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Proposed Spoliation Rules Would Impact Apple-Samsung Trial

By Henry Kelston

The jury trial in the multibillion dollar patent war between Apple and Samsung Electronics is under way today, but the case has already yielded one of this year's most dramatic e-discovery decisions. On Wednesday, Magistrate Judge Paul Grewal of the U.S. District Court for the Northern District of California ordered an adverse inference jury instruction against Samsung for failure to take adequate steps to prevent the destruction of relevant emails.

The decision, in *Apple, Inc. v. Samsung Electronics Co., Ltd.*, [FOOTNOTE 1] highlights some of the key issues in the continuing debate over the possible need for amendments to the Federal Rules governing e-discovery, in particular: What facts or circumstances are sufficient to demonstrate that spoliation caused prejudice? And what level of culpability of the spoliating party justifies an adverse inference instruction? Proposed amendments from Microsoft, Lawyers for Civil Justice, and other corporate interests would change the law in these areas and likely insulate Samsung from sanctions even though two different federal judges have found the company's conduct sufficiently egregious to warrant adverse inference instructions.

In last week's ruling -- one of a string in which both Samsung and Apple have been sanctioned for discovery failures -- Grewal held that Samsung failed to preserve relevant emails after Apple detailed its infringement claims to Samsung at a meeting in August 2010, seven months before filing its complaint in April 2011. Samsung's duty to preserve relevant documents arose at that time, Grewal wrote, because "a reasonable party in the same circumstances would have reasonably foreseen this suit."

Samsung failed to meet its preservation obligations in three respects, according to the decision. First, the company failed to disable the "auto-delete" function on an in-house email system that automatically deleted all emails after 14 days absent affirmative action by the custodian. Second, although Samsung should have foreseen litigation as of August 2010, it distributed litigation hold instructions to just 27 employees at that time and made no effort to reinforce those instructions or check for compliance by those employees. And third, after issuing hold notices to over 2,700 employees once litigation commenced, Samsung failed to monitor its employees' preservation efforts in any way -- while leaving the email auto-delete function operational.

As a result of these failures, the court found, thousands of relevant emails (including many from key fact witnesses) were destroyed. As Grewal pointedly mentioned in his decision, Samsung was

sanctioned with an adverse inference instruction in a previous case for failing to suspend its email auto-delete system. [FOOTNOTE 2]

Concluding that Samsung acted willfully and "with conscious disregard" of its preservation obligations but that the evidence did not support a finding of bad faith on the company's part, Judge Grewal ordered what he described as a "modest, optional adverse jury instruction," ordering that the jury be instructed that (1) Samsung failed to prevent the destruction of relevant evidence for Apple's use in this litigation; (2) the evidence was destroyed because Samsung failed to meet its discovery obligations; and (3) the jury "may presume" both that the lost evidence would have been used at trial and that it would have been favorable to Apple.

On July 26, Samsung appealed to presiding Judge Lucy Koh for relief from Grewal's order. Among other arguments, Samsung claims that Apple failed to establish that it was prejudiced by the destruction of the emails, and that Grewal erred by instructing the jury that the documents Samsung destroyed were "relevant" in the absence of a finding of bad faith on Samsung's part.

Grewal found that Apple was prejudiced by Samsung's spoliation of evidence based on two circumstantial facts: employees who utilized the email system with the 14-day auto-delete function produced "little or even no relevant documents" whereas employees who used an alternative system with no auto-delete feature produced thousands of documents, and some of the employees whose emails were auto-deleted were senior Samsung employees whose emails "would have been especially probative to the claims at issue in this litigation."

Samsung argues that a finding of prejudice requires a showing that the evidence destroyed was not provided from other sources, and that Grewal erred in finding prejudice "without accounting for the full record before him," specifically the 12 million pages Samsung has produced in discovery from other custodians. Samsung offers no evidence regarding the number of deleted emails that were produced from other sources.

The Federal Rules currently allow courts broad discretion to determine the degree of prejudice, if any, resulting from spoliation and to tailor sanctions to the facts of the case. Courts recognize that, because there is a Catch-22 in requiring a party to demonstrate with certainty that it has been prejudiced by the destruction of evidence that no longer exists, a party claiming prejudice should not be held to "too strict a standard of proof regarding the likely contents" of the unavailable evidence.[FOOTNOTE 3] Courts may infer prejudice based on the absence of documents where circumstances and common sense indicate that the documents should exist and would likely have been relevant to the litigation. [FOOTNOTE 4]In *Mosaid v. Samsung*, the earlier case in which Samsung was sanctioned for failure to preserve emails, the district court wrote: "If a party has notice that evidence is relevant to an action, and either proceeds to destroy that evidence or allows it to be destroyed by failing to take reasonable precautions, common sense dictates that the party is more likely to have been threatened by that evidence. By allowing the spoliation inference in such

circumstances, the Court protects the integrity of its proceedings and the administration of justice." [FOOTNOTE 5] Thus, Grewal's finding that Apple was prejudiced by Samsung's spoliation and his imposition of a permissive adverse inference allowing, but not requiring, the jury to presume that the lost emails would have been favorable to Apple, is in keeping with established case law.

