ALERT MEMORANDUM

Second Circuit Clarifies Spoliation Law in *Hoffer v. Tellone*

February 18, 2025

On February 13, 2025, the U.S. Court of Appeals for the Second Circuit issued a unanimous decision in *Hoffer v. Tellone* clarifying the standard that courts should apply when evaluating whether to impose spoliation sanctions.

The decision is the first Second Circuit decision to address the impact of the 2015 amendments to Rule 37(e) of the Federal Rules of Civil Procedure, which abrogated in part the Second Circuit's jurisprudence on sanctions as applied to the loss of Electronically Stored Information (ESI) and resulted in contradictory district court precedent on several issues. *Hoffer* holds that a movant must show, by a preponderance of the evidence, that the allegedly spoliating party acted with an "intent to deprive" another party of the lost information.

The decision provides much needed clarity to litigants in the Second Circuit on the appropriate standard and burden of proof for severe spoliation sanctions and aligns the Second Circuit with other courts to consider the implications of the 2015 amendments.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or to the Cleary authors below.

WASHINGTON

Nowell D. Bamberger
+1 202 974 1752
nbamberger@cgsh.com

BAY AREA

Jennifer Kennedy Park
+1 650 815 4130
jkpark@cgsh.com

NEW YORK

Joseph M. Kay
+1 212 225 2745
jkay@cgsh.com

Samuel Levander
+1 212 225 2951
slevander@cgsh.com

I. Background

Before 2015, the Second Circuit permitted parties to seek severe spoliation sanctions including adverse inferences under Rule 37 of the Federal Rules of Civil Procedure when the spoliating party acted with a "culpable state of mind."[1] The Second Circuit held in *Residential Funding* that negligent loss of evidence could support an adverse inference instruction "because each party should bear the risk of its own negligence."[2]

In 2015, Rule 37(e) of the Federal Rules of Civil Procedure was amended to reject the "culpable state of mind" standard set out in *Residential Funding* as applied to more severe spoliation sanctions for ESI.[3] Under the amended Rule 37(e)(2), severe sanctions—including an evidentiary presumption that evidence was unfavorable, adverse inference instructions, or dismissal—are available for ESI "only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation."[4]

II. *Hoffer v. Tellone*

On February 13, 2025, the Second Circuit issued a decision in *Hoffer v. Tellone* that sets out the Court's first comprehensive analysis of spoliation law for ESI since the 2015 rule amendments.

The appeal arose from a lawsuit brought by Richard Hoffer against the City of Yonkers and several police officers for alleged use of excessive force.[5] Hoffer claimed that one of the officers overwrote video that would have shown the relevant incident and asked for an adverse inference.[6] This request was rejected by the district court, which held that Hoffer had failed to prove an intent to deprive him of the evidence and thus did not qualify for an adverse inference.[7] Hoffer lost at trial and appealed, arguing that the district court erred in refusing to grant an adverse inference sanction.[8]

The Second Circuit affirmed the lower court's decision. First, the Second Circuit acknowledged that the 2015 rule amendments "abrogated the lesser 'culpable state of mind' standard used in *Residential Funding* . . . in the context of lost ESI."[9] The Court held that Rule 37(e)(2) "requires a finding of 'intent to deprive another party of the information's use in the litigation.'"[10]

Second, the Second Circuit held that the movant bears the burden of proving all elements required for spoliation sanctions under Rule 37(e).[11]

Third, the Second Circuit held that the movant's burden was to show the relevant intent by a "preponderance of the evidence,"[12] rejecting lower court decisions that held that the higher "clear and convincing evidence" standard should apply.[13]

Finally, the Second Circuit held that the trial court can make the factual determinations necessary to support spoliations sanctions.[14] Although a district court can put those questions to the jury, the Court held that it is not obligated to do so under the Federal Rules.[15]

III. Conclusion

The *Hoffer* opinion provides much needed clarity to litigants in the Second Circuit on the appropriate standard for ESI spoliation sanctions in civil litigation. Going forward, movants will need to show that the allegedly spoliating party acted with intent to deprive, not just negligently. The Second Circuit's decision

[1] *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 108 (2d Cir. 2002).
[2] *Id.*
[3] Committee Notes on Rule 37(e)(2) (2015 Amendment) ("This subdivision authorizes courts to use specified and very severe measures to address or deter failures to preserve electronically stored information, but only on finding that the party that lost the information acted with the intent to deprive another party of the information's use in the litigation. . . . It rejects cases such as R*esidential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002), that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence.").
[4] Rule 37(e)(2).
[5] *Hoffer v. Tellone*, 2025 WL 479041, at *1 (2d Cir. 2025).
[6] *Id.* at *7.
[7] *Id.*
[8] *Id.* at *3.
[9] *Id.* at *4.
[10] *Id.*
[11] *Id*. at *6.
[12] *Id.* at *5 ("We think that the preponderance standard is appropriate").
[13] *Id.* at *5.
[14] *Id.* at *6.
[15] *Id.*

brings it in line with the Fourth, Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits, representing an emerging consensus on this issue throughout the federal courts.[16]

…

CLEARY GOTTLIEB

[16] *See Jones v. Riot Hosp. Grp. LLC*, 95 F.4th 730, 735 (9th Cir. 2024); *Ford v. Anderson Cnty., Texas*, 102 F.4th 292, 323–24 (5th Cir. 2024); *Skanska USA Civ. Se. Inc. v. Bagelheads, Inc.*, 75 F.4th 1290, 1312 (11th Cir. 2023) (specifying that "intent to deprive" means "more than mere negligence"); *Wall v. Rasnick*, 42 F.4th 214, 222–23 (4th Cir. 2022); *Auer v. City of Minot*, 896 F.3d 854, 858 (8th Cir. 2018); *Applebaum v. Target Corp.*, 831 F.3d 740, 745 (6th Cir. 2016) ("A showing of negligence or even gross negligence will not do the trick.").