THE BUZZ
REDGRAVE LLP
ON INFORMATION MATTERS

FEBRUARY 9, 2012

Judge Affirms *Pippins v. KPMG* Preservation Scope, Encourages Transparency

On February 3, Judge Colleen McMahon of the U.S. District Court for the Southern District of New York affirmed the ruling of Magistrate Judge James Cott, who in October 2011 denied defendant KPMG's request for a protective order in *Pippins v. KPMG*.[1] The Plaintiffs are former employees ("Audit Associates") of KPMG who argue that they were improperly classified as "exempt" from federal laws mandating overtime for certain occupations. The Magistrate rejected KPMG's motion to limit its preservation duties to a "random sampling of a small number of hard drives," in lieu of thousands of hard drives belonging to the potential claimants.[2] The Magistrate ruled that the record in front of him did not allow him to accept KPMG's claims that the information on the hard drives was duplicative, that preserving the hard drives would be overly expensive, or that KPMG's sample would be random and sufficiently representative of the group.

Additionally, Magistrate Judge Cott was wary of applying proportionality considerations at this early stage, stating that: "[w]ith so many unknowns involved at this stage in the litigation, permitting KPMG to destroy the hard drives is simply not appropriate at this time."[3] In response, KPMG took their objections to Judge McMahon. The case even spurred the submission of an amicus brief by the U.S. Chamber of Commerce.

Sounding a common theme in discovery disputes, Judge McMahon first lamented that KPMG and Plaintiffs had been unable to come to an agreement on the disposition of the hard drives. It was clear, however, that she blamed KPMG for this failure based upon her review of the record:

> Plaintiffs informally requested multiple times that … KPMG let it review five randomly selected hard drives so that Plaintiffs "can determine whether this issue is even worth fighting about" … [KPMG] insisted it could not produce even one hard drive for inspection by Plaintiffs. It also refused to respond to any question regarding the content of the hard drives.[4]

---

[1] *Pippins v. KPMG*, No. 11 Civ. 377(CM)(JLC) (S.D.N.Y. Feb. 3, 2012), http://pdfserver.amlaw.com/legaltechnology/Pippins_v_KPMG_Order_20120203.pdf.
[2] *Pippins v. KPMG*, No. 11 Civ. 377(CM)(JLC), 2011 WL 4701849 (S.D.N.Y. Oct. 7, 2011).
[3] *Id.* at *8.
[4] *Pippins*, supra note 1, at *8-9.

Judge McMahon stated that if she had been contacted regarding this impasse, she "would have immediately ordered KPMG to produce a small number of hard drives"[5] for Plaintiffs to review. The Judge took the position that party discussions about sampling and search protocols should be made with some measure of transparency and informational symmetry to achieve cooperation.

While the Judge called it "unreasonable" for KPMG to refuse to turn over a single hard drive to the Magistrate,[6] harsher words were reserved for KPMG's objections to the Magistrate's ruling: "[i]t smacks of chutzpah (no definition required) to argue that the Magistrate failed to balance the costs and benefits of preservation when KPMG refused to cooperate with that analysis by providing the very item that would, if examined, demonstrate whether there was any benefit at all to preservation."[7]

Judge McMahon stated that KPMG "has had ample opportunity to make its case for a protective order," and therefore committed to deciding the issue as presented. First, noting that parties are bound to preserve relevant data (with relevance being "interpreted broadly"), the Judge found that because "[t]he information on the hard drives will likely demonstrate when the Audit Associates were working (hours) and what they did while at work (duties) … [it] is obviously relevant."

However, because courts are required by Federal Rule of Civil Procedure 26(b)(2)(C)(iii) to limit discovery if the anticipated expense outweighs the likely benefit of discovery, Judge McMahon noted that she "could nonetheless grant the motion for a protective order" on proportionality grounds. Citing to *Orbit One Communications* and *The Sedona Conference Commentary on Proportionality in Electronic Discovery*, the Judge found that "[p]roportionality is necessarily a factor in determining a party's preservation obligations," while also reconciling that view with the caution expressed in Magistrate Judge Cott's opinion by stating that some restraint must be exercised when applying proportionality standards to preservation orders, but that it is "at the very least relevant … even if not determinative."[8]

Despite the fact that proportionality could properly be considered at this stage, Judge McMahon stated that there was no way for her to "conclude that the cost of preserving the hard drives outweighs its benefit … because the record before [her was] devoid of the information necessary to conduct such an analysis." Judge McMahon continued, describing the situation as "missing one side of the scale (the benefits)."[9] In keeping with her position that KPMG had been given several opportunities to present a small number of hard drives to Magistrate Judge Cott, Plaintiffs, or herself, Judge McMahon denied KPMG's motion in its entirety.

This opinion highlights the need for clients to carefully consider what is needed early in the process to demonstrate burdens, reflects the opportunities for parties to use techniques such as sampling to

---

[5] *Id.* at *9.
[6] *Id.* at *15.
[7] *Id.*
[8] *Orbit One Commc'ns, Inc. v. Numerex Corp.*, 271 F.R.D. 429, 436 n. 10 (S.D.N.Y. 2010).
[9] *Pippins*, supra note 1, at *19-20.

address burden issues, as well as provides a roadmap for parties and courts to inject proportionality considerations into preservation decisions. It also highlights the need for experienced counsel to help clients prepare for and make the best presentation of facts and evidence regarding relevance and burden in the "meet and confer" and motion practice settings.

Contact Us: For further information or if you have any questions regarding this Alert, please contact your Redgrave LLP attorney or Managing Partner Victoria Redgrave at (202) 681-2599 or vredgrave@redgravellp.com.