

SEPTEMBER 17, 2012

What does the Apple-Samsung Discovery/Spoilation Fight Portend for the Rest of Us?

As was widely reported, the parties in the *Apple v. Samsung* litigation (N.D. Cal.) eventually agreed and did not submit evidence destruction issues to the jury after the district court judge was prepared to impose adverse inference instructions against both Apple and Samsung. This was notable due to both the amount of time that went into Apple's initial motion and the notoriety that accompanied Magistrate Grewal's July 24, 2012 order granting Apple's motion for an adverse inference jury instruction.

The bottom line is not sanguine. Samsung and Apple were both impugned and each faces new risks in other contexts where other parties can attack their actions and practices. For other parties, this case further incentivizes litigants to pursue sanctions in other matters because this court was willing to impose significant, case-altering sanctions (such as an adverse inference jury instruction) as a result of discovery miscues.

The initial shoe falls – Magistrate Grewal's Initial Sanctions Order

In its initial motion for spoliation, plaintiff Apple sought an adverse inference jury instruction for spoliation of evidence against defendant Samsung. *Apple Inc. v. Samsung Elecs. Co., LTD. et al.*, Case No.: C 11-1846 LHK (PSG), slip op. at 1 (N.D. Cal. July 24, 2012). At the heart of the motion was Samsung's decision not to suspend the auto-delete function of Samsung's proprietary email system "mySingle" to avoid destruction of documents after the reasonable anticipation of litigation. *Id.*

The court began by noting that "[t]he common law imposes the obligation to preserve evidence from the moment that litigation is reasonably anticipated." *Id.* at 4. "The duty to preserve evidence also 'includes an obligation to identify, locate, and maintain, information that is relevant to specific, predictable, and identifiable litigation'" and "it generally is recognized that when a company or organization has a document retention policy, it 'is obligated to suspend' that policy and 'implement a

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‘litigation hold’ to ensure the preservation of relevant documents after the preservation duty has been triggered.” *Id.* at 5-6 (internal citations omitted).

With respect to the test for granting an adverse inference spoliation instruction, the court stated that a party 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 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 6-7 (internal citations omitted).

Regarding the first element, the court held that Samsung’s preservation obligations began on August 23, 2010, when Samsung initially sent litigation hold notices to a small group of employees shortly after Apple presented its infringement contentions in a meeting with Samsung. *Id.* at 17. The court determined that Apple’s presentation was “more than just a vague hint” and that Apple “delivered, in person, a comprehensive summary of its specific patent infringement claims.” *Id.* at 16. In further support of its holding, the court pointed to the August 23, 2010 litigation hold notice that read, “there is a reasonable likelihood of future patent litigation between Samsung and Apple.” *Id.* at 16 (emphasis removed).

Concerning the second element, the court determined that “bad faith” was not a prerequisite to finding Samsung destroyed evidence with a “culpable state of mind.” *Id.* at 18. The court stated:

All that the court must find is that Samsung acted with a ‘conscious disregard’ of its obligations. In light of its biweekly automatic destruction policy, Samsung had a duty to verify whether its employees were actually complying with the detailed instructions Samsung claims it communicated to them. As far as the court can see, Samsung did nothing in this regard. Samsung failed to send litigation hold notices in August 2010, beyond a select handful of employees, when its duty to preserve relevant evidence arose. Samsung provided no follow-up, and instead waited to send such notices and to follow-up with individual employees for seven more months, after Apple filed its complaint. Again, at all times, Samsung never checked whether even a single Samsung custodian was at all in compliance with the given directives, while at all times the 14-day destruction policy was in place. This is more than sufficient to show willfulness.

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Id. at 18-19 (internal citations omitted).

