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FEDERAL E-DISCOVERY

'Sekisui' Shakes Up Sanctions Analysis for Evidence Spoliation

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In our last column, we explored the encouraging trend of courts determining the propriety of sanctions for spoliation of electronically stored evidence with reference to the proposed amendment to Federal Rule of Civil Procedure 37(e). Judge Shira Scheindlin of the Southern District of New York, one of the federal judiciary's leading experts on e-discovery and author of some of its most consequential e-discovery decisions, has recently weighed in on the future of sanctions for the destruction of evidence, however, and expressed serious reservations about the proposed changes to Rule 37(e). In *Sekisui American v. Hart*,[1] Judge Scheindlin reversed Magistrate Judge Frank Maas' report and recommendation denying the defendants' motion for sanctions. Scheindlin instead granted the defendants' motion and sanctioned Sekisui for destroying email files relevant to the litigation long after having sent the defendants a notice of claim.

'Sekisui'

Sekisui American Corporation and Sekisui Medical Co. (collectively, Sekisui) sued Richard Hart and Marie Louise Trudel-Hart for breach of contract arising out of Sekisui's acquisition of American Diagnostica Inc. (ADI) in 2009. Hart had been the chief executive officer of ADI, but was fired after Sekisui determined that ADI had violated the sale agreement governing the acquisition. In that contract, ADI represented that it had complied with relevant federal regulations, that its facilities were adequate to conduct business, and that its products contained no material defects. Sekisui sent the Harts a notice of claim on Oct. 14, 2010, and filed a complaint on May 2, 2012.

During discovery, Sekisui revealed that in March 2011, it had deleted Hart's email file from its server, as well as that of another employee relevant to the breach of contract action. Moreover, Sekisui did not implement a litigation hold until January 2012 and did not advise its information technology vendor of its duty to preserve until July 2012. The emails, apparently deleted at the direction of ADI's director of human resources to free up space on the server, were "permanently deleted and irretrievable."[2] Sekisui was, however, able to produce about 36,000 emails to and from Hart using other sources. The Harts sought an adverse inference jury instruction based on Sekisui's destruction of the electronically stored information associated with the email files.

Magistrate Judge Maas, citing the proposed amendment to Rule 37(e), found that the Harts were not entitled to sanctions because they had not proved any prejudice from the destruction of the email files.[3] Judge Scheindlin, however, ruled that an adverse inference instruction was an appropriate sanction for Sekisui's destruction of the evidence. At the core of her ruling lies the principle that the burden should not rest upon the innocent party to prove the relevance of the destroyed evidence and any resultant prejudice. To the extent that proposed Rule 37(e) would mandate a different conclusion in the case, the court disagreed with the proposed rule's allocation of the burden.

Judge Scheindlin applied the Second Circuit's existing framework for sanctions in response to spoliation of electronically stored information. Under *Residential Funding v. DeGeorge Financial*, a party seeking an adverse inference instruction for spoliation of evidence must demonstrate: (1)

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that the party that had control over the evidence was obligated to preserve it when it was destroyed; (2) that the evidence was destroyed with a culpable state of mind; and (3) that the spoliated evidence was relevant to the claim or defense of the party seeking sanctions.[4]

Scheindlin found that each of the three elements was met, and that an adverse inference instruction was therefore justified. In so ruling, Judge Scheindlin pointed to three particularly problematic elements of Sekisui's conduct:

> Sekisui (1) willfully and permanently destroyed the [electronically stored information] of at least two key players in this litigation; (2) failed to impose a litigation hold for more than a year after the duty to preserve arose, despite the fact that Sekisui is the Plaintiff in this action and, as such, irrefutably knew that litigation could arise; and (3) failed to advise its [information technology] vendor of such litigation hold for nearly six months after (belatedly) imposing such hold.[5]

Judge Scheindlin also acknowledged the Second Circuit's more recent decision in *Chin v. Port Authority of New York and New Jersey*, which "reject[ed] the notion that a failure to institute a 'litigation hold' constitutes gross negligence *per se*."[6] Rather, the *Chin* court endorsed a "case-by-case approach," in which the adequacy of a litigant's preservation practices should be considered as one factor in a sanctions determination.[7] The practical effect of the Second Circuit's ruling was to afford district courts greater latitude to decide *against* ordering sanctions. The Second Circuit thus affirmed the district court's decision not to issue an adverse inference instruction, even assuming that the spoliating party was grossly negligent and that the destroyed evidence was relevant. In so holding, the Second Circuit disagreed with *Pension Committee of University of Montreal Pension Plan v. Banc of America Securities*,[8] a seminal e-discovery decision in which Judge Scheindlin had held that the failure to implement a litigation hold constituted gross negligence per se. Despite the shift away from per se spoliation sanctions in *Chin*, Scheindlin found the culpability requirement satisfied in *Sekisui* because, while the *Chin* decision held that a finding of gross negligence did not require an adverse inference instruction, it nonetheless continued to permit such instructions.

