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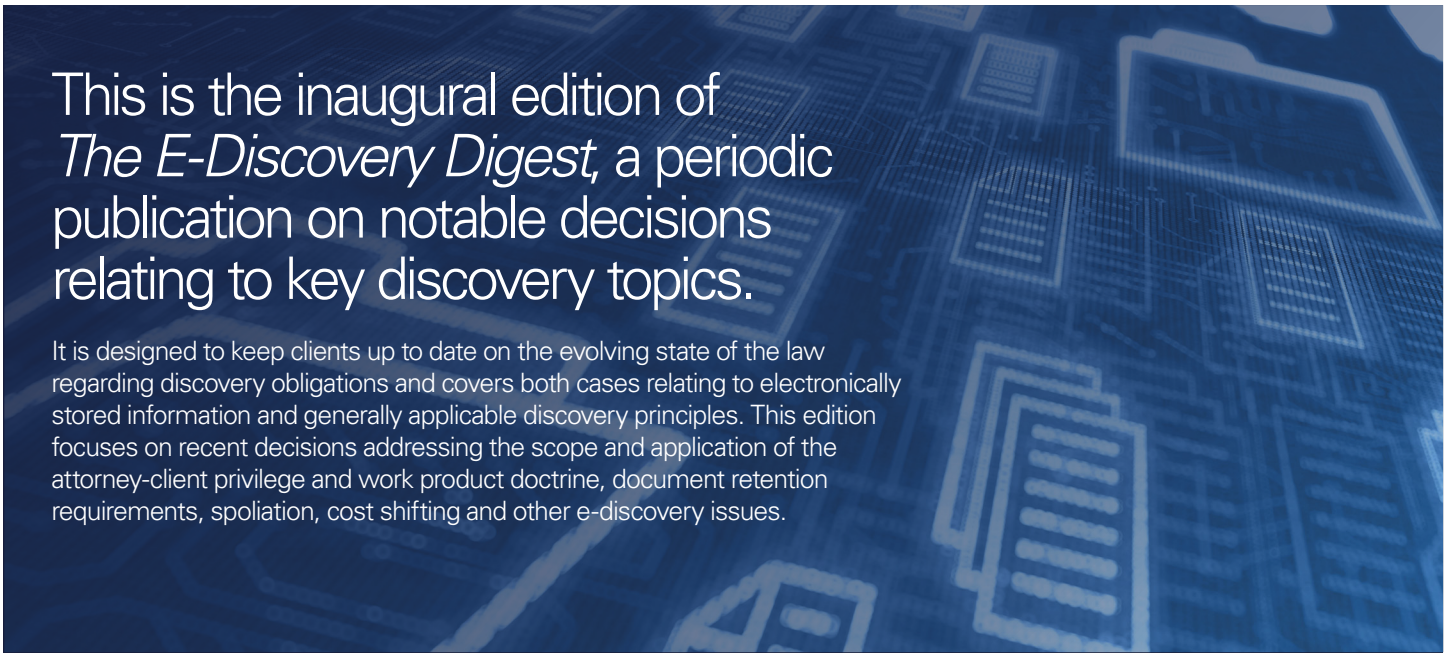

Attorney-Client Privilege/Work Product Decisions

Decisions Protecting Against Disclosure

Clawback Allowed for Inadvertently Produced Document

***Johnson v. Ford Motor Co.*, No. 3:13-cv-06529, 2015 WL 1650428 (S.D. W. Va. Apr. 14, 2015).** In this unintended acceleration defect class action, Magistrate Judge Cheryl A. Eifert of the U.S. District Court for the Southern District of West Virginia denied the plaintiffs' motion to challenge the designation of certain documents and to compel, holding that a document inadvertently produced by Ford Motor Company during discovery did not waive the attorney-client privilege and was subject to clawback under Federal Rule of Evidence 502(b). Looking at West Virginia, Michigan and federal law, the court first determined that the communication was protected by attorney-client privilege because it constituted legal advice. To determine whether Ford had waived the privilege when it first produced the document, the court applied a multifactor test governed by the Advisory Committee Notes to Rule 502(b). The court determined that Ford had taken reasonable precautions in its two-tiered review. Furthermore, of the 2,700 documents Ford had produced, the document was the only privileged document that was inadvertently disclosed. The court also found that confidentiality could be restored where the document at issue had not been made part of the record or used in any deposition. Finally, although the plaintiffs argued that the document supplied crucial information that could not be replicated, the court held that the focus of the Rule 502 fairness analysis was not whether the privilege deprives parties of pertinent information. Therefore, although the length of time the plaintiffs had possessed the document weighed somewhat in their favor, the majority of factors weighed in favor of preserving the privilege. As such, Ford was entitled to claw back the document.

Deposition Preparation for Former Employees Protected

***Hanover Insurance Co. v. Plaquemines Parish Government*, No. 12-1680, 2015 WL 546699 (E.D. La. Feb. 10, 2015)**. Judge Jane Triche Milazzo of the U.S. District Court for the Eastern District of Louisiana denied the plaintiff's motion to appeal the magistrate judge's holding that deposition-preparation conversations between the defendants' counsel and the defendants' former employees were privileged under Louisiana law. In this construction lawsuit, the parties had deposed the defendant general contractor's former vice president and the defendant architect's former construction administrator. The deponents were asked about deposition-preparation conversations with their former employers' counsel and were instructed not to answer on grounds of attorney-client privilege. The plaintiff's motion to compel ensued. The district court examined whether privilege exists between corporate counsel and former employees and, if so, to what extent. It concluded that privilege exists between a corporation's counsel and its former employees where: (1) the company employed the employee during the time relevant to the lawyer's current representation; (2) the former employee possesses knowledge relevant to the lawyer's current representation; and (3) the communication's purpose is to assist the company's lawyer in evaluating whether the employee's conduct has bound or would bind the company, assessing the legal consequences of that conduct, or formulating appropriate legal responses to actions taken with regard to that conduct. Because the deponents were employed with their respective employers at the relevant time, were among the most important individuals on the project, and both spoke with the corporate attorneys in order to help the attorneys to defend against the litigation, the court held that the magistrate judge had correctly found that the communications were privileged.

