SPOLIATION AND SUPPRESSION OF EVIDENCE: RECENT CASES ARE MAKING THE RULES CLEARER – AND TOUGHER

By
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During the course of a lawsuit, each party will likely be asked at some point to make available certain items that are under its control and which are potentially relevant to the case. These items can include parts, materials and documents. While the parts and materials will typically be limited to just the specific items involved in the accident or mishap from which the lawsuit stems, the documents sought by other parties can include a large range of information from the initial development of certain products to any post-accident investigation in which the party participated. It will also require the production of all electronically, as well as physically, stored information. The duty to preserve and produce this material can be extremely burdensome, particularly for the aviation product manufacturer, due to the fact the company is likely to have extensive paperwork related to the part concerned. Nonetheless, information exchange is an important part of every litigation and, as a string of recent cases can attest, a duty which judges will take strong measures to enforce.

A. What is Spoliation and Suppression of Evidence?

Many courts today group spoliation and suppression of evidence under the single term "spoliation". Spoliation, however, is traditionally thought of as some sort of trauma inflicted upon a piece of evidence. It encompasses the loss, destruction, material alteration or the failure to preserve a writing, record, or physical object. Suppression of evidence, on the other hand, is the non-production of requested and relevant material. Sanctions for spoliation or suppression can be based upon a range of culpable conduct from simple negligence (such as not conducting a detailed enough search for documents) to the willful destruction or hiding of evidence.

The duty to preserve evidence arises when a reasonable person in the party's position should have foreseen that the evidence was material to a potential civil action. In the aviation context, this will most likely be at the moment an incident occurs. From that point on, aviation product manufacturers should be taking steps to preserve all evidence. Moreover, if a party is incapable of fulfilling its duty to preserve due to a lack of control or ownership of the evidence, then the party still has an obligation to give other potential parties notice of how to access the evidence or, at least, that there is a possibility the evidence may be destroyed.

In order to ensure the exchange of these items and information, it has been well-established in American jurisprudence that judges have the power to sanction parties that fail to either preserve or make available to opposing parties all potentially relevant

evidence, without a satisfactory explanation.[1] Although each jurisdiction has its own rules with regard to spoliation and suppression of evidence, typically a party requesting sanctions or an adverse inference instruction[2] due to spoliation must establish: (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed, altered or simply not produced; (2) that the evidence was destroyed with a "culpable state of mind" and (3) that the destroyed evidence was relevant to the party's claim or defense. In applying this test, a "culpable state of mind" can include mere ordinary negligence. However, if it is determined that the evidence was willfully destroyed then typically it will be presumed that the information was relevant (the third prong of the test).

While courts and attorneys have wrestled numerous times with these issues over the years, the court opinions that have resulted have tended to focus on the specific facts concerning a particular case and, thus, have been somewhat ambiguous in the guidance they have provided to companies wishing to avoid sanctions in the future. That has changed during the past year. In *Zubulake v. UBS Warburg*, a court for the first time laid out a specific list of what is expected of both parties and their attorneys regarding the preservation and production of evidence. Although primarily aimed at electronically stored information, the opinion applies to all evidence and is expected by many legal authors to be adopted by jurisdictions across the nation. Indeed, shortly after *Zubulake*, the American Bar Association ("ABA") scrambled to re-draft its model rules and standards regarding discovery. In addition, by issuing particularly severe sanctions, *Zubulake* and two other cases within the past year, *United States v. Phillip Morris* and *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.* have given notice that courts are becoming increasingly less tolerant of companies and their counsel who do not take appropriate steps in ensure the preservation and production of relevant evidence.

B. Recent Cases Concerning Spoliation and the Suppression of Evidence

1. *Zubulake v. UBS Warburg*

In *Zubulake v. UBS Warburg*,[3] a "relatively routine employment discrimination dispute," the District Court for the Southern District of New York imposed sanctions against UBS Warburg ("UBS") for destroying a number of potentially relevant e-mail messages and the tardy production of other e-mails. In addition to monetary sanction related to the cost of re-deposing certain individuals due to the tardy production of certain e-mails, the court also ruled that the jury be given an instruction that they are permitted to infer that the lost evidence would have been unfavorable to UBS. The jury found in favor of the plaintiff and ordered UBS to pay $9.1 million in compensatory damages and $20.1 million in punitive damages.

