

A customer brought a federal diversity action against a corporation. During discovery, the customer requested information that was stored on hard drives at the corporation's headquarters. The corporation informed the customer that the hard drives had been wiped clean when the corporation switched over to a new information technology firm a few months before the customer filed suit. The customer moved for sanctions.

After a hearing, the court found that the corporation negligently failed to preserve the information contained in the hard drives, but that the corporation did not act intentionally to prevent the customer from accessing the information. The court also found that the information cannot be obtained by any other means and that the loss of this information prejudices the customer's claim.

Based on those findings, what action should the court take?

- A. Enter a default judgment in favor of the customer.
- B. Instruct the jury at trial that it must presume that the lost information was unfavorable to the corporation.
- C. Permit the parties to present evidence at trial regarding the loss of information.
- D. Prohibit the corporation from seeking discovery in the lawsuit to put the parties at a similar disadvantage.

### Explanation:

Sanctions may be appropriate if a party failed to preserve **electronically stored information** (ESI) that:

- should have been preserved in the **anticipation or conduct of litigation**
- is lost because the party **failed** to take **reasonable steps to preserve it** *and*
- **cannot be replaced** or restored through additional discovery.

If the court finds that the party **intentionally** deprived the requesting party of the ESI, the court may:

- presume that the lost ESI was unfavorable to the party that failed to preserve it
- instruct the jury that it may *or* must presume the lost ESI was unfavorable to that party **(Choice B)** *or*
- dismiss the action or enter a default judgment against that party **(Choice A)**.

These sanctions are not available here because the corporation acted negligently—not intentionally. As a result, the court should only **order measures** that are no greater than necessary to **cure the prejudice** caused to the customer—eg, allow the parties to present evidence at trial regarding the loss of the ESI.

**(Choice D)** It is unlikely that a court would prohibit a party from seeking discovery as a form of sanction as that would frustrate the purpose of discovery—ie, to uncover facts, narrow the issues in dispute, and otherwise prepare both parties for trial.

### Educational objective:

A court may order measures no greater than necessary to cure prejudice caused by a party's failure to preserve electronically stored information that (1) should have been preserved in the anticipation or conduct of litigation, (2) is lost because the party failed to take reasonable steps to preserve it, and (3) cannot be replaced or restored.

### References

- Fed. R. Civ. P. 37(e) (failure to preserve electronically stored information).

## Sanctions for failure to preserve electronically stored information (ESI)

