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Zubulake Judge Defines Discovery Duties and Spoliation Negligence Standards

January 29, 2010

In an amended order subheaded "*Zubulake* Revisited: Six Years Later," Judge Shira A. Scheindlin (SDNY), author of the seminal *Zubulake* opinions, outlines the standards of conduct expected of litigants and counsel engaged in discovery. The order provides a framework for analyzing discovery misconduct that is likely to become a standard point of reference for courts addressing spoliation issues.

Scheindlin defines negligence, gross negligence, and willfulness in the context of discovery misconduct, identifies four concepts for consideration when assessing whether sanctions are required, and specifies the types of misconduct that will lead to sanctions.

Pension Committee Facts

The case itself, *The Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities*, 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010), was playing out at the time when the *Zubulake* opinions were being issued. Originally filed in Florida in February 2004, plaintiffs were 96 sophisticated investors seeking to recover $550 million from two liquidated offshore hedge funds. During 2003, investors formed a committee and some retained counsel. In fall 2003, they collectively retained lead counsel who called and emailed investors about collecting records, including email and electronic documents, to assist with preparing the complaint. There was no formal written hold or instruction to retain all relevant information, and the investors were left unsupervised to search for and select responsive records. Discovery was stayed from 2004 until 2007; in 2005. the case was transferred to SDNY.

In May 2007, a group known as "the Citco defendants" issued document requests. Depositions beginning in August revealed substantial gaps in certain investors' productions and in October, the court ordered discovery regarding the investors' preservation, collection, and production efforts in 2003-2004 and 2007-2008. With this information and by cross-referencing the investors' various productions, the Citco defendants identified more than 300 missing emails from the productions of 13 investors. Alleging that they failed to preserve and produce electronically stored information (ESI) and documents and then submitted false and misleading declarations, the Citco defendants moved for dismissal against the 13 investors.

Analytical Framework for Discovery Misconduct

Noting that this was not a case of purposeful destruction, Scheindlin analyzes whether the conduct that led to the loss of records—specifically, failure to instigate timely, written litigation holds and "careless and indifferent collection efforts after the duty to preserve arose"—merited sanctions. This analysis involves four concepts: the level of culpability; the interplay between the duty to preserve and the spoliation of evidence; who should bear the burden of proving that the conduct led to the loss of evidence; and the appropriate remedy.

Scheindlin notes that negligence, gross negligence, and willfulness form a continuum: "Conduct is either acceptable or unacceptable. Once it is unacceptable the only question is how bad is the conduct." Under the standard definitions, negligence involves conduct that creates an unreasonable risk of harm to others; gross negligence is the failure to exercise even that care which a careless person would use; and willfulness is "intentional or reckless conduct so unreasonable that harm is highly likely to occur." Although the assessment is subjective, the standard of acceptable discovery conduct has emerged from years of judicial determinations; failure to meet these standards "may be negligent even if it results from a pure heart and an empty hand."

Scheindlin takes a chronological tour through the phases of discovery starting with the first step, the duty to preserve relevant information once litigation is reasonably anticipated: "A failure to preserve evidence resulting in the loss or destruction of relevant information is surely negligent, and, depending on the circumstances, may be grossly negligent or willful." Certainly, after July 2004 with the issuance of *Zubulake* opinions IV and V, "the failure to issue a *written* litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information."

In the collection and review phases, "depending on the extent of the failure to collect evidence, or the sloppiness of the review, the resulting loss or destruction of evidence is surely negligent, and, depending on the circumstances may be grossly negligent or willful." Noting that each assessment is fact bound and that the variety of efforts and failures is infinite, Scheindlin provides a nondefinitive list of examples:

> [T]he failure to collect records—either paper or electronic—from key players constitutes gross negligence or willfulness as does the destruction of email or certain backup tapes after the duty to preserve has attached. By contrast, 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 as opposed to a higher degree of culpability. Similarly, the failure to take all appropriate measures to preserve ESI likely falls in the negligence category.

On the interplay between the duty to preserve and spoliation, Scheindlin reiterates that the duty arises when a party reasonably anticipates litigation and that case law makes it "crystal clear" that breaching this duty may be sanctionable. Because plaintiffs largely control the timing of litigation, their duty is usually triggered before litigation commences.

