DECONSTRUCTING *PENSION COMMITTEE*: THE EVOLVING RULES OF EVIDENCE SPOLIATION AND SANCTIONS IN THE ELECTRONIC DISCOVERY ERA

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I. INTRODUCTION

U.S. District Court Judge Shira Scheindlin is arguably the nation's most influential judicial authority on the topic of electronic discovery ("e-discovery"). This article will review Judge Scheindlin's seminal e-discovery opinion in *Pension Committee*,[1] and analyze the subsequent treatment of, and marks left by, a few notable aspects of her ruling.

A discussion of Judge Scheindlin's *Pension Committee* Order and Opinion is incomplete without first mentioning the series of decisions which are her greatest legacy in the area of e-discovery, collectively referred to as *Zubulake*.[2] Indeed, the very first words Judge Scheindlin penned in *Pension Committee* read "*Zubulake* Revisited: Six Years Later."[3]

In the *Zubulake* series of opinions, Judge Scheindlin brought into focus the foundational legal principles relevant to modern discovery practice: preservation, production, and spoliation[4] of electronically stored information. Judge Scheindlin illuminated the legal rules

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[1] Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of America Securities LLC, 685 F. Supp. 2d 456 (S.D.N.Y. Jan. 15, 2010), as amended May 28, 2010.

[2] *See* Zubulake v. UBS Warburg, 217 F.R.D. 309 (S.D.N.Y. May 13, 2003) (*Zubulake I*); *Zubulake*, 216 F.R.D. 280 (S.D.N.Y. July 24, 2003) (*Zubulake III*); *Zubulake*, 220 F.R.D. 212 (S.D.N.Y. October 22, 2003) (*Zubulake IV*); and *Zubulake*, 229 F.R.D. 422 (S.D.N.Y. July 20, 2004) (*Zubulake V*).

[3] *Pension Committee*, 685 F. Supp. 2d at 461.

[4] Spoliation is generally described as "'the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation.'" *See* Byrnie v. Town of Cromwell, Board of Education, 243 F.3d 93, 107 (2d Cir. 2001) (quoting West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999)).

governing these emerging issues, and helped pave the way for the December 2006 amendments to the Federal Rules of Civil Procedure.[5] Whether one agrees or disagrees with the lines drawn by Judge Scheindlin, her *Zubulake* opinions indisputably captured widespread attention and left indelible marks on the nation's judicial system. Indeed, the *Zubulake* opinions have been cited extensively, and are afforded deferential treatment by numerous District Courts[6] and by trial and/or appellate courts in several states.[7] It truly was a landmark case.

A simple reading of *Pension Committee* may leave one wondering why others consider it the most notable e-discovery opinion since *Zubulake*. After all, Judge Scheindlin simply revisits many of the ideas and standards she first articulated in *Zubulake*, without ostensibly upsetting or extending her initial rulings significantly.[8] Upon close examination, however, practical intricacies are revealed that substantially affect discovery practice. Moreover, the subsequent treatment of *Pension Committee* by other courts has highlighted the absence (and need for) national standards pertaining to the preservation of electronically stored information and the appropriate protocols governing spoliation sanctions should litigants fail to do so adequately.

Judge Scheindlin's decision in *Pension Committee* is probably best characterized as an attempt to further ignite litigants—and their counsel—to take their discovery obligations seriously, and to reinforce a sense of fairness for victims of spoliation. To this end, *Pension Committee* is noteworthy for two reasons: (1) it formulaically links the failure to carry out defined preservation tasks with concepts of negligence and gross negligence; and (2) where spoliation results from gross negligence, it provides for rebuttable presumptions that the information lost was relevant and that the innocent party was prejudiced by the spoliation.[9]

For these same reasons, *Pension Committee* is widely criticized for

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[5] The language of the December 2006 amendments to Fed. R. Civ. P. 26, 34, 37, and 45, and the corresponding Advisory Committee Notes, track in large part, and are significantly influenced by, the *Zubulake* decisions.

[6] *See, e.g.*, Williams v. N.Y.C. Transit Auth., No. 10 CV 0882(ENV), 2011 WL 5024280, at *4 (E.D.N.Y. Oct. 19, 2011); Essenter v. Cumberland Farms, Inc., No. 1:09-CV-0539 (LEK/DRH), 2011 WL 124505, at *6 (N.D.N.Y. Jan. 14, 2011); Passlogix, Inc. v. 2FA Tech., LLC, 708 F.Supp.2d 378, 409 (S.D.N.Y. 2010).

[7] *See, e.g.*, Howard Reg'l Health Sys. v. Gordon, 952 N.E.2d 182, 189 (Ind. 2011); Voom HD Holdings LLC v. Echostar Satellite L.L.C., Index No. 600292/08, 2010 N.Y. Misc. LEXIS 6306, at *49–50, *67–68 (N.Y. Sup. Ct. Nov. 3, 2010).

[8] *Pension Committee*, 685 F. Supp. 2d at 471.

[9] *See id.* at 464–65, 467–68.

establishing unreasonably stringent *per se* rules that are too disconnected from everyday "in the trenches" litigation practice, and for swinging the pendulum too far in favor of parties seeking spoliation sanctions by relaxing the burden of proof (and thus encouraging spoliation motions as an offensive tactic).[10] For example, Judge Scheindlin deems the failure to utilize a *written* litigation hold notice an act of gross negligence in and of itself (even if verbal instructions are given); the consequence of which is a nearly automatic presumption, as matter of law, that a party moving for severe sanctions was actually prejudiced by an alleged loss of discoverable information.[11]

The debate surrounding *Pension Committee*—and more generally spoliation and sanctions—boils down to the trilogy of scienter, relevance, and prejudice alluded to above, and the effect each of these elements has on one another in the context of imposing severe sanctions, such as an adverse inference jury instruction.[12] Before and after *Pension Committee*, courts across the nation have struggled to find a consistent and fair balance, repeatedly confronting questions like: Is the spoliation of evidence attributable to ordinary negligence sufficient for the imposition of an adverse inference instruction or must there be proof of bad faith? Who should carry the burden of proving that evidence destroyed by an adversary was or was not relevant, or that the innocent party was or was not prejudiced? Should this burden be allocated among the parties based upon the mental culpability of the spoliating party, and, if so, to what extent?[13] Judge Scheindlin provides her views in *Pension Committee*; others reach disparate results.

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[10] *See, e.g.*, Surowiec v. Capital Title Agency, Inc., 790 F. Supp. 2d 997, 1007 (D. Ariz. 2011) (noting that *per se* rules regarding spoliation are too inflexible and should be evaluated on a case-by-case basis).

[11] *Pension Committee*, 685 F. Supp. 2d at 465–67.

[12] As Judge Scheindlin observed in *Zubulake IV*,

> [i]n practice, an adverse inference instruction often ends litigation—it is too difficult a hurdle for the spoliator to overcome. The *in terrorem* effect of an adverse inference is obvious. When a jury is instructed that it may infer that the party who destroyed potentially relevant evidence did so out of a realization that the evidence was unfavorable, the party suffering this instruction will be hard-pressed to prevail on the merits. Accordingly, the adverse inference instruction is an extreme sanction and should not be given lightly.

Zubulake IV, 220 F.R.D. at 219–20 (internal citation and quotation marks omitted).

[13] *See, e.g.*, Reilly v. Natwest Mkts. Grp. Inc., 181 F.3d 253, 268 (2d Cir. 1999) (noting that when a party's bad faith or negligence results in the failure to turn over relevant evidence an adverse inference instruction might be appropriately given); *see also e.g.*, Davis v. Speechworks Int'l, Inc., No. 03-CV-533S(F), 2005 WL 1206894, at *3 (W.D.N.Y. May 20, 2005) (finding that the party seeking sanctions bears the burden of proving relevancy).

