

# Disputed Accounts, Litigation Holds and Preserving Emails & Electronic Information: Best Practices for the Credit (and Sales) Team

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When a customer fails to pay, the first step of the credit team is to develop a collection strategy that includes attempts to preserve the trade relationship. As the decision tree (Fig 1) sets out, the credit team may consider a number of collection strategies to bring the account current while preserving sales going forward. The key to maintaining the relationship is the customer's consent to a negotiated resolution, whether that means immediate payment, including a possible discount of the face amount of the invoices, or payment over time, backstopped by credit enhancements such as a personal guaranty or junior security interest.

However, some customers refuse to respond to bring the account current, or unjustifiably dispute the balance. In that setting, with the trade relationship terminated, the credit team may be forced to resort to a third party to send a final

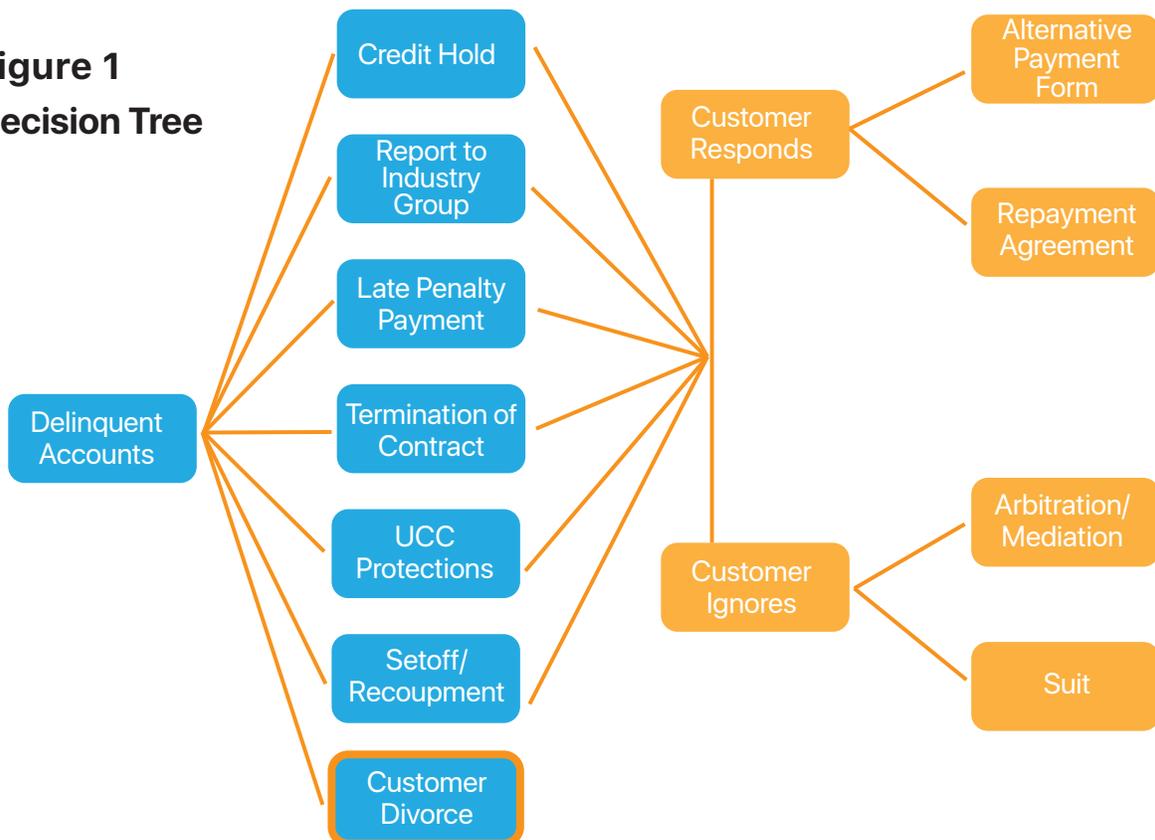
demand for payment or file suit to collect the delinquent account.

