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Prescription for Spoliation: A Short Legal Review

Two drug companies in litigation ended up in a legal brawl over spoliation of backup tapes. The Defendants claimed the Plaintiffs either intentionally or recklessly destroyed back up tapes with key email messages that tended to show the Plaintiffs' drug "escitalopram" did not produce "unexpected results" and therefore was "obvious." *Forest Labs. v. Caraco Pharm. Labs.*, 2009 U.S. Dist. LEXIS 31555, 2-3 (E.D. Mich. Apr. 14, 2009).

The Defendant's "Spoliation Motion" sought the following:

- (1) "[A] one-day hearing to create a record of Forest's spoliation of evidence,"
- (2) "Forbid Forest from claiming at trial that escitalopram produced unexpected results (and thus was not 'obvious')," and
- (3) "Require Forest to pay Caraco's attorney fees." *Forest Labs.* 3-4.



Defining the Law:

The Court conducted an extensive review of the facts and law regarding the spoliation of electronically stored information. This is a thoughtful and detailed case addressing spoliation, triggering dates for the duty to preserve and adverse inference instructions. Relevant sections are summarized below.

Spoliation Defined:

"Spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *Forest Labs.* 3-4, citing *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999).

Spoliation is a rule of evidence and is "administered at the discretion of the trial court." *Forest Labs.* 3-4, citing *Hodge v. Wal-Mart Stores, Inc.*, 360 F.3d 446, 450 (4th Cir. 2004) (quoting *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 155 (4th Cir. 1995)).

Standards for Adverse Inference Instruction:

To establish an adverse inference instruction for the destruction of evidence, the moving party must show the following:

- (1) That the party having control over the evidence had a duty to preserve it at the time it was destroyed;
- (2) That the records were destroyed "with a culpable state of mind"; and
- (3) That the destroyed evidence was "relevant" to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense. *Forest Labs.* 5.

Step 1: Failure to Preserve Evidence

A moving party has to show the non-moving party had a duty to preserve the evidence at the time it was destroyed. This requires determining the “trigger date” to preserve evidence. *Forest Labs*, 9. As the Court summarized:

"Any destruction of potentially relevant evidence that occurs before the trigger date would be harmless, since the party was unaware of a need to safeguard evidence. The destruction of documents and evidence after the trigger date, however, is not allowed." *Forest Labs*, 9, citing *Clark Constr. Group, Inc. v. City of Memphis*, 229 F.R.D. 131, 136 (W.D. Tenn. 2005).

The focus of the legal brawl was over back up tapes, whether they were accessible or not, whether there was a duty to preserve them and when the duty began. As a general rule, a party does not have to save “everything.” *Forest Labs*, 10-11. However, “[a] party or anticipated party must retain all relevant documents (but not multiple identical copies) in existence at the time the duty to preserve attaches, and any relevant documents created thereafter.” *Forest Labs*, 11.

The Court found the back up tapes were not reasonably accessible, largely because the Defendants did nothing to rebut Plaintiffs’ arguments the tapes were for disaster recovery and thus inaccessible. *Forest Labs*, 13.

However, this does not outright mean the inaccessible back up tapes were not subject to preservation. The “Zubulake Exception” states:

If a company can identify where particular employee documents are stored on backup tapes, then the tapes storing the documents of “key players” to the existing or threatened litigation should be preserved if the information contained on those tapes is not otherwise available. This exception applies to *all* backup tapes. *Forest Labs*, 14-15, citations omitted.

Step 2: State of Mind

The failure to produce evidence falls on a “continuum” of degrees from “negligence to intentionality.” *Forest Labs*, 16-17, citations omitted. However, once there is a duty to preserve, “any destruction of [evidence] is, at a minimum, negligent.” *Forest Labs*, 17, citing *Zubulake*, 220 F.R.D. at 220.