II. A SUMMARY OF THE *PENSION COMMITTEE* OPINION AND ORDER

Pension Committee involved a complex securities litigation filed by a group of ninety-six investors trying to recover $550 million in losses incurred from the collapse of two hedge funds.[14] In anticipation of litigation, the plaintiffs engaged outside counsel who "telephoned and e-mailed plaintiffs and distributed memoranda" instructing the plaintiffs to begin collecting and producing to counsel copies of relevant documents that were necessary to draft the complaint.[15] The case was filed in the Southern District of Florida in February 2004; it was transferred to the Southern District of New York in October 2005.[16]

The defendants asserted numerous discovery violations from October 2007 to June 2008, including allegations that thirteen plaintiffs failed to preserve electronically stored information and documents, and then made "false and misleading declarations regarding their document collection and preservation efforts."[17] The defendants moved the court to impose sanctions against the thirteen plaintiffs for their alleged discovery misconduct.[18]

According to the court, the plaintiffs targeted by the motion "clearly failed to preserve and produce relevant documents that existed at the time (or shortly after) the duty to preserve arose."[19] The missing documents included 311 cross–referenced e-mails that were not produced by some plaintiffs, but were by others.[20] The court also concluded that certain unknown, yet presumptively relevant documents were missing from the plaintiffs' productions, including documents that were presumed to have existed as part of the plaintiffs' fiduciary duty of due diligence prior to making significant investments in the hedge funds.[21]

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[14] *Pension Committee*, 685 F. Supp. 2d at 462.

[15] *Id.* at 473.

[16] *Id.*

[17] *Id.* at 463. The defendants, noticing gaps in the plaintiffs' document production, made a request to the court for declarations describing the plaintiffs' preservation efforts. In response, the plaintiffs filed declarations in the first half of 2008. *Id.* at 462. Following depositions of certain declarants, the defendants uncovered significant gaps in discovery proffered by the thirteen plaintiffs, including finding that "almost all of the declarations were false and misleading and/or executed by a declarant without personal knowledge of its contents." *Id.* at 475.

[18] *Id.* at 463.

[19] *Id.* at 476.

[20] *See id.* at 475.

[21] *Id.* ("The paucity of records produced by some plaintiffs and the admitted failure to preserve some records or search at all for others by all plaintiffs leads inexorably to the conclusion that relevant records have been lost or destroyed.").

It is important to note that *Pension Committee* does not involve "any egregious examples of litigants purposefully destroying evidence."[22] Still, Judge Scheindlin imposed severe sanctions in the form of a spoliation jury instruction against certain plaintiffs because they "failed to timely institute written litigation holds and engaged in careless and indifferent collection efforts after the duty to preserve arose."[23]

A. Court-Imposed Sanctions for the Spoliation of Evidence

It is well established that when spoliation of evidence occurs, a court may impose discovery sanctions pursuant to Rule 37(b) of the Federal Rules of Civil Procedure, and more generally, pursuant to a court's "inherent power to manage its own affairs."[24]

Initially, Judge Scheindlin notes that sanctions range in degree of severity, and that the severity of penalties is tied directly to the scienter of the spoliating party.[25] She then attempts to define, in the context of discovery misconduct, the meaning of various terms of mental culpability cemented firmly in modern law: ordinary negligence, gross negligence, and willful conduct.[26] Applying these concepts of scienter to discovery misconduct, Judge Scheindlin

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[22] *Id.* at 463.

[23] *Id.*

[24] Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 106–07 (2d Cir. 2002); DLC Mgmt. Corp. v. Town of Hyde Park, 163 F.3d 124, 135–36 (2d Cir. 1998); *see generally* Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991) ("It has long been understood that '[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution,' powers 'which cannot be dispensed with in a Court, because they are necessary to the exercise of all others.'") (quoting United States v. Hudson, 11 U.S. 32, 34 (1812)).

[25] *Pension Committee*, 685 F. Supp. 2d at 469–70.

[26] Judge Scheindlin notes that "[w]hile many treatises and cases routinely define negligence, gross negligence, and willfulness in the context of tortious conduct, I have found no clear definition of these terms in the context of discovery misconduct." She refers to the law school standby, *Prosser & Keeton on the Law of Torts*, to define several terms: she defines *negligence* as

> conduct 'which falls below the standard established by law for the protection of others against unreasonable risk of harm.' [Negligence] is caused by heedlessness or inadvertence, by which the negligent party is unaware of the results which may follow from [its] act. But it may also arise where the negligent party has considered the possible consequences carefully, and has exercised [its] own best judgment[;]

gross negligence as "'a failure to exercise even that care which a careless person would use' . . . gross negligence is something more than negligence 'and differs from ordinary negligence only in degree, and not in kind'"; and *willful conduct* as where "'the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences.'" *Id.* at 464 (citing PROSSER & KEETON ON THE LAW OF TORTS § 31, at 169, 212–13 (5th ed. 1984) (quoting RESTATEMENT (SECOND) OF TORTS §§ 282, 500)).

observes that the failure to *preserve* or *collect* evidence "resulting in the loss or destruction of relevant information is surely negligent, and, depending on the circumstances, may be grossly negligent or willful."[27]

After defining the continuum of mental culpability in broad stroke, Judge Scheindlin attempts to match the failure to complete specific e-discovery tasks satisfactorily with the corresponding level of culpability.[28] In so doing, Judge Scheindlin creates a formulaic approach to measuring mental culpability based on particular actions and omissions of a party against whom spoliation is alleged. Though attributing levels of mental culpability to specific e-discovery failures is hardly a novel concept (and, indeed, something that must be done to decide nearly every spoliation motion), no court had previously attempted to define standardized criteria for assigning culpability.[29] In this respect alone, *Pension Committee* is notable.

B. The Burden of Proving Spoliation

Before examining the discovery misconduct–to–scienter pairings Judge Scheindlin defines, it is important to understand the significance of her undertaking, and the effect of these pairings on spoliation analysis. To succeed on a motion for severe sanctions, such as an adverse inference jury instruction, it must generally be proven that the spoliating party: (1) had control over the evidence; (2) had a duty to preserve the evidence at the time it was destroyed; (3) acted with a "culpable state of mind;"[30] and (4) the missing evidence is "relevant" to the innocent party's claim or defense.[31] The Second Circuit has provided guidance to define what "relevance" means in the context of spoliation sanctions:

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[27] *Id.* at 464–65.

[28] *Id.*

[29] *See, e.g.*, Reilly v. Natwest Mkts. Grp. Inc. 181 F.3d 253, 267–68 (2d Cir. 1999) (noting that the Second Circuit uses a case-by-case approach to spoliation failures "along a continuum of fault") (quoting Welsh v. United States, 844 F.2d 1239, 1246 (6th Cir. 1988)).

[30] In the Second Circuit, mere negligence is a sufficiently culpable state of mind for imposition of an adverse inference instruction. *See* Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 108 (2d Cir. 2002) ("The sanction of an adverse inference may be appropriate in some cases involving the negligent destruction of evidence because each party should bear the risk of its own negligence . . . . '[The sanction] should be available even for the negligent destruction of documents if that is necessary to further the remedial purpose of the inference. It makes little difference to the party victimized by the destruction of evidence whether that act was done willfully or negligently.'" (quoting Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 75 (S.D.N.Y. 1991) (Francis, J.)).

[31] *Pension Committee*, 685 F. Supp. 2d at 467.

