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### FEDERAL E-DISCOVERY

# In 'Pension Committee,' Judge Revisits 'Zubulake'



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A handful of judges are playing a major role in shaping the developing case law on e-discovery issues: Judge Shira Scheindlin and Magistrate Judge Andrew Peck in the Southern District of New York; Magistrate Judge Paul Grimm in the District of Maryland; Magistrate Judge John Facciola in the District of Columbia; and Magistrate Judge David Waxse in the District of Kansas. So when one of the members of this unofficial "Supreme Court of e-discovery" issues a decision, it tends to attract attention.

And when that decision is issued by Judge Scheindlin—arguably the chief justice of this unofficial high court—it is certain to attract attention. But add to the mix the subject of the opinion (the level of effort necessary to institute a defensible legal hold and avoid spoliation sanctions) and the subtitle given by Judge Scheindlin ("Zubulake Revisited: Six Years Later") and we have in *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*<sup>1</sup> a must-read decision.

Arguably, the most vexing issues facing lawyers and clients today are those accompanying efforts to institute and maintain a defensible legal hold and avoid a detour from the merits of litigation into a sanctions proceeding and endless "discovery about discovery." Those looking for clear guidance from *Pension Committee* are unlikely to welcome the news. That is because despite express language in the decision claiming that "[c]ourts cannot and do not expect that any party can meet the standard of perfection," the standards set out in *Pension Committee*—especially when coupled with a healthy dose of realism about the practical difficulties all clients and lawyers face when instituting and



Judge Scheindlin

maintaining a legal hold—suggest that almost any preservation effort reviewed (as always is the case on a sanctions motion) through the clear focus that hindsight affords will turn out to have been negligently designed and implemented. And negligence, as *Pension Committee* serves to remind us, is enough to trigger sanctions.

Because the decision runs 88 pages and, of necessity, goes into extensive factual details to determine whether sanctions should be imposed (and because we have already told you it is a "must read"), we will not here attempt to capture every detail, but instead highlight (after a brief recitation of the core facts) the key aspects of the decision.

A group of investors initiated this litigation to recover \$550 million lost in the liquidation of two hedge funds in which they were invested. The plaintiff-investors filed state and federal securities claims against former directors, administrators, auditors and the prime broker and custodian of the funds. Plaintiffs began preparing for this suit shortly after the fund

manager, Lancer Management Group, filed for bankruptcy in April, 2003.

The plaintiffs retained their counsel in the fall of 2003 and filed this litigation in February 2004 in the Southern District of Florida.

Shortly thereafter, the case was stayed under the Private Securities Litigation Reform Act (PSLRA) pending the resolution of a motion to dismiss. During that stay, in September 2005, the case was transferred to the Southern District of New York. The PSLRA stay was lifted in 2007.

Once depositions began, defendants quickly complained there were omissions in the plaintiffs' document production. Judge Scheindlin then ordered plaintiffs to prepare declarations describing their document collection and retention efforts. Once the declarations were submitted, several were amended and defendants conducted a second round of depositions to inquire further as to document production issues.

Cross-referencing the productions of the various plaintiffs and former co-defendants as well as productions made in a parallel Securities and Exchange Commission action resulted in defendants uncovering 311 documents from 12 of the 13 plaintiffs that were improperly omitted from earlier productions.

The discovery of these documents coupled with deposition testimony raised serious questions about the accuracy of, and support for, various assertions contained in the declarations. At this point, the defendants moved for sanctions, specifically asking that the court dismiss the complaint or provide lesser relief.

Ultimately, Judge Scheindlin found six of the plaintiffs grossly negligent and resolved to provide the jury with an adverse inference instruction. Six other plaintiffs were found negligent and some were ordered to conduct further discovery. Monetary sanctions to reimburse the defendants for their additional discovery costs were imposed on all 12 culpable plaintiffs.

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## Spoilation Standards

Much of *Pension Committee* offers a refresher on what should by now be familiar rules and standards controlling applications for spoliation sanctions. Thus, the ruling makes clear that sanctions may be imposed for spoliation that is the result of negligent, grossly negligent and, of course, willful and bad faith conduct. If the conduct in question was willful and discoverable material was lost, the most severe sanctions are appropriate, including “terminating sanctions” such as the entry of default judgments and dismissal of claims.

