



ARMA International Educational Foundation

Legal Holds & Spoliation: Identifying a Checklist of Considerations that Trigger the Duty to Preserve

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A Study by John J. Isaza, Esq.
for
The ARMA International Educational Foundation

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I. INTRODUCTION

In the aftermath of Sarbanes-Oxley, concerns over discovery and spoliation have catapulted to the priority lists of most companies, specifically regarding what is considered pending or potential investigations or litigation. After all, severe penalties, including the possibility of jail time, are at stake for those involved in the destruction of relevant documents. Companies, therefore, must balance such severe consequences with proper management of all records, including electronic ones, during litigation. A central and difficult issue surrounding an otherwise sound retention policy is the determination of how and what records must be held from destruction, especially when faced with determining what is considered “potential” (or threatened) litigation or investigations as opposed to clear “pending” litigation. This article, thus, identifies a duty to preserve continuum that should provide companies a set of parameters for triggering a “legal hold” on destruction of records subject to pending or potential litigation or investigations.

A comprehensive treatment of the spoliation doctrine falls outside the intended scope of this article, and besides that other authors have documented the subject extensively.¹ However, a summary of the doctrine is a necessary foundation for this article. To that end, and with due treatment of the above mentioned analysis of legal holds, **at the core**, this article will cover the following:

- 1) Summarize different approaches the 50 states and their courts have taken toward spoliation (i.e. the plundering of evidence);
- 2) Identify triggering events for legal holds, including when a matter becomes “pending” or “potential” litigation under the law, all within the parameters of an ascertainable duty to preserve continuum; and
- 3) Discuss the primary method the courts use to test the reliability of a retention policy, including communication and protocol guidelines the courts expect to see in a sound retention policy.

¹ See, e.g., Kaye, Richard. “Effect of Spoliation of Evidence in Product Liability Action.” 102 ALR 5th 99 (2004 West Group). This article provides a comprehensive and current treatment of the effect of spoliation of evidence in all 50 states; see also, Eng, Kevin. “Spoliation of Electronic Evidence.” 5 BU Journal of Sci & Tech 13 (1999); Egan, Christopher. “Arthur Andersen’s Evidence Destruction Policy: Why Current Spoliation Policies Do Not Adequately Protect Investors.” 34 Tex. Tech L. Rev. 61 (2002).

II. SUMMARY OF SPOILIATION IN THE 50 STATES

A) Summary of the Spoliation Doctrine

The spoliation doctrine drives the duty to preserve documents in the context of litigation or agency investigations. Spoliation has traditionally been defined as the intentional or unintentional destruction or disappearance of things or documents of or during litigation.² However, various state and Federal acts, such as Sarbanes-Oxley, broaden the reach of the spoliation doctrine from mere litigation matters to pending Federal or state agency investigations.³ States vary widely on whether or not to recognize spoliation as a separate cause of action or at minimum to give the courts discretion for sanctions. A court's ability to sanction parties for spoliation is a doctrine that has been in existence for hundreds of years, although the law has developed substantially over the past few years in light of such high profile investigations as Enron and Arthur Andersen.

Whether or not a court sanctions a party for spoliation depends on several factors, including whether the conduct was intentional, the prejudice to the other side, and the availability of alternative evidence. Some states have gone as far as to recognize a separate tort or cause of action for "spoliation." Thus, a distinct range of sanctions the courts apply to spoliation is identifiable, ranging from:

- 1) Instructions to the jury that they may infer misconduct;
- 2) To evidentiary sanctions;
- 3) To dismissal of the case;
- 4) To recognition of a full-blown cause of action for either intentional or negligent spoliation.

This article will next address this range of spoliation sanctions.

² Levy-Sachs, Rebecca and Miller, Gregory. "Spoliation of Evidence: Trend to a New Tort." (September 2001). Available at http://www.dri.org/dri/committees/pdf/ILC_Spoliation.pdf (accessed August 29, 2004) and also **attached hereto as Appendix A.**

³ 18 USC 1519 (imposing fines and prison sentences of up to 20 years for anyone who knowingly alters, destroys, mutilates, conceals, covers up, falsifies or makes false entry in any record, document or tangible object with the intent to impede, obstruct or influence the investigation or proper administration of any department or agency of the United States) (Emphasis added).

B) Hypothetical

Later in this article, the analysis of the duty to preserve continuum will discuss court cases that illustrate the courts' treatment of spoliation issues. In the interim, the following hypothetical will be used to help introduce the above noted spoliation approaches:

Large Retailer ("Defendant") is having a grand opening for a new store in Chicago on a cold snowy day in February. Defendant sends out notice to all vendors advising them not to show up on this day due to the grand opening. Peter Paul ("Plaintiff") is a vendor of children's toys. Somehow he does not receive Defendant's notice, so he shows up for a large toy delivery on the day of the grand opening. When he arrives at the loading dock, one of Defendant's clerks happens to be there and instructs him to go home. As Plaintiff turns around to go home, he trips and falls on the steps of the loading dock. Plaintiff sues Defendant for his personal injuries. At trial, the salient issue is whether or not Plaintiff received notice from Defendant not to make deliveries on the day of the grand opening. If Defendant proves notice, the court will instruct the jury to consider whether Plaintiff assumed the risk of his injury.

C) Application of Hypothetical to Spoliation Approaches

Almost all state courts, except New Jersey and New Mexico, favor punishing a party who plunders evidence with jury instructions that they may infer misconduct. Say in the above hypothetical that Defendant finds out the Plaintiff was the only vendor who did not receive the notice not to make deliveries on the day of the grand opening. To hide this inconsistency, Defendant destroys all e-mails to all vendors for the week that Defendant claims it sent notice to Plaintiff not to show up. At trial, Defendant claims that it inadvertently destroyed all notices to vendors. However, Plaintiff had found out in discovery that of all e-mail records for that year, only the e-mails during the week in question were missing. The court issues instructions to the jury that it may infer Defendant purposely destroyed the e-mails, presumably because they were damaging to its case. Under these instructions, the jury may assume that records were purposefully destroyed, without having to see any specific piece of evidence to prove it. In other words, the absence of the record is enough proof, although the jury ultimately makes the call.

A smaller percentage of states (including Alabama, California, Illinois, Iowa, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, North Dakota, Ohio, Texas, Wisconsin) favor "evidentiary sanctions" or, in other words, the inability to present relevant evidence because some pieces are missing. Say in the above hypothetical that Defendant argues it gave Plaintiff instructions via e-mail not to come to the dock that day. Defendant attempted to produce a witness at trial who was willing to attest that he sent notices to all vendors. However, Defendant is unable to produce the e-mails, because the e-mail records were destroyed pursuant to Defendant's record retention policy. The court rules that the oral testimony is not admissible, because the written records to corroborate the testimony do not exist. This

evidentiary sanction (i.e., the inability to present only a portion of the relevant evidence) essentially prohibits Defendant from mounting its key defense: that Plaintiff assumed the risk when he showed up at the loading dock that day despite alleged notice not to do so.

Even fewer states (including Alabama, Arkansas, Florida, Illinois, Montana, New Jersey and New York) favor spoliation sanctions that would include dismissal of the case. Say in the above hypothetical that Plaintiff destroys the e-mails he received from Defendant, one of which was the one that asked him not to show up on the day in question. Even though Plaintiff could have still gone to the jury to plead his case in most other jurisdictions, the court in one of these “dismissal” jurisdictions has the power to simply throw out Plaintiff’s case as sanction for destroying relevant records.

As far as states that recognize separate causes of action for spoliation, they are split between those that recognize the claim for intentional spoliation (including Alaska, Florida, Illinois, Kansas, Montana, New Jersey, New Mexico and Ohio) versus negligent or unintentional spoliation (including Alabama, Florida, Illinois, Montana, New Jersey and New York). In the above scenarios, whether the act of spoliation was intentional or unintentional and depending on the state, the Plaintiff in the above hypothetical could lose his case against Defendant presumably because key evidence was destroyed. However, Plaintiff still may bring a separate case for spoliation, because Defendant had destroyed records that affected the outcome of his case.

III. LEGAL HOLDS AND THE DUTY TO PRESERVE CONTINUUM

Courts have great discretion to impose sanctions for destroying records relevant to pending or potential litigation. Underscoring all of this is a continuum of various sources that give rise to a duty to preserve potentially relevant evidence, including:

- 1) Statutory or regulatory obligations to preserve;
- 2) Statutes of limitations;
- 3) Duty arising from potential or threatened litigation or investigation;
- 4) Duty created by preservation letter from opposing counsel or agency;
- 5) Duty created by service of a complaint and resulting civil discovery statutes, discovery requests or court orders.

Of the above duty continuum, numbers one and two should be considered in creating the actual records retention schedule. They are not factors in determining “legal holds,” because these laws simply set forth proactive obligations to preserve records until the expiration of a specified retention or limitations period. On the other hand, items four and five set forth easily identifiable reactive events that should trigger a “legal hold.” Finally, item three is critical to the “legal hold” decision, yet it is difficult to standardize as all sources point to reasonable foreseeability and at times outright prediction. This makes the ultimate decision fact-specific and thus impossible to standardize.

A) Statutory or Regulatory Obligations to Preserve and Statutes of Limitation

Thousands of Federal and state laws governing the retention of specific records exist across a wide range of industries, as well as scores of statutes of limitations. Some of the primary Federal regulators, to name a few, include the Securities and Exchange Commission, the Food and Drug Administration, the Department of Labor, and the Environmental Protection Agency. The retention regulations promulgated by these agencies and their state counterparts must be considered when creating a records retention schedule and policy, because the laws set forth obligations to preserve records until the expiration of a specified period. Once expired, the records can be destroyed, except when the records are the subject of potential or pending litigation or investigation.

In addition to the regulatory obligations, companies should consider the statutes of limitation when creating a retention schedule or policy. This will ensure that documents relevant to potentially actionable claims, such as breach of contract or routine personal injury claims, are retained for at least the limitations period. Records thus can be destroyed once the longest of any applicable statute of limitations affecting a record series has expired and, of course, once the longest of any directly applicable statute or regulation has expired, if any. The only exception is if there is pending, threatened or potential litigation or investigation, which would trigger a “legal hold” as discussed below. A legal hold is simply the act of withholding from destruction any records that otherwise would be eligible for destruction pursuant to a retention policy or regulatory requirements.

B) Duty Arising from Potential or Threatened Litigation or Investigation

Notice of pending, potential or threatened litigation or agency investigations can take any of the following forms: 1) via a preservation letter or other written notice from opposing counsel, 2) via pre-litigation discussions, demands and agreements, and 3) via facts or circumstances that would otherwise put a reasonable person on notice. Each of these forms of notice will be discussed below in some detail.

1) Preservation Letters Or Other Written Notice From Opposing Counsel

Prudent counsel seeking to obtain discoverable records can formally trigger this duty to preserve simply by sending a notice letter to the opposing party spelling out a request to preserve certain data that might otherwise be deleted in the ordinary course of business. The letter may say something as simple as the following:

“Our firm has been retained by Mr. Plaintiff regarding his recent termination from employment at your company. We are currently evaluating whether or not Mr. Plaintiff has a claim against your company for wrongful termination, amongst other potential claims. We therefore request that you preserve all records in whatever medium that pertain to Mr. Plaintiff.”

Something as seemingly innocuous as an e-mail, from an opponent’s counsel to someone at the company advising them of such potential litigation, may suffice to trigger a duty to preserve and legal hold. The key, then, is to have a procedure and policy within the company that will route the communication to the appropriate party(ies) designated to initiate a legal hold of the applicable records.

2) *Pre-litigation Discussions, Demands, and Agreements*

Pre-litigation discussions, demands and agreements with the potential plaintiff, agency, or their counsel also trigger a duty to place a legal hold on relevant records. Published opinions usually deal with this issue in the context of spoliation or evidentiary sanctions. In Nation-Wide Check Corporation v. Forest Hills Distributors, for instance, the First circuit examined the facts surrounding Forest Hills’ destruction of checks that would have proven Nation-Wide’s priority rights to certain assets. 692 F.2d 214 (1st Cir. 1982) and **attached hereto as Appendix B**. These rights had been assigned through advice of Nation-Wide’s counsel who had worked on this matter with the Forest Hills counsel prior to the ensuing action. The Circuit Court noted that the destroyer (who was the counsel for Forest Hills Distributors) of the records Nation-Wide needed for its case had previous notice. At least four months before he destroyed the documents, Forest Hills’ counsel had communicated with Nation-Wide’s attorneys about the date Nation-Wide’s rights first assigned. Id. at 219. Although the court found that Forest Hills’ counsel might not have been "completely aware" of the significance of the records, he proceeded to destroy them without further inquiry even though they theoretically could have disproven as well as proven Nation-Wide's claim of rights to the assets. Id.

This case thus imposes a duty on the potential destroyer of records to inquire further about the significance of records affected by pre-litigation discussions prior to having them destroyed. See also, Smith v. Superior Court (1984) 151 Cal.App.3d 491, overruled on other grounds by, Cedars-Sinai Medical Ctr. v. Superior Court (Cal. 1998) 18 Cal.4th 1, 12 (original spoliation case in California where car dealer that had altered a vehicle, and to whom it was towed, had verbally agreed after an accident to maintain the vehicle pending further investigation.)

3) *Facts, Circumstances, Comments or Other Signs: Reasonable Foreseeability and Institutional Notice*

a) Reasonable Foreseeability

Most jurisdictions find that a party has notice if litigation is "reasonably foreseeable." For example, in Blinzler v. Marriott International, Inc., the

First Circuit held that a spoliation inference is proper only when the destroying party knows "of circumstances that are likely to give rise to future litigation." 81 F.3d 1148, 1159 (1st Cir. 1996) **and attached hereto as Appendix C.** In Blinzler, the court allowed the jury to infer Marriott had destroyed certain PBX operator records pertaining to the time Mrs. Blinzler called from her hotel room to inform the operator that her husband was having a heart attack. Mr. Blinzler eventually passed away from a mild heart attack, in part because the PBX operator took too long to call the ambulance after Mrs. Blinzler placed the urgent call. Marriott had destroyed the operator records, although it was aware of Mr. Blinzler's potential lawsuit. The Court concluded that when the evidence indicates that a party is aware of circumstances that are likely to give rise to future litigation and yet destroys potentially relevant records without particularized inquiry, a fact-finder may reasonably infer that the party probably did so because the records would harm its case.

The Texas Supreme Court has not directly addressed this issue, but Justice Baker, in his concurring opinion in Trevino v. Ortega, argued that a party has notice when "the party either actually anticipated litigation or a reasonable person in the party's position would have anticipated litigation." 969 S.W.2d 950, 956 **and attached hereto as Appendix D.** See also, Fire Insurance Exchange v. Zenith Radio (1987 Nevada) 747 P.2D 911 ("even where an action has not commenced and there is only a potential for litigation, the litigant is under a duty to preserve evidence which it knows or reasonably should know is relevant to the action.")

b) Facts that Would Put the Company on Notice

Most courts hold that a duty to preserve evidence arises once a party has notice of possible litigation. For example, in Akiona v. United States, the Ninth Circuit held that the government did not spoliage evidence because it did not foresee litigation when it destroyed documents. 938 F.2d 158, 161 (9th Cir. 1991) **and attached hereto as Appendix E.** In that case, Aaron Akiona was injured when someone threw a grenade into a Honolulu restaurant's parking lot. *Id.* at 159. This grenade was manufactured for and shipped to the United States, but the United States had no record of what happened to the grenade after shipment. In accordance with its document retention policy, the United States had destroyed the grenade's record two years after it was "disposed of." The parties did stipulate, however, that the grenade was acquired "unlawfully and without the knowledge or consent of the government." *Id.*

The lower court had penalized the government for this destruction by instructing the jury that it could draw an adverse inference from the government's destruction, but the Ninth Circuit reversed. The Ninth Circuit held that an adverse inference against the government was improper because the government did not destroy the grenade records "in response to th[e] litigation." *Id.* at 161. Akiona failed to show that "the government was on notice that the records had potential relevance to litigation." *Id.*

In light of the holding in Akiona, companies must consider not only whether there is potential litigation, but also whether particular records are relevant to said potential litigation.

c) Institutional Notice

Institutional notice arises when the person who destroys does not have reasonable notice of a controversy, but the institution as a whole does.

i) Related Lawsuits or Litigation

Although the reasonable foreseeability requirement is usually satisfied by the spoliator's personal knowledge, it is sometimes satisfied by related litigation and/or institutional notice. For example, in Lewy v. Remington Arms Co., the defendant had records of previous complaints about the safety latch of the gun that accidentally went off in the Lewy household and injured Mrs. Lewy. 836 F.2d 1104 (8th Cir. 1988) **and attached hereto as Appendix F**. The Eighth Circuit instructed the trial court to consider whether "lawsuits concerning the complaint or related complaints have been filed, the frequency of such complaints, and the magnitude of the complaints." 836 F.2d at 1112. See also, United States v. Koch Industries Inc. (N.D. Okl.1998) 197 F.R.D. 463 (deposition testimony from other cases and Congressional inquiry triggered a duty to preserve).

Another illustration of related investigation notice is the Arthur-Andersen case. As the demise of Enron unfolded, Arthur-Andersen was apprised of significant financial irregularities at Enron at least by August 2001. By early October, the auditor was aware that it would be the target of an SEC investigation concerning the Enron filings. Nonetheless, a massive worldwide document destruction effort was launched during the second week of October 2001. An email from in-house counsel called for compliance with an existing document retention program. This policy was to the effect that upon completion of an audit, extraneous materials not central to the final audit report should be destroyed. As a result, Arthur-Andersen destroyed dozens of boxes of paper documents and deleted or overwrote thousands of electronic files (electronic documents, spreadsheets, databases and emails). In early November 2001, Arthur-Andersen received its first subpoena for records from the SEC and produced in response the expurgated files. Within two months, in the course of preparing senior executives for congressional testimony, the purge came to light and Arthur-Andersen was compelled to inform the SEC and the public. Despite its hope that coming forward might ward off a prosecution for obstruction of justice, Arthur-Andersen was indicted and convicted at trial.⁴

ii) The "spontaneous utterance"

Perhaps the most extreme example of institutional notice is set forth in the Testa v. Wal-Mart case. 144 F.3d 173 (1st Cir. 1998) **and attached**

⁴ See, Heller Ehrman White & McAuliffe LLP. "*RETAINING BUSINESS RECORDS: Directives and Implications of the Sarbanes-Oxley Act of 2002 and Lessons of the Arthur Andersen Criminal Prosecution for Destruction of Its Enron Audit Documents.*" (August 21, 2002). Available in PDF format at <http://www.hewm.com /use/articleDetails.asp?articleID=1032> (accessed August 29, 2004).

hereto as Appendix G. Mr. Testa slipped on the Wal-Mart parking lot when he showed up at Wal-Mart for a delivery. Wal-Mart photographed the ramp that day and proceeded to conduct a full investigation of the incident. Before the month was out, a Wal-Mart employee prepared an internal report noting, *inter alia*, that Testa had uttered his intent to sue. When Mr. Testa sued, Wal-Mart asserted in its defense that it had notified Mr. Testa that the store would be closed and that he should not show up. However, Wal-Mart only had its own testimony to assert this defense, as Wal-Mart had destroyed the records of its instructions to Mr. Testa pursuant to its retention policy. *Id.* at 174.

The First Circuit held that entities could satisfy the notice of potential litigation requirement via "institutional notice -- the aggregate knowledge possessed by a party and its agents, servants, and employees." In this case, Wal-Mart's employee witnessed Mr. Testa's threat to sue and then prepared an internal report. Despite the fact that the notice came by way of a verbal threat followed by an internal Wal-Mart report regarding same, the Court found that when Wal-Mart destroyed the documents, it had notice both of a potential lawsuit and of the documents' relevance to the claim that underlay such a suit." *Id.* at 178.

For companies this latter case poses serious concern, as essentially all employees will have to treat all threats of litigation with due diligence and consideration. The company must be prepared to have its counsel make a determination of foreseeability on a case-by-case basis for all threats of litigation and, by extension, federal or state investigations.

C) Duty Arising from Civil Discovery Statutes, Requests and Court Orders

Every state and the Federal Rules govern how civil discovery is to take place. However, technically, the discovery statutes do not come into play until a lawsuit has been served or discovery demands have begun. For purposes of establishing a legal hold, then, the edict is clear: place a legal hold on all documents related to the lawsuit once the lawsuit or discovery have been served. Tulip Computers International B.V. v. Dell Computer Corporations (D.Del.2002) 2002 WL 818061 ("...once Dell had knowledge of the case, it had an affirmative obligation to preserve potentially responsive documents...") **and attached hereto as Appendix H.** See also, Trigon Ins. Co. v. United States (E.D. Va. 2001) 204 F.R.D. 277, 287 (stating that a party has a duty to preserve documents once the party "has notice (by a discovery request, by the provisions of a rule requiring disclosure or otherwise), that evidence is necessary to the opposing party's claim").

Attorneys and parties who ignore discovery requests do so at their peril. In Crown Life Ins. Co. v. Craig, the petitioner sought information about the amount of money that he was allegedly owed in renewal commissions. 995 F.2d 1376, 1382-83 (7th Cir. 1993) **and attached hereto as Appendix I.** Although respondent produced written summaries of the year-end computer printouts of total renewals, respondent failed to produce the raw data on which the summaries were based, despite repeated requests. At trial, the existence of a database containing the raw data was confirmed.

The court held that Crown Life's failure to make the raw data available in response to a court order requiring production of "underlying documents" supporting computer entries amounted to a violation of discovery orders. As part of the evidentiary sanctions ordered, respondent was not permitted to rely upon its own calculations at trial.

Similarly, in Computer Assoc. Int'l, Inc. v. American Fundware, Inc., a Colorado district court concluded that American Fundware acted in bad faith by destroying software that was critical to the litigation. 133 F.R.D. 166, 169 (D. Colo. 1990) **and attached hereto as Appendix J**. After the commencement of a copyright infringement action and service of discovery requests, American Fundware continued to destroy old versions of software as it developed new versions in compliance with its internal policy. The court granted the moving party's motion for default judgment, which is tantamount to a dismissal sanction although Colorado is not one of the states that officially recognize dismissal sanctions. See also, Cedars-Sinai Medical Ctr. v. Superior Court (Cal. 1998) 18 Cal.4th 1, 12 (Where the court noted that "[d]estroying evidence in response to a discovery request after litigation has commenced would surely be a misuse of discovery..., as would such destruction in anticipation of a discovery request."); Linnen v. A.H. Robins Company, Inc (Mass. 1999) 10 Mass.L.Rptr. 189, 1999 WL 462015 (where the language of the document request made it clear that the plaintiffs sought the production of items such as the system back-up tapes and, after receiving this request, the defendants had an obligation to preserve any such documents or materials.); see also, R.S. Creative Inc. v. Creative Cotton Ltd. (Cal. 1999) 75 Cal.App.4th 486 (concealment and destruction of evidence on hard drive of PC.); Prudential Ins. Co. of Am. Sales Practices Lit. (D. NJ 1997) 169 F.R.D. 598 (general treatment of discovery orders).

Of course, if the company is anticipating filing a lawsuit as a plaintiff in a case, the legal hold needs to be put in place in accordance with the parameters discussed for potential litigation in subsection "B" above.

IV. APPLICATION AND ENFORCEMENT OF LEGAL HOLDS

Once a duty to preserve records is identified, companies are faced with putting in place retention policies that accommodate notice of pending or potential litigation. Courts will scrutinize the retention policy and its application with a specific three-part test, in addition to scrutiny of how and whether a company put its employees on notice and the procedures it uses to ascertain the legal holds. Following is a discussion of the courts' treatment of these considerations.

A) The Three-Part Test When a Retention Policy Exists

The court in United States of America v. Taber set out three considerations in the case of destruction of records carried out under a document retention policy. 2001

U.S. Dist. LEXIS 24600 (Dist. Ark. 2001), remanded, 2003 U.S. App. LEXIS 17896 **and attached hereto as Appendix K.**⁵ The District Court noted as follows:

“This is not a three-part test where each factor must be met, but rather three factors to be considered in determining whether sanctions should be imposed. First, was the document retention policy ‘reasonable considering the facts and circumstances surrounding the relevant documents?’ Second, did the litigant know, or should it have known, that the documents would become material and, thus, should be preserved? Finally, was the policy instituted in bad faith?”

In Taber, the defendants sought discovery sanctions because the U.S. Government destroyed its files pertaining to a Navy contract ("RB24"). RB24 was a 1988 landing mat contract, in which Defendant Taber served as a vendor or subcontractor. The Federal Acquisition Regulations and a Defense Logistics Agency Manual established the Government’s record retention policy. The policy provided that contract records were to be maintained for six years and three months.

The Arkansas District Court found no evidence to suggest this document retention policy was unreasonable or instituted in bad faith, and thus the government met two parts of the three-part test. However, it deferred to the Eighth Circuit, noting that a mere policy does not relieve defendant from the burden of preserving documents that are relevant to litigation, or potential litigation, or are reasonably calculated to lead to the discovery of admissible evidence:

“Even if the court finds the policy to be reasonable given the nature of the documents subject to the policy, the court may find that under the particular circumstances certain documents should have been retained notwithstanding the policy. For example, if the corporation knew or should have known that the documents would become material at some point in the future, then such documents should have been preserved.”

Finding in favor of the Government, after applying the “knew or should have known” analysis, the Arkansas District Court determined that it was not convinced the Government knew or had reason to know of the relevancy of the RB24 documents. Taber never requested the information about RB24 from the Government until after the documents had already been destroyed. This suggests that neither party knew the contract was relevant until it was too late. See also, Wm. T. Thompson, Co. v. General Nutrition Corp. (C.D. Cal. 1984) 593 F. Supp. 1443, 1455 ("Sanctions may be imposed against a litigant who is on notice that documents and information in its possession are relevant to litigation, or potential litigation, or are reasonably calculated to lead to the discovery of admissible evidence, and destroys such documents and information... A litigant is... under a duty to preserve what it knows, or reasonably should know, is

⁵ Although this case was remanded to the lower court and therefore may not be officially cited as legal precedent before a court, it summarizes nicely the three-part principles applied by previous courts.

relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery, and/or is the subject of a pending discovery request."); Computer Associates International v. American Fundware, Inc. *supra*, 133 F.R.D. at 166 (Sanctions may be imposed against a litigant who is on notice that documents and information in its possession are relevant to litigation, or potential litigation, or are reasonably calculated to lead to the discovery of admissible evidence, and nevertheless destroys such documents and information.)

B) Duty to Notify Employees and Agents

In addition to the above-noted three-part test, courts expect companies to properly communicate legal holds. In National Ass'n of Radiation Survivors v. Turnage, for instance, the court noted that "[t]he obligation to retain discoverable materials is an affirmative one; it requires that the agency or the corporate officers having notice of discovery obligations communicate those obligations to employees in possession of discoverable materials." 115 F.R.D. 543, 57 (N.D. Cal. 1987) **and attached hereto as Appendix L**. See also, Procter & Gamble v. Haugen (D. Utah 1998) 179 F.R.D. 622 (Where the court issued monetary sanctions for failing to preserve e-mail messages of five employees known to be likely to have relevant information); Prudential Ins. Co. of America Sales Practices Litigation, *supra*, 169 F.R.D. at 598 (where effective notice to employees was required); Linnen v. A.H. Robins Company, Inc., *supra*, 10 Mass.L.Rptr. at 189 (where the employees notified by email and voice mail); United States v. Koch Industries Inc., *supra*, 197 F.R.D. at 463 (where court found a duty to notify persons in tape library).

C) Duty to Suspend Normal Business Procedures that Alter or Destroy

Courts also expect companies to have firmly established protocol and guidelines for litigation holds and routine destruction of records. In Prudential Ins. Co. of America Sales Practices Litigation, *supra*, for instance, the court took notice that there was "[n]o comprehensive document retention policy with informative guidelines and lack[ing] a protocol that promptly notifie[d] senior management of document destruction." These systemic failures were deemed to impede the litigation process and merited the imposition of sanctions. 169 F.R.D. at 598 **and attached hereto as Appendix M**. See also, Turner v. Hudson Transit Lines (SDNY 1991), 142 FRD 68,72 (self inflicted inability to produce); National Ass'n of Radiation Survivors v. Turnage, *supra*, 115 F.R.D. at 557 (detailing duties of corporation and counsel to comply with discovery obligations generally).

An even more recent decision reveals how far the courts have come in acknowledging the importance of preservation of electronic records and the need for counsel to communicate with IT to prevent destructions. In Zubulake v. UBS

Warburg, SDNY 02 CV 1243 (July 20, 2004), the Court granted Zubulake an inference of misconduct jury instruction due to UBS's willful destruction of e-mail. The Court set forth three criteria for a party to meet in seeking an adverse inference instruction: (1) the party had a duty to preserve the evidence when it was destroyed; (2) the evidence was destroyed with a "culpable state of mind;" and (3) the destroyed evidence supported the requesting party's claim or defense.

Using the above criteria, the court determined that the few emails found on the backup tapes UBS was required to restore back in 2003 proved that other emails related to Zubulake had been deleted after UBS had been instructed to retain them. Since some of the recovered emails supported Zubulake's claim, and implied that the deleted emails would have as well, the three criteria required for an inference of misconduct were met. The Court acknowledged that UBS's attorneys generally fulfilled their duty to communicate with their client on its duty to preserve and produce data. However, it noted certain key shortcoming, most notably the attorneys' failure to communicate with the client's IT personnel. In a postscript to the opinion, Judge Scheindlin noted that, given the significant strides in spoliation case law over the past few years, "all parties and their counsel are fully on notice of their responsibility to preserve and produce electronically stored information."⁶

D) General Guidelines for Effective and Legally Defensible Policies

Based on the above court opinions, companies therefore must heed the following minimum guidelines to ensure the retention schedule and legal holds policy is effective:

1. Companies must have a clear written document retention policy and schedule that meets its business needs and is fully endorsed by senior management. The policy should define when, where and by whom those records that are required by law or contract, or are otherwise deemed valuable to the company, are routed to appropriate archives, and those records no longer required are to be properly destroyed. Companies also must specify the means of destruction.
2. Companies must take reasonable steps to ensure that this policy is effectively communicated to employees, and is actually followed (e.g., periodic audits, compliance days, certifications). Haphazard implementation will not provide a defense in a negligent spoliation claim. Deferred compliance, as in the Arthur-Andersen case and especially if it occurs only when a problem looms, is likely to be even more damaging.

⁶ To access Judge Scheindlin's July 20, 2004 Zubulake opinion in its entirety, go to http://www.nysd.uscourts.gov/rulings/02cv01243_order_072004.pdf (accessed September 25, 2004). Note that this lower court opinion does not set a legally binding precedent.

3. Companies must enact administrative procedures that will immediately stop the routine destruction of records when and if they become the subject of corporate governance, regulatory or legal concerns.

4. Companies must guide and train all employees on how to prepare effective, accurate records.⁷

V. CONCLUSION

A) Final Checklist of Considerations for Legal Holds

This article outlines a clear checklist of considerations for determining whether threatened or potential litigation or investigation should trigger a legal hold. Any one or combination of these events should initiate the “hold” trigger on “potential or threatened” litigation, including:

- ↔1) A preservation letter or other written notice from opposing counsel;
- ↔2) Pre-litigation discussions, demands and agreements (including verbal ones) with opposing party or its counsel;
- ↔3) Facts or circumstances that would put a reasonable person on notice, including any one of the following:
 - a. Reasonably foreseeable litigation or investigation;
 - b. Related lawsuits or investigations;
 - c. Stated threats to sue;
 - d. The aggregate knowledge (which includes what is known or should be known) of the company, including that of its agents, servants, and employees.

Companies also must apply legal holds in the other more easily discernible circumstances that identify “pending” litigation, including:

- ↔4) Service of complaint or letter of investigation;
- ↔5) Discovery demands, including subpoenas;
- ↔6) Court orders.

⁷ See generally, Heller Ehrman White & McAuliffe LLP, supra. at fn. 4.

B. Final Thoughts

On the whole, the spoliation doctrine continues to evolve, as it has been doing for hundreds of years. And, in an age of increased dependence on electronic records, companies must pay particular attention to the issue of legal holds. This is particularly challenging when it comes to potential or threatened litigation or investigations, for which notice can come in various forms. Any of the forms of notice discussed in this article, or combination thereof, should trigger an immediate legal hold of the relevant records. The key, ultimately, is for the company to have a sound policy and procedure that will channel the notice information to the proper sources that have the authority to initiate a legal hold.

About the Author: *John Isaza, Esq. is a 15-year California-based attorney. He heads up the Legal Information Services Division of the Records Improvement Institute, LLC, an international records and information management consulting firm. He is current co-Chair of the ARMA Long Beach 2004 Program Committee, and he is Chair of the 50th Anniversary ARMA Chicago 2005 Program Committee. Mr. Isaza can be reached at John@johnisaza.com.*

SPOILIATION OF EVIDENCE: TREND TO A NEW TORT¹
STATE SURVEY CHART²
(as of September 1, 2001)

This chart below is a guide to the application of sanctions for Spoliation, the intentional or unintentional destruction or disappearance of things or documents in anticipation of or during litigation. The common law doctrine is several hundred years old, but the law has developed substantially in the past few years. Articles on Spoliation can be found at The FICC Quarterly, Vol 49, No. 2, Winter 1999; and FICC Quarterly, Fall, 1997. Courts apply different sanctions for spoliation based upon several factors, including 1- whether the conduct was intentional; 2- the prejudice to the other side; and 3- the availability of alternative evidence. Moreover, some courts have recognized the dependent tort of “Spoliation”. The chart below identifies the current state of the law in the fifty states with respect to the types of sanctions, which are imposed, and further identifies each states position with respect to the tort of spoliation

STATE	CASE	Adverse Inference	Expert/or Evidence Preclusion	Dismissal	Tort-Negligent	Tort-Intentional	Tort Rejected
ALABAMA	Verchot v. General Motors Corp., 2001 Ala. LEXIS 188 (May 25, 2001)			X			
	Environmental Monitoring & Testing Corp. v. Kidd., 623 So.2d 1031 (Ala. 1993)		X				
	Smith v. Atkinson, 771 So. 2d 429 (Ala. 2000)				X		
	Wal-Mart Stores, Inc., v. Goodman, 789 So. 2d 166 (Ala. 2000)	X					
ALASKA	Hazen v. Municipality of Anchorage, 718 P.2d 456 (Alaska 1986)					X	
ARIZONA	Southwest Cotton Co. v. Clements, 213 P. 1005 (Ariz. 1923)	X					
	LaRaia v. Superior Court, 722 P.2d 286 (Ariz. 1986)						X
ARKANSAS	Middleton v. Middleton, 68 S.W.2d 1003 (Ark. 1934)	X					

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STATE	CASE	Adverse Inference	Expert/or Evidence Preclusion	Dismissal	Tort-Negligent	Tort-Intentional	Tort Rejected
	Viking Ins. Co. of Wisconsin v. Jester, 836 S.W. 2d 371 (Ark. 1992)			X			
	Wilson v. Beloit Corp., 725 F. Supp. 1056 (W.D. Ark. 1989), aff'd, 921 F.2d 765 (8 th Cir. 1990)						X
CALIFORNIA	Pate v. Channel Lumber Co., 59 Cal. Rptr. 2d 919 (Cal. App. Ct. 1997)		X				
	Temple Cmty. Hosp. V. Superior Ct., 20 Cal. 4th 464 (Cal. 1999)						X
	Williamson v. Superior Court of Los Angeles County, 582 P.2d 126 (Cal. 1978)	X					
COLORADO	Lauren Corp., v. Century Geophysical Corp., 953 P.2d 200 (Colo. App. Ct. 1998)	X					
CONN.	Beers v. Bayliner Marine Corp., 675 A.2d 829 (Conn. 1996)	X					
DELAWARE	Collins v. Throckmorton, 425 A.2d 146 (Del. 1980)	X					
FLORIDA	Bondu v. Gurvich, 473 So.2d 1307 (Fla. Dist. Ct. App. 1984)					X	
	Continental Ins. Co. v. Herman, 576 So.2d 313 (Fla. App.Ct. 1990)				X		
	New Hampshire Ins. Co. Inc. v. Royal Ins. Co., 559 So. 2d 102 (Fla. App. Ct. 1990)	X					
	Sponco Manufacturing Co., Inc. v. Alcover, 656 So.2d 629 (Fla. App. Ct. 1995)			X			
GEORGIA	Lane v. Montgomery Elevator Co., 484 S.E. 2d 249 (Ga. App. Ct. 1997)	X					
	Gardner v. Blackston, 365 S.E.2d 454 (Ga. Ct. App. 1988)						X

STATE	CASE	Adverse Inference	Expert/or Evidence Preclusion	Dismissal	Tort-Negligent	Tort-Intentional	Tort Rejected
HAWAII	Akiona v. United States, 938 F.2d 158 (9 th Cir. 1991)	X					
IDAHO	Houser v. Austin, 10 P. 37 (Idaho 1886)	X					
ILLINOIS	American Family Ins. Co. v. Village Pontiac-GMC, Inc., 585 N.E.2d 1115 (Ill. App. Ct. 1992)		X				
	Boyd v. Travelers Ins. Co., 652 N.E.2d 267 (Ill. 1995)				X		
	Graves v. Daley, 526 N.E.2d 679 (Ill. App. Ct. 1988)			X			
	Haynes v. Coca Cola Bottling Co. of Chicago, 350 N.E.2d 20 (Ill. App. Ct. 1976)	X					
	Shelbyville Mut. Ins. Co. v. Sunbeam Leisure Products Co., 634 N.E.2d 1319 (Ill. App. Ct. 1994)					X	
INDIANA	Porter v. Irvin's Interstate Brick and Block Co., Inc. 691 N.E. 2d 1363 (Ind. App. Ct. 1998)	X					
	Murphy v. Target Prods., 580 N.E.2d 687 (Ind. Ct. App. 1991)						X
IOWA	Kilker v. Mulry, 437 N.W.2d 1 (Iowa 1988)		X				
	State v. Langlet, 283 N.W. 2d 330 (Iowa 1979)	X					
KANSAS	In re Grisell's Estate, 270 P. 2d 285 (Kan. 1954)	X					
	Foster v. Lawrence Memorial Hosp., 809 F. Supp. 831 (D.Kan. 1992)					X	
	Koplin v. Rosel Well Perforators, Inc. 734 P.2d 1177 (Kan. 1987)						X
KENTUCKY	Crook v. Schumann, 167 S.W. 2d 836 (Ky. 1942)	X					
	Welsh v. United States, 844 F.2d 1239						X

STATE	CASE	Adverse Inference	Expert/or Evidence Preclusion	Dismissal	Tort-Negligent	Tort-Intentional	Tort Rejected
	(6 th Cir. 1988)						
LOUISIANA	Moorehead v. Ford Motor Co., 694 So. 2d 650 (La. App. Ct. 1997)	X					
	Edwards v. Louisville Ladder Co., 796 F. Supp. 966 (W.D. La. 1992)						X
MARYLAND	Larson v. Romeo, 255 A. 2d 387 (Md. 1969)	X					
	Miller v. Montgomery County, 498 A.2d 1185 (M.D. 1985)						X
MASS.	Capital Bank & Trust Co. v. Richman, 475 N.E.2d 1236 (Mass. App. Ct. 1985)	X					
	Nally v. Volkswagen of America, Inc., 539 N.E.2d 1017 (Mass. 1989)		X				
MICHIGAN	Trupiano v. Cully, 84 N.W. 2d 747 (Mich. 1957)	X					
	Panich v. Iron Woods Prods. Corp., 445 N.W.2d 795 (Mich. Ct. App. 1989)						X
MINNESOTA	Fonda v. St. Paul City R. Co., 74 N.W. 166 (Minn. 1898)	X					
	Himes v. Woodings-Verona Tool Works, Inc., 565 N.W.2d 469 (Minn. App. Ct. 1997)		X				
	Patton v. Newmar Corp., 538 N.W.2d 116 (Minn. 1995)			X			
	Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc. 456 N.W.2d 434 (Minn. 1990)						X
MISSISSIPPI	DeLaughter v. Lawrence Cty. Hosp., 601 So.2d 818 (Miss. 1992)	X					
MISSOURI	Brown v. Hamid, 856 S.W. 2d 51 (Mo. 1993)	X					
	Baughner v. Gates Rubber Co., 863 S.W.2d 905 (Mo. Ct. App. 1993)						X
MONTANA	Livingston v. Izuzu Motors, Ltd., 910 F.Supp. 1473 (D. Mont. 1995)	X					

STATE	CASE	Adverse Inference	Expert/or Evidence Preclusion	Dismissal	Tort-Negligent	Tort-Intentional	Tort Rejected
	Oliver v. Stimson Lumber Co., 993 P.2d 11 (Mt. 1999)				X	X	
NEBRASKA	Scout v. City of Gordon, 849 F.Supp. 687 (D.Neb. 1994)	X					
NEVADA	Fire Ins. Exchange v. Zenith Radio Corp., 747 P.2d 911 (Nev. 1987)		X				
	Reingold v. Wet'n Wild Nevada, Inc., 944 P. 2d 800 (Nev. 1997)	X					
	Stubli v. Big D International Trucks, Inc., 810 P.2d 785 (Nev. 1991)			X			
NEW HAMPSHIRE	Rodriquez v. Webb, 680 A.2d 604 (N.H. 1996)	X					
NEW JERSEY	Aetna Life & Cas. Co. v. IMET Mason Contractors, 309 N.J. Super. 358, 707 A.2d 180 (1998)			X			
	Hirsch v. GM Motors Corp., 266 N.J. Super. 222, 628 A.2d 1108 (1993),		X				
	State v. Council in Div. Resource Development of the Dept. of Conserv. & Economic Dev., 287 A. 2d 713 (N.J. 1972)	X					
NEW JERSEY	Viviano v. CBS, Inc., 597 A.2d 543 (N.J. Super. Ct. App. Div. 1991), cert. denied, 606 A.2d 375 (N.J. 1992)					X	
	Callahan v. Stanley Works and Home Depot, U.S.A., Inc., 703 A.2d 1014 (N.J. Super. Ct. App. Div. 1998)				X		
NEW MEXICO	Gonzales v. Surgidev Corp., 899 P.2d 594 (N.M. 1995)		X				
	Coleman v. Eddy Potash, Inc., 905 P.2d 185 (N.M. 1995)					X	
NEW YORK	Kirkland v. NY City Housing Auth., 666 NYS 2d 609 (N.Y.A.D. 1997)			X			
	Laffin v. Ryan, 162 N.Y.S. 2d 730 (N.Y.A.D. 1957)	X					

STATE	CASE	Adverse Inference	Expert/or Evidence Preclusion	Dismissal	Tort-Negligent	Tort-Intentional	Tort Rejected
	Squitieri v. City of NY, 669 NYS2d 589 (N.Y.A.D. 1998)		X				
	Fada Indus., Inc. v. Falachi Bldg. Co., 2001 N.Y. Misc. LEXIS 225 (N.Y. Gen. Term June 22, 2001)				X		
	Pharr v. Cortese, 559 N.Y.S.2d 780 (N.Y.A.D. 1990) Silverstri v. General Motors, 4 th Cir. Applying NY Law, November, 2001			X			X
NORTH CAROLINA	Henderson v. Hoke, 21 N.C. 119 (N.C. 1835)	X					
NORTH DAKOTA	Bachmeier v. Wallwork Truck Centers, 544 N.W.2d 122 (N.D. 1996)		X	X			
	Krueger v. North Am. Creameries, 27 N.W. 2d 240 (N.D. 1947)	X					
OHIO	Bright v. Ford Motor Co., 63 Ohio App. 3d 256 (1990)	X					
	Travelers Ins. Co. v. Dayton Power & Light Co., 76 Ohio Misc. 2d 17 (1996)		X				
	Smith v. Howard Johnson Co., 615 N.E.2d 1037 (Ohio 1993)					X	
OKLAHOMA	Harrill v. Penn, 273 P. 235 (Okla. 1927)	X					
OREGON	Whitney v. Canadian Bank of Commerce, 374 P. 2d 441 (Or. 1962)	X					
PENNS.	McHugh v. McHugh, 40 A. 410 (Pa. 1898)	X					
RHODE ISLAND	Rhode Island Hospital Trust Nat. Bank v. Eastern General Contractors, Inc. 674 A. 2d 1227 (R.I. 1996)	X					
SOUTH CAROLINA	Wisconsin Motor Corp. v. Green, 79 S.E. 2d 718 (S.C. 1954)	X					
TENNESSEE	Murphy v. Reynolds, 212 S.W. 2d 686 (Tenn. App. Ct. 1948)	X					

STATE	CASE	Adverse Inference	Expert/or Evidence Preclusion	Dismissal	Tort-Negligent	Tort-Intentional	Tort Rejected
TEXAS	Malone v. Foster, 956 S.W. 2d 573 (Tex. 1997)	X					
	San Antonio Press, Inc. v. Custom Built Machinery, 852 S.W.2d 64 (Tex. 1993)		X				
VERMONT	F.R. Patch Mfg. Co. v. Protection Lodge, No. 215, International Assn. of Machinists, 60 A. 74 (Vt. 1905)	X					
VIRGINIA	Hoier v. Noel, 98 S.E. 2d 673 (Va. 1957)	X					
WASH.	Walker v. Herke, 147 P. 2d 255 (Wash. 1944)	X					
WEST VIRGINIA	Kirchner v. Smith, 58 S.E. 614 (W.Va. 1907)	X					
WISCONSIN	Jagmin v. Simonds Abrasive Co., 211 N.W. 810 (Wis. 1973)	X					
	Sentry Ins. Co. v. Royal Ins. Co. of America, 539 N.W.2d 911 (Wis. 1995)		X				
WYOMING	Hay v. Peterson, 45 P. 1073 (Wy. 1896)	X					

Document #: 108248

APPENDIX B

**NATION-WIDE CHECK CORPORATION, INC., Plaintiff, Appellee,
v. FOREST HILLS DISTRIBUTORS, INC., ET AL., Defendants,
Appellants; NATION-WIDE CHECK CORPORATION, INC.,
Plaintiff, Appellant, v. FOREST HILLS DISTRIBUTORS, INC., ET
AL., Defendants, Appellees**

Nos. 82-1281, 82-1285

**UNITED STATES COURT OF APPEALS FOR THE FIRST
CIRCUIT**

692 F.2d 214; 1982 U.S. App. LEXIS 24054

November 15, 1982

PRIOR HISTORY: [**1]

CROSS-APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS. Hon. A. David Mazzone, U.S. District Judge.

DISPOSITION:

Affirmed.

LexisNexis (TM) HEADNOTES - Core Concepts:

COUNSEL:

Ivor C. Armistead, III, with whom Daniel S. Margolies, and Widett, Slater & Goldman, P.C. were on brief, for Defendants Forest Hills Distributors, Inc., et al.

John Wall, with whom Cullen & Wall, and Harry C. Mezer were on brief, for Plaintiff Nation-Wide Check Corporation.

Bc

JUDGES:

Davis, * Campbell and Breyer, Circuit Judges.

* Of the Federal Circuit, sitting by designation.

OPINIONBY:

BREYER

OPINION:

[*215] BREYER, Circuit Judge.

Appellants Joseph Braunstein, Stephen Gordon, and Victor Dahar (the "assignees") are assignees for the benefit of creditors of Forest Hills Distributors, Inc., and Forest Hills of New Hampshire, Inc. ("Forest Hills"). Appellee Nation-Wide Check Corporation ("Nation-Wide") sells money orders. Forest Hills sold Nation-Wide's money orders on Nation-Wide's behalf. After Forest Hills assigned its assets for the benefit of its creditors, Nation-Wide sued the assignees for the proceeds of the money

order sales. The district court found in its favor. The assignees appeal, claiming that the [**2] court rested its decision in part upon an impermissible inference based upon the fact that the assignees allowed the destruction of certain Forest Hills documents in their possession. We believe the district court's inference was permissible, and we therefore affirm its decision.

I

In October 1973 Nation-Wide agreed with Forest Hills that Forest Hills would sell Nation-Wide's money orders to the public in return for a commission. The agreement specifically provided that Forest Hills would hold the sale proceeds apart from all its other assets and revenues, depositing those proceeds in a separate account with The First National Bank of Boston. This procedure, however, was not followed. Instead, the proceeds were deposited in various Forest Hills accounts in local banks near Forest Hills' stores, then transferred to various other Forest Hills accounts in Boston banks. From there, Forest Hills periodically remitted amounts due to Nation-Wide. Moreover, the proceeds were commingled with general Forest Hills revenues when they reached the Boston banks.

In late 1974 Forest Hills encountered financial difficulties and stopped sending money order proceeds to Nation-Wide. On December [**3] 18, Forest Hills executed an assignment of all its assets for the benefit of its creditors. At the time of the assignment, Forest Hills owed Nation-Wide \$71,417.69 for money orders issued between early November (when Forest Hills stopped paying Nation-Wide) and December 18 (when the assignment took place and money order sales were halted).

The assignees quickly liquidated most of Forest Hills' assets. By the end of December 1974 they apparently accumulated a fund of more than \$600,000. Nation-Wide with equal promptness told the assignees about its claim

against Forest Hills. Nation-Wide said that its claim took precedence over the claims of Forest Hills' general unsecured creditors because of the "separate-fund" provisions in its 1973 money order agreement. Nation-Wide's lawyers spoke to assignee Gordon around December 19 and wrote to Gordon about their claim a few days later. The assignees rejected Nation-Wide's priority claim and Nation-Wide filed suit against the assignees and Forest Hills on April 1, 1975, seeking payment of its \$71,000 out of the \$600,000 the assignees had accumulated.

On April 11, Gordon, an associate in a Boston law firm, wrote a letter to a senior partner [**4] in the same office about Forest Hills' business records. He noted that the records were being stored at some expense and asked if they should be discarded. In accordance with advice he received from the firm's partner, he then abandoned many of the documents -- including all 1974 checks -- to the landlord of the storage premises. Gordon's act of abandonment lies at the center of the controversy on this appeal.

In August 1979, when denying cross motions for summary judgment, the district [**216] court made clear just what Nation-Wide would have to prove to establish a preferred position vis-a-vis the general creditors and thereby to prevail. First, Nation-Wide would have to prove that Forest Hills breached a specific agreement to keep the money order sale proceeds separate. At that point Nation-Wide's claim would be like that of a secured creditor or a beneficiary of a trust, whose property the debtor or trustee has commingled with other property of his own. *See In re Dexter Buick-GMC Truck Co.*, 2 B.R. 247, 250 (D.R.I. 1980). Second, Nation-Wide would then have to trace the funds from the sales themselves into the final \$600,000 accumulated by the assignees. [**5]

The first of these tasks was easy; the second was not quite as difficult as it sounds, for

Nation-Wide, like a trust beneficiary seeking recovery from a "commingling" trustee, would benefit from liberal common law tracing presumptions. See 5 A. Scott, *The Law of Trusts* § 517, at 3620-21 (1967) [hereinafter cited as *Scott on Trusts*]. The district court found applicable, for example, the rule that when a trustee withdraws funds for his own purposes from a commingled account, he is presumed to have withdrawn his own money first. See, e.g., *Farinha v. Commissioner of Banks*, 303 Mass. 192, 21 N.E.2d 239 (1939); *Bogert on Trust and Trustees* § 926, at 407-08 (2d rev. ed. 1982); *Scott on Trusts* § 517. The effect of this presumption is to allow the beneficiary to recover the full value of the trust res from the commingled fund as long as the fund's value has never dipped below that of the trust res itself. Thus, if a trustee deposits ten dollars of his own money and ten dollars of trust money in a single account, and withdraws five dollars from the account subsequently, the withdrawal is treated as being taken entirely from the trustee's own money, [**6] and the beneficiary can recover the entire ten dollars from the balance. If the balance of the account were to dip below ten dollars on the other hand, the beneficiary would be entitled only to the "lowest intermediate balance." See *Universal C.I.T. Credit Corp. v. Farmers Bank*, 358 F. Supp. 317, 325-26 (E.D. Mo. 1973); *Scott on Trusts* § 517; 1 G. Palmer, *The Law of Restitution* § 2.16, at 199 (1978).

