

## When the Platform Disappears: Spoliation Sanctions and the Google Analytics Sunset

### Introduction & Facts

Welcome to the Case of the Week segment of the Meet and Confer podcast. My name is Kelly Twigger, your host, and this week we are looking at a spoliation decision out of the Southern District of New York in *PharmacyChecker.com v. Nat'l Ass'n of Bds. of Pharmacy*. This is a decision issued by United States Magistrate Judge Victoria Reznik on a motion for sanctions under Rule 37(e)(1) from [September 25, 2025](#).

This case is one that every litigator needs to pay attention to — not just because of the spoliation analysis, but because of the source of ESI at the center of it. We're talking about website traffic data — the kind of data that marketing teams live in every day but that most litigators have probably never thought twice about. And we're going to talk about what happens when a technology platform that stores that data gets shut down, when the people responsible for preserving it don't have enough guidance from counsel about what matters, and when the result is a 19-month gap in data that's directly relevant to a party's damages theory.

Let me set the stage for you.

PharmacyChecker is an organization that provides consumers with comparative drug pricing information from domestic and international pharmacies. That's particularly important in today's market because the price of a prescription at my local grocery vs. the cost at Costco down the road vs. the cost at the Canadian pharmacy I use can be wildly different and I personally shop pharmacy prices regularly for my family.

PharmacyChecker filed this action back in August 2019, alleging that the defendants — who are a group of nonprofit organizations and private entities associated with drug pricing, including NABP — violated the Sherman Act by conspiring to push PharmacyChecker out of the marketplace. Central to its claims, PharmacyChecker alleged that it was placed on NABP's "Not Recommended Sites" list, and that NABP

then reached private agreements with internet search companies like Google and Bing to incorporate that list into their search engine rankings.

The result, according to PharmacyChecker, was that consumers could no longer find them through organic internet searches, and its web traffic dropped.

So right there — web traffic, and specifically which search engines that traffic was coming from — is at the heart of PharmacyChecker's theory of the case. It's their damages story. They're saying "we lost traffic from Google and Bing because of what the defendants did."

Now, how does a company track that kind of data? And this is where we need to talk about Google Analytics — because it's a source of ESI that you need to know about. Google Analytics is a free platform that millions of websites use to track who's visiting their site, where those visitors are coming from, what pages they're looking at, how long they stay. It captures granular data — meaning it doesn't just tell you you had 10,000 visitors last month. It can break that down and tell you how many came from Google search, how many came from Bing, how many came from a direct link, and how many came from social media. That level of detail — the source-by-source breakdown — is exactly what was at issue in this case.

During what the parties called "phase 1 discovery," PharmacyChecker produced at least one report of monthly organic internet traffic data for its website that was broken down by the specific search engine source of the traffic — Google, Bing, and others — covering the period of January 2015 through August 2021. So they had already produced this granular, source-level data once.

Later, after a dispute was raised with the district judge, PharmacyChecker was ordered to produce additional traffic reports, and it did — but those reports were high-level, not with the granular detail. They showed overall traffic volume, not the source-by-source breakdown. So the defendants had seen the granular data for the earlier period, but the newer reports didn't match that level of detail.

Here's where it gets critical. In March 2022, PharmacyChecker became aware that the platform it had been using to track all of this data — Google's Universal Analytics — was being replaced by a new platform called Google Analytics 4, or GA4. Everybody who was on Google Analytics got notice of this change. Google announced that any data maintained on the old Universal Analytics platform would not be available after July 1, 2024. It was going away. The platform was being sunset, and the historical data on it was going with it.

Now, to PharmacyChecker's credit, they didn't ignore this completely. One of their IT employees — someone who was aware of the litigation and had actually helped generate the traffic data reports that were produced earlier in discovery — began downloading data from Universal Analytics to preserve it before the platform went

offline. But here's the problem: that employee did this without direction from counsel. He downloaded what he believed was relevant based on his own understanding of what had been produced before and what he thought would give a "comprehensive view of the overall traffic." But he did not download the granular, search-engine-specific data — the source-by-source breakdown showing traffic from Google, from Bing, and from other search engines — for every time period. He got the overall numbers, but he missed the detail.

