Zubulake Revisited: *Pension Committee* and the Duty To Preserve

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INTRODUCTION

In 2004, the Honorable Shira Scheindlin shook up the trial bar with the first of a series of e-discovery opinions addressing cost shifting, the prelitigation duty to preserve, preservation of backup tapes, identification of key players, and sanctions. Six years later, she has issued another blockbuster opinion addressing culpability standards associated with a violation of the duty to preserve, defining certain failures to act as grossly negligent or negligent, determining the burden of proof to obtain sanctions for breach of the duty to preserve, and identifying evidentiary presumptions and whether they are rebuttable. Entitled *The Pension Committee of the University of Montreal Pension Plan et al. v. Banc of America Securities, LLC et al.*, ___ F.R.D. ___, 2010 WL 184312 (S.D.N.Y. 2010), the case is sure to generate as much debate as the *Zubulake* decisions have generated.

There are many lessons that lawyers must take from *Pension Committee*, not the least of which is that the opinion magnifies the differences in the circuits on the appropriate standard courts are to follow when they exercise inherent authority. But first I follow the outline of the opinion discussing the background of the case, the analytic framework, the conduct of the sanctioned plaintiffs, and the court's remedy. I then provide an analysis of what the post-*Pension Committee* litigation world will look like.

BACKGROUND FACTS

The action was brought by investors seeking to recover $550 million resulting from the liquidation of two British Virgin Island-based hedge funds, Lancer Offshore, Inc. and OmniFund, Ltd (Funds). The Funds were managed by Lancer Management Group LLC (Lancer) and its principal, Michael Lauer. 2010 WL 184312 at *1.

Lancer filed for bankruptcy on April 16, 2003. The Funds were placed in receivership on July 8, 2003. *Id.* In the summer of 2003, a group of investors of the Funds formed an ad hoc "policy consultative committee" to monitor court proceedings against Lancer and the Funds and to retain legal counsel "as necessary." *Id.* at *8. Before common counsel was retained, certain plaintiff groups had retained counsel in March 2003 and mid-

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2003 respectively.[1] On September 17 and 18, 2003, the investors group met prospective common counsel. The group retained common counsel (described in the opinion as "Counsel") in October or November 2003 to file suit. The actual filing date was February 12, 2004. *Id.*

Plaintiffs asserted claims under federal securities laws against a number of parties. In June 2004, motions to dismiss were filed triggering a stay pursuant to the Private Securities Litigation Reform Act.[2] 2010 WL 184312 at *8. Motions to dismiss were not ultimately resolved until February 2007 following which the stay was lifted.[3] *Id.*

In May 2007, the Citco Defendants[4] propounded their first document request. In 2007, following the lifting of the stay, plaintiffs issued their first written litigation hold. *Id.*

Depositions of plaintiffs began in August 2007 revealing gaps in plaintiffs' document production. In October 2007, the Citco Defendants claimed that plaintiffs' document production had been deficient and sought declarations from plaintiffs on their efforts to produce "missing documents." This request was granted by the district court. Through June 2008, more depositions were taken. The required declarations were also filed. The Citco Defendants then sought to depose certain declarants and other individuals, a request also granted by the district court. *Id.* at *8-9.

By cross referencing the productions of other plaintiffs, former co-defendants, and the receiver in the receivership action involving the Funds, the Citco Defendants identified 311 documents from 12 of the 13 plaintiffs "that should have been in plaintiffs' productions, but were not included." More ominously for plaintiffs, the depositions showed that "almost all of the declarations were false and misleading and/or executed by a declarant without personal knowledge of its contents." *Id.* at *9.

The Citco Defendants moved for the sanction of dismissal based on the failure of the plaintiffs to preserve and produce documents, including electronically stored information, and based on the false and misleading

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[1] 2010 WL 184312 at *8, n. 60. This fact becomes significant later when the trigger date for the duty to preserve was established by the district court.

[2] Under the PSLRA, 15 U.S.C. § 77z-1(b)(1), in any private action arising under the Securities Act of 1933, "all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds, upon the motion of any party, that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party." Subparagraph (b)(2) requires parties to a stayed action "with actual notice of the allegations contained in the complaint" to "treat all documents, data compilations (including electronically recorded or stored data), and tangible objects that are in the custody or control of such person and that are relevant to the allegations, as if they were the subject of a continuing request for production of documents from an opposing party under the Federal Rules of Civil Procedure." 15 U.S.C. § 77z-1(b)(2). Subparagraph (b)(3) then provides that a party "aggrieved by the willful failure" of an opposing party to comply with subparagraph (2) "may apply to the court for an order awarding appropriate sanctions." 15 U.S.C. § 77z-1(b)(3). There is a similar stay provision application if a motion to dismiss is filed in any private securities fraud actions brought under the Securities Exchange Act of 1934. 15 U.S.C. § 78u-4(b)(3)(B). There are also similar provisions applicable to preservation and sanctions for a willful violation of the preservation obligation. 15 U.S.C. § 78u-4(b)(3)(C)(i) and (ii).

[3] The action was originally filed in the Southern District of Florida where the receivership was pending. It was transferred to the Southern District of New York in September 2005 following which there were amendments to the pleadings and ultimately an order in February 2007 allowing the case to go forward. 2010 WL 184312 at *8, n.70.

[4] One defendant, Citco Fund Services (Curacao) N.V. (Citco NV), had been retained by the Funds to perform administrative services, which it did until it later resigned. Citco NV, its parent, Citco Group Limited, and former Lancer Offshore directors who were Citco officers were collectively referred to in the opinion as "Citco Defendants." 2010 WL 184312 at *1.

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declarations. The district court agreed that sanctions were appropriate, rejected this sanction as excessive relative to the conduct in issue, and instead decided to issue an instruction delegating to the jury the evaluation of whether certain plaintiffs' misfeasance resulted in the loss of evidence that prejudiced the Citco Defendants' ability to defend against plaintiffs' claims.

ANALYTIC FRAMEWORK

The district court began its analysis by explaining that it had to determine the appropriate level of culpability, the relationship between the duty to preserve and spoliation of evidence, allocation of the burden of proof, and a remedy tailored to fit the potentially prejudicial spoliation of evidence.

Culpability

The district court explained that in a discovery context, unacceptable conduct is either negligent, grossly negligent, or willful. Looking to treatise writers, the district court described gross negligence as "something more than negligence" differing "'only in degree, and not in kind,'" and willful conduct as 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 *2 (quoting from Prosser and Keeton on Torts).

Judge Scheindlin then applied these concepts to discovery obligations at three junctures: the inception of the duty to preserve, issuance of a litigation hold, and collection and review of documents. This was her construct:

Reason for the Loss or Destruction of Relevant information	Associated Level of Culpability
Failure to comply with the duty to preserve	"surely negligent, and depending upon the circumstances, may be grossly negligent or willful." (*Id.*)
Failure to issue a written litigation hold	Since July 2004 when Zubulake V[5] was decided and perhaps after October 2003 when Zubulake IV[6] was decided, it is gross negligence because "that failure is likely to result in the destruction of relevant information." (*Id.*)
Failure to collect evidence, or sloppy	"surely negligent, and, depending on the circumstances may be

[5] *Zubulake v. UBS Warburg LLC ("Zubulake V"),* 229 F.R.D. 422 (S.D.N.Y.2004) (where the district court decided that post-filing destruction or loss of relevant evidence warranted the issuance of an adverse inference instruction to the jury).

[6] *Zubulake v. UBS Warburg LLC ("Zubulake IV"),* 220 F.R .D. 212 (S.D.N.Y.2003). In this case, the district court determined that a duty to preserve arose at the time that e-mails pertaining to Zubulake were labeled "UBS Attorney Client Privilege" four months before the EEOC charge was filed, "notwithstanding the fact that no attorney was copied on the e-mail and the substance of the e-mail was not legal in nature." *Id.* at 216-217. In addition, Zubulake's supervisor, Chapin, "admitted in his deposition that he feared litigation from as early as April 2001" when he was asked if he thought that Ms. Zubulake was going to sue UBS in late April 2001, and he said, "'Certainly it was something that was in the back of my head.'" *Id.* at 217.

Reason for the Loss or Destruction of Relevant information	Associated Level of Culpability
collection of evidence	grossly negligent or willful." (*Id.*)

More specifically, the district court put certain activities into the "gross negligence" or "negligence" category, apparently as a matter of law with respect to the "gross negligence" category.[7] After a duty to preserve is "well established," the district court said, a finding of gross negligence is supported by the failure to

- issue a written litigation hold;
- identify all of the key players and ensure that their electronic and paper records are preserved;[8]
- cease the deletion of email or preserve the records of former employees that are in a party's possession, custody, or control; and
- 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."

Id. at 7.

Negligence, however, will "likely" be found when, after a duty to preserve has attached, a party fails 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";
- assess the accuracy and validity of selected search terms; and
- "take all appropriate measures to preserve ESI."

Id. at *3.

[7] At one point in the opinion, the district court acknowledged its culpability level list is not definitive and that each case "will turn on its own facts and the varieties of efforts and failures is infinite." 2010 WL 184312 at *3. With respect to the "gross negligence" list, however, the district court appeared to be saying that failures to take certain steps necessarily represented gross negligence: "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…." *Id.* at *7. I say "appeared to be saying" because in the immediately preceding paragraph, the district court said "while it would be helpful to develop a list of relevant criteria a court should review in evaluating discovery conduct, these inquiries are inherently fact intensive and must be reviewed case by case. Nonetheless, I offer the following guidance." *Id.* at *7. It was in the "following guidance" that the district court then said that a finding of gross negligence would be supported by the failures set forth in the text. Do the words "support a finding of gross negligence" mean that the finding is required? Or do they mean that the finding is permitted? The opinion appears to be saying the former and that is likely the way other courts will interpret the district court's language.

[8] Earlier the district court held that the failure to collect relevant records from key players also constituted gross negligence. *Id.* at *3.

Spoliation and the Duty To Preserve

> *Spoliation refers to the destruction or material alteration of evidence or to the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation.*

2010 WL 184312 at *4. If there is a duty to preserve, and if spoliation of evidence occurs, courts have "inherent authority" to impose sanctions to redress the wrong. *Id.* Plaintiffs and defendants, of course, have a duty to preserve after a lawsuit is filed. Common law in the United States teaches that both also have a duty to preserve once litigation is reasonably anticipated. *Id.*

The district court is absolutely correct in these statements of law. The subject is, however, more complicated because the level of conduct justifying the invocation of, and a sanction under, a court's inherent authority is a more debatable topic than the opinion in *Pension Committee* discusses.

But more on that later. Let me continue with the outline in the opinion. With negligence and gross negligence defined and the explanation that courts have the inherent power to redress spoliation, the district court then tackled the allocation of the burden of proof between the "innocent" party and the "spoliating" party.

