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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

Attorney-Client Privilege Does Not Extend to Communications Between Corporate Counsel and Former Employees

***Newman v. Highland Sch. Dist. No. 203,* 381 P.3d 1188 (Wash. 2016)**

In an *en banc* decision, the Supreme Court of Washington held that the attorney-client privilege did not extend to post-employment communications between corporate counsel for the defendant school district and the school district's former employees. In this negligence action, a former high school quarterback who sustained a brain injury while playing football sued the school district. The plaintiff sought discovery regarding communications between several former coaches who had worked in the school district and attorneys for the school district. The school district sought a protective order with respect to the requested discovery, which the district court denied. On appeal, the lower court's order was affirmed on the ground that the attorney-client privilege does not broadly shield counsel's post-employment communications with former employees. The court found that, while the attorney-client privilege "[protects] the right to engage in confidential fact-finding" in the corporate client context, "everything changes when employment ends" and the agency relationship between the former employee and the corporation terminates. Judge Charles K. Wiggins dissented and noted his disagreement with the "majority's decision to adopt a bright-line rule that will cut off the corporate attorney-client privilege at the termination of employment, and will exclude from its scope all postemployment communications with former employees, even when those employees have relevant personal knowledge regarding the subject matter of the legal inquiry and even though had they remained employed, such communications with counsel would have been privileged."

Decisions Ordering Disclosure

Attorney-Client Privilege and Work-Product Protection Waived When Party Failed to Object to Use of Protected Communications at Deposition

Certain Underwriters at Lloyd's, London v. Nat'l R.R. Passenger Corp., 14-CV-4717 (FB), 2016 WL 6875968 (E.D.N.Y. Nov. 17, 2016)

Chief Magistrate Judge Roanne L. Mann of the U.S. District Court for the Eastern District of New York rejected the National Railroad Passenger Corporation's (Amtrak) attempt to "claw back" two privileged documents that had been produced to plaintiffs and used during the deposition of a former Amtrak employee. Amtrak's counsel noted during the deposition that one of the documents was labeled "work product" and purported to "reserve Amtrak's rights" with respect to the document, but did not specifically object to the use of either document on privilege grounds or direct the witness not to answer questions about the documents. After the deposition concluded, counsel for Amtrak sent a "claw back" letter to plaintiffs with respect to the documents. The plaintiffs moved the court to compel reproduction of the documents, and the court granted the motion. According to the court, Amtrak waived any right to assert privilege when its counsel permitted questions about the documents and, despite Amtrak's counsel's claim that he reserved Amtrak's rights with respect to one of the documents, "[g]eneralized objections of this kind are insufficient to preserve a claim of privilege."

Former General Counsel Permitted to Rely on Privileged Information in Whistleblower Retaliation Suit

Wadler v. Bio-Rad Labs., Inc., Case No. 15-cv-02356-JCS, 2016 WL 7369246 (N.D. Cal. Dec. 20, 2016)

Chief Magistrate Judge Joseph C. Spero of the U.S. District Court for the Northern District of California denied Bio-Rad's motion to preclude the plaintiff — the company's former general counsel — from using any information protected by the company's attorney-client privilege or as attorney work protect in pursuing his retaliatory discharge claims against the company. According to the court, the motion — if granted — would essentially bar the plaintiff from using any information he obtained while working for Bio-Rad to support his claims, which would make it impossible for him to prove his case. Thus, Bio-Rad's motion amounted to an out-of-time request for summary judgment and failed for that reason alone. In any event, the court held that the applicable ethical rules and related case law permitted the plaintiff to use confidential information obtained during his representation of the company where it was "reasonably necessary" to prove a claim for retaliatory discharge. In addition, the court noted that Bio-Rad had waived any claim of privilege with respect to many of the communications and materials at issue by disclosing them to several government agencies in connection with investigations and administrative proceedings that predated the plaintiff's lawsuit. As a result, Bio-Rad had no basis to object to the plaintiff's use of those same materials.

