

Premium on Preservation: Recent Delaware Rulings Underscore the Importance of Preserving Documents

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Document discovery plays an essential role in litigation. Litigants and courts rely on documentary exhibits, along with witness testimony about such exhibits, to create a trial record. As a result, courts expect that parties will take reasonable steps to preserve documents. When they fail to do so, heated disputes over spoliation can arise. In some egregious cases, these spoliation fights can grow to overshadow the substantive issues in the case, or even influence or dictate the outcome.

Two recent Delaware opinions address the types of sanctions that are potentially available under Delaware law for spoliation of evidence, and when they will be imposed.

- In *Harris v. Harris*, the Court of Chancery for the first time imposed an adverse inference at the motion to dismiss stage and held that it could do so without treating the inference as a formal discovery sanction under Rule 37.
- In *BDO USA, LLP v. EverGlade Global, Inc.*, Chancellor Kathaleen St. J. McCormick of the Delaware Court of Chancery, sitting by designation as a Delaware Superior Court judge, granted default judgment as a discovery sanction under a theory of *respondeat superior*.

These cases serve as reminders for Delaware litigants and practitioners alike that document discovery is not just a formality to observe on the way to the “real” litigation. Rather, the courts take discovery conduct seriously and will not hesitate to grant relief when the interests of justice so require.

Spoliation Sanctions

In general, a party in litigation or who has reason to anticipate litigation has an affirmative duty to preserve evidence that might be relevant in the lawsuit.¹ Spoliation in this context means the destruction, or failure to take steps to prevent the destruction, of potentially relevant evidence.

Sanctions against spoliating parties may include:

- Adverse inferences.
- Case dismissal.
- Default judgment.
- Fee-shifting.²

Before imposing discovery sanctions for spoliation, the court must make a predicate, evidence-based finding of intentional or reckless destruction of evidence “to deprive another party of the information’s use in the litigation.”

Harris v. Harris

Harris v. Harris involved a complicated and protracted dispute over control of a closely held family company, in which the defendants allegedly looted the company and then successively redomiciled it from New Jersey to Delaware and then back to New Jersey, in an apparent effort to evade causes of action under New Jersey law and to frustrate books and records demands under Delaware law.

¹ See *BDO USA, LLP v. EverGlade Glob., Inc.*, C.A. No. N22C-12-063 KSM CCLD, slip op. at 21 (Del. Super. Jan. 31, 2023) (citing *Beard Rsch., Inc. v. Kates*, 981 A.2d 1175, 1185 (Del. Ch. 2009)); see also *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003).

² See Del. Super. Ct. Civ. R. 37(b)(2)(F).

During this period, the defendants made a practice of deleting their text messages — with at least one defendant later admitting that she did so to prevent them from being produced in discovery. The defendants moved to dismiss for lack of personal jurisdiction under Court of Chancery Rule 12(b)(2), arguing that the court did not have jurisdiction over their actions as fiduciaries of a New Jersey corporation.³

A plaintiff's burden of showing personal jurisdiction is "an evidentiary burden, not a pleading burden," and courts can order jurisdictional discovery into a defendant's contacts with Delaware. Here, text messages between the parties might have shed light on whether the defendants purposely availed themselves of the benefits of Delaware law. But the defendants deleted those messages, raising an as-then-unsettled question: If jurisdictional discovery would be frustrated by spoliation, may an adverse inference be drawn at the motion to dismiss stage? The court answered this question in the affirmative.

The court found that plaintiffs had presented sufficient evidence of spoliation that the court could draw an adverse inference that it had personal jurisdiction over the plaintiffs' claims against two of the defendants. The court pointed to "extensive allegations" in the complaint that "ma[d]e it reasonable to infer that [these defendants] were sufficiently involved in the [transaction at issue] to support service of process under the Long-Arm Statute," including unusual transfers of company funds to these defendants, and close business and personal ties to the other defendants.

"At a minimum," these allegations would have supported jurisdictional discovery. However, because these defendants spoliated evidence bearing on their involvement in the transaction — including by deleting approximately 70,000 text messages — requiring the plaintiffs to pursue further jurisdictional discovery was "unwarranted," and the plaintiffs were entitled to "a pleading-stage inference that [these defendants] were part of a conspiracy to engage in

Delaware-directed acts sufficient to support personal jurisdiction."

This was not, the court stressed, a discovery sanction under Rule 37. Therefore, the court held that it could draw this inference without making the preliminary evidentiary finding of spoliation required by that rule, because "the adverse inference only pertains to whether the plaintiffs have established a *prima facie* case for the exercise of personal jurisdiction at the pleading stage."

Recognizing that referring to this as an "adverse inference" when it was not granted as a discovery sanction could be "confusing," the court explained that its decision should be understood as "simply engaging in the normal practice of drawing a reasonable inference based on the non-conclusory factual allegations in a verified complaint and the other evidence of record that a court can consider for purposes of a Rule 12(b)(2) motion."

BDO USA, LLP v. EverGlade Global, Inc.

BDO v. EverGlade pitted consulting firm BDO USA, LLP against an upstart rival, EverGlade Global, Inc., that a former BDO partner, Eric Jia-Sobota, founded prior to his departure from the firm.