With respect to the last element, the court noted that in contrast to several key Samsung employees that did not produce a single email or only a few emails, “similarly-situated Samsung employees that use Microsoft Outlook, rather than mySingle, produced many times more. For example, employee Wookyun Kho produced 7,594 emails, and employee Junho Park produced 6,005 emails.” *Id.* at 21. The court concluded that it could not “ignore th[is] statistical contrast” and stated that “Samsung to this day has not suspended its email system’s biweekly automatic destruction policy, even as to key custodians, nor has it presented any evidence that Samsung employees have at all complied with the instructions they were given. The court must conclude that Samsung ‘consciously disregarded’ its obligation to preserve relevant evidence.” *Id.* at 21-22 (internal citations omitted).

Accordingly, the court held that an adverse inference jury instruction against Samsung for spoliation of evidence was in order and summarized its basis for such an instruction as follows:

Samsung’s preservation efforts failed because: (1) Samsung did not [sic] to suspend mySingle’s automatic biweekly destruction policy; (2) Samsung failed to issue sufficiently distributed litigation hold notices after Samsung itself admitted that litigation was ‘reasonably foreseeable,’ and to follow up with the affected employees for seven months as it later showed it knew how to do; and (3) at all times Samsung failed to monitor its employees’ preservation efforts to ensure its employees were at all compliant. In effect, Samsung kept the shredder on long after it should have known about this litigation, and simply trusted its custodial employees to save relevant evidence from it. The stark difference in production from mySingle and Microsoft Outlook custodians makes clear that this plan fell woefully short of the mark.

Id. at 23.

Notably, Samsung separately moved in the summer of 2012 for spoliation sanctions against Apple after Magistrate Grewal granted Apple’s adverse inference in the July 24, 2012 order. Samsung argued that, in light of the magistrate’s findings that preservation obligations arose on August 23, 2010 (before the filing of the case), Apple’s failure to issue a legal hold notice until April 2011 resulted in the loss of evidence. *Apple v. Samsung Elecs. Co. et al.*, Case No.: C 11-1846 LHK, slip op. at 6 (N.D. Cal. Aug. 21,

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2012). The magistrate denied the motion as untimely and Samsung appealed both the granting of the adverse inference and the denial of its own sanctions motion to the case judge. *Id.*

The Samsung Sanction on Appeal: Upheld with Moderation

Judge Koh reviewed the magistrate's order under the "clearly erroneous or contrary to law" standard. The highlights regarding this motion and the resulting order include:

- Samsung challenged the finding that its preservation obligations began on August 23, 2010. However Judge Koh declined to find error with this date, noting "[a]s a general matter, there is no question that the duty to preserve relevant evidence may arise even before litigation is formally commenced." *Apple Inc. v. Samsung Elecs. Co., LTD. et al.*, Case No.: C 11-1846 LHK (PSG), slip op. at 16 (N.D. Cal. Aug. 19, 2012).
- Judge Koh agreed with Magistrate Grewal's finding that Apple's alleged spoliation was not a defense that could "absolve Samsung of its own preservation duty" and further found that there might be grounds for a sanction against Apple. *Id.*
- Ultimately Samsung's efforts to preserve relevant documents were deemed insufficient, with Judge Koh quoting the magistrate's finding that "Samsung to this day has not suspended its email system's biweekly automatic destruction policy, even as to key custodians, nor has it presented any evidence that Samsung employees have at all complied with the instructions they were given." *Id.* at 21-22.

Although the district court judge found that the basis for sanctions was not erroneous, the court's order narrowed the scope and arguably weakened the adverse inference instruction. In particular, Judge Koh narrowed the applicability of the adverse inference to Samsung Electronics Co., Ltd. (the entity with the biweekly process that automatically deleted email) and absolved codefendants Samsung Electronics America, Inc. and Samsung Telecommunications America, LLC because they did not employ a similar email deletion policy.

Further, the judge found insufficient evidence of prejudice against Apple to support the Magistrate's strongly worded adverse inference instruction, modifying the instruction as shown below:

Old Instruction

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Samsung has failed to prevent the destruction of relevant evidence for Apple's use in this litigation. This is known as the "spoliation of evidence." I instruct you, as a matter of law, that Samsung failed to preserve evidence after its duty to preserve arose. This failure resulted from its failure to perform its discovery obligations.