Spoliation Decisions

Decisions Declining to Impose Sanctions

Parties Must Diligently Seek Evidence to Justify Imposition of Spoliation Sanctions

FTC v. DIRECTV, Inc., Case No. 15-cv-01129-HSG (MEJ), 2016 U.S. Dist. LEXIS 176873 (N.D. Cal. Dec. 21, 2016)

Magistrate Judge Maria-Elena James of the U.S. District Court for the Northern District of California denied plaintiff Federal Trade Commission's (FTC) motion for spoliation sanctions based on the allegation that defendant DIRECTV improperly failed to preserve previous versions of an interactive website that its expert relied on — and that the FTC was prejudiced due to its inability to view the site or replicate a survey conducted on the site. The FTC also raised various other arguments related to DIRECTV's alleged failure to maintain information related to the website. While the court found that DIRECTV "could have been more forthcoming in its disclosures to the FTC" regarding the website, the court also noted that the FTC "could have been more proactive in its efforts to obtain discovery" regarding these issues. In addition, the court explained that DIRECTV had produced screenshots of the website and had informed the FTC that it was not technologically feasible to maintain a copy of the old version of the site. DIRECTV had also produced some information that would allow the FTC "to compare website versions through documents, screenshots, and source data." The court held that the mere fact that this information was not provided in the format the FTC preferred, or that other data regarding the website may exist, was not sufficient to warrant sanctions. Nevertheless, to ease any prejudice, the court allowed the FTC an additional four-hour deposition of the DIRECTV expert to explore the lost website data on which the expert relied.

Granting Summary Judgment Before Ruling on Spoliation Motion Is Not an Abuse of Discretion

Helget v. City of Hays, Kansas, 844 F.3d 1216 (10th Cir. 2017)

The U.S. Court of Appeals for the Tenth Circuit affirmed an order granting summary judgment in favor of the defendant in a retaliatory termination case, rejecting the plaintiff's argument that the district court erred in granting summary judgment before resolving her claim for spoliation sanctions. The plaintiff in the case moved for spoliation sanctions against her former employer based on the employer's alleged failure to preserve electronic

documents and communications potentially relevant to her retaliation claims. While the spoliation motion was pending, both parties filed for summary judgment, and the defendant's motion was granted. The plaintiff appealed on grounds that the defendant's spoliation of relevant evidence unfairly precluded her from producing evidence to support her claims. The Tenth Circuit rejected the argument, noting that in opposing the defendant's motion for summary judgment, the plaintiff made only "scant" references to the pending spoliation motion. Accordingly, the court found that the plaintiff "forfeited her right to seek refuge in her undecided motion for spoliation sanctions by failing to raise the argument in any meaningful way in opposing summary judgment." As the court explained, the plaintiff had "some obligation to alert the district court that her pending spoliation motion could affect the summary judgment motions," and one reference in more than 100 pages of summary judgment briefing was insufficient to signal that the court should first rule on the spoliation issue. The court therefore affirmed the district court's summary judgment order.

Sanctions Not Warranted Where Destroyed Documents Are Retrievable

***Erhart v. Bofl Holding, Inc.*, Case No. 15-cv-02287-BAS (NLS), 2016 WL 5110453 (S.D. Cal. Sept. 21, 2016)**

U.S. District Judge Cynthia Bashant of the Southern District of California denied the defendant's motion for dismissal of a plaintiff/whistleblower's retaliation action based on the allegation that the plaintiff had "engaged in a pattern and practice of destroying relevant evidence in order to prejudice [the defendant] and hinder its ability to defend itself in this action." Specifically, the defendant argued that the plaintiff deleted files from several electronic devices: his employer-issued laptop, two USB flash drives, his personal desktop computer and his girlfriend's laptop. The plaintiff allegedly deleted hundreds of files off his work-issued laptop around the time he went to regulators about the defendant's alleged wrongdoing and was on leave from the company. In denying the motion, the court acknowledged that just because a party deletes files from a computer does not mean they are "destroyed" or irretrievable. The court found that many of the allegedly deleted documents were still accessible in the computer's recycle bin or on a duplicate flash drive, or were documents still in the defendant's possession. The court acknowledged that the deleted duplicate files on the plaintiff's girlfriend's laptop may have contained certain valuable metadata that was lost. Nevertheless, the court found that it could not say with certainty that the plaintiff acted with a culpable state of mind. Further, even if the plaintiff acted intentionally, the defendant suffered no real prejudice because the files remained recoverable. Without a finding that the documents were unrecoverable, sanctions were not warranted.

