

FEDERAL E-DISCOVERY

Rule 37(e) Absent in Decision Granting Harsh Sanction for ESI Spoliation



By
**H. Christopher
Boehning**



And
**Daniel J.
Toal**

For reasons that should come as no surprise, our Technology Today/Federal E-Discovery column tends to focus on cases that apply the Federal Rules of Civil Procedure relating to e-discovery, including in the context of traditional and newer sources of electronically stored information (ESI). Indeed, previous articles have addressed Rule 37(e), which has, since 2015, set forth the legal standard and process for determining whether a federal court should impose sanctions on a party for spoliation of ESI, resolving a circuit split on the topic.

Since the adoption of Rule 37(e), even while interpretations of the rule have varied, federal courts across the country have

consistently used it as the basis for their ESI spoliation and sanctions analyses.

Not so, however, in a recent case from the Eastern District of Pennsylvania. In an interesting decision, only a traditional sanctions analysis for non-ESI was used where a party failed to produce key evidence that, while originally prepared in paper format, may, in fact, have qualified as electronically stored information.

'Ace'

In the negligence and breach of contract action *Ace Am. Ins. Co. v. First Call Envtl.*, 2023 WL 137456 (E.D. Pa. Jan. 9, 2023), plaintiff Bulk Chemicals alleged that, on June 9, 2019, the defendant improperly and inadequately cleaned and remediated hazardous substances on Plaintiff Bulk's property, which, in turn, caused a fire the following day. See *id.* Plaintiff Bulk Chemical and its insurers notified defendant of their potential claims on July 19,



ADOBE

2019 and filed their complaint on May 24, 2021. See *id.*

The defendant required its employees to complete "Daily Tailgate Safety Meeting" documents, or "Tailgate Documents," and to upload electronic images of the documents to its Internet-based project management application, Basecamp. *Id.* Describing Tailgate Documents, the Court states, "[t]he pre-printed document provides space for an employee to identify, among other information, a particular job's site hazards. ... The documents also provide 'reference meeting notes, employee concerns, and [] descriptions of activities that were to take place on site.'" *Id.*

During discovery, plaintiffs requested "any notes, summaries,

H. CHRISTOPHER BOEHNING and DANIEL J. TOAL are litigation partners at Paul, Weiss, Riffkind, Wharton & Garrison. ROSS M. GOTLER, deputy chair and counsel, e-discovery, and LIDIA M. KEKIS, e-discovery attorney, assisted in the preparation of this article.

or any other documentation ... for all Tailgate Safety meetings conducted by the Defendant in connection with any of [Defendant's] work' at Bulk's facility in June of 2019." *Id.* In response, defendant claimed it had "[n]o responsive documents." *Id.* at *2.

But during depositions, one of defendant's employees testified that Tailgate Documents were "used during the work at Bulk Chemical," that he "personally filled out" two documents and handed a completed document to his supervisor, and that he recalled "personally seeing 'Daily Tailgate Safety Meeting documents ... uploaded to Basecamp for the Bulk Chemical Job.' ... [He] could not recall a reason a Tailgate Document would be removed from Basecamp once uploaded." *Id.*

Nonetheless, defendant "ha[d] not produced the Tailgate Safety meeting documents nor provided any explanation concerning their location." *Id.* Nor had defendant "provided any justification or other information concerning the whereabouts of the Tailgate Documents for the Bulk Chemical Job," even though, as the plaintiffs noted, company policy and procedure in the defendant's "Field Operations Guide require[d] these forms to be completed, reviewed, signed, and uploaded 'prior to engaging in cleanup.'" *Id.* at *2.

