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## **BYU v. Pfizer and the Court's Reluctance Toward Sanctions, Emphasis on Cooperation & Expectation of Records Management**

*Brigham Young University v. Pfizer*, 2012 U.S. Dist. LEXIS 53929 (D. Utah Apr. 16, 2012) – In this patent action, the district court had previously issued a partial grant – and partial denial – of BYU's initial request for sanctions regarding discovery, awarding BYU more than \$850,000 in costs and fees in the fall of 2009. BYU followed this partial victory with three more motions for sanctions against Pfizer; the third and present motion was filed in November 2011. When addressing the November motion, Magistrate Judge Brooke Wells sought to decide whether Pfizer's conduct post-\$850,000 in sanctions deserved the subsequent dispositive sanctions sought by BYU. In its briefing, BYU argued that Pfizer's recalcitrance, embodied in the alleged loss or destruction of critical documents and unreasonable records management practices, continued after Pfizer was sanctioned. BYU asserted that the discovery slate was not wiped clean after Pfizer paid its penalty and that the court must look at the totality of the case when determining sanctions.

After deciding that BYU had not proved Pfizer's bad faith, the court examined BYU's argument that Pfizer's duty to preserve stemmed from, among other things, Pfizer's document retention policy, Pfizer's predecessor Monsanto's document retention policy, obligations to the federal government, and even Pfizer's litigation with other parties. The court clearly held that Pfizer's duty to preserve in this case was owed only to BYU and only within the bounds of the present litigation.

When denying the whole of BYU's motion for sanctions, the court did review the updated history of the litigation but limited its examination to Pfizer's conduct post-sanctions, finding that Pfizer's post-sanction conduct did not rise to a level appropriate to award BYU's presently sought sanctions. Instead, the court stated that “the conduct of Pfizer following the ... prior sanctions order has improved,” that “there have been times when an actual spirit of cooperation existed among the parties and counsel,” and concluded that the “lesser sanctions have proven fruitful.”

The BYU decision highlights a number of serious issues for litigants, including (i) the reluctance of courts to award dispositive sanctions in discovery cases and (ii) the court's strong support for and consideration of the “spirit of cooperation” between the parties in discovery. It also delves into the realities of the intersection of records and information management practices with litigation, especially in those cases where the facts – and documents – at issue date from long ago (here, from “the early 1990s”). In that context, the court shared some pragmatic advice with all prospective litigants seeking discovery: the duty to preserve “cannot prevent the inadvertent destruction or misplacement of



evidence that can occur before such a duty arises. Nor can it prevent the fading of human memories.” Discovery is contextual, it is nearly always imperfect, and in this case, as in others, it could not “be viewed in a vacuum.”

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