



REDGRAVE RESOURCES CASE ALERT

SEPTEMBER 23, 2010

Big and Small Lessons Learned from Victor Stanley II

Magistrate Judge Paul Grimm recently issued a lengthy and detailed order in the ongoing litigation of *Victor Stanley, Inc. v. Creative Pipe, Inc.* (“*Victor Stanley II*”), that, like an earlier decision in this matter,¹ provides important guidance on issues related to the duty to preserve and spoliation of evidence.

The small lesson deals with the facts of the case. In short, the abject failure to comply with multiple court orders, combined with efforts to obfuscate the proceedings, can lead to severe personal sanctions against the offending person. Whether or not the ultimate sanction of imprisonment for civil contempt is imposed, it is clear that substantial sanctions would be warranted and upheld.

The bigger lesson comes from the thoughtful analysis of the requirements for the issuance of sanctions when a party either destroys or fails to preserve evidence, and the distinctions among the various federal circuits regarding culpability standards. Notably, the opinion also has a twelve-page appendix in which Judge Grimm outlines the status of case law on spoliation sanctions in each of the thirteen Circuits, including districts within some of the circuits.

The Facts: “Intentional Misconduct”

The case involves claims of copyright and patent infringement, and unfair competition, based on Victor Stanley’s (“VSI”) claims that Creative Pipe (“CPI”) downloaded VSI design drawings and specifications from VSI’s website, then improperly used the downloaded material in competition with VSI. Discovery in this case has been marked with continuing disputes over preservation issues, and claims that the defendants have spoliated evidence. The most recent decision describes the egregious actions of the Defendants, specifically the actions of Mark Pappas, the President of Creative Pipe, in detail. While the details consumed 35 pages of the 89-page opinion, the pertinent claims are summarized by Judge Grimm as:

- (1) Pappas’s failure to implement a litigation hold;
- (2) Pappas’s deletions of ESI soon after VSI filed suit;
- (3) Pappas’s failure to preserve his external hard drive after Plaintiff demanded preservation of electronically stored information (“ESI”);
- (4) Pappas’s failure to preserve files and emails after Plaintiff demanded their preservation;
- (5) Pappas’s deletion of ESI after the Court issued its first

¹ *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251 (D. Md. 2008).



preservation order; (6) Pappas's continued deletion of ESI and use of programs to permanently remove files after the Court admonished the parties of their duty to preserve evidence and issued its second preservation order; (7) Pappas's failure to preserve ESI when he replaced the CPI server; and (8) Pappas's further use of programs to permanently delete ESI after the Court issued numerous production orders.²

Judge Grimm makes no bones about his findings relating to the Defendants' pattern of conduct:

Taken individually, each section [of the opinion describing lost or destroyed evidence] demonstrates intentional misconduct done with the purpose of concealing or destroying evidence. Collectively, they constitute the single most egregious example of spoliation that I have encountered in any case that I have handled or in any case described in the legion of spoliation cases I have read in nearly fourteen years on the bench.³

Adding insult to injury, the destruction and attempted destruction in this case was poorly done and traceable. Judge Grimm has doubtless added a new phrase to the ESI lexicon by labeling the Defendants as "the gang that couldn't spoliolate straight."⁴

Ultimately, Judge Grimm ordered sanctions in the form of the Plaintiff's attorney's fees and costs "relating to uncovering Defendants' discovery abuses," including "preparing, filing, and arguing all of Plaintiff's ESI motions" and retaining outside experts. He also ordered that Pappas's actions be treated as civil contempt of court, and that Pappas be imprisoned for up to two years, "unless and until he pays" the attorney's fees ordered. In addition, Judge Grimm recommended that the district judge issue a default judgment against the Defendants regarding the copyright infringement claim and a permanent injunction on the copyright claim. Judge Grimm did, however, decline to issue an adverse inference instruction on the remaining claims, despite the Plaintiff's request for such instruction.

The Analysis: Building the Case and Record for Sanctions

Despite the large amount of text required to lay out the background facts in this case, the court likely did not need an additional 54 pages to rule on the specific sanction issues here. However, Judge Grimm acknowledged the concern among lawyers, litigants, and jurists about the lack of a national standard regarding preservation issues, and expressed his belief that nothing in the instant decision would "add to this collective anxiety" in light of undisputed intentional spoliation of evidence and the nonexistence of a claim by Defendants that their conduct was appropriate or reasonable.⁵ Accordingly, Judge Grimm attempted to place his ruling in the larger context of ESI preservation law across jurisdictions, stating that a more "narrow analysis would be of little use to lawyers and their clients who are forced, on a daily basis, to make important decisions in their cases regarding preservation/spoliation issues."⁶

² *Victor Stanley, Inc. v. Creative Pipe, Inc.*, No. MJG-06-2662, 2010 WL 3530097, at *2 (D. Md. Sept. 9, 2010).

³ *Id.* at *16.

⁴ *Id.* at *2.

⁵ *Id.* at *18.

⁶ *Id.*



First, Judge Grimm addressed a court's authority to impose sanctions, finding that the Federal Rules of Civil Procedure permit imposition of sanctions for violations of a court-issued preservation order, even if the order does not order *production* of the information to be preserved.