Moreover, “[w]here a party destroys evidence in bad faith, that bad faith alone is sufficient circumstantial evidence from which a reasonable fact finder could conclude that the missing evidence was unfavorable to that party,” and thus the jury may be instructed that the lost evidence was adverse to the spoliating party.<sup>2</sup>

In cases of negligence or gross negligence, a judge may impose an adverse inference instruction or “less severe sanctions—such as fines and cost-shifting,” even without a showing that particular materials were lost.

“The harshness of the instruction should be determined based on the nature of the spoliating party’s conduct—the more egregious the conduct, the more harsh the instruction,” so when a party is merely negligent, it is appropriate to issue a “spoliation charge,” which permits, but does not require, a jury to presume that destroyed discovery material was relevant and prejudicial.

Additionally, monetary sanctions are appropriate for any level of misbehavior to compensate the moving party for expenses incurred in response to the discovery breaches.

Whether the jury instruction contains a mandatory or permissive presumption of relevance and prejudice, any presumption is rebuttable and allegedly spoliating parties must be afforded an opportunity to counter any evidence of breaches of discovery duties or lost documents.

### ‘Zubulake’ Duties

Perhaps the most significant aspect of *Pension Committee* is its pronouncement of a series of post-*Zubulake* duties, the breach of which may result in a finding of “gross negligence.”

Although at one point Judge Scheindlin describes these pronouncements as “guidance,” it appears this is guidance that should not be ignored. So, Judge Scheindlin concludes that, “definitely after July 2004, when the final relevant *Zubulake* opinion was issued, the failure to issue a written litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information.”

And that is not all. Judge Scheindlin also offers as guidance her view that after that same July 2004 *Zubulake* decision the following

failures also satisfy the “gross negligence” standard: “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 when they relate to key players, if the relevant information maintained by those players is not obtainable from readily accessible sources.”

And there’s more. 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, *Pension Committee* was first filed in the Southern District of Florida in 2004. It was not transferred to the Southern District of New York until October 2005, by which time many of the records that would have been saved by a more comprehensive litigation hold had already gone missing.

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Judge Scheindlin suggests that there was no comparable *Zubulake* duty in the Southern District of Florida until 2007 and this fact saves some of the plaintiffs from the most severe sanctions.

But, even with this acknowledgement, Judge Scheindlin’s description of a *Zubulake* duty is clearly worthy of some careful analysis. Is it really the case that failure to issue a written litigation hold—as opposed to some other form of communication—was, as of mid-2004, the prevailing standard such that a lawyer or client deviating from that standard was “grossly negligent”?

Remember that the *Zubulake* decisions were issued long before December 2006 when the Federal Rules of Civil Procedure e-discovery amendments went into effect. And, as authoritative a voice as Judge Scheindlin has been on e-discovery issues, it bears noting that the *Zubulake* decisions represent the conclusions of one district court judge in response to one set of facts.<sup>3</sup> Indeed, much of the discussion about preservation obligations in *Zubulake* was also written as “guidance.”<sup>4</sup>

There appears to be an inherent tension between Judge Scheindlin’s imposition of a post-*Zubulake* duty and her recognition that the question of what discovery conduct is sanctionable “cannot be measured with exactitude and might be called differently by a different judge.”<sup>5</sup>

Given that discovery sanctions require jurists to make judgment calls based on what Judge Scheindlin believes is a “gut reaction” (cold comfort for those out there trying to adopt defensible litigation hold and document preservation policies) about which reasonable jurists could differ, it is surprising that she seems so ready to adopt blanket rules about what conduct is negligent or grossly negligent.

