Unintentional Consequences? The District Court of Maryland Holds Evidence Failed Rule 37(e)'s "Intent to Deprive" Requirement

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Categories:

E-Discovery: Legal Decisions and Court Rules

A recent opinion from the District Court of Maryland highlights the challenges litigants face proving intent to deprive under Rule 37(e)(2) when seeking sanctions for spoliation of electronically stored information (ESI). In *Gov't Emps. Health Ass'n v. Actelion Pharm. LTD., et al.*, Magistrate Judge Mark Coulson set forth the requirements to prove entitlement to remedial measures or sanctions under Rule 37(e)(1) and (2) and then applied these requirements to decide the ESI spoliation claims before the court. This blog has written extensively on what is required to trigger Rule 37(e) and resulting sanctions.

In June 2017, defendant Actelion ("defendant") was purchased by Johnson & Johnson ("J&J"). Following the acquisition, Actelion migrated its data to J&J, which managed the data of both companies. On November 19, 2018, the plaintiff filed this antitrust litigation against Actelion alleging the plaintiff was forced to pay higher prices for one of Actelion's drugs because of the unavailability of a cheaper generic version caused by the defendant's blocking of competition. Soon after, J&J issued a legal hold to preserve relevant information for the antitrust litigation. The defendant's custodians included in the legal hold were determined by the defendant's then in-house counsel ("Thompson"). Absent from the legal hold were five former defendant employees ("at-issue custodians") with documents relevant to the antitrust litigation. One year after the antitrust lawsuit was filed, J&J sent Thompson a list of all former defendant employees not subject to a legal hold whose data was scheduled to be deleted. Thompson confirmed with J&J that all former defendant employees listed, which included the at-issue custodians, were not subject to any litigation hold. In September 2019, J&J deleted all ESI data for the at-issue custodians.

During discovery in fall 2021, the defendant first advised the plaintiff that the defendant did not have ESI data for four of the five at-issue custodians. As a workaround, the parties agreed to add direct reports for these four at-issue custodians as ESI custodians, include the names and e-mails of the four at-issue custodians as search terms, and search the ESI of 14 additional defendant custodians. In March 2022, suspecting the defendant did not have data for the fifth at-issue custodian, the plaintiff suggested the defendant add a direct report for the fifth at-issue custodian as an ESI custodian and include the fifth at-issue custodian's name and e-mail as search terms. The defendant, now represented by new counsel, rejected the plaintiff's proposal. The plaintiff later filed a motion to compel seeking the addition of the fifth at-issue custodian, as well as discovery of the defendant's document preservation policy and efforts.

In June 2022, the court ordered the defendant to add ESI data for the fifth at-issue custodian and produce its preservation policy in place at the time it reasonably anticipated litigation in this case, as well as a discovery response summarizing its preservation efforts pursuant to that policy, including ESI relating to the five at-issue custodians. The defendant submitted a declaration from J&J legal stating a legal hold was issued on December 20, 2018, the five at-issue custodians were not included in the legal hold, and the ESI data for the five at-issue custodians was deleted in September 2019.

The court concluded Thompson failed to take reasonable steps to preserve ESI for the five at-issue custodians. Nevertheless, the court determined the plaintiff failed to carry its burden of proving by clear and convincing evidence that the defendant had an *intent to deprive* the plaintiff of the lost ESI *at the time it was deleted*, which was a finding necessary for the court to issue serious sanctions – such as the adverse inference requested by the plaintiffs – under 37(e)(2). The court expressly noted that a "lack of reasonable steps" to preserve by the defendant did not equal an "intent to deprive" and that a failure to preserve must be "viewed under all circumstances."

In reaching this conclusion, the court noted that Actelion produced hundreds of thousands of ESI documents from 15 different custodians. While none of the 15 custodians were the at-issue custodians, the defendant ultimately produced more than 33,000 documents that were associated with the at-issue custodians using the parties' workaround. The court found this conduct cut against an *intentional plan* for the defendant to deprive the plaintiff of relevant ESI. The court also noted the defendant identified four of the five at-issue custodians with plaintiffs' counsel during discovery, drawing attention to these custodians, which was inconsistent with an earlier intent to deprive. Finally, the court noted that Thompson left the defendant's employ in September 2019, which cut against any incentive Thompson may have had to intentionally delete data for the defendant in this case.

Given the totality of the circumstances, the court concluded Thompson may have approved the deletion of the at-issue custodian ESI through inattention (*i.e.*, negligence or gross negligence), which failed to satisfy the "intent to deprive" standard. Further, the court stated that, despite "obvious deficiencies in the preservation process," the evidence did not support a conclusion the defendant acted with the required "intent to deprive" at the time of the deletion. Accordingly, the court declined the plaintiff's motion for an adverse inference instruction or barring the defendant's affirmative defenses because the plaintiff failed to make the required showing of specific intent under Rule 37(e)(2).

Despite the plaintiff falling short under Rule 37(e)(2), the court concluded the plaintiff proved "some" prejudice under Rule 37(e)(1) entitling it to remedial relief. The court found the ESI information for the five at-issue custodians should have been preserved, and some portion of the missing information was likely relevant to the claim. Having found the plaintiff was prejudiced, the court concluded its remedy should account for the missing ESI data without conferring undue advantage to either side and should further seek to deter future litigants considering their preservation obligations. The court held if the five at-issue custodians testified, were consistently referred to at trial, or if their documents played a meaningful role at trial, the court should provide an appropriate jury instruction with respect to the deleted ESI data for the five at-issue custodians. The court further awarded the plaintiff half of its fees and costs associated with its application for additional discovery on the defendant's preservations efforts.

Gov't Emps. Health Ass'n highlights a party's obligations under Rule 37 with respect to a duty to preserve ESI of all individuals with relevant knowledge of an anticipated or filed litigation and cautions against blind reliance on prior counsel's representations and efforts to preserve. This case further shows the importance of seeking alternative avenues of relief under Rule 37(e) when appropriate. Litigants must clear real hurdles to prove an intent to deprive before a court will award any of the more severe sanctions available under Rule 37(e)(2), such as the adverse inference instruction or suppression of defenses sought by the plaintiff here. Indeed, because the plaintiff also moved for alternative relief due to prejudice under Rule 37(e)(1), the court was able to award the plaintiff a meaningful jury instruction regarding the loss of ESI data for the at-issue custodians at trial, as well as fees and costs associated with their corresponding discovery motion.

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