The E-Discovery Digest

A periodic publication on notable decisions relating to key discovery topics

Attorney-Client Privilege/Work-Product Decisions

Decisions Protecting Against Disclosure

Privilege Protection Applies Where Legal and Business Investigations Are Kept Separate

***In re Target Corp. Customer Data Security Breach Litigation*, No. 14-2522 (PAM/JJK), 2015 WL 6777384 (D. Minn. Oct. 23, 2015)**

Magistrate Judge Jeffrey J. Keyes of the U.S. District Court for Minnesota rejected the class action plaintiffs' request to access materials created in the course of Target's investigation of its 2013 data breach. The plaintiffs argued that Target improperly asserted privilege and work-product claims with respect to its Data Breach Task Force, which Target established in response to the data breach claims that precipitated the multidistrict litigation (MDL) proceeding. The plaintiffs argued that these communications and documents were not protected by the attorney-client privilege or the work-product doctrine because "Target would have had to investigate and fix the data breach regardless of any litigation, to appease its customers and ensure continued sales, discover its vulnerabilities, and protect itself against future breaches." The plaintiffs also argued that Target improperly asserted privilege with respect to communications and documents involving a third party, Verizon, which was also involved in the investigation. In response, Target explained that it had conducted a "two-track investigation," with one part of the investigation motivated by business concerns and the other conduced at the request of the legal department in anticipation of litigation. According to Target, it was only claiming privilege with respect to communications and materials connected to the legal investigation. Further, Target explained that the only Verizon employees involved in the legal investigation were retained by Target's outside counsel to "enable counsel to provide legal advice to Target, including legal advice in anticipation of litigation and regulatory inquiries." The court accepted Target's explanation and found, based on an *in camera* review of the documents at issue, that the documents related to the "litigation" investigation and were therefore subject to protection.

Common-Interest Doctrine Protects Privileged Documents Shared by Borrower With Its Lender

***Schaeffler v. United States*, 806 F.3d 34 (2d Cir. 2015)**

Circuit Court Judges Ralph K. Winter Jr., John M. Walker Jr. and Christopher F. Droney held that the IRS could not compel disclosure of otherwise privileged documents that a borrower shared with its lender in light of the common-interest doctrine. The loan recipient at issue had attempted to acquire a minority interest in a company, funded by loans from a bank consortium. When the acquisition had unintended consequences that threatened the borrower's solvency and ability to repay the consortium, the borrower decided to undertake a corporate restructuring. The borrower then retained Ernst & Young and Dentons US LLP to advise on the federal tax implications of the refinancing and restructuring, as well as on possible future litigation with the IRS. During this process, the borrower, Ernst & Young, and Dentons shared documents with the consortium, which the IRS argued constituted a waiver of the attorney-client privilege. The district court agreed and denied the borrower's request to quash the IRS's subpoena for these documents, but the Second Circuit reversed. According to the appellate court, the borrower's attorney-client privilege was not waived by disclosure to the consortium because both entities shared a common legal interest — namely, ensuring that the borrower remained solvent and could repay the loan the consortium had given it. The appellate court also concluded that the work-product doctrine protected documents prepared by Ernst & Young in connection with analyzing the tax treatment of the refinancing and restructuring, finding that the borrower "believed litigation was highly probable" at the time the tax advice was prepared and Ernst & Young's work was done in anticipation of that litigation.

Work-Product Protection Is Not Waived in Cases Involving Claims Against Insurer for Unfair Settlement Practices

***Calandro v. Sedgwick Claims Management Services, Inc.*, No. 15-10533-PBS, 2015 WL 8082419 (D. Mass. Dec. 7, 2015)**

Magistrate Judge Judith G. Dein of the U.S. District Court for the District of Massachusetts rejected arguments made by the plaintiff in a bad-faith insurance action that there is a "blanket waiver" of work-product protection in cases involving claims of bad-faith settlement practices. According to the court, a party seeking discovery of work-product materials in bad-faith insurance cases — as in any other case — must prove a "substantial need" for the materials and that it cannot obtain their "substantial equivalent" without undue hardship. The court held that the plaintiff could not make such a showing. The plaintiff had sought discovery of materials created by the defendants' attorney in connection with the case, arguing that the plaintiff had a substantial need for the documents because they were relevant to the defendants' argument that it acted in good-faith reliance on counsel. But, as the court explained, the defendant had previously acknowledged that it had waived privilege with respect to communications with its lawyers and materials that the lawyers had provided to it, and had already produced those documents to the plaintiff. The court held that the work-product materials the plaintiff now sought had not been disclosed to the defendant and therefore were not relevant to the defendant's good-faith reliance defense. Additionally, the court held that, even though the defendant had waived privilege, the defendant's attorney was still entitled to contest disclosure of its own work-product materials. Accordingly, the court refused the plaintiff's request for production.

