

“Duty to Preserve” May Include “Duty to Recover”

Kenneth J. Treece

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A company’s duty to preserve electronic evidence may include a duty to recover it if lost, even if the company did not intentionally destroy it, the U.S. District Court for the District of Columbia ruled. But the defendant’s lack of malicious intent spared it a more severe mandatory adverse inference sanction for the data loss.

In *Beck v. Test Masters Educational Services*, a computer crash caused the defendant company to lose emails it had a duty to preserve. As a result, it could not produce the emails as part of discovery. On plaintiffs’ motion, Judge John Bates sanctioned the defendant for spoliation, and awarded plaintiffs with a mandatory adverse inference instruction. The defendant asked Bates to reconsider the order, arguing that its conduct did not support such a sanction and, in any event, a mandatory permissive inference was improper.

On reconsideration, the court assessed the defendant’s conduct and found that that the computer crash itself was not a result of any intentional or malicious destruction. The court still sanctioned the company, ruling that it did not doing enough to recover the lost emails.

“[The defendant’s] conduct was not accidental,” Bates wrote. “After a computer crash wiped out emails it had a clear duty to preserve, [the defendant] failed to make any serious effort to recover the data. This lackadaisical response ‘constitutes a conscious disregard of [the defendant’s] preservation obligations’... and constitutes culpable conduct supporting a negative inference.”

But the court agreed with the defendant that a mandatory adverse inference was unwarranted. Because he found the lost evidence was not caused by intentional misconduct, Bates ruled that a permissive inference instruction would sufficiently redress any spoliation.

A permissive inference instruction allows, but does not require, the factfinder to presume that the evidence contained in the emails was favorable to plaintiffs.

This case illustrates that, when electronic data under a preservation obligation is accidentally lost, a party may still face serious spoliation sanctions if it does not make a reasonable attempt to recover the data. What is “reasonable” will, of course, depend on the circumstances, and records custodians should memorialize those steps to defend against a potential sanctions motion.