Communications and Materials Underlying Investigations by Counsel Protected

***DeAngelis v. Corzine*, No. 11 Civ. 7866(VM)(JCF), 2015 WL 585628 (S.D.N.Y. Feb. 9, 2015).** As part of the lawsuit liquidating MF Global, Inc., Magistrate Judge James C. Francis IV of the U.S. District Court for the Southern District of New York denied the defendants' motion to compel the trustee to produce certain documents underlying an audit report that was prepared by outside counsel in accordance with a Securities Investor Protection Act (SIPA) statutory directive. (The trustee had been appointed to liquidate MF Global under SIPA.) The defendants argued that the documents were not protected because "the firm's findings were never intended to be kept confidential; rather, they were intended to be incorporated into the published Report." The court rejected this argument, holding that the attorney-client privilege applied because there was no indication that the materials were intended to be published. The defendants also asserted that the documents were not work product because they were "dual purpose" documents created pursuant to statutory mandate. This contention was rejected by Judge Francis, who observed that the report and its underlying documents were only created because of the SIPA proceeding. The court also found the defendants' waiver arguments unavailing.

Witness Interviews Privileged

***In re General Motors LLC Ignition Switch Litigation*, No. 14-MD-2543 (JMF), 2015 WL 221057 (S.D.N.Y. Jan. 15, 2015).** Judge Jesse M. Furman of the U.S. District Court for the Southern District of New York denied the plaintiffs' motion to compel production of notes and memoranda relating to witness interviews conducted by outside counsel as part of an internal investigation into an ignition switch defect and delays in recalling the affected vehicles. Outside counsel retained by GM had conducted more than 200 interviews of GM employees and former employees as part of its investigation into the recall. The result was a written report that GM submitted to Congress and numerous government agencies. The report was also disclosed by GM in discovery. The plaintiffs sought to compel GM to disclose the interview material underlying the report. The court held that the witness interview communications were protected by attorney-client privilege and the work product doctrine. Attorney-client privilege applied under *Upjohn Co. v. United States*, 449 U.S. 383 (1981), because the interviews were conducted as part of the company's request for legal advice; the employees were aware that the purpose was to collect information to assist in providing legal advice; and the communications were not shared with third parties. The court was unpersuaded by the plaintiffs' argument that the GM CEO's testimony that she would share "everything and anything" related to safety demonstrated a lack of expectation of confidentiality. Equally unavailing was the plaintiffs' argument that the interview materials were not made for the purpose of providing legal assistance. Furthermore, the court held that the materials were independently protected by the work product doctrine because they were prepared "in light of the pending DOJ investigation and the anticipation of civil litigation" and "would not have been created in essentially similar form had ... GM not been faced with the inevitability of such litigation."

Untimely Privilege Log Does Not Result in Waiver

***Minden Air Corp. v. Starr Indemnity & Liability Co.*, No. 3:13-cv-00592-HDM-WGC, 2015 U.S. Dist. LEXIS 11499 (D. Nev. Jan. 30, 2015).** Magistrate Judge William G. Cobb of the U.S. District Court for the District of Nevada denied the plaintiff's

motion to compel, rejecting its argument that the defendant had waived the attorney-client privilege by failing to produce its privilege log within a reasonable time. The defendant did not serve a privilege log on the plaintiff until the day following the motion to compel, which was six months after it provided discovery responses. The plaintiff argued that despite this eventual production, the privilege log was per se untimely and therefore the privilege was waived. The court disagreed, finding that despite the untimeliness, other factors counseled against waiver, including the fact that the documents sought were not of great significance and the plaintiff had itself not raised the privilege log issue for several months.

Communications Between Counsel and Public Relations Consultant Privileged

***Schaeffer v. Gregory Village Partners, L.P.*, No. 13-cv-04358-JST, 2015 WL 166860 (N.D. Cal. Jan. 12, 2015).** Judge Jon S. Tigar of the U.S. District Court for the Northern District of California determined that attorney-client privilege extended to certain communications between in-house counsel and a public relations consultant who was hired by the defendants when they faced regulatory action. The court held the consultant qualified as a "functional employee" under *Upjohn Co. v. United States*, 449 U.S. 383 (1981), because her work was substantially intertwined with the subject matter of the company's legal concerns and she provided information to corporate counsel to aid the attorney in advising the company. The court also held that attorney-client privilege protected communications providing legal advice from in-house counsel despite her dual role as the company's vice president. Although ruling in the company's favor as to attorney-client privilege, the court took issue with its withdrawal of several of the challenged privilege log entries after it had recertified the legitimacy of its privilege log as ordered by the court. The court ordered the defendants to show cause why it should not impose monetary sanctions for this conduct.

In-House Counsel's Communications With Subsidiary Protected

***Nester v. Textron, Inc.*, No. A-13-CA-920-LY, 2015 WL 1020673 (W.D. Tex. Mar. 9, 2015).** In a personal injury case regarding a 2011 injury, Magistrate Judge Mark Lane of the U.S. District Court for the Western District of Texas granted in part and denied in part the plaintiffs' motion to compel the production of documents relating to a similar 2005 accident. In handling the earlier accident, Textron's in-house counsel had provided legal advice to the indirect subsidiary involved. The court examined whether Texas law allows the attorney-client privilege to attach to communications between the in-house counsel of a parent company and managing personnel of a separate corporate entity. Finding that the attorney had acted as counsel to both the defendant and its subsidiary during the 2005 investigation, the court held that the documents were largely protected pursuant to joint client privilege under Texas law. While attorney-client privilege did not apply to one challenged communication because it was also sent to an insurance carrier representative, this communication was permissibly withheld under the work product doctrine because it informed defendants' insurer and outside counsel about developments in the case.

Decisions Ordering Disclosure

Attorney Communications With Witness During Deposition Breaks Discoverable

***Coyote Springs Investment, LLC v. Eighth Judicial District Court*, No. 64623, 2015 WL 1514528 (Nev. Apr. 2, 2015)**. A unanimous panel of the Supreme Court of Nevada (Hardesty, C.J., Douglas and Cherry, JJ.) denied the plaintiff's petition for a writ of prohibition challenging the district court order that required the disclosure at trial of a private communication between a witness — the plaintiff's former co-owner and manager — and the plaintiff's counsel during the plaintiff's second deposition. When the defendant's counsel completed questioning at that deposition, the plaintiff's counsel suggested taking a break and requested a conference room for himself, the witness and plaintiff's general counsel. The defendant's counsel objected, but the conference took place. After returning, the plaintiff's counsel began his questioning. At trial, the defense sought to cross-examine the deponent regarding what was discussed at the conference. The writ of prohibition was filed after the trial court ordered disclosure over the plaintiff's objection.