Decisions Ordering Disclosure

In Camera, Multifactor Review Necessary to Determine Whether Fiduciary Exception to Privilege Applies in Shareholder/Investor Actions

***Nama Holdings, LLC v. Greenberg Traurig LLP*, 133 A.D.3d 46, 18 N.Y.S.3d 1 (N.Y. App. Div. 2015)**

Justice Rolando T. Acostia of New York's Supreme Court, Appellate Division, reversed and remanded an order finding that the "fiduciary exception" to the attorney-client privilege applied where the lead investor in an investment group sought to discover communications between managers of the investment group and the group's attorneys. As the court explained, the "fiduciary exception" to privilege protection applies where a shareholder or investor in a company brings suit against corporate management and can establish good cause to discover management's communications with corporate counsel. The court noted, however, that whether an investor can establish "good cause" to invade such privileged communications turns on a number of factors, including — but not limited to — the "necessity or desirability of the [investor] having the information," whether the communication at issue "is of advice concerning the litigation itself," and "the extent to which communication is identified versus the extent to which the [investor is] blindly fishing." Because the trial court did not consider these factors, the Appellate Division reversed and remanded for a full "good cause" analysis. The court made clear that such an analysis would require an *in camera* review of the communications at issue to determine whether the circumstances justify the application of the exception.

Documents Related to Third-Party Investigation Regarding ADA Compliance Not Protected by Attorney-Client Privilege or Work Product

***Heinzl v. Cracker Barrel Old Country Store, Inc.*, No. 2:14-cv-1455, 2015 WL 6604015 (W.D. Pa. Oct. 29, 2015)**

Magistrate Judge Robert C. Mitchell of the U.S. District Court for the Western District of Pennsylvania held that reports prepared by third parties assessing the defendant's compliance with the parking accessibility requirements of the Americans with Disabilities Act (ADA) and other related documents were not protected by the attorney-client privilege or work-product doctrine. According to the court, the materials at issue did not qualify for privilege protection because they were passed between a third-party consultant hired by a restaurant chain to survey some of its restaurant locations for ADA compliance issues and employees of the chain. Because the materials and communications were not received by, sent at the request of or involve corporate counsel, the privilege was inapplicable. Further, the court noted that the surveys at issue constituted nonlegal business guidance and were used to facilitate business decisions. And while the defendant argued that some of the documents contained actual attorney-client communications, it failed to identify those particular documents or establish that privilege applied. The court also found that the documents did not qualify for protection under the work-product doctrine. As the court explained, the third-party investigation would have been conducted — and the resulting materials created — regardless of potential litigation. The court also noted that even though the investigation related to ADA issues that could lead to future litigation, the investigation itself was performed in the ordinary course of business and therefore the doctrine did not apply.

Party Implicitly Waives Attorney-Client Privilege as to Attorney Bills by Bringing Claims for Attorneys' Fees and Costs

***Devault v. Isdale*, No. 615CV135ORL37TBS, 2016 WL 25956 (M.D. Fla. Jan. 4, 2016)**

Magistrate Judge Thomas B. Smith of the U.S. District Court for the Middle District of Florida held that a plaintiff who put her attorneys' billing statements at issue in a suit could not claim privilege with respect to those documents. The plaintiff in the case asserted breach of contract, breach of fiduciary duty, legal malpractice and professional negligence claims against the defendant based on the defendant's provision of wealth management services to the plaintiff and the plaintiff's ex-husband. During the time period in which the defendant was providing those services, the plaintiff and her husband commenced divorce proceedings, in which the plaintiff was represented by Baker & Hostetler. In her suit against the defendant, the plaintiff argued that her divorce attorneys' "billing statements and summaries" were documents that supported her computation of damages caused by the defendant's alleged misconduct. The plaintiff thereafter produced heavily redacted copies of Baker & Hostetler invoices to the defendant, which the defendant complained were almost useless in determining and rebutting that part of the plaintiff's damages claim. After reviewing copies of the redacted invoices, Judge Smith agreed with the defendant. The court found that by including hundreds of thousands of dollars of attorneys' fees and costs in her damage claim, the plaintiff implicitly waived the attorney-client privilege with respect to the invoices that documented those fees and costs.

Ohio Law Applies Exception to the Attorney-Client Privilege in Cases Based on Allegation of Insurer's Bad Faith

***Decker v. Chubb National Insurance Co.*, No. 1:15-cv-88, 2015 WL 5954584 (S.D. Ohio Oct. 14, 2015) *report and recommendation adopted*, 2015 WL 6872937 (S.D. Ohio Nov. 9, 2015)**

Magistrate Judge Karen L. Litkovitz of the U.S. District Court for the Southern District of Ohio, whose report was subsequently adopted by the district court, held that an insurer was required to produce an insurance claim file otherwise protected by privilege in a case alleging that the insurer acted in bad faith in failing to comply with the terms of an insurance policy. The plaintiffs brought claims for breach of contract and failure to act in good faith against their insurer based on the insurer's handling of a claim resulting from a fire on the plaintiffs' property. As part of their discovery requests, the plaintiffs sought the insurance claims file. The insurer produced heavily redacted documents and withheld documents post-dating the service of the plaintiffs' complaint completely, asserting attorney-client privilege and protection under the work-product doctrine. The plaintiffs argued that all of the material should be produced because Ohio law recognizes an exception to the attorney-client privilege for insurance claims file documents that may "cast light" on whether an insurer acted in bad faith. In response, the insurer argued that the court first needed to determine whether the insurer had made a *prima facie* case that it had a good-faith basis to deny the claim, in which case the insurer could not have acted in bad faith and the exception would not apply. The court disagreed, finding that the insurer's approach would circumvent the exception and require the court to prematurely assess the merits of the claims before discovery was complete. Accordingly, the court allowed discovery of the claims file.