Especially troubling is her suggestion that a failure to “obtain records from all employees (some of whom may have had only a passing encounter with the issues on the litigation)” is likely negligent. That would strike many experienced practitioners as an abrupt shift in the law. Discovery obligations require a search that is reasonable under the circumstances. Litigants thus have long been under a duty to search for responsive documents where they are reasonably likely to be found.<sup>6</sup>

One hopes that Judge Scheindlin did not intend this language to sweep so broad but rather was focused on some of the examples highlighted in the factual findings, such as the failure to check for documents with all members of an investment committee that was responsible for overseeing the investments at issue.

Clearly, however, the language captures more. Does Judge Scheindlin mean that at the moment the duty to preserve is triggered the company and its lawyers must identify every person—e.g., the assistant who once received a forwarded committee agenda—and lock down their files for all time?

What is lacking in *Pension Committee* is the recognition that one’s preservation obligations are of necessity elastic. Thus, it has to be the case that reasonable good faith efforts taken at the outset of a litigation that later turn out to have been underinclusive cannot attract sanctions or be classed as negligent.

We all learn more about the facts and likely sources of information as cases progress. So, for example, one might have a document identifying four members of a key committee at a point in time only later to discover that another employee also sat in on the committee from time to time. Is it negligent to have learned that fact as the case progressed rather than on the first day the preservation duty attached?

The point of this discussion is not to take issue with the specific factual findings and conclusions reached in *Pension Committee* for we are not even remotely familiar enough with the record to do so. Rather, the concern is whether some of the broad guidance will serve only to fuel more sanctions motions and more “discovery about discovery.”

Judging from the opinion, much of the six years since *Pension Committee* was first filed has been spent either under the PSLRA automatic stay or engaged in discovery about discovery. Document productions are messy. Lawyers and clients are not perfect. Sooner or later, we need to start considering how much

discovery and document preservation is really necessary.

Thus, while *Pension Committee* recognized that sanctions preserve the integrity of the judicial process<sup>7</sup> it is important that standards are not set so high and discovery does not become so burdensome such that other important aspects of our judicial process—like efficiency and access to justice—are trumped.<sup>8</sup>

### Sanctions for Spoliation?

*Pension Committee* also serves as a timely reminder that plaintiffs are also required to institute legal holds. Indeed, in many cases a plaintiff's duty to institute a legal hold will be triggered before the defendant's duty attaches.

Here, Judge Scheindlin noted that a "plaintiff's duty is more often triggered before litigation commences, in large part because plaintiffs control the timing of litigation." Looking at the particular facts, Judge Scheindlin concluded that the duty to preserve was triggered in April 2003, when Lancer had filed for bankruptcy, a complaint had been filed with the Financial Services Commission in the British Virgin Islands, and some plaintiffs had retained counsel.

This trigger date is well before suit was filed (in February 2004) and, indeed, well before the so-called *Zubulake* duty to institute a written legal hold was established. Despite these facts, one could easily come to the conclusion that the plaintiffs' efforts were analyzed in light of today's standards and not the standards that were the norm in April 2003. While it is admittedly hard to think back to what the standard of care for legal holds was in April 2003, it would seem that we could all agree that what lawyers and clients thought were best practices in April 2003 no longer seem appropriate.

### Other Lessons

Much of the decision is devoted to analyzing the particular preservation efforts taken by each of the 13 plaintiffs. As always, there are lessons to be learned from analyzing the crash scene.

First, *Pension Committee* serves as a reminder that first impressions matter. Many of the plaintiffs appear to have suffered (and indeed could have been made to suffer even more) because their original declarations were incomplete, misleading and inaccurate. As a result, deposition testimony later contradicted the declarations and some of the declarations had to be amended.

Second, the ruling offers yet another warning to those who persist in permitting employees to engage in self-collection and preservation without meaningful direction and supervision from counsel. One plaintiff was faulted for delegating its initial document review to an employee that admitted to having "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." Another plaintiff instructed "employees to locate and preserve 'all files relating to' the funds, but otherwise took no steps to search for documents.

Worse, only two employees were asked to perform searches of their files and they were told nothing with regard to electronic files specifically. Another plaintiff was found to have engaged in negligent spoliation because "employees were directed to search *their own* computers and files."<sup>9</sup> And the "sole decision-maker" at another plaintiff found to have engaged in negligent spoliation testified that employees were always under an order to make hard copies of all electronic documents and correspondence which were then kept on file. However, at his deposition, it was revealed that this person did not know what e-mail system was used, how electronic documents were stored and that he was uninvolved in any electronic searches that were executed.