The Supreme Court of Nevada addressed whether a private communication between a witness and an attorney during a requested break in the witness's deposition is entitled to protection from discovery under the attorney-client privilege. The court held that under Nevada law, attorneys may confer with witnesses during requested recesses in depositions only to determine whether to assert a privilege. In order for the attorney-client privilege to apply to these conferences, counsel must state on the deposition record: (1) the fact that a conference took place; (2) the subject of the conference; and (3) the result of the conference. Because counsel in this case did not make a prompt record of the communications, the court held that the district court did not abuse its discretion in determining that the conference was not privileged.

Deposition of In-House Counsel Allowed

***Sand Storage, LLC v. Trican Well Service, L.P.*, No. 2:13-CV-303, 2015 WL 1527608 (S.D. Tex. Apr. 2, 2015).** In this contract dispute, Magistrate Judge Jason B. Libby of the U.S. District Court for the Southern District of Texas granted in part the plaintiff's

motion to take the deposition of the defendant's in-house counsel. Before the litigation, the defendant's in-house counsel had signed a letter giving the plaintiff formal notice of its failure to perform its contract obligations. The letter set forth facts regarding the plaintiff's deficient performance, which were contested by the plaintiff in the resulting litigation. The plaintiff sought to depose in-house counsel as the author of the letter in order to determine the source of the information in the letter and who had been the decision-maker with regards to the contract. The defendant objected on the grounds of attorney-client privilege. The court recognized that depositions of opposing counsel are "disfavored generally." However, under Fifth Circuit precedent, they may be permissible when the following factors are met: (1) no other means exist to obtain the information; (2) the information sought is relevant and non-privileged; and (3) the information is crucial to the preparation of the case. Here, the court held that deposition of in-house counsel was warranted on limited factual questions: who was the source of the facts in the letter and whether in-house counsel acted as the decision-maker. But the plaintiff was not allowed to question in-house counsel on the confidential communications he had as the company's lawyer with the company's employees because the substance of these communications was protected by attorney-client privilege.

Attorney Communications With Human Resources Consultant Not Privileged

***Scott v. Chipotle Mexican Grill, Inc.*, No. 12-CV-08333 (ALC) (SN), 2015 WL 1424009 (S.D.N.Y. Mar. 27, 2015)**. In a nationwide collective action alleging violations of the Fair Labor Standards Act and state wage and hours laws, Magistrate Judge Sarah Netburn of the U.S. District Court for the Southern District of New York granted in part and denied in part the plaintiffs' motion to compel production of documents that the defendant had identified as privileged on its privilege log. One of two main sources of dispute was a report directed to the company's outside counsel from a human resources consultant. The company claimed that attorney-client privilege extended to the document under the *Kovel* exception in the Second Circuit whereby attorney-client privilege can apply to non-lawyers employed by a law firm. The court, however, determined that the exception was inapplicable because the consultant was engaged to do nothing more than factual research, and her report did not provide "any specialized knowledge" that counsel could not have acquired or understood on their own. One other disputed communication was an email between the company and an attorney at a legal non-profit organization that Chipotle was a member of that provides a variety of services to employers, including HR advice and legal services. The court held that the attorney-client privilege applied, regardless of the absence of a formal engagement agreement and the non-profit's "nontraditional structure," because an *in camera* inspection revealed that the communications contained legal, not business, advice. The final set of privilege log entries plaintiffs disputed were emails where no attorney was involved. The court held that emails between corporate employees that either contained or referred to legal advice were privileged, regardless of the fact that they were not sent by an attorney.

Attorney Drafts Intended for Public Disclosure Not Privileged

***FTC v. Reckitt Benckiser Pharmaceuticals, Inc.*, No. 3:14mc5, 2015 WL 1062062 (E.D. Va. Mar. 10, 2015).** Senior Judge Robert E. Payne of the U.S. District Court for the Eastern District of Virginia partially granted the Federal Trade Commission's (FTC) request for a court order enforcing its civil investigative demand issued to the defendant. In response to the demand, the company had withheld 28,000 documents on the grounds of attorney-client privilege. At issue were draft memoranda, draft letters, draft press releases, draft public relations documents and draft reports. The FTC argued that these communications were not protected by the attorney-client privilege because the privilege does not apply to communications in connection with proposed public disclosure. The court agreed, holding that, in the Fourth Circuit, if the client has solicited the attorney's services to facilitate the production of a public document, then the attorney-client privilege does not extend to the published material or the "details" underlying it. The important inquiry, according to the court, is whether the client has enlisted the attorney's services in order to prepare a document that would eventually be released to the public. The court recognized, however, that the intended publication of a communication does not eviscerate the privilege for all of the material produced for, or in connection with, publication. Specifically, attorney's notes, communications between the attorney and client containing relevant data and other documents that might contain "details underlying the data" might well be privileged. The court noted that this determination would require an individualized, *in camera* inspection of the documents to ensure that only non-privileged content is disclosed.

Internal Investigations and Reports Not Protected

***Frickey v. Kobelco Stewart Bolling, Inc.*, No. 14-2, 2015 WL 1012974 (E.D. La. Mar. 5, 2015).** Magistrate Judge Joseph C. Wilkinson III of the U.S. District Court for the Eastern District of Louisiana ordered Dow Chemical Company to produce an investigatory report detailing the circumstances of the accident at issue in the litigation despite the company's assertion of privilege. Dow admitted that it was the company's regular business practice to create such reports after any accident. Dow argued,

however, that this particular report was protected by attorney-client privilege because it was created with the participation of a lawyer for the purpose of providing legal advice about the potential for litigation. Dow supported this claim with an affidavit from the lawyer stating that when severe injuries or events occur, an attorney will travel to the site to determine whether litigation is likely, and if so, manage the investigation. The court was not persuaded that the mere involvement of a single attorney in the 10-person team that created the report — which contained primarily factual material — was sufficient to distinguish it from other reports created as part of a "standard business practice" for "run-of-the-mill" matters. As the court explained, "Dow cannot convert what is standard business practice performed for a variety of non-legal purposes into privileged material through the simple expedient measure of adding a lawyer into the mix." Therefore, the court held that Dow had failed to meet its burden to prove that the privilege applied.

