

**USING CONTRACT TERMS TO GET AHEAD OF PROSPECTIVE  
eDISCOVERY COSTS AND BURDENS IN COMMERCIAL LITIGATION**

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**I. INTRODUCTION**

[1] During the course of the twentieth century, American and international businesses reacted to the increasing costs and uncertainties of the American civil legal system by trying to create certainty through

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contractual provisions wherever possible.<sup>1</sup> In particular, businesses developed contractual provisions that set forth procedural boundaries to potential disputes for the purpose of providing greater certainty as to where the dispute would be heard, who would hear it, and what laws would apply. For example, choice of venue<sup>2</sup> and choice of law<sup>3</sup> provisions became commonplace. In addition, clauses dictating the use of alternative dispute resolution procedures were also widely adopted.<sup>4</sup> Substantively, other clauses not only limited liabilities, warranties, and damages,<sup>5</sup> but also attempted to establish the applicable burden of proof

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<sup>1</sup> See generally Michael Solimine, *Forum-Selection Clauses and the Privatization of Procedure*, 25 CORNELL INT'L L.J. 51, 52 (1992) (“The rise of forum-selection clauses is a manifestation of the increasing deference to party autonomy in jurisdictional and related matters. Not coincidentally, the last two decades have also seen the enforcement of contractual choice-of-law clauses, and the upholding of waivers of personal jurisdiction and service-of-process requirements.”). Arguably, the power of contracts to modify legal procedure began with the Supreme Court’s pronouncement in *Lochner v. New York*, enshrining “the liberty of contract” as a Constitutionally-protected right. See 198 U.S. 45, 56 (1905). But see *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 486-88 (1955) (upholding state laws regulating contractual relationships where such laws bear a rational relationship to the “health and welfare of the people.”). Arguably, this same process works in reverse whenever a court invokes its power to reject a contract “against the public interest” and justifies its decision as serving to protect such an interest (usually a significant and concrete one). See, e.g., *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 87, 95 (N.J. 1960) (voiding express waiver of implied warranty of merchantability where incentivizing the sale of damaged vehicles could result in serious injuries).

<sup>2</sup> See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 518 (1974) (“[A] ‘forum clause should control absent a strong showing that it should be set aside.’” (quoting *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972))).

<sup>3</sup> See *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989) (affirming decision “[i]nterpreting a choice-of-law clause to make applicable state rules governing the conduct of arbitration.”).

<sup>4</sup> See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23-24, 35 (1991) (enforcing mandatory arbitration clause of an employment contract for a “Manager of Financial Service” and dismissing statutory claim alleging age discrimination).

for any given dispute.<sup>6</sup> While such provisions have been challenged as unenforceable in circumstances of unequal bargaining power—for example contracts between a business and a consumer<sup>7</sup>—or inequitable conduct such as fraud,<sup>8</sup> by and large courts have enforced these provisions, especially in commercial contracts between business enterprises.<sup>9</sup>

[2] At the turn of the twenty-first century, few businesses realized the impending challenges that electronic discovery issues would soon bring to civil litigation in the United States.<sup>10</sup> While businesses had been

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<sup>5</sup> See *e.g.*, *McCarn v. Pac. Bell Directory*, 4 Cal. Rptr. 2d 109, 113 (1992) (upholding clause limiting damages to cost of contract services, in light of offer to negotiate).

<sup>6</sup> See Henry S. Noyes, *If You (Re)Build It, They Will Come: Contracts To Remake the Rules of Litigation in Arbitration's Image*, 30 HARV. J.L. & PUB. POL'Y 579, 646 (2007) (stating that burdens of proof can most likely be modified *ex ante* by contract, both in criminal and civil cases).

<sup>7</sup> See *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449-50 (D.C. Cir. 1965) (“[W]hen a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent . . . was ever given to all the terms. In such a case . . . the court should consider whether the terms of the contract are so unfair that enforcement should be withheld.”); *cf.* *Ray Tucker & Sons, Inc. v. GTE Directories Sales Corp.*, 571 N.W.2d 64, 70 (D. Neb. 1997) (“[T]he parties’ respective bargaining positions . . . is an essential fact upon which any determination of unconscionability depends.”).

<sup>8</sup> See *Gilmer*, 500 U.S. at 33 (“Of course, courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds for the revocation of any contract.” (internal quotation marks omitted) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985))).

<sup>9</sup> See *Williams*, 350 F.2d at 450 (noting that only in the rarest of circumstances would a contract between two businesses reach the legal standard for unconscionability; an “extreme” departure from “the mores and business practices of the time and place” would have a chance at being found unconscionable).

<sup>10</sup> See BARBARA J. ROTHSTEIN ET AL., *MANAGING DISCOVERY OF ELECTRONIC INFORMATION: A POCKET GUIDE FOR JUDGES 1* (Federal Judicial Center 2007), available at [http://www.fjc.gov/public/pdf.nsf/lookup/eldscpkt.pdf/\\$file/eldscpkt.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/eldscpkt.pdf/$file/eldscpkt.pdf).

complaining about the costs and delays incurred through allegedly “abusive” discovery tactics for dozens of years,<sup>11</sup> the first decade of the new century witnessed parallel growth of information in each organization as well as increased complexity and costs for organizations to defensibly preserve, collect, and produce relevant information for litigation matters in the United States.<sup>12</sup> Moreover, as technology continued to change rapidly, the legal system began to evolve to meet new challenges that contrasted with those of the old paper world that greatly influenced the initial Federal Rules of Civil Procedure.<sup>13</sup> Not surprisingly, many commentators noted that the current state of jurisprudence on issues related to discovery in the electronic age is nascent,<sup>14</sup> which in turn causes great uncertainty for

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<sup>11</sup> See FED. R. CIV. P. 26(f) advisory committee’s note (1980) (“There has been widespread criticism of abuse of discovery. The Committee has considered a number of proposals to eliminate abuse . . . .”); cf. FED. R. CIV. P. 26(b)(1) advisory committee’s note (2000) (“The amendment is designed to involve the court more actively in regulating . . . discovery. The Committee has been informed repeatedly by lawyers that involvement of the court in managing discovery is an important method of controlling problems of inappropriately broad discovery. . . . The Committee intends that the parties and the court focus on the actual claims and defenses involved in the action.”); FED. R. CIV. P. 26 advisory committee’s note (1983) (acknowledging that some attorneys “use discovery tools as tactical weapons rather than to expose the facts and illuminate the issues by overuse of discovery or unnecessary use of defensive weapons or evasive responses,” which “results in excessively costly and time-consuming activities”).

<sup>12</sup> See John H. Beisner, *Discovering A Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 564-70 (2010).

<sup>13</sup> See FED. R. CIV. P. 26(a) advisory committee’s note (2006) (amending the rules to “recogniz[e] that a party must disclose electronically stored information as well as documents.”); FED. R. CIV. P. 26(b)(2) advisory committee’s note (2006) (stating that the purpose of the amendment was “designed to address issues raised by difficulties in locating, retrieving, and providing discovery of some [ESI]. . . . [when] burdens and costs may make the information on such sources not reasonably accessible”).

<sup>14</sup> See Geoff Howard & Seth Weisburst, *Trends in Electronic Discovery After the December 1, 2006 Amendments to the Federal Rules of Civil Procedure*, in ELECTRONIC DISCOVERY AND RETENTION GUIDANCE FOR CORPORATE COUNSEL 2007 at 13, 33 (PLI Litigation and Administrative Practice Source Handbook Series No. 766, 2007) (finding little impact, positive or otherwise, one year after the 2006 addition of “ESI” to the civil rules, stating that “[i]t will take more time, and more cases, to definitively determine how

companies as to how their preservation, collection, and production steps will be judged in hindsight.

[3] With this background, consideration should be given to whether contractual provisions can provide greater certainty and direction to parties than the current and future state of law pertaining to electronic discovery issues. Specifically, much of the uncertainty, excess costs, and burdens related to electronic discovery in the world of commercial litigation can be obviated through the mutual adoption and ratification of terms concribing the scope of discovery in the event of a dispute that would be the subject of arbitration or litigation.<sup>15</sup> In essence, such clauses would provide a pre-defined set of fair rules that the parties agree to follow in a dispute relating to any preservation or discovery of electronically stored information.

[4] To explore the viability of such provisions, this article first identifies the type of model clauses that could be included in commercial contracts. For each type of clause, the potential benefits and risks

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courts will define and apply each of the new electronic discovery amendments”). The doctrine is indeed continuing to evolve. New rules are being contemplated yet none are expected to be published in the immediate future (as of May 29, 2012). See *Federal Rules Published for Comment*, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/PublishedRules.aspx> (last visited May. 29, 2012); Civil Rules Suggestions, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/ResearchingRules/CivilRulesSuggestions.aspx> (last visited May, 29, 2012).