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[1] It should also be noted that, in addition to court sanctions, some states have enacted statutes making the willful destruction of evidence a misdemeanor crime and/or have allowed spoliation of evidence to be the basis of independent tort action.

[2] This is an instruction wherein the judge instructs the jury that they may, but are not required to, draw an inference that evidence damaged or not produced would have been unfavorable to the party who failed to preserve or produce it.

[3] 02 Civ. 1243 (S.D.N.Y. 2004) (aka "*Zubulake V*")

In August 2001, Laura Zubulake, a former equities trader, sued her former employer for gender discrimination, failure to promote, and retaliation under applicable federal, state, and city law. Soon after receiving notice of the lawsuit, UBS' in-house and outside counsel issued a "litigation hold" to company personnel instructing them to retain relevant information whether in hard copy or electronic form. Unfortunately, despite this instruction, some e-mails were deleted. Compounding the problem was counsels' failure to also instruct the company's information and technology (IT) department to maintain all electronic back-up files, which also stored e-mails. These back-up files were periodically erased as part of the company's normal document retention policy. As a result certain e-mails were permanently lost and those e-mails that were subsequently recovered from the backup tapes and produced, were produced long after Zubulake's initial document requests. Indeed, some UBS personnel's e-mails were not produced until after those individuals were deposed.

Zubulake brought a motion for sanctions in light of UBS' failure to preserve and timely produce certain e-mails. The court granted the motion and admonished both UBS and its counsel for the spoliation and tardy production of information consisting of e-mails and other documents which, at the time Zubulake filed her suit, existed in electronic form in two locations: the individual employees' computer files and on computer backup tapes. The court explained that company and counsel must do more than just issue a litigation hold order. Corporate counsel (in-house and/or outside counsel) have a duty to oversee compliance with the litigation hold order, and must affirmatively monitor the party's efforts to preserve and produce relevant documents. Specifically, the court provided the following guideline for corporate in-house and outside counsel to follow to ensure that the corporation fulfills its duty to locate, preserve and produce relevant information:

(1) A "litigation hold" must be issued (and routine document retention/destruction policies suspended) whenever litigation is reasonably anticipated; this will include, at a minimum, instructions to produce all active electronic files and identify, retain and store in a safe place all back-up media; counsel must also periodically re-issue the litigation hold notice so that employees maintain their awareness of it;

(2) In-house and/or outside counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched; it is not sufficient to simply notify all employees of a litigation hold and expect that the employees will then identify, retain and produce all relevant information;

(3) Counsel must become fully familiar with the company's document retention policies and data retention architecture; this will involve speaking with IT personnel;

(4) Counsel must communicate with "key players" in the litigation in order to understand how they stored information (i.e.: hard copy, electronic or both) and to determine whether all potential sources of information have been searched;

It is not clear yet whether *Zubulake*'s reasoning and instructions will be followed by jurisdictions across the country. Many legal commentators believe it will.[4] Spurred by *Zubulake*, within a few months of that court's opinion the American Bar Association revised and updated its standards regarding document preservation and production to address practical aspects of electronic discovery not previously addressed by the rules. The ABA stated the changes were needed in order to assist companies and counsel in (1) completing effective discovery and (2) avoiding spoliation problems. Thus, it is seems likely that other courts will follow *Zubulake*'s lead. If this happens, companies and counsel litigating in the U.S. will need to become considerably more zealous and comprehensive in gathering and preserving information during litigation than in the past.

2. *United States v. Phillip Morris*

While not specifically adopting the guidelines set forth in *Zubulake*,[5] the sanctions ordered by the court in *United States v. Phillip Morris*[6] underscore the recent intolerance judges have had for counsel and companies that who do not take proper measures to preserve and produce relevant evidence. The District Court for the District of Columbia sanctioned Philip Morris $2.75 million for failing to prevent the deletion of potentially relevant e-mails and precluded one Phillip Morris employee from testifying as a fact witness on the basis that he did not comply with Phillip Morris' own internal document retention policy.