We suspect, but do not decide, that the district court might have used other liberal presumptions as well, although there is no specific indication that it did so. For example, if a trustee commingles trust funds with other funds, then withdraws part of the commingled fund and preserves it but dissipates the balance, the trust attaches to the preserved fund despite the fact that it was the first sum withdrawn and hence would otherwise be considered the trustee's money under the first presumption. See *Scott on Trusts* § 517.1. Under this presumption, if the trustee withdraws ten

dollars from a commingled fund and uses it to buy a watch, or simply places it in another account, and then dissipates the balance of the commingled fund on other personal expenses, [**7] the beneficiary can recover against the watch or the new account rather than being consigned to the status of general creditor because the first account is empty.

In any event, we believe the court was operating on the assumption that, if Nation-Wide could demonstrate that the balances in the various bank accounts into which Forest Hills directly placed, or transferred, money order proceeds never declined below the level of the money order proceeds placed in them, it could recover the whole amount of the proceeds. More realistically, even if any local account did decline below the level of the proceeds placed in it, Nation-Wide might still recover the full amount, by showing that the shortfall was accounted for by a transfer to another account that did not itself subsequently fall below the required level and that reached the assignees. If it were able to produce records of inter-account transfers and account balances for the relevant period, Nation-Wide could effectively "trace" all of the proceeds from the initial sales through Forest Hills' various bank accounts into the hands of the trustees.

At trial, Nation-Wide was able to present only limited evidence of the money order [**8] proceeds' "path" through Forest Hills' various accounts -- in part because it had no recourse to the documents that Gordon discarded, in part because most of the banks [*217] involved had scanty records or no records at all. Nation-Wide produced records of the dates, locations, and amounts of money order sales for the relevant period, along with testimony that the proceeds were systematically deposited within a relatively short time by each local Forest Hills' store in a local bank. Nation-Wide also produced a list of the local bank accounts in both Massachusetts and New Hampshire and a compilation of the statements of those accounts

in Massachusetts indicating that the aggregate balance for the period was always roughly equal to or substantially above the level of proceeds from all stores. Finally, it showed that the assignees deposited over \$450,000 of Forest Hills' money in a new account within twelve days of the assignment, although it was unable (with one exception) to prove where the money came from.

While this evidence was consistent with the final accumulated fund containing proceeds of the original sales, in only one case did Nation-Wide produce conclusive documentary [**9] evidence of the route of the proceeds -- a transfer of \$1,204.85 from the Seabrook, New Hampshire, store, through the Hampton National Bank and the New England Merchants' Bank, into the assignees' First National Bank of Boston account. The court found that the movement of funds from the Seabrook store was "typical" of the movement of funds from other stores, but Nation-Wide was unable to introduce parallel documentation to trace the balance of the proceeds from other accounts.

The district court filled this evidentiary gap by drawing an inference from the destruction of Forest Hills' business records by Gordon. The court found that Gordon had known as early as December 1974, from his communications with Nation-Wide's attorney, that the business records might be needed to trace the money order funds into the hands of the assignees. The court concluded that while Gordon had not acted in actual bad faith, he had "intentionally discarded" the documents "in knowing disregard of the plaintiff's claims," and that it was therefore proper to infer that the documents would have allowed Nation-Wide to trace the balance of the money order proceeds into the hands of the assignees.

The most [**10] recent authority in this circuit on the inferences to be drawn from the destruction of documents is *Allen Pen v. Springfield Photo Mount Co.*, 653 F.2d 17 (1st

Cir. 1981). *Allen Pen* held that without some evidence that documents have been destroyed "in bad faith" or "from the consciousness of a weak case," it is "ordinarily" improper to draw an adverse inference about the contents of the documents. 653 F.2d at 23-24. The district court expressly found that Gordon did not act in bad faith, not because it believed that Gordon's behavior was in any sense proper, but because it felt that Gordon, as an assignee for the benefit of creditors, had no direct stake in the disposition of Forest Hills' assets among the claimants. However, the court did not interpret *Allen Pen* as establishing a *per se* requirement that bad faith be found before an adverse inference is drawn. It concluded that the inference was proper in this case because Gordon's conduct was not merely negligent but "purposeful" and "in knowing disregard" of Nation-Wide's claim. Unless an adverse inference were drawn, the court feared that other assignees might act like Gordon; they would [**11] be encouraged to destroy relevant documents and claimants in Nation-Wide's position would be denied their rightful property.

II

The general principles concerning the inferences to be drawn from the loss or destruction of documents are well established. When the contents of a document are relevant to an issue in a case, the trier of fact generally may receive the fact of the document's nonproduction or destruction as evidence that the party which has prevented production did so out of the well-founded fear that the contents would harm him. Wigmore has asserted that nonproduction is not merely "some" evidence, but is sufficient by itself to support an adverse inference even if no other evidence for the inference exists:

The failure or refusal to produce a relevant document, or the destruction of it, is evidence *from which alone* its contents

[*218] may be inferred to be unfavorable to the possessor, provided the opponent, when the identity of the document is disputed, first introduces some evidence tending to show that the document actually destroyed or withheld is the one as to whose contents it is desired to draw an inference.

2 *Wigmore on Evidence* § 291, [**12] at 228 (Chadbourn rev. 1979) (emphasis added). The inference depends, of course, on a showing that the party had notice that the documents were relevant at the time he failed to produce them or destroyed them.

The adverse inference is based on two rationales, one evidentiary and one not. The evidentiary rationale is nothing more than the common sense observation that a party who has notice that a document is relevant to litigation and who proceeds to destroy the document is more likely to have been threatened by the document than is a party in the same position who does not destroy the document. The fact of destruction satisfies the minimum requirement of relevance: it has some tendency, however small, to make the existence of a fact at issue more probable than it would otherwise be. *See* Fed. R. Evid. 401. Precisely how the document might have aided the party's adversary, and what evidentiary shortfalls its destruction may be taken to redeem, will depend on the particular facts of each case, but the general evidentiary rationale for the inference is clear.

The other rationale for the inference has to do with its prophylactic and punitive effects. Allowing the trier of fact [**13] to draw the inference presumably deters parties from destroying relevant evidence before it can be introduced at trial. The inference also serves as a penalty, placing the risk of an erroneous judgment on the party that wrongfully created

the risk. In McCormick's words, "the real underpinning of the rule of admissibility [may be] a desire to impose swift punishment, with a certain poetic justice, rather than concern over niceties of proof." *McCormick on Evidence* § 273, at 661 (1972).

That this policy rationale goes beyond a mere determination of relevance has been clear from the beginning. In the famous case of *Armory v. Delamirie*, 1 Stra. 505, 93 Eng. Rep. 664 (K.B. 1722), the chimney sweep who sued the jeweler for return of the jewel he had found and left with the jeweler, was allowed to infer from the fact that the jeweler did not return the jewel that it was a stone "of the finest water." Were relevance all that was at issue, the inference would not necessarily be that the jewel was "of the *finest* water"; the fact that the jeweler kept the jewel proved that the jewel had value, but it did not prove the value of the jewel. Nonetheless, the judge [**14] instructed the jury to "presume the strongest against him, and make the value of the *best* jewels the measure of their damages" -- a clear sign that the inference was designed to serve a prophylactic and punitive purpose and not simply to reflect relevance.

In this case, both the evidentiary and the policy rationales support the inference drawn by the district court. It is important as an initial matter to recall how much Nation-Wide had shown, directly or indirectly, without resort to the inference. It had established the precise dates and amounts of the money orders and the probable initial route of the proceeds into the local accounts. It had shown that at least some of the Massachusetts accounts had sufficient balances at all relevant times to cover the proceeds. Although it was unable to introduce cancelled checks or other records to trace most inter-account transfers, it was able to do so with regard to the Seabrook proceeds, and the court found that the flow of money from the Seabrook store's local account to the central accounts was "typical" of the flows from the

other stores. Finally, it showed that some \$88,000 came into the assignees' hands from a specific Forest Hill central account, and while it could not prove where the rest of the money collected by the assignees came from, it was not unreasonable to assume that some portion of it came from other Forest Hill accounts. In short, even without the inference from the destruction of the records, the court had significant circumstantial evidence that the proceeds were not dissipated before they could reach the assignees. The issue before the court was not whether the destruction was sufficient, standing alone, to warrant an adverse inference about the documents' contents; it was simply whether the destruction was at all relevant to the tracing issue, and if so, whether it was sufficiently probative in conjunction with the other evidence to support the tracing conclusion.

That the destruction was relevant is clear. As the district court found, Gordon had notice that the documents might be necessary to Nation-Wide's claim at the time he destroyed them. The assignees argue to the contrary on appeal, but there is sufficient evidence in the record to support the court's finding that Gordon was put on notice as early as late December 1974, four months before he destroyed the documents, by his communications with Nation-Wide's attorney. More importantly, the court found that Gordon's conduct transcended mere negligence and amounted to "knowing disregard" of Nation-Wide's claim. The court's reluctance to label Gordon's conduct as "bad faith" is not dispositive: "bad faith" is not a talisman, as *Allen Pen* itself made clear when it stated that the adverse inference "ordinarily" depended on a showing of bad faith. Indeed, the "bad faith" label is more useful to summarize the conclusion that an adverse inference is permissible than it is actually to reach the conclusion. Here, although the court found that Gordon might not have been "completely aware" of the significance of the records, he

proceeded to destroy them without further inquiry even though they theoretically could have disproven as well as proven Nation-Wide's tracing claim. This conscious abandonment of potentially useful evidence is, at a minimum, an indication that Gordon believed the records would not help his side of the case -- by proving, through the checks written, for example, that the accumulated funds could not contain the sale proceeds. In turn, such a belief by an assignee who was presumably familiar with records that included all 1974 checks, who knew of the assignee's denial of Nation-Wide's claim, and who knew of Nation-Wide's suit against him, is some (though perhaps weak) evidence that the records would have helped Nation-Wide.

Once this minimum link of relevance is established, however, we believe that the district court has some discretion in determining how much weight to give the document destruction, and prophylactic and punitive considerations may appropriately be taken into account. The court did consider the innocuous reason that Gordon claimed had led to his discarding the records -- avoiding storage costs. The court also took account of the fact that an assignee ordinarily is supposed to be "neutral" as among claimants and thus would not wish to destroy evidence that would support a meritorious claim. It is also true that Gordon did not "destroy" the documents in an orthodox sense; he simply left them for the landlord to destroy.

While these considerations arguably reduce the probative value of Gordon's acts, they do not destroy the relevance of the acts altogether. Gordon's letter to his partners could be seen as self-serving. His neutrality also can be called into question, both because he had been made an assignee by the general creditors rather than by Nation-Wide, and because he was a defendant in Nation-Wide's suit. Moreover, while the mitigating circumstances surrounding Gordon's conduct might provide a

basis for tempering a prophylactic or punitive use of the inference, the court was entitled to consider countervailing factors. Among these were the improper nature of Gordon's conduct, the desirability of deterring other assignees from engaging in similarly reckless behavior, and the extent to which fairness dictates making the assignees, rather than Nation-Wide, bear the financial risks arising from document loss. The court could also take into account the other evidence tending to show that the money flows satisfied the "tracing" requirements and reasonably conclude that the evidentiary gap was not a large one. Taking these matters into account, the district court decided to give the act of document destruction sufficient weight to satisfy, in context, the tracing burden the law imposed upon Nation-Wide. Given that the act of destruction was logically connected to the ultimate fact proved and that the policy considerations [**19] militated in favor of according [*220] that act significant weight, we believe the district court's decision was reasonable and within its discretion.

We note that Nation-Wide has cross-appealed on the ground that the district court erred in denying it attorney's fees and awarding it pre-judgment interest under the statutory provisions for tort actions. The district court's reasoning in rejecting Nation-Wide's requests below is entirely unobjectionable, and Nation-Wide has not bothered to present the case for its position either in its brief or at oral argument other than by making the contention (which we have rejected) that Gordon should be found to have acted in bad faith. We see no reason to upset the district court's judgment in this respect.

The decision of the district court is

Affirmed.

APPENDIX C
**GLORIA BLINZLER, Individually and in her capacity as Wrongful
Death Beneficiary of James A. Blinzler, Plaintiff, Appellant, v.
MARRIOTT INTERNATIONAL, INC., Defendant, Appellee.**
**GLORIA BLINZLER, ETC., Plaintiff, Appellee, v. MARRIOTT
INTERNATIONAL, INC., Defendant, Appellant.**

No. 95-2108, No. 95-2199

**UNITED STATES COURT OF APPEALS FOR THE FIRST
CIRCUIT**

81 F.3d 1148; 1996 U.S. App. LEXIS 7575

April 12, 1996, Decided

PRIOR HISTORY: [**1] APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND. Hon. Ronald R. Lagueux, U.S. District Judge.

DISPOSITION: Affirmed in part and reversed in part.

LexisNexis (TM) HEADNOTES - Core Concepts:

COUNSEL: John P. Barylick, with whom Wistow & Barylick Inc. was on brief, for plaintiff.

Stephen B. Lang, with whom Patrick B. Landers and Higgins, Cavanagh & Cooney were on brief, for defendant.

JUDGES: Before Selya, Cyr and Boudin, Circuit Judges.

OPINIONBY: Selya

OPINION:

[*1150] **SELYA, Circuit Judge.** These cross-appeals require us to wend our way through a maze of unusual facts and subtly nuanced legal issues. After exploring a little-charted frontier of tort law, we reverse the district court's direction of judgment notwithstanding the verdict and reinstate the jury's award on the plaintiff's claim for negligent infliction of emotional distress. In all other respects, we affirm the rulings of the lower court.

I. BACKGROUND

This litigation arises out of the tragic demise of James Blinzler, husband of the plaintiff Gloria Blinzler. The course of events leading to James Blinzler's death began on November 13, 1992, when the Blinzlers checked into a Somerset, New Jersey, hotel operated by the defendant Marriott [**2] International, Inc. (Marriott). Shortly after 8:30 p.m. the decedent, relaxing in his room, experienced difficulty in breathing. Sensing danger, he ingested nitroglycerin (he had suffered heart attacks before) while his wife

called the hotel PBX operator and requested an ambulance. The operator received the SOS no later than 8:35 p.m. and agreed to honor it. She promptly told the hotel's security officer and the manager on duty about the medical emergency. Though the defendant steadfastly maintains that the operator also called an ambulance then and there, the record, read hospitably to the verdict, see *Cumpiano v. Banco Santander P.R.*, 902 F.2d 148, 151 (1st Cir. 1990), indicates that she did not place this critical call until some fourteen minutes after receiving the plaintiff's entreaty. The ambulance arrived at 9:02 p.m. In the meantime the plaintiff watched her husband's condition deteriorate: he collapsed on the bed, vomited while supine, and apparently stopped breathing. During this horrific hiatus, the plaintiff twice asked hotel personnel whether an ambulance had been summoned when the emergency first arose. She was twice falsely reassured (whether in honest error [**3] is not clear) that one had been called.

When the paramedics arrived on the scene, they could not locate a pulse and discovered that the decedent's airway was blocked. Resuscitative [*1151] efforts restored the decedent's heart to a normal rhythm and he was transported celeritously to a nearby hospital. Doctors diagnosed the heart attack as a "very small myocardial infarction." Nevertheless, the brain damage resulting from a prolonged period of asystole without cardiopulmonary resuscitation led to James Blinzler's death three days later.

II. PROCEEDINGS BELOW, ISSUES ON APPEAL, AND RULES OF DECISION

Invoking diversity jurisdiction, 28 U.S.C. § 1332 (1994), the plaintiff sued Marriott in Rhode Island's federal district court for wrongful death (count 1), loss of consortium (count 2), and negligent infliction of emotional distress (count 3). She alleged in substance that the hotel failed to summon an ambulance in a

timely fashion and that this carelessness proximately caused both her own damages and her husband's death. The jury agreed, awarding \$ 200,000 for wrongful death, \$ 50,000 for loss of consortium, and \$ 200,000 for emotional distress. Addressing a variety of post-trial [**4] motions, the district judge upheld the verdict on the first two counts, but granted judgment for the defendant on the third count. Both sides appeal.

The cross-appeals raise several issues. Two are in the forefront. The centerpiece of the defendant's appeal is the assertion that the evidence did not forge a causal link between the failure promptly to summon an ambulance and the ensuing death. In contrast, the plaintiff's appeal hinges on the district court's extirpation of the jury verdict on her claim for negligent infliction of emotional distress. Because the defendant's contention that the plaintiff failed as a matter of law to prove causation involves an across-the-board challenge to the jury verdict as a whole, we deal first with that issue. We then mull the plaintiff's contention that the lower court erroneously forecast emergent New Jersey law on bystander liability and therefore erred in setting aside the verdict on count 3. Finally, we address the defendant's remaining assignments of error.

Under the principles of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78, 82 L. Ed. 1188, 58 S. Ct. 817 (1938), state law (here, the law of New Jersey) supplies the substantive rules of decision in this diversity [**5] case. Since New Jersey law is less than explicit on one key issue that concerns us, we pause to comment briefly on the role of a federal court in adjudicating controversies controlled by state law.

In its barest essence, borrowing state law demands nothing more than interpreting and applying the rules of substantive law enunciated by the state's highest judicial authority, or, on questions to which that

tribunal has not responded, making an informed prophecy of what the court would do in the same situation. n1 See *Moore v. Greenberg*, 834 F.2d 1105, 1112 (1st Cir. 1987). In the latter instance, we seek guidance in analogous state court decisions, persuasive adjudications by courts of sister states, learned treatises, and public policy considerations identified in state decisional law. See *Ryan v. Royal Ins. Co.*, 916 F.2d 731, 734-35 (1st Cir. 1990); *Kathios v. General Motors Corp.*, 862 F.2d 944, 949 (1st Cir. 1988). As long as these signposts are legible, our task is to ascertain the rule the state court would most likely follow under the circumstances, even if our independent judgment on the question might differ. See *Moore*, 834 F.2d at 1107 n.3.

n1 Indeed, this kind of predictive approach is among our conceptions of law itself. See Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 461 (1897) ("The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by law.").

[**6]

III. CAUSATION

The defendant challenges the entire verdict on the basis that the plaintiff provided insufficient evidence from which a reasonable jury could conclude that the belated call constituted a proximate cause of the ensuing death. Under New Jersey law the plaintiff bears the burden of proving that the defendant's conduct comprised "a substantial factor in producing the harm" of which the plaintiff complains. *Francis v. United Jersey Bank*, 87 N.J. 15, 432 A.2d 814, 829 (N.J. 1981). When the questioned conduct [*1152] is an omission -- the defendant's failure to act rather than the defendant's maladroit performance of an affirmative act -- this rule is easier to state than

to apply. In the last analysis, it can rarely (if ever) be said with absolute certainty that harm would not have befallen the victim if the omitted action had been taken.

One species of omission that occurs from time to time involves the generic charge that, had the defendant done some particular act, the plaintiff (or, as here, the plaintiff's decedent) would have had a better chance to ward off threatened harm. In these so-called "loss of chance" cases New Jersey law instructs that the plaintiff can carry [**7] her burden by showing a "substantial possibility" that the harm would have been averted had the defendant acted in a non-negligent manner. *Hake v. Manchester Township*, 98 N.J. 302, 486 A.2d 836, 839 (N.J. 1985); see also *Olah v. Slobodian*, 119 N.J. 119, 574 A.2d 411, 417-19 (N.J. 1990) (discussing *Hake*). n2 Transposed to the rescue context, this rule renders a defendant's omission actionable if the plaintiff can show that the omission "negated a substantial possibility that prompt rescue efforts would have been successful." *Hake*, 486 A.2d at 839.

n2 It is commonly thought that the "substantial possibility" standard is more lenient than a standard that requires a plaintiff to prove it is more likely than not that a defendant's failure to act constituted a substantial factor in bringing about the victim's injury or death. See *W. Page Keeton et al., Prosser & Keeton on Torts* § 41, at 44 (Supp. 1988).

Under these authorities, the question here reduces to whether the evidence, viewed in the light most congenial [**8] to the plaintiff, supports a finding that the defendant's failure promptly to call an ambulance negated a substantial possibility that James Blinzler

would have survived. We think that this question warrants an affirmative answer.

The plaintiff submitted evidence that she beseeched the defendant to summon help at 8:35 p.m.; that an ambulance crew was available and free to respond at that time; and that the defendant agreed to place the call but then neglected to do so. The defendant actually made the call at 8:49 p.m. (some fourteen minutes later) and the ambulance reached the scene at 9:02 p.m. (an elapsed time of thirteen minutes). The jury heard opinion evidence from a renowned cardiologist that serious brain damage (and, hence, death) would have been forestalled had the paramedics reached the premises ten minutes earlier. On this record, we believe that a reasonable jury could conclude that the defendant's omission negated a substantial possibility that the rescue efforts would have succeeded. Put another way, a reasonable jury could find (as this jury apparently did) that the ambulance likely would have arrived fourteen minutes earlier had it been summoned immediately; that the [**9] course of treatment would have been accelerated by a like amount of time; and that, but for Marriott's negligence James Blinzler would have survived.

The defendant tries to parry this thrust in two ways. One initiative involves assembling a string of cases (mostly of hoary origin) in which courts have rejected plaintiffs' claims of negligence for failure to rescue. See, e.g., *Foss v. Pacific Tel. & Tel. Co.*, 26 Wash. 2d 92, 173 P.2d 144, 149 (Wash. 1946); *Whitehead v. Carolina Tel. & Tel. Co.*, 190 N.C. 197, 129 S.E. 602, 605 (N.C. 1925); *Volquardsen v. Iowa Tel. Co.*, 148 Iowa 77, 126 N.W. 928, 930 (Iowa 1910); *Lebanon, L. & L. Tel. Co. v. Lanham Lumber Co.*, 131 Ky. 718, 115 S.W. 824, 826 (Ky. 1909). These cases -- all of which involve fire damage coupled with some alleged negligence on the part of a telephone company in respect to a telephone call meant to summon the fire department -- provide little

guidance. In those cases, unlike here, the plaintiffs did not proffer evidence that, had the call gone through, the rescuers (there, the firefighters) could have reached the scene in time to prevent the harm (there, the rapid spread of a conflagration that had already started). See, e.g., [**10] *Foss*, 173 P.2d at 149; *Lebanon*, 115 S.W. at 826. And perhaps more importantly, each of those cases draw on *Lebanon* for the legal standard of causation -- a standard that differs materially from New Jersey's standard. See *Lebanon*, 115 S.W. at 826 (stating that "it must be established with certainty that but for their negligence the fire would [*1153] have been confined" as the plaintiff contends) (emphasis supplied).

This second point is aptly illustrated by the one entry in Marriott's string citation that does not involve a burning building: *Hardy v. Southwestern Bell Tel. Co.*, 910 P.2d 1024 (Okla. 1996). To understand *Hardy*, it is necessary to note that, in *McKellips v. St. Francis Hosp., Inc.*, 741 P.2d 467, 475-77 (Okla. 1987), the Oklahoma Supreme Court held that the causation standard of the Restatement (Second) of Torts § 323 (under which a plaintiff may prove negligence in a loss of chance case by showing that the defendant's omission "increased the risk" of harm), applied in medical malpractice cases. *Hardy* -- a case in which the plaintiff alleged that the telephone company's negligent operation of a 911 service prevented him from summoning [**11] rescue assistance and thereby proximately caused his wife's death -- postdated *McKellips*. The Oklahoma Supreme Court there considered extending the causation standard of Restatement § 323 to loss of chance claims outside the medical malpractice context. See *Hardy*, 910 P.2d at 1025. It declined to do so. See *id.* at 1030.

Hardy, fairly read, confirms the distinction between proof of causation in loss of chance cases under the traditional test (to which Oklahoma adheres in cases not involving

medical malpractice) and under more modern standards that focus instead on whether a defendant's conduct has significantly increased particular risks. As we have explained, New Jersey's "substantial possibility" standard applies to loss of chance cases in general, n3 and it is at a minimum as liberal as the "increased risk" standard endorsed by section 323 of the Restatement. See *Olah*, 574 A.2d at 419 (suggesting that whether the plaintiff "has a substantial possibility of avoiding harm would ordinarily be subsumed in the jury's determination whether a defendant's deviation increased the risk of harm") (internal quotations omitted). Since Hardy apparently would have stated a [*12] claim had the Oklahoma court applied the more lenient "increased risk" standard, see *Hardy*, 910 P.2d at 1030, *Marriott's* flagship case actually supports a finding of causation under New Jersey law.

n3 Like Oklahoma, New Jersey has explicitly adopted section 323 of the Restatement for use in loss of chance cases involving medical malpractice. See *Scafidi v. Seiler*, 119 N.J. 93, 574 A.2d 398, 405 (N.J. 1990); *Evers v. Dollinger*, 95 N.J. 399, 471 A.2d 405, 415 (N.J. 1984).

Marriott's second attempt to scuttle the finding of causation features its lament that the plaintiff did not prove that the same traffic conditions which were extant at and after 8:49 p.m. were also extant at and after 8:35 p.m. This lament can scarcely be taken seriously. Juries have the power to draw reasonable inferences from established facts. It is well within a jury's ordinary competence to conclude that traffic conditions for an emergency vehicle do not change dramatically in a fourteen minute period that is well outside rush hour.

The defendant's [*13] suggestion that a highway accident, or a diluvian tempest, or some other freak occurrence, later abated, might have delayed the ambulance if it began its run at 8:35 p.m. rather than at 8:49 p.m. is equally jejune. It is the plaintiff's burden to prove her case by a preponderance of the evidence, not beyond all conceivable doubt. In the absence of some reason to suspect changed conditions -- and there is no evidence of any actual change here -- the jury's inference that the ambulance would have arrived in roughly the same elapsed portal-to-portal time is unimpeachable. See *Levesque v. Anchor Motor Freight, Inc.*, 832 F.2d 702, 704 (1st Cir. 1987) (explaining that the "perhapses" that dot a factbound trial record typically "are for factfinders to resolve -- not for judges imperiously to dictate"); see also *W. Page Keeton et al., Prosser & Keeton on Torts* § 41, at 269 (5th ed. 1984) (noting that a plaintiff does not have to negate entirely the possibility that the defendant's conduct was not a contributing cause of the harm).

Silhouetted against this legal backdrop, the evidence of record, visualized most favorably to the plaintiff, see *Cumpiano*, 902 F.2d at 151, [*14] suffices to ground a finding that, had the defendant hailed an ambulance immediately upon request, there was at least a significant possibility that James Blinzler's death could have been prevented. Accordingly, we are not at liberty under New Jersey law to disturb [*1154] the jury's conclusion that *Marriott's* negligence constituted a substantial factor in the ensuing death.

IV. BYSTANDER LIABILITY

The most vexing issue in this case involves the plaintiff's claim of negligent infliction of emotional distress. This claim is based on the injury that she experienced while watching her husband suffer as the beleaguered couple awaited the ambulance's overdue arrival. We start this segment of our analysis with a

discussion of the doctrine of bystander liability as it has evolved in New Jersey, then shift our attention to an open question that the district court found to be dispositive, and, finally, apply the doctrine as we understand it to the idiosyncratic facts of this case.

A. General Principles of Bystander Liability.

American courts first recognized bystander liability in the landmark case of *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (Cal. 1968). Drawing in part on precedents [**15] from English common law, the court ruled that a mother could recover for emotional and physical injuries suffered "from witnessing the [negligent] infliction of death or injury to her child." 441 P.2d at 914. The *Dillon* court implicitly suggested that any bystander should be able to recover for all objectively foreseeable injuries. See *id.* at 920-21. To help jurists navigate the reefs and shoals of foreseeability, the court attempted to elucidate guidelines based on *Dillon's* factual scenario. See *id.* at 920.

Twelve years later, New Jersey embraced bystander liability in *Portee v. Jaffee*, 84 N.J. 88, 417 A.2d 521 (N.J. 1980). The state supreme court did not clasp *Dillon* uncritically to its bosom, but, rather, abjured a tunnel-vision focus on foreseeability, fearing that it would open the door to claims of emotional distress advanced on behalf of any onlooker to any negligently caused event. n4 417 A.2d at 527 (cautioning against institutionalizing "an unreasonably excessive measure of liability"); see also *Carey v. Lovett*, 132 N.J. 44, 622 A.2d 1279, 1286 (N.J. 1993) (suggesting that treating foreseeability as a sole talisman would render it difficult to differentiate [**16] between legitimate and fraudulent claims); *Prosser & Keeton*, supra, § 54, at 366 (warning that forcing defendants to pay for the "lacerated feelings" of every bystander would be "an entirely unreasonable burden on human activity").

n4 New Jersey is not alone in its reluctance blindly to follow *Dillon's* lead. See, e.g., *D'Ambra v. United States*, 114 R.I. 643, 338 A.2d 524, 528 (R.I. 1975) (rejecting rigid foreseeability focus). Indeed, even the progenitor of the doctrine has had second thoughts. See *Thing v. La Chusa*, 48 Cal. 3d 644, 771 P.2d 814, 826, 257 Cal. Rptr. 865 (Cal. 1989) (retreating from *Dillon* on this point).

In an effort to furnish a condign remedy for deserving injuries while at the same time avoiding "speculative results or punitive liability," *Portee*, 417 A.2d at 526, New Jersey transmogrified the *Dillon* guidelines into prerequisites of a cause of action for bystander liability, see *id.* at 528. The *Portee* court concluded that a bystander plaintiff should be permitted to recover under New Jersey [**17] law only if she could prove (1) the death or serious injury of another (caused by the defendant's negligence); (2) an intimate familial relationship with the victim; (3) her observation of the victim at the time of the injury or immediately thereafter; and (4) severe emotional distress resulting from the observation. See *id.* Subsequent decisions have cut plaintiffs some slack (but not very much) in their efforts to fulfill this quadrat of requirements. See, e.g., *Dunphy v. Gregor*, 136 N.J. 99, 642 A.2d 372, 377-78 (N.J. 1994) (holding that unmarried cohabitants may enjoy an intimate familial relationship); *Frame v. Kothari*, 115 N.J. 638, 560 A.2d 675, 678 (N.J. 1989) (explaining that a plaintiff may recover without actually seeing the injury so long as it is "susceptible to immediate sensory perception" and the plaintiff observes the victim immediately after the injury is inflicted).

These four elements serve a critical function in keeping bystander liability within reasonable bounds. First, they furnish a set of

guideposts that help to identify and define a range of claims that are presumptively valid while excluding other claims that society simply cannot afford to honor. See [**18] Dunphy, 642 A.2d at 377 [*1155] (noting that the elements of bystander liability "structure the kind of 'particularized foreseeability' that ensures that the class is winnowed . . . and that limitless liability is avoided"). Second -- and relatedly -- they combine to define narrowly the emotional interest that the law protects. See Carey, 622 A.2d at 1286; accord *Thing v. La Chusa*, 48 Cal. 3d 644, 771 P.2d 814, 829, 257 Cal. Rptr. 865 (Cal. 1989). While "the law should find more than pity for one who is stricken by seeing that a loved one has been critically injured or killed," Portee, 417 A.2d at 526, the elements of the bystander liability tort frankly recognize that it is not the law's province to shield people from all anxieties. Since the ordinary slings and arrows of human existence inevitably produce stress and strain, "only the most profound emotional interests should receive vindication for their negligent injury." *Id.*

The common thread that runs through these cases is that emotional anguish is a natural, perhaps omnipresent, reaction whenever one is forced to watch a loved one suffer, and therefore should not be compensable in the absence of special circumstances. In an effort to hold the line, [**19] New Jersey law decrees that bystanders may recover in tort only for the particularly exquisite anguish that occurs when they personally observe trauma strike a loved one like a bolt from the blue. See *Frame*, 560 A.2d at 679 (explaining that bystander liability is supposed to remedy the "harm of seeing a healthy victim one moment and a severely injured one the next"); Portee, 417 A.2d at 527 ("Discovering the death or serious injury of an intimate family member will always be expected to threaten one's emotional welfare. Ordinarily, however, only a witness at the scene of the accident causing death or serious injury will suffer a traumatic

sense of loss that may destroy his sense of security and cause severe emotional distress."). Thus, there can be no recovery unless the close relation's helpless watching arises in the context of a sudden, unexpected, and accidental injury.

B. The Fork in the Road.

The issue before us is whether the plaintiff's asserted injury falls within the narrow range of bystander liability claims that are actionable under New Jersey law. The district court decided that it did not. The court relied primarily on a series of bystander liability/medical [**20] malpractice cases in which the New Jersey Supreme Court placed a gloss on its earlier decisions and indicated that a plaintiff must witness the actual act of malpractice and appreciate its effect on the patient in order to bring herself within the class of persons entitled to recover. See Carey, 622 A.2d at 1288 (declaring that a plaintiff must "contemporaneously observe the malpractice and its effects on the victim"); *Frame*, 560 A.2d at 681 ("In an appropriate case, if a family member witnesses the physician's malpractice, observes the effect of the malpractice on the patient, and immediately connects the malpractice with the injury, that may be sufficient to allow recovery for the family member's emotional distress."); see also *Gendek v. Poblete*, 139 N.J. 291, 654 A.2d 970, 975 (N.J. 1995) (rejecting a claim on the ground that the bystander did not "immediately connect[] any act of malpractice" with the victim's death).

Here, concededly, Mrs. Blinzler cannot satisfy this added requirement; she neither "witnessed" the negligence (which comprised the hotel operator's failure immediately to call an ambulance and which occurred six floors beneath the Blinzlers' room) nor fully appreciated [**21] at the time that the negligence was hindering needed assistance (indeed, the defendant's misrepresentations, if believed, concealed the very fact of the

negligence). Thus, to decide this case we must determine whether the Gendek-Carey-Frame gloss applies only to bystander liability/medical malpractice claims (as the plaintiff contends) or whether it applies to all bystander liability claims (as the defendant contends and as the lower court concluded). Although the answer to the question is by no means free from doubt, we think that the district court took the wrong fork in the road.

As an initial matter, the New Jersey Supreme Court has never imposed the added requirement that a plaintiff witness the negligent act and contemporaneously connect it to the injury of a loved one in any case outside the medical malpractice context, and the malpractice [*1156] cases in which the requirement has been imposed strongly suggest that it is restricted to that milieu. See Gendek, 654 A.2d at 974 (describing the requirement as "added" and "special" in that it is "imposed to establish an indirect claim for emotional distress arising from medical malpractice"); Carey, 622 A.2d at 1286 ("With [**22] medical-malpractice claims, we have required that claimants observe contemporaneously the act of malpractice and the resultant injury.") (emphasis supplied). What is more, crafting a special set of rules for bystander liability/medical malpractice cases is not in any way an unprecedented flight of fancy; other courts that recognize bystander liability claims in general sometimes treat such claims more restrictively in the medical malpractice setting, even, on occasion, barring them outright. See, e.g., *Maloney v. Conroy*, 208 Conn. 392, 545 A.2d 1059, 1063-64 (Conn. 1988); *Wilson v. Galt*, 100 N.M. 227, 668 P.2d 1104, 1110 (N.M. 1983).

We note, too, that the added requirement designed by the New Jersey Supreme Court for use in connection with bystander liability/medical malpractice claims is grounded in a set of policy considerations that do not seem to apply to other bystander liability

claims. For one thing, the unique emotional interest that fuels the doctrine of bystander liability is unaffected in most cases of medical malpractice for the harm caused by, say, misdiagnosis usually does not manifest itself until days, weeks, months, or years have elapsed, and even then, the misdiagnosis [**23] rarely culminates in a single spontaneous and shocking event. See Frame, 560 A.2d at 678-79 (explaining that in the typical malpractice case "grief over the gradual deterioration of a loved one, as profound as that grief may be, often does not arise from a sudden injury," but, rather, under circumstances in which the family members have had the "time to make an emotional adjustment"). It is largely for this reason that bystander liability must be even more "narrowly circumscribed in the context of a medical misdiagnosis or failure to act." Gendek, 654 A.2d at 975-76. New Jersey chose to accomplish this circumscription by limiting bystander liability in the medical malpractice arena to those situations in which the putative plaintiff observes both the act of malpractice and its immediate effects, and appreciates the interrelationship. See, e.g., Frame, 560 A.2d at 681. That rationale loses force outside the medical malpractice context.

For another thing, the added requirement applicable to bystander liability in the medical malpractice context reflects societal concerns about the impact of expanded liability on the delivery of health care. See Gendek, 654 A.2d at 975 [**24] ("In considering the standards that govern an appropriate duty of care and limitations of liability in [the health care] setting, we must be especially mindful of the principles of sound public policy that are informed by perceptions of fairness and balance."); Carey, 622 A.2d at 1286 (voicing uneasiness about the "effects of the expansion of liability on the medical profession and society," and specifically noting sharp increases in malpractice insurance premiums); Frame, 560 A.2d at 681 (emphasizing that the special refinement of bystander liability for medical

malpractice cases is at least partly driven by a desire to avoid "unreasonably burdening the practice of medicine"). This group of situation-specific policy concerns is best addressed by "narrowly circumscribing" bystander liability in the medical malpractice setting so as to minimize any "adverse effect on the practice of medicine or on the availability of medical services." *Frame*, 560 A.2d at 681. Once again, this reasoning loses force outside the medical malpractice context.

The language of the New Jersey cases and the distinctive nature of the policy considerations that underlie the added requirement [**25] mark the genesis of our belief that, when the opportunity arises, the New Jersey Supreme Court will not engraft this health-care-specific requirement upon the body of cases that lie beyond the medical malpractice arena. New Jersey has already expressed its view of general public policy concerns with respect to expanded liability for run-of-the-mine accidents by conferring a right of recovery on bystanders and defining the elements of the tort. See *Dunphy*, 642 A.2d at 377; *Portee*, 417 A.2d at 528. We think it is no accident that in superimposing the added requirement [*1157] on bystander liability/medical malpractice cases, the state supreme court has been scrupulously careful not to imply a broader sweep. Because we believe that this specificity is purposeful rather than serendipitous, we hold that the added requirement imposed by the *Gendek-Carey-Frame* line of cases is applicable only to causes of action that, at bottom, charge health-care providers with malpractice. The district court, therefore, took the wrong fork in the road.

C. Applying the Principles.

Once we put the added requirement to one side, the only question that remains open under this rubric is whether [**26] the jury lacked evidence satisfactory to support a finding that the plaintiff's injury fell within the standard parameters of bystander liability that obtain in

New Jersey vis-a-vis suits arising outside the medical malpractice context. We think the evidence sufficed. Intimate relationship and third-party injury (i.e., a spouse's death) are not in dispute, and the record contains adequate proof of severe emotional distress. The seminal New Jersey case suggests that, in addition to these three elements, a plaintiff need only show that she "observed the death . . . while it occurred." *Portee*, 417 A.2d at 527; see also *supra* p. 13 (recounting the four elements of the tort under New Jersey law). This last element -- firsthand observation -- corresponds to the distinct emotional interest that is infringed when an individual witnesses a "shocking event" and "sees a healthy [family member] one moment and a severely injured one the next." *Frame*, 560 A.2d at 679.

We appreciate that things are not always what they seem and that it may be overly simplistic to say that in New Jersey firsthand observation of a suddenly inflicted injury to a loved one invariably gives rise to the [**27] unique emotional interest that underlies bystander liability. Arguably, it is not merely the observation of the injury but the perception that it is accidental or otherwise unwarranted that threatens a "plaintiff's basic emotional security," *Portee*, 417 A.2d at 521, and thus paves the way for bystander liability. See *id.* at 528 (noting that it is the "shock and fright" attendant to observing the "accidental death" of an intimate relation that infringes the narrowly defined interest in emotional security). *Frame* makes this point most clearly, albeit in dictum:

Everyone is subject to injury, disease, and death. Common experience teaches that the injury or death of one member of a family often produces severe emotional distress in another family member. A threshold problem is separating the grief that attends that distress when no one is at fault from the added stress attributable to the fact

that the injury or death was produced by the negligent act of another.

560 A.2d at 677. And while the Portee elements have not yet been formally modified in this respect, n5 we think it is not unlikely that New Jersey will move in this direction. Cf. *Thing*, 771 [**28] P.2d at 829 (tightening the elements of a bystander liability action under California law to require that the plaintiff be "present at the scene of the injury-causing event" and be "then aware that it is causing the injury to the victim"). But there are two reasons why we need not cross this bridge today.

n5 In *Portee*, the question was not raised squarely. There the plaintiff (the victim's mother) arrived at the scene after her son became trapped in an elevator. She did not witness either the initial entrapment or the act of negligence (faulty maintenance) that caused the accident. It was quite clear, however, that the mother knew immediately that her child's injuries had an unnatural cause and stemmed from the elevator's accidental collapse.

1. The evidence here clearly satisfies the *Portee* requirements simpliciter. The plaintiff witnessed a sudden and shocking event when she watched her husband of forty-two years undergo excruciating chest pain, vomit, struggle to catch his breath, asphyxiate, lose [**29] consciousness, and ultimately die. Because she "witnessed the victim when the injury [was] inflicted," *Frame*, 560 A.2d at 678, recovery would seem appropriate under a formal incantation of the *Portee* elements.

2. The law of the case doctrine eliminates any potential problem as to the precise dimensions of *Portee*. At trial's end, the district court charged the jury that "the plaintiff must be present at the scene of the event [**1158]

and be aware that the victim is being injured." The defendant's counsel objected generally to the court's decision to instruct the jury at all on count 3 (asseverating that New Jersey law requires the plaintiff actually to witness the negligent act) but he did not object in any other, more specific respect to the district court's formulation of the basic elements of the tort. Thus, even if New Jersey might in an appropriate case impose some intermediate limitation going beyond *Portee* but stopping short of mandating that the plaintiff witness the negligent act, the defense formulated no such intermediate position at the jury-instruction stage. In other words, the content of the instruction stands as the law of the case with respect to the unembellished [**30] contours of a cause of action for bystander liability. See *Quinones-Pacheco v. American Airlines, Inc.*, 979 F.2d 1, 4 n.3 (1st Cir. 1992); *Milone v. Mocerri Family, Inc.*, 847 F.2d 35, 38-39 (1st Cir. 1988). And as we have already pointed out, the plaintiff's proof, measured against the language of the trial court's instruction, suffices to create a jury question.

Even if we assume *arguendo* that the New Jersey Supreme Court would augment the elements of a non-medical-malpractice cause of action for bystander liability along the lines exemplified by *Thing*, the verdict might well be sustainable. From the evidence adduced at trial, the jury rationally could find that during the incident proper the plaintiff twice asked the manager whether the ambulance had been called. Though she was (erroneously) assured that the call had been made punctually, she asked the manager yet again at the hospital (receiving the same misinformation), and then checked with the hotel three days later (after her husband had perished). This type of evidence arguably could support an illation that the plaintiff suspected all along that a delay attributable to the defendant was causing [**31] injury to her husband. Watching the event while suspecting that her husband's suffering was being unnecessarily prolonged

and worrying that prospects for his rescue were diminishing would appear to be the kind of distinct emotional harm for which bystander liability would lie under the premise of Thing. See, e.g., *Bloom v. Dubois Regional Med. Ctr.*, 409 Pa. Super. 83, 597 A.2d 671, 683 (Pa. Sup. Ct. 1991).

V. OTHER ISSUES

The defendant raises a salmagundi of other issues in connection with its appeal. None of its asseverations is persuasive. Only three warrant discussion.

A. The Evidentiary Rulings.

The defendant argues that it is entitled to a new trial because the district court erred in certain evidentiary rulings. Its chief complaint concerns the admission of evidence relating to the destruction of the so-called Xeta report (a printout that catalogues all outgoing calls from the hotel's PBX operator) for November 13, 1992. The defendant destroyed this telephone log approximately thirty days after the incident. Had the report been preserved, it would have pinpointed the very moment that the operator first placed the call for emergency assistance.

During [**32] the trial, the plaintiff sought to show that the defendant had destroyed this evidence. The defendant objected, contending that it discarded the Xeta report in the ordinary course of business, pursuant to established practice, and not as part of an effort to inter unfavorable evidence. The district court overruled the objection and permitted the plaintiff to introduce evidence at trial of the existence and subsequent destruction of the Xeta report, leaving the defendant's explanation to the jury. We review the district court's rulings admitting or excluding evidence for abuse of discretion. See *Veranda Beach Club Ltd. Partnership v. Western Sur. Co.*, 936 F.2d 1364, 1373 (1st Cir. 1991); *United States v. Nazzaro*, 889 F.2d 1158, 1168 (1st Cir. 1989). We see none in this instance.

When a document relevant to an issue in a case is destroyed, the trier of fact sometimes may infer that the party who obliterated it did so out of a realization that the contents were unfavorable. See *Nation-Wide Check Corp. v. Forest Hills Distributors, Inc.*, 692 F.2d 214, 217 (1st Cir. 1982); see also 2 *Wigmore on Evidence* § 285, at 192 (James H. Chadbourn rev. ed. 1979). [**33] [*1159] Before such an inference may be drawn, there must be a sufficient foundational showing that the party who destroyed the document had notice both of the potential claim and of the document's potential relevance. See *Nation-Wide*, 692 F.2d at 218. Even then, the adverse inference is permissive, not mandatory. If, for example, the factfinder believes that the documents were destroyed accidentally or for an innocent reason, then the factfinder is free to reject the inference. See, e.g., *Jackson v. Harvard Univ.*, 900 F.2d 464, 469 (1st Cir.), cert. denied, 498 U.S. 848, 112 L. Ed. 2d 104, 111 S. Ct. 137 (1990); *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 925-26 (1st Cir. 1988).

In this case, the defendant contends that there was no direct evidence to show that it discarded the Xeta report for any ulterior reason. This is true as far as it goes -- but it does not go very far. The proponent of a "missing document" inference need not offer direct evidence of a coverup to set the stage for the adverse inference. Circumstantial evidence will suffice. See, e.g., *Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119, 1134 (7th Cir. 1987), cert. denied, 485 U.S. 993, 99 L. Ed. 2d 512, 108 S. Ct. 1302 (1988). [**34]

We do not believe that the district court abused its considerable discretion in deciding that the totality of the circumstances here rendered such an inference plausible. A reasonable factfinder could easily conclude that Marriott was on notice all along that the Xeta report for November 13, 1992 was relevant to likely litigation. Although no suit had yet been

begun when the defendant destroyed the document, it knew of both James Blinzler's death and the plaintiff's persistent attempts -- including at least one attempt after Blinzler died -- to discover when the call for emergency aid had been placed. This knowledge gave the defendant ample reason to preserve the report in anticipation of a legal action. When the evidence indicates that a party is aware of circumstances that are likely to give rise to future litigation and yet destroys potentially relevant records without particularized inquiry, a factfinder may reasonably infer that the party probably did so because the records would harm its case. See *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995); *Partington v. Broyhill Furn. Indus., Inc.*, 999 F.2d 269, 272 (7th Cir. 1993); *Nation-Wide*, 692 **[**35]** F.2d at 219. In the circumstances at bar, the trial court acted within its discretion in admitting the Xeta report.

The defendant also chastises the court for admitting evidence of another missing record. The security officer's log for November 13, 1992 could not be located, and the judge permitted evidence of that fact to go to the jury. Once again, the ruling cannot be faulted. The defendant had no good explanation for the missing log, and the jury was entitled to infer that the defendant destroyed it in bad faith.

To cinch matters, these two pieces of evidence had a synergistic effect. We think it would be proper for a reasonable factfinder to conclude that the unavailability of two important documents, both of which bore upon the timing of the call for emergency assistance, was something more than a coincidence. The veteran district judge, after hearing all the evidence limning these mysterious disappearances, put it bluntly in the course of ruling on post-trial motions:

I will tell you now that the Xeta Report raises a compelling inference in my mind that

personnel at the Marriott Hotel did destroy that record willfully, along with the security officer's daily log **[**36]** of that date. The inference is compelling that the Marriott Hotel was hiding the delay of the telephone operator in making this telephone call.

This is a harsh assessment -- but it is based on a firsthand appraisal of the testimony and it is one that a rational jury easily could draw on the record.

B. The Motion to Reopen.

After the plaintiff rested, the defendant moved for a directed verdict under Fed. R. Civ. P. 50(a). After hearing arguments, the district court permitted the plaintiff to reopen her case in order to offer certain additional **[*1160]** evidence on the issue of causation. ⁿ⁶ The defendant assigns error to this ruling. There is none.

ⁿ⁶ The supplemental evidence consisted of testimony from two witnesses. The first, plaintiff's medical expert, simply clarified and confirmed his earlier testimony that James Blinzler would have survived had the ambulance arrived ten minutes earlier. The second witness (an employee of the ambulance service) testified that the ambulance service had a unit ready, available, and on call at 8:35 p.m. on November 13, 1992.

[37]**

The Federal Rules of Evidence give the district court broad discretion in ordering the proof. See Fed. R. Evid. 611. This discretion extends to granting or denying motions to reopen, see *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 331-32, 28 L. Ed. 2d 77, 91 S. Ct. 795 (1971); *Rivera-Flores v.*

Puerto Rico Tel. Co., 64 F.3d 742, 746 (1st Cir. 1995); *Lussier v. Runyon*, 50 F.3d 1103, 1113 (1st Cir.), cert. denied, 133 L. Ed. 2d 30, 116 S. Ct. 69 (1995), and such rulings are reviewed principally for abuse of that discretion.

A trial court's decision to reopen is premised upon criteria that are flexible and fact-specific, but fairness is the key criterion. See *Rivera-Flores*, 64 F.3d at 746; *Capital Marine Supply, Inc. v. Thomas*, 719 F.2d 104, 107 (5th Cir. 1983). The specific factors to be assessed include the probative value of the evidence sought to be introduced, the proponent's explanation for failing to offer the evidence earlier, and the likelihood of undue prejudice. See *Rivera-Flores*, 64 F.3d at 746; *Joseph v. Terminix Int'l Co.*, 17 F.3d 1282, 1285 (10th Cir. 1994); see also 6A James W. Moore, *Moore's Federal Practice* P 59.04[13], at 59-33 (2d [**38] ed. 1993). The prospect of prolonging the trial is also material. If the additional evidence is immediately available or nearly so, the trial court will have a greater incentive to permit the case to be reopened. Conversely, if gathering the additional evidence portends a significant delay in the trial, the court ordinarily will have a greater reluctance to grant the motion. See Moore, *supra*, P 59.04[13], at 59-33.