Investigation by Compliance Personnel Not Privileged

***Wultz v. Bank of China Ltd.*, No. 11 Civ. 1266(SAS)(GWG), 2015 WL 362667 (S.D.N.Y. Jan. 21, 2015).** Magistrate Judge Gabriel W. Gorenstein of the U.S. District Court for the Southern District of New York granted the plaintiffs' motion to compel the production of documents relating to investigations conducted by the Bank of China (BOC) into terrorist-related account activity. The investigations were undertaken following a demand letter sent by the plaintiffs and were directed by in-house compliance personnel, not in-house counsel. BOC asserted attorney-client privilege on the grounds that the investigation was conducted "with the expectation" that U.S. counsel would use the information to provide legal advice. BOC also argued that the documents were protected work product because they were created in response to the plaintiffs' demand letter. The court rejected both arguments. First, the court found that BOC had provided no evidence that the documents were produced at the direction of an attorney. The court held that the collection of information is not "protected merely because the person [conducting the investigation] harbors a plan to provide the information later to an attorney." Second, although the court accepted that the demand letter triggered BOC's investigation, the court found that BOC had not met its burden to show that it would not have conducted an essentially similar investigation if the information had been brought to its attention through another means.

Root-Cause Analysis Not Privileged Despite Attorney Involvement

***Chevron Midstream Pipelines LLC v. Settoon Towing LLC*, Nos. 13-2809, 13-3197, 2015 WL 65357 (E.D. La. Jan. 5, 2015).** In litigation following a maritime accident, Magistrate Judge Michael B. North of the U.S. District Court for the Eastern District of Louisiana granted the defendants' motion to compel the plaintiff's production of the Root Cause Analysis (RCA) that its employees created after the accident. Chevron argued that the document was protected work product because unlike the company's routine root cause procedures, this RCA was "legally chartered." According to Chevron, one in-house attorney had appointed an RCA team including two other in-house lawyers to investigate and gather information necessary to provide legal advice. He had further prepared and signed a "Root Cause Investigation Legal Charter." The court rejected Chevron's argument that its "legally chartered" RCAs were distinguishable from the root cause analyses routinely conducted to determine the cause of an incident in order to prevent similar accidents from reoccurring. The court found that the plaintiff's "conclusory and self-serving" argument was undermined by other testimony and the documents themselves. Therefore, the court ordered the RCA and related documents be produced, except where attorney-client privilege otherwise applied.

Attorney-Client Privilege Survives Dissolution of Business in Certain Cases Only

***Red Vision Systems, Inc. v. National Real Estate Information Services, L.P.*, 108 A.3d 54 (Pa. Super. Ct. 2015).** A unanimous panel of the Superior Court of Pennsylvania (Ford Elliott, P.J.E., Allen and Strassburger, JJ.) affirmed the trial court's denial of a motion to quash a subpoena because the subpoenaed party, the defendants' former in-house counsel, could not rely on attorney-client privilege where the client was a dissolved corporation. The dispute arose when the plaintiffs sought to subpoena the defendants' former in-house counsel to produce documents related to the identification of the defendants' management personnel and insurance coverage, and any transfer of the defendants' assets. Former in-house counsel objected to the subpoena on the grounds that he had an ongoing duty to shield the documents from release under attorney-client privilege. In its decision, the court identified the issue presented as one of first impression: whether the attorney-client privilege survives the dissolution of a business entity. The court held that communications between a corporation or other business entity and its attorney remain subject to the attorney-client privilege after the company dissolves and/or ceases normal business operations so long as the company retains some form of continued existence evidenced by having someone with authority to speak for the client. Finding that the attorney here had failed to identify a person who presently had the authority to speak on behalf of the defendants, the court ruled the attorney-client privilege did not apply to the information or documents in his possession.

Spoliation and Preservation Decisions

Sanctions Denied/Reversed

Parties Need Only Preserve Documents Potentially Relevant to Litigation

***Blue Sky Travel & Tours, LLC v. Al Tayyar*, No. 13-2500, 2015 WL 1451636 (4th Cir. Mar. 31, 2015).** A panel of the U.S. Court of Appeals for the Fourth Circuit (Duncan and Keenan, JJ., Shedd, J. (dissenting)) concluded that the district court applied an incorrect legal standard in imposing sanctions for the defendants' spoliation of evidence and remanded the breach of contract case for further factual development on the issue of spoliation. The lower court mistakenly believed that once the defendants were put on notice that there was litigation pending, they were required to stop "normal document retention policies and to preserve all documents because you don't know what may or may not be relevant." This was an abuse of discretion because a party is not required to preserve all documents, but rather only documents that it should have known were potentially relevant to the dispute. Additionally, the parties disputed whether the plaintiff's complaint put the defendants on notice that invoices related to vendors other than the plaintiff could be relevant to the case. Finding the award of an adverse inference instruction created "severe prejudice," the Fourth Circuit remanded for determination of (1) when the duty to preserve was triggered — i.e., the date by which the defendants knew or should have known that the invoices at issue could be relevant in the case — and (2) when the defendants destroyed the invoices.

No Sanctions When Employee Destroys Documents Without Employer's Consent

***Selectica, Inc. v. Novatus, Inc.*, No. 6:13-cv-1708-Orl-40TBS, 2015 WL 1125051 (M.D. Fla. Mar. 12, 2015).** Magistrate Judge Thomas B. Smith of the U.S. District Court for the Middle District of Florida denied the plaintiff's motion for spoliation sanctions in this case involving the misappropriation of trade secrets and unfair competition. While employed by Selectica, nonparty sales person Holt used a company laptop computer that was configured to automatically back up data to his personal cloud storage account. After being hired by the defendant in October 2013, Holt retained access to those files, which he offered to share with his new employer. After filing suit, the plaintiff sent a litigation hold letter to Novatus in December 2013; Novatus, however, did not say anything to Holt concerning his duty to preserve relevant information until January 2014. After learning of the suit, Holt admitted that he purged thousands of Selectica files from his cloud storage account. The court held that the defendant was under a duty to preserve relevant information "within its possession, custody, or control" once it was served with the plaintiff's complaint. Because Holt was an employee and had offered to provide access to the relevant data, the court found that the defendant had the "practical ability" to control the data and was thus obligated to instruct Holt to preserve the files in his personal account. While the files and associated metadata were clearly relevant to the litigation, the court determined that because copies of the files also resided on the laptop Holt used when employed by the plaintiff, the files Holt destroyed were not crucial to the case. While Holt clearly acted in bad faith by destroying the files at issue, because there was no evidence that he acted on instructions from the defendant or with the defendant's knowledge or approval, the defendant's failure to timely implement a litigation hold on Holt's information was not an act of bad faith. Under Florida state law, actions amounting to negligence or even gross negligence do not support an imposition of sanctions.

