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EXPERT OPINION

Second Circuit Sets the Floor for Rule 60(b)(3) Discovery 'Misconduct'

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Electronic discovery is one of the most resource-intensive and process-dependent aspects of modern litigation. To meet their obligations efficiently, parties typically rely on layered processes such as search procedures, coding protocols, vendor-supported workflows, and quality-control checks designed to catch errors before production closes.

Yet even a carefully designed process can fail, and a single missed step—or misstep—can have significant downstream consequences that often are not immediately apparent. When the resulting gap surfaces only after trial, a court may be asked to assess not only what went wrong, but also what remedy, if any, is appropriate.

A recent decision from the United States Court of Appeals for the Second Circuit takes up those questions in the post-judgment context. Addressing Federal Rule of Civil Procedure 60(b)(3) as a matter of first impression, the court held that a merely negligent discovery violation does not constitute "misconduct" under the rule and therefore cannot justify setting aside a final judgment.

In reaching that holding, the court grounded its analysis in the broader culpability framework that governs discovery sanctions under Rule 37, reasoning that severe remedies demand a correspondingly heightened showing of fault.

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The court then examined the discovery process in detail and concluded that the violation was negligent, but no more than that. The decision offers guidance on the limits of post-judgment relief and on what makes a discovery process defensible when later scrutinized.

'Adidas v. Thom Browne'

In *Adidas America, Inc. v. Thom Browne, Inc.*, 2026 WL 1157384 (2d Cir. Apr. 29, 2026), Adidas brought trademark claims against competitor brand Thom Browne, alleging, in part, that a new collection contained design marks likely to cause consumer confusion. The jury returned a verdict for *Thom Browne*, and the Second Circuit affirmed on appeal.

While this appeal in the U.S. was pending, Thom Browne produced four emails in a separate UK litigation that had not been produced in the U.S. case. The

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emails reflected internal concerns by Thom Browne executives that the company's designs in other collections might be confused with *Adidas's* marks. *Adidas* argued*, inter alia,* that Thom Browne's failure to produce the relevant emails constituted "misconduct," which is one of the grounds for relief allowed under Federal Rule of Civil Procedure 60(b)(3).

Adidas moved for relief under Rule 60(b)(3), seeking a new trial. The district court convened an evidentiary hearing on the circumstances behind the non-production of the emails, taking testimony and depositions concerning the review process.

The Document Review Issue

The evidentiary hearing had revealed how communication issues between outside counsel and the e-discovery vendor led to the exclusion of the four emails and how a quality control step by counsel intended to catch such errors was skipped.

As part of its discovery process, counsel ran a search to identify potentially privileged documents, which would then be the subject of a privilege review. A paralegal instructed the e-discovery vendor to generate a saved search returning every potentially privileged document not yet produced.

The vendor did so, noting that it had configured the search to capture all documents that were not produced and not coded for responsiveness or privilege. However, that paralegal had already mass-coded as "needs further review" some documents that contained the word "adidas," including the four emails at issue.

These documents, now having coding values for responsiveness and privilege, were thus excluded from the parameters of the vendor's saved search and counsel's subsequent privilege review. A backstop quality-control review, in which an associate was tasked with reviewing every document tagged "needs further review," also failed to surface the emails. As a result, the four emails went undetected and were not produced to Adidas in the U.S. action.

Drawing on this record, the district court addressed Rule 60(b)(3), which authorizes relief from a final judgment when, among other grounds, an opponent has engaged in "misconduct." While the district court concluded that a negligent discovery violation could qualify as "misconduct" under the rule, it found that Thom Browne's counsel did not act negligently in its reliance on the vendor and the intended quality control check and, therefore, had not engaged in "misconduct." The district court accordingly denied the motion as to Rule 60(b)(3) relief.

The Second Circuit's Analysis

On appeal, the Second Circuit reviewed de novo whether the district court erred in its interpretation of Rule 60(b)(3). The court first addressed the standard for "misconduct" under Rule 60(b)(3) as a matter of first impression. Adidas argued that Thom Browne's discovery violation qualified as "misconduct." Finding that "'misconduct' is susceptible to different meanings," the Court looked to appropriate context to help interpret that term.

