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E-discovery Update

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E-discovery Update

I. Introduction to sanctions analysis in Texas state courts

In *Brookshire Bros. v. Aldridge*, 438 S.W.3d 9 (Tex. 2014), a slip and fall case, the Texas Supreme Court announced a new, two-step judicial process: First, “the trial court must determine, as a question of law, whether a party spoliated evidence”; second, “if spoliation occurred, the court must assess an appropriate remedy.” In order to determine if a party spoliated evidence, the trial court must find that:

(1) [T]he spoliating party had a duty to reasonably preserve evidence, and (2) the party intentionally or negligently breached that duty by failing to do so. Spoliation findings—and their related sanctions—are to be determined by the trial judge, outside the presence of the jury, in order to avoid unfairly prejudicing the jury by the presentation of evidence that is unrelated to the facts underlying the lawsuit. Accordingly, evidence bearing directly upon whether a party has spoliated evidence is not to be presented to the jury except insofar as it relates to the substance of the lawsuit.

A. When is the Duty to Preserve triggered?

The duty to preserve evidence “arises only when a party knows or reasonably should know that there is a substantial chance that a claim will be filed and that evidence in its possession or control will be material and relevant to that claim.” *Brookshire Bros.*, 438 S.W.3d at 20 (quoting *Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718, 722 (Tex. 2003)). Citing to *National Tank Co. v. Brotherton*, 851 S.W.2d 193 (Tex. 1993), a case that addressed when a substantial chance of litigation ensued to trigger the invocation of work-product privilege, the *Brookshire Bros.* court stated that a “substantial chance of litigation” meant that “litigation is more than merely an abstract possibility or unwarranted fear.” *Brookshire Bros.*, 438 S.W.3d at 20 (citing *Nat'l Tank*, 851 S.W.2d at 204).

B. The Scope of the Duty to Preserve

Once a duty to preserve is triggered, a party must determine what must be preserved and the scope of the evidence to be preserved. In Texas state courts,

[a] party that is on notice of either potential or pending litigation has an obligation to preserve evidence that is relevant to the litigation. “While a litigant is under no duty to keep or retain every document in its possession . . . it is under a duty to preserve what it knows, or reasonably should know is relevant in the action, is

reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery, [or] is the subject of a pending discovery sanction.”

Trevino v. Ortega, 969 S.W.2d 950, 957 (Tex. 1998) (citing *Wm. T. Thompson Co. v. General Nutrition Corp.*, 593 F. Supp. 1443, 1455 (C.D. Cal. 1984).

C. Before sanctions can be sought the lost evidence must be material and relevant

In *Brookshire Bros.*, the court recognized “that the party seeking a remedy for spoliation must demonstrate that the other party breached its duty to preserve material and relevant evidence.” *Brookshire Bros.*, 438 S.W.3d at 20.

D. Level of Culpability required for a Spoliation Instruction – Intent to conceal or destroy

Despite the Texas Supreme Court's previous endorsement of jury spoliation instructions, its previous statement that existing “remedies, sanctions and procedures for evidence spoliation are available under Texas jurisprudence” (*Trevino v. Ortega*, 969 S.W.2d 950, 953 (Tex. 1998)), and that trial judges have broad discretion, the *Brookshire Bros.* court concluded “that a party must intentionally spoliolate evidence in order for a spoliation instruction to constitute an appropriate remedy.” *Brookshire Bros. v. Aldridge*, 438 S.W.3d at 23.

According to the Court, intentional spoliation requires intent to conceal or destroy discoverable evidence. *Brookshire Bros. v. Aldridge*, 438 S.W.3d at 23-24. Not even a permissive instruction may be given for negligent conduct. The court found that “[t]o allow such a severe sanction [such as a permissive adverse inference instruction] as a matter of course when a party has only negligently destroyed evidence is neither just nor proportionate.” *Brookshire Bros. v. Aldridge*, 438 S.W.3d at 24.

E. “Willful Blindness”

The *Brookshire Bros.* court included in its definition of intentional spoliation the concept of “willful blindness,” which covers the scenario in where “a party does not directly destroy evidence known to be relevant and discoverable, but nonetheless ‘allows for its destruction.’” *Brookshire Bros.*, 438 S.W.3d at 24. Indeed, the court specifically recognized that “[t]he issue of willful blindness is especially acute in the context of automatic electronic deletion systems. A party with control over one of these systems who intentionally allows relevant information to be erased can hardly be said to have only negligently destroyed evidence.” *Id.* at 24 n.17.

F. Reckless Conduct

The court's use of the phrases “willful” and “willfully blind” is problematic. In *Safeco Insurance Co. of America v. Burr*, the United States Supreme Court, addressing the term “willful” in the context of the Fair Credit Reporting Act noted, “‘willfully’ is a ‘word of many

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