Here, the additional evidence that the plaintiff sought to introduce was non-cumulative. It had significant probative value on an essential element in the plaintiff's case, helping to connect the defendant's negligence to the injuries claimed. See *supra* note 6. There is no sign that the plaintiff withheld the proof as a strategic matter. To the contrary, the record shows quite clearly that she attempted to streamline her case in chief and offered the incremental evidence only after the judge expressed reservations about the state of the proof on the issue of causation. n7

n7 This is consistent with the method of the Civil Rules. Rule 50(a) exists in part to afford the responding party "an opportunity to cure any deficiency in that party's proof that may have been overlooked until called to the party's attention by a late motion for judgment." Fed. R. Civ. P. 50, advisory committee's note (1991 amendment). In other words, Rule 50(a) should be construed "to avoid tactical victories at the expense of substantive interests." Moore, *supra*, P 50.08, at 50-89 The district court echoed this sentiment when it granted the motion to reopen, stating: "I allow the plaintiff to reopen because I want the truth. I want the facts. I want to achieve a just result in this case"

[**39]

Notwithstanding these circumstances, the defendant insists that permitting the plaintiff to reopen worked substantial prejudice because the defense hoped all along that the plaintiff would fail to prove causation. This is disappointment rather than cognizable prejudice. The evidence taken after reopening consisted of only two witnesses and created no unfair surprise. The added testimony simply fleshed out the plaintiff's basic theory of liability -- that the time saved by a prompt call might well have led to James Blinzler's survival. Moreover, allowing the plaintiff to reopen did not perceptibly delay the trial and did not occasion any interruption of the defense case. In any event, the district court prudently offered the defendant a continuance so that it might regroup and better rebut the additional evidence. By declining the court's offer, the defendant confirmed the absence of unfair prejudice. See *United States v. Diaz-Villafane*, 874 F.2d 43, 47 (1st Cir.), cert. denied, 493 U.S. 862 (1989). Under these circumstances, the granting of the plaintiff's motion to reopen comes well within [*1161] the heartland of

the trial court's discretion. See *Rivera-Flores*, 64 F.3d at [**40] 749.

C. The Emotional Distress Award.

Where, as here, a federal court sets aside a jury's verdict and directs the entry of judgment as a matter of law, the court must also rule conditionally on any concomitant motion for a new trial. See Fed. R. Civ. P. 50(c). In this instance the district court held that, if it had erred in granting judgment as a matter of law on count 3, then the jury's award of damages for emotional distress should stand. The defendant assails this contingent ruling and argues for either a new trial or a remittitur on count 3. In its most cogent aspect, the argument is based on the premise that the scanty physical symptoms exhibited by the plaintiff simply do not justify an award of \$ 200,000 in damages.

Federal law governs the question of whether the trial court should order a remittitur in a diversity case. See *Donovan v. Penn Shipping Co.*, 429 U.S. 648, 649, 51 L. Ed. 2d 112, 97 S. Ct. 835 (1977). Under applicable federal standards, appellate review is limited to whether the district court abused its discretion in deciding to endorse the jury award rather than trim it or set it aside as excessive. See, e.g., *Ruiz v. Gonzalez Caraballo*, 929 F.2d 31, 34 [**41] (1st Cir. 1991); *Wagenmann v. Adams*, 829 F.2d 196, 215 (1st Cir. 1987).

An award of damages will not be deemed unreasonably high or low as long as it comports with some "rational appraisal or estimate of the damages that could be based on the evidence before the jury." *Milone*, 847 F.2d at 37 (citation omitted). On the high side, a damage determination will withstand scrutiny unless it is "grossly excessive, inordinate, shocking to the conscience of the court, or so high that it would be a denial of justice to permit it to stand." *Correa v. Hospital San Francisco*, 69 F.3d 1184, 1197 (1st Cir. 1995) (quoting *Grunenthal v. Long Island R.R. Co.*, 393 U.S. 156, 159 & n.4, 21 L. Ed. 2d 309, 89 S. Ct. 331

(1968)), cert. denied, 116 S. Ct. 1423, 134 L. Ed. 2d 547 (1996). Moreover, "an appellate court's normal disinclination to second-guess a jury's evaluation of the proper amount of damages is magnified where . . . the damages entail a monetary valuation of intangible losses, and the trial judge, having seen and heard the witnesses at first hand, accepts the jury's appraisal." *Id.*

Here, viewing the evidence of damages in the light most amiable to the plaintiff, see *Toucet v. [**42] Maritime Overseas Corp.*, 991 F.2d 5, 11 (1st Cir. 1993); *Ruiz*, 929 F.2d at 34, we think that the award, though perhaps generous, passes muster. Under New Jersey law, no particular level of physical symptomatology is necessary to support damages for emotional distress. See *Strachan v. John F. Kennedy Mem. Hosp.*, 109 N.J. 523, 538 A.2d 346, 353 (N.J. 1988). n8 The testimony in this record indicates that the plaintiff watched helplessly as her husband collapsed, vomited, passed out, and became cyanotic. She was still in the room nearly fifteen minutes later when an oxygen mask was being placed over her unconscious husband's mouth and nose. In the aftermath of her husband's death, she experienced daily flashbacks to that time of torment. She still suffers from insomnia, cardiac palpitations, and shortness of breath. Coupled with proof of negligent infliction of emotional distress, this evidence justifies substantial compensation under New Jersey law.

n8 At one time New Jersey courts did require proof of "substantial bodily injury or sickness" in all emotional distress cases. See, e.g., *Caputzal v. The Lindsay Co.*, 48 N.J. 69, 222 A.2d 513, 515 (N.J. 1966); *Falzone v. Busch*, 45 N.J. 559, 214 A.2d 12, 17 (N.J. 1965). *Portee* changed this rule in respect to bystander liability, permitting recovery in the absence of physical symptoms if the

circumstances are such that severe emotional distress can easily be inferred. See *Portee*, 417 A.2d at 527-28.

[**43]

Of course, the task of valuing noneconomic losses in tort cases is an imprecise exercise. There is no one "correct" sum, but, rather, a range of acceptable awards. In many instances the spread between the high and low [*1162] ends of the range will be great. The choice within the range -- which by its nature requires the decisionmaker to translate intangibles (such as pain and suffering) into quantifiable dollars and cents -- is a choice largely within the jury's ken. See *Correa*, 69 F.3d at 1197. Since we are unable to conclude on this record that \$ 200,000 is a figure beyond the wide universe of acceptable awards, we must uphold the district court's finding that the figure is not excessive. See *Ruiz*, 929 F.2d at 34 (explaining that the court of appeals "cannot, and will not, without substantial cause, overrule a trial judge's considered refusal to tamper with the damages assessed by a jury").

VI. CONCLUSION

We need go no further. The record adequately supports the jury's conclusion that the defendant's inexplicable delay in calling an ambulance constituted a proximate cause of James Blinzler's death and negligently inflicted both emotional distress and a loss of consortium [**44] on his wife (now his widow). Finding, as we do, that the law of New Jersey permits this multifaceted conclusion to remain fully intact, that the defendant's several challenges to evidentiary and case-management rulings are meritless, and that the damages awarded are not grossly excessive, we reinstate the jury verdict in its entirety. As a necessary corollary, we vacate the district court's entry of judgment for the defendant on count 3.

**Affirmed in part and reversed in part.
Costs in favor of the plaintiff.**

APPENDIX D
JORGE H. TREVINO, M.D., INDIVIDUALLY AND D/B/A
MCALLEN MATERNITY CLINIC, PETITIONER v. GENARO
ORTEGA, INDIVIDUALLY AND A/N/F OF LINDA ORTEGA, A
MINOR, RESPONDENT

No. 97-0280

SUPREME COURT OF TEXAS

969 S.W.2d 950; 1998 Tex. LEXIS 91; 41 Tex. Sup. J. 907

December 3, 1997, Argued
June 5, 1998, Delivered

PRIOR HISTORY: [**1] ON APPLICATION FOR WRIT OF ERROR TO THE COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS.

DISPOSITION: Court of appeals' judgment reversed and judgment rendered that Ortega take nothing.

LexisNexis(R) Headnotes

COUNSEL: For Petitioner: Thomas F. Nye, Brin & Brin, Corpus Christi, Ms. Diana L. Faust, Cooper & Scully, Dallas, Ms. Linda C. Breck, Brin & Brin, Corpus Christi, R. Brent Cooper, Cooper & Scully, Dallas.

For Respondent: Ricky J. Poole, Mendelsohn & Jackson, San Antonio, Randall C. Jackson, The Jackson Law Firm, San Antonio.

JUDGES: JUSTICE ENOCH delivered the opinion of the Court, in which CHIEF JUSTICE PHILLIPS, JUSTICE GONZALEZ, JUSTICE HECHT, JUSTICE SPECTOR, JUSTICE OWEN, JUSTICE ABBOTT, and

JUSTICE HANKINSON join. JUSTICE BAKER filed a concurring opinion.

OPINIONBY: CRAIG T. ENOCH

OPINION:

[*951] The issue in this case is whether this Court should recognize an independent cause of action for intentional or negligent spoliation of evidence by parties to litigation. n1 The court of appeals held that Texas recognizes a cause of action for evidence spoliation. 938 S.W.2d 219, 223. Because we determine that spoliation does not give rise to independent damages, and because it is better remedied within the lawsuit affected by spoliation, we decline to recognize spoliation as a tort cause of action. Therefore, we reverse the court of appeals' judgment and render judgment that Ortega take nothing.

n1 Whether we recognize a cause of action for spoliation of evidence by persons who are not parties to the underlying lawsuit is not before the Court, and therefore we do not consider it.

[**2]

In 1988, Genaro Ortega, individually and as next friend of his daughter, Linda Ortega, sued Drs. Michael Aleman and Jorge Trevino and McAllen Maternity Clinic for medical malpractice. Ortega alleged that the defendants were negligent in providing care and treatment during Linda's birth in 1974. n2 Discovering that Linda's medical records from the birth had been destroyed, Ortega then sued Dr. Trevino in a separate suit for intentionally, recklessly, or negligently destroying Linda Ortega's medical records from the birth.

n2 At the time of submission, this case was still pending in district court.

It is the appeal from this latter action that is before us. Here, Ortega claims that Trevino had a duty to preserve Linda's medical records and that destroying the records materially interferes with Ortega's ability to prepare his medical malpractice suit. Ortega explains that Aleman, the attending physician, testified that he has no specific recollection of the delivery and, therefore, the missing medical records are [**3] the only way to determine the procedures used to deliver Linda. Because the medical records are missing, Ortega's expert cannot render an opinion about Aleman's, the Clinic's, or Trevino's negligence.

Responding to Ortega's spoliation suit, Trevino specially excepted and asserted that Ortega failed to state a cause of action. The trial court sustained Trevino's special exception and gave Ortega an opportunity to amend. But Ortega declined to amend and the trial court dismissed the case. Ortega appealed. The court of appeals reversed the trial court's dismissal order and held that Texas recognizes an independent cause of action for evidence spoliation. 938 S.W.2d at 223. This Court treads cautiously when deciding whether to

recognize a new tort. *See generally Kramer v. Lewisville Mem'l Hosp.*, 858 S.W.2d 397, 404-06 (Tex. 1993); *Graff v. [**952] Beard*, 858 S.W.2d 918, 920 (Tex. 1993); *Boyles v. Kerr*, 855 S.W.2d 593, 600 (Tex. 1993). While the law must adjust to meet society's changing needs, we must balance that adjustment against boundless claims in an already crowded judicial system. We are especially averse to creating a tort that would only lead to duplicative litigation, encouraging [**4] inefficient relitigation of issues better handled within the context of the core cause of action. We thus decline to recognize evidence spoliation as an independent tort.

A number of jurisdictions that have considered the issue have been hesitant to recognize an independent tort for evidence spoliation for a variety of different reasons. *See, e.g., Wilson v. Beloit Corp.*, 921 F.2d 765, 767 (8th Cir. 1990) (no spoliation tort under Arkansas law); *Edwards v. Louisville Ladder Co.*, 796 F. Supp. 966, 970 (W.D. La. 1992) (existence of adequate remedies); *Christian v. Kenneth Chandler Constr. Co.*, 658 So. 2d 408, 412-13 (Ala. 1995) (no cause of action under facts of case but noting previous cases allowing jury instruction on the spoliation presumption); *La Raia v. Superior Court*, 150 Ariz. 118, 722 P.2d 286, 289 (Ariz. 1986) (existence of adequate remedies); *Gardner v. Blackston*, 185 Ga. App. 754, 365 S.E.2d 545, 546 (Ga. Ct. App. 1988) (no spoliation tort under Georgia law); *Boyd v. Travelers Ins. Co.*, 166 Ill. 2d 188, 652 N.E.2d 267, 270, 209 Ill. Dec. 727 (Ill. 1995) (traditional negligence remedies sufficiently address the issue and remove the need to create [**5] an independent cause of action); *Murphy v. Target Prods.*, 580 N.E.2d 687, 690 (Ind. Ct. App. 1991) (no common-law duty for employer to preserve potential evidence for employee's benefit); *Monsanto Co. v. Reed*, 950 S.W.2d 811, 815 (Ky. 1997) (existence of adequate remedies); *Miller v. Montgomery County*, 64 Md. App. 202, 494 A.2d 761, 767-68 (Md. Ct. Spec. App. 1985)

(existence of adequate remedies); *Panich v. Iron Wood Prods. Corp.*, 179 Mich. App. 136, 445 N.W.2d 795, 797 (Mich. Ct. App. 1989) (no cause of action under facts of case); *Brown v. Hamid*, 856 S.W.2d 51, 56-57 (Mo. 1993) (existence of adequate remedies and not appropriate on facts of case). n3

n3 Courts in more than twenty states have considered the issue, but the courts of only six states have recognized a cause of action for negligent or intentional spoliation. *See Hazen v. Municipality of Anchorage*, 718 P.2d 456, 463 (Alaska 1986) (intentional); *Velasco v. Commercial Bldg. Maintenance Co.*, 169 Cal. App. 3d 874, 215 Cal. Rptr. 504, 506 (Cal. Ct. App. 1985) (negligent); *Smith v. Superior Court*, 151 Cal. App. 3d 491, 198 Cal. Rptr. 829, 832-33 (Cal. Ct. App. 1984) (intentional); *Bondu v. Gurvich*, 473 So. 2d 1307, 1312-13 (Fla. Dist. Ct. App. 1984) (negligent); *Callahan v. Stanley Works*, 306 N.J. Super. 488, 703 A.2d 1014, 1017-19 (N.J. Super. Ct. Law Div. 1997) (negligent); *Coleman v. Eddy Potash, Inc.*, 120 N.M. 645, 905 P.2d 185, 189 (N.M. 1995) (intentional); *Smith v. Howard Johnson Co.*, 67 Ohio St. 3d 28, 615 N.E.2d 1037 (Ohio 1993) (intentional).

[**6]

Evidence spoliation is not a new concept. For years courts have struggled with the problem and devised possible solutions. Probably the earliest and most enduring solution was the spoliation inference or *omnia praesumuntur contra spoliatores*: all things are presumed against a wrongdoer. *See, e.g. Rex v. Arundel*, 1 Hob. 109, 80 Eng. Rep. 258 (K.B. 1617) (applying the spoliation inference); *The Pizarro*, 15 U.S. (2 Wheat.) 227, 4 L. Ed. 226 (1817) (declining to apply the spoliation

inference); *Brown*, 856 S.W.2d at 56 (noting that Missouri has recognized a spoliation inference for over a century). In other words, within the context of the original lawsuit, the factfinder deduces guilt from the destruction of presumably incriminating evidence.

This traditional response to the problem of evidence spoliation properly frames the alleged wrong as an evidentiary concept, not a separate cause of action. Spoliation causes no injury independent from the cause of action in which it arises. If, in the ordinary course of affairs, an individual destroys his or her own papers or objects, there is no independent injury to third parties. The destruction only becomes relevant when someone [**7] believes that those destroyed items are instrumental to his or her success in a lawsuit.

Even those courts that have recognized an evidence spoliation tort note that damages are speculative. *See, e.g., Smith v. Superior Court*, 151 Cal. App. 3d 491, 198 Cal. Rptr. 829, 835 (Ct. App. 1984); *Petrik v. Monarch Printing Corp.*, 150 Ill. App. 3d 248, 501 N.E.2d 1312, 1320, 103 Ill. Dec. 774 (Ill. App. Ct. 1986). The reason that the damages inquiry is difficult is because [*953] evidence spoliation tips the balance in a lawsuit; it does not create damages amenable to monetary compensation.

Our refusal to recognize spoliation as an independent tort is buttressed by an analogous line of cases refusing to recognize a separate cause of action for perjury or embracery. n4 Like evidence spoliation, civil perjury and civil embracery involve improper conduct by a party or a witness within the context of an underlying lawsuit. A number of courts considering the issue have refused to allow the wronged party to bring a separate cause of action for either perjury or embracery. *See, e.g., Cooper v. Parker-Hughey*, 894 P.2d 1096, 1100 n.3 (Okla. 1995) (listing a number of jurisdictions that refuse [**8] to recognize a separate civil cause of action for perjury); *OMI Holdings*,

Inc. v. Howell, 260 Kan. 305, 918 P.2d 1274, 1296 (Kan. 1996) (embracery); *Trudell v. Heilman*, 158 Cal. App. 3d 251, 204 Cal. Rptr. 551, 553 (1984) (embracery disallowed unless plaintiff has no other means of redress); *Hoston v. Silbert*, 514 F. Supp. 1239, 1241 (D.D.C. 1981) (embracery), *rev'd on other grounds*, 220 U.S. App. D.C. 361, 681 F.2d 876 (D.C. Cir. 1982). These decisions rely on public policy concerns such as ensuring the finality of judgments, avoiding duplicative litigation, and recognizing the difficulty in calculating damages. *Kessler v. Townsley*, 132 Fla. 744, 182 So. 232, 232 (Fla. 1938) (res judicata); *OMI*, 918 P.2d at 1290, 1293 (duplicative litigation and speculative damages). Similarly, recognizing a cause of action for evidence spoliation would create an impermissible layering of liability and would allow a plaintiff to collaterally attack an unfavorable judgment with a different factfinder at a later time, in direct opposition to the sound policy of ensuring the finality of judgments.

n4 Embracery is "the crime of attempting to influence a jury corruptly to one side or the other." BLACK'S LAW DICTIONARY 522 (6th ed. 1990).

[**9]

We share Ortega's concern that, when spoliation occurs, there must be adequate measures to ensure that it does not improperly impair a litigant's rights, but we disagree that the creation of an independent tort is warranted. It is simpler, more practical, and more logical to rectify any improper conduct within the context of the lawsuit in which it is relevant. Indeed, evolving remedies, sanctions and procedures for evidence spoliation are available under Texas jurisprudence. Trial judges have broad discretion to take measures ranging from a jury instruction on the spoliation presumption to, in the most egregious case, death penalty sanctions. *See, e.g., Watson v. Brazos Elec.*

Power Coop., Inc., 918 S.W.2d 639, 643 (Tex. App. -- Waco 1996, writ denied) (holding that trial court erred when it failed to give a spoliation instruction); *Ramirez v. Otis Elevator Co.*, 837 S.W.2d 405, 412 (Tex. App. -- Dallas 1992, writ denied) (noting that a trial court possesses wide discretion in awarding discovery sanctions); *see also* TEX. R. CIV. P. 215(b). As with any discovery abuse or evidentiary issue, there is no one remedy that is appropriate for every incidence of spoliation; the [**10] trial court must respond appropriately based upon the particular facts of each individual case.

Ortega also argues that the failure to maintain Linda's medical records violated a statutory duty to maintain such records as required by section 241.103(b) of the Texas Health and Safety Code. Assuming without deciding that such a duty exists and that there was a breach of that duty, it does not necessarily follow that an independent cause of action arises. Nor does a cause of action necessarily arise from a party's obligation to comply with the rules of discovery. As we indicated above, obligations not to destroy evidence arise in the context of particular lawsuits; consequently, spoliation is best remedied within the lawsuit itself, not as a separate tort.

* * * *

We reverse the court of appeals' judgment and render judgment that Ortega take nothing.

Craig T. Enoch

Justice

Opinion delivered: June 5, 1998

CONCURBY: James A. Baker

CONCUR: JUSTICE BAKER, concurring.

The issue in this case is whether Texas recognizes a cause of action for evidence spoliation. The Court holds today that Texas does not. I agree with the Court's conclusion that a separate cause of action [**11] is not warranted. However, I write separately to [*954] consider Ortega's claim that the existing remedies for evidence spoliation are inadequate to protect litigants faced with evidence destruction. Available remedies within the context of litigation can be effective methods for remedying prejudice resulting from evidence spoliation. However, Texas courts have been hesitant to apply remedies for spoliation. Evidence spoliation is a serious problem that can have a devastating effect on the administration of justice. Accordingly, I believe it appropriate to review what remedies are available to Texas trial courts to protect nonspoliating litigants and when the remedies should be applied.

I. ORTEGA'S CONTENTIONS

Ortega argues that a cause of action for evidence spoliation is necessary to protect against evidence destruction because existing remedies are inadequate. Initially, Ortega asserts that Texas's remedies against spoliation only protect against intentional destruction. Thus, he claims that unless there is evidence of intent, a party will be left without a remedy.

Ortega also claims that courts have failed to use the wide variety of remedies that are available in other states. [**12] He contends that the spoliation presumption is the only remedy Texas courts have applied and that it is simply insufficient. Moreover, he asserts that courts are unclear on the presumption's effect, and in cases such as this one, courts may not allow plaintiffs to survive summary judgment and reap the benefits of the spoliation presumption.

Lastly, Ortega asserts that Texas has no method to remedy prelitigation spoliation. He states that in many instances, courts refrain

from sanctioning parties for prelitigation conduct because our rules of civil procedure only allow trial courts to sanction parties for discovery abuse during pending litigation. *See* TEX. R. CIV. P. 215.

II. RESPONSE TO ORTEGA'S CONTENTIONS

A. WHEN TO REMEDY SPOILIATION OF EVIDENCE

Remedies for the spoliation of evidence serve three purposes. First, they punish the spoliator for destroying relevant evidence. Second, they deter future spoliators. *See Nation-Wide Check Corp. v. Forest Hills Distributions*, 692 F.2d 214, 218 (1st Cir. 1982). And third, perhaps most importantly, they serve an evidentiary function. *See Sacramona v. Bridgestone/Firestone, Inc.*, 106 F.3d 444, 446 (1st Cir. 1997). [**13] When evidence spoliation prejudices nonspoliating parties, courts can levy a sanction or submit a presumption that levels the evidentiary playing field and compensates the nonspoliating party. *See Turner v. Hudson Transit Lines*, 142 F.R.D. 68, 75 (S.D.N.Y. 1991); *Bachmeier v. Wallwork Truck Ctrs.*, 507 N.W.2d 527, 533 (N.D. 1993).

When a party believes that another party has improperly destroyed evidence, it may either move for sanctions or request a spoliation presumption instruction. At this point, the trial court should determine whether sanctions or a presumption are justified. This is a question of law for the trial court. *See Miller v. Stout*, 706 S.W.2d 785, 787-88 (Tex. App.--San Antonio 1986, no writ) ("Only ultimate issues of fact are to be submitted to a jury Such proceedings as those involving determination of motions for sanctions because of failure to respond to discovery requests . . . often involve resolution [by a judge] of questions of fact."); *Massie v. Hutcheson*, 270 S.W. 544, 545 (Tex. 1925)(stating that

determining whether a party intentionally destroyed evidence is a preliminary question for the court to decide); *see also Battocchi* [**14] *v. Washington Hosp. Ctr.*, 581 A.2d 759, 767 (D.C. Ct. App. 1990) (holding that a trial court has the discretion to submit a jury instruction after it reviews the spoliator's degree of fault, the spoliated evidence's importance, and the availability of other proof); *Chapman v. Auto Owners Ins. Co.*, 220 Ga. App. 539, 469 S.E.2d 783 (Ga. Ct. App. 1996) (stating that in deciding whether to exclude testimony, the trial court should determine the spoliator's culpability and the prejudice caused by the destruction of evidence). This legal inquiry involves considering: (1) whether there was a duty to preserve evidence; (2) whether the [*955] alleged spoliator either negligently or intentionally spoliated evidence; and (3) whether the spoliation prejudiced the nonspoliator's ability to present its case or defense.

1. Duty

Upon a spoliation complaint, the threshold question should be whether the alleged spoliator was under any obligation to preserve evidence. A party may have a statutory, regulatory, or ethical duty to preserve evidence. *See DeLaughter v. Lawrence County Hosp.*, 601 So. 2d 818, 821-22 (Miss. 1992) (finding a duty to preserve evidence under a statute that required [**15] hospitals to maintain certain medical records). For example, the Texas Health and Safety Code requires hospitals to maintain patient's medical records for a certain period of time. *See* TEX. HEALTH & SAFETY CODE § 241.103. The statute clearly creates a duty to maintain records. *Cf. DeLaughter*, 601 So. 2d at 821-22 (construing MISS. CODE ANN. § § 41-9-63, -69). Similarly, federal regulations require certain hospitals to retain medical records for at least five years. *See* 42 C.F.R. § 482.24 (1998). These regulations can also create a duty to maintain records. *See also Hicks v. Gates*

Rubber Co., 833 F.2d 1406, 1418-19 (10th Cir. 1987) (holding that 29 C.F.R. § 1602.14 creates a duty to preserve evidence); *EEOC v. Jacksonville Shipyards, Inc.*, 690 F. Supp. 995, 998 (M.D. Fla. 1988) (same). Finally, section 7.05 of the *Code of Medical Ethics* provides an example of a potential ethical duty to retain certain documents. Section 7.05 states that physicians have "an obligation to retain patient records which may reasonably be of value to a patient In all cases, medical records should be kept for at least as long as the length of time of the statute of limitations [**16] for medical malpractice claims." *See* COUNCIL ON ETHICS & JUDICIAL AFFAIRS, AMERICAN MED. ASS'N, CODE OF MEDICAL ETHICS, § 7.05 (1994). In certain circumstances, a court could find that this ethical duty rises to the level of a legal duty to preserve records. Thus, if a party violates a statutory, regulatory, or ethical duty to preserve evidence, the party may be subject to either sanctions or a spoliation presumption. Without potential consequences, these duties are rendered meaningless.

Other jurisdictions have held that there is also a common law duty to preserve evidence. These courts have held that a party must preserve documents, tangible items, and information that are "relevant to litigation, or potential litigation, or are reasonably calculated to lead to the discovery of admissible evidence" *Wm. T. Thompson Co. v. General Nutrition Corp.*, 593 F. Supp. 1443, 1455 (C.D. Cal. 1984); *see also Dillon v. Nissan Motor Co.*, 986 F.2d 263, 267 (8th Cir. 1993); *Unigard Sec. Ins. v. Lakewood Eng'g & Mfg. Corp.*, 982 F.2d 363, 365, 367-69 (9th Cir. 1992); *Welsh v. United States*, 844 F.2d 1239, 1241-42, 1246-48 (6th Cir. 1988); *Turner*, 142 F.R.D. at 72; [**17] *Capellupo v. FMC Corp.*, 126 F.R.D. 545, 551 (D. Minn. 1989); *Fire Ins. Exch. v. Zenith Radio Corp.*, 103 Nev. 648, 747 P.2d 911, 913-14 (Nev. 1987). Notably, there are two aspects of this duty to preserve

evidence: (1) when the duty arises and (2) what documents or items a party must preserve.

The first part of the duty inquiry involves determining when the duty to preserve evidence arises. While there is no question that a party's duty to preserve relevant evidence arises during pending litigation, courts have been less clear about whether a duty exists prelitigation. See TEX. R. CIV. P. 215. A number of courts recognize the need for a duty to preserve evidence prelitigation. See, e.g., *Blinzler v. Marriott Int'l, Inc.*, 81 F.3d 1148, 1158-59 (1st Cir. 1996); *Dillon*, 986 F.2d at 267; *Welsh*, 844 F.2d at 1241-42, 1246-48; *Capellupo*, 126 F.R.D. at 551; *Fire Ins. Exch.*, 747 P.2d at 914. I agree with these courts. A party should not be able to subvert the discovery process and the fair administration of justice simply by destroying evidence before a claim is actually filed. See *Fire Ins. Exch.*, 747 P.2d at 913.

The next question then is at what [*18] point during prelitigation does the duty arise. Courts that have imposed a prelitigation duty to preserve evidence have held that once a party is on "notice" of potential litigation a duty to preserve evidence exists. See *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1992); *McGuire v. Acufex Microsurgical, Inc.*, 175 F.R.D. 149, 153 (D. Mass. 1997); *ABC Home Health Servs., Inc. v. IBM Corp.*, 158 F.R.D. 180, 182 (S.D. Ga. 1994); *Turner*, 142 F.R.D. at 72-73; *Computer Assocs. Int'l, Inc. v. American Fundware*, 133 F.R.D. 166, 169 (D. Colo. 1990); *Capellupo*, 126 F.R.D. at 551; *Wm. T. Thompson Co.*, 593 F. Supp. at 1455; *Fire Ins. Exch.*, 747 P.2d at 914; *Burns v. Cannondale Bicycle Co.*, 876 P.2d 415, 419 (Utah Ct. App. 1994). Most courts have not elaborated on the concept of notice. But, a few courts have determined that a party is on notice of potential litigation when the litigation is reasonably foreseeable. See *Blinzler*, 81 F.3d at 1159 (stating that the defendant was aware of circumstances that were likely to give rise to

future litigation and that a reasonable fact finder could conclude that the defendant was on notice that evidence was relevant [*19] to likely litigation); *Rice v. United States*, 917 F. Supp. 17, 20 (D.D.C. 1996) (finding that the defendant was on notice of potential litigation because it was aware of circumstances that were likely to give rise to future litigation); *White v. Office of the Public Defender*, 170 F.R.D. 138, 148 (D. Md. 1997) ("Parties have been deemed to know that documents are relevant to litigation when it is reasonably foreseeable that a lawsuit will ensue . . ."); *Shaffer v. RWP Group, Inc.*, 169 F.R.D. 19, 24 (E.D.N.Y. 1996) (stating that sanctions are appropriate when the defendant "knew or should have known that the destroyed evidence was relevant to pending, imminent, or reasonably foreseeable litigation"); see also JAMIE S. GORELICK ET AL, DESTRUCTION OF EVIDENCE § § 1.22, 3.1 (1989); Donald H. Flanary, Jr. & Bruce M. Flowers, *Spoilation of Evidence: Let's Have a Rule in Response*, 60 DEF. COUNS. J. 553, 555-56 (1993); Steffen Nolte, *The Spoilation Tort: An Approach to Underlying Principles*, 26 ST. MARY'S L.J. 351, 371-72 (1995).

This Court has dealt with a similar issue in *National Tank Co. v. Brotherton*, 851 S.W.2d 193 (Tex. 1993). In *National Tank* the [*20] Court defined "anticipation of litigation" in the context of whether a party should be allowed to assert an investigative privilege. The Court focused on how to determine when a party reasonably foresees or anticipates litigation. Importantly, we did not require actual notice of the potential litigation for a party to anticipate litigation. Instead, we recognized that "common sense dictates that a party may reasonably anticipate suit being filed . . . before the plaintiff manifests an intent to sue." *National Tank*, 851 S.W.2d at 204 (emphasis added). Consequently, the Court held that to determine when a party reasonably anticipates or foresees litigation, trial courts must look at the totality

of the circumstances and decide whether a reasonable person in the party's position would have anticipated litigation and whether the party actually did anticipate litigation. See *National Tank*, 851 S.W.2d at 207.

The *National Tank* test is workable in the spoliation context; yet, it must be modified somewhat. When a party destroys evidence, the party is not seeking the protection of a privilege as in *National Tank*. In *National Tank* the party asserting the investigative [**21] privilege had the burden to prove that it subjectively anticipated litigation and that its belief was reasonable. On the other hand, in spoliation cases, the nonspoliating party bears the burden to prove that the spoliating party anticipated litigation. Because a spoliating party may be subject to the sting of a sanction, in most instances it will be impossible for nonspoliating party to show that the spoliating party subjectively anticipated litigation. It is highly unlikely that a spoliating party will readily admit that it subjectively anticipated litigation. Accordingly, in spoliation cases a party should be found to be on notice of potential litigation when, after viewing the totality of the circumstances, the party either actually anticipated litigation *or* a reasonable person in the party's position would have anticipated litigation. While in certain circumstances a party may not reasonably foresee litigation until the party is actually notified of the opposing party's intent to file suit, there may be times when certain independent facts will put a party on notice of the potential for litigation. Whether a party actually did or reasonably should have anticipated litigation [**22] is simply a fact issue for the trial court to decide by viewing the totality of the circumstances.

Once a trial court determines when a duty to preserve evidence arises, the court should [*957] then look to the second part of the duty inquiry--what evidence a party must preserve. A party that is on notice of either potential or pending litigation has an obligation to preserve

evidence that is relevant to the litigation. "While a litigant is under no duty to keep or retain every document in its possession . . . it is under a duty to preserve what it knows, or reasonably should know is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery, [or] is the subject of a pending discovery sanction." *Wm. T. Thompson*, 593 F. Supp. at 1455; see also *Dillon*, 986 F.2d at 267; *Capellupo*, 126 F.R.D. at 551; *Fire Ins. Exch.*, 747 P.2d at 914. Again, the focus is on whether a party is on notice that a particular piece of evidence is relevant. See *Akiona v. United States*, 938 F.2d 158, 161 (9th Cir. 1991).

2. Breach

If the trial court finds that a party has a duty to preserve [**23] evidence, it should then decide whether the party breached its duty. Parties need not take extraordinary measures to preserve evidence; however, a party should exercise reasonable care in preserving evidence. See *Hirsch v. General Motors Corp.*, 266 N.J. Super. 222, 628 A.2d 1108, 1122 (N.J. Super. Ct. Law Div. 1993) .

Some courts have allowed sanctions or the presumption only for intentional or bad faith spoliation. See *Bashir v. Amtrak*, 119 F.3d 929, 931 (11th Cir. 1997); *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1407 (10th Cir. 1997); *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995); *Spesco, Inc. v. General Elec. Co.*, 719 F.2d 233, 239 (7th Cir. 1983); *Gumbs v. International Harvester, Inc.*, 718 F.2d 88, 96 (3d Cir. 1983); *Vick v. Texas Employment Comm'n*, 514 F.2d 734, 737 (5th Cir. 1975); *State v. Langlet*, 283 N.W.2d 330, 333 (Iowa 1979); *Brown v. Hamid*, 856 S.W.2d 51, 56-57 (Mo. 1993). However, other courts have held parties accountable for either intentional or negligent spoliation. See *Langley v. Union Elec. Co.*, 107 F.3d 510, 514 (7th Cir. 1997); *Sacramona*, 106 F.3d at 447; *Dillon*, 986 F.2d

at 267; *Unigard Sec. Ins.*, [**24] 982 F.2d at 368 n.2; *Pressey v. Patterson*, 898 F.2d 1018, 1023-24 (5th Cir. 1990); *Welsh*, 844 F.2d at 1246-47, 1249; *Turner*, 142 F.R.D. at 75-76; *Sweet v. Sisters of Providence*, 895 P.2d 484, 491 (Alaska 1995); *Public Health Trust v. Valcin*, 507 So. 2d 596, 599 (Fla. 1987); *Hamann v. Ridge Tool Co.*, 213 Mich. App. 252, 539 N.W.2d 753, 756-57 (Mich. Ct. App. 1995); *DeLaughter*, 601 So. 2d at 822; *Bachmeier*, 507 N.W.2d at 533.

Because parties have a duty to reasonably preserve evidence, it is only logical that they should be held accountable for either negligent or intentional spoliation. While allowing a court to hold a party accountable for negligent as well as intentional spoliation may appear inconsistent with the punitive purpose of remedying spoliation, it is clearly consistent with the evidentiary rationale supporting it because the remedies ameliorate the prejudicial effects resulting from the unavailability of evidence. *See Turner*, 142 F.R.D. at 75-76. In essence, it places the burden of the prejudicial effects upon the culpable spoliating party rather than the innocent nonspoliating party. *See Welsh*, 844 F.2d at 1249; *Turner*, 142 [**25] F.R.D. at 75. n1

n1 Furthermore, by punishing negligent conduct, courts will deter future spoliation. The theory of deterrence is not merely limited to deterring intentional conduct. It applies equally to negligent conduct. *See Turner*, 142 F.R.D. at 75 n.3.

A spoliator can defend against an assertion of negligent or intentional destruction by providing other explanations for the destruction. For example, if the destruction of the evidence was beyond the spoliator's control or done in the ordinary course of business, the court may find that the spoliator did not violate

a duty to preserve evidence. Importantly though, when a party's duty to preserve evidence arises before the destruction or when a policy is at odds with a duty to maintain records, the policy will not excuse the obligation to preserve evidence. *See generally Turner*, 142 F.R.D. at 73.

3. Prejudice to Nonspoliator

Though a party may have improperly spoliated evidence, the nonspoliating party may not be entitled to a remedy. One [**26] of the key reasons for allowing remedies for spoliation [*958] is that the spoliation has prejudiced the nonspoliating party. *See Sacramona*, 106 F.3d at 446; *Dillon*, 986 F.2d at 267; *Unigard Sec. Ins.*, 982 F.2d at 368; *Headley v. Chrysler Motor Corp.*, 141 F.R.D. 362, 365 (D. Mass. 1991); *Turner*, 142 F.R.D. at 76-77; *Valcin*, 507 So. 2d at 599. A party is entitled to a remedy only when evidence spoliation hinders its ability to present its case or defense. *See, e.g., Dillon*, 986 F.2d at 267-68; *Sweet*, 895 P.2d at 491.

Courts should look to a variety of factors in deciding whether destroying evidence has prejudiced a party. Most importantly, courts should consider the destroyed evidence's relevancy. *See Flanary & Flowers, supra*, at 555. The more relevant the destroyed evidence, the more harm the nonspoliating party will suffer from its destruction. In many circumstances, however, courts may have difficulty in determining relevancy because the evidence is no longer available for the court to review. Accordingly, courts should give deference to the nonspoliating party's assertions about relevancy. That the evidence was destroyed may be some evidence of [**27] its relevancy. *See Welsh*, 844 F.2d at 1246 (quoting *Nation-Wide Check Corp.*, 692 F.2d at 218). Generally, when a party has destroyed evidence intentionally or in bad faith, the evidence was relevant and harmful to the spoliating party's case. Absent evidence to the

contrary, the trial court could find relevancy based solely on this fact. *See Nation-Wide Check Corp.*, 692 F.2d at 217; *see also* GORELICK ET AL., *supra*, at § 2.4A (Supp. 1998). However, if the spoliating party negligently destroyed evidence, then the nonspoliating party should offer some proof about what the destroyed evidence would show. *See Turner*, 142 F.R.D. at 77. For example, if medical records are negligently destroyed, the nonspoliating party could show what a typical medical record would contain. *Cf. Sweet*, 895 P.2d at 491. Then a court could decide whether the evidence destroyed would have been helpful to the nonspoliating party's case or defense. Importantly, the spoliating party is still free to attempt to show that the negligently destroyed evidence was irrelevant and that no prejudice resulted from its destruction. *See Brewer v. Dowling*, 862 S.W.2d 156 (Tex. App.--Fort Worth [**28] 1993, writ denied).

Additionally, courts should consider whether the destroyed evidence was cumulative of other competent evidence that a party can use in place of the destroyed evidence, and whether the destroyed evidence supports key issues in the case. *See Battochi*, 581 A.2d at 767; *see generally Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76, 79 (3d Cir. 1994) (noting that in design defect cases, a plaintiff may only be minimally prejudiced by the destruction of the actual product); *Dillon*, 986 F.2d at 267-68 (considering plaintiffs' claims that the nonspoliating party was not prejudiced because there was ample evidence available for the defendant to use in defending against the design defect claim). Obviously, the more evidence there is and the less important the issue involved is, the less prejudice the nonspoliating party will suffer.

B. SPOILIATION SANCTIONS

1. Authority to Sanction

Trial courts have broad power to police litigants and protect against evidence spoliation. Our rules of civil procedure allow trial courts to sanction parties whenever a party abuses the discovery process. *See* Tex. R. Civ. P. 215(3). Thus, if a party [**29] destroys relevant evidence during the discovery process, the trial court has the authority to sanction the spoliating party.

In instances where Rule 215 may not apply--for example, prelitigation destruction of evidence--a trial court has inherent power to remedy spoliation. In *Eichelberger v. Eichelberger*, 582 S.W.2d 395 (Tex. 1979), this Court held that trial courts have inherent judicial power to take action that will "aid in the exercise of its jurisdiction, in the administration of justice, and in the preservation of its independence and integrity." In *Kutch v. Del Mar College*, the court of appeals refined this concept by recognizing that the core functions of the judiciary include "hearing evidence, deciding issues of fact raised by the pleadings, [and] deciding questions of law" *Kutch v. Del Mar College*, 831 S.W.2d 506, 510 (Tex. App.--Corpus Christi 1992, no writ); *see also Greiner v. Jameson*, [*959] 865 S.W.2d 493, 498-99 (Tex. App.--Dallas 1993, writ denied). The destruction of potentially relevant evidence clearly inhibits courts' ability to hear evidence and accurately determine the facts. Thus, without the inherent power to protect against evidence [**30] destruction, courts would be prevented from hearing relevant evidence and would be unable to ensure the proper administration of justice. n2

n2 Most other jurisdictions also recognize courts' inherent power to sanction parties for the destruction of evidence. *See, e.g., Sacramona*, 106 F.3d at 446 (recognizing that courts have the inherent authority to sanction a party for spoliating evidence to prevent prejudice

to the nonspoliating party); *Dillon*, 986 F.2d at 267 (holding that courts have the inherent power to sanction parties for destroying evidence prelitigation that the party knew or should have known was relevant to imminent litigation); *Unigard Sec. Ins.*, 982 F.2d at 368 & n.2 (noting that courts have the inherent power to sanction parties who are at fault in destroying evidence prelitigation).

2. Sanctions For Spoliation of Evidence

Once a court finds that evidence has been improperly spoliated and that the nonspoliating party was prejudiced by the spoliation, the court should decide [**31] what sanction to apply. Trial courts have broad discretionⁿ³ in choosing the appropriate sanction. See *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991). There are a wide variety available. See Scott S. Katz & Anne Marie Muscaro, *Spoilage of Evidence--Crimes, Sanctions, Inferences, and Torts*, 29 TORT & INS. L.J. 51 (1993); Kelly P. Cambre, Comment, *Spoliation of Evidence: Proposed Remedies for the Destruction of Evidence in Louisiana Civil Litigation*, 39 LOY. L. REV. 601 (1993). Among other courts that have considered this issue, the primary sanctions are dismissal or default judgment against the spoliator and exclusion of evidence or testimony.

ⁿ³ Some courts have held that when a trial court determines that a party destroyed evidence in bad faith, it is an abuse of discretion not to either sanction the party or submit a spoliation instruction. See *Alexander v. National Farmers Org.*, 687 F.2d 1173, 1205-06 (8th Cir. 1989); *Battochi*, 581 A.2d at 767.

Because [**32] of the varying degrees of sanctions available and because each case presents a unique set of circumstances, courts should apply sanctions on a case by case basis. See *Schmid*, 13 F.3d at 81; *Welsh*, 844 F.2d at 1247. Important factors for the trial court to weigh include the degree of the spoliator's culpability and the prejudice the nonspoliator suffers. See, e.g., *Schmid*, 13 F.3d at 79; *Welsh*, 844 F.2d at 1246; see also *San Antonio Press, Inc. v. Custom Bilt Mach.*, 852 S.W.2d 64, 67 (Tex. App.--San Antonio 1993, no writ). As with any other type of sanction, the trial court's sanction must be directed against the wrongdoer and properly tailored to remedy the prejudice. See *TransAmerican*, 811 S.W.2d at 917.

The most severe sanction for evidence spoliation is to dismiss the action or render a default judgment. See *TransAmerican*, 811 S.W.2d at 917-18; *Ramirez v. Otis Elevator Co.*, 837 S.W.2d 405, 410-11 (Tex. App.--Dallas 1992, writ denied). In considering this sanction, courts must be sensitive to certain constitutional due process considerations and avoid depriving a party of the right to have its case heard on the merits. See *Societe Internationale [**33] Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 209-10, 2 L. Ed. 2d 1255, 78 S. Ct. 1087 (1958); *TransAmerican*, 811 S.W.2d at 917-18. However, courts have found that a dismissal or default judgment is justified when a party destroys evidence with the intent to subvert discovery. See *Computer Assocs. Int'l, Inc.*, 133 F.R.D. at 169; *Wm. T. Thompson Co.*, 593 F. Supp. at 1456. Thus, courts can dismiss an action or render a default judgment when the spoliator's conduct was egregious, the prejudice to the nonspoliating party was great, and imposing a lesser sanction would be ineffective to cure the prejudice. See *TransAmerican*, 811 S.W.2d at 917-18; *Ramirez*, 837 S.W.2d at 410-11; see also *Remington Arms Co. v. Caldwell*, 850 S.W.2d 167, 171 (Tex. 1993);

see also *National Hockey League v. Metro Hockey Club, Inc.*, 427 U.S. 639, 640, 49 L. Ed. 2d 747, 96 S. Ct. 2778 (1976); *Pressey*, 898 F.2d at 1023-24; *Wm. T. Thompson Co.*, 593 F. Supp. at 1456; *Capellupo*, 126 F.R.D. at 552; *Hirsch*, 628 A.2d at 1127.

[*960] Another effective sanction is excluding evidence or testimony. Courts generally use this sanction when the spoliating [*34] party is attempting to admit testimony or evidence adduced from the destroyed evidence. See, e.g., *Sacramona.*, 106 F.3d at 444; *Dillon*, 986 F.2d at 263; *Unigard Sec. Ins. Co.*, 982 F.2d at 363; *Fire Ins. Exch.*, 747 P.2d at 911; *Chapman*, 469 S.E.2d at 783; *Hamann*, 539 N.W.2d at 753. In these situations, the nonspoliating party is at a double disadvantage. Not only is the nonspoliating party precluded from using the evidence, but evidence adduced from the destroyed evidence is being used against that party. Understandably, it will be extremely difficult for the nonspoliating party to defend against the spoliating party's allegations without being able to inspect the evidence. Thus, in some instances, it is proper for courts to exclude the spoliating party's evidence.

C. SPOILIATION PRESUMPTION

In addition to sanctions, Texas courts have broad discretion in instructing juries. See TEX. R. CIV. P. 277; *Mobil Chem. Co. v. Bell*, 517 S.W.2d 245, 256 (Tex. 1975). Thus, when a party improperly destroys evidence, trial courts may submit a spoliation presumption instruction. See, e.g., *Watson v. Brazos Elec. Power Coop., Inc.*, 918 S.W.2d 639 (Tex. [*35] App.--Waco 1996, writ denied). n4 Deciding whether to submit this instruction is a legal determination. As stated earlier, the trial court should first find that there was a duty to preserve evidence, the spoliating party breached that duty, and the destruction prejudiced the nonspoliating party.

n4 Notably, the court of appeals in *Watson* held that the trial court erred in refusing to submit a spoliation instruction when the nonspoliating party had properly raised the issue. See *Watson*, 918 S.W.2d at 643.

Depending on the severity of prejudice resulting from the particular evidence destroyed, the trial court can submit one of two types of presumptions. See *Welsh*, 844 F.2d at 1239. The first and more severe presumption is a rebuttable presumption. This is primarily used when the nonspoliating party cannot prove its prima facie case without the destroyed evidence. See *Welsh*, 844 F.2d at 1248; *Sweet*, 895 P.2d at 491; *Valcin*, 507 So. 2d at 599. The trial court should begin by instructing the [*36] jury that the spoliating party has either negligently or intentionally destroyed evidence and, therefore, the jury should presume that the destroyed evidence was unfavorable to the spoliating party on the particular fact or issue the destroyed evidence might have supported. Next, the court should instruct the jury that the spoliating party bears the burden to disprove the presumed fact or issue. See *Welsh*, 844 F.2d at 1247; *Sweet*, 895 P.2d at 491-92; *Valcin*, 507 So. 2d at 600; *Lane v. Montgomery Elevator Co.*, 225 Ga. App. 523, 484 S.E.2d 249, 251 (Ga. Ct. App. 1997). This means that when the spoliating party offers evidence rebutting the presumed fact or issue, the presumption does not automatically disappear. It is not overcome until the fact finder believes that the presumed fact has been overcome by whatever degree of persuasion the substantive law of the case requires. See *Sweet*, 895 P.2d at 492 (quoting *Valcin*, 507 So. 2d at 600-01).

In shifting the burden of proof to the spoliating party, trial courts are choosing a middle ground that neither "condones the . . . spoliation of evidence at the [nonspoliating party's] expense nor imposes an unduly [*37] harsh and absolute liability" upon the spoliating party.

Welsh, 844 F.2d at 1249. Moreover, by shifting the burden of proof, the presumption will support the nonspoliating party's assertions and is some evidence of the particular issue or issues that the destroyed evidence might have supported. The rebuttable presumption will enable the nonspoliating party to survive summary judgment, directed verdict, judgment notwithstanding the verdict, and factual and legal sufficiency review on appeal. See *Lane*, 484 S.E.2d at 251.

The second type of presumption is less severe. It is merely an adverse presumption that the evidence would have been unfavorable to the spoliating party. See *H.E. Butt Grocery Co. v. Bruner*, 530 S.W.2d 340, 344 (Tex. Civ. App.--Waco 1975, writ dismissed by agreement); see also, *Vodusek*, 71 F.3d at 155; *DeLaughter*, 601 So. 2d at 821-22; *Hirsch*, 628 A.2d at 1126. The presumption itself has [*961] probative value and may be sufficient to support the nonspoliating party's assertions. See *Bruner*, 530 S.W.2d at 344. However, it does not relieve the nonspoliating party of the burden to prove each element of its case. See *DeLaughter*, 601 So. 2d at 822. Therefore, [**38] it is simply another factor used by the factfinder in weighing the evidence.

III. CONCLUSION

Without creating a new cause of action, there are still a variety of remedies available to punish spoliators, deter future spoliators, and protect nonspoliators prejudiced by evidence destruction. Thus, while the Court declines to recognize a cause of action, Ortega has other available remedies. As I have explained, Ortega can move for sanctions or request a spoliation presumption in the underlying malpractice action. If he shows that Dr. Trevino had a duty to preserve evidence, Dr. Trevino violated that duty, and the destruction prejudiced Ortega's ability to bring suit, the trial court can remedy the spoliation.

James A. Baker,

Justice

OPINION DELIVERED: June 5, 1998

APPENDIX E

Aaron K. Akiona; Adam Baker; Bonnie Baker; Edward W. Moore, III, Plaintiffs-Appellees, v. United States of America; Secretary of Defense, Defendants-Appellants. Aaron K. Akiona, Plaintiff-Appellant, v. United States of America; Secretary of Defense; and John Does 1-25, Defendants-Appellees. Adam Baker; Bonnie Baker; Edward W. Moore, III, Plaintiffs-Appellants, v. United States of America; Secretary of Defense; John Does 1-10; Doe Corporations; Partnerships and/or Other Entities 1-10, Defendants-Appellees

Nos. 90-15489, 90-15491, 90-15690

**UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT**

**938 F.2d 158; 1991 U.S. App. LEXIS 14117; 91 Cal. Daily Op.
Service 5294; 91 Daily Journal DAR 8228**

**June 10, 1991, Argued and Submitted, San Francisco, California
July 9, 1991, Filed**

PRIOR HISTORY: [**1] Appeal from the United States District Court for the District of Hawaii. D.C. No. CV-87-0894-SPK. D.C. No. CV-87-0882-SPK. D.C. No. CV-87-0894-SPK. Samuel P. King, District Judge, Presiding.

DISPOSITION:

Reversed and Remanded.

LexisNexis(R) Headnotes

COUNSEL:

Nancy E. Friedman and Paul F. Figley, United States Department of Justice, Washington, District of Columbia, for the Defendants-Appellants-Cross-Appellees.