Decisions Imposing Sanctions

Summary Judgment Warranted Where Party Destroys Critical Evidence

***Oil Equip. Co. v. Modern Welding Co.*, 661 F. App'x 646 (11th Cir. 2016)**

The U.S. Court of Appeals for the Eleventh Circuit upheld a district court order granting summary judgment against the plaintiff in a breach of warranty action as a sanction for destroying critical evidence relevant to its claims. Plaintiff OEC purchased an allegedly defective underground storage tank from defendant manufacturer Modern Welding. When the tank began to leak, OEC sought a replacement under the warranty, which the manufacturer asserted did not apply because the problem stemmed from improper installation. OEC threatened litigation and Modern Welding responded by asking for notification of when the tank was to be dug up and replaced so that it could have an opportunity to inspect. Despite this request, OEC removed and replaced the tank without notifying Modern Welding. It also took no action to preserve the tank and "left the tank exposed to the elements for over a year." In addition, after litigation commenced, OEC had "destructive testing performed on the tank without notifying" the manufacturer. According to the court, OEC acted in bad faith given that Modern Welding had sent an "unambiguous request for notice" prior to tank removal that was ignored. The court further found that being able to observe the removal was critical to the case because it "offer[ed] the best chance to identify defects" and the "installation of a new tank necessarily erases signs of improper installation that may have existed." Thus, OEC's actions were severely prejudicial to Modern Welding. On appeal, the Eleventh Circuit affirmed, agreeing that the severe prejudice to the manufacturer and apparent bad faith on the part of the plaintiff justified the imposition of terminating sanctions.

Party Entitled to Present Evidence of Spoliation at Trial Despite Lack of Evidence of Intent on Part of Spoliating Party

***Sec. Alarm Fin. Enters., L.P. v. Alarm Prot. Tech., LLC*, Case No. 3:13-cv-00102-SLG, 2016 WL 7115911 (D. Alaska Dec. 6, 2016).**

Judge Sharon L. Gleason of the U.S. District Court for the District of Alaska imposed sanctions on the plaintiff in a tortious interference action between two home security companies based on the plaintiff's failure to preserve relevant consumer communications data. Defendant APT sought spoliation sanctions based on the allegation that plaintiff SAFE had "overwritten" thousands of call recordings with customers relevant to the action. The court first found that the spoliation motion was timely, even though it was filed months after the close of discovery,

because "a party need not file a motion at the first inkling of spoliation but is entitled to gather evidence — such as discovery responses — before filing a motion." In addition, the court held that amended Rule 37 — which precludes the district court from dismissing the plaintiff's case or issuing an adverse inference instruction absent a finding that the spoliating party acted with intent to deprive its opponent of relevant information — governed the motion despite the fact that the alleged spoliation occurred prior to its adoption. Applying the amended rule, the court found SAFE had a duty to preserve the call records but did not take sufficient steps to do so. The court explained that SAFE's issuance of a litigation hold was not sufficient to satisfy its duty to preserve because the hold did not clearly encompass the recordings at issue. The court, however, declined to find that SAFE acted with the intent to deprive APT of evidence. Because no finding of intent was made, the court held that it could only impose sanctions that were "no greater than necessary" to cure the prejudice. The court therefore ordered reasonable attorneys' fees for the costs of bringing the spoliation motion and prohibited SAFE from introducing any of the 150 preserved recordings as evidence. Further, while APT was not entitled to a presumption that the spoliated evidence was helpful to its case absent a finding of intent, the court held that it would inform the jury that SAFE had a duty to preserve evidence that it failed to fulfill. The court also held that both parties were entitled to present limited evidence at trial regarding the spoliation allegations.

Intent to Destroy Evidence May Be Inferred From Employees' Deletion of Electronic Messages

***First Fin. Sec., Inc. v. Freedom Equity Grp., LLC*, Case No. 15-cv-1893-HRL, 2016 WL 5870218 (N.D. Cal. Oct. 7, 2016)**

Magistrate Judge Howard R. Lloyd of the U.S. District Court for the Northern District of California granted in part plaintiff First Financial Security's (FFS) motion for spoliation sanctions based on defendant Freedom Equity Group's (FEG) failure to retain: (1) text messages possessed by FEG principal personnel; (2) native format copies of digital data related to FEG hiring; (3) employment applications submitted by former FFS contractors; and (4) phone records that were to be preserved pursuant to the court's prior order. The court sided with plaintiff FFS on two of these arguments. First, the court rejected the defendant's assertion that its employees "'innocently' deleted" their text messages. The court held that it could be inferred from the fact that FFS told its employees not to communicate electronically regarding potential legal claims that the employees who deleted text messages did so with an intent to prevent their discovery. Thus, the court concluded that the employees acted with the intent to deprive plaintiff FFS of evidence and granted the plaintiff's request for an adverse inference jury instruction with respect to this issue. Second, the court rejected the defendant's argument that it lacked control of — and therefore could not produce — the native-format data because the defendant failed to mention this alleged lack of control in previous statements to the court about the discoverability of native-format data and did not object to the discovery for over a year. The court held that the loss of these materials warranted a permissive adverse inference instruction at trial. The court, however, denied FFS' request for spoliation sanctions based on the defendant's failure to produce employment applications, finding that there was no evidence that such documents existed. In addition, the court denied the request for spoliation sanctions based on the loss of the defendant's telephone records, which were destroyed by the defendant's phone company in the ordinary course of business. According to the court, it was not persuaded that the defendant bore "a significant degree of fault for failing to realize" that its phone company would routinely purge the call records.