> [O]ur cases make clear that "relevant" in this context means something more than sufficiently probative to satisfy Rule 401 of the Federal Rules of Evidence. Rather, the party seeking an adverse inference must adduce sufficient evidence from which a reasonable trier of fact could infer that "the destroyed or unavailable evidence would have been of the nature alleged by the party affected by its destruction."[32]

Judge Scheindlin notes carefully, however, that proof of relevance is not enough (even when the Second Circuit's heightened relevancy standard is applied). An 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."[33] Though relevance and prejudice are closely related concepts, "[p]roof of relevance does not necessarily equal proof of prejudice."[34] Generally, each must be proven independently through extrinsic evidence.[35]

In practice, it can be quite difficult to establish the relevancy of lost evidence and the prejudice resulting from its loss. It is often impossible to know the content of lost documents; all that is known is that some documents were or likely were lost. Proof of relevance and prejudice must therefore come from inferences drawn from existing documents, deposition testimony, or other corroborative means. Likewise, it is equally difficult for the spoliating party to disprove the relevancy of lost documents and the resulting prejudice. For example, testimony of the spoliating party as to the content of lost documents is patently self-serving and inherently unreliable, requiring the spoliating party to draw inferences from other evidence to disprove relevancy and prejudice.

Thus, we are faced with the foundational questions of fairness framed by Judge Scheindlin, and others: "Who then should bear the burden of establishing the relevance of evidence that can no longer be found? [W]ho should be required to prove that the absence of the missing material has caused prejudice to the innocent party[?]"[36]

The law in the Second Circuit is evolving to address these

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[32] *Residential Funding*, 306 F.3d at 108–09 (quoting Kronisch v. United States, 150 F.3d 112, 127 (2d Cir. 1998) and Byrnie v. Town of Cromwell, Bd. of Educ., 243 F.3d 93, 110 (2d Cir. 2001)).

[33] *Pension Committee*, 685 F. Supp. 2d at 467 (emphasis added).

[34] *Id.*

[35] *Id.*

[36] *Id.* at 466–67.

questions. Although it has long been recognized that relevance may be presumed, as a matter of law, when the spoliating party willfully destroys evidence,[37] courts have recently displayed a willingness to consider extending this presumption where spoliation results from a party's gross negligence.[38] As with most evolutions in law, inconsistent results have been reached along the way, even within the same court.[39]

In *Pension Committee*, Judge Scheindlin takes a directive stance on this issue, suggesting that a rebuttable presumption of both relevance and prejudice should be applied almost as a matter of course when spoliation results from gross negligence or willful destruction.[40]

Where spoliation results from ordinary negligence, however, "the innocent party must prove both relevance and prejudice in order to justify the imposition of a severe sanction."[41] Considering the burden an innocent party must overcome when confronted with negligent spoliation of evidence, and the practical difficulties of so

[37] *Residential Funding*, 306 F.3d at 109; *Kronisch*, 150 F.3d at 126 ("It is a well-established and long-standing principle of law that a party's intentional destruction of evidence relevant to proof of an issue at trial can support an inference that the evidence would have been unfavorable to the party responsible for its destruction.").

[38] *Residential Funding*, 306 F.3d at 109 ("[A] showing of gross negligence in the destruction or untimely production of evidence will in some circumstances suffice, standing alone, to support a finding that the evidence was unfavorable to the grossly negligent party."); Toussie v. County of Suffolk, 2007 WL 4565160, at *8 (E.D.N.Y. 2007) (declining to presume the relevance of information lost through grossly negligent spoliation, but recognizing that "under certain circumstances a showing of gross negligence in the destruction or untimely production of evidence will support a claim that the missing evidence was favorable to the movant.") (internal citations and quotation marks omitted); Treppel v. Biovail, 249 F.R.D. 111, 121–22 (S.D.N.Y. 2008) ("While it is true that under certain circumstances 'a showing of gross negligence in the destruction or untimely production of evidence' will support [a relevance] inference, the circumstances here do not warrant such a finding, as the defendants' conduct 'does not rise to the egregious level seen in cases where relevance is determined as a matter of law.'") (quoting *Residential Funding*, 306 F.3d at 109 and *Toussie*, 2007 WL 4565160, at *8); *In re* NTL, Inc. Sec. Litig., 244 F.R.D. 179, 200 (S.D.N.Y. 2007) (holding that the nonspoliating party was not required to submit extrinsic proof of relevance where the spoliating party was grossly negligent); Orbit One Commc'ns, Inc. v. Numerex Corp., 271 F.R.D. 429, 441 (S.D.N.Y. 2010) ("[U]nder certain circumstances a showing of gross negligence in the destruction or untimely production of evidence will support [an inference that the missing evidence was relevant] . . . [t]he conduct, however, must be egregious.") (internal citations and quotation marks omitted).

[39] *Compare* In re *NTL, Inc. Sec. Litig.*, 244 F.R.D. at 179 (relevance was presumed by the S.D.N.Y. due to the defendant's grossly negligent conduct in failing to implement an appropriate litigation hold) *with Toussie* 2007 WL 4565160, at *8 (E.D.N.Y. 2007), *Treppel*, 249 F.R.D. at 121–22 (S.D.N.Y. 2008), *and Orbit One*, 271 F.R.D. at 441 (S.D.N.Y. 2010) (holding in each case that relevance was not presumed where the spoliating party was grossly negligent in failing to implement an appropriate litigation hold).

[40] *Pension Committee*, 685 F. Supp. 2d at 468–69.

[41] *Id.* at 468.

doing, this rule appears to be in discord with basic notions of fairness. Indeed, some argue that it should always be the spoliating party who carries the burden of proving that the information was not relevant, or that if it was, the innocent party was not prejudiced by its loss.[42] Judge Scheindlin recognizes this criticism:

> While requiring the innocent party to demonstrate the relevance of information that it can never review may seem unfair, the party seeking relief has some obligation to make a showing of relevance and eventually prejudice, lest litigation become a "gotcha" game rather than a full and fair opportunity to air the merits of a dispute. If a presumption of relevance and prejudice were awarded to every party who can show that an adversary failed to produce any document, even if such failure is completely inadvertent, the incentive to find such error and capitalize on it would be overwhelming. This would not be a good thing.[43]

In *Pension Committee*, Judge Scheindlin articulates a burden-shifting protocol that she describes as ensuring "no party's task is too onerous or too lenient."[44] That is, when the spoliating party's conduct is "sufficiently egregious" (i.e., grossly negligent or willful) to justify a court's imposition of a presumption of relevance and prejudice, the burden shifts to the spoliating party to rebut that presumption.[45] Otherwise, the innocent party carries the burden of proving both relevance of the lost information and the prejudice it suffers as a result of spoliation.[46] In an attempt to soften the burden placed on innocent parties, Judge Scheindlin cautions that the innocent party must not be held "to too strict a standard of proof regarding the likely contents of the destroyed [or unavailable] evidence,' because doing so 'would . . . allow parties who have . . .

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[42] *See, e.g.*, Jain v. Memphis Shelby Airport Auth., 2010 WL 711328, at *2 (W.D. Tenn. Feb. 25, 2010) ("The spoliating party bears the burden of establishing lack of prejudice to the opposing party, a burden the Sixth Circuit has described as an uphill battle.").

[43] *Pension Committee*, 685 F. Supp. 2d at 468. Apart from considerations of fairness to the parties, Judge Scheindlin's view appears to be heavily influenced by concerns of judicial efficiency. *See id.* at 471 ("I note the risk that sanctions motions, which are very, very time consuming, distracting, and expensive for the parties and the court, will be increasingly sought by litigants. This, too, is not a good thing. For this reason alone, the most careful consideration should be given before a court finds that a party has violated its duty to comply with discovery obligations and deserves to be sanctioned."). Indeed, Judge Scheindlin notes that she and two of her law clerks spent "an inordinate amount of time on this motion. We estimate that collectively we have spent close to three hundred hours resolving this motion." *Id.* at 472 n.56.

[44] *Id.* at 468.

[45] *Id.* at 469.

