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E-Discovery Sanctions Keep Getting Harsher: Now to the Tune of $1.4 Billion

Over the past year, we have seen an increasing willingness by courts to impose extraordinary and costly sanctions for e-discovery violations. In July 2004, the federal court in Washington D.C. sanctioned Philip Morris $2.75 Million Dollars for the deletion of emails by senior executives. This sanction was issued despite a finding that there was no bad faith on the part of Philip Morris. In April 2005, a verdict was rendered in the much discussed *Zubulake* case in an amount of $29.3 Million Dollars. The e-discovery issues were plentiful in that case, but the one that was most important to the jury was likely the adverse inference instruction related to the failure to properly preserve email. The recent Perelman/Morgan Stanley decision identified below is yet another case in this disturbing trend.

***Perelman v. Morgan Stanley Decision**:*
A Florida jury awarded 1.4 billion dollars in damages to Ronald Perelman on his claim that Morgan Stanley defrauded him as part of a 1998 sale of his controlling stake in Coleman Co. to Sunbeam Corp. This verdict includes $604 million in compensatory damages and $850 million punitive damages.

On March 1st, the Judge shifted the burden to proof requiring Morgan Stanley to prove that it was not guilty of conspiring to defraud Ronald Perelman. The Judge issued this order in response to Perelman's allegations and the Judge's finding that Morgan Stanley repeatedly failed to properly preserve relevant electronic data.

Morgan Stanley was being sued by Coleman Holdings Inc. for 2.7 billion dollars in damages related to alleged accounting misdeeds at Sunbeam Corp. New York financier Ronald Perelman, who is chairman of Revlon Inc., sold his majority stake in Coleman Inc., to Sunbeam for $1.5 billion, including $680 million in Sunbeam Stock. Sunbeam later filed for bankruptcy when accounting fraud was discovered, leaving the stock worthless.

Judge Elizabeth Maass found that Morgan Stanley failed to preserve e-mail by allowing e-mail to be overwritten after 12 months, despite an SEC regulation requiring all e-mail to be retained in readily accessible form for two years. *See* 17 C.F.R. § 240.17a-4 (1997). The court also found that Morgan Stanley failed to comply with discovery deadlines and the timely notification to the court of over two thousand later discovered e-mail back-up tapes relevant to the pending litigation.

Morgan Stanley had already said it plans to appeal the judgment on the grounds that Circuit Court Judge Elizabeth Maass was biased. Additional arguments on appeal are almost certain to focus on the severity of the sanction and many other issues. Many analysts expect the real legal battle to take place during the appeals process and that there is a high likelihood that the decision will be reversed.

Morgan Stanley said its failure to provide the plaintiffs with e-mails — a failure that led Judge Maass to punish the bank with a pretrial ruling that it had conspired with Sunbeam to defraud Coleman Co. — was not a sign it wanted to conceal evidence but the product of mistakes that can afflict large and unwieldy organizations.

Extraordinary Results from Ordinary Mistakes:
These cases are great examples of how e-discovery issues can lead to extraordinary and unforeseen adverse results. Lawyers, both in-house and outside, have long struggled in the paper world with the question of whether they preserved and produced everything in discovery. In the electronic world this struggle is much more challenging. Electronic data is easily created but its also easily destroyed. Finding and accounting for all your electronic data is no easy task and a source of the most common mistakes. Agreed preservation orders and common law preservation obligations can be difficult to comply with when dealing with electronic data and emerging technologies.

Accordingly, we strongly recommend that you carefully review your policies, procedures and practices regarding electronic data. E-Discovery issues arise in every case. The difficulty arises in determining how to deal with the issues in cases that have varying fact patterns and varying amounts in controversy.

Should you require assistance or advise on electronic discovery issues, Seyfarth Shaw is able to help. We have attorneys at Seyfarth Shaw with extensive technical training and experience that make them well qualified to advise on these difficult electronic discovery issues. We can provide assistance with:

- Overcoming the “language barrier” between IT and Legal that arises from the discussion of technical issues;
- Proper preservation of electronic data in anticipated or pending litigation or regulatory investigation;
- Managing the rising costs of electronic discovery including the design of an electronic data strategy for responding to discovery requests narrowing the scope to relevant data; avoiding undue burden or expense; and by seeking cost shifting as appropriate;
- Development of best practices in dealing with electronic data prior to litigation or investigation and the ability to provide training and consulting related to those best practices;
- Advise and assist in the alignment of electronic data with document retention policies.

Please do not hesitate to contact your Seyfarth Shaw attorney who can coordinate with Seyfarth Shaw’s E-Discovery Task Force.

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