As the process timeline (Fig 2) sets out, the discovery process is at the litigation stage where the adversaries request and exchange information from one another.

A part of a high dollar collection suit, among other forms of supplier litigation, includes discovery (a request for facts and documentation) being served to establish the debtor's liability and confirming damages. The former customer too, often serves discovery on the supplier to establish facts to support their dispute.

The customer's discovery commonly includes requests for the supplier's internal emails and electronically stored information (ESI), such as from the credit team to the sales team. Courts

**Figure 1**  
**Decision Tree**



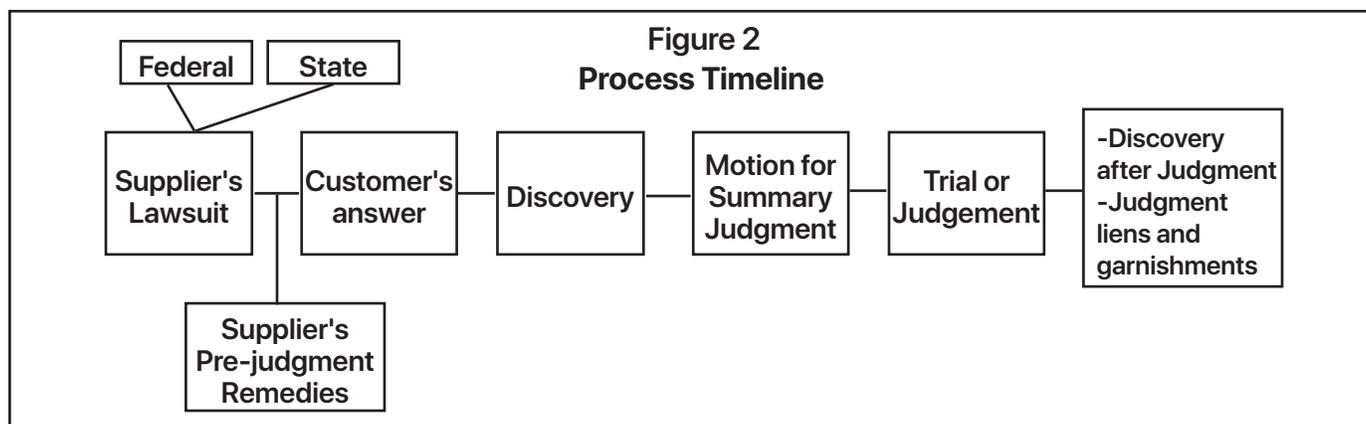
have recently underscored the duty of parties to litigation to preserve emails and ESI that may relate to the litigation. As a recent case discussed below highlights, failing to preserve emails can result in extraordinary sanctions.

However, the responsibility of the credit team (and other teams within the supplier) to preserve emails and ESI are not just when the litigation is commenced, but even when litigation is threatened, such as through a demand letter that may prompt an internal litigation hold notice. And litigation, or the threat of litigation, of course, can be initiated by the customer, such as a challenge to the quality or timeliness of delivery of the supplier's product or alleged antitrust constraints. These types of threats or demands can result in a supplier's duty to preserve emails or ESI.

have found that when there is a credible threat that may involve litigation, a hold should be issued, whether initiated by the supplier or the customer.

An internal notice should be issued to suspend routine email and ESI destruction procedures and to implement a hold in the event of litigation. The emails and ESI must then be collected and produced for use in discovery, if needed. With the 2015 amendments to the Federal Rules of Civil Procedure, parties can be sanctioned for failure to preserve emails and ESI.

For the credit team contemplating initiating a collection lawsuit, for example, that should result in a duty to preserve emails and ESI before the lawsuit is filed with the court.



### Litigation Hold: What Is It?

The credit department now documents its sales electronically, whether in emails with the customer or through documents shared and stored electronically. When the disputed account may lead to litigation, the evidence surrounding that dispute is commonly found through emails with the customer. Thus, emails and ESI can be the primary evidence with which a court or jury rules on the disputed account.