Judge Scheindlin explicitly rejected the approach of the proposed amendment to Rule 37(e) for several reasons in an important footnote of the *Sekisui* opinion. She first observed that the proposed rule would abrogate *Residential Funding* by largely limiting the imposition of sanctions to cases of willful or bad faith destruction of evidence. The court flatly stated that it "d[id] 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."[9] Moreover, Scheindlin concluded that failing to order sanctions for negligent conduct "creates perverse incentives and encourages sloppy behavior."[10] In any event, the court concluded that the proposed rule was "irrelevant" to the motion for sanctions because it has not yet been adopted.[11]

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Sekisui sets forth multiple holdings of note in the ever-evolving doctrine of sanctions for electronic evidence spoliation. First, the court reiterated that the culpability requirement is satisfied by knowing *or negligent* destruction of the evidence. The court's reasoning, which it derived from *Residential Funding*, is that the "sanction of an adverse inference may be appropriate in some cases involving the negligent destruction of evidence because each party should bear the risk of its own negligence."[12] This holding is fundamentally incompatible with the proposed amendment to Rule 37(e), which "rejects the view adopted in… *Residential Funding*" that allows for imposition of spoliation sanctions for negligence, reserving them instead for instances of willfulness or bad faith.[13]

Second, Judge Scheindlin stated that intentional destruction of evidence after the duty to preserve attaches constitutes willful destruction—even if the evidence was not destroyed "with a malevolent purpose" or in bad faith.[14] Thus, Sekisui's good faith explanation that the files were deleted to clear room on the server did not prevent a finding of willfulness on Sekisui's part.[15] This definition of willfulness captures a very broad swath of the spoliation landscape, apparently excluding only a party's inadvertent destruction of evidence once the duty to preserve has attached. In fact, the court recognized that "Sekisui ha[d] made a real effort to minimize the harm done by [its] destruction" of the email files, but imposed sanctions nonetheless.[16] The proposed amendment to Rule 37(e), by contrast, emphasizes curative measures as recourse, and permits sanctions only for those situations in which a party suffers substantial prejudice due to the willful spoliation of evidence or is irreparably deprived of "any meaningful opportunity to present or defend against the claims in the litigation."[17]

Finally, Scheindlin held that the willful or grossly negligent destruction of evidence gives rise to a presumption of prejudice to the innocent party. Specifically, "[w]hen evidence is destroyed willfully or through gross negligence,…prejudice is presumed precisely because relevant evidence…has been intentionally destroyed and is no longer available to the innocent party."[18] This part of the opinion, too, is in direct conflict with the proposed amendment to Rule 37(e), which rejects any presumption of prejudice. Rather, as indicated above, the proposed amendment to the rule would require proof of substantial prejudice to the party seeking sanctions—in addition to a finding of bad faith or willfulness—in nearly all instances.

The collective impact of Judge Scheindlin's rulings in *Sekisui* is quite significant. She articulates an expansive view of culpability that includes negligence, a liberal construction of what constitutes willful destruction of evidence, and a broad conception of prejudice, which is to be presumed where evidence is destroyed willfully or with gross negligence. In short, she has set forth a vision very much at odds with that of the drafters of the amended Rule 37(e), who clearly sought to restrict the imposition of spoliation sanctions.

A Fork in the Road

Judge Scheindlin's rejection of the proposed Rule 37(e) runs counter to the approach other courts have recently taken in embracing the proposed amendment's framework, as we highlighted in a previous column.[19] To this end, an opinion issued a week prior to *Sekisui* in the District of Kansas, *Herrmann v. Rain Link*,[20] declined to accept the plaintiff's argument that he did not need to demonstrate prejudice because the defendant's destruction of evidence was willful. Though the court noted that this result might have been defensible under Scheindlin's *Zubulake* line of cases, it went on to clarify that the Tenth Circuit has made clear that a showing of prejudice is required for spoliation sanctions to issue, even when the destruction of evidence was intentional. In carrying this burden, the moving party must do more than "speculate that [it] is prejudiced because the evidence no longer exists, for this is true in any case involving spoliation of evidence."[21] Similarly, in the Tenth Circuit, the party seeking sanctions must "prove bad faith on the part of the producing party" because "[n]egligence in losing or destroying documents is not sufficient."[22] Both of these rules are essentially in line with the proposed amendment to Rule 37(e).

