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February 18, 2010

ZUBULAKE REVISITED: THE SOUTHERN DISTRICT OF NEW YORK LAYS OUT AN ANALYTICAL FRAMEWORK FOR DETERMINING WHETHER TO IMPOSE SANCTIONS FOR THE SPOLIATION OF EVIDENCE

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On January 15, 2010, Judge Shira A. Scheindlin, author of the frequently cited *Zubulake* opinions, issued an opinion subtitled "*Zubulake* Revisited: Six Years Later," awarding sanctions against 13 plaintiffs for their failure to adequately preserve, collect and produce relevant documents.[1] In an admittedly "long and complicated"[2] opinion, Judge Scheindlin seized the opportunity to re-focus on the *Zubulake* opinions and fashion an analytical framework for determining whether to impose a sanction for the spoliation of evidence. The opinion sets forth important guidelines to help litigants avoid discovery spoliation pitfalls and the consequences that follow. Notably, the opinion makes clear that plaintiffs and defendants carry an equal burden when it comes to the duty to preserve and collect documents and face, in appropriate circumstances, harsh sanctions for non-compliance.

Background

In mid-2003, a group of investors retained counsel to bring an action to recover approximately $550 million in losses as a result of the liquidation of two British Virgin Island based hedge funds. Prior to filing the complaint, counsel gave plaintiffs a general instruction to begin collecting documents in order to assess their claims and draft the complaint. Counsel did not, however, instruct plaintiffs to preserve *all* relevant documents (both electronic and paper) or create a mechanism for collecting the preserved documents. A stay of proceedings pursuant to the Private Securities Litigation Reform Act was instituted in 2004 and remained in place until late 2007, at which time defendants submitted their first request for production of documents. Significantly, plaintiffs' counsel did not issue a written litigation hold until defendants served formal document requests.[3]

During the discovery process, defendants claimed that there were substantial gaps in certain of the plaintiffs' document productions. In response, those plaintiffs submitted declarations attesting that the document production was complete and thorough. Defendants filed a motion for sanctions, alleging that 13 plaintiffs failed to preserve and produce relevant documents and submitted false and misleading declarations concerning their document preservation and collection efforts.

1 *Pension Committee of the Univ. of Montreal Pension Plan v. Banc of Am. Securities, LLC* ("*Pension Committee*"), Civ. No. 05-9016, 2010 WL 184312 (Jan. 15, 2010 S.D.N.Y.) Judge Scheindlin initially issued an opinion in *Pension Committee* on January 11, 2010 but subsequently withdrew that opinion and replaced it with the January 15, 2010 opinion.
2 *Id.* at *2.
3 *Id.* at *8-9.

Judge Scheindlin's Decision

In assessing whether plaintiffs' document preservation and collection efforts were sanctionable, Judge Scheindlin articulated a four-part analytical framework for evaluating plaintiffs' discovery efforts. First, the court must consider the level of a party's culpability, *i.e.*, whether it was negligent, grossly negligent or willful. Second, the court must consider the interplay between the duty to preserve evidence and the spoliation of evidence. Third, the court must consider the extent to which a party should bear the burden of proving that evidence has been lost or destroyed as well as the burden of demonstrating the consequences from that loss. Finally, the court must consider the appropriate remedy, or sanction, for the harm caused.[4]

A. Level of Culpability

In determining an alleged spoliator's level of culpability, Judge Scheindlin held that the analysis turns on whether the party's conduct "is either acceptable or unacceptable. Once it is unacceptable the only question is how bad is the conduct."[5] Specifically, the court must determine whether the conduct is negligent, grossly negligent or willful. Judge Scheindlin provided some examples of conduct that may constitute negligent, grossly negligent or willful conduct, depending on the circumstances.[6] These examples include, but are not limited to:

1. Potentially Negligent Conduct:

- Failing to collect records from all employees with knowledge of the issue(s) (as opposed to key players)
- Failing to take all steps to preserve electronically stored information
- Failing to assess the accuracy and validity of selected search terms

2. Potentially Grossly Negligent Conduct:

- Failing to issue a written litigation hold as soon as litigation is anticipated – *i.e.*, when the duty to preserve has attached -- "because that failure is likely to result in the destruction of relevant information"[7]
- Failing to collect information from the files of former employees that remain in the party's possession, custody or control after a duty to preserve has attached
- Failing to collect records from key players
- Destroying email or certain back-up tapes after the duty to preserve has attached

