# *Pension Committee*: Degrees of Culpability and Discovery Sanctions

By Jennifer Ide and Angie Fox

In 2003 and 2004, Judge Shira Scheindlin of the Southern District of New York issued her oft-cited series of opinions in *Zubulake v. UBS Warburg* that influenced the landscape of e-discovery practices throughout the federal court system.[1] In her latest discovery decision, *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*,[2] subtitled "*Zubulake* Revisited: Six Years Later," Judge Scheindlin provides a framework for when acts or omissions in preserving, collecting, and producing documents may breach current standards of care in discovery practice and when such acts or omissions may lead to the imposition of sanctions.

## Background

*Pension Committee* was filed in the U.S. District Court for the Southern District of Florida in 2004. It involves federal securities fraud and New York state-law claims by a large group of investors seeking to recover $550 million in losses arising out of the liquidation of two offshore hedge funds in which they held shares: Lancer Offshore, Inc. and Omnifund Ltd. The funds were managed by Lancer Management Group LLC and its principal, who for a period of time retained Citco Fund Services (Curacao) N.V. to act as the administrator. Citco N.V., its parent organization, and former Lancer directors who were Citco N.V. officers were names as defendants.

The case was transferred to the U.S. District Court for the Southern District of New York in 2005, but was then stayed for two years under the Private Securities Litigation Reform Act. After the stay was lifted and discovery commenced, it became apparent to the Citco defendants that there were gaps in the plaintiffs' document productions. In response to a court order, the plaintiffs filed declarations regarding their efforts to locate, preserve, and produce documents.

The declarations outlined the steps plaintiffs took to preserve documents and averred that no documents were destroyed after a particular date. The Citco defendants then deposed the declarants and other individuals and discovered that numerous documents that should have been produced had not been. They also showed that "almost all of the declarations were false and misleading and/or executed by a declarant without personal knowledge of its contents." After the close of discovery, the Citco defendants moved for sanctions against 13 of the 96 plaintiffs based on their deficient document productions and misleading declarations. The Citco defendants sought dismissal or any other sanction the court deemed appropriate.

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In what Judge Scheindlin herself characterizes as a "long and complicated opinion," she lays out an analytical framework for analyzing whether the plaintiffs' behavior was unacceptable and what sanctions, if any, were appropriate. As described below, this analysis begins with a three-tiered categorization of unacceptable behavior in the discovery context: negligence, gross negligence, and willfulness. Next, Judge Scheindlin reviews the relationship between the duty to preserve evidence and a finding of spoliation. Third, she defines which party bears the burden of proof in establishing that missing evidence is relevant and its absence prejudiced the innocent party. Finally, Judge Scheindlin identifies various remedies available to address culpable behavior when evidence is missing due to discovery violations.

## Judge Scheindlin's Three Tiers of Culpability

Judge Scheindlin categorizes culpable behavior in document collection, preservation, and production into three tiers: negligence, gross negligence, and willfulness. In doing so, she notes that determining "how bad" unacceptable conduct is will be a judgment call made by courts with the benefit of hindsight and "cannot be measured with exactitude and might be called differently by a different judge."

Judge Scheindlin defines negligence as involving "unreasonable conduct" that "creates a risk of harm to others," which, in the discovery context, means failing to "participate meaningfully and fairly in the discovery phase of a judicial proceeding." She notes that the "failure to conform to this standard is negligent even if it results from a pure heart and an empty head." Examples of negligent behavior provided by Judge Scheindlin include a "failure to preserve evidence resulting in the loss or destruction of relevant information" (which could also rise to the level of gross negligence), a failure to collect evidence, a sloppy review that results in the loss or destruction of evidence (which could also rise to the level of gross negligence or willfulness), a "failure to obtain records from all those employees who had any involvement with the issues raised in the litigation or anticipated litigation"[3] a "failure to take all appropriate measures to preserve ESI," and a "failure to assess the accuracy and validity of selected search terms."[4]

"Gross negligence" is defined by Judge Scheindlin as conduct that fails to "exercise even that care which a careless person would use." She notes that, at least after July 2004 when *Zubulake V* was issued, the failure to issue a *written* litigation hold will constitute gross negligence. Other examples of gross negligence include the "failure to collect records—either paper or electronic—from key players," the "destruction of email or certain backup tapes after the duty to preserve has attached" (both of which could rise to the level of willfulness), and the

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"failure to collect information from the files of former employees that remain in the party's possession, custody, or control after the duty to preserve has attached."