<sup>15</sup> Contractual modification of the litigation process was identified as “a rich avenue for future research” by Robert Scott and George Triantis in their article *Anticipating Litigation in Contract Design*. 115 YALE L.J. 814, 857 (2006). Surprisingly, the authors note that while “arbitration and venue clauses are common in contracts and widely discussed in the literature, the fact that parties can vary the rules of litigation in their ex ante contract is relatively unexplored” and they were “hard pressed . . . to find scholarly treatises on procedure or evidence that identify the subset of these rules that are default rather than mandatory provisions.” *Id.* However, discovery is only briefly mentioned by the same authors who lament the lack of sources in the area at large; “the parties themselves may further reduce litigation costs by consent. . . . [t]hey can do so narrowly, by stipulating facts or agreeing to limited discovery.” *Id.* at 831.

presented by these provisions as they relate to discovery in civil litigation are identified. Next, the general applicability of public policy doctrines and whether such discovery-limiting provisions would be viewed by courts with favor or disfavor are explored. Thereafter, this article analyzes the potential legal arguments that could be raised to challenge the enforceability of such provisions.

[5] In sum, there is considerable merit for considering contractual provisions that set forth common ground for handling the preservation, collection, and production of information by parties to commercial contracts that may later become involved in related disputes. Equally important, it is likely that such provisions will be uniformly upheld and enforced absent unique circumstances.

## **II. LIMITING PROSPECTIVE LITIGATION PRESERVATION AND DISCOVERY DUTIES BY CONTRACT: ASSESSING THE BUSINESS UTILITY AND RISK**

[6] Contractual limitations on future discovery obligations and liabilities can take one or more of five forms: (1) absence of a preservation duty unless a notice or a request to preserve is served; (2) limitations on the amount of discovery allowed, including the amount of preservation required; (3) mechanics governing preservation and production decisions in a predictable framework; (4) procedures allocating the costs for ordinary and extraordinary discovery sought; and (5) agreed restrictions on sanctions for purported discovery failure. After identifying the general benefits of a contractual approach to prospective preservation and discovery obligations, each category of proposed clauses is discussed below, including an identification of potential benefits and drawbacks from a business and litigation standpoint. Each business should assess its own risk profile and the value that could be obtained by such clauses before including them in any contract negotiations.

### **A. Overview of Benefits to Contract Clauses Governing Prospective Preservation and Discovery Obligations**

[7] Discovery-limiting clauses are designed to provide benefits in three ways: reducing the costs of preservation; reducing the costs of production; and reducing the risk of incurring sanctions.<sup>16</sup> These benefits arise primarily by establishing limits on the scope of preservation and the volume of production, thereby eliminating the costs of over-preservation and over-production.<sup>17</sup> Additionally, parties are aware of their specific obligations under the terms of the agreement, which should greatly decrease the chances of being sanctioned for discovery failures, while simultaneously reducing the costs associated with motions for production and sanctions.

[8] While spoliation sanctions can have substantial monetary costs associated with them, including indirect costs,<sup>18</sup> the costs of preservation and production are most often cited as the biggest components of discovery expenses.<sup>19</sup> Perhaps this is because sanctions are quite rare when compared to the omnipresence of significant preservation burdens.<sup>20</sup> While it is clear that more research is needed in this area, basic estimates and anecdotal evidence suggest that the costs are significant. For example, in *In re Aspartame Antitrust*, the three prevailing defendants were awarded a combined \$510,000 in electronic discovery costs,

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<sup>16</sup> See FED. R. CIV. P. 29 advisory committee's note (1993); MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.423 (2004); *The Sedona Conference®, The Case for Cooperation*, 10 SEDONA CONF. J. 339, 343 (2009).

<sup>17</sup> See MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.423; Thomas Y. Allman, *Managing Preservation Obligations After the 2006 Federal E-Discovery Amendments*, 13 RICH. J.L. & TECH. 9, ¶¶ 16-18 (2007).

<sup>18</sup> See *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 607 (S.D. Tex. 2010) ("Spoliation allegations and sanctions motions distract from the merits of a case, add costs to discovery, and delay resolution.").

<sup>19</sup> See Beisner, *supra* note 12, at 566, 570.

<sup>20</sup> See *id.* at 569-70. Compare *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001), with Dan H. Willoughby, Jr. et al., *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L.J. 789 (2010).

amounting to an average of \$170,000 per litigant.<sup>21</sup> The Sedona Conference provides a more scalable estimate in its 2007 *Best Practice Commentary on the Use of Search and Information Retrieval Methods in E-Discovery*, wherein it stated that each gigabyte costs about \$30,000 to review for relevance and privilege.<sup>22</sup> In addition, none of these cost figures included the costs associated with in-house counsel's time, the implementation of preservation policies and tools, or the disruption to employees' productivity when dealing with legal holds and collection.

[9] The predictability and limitations envisioned by the contractual language provide protections for both requesting and responding parties. For example, there is recognition that additional measures may be needed in certain cases but there is a counter-weight of indemnification provisions to ensure that people only seek extraordinary discovery when truly necessary. As for routine discovery, the provisions provide clear guideposts that should avoid disputes and collateral motions practice altogether. Additionally, the potential for a party to be harmed by limits on preservation duties and limits on the scope and volume of production should be minimal.

[10] The costs of drafting and enforcing discovery-limiting provisions should also be *de minimis*. First, the contract is already being negotiated and agreed upon, so there will be few costs associated with that phase of the agreement process. Second, the language is general enough that it can be drafted quickly and adapted to the circumstances. Third, once language is drafted and accepted into one set of contracts, it will likely spread into a variety of different contracts with only slight modifications required. Lastly, as companies become more familiar with preservation and production under this type of agreement, they should be able to optimize the contract language, as well as their internal policies and practices to meet the specified obligations, to further reduce costs and burdens.

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<sup>21</sup> 817 F. Supp. 2d 608, 623 (E.D. Pa. 2011).

<sup>22</sup> See The Sedona Conference®, *The Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery*, 8 SEDONA CONF. J. 189, 192 (2007).

## B. Potential Contractual Clauses Related to Prospective Preservation and Discovery Obligations

### 1. Notice of Preservation Duty and Request to Preserve

[11] This type of clause could provide that no party to the contract has any affirmative obligation to preserve evidence absent a specific written request from another party. The clause could likewise preclude any party from seeking sanctions due to the failure to preserve evidence absent the written notice. As with all contractual provisions, the clause could simply require a written request or prescribe that the request be very detailed in terms of time frame, subject matter scope, and even target sources of information for preservation.<sup>23</sup>

[12] This type of provision has the obvious benefit of eliminating the guesswork surrounding the trigger of preservation duties. Indeed, many organizations have discussed the practical difficulties posed by an *ex post* analysis of the “reasonable anticipation” of litigation,<sup>24</sup> and recent commentary has suggested that the resulting over-preservation imposes a staggering burden on companies.<sup>25</sup>

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<sup>23</sup> See generally RESTATEMENT (SECOND) OF CONTRACTS § 33 (1981) (stating terms of a contract must be “reasonably certain”).

<sup>24</sup> See *Rimkus Consulting Grp. Inc. v. Cammarata*, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010) (noting the difficulty of making “bright-line distinctions between acceptable and unacceptable conduct in preserving information . . . either prospectively or with the benefit (and distortion) of hindsight”).

<sup>25</sup> Compare *Orbit One Commc’ns, Inc. v. Numerex Corp.*, 271 F.R.D. 429, 436 (S.D.N.Y. 2010) (“Until a more precise definition is created by rule, a party is well-advised to ‘retain all relevant documents . . . in existence at the time the duty to preserve attaches.’ In this respect, ‘relevance’ . . . is ‘an extremely broad concept.’” (quoting *Zubulake v. UBS Warburg LLC (Zubulake IV)*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003); *Condit v. Dunne*, 225 F.R.D. 100, 105 (S.D.N.Y. 2004))), with Letter from Microsoft Corporation to Hon. David G. Campbell, Advisory Comm. on Civil Rules Chair, U. S. Dist. Court 5 (Aug. 31, 2011), available at <http://www.uscourts.gov/uscourts/>

[13] The downside to this type of provision is two-fold. First, it does not obviate the potential need to preserve information relevant to non-contractual disputes between the parties and other persons, nor does it affect any statutory or regulatory obligations to retain information.<sup>26</sup> Thus, it could create a false sense of security if organizations overly rely on the existence of such clauses. An organization should completely analyze any potential for non-contractual claims before relying solely on this type of contractual provision in managing its information and records.

[14] Second, one party may lose the opportunity to demonstrate its legitimate claims or defenses under the contract if another party destroys pertinent information prior to receipt of any written notice demanding preservation.<sup>27</sup> This observation cuts to the heart of the matter. A party could prospectively give up the right to obtain information relating to valuable claims or defenses, but it is done knowingly and in service of the greater good of streamlining and reducing the expense of the dispute resolution process.