No Sanctions for Destruction Before There Is Reason to Believe Litigation Likely

***Williams v. Werner Enterprises, Inc.*, No. 14-0212, 2015 WL 1000779 (W. Va. Mar. 2, 2015).** Justice Menis E. Ketchum II of the Supreme Court of Appeals of West Virginia held that the plaintiffs, the estates of deceased truck drivers killed in a tractor-trailer accident, did not establish a claim for intentional spoliation of evidence against the deceased's employer. West Virginia is one of a handful of states to recognize a standalone claim for the tort of intentional spoliation, which requires destruction of evidence with the specific intent to defeat a pending or potential lawsuit. The case turned on the degree of proof necessary to establish knowledge of a pending or potential civil action. The court held that while "actual knowledge" was not required, there was no evidence that the defendant had "any inkling of (let alone cognizance, awareness, a clear perception, or information that would impel it to inquire, ascertain, or find out about) a pending or potential product liability suit" against the manufacturer of the vehicle. At the time the defendant disposed of the fire-burned remains of the tractor-trailer, the defendant was under the impression that the accident was caused by nothing more than a winter storm; records indicating that the vehicle had broken down twice previously were insufficient to put the defendant on notice that the tractor-trailer was allegedly defective.

Grocer With No Expectation of Lawsuit Not Liable for Discarding Allegedly Defective Product

***Pilgrim's Pride Corp. v. Mansfield*, No. 09-13-00518-CV, 2015 WL 794908 (Tex. App. Feb. 26, 2015).** A unanimous panel of the Court of Appeals of Texas (McKeithen, C.J., Kreger and Horton, JJ.) affirmed the trial court's refusal to instruct the jury on

spoliation in this products liability case involving a slip-and-fall incident. While at a grocery store, the appellee slipped and fell on blood that had leaked from a bag of chicken manufactured by the appellant. After assisting the customer, the store manager inspected the bag, found it defective, provided the customer with a replacement and discarded the defective product. The trial court concluded that the grocer was not under a duty to preserve the bag, as the store should not have reasonably known there was a "substantial chance" a claim would be filed. The customer left the store of her own accord without requesting medical assistance or otherwise indicating she intended to sue or file a claim.

No Spoliation Where Evidence Lost Before Defendant Served in Litigation

***Lunkenheimer Co. v. Tyco Flow Control Pacific Party Ltd.*, No. 1:11-cv-824, 2015 WL 631045 (S.D. Ohio Feb. 12, 2015).** In this intellectual property case, Judge Timothy S. Black of the U.S. District Court for the Southern District of Ohio denied the intervening party's request for spoliation sanctions, finding that the duty to preserve evidence had not been triggered at the time the defendant, an Australian company, allegedly destroyed relevant electronically stored information. The intervenor argued that the defendant's duty to preserve was triggered in October 2002, when an internal email indicating that there was conflicting evidence of ownership of the intellectual property at issue was sent to a Tyco executive, while the defendant argued the duty to preserve did not arise before December 8, 2011, when it was served in the litigation. Though noting that the defendant was "not excused from an obligation to preserve evidence simply because it is a foreign company," the court found no evidence that the defendant should have reasonably anticipated litigation in the United States before the date of service. Because the defendant was not under a duty to preserve until 2011, the defendant's failure to preserve emails in 2009 when it switched email software did not constitute spoliation.

No Spoliation Sanctions Where Computer Not Preserved by Mistake

***Advantor Systems Corp. v. DRS Technical Services, Inc.*, No. 6:14-cv-533-Orl-31DAB, 2015 WL 403308 (M.D. Fla. Jan. 28, 2015).** Magistrate Judge David A. Baker of the U.S. District Court for the Middle District of Florida denied the plaintiff's motion for spoliation sanctions in this action involving violation of a nondisclosure agreement. A particular Advantor employee, Greg Larson, had resigned from Advantor and was hired by DRS, allegedly bringing confidential electronic documents with him. Shortly thereafter, Advantor sent a letter to DRS demanding that DRS terminate Larson's employment and return all proprietary data stored on DRS's computers. DRS subsequently fired Larson, and his laptop was reformatted and issued to a new employee. Because the Eleventh Circuit has not set forth specific guidelines on spoliation, the court looked to Florida state law to determine whether sanctions were proper. First, the court determined that DRS had a duty to preserve the contents of the laptop when Advantor sent the letter about Larson, which constituted notice that the hiring of Larson would be contested. At a hearing, the court questioned why DRS did not preserve the laptop, noting that the identification and preservation of electronically stored information in this case, unlike many others, was very straightforward; counsel responded that the failure to preserve was simply a "mistake" by in-house counsel. While the court found the failure to take "obvious steps to preserve the evidence … mystifying," it did not find any actual intent to destroy relevant evidence. In considering the remaining factors — (1) whether the evidence existed at one time and (2) whether the evidence was critical to an opposing party being able to prove its prima facie case or a defense — the court concluded that there was no "real likelihood" that important or confidential files were ever on the DRS computer, and that the plaintiff's argument was "based upon pure speculation." Thus, "despite the essentially unexplained reformatting of Larson's laptop," no spoliation sanctions were warranted.

No Duty to Preserve Documents Seized Pursuant to Court Order

***Perez v. Metro Dairy Corp.*, No. 13 CV 2109 RML, 2015 WL 1535296 (E.D.N.Y. Apr. 6, 2015).** Magistrate Judge Robert M. Levy of the U.S. District Court for the Eastern District of New York denied the plaintiffs' motion for spoliation sanctions in this collective action brought under the Fair Labor Standards Act based on the defendants' failure to produce employment documents and records. The business records at issue were seized by a plaintiff in another action pursuant to a court order in August 2013. The plaintiffs in the other action had seized the defendants' records within 24 hours of the court order. The court held that the defendants did not have an obligation to copy their books and records before complying with the court order, even though the current action was pending at the time of the seizure. Though the court found that the defendants knew or should have known that their business records would also be relevant to the plaintiffs in this case, they found no duty to preserve the evidence at issue.

