Revisiting *Zubulake*: Discovery Guidelines to Follow

By Robert E. Singleton

Pension Committee of the University of Montreal Pension Plan, et al. v. Banc of America Securities, LLC, et al.[1] is a securities action brought by 96 investor plaintiffs to recover losses of approximately US$550 million as a result of the collapse of two British Virgin Island-based hedge funds, Lancer Offshore, Inc. and OmniFund Ltd. While Judge Shira A. Scheindlin's January 2010 decision in the case[2] does not break new ground in the e-discovery world, it does expand upon Judge Scheindlin's seminal *Zubulake* opinions profoundly impacting the e-discovery practices of parties and their counsel. The opinion, titled "*Zubulake* Revisited: Six Years Later," details obligations every litigant has in preserving and collecting all potentially relevant data, both electronic and paper, once litigation is reasonably anticipated. The opinion also provides an analytical framework regarding the standard of acceptable conduct in preserving and collecting relevant data and consequences a party may face for failing to comply with the standard of acceptable conduct.

During discovery in *Pension Committee*, defendants found substantial gaps in the plaintiffs' document productions, resulting in discovery-related depositions and declarations.[3] Judge Scheindlin was thus "compelled to closely review the discovery efforts of parties in a litigation."[4] The judge's frustration at having to once again address preservation and collection issues is apparent in the introductory statement that "[b]y now, 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 the right places for those records, will inevitably result in the spoliation of evidence."[5] This paper identifies key points from the *Pension Committee* opinion that should be observed to avoid being sanctioned for failing to meet the standard of acceptable conduct.

Standard of Acceptable Conduct

As detailed in the opinion (and below), the standard of acceptable conduct in the discovery context has been "set by years of judicial decisions analyzing allegations of misconduct and reaching a determination

[1] Case No. 05 Civ. 9016 (S.D.N.Y. January 15, 2010).

[2] It should be noted that sanctions for discovery violations were sought against only 13 of the 96 plaintiffs.

[3] *Pension Committee* at 4.

[4] *Id.* at 2.

[5] *Id.*

as to what a party must do to meet its obligations to participate meaningfully and fairly in the discovery phase of a judicial proceeding."[6] Intent is not a factor. Indeed, "failure to conform to this standard is negligent even if it results from a pure heart and an empty head."[7]

The degree of negligence (e.g., negligence, gross negligence or willful misconduct) is determined by the circumstances surrounding the failure to comply with the standard of acceptable conduct. For example, the opinion makes clear that since at least July 2004, when the court issued the final relevant *Zubulake* opinion, a party's failure to issue a **written** litigation hold constitutes gross negligence.[8] The opinion repeatedly emphasizes that the litigation hold must be in writing.

Similarly, one party's failure to timely issue a written litigation hold was characterized as gross negligence.[9] A party's failure to collect records, both paper and electronic, from **key custodians** is noted as another example of gross negligence.[10] Perhaps more disconcerting, however, is the judge's position that "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."[11] Given prior decisions, including the *Zubulake* decisions, it is unlikely that the court meant to imply that a company was obligated to collect documents from all employees, even those with no relevance to the pending litigation.[12]

Burden of Proof

The *Pension Committee* opinion also addresses the question of who bears the burden of proving that documents can no longer be found and that such lost documents have prejudiced the innocent party. Judge Scheindlin opines that when an innocent party is seeking a lesser sanction, such as additional discovery, fines or cost-shifting, the innocent party must show that documents were lost and relevant.[13] For more severe sanctions, however, such as dismissal, preclusion or imposition of an adverse inference, the innocent party must prove three elements:

1. the spoliating party had control over the evidence and an obligation to preserve it at the time of destruction of loss;

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[6] *Id.* at 7.

[7] *Id.* at 8.

[8] *Id.* at 9.

[9] *Id.* at 5 and 63.

[10] *Id.* at 10.

[11] *Id.*

[12] *See, e.g., Zubulake v. UBS Warburg, LLC, et al.*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003).

[13] *Pension Committee* at 13-14.

2. the spoliating party acted with a culpable state of mind upon destroying or losing the evidence; and
3. the missing evidence is relevant to the innocent party's claim or defense.[14]

When the spoliating party acts in bad faith to destroy evidence, courts will allow a presumption that the missing evidence was unfavorable to that party. If, however, the spoliating party was merely negligent, "the innocent party must prove both relevance and prejudice in order to justify the imposition of a severe sanction."[15]

If an innocent party meets its burden and a jury is permitted to presume lost documents are relevant and prejudicial, the burden then shifts to the spoliating party to rebut the presumption.[16] The presumption is rebutted by showing the innocent party had an alternate access to the missing data or that the missing data would not have supported the innocent party's claims or defenses.[17]

Remedies

Although courts "cannot and do not expect a party to meet a standard of perfection with regard to e-Discovery," the *Pension Committee* decision has raised the bar by which parties and their counsel will be judged and potentially sanctioned.[18] A party will be found grossly negligent if it fails to:

- issue a written litigation hold;
- identify all key players and ensure those individuals' electronic and paper records are preserved;
- cease deletion of e-mail or to preserve records of former employees that are in the party's possession; or
- preserve back-up tapes when the back-up tapes are the sole source of relevant data.[19]

Depending on the culpability of a party in failing to meet its standard of acceptable care, sanctions against the party include, but are not limited to, further discovery, cost-shifting, fines, special jury instructions, preclusion or the entry of a default judgment/dismissal.[20]

[14] *Id.* at 15.

[15] *Id.* at 15-16.

[16] *Id.* at 17-18.

[17] *Id.* at 18.

[18] *Id.* at 2.

[19] *Id.* at 24.

[20] *Id.* at 20.

Conclusion

Judge Scheindlin determined that each of the 13 *Pension Committee* plaintiffs had allowed some relevant records to be lost or destroyed and imposed sanctions on each corresponding to their level of culpability. Decisions whether to award sanctions are in large measure subjective and often are based primarily on the court's experience and the specific facts of the case. The *Pension Committee* decision provides that court's guidance on essential steps to avoid discovery-related sanctions including issuance of a written litigation hold; identification of all key custodians; preservation of the key custodians' documents; cessation of any preservation policies that may call for the destruction of relevant documents; and preservation of back-up tapes when they are the sole source of relevant information. While commentators and practitioners may disagree with the court's reasoning regarding sanctions, *Pension Committee* does identify basic preservation guidelines to follow when litigation is reasonably anticipated and the case is likely to be widely cited and followed as were the *Zubulake* decisions.

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