

COMPLEX LITIGATION & *E - Discovery*

A Cautionary Tale: The Duty To Preserve And Collect Documents Revisited

By Beth S. Rose and Charles J. Falletta

The Honorable Shira Scheindlin of the Southern District of New York — author of the seminal *Zubulake* opinions — recently issued another landmark e-discovery decision that practitioners will be analyzing for years to come. In *The Pension Committee of the University of Montreal Pension Plan, et al. v. Banc of America Securities LLC, et al.*, No. 05 Civ. 9016 (SAS), 2010 WL 184312, S.D.N.Y. (Jan. 15, 2010), Judge Scheindlin revisits the issue of spoliation of evidence and the duty to preserve documents. As most practitioners now know, the duty to preserve documents may arise well before the filing

Rose is chair of the product liability practice group and co-chair of the litigation practice group at Sills Cummis & Gross in Newark. Falletta is a member of both practice groups. The views and opinions express in this article are those of the authors and do not necessarily reflect those of the firm.

of the complaint or even the retention of counsel. The test is whether the party reasonably anticipates litigation. The duty to preserve documents, however, is intertwined with the duty to collect them. Not only must a party institute a written litigation hold in a timely way, it also must collect documents from key players, and depending on the facts and circumstances of the case, collect documents from peripheral and former employees and preserve backup tapes.

The Pension Committee decision involved spoliation sanctions against 13 plaintiffs based on their alleged failure to timely issue written litigation holds and to preserve certain evidence before the filing of the complaint. While acknowledging that litigants were not required to produce documents with “absolute perfection,” the court cautioned that “at a minimum they must act diligently and search thoroughly at the time they reasonably anticipate litigation” or face potential spoliation of evidence consequences and sanctions, including but not limited to dismissal of their pleading, an adverse inference and monetary sanctions as may be

appropriate. Certain plaintiffs found to have been “grossly negligent” were ultimately subject to an adverse inference instruction and monetary sanctions even though the court found no “egregious examples of litigants purposefully destroying evidence.”

In February 2004, plaintiffs, a group of investors holding shares in two British Virgin Island-based hedge funds seeking to recover alleged losses of \$550 million arising from the liquidation of the funds, commenced an action in the United States District Court for the Southern District of Florida. In October 2005, the matter was transferred to the Southern District of New York. Between 2004 and February 2007, all discovery was stayed as was required by the Private Securities Litigation Reform Act.

Duty to Preserve

In April 2003, the funds’ manager had filed for bankruptcy and, in July 2003, the funds were placed into receivership in the Southern District of Florida. After being retained in October 2003, counsel contacted plaintiffs and instructed them to begin document preservation and collection. Counsel instructed plaintiffs by phone, e-mail and memoranda to be “over, rather than under, inclusive” and to include electronic documents in the production. In what may come as a surprise to some, the court determined that this protocol did not meet the litigation hold standard because it did not: (1) direct the preservation of all relevant paper and

electronic records; (2) create a mechanism to collect the preserved records; or (3) provide for someone other than the employee to determine whether the preserved records were responsive under counsel's supervision. Although the court noted that "not every employee will require hands-on supervision from an attorney," it cautioned that "attorney oversight of the process, including the ability to review, sample, or spot-check the collection efforts, is important" and that the "adequacy of each search must be evaluated on a case-by-case basis." Despite filing the complaint in 2004, counsel did not issue a written litigation hold until 2007 — after the stay was lifted — which was determined by the court to be "grossly negligent."

The court also determined that plaintiffs' duty to preserve attached in April 2003 — even before retaining counsel — based on the facts presented. There were several events, including the bankruptcy filing by the funds' manager, certain plaintiffs retaining counsel and the filing of a prior complaint that caused the duty to preserve to attach. The court reiterated that the "duty to preserve evidence arises when a party reasonably anticipates litigation" and that once it attaches, the party "must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents."

Spoliation of Evidence

During discovery in October 2007, a group of defendants, the Citco defendants, alleged that plaintiffs' document production contained "substantial gaps." At the close of discovery, the Citco defendants moved for sanctions and to dismiss the complaint based on plaintiffs' alleged failure to preserve and produce both paper and electronic documents. The court ordered plaintiffs to provide declarations describing their document preservation and production efforts. The Citco defendants deposed several of the custodians regarding their declarations and identified at

least 311 additional documents that were not produced. They also alleged that nearly all of the declarations were "false and misleading and/or executed by a declarant without personal knowledge of its contents."

As a general matter, the court explained that the "[f]ailure to preserve evidence resulting in the loss or destruction of relevant information is surely negligent, and, depending on the circumstances, may be grossly negligent or willful. For example, the intentional destruction of relevant records, either paper or electronic, after the duty to preserve has attached, is willful." In addition, "[t]he failure to issue a written litigation hold constitutes gross negligence because the failure is likely to result in the destruction of relevant information."

The court further determined 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." In contrast, the court noted 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." The court further reviewed other recent decisions finding that the "failure to collect information from the files of former employees that remain in a party's possession, custody, or control after the duty to preserve has attached" constituted gross negligence and the "failure to assess the accuracy and validity of selected search terms" constituted negligence.

The court also provided a "cautionary note" regarding backup tapes. Although it did not require the preservation of all backup tapes, the court advised that "if such tapes are the sole source of relevant information (e.g., the active files of key players are no longer available), then such backup tapes should be segregated and preserved." However, if "accessible data satisfies the requirement to

search for and produced relevant information, there is no need to save or search backup tapes."

After reviewing the conduct of each of the 13 plaintiffs, the court determined that some plaintiffs were "grossly negligent" while others were only "negligent" in failing to timely implement a written litigation hold and failing to preserve relevant documents. With respect to the "grossly negligent" plaintiffs, the Court imposed the sanction of permitting the jury, if they so chose, to determine that the lost evidence was both relevant and favorable to the Citco defendants, and to draw an adverse inference against those plaintiffs. In addition, the court ordered all 13 plaintiffs to pay the Citco defendants monetary sanctions, including reasonable costs and attorneys' fees related to reviewing the plaintiffs' declarations, the depositions of these declarants, and in filing their spoliation motion.

While the *Pension Committee* decision is not binding on New Jersey courts, it surely will be viewed as persuasive authority and parties seeking sanctions are likely to rely on this opinion. Although spoliation of evidence is fact specific and will be analyzed on a case by case basis, the *Pension Committee* decision makes clear that anything less than a timely written litigation hold put in place as soon as litigation is reasonably anticipated can constitute "gross negligence" and could result in dismissal, an adverse inference jury charge, and monetary sanctions. Moreover, once litigation is reasonably anticipated, a party must direct the preservation of all relevant paper and electronic records by identifying key players involved in the litigation, including current and former employees, implement a procedure to collect the preserved records that includes attorney oversight and supervision of the process, does not simply rely on the employee to determine whether materials are responsive, and provides for evaluation of the adequacy of each search conducted. ■