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BNA INSIGHTS

DDEE Board of Advisor members Jeane A. Thomas and Ronald J. Hedges review the *Victor Stanley* decision and discuss its probable impact.

Victor Stanley Revisited: Judge Grimm's Analysis of the Law Governing Spoliation Sanctions



By JEANE A. THOMAS AND RONALD J. HEDGES

It is not a good idea to intentionally and repeatedly delete and destroy electronically stored information (“ESI”) that is relevant to pending litigation and subject to multiple court orders to preserve and produce. Likewise, it is not a good idea to make repeated misrepresentations to a court and an adversary about that conduct. That’s not exactly news.

However, the recent decision in *Victor Stanley* is particularly noteworthy because of Chief United States Magistrate Judge Paul W. Grimm’s thoughtful analysis of the legal principles involved in spoliation sanctions

and the difficulties created by the lack of uniform national standards. This action will also be remembered for the fact that, among other sanctions, Judge Grimm recommended that an individual defendant spend up to two years in prison if he does not promptly pay the plaintiff’s costs and fees.

In *Victor Stanley, Inc. v. Creative Pipe, Inc., et al*, 2010 U.S. Dist. LEXIS 93644 (D. Md. Sept. 9, 2010) (*Victor Stanley II*), Judge Grimm addressed discovery misconduct that he described as “the single most egregious example of spoliation . . . 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.”

The underlying complaint alleged copyright infringement and other related claims that arose when the corporate defendant, Creative Pipe, Inc. (“CPI”), and its president Mark Pappas allegedly downloaded design drawings and specifications from Victor Stanley, Inc.’s (“VSI”) website—using the fictitious name “Fred Bass”—and used the drawings to compete improperly with VSI. The spoliation claims were based on years of misconduct, following voluminous filings, motions and evidentiary hearings. See, *Victor Stanley, Inc. v. Creative Pipe, Inc., et al.*, D. Md., Civil Action No. MJG-06-2662, 5/29/08 (*Victor Stanley I*).

Judge Grimm found that CPI and Pappas engaged in the following spoliation activities (among others):

- Immediately after the action was filed, Pappas instructed a business contact in Argentina to destroy all e-mail related to VSI. E-mail was destroyed but Pappas’s instructions to get rid of them were produced.

- Pappas purchased an external hard drive immediately before the action was filed, used it for months attached to his work computer, transferred more than 62,000 files to it, and kept its existence secret even from his own ESI expert. Pappas testified that he later returned the hard drive to “Bob from Office Max” after the action was filed without doing any back-up of its contents because Pappas didn’t like some of its features.

- Two weeks after the action was filed, CPI ordered a new server which was installed six months later without backing up any data before the transfer. The old server was eventually produced to plaintiffs, but had become corrupted and could not be searched. Notably, Pappas “stored” relevant e-mail in “deleted items” folders that were not transferred to the new server.

- Between the first Court order to preserve relevant ESI and a discovery hearing six weeks later, 9,282 files were deleted from Pappas’s work computer.

- Following that hearing and a second preservation order, Pappas deleted nearly 4,000 files, ran a Disk Cleanup program, accessed the Registry Editor and ran the system’s Disk Defragmenter program—thus ensuring that the deleted files could not be recovered.

- As late as two years after the action had been filed, CPI ran Easy Cleaner and CCleaner programs to scrub deleted data and clean-up registry entries to eliminate Internet history files and temporary Internet files.

The Court had little difficulty in finding that Pappas’ conduct was willful and in bad faith. Further, based on Pappas’ conduct and the file names of some of the missing ESI, the Court determined that the deleted files were highly relevant to the litigation and that VSI was significantly prejudiced by the spoliation. The result seemed so obvious that the defendants themselves admitted their fault and were willing to accept a default judgment on the copyright infringement claim.

Filing a Void. Given all of this, Judge Grimm could have gone straight to assessing the appropriate sanctions for such egregious and intentional spoliation. Instead, the Court noted the concern generated by recent spoliation decisions and the lack of a uniform national standard governing the imposition of spoliation sanctions.