Amendments to the Federal Rules proposed by members of the corporate bar and corporate-funded organizations would restrict judicial discretion in spoliation cases and virtually eliminate the spoliation inference by requiring a party seeking sanctions to prove actual prejudice. The most "moderate" of the proposed amendments would require a party seeking spoliation sanctions to prove that (i) specified information relevant to its claims was lost, (ii) the lost information was material to its claims or defenses, (iii) the loss caused demonstrable prejudice; and (iv) no alternative source exists for the specified information. [FOOTNOTE 6]

Some proposals would go further, allowing sanctions only upon a finding that the missing evidence would be outcome determinative, or that its absence substantially denied the moving party the ability to defend or prosecute its claim. [FOOTNOTE 7] Any of these formulations would likely have allowed Samsung to escape any sanctions for failing to suspend its email auto-delete system even though two different federal judges have found adverse inference jury instructions warranted by that inaction.

Similarly, under proposed Federal Rules amendments, Grewal's finding that Samsung acted with "conscious disregard" of its preservation obligations would have been an insufficient finding of culpability to support the issuance of sanctions. Lawyers for Civil Justice proposes a rule (endorsed by Microsoft and others) that would permit sanctions only if relevant and material information is "willfully destroyed for the purpose of preventing its use in litigation."[FOOTNOTE 8] Others suggest that a party seeking sanctions be required to prove that the adverse party did not act in good faith, or make an affirmative showing of bad faith.[FOOTNOTE 9]

Samsung also argues that its duty to preserve relevant documents did not arise until Apple commenced litigation in April 2011. Grewal found that Apple presented sufficiently specific information about its claims at the August 2010 meeting that Samsung should have reasonably anticipated litigation. Any doubt about that issue, Grewal wrote, was resolved by the litigation hold notice Samsung sent to a handful of employees in August 2010 stating, in relevant part: "there is a reasonable likelihood of future patent litigation between Samsung and Apple unless a business resolution can be reached."

Robert D. Owen, an advocate for radical reform of the e-discovery rules, proposes that the duty to preserve should be triggered not by the reasonable anticipation of litigation, but only upon the actual commencement of litigation (not incidentally, another change that would have prevented Grewal from sanctioning Samsung). In a recent letter to the Advisory Committee on Civil Rules, [FOOTNOTE 10] Owen responded to one common objection to his proposal: "How can we

adopt a commencement-as-trigger rule ... when parties could adopt radically short auto-delete periods and thereby -- without acting intentionally -- allow the deletion of relevant emails?"

Owen listed the reasons why he believes this concern is misplaced, including other legal and regulatory document retention requirements and the increasing accessibility of back-up media. In addition, he wrote, companies have valid operational reasons for retaining relevant information, such as a complete set of email communications, that should alleviate concern that organizations will thwart litigation adversaries by adopting very short auto-delete periods. Owen concluded that any concern about possible spoliation caused by auto-delete systems before litigation commences is "largely a theoretical concern that all but evaporates when viewed in a realistic light."

While the merits of Grewal's decision will be challenged and debated, perhaps e-discovery commentators and observers can at least agree that concerns about the impact of the Federal Rules amendments proposed by Owen, LCJ, and others are neither misplaced nor purely theoretical.

::::FOOTNOTES::::

FN1 11-1846 LHK (PSG), Docket # 895 (N.D. Cal. July 25, 2012)

FN2 *Id*. at 2, citing *Mosaid v. Samsung*, 348 F. Supp. 2d 332, 339 (D.N.J. 2004).

FN3 *See, e.g.*, *Kosher Sports, Inc. v. Queens Ballpark Co., LLC*, 2011 WL 3471508 at *17, *quoting Kronisch v. United States*, 150 F.3d 112, 128 (2d Cir. 1998).

FN4 *See, e.g.*, *Southeastern Mech. Servs., Inc. v. Brody*, 657 F.Supp. 2d 1293, 1300 (M.D. Fla. 2009).

FN5 *Mosaid v. Samsung*, 348 F. Supp. 2d 332, 339 (D.N.J. 2004).

FN6 Lawyers for Civil Justice *et al.*, "The Time is Now: The Urgent Need for Discovery Rule Reforms," submitted to Civil Rules Advisory Committee on Oct. 31, 2011 at 24, available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/CV%20Suggestions%202011/11-CV-E.pdf.

FN7 *Id.* at 6.

FN8 *Id.* at 24.

FN9 Letter from Robert D. Owen to Honorable David G. Campbell, Oct. 24, 2011, available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/DallasMiniConf_Comments/Robert_Owen_Adv_Comm_Submission_final.pdf.

FN10 Letter from Robert D. Owen to Honorable David G. Campbell and Honorable Paul W. Grimm, March 21, 2012, available at available at http://www3.legalholdpro.com/rs/zapproved/images/NYC_PP_ROwen%2520Ltr%2520to%2520Judges%2520Campbell%2520and%2520Grimm.pdf.

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