The plaintiffs moved for spoliation sanctions in the form of

a mandatory adverse inference jury instruction, alleging that the defendant "'either intentionally destroyed or lost' the Tailgate Documents because Defendant has never produced the documents nor provided any justification." *Id.* Plaintiffs also claimed that defendant was acting in bad faith, citing factual misstatements earlier in the litigation that defendant was forced to correct. Specifically, defendant had claimed its employees were not working near

In an interesting decision, only a traditional sanctions analysis for non-ESI was used where a party failed to produce key evidence that, while originally prepared in paper format, may, in fact, have qualified as electronically stored information.

where the fire occurred—and prepared a map to demonstrate this—only to be contradicted by surveillance footage demonstrating otherwise. *Id.*

Spoliation Analysis

The Court began its spoliation analysis by citing Third Circuit precedent on the legal standard for spoliation, explaining that "[s]poliation occurs where: the evidence was in the party's control; the evidence is relevant to the claims or defenses in the case; there has been actual suppression or withholding of evidence; and,

the duty to preserve the evidence was reasonably foreseeable to the party." *Id.*

Following this guidance, the Court found that defendant had indeed spoliated evidence. First, defendant's internal requirement and policy to complete Tailgate Documents and upload them to Basecamp prior to working on a project demonstrated its control over the requested documents. See *id.* at *3. Second, since the "Tailgate Documents purport to identify any working hazards, including fire hazards, on a facility," the Court found them relevant to the liability claims at issue. *Id.* at *4. Third, given that "under certain circumstances, non-production of [relevant] evidence is rightfully characterized as spoliation," the Court found that "Defendant's non-production of the Tailgate Documents [wa]s sufficient withholding of the evidence under spoliation analysis." *Id.* Lastly, the Court determined that defendant should have foreseen the duty to preserve the Tailgate Documents since it was reasonable to expect litigation after the on-site fire, among other factors. See *id.*

Sanctions Analysis

Turning to the question of the appropriate sanctions for spoliation of the Tailgate Documents, the Court again looked to Third Circuit precedent, which predated the adoption of current Rule 37(e).

It explained, “district courts look to the following factors to determine whether sanctions resulting from spoliation are appropriate: ‘(1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party, and, where the offending party is seriously at fault, will serve to deter such conduct by others in the future.’” *Id.* at *3. With respect to adverse inference jury instructions, the Court stated that “a party’s failure to produce a document can have the same practical effect as destroying it.” *Id.*

Here, based on the defendant’s “high degree of responsibility due to its control over the Tailgate Documents”—and storage thereof in Basecamp—coupled with the defendant’s “failure to provide any explanation surrounding the missing Tailgate Documents and its earlier correction of false and misleading facts suggest[ing] bad faith,” the Court first found a “high degree of fault.” *Id.* at *5, *6. Second, the Court found that the Tailgate Documents “are unique because they seek to show Defendant’s acknowledgment of job hazards before performing work at Plaintiff Bulk’s facility” and also that they “present a higher credibility and reliability than circumstantial evidence, such as an

individual employee’s testimony. Thus, Defendant’s non-production of these relevant and reliable documents greatly prejudice[d] Plaintiffs.” *Id.* Third, and finally, the Court found that “an adverse inference is an appropriate sanction because it is narrowly tailored to Defendant’s non-production of the Tailgate Documents and directly addresses any resulting prejudice to Plaintiffs.” *Id.* The Court concluded that these three factors weighed in favor of spoliation sanctions and, as such, under its discretionary authority, found

It is hard to determine whether an analysis under Rule 37(e) might have produced a different result on these facts. But the analysis, at least, would have been different.

the plaintiffs’ requested mandatory adverse inference jury instruction warranted and appropriate under the circumstances.

ESI and 37(e)

Notable in both the briefs regarding the sanctions motion and the Court’s decision was the absence of discussion about whether the Tailgate Documents in BaseCamp should be treated as ESI subject to Rule 37(e). With the non-production of the original paper documents, an analysis of spoliation and sanctions outside of the ESI context might be expected.

But given that it would not be surprising to assume that paper documents stored in a web-based system might be destroyed once uploaded, one might additionally have expected an analysis under Rule 37(e) since the defendant also failed to produce electronic images of the Tailgate Documents maintained in BaseCamp.

It is hard to determine whether an analysis under Rule 37(e) might have produced a different result on these facts. But the analysis, at least, would have been different. Under 37(e), for example, a threshold question is whether the ESI could be restored or replaced. Were the BaseCamp documents truly unrecoverable, or could they have been located, or restored with additional effort? And for spoliation of ESI, the harsh sanction of an adverse inference instruction is available only upon a finding of intent to deprive. While the Court in *Ace* found that the defendant acted in bad faith, it did not directly address intent.

Ultimately, this may be a distinction without a difference, considering the result reached by the Court.