## **2. Limitations on the Amount of Preservation and Discovery Required**

[15] These types of provisions set forth agreed upon limits on preservation and discovery efforts that the parties may have to

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RulesAndPolicies/rules/DallasMiniConf\_Comments/Microsoft.pdf (“[F]or each one-page trial exhibit, Microsoft produces an average of 1000 pages, manually reviews more than 4500 pages, collects and processes more than 90,000 pages, and preserves almost 340,000 pages. . . . This costs money. But the hard dollars Microsoft spends on data storage, attorney fees, licensing fees and employee salaries do not reflect the business disruption and full impact on productivity.”).

<sup>26</sup> *E.g.*, Stored Communication Act, 18 U.S.C. § 2703(f) (2006); *see also* California v. Wilson, 236 Cal. Rptr. 280, 283 (Cal. Ct. App. 1987).

<sup>27</sup> *See generally* 8 FLORIDA CONSTRUCTION LAW MANUAL, *Spoilation of Evidence* § 16:21 (2012) (indicating that destruction of evidence does not always warrant harsh sanctions).

undertake.<sup>28</sup> For example, the parties to the contract may agree that no party must resort to the preservation of back-up media in connection with any dispute under the contract. Another example could be agreeing to forego any forensic analysis of computers to identify and review deleted data of any type. Yet another example could be agreeing to a preset limit of the files of no more than five custodians being subject to preservation, collection, and production in the event of a dispute under the contract. In some ways, these types of clauses are akin to adoption language that has surfaced in model orders<sup>29</sup> and default standards issued by courts around the country.

[16] One significant benefit of these provisions is a limitation on the amount of effort undertaken in any given dispute under the contract. Another significant benefit is certainty in the efforts required to be defensible in the event of a dispute.

[17] The downside to such provisions is the expected problem of needing information from more persons or places than a party is entitled under the contract clauses. Another equally significant problem occurs when a party chooses five individuals (under the example) in good faith as the targeted custodians only to learn a few months later that a sixth individual is really the key player in the dispute.

### **3. Mechanics to Govern Preservation and Production Decisions and Disputes in a Predictable Framework**

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<sup>28</sup> See D. Md. Loc. Adm. R. app. A [hereinafter Md. Guidelines], *available at* <http://www.mdd.uscourts.gov/publications/forms/DiscoveryGuidelines.pdf> (outlining the Discovery Guidelines for the United States District Court for the District of Maryland).

<sup>29</sup> *E.g.*, E.D. Tex. Civ. R. app. P, *available at* [http://www.txed.uscourts.gov/cgi-bin/view\\_document.cgi?document=22217](http://www.txed.uscourts.gov/cgi-bin/view_document.cgi?document=22217) (providing the “[MODEL] ORDER REGARDING E-DISCOVERY IN PATENT CASES”); *see also* Md. Guidelines, *supra* note 30 (“The parties . . . are encouraged to submit to the Court for approval their agreements to expand or limit discovery.”).

[18] These types of provisions could be the equivalent of mandatory ADR provisions whereby the parties agree in advance as to how particular issues (i.e., number of discovery requests and completeness of responses) will be addressed and decided among the parties or by a neutral arbiter in a cost effective fashion.<sup>30</sup> One possibility is an agreement as to the type of search methodologies that may be required or acceptable to the parties, such as keyword or computer-assisted review. Another possibility could be provisions dealing with the manner by which preservation and discovery from persons and sources outside of the United States would be handled to best ensure compliance with any foreign personal data protection laws. Conceivably, the parties could agree in advance on a particular neutral party or organization with whom to consult in regard to discovery disputes. Again, these are but a few examples of the types of clauses that could be devised.

[19] The benefits of these types of clauses include removing the risk that an already over-burdened court will have to address preservation and discovery disputes in an *ad hoc* fashion.<sup>31</sup> The parties will also benefit from having a better sense of the types of disputes that could be raised as well as the likely range of outcomes, thereby decreasing the uncertainty surrounding discovery practice.

[20] The drawbacks might include the inadvertent creation of a system of satellite dispute resolution for discovery issues that, if not managed well, could balloon to defeat the stated objective of reducing disputes and lowering costs. Another potential downside could be agreeing in advance to limitations that, when the dispute arises, significantly impair the ability

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<sup>30</sup> Observers have frequently cited predictability as a leading benefit of contractually-determine legal procedures. See, e.g., Linda Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 *FORDHAM L. REV.* 291, 294 (1988) (“The doctrine of consensual adjudicatory procedure . . . is lauded for enhancing the values of predictability, certainty, security, stability and simplicity.”).

<sup>31</sup> See *id.* at 294-95.

to obtain and use information that would be helpful to support claims or defenses.

#### **4. Procedures to Allocate the Costs for Ordinary and/or Extraordinary Discovery**

[21] This type of clause would provide specific guidance to the contracting parties as to who pays for the preservation and discovery costs in the event of a dispute. The clause could be as simple as prohibiting any type of fee shifting or sharing or it could require that the requesting party pay for all discovery sought, as well as any requested specific preservation steps. Alternatively, it could establish a specific formula by which certain costs are shared or shifted.

[22] The advantages of such provisions again come from the certainty as to process and the mutual incentives to control costs. Indeed, including such provisions would likely result in more cost-sharing or cost-shifting opportunities because most courts shy away from cost allocation in ordinary litigation, usually citing the American rule on litigation costs.<sup>32</sup> Disadvantages include the fact that a predetermined cost allocation formula may make pursuit of a claim or defense far more expensive than it would be absent the contract language. Another potential disadvantage is the complexity that might be required if the parties want to create a series of presumptions that need to be assessed and applied in any given dispute.

#### **5. Agreed Restrictions on Sanctions for Purported Discovery Failures**

[23] A preemptive limitation on the sanctions that could be sought by a party if another party failed to preserve or produce relevant information

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<sup>32</sup> See, e.g., *Last Atlantis Capital, LLC v. AGS Specialist Partners*, No. 04 C 0397, 2011 WL 6097769, at \*2 (N.D. Ill. Dec. 5, 2011) (rejecting request for cost-shifting, the court noted The Sedona Conference recognized that cost-shifting was “inconsistent with the so called ‘American Rule’ that each party bears its own litigation costs” and that “[t]he party seeking cost-shifting . . . bears the burden of overcoming that presumption.”).

could be very beneficial to both parties to a contract. The clear advantage to such a provision would be eliminating the risks currently attendant to discovery today where any failure or mistake, no matter how innocent, instantly can be magnified into negligence, or worse to support an award of sanctions ranging from monetary penalties to case-altering jury instructions to outright dismissal of claims or defenses. A downside is the risk that a bad actor takes advantage of such protections to destroy relevant information with impunity, thereby impairing the claims or defenses of relatively innocent parties.<sup>33</sup> Careful drafting of this clause should allow parties to eliminate the uncertainty surrounding negligent conduct and limit any sanctions to those situations only involving actual and knowing malfeasance.

[24] Sample contract language for these five categories of clauses is described further in Part V and set forth in the Appendix. While there are infinite variations as to the language that could be employed in any of these five categories, the potential benefits of clarity, risk reduction, and cost savings are well worth exploration by entities involved in a significant number of commercial. It is important for companies to be well-informed and seek counsel when considering the relative value of including such contract language.

### III. LEGAL AUTHORITY FOR CONTRACTUAL DISCOVERY LIMITATIONS

[25] While no judicial decisions exist directly addressing this issue, established law supports the enforceability of other contractual modifications to the litigation process—particularly a small set of near-ubiquitous provisions that include venue, jury waiver, choice of law, and

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<sup>33</sup> See, e.g., *Rosenthal Collins Grp., LLC v. Trading Tech. Int'l, Inc.*, No. 05 C 4088, 2011 WL 722467, at \*14 (N.D. Ill. Feb. 23, 2011) (assessing one million dollars in fines against plaintiff, requiring plaintiff to pay attorney's fees and court costs, and entering default judgment in favor of defendant). *Rosenthal* provides a particularly accurate representation of the downside of limiting sanctions, as the court fined the plaintiff twice for modifying data submitted to the court. *Id.*

arbitration clauses.<sup>34</sup> The jurisprudence regarding enforceability of such contractual provisions is informative with regard to legal support for contractual clauses that limit prospective preservation and discovery obligations.