3. Potentially Willful Conduct

- Intentionally destroying or tampering with evidence
- Failing to collect records from key players

B. Duty to Preserve

Noting that "[i]t is well established that the duty to preserve evidence arises when a party reasonably anticipates litigation,"[8] Judge Scheindlin made clear that the duty to preserve applies equally to plaintiffs and defendants, and, in the case of plaintiffs, can be triggered before the litigation commences.[9] Although plaintiffs' counsel requested that some plaintiffs collect and preserve relevant documents as early as 2003, Judge Scheindlin emphasized that the duty to preserve requires more. It requires a written litigation hold that tells employees to preserve and not destroy *all* relevant records and creates a mechanism for collecting the preserved records so that they can be reasonably searched.[10]

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4 *Id.* at *2.
5 *Id.*
6 Judge Scheindlin specifically noted "[t]hese examples are not meant as a definitive list. Each case will turn on its own facts and the varieties of efforts and failures is infinite." *Id.* at *3.
7 *Id.*
8 *Id.* at *4.
9 *Id.*
10 *Id.* at *8.

C. Burden of Proof

In addressing the burden of proof, the Court focused on which party should bear the burden of establishing the relevance of evidence that is no longer available as well as whether the unavailability of that evidence caused prejudice to the innocent party. Ultimately, the Court determined that the burden of proof differs depending on the severity of the sanctions. For less severe sanctions, such as cost shifting or fines, the court should focus more on the conduct of the spoliating party rather than on whether the documents were lost, relevant or resulted in prejudice. For more severe sanctions, such as dismissal, preclusion or the imposition of an adverse inference, the court should focus on the conduct of the spoliating party *and* whether the documents were lost, relevant or resulted in prejudice.[11] Judge Scheindlin observed that proof of relevance does not necessarily amount to proof of prejudice. Relevance and prejudice, however, may be presumed when the spoliating party acted in bad faith or in a grossly negligent manner.[12]

"To ensure that no party's task is too onerous or too lenient," Judge Scheindlin stated that any presumption is rebuttable regardless of the level of culpability.[13] For example, if the spoliating party's conduct were so egregious as to warrant a presumption that the documents were both relevant and resulted in prejudice, the spoliating party may rebut that presumption by showing that the other party had access to the lost or destroyed evidence and that the evidence would not support the innocent party's claims or defenses. If the spoliating party is able to rebut the presumption, the severity of the remedy may be reduced.[14]

D. Remedies

Judge Scheindlin explained that a trial court has broad discretion to determine an appropriate sanction for spoliation and that it is well accepted that a court should impose the least harsh sanction relative to the circumstance. The various types of sanctions for spoliation of evidence include: (i) further discovery, (ii) cost shifting, (iii) fines, (iv) special jury instructions, (v) preclusion, and (vi) entry of default or dismissal of an action.[15]

Practical Implications

While observing that "[c]ourts cannot and do not expect that any party can meet a standard of perfection,"[16] *Pension Committee* emphasizes that litigants and their counsel must take specific steps to comply with the duty to preserve and collect relevant documents, and do so in a diligent and conscientious manner. The "failure to preserve records--paper or electronic--and to search in the right places for those records, will inevitably result in the spoliation of evidence."[17] Moreover, the "pure heart empty head" defense will not shield a litigant from potential sanctions. *Pension Committee* sets forth important guidelines for litigants and their counsel when it comes to complying with the duty to preserve and collect documents. Whether other courts adopt Judge Scheindlin's broad examples of potentially culpable conduct or, instead, focus on the specific facts and circumstances of each case in assessing the alleged spoliating party's conduct remains to be seen.

Pension Committee is also notable because 13 *plaintiffs* were sanctioned for their discovery lapses. In large, complex cases, defendants are typically the targets of discovery motions. *Pension Committee* makes clear that discovery obligations apply equally to plaintiffs and defendants. Failure to comply with the duty to preserve evidence and conduct a thorough and diligent collection can result in sanctions that can be much costlier than compliance with applicable discovery obligations and rules and, in appropriate circumstances, can lead to harsh, even case terminating sanctions.

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11 *Id.* at *4.
12 *Id.* at *5.
13 *Id.*
14 *Id.* at *6.
15 *Id.*
16 *Id.* at *1.
17 *Id.*

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