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**COURT URGED TO OVERTURN
MASSIVE DOCUMENT PRESERVATION ORDER
(*Pippins v. KPMG LLP*)**

The Washington Legal Foundation (WLF) this week urged the U.S. District Court for the Southern District of New York to overturn a magistrate judge's decision requiring preservation of a massive amount of electronically stored information (ESI) in a putative class action.

In a brief filed in *Pippins v. KPMG LLP*, WLF argued that the costs of complying with the preservation order are so large that it essentially will require the defendant to enter into a settlement agreement as a less-expensive alternative to complying with the order. WLF argued that it is particularly inappropriate to order document preservation on a class-wide basis when the district court has not yet decided whether to certify a plaintiff class.

WLF filed its brief on behalf of itself and the International Association of Defense Counsel, and with the *pro bono* assistance of the law firm of Grant & Misir in Mineola, New York.

"The Supreme Court has repeatedly cautioned that federal class action rules are merely procedural and are neither intended nor permitted to alter substantive rights," said WLF Chief Counsel Richard Samp after filing WLF's brief. "But district courts do, in fact, alter the substantive rights of the parties to class action litigation when they enter discovery orders that force defendants to settle cases based on discovery costs, not on the merits of the plaintiffs' claims," Samp said.

The case involves wage-and-hour claims by three individuals formerly employed as Audit Associates by the accounting firm KPMG. They allege that KPMG misclassified them as "exempt" employees under the Fair Labor Standards Act (FLSA), causing them to be deprived of overtime wages for time they worked in excess of 40 hours per week. They allege that the misclassification also violated labor laws of New York State. The plaintiffs seek: (1) certification of a Rule 23 class action of the New York claims (on behalf of all individuals employed by KPMG as Audit Associates in New York); and (2) certification of an FLSA opt-in collective action (on behalf of current and former Audit Associates nationwide). About 1,500 individuals fall within

the putative New York class; about 7,500 individuals fall within the proposed FLSA collective.

KPMG is already preserving a substantial amount of ESI and other documents regarding the three plaintiffs and their supervisors, including time and payroll records. But at the behest of the plaintiffs, a magistrate judge has ordered KPMG to preserve massive amounts of ESI related to Audit Associates employed across the nation, information that KPMG would not have preserved but for the preservation order. KPMG conservatively estimates the cost of complying with the order at several million dollars. It has asked the district judge to overturn the magistrate judge's order.

In its brief filed with the district judge, WLF argued that putative members of a class action should not be deemed "key players" whose every scrap of information must be preserved once suit is filed. WLF argued that any such obligation should never be deemed to arise unless and until the class is certified. WLF noted that the plaintiffs here made no showing that the ESI in question contained unique information that would be lost if KPMG failed to preserve the ESI. Moreover, WLF noted, the theory underlying a class action is that all plaintiffs are similarly situated (*e.g.*, all class members performed similar job functions for their employer and thus should be classified identically under the FLSA) – and therefore there should be little need to maintain separate sets of information for every class member.

WLF also argued that district courts must engage in a "proportionality" analysis before issuing a preservation order, whereby the costs of compliance with the order are weighed against such factors as the amount in controversy between the parties and the likelihood that the material to be preserved includes relevant evidence that is not being preserved elsewhere. WLF asserted that the magistrate judge erred when he ruled that the "proportionality test" is applicable only to document production orders, not preservation orders.

WLF is a public interest law and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to promoting tort reform and reining in excessive litigation.

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For further information, contact WLF Chief Counsel Richard Samp, (202) 588-0302. A copy of WLF's brief is posted on its web site, www.wlf.org.