And remember — PharmacyChecker had already produced reports at that granular level in phase 1 discovery. The data existed. It was relevant. It had been produced. But when the IT employee went to preserve data before the platform disappeared, he didn't pull it at that same level of detail for every period.

Fast forward to April 2024. NABP served PharmacyChecker with a request for production seeking, among other things, all documents and ESI related to website traffic, lost website traffic from being placed on the Not Recommended Sites list, and alleged damages. PharmacyChecker agreed to refresh the traffic data reports and produced updated spreadsheets — but again, the data was not broken down to the granular level of specific search engines.

A dispute arose, no surprise. NABP filed a pre-motion letter seeking to compel PharmacyChecker to produce a report showing monthly web traffic volume by source. NABP argued that it was relevant — PharmacyChecker had put the source of its lost web traffic directly at issue by alleging that Google and Bing traffic specifically dropped — and that it wasn't burdensome because PharmacyChecker had already generated and produced other files from the same database.

PharmacyChecker pushed back, arguing the request was untimely, that it had sought visitor activity rather than traffic source data, and that it shouldn't have to create new evidence by generating reports from a dynamic database. The Court held a discovery conference on April 11, 2025, during which time PharmacyChecker admitted it could produce the granular report. The Court found the data was relevant, it was not burdensome to produce, and that querying a dynamic database like Universal Analytics was not forcing PharmacyChecker to generate new evidence against itself. The Court granted the motion to compel and ordered the granular report to be produced by PharmacyChecker.

PharmacyChecker produced a report, but the report was missing the granular traffic data for a 19-month period — from September 2021 until May 2023. PharmacyChecker explained that this gap existed because of how the data was downloaded from Universal Analytics before it went offline. And for that 19-month window, only the overall traffic had been downloaded. The granular, source-by-source data was never preserved — and with Universal Analytics now gone, it could never be reproduced.

Now here's what makes this worse: at the April 2025 discovery conference, when PharmacyChecker told the Court it could produce the granular data, it mistakenly believed the data for those 19 months had been retained. It wasn't until after it agreed to produce the granular data and the court ordered it that counsel discovered the gap. And therein lies another problem – counsel agreed to produce something they did not have because they didn't know they didn't have it.

NABP then moved for spoliation sanctions, seeking 1) to prohibit PharmacyChecker and its experts from relying on or presenting any testimony, evidence, or arguments related to Google or Bing search traffic during that 19-month period that was missing; 2) permission to present evidence of PharmacyChecker's destruction of evidence at summary judgment and at trial; 3) a special jury instruction about the destroyed data; and 4) reasonable costs and fees.

That's the setup. PharmacyChecker's entire damages theory depends on showing that the traffic from Google and Bing dropped because of what the defendants did. They knew the platform storing the data was going away. An IT employee tried to preserve it, but without direction from counsel, didn't preserve the specific data that mattered most — the source-level detail — for a 19-month window. And now that data is gone forever.

Let's get into what the Court did with it.

## **Analysis**

United States Magistrate Judge Reznik walks through the Rule 37(e) framework, which is the rule that governs spoliation of electronically stored information for the failure to preserve. And for those of you who are newer to this area, Rule 37(e) sets out a series of threshold requirements that the court has to find before it can impose any sanctions. The court has to determine that what was lost was ESI, that the party had a duty to preserve it, that the party failed to take reasonable steps to preserve it, that the lost ESI cannot be restored or replaced through additional discovery, and that the party seeking sanctions was prejudiced by the loss.

Now, it's important to flag here that we are operating under subsection (e)(1) of Rule 37 — not (e)(2). That distinction matters. Subsection (e)(2) is where you get the more severe sanctions — adverse inference instructions, dismissal, default judgment — but those require a finding of intent to deprive the other party of the evidence. And that's not what's at issue here. Under (e)(1), the court can impose measures no greater than necessary to cure the prejudice caused by the loss of the ESI. So the entire sanctions analysis in this decision — what the court can and cannot do — is governed by that (e)(1) standard, and that's why the prejudice finding is so critical. The court has to find

prejudice before it can do anything under (e)(1), and whatever it does has to be proportional to that prejudice.

