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October 5, 2010

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SPOLIATION ACROSS THE NATION

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Environmental litigation has made an increasing number of in-house counsel acutely aware of evidence preservation obligations facing companies during such litigation and arising whenever litigation is anticipated. Those obligations are the impetus behind the litigation holds that burden many legal departments as corporations seek to avoid the potentially severe sanctions that can be triggered if a company is found guilty of the 's' word: spoliation.

Spoliation is generally defined as the "destruction of records or properties … that may be relevant to ongoing and anticipated litigation, government investigation or audit." [The Sedona Conference Glossary: E-Discovery & Digital Information Management (2ed ed. 2007).] While much attention has been paid to the spoliation of electronic information in recent years, attention must similarly be given to more traditional evidence in environmental litigation, whether it be communications with a consultant, lab data, or soil samples.

By way of example, if your corporation is involved in cleaning up a contaminated property, you will likely retain a consultant to investigate the contamination and oversee remediation of the property, including collecting and analyzing samples of environmental media such as soil and groundwater. In addition to implementing an internal litigation hold, you should advise your consultant to retain those samples (and all other relevant information), to the extent possible, if you are considering asserting claims against prior owners of the property or other potentially responsible parties to reimburse your remediation and response costs. This is particularly true as many jurisdictions have held that a corporation can be found culpable for spoliation committed by its agent (e.g., an environmental consultant) even where the corporation did not, itself, act in bad faith. See, e.g., Connor v. Sun Trust Bank, 546 F. Supp. 2d 1360 (N.D. Ga. 2008).

The potential consequences resulting from spoliation of environmental evidence were highlighted last year in litigation brought by a golf club in Connecticut that sought to recover its cleanup costs from an adjoining property owner, which the Club alleged to be the source of PCBs found on its property. Despite what appeared to be a strong case, the Club found its suit dismissed and sanctions entered against it because the Club's consultant had, in part, failed to preserve soil samples. See, e.g., Innis Arden Golf Club v. Pitney Bowes, Inc., 629 F. Supp. 2d 175 (D. Conn. 2009).

Even more recently, Chief Magistrate Judge Grimm issued a comprehensive opinion concerning evidence preservation and spoliation, in which he canvassed jurisdictions across the country, in Victor Stanley, Inc. v. Creative Pipe, Inc., et al., Civ. No. MJG-06-2662 (D.M.D., Sept. 9, 2010) (Chief Magistrate Judge Paul W. Grimm). This Memorandum and Order may serve as a useful reference particularly given that no uniform

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SPOLIATION ACROSS THE NATION (cont'd)

national standard governs preservation or spoliation issues. While jurisdictions frequently consider similar factors in their spoliation analyses, they still vary widely on such key questions as when the duty to preserve is triggered, and the appropriate severity of sanctions. The resulting confusion was raised in a recent Conference on Civil Litigation at Duke University Law School, where research presented reflected many attorneys' opinion that preservation obligations are a key factor in the ever-escalating costs of litigation, particularly where electronically stored information is involved.

In Victor Stanley, Judge Grimm set forth an analytical framework for addressing spoliation issues in the context of repeated egregious examples of spoliation of evidence relevant to unfair competition, copyright and patent infringement claims. In the Court's view, Defendant engaged in a discovery "cat and mouse game" for years to hide electronically stored information from production, stalling or preventing effective discovery despite court orders, and deleting thousands of electronic files relevant to the litigation.

Victor Stanley is notable not just for its detailed analysis of spoliation concepts, but also the severity of the sanctions issued. Judge Grimm (based primarily on law of the Fourth Circuit, but canvassing other jurisdictions) evaluated: (i) whether there was a breached duty to preserve evidence; (ii) the culpability involved in the failure to preserve; (iii) the relevance of the evidence that was not preserved; and (iv) the prejudice to the party seeking discovery of the evidence that was not preserved. The Court concluded that Defendant's spoliation was so pervasive and willful that it constituted contempt of court, and ordered Defendant to pay Plaintiff's attorney's fees and costs, or otherwise face imprisonment for up to two years. Defendant acknowledged the validity of the majority of Plaintiff's spoliation claims, and indicated a willingness to accept a default judgment for failure to preserve information. Judge Grimm recommended that the default judgment be entered against Defendant for copyright infringement, and openly contemplated referring the matter to the United States attorney for criminal prosecution, but ultimately refrained.

While the extent of the spoliation and severity of sanctions in Victor Stanley are somewhat atypical, they highlight the dangers of failing to preserve evidence and the range of potential consequences. Potential sanctions under the Federal Rules of Civil Procedure for spoliation include court orders directing that certain facts be taken as established for purposes of the litigation or precluding the admission of key evidence or even expert opinions, without which a litigant, as a matter of law, will be unable to establish essential elements of a cause of action. In turn, the cause of action may be summarily dismissed.

The outcome of an action may turn on such 'adverse inferences' or exclusion of key evidence, and can be particularly relevant in environmental litigation, where courtroom success frequently relies on expert testimony regarding factual and scientific theories of causation of contamination. This was the case in a Superfund lawsuit in California where the Court sanctioned Defendant for spoliation by drawing adverse inferences against Defendant after it had removed and disposed of soil and piping directly relevant to Plaintiff's claims that its groundwater had been contaminated by Defendant's discharges. See Ameripride Servs. v. Valley Indus. Serv., 2007 U.S. Dist. LEXIS 18806 (E.D. Cal. 2007). Beyond adverse inferences, a court, such as Victor Stanley, may even treat spoliation as contempt of court for failure to obey discovery orders. Fed. R. Civ. P. 37(b)(2). In such situations, courts may be required to order the spoliating party to pay the reasonable expenses, including attorney's fees, caused by their disobedience.

Whether your company is regularly or infrequently involved in environmental litigation, you would be well served to heed the warnings found in Victor Stanley and Innis Arden, and take steps to protect your company from future claims of spoliation.