) (in non-intervened cases, relators are successful about 6% of the time). But the government is statutorily obligated to "diligently investigate" all *qui tam* claims. 31 U.S.C. §3730(a). While the investigation is underway, basic steps should be taken to advise key government personnel that evidence in their possession should be retained and routine destruction of documents suspended until such time as the government knows that litigation will proceed no further such that preservation is no longer necessary.

And the preservation of evidence in these cases is essential. Evidence in the possession of the government is likely to be highly relevant in any False Claims Act lawsuit. The False Claims Act, after all, is aimed at parties who do business with the federal government. If a transaction is believed to be the product of fraud, evidence in the possession of both parties to the transaction at issue would almost surely be relevant to the liability and damages issues in the case. Evidence in the possession of the government may in fact be dispositive of claims brought under the False Claims Act in the wake of the Supreme Court's decision in *Universal Health Services, Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016).

In *Escobar*, the Supreme Court held that evidence of the government's awareness and treatment of false claims has a direct bearing on materiality. If, for example, the government paid claims aware that certain requirements were violated, that could be "strong evidence" of a lack of materiality. *Id.* at 2003-04.

Not only does the government have notice of the litigation, not only is evidence in its possession relevant, but the *qui tam* litigation is intended for the benefit of the government, whether the government intervenes in the case or not. The *qui tam* provisions of the False Claims Act provide that the action is brought "for the United States Government . . . in the name of the Government." 31 U.S.C. § 3730(b)(1). If, after its investigation, the government chooses not to proceed with the suit, the *qui tam* relator can continue the suit without the government's direct involvement.

Even in that instance, however, the government remains the real party in interest, the principal beneficiary of any recovery at the end of the case:

> All of the acts that make a person liable under [the False Claims Act] focus on the use of fraud to secure payment from the government. It is the government that has been injured by the presentation of such claims; it is in the government's name that the action must be brought; it is the government's injury that provides the measure for the damages that are to be trebled; and it is the government that must receive the lion's share—at least 70%—of any recovery.

United States ex rel. Stevens v. Vermont Agency of Natural Resources, 162 F.3d 195, 202 (2d Cir. 1998), *rev'd on other grounds*, 529 U.S. 765 (2000). Because the government remains the real party in interest and stands to reap the great majority of any recovery, the government should be held to the same duty to preserve as any litigant.

Beyond this, in a non-intervened case, the government retains many rights and obligations under the statute that give it a significant measure of control over the proceeding in addition to a principal stake in the outcome. For example, the government must give its written consent to voluntary dismissal of the action. 31 U.S.C. § 3730(b)(1). The government retains the right to be served with pleadings and deposition transcripts. 31 U.S.C. § 3730(c)(3). The government also retains the right to intervene at any time. *Id.* Frequently, the government will inject its opinions in *qui tam* litigation on matters of law or fact, usually to protect its financial stake and to promote the development of precedent favorable to it. *See, e.g., United States ex rel. McCready v. Columbia/HCA Healthcare, Corp.*, 251 F. Supp. 2d 115, 119-20 (D.D.C. 2003) (United States declined to intervene, yet filed statement of interest urging court to reject defendant's claim that lack of financial benefit precluded liability). The government also retains the right to settle the case over the objection of the relator. *Id.* at § 3730 (c)(2)(B).

Even when a *qui tam* action is dismissed involuntarily, the government typically insists upon a dismissal without prejudice as to its interests. *See, e.g., McCready,* 251 F. Supp. 2d at 119; *United States ex rel. Olsen v. Lockheed Martin Corp.*, No. 1:09-cv-03083-JEC, 2010 WL 1786606 at *2 (N. D. Ga. Feb. 1, 2010) (government filed a statement of interest requesting that any dismissal should be without prejudice as to the United States). The government always has the authority to move for dismissal of the action over the objection of the relator. 31 U.S.C. § 3730(c)(2)(A). Finally, far from walking away at the end of its investigation of most *qui tam* cases, the government almost always insists that the fruits of its investigation remain confidential and that any pre-declination pleadings remain sealed on the court's docket.

The foregoing factors—notice of litigation, possession of essential evidence, status as real party in interest, and substantial control over the cases's prosecution—should combine to create a duty to preserve evidence in the possession or control of the government in non-intervened cases.

Indeed, insofar as courts look to the existence of a special relationship between the possessor of evidence and the litigant to find a duty to preserve evidence (*see, e.g., Superior Boiler Works, Inc. v. Kimball*, 259 P.3d 676, 683-84 (Kan. 2011)), the statute creates a relationship analogous to that of principal and agent. *See, e.g., In re Parmalat Securities Litigation*, 594 F. Supp. 2d 444, 451 (S.D.N.Y. 2009) (agency relationship exists when there is an agreement that agent will act for the principal, and the principal retains a degree of control over the agent); *Hamilton County Emergency Comm. Dist. v. BellSouth Telecomm., LLC*, 154 F. Supp. 3d 666, 692 (E.D. Tenn. 2016) *rev'd on other grounds*, 852 F.3d 521 (6th Cir. 2017)(a formal agreement is not necessary; courts will look to the circumstances to determine agency relationship). Documents in the possession of the relator's (*de facto*) principal should therefore be preserved.

Conclusion

There is a strong argument for imposing a duty to preserve evidence on the government in False Claims Act cases in which it declines to intervene, notwithstanding the government's claim to be a non-party in such cases. To allow the government to avoid such a duty would seriously undermine the administration of civil justice in *qui tam* cases by risking the loss of important evidence. And if the duty is breached, the government in the first instance should bear any resulting sanction. Of course, evidentiary or otherwise dispositive sanctions will affect the relator as well as the government. That is as it should be. After all, the relator is pursuing the government's claim for losses allegedly suffered by the government. Allowing a relator to avoid the effect of sanctions in the face of government spoliation would thwart the deterrent and remedial purpose of sanctions. *See Apple, Inc. v. Samsung Elec. Co., Ltd.*, 881 F. Supp. 2d 1132, 1136 (N.D. Cal. 2012) (sanctions should restore the prejudiced party to position they were in absent spoliation).

Although the duty to preserve imposes a burden, that burden is not without the prospect of government benefit—a minimum of 70% of any recovery. The magnitude of the burden in any given case should be assessed during the government's investigation and considered in the government's intervention calculus. If the government deems the burden too great in light of the merits of the case and the likelihood of recovery by the relator, the government always has the option to move for dismissal if the relator refuses to dismiss the action voluntarily. This approach is far more equitable than allowing the government to avoid any preservation obligation whatsoever in non-intervened cases.