Sekisui Am. Corp. v. Hart – RETURN TO *ZUBULAKE*

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In *Sekisui American Corp. v. Hart*, 2013 U.S. Dist. LEXIS 84544 (S.D.N.Y., June 10, 2013), District Judge Shira Scheindlin returns to the world of ESI – Electronically Stored Information – made famous in her five decisions a decade ago in *Zubulake v. UBS Warburg*.[1] In *Zubulake* and in *Sekisui*, Judge Scheindlin took a strong stand against the party who failed to preserve ESI, primarily emails, once the duty to preserve them arose. Adverse inference charges were crafted in both cases. In her charge in *Sekisui*, Judge Scheindlin would instruct the jury that as a matter of law, the destruction of emails resulted from Sekisui's *gross negligence* and that the lost evidence is *relevant* to the issues. The only issue left to the jury was whether to presume that the lost evidence would have been favorable to the Harts.

Zubulake involved a gender discrimination claim by Laura Zubulake, who worked as an equities trader for UBS Warburg, LLC. *Sekisui* is a breach of contract suit by the company which bought American Diagnostica, Inc., from Richard and Marie Hart. Both cases had to deal with claims that relevant emails were destroyed by the adverse party and that the missing emails would have been favorable to the complaining parties. Because Judge Scheindlin is center-stage in both cases and relies heavily on her *Zubulake* thinking in her approach to *Sekisui*, we first take a short stroll down memory lane to the *Zubulake* decisions.

The *Zubulake* decisions were not officially reported, yet found their way to courts far beyond Manhattan, as well as to lawyers and commentators across the country. It was the first treatment of the law of spoliation of ESI to garner such attention and to provide guidance to the Bar. Some would say it sent shockwaves throughout the legal community. In one series of rulings, Judge Scheindlin laid out the rules, defining spoliation and discussing its construct:

> Spoliation is the destruction or significant alteration of evidence or the failure to preserve property for another's use as evidence in pending or reasonably anticipated litigation.[2]

The duty to preserve evidence is the first inquiry. If no duty exists, the party who destroyed documents, cannot be faulted. The duty arises when the party has notice that the evidence is relevant to litigation or otherwise should have known that the evidence may be relevant to future litigation. The boundaries of the duty to preserve involve two related inquires:

- When does the duty to preserve attach?; and
- What evidence must be preserved?[3]

Ms. Zubulake filed an EEOC complaint in August 2001, but UBS may have known the importance of evidence, primarily emails among key executives, as early as April 2001. What should be preserved? Certainly, not every shred of paper, every email, or backup tape must be preserved. The party should preserve what it knows, or reasonably should know, is relevant in the action or a reasonably anticipated action.[4] Once a party reasonably anticipates litigation, it *must* suspend its routine document retention/destruction policy and put a "litigation hold" in place to ensure preservation of relevant documents.[5]

Finally in *Zubulake IV*, Judge Scheindlin described the request by Ms. Zubulake for an adverse inference. Describing its *in terrorem* effect on the adverse party, Judge Scheindlin stated that "the adverse inference instruction is an extreme sanction and should not be given lightly."[6] In this instance, Ms. Zubulake met two of the three requirements for an adverse inference instruction: UBS had a duty to preserve all backup tapes containing emails of key executives; and destroyed them with the requisite degree of culpability. But the third requirement was not met. She could not show that the destroyed evidence would have supported her claims. The request for an adverse inference instruction was therefore denied.[7]

That changed nine months later in *Zubulake V*, after another motion.[8] Judge Scheindlin concluded that UBS had breached its duty to preserve and had acted willfully in destroying potentially relevant information. Thus, the lost information is presumed to be relevant.[9] Judge Scheindlin determined that she would issue a permissive adverse inference instruction allowing, but not requiring, the jury to infer that the spoliated evidence would have been unfavorable to UBS.

