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Spoliation May Be the Only Evidence Needed: Examining *Brady v. Grendene USA, Inc*., in the Wake of Deflategate

The New England Patriots may play the first quarter of the 2015-16 season without quarterback Tom Brady, as he was suspended for failing to cooperate with an investigation related to footballs deflated below league standards being used in the 2014-15 season AFC championship game with the Indianapolis Colts. A key element in this decision was the finding that Mr. Brady, though not required by the NFL Collective Bargaining Agreement to provide his personal cell phone to investigators, not only refused the request to provide his phone for imaging, but instead instructed an assistant to destroy the phone the same day he was interviewed by an investigator. With the destruction of the phone, the text messages received or sent by Brady for the time period at issue, the four months after the AFC game, were unavailable for evidence in the investigation. Commissioner Goodell resolved the scandal with a suspension penalty, but what would have happened had Deflategate been litigated in the courts? A recent opinion disposing of a discovery dispute in *Brady v. Grendene USA, Inc*.,[1] provides an interesting backdrop for discussion.

Deflategate can be seen as a discovery dispute between the NFL and Tom Brady, Jim "the Deflator" McNally, and John Jastremski (the latter two being football-handling engineers). Reports of the scandal, and allocation of blame, focused on communications between the three and whether anyone was asked to take action with respect to the footballs used in the game. The NFL's report resolved Deflategate by relying on SMS messages found on Jastremski's and McNally's phones. But if Deflategate had played out in U.S. federal courts, governed by the broad discovery allowances under the Federal Rules of Civil Procedure, Mr. Brady's phone would also have been discoverable as potential evidence in resolving the issue.

Similarly, in *Brady v. Grendene USA, Inc*., a dispute related to trademark infringement and breach of a settlement agreement, the Court faced a situation where cell phones were unavailable in discovery. The plaintiffs first claimed that the phones were not central to discovery and did not need to be imaged because the defendant's employees communicated by email (up to three times a day) and not by text message. But after they managed to produce just three emails more than 30 days after the production deadline, the plaintiffs then argued that they communicated primarily by text messages, including SMS and WhatsApp. However, the plaintiffs could not provide the text messages because all cell phones at issue had been lost, stolen, or destroyed more than two years after the complaint had been filed – during a time when the plaintiffs had a duty to preserve relevant communications.[2] The plaintiff then claimed to have "misspoke" and filed a declaration stating that communications really were by email. The plaintiffs' strategy seems to have been "without documentation, you can't prove it was me." Similarly, in Deflategate, the NFL seems to rely upon the converse: without exculpatory evidence from Brady's phone, Brady can't disprove the conclusion that he wasn't involved or knowledgeable about the deflated balls.

For the plaintiffs in *Brady*, this tactic probably would have ended terribly but for the lack of the record presented by the defendant. The Court appeared open to ordering either a forensic examination of one of the plaintiffs' computers to find the missing communications and/or an adverse inference, had it not been

[1] *Brady v. Grendene USA, Inc*., No. 12-cv-604-GPC (KSC), 2015 WL 4523220 (S.D. Cal. July 24, 2015).
[2] *Id*. at *6.

for two issues. First, while the Court doubted that only three relevant emails existed, the defendants had not shown the plaintiffs that the missing emails were centrally relevant to the case – the Court stated in a footnote that "[t]o date, the defendants have only articulated a remote need for the emails…[i]f…the defendants are able to demonstrate that the missing emails are centrally relevant to their case, this Court's analysis may change."[3] More dispositive to the Court, however, was the fact that a motion for summary judgment that might dispose of the case entirely was pending, and granting the motion would render any discovery dispute moot. The Court conspicuously left open the opportunity for the defendants to try again to compel forensic imaging of computers or be awarded an adverse inference instruction after a briefing on the central relevance of the destroyed emails.

Had the NFL's request for Brady's cell phone been part of a civil litigation rather than an NFL investigation, Brady would have had a duty to preserve the phone and its contents once he had knowledge surrounding the improper PSI levels of the footballs and allegations that the deflation was discussed in subsequent text messages in which he was a participant. Further, any communications about the allegations going forward would also be relevant and subject to a preservation and production obligation. As litigants in the federal courts, they would not be able to claim privacy as a reason for non-production. Failure to preserve the text messages, and the instruction to an assistant to affirmatively destroy the phone, could have resulted in sanctions, including an adverse inference, monetary sanctions, and quite possibly the striking of Brady's pleadings as a defendant.

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[3] *Id*. at n.11.