

Discovery Sanctions Opinion

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In an infringement suit brought under the Hatch-Waxman Act, the plaintiffs filed a motion for sanctions against the alleged infringer for spoliation of evidence. The plaintiffs contended that the defendants practiced systematic document destruction (by retaining emails on its server for only one month) and failing to institute a “litigation hold” at a time when litigation was foreseeable, which was at least as early as 2006 as shown by the defendants assertion of work product immunity relating to documents created in 2006. The defendants argued that while the decision to make a generic version of the patented product arose in 2005, the duty to impose a “litigation hold” did not arise until the filing of the Paragraph IV certification in mid-2007.

In examining the defendants “general practice” of preserving documents, the district court granted the motion. The court found that the obligation to preserve documents arose at the time when the defendants reasonably anticipated litigation, which was February 23, 2006 – the first date on which it asserted the work product protection in its privilege log.

The court explained that in making a claim of work product immunity, the alleged infringer averred that the materials “were prepared in the course of preparation for possible litigation.” The court reasoned that while “[t]he exact moment of when the duty to impose a ‘litigation hold’ is vague” and the decision to create a generic drug product “does not automatically give rise to the duty to impose a ‘litigation hold,’” the alleged infringer’s argument that the duty to impose a “litigation hold” did not arise until the filing of the Paragraph IV certification was inconsistent with its assertion of work product immunity with respect to documents created prior to the filing of the Paragraph IV certification. The court ultimately held that an adverse inference could be drawn with respect to documents destroyed between February 23, 2006 and the mid-2007 filing of the Paragraph IV certification, which was the date on which the defendants claimed their obligation to preserve documents arose.

The case stands for the proposition that a party should issue a litigation hold at the time that it believes the work product immunity arises. Stated another way, a party should not assert the work product protection over documents that pre-date its litigation hold.

To read the district court’s opinion in *Sanofi-Aventis Deutschland GmbH v. Glenmark Pharmaceuticals, Inc.*, No. 07-CV-5855 (DMC-JAD) (D.N.J. July 1, 2010), please click [here](#).

Briefing

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