Spoliation Decisions

Sanctions Granted/Evidence of Spoliation Admitted

Adverse Inference Instruction Appropriate Where Key Evidence Destroyed in Violation of Federal Statute

***Fitz Austrum v. Federal Cleaning Contractors, Inc.*, No. 14-cv-81245-KAM, 2016 WL 93404 (S.D. Fla. Jan. 8, 2016) (to be reported in F. Supp. 3d)**

U.S. District Court Judge Kenneth A. Marra of the Southern District of Florida granted spoliation sanctions in the form of an adverse inference instruction based on the defendant's loss of the plaintiff's employment application, which was of central importance to the plaintiff's employment discrimination case. Under Title VII of the Civil Rights Act, the defendant was legally required to maintain the plaintiff's application for one year, and once the plaintiff filed his lawsuit, the preservation period automatically extended to the conclusion of the litigation. Nevertheless, the plaintiff's application was destroyed. The plaintiff moved for spoliation sanctions. The plaintiff conceded that the employer did not have any "malicious motive" in destroying the application, but argued that the employer's violation of federal law alone was sufficient to warrant an adverse inference. The court held that bad faith is required to impose an adverse inference instruction. Quoting the Eleventh Circuit, the court noted that a finding of "bad faith" does not necessarily require "malice" and instead requires weighing "the degree of the spoliator's culpability against the prejudice to the opposing party." The court did note, however, that more than mere negligence is required. According to the court, an adverse inference instruction was appropriate here because: (1) the plaintiff was prejudiced by loss of the application; and (2) the employer's conduct rose above mere negligence, as the employer had "no legitimate excuse for having a practice of discarding applications that it had a legal obligation to preserve under federal regulations."

Adverse Inference Instruction May Be Appropriate Where Spoliator Was Merely Negligent if There Is Proof That the Lost Evidence Would Have Been Helpful to Adverse Party

***Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, No. 153, 2015 WL 8676955 (N.Y. Dec. 15, 2015) (to be reported in N.E.3d)**

Judge Eugene F. Pigott, Jr. of the Court of Appeals of New York, the state's highest court, reversed an order by the state's intermediate court, which overturned a trial court order imposing an adverse inference at trial based on a defendant's loss of evidence. There, one of the defendants in the action failed to institute a litigation hold and, as a result, computer crashes led to the loss of a significant number of electronic documents. The trial court held that the defendant's conduct constituted gross negligence and therefore it could be presumed that the lost documents would have been helpful to the plaintiff's case. Accordingly, the trial court held that an adverse inference instruction was proper as a sanction. The defendant appealed the spoliation sanction order, and the intermediate court reversed, with the majority of a divided court finding that the defendant's conduct was merely negligent — not grossly negligent — and therefore the plaintiff was required to prove that the documents lost would have helped its case. The intermediate court held that the plaintiff could not make such a showing and therefore an adverse inference was not appropriate. On appeal of that decision, the Court of Appeals reversed and remanded. While the Court of Appeals agreed with the intermediate court's finding that the defendant's conduct constituted mere negligence, it held that the intermediate court improperly failed to consider the plaintiff's arguments as to why the lost documents were relevant. Further, it held that the intermediate court improperly suggested that an adverse inference instruction is tantamount to summary judgment and therefore is generally improper in cases involving mere negligence. As the Court of Appeals explained, an adverse inference instruction may be proper in cases of mere negligence where there is evidence that the lost documents would have helped an adverse party's case. Accordingly, it remanded the case to the trial court for a determination as to whether the plaintiff could make such a showing.

Permissive Adverse Inference Instruction Warranted Where Party Delayed Three Years in Issuing Litigation Hold

***Stinson v. City of New York*, No. 10 Civ. 4228 (RWS), 2016 WL 54684 (S.D.N.Y. Jan. 5, 2016)**

Judge Robert W. Sweet of the U.S. District Court for the Southern District of New York granted in part a motion for spoliation sanctions made by a class of New York City residents asserting claims based on the allegation that they were issued summonses without probable cause by the city of New York and its police department. The defendants in the case failed to issue a litigation hold to preserve documents related to the plaintiffs' allegations until more than three years after the complaint was filed, and none of the officers named in the city's initial disclosures acknowledged receiving it. Due to the lack of a litigation hold, potentially relevant evidence, including data on police enforcement activity, individual officers' monthly activity reports and text messages, were destroyed. In general, the defendants produced relatively little electronically stored information (ESI), which they explained was a result of the fact that "the Police Department on the whole did not operate via email." However, documents discovered from alternative sources, including other files and custodians, indicated that "relevant and responsive emails existed at one time in these officers' email accounts, yet no such emails were ultimately produced from those accounts." Based on these facts, the court found that, while there was no basis to conclude that the defendants acted in bad faith, their conduct in failing to implement a litigation hold constituted "gross negligence." The court also found that the evidence destroyed was likely relevant to the plaintiffs' claims. Accordingly, the court held that the plaintiffs were entitled to a "permissive" inference that helpful evidence may have been lost and that the lack of certain documentary evidence should not be taken as an indication that the plaintiffs cannot prove their claims. The court denied, however, the plaintiffs' requests for a variety of other mandatory adverse inferences that the court felt would have relieved them "from their obligation to prove their case."

