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New Guidance on e-Discovery: Zubulake Revisited

In 2003 and 2004, U.S. District Court Judge Shira Scheindlin of the Southern District of New York made a name for herself as an authority on electronic discovery by issuing four groundbreaking rulings in *Zubulake v. UBS Warburg*. Recently, Judge Scheindlin provided additional guidance on the subject in *The Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities*.

Notably, this case didn't involve any "egregious examples of litigants purposefully destroying evidence." Although sanctions for spoliation of evidence are often imposed when a litigant destroys discoverable data, they can also be awarded — as they were in this case — when a party is *grossly negligent* in failing to preserve electronic evidence. And, significantly, the court found that "failure to issue a *written* litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information."

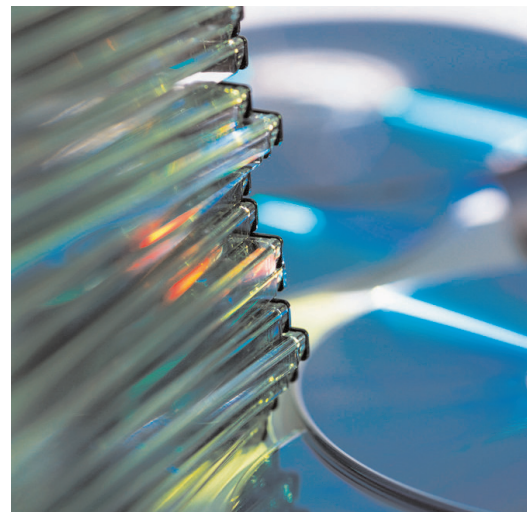
Plaintiffs were "careless and indifferent"

Pension Committee involved various federal securities law claims arising from the liquidation of two hedge funds. The

defendants claimed that certain plaintiffs had failed to preserve and produce documents — including e-mails and other electronically stored information (ESI) — and asked the court to award sanctions for spoliation of evidence.

The court explained that awarding sanctions for spoliation — which can range from monetary penalties to dismissal of a complaint — is a subjective process that depends on a particular case's facts and circumstances and on the level of culpability of the spoliator. In this case, some plaintiffs were merely negligent, while others were grossly negligent with respect to collecting and preserving ESI. For those plaintiffs, the court ordered an "adverse inference instruction." In other words, the court instructed the jury that it's entitled to presume that the ESI these plaintiffs lost was relevant and would have been favorable to the defendants.

In addition to the failure to issue a written litigation hold, the court listed other omissions that might constitute gross negligence. (See the sidebar "Don't be Gross" on next page.) The court also emphasized that a party falls short of its



responsibility to collect and preserve ESI if it relies on employees to search and select what they believe to be responsive records without any supervision from counsel.

Defendants' burden of proof

The burden of proof is critical in spoliation cases — particularly when potential sanctions are severe. In general, the "innocent" party must prove that:

- The spoliator had control over the evidence and an obligation to preserve it,

(continued)

- The spoliator acted with a culpable state of mind when destroying or losing the evidence, and
- The missing evidence was relevant to the innocent party's claim or defense, so that the party is prejudiced without it.

To ensure that litigants can't profit from the destruction of evidence, courts generally allow the jury to presume relevance and prejudice when the spoliator destroys evidence in bad faith or through gross negligence.

In *Pension Committee*, Judge Scheindlin adopted this burden-shifting test:

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.

Rebuttal of this presumption may involve showing that the innocent party had access to the evidence in question or that the evidence wouldn't have supported the innocent party's claims or defenses.

Don't Be Gross

Once a litigant's duty to preserve electronically stored information (ESI) is clear, a finding of gross negligence may be appropriate if the litigant fails to:

- Issue a written litigation hold, which suspends the party's usual record retention and destruction practices,
- Identify all of the key players and ensure that their electronic and paper records are preserved,

- Cease deletion of e-mail or preserve the records of former employees that are in its possession or control, or

- Preserve backup tapes when they're the sole source of relevant information or when they relate to key players.

To avoid sanctions, parties should take all of these steps as soon as litigation becomes reasonably foreseeable.

Missing evidence assumed to exist

One interesting aspect of *Pension Committee* is Judge Scheindlin's willingness to assume the existence of missing e-mails and other evidence. In addition to citing specific documents that the plaintiffs failed to produce, the defendants asked the court "to assume that each plaintiff also received or generated documents that have not been produced by anyone and are now presumed to be missing."

The plaintiffs challenged this request as "absurd" and based on "rank speculation," but the court disagreed, stating that the plaintiffs had "a fiduciary duty to conduct due diligence before making significant investments in the [hedge funds]. Surely records must have

existed documenting the due diligence, investments, and subsequent monitoring of these investments. The paucity of records produced by some plaintiffs and the admitted failure to preserve some records or search at all for others by all plaintiffs leads inexorably to the conclusion that relevant records have been lost or destroyed."

Get involved

Given the potentially disastrous consequences of spoliation sanctions, counsel should get involved in a client's document collection and preservation efforts as soon as litigation is reasonably foreseeable. In addition to drafting a written litigation hold, counsel should closely supervise the client's discovery efforts — particularly with respect to ESI. **h**

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Holtz Rubenstein Reminick LLP • www.hrrllp.com

1430 Broadway
New York, NY 10018
212-697-6900

125 Baylis Road
Melville, NY 11747
631-752-7400

To change contact
information, please contact
info@holtznews.com

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