On October 19, 1999, the court issued an order requiring preservation of "all documents and other records containing information which could be potentially relevant to the subject matter of this litigation." Despite this Order, Phillip Morris continued deleting e-mails from October 1999 to March 2002 which were sixty days old as part of its monthly, company-wide document retention/destruction policy. In addition, individual company employees were not adhering to Phillip Morris' "print and retain" policy, a feature of the company's document retention/destruction policy. As a result, numerous e-mails potentially relevant to the lawsuit were irretrievably lost. The court found Phillip Morris' failure to preserve these e-mails a violation of the court's preservation Order. In calculating the $2.75 million sanction amount, the court fined each corporate manager and/or officer (11 total) who failed to comply with the company's "print and retain" policy $250,000 each.

This case is significant for two reasons. First, the massive monetary sanction signifies the severe consequences that may attach if a party, or person, fails to fully comply with a discovery order. Second, the fact the court imposed this sanction *absent a finding of bad faith* demonstrates the current seriousness with which courts view discovery abuses. The court described Phillip Morris' actions as "egregious", "reckless",

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[4] *See* Preserving Electronic Evidence: How Closely Should a Tennessee Court Follow Zubulake?, 41 Tenn. B.J. 25 (April 2005) ("Given *Zubulake*'s wide spread acceptance and national acclaim…").

[5] However, in denying Phillip Morris' Motion for Reconsideration of the sanction, the judge did point out that the $2.75 million fine was appropriate under the reasoning of *Zubulake*. 2005 U.S Dist. Lexis 5283 (March 25, 2005).

[6] 327 F.Supp.2d 21 (D.C. 2004).

and demonstrating a "gross indifference", but it did not find that the corporate mangers/officers willfully lost the emails. Nor did the court find that the lost e-mails were, in fact, relevant. Rather, the court found that there is "no way of knowing what, if any, value those destroyed emails had to Plaintiffs' case." Nonetheless, the court found the fine reasonable because "it is essential that such conduct be deterred, that the corporate and legal community understand that such conduct will not be tolerated..."[7]

3. *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.*

In March 2005, Judge Maass of Palm Beach County Florida granted Coleman Parent Holdings' (CPH) motion for adverse inference after Morgan Stanley's deliberate and contumacious violations of numerous discovery orders.[8] CPH sued Morgan Stanley for "aiding and abetting and conspiring" with Sunbeam Corporation to perpetrate fraud. In 1998, CPH sold its 82 percent interest in the Coleman Company to Sunbeam in exchange for cash and Sunbeam stock. After the acquisition was complete, Sunbeam filed for bankruptcy and the value of its stock plummeted. Morgan Stanley served as Sunbeam's financial advisor in the acquisition and underwrote the debt used for the deal.

The main focus of the discovery dispute involved CPH's e-mail requests. Morgan Stanley's discovery efforts first looked suspect when in response to CPH's first document request in May 2003, Morgan Stanley produced over 8000 pieces of paper that included only a "handful" of e-mails. In response to CPH's motion to compel, Morgan Stanley claimed the restoration efforts requested by CPH would cost hundreds of thousands of dollars and take months to compete, and that back up tapes with 1997 and 1998 e-mails did not exist.

In April 2004, the parties reached an agreement, and the court issued an Agreed Order. This order required Morgan Stanley to "(1) search the oldest full backup tape for each of 36 [Morgan Stanley] employees involved in the Sunbeam transaction; (2) review e-mails dated from February 15, 1998, through April 15, 1998, and e-mails containing any of 29 specified search terms such as "Sunbeam" and "Coleman" regardless of their date; (3) produce by May 14, 2004, all nonprivileged e-mails responsive to CPH's document requests; (4) give CPH a privilege log; and (5) certify its full compliance with the Agreed Order."[9] The order resulted in the production of over a thousand additional e-mails.

Five months after the production in response to the Agreed Order, Morgan Stanley counsel notified CPH that new backup tapes had been discovered and restored, that they were in the process of running the Agreed Order searches, and some responsive e-mails had been found. Morgan Stanley promised to produce these e-mails "as soon as the production is finalized."

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[7] *Id*. at 26.
[8] *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co*., Inc., No. 03-5045, slip op. at 16 (11th Jud. Cir. March 23, 2005) (Judge Maass also revoked Morgan Stanley's lead counsel's pro hac vice admission).
[9] *Id*. at 5.

