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Courts Confront Preservation and Production of Backup Media

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Parties' obligations with respect to backup media remain one of the most confounded — and most contested — issues in electronic discovery. Several recent decisions provide some insight into courts' views on this subject. In each case, courts have affirmed the potential value that backup media can provide to the discovery process, while seeking to balance the requesting party's need for relevant information against the potential cost and burden that such searches can impose on the producing party.

In *Forest Labs. v. Caraco Pharm. Labs.*,[1] defendants in a patent action alleged that the plaintiffs had intentionally or recklessly destroyed backup tapes containing key emails.[2] Relying on *Zubulake v. UBS Warburg LLC*, [3] the court noted that parties cannot be expected to preserve every single document and that litigation holds generally apply only to backup tapes that are "accessible" (*i.e.*, tapes that are maintained for some additional purpose beyond disaster recovery). Since defendants had offered no evidence that plaintiffs' backup tapes were maintained for any purpose other than disaster recovery, the court determined that the backup tapes were inaccessible as a matter of law.[4] However, the court also highlighted an exception enunciated in *Zubulake* — namely, that tapes storing documents belonging to "key players" should be preserved if the information is not otherwise available and if the company can identify where particular documents are stored on the tapes.[5] The court ordered a hearing to determine whether this exception applied and, if so, whether plaintiffs acted with a culpable state of mind and whether the spoliation evidence was relevant.

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Rather than disagreeing about preservation, the parties in *Kipperman v. Onex Corp.*,[6] a fraud action, disputed whether defendants were obligated to search and produce documents from existing backup media. Defendants originally resisted such production based on burden and cost, and the expectation that the search would yield little of relevance. Plaintiff initially filed a motion to compel, arguing that defendants should produce emails from backup systems and should bear the costs of doing so.[7] The court ordered defendants to pay for a limited search of the backup tapes to determine what sort of data existed. Plaintiff would design the search and designate the tapes, while defendants retained the right to move for fees if the search produced scant discoverable material.[8]

After plaintiff designated two tapes for defendants to search, defendants searched only certain individuals' boxes rather than the entirety of each tape, and redacted the documents it produced. Plaintiff filed a second motion to compel.[9] The court found that defendants "did not do what the court ordered them to do previously";[10] however, it permitted defendants to streamline the search process, including narrowing the search terms and limiting the number of employee boxes to be searched. [11] Following some production of emails, defendants sought a protective order to again limit the scope of the production, which the court granted in part and denied in part. [12] After defendants certified their production as "complete," plaintiff moved for sanctions based on myriad alleged discovery abuses, including defendants' production from the backup media.

The court stated that it was "deeply disturbed" by how defendants had handled the production of emails from the backup systems.[13] In particular, the court took issue with defendants' decision to unilaterally limit the search of the backup tapes, especially where the court had attempted to accommodate the concerns of both sides, noting that defendants were "behaving as if they, and not the court, got to decide what electronic material was relevant and discoverable under Rule 26 and what material was not."[14] Though it labeled the situation as "a textbook case of discovery abuse,"[15] the court declined to enter a default judgment. Instead, it imposed monetary sanctions of just over $1 million, corresponding to the amount plaintiff had expended in attorneys' fees on various discovery issues.[16]

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Cost shifting also occurred in *Kilpatrick v. Breg, Inc.*,[17] where the court granted in part a product liability plaintiff's motion to compel production from defendant's backup tapes, though it was brought on the eve of trial. Acknowledging plaintiff's concern that defendant's production of electronic documents may have been incomplete, the court agreed that there seemed to be gaps in the production, but concluded it was unlikely that any material new documents were located in defendant's backup tapes. The court expressed concern that defendant would not be able to prepare adequately

for trial were significant additional discovery ordered, and noted that it would be impossible to complete all of the requested searches, given the timing of plaintiff's request.[18] Since neither party had submitted evidence regarding the expected cost and burden of conducting the searches, the court permitted plaintiff at its own expense to hire an outside vendor to confirm the completeness of defendant's production by searching for a limited number of keywords on a maximum of five backup tapes.[19]

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These cases indicate that under some circumstances, courts will order production from backup tapes where necessary to fill in gaps in discovery. Whether and to what extent backup media should be preserved in connection with a particular dispute is therefore a key consideration for any litigant. Courts endeavor to resolve disputes surrounding discovery from backup tapes in a way that assures that material relevant documents have been produced while minimizing the burden that review of such data can pose.

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[1] 2009 U.S. Dist. LEXIS 31555 (E.D. Mich. Apr. 14, 2009).
[2] *Id.* at *7-10.
[3] 220 F.R.D. 212 (S.D.N.Y. 2003).
[4] *Forest Labs.*, 2009 U.S. Dist. LEXIS 31555 at *13.
[5] *Id.* at *14-15.
[6] 2009 U.S. Dist. LEXIS 44457 (N.D. Ga. May 27, 2009).
[7] *Id.* at *22-23.
[8] *Id.* at *25-26.
[9] *Id.* at *26.
[10] *Id.* at *29.
[11] *Id.* at *28-29.
[12] *Id.* at *30-31.
[13] *Id.* at *31.
[14] *Id.* at *32.
[15] *Id.* at *59.
[16] *Id.* at *61.
[17] Slip Copy, 2009 WL 1764829 (S.D. Fla. June 22, 2009).
[18] *Id.* at *3.
[19] *Id.* at *4.