

## **Federal Court Sanctions Company for Spoilation of Evidence Over Arguments Data Settings Changed to Comply with CCPA and ISO Requirements**

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A federal court recently sanctioned defendants for spoilation of evidence in litigation. In doing so, the Court rejected the Defendant's argument that they changed their data settings in good faith to align with the California Consumer Privacy Act of 2018 ("CCPA") and the International Standard of Operation Compliance ("ISO"). 2022 U.S. Dist. LEXIS 178233 (N.D. Ohio Sep. 29, 2022). Read on to learn more.

The underlying litigation concerned a trademark dispute between two businesses. Before the lawsuit was filed, but while they were already on notice of the impending lawsuit, the Defendants changed the data retention settings for their messenger service, leading to the deletion of thousands of discoverable records.

Defendant argued that it made this change to comply with the CCPA and the ISO. Plaintiff, on the other hand, argued that this deletion was an intentional spoilation of electronically stored information during the discovery phase of the litigation, in violation of Federal Rule of Civil Procedure 37(e).

The Magistrate Judge sided with Plaintiff and, in a report and recommendation, issued sanctions of a permissive adverse-inference jury instruction.

Both Plaintiff and the Defendants subsequently filed objections. Before the District Court, the Defendant objected to the Magistrate Judge's that it knowingly spoliated data, arguing instead that it changed its data retention settings "with a good faith belief that it minimized potential liability for the theft or disclosure of [their] customer[s]' confidential information" under the CCPA and ISO.

In rejecting this argument, the Court considered the fact that the Defendants were on notice of impending litigation as early as August 2019 and changed their data retention settings only in October 2019. The Court also noted that Defendants further failed to change their data retention settings to preserve evidence until ten months after receiving the litigation hold.

The Court's decision turned on its interpretation of Federal Rule of Civil Procedure 37(e). The Court found that the Defendants intentionally deleted electronically stored information to thwart Plaintiff's discovery in litigation. Under Rule 37(e), if "a party failed to take reasonable steps to preserve

[electronically stored information]” that should have been preserved in anticipation of litigation, and that cannot be restored or replaced, and the party acted with the intent to deprive its adversary of that information’s use in the litigation, the Judge may “instruct the jury that it may or must presume the information was unfavorable to the party.” Federal Rule of Civil Procedure 37(e)(2). The Court found this standard satisfied and issued an order requiring such an instruction.

This decision shows that parties in litigation may not rely on the CCPA and other privacy laws as a shield when they fail to comply with their discovery obligations. Of course, due to the timing issues presented by this case (with a substantial gap between Defendants receiving notice of the litigation and the subsequent date at which the data settings were changed), it remains to be seen whether other circumstances would result in a different ruling.

*Caroline Dzeba also contributed to this article.*

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