Eric A. Seitz, Honolulu, Hawaii, for the Plaintiffs-Appellees-Cross-Appellants.

JUDGES:

H. Chambers, Melvin Brunetti and Pamela Ann Rymer, Circuit Judges. Opinion by Judge Rymer.

OPINIONBY:

RYMER

OPINION:

[*159] RYMER, Circuit Judge.

The plaintiffs brought this action against the United States government under the Federal Tort Claims Act for injuries suffered when an individual threw a hand grenade in a restaurant parking lot. In a bench trial on stipulated facts, the district court found in favor of the plaintiffs and awarded general and special damages. The government appeals the finding of liability, and the plaintiffs cross-appeal on the amount of

damages. We reverse the judgment as to liability.

I

On June 1, 1985, Dennis Keliinui Kaululaau threw a hand grenade in the parking lot of a restaurant in Honolulu. The grenade exploded and injured plaintiffs Aaron Akiona, [**2] Adam Baker, and Edward Moore, who were nearby. Kaululaau was convicted of attempted murder and is currently in prison.

Investigation showed that the grenade had been part of one of two lots of grenades manufactured for the United States government. One lot, consisting of 30,000 grenades, was shipped to Iowa. The other lot was shipped to Japan (700 grenades), Germany (12,557 grenades), and Hawaii (11,450 grenades). These shipments took place between 1967 and 1969.

The government has no record of what happened to the grenades after these shipments. It has a policy of destroying records pertaining to grenades two years after the grenades are disposed of. Kaululaau maintains his innocence, so he has provided no information about how he got the grenade. The parties stipulated, however, that he had the grenade unlawfully and without the knowledge or consent of the government.

Akiona, Baker, and Moore, along with Baker's wife, Bonnie, filed suit under the Federal Tort Claims Act against the United States, alleging that the government was negligent in letting the grenade fall into Kaululaau's hands. The district court held a nonjury trial based on stipulated facts and stipulated testimony. [**3] It concluded that the government owed a duty to the plaintiffs to safeguard its grenades, and it found, despite any direct evidence of negligence, that the government had been negligent in failing to keep the grenade out of unauthorized hands and awarded damages to the plaintiffs. *Akiona v. United States*, 732 F. Supp. 1064 (D. Haw.

1990). The district court reached its decision by applying *res ipsa loquitur* to infer that the injuries would not have happened if the government had not been negligent in maintaining the grenade and by shifting the burden of proof to the government based on its destruction of records.

The government appeals, challenging the finding of liability, and the plaintiffs cross-appeal, challenging the sufficiency of the damages awarded.

II

The United States is liable under the Federal Tort Claims Act "in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. § 2674, and "in accordance with the law of the place where the act or omission occurred," 28 U.S.C. § 1346(b). Because the plaintiffs' theory seems to be that the government negligently let the grenade fall into Kaululaau's hands in Hawaii, [**4] we apply Hawaii tort law.

The elements of a negligence action are:

[*160] 1. A duty, or obligation, recognized by the law, requiring the [defendant] to conform to a certain standard of conduct, for the protection of others against unreasonable risks[;]

2. A failure on the [defendant's] part to conform to the standard required: a breach of the duty . . . [;]

3. A reasonably close causal connection between the conduct and the resulting injury . . . [and]

4. Actual loss or damage resulting to the interest of another . . .

Knodle v. Waikiki Gateway Hotel, Inc., 69 Haw. 376, 742 P.2d 377, 383 (1987) (quoting W. P. Keeton, *Prosser and Keeton on the Law of Torts* § 30, at 164-65 (5th ed. 1984)).

We see no error in the district court's conclusion that the government owed a duty to the plaintiffs to take precautions to prevent theft and misuse of government grenades. We therefore turn to the question of whether the government breached its duty.

A

The plaintiffs were not able to produce any direct evidence of negligence on the part of the government because it is unknown how Kaululaau got the grenade. Nevertheless, the district court found the government negligent [**5] because it concluded that the doctrine of *res ipsa loquitur* created an inference of negligence.

"The doctrine of *res ipsa loquitur* applies 'whenever a thing that produced an injury is shown to have been under the control and management of the defendant and the occurrence is such as in the ordinary course of events does not happen if due care has been exercised . . .'" *Cozine v. Hawaiian Catamaran, Ltd.*, 49 Haw. 77, 412 P.2d 669, 675 (1966) (quoting *Ciacci v. Woolley*, 33 Haw. 247, 257 (1934) (quoting *Morgan v. Yamada*, 26 Haw. 17, 24 (1921))). If the doctrine applies, it creates a rebuttable presumption of negligence. *Guanzon v. Kalamau*, 48 Haw. 330, 402 P.2d 289, 292 (1965).

In order for *res ipsa loquitur* to apply in this case, the plaintiffs must first prove that the government had exclusive control and management of the grenade at the time of the negligence. *Jenkins v. Whittaker Corp.*, 785 F.2d 720, 730 (9th Cir.) (applying Hawaii law), *cert. denied*, 479 U.S. 918, 107 S. Ct. 324, 93 L. Ed. 2d 296 (1986). [**6] The plaintiffs therefore must show that the government had

exclusive control over the grenade at the time it was allowed to get into unauthorized hands.

The evidence establishes that the grenade was initially in the possession of the government because it was stipulated that the grenade was manufactured for and delivered to the government. However, the plaintiffs have presented no evidence that the grenade stayed in the possession of the government. The government's expert witness testified that, to the contrary, the grenade could have been transferred to another country or used in Vietnam. Indeed, a significant number of grenades in the relevant lots were shipped out of the country. Even if this grenade had gone to Hawaii, almost twenty years passed between the time when it was clear that the government possessed the grenade and the time when the grenade was used to harm the plaintiffs. During that period, it could have been used or transferred to others, removing it from the control of the government without any negligence. With this much uncertainty, it was error to find that the government had exclusive control over the grenade, and the district court therefore erred in applying [**7] *res ipsa loquitur*.

The government also argues that the second prong of the *res ipsa loquitur* test is not satisfied because the occurrence is not of the sort that ordinarily does not happen without someone's negligence. We need not reach that issue because, without a showing of exclusive control, *res ipsa loquitur* does not apply.

B

The district court also facilitated its finding of liability by shifting the burden of proof to the government because of the government's destruction of records [*161] pertaining to the grenade. Generally, a trier of fact may draw an adverse inference from the destruction of evidence relevant to a case. *Welsh v. United States*, 844 F.2d 1239, 1246 (6th Cir. 1988).

The adverse inference is based on two rationales, one evidentiary and one not. The evidentiary rationale is nothing more than the common sense observation that a party who has notice that a document is relevant to litigation and who proceeds to destroy the document is more likely to have been threatened by the document than is a party in the same position who does not destroy the document. . . .

The other rationale for the inference has to do with its prophylactic and [**8] punitive effects. Allowing the trier of fact to draw the inference presumably deters parties from destroying relevant evidence before it can be introduced at trial.

Nation-Wide Check Corp. v. Forest Hills Distribs., Inc., 692 F.2d 214, 218 (1st Cir. 1982).

The evidentiary rationale does not apply here. Nothing in the record indicates that the government destroyed the records pertaining to the grenade in response to this litigation. Thus, its destruction of the records does not suggest that the records would have been threatening to the defense of the case, and it is therefore not relevant in an evidentiary sense.

The deterrence rationale similarly does not apply. A party should only be penalized for destroying documents if it was wrong to do so, and that requires, at a minimum, some notice that the documents are potentially relevant. *See id.* at 218 ("The inference depends, of course, on a showing that the party had notice that the documents were relevant . . ."); *id.* at 219 (indicating that this "minimum link of relevance" is required before deterrence rationale would justify shifting burden of proof); *see also Vick v. Texas Employment*

Comm'n, 514 F.2d 734, 737 (5th Cir. 1975) [**9] (requiring showing of bad faith). Here, the plaintiffs have not shown any bad faith in the destruction of the records, nor even that the government was on notice that the records had potential relevance to litigation. Nothing in the record indicates that the government destroyed the grenade records with the intent of covering up information.

Indeed, the government may have destroyed the records pursuant to its policy of destroying documents regarding grenades two years after their disposition. Unlike *Welsh*, 844 F.2d 1239, in which the destruction of medical evidence clearly violated a hospital policy, the destruction of the records in this case could have been entirely consistent with the government's document retention policies. If the government had disposed of the grenade (for example, by transferring it to another country), it would not suggest any irregularity or unreasonableness to have destroyed the documents because the government would not expect to be held liable for misuse of the grenade after it left its hands. Because the government's destruction of records is neither relevant nor indicative of bad faith, the district court erred in shifting the burden [**10] of proof to the government.

We conclude that the district court erred by applying *res ipsa loquitur* and by shifting the burden of proof to the government, and we therefore reverse the district court's judgment as to liability to the extent that it relied on these principles.

III

The plaintiffs argue in their cross-appeal that the district court's award of general damages was insufficient to compensate them for their injuries. Because we reverse on liability, the cross-appeal presents an issue we need not reach. Nevertheless, to avoid retrial on damages, we note that we see no error in what the district court did. We review the district

court's determination of damages for clear error. *Shaw v. United States*, 741 F.2d 1202, 1205 (9th Cir. 1984).

The plaintiffs cite two cases in support of their position that the damages are too low. *Mason v. F. Lli Luigi and Franco Dal Maschio Fu G.B. s.n.c.*, 832 F.2d 383, 388 (7th Cir. 1987) (upholding \$ 800,000 jury verdict for plaintiff who lost right hand and part of arm); *Bates v. Merritt Seafood, [*162] Inc.*, 663 F. Supp. 915, 934-36 (D.S.C. 1987) (awarding over \$ 760,000 to injured seaman). [**11] The district court's findings of damages are, of course, lower than these awards, but that does not mean that they are clearly erroneous. These cases simply hold that damages of approximately \$ 800,000 may be appropriate; they do not hold that \$ 800,000 is required. Moreover, neither of these cases illustrates what similar awards are in Hawaii.

The plaintiffs did not present any evidence of future medical expenses or of reduced earning capacities. They only described their injuries. Without more particular information, we cannot conclude that the district court committed clear error in its determination of general damages.

REVERSED AND REMANDED.

APPENDIX F
LEXSEE 836 F.2D 1104,AT 1112

**Evelyn and Jack Lewy, Appellees, v. Remington Arms Co., Inc.,
Appellant**

No. 86-2215

**UNITED STATES COURT OF APPEALS FOR THE EIGHTH
CIRCUIT**

**836 F.2d 1104; 1988 U.S. App. LEXIS 83; 24 Fed. R. Evid. Serv.
(Callaghan) 516; CCH Prod. Liab. Rep. P11,662**

**October 14, 1987, Submitted
January 7, 1988, Filed**

SUBSEQUENT HISTORY: [**1]

As amended March 21, 1988. Rehearing En Banc and Rehearing by the Panel Denied March 14, 1988.

Heaney, Circuit Judge, Floyd R. Gibson, Senior Circuit Judge, and John R. Gibson, Circuit Judge. John R. Gibson, concurring and dissenting.

PRIOR HISTORY: Appeal from the United States District Court for the Western District of Missouri. The judge who heard the case in the district court was Honorable William Collinson.

OPINIONBY:

GIBSON

LexisNexis (TM) HEADNOTES - Core Concepts:

OPINION:

[*1105] FLOYD R. GIBSON, Senior Circuit Judge.

COUNSEL:

Counsel who presented argument on behalf of the Appellant was Jack Headley.

Counsel who presented argument on behalf of the Appellee was William H. McDonald, Richard Miller and John Shaw.

Remington appeals from a final judgment entered by the district court on a jury verdict awarding Evelyn Lewy \$ 20,000 in compensatory damages and \$ 400,000 in punitive damages in this products liability suit. For the reasons stated below we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

JUDGES:

I. BACKGROUND

On November 14, 1982, Mike Lewy went deer hunting on the family land where he and

his parents, Evelyn and Jack Lewy, lived. He returned [**2] home around noon and entered his basement living quarters, placing his loaded Remington Model 700 bolt-action center fire 30.06 rifle (M700) on a couch. Prior to going to bed at around 10:30 that evening, Mike remembered the loaded rifle and decided to unload it. Mike pointed the rifle toward the ceiling and proceeded to unload it. The design of the rifle required the safety to be moved to the fire position in order to lift the bolt handle to eject a chambered cartridge. When Mike placed the safety on the fire position the rifle discharged and the bullet penetrated the ceiling striking his mother in the upper left leg while she was seated in a living room chair. Mrs. Lewy required hospitalization for slightly more than a month, but she has now apparently recovered from the accident.

[*1106] Mrs. Lewy and her husband filed suit against Remington Arms and the K-Mart Corporation for damages, alleging three separate theories of liability: strict liability -- design defect, strict liability -- failure to warn, and negligent failure to warn. The Lewys alleged two design defects: 1) the bolt lock feature which required the rifle to be in the fire position when unloading and 2) the [**3] fire control mechanism which is susceptible to firing on release of the safety (FSR). Evelyn Lewy claimed damages for personal injuries and Jack Lewy claimed damages for loss of consortium. The jury returned a verdict in favor of the Lewys on all three theories of liability. Evelyn Lewy was awarded \$ 20,000 in compensatory damages and \$ 400,000 in punitive damages while Jack Lewy was not awarded monetary damages.

II. DISCUSSION

Remington raises several arguments on appeal: 1) the trial court erred in denying its motions for directed verdict and judgment notwithstanding the verdict on the issue of punitive damages; 2) the trial court erred in

admitting evidence regarding similar incidents involving other Model 700 rifles; 3) the trial court erred in allowing evidence concerning the Model 600 rifle; and 4) a litany of errors which occurred during the trial had the cumulative effect of depriving Remington of a fair trial. We will address the arguments in order beginning with the issue of punitive damages.

A. Punitive Damages

Remington argues that the trial court erred in denying its motions for directed verdict and judgment notwithstanding the verdict on the [**4] issue of punitive damages. Remington argues that the evidence was insufficient as a matter of law to submit the punitive damages claim to the jury on either the defective design or failure to warn theories because the Lewys did not prove that Remington acted with conscious disregard for the safety of others.

The standard for granting a motion for a directed verdict, under both federal and Missouri state law, is whether the evidence, when viewed in the light most favorable to the nonmoving party, is such that reasonable persons could only conclude that the movant should prevail. *Hale v. Firestone Tire & Rubber Co.*, 756 F.2d 1322, 1336 (8th Cir. 1985) (*Hale I*). This standard is the same for the granting of a judgment notwithstanding the verdict. *Hale v. Firestone Tire & Rubber Co.*, 820 F.2d 928, 936 (8th Cir. 1987) (*Hale II*). We hold that the district court did not err in denying Remington's motions.

Because we hold, *infra*, that the trial court improperly allowed evidence concerning the Model 600 Rifle, we will not consider this evidence when reviewing the record to determine whether there was sufficient evidence to submit the issue [**5] of punitive damages to the jury.

Under Missouri law a plaintiff may recover punitive damages if the defendant acts with "complete indifference to or conscious disregard for the safety of others." *Roth v.*

Black & Decker, 737 F.2d 779, 782 (8th Cir. 1984); *Bhagvandoss v. Beiersdorf, Inc.*, 723 S.W.2d 392, 397 (Mo. banc 1987); *Racer v. Utterman*, 629 S.W.2d 387, 396 (Mo. App. 1981), *appeal dismissed, cert. denied sub nom. Racer v. Johnson & Johnson*, 459 U.S. 803, 74 L. Ed. 2d 42, 103 S. Ct. 26 (1982).

We hold that there was sufficient evidence from which the jury could find that Remington knew the M700 was dangerous. The following evidence was before the jury: complaints from customers and gunsmiths that the Model 700 would fire upon release of safety, some of these complaints dating back as far as the early 1970s; n1 Remington's own internal documents [*1107] show that complaints were received more than two years before the Lewy rifle was produced; Remington created a Product Safety Subcommittee to evaluate M700 complaints and on two occasions decided against recalling the M700; and Remington responded to [**6] every customer complaint with a form letter that stated that they were unable to duplicate the problem, that the customer must have inadvertently pulled the trigger and that Remington could not assume liability for the discharge.

n1 Many of the customers complaining to Remington about alleged FSR's were adamant in their correspondence with Remington. Some excerpts of the customer complaints appear below.

I don't agree with your analysis of the 3 incidents I reported to you (the 3rd incident was directly witnessed by 2 other people). (J.A. IV at 645).

Your letter advised that your experts have concluded their examination and that the rifle has passed all necessary

tests and that possibly there was pressure applied to the trigger mechanism. Please be advised that I intend to hold Remington Arms Company fully responsible for the malfunctions of this rifle regardless of what their experts say.

* * *

Therefore, if you are willing to send this rifle back to me, then your company *will assume all responsibility for the same.*

(J.A. Vol. IV at 726) (emphasis in original).

Please be advised that the subject rifle purchased from your firm has a very dangerous defect. The rifle will discharge when the safety switch is moved from the safety position to the fire position, and it will discharge when the bolt is moved to clear cartridges from the chamber and clip.

* * *

By copy of this letter I am putting the manufacturer on notice of these problems.

(J.A. Vol. IV at 808).

I am however, going on record as completely disagreeing with your conclusion that the trigger was being pulled at the same time the safety lever was being removed from the "safe" position to the "fire" position. * * *

Your conclusion is simply not correct, and it goes without saying that I will not accept

your position of having no liability should this condition persist. (J.A. Vol. IV at 817).

Many of the complainants sent copies of their complaints to their attorneys in apparent anticipation of litigation; and all of these complaints were sent to Remington before the Lewy accident occurred.

[**7]

We believe that in viewing this evidence, and permissible inferences, in the light most favorable to the Lewys a jury could reasonably conclude that Remington was acting with conscious disregard for the safety of others. Remington maintains that their actions in investigating and responding to customer complaints and in creating the Product Safety Subcommittee to study the customer complaints reflect their good faith and sincerity in dealing with the M700. However, another permissible view to be drawn from all of this evidence may be that Remington was merely "gearing up" for a second round of litigation similar to the litigation involving the M600 which resulted in the ultimate recall of the M600. Remington's Product Safety Subcommittee concluded that of approximately two million M700s held by the public about 20,000 of them may have a potential defect. n2 A recall was not pursued because of the relatively small number of rifles that may have the defective condition. *See, e.g., Kehm v. Procter & Gamble Mfg. Co.*, 724 F.2d 613, 620 (8th Cir. 1983) ("In determining whether a manufacturer has a duty to warn, courts inquire whether the manufacturer knew that there were [**8] even a relatively few persons who could not use its product without serious injury, and whether a proper warning would have helped prevent harm to them."). Thus, the jury may have concluded that rather than suffer the

expense of a recall, Remington would rather take their chances that the 20,000 potentially dangerous M700 rifles held by the public will not cause an accident. Such a view, if true, would certainly establish that Remington acted with conscious disregard for the safety of others.

n2 Remington argues that this statement, made during a Product Safety Subcommittee meeting, was made when discussing the "Trick" condition and not the FSR condition, which was the alleged defect in the Lewy M700. However, we believe that a reasonable jury could conclude that there is no difference in the Trick and FSR conditions. The evidence which was presented to distinguish these two conditions was confusing at best. It is apparent that the trial court was confused with Remington's distinction as is this court. Extensive briefing and oral argument on this distinction have not relieved the confusion. We believe that this evidence supports the district court's decision to submit the issue of punitive damages to the jury.

[**9]

B. Similar incidents involving other Remington Model 700 Rifles

Remington next argues that the district court erroneously admitted evidence of other Model 700s which were claimed to have [*1108] discharged when the safety was placed in the fire position. We disagree.

In order to be admissible a proper foundation must be laid showing that the other incidents involving a Model 700 discharging on release of the safety occurred under circumstances substantially similar to the circumstances surrounding the discharge of the Lewy rifle. *Hale II*, 820 F.2d at 934; *Johnson v. Colt Indus. Operating Corp.*, 797 F.2d 1530,

1534 (10th Cir. 1986). The Lewys laid an adequate foundation for admission of the related incidents involving the Model 700. *See, e.g., R. W. Murray, Co. v. Shatterproof Glass Corp.*, 758 F.2d 266, 275 (8th Cir. 1985).

The Lewys laid a foundation which established that the Model 700 evidence introduced was substantially similar to the Lewy Model 700. The Lewys established substantial similarity in both manufacture and defect primarily from records maintained by Remington. Remington prepared Gun Examination [**10] Reports (GERs) for every Model 700 which was returned to Remington because of customer complaints that the rifle fired on release of safety. Each report contains a statement of the customer's complaint and the circumstances relating to the alleged FSR. These GERs, as well as the other evidence supporting them, sufficiently established the foundation for the admission of the M700 evidence. In addition to the GERs, the Lewys introduced customer complaint letters, responsive correspondence prepared by Remington, and depositions and live testimony of some of the customers who complained to Remington.

It should also be noted that the district court did not allow the Lewys to admit all M700 evidence carte blanche. In fact the district court specifically excluded any evidence of M700 discharges that may have resulted from other causes unrelated to the alleged defect in the Lewy rifle.

On remand, once the evidence is admitted Remington remains free to argue to the jury that the evidence is not persuasive by pointing out the dissimilarities in the M700 evidence and the Lewy rifle. *Kehm*, 724 F.2d at 626.

Remington also argues that the evidence regarding other Model 700s [**11] is irrelevant. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the

determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. As we have previously noted, a foundation was properly laid establishing that the Model 700 evidence was substantially similar to the Lewy Model 700. Therefore, the evidence was relevant to several contested issues in the trial. First, it was relevant to whether Remington had notice. Notice was a hotly contested issue and was an important element of the Lewy's failure to warn theory of the case. Additionally, notice is important in establishing a submissible case for punitive damages. Second, the evidence was relevant to show causation. "Under Fed.R.Evid. 401, evidence of similar occurrences 'might be relevant to the defendant's notice, magnitude of the danger involved, the defendant's ability to correct a known defect, the lack of safety for intended uses, * * * the standard of care, and causation.'" *Kehm*, 724 F.2d at 625 (quoting *Ramos v. Liberty Mut. Ins. Co.*, 615 F.2d 334, 338-39 (5th Cir. 1980), [**12] *cert. denied sub nom. Rucker Co. v. Shell Oil Co.*, 449 U.S. 1112, 66 L. Ed. 2d 840, 101 S. Ct. 921 (1981)); *Thomas v. Chrysler Corp.*, 717 F.2d 1223, 1224-25 (8th Cir. 1983).

C. Similar incidents involving Remington Model 600 Rifles

The district court allowed the Lewys to introduce extensive evidence concerning the Remington Model 600 rifle, Remington's recall of the Model 600, and the settlement of a serious personal injury lawsuit involving the Model 600. Remington made several objections to this evidence and at the conclusion of the trial requested the court to issue a withdrawal instruction instructing the jury to disregard the evidence concerning the Model 600 rifle. The district court, although expressing reservations on the admission of the evidence, denied Remington's requests for a withdrawal instruction.

[*1109] The Lewys argue that evidence concerning the Model 600 was relevant to the

issues of: 1) notice, 2) feasibility of warning, and 3) establishing that when the Model 600s were returned upon recall and retrofitted with a new fire control, the bolt lock was not removed. We disagree, because in order to be relevant to [**13] these issues the incidents involving the Model 600 must have occurred under circumstances substantially similar to the discharge of the Lewy Model 700.

Although trial judges are granted wide discretion in determining the relevancy and admissibility of evidence, *Roth*, 737 F.2d at 783, we believe the trial court abused its discretion in allowing the evidence concerning the Model 600. The standard by which we review the Model 600 evidence is the same standard just discussed with respect to the Model 700. In order to allow the evidence concerning the Model 600 it is necessary to find that the Model 600 and Model 700 fire control mechanisms are substantially similar in design and manufacture. In contrast to the foundation laid concerning the Model 700 evidence, the Lewys failed to lay an adequate foundation for the Model 600 evidence.

The evidence before the trial court showed that the dimensions of the M700 and M600 fire controls were different and thus affected the operation of the two fire controls. In this regard it is significant that Lewy's counsel at oral argument noted that the operation of the M700 fire control could be affected by a change in the tolerances [**14] as small as the width of a human hair. Thus, the M600 fire control, with component parts of different shape and dimension than those of the M700, cannot be said to be substantially similar to the M700. In addition, it is significant that when the Model 600 was recalled Remington took out the Model 600 fire controls and "put in ones that more resembled the Model 700 fire controls." Tr. Vol. 10 at 163. This fact was also noted by Lewy's counsel at oral argument.

This suggests that the M700 and M600 fire controls were not substantially similar. It would

not make sense for a manufacturer to recall a product because of an alleged design defect and attempt to correct the problem by replacing the defective components with substantially similar components which suffer from the same defect as the original components.

For all of the reasons just discussed we do not believe that the Lewys have met their burden of showing substantial similarity in the M600 and M700 fire controls. Therefore the district court should not have admitted the M600 evidence.

The relevancy of evidence is a question of law which should be decided by the judge. However, it appears from the record that this important [**15] function was submitted to the jury. The district court expressed serious doubts about the relevancy of the Model 600 evidence and at the conclusion of the trial commented that he wished he would not have allowed the evidence in. The trial court felt that the jury should be allowed to decide the weight to be given to the Model 600 evidence.

In deciding on the admissibility of evidence concerning similar occurrences the trial court must satisfy itself that a proper foundation exists for the evidence to be received by the court. There is no question that it is the jury's role to weigh the evidence, but it is the judge's obligation to determine whether it gets on the scale.

When this case is retried, the evidence concerning the Model 600 should not be admitted.

D. Evidentiary Rulings, Attorney Misconduct, Bias of the District Judge and Improper Jury Instructions

The final argument Remington raises is that the district court should have granted their motion for a new trial because the cumulative effect of erroneous evidentiary rulings, attorney misconduct, judicial bias, and an improper jury instruction deprived them of a fair trial.

Remington argues that the trial court [**16] erred in refusing to allow one of their witnesses, John Linde, to testify with regard to any opinions or conclusions he reached in his evaluation of the Model 700 [*1110] during his employment with Remington. The Lewys respond by arguing that Linde was not properly identified by Remington as an expert witness until the Friday before trial. The district court's ruling on the Lewy's motion *in limine* limited Linde's testimony to that of a lay witness and during trial the court prevented Linde from giving any opinion testimony.

It is not necessary for the court to decide this issue in view of our disposition of the case. On remand Remington will be able to properly identify its expert witnesses in sufficient time to prevent unnecessary surprise or prejudice to the Lewys.

Remington next argues that they were prejudiced by the misconduct of opposing counsel. Remington cites instances of inappropriate remarks made by counsel for the Lewys in the presence of the jury and argues that counsel mislead the trial court as to pertinent facts in order to receive favorable evidentiary rulings. Again, because of our disposition of the case it is not necessary to decide whether the conduct [**17] of appellee's counsel was inappropriate. However, because this case is remanded for a new trial, counsel will be well advised to consider the allegations and arguments made by Remington in their brief.

Remington next argues that the trial court was biased against them. This bias, Remington argues, was evident from the comments of the trial court -- both in chambers and in the presence of the jury, in questions asked of witnesses, and in interrupting Remington's counsel.

The "behavior and bearing of a judge during a jury trial must be such that the entire trial will be conducted in a general atmosphere

of impartiality." *United States v. Cassagnol*, 420 F.2d 868, 878 (4th Cir.), *cert. denied*, 397 U.S. 1044, 25 L. Ed. 2d 654, 90 S. Ct. 1364 (1970). We have carefully read the record. The impression left in our mind, after reading the record, is that the trial court may have formed an opinion early on in the trial as to whether there was a defect in the Model 700, as any judge is bound to be affected by the evidence adduced in a strongly contested case. It seems evident that the trial court was convinced that the Model 700 was defective and, while [**18] we might agree with the trial court's perception, this question is for the jury to decide. In addition, the trial judge, when admonishing the jury not to speak with others about the case, told the jury that he discussed the facts of the case with his wife and she immediately decided the case. We believe that these comments as well as others made in the presence of the jury may have conveyed the judge's perception of the case to the jury. We do, however, recognize that many of the court's comments were merely efforts to expedite what had become a very lengthy trial.

We recognize that federal judges have the right to comment on the evidence. As an earlier case, *McCoy v. Blakely*, 217 F.2d 227, 233 (8th Cir. 1954), stated:

The right to comment must be judiciously exercised and the jurors must be clearly advised that the province of determining the factual questions remains theirs. In *Buchanan v. United States*, 8 Cir., 1926, 15 F.2d 496, 498, this court stated clearly the permissible limitations in making such comments:

"Under the rule, as stated and applied by the Supreme Court, it seems that, when a judge expresses his opinion as to the facts [**19] to the jury, making it clear that it is nothing but his opinion, and not

binding upon them in any way, and that it is their duty and responsibility to determine all of the facts, he is within his rights, and that he is only subject to reversal when his comments upon the evidence or opinions as to the facts amount to partisan argument or advocacy, or constitute an appeal to passion or prejudice."

Again, as noted in *Kansas City Star Co. v. United States*, 240 F.2d 643, 664 (8th Cir.), cert. denied, 354 U.S. 923, 1 L. Ed. 2d 1438, 77 S. Ct. 1381 (1957): "A federal judge has a right to fairly comment upon the evidence and even to express his opinion thereon, provided he makes clear that the ultimate fact determinations are for the jurors." (Citations omitted). A later case, *Champeau v. Fruehauf Corp.*, 814 F.2d 1271, 1275 [*1111] (8th Cir. 1987), views the trial court's role as follows:

A trial judge should never assume the role of advocate, and must preserve an attitude of impartiality in the conduct of a trial. It is also true, however, that a trial judge may question witnesses or comment on the evidence. A federal [*20] judge is more than a 'mere moderator' or umpire in the proceedings and he may take an active role in conducting the trial and developing the evidence.

(quoting *Warner v. Transamerica Insurance Co.*, 739 F.2d 1347, 1351 (8th Cir. 1984) (citations omitted)).

It does appear that the practice of allowing comments on the evidence by a trial judge is at considerable variance with the concept that the judge should retain and present an air of impartiality, particularly in jury trials where the

jurors are the fact finders. Thus the trial court is often in the difficult position of needing to clarify the evidence while still maintaining an air of impartiality. This feat requires the judge to operate within a restricted range; but, obviously the judge must be accorded a fair measure of discretion in harmonizing the concepts of opinion comment with that of impartiality. Over the past decade or two and at the present time the trial courts are exercising more restraints in making comments on the evidence in order to present an air of impartiality over the proceedings. We believe this change in perspective is salutary and as noted in *Hale I*, 756 F.2d at 1331: [*21] "We further note that judicial restraint and decorum would be better served and advanced if district judges would refrain from making such comments. Courts must not only be fair and impartial in proceedings before them but must also avoid those actions which appear to be partial and unfair." We, however, recognize that there may well be situations where a judicial comment is necessary and proper.

Remington also argues that the judge's questioning of the witnesses indicated his disfavor toward Remington's case. Federal Rule of Evidence 614(b) provides that "the court may interrogate witnesses, whether called by itself or by a party." Fed. R. Evid. 614(b); *Hale I*, 756 F.2d at 1330. While we agree that the judge's questioning of witnesses could have reflected his view of the evidence to the jury, we do not believe that the judge assumed the role of advocate. This trial lasted four weeks and the trial transcript covers 21 volumes. The court's questioning of witnesses was not extensive and many of the questions were properly asked to clarify factual issues. *Jaeger v. Henningson, Durham & Richardson, Inc.*, 714 F.2d 773, 777 (8th Cir. 1983).

The final [*22] error asserted by Remington refers to the propriety of a general instruction given to the jury. The instruction,

taken from Devitt and Blackmar's *Federal Jury Practice and Instructions*, reads as follows:

If a party fails to produce evidence which is under his control and reasonably available to him and not reasonably available to the adverse party, then you may infer that the evidence is unfavorable to the party who could have produced it and did not.

E. Devitt, C. Blackmar & M. Wolff, 3 *Federal Jury Practice and Instructions* § 72.16 (4th ed. 1987).

This instruction was requested by the Lewys because Remington was unable to produce several documents that were destroyed pursuant to Remington's "record retention policy." Remington argues that destroying records pursuant to routine procedures does not provide an inference adverse to the party that destroyed the documents. *Smith v. Uniroyal, Inc.*, 420 F.2d 438, 442-43 (7th Cir. 1970).

The record reflects that Remington had its record retention policy in place as early as 1970. In addition, the records that have been destroyed pursuant to the policy -- complaints and gun examination reports [**23] -- were kept for a period of three years and if no action regarding a particular record was taken in that period it was destroyed. *Vick v. Texas Employment Commission*, 514 F.2d 734, 737 (5th Cir. 1975) (records destroyed pursuant to regulations governing inactive records).

[*1112] We are unable to decide, based on the record we have before us, whether it was error for the trial court to give this instruction. On remand, if the trial court is called upon to again instruct the jury regarding failure to produce evidence, the court should consider the following factors before deciding whether to give the instruction to the jury. First, the court should determine whether Remington's record

retention policy is reasonable considering the facts and circumstances surrounding the relevant documents. For example, the court should determine whether a three year retention policy is reasonable given the particular document. A three year retention policy may be sufficient for documents such as appointment books or telephone messages, but inadequate for documents such as customer complaints. Second, in making this determination the court may also consider whether lawsuits [**24] concerning the complaint or related complaints have been filed, the frequency of such complaints, and the magnitude of the complaints.

Finally, the court should determine whether the document retention policy was instituted in bad faith. *Gumbs v. International Harvester, Inc.*, 718 F.2d 88, 96 (3rd Cir. 1983) ("no unfavorable inference arises when the circumstances indicate that the document or article in question has been lost or accidentally destroyed, or where the failure to produce it is otherwise properly accounted for."); *Boyd v. Ozark Air Lines, Inc.*, 568 F.2d 50, 53 (8th Cir. 1977) ("We recognize, however, that the destruction of business records may be sufficient to raise an unfavorable inference."). In cases where a document retention policy is instituted in order to limit damaging evidence available to potential plaintiffs, it may be proper to give an instruction similar to the one requested by the Lewys. Similarly, even if the court finds the policy to be reasonable given the nature of the documents subject to the policy, the court may find that under the particular circumstances certain documents should have been retained notwithstanding [**25] the policy. For example, if the corporation knew or should have known that the documents would become material at some point in the future then such documents should have been preserved. Thus, a corporation cannot blindly destroy documents and expect to be shielded by a seemingly innocuous document retention policy. *Gumbs*, 718 F.2d at

96 ("Such a presumption or inference arises, however, only when the spoliation or destruction [of evidence] was intentional, and indicates fraud and a desire to suppress the truth, and it does not arise where the destruction was a matter of routine with no fraudulent intent.") (quoting 29 Am. Jur. 2d *Evidence* § 177 (1967)).

Finally, we have some doubts as to whether the defective design of the Lewy rifle was the proximate cause of the injuries sustained by Mrs. Lewy. Liability cannot be placed on a manufacturer of a defective product without a showing that the defect was the proximate cause of the plaintiff's injury. See *Prosser and Keeton on Torts* § 102, at 710 (W. Keeton 5th ed. 1984). The undisputed facts reveal that Mike Lewy adjusted his rifle's trigger pull in apparent disregard of the owner's manual which warned [**26] against owner adjustments of the rifle. Remington's test of the rifle shows that in this altered condition the rifle would fire on release of safety nine out of thirteen trials. However, when returned to factory specifications the Lewy rifle did not FSR once in fifty trials.

Although we recognize that Missouri does not allow a defendant to submit a sole cause instruction, M.A.I. 1.03 (1981), this does not prevent a defendant from requesting such an instruction from a federal court sitting in diversity or from arguing to the jury that someone else was the sole cause of the accident. *Roth*, 737 F.2d at 784 ("While state law determines the substance of jury instructions in a diversity action, the granting or denying of such instructions is controlled by federal law."); *Cook v. Cox*, 478 S.W.2d 678, 682 (Mo. 1972) (although M.A.I. 1.03 precludes a sole cause instruction, the defendant may still argue the sole cause defense to the jury and converse the plaintiff's instruction). Thus Remington may be entitled to a sole cause instruction presenting its theory of [*1113] the case to the jury, "if 'legally

correct, supported by the evidence and brought [**27] to the court's attention in a timely request." *Roth*, 737 F.2d at 784 (quoting *Board of Water Works Trustees v. Alvord, Burdick & Howson, Inc.*, 706 F.2d 820, 823 (8th Cir. 1983)). However, Remington was not able to effectively argue that Mike Lewy's adjustments to his M700 were the sole cause of the rifle's discharge. The district court made it very clear to Remington that it did not believe that Mike Lewy's adjustments to his rifle had anything to do with the lawsuit. Further, on several occasions the court prevented Remington from developing its sole cause argument. Any attempt by Remington to continue to develop this evidence would have been futile in light of the district court's rulings and comments.

We recognize that the Missouri Supreme Court has stated that "the plaintiff's contributory negligence is not at issue in a products liability case." *Lippard v. Houdaille Industries, Inc.*, 715 S.W.2d 491, 493 (Mo. banc 1986). However, the court further stated "the defendant may sometimes make use of the plaintiff's alleged carelessness in support of arguments that the product is not unreasonably dangerous, or that the alleged [**28] defects in a product did not cause the injury * * *" *Id.* On remand we believe that the trial court should not prevent Remington from developing this line of inquiry.

III. CONCLUSION

To briefly summarize, we affirm the judgment of the district court holding that the Lewys presented a submissible case for punitive damages and that evidence of similar incidents involving other Model 700 rifles were admissible. We reverse the judgment of the district court admitting evidence of similar incidents involving the Model 600 rifle because an adequate foundation of substantial similarity was not laid. The remaining assignments of error need not be decided because we remand this case for a new trial.

Affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion.

CONCURBY:

GIBSON

DISSENTBY:

GIBSON

DISSENT:

JOHN R. GIBSON, concurring and dissenting.

I concur in the court's opinion except for Part II A which holds punitive damages to be submissible. Certainly the evidence of knowledge was strong, but I am not satisfied that it demonstrates the complete indifference to or conscious disregard for the safety of others so as to establish the predicate [**29] for punitive damages. Accordingly, I respectfully dissent from Part II A of the opinion as I do not believe there is sufficient evidence to support an award of punitive damages.

APPENDIX G
**LOUIS R. TESTA, Plaintiff, Appellee, v. WAL-MART STORES,
INC., Defendant, Appellant.**

No. 97-2079

**UNITED STATES COURT OF APPEALS FOR THE FIRST
CIRCUIT**

144 F.3d 173; 1998 U.S. App. LEXIS 10233

May 21, 1998, Decided

PRIOR HISTORY:

[**1] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE. Hon. Shane Devine, Senior U.S. District Judge.

DISPOSITION:

Affirmed.

COUNSEL:

George R. Moore, with whom Bret D. Gifford and Devine, Millimet & Branch, P.A. were on brief, for appellant.

Stewart S. Richmond, Jr., with whom Scott H. Harris and McLane, Graf, Raulerson & Middleton, P.A. were on brief, for appellees.

JUDGES:

Before Torruella, Chief Judge, Selya and Lynch, Circuit Judges.

OPINIONBY:

SELYA

OPINION:

[*174] SELYA, Circuit Judge. Defendant-appellant Wal-Mart Stores, Inc. (Wal-Mart) insists that the jury verdict in this piscine

personal injury case results from instructional error. After careful perustration of the record, we conclude that Wal-Mart is fishing in an empty stream.

I. BACKGROUND

Plaintiff-appellee Louis R. Testa worked as a truck driver for Heavenly Fish, a wholesaler of tropical fish. On February 2, 1993, Testa arrived at a brand new Wal-Mart retail outlet in Hinsdale, New Hampshire, with merchandise in tow. He parked his van on the delivery ramp behind the store and alerted Wal-Mart to his arrival. A Wal-Mart employee helped Testa unload his ichthyic cargo. In the process, Testa slipped [**2] on the snow-and-ice-coated ramp, fell, and injured himself.

Wal-Mart photographed the ramp that day and proceeded to conduct a full investigation of the incident. Before the month was out, a Wal-Mart employee prepared an internal report noting, inter alia, that Testa had threatened to sue.

On April 24, 1995, Testa made good on his word. Invoking diversity jurisdiction, see 28 U.S.C. § 1332(a), Testa sued Wal-Mart in New Hampshire's federal district court. Wal-Mart denied that it had committed any actionable negligence. It pointed out that the

mishap occurred on the day of the Hinsdale store's grand opening and, anticipating a huge turnout, it wanted the staff's attention focused exclusively on customer service. To that end, it asserted that Rachelle Manning, an invoice clerk, informed all vendors on February 1 that Wal-Mart would not accept [*175] deliveries the following day. Thus, Wal-Mart explained, it did not bother to clear the ramp on February 2 because it believed that no deliveries would be forthcoming. In addition to this defense, **Wal-Mart** also suggested that **Testa** had assumed the risk of using the icy ramp and that his negligence caused (or at least contributed to) the [**3] occurrence of the accident.

The trial itself was brief but jury deliberations were protracted. Eventually, the jury returned a verdict for the plaintiff in the sum of \$ 55,112. This appeal ensued.

II. THE JURY'S QUESTION

After nearly five hours of deliberation, the jury sent a note to the judge which read in pertinent part: "Your Honor, can we please have a review of the law 'negligence', and [its] relation to proximate cause?" n1 The judge consulted with counsel and responded to this query by re-reading his original charge on negligence and proximate cause. The judge asked the jury if the supplemental instruction satisfied their request and the foreperson responded affirmatively.

n1 The note also contained another question, but the appellant does not assign error to the judge's handling of the second question and we therefore eschew any discussion of it.

The error that Wal-Mart perceives is less with what the judge said than with what he did not say. Over Wal-Mart's objection, Judge

Devine declined [**4] to re-read his charge on comparative negligence as part and parcel of the supplemental instruction. In this vein, the judge noted that "you don't get to comparative negligence until or unless [the jurors] establish that there is negligence existing on the part of the defendant, and their question specifically asks for negligence and proximate cause." Based on this scenario, Wal-Mart maintains that the trial court erred by refusing to include language anent comparative negligence in the supplemental instruction.

We ordinarily review jury instructions to discern whether they adequately illuminate the law applicable to the controverted issues in the case without unduly complicating matters or misleading the jury. See *Levinsky's, Inc. v. Wal-Mart Stores, Inc.*, 127 F.3d 122, 135 (1st Cir. 1997). In that process, we examine the instructions as a whole rather than taking each fragment in isolation. See *United States v. DeStefano*, 59 F.3d 1, 3 (1st Cir. 1995). Withal, a jury instruction given after deliberations have begun comes at a particularly delicate juncture and therefore evokes heightened scrutiny. See *Bollenbach v. United States*, 326 U.S. 607, 612, 90 L. Ed. 350, 66 [**5] S. Ct. 402 (1946); *Tart v. McGann*, 697 F.2d 75, 77 (2d Cir. 1982).

Careful craftsmanship of a supplemental jury instruction requires the district court to walk a fine line -- the court can err as easily by overinclusiveness as by underinclusiveness. See *Tatro v. Kervin*, 41 F.3d 9, 15 (1st Cir. 1994) (warning that "extra language" may erroneously mislead a jury); *United States v. Parent*, 954 F.2d 23, 25 (1st Cir. 1992) (cautioning against "gratuitous pererrations" in the course of supplemental jury instructions). Understandably concerned about this phenomenon, Judge Devine gave the jury accurate legal standards concerning the precise area of their inquiry -- negligence and proximate cause -- and eschewed a

broader compass. He thus avoided the possible confusion that might have been engendered had he volunteered an instruction that the jury had not requested.

Wal-Mart contends that, even if the district court's supplemental instruction adequately responded to the letter of the jury's inquiry, it did not capture the spirit. In Wal-Mart's view, all negligence concepts are linked, more so in this case. Thus, the jury's query necessarily implied a curiosity about comparative [**6] negligence and suggested that the court, to be fair, should give an additional instruction that the jury lacked the sophistication to ask for specifically. We reject this conjectural construct. It amounts to nothing more than rank speculation -- and we are unwilling to overturn a jury verdict on the basis of sheer surmise.

Here, moreover, the surrounding circumstances suggest that Wal-Mart's speculation likely is unfounded. For one thing, as Judge Devine remarked, comparative negligence [*176] is an affirmative defense under New Hampshire law, see *Brann v. Exeter Clinic, Inc.*, 127 N.H. 155, 498 A.2d 334, 336-337 (N.H. 1985), and a jury logically would not be expected to reach that issue until it first had resolved the question of negligence. For another thing, after Judge Devine gave the supplemental instruction, the jury foreperson responded that the panel's question had been fully answered. Although this response, in itself, is not conclusive -- as the appellant ruminates, the forelady might have spoken only for herself or might have grown bashful in an unaccustomed spotlight - - it is at least some evidence that the jury received exactly what had been requested.

We will not paint [**7] the lily. The usual rule, to which we subscribe, is that when a jury question is received during deliberations, the judge must address only those matters fairly encompassed within the question. See *Parent*, 954 F.2d at 25; *Stathos*

v. Bowden, 728 F.2d 15, 19 (1st Cir. 1984); *Jury v. R & G Sloane Mfg. Co.*, 666 F.2d 1348, 1352-53 (10th Cir. 1981); see also *United States v. Ladd*, 885 F.2d 954, 961 (1st Cir. 1989) (stating that a judge, in answering a question posed by a deliberating jury, normally should "confine his response to the approximate boundaries of the jury's inquiry"). n2 It is a corollary of this rule that the trial judge has discretion to embellish his answer as he reasonably may deem advisable. See *United States v. Bayer*, 331 U.S. 532, 536, 91 L. Ed. 1654, 67 S. Ct. 1394 (1947) (explaining that "once the judge has made an accurate and correct charge [in response to a jury's question], the extent of [any] amplification must rest largely on his discretion"); see also *Elliott v. S.D. Warren Co.*, 134 F.3d 1, 6 (1st Cir. 1998) (stating that "within wide limits, the method and manner in which the judge carries out this obligation [to inform the jury [**8] about the applicable law] is left to his or her discretion"). The operative word, however, is "discretion". We do not doubt that Judge Devine could have repeated his comparative negligence instruction as a part of his answer to the jury's question if he believed that doing so would help the jury to understand the concepts of negligence and proximate cause. But we see nothing in the circumstances of this case that compelled the judge to add such an embellishment or that otherwise required a deviation from the customary praxis. Consequently, the appellant's first assignment of error fails.

n2 A different rule sometimes may apply in criminal cases, as a court often must take particular pains to remind a deliberating jury of the presumption of innocence, the burden of proof, the defendant's right to remain silent, and kindred matters. See *Bollenbach*, 326

U.S. at 613-14. No such concerns are raised in this civil action.

III. DESTRUCTION OF BUSINESS RECORDS

Wal-Mart contends that the trial court committed [**9] a second instructional error. Manning testified that she had put a hold on the order previously placed with Heavenly Fish on February 1, 1993, thus bolstering Wal-Mart's claim that it had no reason to clear the delivery ramp on February 2. At trial, however, Wal-Mart was unable to produce either the purchase order addressed to Heavenly Fish or the telephone records for February 1 (the date when Manning claims to have called). According to Wal-Mart, Manning discarded these records in or around February 1995 (a few months before Testa brought suit), pursuant to a standard record-retention policy. Manning stated that she did not know about the accident at the time and no one instructed her to preserve either the purchase order or the telephone records.

Despite Wal-Mart's protest that it acted in good faith and without notice of the destroyed records' relevance, the district court instructed the jury that:

A reasonable inference is a deduction which common sense and reason lead you to draw from the evidence. An example is one inference that the plaintiff seeks to have you draw here is to the effect that the defendant, having known that a lawsuit was pending, destroyed certain records [**10] and did so because defendant knew the records to be harmful to its own case. But the law holds that such an inference can be drawn only if the plaintiff proves by a preponderance of the evidence that [the defendant] not only knew of the potential [*177] claim of the plaintiff, but also knew of the potential relevance of the destroyed documents. And even where plaintiff satisfies this burden of proof, any

inference that may be drawn is permissive and not mandatory. That is, such inference may or may not be drawn by the jury.

The appellant challenges the propriety of this instruction insofar as it allowed the jury to draw a permissive negative inference from the unavailability of the purchase order and the telephone records.

We have held with some regularity that a trier of fact may (but need not) infer from a party's obliteration of a document relevant to a litigated issue that the contents of the document were unfavorable to that party. See, e.g., *Blinzler v. Marriott Int'l, Inc.*, 81 F.3d 1148, 1158 (1st Cir. 1996); *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 925 (1st Cir. 1988); *Nation-Wide Check Corp. v. Forest Hills Distributors, Inc.*, 692 F.2d 214, 217-18 (1st [**11] Cir. 1982). This permissive negative inference springs from the commonsense notion that a party who destroys a document (or permits it to be destroyed) when facing litigation, knowing the document's relevancy to issues in the case, may well do so out of a sense that the document's contents hurt his position. See *Beil v. Lakewood Eng'g & Mfg. Co.*, 15 F.3d 546, 552 (6th Cir. 1994). Consistent with this rationale, a suitable foundation must exist before such an inference can materialize. Thus, the sponsor of the inference must proffer evidence sufficient to permit the trier to find that the target knew of (a) the claim (that is, the litigation or the potential for litigation), and (b) the document's potential relevance to that claim. See *Blinzler*, 81 F.3d at 1159. Moreover, even if these foundational requirements have been met, the trier nonetheless may refuse to draw the negative inference. In other words, the inference is permissive, not mandatory. See *id.*

Wal-Mart acknowledges this doctrine, but labors to convince us that **Testa** failed to

lay an adequate foundation in this instance. We are not persuaded.

We think it is obvious that a rational jury could conclude that **Wal-Mart** [**12] was on notice of **Testa's** claim. The accident occurred on February 2, 1993. Wal-Mart investigated immediately and, as early as February 18, 1993, Wal-Mart completed an internal accident report in which it acknowledged Testa's inclination to sue. There is nothing in the record that would have dispelled this premonition.

By like token, a rational jury also could conclude that Wal-Mart was on notice of the records' relevance. After all, Wal-Mart's defense from the start was anchored on the premise that it had no reason to anticipate any deliveries on the day in question. Surely, then, a reasonable factfinder could view Wal-Mart's placing of a purchase order for delivery on February 2 to be antagonistic to this defense. The telephone records showing whether Manning in fact called Heavenly Fish to abrogate the purchase order (and if so, when) also would bear on this line of defense. n3 Accordingly, a jury could find that Wal-Mart had ample notice of both the claim and the relevance of the records.

n3 Wal-Mart argues that these documents would be cumulative of Manning's testimony, but that argument begs the question. The records would be cumulative only if they matched Manning's recollection, and their destruction precluded the plaintiff (and the jury, for that matter) from ascertaining whether the records and the testimony were consistent.

[**13]

Wal-Mart offers two rejoinders. First, it points to evidence showing that it destroyed the documents not for a nefarious purpose, but only in compliance with a corporate record-retention policy. We readily agree that evidence that documents were destroyed in the ordinary course of business, pursuant to routine practice, is material to the inquiry, but the mere introduction of such evidence neither removes the question from the jury's ken nor precludes the jury from drawing a negative inference. See *Nation-Wide Check*, 692 F.2d at 219.

