

Court Reaffirms Duty of Company to Preserve Electronic Records When It Reasonably Anticipates Litigation

DSSV recently made a successful motion in New York State Supreme Court on behalf of its client, Forest Laboratories, Inc., that serves as a reminder about an organization's obligation to preserve its records: once a dispute has reached the point where one "reasonably anticipates" that litigation will occur, even if no litigation has yet commenced, an organization should proactively take steps to preserve records relating to that dispute. In a case pending in New York State Supreme Court in New York County, *QK Healthcare, Inc. v. Forest Laboratories, Inc.*, Forest moved for sanctions against QKH based on spoliation of evidence after learning that (1) the electronic files of QKH's president were destroyed after the parties' dispute arose but before commencement of the litigation, and (2) that the electronic files of a second relevant QKH employee were destroyed after the lawsuit had been commenced. In granting Forest's motion and ruling that an adverse inference instruction would be issued at the time of trial, Justice Donna Mills held that the destruction of QKH's files occurred well after it reasonably should have anticipated the litigation, and thus it had a duty to preserve evidence relating to the dispute. The Court held that QKH had a duty to preserve based on, among other things, the existence of at least one document prepared in anticipation of litigation by the time its president's files had been destroyed. The Court's decision is reported in the *New York Law Journal* for May 23, 2013. Forest is represented in this action by Bruce Handler and Cynthia L. Ebbs at DSSV.

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