[46] *Id.* at 467–68.

destroyed evidence to profit from that destruction."[47] Nevertheless, one thing is clear—where the spoliating party acts willfully or is grossly negligent, the innocent party has a much easier lift when seeking severe sanctions and the spoliating party is burdened significantly in having to rebut the presumptions of relevance and prejudice.

C. Criteria For Finding Mere Negligence vs. Gross Negligence in the Context of Discovery Misconduct

Understanding the practical significance of whether a party accused of spoliation was merely negligent or grossly negligent in failing to preserve or collect relevant documents, Judge Scheindlin's discovery misconduct-to-scienter pairings can now be examined in proper context. She first points to authority indicating that a party acts with gross negligence, or even willfully in some circumstances, if it: "[fails] to issue a written litigation hold";[48] "[fails] to collect information from the files of former employees that remain in [its] possession, custody, or control after the duty to preserve has attached";[49] "[fails] to collect records—either paper or electronic—from key players";[50] or "[destroys] e-mail or certain backup tapes after the duty to preserve has attached."[51]

On the other hand, a party acts with mere negligence if it fails to obtain records from every employee who had any involvement with the issues raised in the litigation (as opposed to just the "key players"), or if it fails to take all appropriate measures to preserve relevant electronic records.[52]

Pension Committee makes it clear that "at the end of the day the judgment call of whether to award sanctions is inherently subjective."[53] Judge Scheindlin observes that it would be helpful for courts to have available a list of criteria that should be considered in evaluating discovery misconduct, even though "these inquiries are inherently fact intensive and must be reviewed case by case."[54] She then provides her guidance on specific discovery failings that in her opinion equate to gross negligence:

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[47] *Id.* at 468 (internal citations and quotation marks omitted).
[48] *Id.* at 488.
[49] *Id.* at 465.
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.* at 471.
[54] *Id.*

> After a discovery duty is well established, the failure to adhere to contemporary standards can be considered gross negligence. Thus, *after the final relevant* Zubulake *opinion in July, 2004,* the following failures support a finding of gross negligence, when the duty to preserve has attached: to issue a *written* litigation hold; to identify *all* of the key players and to ensure that their electronic and paper records are preserved; to cease the deletion of e-mail or to preserve the records of former employees that are in a party's possession, custody, or control; and 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.[55]

D. Applying the Law to the Pension Committee *Plaintiffs*

The most significant flaw shared by all thirteen of the plaintiffs targeted by the defendant's spoliation motion was that none instituted a written litigation hold until 2007—four years after the duty to preserve relevant evidence was triggered.[56] Shortly after being retained in 2003, the plaintiffs' counsel contacted the plaintiffs by telephone and e-mail to request that they produce copies of certain documents that were needed to draft the complaint.[57] Plaintiffs' counsel then distributed memoranda instructing the plaintiffs to be over, rather than under, inclusive, and noting that e-mails and other electronic documents should be included in the production.[58] Moreover, counsel sent the plaintiffs monthly case status memoranda, which included additional requests for relevant documents, including electronic documents.[59]

Judge Scheindlin held that the e-mails and memoranda distributed by counsel failed to meet the standard for a suitable written litigation hold because they: (1) "[did] not direct employees to preserve all relevant records"; (2) "[did not] create a mechanism for collecting the preserved records so that they can be searched by someone other than the employee"; (3) "place[d] total reliance on the employee to search and select what that employee believed to be

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[55] *Id.* (emphasis added).
[56] *Id.* at 476.
[57] *Id.* at 473.
[58] *Id.*
[59] *Id.*

responsive records without any supervision from Counsel"; and (4) "never specifically instructed plaintiffs not to destroy records so that Counsel could monitor the collection and production of documents."[60]

In examining the plaintiffs' level of culpability, Judge Scheindlin noted that it was important to analyze the plaintiffs' conduct in light of evolving e-discovery laws.[61] For example, although Judge Scheindlin believes that the requirement to institute a written litigation hold was clearly established in the Southern District of New York by the middle of 2004—after *Zubulake V*—neither the Southern District of Florida (where *Pension Committee* was filed in 2003), nor any other court in the Eleventh Circuit had articulated a litigation hold requirement until 2007.[62] Therefore, the plaintiffs were not required, as a matter of law, to institute a written litigation hold until the case was transferred to the Southern District of New York in 2005.[63]

Accordingly, *Pension Committee* distinguishes the plaintiffs' pre-2005 conduct from their conduct occurring after 2005.[64] Judge Scheindlin held that, although the failure to institute a written litigation hold in 2005 was, at a minimum, grossly negligent, the defendants failed to demonstrate that any documents were actually destroyed after 2005. Indeed, Judge Scheindlin notes, "[i]t is likely that most of the evidence was lost before 2005 due to the failure to institute written litigation holds."[65]

As a result of the relatively unsettled law in the early years of the *Pension Committee* controversy, Judge Scheindlin held that the plaintiffs' failure to institute timely written litigation holds, standing alone, did not demonstrate gross negligence.[66] Instead, she looked to any additional errors made during discovery to determine whether the plaintiffs' conduct was merely negligent or grossly negligent.[67] Given the complexity of this securities case and

[60] *Id.*

[61] *Id.* at 475–76.

[62] *Id.* at 476–77.

[63] *Id.* at 477 ("The failure to [issue a written legal hold] as of that date was, at a minimum, grossly negligent.").

[64] *Id.* at 476.

[65] *Id.*

[66] *Id.* at 489 n.179 ("I reach this conclusion, in part, because once the duty to institute a litigation hold was clearly established—when the case was transferred to this District in 2005, it is very likely that electronic records that existed in 2003 would have been lost or destroyed. Thus, instituting the litigation hold in 2005 instead of 2007 may not have made any difference.").

[67] *Id.* at 479–96.

the heterogeneous group of plaintiffs, the court examined the preservation efforts of each plaintiff.[68] Overall, six plaintiffs were deemed grossly negligent, and the remaining seven were deemed ordinarily negligent.[69]

Those plaintiffs found to be grossly negligent had failed to issue a written litigation hold prior to 2007; continued to delete relevant documents after the duty to preserve arose; failed to request documents from key players; delegated search efforts without any supervision from management; destroyed backup tapes containing documents relating to key players that were not otherwise available; and/or submitted misleading or inaccurate declarations.[70] Thus, Judge Scheindlin held that "[f]rom this conduct, it is fair to presume that responsive documents were lost or destroyed. The relevance of any destroyed documents and the prejudice caused by their loss may also be presumed."[71] The court held that the defendants were able to show that unknown, yet presumptively relevant documents, were destroyed due to poor preservation and the lack of an effective litigation hold.[72]

The latter group of plaintiffs were found to be merely negligent "after careful consideration"[73] because use of a written litigation hold "was not yet generally required"[74] in early 2004 in federal court in Florida. As a result, failure to issue a litigation hold alone was insufficient to constitute gross negligence, absent additional discovery violations.[75]

The opinion included a detailed spoliation instruction to provide the jury with information about the spoliation caused by the "grossly negligent" plaintiffs.[76] For the ordinarily negligent plaintiffs, the defendants were required to demonstrate both the relevance of the unknown missing documents, and that they were prejudiced by the missing documents.[77]

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[68] *See id.*

[69] *See id.* at 477, 479, 488.

[70] *Id.* at 479.

[71] *Id.*

[72] *Id.* at 477. The plaintiffs argued that it was absurd for them to be held responsible for an allegedly missing class of unknown documents. The Court disagreed, holding that "[t]he paucity of records produced by some plaintiffs and the admitted failure to preserve some records or search at all for others by all plaintiffs leads inexorably to the conclusion that relevant records have been lost or destroyed." *Id.* at 476.

[73] *Id.* at 488.

[74] *Id.*

[75] *Id.* at 489.

[76] *Id.* at 496.