Here, the Court notes right up front that most of the threshold requirements of (e)(1) are undisputed. Both sides agree that the lost traffic data was ESI, that PharmacyChecker had a duty to preserve it, and that it cannot be restored or replicated — Universal Analytics is gone, and the data went with it. The only two issues in dispute are whether PharmacyChecker took reasonable steps to preserve the granular data, and whether NABP was prejudiced by its loss.

Let's start with reasonable steps.

NABP's argument is straightforward: PharmacyChecker knew the platform was going away, knew the granular data was relevant, and simply never downloaded it for that 19-month window. PharmacyChecker pushes back and says, look — we did download traffic data for the entire period, it just wasn't broken down by search engine source. And we refreshed exactly what District Judge Davison told us to produce, so it was reasonable for us to think that level of detail was sufficient.

Magistrate Judge Reznik, however, frames the reasonable steps inquiry as essentially a negligence analysis — did the party do what a reasonable person would have done in a similar situation? And she finds that PharmacyChecker did not.

The Court's reasoning here is really important. She points to several facts in her analysis. First, PharmacyChecker's own complaint alleged that being blacklisted caused it to lose organic internet traffic from Google and Bing specifically. They named those search engines.

Second, during phase 1 discovery, PharmacyChecker actually produced at least one report with granular, search-engine-specific breakdown. So the granular data wasn't some tangential nice-to-have — it was central to PharmacyChecker's own theory of the case, and it had already been produced at that level of detail. Given those two facts, the Court found that it was reasonable to expect that search-engine-specific traffic data would remain relevant and necessary throughout the litigation.

But it's the next part of the analysis that is the real takeaway for litigators. The Court looks at what happened — and more importantly, what didn't happen — after PharmacyChecker learned that Universal Analytics was going offline. And she identified a series of failures.

PharmacyChecker's IT employee downloaded whatever data he personally believed was relevant. He did this without direction from counsel. Let me say that again — without direction from counsel. No attorney told him what to download. No attorney reviewed what he downloaded. No attorney checked whether what he preserved matched what had already been produced in discovery. PharmacyChecker's counsel

conceded at the September 2025 discovery conference that no attorney worked with the employee to determine what data was necessary to download. No one took affirmative steps to strategize, develop, and execute an assessment of what needed to be preserved. No one contacted opposing counsel to discuss the ramifications of losing access to the platform. And no one followed up afterward to verify that the right data had been preserved.

The Court says that all of these failures, viewed together, rise to the level of negligence and constituted a failure to take reasonable steps.

And I want to pause here for just a second because this is critical for litigators to take away from this case. We talk all the time on this podcast about the duty to preserve and taking reasonable steps. What Magistrate Judge Reznik is telling us is that when you know a source of ESI is going to disappear — whether it's a platform being sunsetted, a system being decommissioned, a vendor contract expiring — you cannot hand that preservation of that data off to an IT employee and walk away. Counsel has to be involved. Counsel has to assess what data matters in the context of the litigation. Counsel has to assess what data matters in the context of litigation. Counsel has to communicate with the people doing the preservation work. And counsel has to follow up to make sure it was done correctly. Counsel doesn't have to DO the work, but they do have to supervise it.

The Court also makes an important point about the meet and confer process between the parties. When PharmacyChecker and NABP discussed refreshing the earlier traffic data reports, neither side was precise about what “refresh data” meant. NABP's counsel understood it to mean that every report that had ever been produced, including the granular ones. And Magistrate Judge Reznik notes in a footnote in this case that much of this protracted motion practice could have been avoided if the parties had been clearer at the start about what spreadsheets would be updated and what it had made certain to preserve and discuss before the database went offline. But she makes clear that as the party in sole control of the ESI, the burden fell more heavily on PharmacyChecker to be proactive and diligent with its preservation.

Now let's talk about prejudice — and this is where I want to spend a little bit of time, because what Magistrate Judge Reznik does here is exceptional.

Remember that we're under Rule 37(e)(1), which means that the court has to find prejudice before it can impose any sanctions, and whatever sanctions it imposes must be no greater than necessary to cure that prejudice. So the prejudice finding isn't just a box to check — it defines the ceiling of what the court can do. And the level of nuance that Magistrate Judge Reznik brings to this analysis is not something we see often in spoliation decisions. It is, frankly, fantastic, and it's a guide for how litigators should be arguing the prejudice question — both for and against.