The most egregious level of culpable behavior is willful conduct, which Judge Scheindlin defines as "intentional or reckless conduct that is so unreasonable that harm is highly likely to occur." In addition to the examples provided above, Judge Scheindlin notes that willfulness would include acts such as "the intentional destruction of relevant records, either paper or electronic, after the duty to preserve has attached."

## Sanctions under *Pension Committee*

Where a party fails to preserve documents once litigation is reasonably foreseen, spoliation of evidence may occur, which Judge Scheindlin defines as "the destruction or material alteration of evidence or . . . the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." The right to impose sanctions for spoliation "arises from a court's inherent power to control the judicial process and litigation." Judge Scheindlin notes, however, that the court's power is limited to that necessary to redress conduct "which abuses the judicial process."

Two separate concerns come into play in the decision to impose sanctions. First, did a party abuse the judicial process by acting unreasonably in conducting discovery? Second, did the offending party's conduct result in the loss of relevant evidence, and has the innocent party been prejudiced by the loss? An abuse of the discovery process even without a showing of relevance and prejudice may warrant lesser sanctions such as further discovery, cost-shifting, or fines. For the "severest of sanctions"—such as an adverse-inference instruction, preclusion, or dismissal—to be imposed, however, an innocent party must show the missing evidence was relevant and the innocent party was prejudiced by the loss of evidence.[5]

To ensure the punishment fits the crime, Judge Scheindlin ties the burden in establishing spoliation and the applicable sanctions to whether the conduct at issue was negligent, grossly negligent, or willful. Where a party has acted willfully in destroying or failing to preserve evidence, Judge Scheindlin opines that both bad faith and relevance should be presumed. Where gross negligence is found, this presumption may be made, but it is not required. Under either tier of culpability, the presumption is rebuttable if the spoliating party can show there has been no prejudice. An example of evidence that may rebut this presumption would be a showing 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." The innocent party may then offer evidence to counter this assertion.

Where a spoliating party acts with negligence, the harshest sanctions may be imposed if there is a showing that the offending party's conduct resulted in the loss of relevant evidence, but there is no presumption of relevance or prejudice and the innocent party bears the burden of proving both. To do so, the innocent party "'must present extrinsic evidence tending to show that the destroyed [documents] would have been favorable to [its] case.'"[6] Judge Scheindlin notes that the innocent party should not be held to "too strict a standard of proof" regarding relevance and prejudice because to do so would reward the spoliating party.

Finally, where the harshest sanctions are not warranted, Judge Scheindlin remarks that "less severe" sanctions, such as fines or cost shifting, may be appropriate. With these types of sanctions, the focus is less on a finding of relevance and prejudice and more on the conduct of the spoliating party.

## Outcome of the *Pension Committee* Decision

After laying out this analysis, Judge Scheindlin goes through the allegations brought against each of the 13 plaintiffs. Ultimately, Judge Scheindlin concludes that "most plaintiffs conducted discovery in an ignorant and indifferent fashion" and should be sanctioned.[7] She determines that with respect to the plaintiffs who acted with gross negligence—those who failed to issue a timely written litigation hold; failed to preserve or collect *any* electronic documents prior to 2007; continued to delete electronically stored information (ESI) after the duty to preserve arose; failed to request documents from key players; delegated search efforts without any supervision from counsel or management; destroyed backup data potentially containing responsive documents of key players otherwise unavailable; and/or submitted inaccurate or misleading declarations—a charge to the jury that it *could* presume that the lost evidence was relevant and would have been favorable to the Citco defendants was warranted.