Burden of Proof

The district court tried to answer two questions:

1. Who should bear the burden of establishing the relevance of evidence that can no longer be found?
2. Who should be required to prove that the absence of the missing material has caused prejudice to the innocent party?

In considering the answers to these questions, one might also ask: is there a difference between relevance and prejudice? An innocent party cannot establish prejudice if the lost evidence is not relevant.[9] If an innocent party can establish relevance, there still may not be any prejudice if the lost evidence is cumulative of other evidence or can be located from other sources. In other words, "Proof of relevance does not necessarily equal proof of prejudice." *Id.* at *5.

The district court then answered its questions by this statement of the burden of proof:

> *In short, the innocent party must prove the following three elements: that the spoliating party (1) had control over the evidence and an obligation to preserve it at the time of destruction or loss; (2) acted with a culpable state of mind upon destroying or losing the evidence; and that (3) the missing evidence is relevant to the innocent party's claim or defense.*

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[9] I view "material" and "relevant" as interchangeable in this analysis. In the end, the focus will be on "prejudice" whatever label one wishes to give to the evidence lost, and whether the conduct was inadvertent (*not* suggestive of a "weak case" or "harmful documents") or culpable to the point that represents "spoliation" to avoid having to produce harmful documents.

Id. at *5.[10]

Then in two principle-laden paragraphs, the district court set forth the following precepts:

- Relevance and prejudice "may be presumed when the spoliating party acted in bad faith or in a grossly negligent manner."[11]
- Where there is a finding of gross negligence, application of the presumption of relevance and prejudice is not *required*; rather the circumstances in a particular case will dictate whether the presumption is applicable.[12]

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[10] The standard was drawn from the Second Circuit's opinion in *Residential Funding Corp. v. DeGeorge*, 306 F.3d 99, 107 (2nd Cir. 2002), an important decision in the sanctions' arena in part because it is not necessarily consistent with the law in other circuits. *Residential Funding* involved the late production of emails. RFC had delayed in the production of e-mails during discovery until just before trial started. In August 2001 it produced a number of e-mails but none from a critical October – December 1998 time period. DeGeorge` asked for backup tapes to search for e-mails itself. RFC agreed to produce the backup tapes on the condition that any e-mails identified by DeGeorge's consultant be sent to RFC for review first. Jury selection was starting at this time. RFC turned over the backup tapes. It refused to answer questions about what type of tapes had been produced and their technical characteristics, which would have assisted DeGeorge in reading the tapes. This was brought to the district court's attention and RFC agreed to answer the questions. Within four days, DeGeorge's contractor found 950,000 e-mails in the relevant time period. Of these, 4,000 were printed out in the limited time available (trial was ongoing) and 30 of these were determined to be responsive to discovery requests, "though none appear to be damaging to RFC." 306 F.3d at 104. DeGeorge moved for sanctions seeking a presumption that the e-mails from October to December 1998 which had not been produced "would have disproved RFC's theory of the case." After hearing argument, the district court denied the motion. The jury returned a $96.4 million verdict in favor of RFC four days later. The court of appeals vacated the order denying any sanctions. On remand, DeGeorge was permitted to renew its motion for sanctions with the benefit of discovery, including reexamination of the backup tapes and depositions and, if appropriate, an evidentiary hearing. The court of appeals said the judgment should be vacated if the district court determines that RFC acted with a sufficiently culpable state of mind and that DeGeorge was prejudiced by the failure to produce the e-mails. If there is a culpable state of mind found, but no prejudice, the district court should consider awarding lesser sanctions, including awarding DeGeorge the costs of its motion for sanctions and this appeal, the Second Circuit added. The district court was also told to consider whether as a sanction for discovery abuse, RFC should forfeit postjudgment interest for the time period from the date of the entry of judgment until the entry of the district court's decision on remand. Finally, the Second Circuit said that if there was no culpable state of mind, it should still consider whether the purposeful sluggishness warrants the imposition of sanctions. In the course of the opinion, the court of appeals held that a party seeking an adverse inference instruction based on the destruction of evidence must establish that (1) the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) the records were destroyed "with a culpable state of mind"; and (3) the destroyed evidence was "relevant" to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense. *Id.* at 107. Because there was only a delay in production, the court of appeals modified this standard as follows: "Similarly, where, as here, an adverse inference instruction is sought on the basis that the evidence was not produced in time for use at trial, the party seeking the instruction must show (1) that the party having control over the evidence had an obligation to timely produce it; (2) that the party that failed to timely produce the evidence had "a culpable state of mind"; and (3) that the missing evidence is "relevant" to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense." *Id.* With respect to the level of culpability required, the court of appeals said that grossly negligent acts that hinder discovery can support an inference that the evidence not produced is harmful: "Thus if any of RFC's acts that hindered DeGeorge's attempts to obtain the emails was grossly negligent or taken in bad faith, then it could support an inference that the missing e-mails are harmful to RFC." *Id.* at 110. It is in part because of this sentence from *Residential Funding* that the district court's definition of "grossly negligent" conduct takes on added significance for practitioners in the Southern District of New York.

[11] The district court again cited *Residential Funding Corp.,* 306 F.3d at 108-09 (quoting *Kronisch v. United States,* 150 F.3d 112, 126 (2d Cir.1998): "Where a party destroys evidence in bad faith, that bad faith alone is sufficient circumstantial evidence from which a reasonable fact finder could conclude that the missing evidence was unfavorable to that party." 2010 WL 184312 at *5, n.31.

[12] The district court cited *Treppel v. Biovail,* 249 F.R.D. 111, 121 (S.D.N.Y.2008), *Toussie v. County of Suffolk,* 2007 WL 4565160, at *8 (E.D.N.Y. Dec. 21, 2007), and its own opinion in *Zubulake IV,* 220 F.R.D. at 221 in support of this proposition.

- When a spoliating party is negligent, the innocent party must prove both relevance and prejudice to justify the imposition of a severe sanction.[13]
- "Courts must take care not to 'hold[ ] the prejudiced party 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 ... destroyed evidence to profit from that destruction.'" *Id.*
- Irrespective of the level of culpability, any presumption of relevance and prejudice "is rebuttable": "the spoliating party should have the opportunity to demonstrate that the innocent party has not been prejudiced by the absence of the missing information. If the spoliating party offers proof that there has been no prejudice, the innocent party, of course, may offer evidence to counter that proof." *Id.*

Taking these precepts into account, the district court established a burden-shifting protocol dependent upon the egregiousness of the spoliating party's conduct. Where the conduct is "sufficiently egregious" that the court is justified in "imposing" a presumption of relevance and prejudice, or when the conduct "warrants permitting the jury to make such a presumption," the burden shifts to the spoliating party to rebut that presumption.[14] However, if the spoliating party "demonstrates to a court's satisfaction that there could not have been any prejudice to the innocent party, then no jury instruction will be warranted, although a lesser sanction might still be required." *Id.* at *6.

Remedies

Canvassing the sanctions' case law, the district court coalesced these decisions into a number of principles.

The district courts have the discretion to decide on a case-by-case basis the sanction to be imposed to achieve the goals of (a) deterrence of undesirable conduct, (b) accountability for such conduct, and (c) redress for the affected party. On a sanctions continuum, the sanction should be tailored to the remedy:

> *It is well accepted that a court should always impose the least harsh sanction that can provide an adequate remedy. The choices include-from least harsh to most harsh-further discovery, cost-shifting, fines, special jury instructions, preclusion, and the entry of default judgment or dismissal (terminating sanctions). The selection of the appropriate remedy is a delicate matter requiring a great deal of time and attention by a court.*

Id. at *6 (footnotes omitted).

Where a spoliating party acts "willfully or in bad faith," a jury "can be instructed that certain facts are deemed admitted and must be accepted as true." *Id*. (footnote omitted).

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[13] How is the innocent party to do this? By producing sufficient evidence to allow a trier of fact to infer that the evidence would have been "of the nature alleged by the party affected by its destruction," or in the case of destroyed e-mails, for example, that they "would have been favorable to" the innocent party's case. 2010 WL 184312 at *5 (citations omitted).

[14] "The spoliating party can do so, for example, by demonstrating 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." *Id.* at *6.

At what the district court called "the next level," "when a spoliating party has acted willfully or recklessly," a court "may impose a mandatory presumption."

Finally, even a mandatory presumption is rebuttable. *Id.* The "least harsh instruction *permits* (but does not require) a jury to *presume* that the lost evidence is both relevant and favorable to the innocent party. *Id.* at *7 (emphasis in the original). If a court gives this type of instruction, "the spoliating party's rebuttal evidence must then be considered by the jury, which must then decide whether to draw an adverse inference against the spoliating party."[15] *Id.* The district court then characterized this type of charge as a "spoliation charge" to distinguish it from a charge "where [the] jury is *directed* to presume, albeit still subject to rebuttal, that the missing evidence would have been favorable to the innocent party, and from a charge where the jury is *directed* to deem certain facts admitted." *Id.* (emphasis in the original).

In concluding its discussion of the analytic framework, the district court, explaining that resolution of the motion took nearly 300 hours of the court's and law clerks' time, acknowledged the risk of increased sanctions' motions and offered this advice:

> *Finally, 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. Likewise, parties need to anticipate and undertake document preservation with the most serious and thorough care, if for no other reason than to avoid the detour of sanctions.*

Id.

THE TRIGGER OF THE PRELITIGATION DUTY TO PRESERVE

The district court did not have many choices on picking the trigger date for the duty to preserve. By the latest it would have been October or November 2003 when litigation counsel was retained. The district court thought it should be earlier, in April 2003, because by that date (1) Lancer had filed for bankruptcy, (2) the University of Montreal had filed a complaint with the Financial Services Commission of the British Virgin Islands, two plaintiffs had individually retained counsel, and one of these plaintiffs began communications with "a number of other plaintiffs." 2010 WL 184312 at *9.

One cannot tell from the opinion whether the trigger date was the subject of contention. Perhaps not, because the district court's entire discussion of the issue was quite pithy:

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[15] "This sanction still benefits the innocent party in that it allows the jury to consider both the misconduct of the spoliating party as well as proof of prejudice to the innocent party." 2010 WL 184312 at *7.

> *It is unreasonable to assume that the remaining plaintiffs – all sophisticated investors – were unaware of the impending Lancer collapse while other investors were filing suit and retaining counsel. Accordingly, each plaintiff was under a duty to preserve at that time.*

Id.

DOCUMENT PRESERVATION EFFORTS

After common counsel was retained in October or November 2003, they contacted their clients regarding document production and preservation. They telephoned, emailed, and distributed memoranda "instructing plaintiffs to be over, rather than under, inclusive, and noting that emails and electronic documents should be included in the production."[16] 2010 WL 184312 at *8. This search effort was referred to in the opinion as the "2003/2004 Search."

