E-Discovery Spoliation Sanction Standards in Ohio State and Federal Courts: Differing Culpable Mental States

November 17, 2011

Gregory J. Krabacher
Partner
Columbus
614.227.2369
gkrabacher@bricker.com

Read our ClassActionOhio Blog

Full text of the Beaven case discussed in this article

Background

The No. 1 E-Discovery issue vexing businesses and other organizations today is how far to go in preserving evidence for litigation. Many large organizations are currently over-preserving huge quantities of electronically stored information, a practice they readily admit is a waste of time, effort, and money. This is especially true for those facing the prospect of litigation in which the scope of the issues or the identity of all plaintiffs are initially difficult to define, such as is often the case with class actions and mass action litigation.

Why? The most common answer seems to be two-fold: (1) fear of sanctions resulting from the failure to preserve evidence (known as "spoliation") and (2) a great deal of legal uncertainty regarding what exactly a party's obligations are and the consequence if the party is found to have been deficient. The fever pitch has reached the point that the Federal Rules Advisory Committee is now considering further amendments to the Federal Rules of Civil Procedure.

Take for example a business that operates nationally and faces the potential for litigation in many jurisdictions. This business will face differing standards in each jurisdiction because the courts in each jurisdiction apply their own inherent authority and precedent on issues involving the spoliation of evidence. In particular, the federal circuit courts of appeal are split on the required mental state necessary for a commonly requested spoliation sanction: an adverse inference.[1]

Some, such as the Fifth, Seventh, Eighth, Tenth, Eleventh, and D.C. Circuits appear to require bad faith. The First, Fourth, and Ninth Circuits hold that bad faith is not essential to imposing severe sanctions such as an adverse inference if there is severe prejudice, although the cases often emphasize the presence of bad faith. In the Third

Circuit, the courts balance the degree of fault and prejudice. Decisions of the Second Circuit have been read to permit an adverse inference upon a showing of mere negligence.[2]

Even a company that never crosses state lines faces multiple and conflicting standards. This article focuses on the differing standards applicable to parties in Ohio in federal and state courts.

Sixth Circuit Standard For Spoliation Sanctions

In September of 2010, the Sixth Circuit Court of Appeals, in the case of Beaven v. United States DOJ, adopted a new formulation for deciding whether to grant an adverse inference instruction due to the spoliation of evidence:

> [A] party seeking an adverse inference instruction based on the destruction of evidence must establish (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed "with a culpable state of mind"; and (3) that the destroyed evidence was "relevant" to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.[3]

The Court looked to other circuits – especially the Second and the Fourth – for guidance in adopting its new standard, finding that earlier precedents in the Sixth Circuit had applied state law on spoliation. And, pursuant to its en banc decision in Adkins v. Wolever,[4] federal courts within the Sixth Circuit must now apply federal law in determining whether spoliation sanctions are appropriate.

Adkins had also clarified that federal courts have broad discretion in such decisions.[5] "When appropriate, 'a proper spoliation sanction should serve both fairness and punitive functions,' but its severity should correspond to the district court's finding after a 'fact-intensive inquiry into a party's degree of fault' under the circumstances, including the recognition that a party's degree of fault may 'rang[e] from innocence through the degrees of negligence to intentionality.' 'Thus, a district court could impose many different kinds of sanctions for spoliated evidence, including dismissing a case, granting summary judgment, or instructing a jury that it may infer a fact based on lost or destroyed evidence.'"[6]

Naturally, large organizations concerned with the prospect of spoliation sanctions and who operate in Ohio, Michigan, Kentucky, and Tennessee, were less than thrilled at the Sixth Circuit's decision to adopt a negligence-based standard. Perhaps most

worrisome of all was the Court's approval of a somewhat unusual non-rebuttable adverse inference instruction upon a finding of spoliation of especially crucial evidence.[7]

Now consider the plight of an organization facing the prospect of mass litigation. Beaven, after all, was a lawsuit brought by 106 staff members of the Bureau of Prisons alleging violation of the Privacy Act and claims of common law invasion of privacy under Federal Tort Claims Act. Can an organization really be penalized in the Sixth Circuit for the negligent spoliation of evidence relevant to any of over 100 potential defendants?