Although we have observed courts embracing the stricter standard for spoliation sanctions articulated in the proposed amendment to Rule 37(e), Judge Scheindlin, long an authoritative voice in matters of electronic discovery, has presented an alternative view that could gather momentum. Indeed, only weeks after Scheindlin issued *Sekisui*, Judge Robert Patterson Jr., also of the Southern District of New York, granted a motion for an adverse inference instruction in *Taylor v. City of New York*.[23] In that case, the court found that the City had negligently destroyed three hours of relevant video surveillance footage. Although the City's conduct did not rise to the level of gross negligence—in fact, Patterson distinguished *Sekisui* as a more egregious case—the court deemed an adverse inference instruction appropriate because negligence was enough to satisfy the culpability requirement.[24] As indicated above, sanctions are typically not to be imposed for negligent spoliation under the proposed amendment to Rule 37(e); by contrast, *Sekisui* reaffirmed that negligence suffices to establish culpability under *Residential Funding*.[25] It therefore remains to be seen whether Scheindlin's approach to spoliation sanctions will prove influential and what the implications will be, if any, for adoption of the proposed amendment to Rule 37(e).

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Certainly, the problem that the amendment to Rule 37(e) works to ameliorate by allowing sanctions "only on a finding that the party acted willfully or in bad faith"[26] would remain largely unabated under Scheindlin's analysis. Permitting an adverse inference instruction without a demonstration of prejudice to the party seeking sanctions reflects a more punitive approach to spoliation of evidence than the proposed version of Rule 37(e). Imposing sanctions for negligent destruction of evidence likewise perpetuates parties' tendency to overpreserve evidence, potentially at significant cost. Indeed, it is for this very reason—"to address the overbroad preservation many litigants and potential litigants felt they had to undertake to ensure they would not later face sanctions"[27]—that the Advisory Committee on Civil Rules proposed changes to Rule 37(e). While the proposed amendment to Rule 37(e) may not be the only answer to the problems presented by the abundance of electronically stored information in litigation today, we continue to view the Rule 37(e) proposal as progress toward a more workable and efficient standard for litigants to manage their evidence preservation efforts.

Conclusion

Judge Scheindlin doubtless shares a common objective with the drafters of the proposed rule that "a party that adopts reasonable and proportionate preservation measures should not be subject to sanctions."[28] Perhaps highlighting the difficulty of this goal, *Sekisui* and the proposed amendment to Rule 37(e) have mapped out markedly different paths for arriving at this point. In the age of e-discovery, the balance between incentivizing good document preservation habits and discouraging wasteful expenditures in anticipation of litigation continues to prove elusive. This area of electronic discovery law, already in flux and difficult to navigate for litigants, may now be even more so.

1. No. 12-cv-3479-SAS-FM, 2013 WL 4116322 (S.D.N.Y. Aug. 15, 2013).
2. Id. at *2.
3. No. 12-cv-3479-SAS-FM, 2013 WL 2951924 (S.D.N.Y. June 10, 2013).
4. 306 F.3d 99 (2d Cir. 2002).
5. *Sekisui*, 2013 WL 4116322, at *8.
6. 685 F.3d 135, 162 (2d Cir. 2012), cert. denied, 133 S. Ct. 1724 (2013).
7. Id.
8. 685 F. Supp. 2d 456 (S.D.N.Y. 2010).
9. *Sekisui*, 2013 WL 4116322, at *4 n.51.
10. Id.
11. Id.
12. Id. at *4 (quoting *Residential Funding*, 306 F.3d at 108 (internal quotation marks omitted)).
13. Memorandum, Civil Rules Advisory Committee, 35 (May 8, 2013) (Committee Memorandum).
14. *Sekisui*, 2013 WL 4116322, at *6.
15. Id. ("That Sekisui provides a good faith explanation for the destruction of Hart's ESI…does not change the fact that the [electronically stored information] was willfully destroyed").
16. Id. at *7.
17. Committee Memorandum, supra note 13, at 35.
18. *Sekisui*, 2013 WL 4116322, at *5.
19. H. Christopher Boehning & Daniel J. Toal, "Race to a More Reasonable Sanctions Analysis," 250 NYLJ, 26 (Aug. 6, 2013). See *Pillay v. Millard Refrigerated Servs.*, No. 09 C 5725, 2013 WL 2251727 (N.D. Ill. May 22, 2013) (applying proposed Rule 37(e) framework to question of sanctions for spoliation of electronically stored information); *Cottle-Banks v. Cox Commc'ns*, No. 10cv2133-GPC (WVG), 2013 WL 2244333 (S.D. Cal. May 21, 2013) (same).
20. *Herrmann v. Rain Link*, No. 11-1123-RDR, 2013 WL 4028759 (D. Kan. Aug. 7, 2013).
21. Id. at *3.
22. Id. at *2.
23. No. 12-cv-5881-RPP, 2013 WL 4744806 (S.D.N.Y. Sept. 4, 2013).
24. Id. at *8-9.
25. *Sekisui*, 2013 WL 4116322, at *4.
26. Committee Memorandum, supra note 13, at 35.
27. Id.
28. Id.