Second, Wal-Mart notes that there is no proof that Manning (the Wal-Mart employee who actually discarded the records) knew of either the claim or the records' relevance to it. This is true as far as it goes -- but it does not go very far. Whether [*178] the particular person who spoils evidence has notice of the relationship between that evidence and the underlying claim is relevant to the factfinder's inquiry, but it does not necessarily dictate the resolution of that inquiry. The critical part of the foundation that must be laid depends, rather, on institutional notice -- the aggregate knowledge possessed by a party and its agents, servants, and employees. [**14] See *Blinzler*, 81 F.3d at 1158-59; *Nation-Wide Check*, 692 F.2d at 217-18. Here, the preconditions for jury submission of the permissive negative inference were fully satisfied.

We need go no further. We hold that, on these facts, the district court properly told the jury that it could (but need not) draw a negative inference if the plaintiff proved by a preponderance of the evidence that, when Wal-Mart destroyed the documents, it had notice both of a potential lawsuit and of the documents' relevance to the claim that underlay such a suit.

Affirmed. Costs to appellee.

APPENDIX H

United States District Court, D. Delaware.

TULIP COMPUTERS INTERNATIONAL B.V., Plaintiff,
v.
DELL COMPUTER CORPORATION, Defendant.

No. CIV.A. 00-981-RRM.

April 30, 2002.

[Steven J. Balick](#), Esquire and John G. Day, Esquire, Ashby & Geddes, Wilmington, Delaware; Dirk B. Thomas, Esquire, [Robert A. Auchter](#), Esquire, and [Bradley J. Olson](#), Esquire, Robins, Kaplan, Miller & Ciresi L.L.P.; counsel for plaintiff Tulip Computers International B.V.
[Frederick L. Cottrell, III](#), Esquire, Richards, Layton & Finger, Wilmington, Delaware; [Scott F. Partridge](#), Esquire and [Howard L. Speight](#), Esquire, Baker Botts L.L.P., Houston, Texas; counsel for defendant Dell Computer Corporation.

MEMORANDUM OPINION

MCKELVIE, District J.

*1 This is a patent infringement case. Plaintiff Tulip Computers International B.V. is a Dutch corporation having its principal place of business in the Netherlands. Dell Computer Corporation is a Delaware corporation having its principal place of business in Round Rock, Texas. Dell is in the business of making and selling personal computer products. Tulip is the owner of [U.S. Patent No. 5,594,621 \("the '621 patent"\)](#), entitled "Motherboard for a computer of the AT type, and a computer of the AT type comprising such Motherboard." The claims of [the '621 patent](#) are generally directed at a personal computer motherboard that has a uniquely arranged expansion card slot which has the

capability of supporting both ISA and PCI type expansion cards. The invention provides for improved cooling of the expansion card components, reduced number of connector

terminals for expansion card on the motherboard, and shortened length of the connections from the motherboard to the expansion cards. [\[FN1\]](#) The parties both characterize the invention as a transition device, which at the time when personal computer peripherals were moving towards the 32 bit standard provided a solution that could accommodate both 16 bit and 32 bit devices.

[FN1](#). According to [the '621 patent](#), in order to arrange both ISA and PCI expansion cards on a riser card, prior art devices employed a "combi-connector," consisting of two connections--one for each type of expansion card." The drawback of this solution was that, due to the

physical design and dimensions of PCI cards, it was necessary to arrange the PCI expansion cards on the upper part of the riser card. As a result, the linking tracks that transmit high frequency signals

are longest, which is undesirable. Moreover, the PCI expansion cards had to lie on the connector in a downward orientation, which impeded the proper cooling of the PCI cards.

On November 24, 2000 Tulip filed its complaint in this case alleging that Dell is infringing one or more of the claims of [the '621 patent](#) by making, offering to sell, and selling personal computers embodying the claimed invention. Dell answered Tulip's complaint on January 19, 2001, and the parties proceeded to take discovery in the case. Fact discovery is now scheduled to close on May 10, 2002, although the parties may agree or ask the court to extend that deadline. In the past months, a number of discovery disputes have arisen between the parties. These disputes have culminated with Tulip's filing, on March 25, 2002, of a motion to compel and for sanctions against Dell. Tulip's brief in support of its motion, focuses on a number of areas of discovery on which it asserts Dell's cooperation must be required by the court, and requests broad relief to effect that cooperation. Dell opposes Tulip's motion. Briefing on the motion is now complete. On April 24, 2002 the court heard oral argument from the parties on Tulip's motion. This is the court's decision on Tulip's motion to compel and for sanctions.

I. BACKGROUND AND PARTIES' CONTENTIONS

Tulip's brief in support of its motion primarily relates to five contentions regarding problems it has encountered in seeking to obtain certain discovery from Dell. They are: (i) Dell's failure to inform Tulip of its document archives, which upon investigation contained responsive information; (ii) Dell's delay and lack of cooperation in providing Tulip with

the ability to search Dell's electronic data warehouse to gather responsive information; (iii) Dell's destruction of responsive documents; and (iv) Dell's failure to provide a sufficiently knowledgeable 30(b)(6) witness; (v) Dell's refusal to provide Tulip with reasonable discovery of the e-mails of certain Dell executives.

*2 Tulip contends that the above five problem areas evidence that Dell has actively interfered with Tulip's ability to obtain basic discovery by either delaying production of responsive documents or inaccurately representing or assuming that the documents sought did not exist. Tulip argues that the record before the court demonstrates that Dell has exhibited an improper and cavalier attitude towards its discovery obligations. Tulip seeks a court order to remedy Dell's alleged discovery failures. Before determining whether to grant Tulip's motion, the court will summarize the details of the parties' discovery disputes.

1. Dell's Failure to Timely Identify the Existence of its Off-Site Warehouse Beginning in September 2001, Tulip has expressed its concerns to the court about what it perceived to be gaps in Dell's document production relating to Dell's decision to adopt the allegedly accusing components in its personal computer products. In response, Dell denied that such documents existed and maintained that they had produced all responsive documents that they had. During the September 26, 2001 conference with the court, Dell's counsel stated that: "The fact that an invention is of such minor character, and so inconsequential, probably explains why there aren't memos to officers of the company." At that time, the court suggested that Tulip proceed with its discovery and to "come back and show if there is a basis for believing the documents existed and weren't produced."

On January 25, 2002, nine months after Tulip served Dell with its requests for production of

documents, Dell disclosed to Tulip, for the first time, the existence of an off-site warehouse containing over 44,300 boxes of documents. Soon thereafter, Dell informed Tulip of the existence of a large number of backup tapes that it had previously failed to identify. During a February 19, 2002 conference call, the court questioned Dell concerning the documents stored in its off-site warehouse. Counsel for Dell replied that "It would be a miracle, we think, to find [the types of documents Tulip seeks] in that warehouse" At the suggestion of the court, Tulip spent a week reviewing documents contained in approximately 450 of the boxes, using an index of the boxes provided by Dell. Tulip represents that this search has led to the identification of more than 70 boxes and 100,000 pages of responsive documents. The boxes have been marked for copying. As of the date of the oral argument, Tulip had not yet received the documents, although counsel Dell ensured that they would be promptly produced as soon as copying was completed. Dell asserts that as soon as it discovered that responsive documents might be stored at its off-site records storage facility, it agreed to make the records stored there available to Tulip and provided Tulip with its indexes of those records. Dell points out that, using that index, Tulip searched for, marked, and will receive the requested responsive documents that it sought.

***3** Due to Dell's alleged failure to perform the adequate inquiry and search for responsive documents that is contemplated by the rules and in light of Dell's erroneous representations to Tulip and the court that all existing responsive documents had been produced, Tulip requests that the court order the following relief: (i) require Dell to confirm the content description in Dell's index of the boxes of documents located at the off-site warehouse; (ii) require Dell to certify to Tulip and the court that its search was complete and thorough; (iii) allow Tulip, but

not Dell, to conduct fact discovery beyond the current fact discovery deadline.

2. Dell's Failure to Produce Sales Documents From Its Data Warehouse and Dell's Obstruction of Tulip's Efforts to Access Its Data Warehouse

Last Fall, Dell offered Tulip complete access to its electronic documents as they are kept in the ordinary course of business. Those documents are kept in Dell's data warehouse. By searching the data warehouse, a user can identify whether and how many of the specific components of the accused infringing products were sold and when they were sold. Dell's data warehouse contains damages information sought by Tulip, such as unit prices and model types of the allegedly infringing products. To obtain the damages information it sought, Tulip first requested that Dell search its own databases and provide the requested information. Dell refused, however, explaining that it did not have the ability to search the data warehouse at the level of detail that Tulip sought. Instead Dell suggested that Tulip hire its own database consultant and offered to make its databases fully accessible to Tulip and its consultants. Dell's counsel confirmed to the court, at that time, that whatever search capabilities are available to Dell would be made available to Tulip. Thereafter, Tulip's discovery team met with Dell's counsel and Dell employees, including Dell's Data Warehouse Manager, Sue Patti. At that meeting she informed Tulip that the information related to sales of the accused infringing computers, which Tulip had been requesting for nearly a year, was in fact available in the data warehouse and that Dell employees knew how to conduct search queries that could cull that type of information from the database system. Dell states that it believes that its data warehouse and internal documents could provide evidence for its own case about the conception and adoption of the allegedly infringing invention at Dell. Therefore, Dell

asserts it had every motivation to enable a search of its records. It maintains that simply believed, at first, that the desired data could not be extracted from the data warehouse. Only after its employees worked with Tulip's data consultants were they able to perform the searches that Tulip sought.

After agreeing to give Tulip access to its data warehouse, Dell raised the concern that Tulip's use of the data warehouse may cause an undue burden on Dell's day to day operations. According to Tulip, when it took steps to obtain access to Dell's electronic records, Dell attempted to impose numerous conditions on Tulip's inspection and gave Tulip access to only a subset of the data warehouse. These restrictions included restricting the fields to which Tulip would have access in the search process and filtering out data fields, such as customer names, which Dell asserted were non-responsive.

*4 It appears from the oral argument, that the parties have now resolved this discovery dispute. Only recently was Tulip able to extract the documents that it sought. Tulip, along with its consultants, have worked with Ms. Patti to obtain the responsive information from Dell's data warehouse. Tulip urges the court that this dispute, while resolved, is still relevant to indicate just how difficult Dell has made the discovery process.

3. Discovery of The Email Records of Dell Executives

Tulip also contends that Dell has refused to produce email or electronic documents for any senior Dell executive, "unless Tulip can demonstrate a direct connection to this matter." Tulip seeks such production to gather discovery on Dell management's decision to adopt the '621 patented invention in its products. Dell states that it has circulated Tulip's document requests to over 300 Dell employees and has already produced all responsive documents. Furthermore, Dell asserts that none of the senior executives from whom Tulip seeks information would have

relevant and responsive information. Dell thus contends that a production of executive's e-mails is cumulative and that its only purpose is to harass Dell's senior executives.

Tulip seeks this discovery, and contends that Dell's prior pattern of behavior in blocking discovery and inaccurately stating that no responsive documents could exist in certain places that were subsequently found to have responsive documents, causes it to doubt Dell's representation that all relevant documents have been produced. Tulip suggests a solution that it asserts is sensitive to concerns that Dell may have about privilege and confidentiality. Tulip seeks the following relief: Tulip suggests that the e-mails on the current hard drives of the identified Dell executives be placed on a searchable CD ROM or database. Tulip's consultant will search the CD ROM on certain mutually agreed upon search terms that relate to the infringing products or to this case. Such terms may involve "Tulip" or code words for the allegedly infringing models such as "STINGER," "MASH," or "HONEYCUT." If the search terms generate hits, Dell will review the documents and produce them to Tulip subject to the privilege and confidentiality designations provided under the protective order.

4. Dell's Destruction of Responsive Documents

Tulip also urges the court to impose sanctions on Dell for Dell's destruction of a box of documents that contained responsive information relating to this lawsuit. The facts regarding Dell's document destruction are as follows.

On March 26, 2001, Tulip served Dell with its First Set of Requests for Production of Documents, pursuant to [Fed.R.Civ.P. 34](#). On June 15, 2001, in keeping with its document retention policy, Dell ordered its off-site document warehouse service vendor, Iron Mountain, to destroy approximately one hundred boxes of documents. On March 21,

2002, counsel for Dell wrote to counsel for Tulip, informing them that the documents were destroyed, and enclosing an index of the boxes. The parties agree that at least Box 92, which contained market research concerning the accused Dell Optiplex products, contained documents responsive to Tulip's document requests. Dell has offered to attempt to recreate the contents of that box, and notes that the documents on Box 92 "are likely cumulative" of already-produced materials.

*5 Tulip requests that the court order Dell to take immediate steps to ensure that responsive documents, whether hard copy or electronic, are preserved and produced. To that end, Tulip's proposed order requests that the court order Dell to cease and desist from destroying all documents until such time as the court grants it permission to do so. It has also stated that once the full scope of destruction has been identified, Tulip will request an adverse inference against Dell related to issues associated with the documents destroyed.

5. Dell's Failure to Provide a Knowledgeable 30(b)(6) Witness

Last, Tulip contends that Dell failed to adequately prepare a knowledgeable 30(b)(6) witness to give testimony of behalf of Dell on issues relating to the production, retention, and destruction of documents. Tulip asserts that Henry Garrana, the 30(b)(6) witness produced by Dell to be deposed on these issues was unable to answer many of the questions asked. Tulip lists fifteen questions which Garrana was unable to answer with any degree of specificity. Those questions include whether Dell circulated a memo requesting that individuals not destroy or delete documents, whether there is a corporate policy that describes how files are to be kept and/or destroyed, whether Dell has a system-wide document storage system for electronic documents, and whether Dell had searched its off-site warehouse in response to Tulip's initial document requests.

According to Dell, Garrana was produced

because the witness that was most knowledgeable, Diana Roberts, no longer works for Dell. Dell asserts that it prepared Garrana as best as it could and that he answered most of the questions to the best of his ability. Dell has offered to provide another witness if Tulip wants to deepen its inquiry on those topics covered. Tulip requests the court to order Dell to produce a properly prepared and knowledgeable 30(b)(6) witness. It further requests that Dell be ordered to pay Tulip's costs, expenses, and attorney's fees for the Garrana deposition.

II. DISCUSSION

A. Standard of Decision

While the discovery rules set forth in the Federal Rules of Civil Procedure are meant to "secure the just, speedy, and inexpensive determination of every action," [Fed.R.Civ.P. 1.](#), the parties are well aware that the process of taking discovery in complex civil litigation is often time-consuming, burdensome, and expensive. As the advisory committee explanatory statement to [Fed.R.Civ.P. 26-37](#) notes, however, the discovery procedures set forth under the rules make trial and settlement fairer by providing the parties with a mechanism to obtain evidence that would not otherwise to them.

In an ideal world, counsel for the parties would work together to streamline the discovery process. The amount of time that the court spends resolving discovery disputes suggests that, in reality, this is not often the case, perhaps due to the aggressive adversarial nature of litigation and the duty of each litigant's counsel to protect its own clients, where possible, from excessive burdens. In order to ensure that the adversarial process works effectively, therefore, courts implementing those rules must, when necessary, step in to ensure that discovery proceeds in a manner that is fair. In shepherding cases along to trial, the court seeks to encourage parties to work together to take discovery in a manner that is sensitive to

the parties' interests in both gaining information from each other and in minimizing the potential burdens of the discovery process.

***6** In this case, Tulip has come to court seeking an order to compel and seeking sanctions, because it believes that Dell is not cooperating in fulfilling its discovery obligations. The court reviews Tulip's assertions and the relief that it seeks, with an eye towards ensuring that parties participating in the discovery process fulfill their obligations under the rules while guarding against ordering relief that places an unfair burden on any one party.

B. Should the Court Grant Relief to Tulip Based on the Discovery Problems Raised in its Motion?

Tulip's motion raises significant concerns about a number of commonly raised discovery issues: the discovery of electronically stored information, the production of a well-prepared 30(b)(6) witness, and the destruction of documents. After reviewing the briefing and listening to the parties at oral argument, it is apparent that Dell has not fulfilled many of its basic discovery obligations in this case. Dell's failure to identify an off-site warehouse which contained responsive information, its failure to take steps to prevent the destruction of potentially responsive documents, and its inaccurate representations about the scope of discoverable information accessible in its own data warehouse indicates either a failure to take its discovery obligations with the required degree of seriousness and diligence or an extreme lack of knowledge and control over its own files and procedures. The latter seems unlikely for a party as large and sophisticated as Dell.

That being said, the court also believes that the relief that Tulip seeks on its motion is far too broad. Therefore, the court will briefly set forth the relief that it will order for each of the five areas identified by Tulip. By ordering

such relief, however, the court does not seek to preclude Tulip from seeking broader relief, should it be able to demonstrate that the relief ordered by the court is insufficient.

1. Documents From Dell's Off-Site Warehouse

Dell and Tulip seem to have resolved the issue of the production of documents from Dell's off-site warehouse. Using the index provided by Dell, Tulip has asked for and shortly will receive copies of responsive documents.

Tulip's request that Dell review its index to ensure it is accurate and that Dell certify that it correctly describes the content of over forty-four thousand boxes stored in the off-site facility would require Dell to physically review every one of those boxes. Such a request is too burdensome and impractical. Instead, the court will order that Dell certify that the indexes provided to Tulip are the indexes that it uses in the ordinary course of its business. Further, the court will order Dell to provide Tulip with any other existing documentation that catalogs the contents of the off-site warehouse and that would be of assistance in determining whether further responsive documents exist at the site. Naturally, should Tulip request additional responsive documents based on the index or catalog, Dell shall promptly comply.

2. Electronic Documents

***7** The court will discuss the discovery issues pertaining to e-mails and to access to Dell's data warehouse together. With regard to the data warehouse, it seems that the parties have already agreed to the very solution that Tulip requested the court to impose. Tulip and its consultant, Ontrack International, Inc. have been given access to Dell's databases, and, with the assistance of Ms. Sue Patti, have conducted data searches appropriate for Tulips' discovery purposes. Therefore, the court need not order further relief to resolve the data warehouse issue.

The court will next turn to the e-mail based

discovery that Tulip seeks. Counsel for Dell has repeatedly argued that because Tulip has not shown that Dell breached its discovery obligations with regard to e-mail, the court should not accede to Tulip's request. Dell's argument misses the mark. The history of Dell's failures to cooperate in the discovery process--and its sweeping but inaccurate positions that Tulip would never find certain documents that Tulip, through persistence and diligence, later uncovered--counsel in favor of awarding Tulip some relief that allows them to ascertain for themselves whether Dell's representations that all responsive documents have been produced are accurate. Moreover, counsel for Dell could not represent to the court that it has thoroughly searched these e-mail records for responsive information. The procedure that Tulip has suggested for the discovery of e-mail documents seems fair, efficient, and reasonable. Dell shall provide the e-mails from the hard disks of the identified executives in electronic form to Ontrack. Ontrack will search the e-mails based on an agreed upon list of search terms. Tulip will give Dell a list of the e-mails that contain those search terms. Dell will then produce the e-mails to Tulip, subject to its own review for privilege and confidentiality designations.

While Tulip has stated that certain of the identified executives were involved in the 1994 roll-out of the allegedly infringing Optiplex device and that others may have had relevant communications with third parties about that device, it is, by contrast, unclear to the court that a search of Dell CEO Michael Dell's e-mails will produce responsive discovery in this case [\[FN2\]](#).

[FN2](#). The only link that Tulip can point to between Michael Dell and any issue in this case is an e-mail from Michael Dell to another Dell executive, stating that he was happy that his project was completed. This

does not indicate that Michael Dell's involvement in the alleged incorporation of the patented device into the Optiplex was at a detailed level, such that discovery of his e-mail records would uncover in relevant documents.

Therefore, the court will adopt the relief suggested by Tulip for all of the identified executives, except Michael Dell. If Tulip obtains additional information that leads it to believe that a search of Michael Dell's e-mail will produce responsive documents, it should present that information to the court. Until then, the parties should proceed with the e-mail discovery procedure outlined above and in Tulip's motion, for the following persons: John Stuewe, Jeff Clarke, Gary Curtis, Karl Steffes, Timothy Radloff, Ajay Kwatra, Abeye Teshome, Matthew Mendelow, Kevin Miller, Richard Chan, Neil Hand, Joseph Marengi, Eric Sholder, and Ro Parra.

3. Document Destruction

Dell concedes that it improperly destroyed Box 92. Even though Dell asserts that the box at issue was targeted for destruction in accordance with Dell's document retention policy and before Dell had received any document requests in this case, it is well established that once Dell had notice of this case, it had an affirmative obligation to preserve potentially responsive documents. Despite its failure to fulfill this obligation vis-a-vis Box 92, there is no evidence of bad faith on Dell's part or of the destruction of other potentially responsive boxes of information.

*8 Tulip's requested relief would enjoin Dell from destroying any documents until the close of discovery in this case. Such relief is overly broad.

The person who submitted the documents in Box 92 into storage is a Dell employee named Barry Jennings, who has declared that he has personal knowledge as to the contents of that box. The court will order Dell, through Jennings, to identify the contents of Box 92 to Tulip and to recreate those contents to the best of his ability. Jennings should also be available to be deposed by Tulip, should it seek to do so. In addition, Dell should continue to submit to Tulip a list of document that are to be destroyed, so that Tulip can request that certain boxes, which it believes are responsive, be maintained for a period to allow them to be copied and produced.

4. Dell's 30(b)(6) Witness

The court finds that Dell's purported failure to produce an adequately prepared 30(b)(6) witness is not deserving of sanctions. At oral argument, Dell represented that the person most knowledgeable about the issues that Garrana was deposed on was no longer with the company. Dell also offered to produce another witness to answer the questions that Garrana was not able to. While the court hesitates to sanction Dell, Dell should work diligently to ensure that Tulip receives the answers to the questions that Garrana could not answer. This can be accomplished by producing another deponent for a short deposition, by producing documents, or by producing answers to interrogatories submitted by Tulip. The court leaves it to the parties to

work out the most efficient manner for Tulip to obtain the answers to its questions. Should another deposition be required, however, the court will order Dell to pay the costs of that deposition.

III. CONCLUSION

The court will enter an order in accordance with this memorandum opinion.

APPENDIX I

**CROWN LIFE INSURANCE COMPANY, a Canadian Corporation,
Plaintiff-Appellant, v. KERRY P. CRAIG and CRAIG/ASSOCIATES,
INC., an Illinois Corporation, Defendants-Appellees.**

No. 92-3180

**UNITED STATES COURT OF APPEALS FOR THE SEVENTH
CIRCUIT**

**995 F.2d 1376; 1993 U.S. App. LEXIS 12943; 26 Fed. R. Serv. 3d
(Callaghan) 113**

**February 16, 1993, Argued
May 28, 1993, Decided**

SUBSEQUENT HISTORY: Petition for Rehearing Denied June 30, 1993, Reported at: 1993 U.S. App. LEXIS 15995.

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 90 C 0940. Brian Barnett Duff, Judge.

DISPOSITION: AFFIRMED

LexisNexis(R) Headnotes

COUNSEL: For CROWN LIFE INSURANCE COMPANY, a Canadian corporation, Plaintiff-Appellant: David J. Novotny, 312/861-1400, Suite 7300, J. Robert Geiman, 312/861-1400, Suite 7300, Donald A. Murday, 312/861-1400, Suite 7300, PETERSON & ROSS, 200 E. Randolph Drive, Chicago, IL 60601, USA. Kevin R. Hayes, 703/684-6792, Suite 140, 201 N. Union Street, Alexandria, VA 22314, USA.

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JUDGES: Before CUMMINGS and COFFEY, Circuit Judges, and ESCHBACH, Senior Circuit Judge.

OPINIONBY: ESCHBACH

OPINION:

[*1377] ESCHBACH, *Senior Circuit Judge*. Crown Life Insurance Company [**2]

("Crown Life") appeals the district court's imposition of sanctions, findings of fact and refusal to allow a witness to testify in this diversity case. After a bench trial, the district court entered judgment in favor of Crown Life on a check that Kerry P. Craig and Craig/Associates, Inc. (collectively "Craig") had written to Mr. Craig, but the district court found in favor of Craig on three other checks. The district court also granted Crown Life judgment on its claim for payment of loan indebtedness, although not in the full amount that Crown Life claimed. After finding that Crown Life had violated discovery orders, the district court sanctioned Crown Life by entering a default judgment in favor of Craig on its counterclaim. We have jurisdiction to decide this appeal pursuant to 28 U.S.C. § 1291. We affirm the judgment and the sanction.

I.

A. General Background

Crown Life filed this action against Craig, its former Chicago general agency. In its complaint Crown Life alleged that Craig wrongfully drew eleven checks on Crown Life's funds in a bank account known as the "branch account". Crown Life also sought recovery of an additional amount [**3] over \$ 500,000, which Crown Life alleged it had loaned to Craig under certain financing agreements during the term of Craig's general agency. Craig filed a counterclaim alleging that it was owed renewal commissions by Crown Life.

Prior to trial on the claim and counterclaim, the district court granted summary judgment in favor of Crown Life on seven of the eleven branch account checks Craig wrote. Of the four remaining checks, three were written to brokers and one was payable to Mr. Craig. The three broker checks were drawn to pay producer bonuses and commissions to brokers who had placed

business with Crown Life through Craig. The district court found that Crown Life had implicitly authorized Craig to use the account for these purposes by allowing such use in the past. Thus, the district court found in favor of Craig on these three checks. The district court found that the remaining check written to Mr. Craig was unauthorized and granted judgment in favor of Crown Life on it.

With regard to Craig's alleged loan indebtedness, the main issue at trial was whether Crown Life had agreed to forgive or write-off certain loans made to Craig. Most of the controversy on this issue centered [**4] specifically on a loan relating to arbitration in an unrelated dispute between Craig and Clarke Lloyd, a former senior vice president for Crown Life. Ultimately, the district court found that Crown Life had forgiven the arbitration loan, and awarded Crown Life judgment [*1378] on only a part of its claim for loan repayments.

The counterclaim concerned the amount of renewal commissions due Craig. Other than Summaries of Renewal Commissions Payable and other Crown Life internal documents, the only evidence offered on this issue was the testimony of Clarke Lloyd. Lloyd testified regarding a rule-of-thumb in the insurance industry for evaluating future renewal commissions. Crown Life also submitted into evidence the general agency agreement it had signed with Craig. (Crown Life Ex. 3). This agreement provided that renewal commissions were payable only as they were "earned", i.e., when the premium was paid by the policyholder. According to the agreement, renewal commissions would be paid over a ten-year period following a general agent's termination.

A Crown Life employee, Robert Currie, testified at trial about a database containing data for each policy sold by Crown Life's general agents, including [**5] Craig. The parties and the district court referred to this

data as the "raw data". During the pendency of the trial, Craig's expert witness informed counsel for Craig that the documentation given to him (i.e., the documents produced by Crown Life) was insufficient for him to formulate an opinion on the amount of commissions due Craig. Counsel for Craig then moved to dismiss Crown Life's complaint because it had not produced the raw data.

Three days before the conclusion of the trial, counsel for Crown Life informed the district court that one of its witnesses, Daniel Martineau, would not be available to testify as scheduled. The district court refused to continue the trial to allow this testimony. The district court also sanctioned Crown Life for not producing the raw data.

The district court held that Crown Life was entitled to judgment on the check payable to Craig on the branch account and that Crown Life was entitled to judgment for a portion of the loan indebtedness it sought to recover against Craig. The district court also granted judgment in favor of Craig on the counterclaim for renewal commissions. As a sanction, the district court did not allow Crown Life to rely on its [**6] own figures for renewal commissions, did not allow it to rebut Lloyd's rule of thumb, and did not allow it to rely on the contract provision providing payment as it is earned. Therefore, the amount of the counterclaim judgment was established based on the rule-of-thumb estimate described by Lloyd.

On appeal, Crown Life argues that the district court's sanction was based on a clearly erroneous factual finding that Crown Life violated the discovery order, or in the alternative, that the sanction was too harsh and an abuse of discretion. Crown Life also challenges the district court's refusal to continue the trial to hear testimony from Martineau. Finally, Crown Life argues on appeal that the district court's finding that the

three broker checks were authorized and its finding that the arbitration loan was forgiven were clearly erroneous.

B. Facts Relevant to the Discovery Sanction

To resolve the challenge to the discovery sanction, we must consider in some detail the history of discovery. Craig propounded its Request for Production of Documents on April 13, 1990. (Crown Life, Ex. A).ⁿ¹ In response to requests numbered 3 and 12, Crown Life produced some copies of documents entitled [**7] Agency Management Status [*1379] Reports ("AMSRs"), which reflected summaries of renewal commissions earned by Craig. Crown Life also produced documents entitled Agent's Statement of Earnings and Account ("ASEAs"). (Crown Life, Ex. B).

ⁿ¹ These requests included:

3. Any and all correspondence, notes, memoranda, or other written documents including, but not limited to, summary sheets or valuation sheets, reflecting summaries or calculations of renewal commissions, potential overrides, and/or collection fees regarding the Defendant's agency operations in the geographical areas encompassing Chicago, Illinois, and Peoria, Illinois, including, but not limited to, those for par, non-par, universal life, and disability policies.

* * *

12. Any and all correspondence, notes, memoranda, or other written documents relating to the calculation of commissions due the Defendants from the Plaintiff, including but not limited to, documents relating to the calculation of group bonuses, paid-for bonuses, net

bonuses, quality volume bonuses, and persistency bonuses, for the period of January, 1980 through December, 1989, for the geographical areas encompassing Chicago, Illinois and Peoria, Illinois.

[**8]

Crown Life propounded interrogatories to Craig, including question 14, which asked Craig to identify those persons it expected to call as expert witnesses at trial. In response to question 14, Craig stated that it had not yet retained an expert witness, but that once it did, Craig would provide the requested information.

On July 19, 1990, Craig filed a motion to compel, alleging that Crown Life had failed to produce documents, including documents responsive to request number 12. (R. 29). On August 14, 1990, the motion was argued before Magistrate Judge Weisberg, to whom the district judge had referred all matters concerning discovery. At that time, Magistrate Judge Weisberg ordered Crown Life to produce ASEAs and AMSRs for the remaining dates requested, and he also ruled that Craig was entitled to an affidavit signed by a responsible Crown Life representative stating that there were no underlying documents to support these summaries. (Transcript of Proceedings before Magistrate Judge Weisberg, September 5, 1990). Craig received an affidavit signed by Kevin R. Hayes, Associate General Counsel for Crown Life, stating that all documents responsive to the request had been produced. (Appellee's [**9] Supplemental Appendix 5).

On September 24 and 25, 1990, Craig deposed Robert Currie, Crown Life's Manager of U.S. Individual Agency Services. In his deposition testimony, Currie referred to a year-end computer printout of total renewals attributable to each general agency and a "Summary of Renewal Commissions

Payable" produced every year in December. Thereafter, Craig filed another motion to compel, seeking production of the documents to which Currie referred in his testimony. (R. 55). In response, Crown Life argued that the summaries were not relevant because these statements were internal memoranda that reflected mere estimates of renewal commissions and not actual earnings. Magistrate Judge Weisberg ordered Crown Life to produce any and all documents that reflected the calculation of the renewal commissions by December 4, 1990. (Transcript of Proceedings before Magistrate Judge Weisberg, November 13, 1990, at 6-9).

After the deadline had passed, Craig filed another motion to compel. (R. 66). Two days before the hearing on the motion, counsel for Crown Life produced some responsive documents. At the hearing, Magistrate Judge Weisberg granted Craig's motion to compel and allowed [**10] Crown Life until January 24, 1991 to comply with its order to produce the documents. Magistrate Judge Weisberg also awarded Craig attorneys' fees in the amount of \$ 250 pursuant to Rule 37(a)(4) of the Federal Rules of Civil Procedure. (Transcript of Proceedings before Magistrate Judge Weisberg, January 10, 1991, at 5-6).

Craig took the deposition of Daniel Martineau, Crown Life's Director of Actuarial Services. Martineau's department is responsible for producing the Summary of Renewal Commissions Payable and is responsible for maintaining the program and database that generates the summaries. Martineau was questioned at length about the summaries and how they are prepared.

On January 18, 1991, Craig received a letter from counsel for Crown Life stating that Crown Life would produce further documents on January 21, 1991, placing Crown Life in full compliance with Magistrate Judge Weisberg's order. (Appellee's Supplemental

Appendix, 10). When the documents did not arrive, Craig filed a motion to dismiss or for other sanctions for failure to produce these documents. At the hearing on this motion, Magistrate Judge Weisberg ordered that sworn statements be filed by responsible officials [**11] of Crown Life stating that a search had been made for the particular documents and that they had not been found. (Transcript of Proceedings before Magistrate Judge Weisberg, January 31, 1991, at 5).

On February 11, 1991, the parties appeared for a status hearing before the district court. At that time, counsel for Crown Life represented that Crown Life had no further responsive documents. (Transcript of Proceedings before Judge Duff, February [1380] 11, 1991, at 5). On February 13, 1991, Hayes, Associate General Counsel for Crown Life, filed an affidavit stating that a search had been made for the documents. n2 The district court set a discovery cutoff of May 15, 1991. (R. 84).

n2 That affidavit stated:

2. I have caused a search to be conducted for the following documents:

(a) summaries of renewal commissions payable for the years 1989 and 1990;

(b) written requests by CRAIG/ASSOCIATES INC., to the financing committee of CROWN LIFE INSURANCE COMPANY for loans, advances, and financing;

(c) entries in the minutes of the financing committee referring to the Chicago Agency;

(d) the write-off file in existence at the time of Robert Currie's deposition.

3. Based on searches for these documents which were conducted by CROWN LIFE personnel at my direction, your affiant states that CROWN LIFE INSURANCE COMPANY has produced all documents meeting the above description which could be located.

(R. 185).

[**12]

On July 2, 1991, counsel for Craig propounded its request for supplementation of documents. The only supplemental requests relating to renewal commissions were requests for ASEAs, AMSRs, and Summaries of Renewal Commissions. (R. 116, Ex. A). Apparently, Craig sought the most current documents to supplement others that had already been produced for earlier time periods. (Tr. 494-501).

Six days before trial, Craig filed a motion to compel based on Crown Life's failure to supplement its production of documents. (R. 116). Three business days before the pretrial conference, Craig's attorneys advised Crown Life that they intended to call an expert witness at trial. (R. 128-54). Crown Life filed a motion to bar Craig's expert because it felt the disclosure of the expert was not timely. (R. 128-119). At the pretrial conference, the district court denied Crown Life's motion to bar Craig's expert, but the district court ordered Craig to provide Crown Life with an expert's report. The district court also directed Crown Life to produce the updated summaries. These summaries were produced September 13, 1991. The trial began on September 17, 1991.

During the trial, Currie testified on cross-examination [**13] about a database containing raw data that pertained to commissions on each policy sold by Craig. Later that day, Clarke Lloyd confirmed the

existence of such a database, and Craig informed the district court that Craig's expert witness had insufficient information to enable him to testify. Craig then moved the district court to dismiss the complaint and grant judgment on Craig's counterclaim because Crown Life had failed to produce the raw data.

On September 24, 1991, the district court found that the raw data was available to Crown Life and retrievable by it. Furthermore, the district court believed that Crown Life used the raw data to prepare its own witness, Martineau, and planned to use the raw data to rebut Craig's case. The district court gave two reasons for not allowing Martineau to testify: one was that he was not available at the scheduled time (Tr. 537) and the other was that Crown Life would not be allowed to put on any evidence to rebut Lloyd's rule of thumb. (Tr. 549). In its memorandum opinion, the district court stated:

57. Nonetheless, because a number of his policies have been renewed since he left Crown Life, Craig is entitled to a certain amount of money in [**14] commissions. However, because of Crown Life's refusal to respond to certain of Craig's discovery requests, it is impossible to compute the amount of renewal commissions due Craig. Specifically, Crown Life did not make available certain internally generated documents with which Craig could have accurately computed the amount of renewal commissions due. Because he lacked these documents, Craig was unable to contest Crown Life's calculation of commissions due.

58. The court warned Crown Life during trial that its refusal to timely produce these documents could result in sanctions. Having determined that the

information which Crown Life withheld is critical to Craig's case, and that Crown Life offered no reasonable excuse for its failure to produce [*1381] the documents, the court will sanction Crown Life in the following manner: Crown Life may not rely upon its own calculations of commissions due Craig; Craig may use "Clarke Lloyd's rule of thumb" (described in detail below) to calculate the amount of commissions owed him by Crown Life; and Crown Life may not rely upon the contract provision which permits it to pay renewal commissions only after the premiums are collected and deposited in [**15] Crown Life's account--that is, Craig may recover the estimated future value of his commissions as the premiums are paid to Crown Life. n3

(Mem. Op. at 15).

n3 It appears that this portion of the Memorandum Opinion has an error. At the end of paragraph 58, the district court states that Craig may recover the estimated future value of his commissions "as the premiums are paid to Crown Life." However, earlier in that same paragraph the district court indicated that Crown Life could not rely on the portion of the contract allowing payment of renewal commissions over a ten year period as the premiums were paid. We need not be concerned with this apparent inconsistency because the district court makes clear in paragraph 68 of the Memorandum Opinion that it "prohibited Crown Life from relying upon the contract provision which provides for payment of commissions only after the premium has been deposited in Crown Life's bank account." (Mem. Op. at 17).

Before the district court's ruling, counsel for Crown Life had informed [**16] the district court that the data was never put into "document" form and that until recently it had been impossible to obtain a printout of the data. Nevertheless, Crown Life offered to make the data available.

II.

As a sanction the district court ordered that Crown Life would not be allowed to: present or rely on its own calculations of renewal commissions; rebut Lloyd's rule-of-thumb; or rely on the portion of the contract which provides that renewal commissions would be payable over a ten-year period. Crown Life urges that this amounted to a default judgment on Craig's counterclaim. n4 Craig responds by arguing that the sanction did not amount to a default judgment, but rather the sanction was similar in kind to other sanctions such as the exclusion of evidence or the imposition of fines.

n4 Federal Rule of Civil Procedure 37 allows for dismissal of a plaintiff's claim as a sanction for plaintiff's failure to comply with discovery. Similarly, when a defendant fails to comply with discovery, Rule 37 provides that a default judgment may be awarded. We treat both Rule 37 dismissals and default judgments the same for the purposes of this discussion.

[**17]

Craig cites a Ninth Circuit case, which held that the exclusion of certain exhibits at trial did not amount to a dismissal under Federal Rule of Civil Procedure 37(b)(2)(C). *Von Brimer v. Whirlpool Corporation*, 536 F.2d 838 (9th Cir. 1976). That case can be distinguished, however, because this is not a case where some exhibits were excluded because they were untimely. Here, the district court's ruling was that "Craig may recover the

estimated future value of his commissions." (Mem. Op. at 15). Crown Life was therefore not allowed to present any witnesses or evidence regarding the amount of renewal commissions. When a district court prevents a defendant from presenting any evidence whatsoever on a claim this normally leads to a default judgment. That is exactly what occurred here.

That we review an order granting a Rule 37 default or dismissal for abuse of discretion is clear. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642-43, 96 S. Ct. 2778, 2780-81, 49 L. Ed. 2d 747 (1976) (per curiam). It is less clear how far a district court's discretion extends when dealing with Rule 37 dismissals or default [**18] judgments. Crown Life argues that there must be a finding of wilfulness or bad faith before a default judgment can be entered as a sanction. *Fox v. Commissioner*, 718 F.2d 251, 254 (7th Cir. 1983). See also *Philips Medical Systems International, B.V. v. Bruetman*, 982 F.2d 211, 214 (7th Cir. 1992); *Diehl v. H.J. Heinz Co.*, 901 F.2d 73, 75 (7th Cir. 1990); *Dole v. Local 1942, International Brotherhood of Electrical Workers*, 870 F.2d 368, 371-72 (7th Cir. 1989); *Roland v. Salem Contract Carriers, Inc.*, 811 F.2d 1175, 1179 (7th Cir. 1987). Craig, however, points out that other cases in this circuit have not required [*1382] such a finding before affirming a default judgment as a sanction. *Govas v. Chalmers*, 965 F.2d 298 (7th Cir. 1992). See also *Newman v. Metropolitan Pier & Exposition Authority*, 962 F.2d 589 (7th Cir. 1992); *Profile Gear Corp. v. Foundry Allied Industries, Inc.*, 937 F.2d 351 (7th Cir. 1991) (even absent finding of dishonesty, we affirm [**19] default judgments due to dilatory tactics); *Powers v. Chicago Transit Authority*, 890 F.2d 1355 1362 (7th Cir. 1989) (dismissal appropriate when there is clear record of delay or contumacious conduct, or when other less drastic sanctions have proven unavailing).

Craig argues that *Govas* changed the standard set forth in *Fox*, noting that *Govas* is the more recent decision of this circuit. However, *Bruetman* is even more recent, and in that case, the panel stated, "Sanctions may only be imposed where a party fails to comply with a discovery order and displays wilfulness, bad faith or fault." *Bruetman*, 982 F.2d at 214 (citation omitted). Further complicating this issue, a panel of this circuit recently stated that, "The cases in this circuit, at any rate, do not set up a row of artificial hoops labeled 'bad faith' and 'egregious conduct' and 'no less severe alternative' through which a judge must jump in order to be permitted by us appellate judges to dismiss a suit." *Newman*, 962 F.2d at 591.

Although these decisions may appear somewhat inconsistent on their face, this inconsistency [**20] is not fatal to our analysis. *Govas*, *Powers and Profile Gear* all required, if not wilfulness and bad faith, at least "contumacious conduct", "dilatatory tactics", or the failure of less drastic sanctions. Even in *Newman*, the panel noted that a district court's discretion in awarding a default judgment has some limitations.

A plaintiff's failure to comply with discovery orders is properly sanctioned by dismissal of the suit, a defendant's by entry of a default judgment. Of course the circumstances of the failure must be considered, because the judge must be guided by the norm of proportionality that guides all judicial applications of sanctions. . . . If the failure is inadvertent, isolated, no worse than careless, and not a cause of serious inconvenience either to the adverse party or to the judge or to any third parties, dismissal (if the failure is by the plaintiff) or default (if by the defendant) would be an excessively severe sanction.

Newman, 962 F.2d at 591 (citations omitted). Therefore, even assuming that there are no "hoops" through which a district judge must jump (such as a finding of wilfulness, etc.), an award of sanctions [**21] must be proportionate to the circumstances surrounding the failure to comply with discovery. Ultimately, all of these cases support the district court's sanction in this case because the sanction is proportionate to Crown Life's wilful failure to comply with discovery orders and Crown Life's record of contumacious conduct.

In support of its argument that the sanction was an abuse of discretion, Crown Life urges that the district court's factual finding underlying the sanction was clearly erroneous and that in fact, there was no discovery violation with regard to the raw data because it was never requested. We do not agree. Craig requested documents reflecting "summaries or calculations of renewal commissions" and "documents relating to the calculation of commissions". These requests make clear that Craig desired data and information regarding the *calculation* of renewal commissions, not merely the summaries of renewal commissions. The data that Crown Life used to compute commissions was the raw data discussed at trial. The requests cover this data. Furthermore, at the hearing before Magistrate Judge Weisberg on September 5, 1990, counsel for Craig made it clear that Craig sought [**22] underlying documents as well as the summaries of renewal commissions payable when he said, "The plaintiffs should produce these documents to us and *any underlying documents which supported these computer entries* on the documents that we are talking about." (Transcript of Proceedings before Magistrate Judge Weisberg, September 5, 1990, at 3) (emphasis added). The requests for production and this statement convince us that Craig requested the data.

Crown Life also argues that the data is not "documents" because it was never in any hard copy form and Craig requested "written documents". However, the Advisory Committee [*1383] notes to the 1970 amendment of Federal Rule of Civil Procedure 34 make clear that computer data is included in Rule 34's description of documents. Therefore, Crown Life's failure to make the raw data available amounts to a violation of discovery orders. The district court's decision that Crown Life had violated the discovery orders was not clear error, because we are not "left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 542, 92 L. Ed. 746 (1948). [**23]

We must now determine whether the district court's specific sanction in this case amounted to an abuse of discretion. As we noted above, a default judgment may be awarded if it is a sanction proportional to the discovery failure. We will presume proportionality when there are wilful or bad faith violations of discovery orders. The same presumption applies when there is a pattern of contumacious conduct or dilatory tactics or the failure of less drastic sanctions.

Crown Life argues that even if the raw data constitutes discoverable "documents" pursuant to Rule 34, the raw data was inaccessible to Crown Life. Therefore, its failure to produce the raw data was not wilful. This argument is unavailing. Even if we accept, for purposes of this discussion, that at the time Craig requested the data Crown Life could not access the data, Crown Life is not relieved from its responsibility to make the data available. Rule 34 contemplates that when data is in an inaccessible form, the party responding to the request for documents must make the data available. The Advisory Committee notes to the 1970 Amendment state:

It makes clear that Rule 34 applies to electronic data compilations from which [**24] information can be obtained only with the use of detection devices, and that when the data can as a practical matter be made usable by the discovering party only through respondent's devices, respondent may be required to use his devices to translate the data into usable form. . . . Similarly, if the discovering party needs to check the electronic source itself, the court may protect respondent with respect to preservation of his records, confidentiality of nondiscoverable matters, and costs.

While it may be true that Crown Life could not access the data at the time of the request, that does not mean that the data did not exist or was not discoverable. Crown Life had a duty to make the data available to Craig. Well over a year was dedicated to discovery. Surely, Crown Life could have made the data available during that time. Therefore, the district court's conclusions that the raw data was discoverable and that it had been requested are not clearly erroneous.

Additionally, the district court characterized Crown Life's failure to produce the data as a "refusal" to produce. (Mem. Op. at 15). We interpret this as a finding that Crown Life's failure was wilful. Almost a full year [**25] before trial, Craig received an affidavit signed by Kevin R. Hayes, Associate General Counsel for Crown Life, stating that all documents responsive to the document requests had been produced. (Appellee's Supplemental Appendix 5). Based on the fact that the data was in the exclusive control of Crown Life, that it was discoverable and that Crown Life nevertheless failed to make it available, this affidavit is blatantly false. Crown Life attempts to convince us that because the motions to compel usually

mentioned documents by name, it could not have known that Craig needed the raw data. However, Crown Life sent Craig an affidavit signed by Hayes indicating that it had produced all the documents relevant to the discovery requests. Therefore, Craig did not know, nor could it have known until Currie's trial testimony, that the raw data existed. The motions to compel mention summaries specifically because Craig knew the summaries existed. Crown Life cannot say in an affidavit that no documents exist and then fault Craig for not requesting those documents specifically in a motion to compel.

Also, the district court found that Crown Life's response to discovery was marked by contumacious conduct. [**26] (Tr. 549). Given the facts set forth earlier in this opinion, we cannot disagree. Less severe sanctions had failed. Even in the face of an award of attorneys' fees, Crown Life did not comply [*1384] with discovery orders. Because Crown Life's failure to comply with discovery orders was wilful and demonstrated contumacious conduct and less severe sanctions failed, the sanction here involved was proportionate to the violation. The district court did not abuse its discretion, and we affirm the sanction.

III.

Crown Life's second challenge is to the judgment itself. Crown Life argues that the district court erred in refusing to allow Daniel Martineau to testify. The district court treated the request that trial be delayed for Martineau to testify as a motion to continue. (Tr. 532). We will reverse a district court's decision regarding trial management only for an abuse of discretion. *Mraovic v. Elgin, Joliet & E. Ry. Co.*, 897 F.2d 268, at 270 (7th Cir. 1990). "Generally, the common thread in the rare cases that reverse the denial of a continuance is the existence of changed circumstances to which a party cannot reasonably be expected to adjust without an extension [**27] of

time." *Daniel J. Hartwig Assoc., Inc. v. Kanner*, 913 F.2d 1213, 1222-23 (7th Cir. 1990).

Crown Life's only argument is that the district court should have allowed such a continuance because Martineau's testimony would have added only half a day to the two week trial. Crown Life was not prejudiced by any changed circumstances. The district court had set the trial date a full three months before trial. Crown Life had ample opportunity to arrange for Martineau's testimony or for the testimony of another employee in the Department of Actuarial Services. Furthermore, this trial lasted two weeks, giving Crown Life sufficient opportunity to have Martineau available for testimony. Denying a continuance was not an abuse of discretion.

Finally, Crown Life argues that several of the district court's other factual findings were clearly erroneous. Only two of these contentions merit comment. These are whether the district court erred in its determination that the branch account checks written to brokers were authorized, and whether the district court also erred in its finding of fact that the arbitration loan was forgiven. We will reverse a district court's factual [**28] finding only when we are convinced that a mistake has been committed. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 542, 92 L. Ed. 746 (1948). "Where two permissible conclusions can be drawn, the fact finder's choice cannot be clearly erroneous." *In re Bonnett*, 895 F.2d 1155, 1157 (7th Cir. 1989).

With regard to whether Crown Life implicitly authorized Craig to use the branch account to pay broker commissions, Crown Life does not refer us to any specific evidence to rebut Mr. Craig's testimony that Crown Life had authorized such uses of the account. Mr. Craig gave credible testimony that he had used the branch account for such purposes in

the past, and the district court is entitled to rely on that testimony. Therefore, the factual findings regarding the branch account checks were not clearly erroneous.

Crown Life also argues that the district court's finding that Crown Life and Craig had agreed that the arbitration loan was an advance that Craig was not required to repay was clearly erroneous. This finding was based on evidence that despite its general policy, Crown Life never issued a promissory [**29] note for this alleged indebtedness and on Mr. Craig's testimony that he was not required to repay the loan.

Crown Life points out that the cover letter with the check identified the money as "a special loan with interest at 10 percent." (Crown Life Ex. 124). Crown Life also argues that Michael O'Brien, n5 Craig's attorney who was present at a meeting where the arbitration loan was discussed, "admitted at trial that no one specifically told him that Crown Life would 'forgive' the arbitration loan." (Brief of Appellant, 48). Crown Life notes that Currie testified that the arbitration loan was carried on the Agent's Statement of Earnings [*1385] and Account Report, indicating that Crown Life expected Craig to repay it. Based on this evidence, Crown Life concludes that the district court's findings with regard to this advance were clearly erroneous.

n5 In its brief, Crown Life refers to this person as John Bingler, another of Craig's attorneys. However, the record cite refers to O'Brien's testimony. Bingler did not testify at trial. Therefore, we assume that Crown Life intended to refer to O'Brien.

[**30]

First, the evidence showed that with the exception of this "loan", Crown Life always required the general agent to sign a note. Therefore, the district court was free to

conclude that the letter accompanying the check had little value compared with the admitted fact that no note accompanied this loan. Furthermore, we note that O'Brien's testimony was equivocal. On direct examination, he stated that it was his understanding that Craig did not have an obligation to repay this advance. (Tr. 409). The evidence to which Crown Life refers is that on cross-examination, O'Brien testified that he did not recall anyone at Crown Life specifically telling him that the arbitration advance would be forgiven. (Tr. 426). Finally, we point out that Mr. Craig testified that it was his understanding that the advance need not be repaid. The district court found this testimony to be highly credible. When a factual finding is based upon a credibility determination, "we are bound by the trial court's finding of fact if upon our review of the entire record the district court's account of the evidence is plausible." *Hughes v. United Van Lines, Inc.*, 829 F.2d 1407, 1416 (7th Cir. 1987), [**31] *cert. denied*, 485 U.S. 913, 99 L. Ed. 2d 248, 108 S. Ct. 1068 (1988). Given Mr. Craig's testimony and the lack of a note, the district court's findings with regard to the arbitration loan are plausible, and we affirm the judgment in its entirety.