The district court immediately held this instruction did not satisfy plaintiffs' obligation to preserve documents. Citing her treatise on electronic discovery,[17] Judge Scheindlin explained that the instructions did not direct anyone to preserve relevant documents and electronically stored information and did not create a mechanism to collect the preserved records:

> *This instruction does not meet the standard for a litigation hold. It does not direct employees to preserve all relevant records-both paper and electronic-nor does it create a mechanism for collecting the preserved records so that they can be searched by someone other than the employee. Rather, the directive places total reliance on the employee to search and select what that employee believed to be responsive records without any supervision from Counsel.*

[16] Common counsel explained that the documents were necessary to draft the complaint, "although they did not expressly direct that the search be limited to those documents." 2010 WL 184312 at *8.

[17] Shira A. Scheindlin, et al., Electronic Discovery and Digital Evidence: Cases and Materials, 147-49 (2009).

2010 WL 184312 at *8 (emphasis in original, footnotes omitted).[18]

The district court also faulted common counsel for failing, in monthly status alerts sent throughout the litigation, to alert plaintiffs "not to destroy records so that Counsel could monitor the collection and production of documents." *Id.*

WERE RELEVANT RECORDS LOST OR DESTROYED?

The district court concluded that relevant records had been lost or destroyed by plaintiffs because of the failure of plaintiffs to produce records that, the district court felt, had to have been in existence at one time:

> *All plaintiffs had a fiduciary duty to conduct due diligence before making significant investments in the Funds. Surely records must have existed documenting the due diligence, investments, and subsequent monitoring of these investments. The paucity of records produced by some plaintiffs and the admitted failure to preserve some records or search at all*

[18] The district court (2010 WL 184312 at *8, n.68) relied on *Adams v. Dell*, 621 F.Supp.2d 1173, 1194 (D. Utah 2009) for the proposition that preservation practices should not "place operations-level employees in the position of deciding what information is relevant." More broadly, *Adams* is a questionable decision. It involved claims against ASUSTEK Computer, Inc. and ASUS Computer International (jointly, ASUS), Taiwan based companies. As a records management practice, ASUS did not archive emails and depended on employees to individually preserve emails that had any long-term value. This practice resulted in an allegation of spoliation of material evidence for which sanctions were sought. The magistrate judge held: "ASUS' practices invite the abuse of rights of others, because the practices tend toward loss of data. The practices place operations-level employees in the position of deciding what information is relevant to the enterprise and its data retention needs. ASUS alone bears responsibility for the absence of evidence it would be expected to possess. While Adams has not shown ASUS mounted a destructive effort aimed at evidence affecting Adams or at evidence of ASUS' wrongful use of intellectual property, it is clear that ASUS' lack of a retention policy and irresponsible data retention practices are responsible for the loss of significant data." *Id.* at 1194. The issue in *Adams v. Dell* was not whether a preservation practice was faulty. The issue was whether Taiwanese companies should have had a records management program that satisfied American discovery standards. The magistrate judge in *Dell* quoted from *Kozlowski v. Sears, Roebuck*, 73 F.R.D. 73 (D. Mass 1976) to describe a "party's duty" to use "an adequate information management system." The full quote reads: "The defendant may not excuse itself from compliance with Rule 34, Fed.R.Civ.P., by utilizing a system of record-keeping which conceals rather than discloses relevant records, or makes it unduly difficult to identify or locate them, [renders] the production of the documents an excessively burdensome and costly expedition. To allow a defendant whose business generates massive records to frustrate discovery by creating an inadequate filing system, and then claiming undue burden, would defeat the purposes of the discovery rules." 73 F.R.D. at 76. ASUS did not receive a demand letter until February 23, 2005, after which it said that it had complied with its preservation duties. 621 F.Supp.2d at 1190. But the magistrate judge held that the duty to preserve was triggered in 1999-2000 because in late 1999 Toshiba had settled a lawsuit "related to the floppy disk errors at issue" and a "class action lawsuit was filed against HP, and in April 2000, a suit was filed against Sony" based on a defect that had been the subject of an email written by an ASUS employee in early 2000. Analogizing the presence of litigation against other companies to a building owner's duty to preserve defective wiring that was critical to the issue of responsibility for a fire in the building owner's product liability suit against the wire manufacturer, the magistrate judge held: "The building owner may not have known that a defective wiring bus caused the fire, or that suit would be filed, but the owner had a duty to preserve immediately after the fire. In the 1999-2000 environment, ASUS should have been preserving evidence related to floppy disk controller errors." *Id*. at 1191. Whether a plaintiff who is going to bring an action following a fire is in the same position as a defendant who has not been sued while other companies in the industry have been is a debatable proposition. But because of this trigger date, ASUS's normal records management practices were—obviously—faulty: "Similarly, here, ASUS' system architecture of questionable reliability which has evolved rather than been planned, operates to deny Adams access to evidence. This should not be excused." *Id.* at 1194. Wright, Miller & Marcus say *Kozlowski's* interpretation of Rule 34(b) "appears unwise" because litigants do not have a duty to produce documents organized in the way that a requesting party would like them organized. Wright, Miller & Marcus, Federal Practice and Procedure: Civil 2d § 2213 n.16.

for others by all plaintiffs leads inexorably to the conclusion that relevant records have been lost or destroyed.

2010 WL 184312 at *10.[19]

GROSSLY NEGLIGENT PLAINTIFFS

The district court decided that certain of the plaintiffs were "grossly negligent." Let's look at what each of these plaintiffs did or failed to do.

2M

2M "took no action to collect or preserve electronic documents prior to 2007."[20] It did not produce "a single email until 2008." It "dumped thousands of pages on the Citco Defendants only when it faced the prospect of sanctions."[21] 2M verified that it had not deleted any emails on its server since 2004, but there was no "similar representation for the most relevant period—i.e., *prior* to 2004." 2010 WL 184312 at *13 (emphasis in original).[22] 2M also conceded that its employees' collection of documents "lacked oversight and that no direction was given either orally or in writing to preserve documents or cease deleting emails" until a written litigation hold was issued in 2007. 2M's initial disclosures "were misleading" regarding electronic search

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[19] In a footnote contained in this passage, the district court described the search results for three of the plaintiffs: "Coronation produced no documents from 1999 to 2000, and very few documents from 2001 to 2002. The Chagnon Plaintiffs produced only four documents from 1998 through 2002. Okabena produced only ten emails for the entire relevant period." 2010 WL 184312,at *10, n. 86.

[20] In October 2007, the former chief financial officer to 2M testified that he was the lead contact with counsel prior to leaving 2M in 2004. He said he did not take any steps to preserve emails and was not aware of anyone who took such steps. He did not recall giving any document preservation instructions to anyone and never received any either. In March 2008, this same individual signed a declaration in which he said he directed employees to locate and preserve Lancer-related documents and all documents related to Lancer had been produced to counsel during the 2003-04 search. Finally, he declared that to his knowledge no Lancer-related documents were discarded or destroyed after counsel instructed 2M to locate all documents in its possession in late 2003 or early 2004. Later, this individual amended his declaration to say that only "paper" documents had been produced. 2010 WL 184312 at *12-13.

[21] In August 2009, days after plaintiffs submitted their memorandum of law opposing the sanctions motion, 2M produced 8,084 pages of documents including nearly 700 emails. 2010 WL 184312 at *13.

[22] Trumpower, 2M's current CFO and general counsel, gave deposition testimony that no emails had been deleted from 2M's server since 2004 and personal folders were not automatically deleted from 2M's network. However, Trumpower testified about "reams of research" on Lancer which had been destroyed after April 2003 according to an April 22, 2008 email to counsel for 2M. 2010 WL 184312 at *13. The Citco Defendants also identified 46 emails sent or received by 2M between June 9, 2003, and October 28, 2003, that had not been produced by 2M, *id.*, although it was not clear from the opinion whether these emails were separately located by the Citco Defendants. 2M was not one of the parties that had sought out individual counsel prior to retention of common counsel in October or November 2003. 2010 WL 184312 at *9. To the extent that relevant documents were destroyed by 2M prior to October 2003, one can appreciate the importance of deciding when a prospective plaintiff, not yet represented, has crossed the preservation line. One alleged product defect case makes the point crystal clear. In *Silvestri v. General Motors Corp.*, 271 F.3d 583 (4th Cir. 2001), plaintiff claimed that a GM vehicle was defective and that the defect caused the accident in issue. Plaintiff had his experts inspect the vehicle. One of the experts told plaintiff to advise GM of the accident so GM could inspect it. But GM was not notified of the accident until three years later and by then the vehicle had been repaired and resold. The district court dismissed the case as a sanction. The Fourth Circuit affirmed. "In sum, we agree with the district court that Silvestri failed to preserve material evidence or to notify GM of the availability of the evidence, thus breaching his duty not to spoliate evidence." 271 F.3d at 592.

efforts prior to 2007 but were later amended within a reasonable time "of being notified of the deficiencies in the original declaration."[23] While explaining that submission of a misleading declaration represented "bad faith," because of the amendments submitted and considering the other conduct of 2M, the district court concluded that 2M was guilty of gross negligence.[24] *Id.*

Hunnicutt

Hunnicutt was found responsible for gross negligence because its President (also Hunnicutt) deleted emails received after November 2003,[25] it failed to seek any Lancer-related documents or emails from a current employee and a former employee both of whom had worked on the Lancer investment,[26] and it failed to retain 57 emails sent between February 3, 1999, and May 14, 2003.[27] The district court also appeared to fault Hunnicutt for inconsistencies between his deposition testimony and his declaration.[28] These "actions and inactions," the district court held, "lead inexorably to the conclusion that relevant documents were not produced and are now lost." 2010 WL 184312 at *14.

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[23] 2M's current CFO and general counsel, Trumpower, submitted a declaration stating that 2M had searched for electronic documents prior to his arrival at 2M in 2007 but later clarified this statement by explaining that he was referring only to the 2007/2008 search for documents. A former CFO declared that all Lancer-related documents were produced during the 2003/2004 Search but later amended his declaration to say that only "paper" documents were produced. 2010 WL 184312 at *13.

[24] It was not clear from the opinion what the relevance was of any documents generated after Lancer went into bankruptcy in April 2003. What was clear is that a litigation hold was not in place after April 2003 and that an effective litigation hold was not in place after October 2003 at least as to electronic documents.

[25] The opinion does not explain how emails received after November 2003 were relevant to claims that apparently focused on conduct prior to this date when Lancer investments were made.

[26] A failure to contact and search the files of key players after a duty to preserve has attached is always going to get a producing party in trouble. These two individuals apparently worked on their personal computers outside of Hunnicutt's offices as well, 2010 WL 184312 at *13, which emphasizes the importance of understanding the operating practices and storage habits of a key player. The opinion does not state whether these two individuals' documents had, in fact, been deleted or destroyed or were still searchable.

