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'Zubulake Revisited: Six Years Later'

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Published in Law360, New York on January 15, 2010 – Judge Shira A. Scheindlin of the Southern District of New York has issued an important new opinion in Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, 05-Civ. 09016 (S.D.N.Y. Jan. *[15]*, 2010), in which she lays out a framework for courts to assess discovery misconduct and sanctions.

The Jan. *[15]*, 2010 opinion, which Judge Scheindlin titled "Zubulake Revisited: Six Years Later," sanctions 13 plaintiffs for failing to preserve and collect documents.

Though the case did not present any "egregious examples of litigants purposefully destroying evidence," Judge Scheindlin imposed sanctions based on plaintiffs' failure "to timely institute written litigation holds" and their "careless and indifferent collection efforts after the duty to preserve arose." *Slip op.* at 5.

Procedural History and Facts

The plaintiffs are a group of investors who seek to recover losses from the liquidation of two hedge funds. In late 2003, plaintiffs retained counsel, who instructed them to begin collecting documents for use in drafting a complaint. *Id.* at 27-28.

On Feb. 12, 2004, plaintiffs filed their complaint in the Southern District of Florida. *Id.* at 27. Pursuant to the Private Securities Litigation Reform Act, discovery was automatically stayed. *Id.* at 29.

On Oct. 25, 2005, the case was transferred to the Southern District of New York and assigned to Judge Scheindlin. *Id.* at 27. The stay was lifted in 2007, and only at that time did plaintiffs undertake preservation efforts and issue a written document hold. *Id.* at 29*[-30]*.

Once the stay was lifted, discovery began, and plaintiffs produced documents. In October 2007, defendants brought the gaps in plaintiffs' productions to the court's attention. *Id.* at 30.

The court ordered plaintiffs to provide declarations detailing their efforts to preserve and produce documents. *Id.* Defendants were then given the opportunity to depose the declarants. These depositions revealed false and misleading statements in plaintiffs' declarations and additional gaps in their productions. *Id.* at 31-*[33]*.

Defendants moved for sanctions, asking the court to dismiss plaintiffs' complaint. *Id.* at 4.

Judge Scheindlin's Recitation of the Law Governing eDiscovery

In her opinion, Judge Scheindlin provides a framework for courts to follow in assessing discovery misconduct and determining sanctions. She set forth four concepts for a court to consider:

1.) the level of culpability;

2.) the interplay between the duty to preserve and the spoliation of evidence;

3.) which party has the burden of proving that evidence was lost and the resulting consequences of the loss; and

4.) the appropriate remedy for the harm caused by the loss. *Id.* at 6.

Culpability
In determining the level of culpability, Judge Scheindlin borrows the tort concepts of negligence, gross negligence and willfulness. *Id.* at 6-11. These concepts fall along a continuum of unacceptable conduct with increased sanctions being applied as the conduct becomes worse. *Id.* at 6-7.

In the electronic discovery context, Judge Scheindlin notes that, once the duty to preserve attaches, the failure to do any of the following supports a finding of gross negligence:

1.) Issuing a written document hold

2.) Identifying key players and ensuring that their electronic and paper records are preserved

3.) Ceasing the deletion of e-mail

4.) Preserving the records of former employees that are in a party's possession, custody or control

5.) Preserving back-up tapes that are the sole source of relevant information or relate to key players "[, *if the relevant information maintained by those players is not obtainable from readily accessible sources*]" *Id.* at 24*[-25]*.

Duty to Preserve
It is well established that the duty to preserve arises once litigation is reasonably anticipated. *Id.* at 12.

For plaintiffs, this obligation generally arises before the litigation is commenced. *Id.* For defendants, this may or may not be the case, depending on the circumstances. For either side, however, sanctions are appropriate only with respect to documents that are destroyed after the obligation to preserve arises.

Burden of Proof
The burden of proof changes with the sanction being sought. *Id.* at 13. Where the sanction is cost shifting, the inquiry relates more to the conduct of the spoliating party than whether documents were lost or the innocent party was prejudiced. *Id.* at 14.

For more severe sanctions, such as dismissal, preclusion, or the imposition of an adverse inference, the innocent party must also establish that it was prejudiced. *Id.* To establish prejudice, the missing evidence must be more than responsive to a document request; the innocent party must show that "the evidence would have been helpful in proving its claims or defenses." *Id.*

Placing the burden on the innocent party "may seem unfair," but is necessary to prevent litigation from becoming "a 'gotcha' game rather than a full and fair opportunity to air the merits of a dispute." *Id.* at 17.

Sanctions
The range of sanctions includes further discovery, cost shifting, fines, special jury instructions, preclusion, and dismissal/default judgment. *Id.* at 19-20.

Although Judge Scheindlin offers guidance regarding the imposition of sanctions, she observes that "at the end of the day the judgment call of whether to award sanctions is inherently subjective. A court has a 'gut reaction' based on years of experience as to whether a litigant has complied with its discovery obligations and how hard it worked to comply." *Id.* at 23-*[24]*.