Given the importance of emails and ESI relating to a disputed account, the duty to produce emails and ESI is triggered at the discovery stage of litigation. If this occurs, what is the duty of the credit team and other teams to preserve the information, and when does it arise?

The issue of when relevant e-mails and ESI should be preserved under a litigation hold depends upon whether the supplier (or the customer, if the customer has made the litigation threat) reasonably anticipates litigation. To determine what is reasonably anticipated, courts

### Failing to Preserve Emails: A Recent (Costly) Example

In 2012, Plantronics, Inc. (Defendant) was sued by a competitor for allegedly violating the Sherman Act for restraining trade with the distribution of its product.<sup>1</sup>

During the litigation, it was revealed that a Defendant's sales team member allegedly deleted thousands of emails, along with instructions to staff to do the same, relevant for discovery in the antitrust case. The court found the Defendant "destroyed evidence in bad faith" and sanctioned Defendant \$3 million, and \$1.9 million in Plaintiff's attorney's fees, for deleting the emails subject to discovery, some of which were not recovered. The ongoing litigation is dealing with whether a jury should be advised to draw an adverse inference from the deleted emails.

<sup>1</sup> GN Netcom, Inc. v. Plantronics, Inc., 967 F. Supp. 2d 1082 (D. Del. 2013). GN Netcom, Inc. v. Plantronics, Inc., No. CV 12-1318-LPS, 2016 WL 3792833 (D. Del. July 12, 2016).

As a result of the sanction, the Defendant may be barred from taking federal contracts. A takeaway is if the electronic discovery is not handled correctly, government work could be at risk in addition to fines and other court sanctions.

### **Best Practices for the Credit and Sales Team**

With a disputed account that is viewed as likely to lead to litigation, the credit team should notify house counsel, as well as the IT, management, finance and sales teams, that a litigation hold notice should be issued (which requires the preserving of emails and ESI) to those within the company who may have information about the claim or any customer defenses. Likewise, if the customer has responded to a demand letter with threats of litigation, or the customer has issued a litigation hold demand or is otherwise threatening litigation, the credit team should preserve emails and ESI.

Often in-house counsel or outside counsel notifies all within the organization that may have emails and ESI pertinent to the dispute that they must preserve relevant emails and ESI, and confirm that they have complied with this notification.

The credit team's duties under a litigation hold are to immediately put a hold on the routine destruction of the customer's records (even though they are no longer doing business with the customer), and hold ESI and hard copies of documents related to the account, such as credit applications, invoices, credits and email exchanges between credit and sales.

The credit team may work with IT and counsel to ensure all data sources are preserved, including those stored on servers, CDs, hard drives, desktops and portable devices.

The internal litigation hold notice should make it clear the credit team is to preserve documents until they have been told that the litigation hold has been released. The credit team may consider adopting an automated system to comply with the notice.

### **Takeaways for the Credit Team**

Courts take a harsh view of emails or ESI that are not preserved when litigation is anticipated or commenced, which may lead to court sanctions or even a judgment in favor of the customer. Given the credit team is responsible for collection on accounts often valued in the millions, they are often the first to learn of customer disputes that may lead to litigation or other adversarial proceedings. Given this, the credit team should be trained on initiating and responding to litigation holds, and should have a readiness plan to implement email and ESI preservation procedures.

Suppliers and their former customers are often seeking discovery sanctions for not preserving emails. In light of this, if there is a remote chance of litigation, such as when a customer's response to a demand letter alleges the product was defective and cost them meaningful losses or that they paid a higher price for orders violating the Robinson Patman Act, the credit team's best practice is to give notice to IT and counsel and to preserve emails and ESI regarding the account to avoid the risk of sanctions. A hold should be implemented without delay, as otherwise a former customer may contend that emails or ESI pertinent to establishing the basis of its dispute were destroyed by the supplier.

Best practice by the credit team to preserve emails and ESI is essential to avoiding unnecessary and costly court fines and other sanctions.

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