[26] Many courts have upheld choice of venue or forum selection provisions.<sup>35</sup> Generally, a forum selection clause is enforceable unless it “contravene[s] a strong public policy of the forum in which suit is brought, whether declared by statute or judicial decision.”<sup>36</sup> Courts have refined this mandate to hold that

[a] forum-selection clause is unenforceable if it is determined that any of the three following circumstances are applicable: (1) enforcement of the clause would effectively prevent a party from having his day in court; (2) the forum-selection clause itself was procured by overreaching or fraud; or (3) the [c]ourt’s enforcement of the forum-selection clause would violate a strong public policy.<sup>37</sup>

Our informal survey of cases indicates that most challenges to forum selection clauses fail because there exist few fact situations that implicate the policy considerations identified by the Supreme Court in *Bremen*.<sup>38</sup>

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<sup>34</sup> See generally *Liles v. Ginn-La W. End, Ltd.*, 631 F.3d 1242, 1256-57 (11th Cir. 2011) (finding a forum-selection clause and an arbitration clause enforceable); *Speed v. Omega Protein, Inc.*, 246 F. Supp. 2d 668, 672 (S.D. Tex. 2003) (considering a forum-selection clause in determining proper venue).

<sup>35</sup> See *Liles*, 631 F.3d at 1243; *Speed*, 246 F. Supp. 2d at 673.

<sup>36</sup> *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972).

<sup>37</sup> See *Speed*, 246 F. Supp. 2d at 672.

<sup>38</sup> See e.g., *Liles*, 631 F.3d at 1243 (holding the forum-selection clause enforceable).

[27] Likewise, courts have routinely upheld choice of law provisions even though they affect the substantive outcomes of disputes.<sup>39</sup> Section 187 of the Restatement (Second) Conflict of Laws provides in pertinent part:

- (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either
- (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
- (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.<sup>40</sup>

[28] Comment e to Section 187 of the Restatement sets forth the basic rationale of having such clauses:

Prime objectives of contract law are to protect the justified expectations of the parties and to make it possible for them to foretell with accuracy what will be their rights and liabilities under the contract. These objectives may best be attained in multistate transactions by letting the parties choose the law to govern the validity of the contract and the rights created thereby. In this way, certainty and

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<sup>39</sup> *E.g.*, *Cent. States, Se. & Sw. Areas Pension Fund v. Aalco Express Co.*, 592 F. Supp. 664, 667 (E.D. Mo. 1984); *Finch v. Hughes Aircraft Co.*, 469 A.2d 867, 887 (Md. Ct. Spec. App. 1984); *Morris v. Watsco, Inc.*, 433 N.E.2d 886, 889 (Mass. 1982); *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 (1971).

<sup>40</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971).

predictability of result are most likely to be secured. Giving parties this power of choice is also consistent with the fact that, in contrast to other areas of the law, persons are free within broad limits to determine the nature of their contractual obligations.<sup>41</sup>

[29] Courts have routinely upheld choice of law provisions,<sup>42</sup> yet there are notable circumstances where exceptions apply and courts do not enforce the provisions.<sup>43</sup> In almost all of the exceptions, courts have found a fundamental issue of state law that was outcome determinative (e.g., whether claims would be barred by a different statute of limitations or whether one state recognized a cause of action not recognized by another).<sup>44</sup>

[30] With respect to mandatory arbitration provisions, such clauses have been enforced in situations where there is some inequality in bargaining power (between companies and their employees),<sup>45</sup> where the arbitration agreement is part of a standardized non-negotiable form,<sup>46</sup> and

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<sup>41</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. e (1971).

<sup>42</sup> *See, e.g.*, *N. Ins. Co. of N. Y. v. Point Judith Marina, LLC*, 579 F.3d 61, 72 (1st Cir. 2010) (enforcing choice of law provision); *see also* *PAE Gov't Servs, Inc. v. MPRI, Inc.*, 514 F.3d 856, 860 (9th Cir. 2007).

<sup>43</sup> *See, e.g.*, *Homa v. Am. Express Co.*, 558 F.3d 225, 227, 230-31 (3d Cir. 2009) (predicting that, if the claims at issue were of such a low value as effectively to preclude relief when decided individually, then the New Jersey Supreme Court would hold that the agreements' choice of Utah law, which expressly allowed class-arbitration waivers, was unenforceable under New Jersey choice-of-law rules, because it would violate a fundamental public policy of New Jersey).

<sup>44</sup> *See e.g.*, *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496-97 (1941) (holding that federal courts may not, by enforcing an independent "general law" of conflict of laws, controvert local policies pursued by a state within limits permitted by the Constitution).

<sup>45</sup> *See, e.g.*, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991).

where the claims to be arbitrated are torts.<sup>47</sup> Nevertheless, there are still limits to courts' enforcement of arbitration clauses. For example, in *Cole v. Burns International Security Services*, the D.C. Circuit Court of Appeals refused to enforce an arbitration clause that required employees to pay for the services of an arbitrator beyond any reasonable costs, such as filing or administrative expenses.<sup>48</sup> Indeed, the United States Supreme Court has observed that the costs of arbitration should not prohibit the adjudication of wrongs.<sup>49</sup> However, the Court nevertheless held that when "a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs."<sup>50</sup> It is also important to note that the Federal Arbitration Act ("FAA")<sup>51</sup> has been frequently cited as a significant factor in support of enforcing arbitration clauses,<sup>52</sup> and the Supreme Court has recognized a clear federal policy in favor of arbitration.<sup>53</sup> In short, mandatory arbitration clauses are upheld in the majority of cases, including those involving unequal bargaining power.

[31] Based on decisions analyzing the enforceability of forum selection, choice of law, and arbitration clauses, it is very likely that the contractual discovery limitations described herein will be enforceable between

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<sup>46</sup> See, e.g., *Battle v. Prudential Ins. Co.*, 973 F. Supp. 861, 867 (D. Minn. 1997).

<sup>47</sup> See, e.g., *Woodmen of the World Life Ins. Soc'y v. JRY*, 320 F. App'x 216, 222 (5th Cir. 2009).

<sup>48</sup> 105 F.3d 1465, 1484 (D.C. Cir. 1997).

<sup>49</sup> See *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 91-92 (2000).

<sup>50</sup> *Id.* at 92.

<sup>51</sup> United States Arbitration Act of 1925, 9 U.S.C. § 4 (2006).

<sup>52</sup> See, e.g., *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983).

<sup>53</sup> See *Green Tree*, 531 U.S. at 91; see also *AT&T Mobility LLC v. Concepcion*, 563 U.S. \_\_\_, 131 S.Ct. 1740 (2011).

commercial parties of sufficient sophistication, especially with drafting tailored to the facts of the contractual relationship. There is ample legal authority that illustrates that public policy in fact supports cooperative efforts to limit discovery consistent with Federal Rule of Civil Procedure<sup>54</sup> and its state court analogues.<sup>55</sup> Moreover, ample support exists to support the proposition that since the mid 1970's, public policy has favored meaningful limits on civil discovery.<sup>56</sup> For example, in 1976 an American Bar Association ("ABA") task force was established to address the unfair use of the discovery process.<sup>57</sup> In the process of studying the question, an ABA committee concluded that discovery abuses broke down into three common complaints: first, discovery was too costly; second, discovery procedures were being misused; and third, discovery was subject to "overuse."<sup>58</sup>

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<sup>54</sup> See generally FED. R. CIV. P. 1 (stating that rules should be administered to "secure the just, speedy, and inexpensive determination of every action and proceeding").

<sup>55</sup> See *William A. Gross Constr. Assocs. v. Am. Mfrs. Mut. Ins. Co.*, 256 F.R.D. 134, 136 (S.D.N.Y. 2009) ("[T]he best solution in the entire area of electronic discovery is cooperation among counsel. This Court strongly endorses *The Sedona Conference Proclamation*."); see also *The Sedona Conference, The Case for Cooperation*, 10 SEDONA CONF. J. 339, 342 (2009); AM. COLL. OF TRIAL LAWYERS & THE INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM at 2 (2009), available at <http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=4008>.

<sup>56</sup> See, e.g., FED. R. CIV. P. 26(c) advisory committee's note (1970) (explaining that, in the 1970 amendment to subdivision (c), "drafting changes [were] made to carry out and clarify the sense of the rule" and "[i]nsertions [were] made to avoid any possible implication that a protective order does not extend to 'time' as well as to 'place' or may not safeguard against 'undue burden or expense'"); see also FED. R. CIV. P. 33(c) advisory committee's note (1970) (noting that the purpose of the 1970 amendment adding subdivision (c) to FRCP 33 was to give "the party an option to make the records available and place the burden of research on the party who seeks the information").

<sup>57</sup> See AMERICAN BAR ASS'N, REPORT OF POUND CONFERENCE FOLLOW-UP TASK FORCE (1976), reprinted in 74 F.R.D. 159, 191 (1976).