**The "*Zubulake* sequel" may not have had quite the bite first anticipated.**

Judge Scheindlin finds that the other plaintiffs' behavior constitutes simple negligence. While these plaintiffs had failed to issue a written litigation hold until 2007, Judge Scheindlin notes that the case was originally filed in Florida where it was less well established than in New York at the time that a written litigation hold was required. Judge Scheindlin, therefore, examines these plaintiffs' conduct on the whole to determine whether it was negligent or grossly negligent. In doing so, she determines that the additional acts and omissions such as failing to understand how electronic documents are stored, failing to supervise document searching and retrieval in a meaningful manner, failing to search the emails of all employees with involvement in the matter, failing to search documents sent and received on handheld devices, and failing to conduct a full and complete search of ESI under the specific facts at issue, constituted negligence rather than gross negligence.

Judge Scheindlin imposes monetary sanctions against both the negligent and grossly negligent plaintiffs, awarding the Citco defendants their costs and fees in bringing the discovery motion, including the taking of depositions that showed the discovery inadequacies. Finally, Judge Scheindlin orders that certain plaintiffs

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be required to respond to further discovery where there was reason to believe that additional searching may be productive.

Considering the underlying facts, the ultimate outcome of *Pension Committee* is not particularly surprising. However, the analytical framework established by Judge Scheindlin in *Pension Committee* has left some practitioners wondering if the harsh sanction of an adverse-inference instruction may be imposed in the future on plaintiffs who act in a merely negligent manner and under what circumstances.

## Preservation Duties Texas-Style: Judge Rosenthal Reins in *Pension Committee*

On the heels of the *Pension Committee* decision, Judge Lee H. Rosenthal, chair of the Federal Judicial Conference Advisory Committee for the Federal Rules of Civil Procedure, issued a thoughtful opinion in *Rimkus Consulting Group v. Cammarata*[8] suggesting that Judge Scheindlin's "*Zubulake* sequel" may not have had quite the bite first anticipated.

As distinguished from the negligent acts underlying *Pension Committee*'s holding, *Rimkus* imposes an adverse inference against a party for intentionally destroying ESI—conduct that most courts agree may warrant such a sanction. Notwithstanding this rather unremarkable ultimate holding, however, *Rimkus* is a must-read opinion because Judge Rosenthal broadly discusses the analytical issues underlying spoliation claims, and in doing so, tethers *Pension Committee* to its facts and the Second Circuit's minority view concerning when an adverse-inference instruction is an appropriate discovery sanction.

## *Rimkus*: A Brief Summary

In *Rimkus*, a forensic-engineering company sued its former employees who started a rival company, alleging breach of fiduciary duty, misappropriation of trade secrets, and breaches of noncompetition and nonsolicitation agreements.[9] The former employees were plaintiffs in an earlier-filed Louisiana suit seeking declaratory judgment that the noncompetition and nonsolicitation provisions were unenforceable. Judge Rosenthal finds the employees' duty to preserve evidence was triggered no later than when they began discussing the preemptive Louisiana action.

Despite this duty, the defendant employees "made *no* effort to preserve relevant documents, even after the Louisiana and Texas suits had been filed." Instead, the record demonstrated that the defendant employees took affirmative steps to destroy ESI containing evidence favorable to the plaintiff's claims. Judge Rosenthal finds sufficient evidence that the documents were destroyed in bad faith because, among other things, the defendants gave inconsistent explanations for the deletions; failed to disclose personal email accounts later shown to have been used to transmit proprietary information; and denied taking proprietary information later contradicted by recovered emails.

Judge Rosenthal concludes that the plaintiff corporation is entitled to an adverse-inference instruction because there was sufficient evidence from which a jury could find the defendant employees willfully and in bad faith destroyed relevant documents. Judge Rosenthal further awards the plaintiff "its costs and attorneys' fees reasonably incurred in investigating the spoliation, obtaining emails from third-party subpoenas, and taking the additional depositions of [defendants] on the issues of email deletion."

