



Top Ten Cases Impacting Electronic Discovery

Zubulake v. UBS Warburg LLC, 2003 U.S. Dist. LEXIS 7939, 91 Fair Empl. Prac. Cas. (BNA) 1574 (S.D.N.Y. May 13, 2003).

After presenting substantial evidence that additional responsive email messages existed, likely on backup tapes and optical storage media, plaintiff requested supplementary email messages to the 100 pages previously produced by defendant. Defendant estimated that producing these email messages would cost \$175,000, without attorney review time and objected to this discovery. The court found plaintiff's claims relevant and both parties asked the court to apply the Rowe factors to determine who should pay the discovery costs, with the court maintaining that the usual rules of discovery apply for information that is retained in an accessible format. When electronic information is stored in an inaccessible manner, such as on backup tapes, cost-shifting should be considered and, in addition, compelling the responding party to restore and produce responsive documents from only a minimal sample of the requested backup tapes is, in general, sensible. The court rejected the Rowe factors for this case and instead utilized the following seven "Zubulake factors" to determine cost shifting:

1. The extent to which the request is tailored to discover relevant data.
2. The availability of that data from other sources.
3. The total cost of production, relative to the amount in controversy.
4. The total cost of production, relative to the resources available to each party.
5. The relative ability and incentive for each party to control its own costs.
6. The importance of the issues at stake in the litigation.
7. The relative benefits to the parties in obtaining that data.

Based on these factors, the court ordered defendant to, at its own expense, produce responsive email messages from any five backup tapes chosen by plaintiff and to prepare an affidavit detailing the results of the searches, as well as time and money spent. Based on this affidavit, the court would then conduct the appropriate cost-shifting analysis.

Dodge, Warren, & Peters Ins. Servs. v. Riley, 2003 WL 245586 (Cal. Ct. App. Feb 5, 2003).

Defendants copied and removed excessive amounts of electronic information from plaintiff's files and storage media prior to their termination. Alleging misappropriation of trade secrets, unfair business practices, breach of fiduciary duty and breach of contract, plaintiff sued defendants. The trial court issued a preliminary injunction against defendants, ordering them to preserve electronic evidence and appointing an expert to recover lost or deleted files, copy data,

and perform key word searches. Upon the defendants' appeal, the appellate court upheld the trial court's order.

McPeck v. Ashcroft, 2003 U.S. Dist. LEXIS 172 (D.D.C. January 9, 2003)

An employment discrimination suit was brought against the United States Attorney General and the United States Bureau of Prisons by plaintiff, a former government employee. Prior to the court's ruling in *McPeck v. Ashcroft*, 202 F.R.D. 31 (D.D.C. 2001) in which defendants were ordered to analyze one backup tape to identify any information relevant to plaintiff's claims, plaintiff requested discovery of additional backup tapes pertaining to certain government employees. Plaintiff and defendant disagreed as to the outcome of the search after the original backup tape was analyzed, with plaintiff alleging the search had produced useful information and justified analysis of the additional backup tapes and defendant asserting that the initial search only produced documents that supported what plaintiff already had. Based on analysis performed in the court's prior ruling, the court denied plaintiff's request for further discovery.

Rowe Entertainment, Inc. v. William Morris Agency, Inc., 2002 U.S. Dist. LEXIS 488 (S.D.N.Y.), motion denied, 2002 U.S. Dist. LEXIS 8308 (S.D.N.Y.).

Plaintiffs made 35 document requests, described by the magistrate as "sweeping", to which four defendants requested a protective order with regards to email messages, stating that the high cost and burden associated with producing possibly relevant email messages outweighed any benefit that could be gained from them. The magistrate denied defendants' motion, as it sought to prevent the discovery of email messages in total and instead established an eight-factor balancing test that was used to determine whether discovery requests should be shifted. Based on this balancing test, the magistrate found that plaintiff should pay costs associated with identifying relevant email messages, a ruling that was upheld by the court.

Tulip Computers International B.V. v. Dell Computer Corporation, 52 Fed. R. Serv. 3d 1420 (D. Del 2002).