After over two months of waiting for the newly discovered e-mails, the Florida court granted CPH's first adverse inference motion. In the order, the court reversed the burden of proof on the aiding and abetting, and conspiracy claim, to Morgan Stanley and "included a statement of evidence of [Morgan Stanley's] efforts to hide its e-mails to be read to the jury, as relevant to both its consciousness of guilt and the appropriateness of punitive damages."[10]

The court lists over 20 inconsistencies related to Morgan Stanley's inadequate production of e-mails and multiple other discovery abuses the court found inexcusable. Based on Morgan Stanley employees' and counsel's handling of the discovery process, Judge Maass summarized:

> [Morgan Stanley] has deliberately and contumaciously violated numerous discovery orders…. [I]t chose to hide information about its violations and coach witnesses to avoid any mention of additional undisclosed problems with its compliance with the Agreed Order. Implicit in the requirement that [Morgan Stanley] certify compliance with the Agreed Order was the requirement to disclose impediments to its ability to so certify. As outlined in this Order, [Morgan Stanley] employees, and not just counsel, have participated in the discovery abuses. The prejudice to CPH from these failings cannot be cured. Even if all the [email search program] errors have been located and corrected, and [Morgan Stanley] has failed to show they have, and even if all of the email backup tapes have now been located, and [Morgan Stanley] has failed to show they have, the searches cannot be completed in time. The other discovery abuses outlined call into doubt all of [Morgan Stanley's] discovery responses. *The judicial system cannot function this way*.[11]

Judge Maass' Order effectively made it impossible for Morgan Stanley to defend itself. The jury awarded CPH, including interest, over $727 million in compensatory damages, and $850 million in punitive damages.

C. Recommendations to Avoid Allegations of Spoliation

The cases discussed above have prompted corporations and their lawyers to review record retention/destruction policies and to review, or establish, clear procedures for preserving all information, hardcopy and electronic, once a claim is known or is reasonably anticipated. Companies must be on guard against affecting the outcome of an otherwise defensible lawsuit by opening themselves up to allegations of spoliation. *Zubulake* is not binding in all jurisdictions but it has clearly been persuasive, and in light of the recent emergence of hefty monetary sanctions and severe adverse inference instructions, all companies should be adopting the guidelines set forth in that court's opinion. Namely:

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[10] *Id*. at 9.
[11] *Id*. at 16.

(1) Review the company's routine document retention/destruction policies. Document destruction is a necessary business function. Companies can, and should, remove all copies of documents, unused drafts and all "personal" employee documents on a regular basis. However, companies must ensure that the policy is consistent, company-wide and based upon objective factors such as age of documents, end of a product line, etc. Avoid gaps in time (that is, where newer documents pertaining to a particular subject are destroyed even though older documents still exist). Always eliminate documents systematically.

(2) Work with both in-house and outside counsel to ensure that those members of the legal team that will handle document preservation and production are fully familiar with the company's document retention policies and data retention architecture.

(3) Establish a "litigation hold" policy to be followed whenever litigation is reasonably anticipated. This will include, at a minimum, cancellation of routine document retention/destruction policies, instructions to relevant personnel to produce all active electronic files and identify, retain and store in a safe place all back-up media, and a procedure for periodically re-issuing the litigation hold notice so that employees maintain their awareness of it.

(4) Once litigation is reasonably anticipated, "key players" must be identified and counsel must communicate with these individuals in order to understand how they store information to determine what potential sources of information need to be searched.

(5) Throughout the litigation in-house and/or outside counsel must take affirmative steps to monitor compliance with all company litigation hold orders and all court discovery orders so that all sources of discoverable information are identified and searched. Simply notifying all employees of a litigation hold or court discovery order is not sufficient.

