

DECEMBER 2015

FINANCIER
WORLDWIDE corporatefinanceintelligence



LITIGATION & DISPUTE RESOLUTION

Avoiding spoliation and sanctions: recent USITC decision highlights risks of inaction

MICHAEL R. DOMAN, JR.

ADDUCI, MASTRIANI & SCHAUMBERG, LLP.

Advances in technology have allowed companies to store information and data in myriad ways, including the mass storage of files and records via hard drives, memory chips and the cloud. Preservation of such information and data can be critical in the litigation context. Indeed, litigants have an affirmative duty to preserve relevant evidence. A violation of that duty – known as spoliation of evidence – can result in both equitable and monetary penalties.

Electronic document retention policies and e-discovery techniques have long been used to ensure that relevant evidence is preserved and to prevent spoliation. Jurisdictions around the world now have well-established legal standards with respect to what constitutes evidence spoliation.

The United States International Trade Commission (USITC) recently provided its most fulsome analysis regarding spoliation, illustrating that, though discovering and proving that spoliation has occurred may be more difficult due to the accelerated litigation timeframe of actions at the USITC, it will impose harsh sanctions on parties found liable for spoliation of evidence. Because the USITC has broad authority to regulate unfair methods of competition and



AMS ADDUCI MASTRIANI
& SCHAUMBERG LLP

Michael R. Doman, Jr. is an associate at Adduci, Mastriani & Schaumberg, LLP. He can be contacted on +1 (202) 467 6300 or by email: doman@adduci.com.

trade practices, companies in a wide variety of industries from around the world can potentially find themselves before the USITC. Familiarity with this recent spoliation decision will allow companies to take the necessary steps to better protect their interests.

On 30 April 2015, the USITC imposed severe, dispositive sanctions in a proceeding where Dow Chemical Company alleged patent infringement and trade secret misappropriation against Organik Kimya. Specifically, the USITC found Organik liable for evidence spoliation, issued a default judgment in favour of Dow, and found Organik and its counsel jointly and severally liable to Dow for nearly \$2m. In other words, as a result of the spoliation finding, Organik was found liable for trade secret misappropriation without having a trial and were also forced, along with its counsel, to pay Dow a large monetary sum.

In that investigation, allegations were raised that Organik was withholding pertinent evidence. The Administrative Law Judge (ALJ) issued various subpoenas, orders to preserve certain evidence and orders compelling forensic inspection of certain evidence. Through the discovery process, it was uncovered that Organik had, in fact, destroyed or failed to preserve certain

relevant evidence. Specifically, it was found that, firstly, a hard drive was essentially overwritten and steps were taken to hide that action, secondly, that thousands of files were deleted from another computer previously connected to multiple storage devices, and finally, that a third computer had its hard drive replaced without preserving the original drive or transferring the files therefrom. Dow consequently moved for monetary sanctions and default judgment, which the USITC ultimately granted.

Notably, the actions leading to the sanctions appear to have been committed by a few employees, without any directive from the lawyers or company executives. However, the entire company, and its outside counsel, were punished for those actions. The USITC's reasoning for holding the company and outside counsel liable was partly due to the inaction following allegations and suspicions of employee bad acts. The USITC considered the relatively tepid responses by both the company and outside counsel as allegations and instances of evidence spoliation began to unfold in the discovery process. In particular, the ALJ presiding over the proceeding took note that after the first instance of alleged

evidence spoliation, no "[l]itigation hold memo, or equivalent, was issued or disseminated. . . Nor [wa]s there evidence that an active undertaking was made to preserve evidence".

How can you protect your company or your client and avoid these disastrous consequences? First, companies should examine the relationship between their internal legal department and outside lawyers who are hired by the company to provide legal services. It is prudent to foster an atmosphere that encourages all counsel to be on the lookout concerning suspicions of potential employee misconduct within the company. By openly discussing any such suspicions, company executives and their in-house counsel can provide official and unofficial guidance to employees engaged in collection of discovery that makes clear that the company seeks to provide fulsome, honest discovery. Because outside counsel usually deal more closely with the intricacies of discovery than in-house lawyers, outside counsel must understand these goals, and must provide the company an open and honest assessment of any risks that the company may not be satisfying its discovery obligations, or worse. Corporate executives can set the tone by insisting on an open and

»»

honest working relationship between outside and in-house counsel. Such a relationship will ensure that in-house attorneys are advised of potential discovery misconduct within the company, and can take any necessary steps to mitigate the harm that may arise from such actions.

Companies should also consider policies that define responsibilities among the attorneys for conducting their investigation in the event that suspicions or allegations of employee bad acts arise. Hired lawyers may sometimes be limited in the actions

they feel they can or should take in investigating potential bad acts of company employees, and in-house company lawyers may be wary of getting too involved in, or disturbing, discovery strategy. A clear policy that defines measures to be taken will help prevent potentially harmful inaction due to a lack of clarity with regard to investigative responsibility.

Although no measure will completely eliminate the potential for evidence spoliation in a legal proceeding, an awareness of recent case law and legal outcomes allows companies

to allocate resources in ways that will provide better protection in the event of litigation. In this regard, the recent spoliation decision by the USITC demonstrates the risks inherent in rogue employees' destruction of evidence, and an apparent lack of vigilance by counsel in preventing such destruction. Awareness of these risks, and taking affirmative steps to mitigate them, is especially important given the continual advances in technology which change the ways in which mass amounts of information and data are stored. ■