Next, the court addressed the requirements for sanctions using both treatise/article material and case law to identify the differences between the circuits regarding the scope of the duty to preserve and what constitutes a breach of that duty. The opinion addresses varying levels of culpability (negligence, gross negligence, willfulness, and bad faith), and the varying applications of each across the circuits. Judge Grimm identifies the legal hold obligation as a particular point of contention, noting that courts vary widely on this issue. He notes that the preservation duty is a duty to the *court*, not to a party's adversary. The court must have access to the facts in order to decide cases on their merits, and cannot do so if information is not preserved. Accordingly, it is the injury to the court's ability to discern the facts that allows the court to "match[] the appropriate sanction to the spoliating conduct. . . ."⁷

Notably, the portion of the opinion regarding legal holds and adverse inference instruction sanctions stands in contrast to a January 2010 decision by Judge Shira Scheindlin in *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*, which has since been settled by the parties. Judge Grimm acknowledged that the most recent *Pension Committee* decision clearly held that a failure to issue a written litigation hold is automatically "gross negligence," and held that an adverse jury instruction was warranted for such behavior, even without a showing of intent. In contrast, Judge Grimm noted that, in the Fourth Circuit, although bad faith was not required for an adverse instruction, "gross negligence" alone was insufficient to warrant such an instruction.⁸ Judge Grimm addressed the *Pension Committee* position that a failure to issue a written litigation hold constitutes "gross negligence" *per se*, therefore presuming relevance, and leaving the court "inexorably poised to give an adverse inference instruction without further analysis." This, he concluded, also was not consistent with Fourth Circuit precedent.

Against this background, Judge Grimm not only decided the fate of the Defendants in the case before him, but provided his view regarding the necessity of bad faith or intent for case-dispositive sanctions. The opinion outlines the step-by-step requirements for imposition of sanctions for destroying or failing to preserve evidence in the Fourth Circuit: (1) a duty to preserve evidence and a breach of that duty; (2) a culpable state of mind; and (3) the relevance of the lost evidence and resulting prejudice. Judge Grimm walked through each element, and concluded that the evidence demonstrated bad faith on the part of the Defendants sufficient to warrant a presumption that the destroyed evidence was relevant to the copyright claim, and that its unavailability was prejudicial to Plaintiff. With respect to the remaining claims, however, Judge Grimm found that even where the conduct rose to the level of "gross negligence," the degree of culpability was not "willful", and therefore insufficient under Fourth Circuit law to give rise to the presumption that the evidence was relevant, or that its absence was prejudicial to Plaintiff. Thus, Defendants'

⁷ *Id.* at *27.

⁸ A similar conclusion was reached by a district court within the Fifth Circuit, where the judge stated, "As a general rule, in this circuit, the severe sanctions of granting default judgment, striking pleadings, or giving adverse inference instructions may not be imposed unless there is evidence of 'bad faith.'" *Rimkus Consulting Group v. Cammarata*, 688 F. Supp. 2d 598 (S.D. Tex. 2010). The *Rimkus* decision also contains a discussion of the differences among the circuits with respect to requirements of "bad faith" or lesser degrees of culpability.



grossly negligent conduct did not warrant the adverse inference instruction sanction requested by the Plaintiff. Notably, however, the remaining claims will proceed as a bench trial without a jury, and Judge Grimm left the door open to Plaintiff to resurrect the spoliation issues in the future if Plaintiff can “demonstrate with greater particularity . . . that it cannot meet its burden of proof” as to liability or damages for the remaining claims.⁹

Lessons for the Rest of Us

- **Evaluation of a party’s preservation efforts is always fact-specific.** What works in one case may not work in another. What is reasonable in one case may not be sufficient in another. This decision, like many other recent ESI cases, does not provide an instruction manual for what specific actions must be taken in every case, but provides examples of steps that a reasonable party *and their counsel* would take under the circumstances. It should go without saying that parties should always follow instructions given by the court in their own cases, but as this decision illustrates, some parties choose not to do so, at their own sure peril.
- **Courts expect and require that parties take steps to preserve evidence.** At a minimum, parties are obligated and expected to identify and preserve evidence they know is relevant. They must take good faith, reasonable steps by issuing a written legal hold document, collecting and preserving such evidence, and/or suspending automatic deletion functions to ensure that relevant evidence is not lost or destroyed.
- **The law of the land differs from circuit to circuit.** The ESI landscape is starting to become more defined, but that definition remains far from consistent. The key differences among the circuits as discussed in this case did not have to do with whether the conduct at issue was right or wrong, but with how wrong it was. As Judge Grimm’s comparisons show, the Defendants’ behavior in this case would almost certainly have led to adverse inference instructions or claim dismissal in other jurisdictions.
- **Bad conduct leads to bad consequences.** The Defendants didn’t earn any points for their ultimate agreement that they should lose on the copyright claim. Their acquiescence confirmed for the court that their conduct was not only improper, but also knowing and intentional. At the end of the day, the court had a party that destroyed evidence, did it poorly, and then lied about it. This combination of events warrants significant sanctions and rebuke in any court, but the outer bounds of appropriate punishment may depend on the jurisdiction in which the court sits.
- **Don’t walk the line. Be proactive: Have a defensible plan and execute it effectively.** Many of the recent decisions related to the duty to preserve and spoliation of evidence have involved willful or grossly negligent conduct that led to the imposition of sanctions. And, while the circuit courts differ in the level of culpable behavior required to impose the harshest sanctions, no litigant wants to be walking the line between gross negligence and bad faith. The best way to avoid any sanctions is to have a defensible litigation response plan in place that

⁹ *Id.* at *42.



effectively allows for the identification, preservation and eventual production of relevant evidence.

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