[32] The 1983 Amendments to the Federal Rules of Civil Procedure were enacted in response to the many and frequent calls for discovery reform.<sup>59</sup> States thereafter implemented their own reforms, with many adopting the same or similar provisions to ensure a proportional approach to discovery in civil matters.<sup>60</sup> In enacting the 1983 rules, the Advisory Committee noted that “[e]xcessive discovery and evasion or resistance to reasonable discovery requests pose significant problems.”<sup>61</sup> Accordingly, Rule 26(b)(1) was amended to grant courts the authority to limit discovery where it was found to be redundant or duplicative.<sup>62</sup> The Committee Notes to the 1983 Amendments indicate that Rule 26(b)(1)(iii) was designed to address the problem of disproportionate discovery, and lists factors to be considered when determining proportionality: the “nature and complexity” of the lawsuit, “the importance of the issues at stake,” the parties’ resources, and “the significance of the substantive issues.”<sup>63</sup> The Committee Notes also explicitly state that public policy concerns might have importance beyond the monetary amount at stake and the proportionality calculus should include this more esoteric consideration.<sup>64</sup>

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<sup>58</sup> American Bar Association, Comments on Revised Proposed Amendments to the Federal Rules of Civil Procedure (1979) (on file with author).

<sup>59</sup> See FED. R. CIV. P. 26 advisory committee’s note (1983).

<sup>60</sup> See Patricia A. Ebener, INST. FOR CIVIL JUSTICE, COURT EFFORTS TO REDUCE PRETRIAL DELAY: A NATIONAL INVENTORY, at xi-xii (1981) (noting that, by 1980, twenty-nine states had implemented reforms to expedite pretrial discovery, which ranged from limiting the number of interrogatories that a party could request, to “[a]ssigning penalties to attorneys who bring frivolous [discovery] motions”).

<sup>61</sup> FED. R. CIV. P. 26 advisory committee’s note (1983).

<sup>62</sup> See FED. R. CIV. P. 26(b)(1) advisory committee’s note (1983) (explaining that the objective of the 1983 amendment was “to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry”).

<sup>63</sup> FED. R. CIV. P. 26 advisory committee’s note (1983).

<sup>64</sup> *Id.*

The Advisory Committee further explained that the Rule sought to “reduce repetitiveness and to oblige lawyers to think through their discovery activities in advance so that full utilization is made of each deposition, document request, or set of interrogatories.”<sup>65</sup> To effectuate this mandate, courts were expected to apply the rules in an even-handed manner, thereby preventing the use of discovery as a means of coercion or as a tool in a “war of attrition.”<sup>66</sup>

[33] In light of this history and thirty years of jurisprudence in which courts have routinely entered and enforced the parties’ case management agreements and otherwise imposed limits on civil discovery, there is ample ground to conclude that public policy would favor contractual clauses that prescribe limits on preservation and discovery before disputes arise. Moreover, unless there is fraud or duress in the contracting process, there are no clearly identifiable general, federal, or state policies that are contrary to the use of such clauses. Thus, examination of the enforceability of such clauses will turn on particular facts regarding the circumstances of the contracting, which is addressed in the next section.

#### **IV. POTENTIAL CHALLENGES TO THE ENFORCEABILITY OF CONTRACTUAL LIMITATIONS ON PROSPECTIVE PRESERVATION AND DISCOVERY OBLIGATIONS IN CIVIL LITIGATION**

[34] The potential benefits of contractual preservation and discovery limitations can be washed away entirely if the specific proposed provisions are found unenforceable for any reason. Indeed, for each measure of uncertainty of the enforceability of a given provision, there is a corresponding diminishment of the benefits as the parties are forced to hedge proportionately against the risk of the provision’s failure. Thus, it is critical to examine the possible challenges to contract provisions of the

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

type suggested in this article and the likely outcome of such challenges before businesses start incorporating such provisions into contracts.

[35] At the outset, it should be understood that like other parts of the civil litigation process, discovery is not constitutionally mandated and is therefore subject to waiver and modification according to the same rules of enforceability that govern most contractual agreements.<sup>67</sup> Therefore, courts assess the enforceability of such contract provisions in light of whether they violate public policy, are unconscionable, shield parties from tort liability, purport to waive any third parties' rights, or improperly usurp judicial authority or procedural rules.<sup>68</sup> The sections below walk through each of these potential challenges and predict possible outcomes.

#### A. Contracts Against the Public Interest

[36] Courts have long been reluctant to nullify agreements for allegedly violating public policy, a power the Supreme Court of Nebraska called

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<sup>67</sup> See *Developments in the Law - Discovery*, 74 HARV. L. REV. 940, 979 n.301 (1991) (stating "a court may refuse to enforce a discovery modification if it is unconscionable" just like other contract provisions); cf. Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507, 545 (2011) ("As for limitations on discovery, a large body of literature emphasizes the importance of full discovery to judicial decisions in such areas of the law as employment discrimination and consumer protection, in which claims, legal theories, and evidentiary proofs cannot be developed without a rich factual base. Similarly, commentators point to the relevance of tort actions for improving federal agency policymaking by encouraging the disclosure of information.").

<sup>68</sup> See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985) ("Of course, courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract,'" (quoting 9 U.S.C. § 2 (2006))). Because these doctrines have sprung from common law, their precise contours are defined by the laws of the various states, as well as some influential federal cases like *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). However, although there is no established federal common law for enforcing these rules, convergence over the course of contracts' lengthy American history has resulted in significant interstate consistency. Thus, the validity of commercial agreements to limit discovery will likely be answered in a similar way by state and federal courts in different jurisdictions.

“delicate and undefined.”<sup>69</sup> That being said, an affected party may argue that limiting the availability of established procedures under state and federal laws, such as the Federal Rules of Civil Procedure, is against the public interest because it diminishes or eliminates the states’ critical role of adjudicating disputes through public forums. Indeed, many courts have stated that broad discovery is a “cornerstone of the litigation process contemplated by the Federal Rules of Civil Procedure.”<sup>70</sup>

[37] Public policy objections prevail in those instances where the contract language at issue impairs an independent fundamental interest of the state.<sup>71</sup> A reputable summary of the public policy considerations weighing against clauses was recently set forth by Kevin Davis and Helen Hershkoff; identifying first, “a large body of literature [that] emphasizes the importance of full discovery to judicial decisions in such areas of the law as employment discrimination and consumer protection, in which claims, legal theories, and evidentiary proofs cannot be developed without a rich factual base,” and second, “the relevance of tort actions for improving federal agency policymaking by encouraging the disclosure of information,” in products liability cases and some class action suits.<sup>72</sup> For

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<sup>69</sup> See *Custer Pub. Power Dist. v. Loup River Pub. Power Dist.*, 75 N.W.2d 619, 628-29 (Neb. 1956).

<sup>70</sup> See *Zubulake v. UBS Warburg LLC (Zubulake I)*, 217 F.R.D. 309, 311 (S.D.N.Y. 2003) (quoting *Jones v. Goord*, No. 95 Civ. 8026, 2002 WL 1007614, at \*1 (S.D.N.Y. May 16, 2002)); see also *Wood v. Capital One Servs., LLC*, No. 5:09-CV-1445, 2011 WL 2154279, \*3 (N.D.N.Y. Apr. 15, 2011) (quoting *Zubulake I*, 217 F.R.D. at 311).

<sup>71</sup> See, e.g., *Mason v. Orthodontic Ctrs. of Colo., Inc.*, 516 F. Supp. 2d 1205, 1216-17 (D. Colo. 2007) (finding the public interest prohibiting fee splitting outweighed a fee-splitting contract provision); *Aurora Nat. Life Assurance Co. v. Harrison*, 462 F. Supp. 2d 951, 971-72 (S.D. Iowa 2006), *aff'd, sub nom. Aurora Nat. Life Assurance Co. v. Ewing*, 527 F.3d 1358 (8th Cir. 2008). See generally RESTATEMENT (SECOND) OF CONTRACTS §178 (1981) (terms of agreements are unenforceable if enforcement is outweighed by public policy).

<sup>72</sup> Davis & Hershkoff, *supra* note 67, at 545.

example, in *Brack v. Omni Loan Company*, the California Fourth District Court of Appeal declined to enforce a choice of law provision that would have prevented California citizens from prevailing on claims against a Nevada lender.<sup>73</sup> The court stated that enforcement of the provision would conflict with a “fundamental policy” of California, “in circumstances in which California has a greater interest than Nevada” (i.e., where California citizens were being harmed).<sup>74</sup> Another example is *Henningsen v. Bloomfield Motors, Inc.*, where the Supreme Court of New Jersey decided that auto manufacturers’ express waiver of the implied warranty of merchantability was “inimical” to the public interest where it would bar tort claims for injuries arising from latent automobile defects.<sup>75</sup>

[38] Nevertheless, public policy is not a likely bar to enforcing agreements that limit the scope of discovery where the goal is to prevent excessive preservation and production and the limitations only apply in the context of commercial contracts between business entities. It seems unlikely that any party could identify a “fundamental” public interest mandating extensive discovery in civil claims between sophisticated litigants, and it is uncertain how any other person could intervene to assert such an interest. Even if the effect of the limitation would limit or preclude claims, in light of the relatively equal bargaining power and deference to contractual relations, it is unlikely that a court would intervene and invalidate a limitation based upon a public policy exception. Finally, in light of the emergence of state and federal efforts to encourage more limited and tailored discovery over the past three decades,<sup>76</sup> it does not appear likely that challenges to discovery limitations based on public policy grounds will be successful absent some very unique circumstances,

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<sup>73</sup> 80 Cal. Rptr. 3d 275, 287 (Cal. Ct. App. 2008).