Case law defines three possible states of mind for culpability: (1) Bad faith destruction, (2) Gross negligence, and (3) Ordinary negligence.” *Forest Labs*, 17, citing *Sampson v. City of Cambridge, Md.*, 251 F.R.D. 172, 179 (D. Md. 2008).

Some courts have found negligence is enough to meet the state of mind requirement. *Forest Labs*, 17. One prior court stated:

[The] sanction [of an adverse inference] should be available even for the negligent destruction of documents if that is necessary to further the remedial purpose of the inference. It makes little difference to the party victimized by the destruction of evidence whether that act was done willfully or negligently. The adverse inference provides the necessary mechanism for restoring the evidentiary balance. The inference is adverse to the destroyer not because of any finding of moral culpability, but because the risk that the evidence would have been detrimental rather than favorable should fall on the party responsible for its loss. *Forest Labs*, 17-18, citing *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 75 (S.D.N.Y.1991).

Step 3: Destroyed Evidence was Relevant to a Claim or Defense

The “prejudiced party” has to show some evidence that the destroyed documents (or ESI) was relevant “to substantiating his claim would have been included among the destroyed files.” *Forest Labs*, 20, citing *Byrnie v. Town of Cromwell Bd. of Educ.*, 243 F.3d 93 at 108 (2d Cir. 2001). As the Court explained:

“[R]elevant” in this context means something more than sufficiently probative to satisfy Rule 401 of the Federal Rules of Evidence. Rather, the party seeking an adverse inference must adduce sufficient evidence from which a reasonable trier of fact could infer that “the destroyed [or unavailable] evidence would have been of the nature alleged by the party affected by its destruction.” *Forest Labs*, 20, citing *Byrnie*, 243 F.3d at 110.

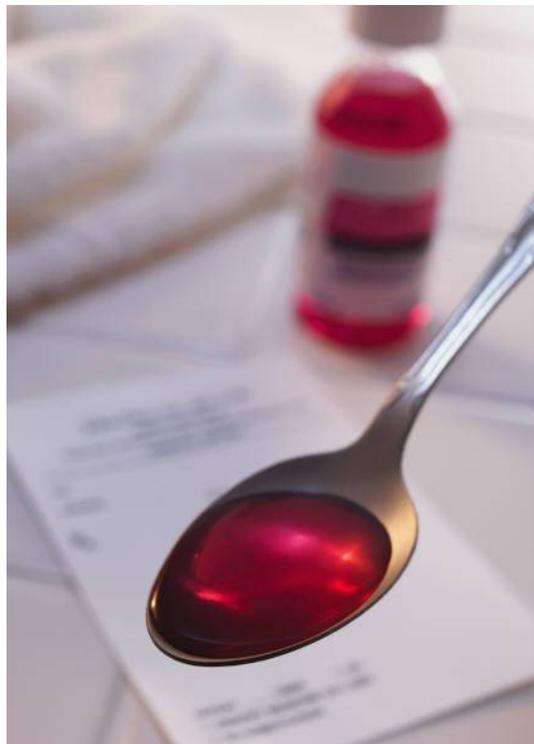
Application to the Facts

The Court found the Plaintiffs had a duty to preserve evidence beginning in August 2003. This was the timeframe when the Plaintiffs were on notice that an Abbreviated New Drug Application had been filed, which was a “triggering event” for potential litigation. *Forest Labs*, 7-8.

The Court ordered a two part spoliation hearing to determine 1) whether the “Zubulake” exception applied and 2) determine if the Plaintiffs had a culpable state of mind and whether the spoliated evidence is relevant. *Forest Labs*, 21-22.

The “Zubulake Exception” is threefold analysis to determine whether:

- (1) “The information contained on [the] tapes” is “otherwise available,”
- (2) The alleged spoliator can “identify where particular employee documents are stored on the backup tapes,” and
- (3) The tapes “store the documents of ‘key players’ to the . . . litigation. *Forest Labs*, 22, *Zubulake*, 220 F.R.D. at 218.



This case is not over and will be interested to see what happens next.