In contrast to *Pension Committee*'s complicated burden-shifting jury instruction, Judge Rosenthal rules that the jury first determine whether the employees willfully destroyed ESI. If the jury determines there was willfulness, Judge Rosenthal empowers the jury to make the ultimate decision, considering all the evidence, on whether to infer that the lost information would have been unfavorable to the spoliating party's case.

## *Rimkus* Tethers *Pension Committee* to Its Facts

Judge Rosenthal introduces the concept of proportionality into her discussion of the spoliation analysis in *Pension Committee*. Citing the Sedona Principles,[10] Judge Rosenthal holds that whether the loss of ESI is actionable depends on "what is *reasonable*, and that in turn depends on whether what was done—or not done—was *proportional* to that case and consistent with clearly established applicable standards."[11] She also emphasizes that the extent to which the spoliation may be sanctioned by courts defies bright-line rules and "depends on both the degree of culpability and the extent of prejudice," tailored to be no harsher than needed to serve the goals of compensation or deterrence.

At first blush, Judge Rosenthal's use of a more traditional negligence standard (e.g., reasonableness) appears at odds with Judge Scheindlin's categorical approach (e.g., "failure to preserve evidence resulting in the loss or destruction of relevant information is surely negligent" and a post-2004 "failure to issue a written litigation hold constitutes gross negligence"). Judge Rosenthal seems to suggest, however, that *Pension Committee*'s culpability standard implicitly embodies a proportionality requirement when viewed in its factual context. Discussing the need for proportionality, Judge Rosenthal notes "the reasonableness of discovery burdens in a $550 million case arising out of the liquidation of hedge funds, as in *Pension Committee*, will be different than the reasonableness of discovery burdens in a suit to enforce noncompetition agreements and related issues, as in the present case."

By highlighting the factual basis upon which Judge Scheindlin based her spoliation analysis, Judge Rosenthal suggests *Pension Committee* does not create per se culpability standards. Instead, Judge Rosenthal seems to take Judge Scheindlin at her word that determining whether a party's e-discovery conduct is unacceptable must be determined on a case-by-case basis and is "a call that cannot be measured with exactitude and might be called differently by a different judge."[12]

## Circuits Are Split

In addition to underscoring the need to balance the burdens of discovery against the nature of the case and the amount in controversy, *Rimkus* is important because it charts a clear path for litigants in other circuits, seeking to diminish the precedential weight of *Pension Committee* and to avoid an adverse-inference instruction.

In issuing an adverse-inference instruction for grossly negligent conduct, Judge Scheindlin applied Second Circuit precedent that holds "[t]he sanction of an adverse inference may be appropriate

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in some cases involving the negligent destruction of evidence because each party should bear the risk of its own negligence."[13]

By contrast, in *Rimkus*, Judge Rosenthal was bound by Fifth Circuit precedent, which generally requires a showing of bad faith before a court may issue an adverse-inference instruction.[14] This rule, in essence, is shared by the Seventh, Eighth, Tenth, Eleventh, and D.C. Circuits. For this reason, Judge Rosenthal asserts "[t]he circuit differences in the level of culpability necessary for an adverse inference instruction limit the applicability of the *Pension Committee* approach."

In accordance with the policy rationale underlying an adverse inference—that certain conduct supports an inference of consciousness of a weak case—other circuits seem to agree something more than negligence is required. In the First, Fourth, and Ninth Circuits, bad faith is not required if the innocent party is severely prejudiced. Nevertheless, as Judge Rosenthal notes, these circuits often emphasize the presence of bad faith when issuing an adverse inference. The Third Circuit employs a hybrid standard balancing the degree of culpability and the extent of prejudice.

