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Court Compels Retention of All Putative Class Members' Hard Drives

Rejecting proportionality claim, the Southern District of New York requires preservation of thousands of hard drives at an estimated cost of \$1.5 million.

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When a potential employment class action arises, the costs of the attendant electronically stored information (ESI) preservation obligations can be staggering. At times, the potential amounts of money at issue in the class action pale in comparison to the cost of preservation. In the face of looming ESI preservation obligations, parties may seek relief in the form of a protective order limiting preservation in light of proportionality concerns. That was exactly the route taken by KPMG LLP in the matter of *Pippins v. KPMG*, No. 11-civ-377 (S.D.N.Y., filed February 3, 2012). However, that strategy backfired when the U.S. District Court for the Southern District of New York denied the motion for a protective order and affirmed KPMG's obligation to preserve large amounts of data. In its decision, the court indicated that it may have been much more receptive to KPMG's motion if KPMG had not acted unreasonably by failing to provide any information at all regarding the data it sought to no longer preserve.

Background

The plaintiffs in *Pippins* filed Fair Labor Standards Act (FLSA) and New York Labor Law (NYLL) claims for unpaid overtime wages, claiming that KPMG misclassified audit associates as exempt employees. KPMG countered that the plaintiffs were exempt employees and thus were not entitled to overtime pay. The plaintiffs sought conditional collective action certification for a nationwide class, which was ultimately granted. However, while the plaintiffs' motion for conditional certification was pending, the court issued a discovery stay. During the course of the stay, the parties continued to negotiate their respective preservation obligations.

Several months after the stay was issued, but before conditional certification was granted, KPMG sought a protective order limiting its preservation obligations to just a random sampling of 100 former audit associates' hard drives. KPMG further requested that if it were to preserve any hard drives beyond that 100, the plaintiffs would have to pay for their preservation. Neither party disputed the fact that preservation of the putative class members' hard drives would be a costly endeavor, although the plaintiffs did question the actual cost estimate provided by KPMG—\$1.5 million—based on the

plaintiffs' inability to examine the basis for the estimate. Both parties also agreed that a sampling of hard drives was probably the most cost-efficient way to move forward. However, the parties could not agree on a plan for that sampling.

The plaintiffs requested that KPMG provide a small number of hard drives for the plaintiffs to examine in order to craft a preservation plan. KPMG refused to do so, citing the discovery stay. Although Magistrate Judge James Cott attempted to perform a proportionality analysis, the analysis was hindered by KPMG's refusal to provide any information regarding the value of the data, and KPMG's motion was ultimately denied. Instead, Magistrate Judge Cott issued an order obligating KPMG to preserve all former audit associates' hard drives (the Hard Drives) until issuance of a further court order or until the parties could agree on a sampling methodology. KPMG appealed Magistrate Judge Cott's ruling to the court.

Southern District of New York Decision

With the granting of conditional collective action certification, the stay (KPMG's reason for nonproduction) automatically ceased. Nevertheless, the standoff between the parties continued. In the court's decision, Judge Colleen McMahon expressed her displeasure with KPMG for using the stay as an excuse for not producing a single Hard Drive for examination. She felt that it was a miscomprehension of the court's intent in issuing the stay, and that KPMG acted unreasonably.

Next, the court examined the merits of KPMG's request for a protective order. While the court recognized that "proportionality is necessarily a factor in determining a party's preservation obligations," the court was unable to conclude that the costs of preserving the Hard Drives outweighed the likely benefit of their preservation "because the record before [the court] is devoid of information necessary to conduct such an analysis." The court examined the merits of KPMG's assertions that to require preservation of all the Hard Drives was disproportionately expensive and improper. The court considered the Hard Drives' potential relevance, the proportionality of the preservation obligation, and whether all former audit associates were properly key players, thereby meriting preservation of their Hard Drives.

As far as relevance, the court found that employees' personal computers likely contain documents illustrating the employees' job duties as well as when the employees were working. Indeed, KPMG provided no information as to the Hard Drive's contents, thereby failing to rebut the plaintiffs' evidence regarding the relevance of the purported data on the Hard Drives. Similarly, KPMG's failure to provide information related to the Hard Drives prevented the court from undertaking a true proportionality analysis. Federal Rule of Civil Procedure 26(b)(2) supplies a balancing standard or "proportionality" test that allows a court to balance the burden or expense of proposed discovery, or in this context preservation, against its likely benefit. KPMG's decision to hide behind the discovery stay in refusing to produce information regarding the Hard Drives prevented the court from balancing the burdens and benefits of preservation. Absent that analysis, the preservation of all potentially relevant data was required.

The court then pointed out that all parties "are, by definition, key players." In a class action, anyone receiving the opt-in notice can become a party. Because the court certified a nationwide FLSA collective action, all departed audit associates nationwide were key players whose Hard Drives needed to be preserved. In addition, all audit associate employees who worked in New York would become parties to the NYLL class action unless they opted out. Therefore, the Hard Drives for every potential plaintiff

contained information for key players that must be preserved. However, that duty to preserve would cease for those potential class members who did not work in New York, and thus were not members of the NYLL putative class, and who failed to opt in to the collection action before the opt-in deadline.

Ultimately, KPMG’s recalcitrance in providing any hard drive information, thus preventing the court from assessing the benefits and burdens of preservation, coupled with the finding that a putative class member is a key player by definition, resulted in the court ordering the preservation of all audit associate Hard Drives.

Conclusion

While a party may seek to apply principles of proportionality to its preservation obligations, relying upon statements in cases such as *Rimkus Consulting Group, Inc. v. Cammarata* and *Victor Stanley v. Creative Pipe, Inc.*,¹ the party must prove that the burdens of preserving materials outweigh the likely benefits. When objecting to preservation on the grounds of undue burden, a party must be prepared to provide specific details regarding the effort and cost required to preserve data as well as the type of data likely found within the materials. Providing mere generalities about the contents of the materials to be preserved and the availability of the data elsewhere will not prove that benefits of preservation are minimal, as a court will not presume that materials are duplicative of other information. Instead, a party should provide the court with examples evidencing how the precise ESI that it claims is unduly burdensome to preserve is duplicative of other materials already being retained.

Still, one part of the opinion might contain some potential relief for a class action defendant required to preserve each putative class member’s data. The court noted, “[I]f I issue a decision vindicating KMPG’s position as a matter of law and undisputed fact, I will be amenable to an application to transfer the cost of preserving the drives to [p]laintiffs pending any appeal.”

If you have any questions or would like more information on the issues discussed in this LawFlash, please contact any of the following Morgan Lewis eData attorneys and technologists:

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1. 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010) (“Whether preservation . . . is acceptable . . . depends on what is reasonable, and that in turn depends on whether what was done . . . was proportional to that case and consistent with clearly established applicable standards.”), and 269 F.R.D. 497, 523 (“assessment of reasonableness and proportionality should be at the forefront of all inquiries into whether a party has fulfilled its duty to preserve relevant evidence”), respectively.

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