[27] The Citco Defendants identified the 57 emails, but it was not clear from the opinion whether the 57 emails had been located from other sources (and therefore were not lost). Hunnicutt had retained counsel in March 2003 to file a complaint against Lancer, 2010 WL 184312 at *8, n.60, so there was no question about its retention obligations after March 2003. It was clear from the opinion that only one of the emails was dated after this duty to preserve attached, but the district court assumed that "many of" the other 56 emails must have been in existence at Hunnicutt after the duty attached ("it is likely that as of that date [April 2003] many of these emails would have been in the possession of Hunnicutt, as most entities maintain electronic records for at least a year on active servers or on backup media." 2010 WL 184312 at *13, n.124). Whether or not most businesses have such a standard retention time period and whatever Hunnicutt's actual retention practice was, between the range of dates of the 57 emails (February 3, 1999 and May 14, 2003), the opinion does not state how many were dated in 1999, 2000, 2001 or the first half of 2002, versus later in 2002 or 2003.

[28] "At his deposition, William Hunnicutt, President of Hunnicutt, testified that to the best of his recollection, he maintained all of the emails he sent regarding Lancer from the inception of his relationship with Lancer in April 1998 through the first quarter of 2003. However, Mr. Hunnicutt also testified that he had a practice of deleting emails unless he "felt there was an important reason to keep them" and did not recall anyone ever instructing him to discontinue that practice. 2010 WL 184312 at *13. "When shown [at his deposition] emails he had sent but not produced, Mr. Hunnicutt could not explain why he had not produced them. However, when Mr. Hunnicutt submitted his declaration approximately two months later, he stated that he now recalled having accidently deleted his email "sent" file prior to March 13, 2003. *Id.*

Coronation

Coronation operated out of offices in London and Cape Town, South Africa. It entrusted document production to Hardman, an employee "in the due diligence area." Hardman was apparently based in London. She testified that she "had no experience conducting searches, received no instruction on how to do so, had no supervision during the collection, and no contact with Counsel during the search," yet she provided a declaration that "to the best of her knowledge" Coronation located and preserved "all documents" related to Lancer. Id. at *14. She searched a drive on the London computer network, "even though she was aware that not all emails or electronic documents on the office computers of investment team members would be on that drive."[29] *Id.* The files of seventeen investment team employees,[30] including a compliance officer and chief investment officer, also were never searched. *Id.* The Citco Defendants also identified 39 emails from May 16, 2003, through September 2003 that Coronation did not produce.[31] *Id.* "Based on the all of these facts it is apparent that Coronation acted in a grossly negligent manner." *Id.*

The Chagnon Plaintiffs

The Chagnon Plaintiffs hired their own counsel in March 2003 "in connection with matters related to its investments in the Funds." 2010 WL 184312 at *8, n.60. Gregoire, the declarant for the Chagnon Plaintiffs was not hired until 2004. "Gregoire did not know how searches were conducted or the instructions given to employees and was unsure whether the Chagnon Plaintiffs' network was searched for emails and electronic documents." *Id.* at *15, n.142. Some emails located in 2004 were not provided to common counsel until 2008. *Id.* at *15. Only four of twelve employees involved in Lancer-related investment decisions were asked to search for records in the 2003/2004 Search. The other eight were later interviewed but only cursorily and without follow-up. *Id.* The Citco Defendants identified three emails from May and June 2003 that were not produced. The Chagnon Plaintiffs produced two emails and two pieces of correspondence from 1998 through

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[29] The district court noted that Hardman was aware that Coronation kept backup tapes "but never searched them for Lancer-related documents and was unaware of anyone else doing so." In response, plaintiffs argued that there was no duty to search backup tapes since they were not readily accessible. 2010 WL 184312 at *14, n.131. *Cf. Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003): "The scope of a party's preservation obligation can be described as follows: Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents. As a general rule, that litigation hold does not apply to inaccessible backup tapes (e.g., those typically maintained solely for the purpose of disaster recovery), which may continue to be recycled on the schedule set forth in the company's policy…However, it does make sense to create one exception to this general rule. If a company can identify where particular employee documents are stored on backup tapes, then the tapes storing the documents of 'key players' to the existing or threatened litigation should be preserved if the information contained on those tapes is not otherwise available. This exception applies to all backup tapes."

[30] The district court acknowledged that it was "not entirely clear" whether all of these individuals had involvement in the Lancer matter.

[31] As noted earlier, Coronation did not produce any emails or correspondence from 1998-99 and only limited emails and correspondence from 2000 through 2002, but it is not clear whether these documents existed after a duty to preserve attached. The district court assumed that some were: "Coronation produced one email from 2000, six emails and three letters from 2001, and eight emails and three letters from 2002. While it is impossible to know whether emails and correspondence from 1998 through 2002 were still in Coronation's possession in April, 2003, Coronation did produce some documents from this time frame. Thus, it is fair to presume that some records from this time frame were in Coronation's possession at the time the duty to preserve arose." 2010 WL 184312 at *14, n. 138 (record citation omitted).

2002 and an unspecified number of emails from 2003.[32] And documents produced by 2M after the motion for sanctions was filed included emails on which the Chagnon Plaintiffs were copied and yet were not produced. With a misleading declaration (that all documents were produced) and this other evidence of misfeasance, the district court concluded that the Chagnon Plaintiffs were guilty of gross negligence.

Bombardier Trusts

Romanovici, who joined the Trusts in 2007, submitted a declaration. She admitted that Bombardier Trusts failed to search or preserve emails or electronic documents prior to 2007 even though she also declared that they had preserved and located "all documents" in their possession in 2003. 2010 WL 184312 at *16.[33] A vendor hired in 2007 to retrieve documents from backup tapes was not able to do so from some of the tapes which the district court said was "not surprising given that the recycling of backup tapes was never suspended." *Id.*[34] "At least eleven members of its Investment Committee were not asked for any documents-paper or electronic-or instructed to preserve documents, until 2007." 2M's document production also contained documents copied to the Trusts that were not produced by the Trusts. Given this conduct and the "misleading and inaccurate declaration," the Trusts were found guilty of gross negligence. *Id.*

Bombardier Foundation

The Bombardier Foundation failed to search for "*any* electronic documents or emails related to Lancer *until 2007*." 2010 WL 184312 at *17 (emphasis in the original). The Foundation's declarant, Lavoie, explained that backup data for the year 2003 would only have existed for one year because of the Foundation's recycling practices. This statement prompted the district court to conclude that the Foundation could not rectify the failure to search "given Lavoie's admission that relevant information has been deleted from the Foundation's servers." Lavoie also stated that the Foundation's employees were instructed in 2004 to locate and preserve "all" Lancer-related documents, but "there is no indication," the district court explained, that "electronic documents or emails" were searched. *Id.* The Foundation also failed "to request any documents-paper or electronic-from the Foundation's Investment Committee or its Board of Governors" or alter "its practice of overwriting backup data to preserve the records of key players,"[35] and "withheld until 2008 documents it had collected in 2004, but had independently and arbitrarily decided were not 'responsive.'" *Id.* "Such conduct, coupled with the Bombardier Foundation's misleading and inaccurate declaration, amounts to gross negligence." *Id.*

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[32] The opinion does not explain what the records retention policy was, if any, but again, the district court must have concluded that documents from 1998-2002 were in existence after the duty to preserve attached.

[33] It appears from the opinion that the declarant was likely referring to paper documents in the earlier statement. 2010 WL 184312, n.154.

[34] It is not clear why the failure to stop recycling of backup tapes would affect the ability to retrieve information from tapes that still existed. The opinion earlier quoted from Romanovici's declaration which explained that, "'For a number of months during the years 2001 and 2002,' Bombardier Trusts was not able to recover emails because backup tapes either never existed or were blank. Romanovici speculated that the loss of these tapes was 'possibl[y] due to systemic technological problems.'" 2010 WL 184312 at *16.

[35] Presumably, the records of these key players would have existed only on backup tapes at the time that the backup tapes were recycled.

NEGLIGENT PLAINTIFFS

Other plaintiffs were found negligent. The difference in conduct was significant in relation to the district court's sanction. One significant factor distinguishing the "negligent" plaintiffs from the "grossly negligent" plaintiffs is the absence of an inaccurate or misleading declaration. The table below sets forth the conduct amounting to negligence for the remaining plaintiffs.

Plaintiff	Action or Inaction
Altar Fund (*Id.* at *18)	■ Failure to supervise persons delegated to perform the search. ■ Unfamiliarity with the email systems in use or how electronic files were maintained. ■ Emails between May-September 2003 identified by the Citco Defendants were not produced. ■ Emails produced by 2M that the Altar Fund received were not produced.
L'Ecole Polytechnique (*Id.* at *19)	■ Failed to conduct a thorough search of its computer system. ■ Failed to specifically direct all the members of the Investment Committee of the need to preserve Lancer-related documents; however, the chair of the Committee and five of its members of the Committee did search their records. ■ The records of one employee (Bataille) should have been searched during the 2003/2004 Search, although it is unclear whether he was a member of the Investment Committee or played any role in the Lancer investment. ■ The Citco Defendants identified nine emails that were not produced. ■ Emails produced by 2M on which L'Ecole Polytechnique was copied were not produced.
Okabena (*Id.* at *19-20)	■ Failure to conduct a thorough search for electronically stored information. ■ Okabena produced approximately ten emails for the entire relevant period. ■ The Citco Defendants identified thirty-nine emails from August 26, 1999, through September 19, 2003, that were not produced. ■ After plaintiffs filed their opposition to this motion, Okabena produced three of the thirty-nine emails previously produced by others. ■ Emails produced by 2M on which Okabena was copied were not produced.
The Corbett Foundation (*Id.* at *20)	■ Failure to search one employee's palm pilot, which may have contained emails. ■ Failure to instruct employees to preserve their emails or paper documents. ■ Failure to produce twenty-two emails identified by the Citco Defendants.
Commonfund (*Id.* at *20-21)	■ Execution of a declaration without fully investigating Commonfund's 2003/2004 Search. ■ Execution of a declaration without personal knowledge of the steps taken by Commonfund to preserve and produce documents. ■ Failure to collect documents from all key players: the Audit and Risk Management Committee members were omitted from the search and the Citco Defendants demonstrated that the Committee had some involvement in Lancer, "although not at the level of key decision makers." ■ Late production of the Committee minutes. ■ Failure to produce a variety of documents (some of which had been produced by the