AFFIRMED

APPENDIX J

**COMPUTER ASSOCIATES INTERNATIONAL, INC., Plaintiff, v.
AMERICAN FUNDWARE, INC., et al., Defendants**

Case No. 86-C-2562

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
COLORADO**

**133 F.R.D. 166; 1990 U.S. Dist. LEXIS 16613; 18 U.S.P.Q.2D
(BNA) 1649; Copy. L. Rep. (CCH) P26,685**

**December 6, 1990, Decided
December 6, 1990, Filed**

**LexisNexis (TM) HEADNOTES - Core
Concepts:**

COUNSEL:

[**1] Jane Michaels, Steven C. Chocquette, Denver, Colorado, for Plaintiff.

Douglas E. Bragg, Esq., Denver, Colorado, Peter Vogel, Esq., Dallas, Texas, Stephen Kahn, Esq., Denver, Colorado, Karl J. Dakin, Esq., Englewood, Colorado, for Defendants.

JUDGES:

Jim R. Carrigan, United States District Judge.

OPINIONBY:

CARRIGAN

OPINION:

[*167] MEMORANDUM OPINION
AND ORDER

Computer Associates International, Inc. ("CA"), a Delaware corporation with its principal place of business in New York, commenced this action asserting claims and seeking damages for breach of contract (First Claim), unfair competition (Fourth Claim) and copyright infringement (Fifth Claim). As additional remedies, CA seeks preliminary and permanent injunctions (Second Claim) and punitive damages (Third Claim). Defendant American Fundware, Inc. ("AF") is a Colorado corporation with its principal place of business in Colorado. Defendant Yeager, a Colorado citizen, is AF's president. Defendant Dayton, also a Colorado citizen, is AF's vice-president. Defendants will be referred to collectively as "AF."

Asserting that AF destroyed critical evidence, CA has moved for a default judgment as a sanction pursuant to Fed. R. Civ. P. 37(b). Magistrate Hilbert Schauer reviewed [**2] the matter and prepared a recommendation pursuant to this court's Local Rule 603 that a sanction short of default be ordered. CA has objected to the Magistrate's recommendation, renewing its request for

default judgment as a sanction against all three defendants.

[*168] The parties have fully briefed the issues, and a hearing has been held. Jurisdiction is founded on 28 U.S.C. § § 1332 and 1338(a).

In the 1970's, CA's predecessor developed and marketed a series of proprietary computer accounting programs. On May 25, 1979, CA's predecessor entered into a Computer Software Agreement (the "agreement") with AF's predecessor. The agreement provided that AF's predecessor could use and distribute certain of CA's predecessor's programs subject to specified conditions. CA and AF are successors to the rights and responsibilities of their respective predecessor companies under the agreement.

AF currently is marketing a series of accounting programs called PC-Fund. By supplemental complaint, CA alleges that PC-Fund is a reproduction of its software and therefore violates the agreement. CA further alleges that, in violation of CA's copyright, AF copied the structure, sequence, organization and other features [**3] of CA's programs.

In October 1986, CA informed AF of its concern that AF had violated the agreement. In an effort to allay CA's suspicions, AF gave CA a portion of PC-Fund's source code. n1 This effort, however, produced a result opposite to that intended, for CA concluded that AF indeed had copied its software and thereby had violated the agreement.

n1 Source code is the form of computer program written in a language that suitably trained programmers can read and understand.

On December 4, 1986, the parties met in an unsuccessful attempt to resolve their

dispute. At that meeting, CA informed AF that it believed PC-Fund had been copied from CA's programs. On December 19, 1986, CA filed this action, and on December 23, 1986, AF was served.

Prior to December 1986, AF at any one time had retained only the then current version of PC-Fund's source code. Under that procedure, as the program was revised, previous versions were destroyed. AF continued this practice until September 1987, long after commencement of this lawsuit. [**4] The record indicates that such a practice is commonly followed in the industry, for legitimate reasons, and is not inherently wrongful. However, it is not the general propriety of the practice that is at issue. Rather CA contends that once AF knew, or should have known, that the source code probably would be critical evidence in pending or imminent litigation, a duty arose to preserve it. If AF breached that duty, contends CA, the most serious sanction would be appropriate.

This court has the inherent authority to enter sanctions for discovery abuses. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765, 65 L. Ed. 2d 488, 100 S. Ct. 2455 (1980). If the abuses are egregious, default judgment is appropriate. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643, 49 L. Ed. 2d 747, 96 S. Ct. 2778 (1976). This inherent power has been reinforced by Fed. R. Civ. P. 37(b)(2). In pertinent part, that rule reads:

"If a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following: . . . (C) An order striking out pleadings or parts thereof . . . or rendering a

judgment by default against the disobedient [**5] party."

Other courts have exercised this power to enter default judgments as punishment for a defendant's destruction of documents. *Wm. T. Thompson Co. v. General Nutrition Corp.*, 593 F. Supp. 1443, 1455-56 (C.D. Cal. 1984); *Telectron, Inc. v. Overhead Door Corp.*, 116 F.R.D. 107 (S.D. Fla. 1987). Therefore, I must determine whether AF breached any obligation, and if so, what sanction, if any, is appropriate.

The threshold question is when AF's duty to preserve the source code arose. AF asserts that the duty did not arise until the Magistrate ordered it to produce the code on September 11, 1987. [*169] However, pre-litigation discussions between the parties had made clear that the central issue in this dispute would be PC-Fund's source code and especially whether it had been copied from CA's product. Even if those discussions had not occurred, notice from CA's complaint filed December 19, 1986, and its later supplemental complaint, surely eliminated any lingering doubt regarding the crucial importance of the source code as evidence.

On April 3, 1987, CA served on AF a production request seeking PC-Fund's source code. On May 21, 1987, CA filed a motion to compel discovery of PC-Fund's source [**6] code. In spite of clear notice from these pending discovery efforts, AF continued to destroy older versions of the PC-Fund code until September 1987. As stated in *Wm. T. Thompson, Co.*:

"Sanctions may be imposed against a litigant who is on notice that documents and information in its possession are relevant to **litigation, or potential litigation,** or are reasonably calculated to lead to the

discovery of admissible evidence, and destroys such documents and information. While a litigant is under no duty to keep or retain every document in its possession once a complaint is filed, it is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery, and/or is the subject of a pending discovery request." 593 F. Supp. at 1455.

All reasonable inferences lead inexorably to the conclusion that AF must have been aware that PC-Fund's source code would be the subject of a discovery request long before it stopped destroying older versions, and I so find. It is inconceivable that after the October 1986 meeting, AF did not realize that the [**7] software in its possession would be sought through discovery. Certainly commencement of the action settled any doubts. Thereafter the request for production, followed by the motion to compel, provided repeated, insistent reminders of the duty to preserve this irreplaceable evidence. Yet the destruction proceeded.

Therefore, I find and conclude that AF was subject to a duty to preserve the source code no later January 13, 1987, *i.e.*, twenty days after December 23, 1986, when it was served with the complaint, because, in the normal course of proceedings, it had a duty by then to investigate the matter and file an answer, or otherwise respond, to the complaint. Even assuming that maintenance of only a single, updated version of the source code was, in other circumstances, a bona fide business practice, any destruction of versions of the code after January 13, 1987, could not

be excused as a bona fide business practice. That date gives AF the benefit of every doubt.

Further, I find and conclude that AF intentionally destroyed portions of the source code not only after being served in this action and thus put on notice that the source code was irreplaceable evidence, but even after [**8] the request for production and motion to compel had dramatically and specifically emphasized the significance of the code versions being destroyed as evidence.

The only remaining question is what sanction should be imposed against AF for thus willfully violating its discovery obligations. Sanctions serve a dual function. Their purpose is "not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." *National Hockey League*, 427 U.S. at 643.

One of the most severe sanctions available is default judgment. It is reserved for egregious offenses against an opposing party or a court. Therefore I have considered default judgment as a last resort to be invoked only if no lesser, yet equally effective, sanction is available. Employing default as a sanction requires findings: (1) that AF acted willfully or in bad faith; (2) that CA was seriously prejudiced by AF's actions; and (3) that alternative sanctions would not adequately punish AF and deter future discovery violations. [*170] *See Telectron, Inc. v. Overhead Door Corp.*, 116 F.R.D. 107 (S.D. Fla. 1987).

As stated, I have found that [**9] AF intentionally destroyed evidence after the obligation to preserve it arose and after AF had clear notice of that obligation. Therefore, I find and conclude that AF acted willfully.

Obviously CA was seriously prejudiced by AF's actions. Comparing PC-Fund's source code to CA's was the only way to prove CA's

claim that AF had copied its product. However, that comparison has been rendered all but impossible because AF intentionally destroyed the relevant version. Destroying the best evidence relating to the core issue in the case inflicts the ultimate prejudice upon the opposing party.

I find and conclude that no alternative sanction short of a default judgment would adequately punish AF and deter future like-minded litigants. Any lesser sanction would allow a party possessing evidence that would insure an adverse result to destroy that evidence with impunity, thus assuring defeat for the opponent while risking only a comparatively mild rebuke. One who anticipates that compliance with discovery rules, and the resulting production of damning evidence, will produce an adverse judgment, will not likely be deterred from destroying that decisive evidence by any sanction less than the adverse [**10] judgment he (or she) is tempted to thus evade. It follows that the only sanction adequate and appropriate to punish AF and deter future similarly situated litigants is default judgment on liability.

At oral argument, AF's counsel asserted that default judgment is inappropriate because CA's complaint is without merit. That argument, of course, begs the question, for AF's misconduct has precluded the court from determining whether CA's complaint has merit or not. Most probably AF would have been meticulously careful to preserve evidence that could have demonstrated lack of merit in CA's case. It is familiar doctrine that if a party fails to produce from within its control evidence that is relevant and material, the fair inference is that that evidence would have weighed against the party who held it back. *See Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 350-351, 53 L. Ed. 530, 29 S. Ct. 370 (1909); *Ohio v. Arthur Andersen & Co.*, 570 F.2d 1370, 1374-1375 (10th Cir. 1978). *A fortiori*, where a party destroys

evidence after being put on notice that it is important to a lawsuit, and being placed under a legal obligation to preserve and produce it, the compelling inference is that the evidence would have supported the [**11] opposing party's case. *Id.* (both cites).

In this post Iran-gate era of widely publicized evidence destruction by document shredding, it is well to remind litigants that such conduct will not be tolerated in judicial proceedings. Destruction of evidence cannot be countenanced in a justice system whose goal is to find the truth through honest and orderly production of evidence under established discovery rules. I hold that nothing less than default judgment on the issue of liability will suffice to both punish this defendant and deter others similarly tempted.

Accordingly, IT IS ORDERED that:

- (1) The Magistrate's recommendation is not adopted as the order of this court;
- (2) CA's objection to the Magistrate's recommendation is sustained;
- (3) CA's motion to strike the defendants' answer is granted to the extent of striking liability

defenses and granting CA judgment by default as to liability against American Fundware, Inc., Richard E. Yeager and Jerome C. Dayton;

(4) CA's motion for entry of default judgment on the issue of liability against all defendants is granted, and the clerk of this court shall enter judgment as to liability in favor of the plaintiff and against the [**12] defendants accordingly;

(5) The parties and their counsel are ordered to confer within eleven days of this order in a good faith attempt to settle all remaining issues in this case, including the amount of the plaintiff's damages and the terms of any injunctive [*171] relief that is appropriate. Further, the parties are ordered to report to this court in writing, within eleven days after their meeting, stating the results of their settlement negotiations. If any issue remains unsettled, either party may move for an expedited hearing.

APPENDIX K
United States of America, Plaintiff-Appellee, v. Taber Extrusions, LP,
et al., Defendants-Appellants.

No. 02-2965

UNITED STATES COURT OF APPEALS FOR THE EIGHTH
CIRCUIT

2003 U.S. App. LEXIS 17896

April 14, 2003, Submitted
August 27, 2003, Filed

PRIOR HISTORY: [*1] Appeal from the United States District Court for the Eastern District of Arkansas.

United States v. Taber Extrusions L.P., 2001 U.S. Dist. LEXIS 24600 (E.D. Ark., Dec. 26, 2001)

DISPOSITION: District court's judgment reversed and case remanded for further proceedings.

LexisNexis (TM) HEADNOTES - Core Concepts:

COUNSEL: For United States of America, Plaintiff - Appellee: Arthur Douglas Chavis, Paula J. Casey, U.S. Attorney, U.S. ATTORNEY'S OFFICE, Little Rock, AR. David W. Ogden, WILMER & CUTLER, Washington, DC. Michael F. Hertz, J. Chris Larson, U.S. DEPARTMENT OF JUSTICE, Washington, DC.

For Taber Extrusions, LP, National Materials, LP, TABER METALS HOLDING, INC. fka

C.T. Five, Inc., Thomas C. Walsh, BRYAN & CAVE, St. Louis, MO. Kevin Arlen Crass, FRIDAY & ELDREDGE, Little Rock, AR. Joel S. Feldman, Matthew John O'Hara, SACHNOFF & WEAVER, Chicago, IL.

JUDGES: Before LOKEN, Chief Judge, HANSEN and BYE, Circuit Judges.

OPINIONBY: LOKEN

OPINION: LOKEN, Chief Judge.

In July 1993, defense contractor Precision Machining, Inc. (PMI) was awarded a contract to build aluminum ribbon bridges for the United States Army. In the following months, PMI submitted three requests for progress payments based in part on "pro forma" invoices for aluminum extrusions from its independent supplier, Taber Extrusions, LP. In 1998, officers of PMI pleaded guilty to criminal fraud, admitting that the progress payment requests had improperly included [*2] the amounts invoiced by Taber Extrusions as "incurred costs," i.e., current obligations PMI had either paid or recorded on its ledgers as accounts payable. The United States then

brought this civil action against Taber Extrusions and two of its affiliates (collectively, "Taber"), alleging that Taber violated the False Claims Act, 31 U.S.C. § § 3729-3733, by conspiring with PMI to submit false progress payment requests, and by causing the submission of false claims by issuing false invoices that PMI used to support its false progress payment requests. The district court granted summary judgment for the United States on its fraud claims. We review the grant of summary judgment de novo, viewing the facts in the light most favorable to Taber. See *Mercer v. City of Cedar Rapids*, 308 F.3d 840, 843 (8th Cir. 2002) (standard of review). Concluding that genuine issues of material fact preclude the grant of summary judgment, we reverse.

We will review separately the two critical conclusions supporting the district court's decision to grant summary judgment for the plaintiff in this False Claims Act case. First, the court concluded that Taber's [*3] three invoices were "false or fraudulent" for purposes of 31 U.S.C. § 3729(a). In reaching this conclusion, the court accepted as true, indeed, as undisputed, the government's evidence (i) that under the applicable procurement regulations progress payments may only be based upon current obligations (incurred costs); and (ii) that the lack of the words "pro forma" on the Taber invoices caused them to be presented "as present, real, and current obligations," when in fact PMI had no current obligation to Taber. In our view, this analysis ignores Taber's evidence of the following genuinely disputed facts:

-- both Taber and the government knew PMI was in financial difficulty when it was awarded the aluminum ribbon bridges contract;

-- PMI was the contractor on another important military contract, so the government had a

strong interest in PMI continuing in business;

-- PMI had used pro forma invoices from Taber to obtain progress payments on prior military contracts;

-- pro forma invoices are a device common in industry whereby a supplier advises a customer who is not credit-worthy what price the customer must pay before the supplier will assemble and ship [*4] a specific order; n1

-- the invoices in question were obviously pro forma because they did not contain a shipping date or other shipping information;

-- PMI did not submit the Taber invoices to the government along with PMI's requests for progress payments;

-- after PMI had obtained progress payments based in part on the first two Taber invoices, a government audit revealed that Taber had shipped no aluminum; this confirmed the pro forma nature of the Taber invoices, yet the government then made a progress payment based on the third Taber invoice without objection.

This evidence, if believed, could lead a reasonable jury to find that the Taber invoices in question were not false or fraudulent. In addition, this evidence raises genuine issues of fact as to materiality and government knowledge, see *United States ex rel. Costner v. URS Consultants, Inc.*, 317 F.3d 883, 886-88 (8th Cir. 2003), and as to whether Taber's conduct caused the government to make the

progress payments in question, see *United States ex rel. Shaver v. Lucas Western Corp.*, 237 F.3d 932, 933-34 (8th Cir. 2001).

n1 This evidence is consistent with dictionary definitions of a pro forma invoice. Black's defines a pro forma invoice as an invoice "provided in advance to describe items, predict results, or secure approval." BLACK'S LAW DICTIONARY 1227 (7th ed. 1999). The Oxford English Dictionary defines it as "an invoice sent to a purchaser in advance of the ordered goods, so that formalities may be completed."

[*5]

Second, the district court concluded that Taber acted knowingly, for purposes of False Claims Act liability, because more than one Taber employee admitted knowing that PMI would use the pro forma invoices to obtain progress payments. The difficulty with this analysis is that Taber was a supplier that did not deal directly with the government. Without question, the first three subsections of 31 U.S.C. § 3729(a) are broad enough to "reach any person who knowingly assisted in causing the government to pay claims which were grounded in fraud, without regard to whether that person had direct contractual relations with the government." *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 544-45, 87 L. Ed. 443, 63 S. Ct. 379 (1943). But the issue is whether Taber "knowingly assisted" PMI's fraud. The Act defines "knowingly" to mean actual knowledge that the information was untrue or deliberate ignorance or reckless disregard of the truth or falsity of that information. See 31 U.S.C. § 3729(b). "However, innocent mistakes and negligence are not offenses under the Act. . . . In short, the claim must be a lie." *United States ex rel. Quirk v. Madonna Towers, Inc.*, 278 F.3d 765, 767 (8th Cir. 2002) [*6] (quotations omitted). Thus, to hold Taber

liable, either as a conspirator or as one who caused PMI's false claims to be made, the government must prove that Taber knew that PMI would use Taber's pro forma invoices in a manner which would cause the facts represented or omitted in the invoices to defraud the United States. See *Minn. Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp.*, 276 F.3d 1032, 1053 (8th Cir.), cert. denied, 537 U.S. 944, 123 S. Ct. 345, 154 L. Ed. 2d 252 (2002); *Hindo v. Univ. of Health Sciences/Chicago Med. Sch.*, 65 F.3d 608, 613 (7th Cir. 1995), cert. denied, 516 U.S. 1114, 133 L. Ed. 2d 846, 116 S. Ct. 915 (1996).

The government certainly has evidence creating the requisite inference, but Taber presented contrary evidence. Taber's officers denied knowing that pro forma invoices could not be used to support progress payment requests. n2 Taber's national sales manager testified that a progress payment "allows a supplier to recoup some needed costs to cover expenses while the contract is being completed because the contract in many respects is larger than the entity itself that's doing [*7] business with the government." Depending on factors such as witness credibility, a reasonable jury might find that Taber was reasonable in demanding payment in advance from the financially stressed PMI and in believing or assuming that the military might allow progress payments to fund PMI's advance payments to a critical vendor. Particularly when the issue turns on the defendant's intent or scienter, summary judgment for the plaintiff is inappropriate. See *Pfizer, Inc. v. Int'l Rectifier Corp.*, 538 F.2d 180, 185 (8th Cir. 1976), cert. denied, 429 U.S. 1040, 50 L. Ed. 2d 751, 97 S. Ct. 738 (1977).

n2 If Taber had no actual knowledge of what the government's progress payment regulations required, whether Taber as a second-tier supplier had a duty to inquire is clearly an issue for the

ultimate fact-finder. Cf. Quirk, 278 F.3d at 768.

In granting summary judgment in favor of the government, the district court stated that its analysis applied equally to all [*8] three False Claims Act counts in the government's amended complaint. Accordingly, the grant of summary judgment is reversed as to all three counts. Compare *United States v. Murphy*, 937

F.2d 1032, 1038-39 (6th Cir. 1991) (reversing summary judgment for the government on a False Claims Act conspiracy claim). The other issues discussed in the parties' briefs require no discussion at this interlocutory stage of the case.

The judgment of the district court is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

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APPENDIX L

**NATIONAL ASSOCIATION OF RADIATION SURVIVORS, et al.,
Plaintiffs, v. Thomas K. TURNAGE, et al., Defendants**

No. C-83-1861 MHP

**UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA**

115 F.R.D. 543; 1987 U.S. Dist. LEXIS 3468

**April 29, 1987, Decided
April 29, 1987, Filed**

LexisNexis(R) Headnotes

COUNSEL:

[**1] James J. Garrett, Gordon P. Erspamer and Michael F. Ram of Morrison & Foerster, for plaintiffs.

George C. Stoll, Assistant U.S. Attorney; Theodore C. Hirt, Gena E. Cadieux, Merrill Hirsh, Richard A. Hertling, Anne Gulyassy and Thomas Peebles, Attorneys, Department of Justice; Donald E. Zeglin, Deputy Assistant General Counsel, for defendants.

JUDGES:

Marilyn Hall Patel, U.S.D.J..

OPINIONBY:

PATEL

OPINION:

[*545] MARILYN HALL PATEL,
U.S.D.J.

Plaintiff class is comprised of veterans exposed to ionizing radiation during their service with the United States armed forces, who now allege that the Veterans Administration's claims adjudication procedure violates due process. The matter is currently before the court on plaintiffs' motion for an award of sanctions following the V.A.'s alleged destruction and nonproduction of documentary evidence responsive to various discovery requests.

After a series of hearings on plaintiffs' earlier motions for restraining orders and sanctions, the court determined that an evidentiary hearing was required to establish whether defendant's conduct was sanctionable. On December 3, 4, and 5, 1986, the court heard testimony from a number of the defendant's employees involved in discovery compliance and document [*2] destruction. On the basis of the testimonial and documentary evidence presented at that hearing, the court issued a bench order on January 8, 1987, granting plaintiffs' motion for sanctions. This written order memorializes the court's ruling from the bench.

I. BACKGROUND

As set forth in the court's order dated November 26, 1986, plaintiffs' counsel received an anonymous letter on July 11, 1986, indicating that the Compensation and Pension Service ("CPS") of the Veterans Administration was in the process of destroying a significant number of documents relevant to this action. Plaintiffs subsequently sought a temporary restraining order enjoining further document destruction, and an order to show cause why the restraining order should not be made permanent. On July 18, 1986, the court granted plaintiffs' application.

[*546] After hearing on the order to show cause, the court entered a permanent protective order on September 26, 1986. The order issued upon plaintiffs' undisputed showing that during June and July 1986, the CPS destroyed numerous discoverable documents relating to the processing of veterans' benefits claims, and had planned to destroy additional documents specifically relating [*3] to the claims of ionizing radiation victims. Only the entry of the temporary protective order saved these clearly relevant materials from destruction. Counsel for the defendant explicitly conceded that the document purge reached relevant and discoverable material; he stated before the court on September 26, 1986, that "all sorts of documents, some of which could have been considered relevant and discoverable, have been and are being destroyed." R.T. at 5.

It remained to be determined whether the defendant's document destruction was willful, reckless, or merely the inadvertent result of office housecleaning. At the hearing on the permanent protective order, the parties submitted conflicting deposition testimony regarding the motivation for the document destruction. Defendant claimed that the document destruction was part of an innocent

filekeeping process, completed prior to the receipt of plaintiffs' Eighth Request to Produce Documents (which sought a number of the purged documents). Plaintiffs countered with evidence suggesting that the document purge took place after the receipt of the discovery request, and was either an attempt to evade discovery or a reckless abrogation of the [**4] defendant's pretrial responsibilities.

The court determined that the extent and motivation of defendant's document purge could not be established without an evidentiary hearing. Accordingly, the court ordered that the employees of the CPS who participated in the document destruction appear at a hearing to testify before the court. Pursuant to that evidentiary hearing, the court now enters findings of fact, conclusions of law, and sanctions.

n1 In the period preceding the evidentiary hearing it became apparent that the issue of document destruction was only one aspect of a larger pattern of potentially sanctionable pretrial behavior on the part of the defendant, including its repeated failure to produce documents clearly responsive to plaintiffs' various discovery requests. The court therefore took additional testimony at the hearing on the issue of discovery compliance.

II. FINDINGS OF FACT

There are three primary allegations made by the plaintiff class: (1) that discoverable documents were destroyed or never produced; n2 (2) that the destruction of documents postdated defendant's receipt of the eighth document request; and (3) that defendant's overall failure to comply [**5] with discovery requests was intentional or reckless,

and was concealed in part by threats of retaliation. The court enters findings of fact with respect to each.

n2 As observed above, defendant's counsel has already conceded that the document purge destroyed relevant and discoverable material. Thus, plaintiffs' showing with respect to the purge of relevant documents goes only to the extent, rather than the fact, of such impermissible destruction.

A. Discoverability of the Destroyed or Unproduced Documents

Destroyed Documents in the Field Operations General Files

1. The first category of documents destroyed during the summer of 1986 were the general files of the Compensation and Pension Service's Field Operations staff. Vivian Drake, secretary to the CPS's Assistant Director for Field Operations, Michael Dunlap, maintained these files and conducted the purge of their contents. She stated that she "glanced through" the files and cleaned them out on the basis of age, using a V.A. publication providing guidelines for document retention. R.T. at 18, 19. While Drake could not identify the specific time frame utilized, she suggested that she had destroyed documents over two years [**6] old. R.T. at 21. Drake stated that [*547] everything she threw out had first been approved by Dunlap. R.T. at 20.

2. Ms. Drake testified that the general files contained interstaff correspondence within the V.A., internal memoranda generated by the Compensation and Pension Service, and staff analyses of field stations. R.T. at 18-19. The originals of the staff analyses are kept in the Field Operations general files, while additional copies are maintained in the Field

Operations operating files and the regional offices. R.T. at 28. Dunlap stated that the staff analyses in the general files date back to the late 1970s and early 1980s. R.T. at 175. Drake testified that she destroyed none of these. R.T. at 28. Dunlap concurred. R.T. at 157. Dunlap testified that the general files also contain various blank forms and a "history" file. *Id.* The specific content of the forms and the history files was not established.

3. Drake averred that she recalls absolutely nothing about the specific documents which were destroyed, and would state only that no staff analyses were thrown out. Dunlap, who reviewed each document prior to its destruction, evinced a similar absence of memory. Drake's virtually [**7] complete lack of any specific recollection regarding the nature of the documents she destroyed only a few months earlier, and her highly nervous and recalcitrant demeanor on the stand, cast serious doubt upon the credibility of her testimony. Unfortunately, Drake and Dunlap are the only individuals competent to testify to the specific documents destroyed, and their refusal or incapacity to do so precludes a determination of the specific relevance of the documents destroyed in the Field Operations general files.

Destroyed Documents in the Field Operations Operating Files

4. The Field Operations operating files were purged by consultants Stephen Tomasek, Doug Bissell, and Allen Zinn. Bissell estimated that he purged approximately half the contents of the files for which he was responsible -- enough to fill approximately three to four government-issue garbage cans. R.T. at 311, 316-17. Zinn and Tomasek both testified that they used a 1980 cutoff date for purging documents, although both also testified that pre-1980 documents were saved if the consultants considered them particularly significant. R.T. at 219, 482. The

documents destroyed were up to twenty years old; the permanent files [**8] apparently had not been purged in at least a decade. R.T. at 217, 310.

5. The operating files are maintained on a station-by-station basis for each of the 58 regional offices of the Veterans Administration. R.T. at 49. For each station, the operating file contains a permanent and temporary file. Of the three consultants purging these files, only Bissell purged the temporary files; the other two consultants focused exclusively on the permanent files. R.T. at 293, 309, 473.

6. The temporary files contain the raw data for the summary documents contained in the permanent files. This raw data includes a variety of documents. Exception sheets, generated by the CPS's Quality Review staff through random reviews of claim files in regional offices, R.T. at 137-38, contain analyses of processing errors found in individual cases. R.T. at 137. Each contains a claim number, the claimant's name, an "end product" indicating the agency action, the error made, and a notation of what should have been done. *Id.* By the terminal digit of the "end product" code, exception sheets can be linked to radiation claims. R.T. at 193. Three copies of these sheets exist: one in Quality Review, one in the Field [**9] Operations temporary operating file, and one in the regional office claim file. R.T. at 97-98. While two of the consultants did not purge the temporary files, the files are nonetheless maintained by CPS staff for only one year. Since Quality Review also retains its copies of exception sheets for no more than a year, R.T. at 189, the only available copies, if any, of exception sheets older than one year are contained in the various regional offices. It is doubtful that these copies are practically obtainable.

[*548] 7. The temporary files also contain local "Systematic Quality Control"

information and reports of corrective actions taken by regional offices in response to inquiries from the CPS central office. R.T. at 310. This data is also destroyed on a yearly basis, and is not otherwise practically obtainable.

8. The permanent files contain a variety of documents which are assembled from the raw data contained in the temporary files. These include staff analyses and site surveys of regional offices. R.T. at 46-47, 136. The permanent files also contain general correspondence between regional offices and the Field Operations central office staff. R.T. at 26. Staff analyses are prepared twice [**10] a year at the central office on the basis of information submitted from the regional offices. An analysis includes a "review of end product timeliness, average delay time to establish target claims, quality review, and assessment of the station's productivity statistics." R.T. at 136. Of the consultants, Tomasek purged the permanent files of all staff analyses more than one year old, while Zinn threw out none. R.T. at 221, 482. The original copies of the analyses are kept in the Field Operations general files. Dunlap testified that these originals were not purged, so the information remains available.

9. Site surveys differ from staff analyses insofar as they represent the findings of an actual visit to a regional office. R.T. at 46. Site surveys review a regional office's adherence to V.A. regulations governing the adjudication of benefits claims, and comment on due process violations. R.T. at 46-47. Copies of the site surveys are kept only in the permanent operating files. R.T. at 295. Zinn and Bissell testified that they preserved all site surveys. R.T. at 313, 482. Tomasek threw out all but the last two site surveys, which are prepared from once a year to once every eight years. [**11] R.T. at 295-96. The site surveys purged by Tomasek, some possibly only two years old, are thus irretrievably lost.

10. Other information in the permanent files includes inspector general reports and correspondence between the central and regional offices regarding corrective actions. Additional copies of this correspondence are found only in the files of the particular regional office which generated or received it. R.T. at 168. Tomasek testified that he generally did not throw out any corrective action correspondence, though he "might" have. R.T. at 219-20. Tomasek admitted destroying an anonymous letter in a permanent file critical of Mr. Thomas Verrill, an adjudication officer in Philadelphia and later in San Francisco. R.T. at 224. Tomasek threw out inspector general reports, claiming that they are now maintained elsewhere in the Compensation and Pension Service; Bissell stated that he threw none away. R.T. at 246, 313. While Zinn and Bissell both stated that they threw out only mundane and outdated correspondence and forms, R.T. at 325, 483, and while Tomasek asserted to others within the CPS that he purged nothing of importance, R.T. at 102, Bissell admitted that there "may have [**12] been some quality control issues regarding due process that may have been destroyed." R.T. at 338. It is thus highly probable that relevant documentary evidence, including agency correspondence, was destroyed by the consultants. Copies, if any, exist only in the files of the various regional offices, and in all likelihood are not practically obtainable.

Nearly-Destroyed Ionizing Claim Documents

11. Twelve boxes of ionizing claim documents located in the Advisory Review offices of the Compensation and Pension Service were spared from destruction in July 1986 by this court's temporary restraining order. R.T. at 166. The boxes allegedly were to be destroyed to create more office space. R.T. at 185. The boxes contained requests made to the Defense Nuclear Agency, the

Department of the Navy, and the Department of the Army regarding the radiation exposure of particular veterans. R.T. at 162. The documents contained the names of the veterans, their service numbers, the V.A. claim file numbers, and the [*549] responses from the various agencies regarding the claimants' radiation exposure. *Id.* Some of the documents contained dose estimates. R.T. at 184.

12. These documents are located together [**13] only in the offices of the Advisory Review staff; the only other copies are contained in individual veterans' claim files maintained by the various regional offices of the V.A. R.T. at 164. Thus had the destruction taken place, the remaining copies would have been practically unobtainable.

Unproduced Documents: SIRS and PIF

13. The Special Issue Rating System ("SIRS") and the Pending Issue File ("PIF") are two V.A. computer systems capable of segregating and identifying the claims of ionizing radiation victims. The existence and capabilities of neither was revealed to plaintiffs until late 1986, though both have existed for a number of years.

14. Gary Hickman, a CPS Assistant Director, testified that SIRS has been used for several years. R.T. at 608. Dunlap knew of SIRS when he worked in the Washington, D.C. regional office of the V.A. in 1985, and testified that PIF has been in effect "a long time. Several years." R.T. at 200-01. Plaintiffs produced a recently-acquired document entitled "DVB Circular 20-82-39," which indicates that the PIF system has been capable of segregating ionizing radiation claims since 1982. R.T. at 553-59.

15. The SIRS field includes the claimant's file [**14] number and name, the date of the claim, and the agency disposition. R.T. at 199. Included among SIRS claims are those involving ionizing radiation. R.T. at 200.

SIRS is presently capable of segregating ionizing radiation claimants by specific disease. R.T. at 567. Hickman acknowledged that SIRS can readily identify all radiation claimants in whose case a ratings decision has been entered. R.T. at 570.

16. The PIF field includes a file number, end product code, the claimant's "stub" name, the date of filing of the claim, and information regarding the claim's disposition. PIF segregates ionizing radiation claims by the terminal digit of the end product code, and thus can identify all such pending claims. R.T. at 200.

17. Defendant has indicated throughout this litigation that it was incapable of identifying ionizing radiation claimants. *See, e.g.,* Declaration of Jack Nagan, dated May 16, 1983, at 2-3; Defendant's Answers to Plaintiffs' First Set of Interrogatories, dated June 17, 1983, at 1, 11, 13; Defendant's Authorities in Opposition to Plaintiffs' Motion for Class Certification, dated April 1, 1986, at 10 ("no one knows the size of the proposed class [of ionizing radiation [**15] claimants] -- not plaintiffs, not the Court, and certainly not this Agency.")

18. Defendant's purported inability to provide information regarding ionizing radiation claimants has substantially multiplied the litigation in this matter. Significant among the resulting disputes is defendant's tenacious opposition to plaintiffs' motion for class certification, based in large part on plaintiffs' alleged failure to establish numerosity. *See* Defendant's Authorities in Opposition to Plaintiffs' Motion for Class Certification, dated April 1, 1986.

Other Unproduced Documents

19. During the course of the hearing, a number of specific unproduced documents were brought to the court's attention by the plaintiffs. Since it is unclear from which file or office within the CPS they originated, the

documents are listed individually. These include, in part: (a) correspondence between the central office and the St. Petersburg regional office regarding hearings and due process; (b) various papers on due process trends, problems, and policies, prepared by CPS legal consultant Ronald Abrams, R.T. at 409-10; (c) a manual form change altering "the error call for failure to provide due process," triggered [**16] by extensive correspondence from regional offices regarding difficulties they had experienced in evaluating this problem, R.T. at 412; (d) a CPS file dealing [*550] with "end product abuse," apparently containing a memorandum revealing 47,995 extra end products entered by at least fifteen regional offices, R.T. at 413, 449; (e) a CPS file entitled "Due Process," R.T. at 549; (f) DVB Circular 20-82-39, discussed above with reference to PIF; (g) a letter from Gerald Moore, the Director of the CPS, to regional offices regarding the process of adjudicating ionizing radiation claims and the implications of 38 C.F.R. 3.311B, governing such adjudication, R.T. at 576; (h) a number of circulars describing SIRS and its various capabilities, R.T. at 563 *passim*; and (i) a series of three training letters from Mr. Moore to regional offices, discussing various procedural shortcomings in claims processing, R.T. at 617.

B. Timing of the Document Destruction Vis-a-Vis Receipt of the Eighth Document Request

20. Plaintiffs served defendant with their eighth document request on June 25, 1986. Plaintiffs allege that this request specifically sought a number of the destroyed documents. *See, e.g.,* [**17] Plaintiffs' Eighth Request to Produce Documents, Request Nos. 3, 6.

21. Vivian Drake testified that soon after being hired, she discussed with Dunlap the possibility of cleaning out and organizing the Field Operations general files. This conversation took place somewhere between

October 1985 and April 1986; Drake could offer no greater specificity. R.T. at 27. Dunlap stated that he told her to work on cleaning out the files on a "time available basis" when he hired her. R.T. at 181. Though Drake had nearly no recollection regarding the date of the second conversation with Dunlap that specifically led to the document destruction, Drake's affidavit dated August 4, 1986, places the conversation in June 1986.

22. Drake demonstrated a similar failure of recollection with respect to the time period during which she actually conducted the purge of the general files. R.T. at 22. She left for another job on July 11, 1986, and stated that she could not remember whether she continued to work on the files until her departure. R.T. at 21. In her earlier deposition, she indicated that she worked on the file purge until she left. Drake Dep. at 55. Dunlap recalls that Drake worked on the purge up [**18] until the time she transferred, and recalls that she worked on it while he was gone in early July. R.T. at 156, 195. Drake's purge of the general files thus can be reasonably placed after defendant's receipt of the eighth document request.

23. The date of the consultant's purge of the operating files is the subject of contradictory testimony. The consultants testified that the purge of the operating files was initiated by Vivian Drake, who had received authorization from Dunlap. They testified that Drake wanted to have the operating files thinned out because of their increasingly unwieldy bulk. R.T. at 242-43. Drake passed Dunlap's authorization along to Tomasek, who testified that the conversation took place in mid-June. R.T. at 238.

24. Tomasek, Zinn, Bissell, and Dunlap all related nearly identical stories placing the subsequent document destruction during a short period in the middle of June, well before the receipt of the eighth document request. All testified that the document destruction

began during the absence of Dunlap and Fay Norred, a supervisor in Field Operations, who was on vacation from June 10 through June 25. This apparently was her only absence. R.T. at 509. Dunlap [**19] was in Los Angeles from June 11 through June 13. R.T. at 160. They claimed that the operating file purge was conducted during a fairly short period of time, and was finished well before June 25. R.T. at 175, 236.

25. The evidence suggesting a later starting date, possibly after receipt of the eighth request, stems largely from the testimony of Barry Boskovich, a consultant working on the Adjudication Procedures staff of the CPS. Boskovich testified that he had two conversations with Tomasek about the purge -- one in late June and another on July 7. R.T. at 49-50. The second [*551] conversation, which took place with Bissell present, occurred after Boskovich had seen portions of the eighth document request. He teased Tomasek, who had worked in Baltimore, about the inclusion of the Baltimore office in the discovery request, and got the "impression" over the course of the conversation that the purge was continuing. R.T. at 52. In earlier deposition testimony, Boskovich was far more direct in his description of Tomasek's admission that documents had been destroyed after receipt of the request. *See* Boskovich Dep. at 14, 58, 65. Boskovich subsequently corrected these deposition statements [**20] and rendered them far more guardedly. He explained the changes as clarifications of those statements which he "didn't know for a fact," and which resulted from the confusion of his two conversations with Tomasek. R.T. at 108-09. The court observes that significant evidence exists of employee intimidation and harassment. *See infra* paragraphs 43 through 45. Boskovich's shifting testimony must be considered in light of this intimidation.

26. In the second conversation, Boskovich raised the question of the propriety of the purge in light of the request, and Tomasek reportedly indicated that he had not seen the request, that he had done nothing wrong, and that the documents that he had thrown out were unimportant. R.T. at 69-70. Larry Nicholson, a supervisor within the CPS who had been present for some of the conversations, confirmed in his testimony that Tomasek stated he had done nothing wrong. R.T. at 347. There is agreement that Tomasek never denied that the purge of documents continued after receipt of the eighth document request. R.T. at 56-57, 346-47. Nicholson concluded, as did Boskovich, that on the basis of Tomasek's comments during various discussions, destruction of documents [**21] proceeded after receipt of the eighth request. R.T. at 370-71.

27. Two other considerations cast doubt on Tomasek's rendition of the events. In his deposition on August 25, Tomasek stated that the purge began two to three weeks prior to the date when he gave his initial affidavit, which was conducted on August 1, 1986. R.T. at 238. This deposition testimony placed the purge during the first few weeks of July. Tomasek subsequently testified that this was an "anomaly" in light of his testimony placing the purge in mid-June. *Id.* Second, the initial affidavits given by the three consultants were drawn up only after they had consulted among themselves regarding the date of the document purge. R.T. at 229, 319-20. The resulting affidavits are essentially identical, and wholly exculpatory.

28. While the date of the document purge cannot be identified with a high degree of specificity, and while there is substantial contradictory testimony regarding its occurrence, there is significant circumstantial evidence that the document purge continued after defendant's receipt of the Eighth Request for Documents.

29. Dunlap approved the shredding of the twelve boxes of ionizing claim documents [**22] in mid-July, well after receipt of the eighth request and following extensive discussion of this litigation within the Compensation and Pension Service. R.T. at 165. Only Dunlap's conversation with a number of CPS officials on July 21 or 22, in which he was instructed to save the documents pursuant to this court's temporary restraining order, halted the plans for destruction from proceeding. R.T. at 166. These events occurred indisputably after Dunlap and others in the CPS had significant knowledge of this lawsuit.

C. Evidence of Culpable Intent in the Destruction and Nonproduction of Documents

30. Plaintiffs have offered significant evidence of the defendant's culpable intent in its pattern of noncompliance with discovery requests. This intent is reflected in two areas: evidence of CPS officials' failure to establish any systematic process to comply with plaintiffs' discovery requests, and evidence of the officials' affirmative attempts to stifle full compliance with discovery requests and disclosure to the court of past inadequacies.

*[*552] Absence of a Systematic Compliance Procedure*

31. Gary Hickman was the individual responsible within the Compensation and Pension Service [**23] for coordinating discovery compliance. R.T. at 611. He is a lawyer, and testified to possessing a full understanding of the issues involved in the litigation. R.T. at 516, 612.

32. Despite his knowledge and his background, Hickman did nothing to systematically assure compliance with plaintiffs' discovery requests. He has no recollection of giving any instructions to his staff regarding discovery compliance. R.T. at 613. His procedure was to send a portion of a

particular discovery request to the head of a particular department within the CPS, and leave it to the supervisor to interpret the request and provide the information. R.T. at 614. Hickman has never instructed his staff to contact each department head within the CPS regarding each discovery request. R.T. at 530. This procedure apparently has not yet been changed. R.T. at 458.

33. Ronald Abrams testified that because of this process, a number of individuals possessing information responsive to the document requests have never seen the requests. R.T. at 452-53.

34. After a supervisor prepared a response, Hickman simply would read it, along with the request. He did nothing to verify the sufficiency of the response. R.T. at 614-15. [**24] Hickman admitted that his level of knowledge regarding the contents of the various departmental files was inadequate to determine whether the response was complete. R.T. at 614.

35. Hickman has maintained no records of the discovery produced, so he is incapable of verifying whether or not any particular documents have been provided to the plaintiffs. R.T. at 615.

36. Either as a result of their misrepresentation or Hickman's failure to inform the personnel in Field Operations of the substance of this litigation, Drake, Dunlap, Bissell, and Zinn all testified to varying degrees of ignorance about the lawsuit. R.T. at 26, 142-43, 326, 489. While most claimed that they knew the case involved radiation claims and the statutory ten dollar attorneys' fee limit, none testified to any familiarity with the due process claims made in the litigation.

37. Tomasek testified to a greater understanding of the lawsuit. He stated that he knew the litigation dealt with due process issues, since Abrams constantly "harps" on

the subject and brought it to Tomasek's attention when he worked in a regional office during 1984. R.T. at 288-89. Larry Nicholson, to whom Dunlap delegated his portion of the response [**25] to the eighth document request, R.T. at 145-46, also testified to a more extensive understanding of the litigation. In 1984 he had participated in document collection pursuant to an earlier discovery request. R.T. at 341-42.

38. Dunlap and Drake testified to remarkable levels of ignorance. Drake claimed never to have heard of the case. R.T. at 26. Dunlap stated that he first learned of the case this year, and did not know in June 1986 that the lawsuit involved the ten dollar fee limitation or benefits claims by atomic bomb test survivors. R.T. at 143-44, 171. These and other claims of ignorance regarding the litigation must be considered in light of Tomasek's observation that "the NARS case is felt throughout the V.A. Everyone knows about the NARS case." R.T. at 288. Additionally, Hickman testified that he knew both Dunlap and Ted Spindle -- another assistant director within the CPS -- were well aware of the issues in the NARS litigation. R.T. at 519; Hickman Dep. at 56.

39. Once informed of the substance of the lawsuit, the Field Operations supervisors exhibited the same kind of disregard for the sufficiency of their staff's particular responses as Hickman exhibited for the overall [**26] response of the Compensation and Pension Service. Nicholson, a lawyer who was responsible for the Field Operations' response to the eighth request, made no attempt after learning of the purge to determine [**553] if the documents destroyed in the operating files were responsive to it. He suggested that it was not his problem and declined to investigate after consultants Boskovich, Abrams, and Thomas Kenny all specifically expressed concern to him about the document

destruction and its implications for the discovery request. R.T. at 79, 350, 353-54.

40. Dunlap also made no attempt to investigate the responsiveness of the destroyed documents after receiving the eighth request. R.T. at 161. Neither did he initially provide the consultants with any criteria for their purge of the files, or check to see if there existed copies of the destroyed documents in other files. R.T. at 215-16. This lack of inquiry followed distribution within the CPS of copies of the anonymous "deep throat" letter to plaintiffs' counsel, which specifically suggested that the document destruction was an attempt to thwart discovery requests. R.T. at 146-47. When Boskovich went to Spindle, supervisor of the adjudication procedures [**27] staff, he similarly refused to do any follow-up, stating that it was a field operations problem. R.T. at 66.

41. Perhaps the most striking disregard of the discovery process was Dunlap's approval of the destruction of twelve boxes of ionizing radiation claims data in mid-July. After testifying that he "may have assumed" prior to June 1986 that this lawsuit dealt with the adjudication of ionizing radiation claims, R.T. at 143, after testifying that extensive discussions regarding the litigation occurred within the CPS in early July 1986, R.T. at 147, and after testifying that as of July he knew that documents contained within the boxes slated for destruction were crucial to the adjudication of ionizing radiation claimants, R.T. at 163, Dunlap weakly asserted that he did not think the boxed documents had any relation to the issues involved in the litigation. R.T. at 186. This demonstrates either a complete and reckless disregard of discovery obligations or a very poor attempt to disguise the intentional destruction of relevant documents.

42. Hickman's wholly unpersuasive attempts to explain the V.A.'s inadequate

responses to various document requests are equally troubling, and point [**28] in the same direction: either he made no effort to understand and then to respond to the requests in good faith, or he concealed responsive documents and now vainly attempts to sanitize the omissions. *See* R.T. at 538-46.

Encouragement and Concealment of Noncompliance and Destruction

43. Even more troubling than evidence of the defendant's disregard of its obligations to fully comply with discovery requests is evidence of its affirmative attempts to stifle such compliance and its employees' subsequent cooperation with this court's inquiry into discovery violations. A number of individuals testified to efforts made by various CPS officials to restrain full disclosure of information -- efforts which included threats of retaliation.

44. When Thomas Kenny went to Ted Spindle with his concerns that documents were being destroyed which were responsive to discovery requests, he was told to "keep his nose out of it." R.T. at 379. In Boskovich's first deposition, he stated that Spindle had similarly told him to "stay out of it" after Boskovich went to him with his concerns. Boskovich Dep. at 49. Boskovich later deleted this statement -- but left in its repetition only a few lines later. [**29] Boskovich later repeated in testimony that Spindle had told him to "stay out of it," not to put anything in writing, to come to him if he discovered additional information, and not to talk with anyone else. R.T. at 112. In a transparent threat of retaliation, Spindle indicated that Boskovich should focus his attention and concerns not on the agency, but on himself and his family. *Id.*

45. Similarly, Ronald Abrams was told by Deputy Director Herbert Mars, Hickman, and Spindle not to put anything in writing after he expressed concerns about discovery

noncompliance. R.T. at 411-12. Abrams presently fears retaliation from Dunlap for his role in exposing due process violations within the V.A. R.T. at 395. [*554] Dunlap tore apart and discarded one of Abrams' previous memoranda on due process violations, contending that it was inappropriately critical of regional offices; he was known to Abrams as having little concern for "documentation of due process and providing full notice." R.T. at 402, 404.

46. Finally, Tomasek has now stopped attending the coffee-break discussion group of which he previously was a part, because "he feared someone he might talk to would give information away," according [*30] to Boskovich. R.T. at 64. Tomasek claimed that he stopped going simply to comply with the court's sealing order. R.T. at 241.

47. Boskovich offered testimony suggesting that individuals in positions of greater authority within the V.A. were aware of attempts to thwart discovery and this court's investigation. In a conversation between Boskovich and his immediate supervisor, Dale Rice, Boskovich reported the document destruction and his concerns about its relation to the outstanding discovery request. Rice replied that "the third floor knows." R.T. at 66. Abrams indicated that the "third floor" suggests the offices of the Chief Benefits Director and his staff. R.T. at 424.

48. While it remains unclear how extensive or coordinated was the attempt among the supervisory staff of the V.A. to stifle disclosure of discovery violations, there is convincing evidence that a number of individuals in positions of authority willfully attempted to thwart this court's investigation of possible improprieties relating to the CPS's destruction and nonproduction of relevant evidence. An inference of conscious intent in the first instance to destroy responsive documents, though, is inconsistent with

[**31] the haphazard and essentially uncoordinated nature of the document purge.

III. CONCLUSIONS OF LAW

Given this factual record, the court concludes that the Veterans Administration has acted in a sanctionable manner in a variety of respects. First, its failure to provide documentary evidence clearly responsive to multiple requests made by plaintiffs during the course of discovery is sanctionable under Fed. R. Civ. P. 11 and 26(g) insofar as the discovery responses, as well as subsequent motions and papers based on those responses, did not reflect a reasonable inquiry on the part of defendant and its counsel. Second, sanctions for the destruction of potentially discoverable documents, regardless of whether they were specifically responsive to outstanding discovery requests, are an authorized exercise of the court's inherent power to preserve and protect its jurisdiction and the integrity of proceedings before it. Third, plaintiffs' costs in bringing motions for temporary and permanent protective orders to spare discoverable documents from destruction are recoverable under Fed. R. Civ. P. 37(a)(4) as expenses incurred to compel discovery.

While evidence that the defendant acted willfully [*32] or recklessly in thwarting discovery and this court's subsequent investigation into alleged improprieties is neither required to sanction the defendant's conduct under Rules 11 and 26 nor grounds for additional sanctions apart from those outlined above, it nonetheless is relevant to the determination of the particular measures imposed to deal with the defendant's various transgressions.

A. Sanctions for the Nonproduction of Responsive Documents Under Rules 11 and 26

Under Fed. R. Civ. P. 11, an attorney who signs any pleading, motion, or other paper certifies that he or she has established, after reasonable inquiry, that it is "well grounded in fact." The rule

was designed to create an affirmative duty of investigation as to law and as to fact before motions are filed. It creates an objective standard of "reasonableness under the circumstances." This was intended to be a standard "more stringent than the original good faith formula" so "that a greater range of circumstances will trigger its violation."

[*555] *Golden Eagle Distributing Corporation v. Burroughs Corporation*, 801 F.2d 1531, 1536 (9th Cir. 1986) (citations omitted). If counsel relies on the investigation of preceding counsel [**33] or a party, the duty remains to "acquire[] knowledge of facts sufficient to enable him to certify that the paper is well-grounded in fact." Schwarzer, *Sanctions Under the New Federal Rule 11 -- A Closer Look*, 104 F.R.D. 181, 187 (1985).

