Zubulake Revisited: New E-Discovery Opinion Clarifies Preservation Obligations and Standards for Award of Sanctions

January 20, 2010

In *Pension Committee of the Univ. of Montreal Pension Plan, et al., v. Banc of America Securities, LLC, et al.* (Case No. 05-9016, S.D.N.Y. Jan. 11, 2010) *("Pension Committee"),* Judge Scheindlin, author of the influential *Zubulake* opinions on e-discovery, issued an admittedly "long and complicated" opinion granting sanctions against 13 plaintiffs for, among other reasons, their failure to "timely institute written litigation holds and [for engaging] in careless and indifferent collection efforts after the duty to preserve arose." *Id.* at 5. The 87-page opinion, titled "*Zubulake* Revisited," explores in detail the analysis of sanctions motions and, in the process, offers Judge Scheindlin's insight into the steps a party must take to satisfy discovery obligations. Given the influence of the *Zubulake* opinions, litigants should carefully consider *Pension Committee* and their e-discovery practices.

Background

Judge Scheindlin noted that "[e]ach case will turn on its own facts and the varieties of [e-discovery] efforts and failures is infinite," (*Id.* at 10), and stressed that "the judgment call of whether to award sanctions is inherently subjective." (*Id.* at 23). She further emphasized:

> "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. . .[and] while it would be helpful to develop a list of relevant criteria a court should review in evaluating discovery conduct, these inquiries are inherently fact intensive and must be reviewed case by case." (*Id.* at 23-24).

The plaintiffs in *Pension Committee* were a group of 96 investors who sought to recover losses of $550 million stemming from the liquidation of two British Virgin Islands-based hedge funds in which they held shares. The plaintiffs asserted various claims against former directors, administrators and others associated with the funds. *Id.* at 2-3.

During discovery, the defendants noticed substantial holes in 13 of the plaintiffs' document productions, and the Court ordered depositions and the submission of declarations regarding the plaintiffs' preservation practices. Each plaintiff's declaration stated that it had "located, preserved and produced all" relevant documents in its possession. *Id.* at 31. However, at the follow-up depositions, it became apparent 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.

The Court sanctioned all 13 plaintiffs, finding they had failed to "act diligently and search thoroughly [for documents] at the time they reasonably anticipate[d] litigation." *Id.* at 85. The court awarded monetary sanctions against all 13 plaintiffs and ordered some to search through available (yet never searched) data sources.

The Court also found six of the plaintiffs "grossly negligent" because they "fail[ed] to institute a timely written litigation hold, [failed] to collect or preserve *any* electronic documents prior to 2007, continued to delete electronic documents after the duty to preserve arose, did not request documents from key players, delegated search efforts without any supervision from management, destroyed backup data potentially containing responsive documents of key players, and/or submitted misleading or inaccurate declarations." *Id.* at 42. The Court ordered that the jury would be given an adverse inference instruction as to those plaintiffs.

Presumption of Relevance and Prejudice

Judge Scheindlin applied a novel framework in determining whether and which sanctions are appropriate for spoliation. The

Court held that in order to award a "severe" sanction for spoliation (such as an adverse inference, preclusion or termination), a court must find that:

- the spoliating party had control over the evidence and an obligation to preserve it at the time of destruction or loss;
- the spoliating party acted with a culpable state of mind upon destroying or losing the evidence; and
- the missing evidence is relevant to the innocent party's claim or defense and he or she is prejudiced by the loss or destruction.

Id. at 15.

The Court noted that the third element, relevance and prejudice, can be difficult to show as it requires analyzing the content of documents that had been lost or destroyed. As a result, Judge Scheindlin held that relevance and prejudice may, but need not, be presumed when the spoliating party acted with bad faith or gross negligence. *Id.* Thus, if bad faith or gross negligence are found, the court may direct the jury to presume relevance and prejudice (a "mandatory presumption") or else the court may permit the jury to analyze the spoliating party's conduct and decide for itself whether or not to presume relevance and prejudice (a "spoliation charge"). *Id.* at 22-23.

However, if the spoliating party was merely negligent, there is no presumption and the innocent party must prove both relevance and prejudice in order to justify a severe sanction. *Id.* at 15-16. Therefore, an important part of the inquiry turns on the spoliating party's level of culpability.