Sanctions Granted/Upheld

Destroying Product at Issue in Litigation Constitutes Spoliation

***Kettler International, Inc. v. Starbucks Corp.*, No. 2:14cv189, 2015 WL 390344 (E.D. Va. Jan. 28, 2015) and *Kettler International, Inc. v. Starbucks Corp.*, No. 2:14cv189, 2015 WL 1544682 (E.D. Va. Apr. 7, 2015).** In his first decision addressing Starbucks' destruction of allegedly defective patio chairs, Senior Judge Henry Coke Morgan, Jr. of the U.S. District Court for the Eastern District of Virginia found that Starbucks' conduct constituted spoliation but withheld his decision on sanctions. After a series of personal injury claims were brought against Starbucks in late 2012 involving the patio chairs purchased from the plaintiff, Starbucks commissioned a third party to test the chairs for defects and filed a third-party complaint against Kettler for indemnity. In February 2014, Starbucks arranged for the recycling of all chairs, with the exception of 200 chairs, which were to be set aside for the plaintiff's inspection. As destruction of the chairs was ongoing, Starbucks sent the plaintiff a "Notice of Breach of Warranty" letter, to which Kettler responded by filing its complaint for declaratory judgment and alerting Starbucks of its obligation to "preserve every chair upon which a claim is being made." Starbucks continued destroying chairs after being served with notice of the plaintiff's lawsuit on May 7, 2014, and subsequently counterclaimed for breach of contract and breach of warranty arising from the sale of allegedly defective chairs. In granting the plaintiff's motion for spoliation sanctions, the court found that Starbucks' duty to preserve began in October 2013 when Starbucks had the chairs tested for defects. Finding that Starbucks' conduct in destroying over 7,000 chairs "undoubtedly relevant" to the litigation clearly amounted to spoliation, the court withheld its decision on whether the severe sanction of dismissal would be appropriate until the plaintiff had an opportunity to inspect the 200 remaining chairs to determine whether the plaintiff could fully develop its defenses based on the limited sample.

In a subsequent decision, the court declined to dismiss Starbucks' counterclaims as a sanction for spoliation but instead ordered that the amount of damages Starbucks could recover in the underlying suit would be limited to those arising from the sale of the 200 remaining chairs, rather than the 13,000 on which its counterclaims were based. To determine whether the sanction of dismissal was appropriate, the court looked to the Fourth Circuit's test set forth in *Silvestri v. General Motors Corp.*, 271 F.3d 583 (4th Cir. 2001): (1) whether the spoliator's conduct was "so egregious as to amount to a forfeiture of his claim" or (2) whether the effect of the spoliator's conduct was "so prejudicial that it substantially denied the defendant the ability to defend the claim." The court found that Starbucks' conduct was comparable to that in *Silvestri*. While it was not the most egregious example of spoliation it had seen, strong sanctions were appropriate: Starbucks knowingly destroyed evidence after the initiation of litigation and the plaintiff suffered prejudice in defending its claims, as the 200 chairs retained by Starbucks were not a representative sample of all the chairs for which Starbucks sought damages.

Sanctions for Destruction of Computers After "Pre-Suit" Letters

***F.D.I.C. v. Horn*, No. CV 12-5958(DRH)(AKT), 2015 WL 1529824 (E.D.N.Y. Mar. 31, 2015).** Magistrate Judge A. Kathleen Tomlinson of the U.S. District Court for the Eastern District of New York granted the FDIC's motion for spoliation sanctions against the defendant, a licensed attorney who served as AmTrust's closing agent in six residential mortgage loans in September 2008. The defendant admitted during a Rule 30(b)(6) deposition that in 2010 he discarded his office's old computers, BlackBerry devices used by himself and his paralegal, backup tapes and off-site server storage without attempting to preserve or transfer any email or data. At issue was when the duty to preserve was triggered. While the FDIC argued that a series of "pre-suit" letters sent to the defendant in 2009 alleging potential professional negligence claims triggered the duty to preserve, the defendant disagreed, arguing that the letters raised "very limited claims of malpractice." The court concluded that the duty was triggered when the defendant received the first letter, noting that the letters should have "raised enough of a red flag for [the defendant] to undertake some precautions" as litigation was "reasonably foreseeable," especially for an attorney. The court considered the defendant's failure to issue a formal litigation hold or otherwise adopt "the most basic document preservation steps" sufficiently culpable to support the imposition of sanctions, noting that the defendant had, "at the very least, acted with a pure heart and an empty head."

Sanctions for Failure to Institute Litigation Hold for Employee Emails

***Fidelity National Title Insurance Co. v. Captiva Lake Investments, LLC*, No. 4:10-CV-1890 (CEJ), 2015 WL 94560 (E.D. Mo. Jan. 7, 2015).** Judge Carol E. Jackson of the U.S. District Court for the Eastern District of Missouri granted the defendant's motion for spoliation sanctions arising from the destruction of relevant electronically stored information that resulted from the plaintiff's failure to impose a litigation hold. Following the plaintiff's incomplete production of materials from its computer-based "Claims Processing System" (CPS) and monthly Major

Claims Reports, the court appointed a specialist to examine the plaintiff's computer systems. The specialist determined that: (1) the plaintiff had not instituted a litigation hold; (2) the plaintiff had not conducted a systematic search of its computer systems, including email archives, for discoverable information; (3) a contractor had lost as many as 13 million email messages while implementing an email retention program; (4) a former claims handler's network shared folder was not preserved; (5) new entries into the CPS overwrote existing data; and (6) CPS logs were destroyed by the system after one month. The court held that the plaintiff's failure to impose a litigation hold on the email accounts of employees involved with the relevant claim was sufficiently culpable for the court to award sanctions in the form of an adverse inference instruction and fees, even absent an explicit finding of bad faith. However, the court distinguished the preservation of emails from the preservation of data stored on the CPS database system, holding that the overwriting of data in CPS did not constitute sanctionable spoliation without a compelling claim that relevant evidence was lost. The plaintiff was not required to undertake a "significant intervention in a major computer system" in an "attempt[] to prevent all overwriting or deleting of electronically store[d] information" which "might cripple a computer system."