Like plaintiffs found to be grossly negligent, this individual "delegated the search for records to his assistants, but failed to provide meaningful supervision."

Third, *Pension Committee* demonstrates that efforts to limit the number of employees involved in initial preservation and collection efforts are likely to backfire. The degree of negligence associated with the failure to request documents from all personnel appears linked to the proportion of key players omitted and number of documents lost,<sup>10</sup> however there is little to distinguish the various plaintiffs on this point. The lesson, however, is clear: Meeting with the key players early on to discuss preservation and determine whether there are others who might have relevant documents is a critical step in the preservation process.

Fourth, *Pension Committee* confirms that parties need to take steps to preserve the files of former employees that remain in a party's possession, custody or control after the duty to preserve arose.

### Conclusion

Judge Scheindlin is a powerful and knowledgeable voice on e-discovery. Her *Zubulake* opinions—issued well before the 2006 amendments to the Federal Rules of Civil Procedure—offered much needed guidance and no doubt led many practitioners to think carefully (and perhaps for the first time) about the tricky preservation and collection issues associated with electronically stored information. For that reason alone, *Pension Committee* is an important opinion as it allows us to see how views have changed since the early days of e-discovery and what standards we all will be asked to meet. One can only hope that the broad language—language that arguably requires lawyers and clients alike to achieve perfection—are offered to set a high bar so we will all strive to do better and not a trap so we all will be found negligent in our practices.

1 No. Civ. 05-9016, 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010).

2. *Id.* at \*5 (quoting *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 109 (2d Cir. 2002)).

3. Opinions of one district court judge in one district do "not have binding precedential effect"...especially one from another federal circuit." See *United States v. Ensminger*, 567 F.3d 587, 591 (9th Cir. 2009) (quoting *NASD Dispute Resolution Inc. v. Jud. Council of Cal.*, 488 F.3d 1065, 1069 (9th Cir. 2007); *McGinley v. Houston*, 361 F.3d 1328, 1331 (11th Cir. 2004) ("The general rule is that a district judge's decision neither binds another district judge nor binds him.").

4. *Zubulake v. UBS Warburg, LLC*, 229 F.R.D. 422, 441 (S.D.N.Y. 2004) (Scheindlin, J.) ("This Court, for one, is optimistic that with the guidance now provided it will not be necessary to spend this amount of time again. It is hoped that counsel will heed the guidance provided by these resources and will work to ensure that preservation, production and spoliation issues are limited, if not eliminated.").

5. *Pension Committee*, 2010 WL 184312 at \*2.

6. See, e.g., *Vaughn v. City of Puyallup*, No. C07-5093, 2007 WL 3306743, at \*2 (Nov. 6, 2007 W.D. Wash.) ("Defendant is already under a duty to conduct a reasonable inquiry regarding relevant documents and to produce such documents.").

7. *Pension Committee*, 2010 WL 184312 at \*1.

8. See, e.g., Fed. R. Civ. P. 26(b)(2)(C) (establishing proportionality principle, that "the burden or expense of the proposed discovery [must not] outweigh its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues").

9. Emphasis in original.

10. *Id.* at \*10 (mistakes made during discovery only merit sanctions when "documents were destroyed after the duty to preserve arose" and it is the moving party's burden to establish those elements). In this case, many of the 311 documents (those found years later that were unproduced in the initial production) were generated after the funds had filed for bankruptcy and it should have been readily apparent to the plaintiffs, "all sophisticated investors," that litigation was impending. *Id.* at \*9. Thus, the preservation and production of those 311 documents was a sanctionable discovery miscue. Moreover, because plaintiffs had a fiduciary duty to be informed as to the funds, the Court presumed that documents reflecting such due diligence must have existed and the paucity of such documents within the plaintiffs' production also established that documents were destroyed that should have been preserved. *Id.* at \*9-10.