[77] *Id.* at 478. Monetary sanctions were also imposed against all thirteen plaintiffs. *Id.* at 497. The Court awarded reasonable costs to the defendants, including attorneys' fees

III. THE IMPACT (AND CRITICISM) OF *PENSION COMMITTEE*

Pension Committee, like *Zubulake*, has and will continue to impact the national landscape of discovery law. Like *Zubulake*, it has also provoked sharp criticism and debate from jurists, scholars, and practitioners.

In particular, Judge Scheindlin does two things in *Pension Committee* that spark debate: (1) she creates a *per se* rule that failure to institute a written litigation hold constitutes gross negligence, and (2) she holds that a spoliating party's gross negligence may, and often will, presumptively establish relevance and prejudice in the context of awarding severe sanctions. Moreover, *Pension Committee*, and its subsequent criticism and debate, highlight the tremendous inconsistencies from jurisdiction-to-jurisdiction (and even within jurisdictions) in how courts analyze spoliation issues and levy sanctions.

A. The Requirement That Litigation Holds Be In Writing

One brief sentence in *Pension Committee*, more than any other aspect of Judge Scheindlin's eighty-eight-page scholarly analysis, has garnered the close attention of many: "the failure to issue a *written* litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information."[78]

Many courts before and after *Pension Committee* agree that the failure to implement a litigation hold may, by itself, constitute gross negligence, but Judge Scheindlin was the first to require explicitly that the hold be in writing.[79] Several courts—the majority of which are in and around New York's Southern District—have chosen to

associated with bringing the motion, deposing the declarants and reviewing the plaintiffs' declarations. *Id.*

[78] *Id.* at 465.

[79] *See* Crown Castle USA Inc. v. Fred A. Nudd Corp., 2010 WL 1286366, at *13 (W.D.N.Y. Mar. 31, 2010) (holding that the plaintiff's failure to institute any form of litigation hold, orally or in writing, supported a finding that the loss of key a employee's e-mails resulted from the plaintiff's gross negligence); Richard Green (Fine Paintings) v. McClendon, 262 F.R.D. 284, 290 (S.D.N.Y. 2009) ("[T]he failure to implement a litigation hold is, by itself, considered grossly negligent behavior."); Chan v. Triple 8 Palace, Inc., 2005 WL 1925579, at *7 (S.D.N.Y. Aug. 11, 2005) ("[T]he utter failure to establish any form of litigation hold at the outset of litigation is grossly negligent."); *Toussie*, 2007 WL 4565160, at *8; Pandora Jewelry, LLC v. Chamilia, LLC, 2008 WL 4533902, at *8–9 (D. Md. 2008) (concluding that it was grossly negligent of the defendants to exchange servers during litigation and to fail to institute a litigation hold even though their e-mails were automatically archived or deleted after ninety days).

adopt Judge Scheindlin's *per se* rule that failure to institute a written litigation hold equals gross negligence.[80]

Other courts following *Pension Committee* have subtlety questioned the proprietary of an automatic *per se* rule. For instance, in *Merck Eprova AG v. Gnosis S.P.A.*, Judge Sullivan (S.D.N.Y.) refers deferentially to *Pension Committee* ("The Court agrees with the analytical framework set forth in [*Pension Committee*] and will rely on it here.").[81] Then, in evaluating whether the defendants' discovery efforts complied with acceptable standards of conduct, the court—citing *Pension Committee*—observed that "[o]ne such standard that has emerged requires parties to . . . issue written litigation holds once litigation is reasonably anticipated."[82]

But, Judge Sullivan does not blindly endorse *Pension Committee*'s *per se* rule. He leaves open the possibility that oral litigation holds might be acceptable:

> In this case, there is no doubt that Defendants failed to issue a written litigation hold. Even assuming arguendo that there might be circumstances in which a nonwritten litigation hold could suffice—for example, when the party, like Gnosis, is a small company whose intra-office communications are primarily oral—it is clear that Defendants made no significant effort to ensure the preservation of relevant documents.[83]

Similarly, Magistrate Judge Goodman of the U.S. District Court for the Southern District of Florida has questioned the

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[80] *See* PassLogix, Inc. v. 2FA Tech., LLC, 708 F. Supp. 2d 378, 410 (S.D.N.Y. 2008) (holding that the defendant acted with gross negligence when it deleted relevant e-mail in the absence of a written litigation hold and observing that "[o]nce on notice of litigation, the failure to issue a *written* litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information.") (internal citations and quotation marks omitted); Philips Elecs. North America Corp. v. BC Technical, 773 F. Supp. 2d 1149 (D. Utah 2011) ("Under current law, the failure to issue a written litigation hold constituted gross negligence because it was likely to result in destruction of relevant information."); Zimmerman v. Poly Prep Country Day Sch., 2011 WL 1429221, at *22 (E.D.N.Y. Apr. 13, 2011); Chen v. LW Rest., Inc., 2011 WL 3420433, at *11 (E.D.N.Y. 2011) (holding that severe sanctions were warranted and observing that "[n]ot only does it appear that counsel failed to issue a written litigation hold, but he appears to have not issued a hold of any kind."); Williams v. N.Y.C. Transit Auth., 2011 WL 5024280, at *7 (E.D.N.Y. 2011); N.V.E., Inc. v. Palmeroni, 2011 WL 4407428, at *5 (D.N.J. 2011) ("Here, the Court finds that NVE acted with gross negligence in both failure to preserve evidence and collection and review. As to preservation, NVE's counsel failed to institute a litigation hold . . . and admits that it failed to issue a written litigation hold.") (internal citations omitted).

[81] Merck Eprova AG v. Gnosis S.P.A., 2010 WL 1631519, at *4 (S.D.N.Y. Apr. 20, 2010).

[82] *Id.*

[83] *Id.* at *5.

appropriateness of adopting a rule that assigns heightened culpability automatically if a written hold is not implemented:

> [W]hile this Court may consider the absence of a written litigation hold in evaluating a claim of bad faith in the spoliation context, the inquiry does not end with a finding that no formal *written* litigation hold was issued. Indeed, courts in this Circuit do not equate an oral litigation hold with bad faith.[84]

Leaving subtlety behind, a few district court judges (including some influential e-discovery jurists in their own right) have expressed outright disagreement with *Pension Committee*'s requirement that litigation holds be in writing to avoid an automatic finding of gross negligence. For instance, Magistrate Judge Paul Grimm of the District of Maryland notes that it might not always be necessary to implement a litigation hold—much less a written one—and that the reasonableness of a party's preservation efforts should be the prevailing consideration.[85]

Despite the holding of *Pension Committee*, there is no authority from the Second Circuit or any other Circuit Court of Appeals that a litigation hold must be in writing.[86] Thus, numerous courts (including Judge Scheindlin's *own* court) have openly and completely disagreed with *Pension Committee*'s *per se* rule that litigation holds be in writing, to avoid an automatic finding of gross negligence.[87]

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[84] Point Blank Solutions, Inc. v. Toyobo Am., Inc., 2011 WL 1456029, at *29 (S.D. Fla. Apr. 5, 2011). Judge Goodman correctly observed that in the Eleventh Circuit sanctions for discovery misconduct are unavailable absent a finding of bad faith. *Id.* at 28. Therefore, application of *Pension Committee* litigation hold rule was examined within the context of measuring bad faith, not gross negligence. *See id.* at 28–32.

[85] Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 524 (D. Md. 2010) [hereinafter *Victor Stanley II*] (citing Jones v. Bremen High Sch. Dist., 2010 WL 2106640, at *7 (N.D. Ill. May 25, 2010) and Thomas Y. Allman, AMENDING THE FEDERAL RULES: THE PATH TO AN EFFECTIVE DUTY TO PRESERVE (2010 Conf. on Civil Litig., June 15, 2010), http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/h_Toc/47B91A2AC603E0340525670800167201/?OpenDocument) (copy on file with Albany Law Review) ("[I]f a litigation hold process is employed, that fact should be treated as prima facie evidence that reasonable steps were undertaken to notify relevant custodians of preservation obligations.").