Accordingly, Judge Grimm used *Victor Stanley II* “to synthesize not only the law of this District and Circuit, but also to put it within the context of the state of the law in other circuits as well. I hope that this analysis will provide counsel with an analytical framework that may enable them to resolve preservation/spoliation issues with a greater level of comfort that their actions will not expose them to disproportionate costs or unpredictable outcomes of spoliation motions.”

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PAUL W. GRIMM
CHIEF U.S. MAGISTRATE JUDGE (D.MD.)

Preservation. In the course of this analysis, the Court noted that standards relating to the scope of the duty to preserve are not consistent across circuits or even within individual district courts. For example, there is a difference among circuits with respect to the extent to which the duty to preserve extends to evidence controlled by third parties, and a difference among individual courts regarding the level of fault assigned when a party fails to implement a litigation hold.

As a general rule (although not an issue in *Victor Stanley II*), Judge Grimm observed that an “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.”

Standards for Sanctions. *Victor Stanley II* also described the differences among circuits with respect to varying standards of culpability necessary to impose different types of sanctions and different approaches to determining the elements of relevance and prejudice. In some circuits, unintentional conduct (i.e., negligence or gross negligence) are insufficient to warrant a presumption of relevance or prejudice.

However, citing *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec.*, 685 F. Supp. 2d 456 (S.D.N.Y. 2010), Judge Grimm noted that, in the Second Circuit, relevance and prejudice may be presumed when the spoliating party is grossly negligent:

This distinction is all the more significant because, as noted, in the Second Circuit, certain conduct is considered gross negligence *per se*. *Pension Comm.*, 685 F. Supp. 2d at 471. Thus, for example, if a party fails to issue a written litigation hold, the court finds that it is grossly negligent, in which case relevance and prejudice are presumed. Point. Game. Match.

Judge Grimm concluded that this “lack of a uniform standard regarding the level of culpability required to warrant spoliation sanctions has created uncertainty and added to the concern that institutional and organizational entities have expressed regarding how to con-

duct themselves in a way that will comply with multiple, inconsistent standards.”

Relevance, Prejudice. The Court had no difficulty in presuming the relevance of the lost ESI or the prejudice to VSI given the willful, bad faith conduct of Pappas and CPI. Consistent with that conclusion, Judge Grimm recommended that a default judgment as to liability be entered against the defendants on the copyright claim, although he refrained from any recommendation as to any other claim or as to damages on the copyright infringement claim.

Judge Grimm also ordered Pappas to pay VSI’s attorneys fees and costs allocable to the spoliation, including attorneys’ fees and costs relating to discovery, preparation of, and litigation of the spoliation motions (including expert fees).

Criminal Charges? Finally, Judge Grimm also addressed VSI’s request that the Court refer the action to the United States Attorney for possible criminal charges against Pappas, including perjury. However, given the substantial time, effort and resources already incurred, Judge Grimm declined to invite “a criminal proceeding that unavoidably will go over the same ground, and likely involve yet another judge.”

Instead, finding that “Pappas’s civil contempt is established by clear and convincing evidence,” the Court recommended that Pappas be found in civil contempt and that he be imprisoned for a period not to exceed two years “unless and until” Pappas pays the significant fees and costs that will be awarded to VSI.

Impact. *Victor Stanley II* is a valuable overview and analysis of the state of federal law relating to spoliation sanctions and the problems created by the lack of uniform and consistent standards. Judge Grimm referred to papers presented in connection with the 2010 (Duke) Conference on Civil Litigation when he observed that “many lawyers, as well as institutional, organizational, or governmental litigants, view preservation obligations as one of the greatest contributors to the cost of litigation being disproportionately expensive in cases where ESI will play an evidentiary role.”

There is little doubt that this opinion will be cited by the chorus seeking further evolution and harmonization of these standards.

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