ONE SMALL CHANGE BY JUDGE SCHEINDLIN TO A RECENT SEMINAL OPINION COULD BE ONE GIANT LEAP FOR E-DISCOVERY COST CONTROL

June 1, 2010

To Our Clients and Friends:

On January 15, 2010, we circulated a memo to clients discussing Judge Shira Scheindlin's influential decision in *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*, 685 F. Supp. 2d 456 (S.D.N.Y. 2010), in which she revisited her *Zubulake* decisions discussing all aspects of the electronic discovery process. We then circulated another memo on January 20 highlighting amendments to the opinion that addressed two of the three issues about which we had expressed concern. Last week, Judge Scheindlin issued an order amending *Pension Committee* again, this time addressing the final problematic issue we had discussed in our original memo.

In the original opinion, after holding that "the failure to collect records — either paper or electronic — from key players constitutes gross negligence or willfulness as does the destruction of email or certain backup tapes after the duty to preserve has attached," Judge Scheindlin wrote that "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 as opposed to a higher degree of culpability." With last week's amendment, that line has been softened to "the failure to obtain records from all those employees who had any involvement with the issues raised in the litigation or anticipated litigation, as opposed to just the key players, could constitute negligence."

Pension Committee thus still holds that litigants, to avoid risk of being found negligent or even grossly negligent, must (1) send a written, comprehensive preservation notice to *all* employees with relevant documents; (2) collect documents from all "key players;" and (3) carefully consider whether documents also must be collected from other employees who, though not "key players," still may have documents important to the case. With this important change, however, now if litigants can show their adversaries (or the court) good reason why document collection from employees with only tangential involvement will not yield important enough information to justify the expense, *Pension Committee* no longer should be seen as a bar to recognizing those potentially significant cost savings.

Please feel free to contact us with any questions.

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