Plaintiff	Action or Inaction
	Commonfund in a separate action) to the Citco Defendants.
KMEFIC (*Id.* at *21-22)	■ Failure to request documents from its Investment Committee before 2007. ■ Failure of management or counsel to supervise key players who searched their own files. ■ Failure of a declarant to carefully inquire into the details of KMEFIC's search prior to signing his declaration. ■ Reliance by a declarant "on the possibly false assertion" that one particular employee "would have been copied on any Lancer-related email."
UM (*Id.* at *22-23)	■ Failure to do a complete search of electronically stored information where UM searched subfiles titled "Lancer" but this folder "may, or may not, have encompassed all Lancer-related documents." ■ Failure to check "the electronic files of each employee to confirm that his or her search was complete." ■ Possible failure to request electronically stored information when UM sought documents from the Investment Committee in 2004. ■ Initial production of a 1999 Newsletter was sloppy.[36]

SANCTIONS

With respect to the grossly negligent defendants only, the district court decided to give a jury charge that reflects the district court's analysis of the burden of proof, applicable presumptions, and the ability to rebut the presumption. The entire charge appears as Appendix I. Its highlights are as follows:

1. The party seeking the adverse inference must prove by a preponderance of the evidence that (a) relevant evidence[37] was destroyed after the duty to preserve arose and (b) the lost evidence would have been favorable to the party seeking sanctions.
2. As a matter of law, the jury should be told that each of the grossly negligent plaintiffs failed to preserve evidence after the duty to preserve arose, but it was up to the jury to determine if the lost evidence was

[36] The1999 "Lancer Year End Review Newsletter" was first produced by UM without a page "that disclosed a surge in redemptions in the summer of 1998, which necessitated a liquidation of part of the portfolio resulting in losses to the Fund. Plaintiffs contend that the document was accidentally copied double sided to single sided. The document was recopied and reproduced. However, the reproduced copy did not include the same handwritten notation 'copie,' as did the originally produced copy." 2010 WL 184312 at *22. The district court rejected an argument that UM was attempting to suppress information, instead regarding the production as sloppy. *Id.* at *23.

[37] "Evidence is relevant if it would have clarified a fact at issue in the trial and otherwise would naturally have been introduced into evidence." 2010 WL 184312 at *23.

relevant and favorable to the party seeking sanctions.[38] In making this determination, the jury "may take into account the egregiousness of the plaintiffs' conduct in failing to preserve the evidence."

3. The party opposing sanctions "has offered evidence that (1) no evidence was lost; (2) if evidence was lost, it was not relevant; and (3) if evidence was lost and it was relevant, it would not have been favorable to the Citco Defendants." If the jury agreed that the lost evidence was not relevant or would not have been favorable, "then your consideration of the lost evidence is at an end, and you will not draw any inference arising from the lost evidence."
4. If instead the jury decided that it should "presume that the lost evidence was relevant and would have been [favorable] to the Citco Defendants," then the jury had to decide if the grossly negligent plaintiffs rebutted the presumption.
5. If any of these plaintiffs carried their burden, the jury was told, "you will not draw any inference arising from the lost evidence against that plaintiff." If any did not, then the jury was told that it "may draw an inference against that plaintiff and in favor of the Citco Defendants-namely that the lost evidence would have been favorable to the Citco Defendants."
6. To address the possibility of evidence spillover, the jury would be reminded that each plaintiff "is entitled to your separate consideration. The question as to whether the Citco Defendants have proven spoliation is personal to each plaintiff and must be decided by you as to each plaintiff individually."[39]

The district court also awarded the Citco Defendants reasonable costs, including attorneys' fees, "associated with reviewing the declarations submitted, deposing these declarants and their substitutes where applicable, and bringing this motion."[40]

WHAT WILL LIFE AFTER *PENSION COMMITTEE* BE LIKE?

Judge Scheindlin had an enormous record to absorb and was obviously concerned that the Citco Defendants

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[38] In a footnote, the district court explained that "the jury is bound by the Court's determination that certain plaintiffs destroyed documents after the duty to preserve arose." 2010 WL 184312 at *23, n.251 (citation omitted). The district court emphasized that it was not instructing the jury that the missing "evidence is relevant or whether its loss has caused any prejudice to the Citco Defendants. The jury must make these determinations because, if the jury finds both relevance and prejudice, it then may decide to draw an adverse inference in favor of the Citco Defendants which could have an impact on the verdict. Such a finding is within the province of the jury not the court." *Id.* (citation omitted).

[39] In another case involving spoliation of electronic information, Judge Rosenthal took an alternative approach: "[T]his court makes the preliminary findings necessary to submit the spoliation evidence and an adverse inference instruction to the jury. But the record also presents conflicting evidence about the reasons the defendants deleted the emails and attachments; evidence that some of the deleted emails and attachments were favorable to the defendants; and an extensive amount of other evidence for the plaintiff to use. As a result, the jury will not be instructed that the defendants engaged in intentional misconduct. Instead, the instruction will ask the jury to decide whether the defendants intentionally deleted emails and attachments to prevent their use in litigation. If the jury finds such misconduct, the jury must then decide, considering all the evidence, whether to infer that the lost information would have been unfavorable to the defendants. Rather than instruct the jury on the rebuttable presumption steps, it is sufficient to present the ultimate issue: whether, if the jury has found bad-faith destruction, the jury will then decide to draw the inference that the lost information would have been unfavorable to the defendants." *Rimkus Consulting Group, Inc. v. Cammarata*, ___ F.R.D. ___, Civ. No. H-07-0405 (S.D. Tex. February 19, 2010), Slip Opinion at 25.

[40] The Citco Defendants were instructed to submit "a reasonable fee" application after approval of which the district court said it would allocate the costs among the plaintiffs. 2010 WL 184312 at *24.

may have been harmed in their ability to defend the claims against them because of the sloppy preservation practices of the plaintiffs. She was also bothered by false and misleading declarations made by some of the plaintiffs' representatives. She also recognized that the case law in the Second Circuit did not make a meaningful distinction between negligence and gross negligence,[41] and that the case law had not paid much attention to burden of proof, the type of evidentiary presumptions that might be made by a jury, and whether those presumptions were rebuttable. Her elegant opinion answers these questions for lawyers in the Southern District of New York.[42]

Unfortunately, statements like relevance and prejudice "may be presumed when the spoliating party acted in bad faith or in a grossly negligent manner"—even if mollified by the statement that application of the presumption of relevance and prejudice is not always *required* and instead the circumstances in a particular case will dictate whether the presumption is applicable—raise the stakes for litigants in any jurisdiction that adopts *Pension Committee's* "gross negligence" categories. There are a number of other questions raised that go beyond the opinion, the answers to which will also affect the practices of all litigants in a post-*Pension Committee* world.

The Use of Inherent Power in the Absence of Bad-Faith Conduct

Careful reviewers will note that even though most of the culpable conduct of the plaintiffs occurred after the complaint was filed, the district court did not rely on Rule 37 or any of the other sanctions' provisions in the Federal Rules of Civil Procedure to reach its result. Instead, without using the words "inherent authority," the district court relied on its power to avoid abuse of the judicial process.

> *The common law duty to preserve evidence relevant to litigation is well recognized. The case law makes crystal clear that the breach of the duty to preserve, and the resulting spoliation of evidence, may result in the imposition of sanctions by a court because the court has the obligation to ensure that the judicial process is not abused.*

Id. at *4 (footnotes omitted). The district court relied on *Chambers v. NASCO, Inc.,* 501 U.S. 32, 45-46 (1991) to support its obligation to prevent abuse of the judicial process. Does *Chambers* support reliance on inherent power when other than bad-faith conduct is involved?

In *Chambers*, the Supreme Court affirmed an award against Chambers of attorneys' fees by the district court in reliance on its inherent authority. Chambers was the sole shareholder of a television station who agreed to sell the station and a broadcast license to NASCO but reneged on the sale prompting NASCO's specific performance action. Chambers engaged in a number of actions to frustrate the sale, as well as acts of fraud both before the court and outside the confines of the court, filed false and frivolous pleadings, and attempted,

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[41] *See Rimkus Consulting Group, Inc. v. Cammarata*, ___ F.R.D. ___, Civ. No. H-07-0405 (S.D. Tex. February 19, 2010), Slip Opinion at 15-16 (discussing the variability in the circuit standards on the level of culpability required to warrant an adverse inference, and especially the Second Circuit's negligence standard, in contrast with the Fifth Circuit's requirement of bad faith conduct before an adverse inference can be drawn.)

[42] *See Rimkus Consulting Group, Inc. v. Cammarata*, ___ F.R.D. ___, Civ. No. H-07-0405 (S.D. Tex. February 19, 2010), Slip Opinion at 17 ("The circuit differences in the level of culpability necessary for an adverse inference instruction limit the applicability of the *Pension Committee* approach.")

"by other tactics of delay, oppression, harassment and massive expense to reduce [NASCO] to exhausted compliance." *Id.* at 35-41. The district court sanctioned Chambers over $1 million representing NASCO's attorneys' fees. It chose not to rely on the sanctions' provisions of the rules of civil procedure[43] or 28 U.S.C. § 1927,[44] but instead on its inherent authority. The Supreme Court accepted the petition for review to evaluate (1) the use of the court's inherent authority when rules on a statute were available to discipline Chambers, and (2) the propriety of the sanction.

The Supreme Court traced the history of the inherent authority principle back to 1812 identifying precedents supporting the power of a court to discipline attorneys who appear before it, punish for contempt, vacate a judgment upon proof of fraud perpetrated on the court and conduct an independent investigation to determine whether it has been the victim of fraud, bar a criminal defendant from a courtroom for disruption of a trial, dismiss an action on *forum non conveniens*, and act *sua sponte* to dismiss a case for lack of prosecution. *Id.* at 43-44. Saying that "inherent powers must be exercised with restraint and discretion," the Court reasoned that if there was inherent power to dismiss a complaint, there was inherent power to assess attorneys' fees. *Id.* at 44-45.

Despite the American rule that requires each party to bear its own fees, the Court identified three "narrowly defined" circumstances when courts can award attorneys' fees: (1) the common fund exception where one party's success benefits others, (2) willful disobedience of a court order, and "most relevant here" (3) when a party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Id.* at 45-46 (citations and internal quotes omitted).

The Court explained it could "discern no basis" for holding that Section 1927 and the rules of civil procedure displace "the inherent power to impose sanctions for the bad-faith conduct."[45] On the one hand, inherent power is broader than prohibitions in rules because it "extends to a full range of litigation abuses." On the other it is narrower because the exceptions to the American Rule "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," while other mechanisms, such as Rule 11, "permit a court to impose

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[43] The Supreme Court identified potentially applicable rules in place at the time: "A number of the Rules provide for the imposition of attorney's fees as a sanction. *See* Fed.Rule Civ.Proc. 11 (certification requirement for papers), 16(f) (pretrial conferences), 26(g) (certification requirement for discovery requests), 30(g) (oral depositions), 37 (sanctions for failure to cooperate with discovery), 56(g) (affidavits accompanying summary judgment motions). In some instances, the assessment of fees is one of a range of possible sanctions, see, e.g.,Fed.Rule Civ.Proc. 11, while in others, the court must award fees, see, e.g.,Fed.Rule Civ.Proc. 16(f). In each case, the fees that may be assessed are limited to those incurred as a result of the Rule violation. In the case of Rule 11, however, a violation could conceivably warrant an imposition of fees covering the entire litigation, if, for example, a complaint or answer was filed in violation of the Rule. The court generally may act *sua sponte* in imposing sanctions under the Rules." 501 U.S. at 42, n.8. The district court had focused on Rule 11 deciding it was not broad enough to reach the conduct in question. 403 U.S. at 42.