The Second Circuit found that context in Federal Rule of Civil Procedure 37, which governs discovery sanctions. In the court's view, Rule 37 illustrated that discovery-related "misconduct" means more than mere negligence. Under Rule 37(e)(2), the most severe remedies—adverse inference, dismissal, and default judgment—are reserved for parties found to have acted with intent to deprive an opponent of the information at issue.

Drawing on Rule 37(e)(2)'s structure, the court reasoned that setting aside a final judgment is itself a severe remedy and should likewise require a showing of culpability above negligence. Otherwise, a party could obtain a new trial for conduct that would normally warrant a far less severe discovery remedy, such as cost-shifting. The court also reasoned that the rule's text and drafting history supported this interpretation. The court therefore held that "a merely negligent discovery violation does not constitute 'misconduct' under Rule 60(b)(3)."

Turning to the facts of the case, the Second Circuit then addressed whether Thom Browne's non-production of the four emails rose above mere negligence to qualify as "misconduct" under Rule 60(b)(3). The court concluded that the violation was negligent. The court began by recognizing that the bar for negligence in the discovery context is low.

The district court had previously found no negligence because the paralegal reasonably relied on the e-discovery vendor to create the saved search as instructed and an associate's separate quality-control

review reflected an effort to satisfy discovery obligations. The Second Circuit, however, disagreed, noting that even if the vendor miscommunication could be excused, the record did not support the conclusion that the follow-up quality-control review had actually been performed as intended.

The associate testified that she had "endeavored" to review every document tagged "needs further review" and believed she had done so. Document histories, however, showed that no firm personnel other than two paralegals had ever opened the four emails. The record showed that while the firm had taken the "widely-recognized step" in discovery to review potentially responsive documents, it "apparently missed some." The court thus found outside counsel's discovery performance to be negligent, but "no worse."

In short, because Thom Browne's discovery violation amounted to no more than negligence, it was not "misconduct" under Rule 60(b)(3), and the court affirmed the denial of relief. The court noted that due to this conclusion, it did not need to decide what higher level of culpability would satisfy the rule in a future case.

Practical Takeaways

The Second Circuit's decision in *Adida*s offers several important lessons for litigants and counsel. First, while the court held that mere negligence cannot support post-judgment relief under Rule 60(b)(3), it expressly left open what higher level of culpability, such as gross negligence, recklessness, or intent, would suffice.

Practitioners should not read *Adidas* as foreclosing Rule 60(b)(3) relief for discovery violations; the decision sets a floor and signals that more serious misconduct may still warrant vacatur. Parties seeking Rule 60(b)(3) relief should build the culpability record with care; proof of a discovery failure alone may not suffice.

Second, although Adidas arose post-judgment, its reasoning may influence how courts evaluate similar conduct in pretrial disputes. The opinion offers a new precedential example of conduct that constitutes negligence, but not gross negligence—a distinction that recurs throughout Rule 37 jurisprudence. Its emphasis on whether counsel took "widely-recognized steps" to comply with discovery obligations gives district courts a useful reference point when calibrating pretrial sanctions to the degree of fault.

Third*, Adidas* underscores the importance of designing and faithfully executing quality-control processes in document review. A properly functioning backstop review would almost certainly have caught the four emails. The associate's stated intent to review every document tagged "needs further review" was not enough; document histories told a different story.

Quality-control procedures should be both documented and verifiable, generating auditable records confirming that each step was actually performed as designed. Counsel here was fortunate the Second Circuit characterized this lapse as negligent rather than something worse; on slightly different facts, another court might well have reached a different conclusion.

Finally, *Adidas* highlights the importance of clear communication and technical precision between counsel and e-discovery vendors. The non-production of emails was traced to a single technical mismatch: a paralegal's mass-coding of "adidas" hits as "needs further review" rendered those documents invisible to a saved search the vendor later had been instructed to build around uncoded documents.

Neither the instruction nor the vendor's execution was unreasonable in isolation, but together they produced a gap that no one caught. Confirming in writing the precise parameters of saved searches, validating resulting document populations against expected counts, and ensuring that those overseeing the review understand the underlying coding logic are inexpensive safeguards against the kind of breakdown *Adidas* illustrates.