



ZUBULAKE JUDGE GIVES GUIDANCE REGARDING PRESERVATION AND COLLECTION OF ELECTRONIC EVIDENCE

On January 15, 2010, Judge Scheindlin of the Southern District of New York provided further guidance to parties litigating in federal courts regarding what actions might lead to a finding of spoliation of electronic evidence and the resulting issuance of sanctions. Known for her *Zubulake* opinions regarding preservation of electronically-stored information (“ESI”), Judge Scheindlin issued a decision that clarifies what is required of parties in preserving and collecting documents, including ESI, throughout litigation. In *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*, 2010 WL 93124 (Jan. 11, 2010, S.D.N.Y.) (as amended on Jan. 15, 2010), the Court sanctioned 13 plaintiffs for, among other things, (1) failing to timely issue a proper litigation hold notice, and (2) not properly supervising the collection and production of relevant documents.

FACTS AND PROCEDURAL BACKGROUND

In 2004, the plaintiffs in *Pension* brought an action to recover losses stemming from the liquidation of hedge funds in which they held shares. After a stay, discovery began in earnest in 2007. The defendants claimed there were substantial gaps in the plaintiffs’ document productions.

Although counsel telephoned and emailed plaintiffs and sent memoranda instructing plaintiffs to be over rather than under inclusive in their document collection, there was no specific direction to preserve all relevant records. In some instances, no form of a litigation hold was sent until after the stay was lifted in 2007. And for some plaintiffs, there was no mechanism for collecting the preserved records so they could be searched for relevance by someone other than the employee. Rather, there was “total reliance on the employee to search and select what the employee believed to be responsive records without any supervision from Counsel.” 2010 WL 93124, at *8.

Defendants moved for sanctions alleging that each plaintiff failed to preserve and produce documents, including ESI. The defendants sought dismissal of the complaint.

THE COURT’S RULING

Although the Court did not find that the spoliation of evidence by the plaintiffs was willful, the Court did issue sanctions. For those plaintiffs held to be grossly negligent, the jury was instructed that it was permitted to presume the missing documents were both relevant and prejudicial to the plaintiffs’ case.

Of importance, the Court listed various actions, or lack thereof, that led to a finding that a party was grossly negligent. The following failures support a finding of gross negligence once the duty to preserve has attached:

- ◆ failure to issue a timely written litigation hold;
- ◆ failure to identify key players and ensure their electronic and paper records are preserved;
- ◆ failure 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
- ◆ failure 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.

Regarding the litigation hold notice, it is this Court's opinion that only written instructions will pass muster. Additionally, the litigation hold must include an instruction to preserve evidence, and not just collect evidence. Equally as important, reliance on the custodian of the documents or information to collect relevant information may not be enough. The Court took issue with the delegation of search efforts to the custodians without any supervision from management or outside counsel.

The Court also gave further guidance as to when a party needs to preserve its backup tapes, a timely and costly endeavor in any litigation. Judge Scheindlin clarified that not all backup tapes need to be preserved. If they are the sole source of information, however, segregation and preservation of those backup tapes is required.

Routine searches of backup tapes need not take place when the relevant information is found elsewhere. If relevant material is known to exist and was not produced, or relevant material should have existed but is not produced, however, backup tapes should be searched for that material.

Although not binding on other courts, this decision will likely be persuasive and influential considering Judge Scheindlin's opinions in *Zubulake*. Parties in litigation in federal courts, therefore, should take note and ensure compliance with these measures.

To view the text of the initial opinion and order, please follow this [link](#). To view the text of the amended opinion and order, please follow this [link](#).

Please contact the Thompson & Knight LLP attorney with whom you regularly work or one of the attorneys listed below to discuss any questions you have regarding the impact of this case on your policies and practices.

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