This is unlikely. In Beavens, the district court determined that the destruction of the evidence at issue, a file folder, was intentional and was subsequent to the Defendant's acknowledgement of the potential for tort claims.[8] And this wasn't just any file folder that might arguably have relevance to some of the plaintiff's claims. The folder was the critical evidence upon which all of the plaintiffs' cases depended. The plaintiffs' claims arose from a Justice Department investigator leaving this file folder on a civilian employee's desk in the Project Management area of a prison. The folder contained all the plaintiff employees' names, addresses, Social Security numbers, home telephone numbers, pay grades, and other personal information.[9] After doing some belated damage control, including misrepresenting the scope of the problem to the employees, Defendant destroyed the file folder.

Thus far, the new standard adopted by Beavens has not resulted in a raft of adverse inference instructions stemming from negligent spoliation. Indeed, as of the time of this writing, seventeen citing decisions within the Sixth Circuit have considered an adverse inference Thirteen denied the adverse inference.[10] Three granted a permissive instruction.[11] Only one granted a non-rebuttable adverse inference where crucial evidence was lost.[12]

Ohio State Standards for Spoliation Sanctions

In Ohio, an aggrieved party has two avenues of relief for spoliation of evidence: it may bring a separate cause of action in tort and may also seek relief in the form of sanctions.[13] Both generally require a relatively high level of culpability.

The elements for the independent tort actions for spoliation were set forth by the Ohio Supreme Court in Smith v. Howard:

> A cause of action exists in tort for interference with or destruction of evidence; * * * the elements of a claim for interference with or destruction of evidence are (1) pending or probable litigation involving the plaintiff, (2) knowledge on the part of defendant that litigation exists or is probable, (3) willful

> destruction of evidence by defendant designed to disrupt the plaintiff's case, (4) disruption of the plaintiff's case, and (5) damages proximately caused by the defendant's acts.[14]

Notably, "Ohio does not recognize a [tort] cause of action for negligent spoliation of evidence."[15]

Ohio courts also have discretion under Civ. R. 37 and their inherent authority to fashion sanctions for spoliation. Unsurprisingly, most Ohio courts to address the issue have required a mental state akin to that required by the Ohio tort of spoliation. A common formulation used by Ohio courts is "a strong showing of malfeasance – or at least gross neglect."[16]

Indeed, Ohio courts have observed that "sanctions generally are not warranted where an adverse party's failure to provide discovery was not willful and where no prejudice has been shown."[17] This is especially true for the harshest of sanctions, such as dismissal, which "should only be imposed where failure to comply with a discovery order is due to willfulness or bad faith."[18]

Ohio courts are not uniform on the culpable mental state necessary for spoliation sanctions, however. The Eighth Appellate District has suggested that at least some form of sanction might be warranted for negligent spoliation, especially where the evidence was crucial to the other party. In Penix, the Appellate Court observed: "The court must balance the intent of the offending party, the level of prejudice, and the reasonableness of the offending party's action in fashioning a just remedy. The relative importance of the information denied the opposing party bears directly on the reasonableness of the offending party's action and the resulting prejudice."[19] Ultimately, the Court "decline[d] to extend the doctrine" of spoliation to the facts of this case.[20] However, it did observe, in dicta, that "[e]ven if the court finds the evidence was not deliberately destroyed, negligent or inadvertent destruction of evidence is sufficient to trigger sanctions where the opposing party is disadvantaged by the loss."[21]

Sanctions of lower severity have been found to be appropriate where spoliation resulted in an unfair advantage to the spoliator. In Cincinnati Ins. Co., the Sixth Appellate District adopted a line of persuasive authority in the area of product liability litigation to preclude expert testimony by a spoliator regarding evidence "intentionally or negligently" lost prior to the opportunity for examination by an opposing expert and where the spoliator failed to overcome the rebuttable presumption that the opposing party was harmed thereby.[22] This approach has been cited with approval by the Eleventh Appellate District, though the court did not reach the question in that case.[23]