<sup>74</sup> *Id.*

<sup>75</sup> 161 A.2d 69, 87 (N.J. 1960) (denying release of liability for grossly negligent handling of consumer automobiles by dealership, despite express waiver of the implied warranty of merchantability by contract).

<sup>76</sup> See FED. R. CIV. P. 26 advisory committee’s note (1993).

such as the widespread intentional destruction of evidence or some other unquestionably “bad” act while purportedly acting in compliance with the contractual provisions.

### B. Unconscionability

[39] Unconscionability is a finding that a contract or clause should not be enforced because the terms are so one-sided that “no reasonable person would make them and no fair and honest person would accept them.”<sup>77</sup> Certainly influenced by the public interest in not having fellow citizens taken advantage of, unconscionability analysis is nevertheless slightly more grounded and formalized. It is composed of two parts: procedural and substantive unconscionability.<sup>78</sup> Procedural unconscionability describes a situation where the contractual process is so unfair that one party has not been given any meaningful choice.<sup>79</sup> While substantive unconscionability involves one party using a pronounced advantage in bargaining power to achieve unfair terms.<sup>80</sup> Most jurisdictions have decided that substantive unconscionability is sufficient to void an agreement while a few jurisdictions require both the procedural and substantive components.<sup>81</sup> Practically speaking, courts will often gloss over these subtle distinctions and concentrate on the essence of unconscionability: “a gross inequality of bargaining power.”<sup>82</sup>

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<sup>77</sup> See *Fanning v. Fritz’s Pontiac-Cadillac-Buick*, 472 S.E.2d 242, 245 (S.C. 1996) (citing *Jones Leasing v. Gene Phillips & Assoc.*, 318 S.E.2d 31 (S.C. Ct. App. 1984)).

<sup>78</sup> See 8 Samuel Williston & Richard A. Lord, *A TREATISE ON THE LAW OF CONTRACTS* § 18:10 (4th ed. 2010).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> See *Maxwell v. Fid. Fin. Servs., Inc.*, 907 P.2d 51, 58 (Ariz. 1995) (concluding that substantive unconscionability is sufficient for a finding of unenforceability).

<sup>82</sup> *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965); *cf. Ray Tucker & Sons v. GTE Directories Sales Corp.*, 571 N.W.2d 64, 70 (Neb. 1997).

[40] Although the doctrine is described in comparative terms, it would be more accurate in the commercial setting to say that a contract will be enforced if both parties meet a minimum level of sophistication. For example, in *Myers v. Nebraska Investment Council*, an investment company argued that its agreement with the State of Nebraska was unconscionable because the State had far more resources at its disposal.<sup>83</sup> While the underlying claim was true with respect to total assets, the district court rejected the legal conclusion, noting that “substantive unconscionability [in a commercial setting, standing] alone is usually insufficient to void a contract or clause.”<sup>84</sup> The Eighth Circuit endorsed a similar approach in *Faber v. Menard, Inc.*, finding that an agreement between a “large national company” and an employee was not “automatically unconscionable.”<sup>85</sup> Similarly, the Sixth Circuit held that “it is not enough that the parties have unequal bargaining power, a vast disparity is required.”<sup>86</sup> In other words, an agreement would have to be inconsistent with regular business practices to an “extreme” degree to be unconscionable.<sup>87</sup> Due to that high standard, the paradigm for unconscionability remains “contracts of adhesion” between large corporations and consumers.<sup>88</sup>

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<sup>83</sup> See *Myers v. Neb. Inv. Council*, 724 N.W.2d 776, 798-99 (Neb. 2006).

<sup>84</sup> *Id.* at 799 (citing *Adams v. Am. Cyanamid Co.*, 498 N.W.2d 577 (Neb. 1992)); 1 E. Allan Farnsworth, *FARNSWORTH ON CONTRACTS* § 4.28 (2d ed. 1990).

<sup>85</sup> 367 F.3d 1048, 1053 (8th Cir. 2004).

<sup>86</sup> *Scovill v. WSYX/ABC, Sinclair Broad. Grp., Inc.*, 425 F.3d 1012, 1017-18 (6th Cir. 2005) (citing *Faber v. Menard, Inc.*, 367 F.3d 1048, 1054 (8th Cir. 2004)).

<sup>87</sup> See *Williams*, 350 F.2d at 450 (citing 1 ARTHUR CORBIN, *CORBIN ON CONTRACTS* § 128 (1963) (noting that “[t]he terms are to be considered ‘in the light of the general commercial background and the commercial needs of the particular trade or case,’” and concluding that Corbin is correct that “the test as being whether the terms are ‘so extreme as to appear unconscionable according to the mores and business practices of the time and place’”).

<sup>88</sup> Compare *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 186 (1972) (finding that an agreement between two companies did not involve a “refusal to deal,” a contract of

[41] It is unlikely that discovery limitation clauses in commercial contracts between businesses, as contemplated by this article, would run afoul of the unconscionability standards. Not only would the entities be presumably sophisticated, even if not equally so, the contract limitations would be applicable to all of the parties to the agreement. While it is true that one of the parties may benefit more than the other from having limited discovery when a particular dispute arises in the future, it is difficult to predict which party that will be. Stated otherwise, unconscionability must be present at the time the contract is made.<sup>89</sup> If one party claims a need for extensive discovery after a dispute arises, but cannot get it due to this type of agreement, the unconscionability doctrine is not implicated.<sup>90</sup>

### C. Tort Claims by Contracting and Third Parties

[42] Courts have routinely viewed contractual limitations with greater scrutiny when they impact tort claims, especially intentional torts.<sup>91</sup> For example, in *Rodenbur v. Kaufmann*, the D.C. Circuit strictly interpreted a

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adhesion, or unequal bargaining power), *with* *Brennan v. Bally Total Fitness*, 198 F. Supp. 2d 377, 382-83 (S.D.N.Y. 2002) (voiding agreement signed by employee who “reasonably felt that she had no choice but to sign . . . or she would lose her job,” while noting that “inequality in bargaining power between employers and employees is not alone sufficient” to find unconscionability).

<sup>89</sup> *See* U.C.C. § 2-302(1) (2011) (contract must be “unconscionable at the time it was made” to be unenforceable); *see also* *AT&T Mobility*, 563 U.S. \_\_\_, 131 S.Ct. 1740 (2011) (both the majority and dissenting opinions discuss hypothetical extension of unconscionability arguments under California law to restrictions on “full” and “judicially monitored” discovery in the context of arbitration agreements, seemingly indicating that such restrictions, at least in the setting of arbitration agreements, would not be subject to unconscionability attacks per se under, respectively, the holding of the majority opinion or the minority opinion’s view of existing jurisprudence). *But cf.* *Lau v. Mercedes-Benz USA, LLC*, No. CV 11-1940, 2012 WL 370557, at \*3 (N.D. Cal. Jan. 31, 2012) (holding that *Conception* case did not preclude independent analysis and application of state law unconscionability doctrines to enforceability of arbitration agreements).

<sup>90</sup> *Id.*

<sup>91</sup> *E.g.*, *Rodenbur v. Kaufmann*, 320 F.2d 679, 684 (D.C. Cir. 1963).

jury waiver clause for all claims “arising” from a home lease, finding that in spite of the broad language, it was not intended to apply to tort claims.<sup>92</sup> Generally, while waivers of claims for negligent acts bind parties in most states, those provisions must be “clear, definite and unambiguous” and will not extend to recklessness, gross negligence, or intentional torts.<sup>93</sup> Therefore, courts might view contractual limitations on discovery differently if there are claims of fraud or statutory violations, such as antitrust claims, especially if there is a perception that a party is attempting to use discovery limitations to escape liability for intentional malfeasance.

[43] A related consideration is remembering that while parties can contractually modify their legal obligations with regard to preservation between themselves such clauses will not prevent another person from asserting that an event triggered an independent preservation duty as to which the third person was the beneficiary. While this argument seems axiomatic,<sup>94</sup> there is a danger that contracting parties would overestimate the effect of contract clauses by disregarding the existence of other, non-contracting parties that may be able to argue that a preservation duty was owed to them as a potential litigant.