Spoliation Sanctions Warranted Where Party Knowingly Ran 'Clean Up' Software That Deleted ESI

***Ericksen v. Kaplan Higher Education, LLC*, No. CV 14-3106-RDB, 2015 WL 6408180, at *4 (D. Md. Oct. 21, 2015)**

The defendants in a wage-and-hour case moved for spoliation sanctions based on the plaintiff's use of "clean up" software on her computer, which contained relevant evidence. The plaintiff sought to use two key pieces of evidence — an email and a letter — contained on her computer to support her claims. When the defendants disputed the veracity of the documents, the plaintiff agreed to submit her personal computer to a forensic inspection. The inspection revealed that, in the days leading up to the inspection, the plaintiff had run five different data "clean up" or optimizer programs on her laptop, which had the effect of deleting over 400,000 files on her drive. While the plaintiff claimed that the only files deleted were temporary files that helped optimize her computer's performance, Magistrate Judge J. Mark Coulson of the U.S. District Court for the District of Maryland found that such conduct amounted to willful spoliation. According to the magistrate judge, the plaintiff had control over the computer, knew of her obligation to preserve evidence, and was aware that the software programs "imperiled the potential evidence" when run. Additionally, the magistrate judge noted that there was a "reasonable possibility" that relevant evidence that would establish or disprove the authenticity of the two documents at issue was destroyed by the plaintiff's actions. The magistrate judge found, however, that it was unclear whether the programs were run to intentionally destroy data or optimize the performance of the computer, and that the defendants' ability to defend themselves was not substantially impaired by the loss of materials. Accordingly, the magistrate judge determined that the extreme sanction of dismissal was not warranted. Instead, the magistrate judge recommended that the court preclude the plaintiff from using the letter and email as evidence in the case, given that the defendants were effectively "deprived of the opportunity to definitively disprove the authenticity of those documents."

Delay in Circulating Litigation Hold and Disabling Automatic Deletion of ESI Constitutes 'Gross Negligence'

***Ocwen Loan Servicing, LLC v. Ohio Public Employees Retirement System*, 49 Misc. 3d 1219(A), 2015 WL 8392486 (Sup. Ct. N.Y. County Dec. 7, 2015)**

Judge Eileen Bransten of the Supreme Court of New York County granted the plaintiff's motion for spoliation sanctions based on the defendant's failure to preserve relevant ESI in connection with litigation arising from the mistaken receipt of funds. The court found that the defendant, OPER, should have reasonably anticipated litigation in spring 2011, triggering the company's duty to preserve, but failed to issue a litigation hold until January 2013 and continued to permit the automatic purging of emails saved in the company's central repository until that time. In addition, in June 2011 — after the duty to preserve arose — OPER directed that the hard drive and messaging account of employee Eric France, the sole negotiator of the sale out of which the litigation arose, be wiped upon his separation from the company. Based on these facts, the court held OPER was "gross[ly] negligen[t]" for the loss of ESI. The court noted that this finding of gross negligence permitted a presumption that the materials at issue were relevant to the case, but that the presumption was rebuttable. The court concluded that OPER had rebutted the presumption with respect to many of the materials that did not appear to have a connection to the sale transaction at issue, but not with respect to materials pertaining to Mr. France, who was directly involved in the sale. While the court found that the plaintiff was clearly prejudiced by OPER's failure to preserve Mr. France's documents, it held that the "extreme sanction" of striking OPER's affirmative defense of detrimental reliance was not appropriate because the plaintiff was able to obtain some evidence to disprove the defense — namely, messages sent from a third party to France that the plaintiff had subpoenaed. Instead, the court adopted an adverse inference to be read at trial with respect to that defense. The court also ordered the defendant to pay the plaintiff's attorneys' fees and costs for bringing the motion.

Evidence of Alleged Spoliation May Be Presented to Jury Prior to Finding That Spoliation Elements Are Met

***Evans v. Quintiles Transnational Corp.*, No. 4:13-cv-00987-RBH, 2015 WL 9455580 (D.S.C. Dec. 23, 2015)**

U.S. District Court Judge R. Bryan Hartwell of the District of South Carolina granted in part the plaintiff's motion for a negative inference instruction in a wrongful termination action based in large part on the defendant's failure to produce files on the plaintiff's laptop, which the plaintiff returned to the company after her termination in September 2012. The plaintiff claimed that the computer contained files that allegedly documented the defendant's wrongdoing and asserted that she had informed the defendant's human resources manager about them at the time of her termination. The plaintiff also asserted that she filed a demand letter shortly after her termination alerting the defendant to her potential claim. Nevertheless, the defendant — consistent with company policy — reimaged the plaintiff's laptop and deleted her Outlook account 30 days after her termination. Based on these facts, the plaintiff argued that she was entitled to jury instructions at trial that would permit the jury to make a number of negative inferences about the deletion of her computer files. The court acknowledged that such a spoliation sanction would require proof that the defendant had a duty to retain the files and failed to do so with a "culpable state of mind," and that the files were relevant to the actions. The court found that, based on the record before it, there was insufficient evidence to conclude that these elements were met, especially because there was no evidence that the computer files allegedly documenting wrongdoing ever existed. Accordingly, the court found that an adverse inference would be improper. Nevertheless, the court held that the plaintiff could present evidence about the alleged document loss to the jury so that it could answer the "credibility questions" necessary to determine whether spoliation had occurred. The court then invited the parties to submit jury instructions laying out the applicable spoliation law to guide the jury in its resolution of the spoliation issue.