In addition to those general suggestions, there are some specific activities of which aviation product manufacturers need to be wary. Gone is the day when an aviation product manufacturer could carry a product back to its plant after an accident and tear it down without regard to that action's impact on litigation years down the road. Conversely, a manufacturer should not be chilled into failing to fully investigate a potentially defective product, particularly when that product is the target of a National Transportation Safety Board (NTSB), Federal Aviation Administration (FAA), or Judge Advocate General (JAG) investigation. In order to avoid allegations which could negatively affect the defense effort, the following should be considered by aviation product defendants:

(1) No destructive testing should be performed prior to litigation unless absolutely necessary for safety, or when instruction or authority from a governmental agency has been obtained first. Product manufacturers should be mindful that what constitutes "destructive" testing is broader

than it used to be. Today, even the unscrewing of a component part can raise allegations that the condition of the product has been forever altered.

(2) If inspection testing is done, photographs and/or video should be taken of the condition of the product before, during and after the inspection or test. Even if spoliation is alleged, the photographs and video can serve as evidence of what was found.

(3) Know what your employees are doing. Many times unwary risk managers or in-house counsel will send an engineer to inspect an accident scene, and the engineer will either spoliate on scene or bring a product back to the plant and spoliate it there. Product manufacturers should ensure that those persons involved in accident investigation understand the potential for spoliation.

(4) If you know who the plaintiff and co-defendants are, notify them of any inspection or testing to be done on a product, and give all parties full opportunity to be present at the inspection or testing. Notify all potential parties even if the inspection or testing has been requested or approved by the NTSB, FAA or another government agency. The fact that the government either requested or approved the testing is not a "safe harbor" against a claim of spoliation.

(5) Do not throw anything out without prior proper notification to all parties. Even the most seemingly insignificant piece of a product that is discarded can lead to allegations of spoliation.

(6) Have a safe room. When products, or their component parts, are brought back to a manufacturer's facilities, the parts should be stored in a secured room which is protected from the elements, if possible. Removal of any parts should be catalogued and access to the secured room should be controlled by a risk manager or in-house attorney. A safe room with documented tracing of the product's location from the moment of its arrival at the manufacturer's facility can prove to be a solid defense to allegations of wrongdoings. Where a safe room is not possible, as with large products or a large quantity of products, a secure fenced area with weather protection should be sufficient to ward off serious spoliation allegations.

D. Protecting Against Plaintiff/Co-Defendant Spoliation

Spoliation is not a one-way street. Product defendants and their counsel must also take full advantage of the current state of the law and pursue spoliation remedies when they feel their defense has been affected by a careless or unethical plaintiff or co-defendant.

Early on, preferably at the time the answer to the complaint is filed, a number of pleadings and notices should be served to protect against or secure a claim for spoliation, should it arise. Counsel for the product defendant should serve the following discovery:

(a) *Interrogatories* asking the exact location of the subject product; who has custody/control over the subject product; the manner in which the product is being stored; and what testing or inspection has been done of the product and by whom.

(b) *Requests for Production* requesting immediate inspection of the product, together with all photographs taken by the party and its consultants.

(c) *Notice to Preserve Evidence* should be served on all parties stating that no destructive testing shall be done on the product without the consent of all involved parties.

While the foregoing discovery will give product defendants early notice of spoliation problems regarding their product, as well as secure their rights to a claim of remedy, product defendants and their counsel should also be wary of the destruction, loss or alteration of other evidence which might have proved their product safe. For example, it is not uncommon for a plaintiff or co-defendant with control over the wreckage of an aircraft, or other aviation related product, to safely maintain the allegedly offending part, but throw out the rest (e.g., save the engine and propeller assembly, but discard the airframe). Such conduct constitutes spoliation which may detrimentally affect a manufacturer's ability to prove alternate theories of causation. When handled appropriately, a cross or counter claim for spoliation, or motion for discovery sanction, can aid in the ultimate disposition of a case.

E. Conclusion

Whether it is the almost open mockery of the judicial system displayed in such cases as *Morgan Stanley* or the more subtle spoliation and/or suppression of evidence claims that result from a less than energetic effort to locate, preserve and produce evidence displayed in the *Zubulake* and *Phillip Morris* cases, it appears that hefty fines and severe adverse inference instructions are becoming the norm, not the exception. In addition, the *Zubulake* case has taken what was once a rather esoteric legal theory and set forth a clear guideline for companies and counsel to follow - A guideline that is being favorably reviewed by both judges and legal scholars. Thus, companies and counsel should heed the case law from the past year. It is becoming increasingly clear that it is to be ignored only at great peril to a party's pocketbook and case.