FEBRUARY 2010

A JUDICIAL PRIMER ON LITIGATION HOLDS

On January 15, 2010, Judge Shira Scheindlin of the Southern District of New York granted sanctions against 13 plaintiffs—six for gross negligence and seven for negligence—in connection with their failure to preserve, collect, and produce electronic documents, in *Pension Committee of the Univ. of Montreal Pension Plan, et al. v. Banc of America Securities, LLC, et al.*, 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010). The decision, involving claims of securities fraud, is subtitled "*Zubulake Revisited: Six Years Later*," as Judge Scheindlin built her conclusions upon principles she established in the six often-cited opinions she issued in the *Zubulake* litigation regarding discovery generally and electronic discovery in particular.

The opinion includes three parts. In the first, she defines "negligence," "gross negligence," and "willfulness in the spoliation context" and outlines what conduct falls within each category. In this portion of the opinion, she synthesizes existing case law into an analytical framework likely to be followed by other courts because it provides a workable approach for determining where in the spoliation continuum a party falls. In the second part, she describes in detail the conduct of each of the 13 plaintiffs. As the court notes, this is *not* a case that presents any egregious examples of litigants purposefully destroying evidence. Rather, according to the court, "it is a case where plaintiffs failed to timely institute written litigation holds and engaged in careless and indifferent collection efforts after the duty to preserve arose." *Id.* at 2. In the third part of the opinion, she applies the analytical framework outlined earlier to the facts in order to decide what sanctions to impose. For those found to be grossly negligent, the court determined that she would ultimately issue an adverse inference instruction to the jury. *Id.* at 23-24. The court imposed significant monetary sanctions on the negligent plaintiffs. *Id.* at 24.

Although Judge Scheindlin recognizes that any spoliation inquiry is extremely fact specific and although this ruling may not bind other courts, the opinion does suggest a host of points for companies to consider when implementing a timely, reasonable, good-faith, and effective preservation plan that fits their particular circumstances. In addition, the opinion provides excellent insights into how a judge analyzes

conduct to determine if sanctions should be imposed and the severity of such sanctions.

LESSONS FROM THE DECISION

Issue a Timely Written Litigation Hold Letter. As the court notes, the duty to issue a hold may arise before litigation commences, especially for plaintiffs, because plaintiffs control the timing of the litigation. *Id.* at 4. "It is well established that the duty to preserve evidence arises when a party reasonably anticipates litigation." *Id.* The failure to issue such a hold played a part in the sanctions against each of the 13 plaintiffs. The *Zubulake Revisited* reference is relevant to this point insofar as Judge Scheindlin concludes that in the Southern District of New York after July 2004, when she issued her *Zubulake V* opinion regarding document preservation, "the failure to issue a *written* litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information." *Id.* at 3 and 18.

Identify All Key Players Related to the Litigation, Including Former Employees. A number of the plaintiffs failed to identify, and hence collect documents from, all key players. Moreover, the court emphasized the duty to preserve and collect information from former employees when the information remains in a party's possession, custody, or control. *Id.* at 3, 7.

Have Someone Knowledgeable Supervise Custodian-Initiated Collection Efforts. The court criticized the practice of preserving and collecting solely through a process that has employees do their own electronic data searches and determine what is relevant without any knowledgeable supervision by counsel and without an express direction not to destroy records so that counsel could monitor the collection effort. *Id.* at 8, 12.

Halt the Deletion of Emails and Routine Destruction of Business Records. In certain circumstances, the court considered automatic deletion of emails after a duty to preserve arises as gross negligence. *Id.* at 7.

BRIEF CASE BACKGROUND

Plaintiffs include 96 investors in certain hedge funds that failed. In 2004, a year after the hedge fund manager instituted bankruptcy proceedings relating to the funds, these investors filed suit against several defendants based on alleged violations of the Private Securities Litigation Reform Act. Discovery was stayed until early 2007. The plaintiffs collected documents at the beginning of the litigation and again after the court lifted the stay. The defendants asserted that the plaintiffs' document productions were incomplete. The court required plaintiffs to submit declarations relating to their preservation and collection efforts, and some of them were deposed. The prevalence of inaccuracies and lack of complete information in these declarations, which were being prepared years after the process was undertaken, had a significant negative impact on how the court viewed any particular plaintiff's conduct. This underscores the value of contemporaneously documenting a preservation effort.

NEGLIGENCE, GROSS NEGLIGENCE, AND WILLFULNESS

The distinction between "negligence" and "gross negligence" is one of degree, with "gross negligence" described as "'a failure to use even that care which a careless person would use.'" *Id.* at 3. In contrast, "willfulness" involves intentional conduct in "'disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow. . . .'" *Id*.

According to Judge Scheindlin, once the duty to preserve has attached, the following facts can support a finding of gross negligence:

- The failure to issue a *written* litigation hold (*id.* at 3, 7);
- The failure to identify all of the key players and to ensure that their electronic and paper records are preserved (*id.* at 7);

- The failure to preserve and collect information from former employees when the information remains in a party's possession, custody, or control (*id.* at 3, 7);

- The failure to halt the deletion of emails (*id.* at 7); and

- The 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 (*id.*).

On the other hand, according to Judge Scheindlin, the failure to collect records from all employees, as opposed to key players, and the failure to assess the accuracy and reliability of selected search terms only amounts to negligence (*id.* at 3).

SOME EXAMPLES OF PLAINTIFFS' NEGLIGENCE AND GROSS NEGLIGENCE

A few examples of conduct found sanctionable in this case provide insight as to how collection efforts are likely to be viewed by a judge with the benefit of hindsight when ruling on a sanctions motion.

The court found negligent conduct where:

- The plaintiff failed to institute a written litigation hold in a timely manner (*id.* at 18);

- Electronic searches were done by assistants without supervision by counsel or other senior personnel (*id.*);

- The person responsible for the searches was unfamiliar with his company's email systems and how electronic files were maintained (*id.*);

- The plaintiff failed to produce nearly 50 emails that it sent or received (that were produced by others) (*id.*);

- The plaintiff failed to collect documents from all key individuals (*id.* at 19); and

- The plaintiff failed to conduct a thorough search of its computer system for relevant documents (*id.*).

The court found gross negligence where, in addition to failing to institute a written litigation hold in a timely manner (*id.* at 12), the plaintiff:

- Delegated the searches to a person who had no experience conducting searches, had received no instructions on how to do the searches, and had no supervision when doing the searches (*id.* at 14);

- Failed to search for documents on all relevant computer network systems (*id.*);

- Failed to search known backup tapes for a period where limited production had taken place from other sources (*id.*);

- Failed to collect documents from all key individuals (*id.* at 15);

- Permitted employees to conduct their own searches without supervision (*id.* at 14); and

- Failed to collect documents from two-thirds of the key players (*id.* at 15).

LAWYER CONTACT

For further information, please contact your principal Firm representative or the lawyer listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

Irene Savanis Fiorentinos
+1.312.269.4155
ifiorentinos@jonesday.com