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State E-Discovery

Non-Willful Spoliation Of ESI

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ISTOCK

Recent state court decisions have grappled with the appropriate sanction for non-willful spoliation of electronically stored information (ESI) and, as noted in *Arbor Realty Funding v. Herrick, Feinstein*,[1] the spoliation "sanction must reflect 'an appropriate balancing under the circumstances.'" As such, in non-willful spoliation disputes, often courts are not striking pleadings or issuing preclusion orders but instead are issuing adverse or negative inference instructions to the jury. A recent motion court decision in *Auffarth v. Harold Natl. Bank*,[2] however, expressed concern that instructing the jury with an adverse inference was "tantamount" to giving one side a victory on an issue and thus, as an alternative, decided that it would instruct the jury with a missing document charge in the event the defendant contested a certain issue.

Often neither the mens rea of a party's intent relating to the destruction of ESI is at issue nor is the relevance of the ESI, and thus a litigator needs to strategize carefully what sanction to seek that would achieve for its client relief commensurate with the conduct at issue, while still maintaining credibility with the court. The frustration, however, experienced by a party (and its counsel) whose ESI has been spoliated is that the issuance of a curative jury instruction may constitute "snow in the winter" as very few cases go to the jury. Thus, a court's sanction of ordering a curative instruction often bears no real consequence to the spoliating party. Courts, no doubt, are aware of this inherent problem with spoliation sanctions and, in *Arbor Realty*, the First Department, after reversing the motion court's striking of the complaint and ordering that an adverse inference charge be issued as the spoliation sanction, addressed that issue in part by expressly ruling that the "modification of the motion court's order is without prejudice to [defendant] seeking dismissal of the complaint or other spoliation sanctions in the future, should there be further revelations making such a motion appropriate."

In *Arbor Realty*, defendant sought spoliation sanctions and the First Department held it was undisputed that Arbor's obligation to preserve evidence arose at least as early as June 2008, but it did not issue a formal litigation hold until May 2010. The First Department noted:

> Failures which support a finding of gross negligence, when the duty to preserve electronic data has been triggered, include: (1) the failure to issue a written litigation hold []; (2) the failure to identify all of the key players and to ensure that their electronic and other records are preserved; and (3) the failure to cease the deletion of email. (citations omitted)

The Appellate Division held that the "motion court correctly determined that Arbor's destruction of evidence was, at a minimum, gross negligence, since Arbor

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failed to institute a formal litigation hold until approximately two years after even Arbor admits it had an obligation to do so." The court noted that the "sanction must reflect 'an appropriate balancing under the circumstances'" and that "[g]enerally, dismissal of the complaint is warranted only where the spoliated evidence constitutes 'the sole means' by which the defendant can establish its defense or where the defense was otherwise 'fatally compromised' or defendant is rendered 'prejudicially bereft' of its ability to defend as a result of the spoliation." The court held:

> An adverse inference charge is an appropriate sanction under the circumstances since it will permit the jury to: (1) find that the missing emails and other electronic records would not have supported Arbor's position, and would not have contradicted evidence offered by Herrick, and (2) draw the strongest inference against Arbor on the issues of whether Arbor would have made the loans regardless of any potential zoning issues, and the measure of Arbor's damages taking into account its assignment of the loans and/or failure to mitigate its damages (PJI 1:77).

Finally, the First Department noted that the modification of the motion court's order is without prejudice to Herrick seeking dismissal of the complaint or other spoliation sanctions in the future should there be further revelations making such a motion appropriate.

In *Auffarth*, a spoliation sanction was denied where the destruction of emails did not support a finding of gross negligence. The motion court held that gross negligence is "conduct that evinces a reckless disregard of the rights of others or smacks of intentional wrongdoing." Applying such standard, the motion court found that there was "no evidence that the emails were intentionally or willfully destroyed" where the bank attempted to preserve the emails of all terminated employees, but left plaintiff's name off the list of whose emails were to be preserved due to an error made in failing to copy and paste all of the names properly. The motion court found that this error was inadvertent and that such act was negligent in "failing to take reasonable care after being instructed to preserve the emails of all employees terminated." The motion court noted that there had been "no showing by the estate how the emails are relevant to establishing that the bank acted in bad faith or engaged in fraud or arbitrary action in terminating [the decedent] for his alleged failure to perform."

The motion court noted that the "destroyed emails do not foreclose the estate from presenting evidence that [the decedent] was thwarted in his attempt to develop the loan and deposit business because of the banks' inability to handle the size of the deals it represented that it could undertake as its capital and financial condition declined," which could be established through other evidence, including financial records.

> A litigator needs to strategize carefully what sanction to seek that would achieve for its client relief commensurate with the conduct at issue, while still maintaining credibility with the court.

In *Cioffi v. S.M. Foods*,[3] the Second Department held that the record supported the motion court's conclusion that "at the time the Atlanta defendants destroyed the electronic data at issue, they were parties to this litigation and knew or should have known of the potential relevance of the data to the plaintiffs' claims." Nevertheless, the court held that plaintiffs failed to demonstrate that the "Atlanta defendants' destruction of the data was willful rather than merely negligent." In addition, the Second Department held that plaintiffs failed to demonstrate that the "destruction of the data has significantly affected their ability to prove their claims." As such, the court held that the motion court "providently exercised its discretion in declining to strike the Atlanta defendants' answer or preclude them from presenting evidence." However, since the Atlanta defendants "knew or should have known that the data should have been preserved," the court held that the "imposition of the lesser sanction of a negative inference was appropriate." Accordingly, the Second Department held that the motion court "properly granted that branch of the plaintiffs' motion which was to impose a sanction against the Atlanta defendants to the extent of directing that a negative inference charge be given against them at trial."

In *Abe v. New York Univ.*,[4] the First Department held that the motion court did not abuse its discretion in finding that plaintiff failed to demonstrate an entitlement to spoliation sanctions where the "computer drive that was erased was a back-up of a drive that remained available." As such, the court held that there was "no showing that evidence was destroyed in the first instance." Further, plaintiff offered "no proof that any evidence was destroyed by the loss of access to the laptop used, but not owned, by one of the defendants." The court further noted that where "an export chart of the letters' metadata" was provided, plaintiff's assertion that "additional metadata existed, but was not exchanged, was unsupported."

1. 140 A.D.3d 607, 36 N.Y.S.3d 2 (1st Dep't 2016).
2. 2016 N.Y. Misc. LEXIS 2320, 2016 NY Slip Op 31169(U) (Sup. Ct. N.Y. Co. June 21, 2016).
3. 2016 N.Y. App. Div. LEXIS 5609, 2016 NY Slip Op 05741 (2d Dep't Aug. 10, 2016).
4. 140 A.D.3d 557, 32 N.Y.S.3d 506 (1st Dep't 2016).

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