You also may presume that Apple has met its burden of proving the following two elements by a preponderance of the evidence: first, that relevant evidence was destroyed after the duty to preserve arose. Evidence is relevant if it would have clarified a fact at issue in the trial and otherwise would naturally have been introduced into evidence; and second, the lost evidence was favorable to Apple.

Whether this finding is important to you in reaching a verdict in this case is for you to decide. You may choose to find it determinative, somewhat determinative, or not at all determinative in reaching your verdict.

New Instruction

Samsung Electronics Company has failed to preserve evidence for Apple's use in this litigation after its duty to preserve arose. Whether this fact is important to you in reaching a verdict in this case is for you to decide.

A New Shoe Drops: Apple's Sanction

After reversing the magistrate's denial of Samsung's sanctions motion (finding it to have been untimely), Judge Koh considered whether Apple's conduct warranted sanctions in the context of reviewing Magistrate Judge Grewal's denial of such sanctions.

When considering whether Apple destroyed evidence, the court found that, like Samsung, Apple failed to issue litigation hold notices until Apple filed the complaint, eight months after their preservation obligations began. The court further stressed that certain key custodians did not receive a legal hold until months later. *Id.* at 26.

Although Apple did not employ any automatic deletion of email, the court cited evidence that in the routine course of business employees are "encouraged to keep the size of their email accounts below certain limits" and receive automatic notices that they reduce the size of their mailbox. Based on the

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failure to issue a timely legal hold and the potential that employees received encouragement or instruction to manage their mailbox size, the court found “Apple destroyed documents after its duty to preserve had already arisen.” *Id.* at 26.

The court then found that Apple destroyed this evidence with a culpable state of mind, because Apple had greater notice than Samsung of the likelihood of litigation prior to filing the case. Finally, the judge ruled that the documents destroyed were relevant to the matter, supporting this analysis by comparing the number of custodial emails produced by a number of key custodians with the number of non-custodial emails produced for the same defendant and stating that “[i]t is reasonable to infer that documents produced by these key Apple witnesses, who are named inventors on various Apple patents asserted in this suit, would have been relevant to this litigation, and likewise that the destruction of any such documents prejudiced Samsung.” *Id.* at 28.

Based on the above, the court imposed a “mild adverse inference instruction” on Apple, mirroring the language of the revised Samsung instruction.

This development was notable not only for the result but for the speed by which Apple’s problems came to the surface and resulted in similar, potentially case-altering sanctions.

Truce Declared

Only after having the misfortune visited on both sides of the dispute did counsel decide that arguing about evidence spoliation was not in either clients’ best interests. *See* John Paczkowski, *Apple, Samsung Jury Won’t Hear About Missing Evidence*, ALL THINGS D (Aug. 21, 2012), <http://allthingsd.com/20120821/apple-samsung-jury-wont-hear-about-missing-evidence/>.

Take-Aways

The initial and subsequent decisions of the magistrate judge and district court are very informative as to the lines of attack available through preservation and discovery actions—and the judicial receptivity to such challenges to corporate practices. While it is possible that some business-to-business disputes have an element of “mutually agreed destruction” that may chill any desire to raise spoliation issues, it is likely that citations to these decisions will call into question the legal hold and collection practices of

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companies facing U.S. litigation. Moreover, consistent with our observations across the country, we think this case is one of many more such future challenges—especially in cases where individuals (with relatively small amounts of data and no expectation of information management sophistication) are pitted against large organizations. Clients should be vigilant regarding their litigation response practices (including preservation strategies and execution), cautious about throwing proverbial stones in the glass house of discovery conduct, as well as alert to any signs of significant discovery disputes—in order to diffuse and resolve disputes long before the eve of trial.

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