Parties before the Sixth Circuit, however, may want to brush up on their so-called *Zubulake* duties because *Pension Committee* is more likely to influence the extent to which Sixth Circuit courts issue an adverse inference for negligent e-discovery conduct. Recently, overturning its prior ruling, the Sixth Circuit in *Adkins v. Wolever* joined other circuits in holding that federal spoliation law applies to diversity cases litigated in federal court.[15] Given the lack of prior cases interpreting federal spoliation law in the Sixth Circuit pre-*Adkins*, Sixth Circuit district courts have looked outside their jurisdiction for guidance on federal spoliation standards. In doing so, there has emerged a split among the district courts regarding the degree of culpability required for an adverse-inference instruction.[16]

In developing their federal spoliation jurisprudence, several district courts in the Sixth Circuit have interpreted Second Circuit case law as permitting an adverse inference for ordinary negligence.[17] These courts find that bad faith is unnecessary but useful for establishing the necessary element of relevance.[18] The U.S. District Court for the Southern District of Ohio, however, has recently stated that "[g]enerally, a court will not impose an adverse inference with respect to destroyed evidence, unless the party did so in bad faith."[19]

If past is prologue, the Sixth Circuit is likely to resolve such split in favor of adopting the Second Circuit approach. When construing state spoliation law pre-*Atkins*, the Sixth Circuit permitted a rebuttable adverse-inference instruction when "a plaintiff [wa]s unable to prove an essential element of her case due to the *negligent* loss or destruction of evidence by an opposing party."[20] Given the Sixth Circuit's willingness to grant an adverse inference for negligent conduct, and the policy rationale employed to do so, it is likely the Sixth Circuit will resolve any conflict among the district courts in favor of the Second Circuit approach in light of Judge Scheindlin's holding in *Pension Committee*.

## Avoiding an Adverse-Inference Instruction Outside the Second Circuit

In addition to the circuit split over the level of culpability required for an adverse inference, Judge Rosenthal's *Rimkus* opinion reveals a diverging view regarding the burden of proof necessary for such sanction.[21] Generally, the innocent party is required to prove, among other things, that the lost information was both relevant and prejudicial to its case.[22] In *Pension Committee*, Judge Scheindlin held that the jury could presume relevance and prejudice if the spoliating party acted with gross negligence, allowing the innocent party to rebut the presumption.[23] Unlike the Second Circuit, Judge Rosenthal states, in dictum, that Fifth Circuit precedent likely forecloses courts from such burden shifting, even where a party has willfully destroyed information.[24] Instead, the Fifth Circuit approach favors a strong check on frivolous spoliation allegations.

Perhaps most controversially, however, Judge Rosenthal insinuates that Second Circuit case law (and by association *Pension Committee*) may contravene the U.S. Supreme Court decision *Chambers v. NASCO, Inc.*,[25] by imposing an adverse inference in the absence of bad faith "to the extent sanctions are based on inherent power."[26] In *Chambers*, the Supreme Court held that a federal court may impose sanctions in the form of attorney fees pursuant to its inherent authority.[27] In so holding, the Supreme Court emphasized that a court's inherent power to issue "the 'less severe sanction' of an assessment of attorney's fees" only may be exercised "in narrowly defined circumstances." These narrow exceptions "effectively limit a court's inherent power to impose attorney's fees as a sanction to cases in which a litigant has engaged in bad-faith conduct or willful disobedience of a court's orders."

## Conclusion

While it is indisputable that the *Zubulake* opinions have had a far-reaching impact on the world of e-discovery—*Zubulake IV* has been cited over 1,600 times—the same may not prove true for the entirety of the *Pension Committee* decision. Judge Scheindlin's thorough opinion lays out a helpful and well-reasoned approach to discovery sanctions. However, with respect to merely negligent behavior, courts outside the Second and Sixth Circuits are likely to diverge from *Pension Committee* and continue to require a finding of bad faith before imposing an adverse-inference instruction for the spoliation of evidence.

## Endnotes

1. Zubulake v. UBS Warburg, 217 F.R.D. 309 (S.D.N.Y. 2003) (*Zubulake I*); Zubulake v. UBS Warburg, 230 F.R.D. 290 (S.D.N.Y. 2003) (*Zubulake II*); Zubulake v. UBS Warburg, 216 F.R.D. 280 (S.D.N.Y. 2003) (*Zubulake III*); Zubulake v. UBS Warburg, 220 F.R.D. 212 (S.D.N.Y. 2003) (*Zubulake IV*); Zubulake v. UBS Warburg, 229 F.R.D. 422 (S.D.N.Y. 2004) (*Zubulake V*).