Conclusion

A deep jurisdictional split on the issue of what culpable mental state is necessary for a court to order an adverse inference instruction is reflected both among the federal circuit courts of appeal and federal and state courts in Ohio. While Ohio Courts generally require a higher culpable mental state, of malfeasance or at least gross neglect, federal courts within the Sixth Circuit are imbued with discretion to order an adverse inference upon a showing of ordinary negligence. However, both the Ohio state and federal Sixth Circuit courts have exercised their discretion very conservatively. Adverse inference instructions due to negligent spoliation are very rare even under the ostensibly lower standard applicable at the federal level. In the few cases in which they are granted, it is generally because the evidence lost was shown to be especially critical to the aggrieved party's case.

Footnotes

1. Rimkus Consulting Grp. v. Cammarata, 688 F. Supp. 2d 598 (S.D. Tex. 2010) (Rosenthal, J.) (collecting cases).
2. Id.
3. Beaven v. United States DOJ, 622 F.3d 540, 553 (6th Cir. Ky. 2010), citing Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 107 (2d Cir. 2002) (quoting Byrnie v. Town of Cromwell, Bd. of Educ., 243 F.3d 93, 107-12 (2d Cir. 2001)).
4. Id.
5. Adkins v. Wolever, 554 F.3d 650, 652 (6th Cir. 2009) (en banc).
6. Beaven at 553.
7. Adkins at 652; Beaven at 553.
8. Beaven at 553, quoting Adkins at 653-54 (internal citations omitted).
9. Beaven at 555 ("[The] sanction [of an adverse inference] should be available even for the negligent destruction of documents if that is necessary to further the remedial purpose of the inference." (citation omitted).
10. Beaven, 622 F.3d at 554.
11. Id. at 554-545.
12. Id. at 554.
13. Jennings v. Bradley, 419 Fed. Appx. 594, 599-600 (6th Cir. Mich. 2011); Interlake S.S. Co. v. VanEnkevort Tug & Barge, Inc., 2011 U.S. Dist. LEXIS 115929, *19-22 (W.D. Mich. Oct. 7, 2011); Zarwasch-Weiss v. SKF Economos USA, Inc., 2011 U.S. Dist. LEXIS 113707, *20 n.7 (N.D. Ohio Oct. 3, 2011); Amine v. King, 2011 U.S. Dist. LEXIS 107424,

*59-61 (E.D. Mich. Sept. 21, 2011); Hiser v. Grand Ledge Pub. Sch., 2011 U.S. Dist. LEXIS 102684, *31-32 (W.D. Mich. Sept. 12, 2011); Webb v. Jessamine Cnty. Fiscal Court, 2011 U.S. Dist. LEXIS 93136, *16-21 (E.D. Ky. Aug. 19, 2011); Logan v. Cooper Tire & Rubber Co., 2011 U.S. Dist. LEXIS 86286, *6-9 (E.D. Ky. Aug. 3, 2011); Noffsinger v. United States, 2011 U.S. Dist. LEXIS 45617, *4-7 (W.D. Ky. Apr. 26, 2011); Roth v. Sloan, 2011 U.S. Dist. LEXIS 40183, *9-15 (N.D. Ohio Mar. 31, 2011); Level 3 Commc's., LLC v. Floyd, 2011 U.S. Dist. LEXIS 30427, *23-30 (M.D. Tenn. Mar. 22, 2011); Blevins v. Cnty. of Franklin, 2011 U.S. Dist. LEXIS 35748, *9-14 (S.D. Ohio Mar. 16, 2011); Herbert v. Baker, 2010 U.S. Dist. LEXIS 134847, *11-18 (E.D. Mich. Dec. 21, 2010); Baker v. Chevron USA, Inc., 2011 U.S. Dist. LEXIS 95653, *77-83 (S.D. Ohio Aug. 19, 2011) (J., Beckwith).