[44] Accordingly, parties considering the use of contractual discovery limitations should understand that a court may be more willing to consider

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<sup>92</sup> *See id.* at 684.

<sup>93</sup> *Standard Ins. Co. of N.Y. v. Ashland Oil & Ref. Co.*, 186 F.2d 44, 47 (10th Cir. 1951); *see* RESTATEMENT (FIRST) OF CONTRACTS § 574 (1932).

<sup>94</sup> *Compare Hittson v. Chi., Rock Island & Pac. Ry. Co.* 86 P.2d 1037, 1039 (N.M. 1939) (stating that a person can waive any contractual, statutory, or constitutional right “provided it is intended for his sole benefit, and does not infringe upon the rights of others, and such waiver is not against public policy”), *with Point Blank Solutions, Inc. v. Toyobo Am., Inc.*, No. 09-6116-CIV, 2011 WL 1456029, at \*26 (S.D. Fla. Apr. 5, 2011) (finding that reasonable anticipation of investigation by government and suit by Second Chance Inc., did *not* trigger duty to preserve documents for other, then-unknown future plaintiffs).

a challenge to a commercial discovery agreement in a case involving extra-contractual claims of fraud, intellectual property theft, unfair business practices, or cases that impact non-parties to the contract. Likewise, parties should understand that contractual limitations between the parties will not affect any preservation duties that arise separately where other persons could claim that information should have been preserved with respect to any matter involving such persons.

#### **D. Usurpation of Judicial Authority and Conflicts with Procedural Rules**

[45] Similar to judges' occasional refusal to enforce contractual provisions based on overriding public interests, they may also reject provisions that seek to limit discovery by restraining judicial discretion or inherent powers. Judges have the inherent authority to hold persons in contempt of court,<sup>95</sup> to impose sanctions, to directly question witnesses,<sup>96</sup> to call witnesses whom the parties do not wish to call,<sup>97</sup> and to demand the production of evidence.<sup>98</sup> Notably, court opinions and the Restatement of Conflict of Laws have stated that forum courts will always apply their jurisdiction's own procedural rules while deferring to the parties' choice of substantive rules.<sup>99</sup> This authority raises an important issue for parties seeking to limit discovery because the discovery rules are part of the state

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<sup>95</sup> See *Gompers v. Buck Stove & Range Co.*, 221 U.S. 435, 450 (1911) (holding that court's power to hold people in contempt is a "necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the[ir] duties").

<sup>96</sup> FED. R. EVID. 614(b); see *Collins v. Kibort*, 143 F.3d 333, 336 (7th Cir. 1998).

<sup>97</sup> See *United States v. Ostrer*, 422 F. Supp. 95, 103 n.11 (S.D.N.Y. 1976) (stating that the court's power to call witnesses is rarely invoked).

<sup>98</sup> See *McKinley v. S. Pac. Co.*, 181 P.2d 899, 908 (1947).

<sup>99</sup> See *Cent. States, Se. & Sw. Areas Pension Fund v. Aalco Express Co.*, 592 F. Supp. 664, 666 (E.D. Mo. 1984); *Finch v. Hughes Aircraft Co.*, 469 A.2d 867, 887 (Md. Ct. Spec. App. 1984); *Morris v. Watsco, Inc.*, 433 N.E.2d 886, 889 (Mass. 1982); see also *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 122 (1971).

and federal rules of civil procedure.<sup>100</sup> In light of the fact that certain laws are found to be procedural, including general statutes of limitations, discovery-limiting agreements may be at risk for rejection as part of the same group.<sup>101</sup>

[46] On the other hand, it is important to note that these discovery agreements are not intended to force courts to apply the discovery rules of other jurisdictions, which is precisely the reason cited for rejecting parties' choice of procedural rules—it is inefficient and unfair to ask courts to apply rules that they are unfamiliar with, especially when those rules will not regularly have a substantive effect on the outcome of a case.<sup>102</sup> Rather, the goal of the contractual discovery limitations is twofold. First, they function to establish agreed upon specifics to better define common law duties, state rules, and federal rules so that parties can conduct their preservation and production with predictable consequences instead of arguing over interpretation later. Second, the limitations narrow the scope of those same discovery rules, but do so within the procedural framework that those rules have established without exceeding their bounds or introducing procedures from other jurisdictions. These limitations, while they undoubtedly affect procedure, do not replace local rules. They merely attempt to achieve the same clarity and reasonable limits that are the goals of the model orders, scheduling orders, and other court initiatives discussed above.

[47] However, not all courts have foreclosed upon the possibility of enforcing procedural choices. One federal court stated: “[t]his Court does not decide whether the parties to a collective bargaining agreement or a

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<sup>100</sup> See FED. R. CIV. P. 26; *Klonoski v. Mahlab*, 156 F.3d 255, 271 (1st Cir. 1998) (discussing the rules of evidence and their relationship to the federal discovery rules).

<sup>101</sup> See *Aalco Express Co., Inc.*, 592 F. Supp. at 667.

<sup>102</sup> See *Hanna v. Plumer*, 380 U.S. 460, 469 (1965) (relying on the same substantive versus procedural distinctions in the *Erie* doctrine context to hold that the Federal Rules of Civil Procedure apply whenever “the difference between the two [state and federal] rules would be of scant, if any, relevance to the choice of a forum”).

pension trust agreement can . . . provide expressly for a particular [a procedural rule].”<sup>103</sup> This possibility is echoed by the Restatement of Conflict of Laws, which states, “[o]ne factor is whether the issue is one to which the parties are likely to have given thought in the course of entering into the transaction.”<sup>104</sup> Therefore, the parties should include language stating that it is their understanding that these provisions will be enforceable even if they are treated as procedural rules. In fact, this type of broad provision has been used successfully in the past.<sup>105</sup>

[48] Additionally, parties can minimize the chance that uncertainty on this point will be exploited as a way to frustrate the agreement by deciding to indemnify each other for the expenses associated with any effort to dispute the agreement’s enforceability. When used in conjunction with the stipulations discussed in the preceding paragraph, any remaining incentive to dispute the agreement’s enforceability is eliminated. While the contractual understanding that the rules will be enforced even if they are determined to be procedural makes the chances of prevailing on this issue low, the indemnification provisions should remove any incentive to dispute this fact.

[49] It is worth mentioning that courts often look at state public policy to decide choice of law issues alongside the distinction between substantive and procedural rules.<sup>106</sup> We have already stated our position

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<sup>103</sup> *Aalco Express Co.*, 592 F. Supp. at 667.

<sup>104</sup> See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 cmt. a (1971).

<sup>105</sup> See *Mayo v. Dean Witter Reynolds, Inc.*, 258 F. Supp. 2d 1097, 1104-05 (N.D. Cal. 2003) (giving effect to an agreement that “[t]he law of the State of New York will apply in all respects, including but not limited to determination of applicable statutes of limitation and available remedies,” as incorporating procedural elements such as statutes of limitation).

<sup>106</sup> See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496-97 (1941) (reasoning that “[i]t is not for the federal courts to thwart . . . local policies” and finding that states are “free to determine whether a given matter is to be governed by the law of the forum or some other law”).

that public policy concerns will not result in discovery limitations being voided. However, parties can strengthen this position by additionally indemnifying one another against the costs of disputing this aspect of enforceability.

## V. SAMPLE CONTRACTUAL TERMS

[50] We have included in the Appendix a sample contractual provision setting forth our vision of complete eDiscovery limiting provisions. It is our hope that practitioners will be able to use this contractual language as a starting point in negotiating these clauses into their agreements where appropriate.

[51] Broadly, the terms are intended to limit discovery rather than to dictate the manner of discovery. This is in keeping with the goal of letting each court employ its own procedural rules, but prospectively agreeing to define the actions that will be available to parties under those rules. This approach also avoids any issues that could be raised by contractually requiring a party to undertake an action that may be proscribed by privacy law or a blocking statute. Apart from the less controversial undertakings regarding cooperation, these provisions generally focus on what parties are agreeing not to do, rather than what they will do. There are several operative principles embodied in the language in the Appendix:

### 1. **Preservation only required upon notice**

Parties will not be held liable for failures to preserve unless and until a notice of claim has been received from the other party.

### 2. **Adequate preservation steps defined**

A party complying with the requirements set forth in the sample language will be deemed to have met their preservation obligations. Extraordinary steps, such as preservation of backup tapes or volatile memory, are expressly excluded from a party's obligations.

### 3. **Limit collection and search**

The model language includes strict numeric limits on custodians and server based systems. If a party includes data

from a non-enumerated custodian in order to support its own claims or defenses, that custodian is then deemed “in play.”

**4. Require actual knowledge for sanctions**

No party will be held liable for sanctions absent a showing of actual knowledge supported by clear and convincing evidence.