Precluding Use of All Text Messages as Sanction for Party's Selective Failure to Preserve Certain Texts

***United States v. Vaughn*, No. 14-23 (JLL), 2015 WL 6948577 (D.N.J. Nov. 10, 2015)**

The defendant in a criminal action requested that the court dismiss his indictment or, in the alternative, give the jury a mandatory adverse inference instruction, based on the government's admitted failure to retain certain text messages between a police officer and a confidential informant. The government conceded that it had a duty to retain the text messages but had failed to do so — and therefore some sanction was appropriate — but argued that the sanctions sought by the defendant were too extreme. Judge Jose L. Linares of the U.S. District Court for the District of New Jersey agreed that dismissal of the indictment was inappropriate. In addition, the court reserved judgment until trial as to whether an adverse inference instruction was appropriate. The court did, however, impose the sanction of barring the government "from using *any* text messages in its case in chief." According to the court, this sanction was appropriate given that the police officer who deleted the text messages was aware of the policy that all communications between law enforcement and confidential informants should be retained. Further, the officer had played an active role in the investigation of the defendant and therefore there could be no assumption that the texts were irrelevant to the case. The court also found that the government's assertion that the messages were deleted as a result of inadvertent error were not credible given the extent of the loss of texts and the inconsistencies in the government's story as to how they were lost. The court also concluded that the government had not taken appropriate steps to ensure the messages were retained. Finally, the court found that the government's differential treatment of text messages depending on the source of those messages (*i.e.*, taking care to retain text messages recovered from the defendant's phone but deleting its own) indicated a fundamental unfairness that made it necessary to preclude the government from using any text messages at all to support its case.

Adverse Evidentiary Inference Proper Even Though Party Lacked Bad Faith

***United States v. Dish Network, L.L.C.*, No. 09-3073, 2015 WL 5970446 (C.D. Ill. Oct. 13, 2015)**

Judge Sue E. Myerscough of the U.S. District Court for the Central District of Illinois granted in part the plaintiffs' motion for spoliation sanctions based on the defendant's failure to produce responsive documents. In this suit, the Federal Trade Commission (FTC) and various state attorneys general claimed that the defendant Dish Network, LLC made telemarketing calls in violation of various federal and state laws and regulations. The FTC served its civil investigative demand on Dish in July 2005, triggering Dish's duty to preserve and retain responsive documents. Dish failed to retain in native format responsive emails sent to and from Dish's Retail Services Compliance Officer Reji Musso from August 2006 to April 2008. Dish's counsel certified that Musso kept responsive emails in paper files and in a shared computer drive, and Dish produced those materials during discovery. Later discovery showed, however, that Dish's production of the paper files and shared drive only contained a small percentage of Musso's relevant communications. Based on this, the plaintiffs argued that the defendant should be sanctioned for failure to retain responsive communications. The court agreed and found that an appropriate sanction was to "take as an established fact" that Musso had communications with other retailers of the type presumed to be contained in the missing discovery. The court declined to impose the more severe sanctions suggested by the plaintiffs because the court found no evidence of bad faith.

Party Accused of Altering Email Evidence Precluded From Using Emails at Trial and Ordered to Pay Costs

CAT3, LLC v. Black Lineage, Inc. **No. 14 Civ. 5511 (AT) (JCF), 2016 WL 154116 (S.D.N.Y. Jan. 12, 2016)**

United States Magistrate Judge James Francis granted the defendant's motion for spoliation sanctions based on evidence that the plaintiff in the case altered emails before producing them to the defendant. The plaintiff alleged that the defendant was aware of the plaintiff's intent to use a specific company name and intentionally registered an Internet domain with a very similar name, in violation of the plaintiff's trademark rights. In support of its claim, the plaintiff produced emails purporting to show that its employees sent emails to defendant's employees from email addresses that included the company name at issue, thereby putting the defendant on notice of the plaintiff's intent to use the name. It later became apparent that alternate versions of the emails existed that showed the plaintiff's employees having different email addresses that did not include the company name in dispute. The defendant moved for spoliation sanctions, arguing that the plaintiff had deliberately altered the emails to gain an advantage in litigation and presenting testimony from a well-qualified forensic investigator that the alteration of the emails was intentional, rather than the result of an accidental or inadvertent email process. The court agreed with the defendant that this constituted clear and convincing evidence that spoliation sanctions were appropriate under the recent amendments to Rule 37. While the court recognized that Rule 37 does not allow spoliation relief where lost evidence can be "restored or replaced" from other sources, it held that this did not bar sanctions. According to the court, although the defendant eventually uncovered the authentic versions of the emails at issue, the mere existence of alternate versions caused harm by casting doubt on the authenticity of both versions. The court nevertheless rejected the defendant's request for "drastic" sanctions in the form of dismissal or the issuance of an adverse inference instruction, finding that they were too "severe." Instead, the court held that the prejudice resulting from the plaintiff's misconduct could be cured by precluding the plaintiff from using the allegedly altered versions of the emails to support its case and requiring the plaintiff to pay the defendant's costs and fees in raising the spoliation issue with the court.

