

Scenario:

Breach of contract case with regard to the acquisition of a company. Allegation is that the stock purchase agreement governing the sale contained a number of representations and warranties made by the company to be purchased and that the company failed to comply with these representations and warranties after the acquisition.

During discovery, Plaintiff reveals that certain email files, including those of the president of the company acquired, so the President of the Defendant company, were permanently deleted. The emails were deleted by Plaintiff five months after Defendants received a Notice of Claim from Plaintiff. It was learned that Plaintiff did not institute a litigation hold until more than fifteen months after sending the Notice of Claim to the Defendants. Plaintiffs further did not notify the vendor in charge of managing Plaintiff's technology of a duty to preserve until three months after the complaint was filed.

Plaintiff maintained that the destruction of the ESI was largely due to the actions of a single former employee acting without direction from Plaintiff and that the decision was made to delete the President's email in order to free up space on the server after determining that the account was no longer receiving work-related email. Before instructing to permanently delete the files, the former employee "identified and printed any emails that were deemed pertinent to the company" which emails were produced. It is impossible to say how many emails were permanently deleted and remain unrecoverable. The President suffers from a cognitive disorder and cannot testify nor be deposed. Defendants request sanctions for spoliation of evidence. Specifically requesting (1) an adverse inference jury instruction based on the destruction of the ESI from the President of the company.

For discussion:

Is the requested relief an appropriate remedy for the injured party? What would be a more appropriate remedy?

Would you find that the "records were destroyed with a culpable state of mind?" under these facts. Why or why not?

Does it/should it make a difference whether the evidence was destroyed in good faith or bad faith?

How would the proposed amendments to Rule 37 affect your decision in the case?

Magistrate:

The destruction of the President's ESI may well rise to the level of gross negligence and that the destroyed emails may have been relevant to the breach of contract claim, but no sanctions should be imposed because Defendants failed to produce or describe any relevant email that Plaintiffs failed to produce—Defendants made no showing of prejudice.

Court:

Granted the motion, finding that (1) Plaintiff had an obligation to preserve it at the time it was destroyed; (2) evidence established a culpable state of mind in that the evidence was destroyed

knowingly, even without it being maliciously; (3) that the evidence was relevant in that when evidence is destroyed willfully, the destruction alone is sufficient circumstantial evidence from which a reasonable fact finder could conclude that the missing evidence was unfavorable to the destroying party; (4) prejudice to the innocent party may be presumed because relevant evidence has been intentionally destroyed and is no longer available to the innocent party.