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Harsh Sanctions Ruling Signals Federal Courts' Decreasing Tolerance for Insufficient E-Discovery Procedures

Over the past decade, the law governing litigants' obligations to preserve and collect electronic discovery materials has developed substantially. Much of this development was spearheaded by a series of leading decisions issued by federal district judge Shira A. Scheindlin in a long-running litigation known as *Zubulake*.[1] Recently, Judge Scheindlin — in a new ruling that she entitled "*Zubulake* Revisited: Six Years Later" — held that many of document preservation and collection obligations that were first recognized in *Zubulake* and its progeny by now had become so well established that litigants' failure to comply with them warranted severe sanctions, both monetary and substantive. Her ruling, in *Pension Committee of the University of Montreal Pension Plan* v. *Banc of America Securities, LLC* (S.D.N.Y. Jan. 11, 2010), sounds yet another wake-up call to litigants about the seriousness and alacrity with which they must address document preservation and collection once litigation reasonably can be anticipated.

Overview

Pension Committee involved 13 plaintiffs, all of whom were found to be negligent in meeting their e-discovery obligations so as to cause relevant documents to be lost or destroyed. Monetary sanctions were imposed on all 13 of these plaintiffs.

In addition, Judge Scheindlin also found six of these plaintiffs to have been not just negligent but grossly negligent, with the result that these six plaintiffs were additionally subjected to an "adverse inference instruction," under which the jury will be told to presume that the destroyed documents would have harmed the plaintiffs' case had they been available. As Judge Scheindlin earlier stated in *Zubulake IV*, "an adverse inference instruction often ends litigation—it is too difficult a hurdle for the spoliator to overcome."[2] Judge Scheindlin acknowledged that giving an adverse inference instruction was a severe sanction, but concluded it was nevertheless warranted in this case because these six plaintiffs' failures to comply with their *Zubulake* obligations were so pervasive as to amount to gross negligence.

While determining whether particular parties' e-discovery failures were the product of ordinary negligence or gross negligence is ultimately a "judgment call" that "cannot be measured with exactitude and might be called differently by a different judge," Judge Scheindlin asserted that "[a]fter a discovery duty is well established, the failure to adhere to contemporary standards can be considered gross negligence," thus warranting imposition of the adverse inference instruction as a sanction.

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1 *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003) (*Zubulake I*); 230 F.R.D. 290 (*Zubulake II*); 216 F.R.D. 280 (*Zubulake III*); 220 F.R.D. 212 (*Zubulake IV*); 229 F.R.D. 422 (S.D.N.Y. 2004) (*Zubulake V*).

2 220 F.R.D. 212, 219 (S.D.N.Y. 2003).

E-Discovery Failings that Amount to Gross Negligence

The court identified the following e-discovery failures as sufficient to show gross negligence:

1. *Failure "to issue a written litigation hold" at the time when the duty to preserve documents first attached*

Despite the well-settled law that the duty to preserve evidence arises from the time that a party reasonably anticipates litigation, the plaintiffs in *Pension Committee* made no effort to preserve and collect relevant documents until they retained joint counsel. The court observed that the sophisticated plaintiffs in *Pension Committee* were presumptively aware of prospective litigation six months before joint counsel's retention, and 10 months before the action was filed, and that their duty to preserve had arisen at that time.

Moreover, the joint counsel's communications with plaintiffs were held insufficient to constitute an adequate litigation hold because:

- The communications did not direct the preservation of documents or instruct plaintiffs not to destroy records;
- The communications gave employees the discretion to search and select relevant documents without supervision; and
- The communications did not create a mechanism for collection and production of documents.

2. *Failure "to identify the key players and to ensure that their electronic and paper records are preserved"*

The Court found that five of the six plaintiffs found grossly negligent had excessively limited the group of individuals from whom documents were preserved and collected. The Court in particular noted these plaintiffs' failure to have requested documents:

- from individuals who, while not the central actors, were nevertheless involved in the matter that was the subject of litigation;
- from individuals who were in a supervisory position, such as members of a Board of Trustees; and
- from individuals to whom certain work may have been delegated.

3. *Failure "to cease the deletion of email or to preserve the records of former employees . . . and to preserve backup tapes when they are the sole source of relevant information or relate to key players"*

The Court held that the duty to preserve backup tapes in situations where those tapes relate to key players, or are the only source of relevant information, was sufficiently well-established that failure to comply with this duty supported a finding of gross negligence for a plaintiff who acknowledged failing to preserve a tape with such relevant information.

4. *Failure "to sufficiently supervise or monitor their employees' document collection"*

The Court noted repeatedly that the failures described above were accompanied by a lack of effective supervision of whatever efforts the plaintiffs' employees' were making as to document preservation and collection.

- Some plaintiffs provided their employees no supervision at all.
- Other plaintiffs delegated the document preservation and collection to inexperienced employees.
- Indeed, one assigned its document preservation obligations to an employee who "had no experience conducting searches, received no instruction on how to do so, had no supervision during the collection, and no contact with Counsel during the search."

Not surprisingly, the document preservation and collection efforts that resulted were deficient. The failure to provide the necessary effective supervision was all the more regrettable because such supervision might well have allowed the plaintiffs to avoid the mistakes described above and the Court's subsequent imposition of sanctions.

E-Discovery Failings that Amount to Ordinary Negligence

In addition to the problems noted above, the Court found that less sweeping failures to satisfy established standards could constitute ordinary negligence that warrant a lesser degree of sanctions, such as monetary sanctions only. For example, there were seven plaintiffs whose searches for relevant electronic documents proved deficient because subsequent evidence revealed that not all relevant files and e-mails had been included in the search. The Court held these plaintiffs to be negligent, observing that a lack of effective supervision resulted in inadequate preservation and production procedures, albeit to a much smaller degree than with the grossly negligent plaintiffs, such that monetary sanctions alone where held to be the appropriate judicial response.

Conclusion

This recent opinion by a leading judge in the area of e-discovery obligations serves as a stark reminder of the perils faced by litigants when they and/or their counsel do not devote sufficient attention to preserving, collecting and producing relevant electronic documents and to determining when those obligations take effect in a particular case. The days are long past, if they ever existed, when parties could provide their employees with a general instruction not to destroy or discard documents relating to a particular party or dispute and hope for the best. Active and specific supervision, including supervision by counsel, is critical to doing the job that courts expect of litigants in disputes today. *Pension Committee* makes clear that the price of failing to meet these standards has gone way up indeed.

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