Sanctions Denied/Evidence of Spoliation Excluded

Evidence of Spoliation Inadmissible Where No Evidence of Bad Faith or Prejudice

West v. Talton**, No. 5:13-cv-338 (CAR), 2015 WL 6675565 (M.D. Ga. Nov. 2, 2015)**

Judge C. Ashley Royal of the U.S. District Court for the Middle District of Georgia granted the defendants' motion to exclude all evidence and argument related to the plaintiff's allegations of spoliation in an employment case. The plaintiff learned during discovery that the defendant county had automatically written-over backup tapes for its computer server and deleted the email account of one of its employees following his resignation. The county, however, was subsequently able to retrieve the employee's computer and preserve the hard drive, which allowed it to produce over 1,000 documents, including several emails, from the employee's files that could be used by the plaintiff in the litigation. Based on these facts, the court found that the plaintiff's requests for an adverse jury instruction or, in the alternative, to introduce evidence of the county's failure to preserve emails were inappropriate. According to the court, the materials at issue were deleted pursuant to a routine procedure, and the plaintiff had not established that the loss of documents was the result of a "malicious act or done in bad faith." Further, the court held that the plaintiff's argument that he was prejudiced by the loss of documents was "completely speculative" given that the county was ultimately able to produce a substantial number of documents from the recovered computer. Thus, spoliation sanctions were not warranted. In addition, the court found that spoliation evidence could not be presented at trial because the "danger of confusing the issues and misleading the jury outweighs the probative [effect]" of such evidence.

No Spoliation Where Documents Were Deleted by Defendant's Assistant Prior to Filing of Lawsuit

Harfouche vs. Stars On Tour, Inc.**, No. 2:13-cv-00615LDG-NJK, 2016 WL 54203 (D. Nev. Jan. 5, 2016)**

Magistrate Judge Nancy J. Koppe of the U.S. District Court for the District of Nevada denied the plaintiff's motion for spoliation sanctions in a breach of contract action filed in 2010. The plaintiffs' motion stemmed from the defendant's assertion that all materials created by her personal assistant (which may have included documents relevant to the action) were destroyed in 2008, when the personal assistant left her job. Because the plaintiff did not present any evidence that the defendant should have been on notice of future litigation prior to the filing of the lawsuit in 2010, the court held that there was no duty to preserve materials at the time the personal assistant's records were deleted.

Additionally, the court rejected the plaintiff's argument that the defendant's personal assistant destroyed the documents "willfully" and that her "culpable state of mind" should be attributed to the defendant. According to the court, the "state of mind of an apparently disgruntled employee" does not indicate that the defendant acted willfully or in bad faith. Lastly, the court held that the plaintiff failed to present evidence that the lost documents, if they ever existed, were relevant to his claim or defense.

No Spoliation Where Destroyed Documents Were Duplicative and Party Had No Culpable State of Mind

***Star Envirotech, Inc. v. Redline Detection, LLC*, No. SA CV 12-01861-JGB(DFMx), 2015 WL 9093561 (C.D. Cal. Dec. 16, 2015)**

Magistrate Judge Douglas F. McCormick of the U.S. District Court for the Central District of California found that there was no evidence that the defendant committed spoliation when it destroyed advertising materials and operating manuals in which it allegedly represented that its smoke machines were compatible with nitrogen in violation of the plaintiff's patent. The court agreed with the defendant that "the duty to preserve d[id] not require it to preserve 'every shred of paper,'" particularly given that the plaintiff had exemplars "of the vast majority of [the defendant]'s advertisements and operating manuals." The court also found that the defendant did not act with a culpable state of mind when disposing of the documents. According to the court, because the defendant did not contest that it had represented that its products were compatible with nitrogen, it was "difficult to imagine what nefarious purpose would have been served by destroying" the documents. The court did grant the plaintiff's request for monetary sanctions and adverse jury instructions as a result of the defendant's belated production of customer sales data. Because the record showed that the defendant had "engaged in tactics designed to delay" the production of the data — and indeed, did not produce the data in full until the court issued its third order directing production — the court found that sanctions were warranted.

Other Spoliation Decisions

Spoliation Resulted in Exclusion of Expert Reports Based on Secondhand Data

***Bruno v. Bozzuto's, Inc.*, No. 3:09-cv-874, 2015 WL 7294464 (M.D. Pa. Nov. 19, 2015)**

U.S. District Court Judge Matthew W. Brann of the Middle District of Pennsylvania granted the defendant's motion to exclude the plaintiff's expert reports and testimony. While the court's decision was based on a *Daubert* analysis rather than a strict spoliation analysis, the court found that the flaws in the contested expert reports were a direct result of the plaintiff's knowing destruction of all of her business's financial records, including those saved on a store computer, during a move that took place months before the filing of her complaint but after the plaintiff had contemplated litigation. The plaintiff's spoliation put her experts in the position of having to rely on flawed secondhand sales projections. Judge Brann cited this as an example of "[b]ad decisions early in the litigation ... hav[ing] far-reaching consequences."

Cost-Shifting Decisions

Costs Associated With Accurately Reproducing Digital Documents Recoverable as 'Making Copies' Under Section 1920

***Jo Ann Howard & Associates, P.C. v. Cassity*, No. 4:09CV01252 ERW, 2015 WL 7422199 (E.D. Mo. Nov. 20, 2015)**

Senior District Judge E. Richard Webber of the U.S. District Court for the Eastern District of Missouri granted in part and denied in part the plaintiffs' motion to recover under §1920(4) copying and exemplification costs incurred during discovery and trial following a jury verdict in their favor. The court acknowledged that the law regarding what qualifies as "making copies" within the meaning of §1920(4) is inconsistent throughout the nation, but that it believed the term should be construed to include the movant's costs of OCR scanning, TIFF conversions, imaging computer storage drives, transferring files from one drive or disc to another, producing load files, and extracting or imaging metadata. According to the court, these were all ancillary procedures necessarily performed to accurately reproduce digital documents. However, costs associated with Bates stamping digital documents were not recoverable as costs of "making copies" — despite the practical necessity of doing so — because Bates labeling was "an organizational procedure, not a method of replication."

