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Destruction of Files After Company Reasonably Anticipated Litigation Warrants Sanctions

In this breach of contract action, prescription drug wholesaler QK Healthcare sought to recover over \$70,000 from manufacturer and seller of pharmaceutical products, Forest Laboratories. Forest refused to make payments to QK upon its return of unsold Forest merchandise. Forest moved for sanctions based on alleged spoliation of evidence by QK, arguing same occurred after the present dispute arose, but before litigation commenced. The court noted while QK did not start this action until Dec. 2009, it reasonably anticipated litigation in late 2007. It stated a privilege log QK provided indicated its anticipation of litigation. The court found the destruction of QK's president's files in April 2008 and destruction of a former employee's files in Feb. 2010 occurred well after QK reasonably anticipated this litigation, triggering its duty to preserve evidence relating to the action, and to suspend its routine document retention/destruction policy. It stated the facts showed that at a minimum the destruction of files was negligent, if not willful. Yet, the court stated as the evidence lost or destroyed was not crucial to Forest's defense, the appropriate sanction would be an adverse inference instruction at the time of trial.

QK Healthcare v. Forest Laboratories, 117407/09 (May 8)

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