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FEDERAL E-DISCOVERY

Race to a More Reasonable Sanctions Analysis


By **H. Christopher Boehning** And **Daniel J. Toal**

In our last installment, we discussed a proposed amendment to Federal Rule of Civil Procedure 37(e) that is intended to bring some uniformity to the law governing sanctions in connection with the preservation of electronically stored information. We set out our view that the proposed amendment "is almost certainly a step in the right direction."[1] If anyone wanted to take a contrary view and argue that the proposed amendment is premature and the courts simply need more time to flesh out the law under current Rule 37(e), they need look no further than the three cases discussed in today's column.

When Judge Paul W. Grimm penned "Victor Stanley II"[2] and attached as an exhibit a chart detailing the differing standards governing sanctions for spoliation, he highlighted a key concern for businesses and practitioners—that inconsistent standards were leading to over preservation and greatly increasing the cost of litigation. That concern has no doubt been at the heart of the movement to amend Rule 37(e). But, it is sometimes easy to forget that Rule 37(e)—and, indeed, all of the 2006 e-discovery amendments—are still in their infancy and that it can take time for courts around the country to address the issues and to converge—if at all—on a relatively uniform approach.

With Rule 37(e) already slated for amendment, it is interesting to note that three recent decisions hew very close to the approach adopted in the proposed amendment—one under which sanctions are generally unavailable absent a demonstration that a party has been prejudiced by the missing or destroyed evidence.

H. CHRISTOPHER BOEHNING *and* DANIEL J. TOAL *are litigation partners at Paul, Weiss, Rifkind, Wharton & Garrison.* MELANIE BAPTISTE JEAN NOEL*, an associate, assisted in the preparation of this article.*

'Sekisui America v. Hart'

On the heels of the Standing Committee's approval of proposed Rule 37(e), Magistrate Judge Frank Maas of the Southern District of New York, in a case referred to him by District Judge Shira Scheindlin, issued a sanctions decision in *Sekisui America v. Hart*.[3] *Sekisui* stemmed from a corporate merger gone wrong. Shortly after acquiring the defendants' company (American Diagnostics Inc. (ADI)), the plaintiff acquirer, Sekisui, sued the defendants, Richard Hart and his wife Mary Louise Trudel-Hart, for alleged wrongs not specifically mentioned in the decision. The defendants sought discovery sanctions "for the undisputed destruction of the contents of Hart's ADI email folder."[4] Sekisui had failed to implement a litigation hold until more than 15 months after it sent the defendants a Notice of Claim, and authorized the deletion of Richard Hart's email account a year after starting the litigation.[5] Additionally, the defendants sought sanctions for Sekisui's alleged destruction of email files belonging to other employees related to the case.

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This is one of those fact patterns that easily would have led judges from prior decisions to rail against Sekisui's behavior, to label Sekisui as a spoliator, and to impose an adverse inference and/or monetary sanctions. Pointing to the decision in *Orbit One Commc'ns v. Numerex*,[6] however, Judge Maas noted that "a court should never impose spoliation sanctions of any sort unless there has been a showing—inferential or otherwise—that the movant has suffered prejudice."[7] Interestingly, Maas also noted proposed Rule 37(e) stating, "under the proposed amendment, unless a moving party were able to establish that it was 'irreparably deprived' of a 'meaningful opportunity to present or defend against' claims, it would be required to demonstrate that the non-moving party acted willfully or in bad faith to obtain sanctions."[8] He then considered several steps taken by Sekisui "to ameliorate any potential prejudice to the Hart Defendants."[9]

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To that end, Maas found it significant that prior to deleting one of the key custodian's email accounts, Sekisui printed certain emails and subsequently was able to produce those emails to the defendants.[10] Maas also found it noteworthy

that "Sekisui reviewed the email folders of other ADI employees in an effort to find relevant emails to or from Hart."[11] Maas considered that Sekisui located and searched an alternative source of some, though not all, of the lost electronically stored information,[12] from which Sekisui had recovered and produced over 36,000 relevant emails. Moreover, he recognized that "despite their complaints about [the] decision to allow [the deletion of Hart's email folder], the Hart Defendants ha[d] yet to produce—or even describe—so much as a single relevant email that Sekisui ha[d] failed to produce."[13]

Maas concluded:

> In these circumstances, although the Hart Defendants may have convincingly established that Sekisui destroyed Hart's emails with the requisite culpable state of mind, they have not shown, as they must, that relevant information potentially helpful to them is no longer available.[14]

Thus, Maas denied the defendants' motion for sanctions, stating "[a]t best, as frequently occurs in e-discovery sanctions motions, the Hart Defendants have established the presence of some smoke, intimating that there consequently must have been a fire."[15] Maas' decision to focus on the prejudice, if any, resulting from spoliation and prejudice is consistent with the approach taken in proposed Rule 37(e).

'Cottle-Banks v. Cox Commc'ns'

In *Cottle-Banks v. Cox Commc'ns*,[16] District Judge Gonzalo Curiel took a similar approach to addressing whether an adverse inference was the appropriate sanction for certain e-discovery failures. In *Cottle-Banks*, the plaintiff "allege[d] that Cox ha[d] violated the negative-option-billing provision of the federal Cable Act by failing to disclose and obtain customers' consent to be charged for monthly rental fees associated with their cable set-to[p] boxes."[17] When defendant cable company, Cox, failed to halt "the routine overwriting of its customer call recordings" upon notification of the lawsuit, Cottle-Banks sought an adverse inference.[18]

Absent California precedent on a standard for determining when such sanctions are warranted, Curiel looked to the Second Circuit. Citing *Residential Funding v. DeGeorge Fin.*,[19] Curiel noted a three-part test for determining whether sanctions are appropriate:

> (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed "with a culpable state of mind"; and (3) that the evidence was "relevant" to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.

