JUDGE SCHEINDLIN REVISITS *ZUBULAKE*, WHERE THE PRESERVATION AND PRODUCTION WATERS STILL CAN BOIL YOU

January 15, 2010

To Our Clients and Friends:

Judge Shira Scheindlin of the U.S. District Court for the Southern District of New York, the author of the two influential *Zubulake* opinions in 2003-2004 discussing litigants' duties to preserve and produce electronic evidence, issued a new decision this week asserting that "the failure to issue a *written* litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information."

In this new case, *Pension Committee v. Banc of America Securities, LLC*, No. 05 Civ. 9016 (SAS), 2010 WL 93124 (S.D.N.Y. Jan. 11, 2010), Judge Scheindlin noted that the *Zubulake* decisions put litigants on notice of their preservation and collection responsibilities. Now that those decisions have set the bar, "the following failures support a finding of gross negligence, when the duty to preserve has attached: to issue a written litigation hold, to identify 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 relate to key players."

These categorical standards, Judge Scheindlin writes, "have been set by years of judicial decisions analyzing allegations of misconduct and reaching a determination as to what a party must do to meet its obligation to participate meaningfully and fairly in the discovery phase of a judicial proceeding. A failure to conform to this standard is negligent even if it results from a pure heart and an empty head." Judge Scheindlin's synthesis of the case law in *Pension Committee* is likely to be persuasive to other courts, both because of the influence of her *Zubulake* decisions and because of her authorship of a leading case book on electronic discovery and digital evidence.

According to Judge Scheindlin, where "gross negligence" is found due to the omission of any of these steps, the judge must at least give the jury a "spoliation charge," allowing a jury to consider presuming that lost data would have been helpful to the requesting party. The court may consider harsher sanctions, such as a flat instruction to the jury to presume that lost evidence would have aided the requesting party, or, even more damaging, one deeming the disputed facts to have been admitted. In choosing among these sanctions, Judge Scheindlin wrote, "a court should always impose the least harsh sanction that can provide an adequate remedy." The most severe sanction of terminating the lawsuit in the other side's favor, she wrote, must be reserved for cases of intentional destruction.

The *Pension Committee* opinion imposes duties not found in *Zubulake*. For example, after Judge Scheindlin wrote 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 backup tapes after the duty to preserve has attached," she went on to say 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." Although Judge Scheindlin was careful not to impose "a higher degree of culpability" on the failure to obtain documents from "*all* employees" (emphasis in original), her *Pension Committee* decision cites no authority for the proposition that it is negligent not to collect documents from tangential players. *Pension Committee* also disapproves categorically of allowing employees to decide for themselves what documents are relevant, without allowing that this may be appropriate depending on the particulars of a case.

Pension Committee also is noteworthy because of its categorical approach. Judge Scheindlin appears to announce bright-line rules about conduct that will be deemed willful, grossly negligent or negligent. These rules contrast with the approach taken in some cases that appear to employ a balancing of the preservation and production efforts of a party against the magnitude of the claims – especially where the issue relates to preservation or production obligations related to ancillary actors in the underlying events.

In *Pension Committee*, Judge Scheindlin penalized many of the plaintiffs, but the sanctions were more lenient than the defendants requested. All of the plaintiffs in question were required to reimburse the defendants' attorneys' fees and costs "associated with reviewing the declarations submitted, deposing these declarants . . . and bringing [the sanctions] motion." In addition, with respect to the "grossly negligent" plaintiffs, Judge Scheindlin resolved to issue a spoliation charge to the jury, allowing them to presume that lost evidence was relevant, unless each sanctioned defendant carried a shifted burden of demonstrating that any lost evidence was not relevant.

Corporations that have watched electronic discovery costs rise exponentially in the years since *Zubulake* have hoped for a swinging of the pendulum back toward less onerous and less costly discovery burdens. *Pension Committee* suggests that this may not happen anytime soon. Above all, however, *Pension Committee* reinforces the need to take prompt, comprehensive steps to preserve and collect relevant documents — both paper and electronic — as soon as litigation becomes reasonably anticipated.

Please feel free to contact us with any questions.

Jeffrey S. Jacobson
+1 212 909 6479
jsjacobson@debevoise.com

Timothy K. Beeken
+1 212 909 6518
tkbeeken@debevoise.com

Colby A. Smith
+1 202 383 8095
casmith@debevoise.com