Negligent Failure to Preserve Electronically Stored Information and Paper Documents After Litigation Hold Warrants Presentation of Spoliation Evidence at Trial

***McQueen v. Aramark Corp.*, Case No. 2:15-CV-492-DAK-PMW, 2016 WL 6988820 (D. Utah Nov. 29, 2016)**

Magistrate Judge Paul M. Warner of the U.S. District Court for the District of Utah granted plaintiffs' motion for spoliation sanctions where the defendant failed to maintain records related to a workplace accident. The plaintiffs in the case sent a preservation letter in August 2014, two months after the accident giving rise to the litigation occurred. During a deposition more than a year later, the plaintiffs learned of work orders for the accident site that were not produced. The plaintiffs filed a request for production and the defendant responded that the work orders were no longer in existence because it was the company's regular business practice to destroy such records after one year. The plaintiffs filed a motion to compel, and in the process of briefing the motion, the defendant revealed that it had failed to put a true litigation hold in place until more than a year after receiving the preservation letter from the plaintiffs. The defendant asserted, however, that the information in the work orders that were lost could be obtained through testimony or third-party discovery. The court rejected this argument, finding that "[t]he bottom line is that Defendant should have preserved the relevant records but failed to do so." The court also noted that even if forensics could restore lost electronically stored information (ESI), the paper records that were destroyed were unrecoverable. While the court found that the defendant "acted with gross negligence," it could not conclude that it acted intentionally or in bad faith. Accordingly, Rule 37 did not permit

an instruction to the jury regarding any presumption or inference regarding the destruction of the materials. Instead, the court held that the plaintiffs would be permitted to present evidence regarding the spoliation of the work orders and to "argue any inferences they want the jury to draw."

Parties Must Take Steps to Preserve ESI, Including Information on Personal Cellphones

***Shaffer v. Gaither,* Docket No. 5:14-cv-00106-MOC-DSC, 2016 U.S. Dist. LEXIS 118225 (W.D.N.C. Sept. 1, 2016)**

Judge Max O. Cogburn, Jr. of the U.S. District Court for the Western District of North Carolina denied a request for dismissal of sexual harassment/improper termination claims alleged by the plaintiff in light of her alleged failure to take reasonable steps to preserve relevant text messages stored on her cellphone, but he noted that evidence of such loss of evidence was admissible at trial. The defendant contended the deleted messages were crucial to his defense because they were probative of the plaintiff's understanding of the reason that she was fired. Applying amended Rule 37(e), the court found that the plaintiff and her counsel failed to take reasonable steps to preserve texts that resided only on her phone and not in another backup system. According to the court, "[o]nce it is clear that a litigant has ESI that is relevant to reasonably anticipated litigation, steps should be taken to preserve that material, such as printing out the texts, making an electronic copy of such texts, cloning the phone, or even taking possession of the phone and instructing the client to simply get another one." The court noted, however, that there was no evidence of a specific intent to destroy materials and therefore held that dismissal was too harsh a sanction. Instead, the defendant would be permitted to "explore in front of a jury the circumstances surrounding the destruction of these texts." The court also acknowledged that it had not "ruled out" the possibility of a spoliation instruction at trial and reserved ruling on that issue until after hearing the evidence presented at trial.

Form/Format of Discovery Responses and/or Cost Shifting

A Party Is Not Required to Use Predictive Coding in Absence of Evidence That Its Preferred Method Would Produce Insufficient Discovery Responses

***In re Viagra (Sildenafil Citrate) Prod. Liab. Litig.,* Case No. 16-md-02691-RS (SK), 2016 WL 7336411 (N.D. Cal. Oct. 14, 2016)**

In this products liability action, Magistrate Judge Sallie Kim of the U.S. District Court for the Northern District of California rejected the plaintiffs' proposal to require the defendant to use predictive coding, also known as technology assisted review or TAR, to identify responsive ESI. The court noted that there was no case law in support of the plaintiffs' proposal to require a party to use predictive coding, as opposed to other methodologies, and no court has ordered a party to engage in predictive coding over its objection. Further, the court reasoned that even if predictive coding were more efficient — which was disputed — there was no basis to compel a party to use it absent evidence that the party's preferred method would produce, or has produced, insufficient discovery responses.