[86] Steuben Foods, Inc. v. Country Gourmet Foods, LLC, 2011 WL 1549450, at *5 (W.D.N.Y. Apr. 21, 2011).

[87] *Id.* at *5 ("Thus, this court is not obliged to follow the holding of *Pension Committee* as to its finding of a requirement of a written litigation hold . . . . Accordingly, the court in this case declines to hold that implementation of a written litigation hold notice is required in order to avoid an inference that relevant evidence has been presumptively destroyed by the party failing to implement such written litigation hold."); Surowiec v. Capital Title Agency, Inc., 790 F. Supp. 2d 997, 1007 (D. Ariz. 2011) ("The Court disagrees with *Pension Committee*'s holding that a failure to issue a litigation hold constitutes gross negligence *per se*. *Per se* rules are too inflexible for this factually complex area of the law where a wide variety of

In *Orbit One Communications, Inc. v. Numerex Corp.*,[88] Magistrate Judge Francis (who presides alongside Judge Scheindlin) notes that *Pension Committee*'s written litigation hold requirement is too inflexible, and may result in too great an emphasis on the spoliating party's conduct and too little on whether information relevant to discovery was actually lost. Judge Francis writes:

> [T]he failure to [institute a written litigation hold] does not necessarily constitute negligence, and certainly does not warrant sanctions if no relevant information is lost. For instance, in a small enterprise, issuing a written litigation hold may not only be unnecessary, but it could be counterproductive, since such a hold would likely be more general and less tailored to individual records custodians than oral directives could be. Indeed, under some circumstances, a formal litigation hold may not be necessary at all.[89]

Thus, Judge Francis, Judge Grimm, and others imagine circumstances where exceptions to the use of a written litigation hold should apply. *Pension Committee* offers no such flexibility. Without question, use of a written litigation hold is a good (if not best) practice, and one that should be followed in the vast majority of cases.[90] But, to hold that use of oral notice is always an exercise of gross negligence, without regard to the sufficiency of oral instructions vis-à-vis written ones, or how effective oral delivery might be in certain circumstances, probably is too stringent a rule that ignores the everyday realities of litigation practice.

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circumstances may lead to spoliation accusations. An allegedly spoliating party's culpability must be determined case-by-case."); Orbit One Commc'ns, Inc. v. Numerex Corp., 271 F.R.D. 429, 441 (S.D.N.Y. 2010); Sampson v. City of Cambridge, Maryland, 251 F.R.D. 172, 181–82 (D. Md. 2008) (holding that the defendant was negligent, but not grossly negligent, when it failed to implement a written litigation hold but had instructed the employees most involved in the litigation to retain documents); *Jones*, 2010 WL 2106640, at *7 (failure to implement a written litigation hold is not negligence *per se*; reasonableness must be considered); Haynes v. Dart, 2010 WL 140387, at *4 (N.D. Ill. Jan. 11, 2010) ("The failure to institute a document retention policy, in the form of a litigation hold, is relevant to the court's consideration, but it is not *per se* evidence of sanctionable conduct.").

[88] *Orbit One*, 271 F.R.D. at 429.

[89] *Id.* at 441.

[90] *See* THE SEDONA CONFERENCE COMMENTARY ON LEGAL HOLDS: THE TRIGGER AND THE PROCESS, at 12 (August 2007), http://www.thesedonaconference.org/content/miscFiles/Legal_holds.pdf ("When a duty to preserve arises, reasonable steps should be taken to identify and preserve relevant information as soon as is practicable. *Depending on the circumstances*, a written legal hold (including a preservation notice to persons likely to have relevant information) *should* be issued."(emphasis added)).

If nothing else, Judge Francis's *Orbit One* opinion is an alternative perspective from the Southern District of New York—arguably the epicenter of e-discovery among the federal judiciary—and may offer a counterbalance to *Pension Committee*. This is small comfort to potential litigants and their counsel, however, because the judge assigned to each case will dictate how spoliation issues are decided. Thus, the safest course in planning discovery efforts and assessing the risk of sanctions is to apply the strictest standard, which right now is Judge Scheindlin's.

One implication of *Pension Committee* then is that if counsel were to provide comprehensive and readily-understandable litigation hold instructions to a client orally, and should some spoliation of evidence nevertheless occur or at least be alleged, the failure to reduce those litigation hold instructions to writing amounts to gross negligence (which, in turn, gives rise to presumptions of relevance and prejudice that the spoliating party must rebut). Moreover, if counsel communicates oral litigation hold instructions to its client, and then puts those instructions in writing, gross negligence may be found if the written instructions are not delivered in as timely a fashion as some future court might deem necessary. The relative timing of oral and written instructions is an important consideration; delivery of oral litigation hold instructions may be viewed as an acknowledgement that the duty to preserve was triggered at that time. Absent an immediate written litigation hold once the duty to preserve is triggered, a party is at risk of being labeled grossly negligent. Thus, counsel is effectively disincentivized to provide oral hold instructions unless a written hold is simultaneously available, even though oral notice may be more timely and effective.

Pension Committee's unfortunate focus on written litigation holds may place too much emphasis on documentation and not enough on process. Stated differently, *Pension Committee* may inadvertently promote form over substance. Hold directives that fail to communicate specific, relevant, and defensible steps for custodians to follow are merely documentation for the sake of documentation. To be sure, Judge Scheindlin and others will continue to measure culpability by the reasonableness of a party's efforts, and won't be satisfied simply because a litigation hold directive is in writing; its substantive content must still satisfy all the foundational requirements of an effective litigation hold notice.

B. The Rebuttable Presumptions of Relevance and Prejudice Where

Spoliation Results From Gross Negligence

According to *Pension Committee*, if a party accused of spoliation acts in a grossly negligent or willful manner then a court may (and, according to Judge Scheindlin, often will) presume that for purposes of imposing severe sanctions the lost evidence was relevant, and that the non-spoliating party was prejudiced by its loss. Although *Pension Committee* is framed as a restatement of *Zubulake* in many respects, on this issue Judge Scheindlin substantially extends the narrow presumption she expressed in *Zubulake V*:

> When evidence is destroyed in bad faith (i.e. intentionally or willfully), that fact alone is sufficient to demonstrate relevance. By contrast, when the destruction is negligent, relevance must be proven by the party seeking the sanctions. . . . [This requirement] is even more necessary where the destruction was merely negligent, since in those cases it cannot be inferred from the conduct of the spoliator that the evidence would even have been harmful to him. This is equally true in cases of gross negligence or recklessness; only in the case of *willful* spoliation is the spoliator's mental culpability itself evidence of the relevance of the documents destroyed.[91]

First, *Zubulake* did not allow for a presumption of relevance where spoliation was the result of gross negligence. Second, although *Zubulake* addressed a presumption of *relevance*, it did not address a presumption of *prejudice*. In fact, Judge Scheindlin does not discuss the requirement that prejudice be proven in any of her relevant *Zubulake* rulings.

Interestingly, *Pension Committee* cites five cases for the proposition that "many courts in this district presume relevance where there is a finding of gross negligence,"[92] but only one of the five cases cited actually made that presumption.[93] Indeed, the other four cases mention only that "under certain circumstances" gross

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[91] *Zubulake V*, 229 F.R.D. 422, 431 (S.D.N.Y. 2004).