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With that background, we turn to Judge Scheindlin's decision in *Sekisui v. Hart*. In *Sekisui*, Judge Scheindlin restates the duty to preserve relevant electronic documents: "At its simplest, that duty requires a party anticipating litigation to refrain from deleting electronically stored information ("ESI") that may be relevant to that litigation."[10] Here, Judge Scheindlin undertakes to determine the proper penalty for a party who – with full knowledge of the likelihood of litigation – "intentionally and permanently destroyed the email files of several key players in this action."[11]

Sekisui America and an affiliate, co-plaintiff Sekisui Medical Co., Ltd., purchased a medical diagnostics products manufacturer, America Diagnostica, Inc., (ADI) from Richard Hart and Marie Louise Trudel-Hart. Mr. Hart was the president of ADI. Sekisui later brought a breach of contract action against the Harts. During discovery in that case, it was revealed that "ESI in the form of email files belonging to certain key ADI employees – including Hart – had been deleted [by Sekisui as new owner] or were otherwise missing." The other key ADI employee whose emails disappeared was Leigh Ayres, the ADI employee responsible for ensuring compliance with FDA regulations. According to the opinion, Sekisui America did not institute a litigation hold on ESI until fifteen months after it sent a Notice of Claim to the Harts. The Harts requested that Judge Scheindlin impose spoliation sanctions, including an adverse inference instruction.[12]

Sekisui's Notice of Claim was served on the Harts on October 14, 2010. It was revealed by counsel for Sekisui that although a litigation hold was put into place in January 2012, fifteen months too late, Mr. Hart's emails were deleted in March 2011, five months after the Notice of Claim was served. Some of the deletion had been performed by an outside vendor at the direction of another ADI employee, Dicey Taylor, head of Human Resources. In October 2011, Taylor also directed the vendor to delete the ESI of FDA compliance employee Leigh Ayers.[13] According to Judge Scheindlin, Taylor's instruction to delete Leigh Ayers's ESI was done with the approval of ADI's then – president, Kevin Morrissey.[14] On these facts, the Harts requested an adverse inference instruction.

Judge Scheindlin referred to the controlling Second Circuit adverse inference case, *Residential Funding Corp. v. DeGeorge Financial Corp.*,[15] for the requirements to impose an adverse inference instruction. Specifically, Judge Scheindlin stated that the party seeking the instruction must establish that –

- The party having control over the evidence had an obligation to preserve it at the time it was destroyed;
- The records were destroyed with a culpable state of mind; and
- The destroyed evidence was relevant to the party's claim or defense such that a reasonable finder of fact could find that it would support its claim or defense.[16]

Here, the obligation to preserve the evidence was established by the gross negligence of Sekisui in the destruction of the files. The culpable state of mind requirement is satisfied by a showing that the evidence was destroyed knowingly, even if without intent to breach a duty, or negligently. The intentional destruction of the relevant records, paper or electronic, after the duty to preserve has attached, was willful. An adverse inference sanction may be appropriate in some cases on the basis of negligence. When the conduct arises to gross negligence or willful conduct, the adverse inference mechanism restores the evidentiary balance, since the result of the destruction of the evidence should fall on the party who destroyed it, not the party seeking it.[17]

The affected party must establish that the destroyed evidence it seeks is relevant – that it would have been helpful to that party. Where evidence is destroyed willfully, that destruction is sufficient to allow the fact finder to conclude the evidence was unfavorable to the destroying party. And a destruction through bad faith or gross negligence may also support a finding that the evidence was unfavorable to the grossly negligent party.[18]

Finally, the adverse inference sanction is not appropriate unless the movant establishes that it has been prejudiced. But when evidence is destroyed willfully or through gross negligence, prejudice to the innocent party may be presumed.[19] The destruction of ESI was willful, as Dicey Taylor directed the outside vendor to delete it. The fact that Dicey may have given the order so as to save space on the server does not change the fact that the ESI was willfully destroyed. As with Hart's ESI, Ayers' ESI was destroyed at the behest of another ADI official, Dicey Taylor, *after the duty to preserve had attached*.[20]