14. Arch Ins. Co. v. Broan-Nutone, LLC, 2011 U.S. Dist. LEXIS 99043, *9-16 (E.D. Ky. Aug. 31, 2011); Alexander v. Del Monte Corp., 2011 U.S. Dist. LEXIS 9915, *3-5 (E.D. Mich. Jan. 11, 2011); Flagg v. City of Detroit, 2011 U.S. Dist. LEXIS 116963, *44-61 (E.D. Mich. Aug. 3, 2011).

15. Flottman v. Hickman Cnty., 2010 U.S. Dist. LEXIS 117251, *1-4 (M.D. Tenn. Nov. 3, 2010), approving Magistrate's Report and Recommendation in part and rejecting it in part (Flottman v. Hickman Cnty., 2010 U.S. Dist. LEXIS 110758, *9-14 (M.D. Tenn. Oct. 18, 2010)).

16. Keen v. Hardin Mem. Hosp., 2003 Ohio 6707, ¶ 10 (Ohio Ct. App., Hardin County Dec. 15, 2003).

17. Smith v. Howard Johnson Co., 67 Ohio St.3d 28, 29 (Ohio 1993) (emphasis added).

18. Barker v. Wal-Mart Stores, Inc., 2001 Ohio 8854 (Ohio Ct. App., Franklin County Dec. 31, 2001).

19. RFC Capital Corp. v. EarthLink, Inc., 2004 Ohio 7046, ¶ 88 (Ohio Ct. App., Franklin County 2004) (citing Schwaller v. Maguire, 2003 Ohio 6917, ¶ 24; Brokamp v. Mercy Hosp. Anderson, 132 Ohio App. 3d 850, 870; Vernardakis v. Thriftway, Inc., 1997 Ohio App. LEXIS 1818); see also Cherovsky v. St. Luke's Hosp., 1995 Ohio App. LEXIS 5530, *16 (Ohio Ct. App., Cuyahoga County Dec. 14, 1995) ("Ohio courts normally would require a strong showing of malfeasance – or at least gross neglect – before approving such a[n] [adverse inference] charge.").

20. Barker v. Wal-Mart Stores, Inc., 2001 Ohio 8854, 2001 Ohio App. LEXIS 5965, *21 (Ohio Ct. App., Franklin County Dec. 31, 2001) (emphasis added).

21. Barrow v. Miner, 190 Ohio App. 3d 305, 312 (Ohio Ct. App., Lucas County 2010).

22. Penix v. Avon Laundry & Dry Cleaners, 2009 Ohio 1362, ¶ 52 (Ohio Ct. App., Cuyahoga County Mar. 26, 2009) (citing American States Ins. Co. v. Tokai-Seiki, 94 Ohio Misc.2d 172, 176 (Common Pleas, Miami County, May 27, 1997.

23. Id.

24. Id.

25. Cincinnati Ins. Co. v. General Motors Corp., 1994 Ohio App. LEXIS 4960, *11 (Ohio Ct. App., Ottawa County Oct. 28, 1994) (citing Hirsch v. General Motors Corp. (N.J.Super.L. 1993), 628 A.2d 1108, 1118 among other product liability case authority in precluding plaintiff's expert witness testimony on evidence in which defendant's expert did not have an opportunity to examine). Under the burden shifting analysis adopted by the Court, "the defendant must first establish (1) that the evidence is relevant; (2) that the plaintiff's expert had an opportunity to examine the unaltered evidence; and (3) that, even though the plaintiff was contemplating litigation against the defendant, this evidence was intentionally or negligently destroyed or altered without providing an opportunity for inspection by the defense." If defendant makes this showing, then "plaintiff bears the burden of persuading (burden of persuasion is on the spoliator) a trial court that there is no reasonable possibility that lack of access to the unaltered or intact product deprived the defendant of favorable evidence otherwise unobtainable, that is, that the defendant was not prejudiced."

26. Simeone v. Girard City Bd. of Educ., 171 Ohio App. 3d 633, ¶ 75 (Ohio Ct. App., Trumbull County 2007) (reversing sanctions because it was not clear in that case whether evidence was in fact destroyed).