LITIGATION ALERT

HOGAN & HARTSON

Zubulake Revisited

Judges rarely, if ever, title their opinions as an author would title a book. When Federal District Judge Shira Scheindlin of the Southern District of New York titles an opinion *"Zubulake Revisited: Six Years Later,"* it is bound to be noticed.

In 2003-04, Judge Scheindlin almost single-handedly put e-discovery at the forefront of the legal landscape through her now-legendary *Zubulake* opinions which defined parties' duties to (1) issue written litigation holds once litigation is reasonably foreseeable, and (2) preserve and produce electronically stored information to the same extent as required for paper discovery.

On January 11, 2010, Judge Scheindlin issued her eighty-five page opinion—entitled *Zubulake Revisited: Six Years Later*. The case reminds plaintiffs and defendants alike of the critical importance of proper preservation and competent retrieval of electronically stored information. *Pension Committee of the University of Montreal Pension Plan v. Banc of America Secs., LLC, et al. ("Pension Committee")* addresses what sanctions are appropriate for various degrees of failure to retain and collect documents. The holding amplifies the duties that *Zubulake* first trumpeted, and sounds a loud warning to those guilty of "ignorant" or "indifferent" compliance.

Pension Committee is one of the rare cases where plaintiffs, who here seek to recover losses of $550 million stemming from the demise of two hedge funds, are on the wrong end of the e-discovery challenges. After carefully comparing document productions of thirteen plaintiffs who had acted in concert early on in monitoring their investments, the defendants found numerous "gaps" in production and moved for sanctions alleging that these plaintiffs had failed to preserve and produce electronically stored information.

"By now," Judge Scheindlin began, "it should be abundantly clear that the duty to preserve means what it says and that a failure to preserve records – paper or electronic – and to search in the right places for those records, will inevitably result in the spoliation of evidence."

The opinion then, for the first time in the context of discovery, analyzed the producing party's level of culpability on a continuum from negligence, to gross negligence, then to willfulness or bad faith, and discussed the various sanctions appropriate along the continuum.

The court held that the "failure to collect records – either paper or electronic – from key players constitutes gross negligence or willfulness as does the destruction of email or backup tapes after the duty to preserve has attached." Similarly, the failure to issue "a *written* litigation hold" constitutes "gross negligence because that failure is likely to result in the destruction of relevant information." On the lesser end of the spectrum, "the failure to obtain records from *all* employees (some of whom may have had only a passing encounter with the issues in the litigation), as opposed to key players, likely constitutes negligence." Of course, intentional destruction of either

HOGAN & HARTSON

paper or electronic records by "burning, shredding, or wiping out computer hard drives" is always willful and will justify the most severe sanction.

A broad array of sanctions is possible, including dismissal (terminating sanctions), preclusion of evidence, the imposition of an adverse-inference instruction (permitting the jury to presume that lost evidence was relevant and would have been favorable to the other side), or the award of costs. But in determining what sanction is appropriate, courts must not only evaluate the conduct of the accused (or "spoliating party"), but also whether the missing evidence sought was *relevant* and whether the moving ("innocent") party was *prejudiced* by the loss of evidence.

There will be a rebuttable presumption of relevance and prejudice when the spoliating party acted in bad faith or in a grossly negligent manner because a finder of fact could conclude that the missing evidence was unfavorable to that party. If, however, the spoliating party was only negligent, the burden would be on the innocent party to prove both relevance and prejudice to justify the court's imposition of severe sanctions. Any presumptions will be rebuttable because the spoliating party should have the opportunity to show that the innocent party was not prejudiced. Otherwise, every litigation would become a "gotcha" game where the incentive to find and capitalize on errors would be overwhelming.

Pension Committee was not a case about "litigants purposefully destroying evidence;" but one where the plaintiffs failed to timely institute "written litigation holds and engaged in careless and indifferent collection efforts after the duty to preserve arose," resulting in the obvious loss or destruction of documents. As to each of the thirteen plaintiffs, Judge Scheindlin analyzed the specific measures they had taken to preserve and collect documents, then meted out sanctions—including an adverse-inference instruction,[1] monetary sanctions, and further production requirements—depending on each party's specific degree of culpability.