Requesting Party Should Bear Costs of Retrieving and Restoring Archived Emails if That Party Fails to Show Good Cause to Overcome Undue Burden and Expense

***Elkharwily v. Franciscan Health Sys.,* Case No. 3:15-cv-05579-RJB, 2016 WL 4061575 (W.D. Wash. July 29, 2016)**

In this employment discrimination action, Judge Robert J. Bryan of the U.S. District Court for the Western District of Washington held that the defendant's archived emails were discoverable, but the plaintiff should bear the costs of retrieving and restoring them in advance. According to the court, the production of archived emails would result in undue burden and cost to the defendant. Specifically, the evidence suggested it would cost roughly $157,500 to retrieve, restore and review the defendant's backup tapes for responsive archived emails. Moreover, the plaintiff failed to show good cause to compel the discovery notwithstanding the costs because he had not identified any individuals that allegedly exchanged emails about him nor described the suspected content of any of the emails. Thus, the court held that the defendant should not be compelled to produce the archived emails unless it was at the plaintiff's expense.

For Purposes of Recovering Fees for Exemplification and Copies, Costs Leading Up to Making Copies Do Not Constitute Costs Associated With Copies

***Clearlamp, LLC v. LKQ Corp.,* Case No. 12 C 2533, 2016 WL 7013478 (N.D. Ill. Nov. 30, 2016)**

Judge Joan Humphrey Lefkow of the U.S. District Court for the Northern District of Illinois held that prevailing parties cannot recover costs related to processing ESI into litigation databases when recovering fees for exemplification and copies. According to the court, a party may not recover for expenses "leading up to" making copies of materials, such as creating a litigation database, electronic data hosting, or analyzing metadata or deduplication. However, the court held that the costs associated with scanning documents were properly treated as copying costs and were therefore recoverable.

Party Is Not Entitled to Forensic Examination of Nonparties' Electronic Devices When Recovered Information Is Not Critical, Could Be Discovered by Other Means and Might Disclose Confidential Information

***In re Am. Med. Sys., Inc.*, MDL No. 2325, 2016 WL 6666890 (S.D.W. Va. Nov. 10, 2016)**

In a product liability action alleging that a medical device manufactured by the defendant was defective, Magistrate Judge Cheryl A. Eifert of the U.S. District Court for the Southern District of West Virginia denied the defendant's request to "mirror image" certain nonparties' electronic devices in an effort to recover deleted data. The nonparties had arranged and funded some of the plaintiffs' corrective surgeries, which the defendant contended were unnecessarily complex and expensive. In an attempt to learn more about the medical necessity and costs of the procedures for damages purposes, the defendant sought forensic examination of the nonparties' deleted electronic data. Although the defendant offered to pay expenses associated with the discovery, the nonparties objected, arguing that forensic examination would disclose, *inter alia*, confidential commercial and personal information. The court agreed. According to the court, there was insufficient proof that any of the materials expected to be recovered from the forensic examination were critical to the case or could not be obtained from more convenient sources. The court also emphasized that the nonparties had a significant interest in preventing the disclosure of the personal health information of their customers, many of whom had no connection to the product liability action. Thus, the court held that the defendant was not entitled to forensic examination of the nonparties' electronic devices.

Other Decisions

Communications Between a Party's Subsidiaries and Foreign Regulators Not Discoverable

***In re Bard IVC Filters Prod. Liab. Litig.*, No. MDL 15-02641-PHX DGC, 2016 WL 4943393 (D. Ariz. Sept. 16, 2016)**

Judge David G. Campbell of the U.S. District Court for the District of Arizona denied the plaintiffs' request for discovery regarding communications between foreign regulators and the defendant medical device manufacturer's foreign subsidiaries or divisions. In examining the plaintiffs' request, the court noted that amended Rule 26(b)(1) provides that discovery must be: (1) relevant to any party's claim or defense; and (2) proportional to the needs of the case. The court found that communications between the defendant's foreign subsidiaries and foreign regulators was only marginally relevant to the plaintiffs' product liability claims because none of the plaintiffs in the multidistrict litigation were from foreign countries. According to the court, the mere possibility that the communications with foreign regulators might be inconsistent with the defendant's communications with American regulators was not sufficient to warrant discovery. In addition, the court found that the request was not proportional to the needs of the case because the burden of collecting foreign communications — which included searching ESI from 18 different countries over a 13-year period — outweighed the possible benefit of discovering inconsistent communications.