[44] Section 1927 provides: "Any attorney ... who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." The district court rejected application of Section 1927 because it only applied to attorneys and was not broad enough to reach actions by a litigant that degraded the judicial system. 501 U.S. at 42.

[45] Later in the opinion, the Court added: "The Court's prior cases have indicated that the inherent power of a court can be invoked even if procedural rules exist which sanction the same conduct." *Id.* at 49 (citing *Link v. Wabash R. Co.*, 370 U.S. 626, 630-32 (1962) (affirming *sua sponte* dismissal of an action for lack of prosecution)).

attorney's fees as a sanction for conduct which merely fails to meet a reasonableness standard." *Id.* at 46.[46]

To bolster its decision, the Court used its remand in *Roadway Express, Inc. v. Piper,* 447 U.S. 752 (1980)[47] to highlight the role that inherent power plays where bad-faith conduct has occurred even when a statute or rule may be applicable:

> *After determining that § 1927, as it then existed, would not allow for the assessment of attorney's fees, we remanded the case for a consideration of sanctions under both Federal Rule of Civil Procedure 37 and the court's inherent power, while recognizing that invocation of the inherent power would require a finding of bad faith.*

Id. at 49 (citing 447 U.S. at 767; emphasis in original, footnote omitted).

The Court then reached this conclusion, again linking the use of inherent authority to bad-faith conduct and explaining that where such conduct occurs during litigation, courts should "ordinarily" rely on the rules of civil procedure rather than inherent power if the conduct can be "adequately sanctioned" under the rules:[48]

> *There is, therefore, nothing in the other sanctioning mechanisms or prior cases interpreting them that warrants a conclusion that a federal court may not, as a matter of law, resort to its inherent power to impose attorney's fees as a sanction for bad-faith conduct. This is plainly the case where the conduct at issue is not covered by one of the other sanctioning provisions. But neither is a federal court forbidden to sanction bad-faith conduct by means of the inherent power simply because that conduct could also be sanctioned under the statute or the Rules. A court must, of course, exercise caution in invoking its inherent power, and it must comply with the mandates of due process, both in determining that the requisite bad faith exists and in assessing fees, see Roadway Express, supra, at 76. Furthermore, when there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power. But if in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power.*

Id. at 50.[49]

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[46] Justice White, writing for the five-justice (Justices Marshall, Blackmun, Stevens, and O'Connor joined Justice White) majority (Justices Scalia, Kennedy, Rehnquist, and Souter dissented) added that Congress had the power to limit the inherent power of a court, but said it had not done so despite the fact there were opportunities to do so as evidenced by changes made to Section 1927 and Rule 11. *Id.* at 47-48. *Cf.* n.2., *supra.*

[47] In this case, a party failed to comply with discovery orders and an order regarding the schedule for filing briefs.

[48] *See Rimkus Consulting Group, Inc. v. Cammarata*, ___ F.R.D. ___, Civ. No. H-07-0405 (S.D. Tex. February 19, 2010), Slip Opinion at 9 (In a case also involving the proper sanction for spoliation of documents, citing *Chambers*, "If an applicable statute or rule can adequately sanction the conduct, that statute or rule should ordinarily be applied, with its attendant limits, rather than a more flexible or expansive 'inherent power.'")

[49] The Supreme Court also affirmed the district court's assessment of attorneys' fees for Chambers' bad-faith conduct. *Id.* at 55-58.

Does *Chambers* limit a district court's ability to rely on inherent power to bad-faith conduct?[50] If it does, *Pension Committee* and other decisions that invoke inherent power in the absence of bad-faith conduct may have reached the right result but for the wrong reason. The rules of civil procedure will be looked to first to address postfiling conduct. And until the Supreme Court or Congress reconcile the differences, prefiling conduct will remain subject to the varying standards in the federal circuits on the level of culpability required to warrant any sanction or something more than monetary sanctions.[51]

Trigger of the Prelitigation Duty To Preserve

The district court in *Pension Committee* decided that the Lancer bankruptcy filing and retention of counsel by two of the investors triggered the duty to preserve for all of the plaintiffs, six to seven months before common counsel was retained.

Should the trigger be that automatic, especially where gross negligence will result from a failure to issue a litigation hold and the loss of relevant evidence might then be presumed? It is conceivable that a sophisticated investor might be aware of what other investors were doing and still not have decided it wanted to become

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[50] Contrast *Pension Committee* with *Benzel v. Allied Pilots Association*, 2009 WL 4884052 (D.N.J. December 19, 2009). In this case which had gone up and back to the Third Circuit and was eight years old, the district court determined that the filing date was the trigger of the duty to preserve. Defendant did not issue litigation holds in a timely manner resulting in a claim that emails, documents, and other communications were destroyed. Applying the Third Circuit's standards, which are more rigorous than the Second Circuit's standards, the district court refused to sanction the defendant because there was no evidence of bad faith: "While Defendants should have moved more quickly to place litigation holds on the routine destruction of certain documents and electronic data, the Court does not see any evidence of bad faith. Accordingly, the Court declines to issue a spoliation inference or to impose any other sanction at this time." *Id.* at *3. The conduct included the destruction of 269 boxes of documents by Iron Mountain who submitted a letter saying the documents were inadvertently destroyed. This prompted the district court to quote from *Brewer v. Quaker State Oil Refining Corp.*, 72 F.3d 326, 334 (3rd Cir. 1995): "No unfavorable inference arises when the circumstances indicate that the document or article in question has been lost or accidentally destroyed, or where the failure to produce it is otherwise accounted for." *See also Rimkus Consulting Group, Inc. v. Cammarata*, ___ F.R.D. ___, Civ. No. H-07-0405 (S.D. Tex. February 19, 2010), Slip Opinion at 10 ("If inherent power, rather than a specific rule or statute, provides the source of the sanctioning authority, under *Chambers*, it may be limited to a degree of culpability greater than negligence.")

[51] If a party destroys evidence that makes it impossible for a defendant to defend the case or a plaintiff to prove its case, should it matter whether the destruction was accidental or inadvertent? The case law is inconsistent from circuit to circuit on the appropriate standard to follow. For example, compare *Vick v. Texas Employment Comm'n*, 514 F.2d 734, 737 (5th Cir. 1975) (citation omitted) ("The adverse inference to be drawn from destruction of records [before trial] is predicated on bad conduct of the defendant. 'Moreover, the circumstances of the act must manifest bad faith. Mere negligence is not enough, for it does not sustain an inference of consciousness of a weak case'") with *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995) ("We reject the argument that bad faith is an essential element of the spoliation rule."). To understand outcomes, one must carefully comprehend the proof of prejudice. *Cf. Mosaid Technologies Inc. v. Samsung Elec. Co., Ltd., et al.*, 348 F.Supp.2d 332 (D.N.J. 2004). The district court in New Jersey surveyed the Third Circuit case law on the level of conduct required before issuance of an adverse inference instruction. It held that "bad faith" was not required: "Having considered the two different approaches courts take under the Third Circuit's "actual suppression" standard, and the Third Circuit's characterization of the spoliation inference as a lesser sanction, this Court believes the flexible approach is the better and more appropriate approach. Primarily, the spoliation inference serves a remedial function--leveling the playing field after a party has destroyed or withheld relevant evidence. As long as there is some showing that the evidence is relevant, and does not fall into one of the three categories enumerated in *Schmid,* the offending party's culpability is largely irrelevant as it cannot be denied that the opposing party has been prejudiced. Contrary to Samsung's contention, negligent destruction of relevant evidence can be sufficient to give rise to the spoliation inference. If a party has notice that evidence is relevant to an action, and either proceeds to destroy that evidence or allows it to be destroyed by failing to take reasonable precautions, common sense dictates that the party is more likely to have been threatened by that evidence. *See Schmid,* 13 F.3d at 78. By allowing the spoliation inference in such circumstances, the Court protects the integrity of its proceedings and the administration of justice." 348 F.Supp.2d at 338 (footnotes omitted).

involved in litigation. It might have too little at stake to warrant litigation. There may be public relations or evidentiary reasons why it would not want to become involved in a suit. It might want to obtain an opinion from counsel on the likelihood of success vis-à-vis the likely costs of litigation before making a decision to file suit.[52] Or perhaps the investor legitimately assumed there was an arbitration clause, which might prompt a different duty to preserve analysis.[53]

Just as significantly, can a prospective plaintiff have a duty to preserve if it has not hired counsel to tell it of such a duty?[54] What if the prospective plaintiff is located in a civil law tradition that has no duty to preserve? Individuals and companies, no matter how sophisticated, do not necessarily know that they are supposed to preserve documents if a lawyer has not been engaged to tell them of the duty.

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[52] Consider the mirror image of the problem. Does every defendant have a duty to preserve if a prospective plaintiff writes a letter saying it is going to sue the defendant at some point in the future? Such a letter might well trigger a duty to preserve on the right facts, but it should not trigger a duty to preserve in every case. Or on a more attenuated basis, suppose a prospective plaintiff issues a press release about a suit it is going to bring, or makes a public comment about bringing suit at a convention or in a publicly held meeting (say, a town council meeting). Do statements like this trigger a duty to preserve by the targeted prospective defendant? Does it matter who at the prospective defendant is aware of the comment—e.g., a plant manager versus a legal officer?

[53] Some victims of the Bernie Madoff Ponzi scheme had arbitration clauses in contracts with persons who managed their money and invested it with Madoff. United States law is not necessarily applicable in an arbitration agreement and the seat of the arbitration may not be in the United States.

[54] See *Bowmar Instrument Corp. v. Texas Instruments, Inc.*, 25 Fed. R. Serv. 2d 423, 427 (N.D. Ind. 1977) where the district court refused to sanction prelitigation destruction of records (six months before suit was filed) in part because the law department had no knowledge of the potential suit even though others in the defendant corporation had heard rumors that Bowmar was going to sue Texas Instruments: "The critical question is when the threat of litigation first became known to the Texas Instruments Legal Department. Without a clear showing of this knowledge, it is quite impossible to find that the defendant's actions constituted the willful destruction of evidence."

