



The Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLP et al.

Shira A. Scheindlin, U.S.D.J. (Amended Opinion filed January 15, 2010)
(United States District Court, Southern District of New York)

Zubulake Revisited Six Years Later

Creates Three Standards of Discovery Misconduct

Looks to traditional tort law concepts for standards of conduct in discovery

- (1) Negligence
- (2) Gross negligence
- (3) Willfulness

Admits three standards cannot be measured with exactitude and might be called differently by a different judge

Sanctions for Spoliation Requires Four-Part Analysis

- (1) Level of culpability (negligence; gross negligence; willfulness)
- (2) Interplay between the duty to preserve evidence and the spoliation of that evidence
- (3) Burden of proof that evidence has been lost or destroyed and consequences of that loss
- (4) Appropriate remedy

Examples of Negligence

- Issuance of defective litigation hold resulting in the loss or destruction of relevant information
- Failure to obtain records from all employees (as opposed to key players)
- Failure to take sufficient measures to preserve ESI
- Failure to assess accuracy and validity of search terms

Examples of Gross Negligence

- Failure to issue written litigation hold
- Failure to collect records from key players
- Failure to cease destruction of e-mail or back-up tapes after duty to preserve
- Failure to collect ESI from former employees that remain in party's possession

Examples of Willfulness

- Intentional destruction of e-discovery or documents after duty to preserve attaches
- Intentionally deleting computer files

Duty To Preserve

- Arises when a party reasonably anticipates litigation
- Plaintiff's duty arises before litigation starts
- Must suspend routine retention/destruction policies
- Must issue written litigation hold to all appropriate constituents

Burden of Proof

- Depends on severity of sanction
- Severe sanctions (dismissal; preclusion; adverse jury instruction)
- Court must consider: (1) Conduct of spoliating party; (2) Relevance of missing evidence; and (3) Prejudice to innocent party (helpful in proving claims or defenses)

- Innocent party must prove both relevance and prejudice if spoliating party acted with negligence
- Relevance is a “limited” burden
- Relevance and prejudice may be presumed if spoliating party acted in bad faith or grossly negligent
- Any presumption is rebuttable (i.e., spoliating party demonstrates innocent party had access to lost information or that such information does not support innocent party’s claims or defenses)

Lesser sanction may be granted even if no prejudice

Sanctions

- Court should always impose least harsh sanction that can provide adequate remedy
- Examples (least harsh to most harsh): Further discovery; cost-shifting; fines; special jury instructions; preclusion; entry of default or dismissal (terminating sanctions)

- Selection of appropriate remedy is “a delicate matter requiring a great deal of time and attention by a court”
- Terminating sanction: Where spoliating party has engaged in perjury, tampering with evidence or intentionally destroying evidence by burning, shredding or wiping computer hard drives
- Non-terminating sanctions for spoliation: Instruction that certain facts are admitted, court may direct mandatory presumption (still rebuttable); court may instruct permissible presumption; monetary sanctions (cost of motion for sanctions)

Court admits sanctions are “inherently subjective” based upon a “gut reaction”

Judge provides jury instruction to be used in the case (good sample for other cases)

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