[92] Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec. LLC, 685 F. Supp. 2d 456, 467 (S.D.N.Y. 2010) (citing Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 109 (2d Cir. 2002); Treppel v. Biovail, 249 F.R.D. 111, 121–22 (S.D.N.Y. 2008); Toussie v. County of Suffolk, 2007 WL 4565160, at *8 (E.D.N.Y. Dec. 21, 2007); *Zubulake IV*, 220 F.R.D. 212, 221 (S.D.N.Y. 2003); and *In re* NTL, Inc. Sec. Litig., 244 F.R.D. 179, 200 (S.D.N.Y. 2007)).

[93] *See* In re *NTL, Inc. Sec. Litig.*, 244 F.R.D. at 200 (holding that the nonspoliating party was not required to submit extrinsic proof of relevance where the spoliating party was grossly negligent).

negligence may be sufficient to presume relevance, and in each case the presumption was not made because the spoliating party's gross negligence did not rise to "the egregious level seen in cases where relevance is determined as a matter of law."[94]

In fashioning the burden-shifting protocol designed to balance the competing interests and burdens of spoliating and innocent parties, *Pension Committee* builds upon the fiction that "many courts in this district presume relevance where there is gross negligence."[95] But, as Judge Francis notes in *Orbit One*, there must be truly egregious conduct for this presumption to be made—generally something more than failure to implement a litigation hold or other indicia of gross negligence vis-à-vis bad faith.[96]

Thus, *Pension Committee* has morphed the long-standing rebuttable presumption of relevance into a legal doctrine that is disconnected from its foundational purpose. At the roots of this presumption lies the rationale that the relevance of destroyed information can be inferred from its willful spoliation.[97] Stated differently, why would someone purposefully destroy information while under a duty to preserve it and put himself at risk of sanctions for doing so, unless that information was sufficiently harmful to him? The logic of this rationale does not extend to grossly negligent spoliation, and, in fact, no court outside of the Second Circuit has held that gross negligence is sufficient to presume relevance.

Judge Grimm notes the logical disconnect between the foundational purpose of the relevance/prejudice presumption, and negligent spoliation:

> [C]ertain sanctions make no logical sense when applied to particular breaches of the duty to preserve. For example, an adverse inference instruction makes little logical sense if given as a sanction for negligent breach of the duty to preserve, because the inference that a party failed to

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[94] *Treppel*, 249 F.R.D. at 121–22 (quoting *Toussie*, 2007 WL 4565160, at *8).

[95] *Pension Comm.*, 685 F. Supp. 2d at 468.

[96] Orbit One Commc'ns, Inc. v. Numerex Corp., 271 F.R.D. 429, 439 (S.D.N.Y. 2010) (Francis, J); *see, e.g.*, Zimmerman v. Poly Prep Country Day Sch., 2011 WL 1429221, at *24 (E.D.N.Y. Apr. 13, 2011) (declining to presume relevance despite the defendant's gross negligence in failing to institute a litigation hold); *Toussie*, 2007 WL 4565160, at *8 (declining to presume relevance or award adverse inference instruction even though the defendant failed to implement a litigation hold); Cordius Trust v. Kummerfeld, 2008 WL 113664, at *4 (S.D.N.Y. Jan. 11, 2008) (stating that defendant's "long-term and purposeful evasion of discovery requests," standing alone, was sufficient to support a finding of relevance for purpose of imposing sanctions).

[97] *See Zubulake V*, 229 F.R.D. at 431.

> preserve evidence because it believed that the evidence was harmful to its case does not flow from [negligence] . . . . The more logical inference is that the party was disorganized, or distracted, or technically challenged, or overextended, not that it failed to preserve evidence because of an awareness that it was harmful.[98]

In *Rimkus Consulting Group, Inc. v. Cammarata*, the court declined to follow *Pension Committee*'s approach of presuming relevance and prejudice when the spoliating party is grossly negligent, noting that requiring "a showing that the lost information is relevant and prejudicial is an important check on spoliation allegations and sanctions motions."[99] As Judge Rosenthal noted in *Rimkus*, "[t]he Fifth Circuit has not explicitly addressed whether even bad-faith destruction of evidence allows a court to presume that the destroyed evidence was relevant or its loss prejudicial," and that "[c]ase law in the Fifth Circuit indicates that an adverse inference instruction is not proper unless there is a showing that the spoliated evidence would have been relevant."[100] Accordingly, *Rimkus* held that a "severe sanction such as a default judgment or an adverse inference instruction requires bad faith *and* prejudice," and that only a "jury may draw an adverse inference 'that party who intentionally destroys important evidence in bad faith did so because the contents of those documents were unfavorable to that party.'"[101]

Courts in the Fourth,[102] Sixth,[103] and Seventh[104] Circuits have similarly held that grossly negligent spoliation is insufficient to presume relevance or prejudice. This issue has not yet been

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[98] *Victor Stanley II*, 269 F.R.D. 497, 526 (D. Md. 2010).

[99] Rimkus Consulting Grp., Inc. v. Cammarata, 688 F. Supp. 2d 598, 616 (S.D. Tex. 2010). *Rimkus* also made clear, however, that where "the evidence in the case as a whole would allow a reasonable fact finder to conclude that the missing evidence would have helped the requesting party support is claims or defenses, that may be a sufficient showing of both relevance and prejudice to make [sanctions] appropriate." *Id.* at 617.

[100] *Id.* at 617.

[101] *Id.* at 642–43 (quoting Russell v. Univ. of Tex. of the Permian Basin, 234 F. App'x 195, 207 (5th Cir. 2007) (emphasis added)).

[102] Sampson v. City of Cambridge, Maryland, 251 F.R.D. 172, 179 (D. Md. 2008). In the Fourth Circuit, only willful spoliation is sufficient to establish a rebuttable presumption of relevance. *See id.*

[103] Jain v. Memphis Shelby Airport Auth., 2010 WL 711328, at *2 (W.D. Tenn. Feb. 25, 2010) ("The spoliating party bears the burden of establishing lack of prejudice to the opposing party, a burden the Sixth Circuit has described as an uphill battle.").

[104] *In re* Kmart Corp., 371 B.R. 823, 853–54 (Bankr. N.D. Ill. 2007) (noting that in the Seventh Circuit proof of bad faith spoliation is required to impose a rebuttable presumption of relevance).

addressed by courts in the First, Third, Eighth, Ninth, Tenth, Eleventh, or D.C. Circuits.[105]

Accordingly, a nationwide survey of spoliation law reveals that the possibility of imposing a rebuttable presumption of relevance and prejudice for grossly negligent spoliation exists only in the courts of the Second Circuit. It is further revealed that among those courts, only *Pension Committee* creates a rebuttable presumption of prejudice; other courts in the Second Circuit (including Judge Scheindlin in *Zubulake V*) have established only a presumption of relevance without mention of prejudice. Moreover, courts in the Second Circuit (again, including Judge Scheindlin in *Zubulake V*) have historically reserved this presumption for cases involving willful or other "sufficiently egregious" spoliation, not gross negligence. All of this leads to the inevitable conclusion that in the context of spoliation sanctions, *Pension Committee* establishes the most aggressive rebuttable presumption in the country—just like it establishes the strictest litigation hold standard.