In this patent infringement case, on several occasions defendant did not answer discovery requests, did not offer any reasonable explanations for failing to answer discovery requests, and did not present any witnesses capable of answering questions regarding its records management system. Plaintiff moved to compel defendant to provide the computer hard drives utilized by specific company executives for key word searching. The court granted this motion and ordered plaintiff to provide defendant with a list of the email messages containing the search terms so defendant could then review them for privilege and confidentiality before producing them for plaintiff.

Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 2002 U.S. App. LEXIS 20422, 53 Fed. R. Serv. 3d (Callaghan) 1105 (2d Cir. Conn. Sept. 26, 2002).

Plaintiff failed to produce specific email messages until after the start of the trial and subsequently prevailed over defendant. In their appeal, defendant stated the trial court's denial of their request for sanctions, specifically in the form of an adverse jury instruction. The Second

Circuit agreed that the trial court had broad discretion when applying sanctions in that they may be imposed when a party has acted grossly negligent or in bad faith. However, the Second Circuit also found that the trial court had applied the wrong legal standard as sanctions may also be imposed for ordinary negligence and thus called for a renewed hearing on discovery sanctions.

Antioch Co. v. Scrapbook Borders, Inc., 210 F.R.D. 645, 2002 U.S. Dist. LEXIS 20811, Copy. L. Rep. (CCH) P28554, 54 Fed. R. Serv. 3d (Callaghan) 427 (D. Minn. Apr. 29, 2002).

In this copyright infringement suit, plaintiff brought numerous discovery motions requiring defendant to: protect records, accelerate discovery, compel discovery, and appoint a neutral forensics expert. The court found that discoverable and relevant information could be found in deleted documents residing on defendant's computer systems and that it was reasonable for plaintiff to attempt to recover such information. The court ordered defendant to make their computer systems available to plaintiff's computer forensics expert for duplication purposes and that appointed expert would report to the court regarding the information that was produced and the forensic work performed by the expert.

Trigon Insurance v. United States, 204 F.R.D. 277 (E.D. Va., 2001).

In this corporate taxpayer suit, Defendant retained a litigation support company who hired third party experts to consult and testify in the case. As per company policy, the litigation support company destroyed all email messages and draft reports between themselves and the third party experts. Based on the facts of this specific case, the court found that the email messages and drafts would have been discoverable and defendant was held responsible for the deliberate spoliation of these documents. The court imposed sanctions on defendant in the form of adverse inferences regarding the content of the destroyed electronic documents.

Playboy Enterprises, Inc. v. Welles, 60 F. Supp.2d 1050 (S.D. Cal. 1999).

Plaintiff claimed defendant infringed upon plaintiff's trademark by utilizing their name and logo on defendant's personal website. Defendant counterclaimed based on defamation and interference with prospective business advantage. Although plaintiff requested production of email communications, defendant routinely deleted such email messages throughout the litigation; thus, plaintiff moved to compel defendant to provide plaintiff with her computer hard drive for mirror imaging. Defendant contended that plaintiff had not specifically referenced the computer hard drive in their initial request for production. The court found that defendant's computer hard drive was discoverable as it likely held information relevant to the case and that production of such information would not be unduly burdensome upon Defendant.

Anti-Monopoly, Inc. v. Hasbro, Inc., 1995 U.S. Dist. LEXIS 16355, 1995-2 Trade Cas. (CCH) P71218 (S.D.N.Y. Nov. 3, 1995).

In this antitrust case, plaintiff moved to compel defendant to produce certain data processing files in their native electronic form, although they had already been submitted in paper form. Defendant maintained that they had satisfied their discovery obligations and that, as the

documents had already been destroyed in their electronic form, producing them would require defendant to recreate documents, incurring high costs. The court found that defendant was not relieved from producing documents in electronic form solely because said documents had been provided in paper form, stating “The law is clear that data in computerized form is discoverable even if paper ‘hard copies’ of the information have been produced...[T]oday it is black letter law that computerized data is discoverable if relevant.” However, the court withheld ruling on defendants' contention that the rules did not require them to essentially recreate the electronic files and found that the parties must come to a mutually satisfactory manner for exchanging the electronic documents.