But I assume that none of these arguments had a meritorious factual basis in *Pension Committee*. And, as noted above, six months later, plaintiffs in fact engaged common counsel to bring the securities action that was filed in February 2004.[55]

Determining Relevance of Lost Information

The district court determined that each plaintiff had a fiduciary duty to conduct due diligence before investing in the hedge funds in issue and as a result concluded: "Surely records must have existed documenting the due diligence, investments, and subsequent monitoring of these investments. 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." 2010 WL 184312 at *10.

If the duty to preserve had arisen in 1999, then absence of records might be significant. But where the duty to preserve was found to have been triggered in 2003, should there be any consequence if relevant records were not maintained, lost, destroyed, or deleted before the duty to preserve attached? That question is not answered

[55] The district court pointed out, 2010 WL 184312 at *9, n.82, that the duty to preserve had long ago included electronic records citing *Rowe Enter. Inc. v. Morris Agency, Inc.*, 205 F.R.D. 421, 428 (S.D.N.Y. 2002) which explained that electronic documents are subject to disclosure in the same manner as paper documents citing a 1985 decision from the District Court of Utah. There is no doubt that as a matter of federal common law the duty to preserve covers any relevant records, in whatever form they might exist, and that this has always been true. Whether a person or entity who or which might file suit one day but has not yet retained counsel would understand the duty to preserve, much less the breadth of the duty, is a separate question. The *Rambus* cases present a saga in and of themselves but in a decision finding no violation of a prelitigation duty to preserve by Rambus, *Hynix Semiconductor, Inc. et al. v. Rambus Inc.*, 591 F.Supp.2d 1038 (N.D. Cal. 2006), the district court held that a duty to preserve did not arise in February 1998 when Rambus "began to plan a litigation strategy" because filing a lawsuit was not "reasonably probable" because "several contingencies" had to occur before Rambus would engage in litigation (including issuing of certain patents and approval by Rambus's board to commence licensing negotiations and rejection of Rambus's licensing terms). The district court ultimately reached this conclusion: "In sum, although Rambus began formulating a licensing strategy that included a litigation strategy as of early 1998, Rambus did not actively contemplate litigation or believe litigation against any particular DRAM manufacturer to be necessary or wise before its negotiation with Hitachi failed, namely in late 1999. While hiring of litigation counsel or actually filing suit is certainly not necessary to demonstrate that a company anticipates litigation, in light of the record presented, it would appear that litigation became probable shortly before the initiation of the "beauty contest" in late 1999 in which litigation counsel for the Hitachi matter, Gray Cary, was selected. Thus, Rambus's adoption and implementation of its content neutral Document Retention Policy in mid-1998 was a permissible business decision. The destruction of documents on the 1998 and 1999 Shred Days pursuant to the policy did not constitute unlawful spoliation." *Id.* at 1064. Those familiar with the *Rambus* cases know that just the opposite conclusion was reached on the same facts by different courts. *See Rambus, Inc. v. Infineon Technologies AG, et al.,* 222 F.R.D. 280 (E.D. Va. 2004); *Samsung v. Rambus*, 439 F.Supp.2d 524, 565-569 (E.D. Va. 2006) (This opinion including its spoliation findings was later vacated. Based on the outcome in *Infineon,* Rambus had dismissed its counterclaim against Samsung and made an offer of judgment to pay Samsung's attorneys' fees. Samsung rejected the offer. The Federal Circuit held that, based on these facts, the case was moot and the district court no longer had jurisdiction. *Samsung Electronics, Ltd. v. Rambus Inc.*, 523 F.3d 1374 (Fed. Cir. 2008)); *Micron Tech., Inc. v. Rambus Inc.*, 255 F.R.D. 135 (D. Del. 2009).

in the opinion and one can only surmise that the underlying facts demonstrated that the records were in existence after the duty to preserve attached, and then were discarded or deleted.[56]

It is also not clear why the failure to search for records should in every case result in a conclusion that relevant records have been lost or destroyed. A postlitigation failure to search for requested records subject to discovery is inconsistent with a party's obligations under Fed.R.Civ.P. 34. But the records may still exist converting the issue into a late production of documents rather than no production of documents. Cf. *Tracinda Corp. v. DaimlerChrysler AG et al.*, 502 F.3d 212, 243 (3rd Cir. 2007) (during trial, discovery of a witness's notes not previously produced due to inadvertence resulted in monetary sanctions under Fed.R.Civ.P. 16(f)); *Phoenix Four, Inc. v. Strategic Resources Corp. et al.*, 2006 WL 1409413, *5-6 (S.D.N.Y. May 23, 2006) (failure to locate and timely produce evidence stored in a dormant drive of a server resulted in monetary sanctions). It would seem that the question to ask is whether relevant records were located after the search was finally made and, if not, assuming that at one time the records did exist, whether they were discarded or deleted before or after a duty to preserve arose.

Written **Litigation Holds**

Pension Committee emphasizes the importance of written litigation holds since the failure to issue one represents gross negligence. To be sure, in settings where the only way to satisfy the duty to preserve is by a written litigation hold, a litigant was ill-advised before *Pension Committee* not to have a written litigation hold and certainly after this decision is ill-advised not to have one.

But the focus must be not so much on whether a hold notice is written but on whether a hold is effective. A sole proprietorship, for example, is not going to issue a written litigation hold if, in fact, there are no other employees, or no other key players. Small companies may work with their counsel on preservation, collection, and production of documents without a written litigation hold and be compliant with their duty to preserve.

So it is important not to be so literal in one's interpretation of *Pension Committee* that the circumstances of each case are ignored. Otherwise, every time a litigant issues a litigation hold that is not written, there is the potential for a motion for sanctions to be filed. It would seem that the better postfiling emphasis should be on compliance with the discovery rules and court orders such as those entered under Rule 16, rather than on trying to determine if a party is negligent or grossly negligent. There would appear to be ample rules' power to

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[56] In addressing Hunnicutt, President of one of the plaintiffs, the district court discussed 57 emails Hunnicutt sent between February 3, 1999 and May 14, 2003 but did not produce: "While only one of these emails post-date April, 2003, it is likely that as of that date many of these emails would have been in the possession of Hunnicutt, as most entities maintain electronic records for at least a year on active servers or on backup media." 2010 WL 184312 at *13, n.124. There was no citation to support the commonality of this retention policy and no discussion of what Hunnicutt's actual retention policy was. But the footnote appears to be acknowledging that the loss or destruction of records before any duty to preserve attaches should have no consequence. See *Arthur Andersen LLP v. United States,* 544 U.S. 696, 704 (2005) ("It is, of course, not wrongful for a manager to instruct his employees to comply with a valid document retention policy under ordinary circumstances."). *Cf. Oxford House, Inc. v. City of Topeka*, 2007 U.S. Dist. LEXIS 31731 (D. Kan. Apr. 27, 2007) (party had no duty to search backup tapes for responsive emails where overwriting of backup tapes covering the time period in question had occurred before duty to preserve attached and further a litigation hold does not apply to inaccessible backup tapes used for disaster recovery purposes).

sanction a party for postfiling conduct without having to resort to categorizing conduct as negligent or grossly negligent.

Prefiling, the question of when the duty to preserve is triggered will impact the outcome of the culpability analysis. If a litigant guesses wrong, gross negligence will be established because no litigation hold, much less a written one, will have been issued. Motions practice over the trigger is sure to consume judicial resources since the prize—an automatic finding of gross negligence in jurisdictions that decide to follow *Pension Committee*—may be irresistible. Of course, if bad faith is required to utilize inherent power, *Pension Committee's* rationale may not hold up. But even if that is the case, I expect that a district court will always find a way to punish a litigant that destroys relevant information prejudicing another litigant's ability to bring or defend against a claim if there was a duty to preserve in place before the destruction.

Key Players and Former Employees

Another gross negligence category in *Pension Committee* is that of the identification of "all of the key players." This presents the reverse of the written litigation-hold-notice problem. Litigants with one or very few employees should be able to identify key players without much difficulty. Litigants with thousands of employees in multiple locations may find this admonition impossible to satisfy. On the scale of numbers of employees between the very small and the very large, circumstances should dictate whether the initial decision on the breadth of key players was a reasonable one. If it was, "gross" negligence should not attach if someone after-the-fact can identify additional persons that become "key players" because of information that turns up later in discovery.

It would be unfortunate if post-*Pension Committee*, litigants engage in "defensive medicine" by over-identifying individuals as "key" players to avoid a sanctions motion because then litigation costs will go up, a direction that we should try to avoid wherever due process allows. I expect Judge Scheindlin would be the first to say that reasonable efforts to determine what players are "key" are what a party must undertake. The grossly negligent litigants in *Pension Committee* engaged in no meaningful efforts to identify key players. The facts must control the outcome in each case.

Similarly, former employees who are key players would fall into the same category as key players who are still employed. Litigants who engage in reasonable steps to identify such individuals and then preserve their records should not suffer a "gross negligence" label.

Again, one would hope that in the future the overriding focus will be on sufficient proof of harm from spoliation conduct rather than on an automatic finding of grossly negligent conduct accompanied by an argument that relevance and prejudice must be presumed as a result.

Preservation of Backup Tapes With Unique Information

Another gross negligence category in *Pension Committee* is the failure to preserve backup tapes when they have relevant information on them not available elsewhere. This is another problematic area for litigants who may not immediately know whether their backup tapes have unique, relevant information on them. Large companies with tens of thousands of backup tapes being generated monthly are placed in automatic jeopardy and small companies who have little litigation experience are likely to be as well. Because of this new "gross

negligence" label, litigants are forced to evaluate very quickly what electronic documents key players have and to do so thoroughly. That could take significant time and expense meaning that litigants, in effect, are forced to preserve all backup tapes until they can determine the answer to the question for fear that they will be accused of gross negligence. The result? Litigation costs will go up unnecessarily in most cases since information on backup tapes will rarely affect the outcome of an action.

Again, one should not divorce the holding in *Pension Committee* from the facts in the case. We should have rules that encourage adjudication on the merits and not a sanctions motion practice.

CONCLUSION

Relative to the duty to preserve, the stay of discovery required by PSLRA, which lasted three years, makes *Pension Committee* an unusual case.[57] But it also emphasizes the diligence required to ensure that good decisions are made on the scope and implementation of a litigation hold with respect to electronic information that can disappear with a keystroke or the operation of auto-delete or backup tape recycling programs.

After *Pension Committee*, lawyers

- must pay close attention to:
    - issuance of a "written" litigation hold,
    - the scope of key players and every place they keep their electronic documents,
    - identification of any former employees as key players and retention of their electronic documents wherever they might reside, and
    - development promptly of an understanding of the role that backup tapes will play as a storage location of relevant information not available elsewhere;
- who do not assure adequate supervision of document preservation efforts face *Pension Committee* jeopardy;
- involved in cases with long delays in discovery must not lose sight of document preservation obligations particularly where electronic storage media are involved;
- must assure the accuracy of document preservation declarations if there is evidence of preservation missteps;
- must take reasonable steps in identifying search terms; and
- must understand electronic document storage protocols so to be able to have appropriate measures taken to preserve electronically stored information.

