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Severe Sanctions Imposed for Failure to Preserve, Collect and Produce Electronic Discovery

In a recent decision from the Southern District of New York, Judge Shira Scheindlin imposed sanctions as a result of careless and indifferent document collection efforts, raising the bar for parties to preserve, collect and produce electronically stored information. The decision, *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC, et al.*, 2010 U.S. Dist. LEXIS 4546 (S.D.N.Y. Jan. 15, 2010), comes six years after Judge Scheindlin's ground breaking *Zubulake* decisions. See, e.g., *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004).

In February 2004, the plaintiffs in *Montreal Pension* brought an action in the Southern District of New York claiming violations of federal securities laws and New York law. At the time the action was commenced, the plaintiffs' attorneys requested that the plaintiffs collect documents related to their claims, including electronic documents. The requests did not, however, include specific instructions that the plaintiffs should refrain from deleting or destroying records, nor were the requests accompanied by written litigation hold letters, which were not formally issued until 2007.

During the discovery process, several defendants claimed to have found substantial gaps in plaintiffs' document productions. After the close of discovery, defendants moved for sanctions, alleging that several plaintiffs not only failed to preserve and produce documents but also submitted false and misleading declarations regarding their document collection and preservation efforts.

In her decision, Judge Scheindlin ruled that the plaintiffs targeted by the discovery motion fell into two categories - negligent or grossly negligent. She concluded the plaintiffs had either lost or destroyed documents based on the scarcity of the documents produced, the admitted failure to preserve records after the duty to preserve arose, and in some instances the failure to search for records at all. She then imposed monetary sanctions on both the negligent and grossly negligent parties, and awarded attorneys' fees to the innocent parties for the additional discovery conducted regarding spoliation of evidence. Judge Scheindlin also agreed to instruct the jury that, as to the grossly negligent plaintiffs, the jury could infer the missing documents were relevant to the defendants' case and would have been prejudicial to the offending plaintiffs. The decision highlights the need for vigilance with respect to the collection and retention of a party's relevant documents once litigation is foreseeable. ■

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