NABP argues that the loss of the granular data is devastating because the search-engine-specific breakdown is central to PharmacyChecker's claims, its damages, and NABP's defenses. Without that data, according to NABP, it can't identify which traffic came from Google versus Bing versus other search engines during that 19-month window, and it can't demonstrate that any drop in traffic was caused by confounding factors unrelated to NABP's conduct.

PharmacyChecker responds by saying the missing data is just a small piece of the overall dataset, and that neither side's experts actually relied on the granular data in forming their opinions.

The Court finds that NABP was prejudiced — but not as much as NABP claims. And this is where the nuance comes in and what's important to pay attention to.

Magistrate Judge Reznick acknowledges that the granular data is relevant to PharmacyChecker's claims and would have helped NABP defend against them. That's enough to find prejudice. But she then identifies several reasons why the prejudice is mitigated. First, NABP can still cross-examine PharmacyChecker's experts about the reliability of their conclusions given that the granular data doesn't exist — and she notes that NABP has already done exactly that in depositions and in its Daubert motions.

Second, NABP received granular data spanning January 2015 to April 2025 — 10 years' worth of data — with only the 19-month gap from September 2021 through May 2023 missing. NABP can use the data it has to rebut PharmacyChecker's claims.

And third — and this is really a key point — the Court observes that the evidence of confounding factors that might explain changes in search traffic during that period largely exists outside of the search traffic data itself. So NABP isn't left without any tools to make its case.

And then the Court says something really interesting: in some ways, the missing data gives NABP a stronger argument against PharmacyChecker's damages and experts than if the data had been produced. Because now NABP can attack the certainty and reliability of any damages claimed during that window, where, if the data existed, it could not.

This kind of nuanced prejudice analysis — where the court doesn't just find prejudice or no prejudice but actually calibrates the degree of it — is going to become more and more important as these spoliation decisions evolve. Now, I don't know whether PharmacyChecker's counsel was the one who alerted the Court to all of these nuances. We stay within the four corners of the decision on the Case of the Week, and usually if a court is drawing heavily from a party's arguments, it says so. So I think a lot of this analysis may be Magistrate Judge Reznick's own careful work. But either way, the lesson for litigators is this: you cannot assume the judge is going to do this work for you. Not every judge is going to be as prepared to conduct this kind of calibrated prejudice

analysis as Magistrate Judge Reznik was here. It's up to you — whether you're the party seeking sanctions or the party defending them — to lay this out for the court. Why the prejudice is severe, or show the court why it's mitigated and what your client can still do with the evidence that does exist. Ask the court for this level of analysis. But you'll have to guide the court to it in many instances.

Having found prejudice under Rule 37(e)(1), Magistrate Judge Reznik then turned to what sanctions are appropriate — because that's what the rule requires. The court's authority is limited to ordering measures no greater than necessary to cure the prejudice it found. And given that the Court calibrated the prejudice as real but mitigated, the sanctions here reflect that.

NABP asked for four things: first, an order precluding PharmacyChecker and its experts from relying on or presenting any testimony, evidence, or arguments relating to Google and Bing search traffic during the 19-month gap; second, permission to present evidence of PharmacyChecker's destruction of evidence at summary judgment and trial; third, a special jury instruction about the specific data; and fourth, attorneys' fees and costs.

On preclusion, the Court took a measured approach. She declined to preclude PharmacyChecker from making any argument on liability and damages during the 19-month period because that would be too severe under Rule 37(e)(1). She noted that there are eight and a half years of granular data that was produced, and that the produced data consistently shows that Google accounts for most of the organic search traffic in every period where such data was measured. For the missing 19 months to look vastly different from every other period would, as the Court puts it, defy logic and mathematical probabilities.

But — and this is what the Court does impose — PharmacyChecker must make clear that any Google and Bing search traffic and related damages for the missing period are an approximation or estimate derived from the available data, which does not include granular data by search engine. PharmacyChecker cannot present those numbers as if they are certain and precise when the specific data to contradict that evidence is unavailable to NABP.

On NABP's request to present evidence about the loss of data and to seek a jury instruction — the Court granted both. NABP is allowed to tell the jury what happened to the data, and if the case goes to trial, NABP can seek an appropriate jury instruction, with the wording and scope left to the judge's discretion.