While the rule's language speaks directly to the obligations of certifying attorneys who sign the papers, parties may also be sanctioned under its provisions. As the Advisory Committee observed,

even though it is the attorney whose signature violates the rule, it may be appropriate under the circumstances of the case to impose a sanction on the client. This modification brings Rule 11 in line with practice under Rule 37, which allows sanctions for abuses during discovery to be imposed upon the party, the attorney, or both.

Fed. R. Civ. P. 11 Advisory Committee's Note (citations omitted).

Fed. R. Civ. P. 26(g) contains sanction provisions parallel to those found in Rule 11. The primary distinction is that Rule 26 applies exclusively to discovery requests and responses, while Rule 11 applies to any paper, pleading, or motion. Rule 26(g) thus requires a signing attorney to certify that a reasonable inquiry has been made with respect to the factual [**34] and legal basis for any discovery request or response. Fed. R. Civ. P. 26(g) Advisory Committee's Note. The reasonableness of the inquiry is measured by an objective standard; there is no required showing of bad faith. *Id.* While Rule 11 is reserved for those papers, pleadings, and motions for which there are not other applicable sanction provisions, and thus cannot be used to preempt the application of Rule 26(g) to discovery responses and requests, *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 830 (9th Cir. 1986), its interpretation nonetheless guides the application of Rule 26(g).

Plaintiffs have established that the defendant failed to produce clearly responsive documentary evidence over the course of discovery in this litigation. These omissions reflect the consistent failure of defendant and its counsel to conduct reasonable factual inquiries prior to filing various discovery responses and other pleadings, papers, and motions. The omissions are sanctionable under Rule 26(g) where the omitted documents and information should have been disclosed in particular discovery responses, and under Rule 11 where the undisclosed documents and information refuted the asserted factual [**35] basis for other motions, pleadings, or papers subsequently filed by defendant.

Defendant's most egregious discovery omission was its failure to produce the SIRS

and PIF computer data, which was clearly responsive to numerous requests made by the plaintiffs. Plaintiffs' first request for documents and first set of interrogatories required the production of data within the fields of SIRS and PIF. *See* Plaintiffs' First Set of Interrogatories, Interrogatory Nos. 1, 8, 9; Plaintiffs' First Request to Produce Documents, Request No. 6. The defendant's initial and subsequent responses to these and other discovery requests falsely asserted that data available in the SIRS and PIF systems was only obtainable through a manual review of the virtually millions of individual claim files in the various regional offices of the Veterans Administration. *See, e.g.*, Declaration of Jack Nagan in Response to Plaintiff's First Request to Produce Documents, dated May 16, 1983, at para. 4(a):

Because of the size of the Agency . . . , the nature of our record-keeping activities, and the huge number of records involved, it is literally impossible to produce *all* documents in the VA's possession concerning [**36] subject matters as broad as those involved in plaintiff's Request. For example, both the material already provided and that which will be provided for the most part, does not include documents prepared locally at a VA Regional Office. These documents could only be obtained by a manual review of all VA [**556] records, including but not limited to the approximately 34 million claims folders located at the 58 field stations, Records Processing Centers and Federal Archive Records Centers.

The defendant asserted as recently as October 28, 1986, that it could not identify the pending ionizing radiation claims before the Veterans Administration -- a statement that the V.A. retracted as false on November 18, 1986, after it finally acknowledged the capabilities of the PIF database.

Plaintiffs have brought to the court's attention a number of additional unproduced documents which were responsive to various discovery requests. Based upon defendant's conduct in this litigation, the court must presume that these particular documents, obtained by plaintiffs despite the defendant's noncompliance, represent but a fraction of the responsive materials which defendant controls but has not produced. These [**37] documents are enumerated, in part, in paragraph 19 of the Findings of Fact, *supra*. They include analyses and documentation of due process problems prepared by CPS employees, correspondence between regional offices and the CPS central office regarding various due process issues, and circulars describing the capabilities of SIRS and PIF. These documents are responsive to a variety of plaintiffs' discovery requests, including Requests 3 and 6 of the Plaintiffs' Eighth Request to Produce Documents.

The V.A.'s various discovery omissions are directly attributable to the failure of defendant and its counsel to establish a coherent and effective system to faithfully and effectively respond to discovery requests. As detailed in paragraphs 31 through 42 of the Findings of Fact, *supra*, the defendant employed an unconscionably careless procedure to handle discovery matters, suggesting a callous disregard for its obligations as a litigant. As detailed in paragraphs 43 through 48 of the Findings of Fact, *supra*, the attempts of various supervisors to stifle disclosure of potentially nondisclosed and destroyed documents, rather than to vigorously investigate possible

noncompliance, accentuates [**38] the defendant's profound disrespect for its responsibilities in this litigation.

The court concludes that the defendant and its counsel failed in a variety of instances to conduct any reasonable inquiry into the factual basis of its discovery responses as well as the factual basis of subsequent pleadings, papers, and motions based on those responses. Such an inquiry would have required, at a minimum, a reasonable procedure to distribute discovery requests to all employees and agents of the defendant potentially possessing responsive information, and to account for the collection and subsequent production of the information to plaintiffs. The defendant's failure to institute such a procedure, its attendant failure to produce clearly responsive documents and information, and its subsequent submission of papers, pleadings, and motions based on asserted facts directly refuted by the nonproduced material violate the requirements of Rules 26(g) and 11 and require the imposition of sanctions.

B. Sanctions for the Destruction of Relevant and Discoverable Documents Under the Court's Inherent Powers

The court has the inherent authority to sanction a litigant for the destruction of relevant [**39] and potentially discoverable documents. As the court in *Wm. T. Thompson Co. v. General Nutrition Corp.*, 593 F. Supp. 1443 (C.D. Cal. 1984), observed,

sanctions may be imposed against a litigant who is on notice that documents and information in its possession are relevant to litigation, or potential litigation, or are reasonably calculated to lead to the discovery of admissible evidence, and destroys such documents and

information. While a litigant is under no duty to keep or retain every document in its possession once a complaint is filed, it is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible [**557] evidence, is reasonably likely to be requested during discovery, and/or is the subject of a pending discovery request.

Id. at 1455; see *Graham v. Teledyne-Continental Motors*, 805 F.2d 1386, 1390 n.9 (9th Cir. 1986) ("sanctions available to punish those who alter or destroy evidence"); *Struthers Patent Corp. Nestle Co.*, 558 F. Supp. 747, 765-66 (D.N.J. 1981) (the destruction of documents which the party knew or should have known would be relevant to a lawsuit soon [**40] to be filed is sanctionable); *Bowmar Instruments Corp. v. Texas Instruments, Inc.*, 25 Fed. R. Serv. 2d (Callaghan) 423, 426-27 (N.D. Ind. 1977) (same).

There is no question that relevant documents were destroyed and are now permanently lost; defendant's counsel conceded this in open court. Among the destroyed documents were exception sheets, statistical quality control data, and other information contained in the CPS temporary files; the CPS site surveys thrown out by Tomasek; and certain pieces of agency correspondence, including the letter critical of Thomas Verrill. By the very fact of their destruction, though, the vast majority of the purged documents cannot now be identified. A striking absence of recollection regarding the content and nature of the destroyed documents characterized the testimony of Drake, Dunlap, and the consultants who conducted the purge, and makes the specific

identification of the discarded materials even more difficult than it would be otherwise.

Needless to say, plaintiffs should not suffer because of this. Where one party wrongfully denies another the evidence necessary to establish a fact in dispute, the court must draw the strongest allowable inferences [**41] in favor of the aggrieved party. *Cecil Corley Motor Co. v. General Motors Corp.*, 380 F. Supp. 819, 859 (M.D. Tenn. 1974). As the court in *Alexander v. National Farmers Org.*, 687 F.2d 1173 (8th Cir. 1982), *cert. denied*, 461 U.S. 937-38, 103 S. Ct. 2108, 77 L. Ed. 2d 313 (1983), observed,

obviously, the relevance of and resulting prejudice from destruction of documents cannot be clearly ascertained because the documents no longer exist. Under the circumstances, [the culpable party] can hardly assert any presumption of irrelevance as to the destroyed documents. On this record, the district court properly could have imposed the most severe sanctions upon [the culpable party] -- dismissal of its claims and default judgment Nonetheless, we cannot say it was an abuse of discretion not to do so. It was error, however, not to draw factual inferences adverse to [the culpable party] on matters undertaken in or through offices and individuals involved in the destruction of documents.

Id. at 1205-06 (citations and footnote omitted). The court therefore infers and concludes that a significant proportion of those materials purged from the CPS general and operating files which now cannot be identified were [**42] either "relevant in the action, reasonably calculated to lead to

the discovery of admissible evidence, reasonably likely to be requested during discovery, and/or the subject of a pending discovery request." *Wm. T. Thompson*, 593 F. Supp. at 1455.

The court further concludes that the defendant knew or should have known that these destroyed materials were relevant and discoverable. After more than three years of litigation, the V.A. can hardly assert that it was not on notice of the issues involved in this lawsuit. It is no defense to suggest, as the defendant attempts, that particular employees were not on notice. To hold otherwise would permit an agency, corporate officer, or legal department to shield itself from discovery obligations by keeping its employees ignorant. n3 The obligation to retain discoverable [*558] materials is an affirmative one; it requires that the agency or corporate officers having notice of discovery obligations communicate those obligations to employees in possession of discoverable materials. Certainly at this late stage in these proceedings, the responsibility lies with the Veterans Administration to inform its employees and agents of the substance [**43] of the litigation and to assure that relevant and discoverable materials are not destroyed. Far from achieving this objective, the procedure described by Mr. Hickman to manage discovery bordered on the anarchic. The V.A.'s reckless and irresponsible abrogation of its responsibility to assure full compliance with discovery requests cannot be tolerated or excused, and is most assuredly sanctionable where it results in the wholesale destruction of potentially relevant material. n4

n3 As noted above in paragraph 38 of the Findings of Fact, there is substantial reason to doubt that the CPS employees were as ignorant of the substance of this litigation at the time of the document purge as they now claim.

Furthermore, it is beyond dispute that the supervisory staff of the CPS understood the basis of the litigation by mid-July 1986, when plans to destroy twelve boxes of clearly relevant ionizing radiation claim data were halted only by this court's temporary restraining order. The defendant's protestations of its employees' innocence are thus less than credible.

n4 To the extent that the documents destroyed were specifically responsive to outstanding discovery requests, sanctions are also appropriate under Rule 11 insofar as the destroyed documents contradicted the facts asserted in applicable pleadings, papers, or motions, and Rule 26(g) insofar as particular discovery responses failed to include the documents. The destruction of responsive documents is only the most egregious variant of nonproduction, and a reasonable inquiry would have led to their preservation and inclusion in defendant's discovery responses.

[**44] *C. Fees and Costs Under Rule 37(a)(4)*

Finally, a prevailing party may recover its fees and costs in bringing motions to compel discovery under Fed. R. Civ. P. 37(a)(4). Plaintiffs' motions for temporary and permanent protective orders to spare discoverable and responsive documents from destruction were brought to compel discovery, and all costs and fees incurred to do so are thus recoverable.

IV. SANCTIONS

By its bench order dated January 9, 1987, this court imposed a variety of measures to sanction the defendant's multiple transgressions and to protect the court's

jurisdiction and the integrity of these proceedings. These measures included the reimbursement of plaintiffs and the court for various expenses incurred as a result of defendant's sanctionable actions, the imposition of a number of requirements for the conduct of further discovery, and the appointment of a special master at defendant's expense to supervise all further discovery. Under the circumstances, the court determined that it was appropriate to direct the sanctions to both the defendant and its counsel, since responsibility for the conduct of the litigation was shared and since culpability could not be accurately [**45] apportioned between the two.

The court here details the sanctions ordered from the bench. These measures are without prejudice to subsequent requests by plaintiffs for the imposition of additional sanctions in the form of the exclusion of evidence or the admission of facts.

A. Monetary Sanctions

1. Defendant shall reimburse plaintiffs for all fees and costs incurred in depositions, discovery, preparation, the hearing, and other matters related to the bringing on of this motion for sanctions and of the plaintiffs' earlier motions for temporary and permanent protective orders. Defendant shall reimburse plaintiffs for all fees and costs incurred in ascertaining the documents destroyed during the defendant's purge and in reconstructing them, if possible. Defendant shall reimburse plaintiffs for all fees and costs incurred as a result of the defendant's failure to produce documents and information responsive to various discovery requests, as outlined in paragraphs 13 through 19 of the Findings of Fact, *supra*. This includes but is not limited to the fees and costs incurred as a result of supplemental discovery requests and as a result of the defendant's opposition to the motion [**46] for [*559] class certification

based upon the plaintiffs' alleged failure to establish numerosity and impracticability of joinder.

2. On February 23, 1987, the parties stipulated that the fees and costs imposed by the January 9, 1987 bench order shall be satisfied by defendant's payment to the plaintiffs of the sum of \$ 105,000.00. Further inquiry into the actual amount of the monetary sanctions therefore is unnecessary. The matter need not be referred to a magistrate and plaintiffs need not submit any further accounting of fees and expenses.

3. The defendant shall pay an additional sum of \$ 15,000.00 to the clerk of this court for the unnecessary consumption of the court's time and resources. *Olga's Kitchen of Hayward, Inc. v. Papo*, 108 F.R.D. 695, 711 (E.D. Mich. 1985); *Itel Containers Int'l Corp. v. Puerto Rico Marine Management, Inc.*, 108 F.R.D. 96, 106 (D.N.J. 1985). In its bench ruling, the court ordered the defendant to pay the money into an extern fund used to compensate unpaid law students who assist in the work of the courts of this district. Defendant moved for reconsideration of that aspect of the ruling, arguing that the provisions of 28 U.S.C. § 751(e) (1982) require all [**47] funds received by the clerks of the courts to be paid into the Treasury of the United States. After review of the applicable statutory authority, the court concludes that its prior bench ruling was inconsistent with the requirements of the law and thus modifies the ruling to require that payment be made to the clerk of the court for deposition as required by law.

B. Additional Discovery Obligations

4. To insure compliance and complete discovery, the defendant shall designate an attorney within the V.A. who shall be responsible at all times for receiving discovery requests, coordinating and preparing their responses, and signing the

responses. By submission filed January 21, 1987, in response to the court's January 9, 1987 bench order, the Veterans Administration designated Donald E. Zeglin, Esq., Deputy Assistant Attorney General, Office of the General Counsel, to serve this function.

5. All discovery responses shall hereafter be signed by the designated attorney and by the General Counsel of the Veterans Administration, whose signatures shall certify not only the matters required by Rules 11 and 26(g) but shall also constitute a certification that the attorneys have made an inquiry [**48] of all documents and files, including computer files, which may contain discoverable material in this action; that they are familiar with the contents of those files; that they have fully distributed all discovery requests so that any employee, unit, or department which may have material relevant to the discovery requests in this case have been apprised; and that the requested discovery has been obtained.

6. The two attorneys shall present to the court a proposed plan to insure the proper and orderly circulation of and compliance with future discovery requests, the maintenance of a record of discovery and documents provided, and the establishment of a system to supervise the response of employees who are asked to obtain or compile discovery. The court, having received and reviewed the defendant's proposed discovery plan and plaintiffs' objections to it, approves the modified plan as set forth in Appendix I, subject to such further modifications as may be recommended by the special master appointed below.

7. The two attorneys shall also present to the court a proposed notice for posting and circulating to all employees of the Veterans Administration, advising them of the pendency and the [**49] nature of this action and, with specificity, notifying them of

the issues involved. The court, having received and reviewed the defendant's proposed notice and plaintiffs' objections to it, approves the notice, as modified, as set forth in Appendix II. Within ten days of this written order, the defendant shall post and circulate the notice to all employees.

[*560] 8. The defendant shall prepare a notice setting forth the obligations of attorneys and litigants, including employees of litigants, in the preservation of evidence, the giving of testimony, and cooperation in pending litigation, so as to avoid unnecessary delay or expense and prevent harassment and other improper conduct eschewed by the Federal Rules of Civil Procedure. The notice shall further advise that adverse action of any kind related to an employee's giving of testimony, evidence, or assistance in this litigation is actionable and may constitute a federal offense, and is further in violation of the orders of this court and may be punished by contempt. The magistrate already assigned to this action, Magistrate Claudia Wilken, is hereby appointed to hear matters related to any complaints arising out of this order. Magistrate [*50] Wilken's name and FTS number shall be included in the notice. The court, having received and reviewed the defendant's proposed notice and plaintiffs' objections to it, approves the notice, as modified, as set forth in Appendix III. Within ten days of this written order, the defendant shall post and circulate the notice to all employees.

9. The magistrate is empowered to receive complaints of any violation of this aspect of the order, determine whether any contemptuous conduct has occurred, and make her findings to this court. She is also authorized to determine whether the matter should be referred to an appropriate body for further investigation.

C. The Appointment of a Special Master

10. The discovery abuses found by the court include destruction of documents, incorrect or false responses to discovery requests, and a failure to divulge information and produce documents. Internal procedures for handling discovery and compiling responses were haphazard, making discovery failures inevitable. In addition, there were willful or grossly neglectful efforts that resulted in the destruction of documents. The Veterans Administration has demonstrated that it is either incapable or unwilling [**51] to provide discovery in accordance with the federal rules governing discovery. Hence, the court appoints Charles A. Horsky of Washington, D.C., to serve as special master to supervise all further discovery in this matter.

11. While this appointment arises under the sanctions provisions of Rules 11 and 26(g) and the court's inherent powers, the court nonetheless is guided by the provisions of Fed. R. Civ. P. 53. Rule 53(b) provides for the appointment of a special master in those matters where "some exceptional condition requires it." The court is mindful of the admonition of *La Buy v. Howes Leather Co.*, 352 U.S. 249, 259, 1 L. Ed. 2d 290, 77 S. Ct. 309, *reh'g denied*, 352 U.S. 1019, 1 L. Ed. 2d 560, 77 S. Ct. 553 (1957), that special masters are to be used sparingly and only where the use of the court's time is not justified. Nevertheless, in a post-*La Buy* case, the use of special masters in certain pretrial and discovery proceedings has been upheld. *In re Armco, Inc.*, 770 F.2d 103 (8th Cir. 1985). In *Armco* the special master was given "broad authority to supervise and conduct pretrial matters, including discovery activity, the production and arrangement of exhibits and stipulations of fact, the power to hear motions for summary [**52] judgment or dismissal and to make recommendations with respect thereto." *Id.* at 105. In this case the powers the court intends to confer are much more limited.

12. Numerous other cases after *La Buy* have approved the appointment of special masters where parties have failed to comply with court orders, displayed intransigence in the litigation, or required close supervision. See *Ruiz v. Estelle*, 679 F.2d 1115, 1159-63 (5th Cir.), modified on other grounds, 688 F.2d 266 (5th Cir. 1982), cert. denied, 460 U.S. 1042, 75 L. Ed. 2d 795, 103 S. Ct. 1438 (1983); *Gary W. v. Louisiana*, 601 F.2d 240, 244-45 (5th Cir. 1979). Discovery is an area where special masters are frequently appointed either because the problems are complicated or the parties are recalcitrant. See *United States v. American Tel. & Tel. Co.*, 461 F. Supp. 1314, 1348-49 (D.D.C. 1978); *Fisher v. Harris, Upham & Co.*, 61 F.R.D. 447, 449 (S.D.N. [*561] Y. 1973), appeal dismissed mem., 516 F.2d 896 (2d Cir. 1975). Defendant's egregiously sanctionable conduct during the course of discovery in this matter presents a clear case of the exceptional circumstances contemplated by Rule 53 as justifying the appointment of a special master.
n5

n5 Further evidence of the need for supervision has recently come to the court's attention by way of an order of the magistrate assigned to this case. The magistrate has found that the defendant virtually ignored for three months its order denying the defendant's motion to limit party discovery and instructing the defendant to produce requested documents from other governmental agencies. The order was issued August 8, 1986, and defendant's motion for reconsideration was denied on September 2, 1986. Plaintiffs brought a motion for contempt and to compel discovery on November 21, 1986. Defendant responded that it had made a good faith effort to respond, asserting that "defendants' counsel did act to

provide the agencies identified with plaintiffs' document requests in order to comply as quickly as possible with the August 8 order." Defendants' Response Memorandum of January 7, 1987, at 20-21. The magistrate's order states that

the Court is now apprised, and defendants' counsel concede, that *no* steps were taken by defendants' counsel to initiate compliance with the Court's order until early December In light of this fact it is clear that this was a case of intentional noncompliance with this Court's order on the part of defendant's counsel, as opposed to a good faith but tardy compliance, as counsel had argued to the Court Counsel have compounded their error by providing false and misleading statements to the Court in their memorandum in response to plaintiffs' contempt motion.

Order re Plaintiffs' Motion for Reconsideration and Magistrate's Certificate of Facts Pursuant to 28 U.S.C. § 636(e), filed April 15, 1987, at 3-4 (emphasis in the original).

[**53] 13. The special master is appointed for the purpose of monitoring defendant's compliance with its internal plan for meeting discovery requests, as approved by the court above in paragraph 6. He shall review the plan and advise the court in writing if modification is appropriate and

necessary at any point during the pretrial proceedings to assure that discovery requests are promptly and accurately satisfied. He shall review periodic reports of internal compliance with the plan and notify the court of any material violations.

14. The special master shall hear and resolve all discovery disputes and submit his findings and conclusions to the court with copies to the parties. He is authorized to meet and confer with the parties to informally resolve discovery disputes. In furtherance of these duties, the special master is empowered to hold conferences, conduct hearings, make a record of such hearings or conferences, and require the parties to submit such papers as are necessary to aid in the resolution of any dispute, including internal documents, manuals, and papers that will assist in reviewing the internal discovery plan.

15. The findings, conclusions, and reports of the special master [**54] will be reviewed by the court under the "clearly erroneous" standard set forth in Fed. R. Civ. P. 53(e)(2).

16. The special master shall continue to serve until further order of the court. He shall be allowed his necessary expenses and reasonable fees, as determined by the court, upon submission of a detailed statement setting forth the expenses and hours. Defendant Veterans Administration shall pay such amounts as are approved by the court.

D. Motion for Reconsideration of the Requirement that Defendant Pay All Fees and Expenses of the Special Master

The defendant has moved the court to reconsider its bench ruling that the Veterans Administration pay the entirety of the fees and expenses of the special master, arguing that the sovereign immunity of the United States and its various agencies shields the defendant from the payment of litigation costs absent an express congressional waiver. *See*

Ruckelshaus v. Sierra Club, 463 U.S. 680, 684, 77 L. Ed. 2d 938, 103 S. Ct. 3274 (1983); *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 20-21, 47 S. Ct. 1, 71 L. Ed. 131 (1926). The V.A. argues that the fees and expenses of a special master are litigation costs, that Congress has not waived sovereign immunity with respect to such costs, and [**55] therefore that it cannot be ordered to remunerate [**562] the special master for his work. Defendant asserts that Fed. R. Civ. P. 54(d), which states that "costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law," requires "some source other than Rule 53 to justify an award of the expenses of a master. No such source has been identified in the plaintiffs' request for the appointment and compensation of such a master, nor by the Court in its order." Defendant's Response to the Court's January 8, 1987 Oral Order, at 7.

Defendant's argument ignores both the clear legal basis of the court's order and the applicable case authority interpreting the government's immunity with respect to the fees and expenses of a special master. The court has appointed the special master at defendant's expense specifically as a sanction under Rules 11 and 26(g), and under the court's inherent powers to make all necessary orders in protection of its jurisdiction and the integrity of proceedings before it. Under these sanction provisions, the court "has discretion to tailor sanctions to the particular facts of the case." Fed. R. Civ. P. 11 Advisory Committee's [**56] Note; *see* Fed. R. Civ. P. 26(g) Advisory Committee's Note ("The nature of the sanction is a matter of judicial discretion to be exercised in light of the particular circumstances.") After considering the V.A.'s repeatedly reckless pretrial conduct and the extraordinary difficulties involved in monitoring such a vast and demonstrably uncooperative agency, the court determined that the most effective and appropriate means

to sanction the defendant's ongoing abuses was the appointment of a special master, at defendant's expense, to supervise further discovery and assure future compliance.

Far from challenging the court's authority to impose sanctions under Rule 11 against the government, the Veterans Administration has expressly declined to assert its immunity from such sanctions in this proceeding. In the context of its objections to the initial bench order's requirement that the V.A. pay \$ 15,000.00 into a law student extern fund, the defendant stated that "although the government does not concede that it can be sanctioned pursuant to Fed. R. Civ. P. 11, plaintiffs correctly note that the government has not contended in this specific proceeding that sovereign immunity prohibits [**57] the imposition of Rule 11 sanctions." Defendant's Response to Plaintiffs' Memorandum in Support of Court's Ruling on Rule 11 Sanctions, at n.2. While the court need not look beyond the V.A.'s waiver of immunity objections to the imposition of Rule 11 sanctions, it is significant to note that other courts have, in fact, found government counsel sanctionable under the provisions of Rule 11. *See, e.g., Larkin v. Heckler*, 584 F. Supp. 512 (N.D. Cal. 1984). n6

n6 The Ninth Circuit has also relied on other provisions of the Federal Rules of Civil Procedure to levy fees and costs against the government for dilatory conduct. In *Schanen v. United States Dept. of Justice*, 798 F.2d 348 (9th Cir. 1986), a Freedom of Information Act case in which the Department of Justice waited until its petition for reconsideration to argue that the release of the disputed information would endanger the lives of its agents and informants, the circuit court reluctantly modified its earlier decision and exempted the information

from release. *Id.* at 349. Nonetheless, the court observed that

if the government attorneys had defended this action diligently, much controversy and expense could have been avoided. Rule 60(b) provides that the court may relieve a party from a final judgment 'upon such terms as are just.' Since it was the government's lack of diligence that prolonged these proceedings, justice demands that [the plaintiff and his counsel] be compensated for their expenses occasioned by the additional proceedings. Therefore, on remand, the district court shall order the government to recompense [plaintiff and his counsel] for their actual and reasonable costs and attorneys' fees attributable to all proceedings following the grant of summary judgment, including proceedings before this court.

Id. at 350. There is no reason to conclude that immunity objections would have any greater force with respect to Rule 11 than Rule 60, which evidently is sufficient authorization under *Schanen* for the imposition of fees and costs against the government.

[**58] Even if the court had assessed the fees and expenses of the special master on [*563] grounds other than the sanction provisions to which the defendant has

conceded exposure, its argument would remain without merit. The V.A. has not acknowledged or distinguished the significant case authority specifically establishing the court's ability, outside the context of sanctions, to impose the fees and expenses of a special master upon the government. The Veterans Administration asserts that although the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412 (1982 & Supp. III 1985), authorizes costs to be awarded against the United States when it fails to prevail in a civil action, sovereign immunity is waived only for those litigation costs specifically enumerated in 28 U.S.C. § 1920 (1982). Since section 1920 does not mention the fees and expenses of a special master, the defendant argues that no express waiver of immunity exists with respect to such costs and thus that the government cannot be ordered to pay them. The defendant cites no authority specifically barring the imposition of special masters' fees and expenses on the government, and the only cases directly on point hold otherwise.

In [**59] *Century Investment Corp. v. United States*, 277 F.2d 247, 254 (9th Cir. 1960), this circuit held that the fees and expenses of a special master appointed to compute damages could be charged to the government even though the defendants "engaged in conduct which made it necessary for the government to sue," since the government "misconceived the proper measure of damages" and thus made the master's report unusable. The court specifically held that such fees and expenses were not costs within the meaning of section 2412(a), which at the time excluded the taxing of any cost against the United States. n7 Since the fees and expenses of a special master thus are not "costs" within the meaning of section 2412, at least where the government is culpably responsible for their imposition, charging such expenses to the government need not be considered in light of

immunity limitations possibly raised by section 1920.

n7 Significantly, 28 U.S.C. § 2412(a) was amended in 1966 to delete the provision exempting the government from liability for all costs. *See Young v. Pierce*, 640 F. Supp. 1476, No. P-80-8-CA (E.D. Tex. July 3, 1986) (LEXIS, Genfed library, Newer file). If the Ninth Circuit held that the fees and expenses of a special master were chargeable to the government prior to the legislative expansion of the United States' liability for litigation costs, the defendant can hardly assert that there is now reason for this court to view the government's immunity more expansively.

[**60] Even if the court were to analyze the fees and expenses as costs awarded to a prevailing party under the EAJA, though, the result would be no different. As Chief Judge Justice observed in *Young v. Pierce*, 640 F. Supp. 1476, No. P-80-8-CA (E.D. Tex. July 3, 1986) (LEXIS, Genfed library, Newer file) "the government has been ordered to pay the costs of a special master in a variety of circumstances without an express reference in 28 U.S.C. § 1920." *See, e.g., United States v. Cline*, 388 F.2d 294, 296 (4th Cir. 1968) (government ordered to pay half of the costs of a special master appointed in a boundary dispute against the United States); *United States v. American Tel. & Tel. Co.*, 461 F. Supp. at 1348 n.112 (government ordered to pay half of the costs of a special master appointed to supervise discovery). n8 The court in *Young* observed that the 1966 amendment of the EAJA deleting a provision which exempted the government from liability for costs was intended "to correct the disparity of treatment between parties ' by putting the private litigant and the United

States on an equal footing as regards the award of court costs to the prevailing party in litigation involving the government.'" [**61] *Young*, at 1491 (citations omitted). In light of this statutory intent, the court rejected the government's sovereign immunity defense [**564] based on the provisions of 28 U.S.C. § 1920 and accordingly imposed on the government half the fees and expenses of a special master appointed to supervise discovery and monitor the remedy phase of desegregation litigation. *Young*, 640 F. Supp. 1476.

n8 The fact that the government was ordered to pay half, rather than all, of the special master's fees and expenses in these matters is of no relevance to defendant's sovereign immunity argument. If there is immunity, the court cannot impose any costs; if there is no immunity, the court can impose the entirety of the costs. See *Studiengesellschaft Kohle mb H v. Eastman Kodak Co.*, 713 F.2d 128, 134 (5th Cir. 1983).

In light of the case authority rejecting the defendant's contention that sovereign immunity shields it from the payment of the fees and expenses of a special master when it fails to prevail, as it has here, and given the defendant's failure to identify and object to the specific legal basis underlying the court's assessment of fees and expenses against it, the court declines to reconsider [**62] its ruling that all reasonable fees and expenses of the special master be charged to the defendant.

ACCORDINGLY, plaintiffs' motion for sanctions is granted and sanctions are imposed pursuant to the terms of this order.

IT IS SO ORDERED.

APPENDIX I

DISCOVERY PLAN OF VETERANS ADMINISTRATION

Pursuant to the court's order of January 8, 1987, Donald E. Zeglin, Esq. and Veterans Administration General Counsel Donald L. Ivers hereby submit their "plan for ensuring that discovery requests will be properly circulated and complied with in an orderly manner and a record of discovery provided and documents provided, and a system for doublechecking on employees who are asked to obtain or compile discovery." Transcript of January 8, 1987 Hearing, at 59.

Upon receipt of a discovery request, Mr. Zeglin will distribute a copy of the discovery request to all discovery coordinators designated by the heads of each V.A. department, staff office, and regional office (for those requests specifically designated as applying to regional offices). Each discovery coordinator is to be chosen on the basis of his or her extensive familiarity with and knowledge of the department, staff or regional office's [**63] activities, record-keeping capabilities, information-gathering functions, and the physical location of the office's personnel and files, including computer files. The following individuals have been designated as discovery coordinators:

1. David A. Laprade, Department of Veterans Benefits;
2. Jan Stefan J. Donsback, Special Assistant to the Chairman, BVA;
3. Mansell G. Piper, Director of Administration, DM&S;
4. Dean W. Holt, Department of Memorial Affairs;
5. Peter Mulhern, Budget and Finance;

6. Joel Biederman, Personnel and Labor Relations;

7. Raymond E. Hooper, Congressional and Intergovernmental Affairs;

8. Pamela E. Taylor, Public and Consumer Affairs;

9. Frank J. McGuire, Management;

10. Enar H. Sanders, Program Analysis and Evaluation;

11. Allan L. Gohrband, Information Systems and Telecommunications;

12. David M. O'Brien, Information Management and Statistics;

13. Arlyce Dubbin, Logistics;

14. Loretta A. Gray, Administration;

15. Rozetta E. Henderson, Facilities;

16. Jay J. Joerger, procurement and Supply;

17. Rufus Johnson, Equal Opportunity;

18. Arthur Kyle, Inspector General;

19. Deborah S. Bittinger, Board of Contract Appeals.

20. [add names of regional office coordinators]

[**64] Each discovery coordinator is to assist Mr. Zeglin by supervising an orderly search throughout his or her department, regional office or staff office for all discoverable material, by submitting the material to him and by preparing a record of discovery and documents provided. This record will include an index of all material provided, including notations as to which material is provided in response to which requests, the identities of all employees [*565] contacted, and a description of all locations and files searched. This record will be signed by the discovery coordinator and the head of the department, regional office or staff office (or his or her deputy), certifying that all discoverable material has been provided. The record will be forwarded with the discoverable material directly to Mr. Zeglin.

Mr. Zeglin and his staff will examine the documents to determine the adequacy of the discovery production. In addition, the record of discovery will be reviewed by Mrs. Lynn Covington, Director, Paperwork Management and Regulations Service, Office of Information Management and Statistics, with the assistance of her staff, to assist Mr. Zeglin in determining whether all employees, units, and [**65] departments that may have material responsive to the discovery requests have been apprised and that requested discovery has been obtained.

As soon as Mr. Zeglin has determined that all discoverable material has been collected, he will prepare and sign the V.A.'s response and present it to Mr. Donald L. Ivers, General Counsel, for his signature. Once signed by Mr. Ivers, the response, indices, and discoverable materials will be forwarded to the Department of Justice for production to the plaintiffs along with the materials

collected from other federal agencies, as outlined below.

Mr. Zeglin will forward copies of discovery requests, upon receipt, to other federal agencies when such agencies are specifically designated in the plaintiffs' request. Mr. Zeglin will work with the designated attorney or attorneys responsible for certifying those agencies' discovery responses so as to effect interagency discovery in a timely and coordinated manner. Mr. Zeglin and his staff will collect the discovery responses from the certifying attorneys of other federal agencies and will forward those responses along with the response of the V.A. to the Department of Justice for production to the plaintiffs. [**66]

APPENDIX II

NOTICE OF PENDING COURT ACTION

The Veterans Administration is a defendant in pending litigation entitled *National Association of Radiation Survivors v. Turnage, et al.* The District Court for the Northern District of California, which is hearing the case, has directed the Veterans Administration to circulate a notice to all employees advising them of the pendency and nature of this action and of the specific issues involved.

The plaintiffs in the litigation claim that they were exposed to ionizing radiation from the atomic bomb tests in the Western United States and the Pacific, or from the atomic bombing of Hiroshima and Nagasaki. These "ionizing radiation claimants" challenge the constitutionality of the \$10.00 statutory limitation on the amount of money veterans can pay attorneys for representation in claims against the V.A. for service-connected death and disability benefits. The plaintiffs allege that the statute prevents them from receiving due process and prevents the redress of their grievances under the First Amendment by

infringing upon their constitutional right to retain counsel at their own expense.

The court has already certified a class of "Ionizing [**67] Radiation Claimants" as plaintiffs in this case. In its decision certifying the class, the court described this litigation as involving one fundamental issue: "whether the fee limitation, as applied to ionizing radiation claimants, violates the due process clause and the First Amendment by precluding them from retaining counsel in connection with their [Service Connected Death and Disability] claims." In addition, the court found several other factual issues to be important for trial.

(1) the factual complexity of the underlying Ionizing Radiation Claims; (2) the VA's lack of resources to develop or refusal to develop the facts necessary to establish Ionizing Radiation Claims; (3) the legal complexity of the VA's ionizing radiation regulations and the considerable judgment involved in applying the [*566] law to the facts; (4) the radiogenic nature of the diseases and the lengthy latency periods associated with such diseases; (5) the difficulty of locating and obtaining complete medical records for the claimant's period of service; (6) the almost universal need for expert testimony; (7) the need to refute Defense Nuclear Agency dose reconstructions with testimony from qualified health experts; [**68] (8) the inability of service representatives to adequately represent Ionizing Radiation Claimants and claimants' dissatisfaction with the services performed by service representatives; (9) the difficulty

of placing veterans at exposure sites due to inadequate DOD record-keeping; (10) obstacles placed by DOD/DNA to make the claims process more difficult, such as the necessity of submitting a FOIA request to obtain a government dose reconstruction; and (11) the existence of physical disabilities that prevent claimants from prosecuting their claims.

The Veterans Administration and the Department of Justice are defending this lawsuit. In the course of preparing for trial, defendants are required to provide to the plaintiffs information and documents concerning these issues of fact in a process called discovery. The court issued a protective order requiring the V.A. to maintain any documents that are relevant to this action, notice of which has already been distributed to you. This notice identifying the issues in this lawsuit should be read in conjunction with the Notice of Discovery Obligations, which sets out the responsibilities of V.A. employees to comply with their discovery obligations, [**69] the court order and other orders of the court. If you have any questions concerning how to comply with the court's orders, do not hesitate to contact your supervisor. Your cooperation is essential in ensuring that the Veterans Administration complies with the orders issued by the court. For further information contact [list name and phone number of contact person(s)].

Donald L. Ivers, Esq.

V.A. General Counsel

APPENDIX III

NOTICE OF DISCOVERY
OBLIGATIONS

(*NARS v. TURNAGE*)

In connection with a lawsuit entitled *National Association of Radiation Survivors v. Turnage, et al.*, No. C-83-1861 MHP, the District Court for the Northern District of California has ordered the Veterans Administration to circulate a notice to all employees of the Veterans Administration "setting forth the obligations of attorneys and litigants, including employees of litigants, in the preservation of evidence, the giving of testimony and cooperation in pending litigation, so as to avoid unnecessary delay or expense and prevent harassment and other improper conduct." This order was necessitated by the V.A.'s past failure to comply with its discovery obligations.

DISCOVERY OBLIGATIONS

This notice should [**70] be read in conjunction with the Notice of Pending Court Action, which notifies you of the pendency of litigation concerning V.A. adjudication of service-connected death and disability claims based on alleged exposure to ionizing radiation and the \$10.00 attorney fee limitation. If you have custody of any papers that concern this litigation, you should not throw them out until the court has expressly permitted destruction. We will advise you in writing when that occurs. If you have any questions whether papers in your custody or other papers of which you are aware are covered by these instructions, you should seek guidance from your supervisors. They will be able to contact discovery coordinators in their departments or our attorneys to determine the answer to your questions.

The court has ruled that any destruction of papers relevant to this litigation violates the V.A.'s discovery obligations and would subject both the V.A. and you to sanctions, fines or other penalties. You may be [*567] asked to provide papers in order to enable the V.A. to comply with requests from the plaintiffs for such documents. If you are asked to provide such documents, or if you

are aware of any request of plaintiffs [**71] for papers you have, you should provide them promptly to your supervisor or to the discovery coordinator for your department. You should try to provide your supervisors and the discovery coordinators with as much information as possible so that they can comply with all lawful requests for information. The V.A. attorneys assigned to this case will be required to circulate such requests to ensure that papers called for in the requests are sought from the employees who have the papers, and to institute a system for double-checking to ensure that the papers are received and forwarded to the plaintiffs where appropriate. Compliance with these instructions is therefore important to prevent the V.A. from being held responsible for the destruction and nonproduction of potential evidence.

RELATED OBLIGATIONS

You are advised that this agency will not tolerate any adverse employment action taken against any person for testifying, participating, or otherwise cooperating in any

court proceeding, including this case. This includes demotion, reassignment, transfer, change in responsibilities, verbal or other harassment, and all other adverse actions. The court has ordered the V.A. to inform you [**72] that "adverse action of any kind related to an employee's giving of testimony, evidence, or assistance in the litigation is actionable, may constitute a federal offense, and is further in violation of the orders of this court and may be punished by contempt." The court further ordered that this notice advise you that the U.S. Magistrate assigned to this litigation "is empowered to receive complaints of any violation of this aspect of the order." The U.S. Magistrate assigned to this case is Magistrate Claudia Wilkin, U.S. District Court, Northern District of California, 450 Golden Gate Avenue, San Francisco, California, FTS 556-5964.

Donald L. Ivers

V.A. General Counsel

APPENDIX M
IN RE: THE PRUDENTIAL INSURANCE COMPANY OF
AMERICA SALES PRACTICES LITIGATION; THIS DOCUMENT
RELATES TO: ALL ACTIONS

MDL NO. 1061, CIVIL ACTION NO. 95-4704

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
NEW JERSEY

169 F.R.D. 598; 1997 U.S. Dist. LEXIS 80; 36 Fed. R. Serv. 3d
(Callaghan) 767

January 6, 1997, Decided
January 6, 1997, FILED

SUBSEQUENT HISTORY: [**1] The Publication Status of this Document has been Changed by the Court from Unpublished to Published February 3, 1997.

LexisNexis(R) Headnotes

COUNSEL: APPEARANCES:

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JUDGES: ALFRED M. WOLIN, U.S.D.J.

OPINIONBY: ALFRED M. WOLIN

OPINION:

[*599] **OPINION**

WOLIN, District Judge

This Opinion addresses the persistent and recurrent destruction of documents by agents and employees of The Prudential Insurance Company of America ("Prudential"). Because the preservation of documents and their availability for production is essential to the orderly and expeditious [**2] disposition of litigation, document destruction impedes the litigation process and merits the imposition of

sanctions. Notwithstanding the absence of evidence of willful document destruction, repeated destruction of potentially discoverable materials demands that this Court preserve and protect its jurisdiction and the integrity of the proceedings before it.

INTRODUCTION

Because of the need to resolve the destruction of document issue without delay, the Court has excerpted much of pages 1 through 30 of the Report of Investigation. n1 [*600] The Court has incorporated by reference herein and relied upon the Compendium of Prudential Document Retention Notices ("the Compendium"), the fifty-two depositions taken in response to the Court's Order of December 18, 1996, the Affidavit of Reid L. Ashinoff in Opposition to Motion for Sanctions and Response of the Prudential Insurance Company of America to Plaintiffs' Report of Investigation dated December 31, 1996 ("Prudential's Response"). The Court has filed the Report of Investigation, the Compendium, and Prudential's Response with the Clerk of the Court.

n1 The Court takes this opportunity to express its appreciation to the firm of Milberg Weiss Bershad Hynes & Lerach, for the prompt preparation and delivery of this report to the Court. The Court specifically acknowledges the dedication and effort of Melvyn I. Weiss, Barry A. Weprin, Brad N. Friedman, Keith M. Fleischman, Salvatore J. Graziano, and Seth Ottensoser as the draftsmen of this report. Additionally, the Court expresses its appreciation to all the lawyers who participated in the taking of fifty-two depositions over a four-day period at a time of the year, December 20-24, when most legal machinery comes to a grinding halt, and deservedly so. The firm of Sonnenschein Nath & Rosenthal

is to be equally complimented for its willingness on behalf of Prudential to staff and defend these fifty-two depositions.

[**3]

In February and March 1995, Prudential policyholders commenced class actions against Prudential alleging that during the 1980s and early 1990s Prudential engaged in a scheme to sell life insurance through deceptive sales practices. On August 3, 1995, the Judicial Panel on Multidistrict Litigation transferred all related lawsuits throughout the country, including all class actions, individual actions, and former agent "whistleblower" actions, to this Court.

On September 15, 1995, this Court entered its first Order in the multidistrict litigation (the "September 15, 1995 Order"). The September 15, 1995 Order required, among other things, that all parties "preserve all documents and other records containing information potentially relevant to the subject matter of this litigation." September 15, 1995 Order at 4(d).

Subsequent to the September 15, 1995 Order, and throughout the pendency of this litigation, Prudential's preservation of documents has been a pervasive issue. For example:

On December 13, 1995, agents' lead counsel, Bruce Miller, raised in open court that Prudential was closing offices throughout the country, and requested an order "that the records that exist in these [**4] places must remain secure." December 13, 1995 Tr. at 112. Prudential's counsel, Reid Ashinoff, responded: "I don't have a problem with the substance of Mr. Miller's request." Id. at 113. Ashinoff noted that Prudential could not agree never to destroy any document in the ordinary course of business, but otherwise confirmed: "Yet I agree in principle and substance to a point." Id.

In July 1996, the parties learned that a Prudential employee, David Fastenberg, had been accused of destroying prudential documents. Thus, on July 23, 1996, plaintiffs' counsel and Miller brought this matter to the Court's attention, only to hear from Ashinoff that plaintiffs' counsel were engaged in "the rankest kind of smear campaign," and that once Ashinoff was retained in February/March 1995, warnings were issued that documents should not be destroyed. July 23, 1996 Tr. at 22, 24-25, 27.

Document destruction issues were also discussed in open court on October 21, 1996, December 6, 1996, and December 13, 1996.

On Saturday, December 14, 1996, Prudential's counsel informed plaintiffs' co-lead counsel in the class actions that documents relevant to this litigation in the Prudential Preferred [**5] Financial Services ("PPFS") Boston area office located in Cambridge, Massachusetts (the "Cambridge Office"), had improperly been destroyed by the Managing Director of the Cambridge Office during the pendency of this litigation. That this document destruction violated the September 1995 Order is not contested. Gillen 111-12. n2

n2 A list of deponents is contained in Appendix 3 to the Report of Investigation filed herewith.

On Monday, December 16, 1996, plaintiffs obtained an Order to Show Cause why sanctions should not be imposed in connection with this document destruction (the "December 16, 1996 Order"). Specifically, the Court ordered Prudential to show cause on December 18, 1996 why the Court should not impose sanctions and other appropriate relief for "Prudential's destruction of relevant documents during the pendency of this litigation." See December 16, 1996 Order. The Order to Show Cause was served upon all parties who had

entered an appearance in this multidistrict litigation.

[*601] On December 18, 1996, [**6] the Court held a hearing and, inter alia, ordered plaintiffs to conduct an investigation into the Cambridge Office document destruction incident and to ascertain "whether Prudential's notification on destruction of documents was or was not satisfactory." See December 18, 1996 Tr. at 44.

1. Scope of the Investigation

Pursuant to the Court's instructions, on December 18, 1996, plaintiffs' counsel undertook an extensive investigation into the circumstances and events surrounding the destruction of documents in Prudential's Cambridge Office. Accordingly, plaintiffs' counsel thoroughly investigated the timeliness of the actions taken upon the discovery of this incident and the adequacy of Prudential's document retention policies and/or guidelines, and the enforcement thereof. See December 18, 1996 Tr. at 44.

Between December 18 and December 24, 1996, plaintiffs' counsel reviewed hundreds of Prudential documents, including numerous documents that Prudential contends evidence its written policy concerning the proper handling and retention and/or destruction of documents.

Between December 20 and December 24, 1996, plaintiffs' counsel conducted fifty-two depositions. [**7] Plaintiffs' counsel deposed, among others: Arthur F. Ryan, Prudential's Chairman and Chief Executive Officer; Marc Grier, Prudential's Chief Financial Officer; James Gillen, Prudential's General Counsel; Rodger Lawson, a Prudential Executive Vice President; John M. Breedlove, the Managing Director of the Cambridge Office; Cheryl Rizzo, who was Breedlove's assistant; Melissa Gonzalez and Russ Spaulding, the members of the Prudential Compliance team who

discovered the document destruction incident in the Cambridge Office; and each and every other person identified by Prudential's attorneys as associated with, or having knowledge of, the incident.

In addition, plaintiffs' counsel randomly selected and deposed thirteen agents associated with the Cambridge Office. Prior to these depositions, approximately fifty agents were requested to complete a questionnaire that plaintiffs' counsel created, to ascertain each agent's understanding and knowledge of any Prudential document preservation guidelines and the details of the Cambridge incident. Prior to taking any depositions, plaintiffs' counsel also interviewed David Greenbaum, one of Prudential's outside counsel who had investigated the Cambridge [**8] incident.

Throughout the depositions, additional documents were produced by the deponents and/or their counsel, including internal Prudential memoranda, questionnaires completed by Cambridge agents, and other documents relating to the Cambridge incident.

Furthermore, because plaintiffs' counsel learned that there had potentially been a destruction of relevant documents by Prudential employees in Prudential's Syracuse, New York office, plaintiffs' counsel deposed Paul Berrafato, General Manager of Prudential's Syracuse office.

2. Prudential's Document Destruction Policy and Document Retention Guidelines

A. Implementation/Communication

In early 1994, in response to a regulatory directive issued to most life insurance companies, Prudential undertook a sweep of all of its sales materials to avoid the use of unauthorized sales materials. All unapproved or outdated sales materials were collected, catalogued, and warehoused. Following that 1994 sweep, Prudential initiated a document destruction policy, which required the

destruction of all unauthorized or outdated sales material. Prudential did not attempt to catalogue how any documents were destroyed, the locations they [**9] were taken from, or any other crucial details, such as who destroyed them. Nor did Prudential implement any training program. Rather, according to Prudential's senior management, Prudential policy was to keep a single copy of each piece of sales material so that it would be available to counsel for plaintiffs and to state regulators. Prudential distributed its document retention instructions on a number of occasions, typically through an e-mail system referred to as PROFS notes.

[*602] (i) Prudential's Managing Director Audit Blueprint

Prior to May 1995, PPFS had no written instructions, policies, or procedures regarding the retention and/or destruction of unapproved material. See Tignanelli 250; Cataldo 14; Reynolds 34.

On May 26, 1995, PPFS issued "The Managing Director Marketing Material Audit Blueprint," which was designed to allow Managing Directors systematically to monitor and control the use of marketing material: "The Audit Blueprint is designed to provide a standardized procedure and checklist for Managing Directors to keep up with the on-going changes in marketing material so they can know what is and is not approved material." See Soderstrom Ex. 1 at 5. n3

n3 Exhibits from the depositions are denoted as " Ex. ."

[**10]

The Audit Blueprint is a written manual, printed in a format that permits it to be retained by individual company employees and placed on company bookshelves. It was distributed to all Prudential office managing directors. It

provides -- without qualification -- that "disapproved material," id. at 7, and "out-of-date marketing material," id. at 9, should be destroyed; there is no provision on these pages that any copies should be retained.

Later in the document, the Audit Blueprint instructs a Managing Director on actions to take when unapproved marketing material is found in a client file, including destroying additional copies of the material:

If a Managing Director finds unapproved marketing material in a Special Agent's client file, s/he should require the Special Agent to destroy any additional copies of such material, [footnote 15] and should counsel the Special Agent regarding PPFs policy on the use on unapproved materials with the public.

Id. at 14.

The only reference to document preservation in Prudential's Audit Blueprint is in footnote 15. This note states that unapproved marketing material found in a client file should not be destroyed: [**11]

Unapproved marketing material found in a client file should not be destroyed. The Managing Director should, however, attach a signed and dated note to the material indicating that it is not approved material and that the Special Agent has been instructed not to use the material in the future.

Id. at 14-15.

Prudential general counsel James Gillen confirmed that this corporate policy to destroy improper sales materials continues to this day with his approval. Gillen does not consider this destruction policy to be a violation of this

Court's September 15, 1995 Order that required preservation of all potentially relevant documents. Gillen 105.

(ii) PROFS Notes and Other Document Retention Notices

Unlike the Audit Blueprint, which was a written document that dealt primarily with Prudential's document destruction policy rather than with document retention, Prudential's principal medium of communicating its "document retention" practices was PROFS notes (e-mail). See Compendium at 2, 4-9, 11-14. Priscilla A. Myers, Prudential's Senior Vice President in charge of auditing, acknowledged that while electronic mail was a quick way to disseminate information, electronic [**12] mail notices "are usually followed up with a paper document." Myers 33. This was not done consistently in connection with document retention PROFS notes. Moreover, none of these PROFS notes indicate that they amend the Audit Blueprint, or that they should be kept with the Audit Blueprint.