Other Spoliation Rulings

Order Issued for 30(b)(6) Deposition to Explore Duty to Preserve

***Little Hocking Water Association v. E.I. du Pont de Nemours & Co.*, No. 2:09-cv-1081, 2015 WL 1321870 (S.D. Ohio Mar. 24, 2015).** Magistrate Judge Norah McCann King of the U.S. District Court for the Southern District of Ohio granted in part the plaintiff's motion to broaden discovery into possible spoliation by the defendant. Among the myriad discovery disputes in the case was the defendant's alleged spoliation of well-tracking data from the mid-1980s to 2006, information relevant to the alleged contamination of the plaintiff's water distribution system by the defendant's release of hazardous wastes. During that period of time, well data was tracked on a currently outdated Vantage computer system and stored on tapes that could only be read by a VAX computer. Around 2010, du Pont transitioned to a new system and dismantled the obsolete VAX computer. Given the complexity of the data storage and production, the court had previously ordered a Rule 30(b)(6) deposition to discuss the various data systems and methods of data storage involved. In considering whether the defendant's actions amounted to spoliation, the court first considered when du Pont's obligation to preserve well data arose. Though the case was not filed until November 27, 2009, the court found that du Pont's duty to preserve the data arose in 2002, based in part on the defendant's inclusion of two documents from 2002 on its privilege log that indicated the company anticipated litigation with Little Hocking over the issue of water sampling. In considering the scope of du Pont's duty to preserve, a highly fact-intensive inquiry, the court noted that the record was unclear as to whether historical well data from 1981 even existed in usable format in 2002, the year du Pont's preservation obligations began. Because it was unclear what well data was reasonably available in 2002, the court was unable to determine the scope of du Pont's duty to preserve. Thus, the court granted the plaintiff's motion for broadened sanctions discovery and ordered du Pont to produce Rule 30(b)(6) witness(es) to address what well data was reasonably available as of 2002 and the scope of du Pont's duty to preserve such data.

No Civil Contempt for Non-Party's Use of Reasonable Retention Policies

***United Corp. v. Tutu Park Ltd.*, No. ST-2001-CV-361, 2015 WL 457853 (V.I. Super. Jan. 28, 2015).** Judge Denise M. Francois of the Superior Court of the Virgin Islands denied the plaintiff's motion for an order holding nonparty Kmart Corporation in civil contempt for failure to comply with a subpoena seeking documents related to merchandise sales and inventory. While Kmart produced some responsive documents, it claimed it did not maintain records prior to 2000, and that due to software and program changes, any additional data that may be responsive would not be readable. Under the law of the Virgin Islands, a party may be held in civil contempt for failure to comply with a court order where: (1) the order is clear and unambiguous; (2) the proof of noncompliance is clear and convincing; and (3) there has not been a diligent attempt to comply in a reasonable manner. The court found that Kmart had diligently attempted to comply with the order to produce responsive documents, noting that Kmart's explanations for the limited scope of its production were reasonable. The court recognized that corporations are permitted to employ data retention policies and dispose of records after a period of time and found the internal changes in sales reporting and software and database conversions that Kmart undertook were reasonable.

Cost-Shifting Decisions

Ordering Cost Shifting

Cost Shifting of Production of Native Data and Active ESI Ordered

***United States ex rel. Carter v. Bridgepoint Education, Inc.*, No. 10-CV-01401-JLS (WVG), 2015 WL 818032 (S.D. Cal. Feb. 20, 2015).** In this False Claims Act case, Magistrate Judge William V. Gallo of the U.S. District Court for the Southern District of

California denied the plaintiffs' motion to compel production of certain electronically stored information (ESI). The plaintiffs had requested production of emails from backup databases, metadata and active emails in "Native" format rather than as TIFF images. ("Native" format retains the file structure associated with and defined by the original creating application. "Active" ESI is ESI currently or habitually in use by the requested entity.) The court held that the plaintiffs were not entitled to production of materials from backup databases because though discoverable, the backup data was "inaccessible," meaning that the expenditure of resources required to access the contents is unreasonable when compared to its minimal relevance. Because of the backup tapes' minimal relevance and because the defendants adhered to common ESI policies, the court held that if the plaintiffs wanted the backup data, they would have to bear the expense of its production, estimated to be more than $2 million. Similarly, the court denied the plaintiffs' request for production of email in Native format and any active ESI metadata because the plaintiffs had not specifically asked for Native format or the metadata in their discovery requests or explained why either was necessary for their case. The court noted that the plaintiffs already had much ESI to sift through and, if they wanted more, it was only fair they pay the price of its production in the native form they deemed so invaluable for the prosecution of their own case. The only exception to this ruling was the court's finding that the parties should split the cost of any ESI created after the defendants became aware that the current suit was pending. According to the court, by that point the defendants were surely aware of their legal liability and future plaintiffs' likely need for active data.

Cost Shifting for Copying Expert Reliance Materials Ordered

***Stillwagon v. Innsbrook Golf & Marina, LLC*, No. 2:13-CV-18-D, 2015 WL 500320 (E.D.N.C. Feb. 4, 2015).** Chief Judge James C. Dever III of the U.S. District Court for the Eastern District of North Carolina granted the defendants' motion in this contract dispute for reimbursement of half of the total cost associated with producing documents from third parties. The plaintiff argued that cost shifting was inappropriate because the defendants' experts had relied on the material at issue and therefore were required to produce the documents at their own cost pursuant to Rule 26 of the Federal Rules of Civil Procedure. The court rejected this reading of Rule 26, holding that while that rule required the defendants to make the facts or data that expert witnesses consider in forming their opinions available to the plaintiff, it did not require the defendants to bear the total cost of copying those documents for the plaintiff's use.

Cost of Hard Drive Imaging Deemed Recoverable

***Colosi v. Jones Lang LaSalle Americas, Inc.*, 781 F.3d 293 (6th Cir. 2015).** A panel of the U.S. Court of Appeals for the Sixth Circuit (Keith, Cook, and Donald, JJ.) affirmed the district court's order denying the plaintiff-appellant's objections to costs taxed against her, as the losing party, under 28 U.S.C. §1920. Among her objections, Colosi challenged the district court's decision to tax the cost of imaging her personal computer's hard drive. The court held that such electronic discovery fell within the ordinary meaning of "making copies" under the statute, where the costs of deduplication, indexing and other "non-copying electronic discovery services" were excluded. Imaging costs were reasonable and necessary because the plaintiff-appellant herself provided her family computer in response to the defendant's discovery requests, rather than producing relevant individual files.

