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REVISITING *ZUBULAKE:*
Discovery Sanctions in the e-Discovery Context

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On January 11, 2010, Judge Scheindlin, who authored the groundbreaking *Zubulake* opinions, issued a new opinion regarding sanctions in eDiscovery.[1] *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Scs.*, 2010 U.S. Dist. Lexis 1839 (S.D.N.Y. Jan. 11, 2010), involved an action against defendants who were connected to a hedge fund that lost money. These defendants sought sanctions against the plaintiffs for their alleged failure to properly preserve and produce documents, including electronically-stored information, and for submitting false declarations relating to their collection and production efforts.

In an 87-page opinion, Judge Scheindlin addressed key issues, including the definition of negligence, gross negligence and willfulness in the discovery context, and what types of conduct constitute this type of behavior. Judge Scheindlin also reviewed the law governing the imposition of sanctions for failure to produce electronically-stored information. In the end, Judge Scheindlin held that all of the plaintiffs were either grossly negligent or just negligent in complying with, and satisfying, their discovery obligations. Ultimately, she decided to issue a permissive spoliation/adverse inference instruction against the plaintiffs. In reaching this decision, Judge Scheindlin touched on four key points.

First, Judge Scheindlin analyzed the plaintiffs' level of culpability in determining whether their conduct was negligent, grossly negligent or willful. Judge Scheindlin explained that "negligence involves unreasonable conduct in that it creates a risk of harm to others but willfulness involves intentional or reckless conduct that is so unreasonable that harm is highly likely to occur." Applying this concept, she found that the failure to issue a written litigation hold constitutes gross negligence because it is likely to result in the destruction of relevant information. Regarding the collection and review step of the discovery process, the court explained that "the failure to collect records – either paper or electronic – from key players constitutes gross negligence or willfulness as to the destruction of email or backup tapes after the duty to preserve has attached." The court further explained that, by contrast, the failure to obtain all records from employees -- as opposed to key players -- will likely constitute just mere negligence. The failure to employ all appropriate measures to preserve ESI will also, in most cases, constitute negligence.

Second, Judge Scheindlin focused on the interplay between the duty to preserve evidence and spoliation. She stressed that the duty to preserve is well-developed and should be well-known to litigants and their counsel alike. In discussing this issue, Judge Scheindlin stressed that "[a] plaintiff's duty [to preserve] is more often triggered before litigation commences, in large part because plaintiffs control the timing of litigation."

Third, Judge Scheindlin looked at which party should bear the burden of proving that evidence has been lost or destroyed and the consequences resulting from that loss. She evaluated the key issue in all spoliation cases: what happens when the documents are no longer available? This issue is closely related to who should bear the burden of establishing the relevance of evidence that can no longer be found.

Judge Scheindlin held that these burden of proof questions differed depending on the severity of the sanction. She explained that:

> "[f]or less severe sanctions - such as fines and cost-shifting - the inquiry focuses more on the conduct of the spoliating party than on whether documents were lost, and, if so, whether those documents were relevant and resulted in prejudice to the innocent party. As explained more thoroughly below, for more severe sanctions - such as dismissal, preclusion, or the

1. The opinion was amended with minor changes on January 15, 2010.

> imposition of an adverse inference - the court must consider, in addition to the conduct of the spoliating party, whether any missing evidence was relevant and whether the innocent party has suffered prejudice as a result of the loss of evidence. . . .
>
> It is not enough for the innocent party to show that the destroyed evidence would have been responsive to a document request. The innocent party must also show that the evidence would have been helpful in proving its claims or defenses - i.e., that the innocent party is prejudiced without that evidence. Proof of relevance does not necessarily equal proof of prejudice."

Judge Scheindlin explained that relevance and prejudice can be presumed when the spoliating party has acted in bad faith or in a grossly negligent manner. But, when the spoliating party is merely negligent "the innocent party must prove both relevance and prejudice in order to justify the imposition of a severe sanction." This can be done through extrinsic evidence showing that the destroyed evidence would have been favorable to the moving party's case. Still, Judge Scheindlin stressed that "[c]ourts must take care not to 'hold the prejudiced party to too strict of a standard of proof regarding the likely contents of the destroyed [or unavailable] evidence,' because doing so 'would . . . allow parties who have . . . destroyed evidence to profit from that destruction.'"

Judge Scheindlin also held that regardless of the level of culpability, any presumption relating to spoliation is rebuttable. As such, the spoliating party should always have the opportunity to show that there is no prejudice caused by the absence of missing information. She then adopted a burden-shifting test.

> To ensure that no party's task is too onerous or too lenient, I am employing the following burden shifting test: When the spoliating party's conduct is sufficiently egregious to justify a court's imposition of a presumption of relevance and prejudice, or when the spoliating party's conduct warrants permitting the jury to make such a presumption, the burden then shifts to the spoliating party to rebut that presumption. The spoliating party can do so, for example, by demonstrating that the innocent party had access to the evidence alleged to have been destroyed or that the evidence would not support the innocent party's claims or defenses. If the spoliating party demonstrates to a court's satisfaction that there could not have been any prejudice to the innocent party, then no jury instruction will be warranted, although a lesser sanction might still be required.

Fourth, the opinion is also instructive on the appropriate level of sanctions that should be imposed by the court. Judge Scheindlin stressed that an appropriate sanction must be the least harsh sanction that is available and should be molded by the three-factor test previously adopted by the Third Circuit.

> Where the breach of a discovery obligation is the non-production of evidence, a court has broad discretion to determine the appropriate sanction. Appropriate sanctions should "(1) deter the parties from engaging in spoliation; (2) place the risk of an erroneous judgment on the party who wrongfully created the risk; and (3) restore 'the prejudiced party to the same position [it] would have been in absent the wrongful destruction of evidence by the opposing party.'

The Scheindlin opinion provides a detailed explanation of sanctions in the eDiscovery context. The case is likely to be used by federal courts throughout the country when dealing with spoliation and the failure to properly preserve documents.

To discuss any questions you may have regarding the decision discussed in this Alert, or how it may apply to your particular circumstances, please contact Tom Jones (tjones@cozen.com) or David Walton (dwalton@cozen.com)