Because Prudential's individual insurance organization is divided in three parts -- PPFs, Prudential Select, and Prudential insurance and Financial Services ("PIFS"), notices concerning document retention were sent to all three divisions, often by different management-level personnel of Prudential. The relevant notices were:

1. On August 9, 1995, a PROFS note addressed by Ira Kleinman to Prudential Select Associates stated that as a result of the multi-state task force investigation, Prudential [*603] was amending all existing company document retention guidelines effective immediately. See Compendium at 2. The note stated:

Do not destroy any documents currently being saved under any Company guidelines, even if the existing guidelines call for

destruction (because of document age or other reasons).

This includes, but is not limited to, any and all documents that relate to: insurance sales [**13] that used existing policy values (including dividends) or abbreviated pay plans ('App'), such as agent training brochures or worksheets, marketing and point of sales materials, illustrations, policy disbursement records, client files and related materials, as well as customer complaints and Company disciplinary files.

This PROFS note provided telephone numbers which Prudential Select Associates could call if they had any questions and stated: "When in doubt about retaining a particular document, save it!" The PROFS note also warned that the Company and its employees could face severe sanctions if documents were destroyed and stated that "any willful or deliberate violation of these guidelines will result in serious disciplinary action, up to and including termination." Id.

2. On August 15, 1995, a hard-copy memorandum addressed by Thomas A. Crosswell, Senior Vice President, Agencies, to all PIFS associates and representatives, repeated the contents of the above-described PROFS note, leaving out the warning that any willful or deliberate violation would result in disciplinary action and possible termination. Compendium at 3.

3. On August 17, 1995, a PROFS note addressed [**14] by Joseph P. Mahoney, to all PPFS associates, repeated the same message (again without the warning regarding possible termination). Compendium at 4.

4. On September 8, 1995, a PROFS note addressed by Joseph P. Mahoney to all PPFS

associates instructed all Office Vision users to do the following, effective immediately:

Do not destroy any Office Vision Notes which directly or indirectly relate to insurance sales involving the use of existing policy values (including dividends) or abbreviated pay plans ('APP'). This includes, but is not limited to, Office Vision Notes which relate to agent training, marketing and point of sale materials, policy illustrations, customer complaints, or agent disciplinary files which concern the use of policy values (including dividends) or APP to sell life insurance.

Compendium at 6. The PROFS note stated that PPFS associates should contact their supervisor or the Law Department if they had any questions and stated: "When in doubt about a particular note, save it!" The PROFS note also warned that the Company and its employees could face severe sanctions if Office Vision Notes were destroyed. Id.

5. Also on September 8, 1995, PROFS [**15] notes containing the same text were addressed by Thomas A. Crosswell to PIFS associates and representatives and by Ira Kleinman to all Prudential Select associates. Compendium at 5 and 6.

6. On September 14, 1995, Jeff Hahn, PPFS' Chief Legal Office and Vice President, addressed a PROFS note to all PPFS associates, which referred to the August 1, 1995 PROFS note sent by Joseph Mahoney and provided the following supplementing instructions, effective immediately:

Do not destroy any Office Vision Notes which directly or indirectly relate to insurance sales involving the use of existing policy values (including dividends) or

abbreviated pay plans ('APP') which relate to agent training, marketing and point of sale materials, policy illustrations, customer complaints, or agent disciplinary files which concern the use of policy values (including dividends) or APP to sell life insurance.

Compendium at 8. This PROFS note also stated that PPFs associates should contact their supervisor or the Law Department if they had any questions and, in the middle of a paragraph, stated: "When in doubt about a particular note, save it!" This PROFS note again warned that the Company and its employees [**16] could face severe sanctions if Office Vision notes were destroyed. Id.

[*604] 7. On March 14, 1996, Bill Therrien addressed a PROFS note to all PROFS users repeating the above supplementary instruction, and substituting the term "PROFS notes" for "Office Vision Notes." Compendium at 13.

8. On August 14, 1996, Arthur Ryan addressed a PROFS note to Prudential associates which reported that David Fastenberg, the head of the Individual Insurance Group's Greater Southern Territory, was dismissed for failing to abide by and enforce Company directives to preserve documents. Compendium at 15.

9. On November 6, 1996, Kevin Frawley, Prudential's Chief Compliance Officer, addressed a hard-copy memorandum to all individual insurance employees and agents, stating that it was important to continue preserving documents that might relate to Prudential's recent class-action settlement and other lawsuits and investigations Prudential was facing. Attached to his memorandum was a document entitled "Interim Document Retention Guidelines." This document provided a detailed list of the types of documents that all

employees and agents were instructed to retain. Compendium at 16.

10. On November 13, 1996, [**17] Kevin Frawley addressed the same memorandum to all individual insurance employees and agents, but added a sentence that such records might also be relevant to the Policy Remediation Program. Compendium at 17.

(iii) The Distribution of Prudential's Notices

Most of the above-described notices were never circulated in hard copy. In fact, prior to November 6, 1996, only PIFS associates received a hard-copy memorandum regarding document retention; all others were sent only PROFS notes. Numerous witnesses testified that they received so many e-mails that they ignored any new e-mails transmitted into their system. See Lublin 25-27. A number of deponents confirmed that not all associates have access to e-mail and that, therefore, many individuals never received any of the PROFS notes regarding document retention (unless persons with access to e-mail had made copies for them). See, e.g., Myers 35 (not all associates have computers); Mariani 59-60 ("not each rep had their own terminal which they would access"); Sullivan 18 ("Not everybody is on the system."); Melquist 32-33 (approximately 1100/2700 agents have e-mail).

Nor were the various PROFS Notes ever printed and made available [**18] for general review. In fact, while Prudential's counsel provided plaintiffs with a list of all of the notices that were distributed with regard to document destruction, that list was not produced until December 24, 1996, after almost all of the depositions were completed or already in progress. See Ryan Ex. 1. In addition, as of December 25, 1996, defendants' counsel had yet to locate and produce almost half of the documents identified on the list.

There was no communication to anyone in any written or PROFS note format regarding

the entry of the Court's document preservation order, its import, or the ramifications of violating such a Court order. Grier 97. To date, discovery has shown that neither Prudential, nor its counsel, have ever circulated to anyone at Prudential a copy of the Court's document preservation order or any written directive regarding the Order itself. n4 See Grier 97; Ryan 31.

n4 The notices also failed to make any mention of improper sales practices relating to investment or retirement claims. See generally Compendium.

[**19]

B. Testimony of Prudential Top Management

Prudential top management -- Chairman Arthur Ryan, Executive Vice President Rodger Lawson, Chief Financial Officer Marc Grier, and General Counsel James Gillen -- all recognized that the sales practices lawsuits and regulatory investigations are an extremely important part of Prudential's business. See, e.g., Grier 14; Gillen 27. More importantly, they all recognized Prudential's obligation to preserve documents in connection with the lawsuits and investigations. Yet, none took an active role in formulating, implementing, communicating, or conducting a document retention policy. [*605] Rather, all of them relied on others to do these tasks. See, e.g., Ryan 35, 50.

Arthur Ryan, Prudential's Chief Executive Officer, recognized that it was management's responsibility to communicate the Company's document retention directives to its employees. Chairman Ryan kept abreast of the litigation on a regular basis. In 1995, Chairman Ryan held monthly meetings on the litigation and investigation. Ryan 19. In 1996, William Yelverton, head of individual insurance, took over the monthly meetings, but he and Gillen

kept Ryan regularly informed. [**20] Id. Chairman Ryan stated that with respect to document retention he had:

a pretty good understanding of what is required to insure that people understand what they are supposed to do. The management did communicate through certain written vehicles, but equally important, in all communications, it's the obligation of management to insure that people understand that laws are to be followed, regulations are to be followed, and doing the right thing is to be followed.

Ryan 27-28 (emphasis added).

According to Chairman Ryan, he fulfilled his own personal obligation in this regard by referring the preservation of documents issue to the Prudential Legal Department and felt comfortable that the proper policy would be implemented. See Ryan 35-36. Ryan stated that:

The interpretation of what is required by the law, the regulation is the responsibility of the law department. It is also their responsibility to communicate it to line management. The business unit is then responsible for understanding what goes on in their operations, and would be the ones responsible as they learned it, to communicate it immediately.

Ryan 50.

When Chairman Ryan was informed [**21] that virtually every Prudential agent who was interviewed or deposed in connection with the Cambridge incident denied having knowledge of communications concerning document

retention, he indicated that if this were true he "would be extremely dissatisfied." Ryan 28.

Marc Grier, Prudential's Chief Financial Officer, had very little knowledge or understanding about document preservation requirements. He testified that he had never seen "something in writing" which "demonstrated what the clear policy of the Company was." See, e.g., Grier 54. Grier did not recall ever seeing the Audit Blueprint. Id. 56. Grier acknowledged that management has a responsibility to make important things clear to people within the organization, and also agreed that when it comes to observing court orders, an organization not only must advise the organization of any court-ordered responsibility, but also must audit its compliance. See id. 92-94.

Grier never inquired into whether the Mahoney PROFS note communication of August 15, 1995 was part of a printed manual that was in the libraries of offices around the country for people to access easily. Id. 91. Moreover, Grier admitted his concern [**22] that information about this Court's September 15, 1995 document preservation order was never disseminated to Prudential employees:

Q. Do you believe today that the employees of Pru were made aware of Judge Wolin's document preservation order?

A. No, I don't believe that.

Q. Does that concern you?

A. Yes, it does.

Grier 97-98.

Rodger Lawson, Prudential's Executive Vice President in charge of planning and marketing, joined the company in June 1996. Lawson 7-8. Lawson testified that he was sure that the company had an adequate policy, but

that he was not directly involved in implementing or communicating it:

I am quite certain that the insurance company has clear instructions as to the preservation of documents. I am quite certain that they exist in some volume. Precisely what is in each of those documents, I cannot attest to. I have seen some of them and I have not read them in detail, and I believe the insurance company is [*606] responsible for issuing those instructions and maintaining them.

Lawson 14.

Senior Vice President in charge of auditing, Priscilla A. Myers, was personally aware of the preservation order, but did not know whether compliance [**23] review employees were made aware of it. Myers 42-43.

James Gillen, Prudential's Senior Vice President and General Counsel, relied heavily on Richard Meade and Deborah Bello-Monaco, two attorneys for the individual insurance division of Prudential, to see that proper document retention procedures were developed and implemented. Gillen had little personal involvement in this issue. Gillen 25.

Gillen testified that over the past two years Prudential has issued a variety of communications on document retention, primarily in the form of PROFS notes. Gillen 21. Gillen testified that with respect to messages sent by PROFS notes:

Anybody who has a terminal on their desk would have received this. And they're in offices where typically these kinds of instructions provide that people are -- that the people in offices that

have terminals should share the documents with others that don't.

Gillen 86.

Thus, Gillen testified that Prudential relies upon associates being apprised of PROFS notes by those who have the equipment to receive them. Id. 87. When asked whether he had taken any steps to notify Prudential employees and agents that the Court had entered a document preservation [**24] order, Gillen replied that he "felt that our [Prudential's] existing policies of communications were adequate to meet the requirements of the order." Id. 93.

While Gillen did not believe that a separate communication concerning the September 15, 1995 Order was necessary, Gillen did notify Prudential employees of this Court's subsequent entry of an Order dealing with plaintiffs' communication with Prudential employees. Thus, on April 2, 1996, Gillen personally sent a PROFS note to all Prudential associates. This PROFS note, which was found in the Cambridge Office, stands in stark contrast to the absence of any such communication from Gillen regarding the September 15, 1995 order. It describes this Court's order concerning employee interviews and explains the implications for Prudential employees:

As you know, Prudential has been sued in certain state and federal courts concerning allegedly improper practices in the sale of life insurance products. The federal actions have been consolidated for pre-trial purposes before Judge Wolin of the federal court in New Jersey under the caption 'In re: The Prudential Insurance Company of America Sales Practices Litigation,' Master [**25] Docket No. 95-4704 (AMW). We are vigorously defending these actions.

Several current Prudential employees have expressed their concern to us that plaintiffs' counsel in the federal action have been calling them trying to set up interviews to discuss their knowledge of the company's policies and procedures. You, too, may receive such a call. Judge Wolin has ruled that plaintiffs' counsel may contact you. However, he has also ruled that you need not talk to plaintiffs' counsel. In addition, Judge Wolin has ruled that you can discuss any contacts from plaintiffs' counsel with a member of Prudential's Law Department or with your own attorney. I have instructed all the attorneys in the Prudential Law Department to make themselves available to assist you in these matters.

Breedlove Cambridge Ex. 106. It should be noted that e-mail rather than hard copy distribution was used in this instance as well.

C. How Communications Worked in the Cambridge Office

John Breedlove, Managing Director of the Cambridge Office, testified that either his assistant, Mary McHugh, or business manager, Bette Komanski, was responsible for reviewing incoming PROFS notes and bringing important [**26] notes to his attention. Breedlove 126, 195. Breedlove would then direct McHugh to distribute those PROFS notes that he felt were worthy of distribution.

Several PROFS notes relating to document retention were found in binders on McHugh's desk marked "PROFS Notes Sent [*607] and PROFS Distributed to Associates." Breedlove Cambridge Ex. 106-111. Additionally, many PROFS notes were marked by either Breedlove

or McHugh as "distributed," with a specific date of distribution. However, neither the August 15, 1995 Mahoney, nor the March 14, 1996 Thierren PROFS notes were marked for distribution, and most of the Cambridge Office agents who have been deposed or answered plaintiffs' questionnaires have denied ever seeing any of the PROFS notes relating to document retention. Rider 34; McGloughlin 48, 59; Sayan 30-32.

In addition, hard-copy memoranda were not sent to each individual agent. Rather, they were sent to Komanski for office-wide distribution. Akers 70. As of the beginning of December 1996, Komanski had not yet distributed the November 1996 Frawley memorandum to agents within the Cambridge office. Akers 70-71.

Many agents in Prudential's Cambridge Office were questioned by Prudential after [**27] the disclosure of the Breedlove incident about their awareness of the three document retention PROFS notes circulated within their division, PPFs. Mahoney 8/95, Hahn 9/95, Ryan 8/96. These agents uniformly were not aware that these memos even existed. At most, out of fifty-seven agents interviewed by Prudential and its counsel, n5 seven agents were aware of the Mahoney document retention e-mail; four were aware of Ryan's document retention e-mail; and eight were aware of Hahn's document retention e-mail. See Cambridge Ex. 12-33; Questionnaires completed during Prudential Interviews of Agents From Boston FSO, CAM 000567-CAM 000902.

n5 Prudential produced its notes from these interviews to plaintiffs' counsel.

Similarly, many agents testified when deposed that they never received Prudential's document preservation notices. For example, Thomas F. Rider, an agent in the Cambridge

Office, testified that he does not use the Computer Communication System at Prudential. See Rider 25. Accordingly, Rider testified [**28] he had never seen the Mahoney August 15, 1995 e-mail. Rider 34.

Similarly, William G. McGloughlin, III, an agent in the Cambridge Office, testified that he had never received documentation in a memo form that directed him to preserve documents because such documents could be evidence in a court proceeding. See McGloughlin 40. When asked if he accessed the electronic mail system at Prudential, McGloughlin testified that:

I am on it but I don't access it, if that makes any sense. I am signed on but there are over 700 messages waiting there because I don't know how to use it and I don't have time to learn how to use it.

McGloughlin 43.

3. The Cambridge Document Destruction Incident

A. Background

Like all PPFs Offices, the Cambridge office is subject to both routine and unannounced compliance inspections. Gonzalez 53.

On January 27, 1995, prior to any 1995 compliance inspections, John Breedlove, Managing Director of PPFs' Cambridge Office, advised the associates in that office:

It is critical that all unapproved sales material in your possession be destroyed. Use of unauthorized material is a very serious violation and we have just [**29] completed destruction of all outdated materials in our supply area.

Gonzalez Ex. 7 (emphasis in original).

On April 5, 1995, members of Prudential's compliance review team, Bill Clark and Dean Schroeder, arrived at the Cambridge office unannounced, to perform a surprise compliance review. Tignanelli Ex. 28 at CAM 000966. The review team asked to check sales literature and all other items available to assist agents during the sales process. *Id.* During the inspection, the review team reviewed the supply areas, agent work spaces, and client files. *Id.* The Cambridge Office was cited for failure to adequately regulate the materials in the supply room, the agents' cabinet, and the training room. *Id.* at CAM 000968. Specifically, many of the sales materials that the review team found in these [*608] areas were not listed in the March 1995 Marketing Resources Guide ("MRG") and, thus, were unapproved. *Id.* Therefore, the auditors themselves discarded these outdated materials in accordance with Prudential's document destruction policy:

We reviewed the materials in the supply room and the materials available to agents If the materials that we found on the shelves [**30] were not listed in the MRG, we discarded them. A listing of these materials can be found in Attachment I. . . . An old CONCEPTS manual was also destroyed by Jim Kenealy [BOSX Computer Specialist] when it was pointed out that it had a visual presentation of what was previously known as the 'Private Pension Plan.' . . .

The training room contained many tapes and books. It also included old ACP books (ORD 88672 & 88612) which we discarded. . . . We also discarded some office stationery and blank business cards

that did not comply with the guidelines

Tignanelli Ex. 28 at CAM 000968, 975, and 977 (some emphasis added and some in original).

During the April 5, 1995 investigation, the compliance review team also discovered that agent Zhen-Jing Sun was sending out unapproved correspondence. The unauthorized correspondence located in agent Sun's files was a letter in Chinese that when translated to English used terms such as "retirement Plan" and "Estate Planning." Pearson Ex. 5 at CAM 000463. On June 22, 1995, Michael Cataldo, Executive Director for the northeast marketing territory, sent a sanctions letter to agent Sun assessing him a fine of \$ 250 for [**31] using a piece of unauthorized correspondence. *Id.* at CAM 000481.

On May 25, 1995, Bette Komanski, the office Business Manager, sent a letter to Breedlove advising him that she had discarded some outdated sales material:

Reference was also made to the Silver Dollars Kit. To tell you the truth, I had no idea what was in this because they are shrink wrapped. So while most of the kit is good, there were brochures inside which were outdated. I discarded these.

Breedlove Cambridge Ex. 104 at CAM 000982 (emphasis added).

Thereafter, a routine annual compliance review for the Cambridge office was scheduled for mid-August 1995. Tignanelli Ex. 28 at CAM 000994. In anticipation of this review and upset about the fine levied against agent Sun, Breedlove issued a memorandum dated August 7, 1995, directing all associates to "please review your files during this week and discard any unapproved sales materials."

Gonzalez Ex. 6 at CAM 000948 (emphasis in original).

On August 17 and August 18, 1995, auditors Jeff Soderstrom and Marty Lewis inspected the Cambridge Office. Tignanelli Ex. 28. Their report, dated October 10, 1995, does not discuss the existence of Komanski's [**32] May 25, 1995 letter to Breedlove or Breedlove's August 7, 1996 document destruction memorandum, nor does it mention any evidence of document destruction at the Cambridge Office Id. at CAM 000994-1007. Rather, the report commends Breedlove for doing a fine job of establishing an "In Control" operation and for instituting procedures to monitor sales material. Id. The report, however, did address other areas in which the auditors expressed specific concern. The auditors concluded that other areas of liability exposure existed at the FSO, and that the implementation of management controls was necessary. Id. The report specifically suggested that Breedlove implement individual agent marketing material audits. Id. The auditors also suggested that Breedlove implement a system to spot-check agent correspondence. Id.

Thereafter, in a written memorandum to his associates on February 1, 1996, Breedlove declared that his office would conduct a client file review. Grier Ex. 1. Breedlove's directive stressed the need to "immediately" make sure that client files are "in compliance." He advised all associates that he had designated Cheryl Rizzo to assist with the audit of the [**33] client files and that this would reduce "exposure" and "liability":

One area that we need to work on immediately is making sure that client files are in Compliance. To assist you in your efforts [**609] in this area, I am going to have Cheryl Rizzo visit with each agent and do an audit of your client files to make sure that they are in

Compliance and to reduce your exposure and liability relative to this issue.

Id. The intention was to cleanse all the agent files prior to the next regular audit scheduled for November 1996. Komanski 31.

Hence, from February 1996 to November 1996, at Breedlove's direction, Rizzo reviewed every client's file from every active agent in the office, including the district office in Westborough. n6 Rizzo 30. Rizzo discarded all undated, handwritten notes, as well as any unapproved sales material that appeared to have been used following the 1994 moratorium on the use of such material. Gillen Ex. 3 at CAM 001033-34 (memo from David Greenbaum to Reid Ashinoff dated December 11, 1996). Rizzo's audit involved the cleansing of approximately 9,000 client files, and the destruction of approximately eighty "folders of documents." Rizzo 31; Gillen Ex. [**34] 3. In addition, Rizzo testified that she believed that some agents cleansed their files before her audit, and that additional documents may have been discarded. Id. at 73.

n6 Rizzo continuously worked on this project. Just before the November 20, 1996 compliance review, she worked overtime to ensure completion prior to the compliance inspection. Rizzo 30.

B. Discovery of Destruction

On November 20, 1996, Prudential compliance auditors Russ Spaulding and Melissa Gonzalez commenced the routine annual field office compliance review of the Cambridge Office. Spaulding 34, 40-41. At the start of this review, Breedlove reported his personal document destruction policy, Spaulding 36, and a short time later, Gonzalez discovered Breedlove's February 1, 1996 memo. Gonzalez 49-50. Breedlove also asked

Rizzo to describe her actions for the auditors. Spaulding 68-71.

It appears that Russ Spaulding, the auditor in charge of the November 1996 Cambridge audit, did not consider the document destruction as a matter [**35] of urgency. Spaulding was informed of the Cambridge incident by Breedlove on Wednesday, November 20, 1996, but did not report the incident to his supervisor, William Reynolds, until a phone call on Tuesday, November 26, 1996. Spaulding 40-41. Spaulding completed the audit before further investigating the document destruction. Id. 55-56. He did not substantively discuss the incident with Reynolds until December 2, 1996. Reynolds 44-45. Spaulding did not include document destruction in his initial memo of significant issues that arose during the audit. Spaulding 48-49. On December 4, 1996, Spaulding prepared his first full written report on the Cambridge incident. He prepared a "Compliance Memo" to the Development Unit regarding the document destruction incident. Spaulding 52-53. This memo stated that Breedlove had brought the document destruction incident to Spaulding's attention during the compliance review. Id. Spaulding recommended that Breedlove be punished for the document destruction incident by issuance of a warning letter rather than suspension or termination. Spaulding 63.

On Thursday, December 5, 1996, Jeff Soderstrom learned about the incident in a conversation with [**36] Spaulding. Soderstrom 67. Soderstrom then instructed Spaulding to contact James A. Tignanelli and apprise him of the destruction. Soderstrom 76-77. Spaulding sent an e-mail to Tignanelli and to Tignanelli's superior, Kevin Frawley. Soderstrom and Tignanelli established that Corporate Compliance should take the lead in further investigating the incident. Soderstrom 79-80, 82-83. Tignanelli sent a copy of

Spaulding's e-mail to in-house counsel, Francine Boucher. Tignanelli 326, 337, 343.

On Friday, December 6, 1996, after discussing the matter with Tignanelli, Richard Mariani, Director of Development, called Spaulding and advised him that the Development Unit of the Compliance Department would take over the handling of the investigation. Spaulding 50. Tignanelli "was basically trying to cut off whatever activity Spaulding was trying to generate and then [turn] it over to Fran Boucher [of the law department]." Tignanelli 334-35. Tignanelli told Mariani to get copies of the compliance [**610] memo to him and the law department, "and then sit back and wait for them to tell us what to do, and I told him I would meet with Fran the next day [December 6]." Tignanelli 345.

Tignanelli met with [**37] Boucher at approximately eleven o'clock on December 6. Tignanelli 350. Boucher told Tignanelli that the law department would handle the situation. "They would be getting in touch with outside counsel. They would get in touch with whoever, and that we weren't to do anything until they told us what we were going to do. I said fine. Just let us know whatever you want us to do and we'll do it." Tignanelli 353. Tignanelli was "pretty sure" Boucher had read the memos because "she acted like she did." Id. 355-56. Tignanelli told Boucher that Tignanelli's department had contacted the PPFS people and communicated to them not to do anything because the Law Department was now going to handle the situation. Id. 357. Assistant general counsel Richard Meade also learned of the incident in a brief conversation on December 6, 1996. (He didn't recall how he learned about it.) Meade 6.

On Monday, December 9, 1996, Prudential's lead outside attorney, Reid Ashinoff, was told of the document destruction. Ashinoff Affidavit at 5; December 18, 1996 Tr. at 33. Ashinoff asked one of his partners, David

Greenbaum, to go to Cambridge to investigate. Ashinoff Affidavit at 5.

On either December 9 or [**38] December 10, 1996, Meade, the in-house lawyer in charge of these litigations, discussed the incident in brief conversations with another in-house attorney Deborah Bello-Monaco and Gillen. Meade 9. Greenbaum, Rochelle Barstow (another attorney with Sonnenschein), and Sherry Akers (a Prudential compliance manager), interviewed Breedlove, Rizzo, and Komanski in Cambridge on December 10, 1996. CAM 001027-001032. After these interviews, Greenbaum gave Boucher an oral report about the Breedlove document destruction and Boucher relayed the information to her colleague Bello-Monaco. Boucher 38-39. Barstow prepared a memorandum to Greenbaum outlining the chronology of events and provided a summary of the employee interviews. CAM 001027-1032. Greenbaum received a facsimile transmission from Rizzo containing her "best guess" that 9,125 client files were reviewed. CAM 000903-906.

Senior Vice President and Auditor Priscilla Myers, to whom Tignanelli and Frawley reported, learned from Gillen on "Monday or Tuesday, December 10 or 11" that documents were discarded. Myers 88-89.

Late in the afternoon on December 11, 1996, Ashinoff met with Prudential senior management, Arthur Ryan, James Gillen, [**39] and Marc Grier, and apprised them for the first time of the Cambridge incident. Ashinoff Affidavit P 1a. According to Ryan and Grier, they had no prior knowledge of the incident. Ryan 45; Grier 63-64.

On Friday, December 13, 1996 there were meetings at Prudential's corporate office the entire day. Bello-Monaco 27-28. During the morning meeting, Ashinoff met with Prudential senior management Gillen and Bello-Monaco. Bello-Monaco 24-25. Later, Ashinoff left the

meeting to attend the hearing in this Court on the motion for recusal brought by counsel for Kittle and Krell.

After the Court hearing on December 13, Ashinoff returned to Prudential's corporate office and met with Ryan, Grier, and others. Bello-Monaco 26-28. They made a tentative decision to terminate Breedlove, and public relations executives Robert DeFillippo and Richard Riley began to prepare a public relations statement. Bello-Monaco 46; DeFillippo 45-46.

Thus, by Wednesday, December 11, 1996, the essential facts about the Cambridge incident were known to senior management. Sonnenschein attorney David Greenbaum had completed his preliminary investigation. According to CFO Grier, it was apparent by that time that Breedlove [**40] would be fired. Grier 79. Prudential management acknowledged that they needed to notify the Court, plaintiffs' counsel, and the New Jersey Department of Insurance about the Cambridge incident, preferably simultaneously. Gillen 121 ("Our intent was to inform plaintiff's counsel, [the] regulator and the Court, as soon as possible and at the same time"). Prudential management continued to discuss [**611] the matter on Friday, December 13, 1996, Saturday, December 14, 1996, and Sunday, December 15, 1996. Ryan 76-77; Gillen 129-130; Grier 87-88. Plaintiffs' counsel was notified on December 14, 1996, and the New Jersey and Massachusetts regulators, and the Court, were notified on Monday, December 16, 1996. Also, Breedlove was notified of his firing on December 16, 1996.

4. The Syracuse Office

Several different allegations of improper treatment of documents have recently surfaced in connection with Prudential's Syracuse office.

A number of the incidents involved Paul J. Berrafato, the General Manager of the Syracuse

office, who has served as General Manager in Syracuse for twenty years. n7 Berrafato 7. First, Berrafato removed approximately ten/fifteen tapes from that office immediately [**41] prior to a visit from Prudential's compliance personnel in the late summer or fall of 1996. Id. at 62-63, 84-87. Prudential learned of that incident as a result of allegations made by the ABC television program Prime Time Live. Tignanelli 281-82; Bello-Monaco 70-75.

n7 During the investigation, plaintiffs' counsel learned of an allegation that documents were removed from the Syracuse office and placed in the trunk of the office manager's car in advance of a compliance check by state regulators. Other than as described herein, Berrafato denied that this or any similar incident of document removal ever took place. Berrafato 89-91.

Berrafato testified that he needed to review the tapes to see whether they were still approved for use. Berrafato 63, 85-86. Because he did not have time to do that before the visit from Compliance, id. at 85, he put the tapes into the trunk of his car, allegedly intending to review them at home. Id. at 62-63. Berrafato admitted that, in doing so, he "may have used poor [**42] judgment." Id. at 63.

In fact, it is a fair inference that Berrafato attempted to conceal the tapes until the compliance review was over. He testified that he was concerned that if Compliance had found the tapes, they would have criticized him because he had not gone through them. Id. at 85-86. Berrafato did not reveal to Compliance that he had secreted the tapes and that they therefore were not available for Compliance to review. Id. at 86. Ultimately, in fact, despite his stated intention, Berrafato never did go through the tapes. Instead, he admitted that they ended up "back in [his] office and in the same box,

and [he] still did not have a chance, [he] never used them, and [he] just [has] not gone through them to see which is approved and which isn't." Id. at 63-64.

Berrafato admitted to instances in which he or the Syracuse office manager directed that documents be discarded, destroyed or thrown away. See Berrafato Ex. 5. Although Berrafato initially testified that he had done so in only one memorandum, Berrafato 66-67, the documents that he produced thereafter showed memoranda dated March 20, 1995, September 1, 1995 (discussed above), May 2, 1996, [**43] and May 9, 1996, all of which contained such directions. See Berrafato 73-84 (summarizing and quoting relevant portions of memoranda). A memorandum from the Syracuse Office Manager, Arlene Shore (also included in Berrafato Ex. 5), dated August 28, 1995, also ordered the disposal of documents. Id. Berrafato testified that Shore was in charge of the Syracuse office's document retention function, and that he had never known her to deviate from Prudential company policy on that subject. Berrafato 69-70.

Two of Berrafato's memoranda (dated May 2 and May 9, 1996) that ordered sales people to "throw away" or "discard" documents, post-dated this Court's September 15, 1995 Order requiring the document preservation. Berrafato testified that he has never seen either the September 15, 1995 Order or its "Preservation of Documents" provision. Id. at 35-36, 37. He could not recall whether Prudential had issued any communication that advised that documents were to be preserved pursuant to a judge's order. Id. at 38-39. He testified that he might not have sent those memoranda if he had known of the existence of the Court's September 15, 1995 Order with the "Preservation of Documents" [**44] provision. Id. at 113.

Berrafato stated that he believed he was acting in accordance with Prudential corporate [**612] policy when he sent the 1995 and 1996

memoranda included in Berrafato Ex. 5. Id. at 114. Berrafato never saw either of the two e-mail messages (August 17 and September 14, 1995) that Prudential had sent regarding corporate document retention policy, and testified that those memoranda were not sent to PPFS offices such as Syracuse. Id. at 43-44. The first of the corporate communications on the subject that Berrafato saw was Ryan's memorandum of August 14, 1996. Id. at 44.

With Winston Churchill's admonition in mind that this is not the end; that this is not the beginning of the end; but this is the end of the beginning, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The Court's Order of September 15, 1995 which required, inter alia, that all parties "preserve all documents and other records containing information potentially relevant to the subject matter of this litigation" was never disseminated to Prudential employees.

2. Senior management, inclusive of Arthur Ryan, Prudential's Chief Executive Officer, [**45] Marc Grier, Prudential's Chief Financial Officer, Priscilla A. Myers, Senior Vice President in charge of auditing, and James Gillen, Prudential's Senior Vice President and General Counsel, never directed that the Court's Order of September 15, 1995 to preserve documents be disseminated to Prudential employees. Gillen was satisfied that Prudential's existing communications policies were adequate to meet the requirements of the Court's Order. Thus, Gillen did not believe that a separate communication concerning the Court's Order was necessary.

3. Commencing in August 1995, Prudential issued several PROFS notes (e-mail) directed to document preservation. While they cautioned against the destruction of documents, these one-page memoranda failed to specifically mention the putative class action litigation then pending before this Court in the

District of New Jersey. Moreover, the memoranda subsequent to September 15, 1995, failed to inform the recipients of the Court's document preservation Order. n8 In these notes, "litigation" is referenced in the most general sense as "litigation alleging improper sales practices." Not until November 6, 1996, does a PROFS note mention a class action. [**46] Even then, the only reference is to the settlement agreement.

n8 Some of the PROFS notes caution that any willful or deliberate violation of these guidelines will result in serious disciplinary action, up to and including termination. No mention is made of sanctions provided for by the Federal Rules of Civil Procedure, civil contempt for violation of an Order of the Court, or criminal contempt pursuant to 18 U.S.C. § 401(3).

4. The record is devoid of any reference to a document that would encourage non-management employees to report evidence of document destruction, for example, through the use of a telephone hotline or otherwise.

5. PROFS notes provided the names and telephone numbers of individuals to contact in the event that questions arose about document retention. No specific individual was designated as the primary contact source for information about document preservation.

6. On August 14, 1996, Arthur P. Ryan, Chairman and Chief Executive Officer, issued a PROFS note addressed to Prudential associates. [**47] It was entitled "Announcement." The announcement centered on the destruction of documents that had occurred in the Greater Southern Regional Office located in Jacksonville, Florida. Ryan referenced three Prudential internal orders as the foundation of Prudential's policy to preserve documents. Ryan did not mention this Court's Order to

preserve documents or the class action litigation pending before this Court. Finally, Ryan informed the recipients that Prudential had notified several regulatory authorities of the failure to preserve documents in Jacksonville. Notwithstanding the prior preservation Order issued by this Court and the violation of that Order, both Ryan and Prudential failed to notify this Court of the Jacksonville occurrence.

7. The admonition to preserve documents and not to destroy documents set forth in the PROFS notes was styled in ordinary print. Neither of these admonitions were delineated in emboldened or enlarged font:

[*613] **PRESERVE DOCUMENTS -
DO NOT DESTROY DOCUMENTS.**

8. Prudential's use of PROFS notes to preserve documents and to prevent their destruction was ineffective and failed to implement this Court's document preservation Order. The Report [*48] of investigation demonstrably highlights the PROFS notes inefficacy. Witnesses testified that they ignored e-mails, some testified that they lacked access to e-mail (approximately 1100/2700 agents have e-mail), and others testified that PROFS notes were not always printed and made available for general review. n9 Prudential, in its response to plaintiffs' Report of Investigation, concedes that it could have done more to ensure compliance with its document preservation directives. n10

n9 Report of Investigation at 11.

n10 Response of Prudential at 7.

9. Prudential's Managing Director Audit Blueprint is not a document preservation policy statement. It is a marketing document in the form of a written manual printed in a format that allows it to be retained by individual

company employees and placed on company bookshelves. The Audit Blueprint was designed to provide a standardized procedure and checklist for Managing Directors to enable them to keep abreast of the on-going changes in marketing material so [*49] that they would know what was and was not approved material. n11 The Audit Blueprint is inconsistent in its posture towards document preservation. In at least two locations it counsels that "disapproved material" and "out-of-date marketing material" should be destroyed. As stated in the Report of Investigation at 6, the only reference in the Audit Blueprint to document preservation is found in footnote 15, which states that unapproved marketing material found in a client file should not be destroyed. The Audit Blueprint was dated and distributed to Managing Directors in May 1995, approximately four months prior to the issuance of this Court's document preservation Order.

n11 See Soderstrom Ex. 1 and 5.

10. The Court has record of any written manual that would evidence that Prudential possesses a clear and unequivocal document preservation policy capable of retention by Prudential employees and available for easy reference.

11. Although the PROFS notes specify the types of materials that should be preserved [*50] and counsel against document destruction, these PROFS notes do not constitute uniform guidelines and do not represent the systematic process necessary to preserve documents. Indeed, not until November 13, 1996, did Prudential prepare and distribute a document entitled "Interim Document Retention Guidelines."

12. As of the writing of this Opinion, document destruction has occurred on at least four occasions. Despite the PROFS notes,

documents have been destroyed in Jacksonville, Florida, Cambridge, Massachusetts, Des Moines, Iowa, and in Syracuse, New York. Additionally, in Syracuse, materials were spirited out of the office and secreted to avoid detection by internal Prudential compliance review teams.

13. Prudential acknowledges that document destruction has occurred at all of the above locations.

14. The document destruction that occurred in Cambridge is particularly unfortunate because of its magnitude and the failure to prepare a document destruction index. Approximately 9000 client files were cleansed and eighty "folders of documents" were destroyed. n12 Thus the Court and the litigants are currently unaware of the documents that were destroyed and the files from which these [**51] documents were taken. Without a document destruction index or some other procedure, all concerned are forever foreclosed from the receipt of this information.

n12 Report of Investigation at 22.

15. The document destruction in Cambridge occurred between February 1996 and [**614] November 1996, a period subsequent to the entry of this Court's document preservation Order.

16. Document destruction at the Des Moines, Iowa office involved 150 documents which were removed and discarded from 200 policyholder files. The activity that occurred in Des Moines clearly violated the Order of this Court. Moreover, Prudential concedes in its response to the Report of Investigation that "the document retention directives . . . were not sufficiently clear on their import. Prudential management again must take responsibility for this failing." Response at 13.

17. Prudential's procedures to identify and report document destruction to senior management are unduly cumbersome and slow.

(a) Destruction of documents at the Cambridge, Massachusetts [**52] office was ascertained by routine audit on November 20, 1996.

(b) The auditor's supervisor was notified of the document destruction on November 26, 1996.

(c) The auditor's report, termed a "Compliance Memo," that described the document destruction was submitted to the Prudential Development Unit on December 4, 1996.

(d) Other Prudential employees learned of the document destruction on December 5, 1996.

(e) The Prudential Law Department learned of the document destruction on December 6, 1996. Assistant General Counsel Richard Meade also learned of the Cambridge incident on December 6, 1996.

(f) Prudential's lead outside counsel was told of the document destruction on Monday, December 9, 1996.

(g) Prudential's General Counsel James Gillen learned of the Cambridge destruction incident on either December 9 or December 10, 1996.

(h) Senior Vice President and Auditor Priscilla Myers learned of the document destruction from Gillen on either December 10 or December 11, 1996.

(i) Arthur Ryan, Chief Executive Officer, learned of the document destruction late in the afternoon of December 11, 1996 during a conference with Reid Ashinoff, James Gillen, and Marc Grier. Until that meeting, [**53] Grier had no notice of the prior destruction incident.

(j) Insurance regulators and the Court were notified on December 16, 1996.

18. Approximately twenty-one days elapsed between discovery of the document destruction and its report to senior management Ryan, Grier and Myers. Twenty-six days elapsed between the discovery of document destruction and notification of insurance regulators and the Court.

19. Prudential's senior management has failed effectively to establish a comprehensive document retention policy. The PROFS messages, while reflective of Prudential's intentions, lack sufficient content and detail to constitute a "policy" on document preservation.

20. The insufficiency of the PROFS notes and the failure to prepare and distribute a written document preservation manual made document destruction inevitable.

21. The failure of senior management promptly to ascertain and notify the Court of the Cambridge document destruction episode in particular is inexcusable in light of the December 19, 1996 exclusion date that required Cambridge policyholders to decide whether to remain in the class action.

CONCLUSIONS OF LAW

1. The Federal Rules of Civil Procedure provide for sanctions [**54] when a party to a litigation fails to obey a pre-trial order. Fed R. Civ. P. 16(f). Beyond the formal rules and legislative dictates, the Court possesses the inherent authority to punish those who abuse the judicial process. *Republic of the Philippines v. Westinghouse Electric Corporation*, 43 F.3d 65, 73 (3d Cir. 1995). The reason for the rule and the warrant for its existence lies in the fact that a court, in order to achieve the orderly and expeditious disposition of cases, must have the control necessary to manage its own affairs. *Chambers v. Nasco*, 501 U.S. 32, 43, 115 L. Ed. 2d 27, 111 S. Ct. 2123 (1991).

[*615] 2. While there is no proof that Prudential, through its employees, engaged in conduct intended to thwart discovery through the purposeful destruction of documents, its haphazard and uncoordinated approach to document retention indisputably denies its party opponents potential evidence to establish facts in dispute. Because the destroyed records in Cambridge are permanently lost, the Court will draw the inference that the destroyed materials are relevant and if available would lead to the proof of a claim. See *National Association of Radiation Survivors v. Turnage*, [**55] 115 F.R.D. 543, 557 (N.D. Cal. 1987).

3. When the September 15, 1995 Court Order to preserve documents was entered, it became the obligation of senior management to initiate a comprehensive document preservation plan and to distribute it to all employees. Moreover, it was incumbent on senior management to advise its employees of the pending multi-district litigation venued in New Jersey, to provide them with a copy of the Court's Order, and to acquaint its employees with the potential sanctions, both civil and criminal, that the Court could issue for noncompliance with this Court's Order.

4. When senior management fails to establish and distribute a comprehensive document retention policy, it cannot shield itself from responsibility because of field office actions. The obligation to preserve documents that are potentially discoverable materials is an affirmative one that rests squarely on the shoulders of senior corporate officers.

SANCTIONS

Through its findings of fact and conclusions of law, the Court is satisfied that the conduct of Prudential explicitly violates the mandate to preserve documents. The gravity of Prudential's conduct is especially troublesome in a complex [**56] litigation, such as this, that encompasses 10.7 million policyholders. From the very inception of this litigation, the

allegations of document destruction have been a recurring theme. The accusations of document destruction not only threaten the integrity of this Court and the proceedings before it, but further serve to undermine the foundations of our system of justice. Corporations, like Prudential, who seek access to the federal courts, have an obligation to comply with both the spirit and intent of the rules. Failure to fulfill this responsibility should be met with unwavering judicial disapproval.

A. Rationale

In the exercise of its discretion to sanction, whether under the Federal Rules of Civil Procedure or under the Courts inherent power, the Court must consider the range of sanctions available and choose only those that are necessary to achieve the Court's purposes. Restraint and discretion are integral to the process. The adage "let the punishment fit the crime" is as true here as it was in *Gilbert & Sullivan's "Mikado."* W.S. Gilbert & Arthur Sullivan, *The Mikado*, in *The Complete Plays of Gilbert & Sullivan* 343, 352 (1938).

In the Republic of the Philippines, [**57] the Third Circuit provides a two-part test with concomitant factors to determine whether and which sanctions are appropriate. 43 F.3d at 74.

First, the Court must consider the conduct at issue and must explain why the conduct warrants sanctions. *Id.* A pattern of wrongdoing may require stiffer sanctions than an isolated incident. *Id.* A grave wrongdoing may compel more severe sanctions than a minor infraction. *Id.* And wrongdoing that prejudices the wrongdoer's opponent or hinders the administration of justice may demand a heftier response than wrongdoing that fails to achieve its "untoward object." *Id.* Mitigating factors, if any, must shape the Court's response also. *Id.*

Second, after evaluating the conduct at issue, the Court must consider the range of permissible sanctions and must explain why

less severe sanctions are inadequate or inappropriate. *Id.*

1. Actual Factual Predicate

Here, Prudential violated the Order of the Court to preserve documents and failed to advise its field offices (334 field [*616] offices) of the pendency of the litigation and the Court-ordered requirement to preserve documents. While e-mail is an appropriate means for a corporation [**58] to disseminate its policy, the internal orders directed to the field by Prudential lacked coordination and represented a haphazard response to a serious problem of judicial administration. Moreover, because documents have been destroyed, they can never be retrieved and the resultant harm is incalculable. It is inexcusable that reports of document destruction were unduly delayed at a time when urgency of notification was particularly relevant. n13 Thus, the Court concludes that there exists a more than adequate factual predicate to sanction.

n13 The Court-ordered notice to policyholders required them to opt out by December 19, 1996.

(a) Pattern of Wrongdoing

The Court finds that Prudential's consistent pattern of failing to prevent unauthorized document destruction warrants the imposition of substantial sanctions. Four field offices have reported document destruction. One of those field offices has engaged in deceptive removal of documents to avoid audit. Prudential has acknowledged that its PROFS notes [**59] failed to achieve document retention and prevent document destruction. Yet, Prudential still has not sent the Order of this Court to the field, nor fully explained the need for document retention. Accordingly, the Court finds a repetitive circumstance that requires correction and that merits the imposition of sanctions.

(b) Willful Misconduct

The Court finds no willful misconduct to have occurred.

(c) Prejudice to a Party Opponent

The Court finds that the document destruction, particularly in the Cambridge, Massachusetts office, caused harm to party opponents. Over 9,000 files were cleansed. Prudential is unable to specify what documents were taken from files, nor is it able to identify the files from which the documents were taken. n14 Because the prejudice to affected party opponents is so substantial, Prudential's consistent pattern of failing to curb document destruction, which at the very least was grossly negligent conduct, merits sanctions, despite the Court's finding that Prudential's conduct was not willful.

n14 Although the Alternative Dispute Process set forth in the settlement agreement contemplated that documents would be inadvertently destroyed, the Court is unable to ascertain whether the remedial aspects of that agreement will fully address the harm incurred.

[**60]

(d) Whether the Conduct Hindered the Administration of Justice

Document destruction inevitably hinders the administration of justice. The record is replete with references to document destruction and Prudential was repeatedly admonished by the Court that if Prudential engaged in document destruction, they would do so at their peril. By virtue of the time devoted to document destruction, both in and out of court, and the public frenzy it created, the Court is satisfied that the destruction of document issue has hindered and burdened the administration of justice.

(e) Mitigating Factors

The Court finds no mitigating factors for Prudential's senior management failure to comply with the Order of the Court.

2. Less Severe Alternatives

The Court has considered the range of sanctions available and has determined that each of the sanctions imposed below befits Prudential's conduct and is absolutely necessary to remedy the waste of judicial resources that Prudential has caused and to protect the authority of the Court.

C. Specific Sanctions

Although the considerations under Federal Rule of Civil Procedure 16(f) and under the inherent power of the Court are [**61] comparable, the Court will impose Federal Rule of Civil Procedure 16(f) sanctions as follows:

1. Within ten (10) days after the receipt of this Opinion, Prudential shall mail to every employee a copy of the Court's September 15, 1995 Order, together with a full explanation [*617] of the pending litigation and the civil and criminal sanctions that apply to the failure to follow an Order of the Court.

2. Within thirty (30) days, Prudential shall submit to the Court a written manual that embodies Prudential's document preservation policy. Such manual shall clearly and unequivocally establish guidelines for document retention, as well as the circumstances when a document may be discarded and the procedures to be employed when that event occurs. The plan shall include means to distribute the plan to each employee.

3. During the pendency of this litigation, Prudential shall dedicate a telephone "hotline" to facilitate reports of document destruction, if any. This hotline number shall be communicated to all employees and any caller's request for anonymity shall be respected. Each

such call shall be recorded in a log to be monitored by a member of the Law Department. The date, the time of the [**62] call, and the field office involved are relevant matters that must be recorded. Reports of document destruction shall be promptly reported to the General Counsel and appropriate action taken.

4. During the pendency of this litigation, Prudential shall establish a certification process wherein each field manager shall certify that his/her office is in compliance with the document retention manual and has not engaged in document destruction contrary to Prudential's established policy.

5. Within ten (10) days after the issuance of this Opinion, Prudential shall pay to the Clerk of the United States District Court for the District of New Jersey, the sum of One Million Dollars (\$ 1,000,000). This sanction recognizes the unnecessary consumption of the Court's time and resources in regard to the issue of document destruction. Moreover, this sanction informs Prudential and the public of the gravity of repeated incidents of document destruction and the need of the Court to preserve and protect its jurisdiction and the integrity of the proceedings before it. In the assessment of this monetary sanction, the Court has considered the financial worth of Prudential and the minimal financial impact [**63] this sanction will have on Prudential's financial stability. n15

n15 It is not uncommon for large corporations with vast resources to impede the discovery process through methods and processes that frustrate the production of relevant and unprivileged documents. Courts must be vigilant to prevent that type of conduct when it occurs and must impose meaningful sanctions to protect the integrity of the proceedings before it.

6. Prudential shall promptly reimburse plaintiffs' counsel for all fees and costs associated with the motion for sanctions, the order to show cause, the depositions and discovery in preparation for the depositions, and the preparation and distribution of the Report of Investigation to the Court and counsel.

7. The sanctions contained herein are without prejudice to the subsequent imposition of additional sanctions as may be fair and appropriate to remedy unknown harm to individual party opponents caused by document destruction.

CONCLUSION

Prudential has violated the Order of the Court [**64] on at least four occasions. It has no comprehensive document retention policy with informative guidelines and lacks a protocol that promptly notifies senior management of document destruction. These systemic failures impede the litigation process and merit the imposition of sanctions.

The sanctions imposed fall within the permissible range of sanctions. The imposition of any lesser sanctions would serve to diminish the harm that occurred, as well as the integrity of the proceedings before this Court.

An appropriate Order is attached.

Dated: January 6, 1997

ALFRED M. WOLIN, U.S.D.J.

ORDER

In accordance with the Court's Opinion filed herewith,

It is on this 6th day of January, 1997

ORDERED that Federal Rule of Civil Procedure 16(f) sanctions are imposed against The Prudential Insurance Company of America as follows:

1. Within ten (10) days after the receipt of this Opinion, prudential shall mail to every employee a copy of the Court's September 15, 1995 Order, together with a full explanation of the pending litigation and the civil and criminal sanctions that apply to the failure to follow an Order of the Court;

2. Within thirty (30) days, Prudential shall submit [**65] to the Court a written manual that embodies Prudential's document preservation policy. Such manual shall clearly and unequivocally establish guidelines for document retention, as well as the circumstances when a document may be discarded and the procedures to be employed when that event occurs. The plan shall include means to distribute the plan to each employee;

3. During the pendency of this litigation, Prudential shall dedicate a telephone "hotline" to facilitate reports of document destruction, if any. This hotline number shall be communicated to all employees and any caller's request for anonymity shall be respected. Each such call shall be recorded in a log to be monitored by a member of the Law Department. The date, the time of the call, and the field office involved are relevant matters that must be recorded. Reports of document destruction shall be promptly reported to the General Counsel and appropriate action taken;

4. During the pendency of this litigation, Prudential shall establish a certification process wherein each field manager shall certify that his/her office is in compliance with the document retention manual and has not engaged in document destruction contrary [**66] to Prudential's established policy;

5. Within ten (10) days after the issuance of this Opinion, Prudential shall pay to the Clerk of the United States District Court for the District of New Jersey, the sum of One Million Dollars (\$ 1,000,000);

6. Prudential shall promptly reimburse plaintiffs' counsel for all fees and costs

associated with the motion for sanctions, the order to show cause, the depositions and discovery in preparation for the depositions, and the preparation and distribution of the Report of Investigation to the Court and counsel;

7. The sanctions contained herein are without prejudice to the subsequent imposition of additional sanctions as may be fair and appropriate to remedy unknown harm to individual party opponents caused by document destruction.

ALFRED M. WOLIN, U.S.D.J.

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