

Disagreeing with *Pension Committee*, Court Holds That Showing Loss or Destruction of “Discovery Relevant” Evidence Is a Prerequisite to Sanctions

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The inadequacy of preservation efforts alone is not always sufficient to warrant sanctions; proof of relevance can also be a determining factor for courts in deciding discovery sanctions. In a recent federal district court case addressing defendant’s motion for sanctions, *Orbit One Communications, Inc. v. Numerex Corp.*, 2010 WL4615547 (S.D.N.Y. Oct. 26, 2010), U.S. Magistrate Judge James C. Francis IV questioned some aspects of the analysis set forth in *Pension Committee*,¹ stating that “a court considering a sanctions motion must make a threshold determination whether any material that has been destroyed is likely relevant for purposes of discovery.”

Factual Background

Following the acquisition by Numerex of Orbit One Communications, a dispute arose with Orbit One’s executives, now Numerex employees, alleging that covenants not to compete signed by those executives were unenforceable and overbroad. After actions were transferred from state to federal court, Numerex filed a motion requesting spoliation sanctions based on certain conduct by an Orbit One executive, including the following:

- Failing to issue a formal litigation hold or to inform relevant personnel of the hold
- Removing six gigabytes of data from company servers
- Deleting several personal files and business emails from the company servers
- Replacing a desktop computer potentially containing relevant data with a new laptop and removing that desktop to his home
- Changing out the hard drive in that laptop
- Arranging for certain business emails to be forwarded from a work account to a personal account and then deleting those emails

Despite this “cavalier” conduct, the evidence showed that the data removed from the company servers had been backed up on an external hard drive, the desktop computer hard drive and original laptop hard drive had both been retained, the contents of the desktop and laptop hard drives had also been synchronized with a server backup location prior to the drive changes, the email forwarding protocol

¹ *The Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities*, 685 F. Supp. 2d 456 (S.D.N.Y. 2010) (*Pension Committee*).

left copies of the messages on the company's email server, and no relevant data appeared to have been lost.

Analysis

The court, in its decision, stated that when a party seeks adverse inference instructions based on spoliation of evidence, it must establish that the "spoliating" party destroyed, with a culpable state of mind, documents relevant to its claim or defense over which it had control and that it had a duty to preserve at the time of destruction.

In establishing its threshold for determining discovery sanctions, the court distinguished material of "assistive relevance" from material of "discovery relevance." The court defined material of assistive relevance as material that would be helpful to the party, and it defined material of discovery relevance more broadly to encompass any material reasonably calculated to lead to the discovery of admissible evidence.

The court explained that an inference that the missing evidence would have been favorable to the party seeking sanctions (i.e., that it would have been of "assistive relevance") is possible when there has been destruction of evidence in bad faith or by gross negligence. Before reaching that analysis, however, the threshold determination must be made that some record with discovery relevance existed and was, in fact, lost or destroyed:

Thus, prior to assessing whether a party has breached a preservation obligation, whether it did so with a culpable state of mind, and whether the lost information would have been helpful to the innocent party, a court considering a sanctions motion must make a threshold determination whether any material that has been destroyed was likely relevant even for purposes of discovery.

The court noted that some courts omit the discovery relevance requirement, pointing out that the *Pension Committee* court stated that relevance and prejudice may be presumed when the spoliating party acted in bad faith or in a grossly negligent manner. The *Orbit One* court "respectfully" disagreed with that decision, arguing that poor preservation conduct is not sanctionable conduct unless a showing is made that discovery-relevant material actually existed and was lost or destroyed due to the conduct in question.

The court went on to state that sanctions are not warranted based on a mere showing that a party's preservation efforts were inadequate. The court recited *Pension Committee*'s list of contemporary standards of preservation² and said that "depending upon the circumstances of an individual case, the failure to abide by such standards does not necessarily constitute negligence, and certainly does not warrant sanctions if no relevant information is lost." The court reasoned that "[r]ather than declaring that the failure to adopt good preservation practices is categorically sanctionable, the better approach is to consider such conduct as one factor . . . and consider the imposition of sanctions only if some discovery-relevant data has been destroyed."

² The list included (i) issuing a written litigation hold, (ii) identifying all key players to ensure that their records are preserved, (iii) ceasing the deletion of emails or otherwise preserving the records of relevant former employees, and (iv) preserving backup tapes that contain unique relevant information from key players.

The court concluded that the plaintiffs did not engage in model preservation of electronically stored information but should not be sanctioned because there was no showing that discovery-relevant evidence had been lost or destroyed.

Lessons from *Orbit One*

There are two important lessons companies can take away from *Orbit One*. First, it serves as a reminder that the law of preservation in the electronic discovery context is still being written primarily at the trial court level. Until these issues are addressed by appellate courts, disagreements between jurisdictions or between judges within a jurisdiction will continue to occur. Thus, when making decisions about preservation practices, it is important to consider the diverse views expressed in the various relevant decisions and to take an accordingly conservative approach.

Second, although *Orbit One* expresses disagreement with *Pension Committee* about when sanctions may be awarded for spoliation and about whether certain failures automatically constitute negligence, the decision does not disagree about the basic duties parties and their counsel have to ensure all relevant materials are preserved whenever there is a reasonable anticipation of litigation. Developing and maintaining comprehensive, defensible preservation practices should remain a top priority for litigants and potential litigants.

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