As the court was careful to acknowledge, each case will be different and the same case might even be decided differently by two different judges. Litigants, however, should take special note of the following issues that were some of the key factors in this decision:

- Issue written litigation-hold notices. Failure to issue a timely *written* litigation hold can now be considered gross negligence, leading to a rebuttable presumption that relevant documents were not produced to the prejudice of the other side.

- Hold notices must include preservation. A written instruction to employees merely to identify or collect documents does not constitute a litigation hold. The hold should include an instruction to *preserve* and not destroy the information as well as establish a means to *collect* the preserved records so that the documents can be searched by someone *other than* the employee.

---

[1] Notably, in her opinion known as *Zubulake IV,* Judge Scheindlin essentially acknowledged that an adverse-inference instruction can be the kiss of death. "In practice, an adverse inference instruction often ends litigation – it is too difficult a hurdle for the spoliator to overcome. The *in terrorem* effect of an adverse inference is obvious. When a jury is instructed that it may 'infer that the party who destroyed potentially relevant evidence did so 'out of a realization that the [evidence was] unfavorable,' ' the party suffering this instruction will be hard-pressed to prevail on the merits. Accordingly, the adverse inference instruction is an extreme sanction and should not be given lightly." *Zubulake v. UBS Warberg, LLC,* 220 F.R.D. 212, 219-20 (S.D.N.Y. June 20, 2004).

HOGAN & HARTSON

- Stay of discovery does not alleviate preservation requirements. Even in cases where discovery is suspended until procedural hurdles are satisfied (for example, until after resolution of a motion to dismiss under the Private Securities Litigation Reform Act), litigation holds and preservation must still be addressed at the outset and maintained. A stay of discovery will not be a valid excuse for lost information.

- Consider what documents should exist when finalizing production. Courts may be influenced by the lack of production in situations where records *should* exist. In *Pension Committee*, the court found that plaintiffs had a fiduciary duty to conduct due diligence before making their investment decisions, and the "paucity" of records produced by some plaintiffs documenting their investments led "inexorably" to the conclusion that relevant records were lost or destroyed.

- Address backup tape preservation early. Failure to preserve backup tapes, as in *Zubulake*, was a significant factor in sanctioning certain plaintiffs in *Pension Committee*. Very early in litigation, parties should address whether it is necessary and appropriate to preserve backup materials and suspend any backup-tape recycling.

- Evaluate all potential custodians, not just key players. Although sanctions may be less severe for failure to preserve and search information from marginally involved personnel, early identification and preservation of records from not only key players, but *all* custodians with potentially relevant information, is important.

- Not always acceptable for custodians to do their own searches and collections. Search and retrieval of information must be done by capable personnel who are properly supervised. Several of the plaintiffs in *Pension Committee* had delegated the responsibility to assistants and others who were unfamiliar with the key players or company email systems. Others permitted the key players to search their own files without supervision from management or counsel. Judge Scheindlin cites both situations in support of the imposition of sanctions.

- Do not forget PDAs and other places where data reside. In *Pension Committee* one of the plaintiffs was sanctioned in part because the chief executive's "palm pilot" was never searched.

- Be thorough. At least one of the plaintiffs only searched one sub-file on the company's server, without checking electronic files of each employee to confirm that the search was complete. Again, this supported the imposition of sanctions.

Judge Scheindlin concluded her opinion by stating that "[w]hile litigants are not required to execute document productions with absolute precision, at a minimum they must act diligently and search thoroughly at the time they reasonably anticipate litigation." *Pension Committee* will likely become another of Judge Scheindlin's seminal e-discovery opinions about which parties to litigation must be aware. **To view the complete opinion, please click here.**

If you have any questions regarding this Litigation Alert, please contact any Hogan & Hartson attorney with whom you regularly work or one of the authors listed below.

ALVIN F. LINDSAY
aflindsay@hhlaw.com
305.459.6633
Miami

ALLISON C. STANTON
acstanton@hhlaw.com
202.637.8893
Washington, D.C.