Judge Scheindlin also found a failure on the part of Sekisui to ensure preservation of relevant documents. First, no litigation hold was issued until fifteen months after the Notice of Claim was sent to the Harts, which Judge Scheindlin termed "inexcusable." Second, it took another six months to notify its IT vendor of Sekisui's duty to preserve ESI, during which time the ESI of at least two significant former ADI employees was destroyed. The Judge found that the destruction of the Hart and Ayers ESI was intentional, and the failure to meet basic document preservation obligations constituted gross negligence. Further, it is clear that there is sufficient evidence to conclude that the missing ESI was unfavorable to Sekisui. Sekisui may not profit from its destruction of the evidence, and prejudice to the Harts shall be presumed from the willful destruction.[21]

Accordingly, Judge Scheindlin ruled that she will issue an adverse inference instruction allowing the jury

to presume that the lost evidence would have been favorable to the Harts, telling the jury that they may take into account the egregiousness of Sekisui's conduct in failing to preserve the evidence. In giving that instruction, Judge Scheindlin will include the statement that the court finds as a matter of law that the failures of Sekisui "constitute gross negligence and that the lost evidence is relevant to the issues in this case."[22] The "in terrorem" spoliation charge is set forth *verbatim*.[23]

There is a noteworthy perspective in Judge Scheindlin's recitation. As harsh may be her reputation for the virtual creation of spoliation sanctions in the arena of electronically-stored information, the Judge tells us in a footnote that such sanctions are relatively rare. In over 4,000 cases handled, this is only the third case in which Judge Scheindlin has gone so far as to give an adverse inference instruction based on the spoliation of ESI.[24]

Endnotes

1 *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003) ("Zubulake I"); *Zubulake v. UBS Warburg LLC*, 230 F.R.D. 290 (S.D.N.Y. 2003) ("Zubulake II"); *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280 (S.D.N.Y. 2003) ("Zubulake III"); *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003) ("Zubulake IV"); *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004) ("Zubulake V").
2 Zubulake IV, 220 F.R.D. 212, 216 (internal quotations and citations omitted).
3 *Id.*
4 *Id.* at 216-218.
5 *Id.* at 218.
6 *Id.* at 220.
7 *Id.* at 219-222.
8 *Zubulake v. UBS*, 229 F.R.D. 422 (July 20, 2004) ("Zubulake V").
9 *Id.* at 436.
10 *Sekisui Am. Corp. v. Hart*, 2013 U.S. Dist. LEXIS 115533 at 1, 2013 WL 4116322 (S.D.N.Y. Aug. 15, 2013).
11 *Id.*
12 *Id.* at 2-4.
13 *Id.* at 7.
14. *Id.* at 12.
15. 306 F.3d 99 (2d Cir. 2002).
16. *Sekisui*, at 15-16 (quoting *Residential Funding,* 306 F.3d at 107).
17. *Id.* at 17-18.
18. *Id.* at 21-22 (quoting *Residential Funding,* 306 F.3d at 109).
19. *Id.* at 22.
20. *Id.* at 31.
21. *Id.* at 32-36.
22. *Id.* at 37-39
23. *Id.* at 38-40.
24. *Id.* at 1, fn. 2.

NEW SCHEME, *continued from page 40*

as the average for the activity of its fleet of vehicles;

- Level 3: values calculated by the transportation service provider as the averages for the relevant service from a complete breakdown of its activities, by logistical organization scheme, by means of transportation, by client, or any other appropriate complete breakdown; or
- Level 4: values measured or observed by the transportation service provider during the performance of the service.

It is up to the transportation service provider to determine the duration over which the average values are based but this duration cannot be more than three years.

It should also be noted that Article 8-V of Decree n° 2011-1336 specifically provides that the use of the least accurate level 1 values is only allowed for:

- Transportation service providers having less than 50 employees;
- Transportation service providers having more than 50 employees, but only until July 1st, 2016 (transitional period); and

Transportation service providers which were not provided with information by their subcontractor(s) or those who use new means of transportation.