[52] These principles, combined with the indemnification and cooperation provisions, should provide an adequate framework for parties to thoughtfully and cost-effectively manage the eDiscovery process.

## VI. CONCLUSION

[53] Despite speculation that new Federal Rules may be on the horizon, with the states presumably to follow, companies should take matters into their own hands and limit discovery without governmental or judicial intervention in order to save costs. While organizations have not yet tested this concept in the form of contractual agreements that have been litigated, the emergence of local standing orders and local rules supports the general proposition that more clearly defined obligations and procedures help reduce costs and burdens for everyone, including the judiciary. Indeed, where both parties to a commercial contract recognize the problem, a cooperative effort to preemptively limit discovery should produce significant cost savings for both parties with little downside. None of the traditional indicia of unenforceability—such as harm to public interests, usurpation of judicial power, or unequal bargaining power—are present. In such circumstances, it is hard to imagine that courts would be disposed to do anything except find ways to enforce the parties’ agreements regarding preservation and discovery obligations.

[54] In going down the path of self-imposed discovery limitations, companies should nevertheless understand the potential limitations on contractual provisions that purport to limit discovery and preservation duties. First, the agreements are unlikely to apply to circumstances involving non-contractual claims, especially those involving persons that were not involved in the contract. Second, it is also less likely that a court will enforce the limitations when tort or statutory claims are alleged, even

in jurisdictions that permit tort claims to proceed in conjunction with contract claims. Third, it is less likely that the provision would be upheld as part of a contract outside the commercial context (i.e., there is a greater likelihood that courts would refuse to impose such contractual limitations on individual consumers). Fourth, courts always retain inherent authority despite what the parties may agree upon, and a court may exercise that power if it perceives that the limitations are working some fundamental unfairness to the resolution of the dispute.

#### **APPENDIX: SAMPLE CONTRACT LANGUAGE**

- I. Disputes: Discovery. The Parties recognize that the costs of litigation, arbitration, or any other mode of dispute resolution can be substantial. Each Party agrees that in the interests of minimizing dispute resolution costs, speeding resolution time, and decreasing uncertainty of costs, it may be desirable for both Parties to waive certain rights to which it would otherwise avail itself. Accordingly, the Parties agree, with respect to any litigation, arbitration, mediation, or any other claim arising under or related to this Agreement:
- II. Definitions: The following terms, as used herein, have the following meanings:
  - a. “Claim Amount” means the total amount of any costs, claims, liability, or expenses which the claiming Party is seeking from another Party, exclusive of any interest, punitive or exemplary damages.
  - b. “Custodian” means a person having control of specific discoverable documents. An “Individual Custodian” is a person who has control of its own individual files. A “System Custodian” has control of a warehouse, online system, or other server based information store in which data is not necessarily associated with a single Custodian.

- c. “Document” means any information that is fixed in a tangible form and any information that is stored in a medium from which it can be retrieved and examined, whether physically or electronically. Unless specified otherwise, the term “Document” includes both paper and electronically stored information.
- d. “Legal Hold Notice” means a notice distributed to potential Custodians within a Party’s organization which sets forth the basic substance of the dispute and enumerates the documents to be preserved and which notifies the Custodian of its obligations to preserve such documents.
- e. “Notice of Dispute” means a notice by one Party to the designated notice contact of another Party, setting forth the substance of the dispute, the timeframe of the relevant facts, a listing of initial known participants, the amount in dispute, and making specific reference to this Agreement and the preservation obligations specified herein.
- f. “Producing Party” means the Party upon which a discovery request has been made.
- g. “Requesting Party” means the Party making a request for discovery.
- h. “Server Based Systems” are centralized computer systems on a network that are shared by multiple users of the network, including but not limited to email hosts, web servers, FTP sites, and databases. Certain systems, such as email systems, can be considered Server Based Systems for certain functions such as logging and user privileges, but data such as individual email mailboxes are considered part of an Individual Custodian’s information.

### III. Preservation of Information.

- a. Within a reasonable time after receipt of a Notice of Dispute, the Parties shall:
  - i. Issue a Legal Hold Notice to its current employees directly involved with the subject matter of the dispute directing those employees to preserve relevant documents in their possession (with notices sent to additional current employees directly involved as those additional employees are identified);
  - ii. Take reasonable steps to preserve responsive Documents in the custody of current employees subject to a Legal Hold Notice who are terminated or transferred; and
  - iii. Take reasonable steps to preserve responsive Documents located in Server Based Systems.
- b. No Party shall be required to preserve any Documents or other information beyond these steps. Specifically excluded from preservation are [include as appropriate]:
  - i. Backup tapes;
  - ii. Information or Documents in the possession of third party service providers;
  - iii. Server logs;
  - iv. Information stored in volatile memory; and
  - v. Transient metadata.
- c. No party is obligated to take preservation efforts prior to receiving the written Notice of Dispute and the Parties agree that they will not argue that any failure to preserve information prior to receiving the written Notice of Dispute is culpable, wrongful, or sanctionable in any fashion.
- d. The Parties acknowledge that these preservation steps may be less than what might be otherwise required absent this agreement and may be insufficient to preserve many documents that might ultimately be discoverable in litigation, but expressly agree to limit the Parties' preservation obligations as set forth herein.

IV. Production of Documents.

a. Determination of Individual Custodians. The parties agree that:

- i. In matters where the Claim Amount involves less than \$5 Million, each Party shall only be required to collect, search and produce Documents from no more than five (5) Individual Custodians directly involved in the dispute.
- ii. In matters where the Claim Amount is greater than \$5 Million, the collection and production shall be limited to no more than twenty (20) Individual Custodians.
- iii. The Requesting Party shall be entitled to identify the Individual Custodians specified in paragraphs i. and ii. above from whom documents are to be collected, by name or job responsibility.
- iv. In the event that a Producing Party voluntarily produces Documents from an Individual Custodian not designated by a Requesting Party pursuant to paragraphs i. and ii. above (i.e. to support its own claims or defenses), such Producing Party may be required, upon request of the Requesting Party, to collect, search and produce Documents from such Individual Custodian.

b. Server Based Systems. The Parties agree that, upon request, each Party shall furnish to the other a listing of those Server Based Systems which are likely to contain responsive Documents, including the name of the system, a brief description of the system, a brief description of the likely responsive data stored in the system, a good faith estimate of the number of records likely to be responsive and their size, and the name and title of the System Custodian. Each Party shall only be required to collect, search, and produce

Documents from no more than three (3) Server Based Systems as requested by a Requesting Party.

V. Liability.

- a. No Party shall be liable for the deletion or destruction of any Discovery Materials unless such Party had actual knowledge of the relevance of such Discovery Materials at the time of deletion or destruction [after receiving receipt of a written Notice of Dispute.]<sup>107</sup>
- b. Absent a claim of fraud, misrepresentation, or bad faith supported by clear and convincing evidence, no Producing Party shall be liable for, and no Requesting Party shall seek any remedy for spoliation, adverse inference instruction or other sanction from any Producing Party provided such Producing Party has complied with its obligations under this Section.

VI. Procedures and Cooperation.

- a. The Parties agree that any protective order, case management order, or similar order governing preservation and discovery shall incorporate the terms of this Section. The Parties further agree that they shall agree to an order pursuant to Rule 502(d) of the Federal Rules of Civil Procedure or similar provision providing for the return of privileged documents and preventing the waiver of such privilege in the case of such returned documents.
- b. The Parties may, by mutual agreement, modify any of the provisions of this Section. The Parties agree to cooperate to the extent practical in the conduct of discovery. Specifically, the Parties shall endeavor to:
  - i. Utilize internal ESI discovery “point persons” to assist counsel in preparing requests and responses;

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<sup>107</sup> The bracketed language is optional.

- ii. Exchange information on relevant data sources, including those not being searched, or schedule early disclosures on the topic of Electronically Stored Information;
  - iii. Jointly develop automated search and retrieval methodologies to cull relevant information;
  - iv. Promote early identification of form or forms of production;
  - v. Develop case-long discovery budgets based on proportionality principles; and
  - vi. Consider court-appointed experts, volunteer mediators, or formal ADR programs to resolve discovery disputes.
- VII. Indemnification: If any Requesting Party seeks to compel a Producing Party to require greater preservation, collection, or production requirements than are set forth herein (or seeks relief based upon the other party's failure to preserve, collect or produce documents beyond the obligations contained herein), or otherwise breaches any of the provisions of this Section, or challenges the enforceability of any provisions of this Section, the Requesting Party shall indemnify the other Party for any costs associated with defending against such efforts and any costs incurred as a result of any increased requirements that may result from such efforts, including all reasonable legal fees, outside vendor costs, and internal expenses associated with the collection, review, redaction, and production of such documents.