Denying Cost Shifting

No Cost Shifting for Production of Metadata

***Younes v. 7-Eleven, Inc.*, Nos. 13-3500 (RMB/JS), 13-3715 (MAS/JS), 13-4578 (RMB/JS), 2015 WL 1268313 (D.N.J. Mar. 18, 2015).** Magistrate Judge Joel Schneider of the U.S. District Court for the District of New Jersey granted the plaintiffs' motion to compel production of metadata and denied the defendants' request that the plaintiffs share the cost of production. During the course of the litigation, the company had produced documents "in dribs and drabs" and produced key documents that lacked author and date information. As a result, the plaintiffs moved to compel production of metadata for almost 100 documents and two Excel spreadsheets. The company objected on the grounds that the parties had originally agreed to produce documents as PDFs without metadata. The company also argued that the production of metadata would be burdensome and of limited value to the plaintiffs. The court rejected these arguments, finding that good cause existed to modify the parties' original agreement due to the difficulty the plaintiffs had faced in obtaining relevant information. The court also found that the company had not substantiated its allegation that production would be unduly burdensome. Having dispensed with these objections, the court granted the plaintiffs' motion, finding that they had a particularized need for the metadata because the documents produced were missing "plainly relevant and discoverable" information such as source and date. The court also found that there was no reason to depart from the ordinary practice that parties bear their own costs of responding to discovery. The court therefore denied the company's request that the plaintiffs share the cost of production.

Denying Request for Reimbursement by Third-Party Counsel

***United States v. Cardinal Growth, L.P.*, No. 11 C 4071, 2015 WL 850230 (N.D. Ill. Feb. 23, 2015).** In a suit by the U.S. Small Business Administration (SBA) over loans it had made to a small business investment company called Cardinal Growth, Chief Judge Ruben Castillo of the U.S. District Court for the Northern District of Illinois denied a third party's petition for costs incurred in connection with responding to the plaintiff's document production request. The third party, Cardinal's transactional counsel, requested more than $44,000 in reimbursement. The court had appointed the SBA as Cardinal's receiver and directed Cardinal's attorneys to produce any documents required by the receiver. The SBA submitted a document production request to the firm and in producing the documents, counsel paid an e-discovery vendor to collect and search electronically stored information. Before the court was the attorneys' petition for the costs incurred. The court held that Rule 45 of the Federal Rules of Civil Procedure, which governs third-party subpoenas, did not apply because the document request was based on the court's order, not Rule 45. Even if Rule 45 did apply, Judge Castillo noted that he would not authorize the payment of the law firm's costs. First, the firm was not a typical disinterested non-party because it had derived substantial income from Cardinal over 10 years of representation. Second, the firm could more readily bear the costs than the receiver. And third, the litigation is one of public importance where the lawsuit was brought to address the company's failure to repay public funds.

Other E-Discovery Decisions

Guidance Provided on Technology-Assisted Review Protocol

***Rio Tinto PLC v. Vale S.A.*, No. 14 CIV. 3042 RMB AJP, 2015 WL 872294 (S.D.N.Y. Mar. 2, 2015).** Magistrate Judge Andrew J. Peck of the U.S. District Court for the Southern District of New York approved the parties' technology-assisted review (TAR) protocol, entered into by agreement rather than court order. The court also provided a written opinion on issues relating to TAR given the interest in the subject within the e-discovery community. While it is now black letter law that courts will permit a party to utilize TAR for document review, the issue of how transparent and cooperative the parties need to be with respect to creating their "seed sets" or "training sets" is still an open issue. Here, the parties agreed to disclose all non-privileged documents in their control. The court noted that such cooperation is generally preferred but recognized that there are other appropriate ways to ensure that training and review are sufficient, including statistical estimation, assessing whether there are gaps in the production and quality control review of documents categorized as nonresponsive. The court also emphasized that "it is inappropriate to hold TAR to a higher standard than keywords or manual review" so as not to discourage parties from using TAR out of a fear of high costs resulting from motion practice on the issue.

Guidance Provided on Protocol for Addressing Disputed Search Terms

***In re Lithium Ion Batteries Antitrust Litigation*, No. 13–MD–02420 YGR (DMR), 2015 WL 833681 (N.D. Cal. Feb. 24, 2015).** Judge Donna Ryu of the U.S. District Court for the Northern District of California provided the parties with guidance regarding the adoption of a protocol for the use of search terms. The parties could not reach an agreement regarding the protocol for addressing disputed search terms — i.e., seemingly relevant search terms that returned an inappropriately high number of non-responsive documents. The plaintiffs proposed that they be allowed to review a random sample of the documents that resulted from a disputed search term to assess the utility of using that term. The defendants opposed the proposal on grounds that it would provide the plaintiffs with access to non-responsive, irrelevant documents with no bearing on the litigation. The court agreed with the plaintiffs, noting that the point of qualitative random sampling is to eliminate irrelevant documents from those identified by a computerized search and allow the parties to focus on relevant documents only. The court noted that the defendants' concerns could be mitigated by allowing the defendants to review the random sample and remove non-responsive documents, limiting the plaintiffs' access to the sample and only permitting random sampling for up to five disputed terms. In addition, the court made clear that irrelevant documents should only be used to resolve disputes regarding search terms, not for any other purpose.

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Contributors

Partner

Jessica D. Miller
Washington, D.C.
202.371.7850
jessica.miller@skadden.com

Counsel

Richard T. Bernardo
New York
212.735.3453
richard.bernardo@skadden.com

Discovery Counsel

Giyoung Song
New York
212.735.2564
giyoung.song@skadden.com

Associates

Brian Baggetta
Senior Staff Associate / Washington, D.C.
202.371.7209
brian.baggetta@skadden.com

Brittany M. Dorman
New York
212.735.3485
brittany.dorman@skadden.com

Nina Ramos Rose
Washington, D.C.
202.371.7105
nina.rose@skadden.com

Robin Shah
New York
212.735.3417
robin.shah@skadden.com