August 21, 2013

Sekisui American Corporation v. *Hart*

On August 15, the same day that the new proposed amendments to the Federal Rules of Civil Procedure were officially released for public comment, U.S. District Judge Shira Scheindlin of the Southern District of New York released a public comment of her own with her decision in *Sekisui Am. Corp.* v. *Hart*, No. 12 Civ. 3479 (SAS)(FM), 2013 WL 4116322 (S.D.N.Y. August 15, 2013). Judge Scheindlin, who has been called the godmother of e-discovery thanks to her decisions in the landmark *Zubulake* and *Pension Committee* cases, strongly criticized the proposed changes to Rule 37(e) concerning sanctions for failure to preserve discoverable information and found that in *Sekisui*, the sanction of an adverse inference jury instruction was appropriate due to the plaintiff "willfully and permanently" destroying electronically stored information ("ESI") that was relevant to the matter. *Sekisui* at *8.

Sekisui provided Judge Scheindlin the perfect opportunity for setting forth her thoughts on proposed Rule 37(e). The proposed changes to the rule, according to the May 8, 2013 Report of the Advisory Committee on Civil Rules, seek to "address the overbroad preservation many litigants and potential litigants felt they had to undertake to ensure they would not later face sanctions." David G. Campbell, Report of the Advisory Committee on Civil Rules 35 (2013), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV05-2013.pdf. The revised rule would provide "a uniform national standard for culpability findings to support imposition of sanctions" that "rejects the view adopted in some cases... that would permit sanctions for negligence." *Id.* Under the proposed new Rule 37(e), a court can only issue sanctions if it finds that a party's actions in failing to preserve discoverable information "(i) caused substantial prejudice in the litigation and were willful or in bad faith; or (ii) irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation." *Id.* at 43.

In this dispute, Sekisui brought a breach of contract action in relation to its acquisition of America Diagnostica, Inc. ("ADI") against Richard Hart, the former president of ADI, and his wife Marie Louise Trudel-Hart. Sekisui, however, failed to implement a litigation hold until more than fifteen months after sending a Notice of Claim to the defendants and, during this time, permanently deleted the e-mail files of Richard Hart and of Leigh Ayres, another key player in the dispute. The Harts requested that the court impose sanctions, including an adverse inference jury instruction, against Sekisui for this spoliation of evidence. *Sekisui* at *1.

Judge Scheindlin referred the matter to Magistrate Judge Frank Maas, who "declined to issue any sanctions, finding that the Harts failed to show any prejudice resulting from the destruction of the ESI."

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Id. Taking up the matter after the Harts filed objections to the ruling, Judge Scheindlin reversed Judge Maas and granted the Harts' request for spoliation sanctions.

In her analysis, Judge Scheindlin relied heavily on *Residential Funding Corp.* v. *DeGeorge Financial Corp.*, 30 F.3d 99 (2d Cir. 2002) as the Second Circuit's controlling law on adverse inference instructions when a party has destroyed evidence. In a footnote, she commented on proposed amended Rule 37(e), which had been referenced by Magistrate Judge Maas in his decision. Judge Scheindlin noted that limiting a court's ability to impose sanctions to situations in which there was willfulness or bad faith "would abrogate *Residential Funding* insofar as it holds that sanctions may be appropriate in instances where evidence is negligently destroyed." *Sekisui* at *4 n. 51. Making clear her thoughts on the proposed rule, Judge Scheindlin continued, "I do not agree that the burden to prove prejudice from missing evidence lost as a result of willful or intentional misconduct should fall on the innocent party. Furthermore, imposing sanctions only where evidence is destroyed willfully or in bad faith creates perverse incentives and encourages sloppy behavior. Under the proposed rule, parties who destroy evidence cannot be sanctioned (although they can be subject to 'remedial curative measures') even if they were negligent, grossly negligent, or reckless in doing so." *Id.*

Noting that the proposed Rule itself was irrelevant for the purposes of the decision, *id.*, Judge Scheindlin proceeded with her analysis under *Residential Funding* to determine the propriety of an adverse inference sanction, which requires that the party seeking the sanction "must establish (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 destroyed 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." *Id.* at *4.

Sekisui did not dispute that it was under an obligation to preserve the ESI that it destroyed. *Id.* at *4 n. 48. On the issue of the culpable state of mind, after having previously described a somewhat egregious fact pattern showing the spoliative behavior of Sekisui, Judge Scheindlin found that Sekisui was grossly negligent (noting that even after finally implementing the litigation hold fifteen months late, it took Sekisui another six months to notify its outside technology vendor to preserve relevant documents) and that the destruction of the e-mail of Richard Hart and Leigh Ayres was willful and intentional. *Id.* at *6.

On the issue of relevance, Judge Scheindlin determined that the missing information was relevant but that "the real argument here has always been whether the destruction of that ESI prejudices the Harts." *Id.*at 7. Magistrate Judge Maas had declined to impose sanctions because the Harts had failed to show such prejudice. Judge Scheindlin strongly disagreed with this finding and, implicitly, proposed Rule 37(e), stating that "[b]ecause the destruction of evidence was intentional, I find that the imposition of such a burden on the innocent party is contrary to law." *Id.* Citing *Residential Funding*, she continued "[w]hen evidence is destroyed intentionally, such destruction is sufficient evidence from which to conclude that the missing evidence was unfavorable to that party.... To shift the burden to the innocent

party to describe or produce what has been lost as a result of the opposing party's willful or grossly negligent conduct is inappropriate because it incentivizes bad behavior on the part of would-be spoliators. That is, it 'would allow parties who have destroyed evidence to profit from that destruction.'" *Id.* Referencing her own *Pension Committee* decision, Judge Scheindlin noted that when evidence is destroyed willfully, prejudice, in the context of the adverse inference analysis, is presumed. *Id.*

Judge Scheindlin granted the Harts' request for an adverse inference jury instruction regarding the destruction of evidence, the full text of which she provided in her decision. She was sure to note that the jury could still determine, based on the evidence, that the Harts were not prejudiced by the spoliation of ESI by Sekisui. *Id.* at *8.

As the debate over the law relating to sanctions for spoliation of ESI escalates, *Sekisui* is a reminder that litigants, including plaintiffs like Sekisui bringing actions, can still be tripped up by a failure to implement a timely, defensible litigation hold. *Sekisui* also confirms that until and unless a uniform standard is established, the current state of play – one under which the standard for imposing sanctions can differ dramatically from circuit to circuit – will persist.

The public comment period for the proposed amendments to the Federal Rules of Civil Procedure, including Rule 37(e), runs from August 15, 2013 to February 15, 2014. For those interested in submitting comments, information about the process is available on the U.S. Courts website at http://www.uscourts.gov/RulesAndPolicies/rules/proposed-amendments.aspx.

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