Without question, the law of e-discovery is in its adolescence. Spoliation rules will evolve as the era of e-discovery progresses, but it is highly questionable whether the burden-shifting protocol articulated in *Pension Committee* will be the prevailing standard once the dust settles. Among the courts that have examined the issue of presumptive relevance and prejudice in the context of severe sanctions, the implication is that *Pension Committee* swings the pendulum too far in favor of parties seeking the imposition of severe sanctions—particularly because Judge Scheindlin provides a menu of specific conduct that presumptively constitutes gross negligence (e.g., failure to implement a written litigation hold, failure to identify all key custodians, or failure to collect [not just preserve] records from key custodians). Thus, a check-the-box approach may be followed in the event that a party commits one of the enumerated acts of gross negligence within the formulaic roadmap of *Pension Committee*, the innocent party is strongly incentivized to bring a spoliation motion because the burden rests entirely upon the alleged spoliator to disprove relevance and prejudice, rather than upon the party bringing the motion to prove these elements. Coincidentally, this may result in realization of Judge Scheindlin's pronounced fear—that litigation turns in a "gotcha" game focused more on ancillary strategic attacks (like spoliation) than the merits of the actual controversies before

[105] *See Victor Stanley II*, 269 F.R.D. 497, 542–53 (D. Md. 2010).

courts.[106]

C. The Fallout From Pension Committee Highlights the Lack of National Consistency on Issues of Spoliation

As noted and reinforced in *Pension Committee*, mere negligence is a sufficiently "culpable state of mind" in the Second Circuit to warrant imposition of the severe sanction of an adverse inference jury instruction.[107] The Second Circuit does not stand alone in this regard, but a review of national case law reveals a substantial divide among the federal judiciary.[108]

Like the Second Circuit, ordinary negligence is a sufficiently culpable state of mind for imposition of an adverse inference jury instruction in the First,[109] Third,[110] Sixth,[111] Tenth,[112] and D.C.[113] Circuits. Conversely, willful or bad faith spoliation is required for imposition of an adverse inference instruction in the Fourth,[114] Fifth,[115] Seventh,[116] Ninth,[117] and Eleventh [118] Circuits. Courts in

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[106] Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 685 F. Supp. 2d 456, 468 (S.D.N.Y. 2010).

[107] *Id.* at 467–68.

[108] *See Victor Stanley II*, 269 F.R.D. at 542–53 (Judge Grimm provides an appendix charting the approach of each federal circuit in deciding spoliation motions).

[109] Trull v. Volkswagen of Am., Inc., 187 F.3d 88, 95 (1st Cir. 1999); Oxley v. Penobscot County, 2010 WL 3154975, at *1 (D. Me. Aug. 9, 2010) (holding that imposition of an adverse inference instruction "does not require bad faith or comparable bad motive") (internal citation and quotation marks omitted).

[110] Canton v. Kmart Corp., 2009 WL 2058908, at *2–3 (D.V.I. July 13, 2009).

[111] Miller v. Home Depot USA, Inc., 2010 WL 373860, at *1 (M.D. Tenn. Jan. 28, 2010); Jain v. Memphis Shelby Cnty. Airport Auth., 2010 WL 711328, at *3 (W.D. Tenn. Feb. 25, 2010); Forest Labs., Inc. v. Caraco Pharm. Labs., Ltd., 2009 WL 998402, at *5–6 (E.D. Mich. Apr. 14, 2009).

[112] Hatfield v. Wal-Mart Stores, Inc., 335 F. App'x 796, 804 (10th Cir. 2009) (holding that neither bad faith nor intentionality is required for an adverse inference instruction); Schrieber v. Fed. Ex. Corp., 2010 WL 1078463 (N.D. Okla. Mar. 18, 2010).

[113] D'Onofrio v. SFX Sports Grp., Inc., 2010 WL 3324964, at *10 (D.D.C. Aug. 24, 2010) (noting that an adverse inference instruction may be imposed for mere negligence where "the interests in righting the evidentiary balance and in the deterring of others trumps the lacuna that a logician would detect in the logic of giving such an instruction.").

[114] Goodman v. Praxair Servs., Inc., 632 F. Supp. 2d 494, 519 (D. Md. 2009) ("[A] court must only find that spoliator acted willfully in the destruction of evidence.").

[115] Rimkus Consulting Grp., Inc. v. Cammarata, 688 F. Supp. 2d 598, 615 (S.D. Tex. 2010).

[116] Faas v. Sears, Roebuck & Co., 532 F.3d 633, 644 (7th Cir. 2008).

[117] Karnazes v. County of San Mateo, 2010 WL 2672003, at *2 (N.D. Cal. July 2, 2010) (holding that bad faith or grossly negligent spoliation is required for imposition of an adverse inference instruction).

[118] Point Blank Solutions, Inc. v. Toyobo Am., Inc., 2011 WL 1456029, at *9 ("A party's failure to preserve evidence rises to the level of sanctionable spoliation in this Circuit only where the absence of that evidence is predicated on bad faith, such as where a party purposely tampers with the evidence.") (internal citations and quotation marks omitted); Barnes v. Dalton, 158 F.3d 1212, 1214 (11th Cir. 1998) ("The key to unlocking a court's

the Eighth Circuit take a hybrid approach, under which mere negligence is sufficient for imposition of an adverse inference instruction for "the ongoing destruction of records during litigation and discovery,"[119] but evidence of bad faith is required if spoliation occurs prior to litigation.[120]

Attention to this sharp divide on such a foundational element of spoliation law is a natural outgrowth of the debates that *Pension Committee* has triggered. Indeed, some leaders in judicial thought have recently expressed their view that emphasis on culpability is misplaced and, in determining sanctions, courts should focus not on the degree of fault by the spoliating party, but on the degree of prejudice to the innocent party.[121] Presently though, the prevailing majority rule is that mere negligence is sufficient for the imposition of an adverse inference jury instruction. The variety of standards employed by courts throughout the nation, and the lack of a uniform or consistent approach on issues of culpability and burden of proof, diminish the predictability of the risks and consequences of spoliation (especially for cross-jurisdictional entities), and cause great concern for litigants and counsel who are trying to determine what they must do to comply with contemporary e-discovery standards.

IV. FINAL THOUGHTS

Stepping away from the particular facts and holdings of *Pension Committee*, Judge Scheindlin's opinion is perhaps most notable for the way in which it has galvanized dialogue and debate on three foundational issues impacting litigation in every court:

1. the criteria for evaluating whether certain discovery failings constitute ordinary negligence, gross negligence, or willfulness;

2. the interplay between a spoliating party's mental culpability and the burden of proving (or disproving) the elements required for imposition of severe sanctions; and

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inherent power [to impose sanctions for discovery abuses] is a finding of bad faith."); Penalty Kick Mgmt. Ltd. v. Coca Cola Co., 318 F.3d 1284, 1294 (11th Cir. 2003); Managed Care Solutions, Inc. v. Essent Healthcare, Inc., 2010 WL 3368654, at *13 (S.D. Fla. Aug. 23, 2010).

[119] Stevenson v. Union Pac. R.R., 354 F.3d 739, 747 (8th Cir. 2004); MeccaTech, Inc. v. Kiser, 2008 WL 6010937, at *8 (D. Neb. Apr. 2, 2008); Meccatech Inc. v. Kiser, 2009 WL 1152267 (D. Neb. Apr. 23, 2009).

[120] Greyhound Lines, Inc. v. Wade, 485 F.3d 1032, 1035 (8th Cir. 2007); Menz v. New Holland N. Am., Inc., 440 F.3d 1002, 1006 (8th Cir. 2006); *Stevenson*, 354 F.3d at 747 (stating bad faith is required if spoliation happens prior to litigation).

[121] *See, e.g.*, Orbit One Commc'ns, Inc. v. Numerex Corp., 271 F.R.D. 429, 4429 (S.D.N.Y. 2010) (Francis, J.); *Victor Stanley II*, 269 F.R.D. 497, 526 (D. Md. 2010) (Grimm, J.).

3. the appropriate sanctions that are proportional to the spoliating party's culpability and the prejudice suffered by the innocent party.

The ultimate legacy of *Pension Committee* will not be Judge Scheindlin's controversial *per se* gross negligence or presumptive relevance/prejudice rules, though these issues are of instant concern as litigants and counsel struggle to understand their evolving responsibilities and liabilities related to e-discovery. Rather, *Pension Committee* will likely be remembered as the case that revitalized the debates and calls to action initially ignited by *Zubulake*, which then propelled an immature body of spoliation law toward cross-jurisdictional consistency.