On attorneys' fees and costs, the Court granted fees and costs for the sanctions motion and the pre-motion letter that preceded it, but denies fees for the earlier motion to compel. And the reasoning that Magistrate Judge Reznik gave is important — the motion to compel would have been filed regardless of the spoliation because it was

about getting PharmacyChecker to produce the granular data in the first place. PharmacyChecker's counsel also clarified that at the time of the motion to compel, counsel was unaware that some of the data was no longer available. So tacking those fees onto the spoliation sanctions would go beyond what was necessary to cure the prejudice.

## Takeaways

Let's talk about our takeaways.

The first and most important takeaway is this: counsel's failure to supervise the collection of data from Google Analytics — a single source of ESI — created a cascade of consequences that will follow PharmacyChecker for the rest of this litigation.

Think about what happened here. PharmacyChecker had the data. The traffic numbers clearly documented that their web traffic fell after they were blacklisted. That's their case. That's their damages story. And the granular breakdown by search engine — Google, Bing, others — was already in the record. They had already produced it. All they had to do was make sure it was preserved when the platform went away. And they didn't — not because the data was lost in some unforeseen catastrophe, but because no attorney was involved in deciding what to download.

And now look at where that leaves them. PharmacyChecker has to navigate telling a jury what happened to this data in a way that's credible, that comes across as a genuine mistake rather than something that looks like they had something to hide. They need a witness who appears honest and remorseful enough that the jury doesn't punish them for it, but not so apologetic that it undermines confidence in everything else they present. And they have to do all of this while being required to caveat their damages numbers for the missing period as approximations and estimates — while NABP gets to stand up in front of that same jury and say, "They lost the evidence. They can't prove what they're claiming with precision. You should question everything they're telling you about their damages."

That one failure — counsel not supervising data preservation — gives NABP, with the right lawyer, the opportunity to drive a truck through what would otherwise be an ironclad case. There is a direct correlation between not being involved in the data piece and making the case harder to prove. And it doesn't stop at trial. This impacts settlement dynamics. NABP now has leverage it shouldn't have had.

PharmacyChecker's bargaining position is weaker because there's a hole in their proof that didn't need to exist. And on top of all of that, you have the cost of the motion practice itself — the motion to compel, the pre-motion letters, sanctions briefing, two

discovery conferences, the fees that the Court has now ordered PharmacyChecker to pay. All of it flows from that one failure to supervise.

The second takeaway is about sources of ESI that litigators may not be thinking about. Google Analytics data, website traffic data — this is not something that comes up in every case, but when a party's claims or damages depend on web traffic, this is a source of ESI that counsel needs to identify early and preserve deliberately. And it's not just Google Analytics. Any third-party platform that stores data relevant to the litigation — marketing platforms, CRM systems, cloud-based tools — can be deprecated, sunset, or changed at any time in terms of retention. Counsel has to be asking: where does this data live, who controls it, and what happens if access goes away? If you're not asking those questions, you're exposed to exactly what happened here. If you don't have the knowledge as a litigator handling the case to identify the sources of ESI at issue, you need to find counsel that does.

The third takeaway here is the meet and confer lesson. Magistrate Judge Reznik explicitly flagged that much of this motion practice could have been avoided if the parties had been more precise in their discussions about what “refreshed data” meant. When you're talking to opposing counsel about updating or supplementing productions, be specific. Don't agree to “refresh the data” and walk away. Identify exactly which reports, which fields, which level of detail. Put it in writing. Especially when you know the source of that data is going away — that's the time to over-communicate, not under-communicate.

The next takeaway is one that I think is just as important, and it's about how you handle the situation when you realize you've made a mistake.

My gut reading of this opinion is that PharmacyChecker's counsel realized the error — they knew the granular data wasn't preserved at some point after the April 11th discovery conference — and rather than confronting that head-on, they argued that what they had produced satisfied what District Judge Davison had required. They dug in. They argued the request was untimely. They argued they shouldn't have had to create new evidence. They resisted it at every turn.