Application to Plaintiffs' Conduct

By these standards, the plaintiffs' preservation efforts were deficient. Judge Scheindlin found that plaintiffs' duty to preserve documents arose in April 2003, when the fund manager filed for bankruptcy. *Id.* at 33.

Yet plaintiffs did not issue a document hold until 2007. *Id.* at *[30]*. Because of this, plaintiffs discarded and deleted

documents and some failed to suspend the recycling of backup tapes. *Id.* at 59-61.

Plaintiffs' collection efforts were also deficient. Plaintiffs permitted their employees to collect their own documents and to decide what was responsive without the supervision of counsel. *Id.* at 28.

One plaintiff delegated the collection responsibility to an inexperienced employee who failed to conduct a proper search. *Id.* at *[50-53]*. Other plaintiffs failed to search the files of employees involved with the funds. *Id.* at *[55, 60]*.

Overall, plaintiffs committed numerous mistakes, ranging from more serious errors to more minor infractions. Indeed, the Court faulted one plaintiff for failing to check a Palm Pilot that possibly contained relevant emails. *Id.* at *[73]*.

Plaintiffs' largest mistake, however, was their attempt to hide the problem. In 2007, the court "ordered plaintiffs to provide declarations regarding their efforts to preserve and produce documents." *Id.* at 30.

The declarations were submitted in 2008, and the first sign of trouble arose when plaintiffs had to amend at least four of them. *Id.* at 31*[-32]*. The court also permitted the depositions of the declarants.

These depositions resulted in the discovery of additional gaps in plaintiffs' productions, including at least 311 documents that should have been in plaintiffs' productions (based on a comparison with other productions in the case). *Id.* at 32.

Although defendants obtained these documents from other sources, their absence from plaintiffs' productions indicated that plaintiffs had received or generated other documents "that have not been produced by anyone and are now presumed to be missing." *Id.* at *[35]*.

Significantly, defendants "discovered that almost all of the declarations were false and misleading and/or executed by a declarant without personal knowledge of its contents." *Id.* at 32*[-33]*.

As the court noted, "almost every plaintiff submitted a declaration that — at best — lacked attention to detail, or — at worst — was intentionally vague in an attempt to mislead" defendants and the court. *Id.* at *[38]*.

With respect to one plaintiff, the court observed that the misleading nature of the original declarations could warrant a finding of bad faith. *Id.* at 47*[-48]*. However, the court ultimately concluded this was "merely" gross negligence because the declarations were amended soon after plaintiffs had been notified of the deficiencies. *Id.* at 47.

This effort to conceal the shortcomings of the preservation and collection efforts clearly angered the judge (who noted that the court devoted 300 hours to the motion). *Id.* at *[25]*, n.56.

Defendants sought the most extreme sanction of all — dismissal of plaintiffs' complaint. *Id.* at 20. Judge Scheindlin rejected this, holding that a "terminating sanction is justified in only the most egregious cases, such as where a party has engaged in perjury, tampering with evidence, or intentionally destroying evidence by burning, shredding, or wiping out computer hard drives." *Id. [at 20-21.]*

In the end, the court imposed monetary sanctions on all plaintiffs (reasonable costs associated with reviewing the declarations, deposing the declarants and bringing the motion). *Id.* at 23*[-24].*

With respect to the grossly negligent plaintiffs, the court will instruct the jury that these plaintiffs were grossly negligent in meeting their obligation to preserve evidence and that, as result, "you may presume, if you so choose, that such lost evidence was relevant, and that it would have been favorable" to defendants. *Id.* at *[83]*.

Finally, the court ordered two of the plaintiffs to conduct searches of their backup tapes at their own expense. *Id.* at *[85]*.

Conclusion

This opinion is a must read. Judge Scheindlin is a recognized authority on electronic discovery and she clearly intended to provide a framework for other judges to use in assessing motions for sanctions. We expect her opinion and her framework to be followed widely.

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Post-publication Note

Following the publication of this article, Judge Scheindlin amended her opinion, making two changes of particular importance. First, Judge Scheindlin clarified that a party does not have to preserve all back-up tapes, only those that "are the *sole* source of relevant information (*e.g.*, the active files of key players are no longer available)." *Id.* at 24-25 (emphasis in original). If "accessible data satisfies the requirement to search for and produce relevant information, there is no need to save or search backup tapes." *Id.* at 43 n. 99. Second, Judge Scheindlin noted that employees may collect their own documents in appropriate circumstances, provided that an attorney supervises the document collection effort. *Id.* at 29 n. 68. This means that the attorney must have the ability to conduct a quality control effort, such as spot-checking the collections. *Id.*

We have decided to reflect these changes in the text of the article above. We have changed the date of the opinion, to January 15 to reflect the date of the amended opinion, have added to item 5 on page 2 the following text: ", if the relevant information maintained by those players is not obtainable from readily accessible sources," and amended the citations to match the amended opinion. These changes to the way that the article originally appeared in the Law360 are indicated with square brackets and italics.