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[57] Counsel "did not focus [their] efforts ... on discovery" while the PSLRA discovery stay was in place. 2010 WL 184312 at *7.

However, judges and litigants alike should not lose sight of the unique facts in *Pension Committee.* Reasonable conduct should not be faulted in hindsight or federal courts will face a tsunami of sanctions motions on when a duty to preserve arose, whether a written hold notice was issued, what key players were omitted, and so on all in the hopes that a court will presume prejudice by a finding of "gross negligence" based on the *Pension Committee* categories and not the facts of each case. If *Chambers* is the applicable authority on the exercise of inherent power to govern litigants' conduct, then bad faith is required to invoke it and courts should look to rules and statutes first before invoking their inherent power. Having confidence that similar cases will be treated similarly throughout the federal court system would also counsel for reliance first on rules and statutes that govern litigants' conduct before resorting to inherent power.

In the end the goal is to fairly decide cases on the merits at a reasonable cost and ensure that no party is harmed by another litigant's preservation conduct in their ability to achieve this goal. Good lawyer-client communication; appropriate lawyer-lawyer communications in meet-and-confer sessions; reasonable discovery demands relative to the amount in controversy; proper judicial involvement to ensure a level playing field and measured discovery proportionate to the stakes in the matter; and appropriate judicial availability to prevent discovery differences from becoming discovery disputes and then sanctions motions, are among the ways cases like *Pension Committee* can be avoided in the future. And if we can avoid facts like those in *Pension Committee,* judicial resources will be devoted instead to the just, speedy, and inexpensive determination of each cause of action.

/jmb

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APPENDIX I – JURY CHARGE APPROVED BY THE DISTRICT COURT IN FAVOR OF THE PARTY SEEKING SANCTIONS

The Citco Defendants have argued that 2M, Hunnicutt, Coronation, the Chagnon Plaintiffs, Bombardier Trusts, and the Bombardier Foundation destroyed relevant evidence, or failed to prevent the destruction of relevant evidence. This is known as the "spoliation of evidence."

Spoliation is the destruction of evidence or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation. To demonstrate that spoliation occurred, the Citco Defendants bear the burden of proving the following two elements by a preponderance of the evidence:

First, that relevant evidence was destroyed after the duty to preserve arose. Evidence is relevant if it would have clarified a fact at issue in the trial and otherwise would naturally have been introduced into evidence; and

Second, that if relevant evidence was destroyed after the duty to preserve arose, the [evidence lost] would have been favorable to the Citco Defendants.

I instruct you, as a matter of law, that each of these plaintiffs failed to preserve evidence after its duty to preserve arose. This failure resulted from their gross negligence in performing their discovery obligations. As a result, you may presume, if you so choose, that such lost evidence was relevant, and that it would have been favorable to the Citco Defendants. In deciding whether to adopt this presumption, you may take into account the egregiousness of the plaintiffs' conduct in failing to preserve the evidence.

However, each of these plaintiffs has offered evidence that (1) no evidence was lost; (2) if evidence was lost, it was not relevant; and (3) if evidence was lost and it was relevant, it would not have been favorable to the Citco Defendants.

If you decline to presume that the lost evidence was relevant or would have been favorable to the Citco Defendants, then your consideration of the lost evidence is at an end, and you will not draw any inference arising from the lost evidence.

However, if you decide to presume that the lost evidence was relevant and would have been [favorable] to the Citco Defendants, you must next decide whether any of the following plaintiffs have rebutted that presumption: 2M, Hunnicutt, Coronation, the Chagnon Plaintiffs, Bombardier Trusts, or the Bombardier Foundation. If you determine that a plaintiff has rebutted the presumption that the lost evidence was either relevant or favorable to the Citco Defendants, you will not draw any inference arising from the lost evidence against that plaintiff. If, on the other hand, you determine that a plaintiff has not rebutted the presumption that the lost evidence was both relevant and favorable to the Citco Defendants, you may draw an inference against that plaintiff and in favor of the Citco Defendants-namely that the lost evidence would have been favorable to the Citco Defendants.

Each plaintiff is entitled to your separate consideration. The question as to whether the Citco Defendants have proven spoliation is personal to each plaintiff and must be decided by you as to each plaintiff individually.

2010 WL 184312 at *23-24 (footnote omitted).

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Mr. Barkett is a partner at the law firm of Shook, Hardy & Bacon L.L.P. in its Miami office. He is a graduate of the University of Notre Dame (B.A. Government, 1972, *summa cum laude)* and the Yale Law School (J.D. 1975) and served as a law clerk to the Honorable David W. Dyer on the old Fifth Circuit Court of Appeals. Mr. Barkett is an adjunct professor of law at the University of Miami Law School.

Mr. Barkett has, over the years, been a commercial litigator (contract and corporate disputes, employment, trademark, and antitrust), environmental litigator (CERCLA, RCRA, and toxic tort), and, for the past several years, a peacemaker and problem solver, serving as an arbitrator, mediator, facilitator, or allocator in a variety of environmental or commercial contexts. He is a certified mediator under the rules of the Supreme Court of Florida, serves on the CPR Institute for Dispute Resolution's "Panel of Distinguished Neutrals," and is on National Roster of Environmental Dispute Resolution and Consensus Building Professionals maintained by the U.S. Institute for Environmental Conflict Resolution. He has served or is serving as a neutral in more than fifty matters involving in the aggregate more than $450 million. He has conducted or is conducting commercial domestic and international arbitrations under AAA, LCIA, UNCITRAL, and CPR rules. In November 2003, he was appointed by the presiding judge to serve as the Special Master to oversee the implementation and enforcement of the 1992 Consent Decree between the United States and the State of Florida relating to the restoration of the Florida Everglades. He also consults with major corporations on the evaluation of legal strategy and risk and conducts independent investigations where such services are needed.

Mr. Barkett is former member of the Council of the ABA Section of Litigation after service as the Section's Co-Director of CLE and Co-Chair of the Environmental Litigation Committee. He currently serves as the Section's liaison to the Judicial Conference's Advisory Committee on the Federal Rules of Civil Procedure.

Mr. Barkett has published two books on e-discovery, *E-Discovery: Twenty Questions and Answers*, (First Chair Press, Chicago, October 2008) and *The Ethics of E-Discovery* (First Chair Press, Chicago, January 2009). Mr. Barkett has also published or presented a number of articles in the e-discovery arena:

- *Bytes, Bits and Bucks: Cost-Shifting and Sanctions in E-Discovery*, ABA Section of Litigation Annual Meeting (2004) and 71 Def. Couns. J. 334 (2004).
- *The Prelitigation Duty to Preserve: Lookout!* ABA Annual Meeting, Chicago, (2005).
- *Help Is On The Way…Sort Of: How the Civil Rules Advisory Committee Hopes to Fill the E-Discovery Void,* ABA Section of Litigation Annual Meeting, Los Angeles (2006).
- *Help Has Arrived…Sort Of: The New E-Discovery Rules*, ABA Section of Litigation Annual Meeting, San Antonio (2007).
- *The Battle For Bytes: New Rule 26*, e-Discovery, Section of Litigation (February 2006).
- *E-Discovery For Arbitrators*, 1 Dispute Resolution International Journal 129, International Bar Association (Dec. 2007).
- *Production of Electronically Stored Information in Arbitration: Sufficiency of the IBA Rules*, (a chapter in a book published by JurisNet LLC, New York, September 2008).

In the fall of 2007, Mr. Barkett taught a first-ever course at the University of Miami Law School entitled "E-Discovery."

Mr. Barkett is a Fellow of the American College of Environmental Lawyers. At the University of Miami Law School, Mr. Barkett teaches a course entitled, "Environmental Litigation," that covers four statutes (CERCLA, RCRA, the Clean Water Act, and the Clean Air Act). Mr. Barkett is the author of *A Database Analysis of Superfund Allocation Case Law(*Shook, Hardy & Bacon, Miami, 2003). He is also an editorial board of *Natural Resources & Environment*, a publication of the ABA Section of Environment, Energy, and Resources. Among his other recently published works are:

- *Draft Reports and Attorney-Expert Communications*, 24 N.R.E. (Winter 2010)
- *Burlington Northern:* The Super Quake and Its Aftershocks, 58 Chemical Waste Lit. Rprt. 5 (June 2009)
- *Orphan Shares*, 23 NRE 46 (Summer 2008)
- *Tipping The Scales of Justice: The Rise of ADR*, 22 NRE 40 (Spring 2008)
- *Forward to the Past: The Aftermath of Aviall*, 20 N.R.E. 27 (Winter 2006)
- *The CERCLA Limitations Puzzle*, 19 N.R.E. 70 (Fall, 2004)
- *If Terror Reigns, Will Torts Follow?* 9 Widener Law Symposium 485 (2003)

Mr. Barkett is also the author of Ethical Issues in Environmental Dispute Resolution, a chapter in the ABA publication, *Environmental Dispute Resolution, An Anthology of Practical Experience* (July 2002).

Mr. Barkett is editor and one of the authors of the ABA Section of Litigation's Monograph, *Ex Parte Contacts with Former Employees* (Environmental Litigation Committee, October 2002). He has presented the following papers in the ethics arena:

- *Cheap Talk? Witness Payments and Conferring with Testify Witnesses*, (ABA Annual Meeting, Chicago, Illinois, July 30, 2009.)
- *Fool's Gold: The Mining of Metadata* (ABA's Third Annual National Institute on E-Discovery, Chicago, May 22, 2009)
- *More on the Ethics of E-Discovery* (ABA's Third Annual National Institute on E-Discovery, Chicago, May 22, 2009)
- *From Canons to Cannon*, (Ethics Centennial, ABA Section of Litigation, Washington, D.C. April 18, 2008 commemorating the 100th anniversary of the adoption of the Canons of Ethics)
- *Tattletales or Crimestoppers: Disclosure Ethics Under Model Rules 1.6 and 1.13,* (ABA Annual Meeting, Atlanta, August 7, 2004 and, in an updated version, ABA Tort and Insurance Practice Section Spring CLE Meeting, Phoenix, April 11, 2008).
- *Refresher Ethics: Conflicts of Interest*, (January 2007 ABA Section of Litigation Joint Environmental, Products Liability, and Mass Torts CLE program)
- *The MJP Maze: Avoiding the Unauthorized Practice of Law* (2005 ABA Section of Litigation Annual Conference)
- *A Baker's Dozen: Reasons Why You Should Read the 2002 Model Rules of Professional Conduct*, (ABA Section of Litigation's 2003 Annual Conference)

Mr. Barkett has been recently recognized in the areas of alternative dispute resolution or environmental law in a number of lawyer-recognition publications, including Who's Who Legal (International Bar Association)

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