BDO initially brought arbitration and a related action for injunctive relief in the U.S. District Court for the District of Columbia against EverGlade and Mr. Jia-Sobota, alleging a breach of the BDO partnership agreement. BDO subsequently "became the target of a social media smear campaign" that, at least in part, "appeared to draw on information obtained by Jia-Sobota when he was a BDO partner." BDO sued EverGlade in the Delaware Court of Chancery in connection with the smear campaign.

In response, EverGlade initiated an internal investigation. According to the court, Mr. Jia-Sobota took steps to stymie this investigation, denying EverGlade's discovery vendor access to certain online accounts and scrubbing documents from his work laptop, phone and other devices. Over the course of about seven months, "Jia-Sobota destroyed an enormous amount of evidence."

³ See *Harris v. Harris*, C.A. No. 2019-0736-JTL (Del. Ch. Jan. 16, 2023).

When court-ordered discovery revealed Mr. Jia-Sobota's misconduct, BDO moved for sanctions against EverGlade, including default judgment. In a last-ditch effort to avoid consequences for the spoliation, EverGlade moved to dismiss the case for lack of subject matter jurisdiction. Chancellor McCormick, concerned about overextending equitable authority over a claim involving speech, requested designation as a Delaware Superior Court judge to continue hearing the case.

The court then held a two-day evidentiary hearing to evaluate EverGlade's role in the spoliation. EverGlade admitted that Mr. Jia-Sobota had engaged in spoliation but sought to distance itself from its own CEO, arguing that his actions as a nonparty should not be attributed to the company. BDO and EverGlade agreed that the court should analyze the issue under the standard of *respondeat superior*, or vicarious liability. However, EverGlade argued that because "administering social media campaigns" was not within Mr. Jia-Sobota's scope of employment, EverGlade could not be held vicariously liable either for the alleged smear campaign itself or for Mr. Jia-Sobota's efforts to destroy evidence about it.

In an opinion issued after the evidentiary hearing, Chancellor McCormick brushed aside EverGlade's arguments, applied *respondeat superior* and concluded that Mr. Jia-Sobota spoliated evidence within the scope of his employment. The court found that the relevant "act" for the spoliation analysis was not "Jia-Sobota's management of EverGlade's social media presence," but rather Mr. Jia-Sobota's discovery conduct, holding that "the analysis more logically centers on the employee's obligation with respect to the litigation, including the obligation to manage and preserve evidence."

BDO satisfied all three parts of the "scope of employment" test for *respondeat superior*.

- First, Mr. Jia-Sobota's destruction of evidence was an act "of the kind he is employed to perform" because, as an employee, he was responsible for preserving evidence.
- Second, Mr. Jia-Sobota's acts "occur[red] within the authorized time and space limits"

because he used EverGlade computers to destroy the evidence and did so from his home office while working at home.

- Third, Mr. Jia-Sobota's acts were "activated, in part at least, by a purpose to serve the master," because he acted "to shield EverGlade and himself from having their roles in the campaign uncovered" — even if his primary motivation was to benefit himself.

The court also noted "the basic policy consideration that corporations might otherwise escape accountability for egregious actions were they off the hook when their CEOs destroy evidence to frustrate an opposing party's case."

The court then turned to BDO's request for a default judgment. BDO's sanctions motion came early in the litigation, with discovery and Rule 12 motions practice ongoing. Still, the rules allow for dispositive relief as a discovery sanction. Under Rule 37(b), the Superior Court may grant default judgment upon a finding of reckless or intentional spoliation, and only when "no other sanction would be more appropriate under the circumstances."

Here, the court found that Mr. Jia-Sobota destroyed an enormous amount of evidence using multiple methods. For example, he factory-reset devices to remove all user data and used a program called CCleaner to destroy the files in his work laptop. When confronted about this, Mr. Jia-Sobota first insisted that he did not remember destroying evidence before recanting that testimony and claiming, unconvincingly, "that he destroyed evidence out of fear that BDO would do something to him if BDO acquired evidence of the smear campaign."

For its part, EverGlade admitted that the spoliation was intentional, but it argued that the court should grant, at most, adverse inferences, because the spoliation had not denied BDO evidence related to certain elements of its claim (such as whether the campaign was defamatory). The court rejected this argument and granted default judgment in favor of BDO, holding that "sanctions serve more than remedial purposes — they also punish and deter," and finding that "[i]f punishment is appropriate anywhere, it is here."

Key Points

- Delaware courts continue to enforce the duty of parties and counsel in Delaware litigation to preserve evidence and to participate in discovery in good faith. As a result, it is important to consider preservation obligations when litigation is anticipated and commenced, and good practice to take steps to monitor preservation efforts as the litigation proceeds.
- The *BDO* decision explains that preserving documents for discovery may be within the scope of employment for an employee of a Delaware corporation who possesses responsive documents. Therefore, a corporation should be mindful to take appropriate steps to ensure that its employees comply with preservation efforts.
- Delaware courts have wide discretion for imposing sanctions for spoliation. Among other things, Delaware courts may draw adverse inferences on threshold questions such as personal jurisdiction. Spoliation of evidence can therefore have the potential to create complications from the very outset of a case, underscoring the need to focus on preservation.

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