

FEBRUARY 7, 2012

## A Summary of Significant Preservation Case Law

**Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC, No. 05 Civ. 9016(SAS), 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010) – negligence and gross negligence results in monetary sanctions.**

In Pension Committee, plaintiffs filed suit to recover losses from investments in funds managed by defendant. As discovery progressed, defendant alleged that plaintiffs failed to produce many documents that were relevant to the case and that plaintiffs falsely reported their preservation and document production efforts. Defendant sought sanctions for these issues.

In this often-cited decision, the court determined that six plaintiffs acted in a grossly negligent manner with regard to the preservation and production of files. The court deemed the failure to issue a written legal hold notice, inadequate searches, the destruction of backup data, and the submission of false statements regarding the preservation and production process to be worthy of sanctions. The ultimate order included monetary sanctions (fees and costs related to the motion for sanctions) and an adverse instruction to the jury regarding the deficiency of the preservation efforts. The court determined that seven other plaintiffs acted in a negligent manner, primarily due to the lack of a timely, written legal hold notice. The sanctions imposed on these parties were monetary sanctions only.

In determining the severity of sanctions, the court considered the degree to which plaintiffs were negligent in failing to preserve all relevant documentation. The court did not consider the actions of plaintiffs to be willful, but rather viewed the actions as exhibiting varying degrees of negligence. Further, the court highlighted that appropriate preservation efforts must include the timely issuance of a written legal hold notice. In its decision, the court re-emphasized the view that perfection is not expected, but that a party must make documented, good faith efforts to preserve relevant documents following the start of the anticipation of litigation.

**Rimkus Consulting Group, Inc. v. Cammarata, Civil Action No. H-07-0405, 2010 WL 645253 (S.D. Tex. Feb. 19, 2010) – spoliation in bad faith leads to severe sanctions.**

In Rimkus, plaintiff alleged that defendants violated non-compete and non-solicitation agreements after leaving the employ of plaintiff and entering into direct competition with plaintiff. Even after the filing of the lawsuit, which signaled the clear duty to preserve, defendants deleted emails and files relevant to the case. Some of the files were later recovered and were determined to support allegations by plaintiff that defendant solicited plaintiff's clients and used confidential information to compete with plaintiff.



The court determined the spoliation in this case to be willful, with the specific purpose of delaying and interfering with discovery. Unrelated to the lawsuit filed by plaintiff, defendants also planned to file their own suit against plaintiff. This intention highlighted a further anticipation of litigation, with the accompanying duty to preserve potential evidence. The court ultimately imposed severe sanctions, including the issuance of an adverse inference at trial regarding the emails and other files that were deleted, as well as the award of costs related to the spoliation issue.

**Jones v. Bremen High Sch. Dist. 228, 2010 WL 2106640 (N.D. Ill. May 25, 2010) – grossly negligent preservation efforts lead to sanctions.**

In the Jones discrimination case, plaintiff filed an EEOC complaint alleging racial and disability discrimination and later added a claim of retaliatory firing. In an attempt to preserve potential evidence, defendant initially directed three employees involved in the underlying matter preserve any items that they considered to be relevant, but did not issue a legal hold until more than a year after the initial complaint was filed. Although defendant began to archive all email communication less than one year after case was filed, the related individuals could in the interim have permanently deleted emails, including those relevant to the case.

The court ultimately imposed sanctions, determining that defendant exhibited gross negligence and recklessness in its preservation efforts. These sanctions included attorney fees and costs for the preparation of the motion for sanctions, an instruction to the jury that defendant had the duty to preserve data but did not do so, and costs for deposing witnesses regarding the eventually produced emails.

In determining the severity of sanctions, the court considered whether or not defendant was willful in its poor preservation efforts. Concluding that the conduct was not willful, the court declined to impose harsher sanctions such as an adverse inference or summary judgment.

**Victor Stanley, Inc. v. Creative Pipe, Inc., Civil No. MJG-06-2662, 269 F.R.D. 497 (D. Md. 2010) – severe sanctions for purposeful spoliation.**

In Stanley, plaintiff filed suit for copyright and patent infringement, as well as unfair competition, alleging that defendant had downloaded copyrighted materials from plaintiff's website and presented the materials as original. Defendant denied downloading the materials, but took several steps to destroy electronically stored information (ESI) that indicated otherwise.

The steps taken, or not taken, by defendant included failing to issue a legal hold after litigation was filed, deleting ESI from computers (and rendering them unrecoverable) even after the court issued a preservation order, deleting emails clearly relevant to the litigation, and destroying temporary Internet files (which would have shown whether plaintiff's website had been visited). Among other sanction



motions, plaintiff moved for sanctions against defendant for spoliation of evidence, sought attorney fees and costs associated with discovery issues and the motion for sanctions, and moved for summary judgments on several counts (including copyright infringement and unfair competition).

Plaintiff's motion was granted in part and denied in part. The court determined that defendant failed to take reasonable and proportionate actions to preserve potential evidence, even after litigation was filed and several court orders were issued. The court found that “[d]efendants took repeated, deliberate measures to prevent the discovery of relevant ESI, clearly acting in bad faith,”<sup>1</sup> and accordingly imposed severe sanctions. These sanctions included attorney fees and costs incurred by the plaintiff and a default judgment on the issue of copyright infringement.

In determining the severity of the sanctions, the court emphasized that perfection in the discovery process is not the standard to which parties are to be held. However, reasonable, proportional, and good faith actions, though they may still result in the loss of some ESI, are expected. Deliberate attempts to avoid discovery will open the door to the imposition of sanctions.

**Orbit One Communications, Inc. v. Numerex Corp., 271 F.R.D. 429, 2010 WL 4615547 (S.D.N.Y. Oct. 26, 2010) – spoliation without relevancy may not result in sanctions.**

In Orbit One, plaintiffs filed suit alleging that defendant violated employment agreements and an asset purchase agreement executed between the parties. After several counterclaims, defendant sought sanctions for spoliation, including an adverse inference and attorney fees. The alleged claim of spoliation highlighted the lack of a written legal hold, poor communication between plaintiff and Orbit One IT personnel regarding a separate legal hold as well as the anticipation of litigation in this case, the deletion of data from the Orbit One file server, the deletion of emails, and the removal of a laptop hard drive.

The court determined that while plaintiff did not apply best practices in the area of preservation and production, plaintiff's conduct did not rise to a willful attempt to destroy discoverable information. Likewise, although some spoliation did occur, the court did not impose sanctions, because defendant did not demonstrate that the material in question was relevant and/or not otherwise available as evidence. Notably, the court did not consider the lack of a written legal hold to be *per se* negligent behavior.

Unless otherwise noted, the above information was compiled from Westlaw case summaries. Additional information about each of the cases may be found on Westlaw, as well as through other publicly available sources.

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<sup>1</sup> *Stanley*, 269 F.R.D. 497 at 531.



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