2. 685 F. Supp. 2d 456 (2010 S.D.N.Y.). Judge Scheindlin initially issued an opinion in *Pension Committee* January 11, 2010 but subsequently withdrew that opinion and replaced it with a January 15, 2010, opinion, which was again amended on May 28, 2010.

3. On May 28, 2010, Judge Scheindlin entered a second amendment to the *Pension Committee* opinion and replaced "[b]y contrast, 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" with "[b]y contrast, the failure to obtain records from all those employees who had any involvement with the issues raised in the litigation or anticipated litigation, as opposed to key players, could constitute negligence."

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4. *Pension Comm.*, 685 F. Supp. 2d at 464.

5. *Id.* (citing Residential Funding Corp. v. De-George Fin. Corp., 306 F.3d 99, 109 (2d Cir. 2002).)

6. *Id.* at 468 (quoting Toussie v. Cty. of Suffolk, No. 01 Civ. 6716, 2007 WL 4565160, at *8 (E.D.N.Y. Dec. 21, 2007)).

7. *Id.* at 496.

8. 688 F. Supp. 2d 598 (S.D. Tex. 2010).

9. *Id.* at 621–23.

10. The Sedona Principles: Second Edition, Best Practices Recommendations & Principles for Addressing Electronic Document Production 17 cmt. 2.b. (2007).

11. *Rimkus*, 688 F. Supp. 2d at 613.

12. *Pension Comm.*, 685 F. Supp. 2d at 463.

13. *Residential Funding Corp.*, 306 F.3d at 108.

14. *Rimkus*, 688 F. Supp. 2d at 614.

15. 554 F.2d 650, 652 (6th Cir. 2009).

16. *See* Dilts v. Maxim Crane Works, LP, Civ. A. No. 07-38, 2009 WL 3161362, at *3 (E.D. Ky. Sept. 28, 2009) (recognizing the split among district courts).

17. *See*, *e.g.*, Bancorpsouth Bank v. Herter, 643 F. Supp. 2d 1041, 1061 (W.D. Tenn. 2009).

18. *Id.*

19. *In re* Nat'l Century Fin. Enter., Inc., No. 2:03-md-1565, 2009 WL 2169174, at *3 (S.D. Ohio July 16, 2009).

20. Welsh v. United States, 844 F.2d 1239, 1248–49 (6th Cir. 2002) (emphasis added), *overruled on other grounds by* Adkins v. Wolever, 554 F.2d 650, 652 (6th Cir. 2009) (holding federal spoliation law applies to cases litigated in federal court). In a more recent pre-*Adkins* unpublished opinion, the Sixth Circuit noted that, while bad faith is not required, "[i]n general, a court may not allow an inference that a party destroyed evidence that is in its control, unless the party did so in bad faith." Tucker v. Gen. Motors Corp., 945 F.2d 405, No. 91-3019, 1991 WL 193458, at *2 (6th Cir. Sept. 30, 1991). Harmonizing these somewhat conflicting opinions, the Sixth Circuit noted "the failure to preserve evidence one knows, or should know, to be relevant to potential litigation could be described as acting in 'bad faith.'" One Beacon Ins. Co. v. Broad. Dev. Group, Inc., 147 Fed. Appx. 535, 541 n.3 (6th Cir. 2005).

21. *Rimkus*, 688 F. Supp. 2d at 615–18.

22. *See Zubulake IV*, 220 F.R.D. at 220.

23. *Pension Comm.*, 685 F. Supp. 2d at 446–47.

24. *Rimkus*, 688 F. Supp. 2d at 617.

25. 501 U.S. 32, 43–46, 111 S. Ct. 2123, 2132–33 (1991).

26. *Rimkus*, 688 F. Supp. 2d at 615.

27. *Chambers*, 501 U.S. at 36, 111 S. Ct. at 2128.

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