But what if they hadn't? What if, as Magistrate Judge Reznik essentially suggested in her footnote, PharmacyChecker had conceded the lack of granularity and gone to opposing counsel and said, “Here's what we have. Here's what we don't. The platform is gone. Let's talk about what this means and how we handle it.” What if they had been transparent about the gap and before it became a motion to compel, then a pre-motion letter on sanctions, then a full sanctions briefing, then two discovery conferences?

Now, I will acknowledge, and in my own cases that is certainly true — that would have required a level of adulthood that we don't often see from counsel in litigation on either side. Because the instinct from the other side when they smell blood is sanctions,

sanctions, sanctions. And I get it — NABP was prejudiced, and they had every right to raise it and it was huge for their case. But look at what the Court ultimately did here. The sanctions Magistrate Judge Reznik imposed are incredibly fair. PharmacyChecker can still make its case. It has to caveat its damages as estimates for the missing period, NABP gets to tell the jury what happened, and PharmacyChecker pays the fees on the sanctions motion. That's a measured, proportional outcome.

Imagine if PharmacyChecker had gotten ahead of this. If they had disclosed the gap early, worked with NABP to agree on how to handle the missing data, maybe stipulated to the use of estimates or interpolation for that period — they might have avoided the motion practice entirely. They might have preserved more credibility with the Court, saved their client a lot of money, and they certainly would have avoided paying NABP's fees in addition to their own costs. Instead, by fighting it, they spent months in motion practice, they damaged their credibility with the Court, and they ended up roughly where they would have been anyway — except now NABP gets to stand in front of a jury and tell them that PharmacyChecker destroyed evidence. That narrative exists because of how they handled the problem, not just because the problem existed.

The lesson here is one that applies far beyond spoliation. When you find a gap in your preservation, when you discover that something went wrong in your collection process — and it will happen, because litigation is messy and ESI is complicated — how you respond matters as much as what happened. Transparency and early engagement with opposing counsel and the Court can turn a bad situation into a manageable one. Digging in and hoping no one notices turns a manageable situation into a catastrophic one.

And the final takeaway goes back to what Magistrate Judge Reznik did with the prejudice analysis. This decision is a roadmap. Whether you're moving for sanctions or defending against them, the prejudice argument under (e)(1) is where the outcome gets shaped. If you're the moving party, you need to explain not just that the data is relevant, but specifically how its absence harms your ability to litigate — what arguments you can no longer make, what expert opinions you can no longer challenge. And if you're the party facing sanctions, you need to show the court what the other side can still do. Show them the data that was produced. Show them the cross-examination that's still available. Show them the alternative sources of proof. Guide the court to a calibrated finding, because the degree of prejudice controls the severity of the sanctions. That's exactly what happened here, and it's why PharmacyChecker is still in the game at all — because the prejudice, while real, was found to be mitigated. Not every judge is going to do that work on their own. It's counsel's job to get them there.

## Conclusion

And with that, let me leave you with this. Every organization that has a website. Every organization is using some form of analytics to track traffic to that website. Every organization uses cloud-based tools, marketing platforms, CRM systems, third-party SaaS products. They're all storing potentially relevant ESI on infrastructure that someone else controls and can change or shut down at any time. As litigators, it's our job to be identifying these sources early, we have to be involving ourselves in the preservation process — not delegating it and walking away — and we have to be following up to make sure it was done right.

If this case teaches us anything, it's that the cost of getting it wrong isn't just a sanctions motion. It's the slow erosion of your ability to prove your case — or defend against one — when it matters most.

That's our Case of the Week for this week. I'm your host, Kelly Twigger, and I invite you to subscribe to our blog at [Minerva26.com](https://Minerva26.com) or to follow our Case of the Week updates, as well as to subscribe to the Meet and Confer podcast wherever you get your podcasts. Every decision we cover is available on the Minerva26 platform with full issue tagging so you can find the case law you need when you need it. If you're a litigator navigating discovery strategy and want to see how Minerva26 can help you stay ahead of decisions like this one, visit [Minerva26.com](https://Minerva26.com) to learn more or reach out and schedule a demo.

If you value this content and want us to keep providing it, please share it with your colleagues on social media so that we can continue to reach as many folks as possible. If it's about the discovery of ESI, it's covered in Minerva26, your discovery strategy platform. Thanks so much for joining me. See you next time.