Spoliation Sanctions—Burdens of Proof

The burden of proving the loss of evidence and its consequences differs depending on the severity of the sanction. Sanctions range from least to most harsh, as follows: "further discovery, cost shifting,

fines, special jury instructions, preclusion, and the entry of default judgment or dismissal (terminating sanctions)." For less severe sanctions "the inquiry focuses more on the conduct of the spoliating party than on whether documents were lost, and if so, whether those documents were relevant and resulted in prejudice to the innocent party." For more severe sanctions, the court considers the spoliating party's conduct, whether the lost evidence was relevant, and whether the innocent party suffered prejudice as a result of the loss.

An innocent party must prove that the spoliator "(1) had control over the evidence and an obligation to preserve it at the time of destruction or loss; (2) acted with a culpable state of mind upon destroying or losing the evidence; and that (3) the missing evidence is relevant to the innocent party's claim or defense." To ensure that the burden is appropriate: "When the spoliating party's conduct is sufficiently egregious to justify a court's *imposition* of a presumption of relevance and prejudice, or when the spoliating party's conduct warrants *permitting* the jury to make such a presumption, the burden then shifts to the spoliating party to rebut that presumption." Jury instructions vary in degree: "the more egregious the conduct, the more harsh the instruction." Where a spoliating party acted willfully or in bad faith, "a jury can be instructed that certain facts are deemed admitted and must be accepted as true." For willful or reckless conduct, the court may impose a mandatory but rebuttable presumption.

Once spoliation is established, the court determines what, if any, sanction is appropriate, imposing the least harsh sanction that (1) deters parties from engaging in spoliation; (2) places the risk of an erroneous judgment on the party that wrongfully created the risk; and (3) restores the prejudiced party to the same position it would have been in absent the wrongful destruction of evidence.

Analysis Applied to *Pension Committee*

Applying this analysis to the investors' discovery efforts, the court found that they had a duty to preserve by April 2003. Although issuing a written litigation hold was not a firmly established duty then, the duty to preserve clearly encompassed electronic records. Lead counsel's initial instructions and subsequent status memoranda did not meet the standard for a litigation hold: employees were not directed "to *preserve* all relevant records—both paper and electronic" nor was there "a mechanism for *collecting* the preserved records" for searching and monitoring by someone other than the employee.

The burden then fell to the Citco defendants to show that documents were destroyed after the duty to preserve arose. In addition to identifying specific documents missing from productions, defendants asked the court to assume that investors received and generated additional documents that were not produced by anyone and should be presumed missing. The court rejected the investors' argument that this was "absurd" and required "rank speculation", stating, "Surely records must have existed documenting the due diligence, investments, and subsequent monitoring of these investments." The paucity of some productions and the "admitted failure to preserve some records or search at all for others . . . leads inexorably to the conclusion that relevant records have been lost or destroyed."

Without evidence of egregious conduct (such as perjury or intentional destruction, for example, "burning, shredding, or wiping out computer hard drives"), the court declined to grant dismissal. The court found that some investors were grossly negligent and others negligent. For those who were grossly negligent, because the Citco defendants sufficiently proved failure to produce and resulting prejudice, "a jury will be permitted to presume, if it so chooses, both the relevance of the missing documents and resulting prejudice," subject to the investors' rebuttal. Monetary sanctions were imposed on all investors to compensate the Citco defendants for reviewing declarations, taking

additional depositions, and bringing the motion. In addition, certain investors were ordered to search backup tapes or demonstrate why this could not be done. The court noted that the missing documents were likely destroyed before the case was transferred to SDNY in 2005, but that if the Citco defendants had proved that spoliation occurred after 2005, "[t]he severity of this misconduct would have justified severe sanctions."

Conclusion

Scheindlin provides three final notes. First, 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." Second, these inquiries are inherently fact intensive and must be reviewed case by case. Nevertheless, Scheindlin offers the following guidance:

> After a discovery duty is well established, the failure to adhere to contemporary standards can be considered gross negligence. Thus, after the final relevant *Zubulake* opinion in July, 2004, the following failures support a finding of gross negligence, when the duty to preserve has attached: to issue a written litigation hold; to identify all of the key players and to ensure that their electronic and paper records are preserved; to cease the deletion of email or to preserve the records of former employees that are in a party's possession, custody, or control; and to preserve backup tapes when they 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.

And third, because of the increasing risk that litigants will seek sanctions, courts should give "most careful consideration" before finding that a party has violated its discovery duties. Parties should "anticipate and undertake document preservation with the most serious and thorough care, if for no other reason than to avoid the detour of sanctions."

Scheindlin's roadmap sets high standards and provides concrete guidance on the actions expected of litigants and counsel at each stage of the discovery process. "While 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."

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