Cost-Shifting Denied but Attorneys' Fees Awarded to Nonparty Responding to Facially Overly Broad Subpoena

***American Federation of Musicians of United States & Canada v. Skodam Films, LLC*, No. 3:15-mc-122-M-BN, 2015 WL 7771078 (N.D. Tex. Dec. 3, 2015)**

Magistrate Judge David L. Horan of the U.S. District Court for the Northern District of Texas denied Skodam Films, LLC's request for cost-shifting in connection with an allegedly overbroad and unduly burdensome subpoena, but granted its request for attorneys' fees incurred in responding to a motion to compel. In the underlying litigation between American Federation of Musicians of the United States and Canada (AFM) and Paramount Pictures Corporation, AFM alleged that Paramount breached a collective bargaining agreement based on how it produced a particular movie. Paramount claimed that it did not breach the agreement because Skodam, a nonparty, was the sole producer of the movie. To explore this defense, AFM served a subpoena on Skodam with 51 broad requests seeking production of documents related to the movie and the relationship between Skodam and Paramount. When Skodam objected to the discovery requests as unduly burdensome, AFM moved to compel. In its opposition, Skodam requested that, because AFM failed to take steps to avoid imposing an undue burden and expense on Skodam, the court should require under Rule 45 that AFM pay Skodam's attorneys' fees and costs associated with responding to the subpoena and motion to compel. Even though Rule 45 provides additional protections to nonparties, the court held that cost-shifting was not warranted, given Skodam's level of involvement with the production of the film at issue in the underlying litigation. The court did, however, order that AFM pay Skodam's reasonable attorneys' fees incurred in responding to AFM's motion to compel (including preparation for oral argument), because the subpoena was "facially overbroad" and AFM had "not offered to narrow [its scope] prior to oral argument."

Costs for Electronic Discovery Reduced Under Narrow Interpretation of 'Making Copies'

***Split Pivot, Inc. v. Trek Bicycle Corp.*, No. 12-cv-639-wmc, 2015 WL 9593630 (W.D. Wis. Dec. 31, 2015)**

Judge William M. Conley of the U.S. District Court for the Western District of Wisconsin reduced the amount of taxable costs awarded to the defendant by the clerk following a grant of summary judgment in its favor. Among other costs, the plaintiff challenged the award of $225,180.57 for the defendant's e-discovery efforts. In addressing this category, the court stated that the issue ultimately "comes down to whether ESI-related costs qualify as fees for 'exemplification' or the 'making of copies.'" Noting that the U.S. Court of Appeals for the Seventh Circuit had yet to weigh in on the recoverability of ESI costs, Judge Conley adopted a narrow interpretation of the meaning of "making copies" in §1920(4) in the context of electronic discovery. He ordered that the district court reduce the e-discovery costs awarded to include only costs for Bates stamping, shipping and delivery of electronic documents, native file and email conversion, and TIFF image creation and conversion — not costs associated with discovery consultant charges, "project management, keyword searching, statistical previews" and extraction of proprietary data. The court noted that it included the cost of Bates stamping because the procedure "has often been a part of paper copying costs to insure an orderly and controlled production of documents."

Other Discovery Decisions

Amendments to Rule 26 Do Not Fundamentally Change Burden on Party Resisting Discovery

***Carr v. State Farm Mutual Automobile Insurance Co.*, No.3:15-cv-1026-M, 2015 WL 8010920 (N.D. Tex. Dec. 7, 2015)**

Magistrate Judge David L. Horan of the U.S. District Court for the Northern District of Texas granted the defendant insurance company's motion to compel discovery responses, finding that the newly amended Rule 26 did not change the allocation of burdens for navigating discovery disputes. The plaintiff sought Uninsured/Underinsured Motorist coverage from the defendant in the wake of an automobile accident that caused the plaintiff to suffer personal injuries. Defendant State Farm filed a motion to compel discovery, seeking information regarding the extent of the plaintiff's damages — a requirement for obtaining benefits under the insurance policy. The defendant contended that the plaintiff failed to adequately respond to its discovery requests and failed to amend or supplement his responses, despite State Farm's repeated requests. In weighing the defendant's motion, the court carefully examined the newly amended Rule 26 to determine whether the amendments fundamentally changed the burden upon a party resisting discovery, and ultimately concluded that they did not. First, the court noted that the amendments do not change the essential text of Rule 26(c)(1), which the Fifth Circuit interpreted as placing the burden on the moving party to specifically show "good cause and a specific need for protection" from the discovery. The court then found that the textual amendments themselves do not suggest that the party seeking discovery must first show that the requested discovery is somehow proper — *i.e.*, that it is relevant to the claims or defenses at issue and proportional to the needs of the case. Finally, the court quoted extensively from the Committee Notes accompanying the 2015 amendments to show that the amendments did not change the allocation of burden imposed on the party resisting discovery. Based on its analysis, the court concluded that under the amended Rule 26, "in order to prevail on a motion for protective order or successfully resist a motion to compel," the party resisting discovery must specifically object and show that the requested discovery does not fall within Rule 26(b)(1)'s scope of property discovery, or that a discovery request would impose an undue burden or expense, or is otherwise objectionable. Applying this framework, the court granted the defendant's motion, noting that the plaintiff did not even respond to the motion to compel other than to explain in a joint status report that the plaintiff's counsel's office had attempted to contact the plaintiff to obtain information necessary to supplement his discovery responses.