He observed that a request for "an adverse inference instruction [may be denied] even where the three-part test for spoliation was satisfied, upon concluding that the degree of fault and level of prejudice were insufficient to justify imposition of the sanctions."[20]

Curiel found that even though the plaintiff had satisfied the first two prongs of the test, Cottle-Banks did not satisfy the third prong of the test requiring that the evidence support a claim or defense. To that point, he stated, "[t]he burden falls on the 'prejudiced party to produce' some evidence suggesting that a document or documents relevant to substantiating his claim would have been included among the destroyed files."[21] He continued, "the call recordings already produced in this case are not supportive of Plaintiff's claim. Plaintiff cited only two call recordings out of 280 call recordings produced to support her position."[22] Thus, he concluded that sanctions would not be appropriate.

With the proposed rule not scheduled to go into effect (assuming adoption) until December 2015, it is encouraging to see a cluster of decisions adapting an approach that is consistent with that taken in the proposed rule.

'Pillay v. Millard Refrigerated Svcs.'

In *Pillay v. Millard Refrigerated Svcs.*,[23] District Judge Joan Humphrey Lekfow granted the plaintiff's motion for an adverse inference jury instruction as a sanction for spoliation of information against the defendant, Millard Refrigerated Services (Millard). In this case, the plaintiff alleged that Millard violated the Americans with Disabilities Act when it retaliated against him after he opposed Millard's decision to terminate another employee, Anthony Ramirez, because of a "perceived disability."[24] Central to the plaintiff Pillay's claim were performance reviews created by a labor management system (LMS), which tracked Ramirez's productivity. In August 2009, the raw data used to create Ramirez's LMS numbers was automatically deleted by the LMS software. Prior to that time, however, Pillay and Ramirez reminded Millard of the need to preserve this evidence on several occasions. "Specifically, Pillay sent Millard a demand letter in September 2008 and both Pillay and Ramirez sent preservation notices in December of 2008 reminding Millard of its obligations to preserve evidence."[25]

The court analyzed the issue in much the same way as *Sekisui* and *Cottle-Banks*. First, Lekfow determined whether Millard had a duty to preserve the underlying data. Next, the judge considered whether Millard acted with the requisite culpability when failing to preserve the underlying LMS data. Then, she considered whether Pillay suffered prejudice warranting a sanction. In considering the final question in the analysis, Lekfow noted, "[f]actors that guide the court's decision include whether the party seeking the remedy suffered prejudice and the extent by which an adverse inference instruction can alleviate that prejudice."[26] After considering all of these factors, the judge decided in favor of the plaintiff and granted an adverse inference against Millard. Even though the outcome of this Northern District of Illinois case differed from the outcomes in *Sekisui* and *Cottle-Banks*, the analysis was similar.

Conclusion

We continue to believe that the proposed amendment to Rule 37(e) is a step in the right direction. But, as with any new rule, it will take time for the courts to digest the new rule and flesh out issues in its application. Still, with the proposed rule not scheduled to go into effect (assuming adoption) until December 2015, it is encouraging to see a cluster of decisions adapting an approach that is consistent with that taken in the proposed rule.

1. H. Christopher Boehning & Daniel J. Toal, "Proposed Rule 37(e): A Step in the Right Direction?," 249 NYLJ, 106 (June 4, 2013).
2. *Victor Stanley v. Creative Pipe*, 269 F.R.D. 497 (Sept. 9, 2010).
3. No. 12 Civ. 3479, 2013 WL 2951924, *1 (S.D.N.Y. June 10, 2013).
4. Id. at *1.
5. Id. at 2.
6. *Orbit One Commc'ns v. Numerex*, 271 F.R.D. 429, 431 (S.D.N.Y. 2010) ("No matter how inadequate a party's efforts at preservation may be, …sanctions are not warranted unless there is proof that some information of significance has actually been lost.").
7. *Sekisui*, 2013 WL 2951924, at*3.
8. Id.
9. *Sekisui*, 2013 WL 2951924, at*5.
10. Id.
11. Id.
12. Id.
13. Id.
14. Id.
15. Id.
16. *Cottle-Banks v. Cox Commc'ns*, No. 10cv2133-GPC (WVG), 2013 WL 2244333 (S.D. Cal. May 21, 2013).
17. Id. at *1.
18. Id. at *10 (seeking "an adverse inference operative in all proceedings in this case, that all CSR call recordings destroyed by Defendant after service of the original complaint in this case would have evinced a common practice by Defendant of violation 47 U.S.C. §543(f) by not disclosing equipment and corresponding charges during telephone calls with customers ordering cable service" and/or an order from the court stating, "[d]efendant shall be precluded from introducing evidence that its Rs (sic) complied with 47 U.S.C. §543(f) before June of 2011").
19. *Residential Funding v. DeGeorge Fin.*, 306 F.3d 99, 107 (2d Cir. 2002).
20. *Chin*, 685 F.3d at 162.
21. *Cottle-Banks*, 2013 WL 2244333, at *16 (quoting *Byrnie v. Town of Cromwell, Bd. of Educ.*, 243 F.3d 93, 108 (2d Cir. 2001)).
22. Id.
23. *Pillay v. Millard Refrigerated Svcs.*, No. 09 C 5725, 2013 WL 2251727 (N.D. Ill. May 22, 2013).
24. Id. at 1.
25. Id.
26. Id. at 4.