



Good-Faith Rule Applies to Document Destruction

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Big cases can turn on a little rule of evidence called spoliation. The rule recognizes that a trial court has the inherent authority to sanction a party for destroying, altering, or failing to preserve property that the opponent could have used as evidence. A recent decision in the Eastern District of Virginia serves as a reminder that a judge's decision to award sanctions — and thus tip the balance in one party's favor — turns on familiar concepts of reasonableness, foreseeability, and state of mind.

The case is notable because now that e-discovery has become the norm in complex commercial litigation, many companies are concerned that routine deletion of e-mails, or a minor failure to order the retention of electronic documents, will lead to a finding of spoliation with its potentially severe consequences. This case, involving the DuPont company and Kolon Industries, a competitor, will give some solace to companies that have those concerns.

In February 2009, DuPont filed a complaint against Kolon alleging that Kolon had used trade secrets regarding DuPont's Kevlar product. According to DuPont, the trade secrets had been stolen by a former DuPont employee who went to work as a consultant for Kolon in April 2007. DuPont issued three litigation hold orders in connection with the suit. The first order, issued in June 2007, required certain employees in a specific business unit to preserve records related to the former employee as well as documents related to Kolon's competitive intelligence. On the day it filed suit, DuPont issued a second hold order to all employees in the relevant business unit. DuPont issued the third hold order on April 24, 2009, four days after Kolon filed its counterclaim alleging that DuPont had attempted to monopolize the market for para-aramid fiber, the synthetic fiber from which Kevlar is made.

Notably, it was not until October 2009 that Kolon raised a question regarding DuPont's gathering of competitive intelligence.

Kolon claimed that four former DuPont employees, whose e-mails were deleted in the normal course of business, should have received the first (allegedly belated) hold order. Kolon claimed that DuPont's failure to preserve the e-mails deprived Kolon of the evidence it needed to bolster its defenses. Specifically, Kolon argued that the information DuPont mischaracterized as "trade secrets" was the very type of information DuPont gathered on its competitors, including Kolon. To address the "substantial prejudice" Kolon suffered as a result of DuPont's alleged spoliation, Kolon requested the



court to make findings of fact in Kolon's favor or, alternatively, to instruct the jury that it could make adverse inferences based on the missing evidence.

The judge denied Kolon's request. First, the court held that DuPont's duty to preserve was triggered in May 2007. At that point, DuPont was required to preserve what it knew or reasonably should have known was relevant to the anticipated litigation. The court held that the custodians of the e-mails in questions were not "key players" as of May 2007, so DuPont had no obligation to issue the first hold order to them. Additionally, DuPont had no reason to know that Kolon would eventually assert antitrust counterclaims or that DuPont's own methods of collecting competitive intelligence would become an issue in October 2009. Put simply, these eventualities were not "reasonably foreseeable" as of May 2007.

Judge Robert Payne explained that the duty to preserve is not absolute or intended to cripple organizations. Whether discovery conduct in a given case is acceptable depends on what is reasonable, and what is reasonable depends on whether the conduct is proportional to the case and consistent with clearly established standards. Applying this standard, the court concluded that DuPont acted reasonably and in good faith when it preserved documents it believed were relevant to its potential suit against Kolon. DuPont was not required to preserve evidence based on speculation as to the counterclaims Kolon might assert down the road.

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