Amendments to Rule 26 Require That Requested Discovery Be Proportional to the Needs of the Case

***Gilead Sciences, Inc. v. Merck & Co., Inc.*, No. 5:13-cv-04057-BLF, 2016 WL 146574 (N. D. Cal. Jan. 13, 2016)**

U.S. Magistrate Judge Paul S. Grewal of the U.S. District Court for the Northern District of California denied defendant Merck's motion to compel discovery in a patent infringement case brought by Gilead Sciences that related to a specific chemical compound, PSI-6130. In the course of discovery, Gilead produced a photograph of various tubes of compounds and Merck then sought production of more information about the tubes and their contents, including the tubes themselves. The plaintiff resisted discovery, pointing to evidence that the tubes at issue in the photograph contained different compounds from the one at issue in the case. Merck nevertheless moved to compel, arguing that it should not have to take Gilead at its word about the contents of the tubes. The court disagreed, holding that Merck's demands "are exactly the type of disproportionate demands" that Rule 26 proscribes. According to the court, the December 2015 amendments to Rule 26 make clear that "[n]o longer is it good enough to hope that the information sought might lead to the discovery of admissible evidence." Instead, "a party seeking discovery of relevant, non-privileged information must show, before anything else, that the discovery sought is proportional to the needs of the case." The court held that Merck could not make such a showing given "the absence of any reason to doubt the proof Gilead has tendered about the identity of the disputed compound, and given the cost and potential delay introduced by the requested production."

Party Lacks Control Over Its Employees' Personal Email Accounts for Purposes of Discovery

***Matthew Enterprise, Inc. v. Chrysler Group, LLC*, No. 13-cv-04236-BLF, 2015 WL 8482256 (N.D. Cal. Dec. 10, 2015)**

The plaintiff, a car dealership that buys and resells vehicles from defendant Chrysler, commenced suit, alleging price discrimination under the Robinson-Patman Act. Magistrate Judge Paul S. Grewal of the U.S. District Court for the Northern District of California denied the defendant's request to compel production from the plaintiff's employees' personal email accounts on the ground that the plaintiff did not have control of the emails for purposes of discovery. However, the court granted the defendant's request to compel production of the contents of the plaintiff's customer communications database, which was maintained by a third-party vendor. The dispute centered on the meaning of "control" over the requested data, which is "defined as the legal right to obtain documents upon demand." With respect to the plaintiff's employees' personal email accounts, the court determined that Chrysler had not carried its burden of demonstrating sufficient control by the plaintiff. According to the court, there was no contractual or other legal right for the plaintiff to force employees to turn over their personal emails. Chrysler argued that the plaintiff's employee handbook instructed employees to keep "internal information" in the "sole possession" of the plaintiff. The court rejected this argument, noting that the handbook was not a contract and did not create legal rights for the plaintiff. With respect to the customer communications database, however, the court found that the plaintiff did have the requisite control. This was so, the court held, because the plaintiff had already asked its vendor to produce certain information related to the case. As such, the court declined to require the defendant to subpoena the vendor directly to obtain the requested information from the customer communications database.

Judge Rejects Plaintiffs' Bid for Personnel Files in Product-Liability MDL

***In re Xarelto (Rivaroxaban) Products Liability Litigation*, MDL No. 2592, 2016 WL 311762 (E.D. La. Jan. 26, 2016)**

U.S. District Court Judge Eldon Fallon of the Eastern District of Louisiana denied a request by the plaintiffs in a product-liability action involving the drug Xarelto for the personnel files of the defendants' employees, citing the new, heightened-proportionality requirement in Rule 26, as well as privacy concerns. Although the parties — and the court — agreed that custodial files of employees who are called for a deposition are discoverable, the defendants refused to comply with the plaintiffs' request for those employees' confidential personnel files. The defendants argued that production of these materials raised unique privacy concerns and would harm employer-employee relations. The plaintiffs argued that the defendants' privacy concerns were overblown and that the materials were discoverable because they were relevant to the plaintiffs' "rush to the market" theory of liability, as well as to issues related to potential employee bias. Judge Fallon sided with the defendants, noting that "[t]he privacy concerns implicated by a personnel file are distinct from those presented by a custodial file, because they are far more likely to contain personal, embarrassing material." In other words, personnel files are "special." Accordingly, they are only discoverable where the plaintiff has demonstrated sufficient relevance to overcome the important privacy concerns they raise. Judge Fallon held that the plaintiffs failed to make such a showing because it was not clear whether the information sought — *i.e.*, performance reviews and self-reviews — was particularly relevant to the plaintiffs' "rush to the market" theory of liability or employee bias. Moreover, the plaintiffs failed to demonstrate relevance on a "witness-by-witness basis," as required under the proportionality requirements of amended Rule 26.

The E-Discovery Digest
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