Measuring Culpability

Although each case must be evaluated based on its own facts, the Court attempted to provide guidance on how to measure the culpability of a spoliating party and, specifically, what behavior constitutes gross, as opposed to mere, negligence.

Negligence

The Court held that the failure to follow the standards of acceptable discovery conduct may constitute negligence, even if done with "a pure heart and an empty head." *Id.* at 8. For instance, the Court held that "[a] failure to preserve evidence resulting in the loss or destruction of relevant information is surely negligent," as is "the failure to obtain records from all [relevant] employees" or to properly assess the validity and accuracy of selected search terms. *Id.* at 10-11.

Though this may seem like a low bar, it is worth noting that a showing of negligence is not enough for the court to presume relevance and prejudice, so a merely negligent party may only be sanctioned if the innocent party is able to demonstrate that he or she was in fact prejudiced by the loss of relevant documents.

Gross Negligence

Gross negligence, the Court held, differs from negligence only in degree, not kind. *Id.* at 8. The Court held that after a discovery duty has been well-established, the failure to adhere to the contemporary standards can be considered gross negligence. The Court then offered by way of example that after the July 2004 *Zubulake* opinion, the following could constitute gross negligence:

- The failure to issue a *written* litigation hold;
- The failure to collect documents from key players;
- The failure to collect documents of relevant former employees that remain in the party's possession, custody or control after the duty to preserve has attached; and
- The failure to preserve backup tapes when they are the sole source of relevant information or relate to key players.

Id. at 24.

According to Judge Scheindlin, if the court finds that a party has committed any of these acts, then it can presume that the lost or destroyed documents were relevant to the innocent party's claims or defenses, and that the innocent party was

prejudiced by their loss.

Willfulness

Judge Scheindlin defined willfulness as “intentional or reckless conduct that is so unreasonable that harm is highly likely to occur.” *Id.* at 7. In such cases, the “actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences.” *Id.* at 8. As an example, the Court cited the “intentional destruction of relevant records, either paper or electronic, after the duty to preserve has attached.” *Id.* at 9. If willfulness is found, the court may direct the jury that “certain facts are deemed admitted and accepted as true.” *Id.* at 21.

A Novel Burden-Shifting Test

Under the Court’s framework, simply because a spoliating party has committed gross negligence, it does not automatically follow that the court will issue a severe sanction. Judge Scheindlin proposed a new burden-shifting test, whereby a grossly negligent spoliating party can rebut the presumptions of relevance and prejudice.

In order to do so, the spoliating party must show that “the innocent party had access to the evidence alleged to have been destroyed or that the evidence would not support the innocent party’s claims or defenses.” *Id.* at 18. If the spoliating party is able to show that there was no prejudice or relevance, a severe sanction (such as an adverse inference) is not warranted, though a lesser sanction could still be imposed. *Id.* Finally, note that the opportunity to rebut the presumptions shall apply both where the jury is directed to presume relevance and prejudice, and also to those instances where the court allows the jury to analyze the conduct of the spoliating party and decide for itself whether to make the presumptions.

Conclusions

Although the Court’s analysis may, at first blush, appear to establish burdensome (perhaps unrealistic) e-discovery standards — particularly for complex cases involving many custodians and data sources — its holdings must be viewed in the proper context. First, of the 96 plaintiffs, only 13 were sanctioned, and of them only 6 were given the severe sanction of an adverse inference instruction. Second, the Court concluded that the conduct of those six plaintiffs was particularly troubling, as they: failed to issue timely litigation holds; failed to collect or preserve *any* electronic documents for several years; continued to actively delete electronic documents; and issued false declarations about what they had done. Third, the Court did not address how a party’s diligence in disclosing and/or remedying the preservation issue impacts the analysis, as it appears that none of the sanctioned parties owned up to their failures or attempted to fix them. It may be that Judge Scheindlin may have had a different “gut feeling” if the alleged spoliators acted more transparently.

In sum, although the Court accepted that mistakes may be made in good faith, and that “[c]ourts cannot and do not expect that any party can meet a standard of perfection,” *Id.* at 2, *Pension Committee* reemphasizes that parties and their counsel need to take the duties of document preservation, collection and production seriously. The penalties can be harsh and, as Judge Scheindlin noted, sanctions motions are “very, very time consuming, distracting and expensive for the parties and the court” and that litigants are increasingly seeking them is “not a good thing.” *Id.* at 24-25.

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