Requesting Party Required to Meet and Confer Regarding Search Terms for ESI Discovery

***Pyle v. Selective Ins. Co. of Am.*, 2:16-cv-335, 2016 WL 5661749 (W.D. Pa. Sept. 30, 2016)**

Judge Terrence F. McVerry of the U.S. District Court for the Western District of Pennsylvania granted the defendant's motion to compel the plaintiff to provide ESI search terms to be used in locating potentially relevant documents. The plaintiff's counsel had propounded a request for production of all emails and other documents from many of the defendant's employees. The defendant produced some documents and requested that the plaintiff send a suggested list of search terms to run through email archives to locate additional, potentially relevant documents. The plaintiff refused, arguing that the defendant had not identified any special burden associated with locating and producing the requested materials. The court sided with the defendant. According to the court, such a request for search terms is consistent with the Federal Rules of Civil Procedure regarding the discovery of ESI, as well as the court's local rules, which suggests that the parties will reach an agreement regarding the discovery of ESI, including with respect to the search protocol.

Broad Discovery of Emails and Text Messages Permitted Where Proportional to Needs of the Case

***First Niagara Risk Mgmt., Inc. v. Folino*, CIVIL ACTION NO. 16-1779, 317 F.R.D. 23 (E.D. Pa. Aug. 11, 2016)**

In an action for breach of fiduciary duty brought by an employer against a former employee who started a competing company, Judge Stewart Dalzell of the U.S. District Court for the Eastern District of Pennsylvania granted a motion to compel a broad search of the former employee's email and text messages for relevant documents. The plaintiff, First Niagara, presented the court with evidence that Folino, its former employee, was involved with a competing venture in violation of nonsolicitation and noncompete provisions in his employment agreement. First Niagara requested permission to run particular search terms through all of Folino's emails and text messages to find additional evidence. While the court noted that the request was

broad, it held that the requested material was clearly relevant and proportional to the needs of the case. Specifically, the court found that the potential burden of the discovery request did not outweigh the presumption in favor of disclosure because the issues at stake were significant to First Niagara, First Niagara did not otherwise have access to the information and First Niagara needed to conduct broad discovery to determine the scope of Folino's actions. The court also rejected Folino's attempts to limit the searches, noting that the limitations proposed would exclude documents clearly relevant to his claims. The court noted, however, that it was not unreasonable for Folino to object to the discovery on grounds that it was overly broad and therefore denied First Niagara's request for costs and fees associated with its motion to compel.

Conditional and Boilerplate Objections to Discovery Not Sufficient

***Duffy v. Lawrence Mem'l Hosp.*, Case No. 2:14-cv-2256-SAC-TJJ, 2016 U.S. Dist. LEXIS 176848 (D. Kan. Dec. 21, 2016)**

The plaintiff brought a *qui tam* action against her former employer under the False Claims Act alleging, in part, that the defendant gave false information to the federal government to maximize reimbursement from federal medical care programs. The plaintiff filed a motion to compel, requesting that the court overrule the defendant's objections to the plaintiff's discovery requests. In examining the motion, Magistrate Judge Teresa J. James of the U.S. District Court for the District of Kansas held that the plaintiff's written discovery requests were appropriate because they were directly related to the claims and defenses at issue in the case. In addition, the court approved of the overwhelming majority of the plaintiff's interrogatories and requests for production, finding that the defendant's conditional objections and/or unsupported boilerplate objections to these requests were insufficient to establish that the discovery was inappropriate. Specifically, the court found that the defendant's conditional objections — *i.e.*, the defendant's assertion of objections to certain requests followed by a response to the request "[s]ubject to and without waiving" objections — lacked rational basis because the federal rules require either an answer/statement that documents will be produced or an objection. The court also found that the defendant improperly asserted "boilerplate objections" that the plaintiff's requests were "overly broad, unduly burdensome, vague and ambiguous." According to the court, because the defendant failed to provide facts to justify its objections to the discovery requests at issue, the defendant had not met its burden to show why the discovery was improper.

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