

Electronic Discovery Law

Posted at 3:47 PM on March 10, 2009 by K&L Gates

Suspicious Timing of Destruction Results in Adverse Inference and Permission to Add a Claim of Exemplary Damages despite Lack of "Smoking Gun"

Smith v. Slifer Smith & Frampton/Vail Assocs. Real Estate, LLC, 2009 WL 482603 (D. Colo. Feb. 25, 2009)

Plaintiffs, as representatives of an estate, retained defendants, including broker Peter Seibert, to assist in selling a piece of the estate's property. The property eventually sold, on defendants' recommendation, for approximately \$2.8 million. 83 days later, defendants assisted in reselling the property to a development company for \$7.2 million. On March 19, 2006, plaintiffs' counsel contacted defendants and informed them he was conducting an investigation into the sale. On November 2, 2006, plaintiffs filed suit alleging *inter alia* breach of statutory duties, negligence per se, negligent misrepresentation, and fraud.

Plaintiffs served discovery requests on April 9 and July 30, 2007. Included, were specific requests for electronically stored information ("ESI") and for inspection and sampling of certain of defendants' computers. Defendants' responses indicated that they had searched three primary sources of potentially responsive ESI: Seibert's old office computer, his home computer, and his laptop.

On July 7, 2008, following plaintiffs' filing of a motion to compel certain ESI, defendants' own expert, Ralph Gorgal, reported that Seibert's computer drives had been analyzed "to determine if secure deletion (wiping) software had been installed." He concluded that Anti-Tracks, a data wiping program, had been installed on Seibert's home computer. He further concluded that the Anti-Tracks file was created on August 17, 2006 and last accessed on September 6, 2007 – mere days before copies of Seibert's hard drives were taken. Both dates fell considerably after defendants were

put on notice of the investigation and the resulting lawsuit. Gorgal's report also indicated that the use of Anti-Tracks had resulted in a substantial loss of data.

On July 18, 2008, the presiding District Court Judge granted a joint Motion to Amend the Scheduling and Discovery Order and allowed plaintiffs to supplement their expert's disclosures relating solely to the computer forensic examination. The order also allowed for defendants to submit a rebuttal.

In his subsequent report, plaintiffs' expert, David Penrod, confirmed the presence of Anti-Tracks and the extent of the destruction of electronically stored information on Seibert's home computer. Specifically, Penrod noted that his forensic program automatically recovered 67,714 objects as Lost Files and he determined that "they had been deleted as part of a systemic effort to eraser pertinent data," as evidenced by the timing of the destruction. Amongst the objects deleted were "hives and individual keys of the Windows Registry stored within System Restore Points" whose destruction "obliterates historical records that can be used...to construct a chronology of system and user activity." Moreover, Penrod reported his analysis of the Lost Files indicated that approximately 9,500 files, folders, and critical systems were deleted between September 6, 2007 and September 14, 2007, the day on which Seibert's home computer was imaged, and that many of the deletions appeared to have been accomplished manually.

Penrod also determined that Seibert's office computer had been reformatted on May 10, 2007, the day after Seibert responded to plaintiffs' RFPs and one day before his deposition. Penrod "opined that the formatting was intentional because 'the steps in the process are too many and too complicated to be unintended. One must knowingly and purposely engage in the process to complete it.'"

Defendants' second expert, David Cowan, challenged Penrod's conclusions and methodology. Specifically, Cowan challenged Penrod's conclusion that Seibert's home computer had been wiped and the evidence upon which Penrod based that conclusion. The opinions of a third defense expert were not considered for procedural reasons, but the court did note the expert's agreement that the data on the old office PC was destroyed after May 10, 2007.

Considering the evidence before it, the court concluded that Penrod's opinions regarding the destruction of data were credible. The court went on to find that despite "no smoking gun establishing who caused the loss of data on the two computers," the evidence "strongly supports the conclusion that the person was defendant Seibert or someone acting on his behalf." Thus, the court found that plaintiffs showed by a preponderance of the evidence that after the duty to preserve arose, "defendants failed

to preserve evidence and, in fact, destroyed it in bad faith and intended to prevent disclosure of relevant evidence on Seibert's computers." The court based its finding primarily upon the "highly suspect usage of Anti-Tracks on Seibert's home PC and the timing of the destruction of the hard drive on Seibert's old office PC."

Considering the appropriate sanction, the court stated that "[w]here a party destroys evidence in bad faith, that bad faith alone is sufficient circumstantial evidence from which a reasonable fact finder could conclude that the missing evidence was unfavorable to that party." The court concluded that plaintiffs had provided sufficient evidence to support an inference that the missing data was unfavorable to the defendants. The court also found that Seibert's destruction resulted in substantial prejudice to the plaintiffs and forced them to incur considerable expense.

Despite the damage to plaintiffs' case, however, upon review of the "so-called 'Ehrenhaus factors'" (used to determine if terminating sanctions are appropriate), the court declined to impose the severe sanction of default judgment "[b]ecause dismissal with prejudice defeats altogether a litigant's right to access to the courts" and "should be use of a weapon of last, rather than first, resort." (Citation omitted.)

Instead, the court recommended the imposition of an adverse inference instruction in favor of the plaintiffs. Additionally, the court granted plaintiffs permission to amend their claims to add a claim for exemplary damages based on the adverse inference. The plaintiffs were also awarded their costs and attorney fees. The recommendation of the court was adopted by the presiding Senior District Court Judge and an order was entered accordingly.

Special thanks to Michael Reagor of Dymond Reagor Colville, LLP for ensuring this case came to our attention.

Trackbacks (0)

Comments (0)

This blog/Web site is made available by the contributing lawyers or law firm publisher solely for educational purposes to provide general information about general legal principles and not to provide specific legal advice applicable to any particular circumstance. By using this blog/Web site, you understand that there is no attorney client relationship intended or formed between you and the blog/Web site publisher or any contributing lawyer. The blog/Web site should not be used as a substitute for

competent legal advice from a lawyer you have retained and who has agreed to represent you.

K&L Gates includes lawyers practicing out of 37 offices located in North America, Europe, Asia and the Middle East, and represents numerous GLOBAL 500, FORTUNE 100, and FTSE 100 corporations, in addition to growth and middle market companies, entrepreneurs, capital market participants and public sector entities. For more information about K&L Gates or its locations and registrations, visit www.klgates.com.

Portions of this Web site may contain Attorney Advertising under the rules of some states. Prior results do not guarantee a similar outcome.

e-Discovery Analysis & Technology group at K&L Gates, offering services related to ediscovery, review of electronic documents, electronic discovery and electronic evidence discovery.

K&L Gates LLP

925 Fourth Avenue, Suite 2900, Seattle, Washington 98104-1158

p. 206.623.7580, f. 206.623.7022