New York Law Journal

A NEW YORK LAW JOURNAL SPECIAL SECTION

An ALM Publication

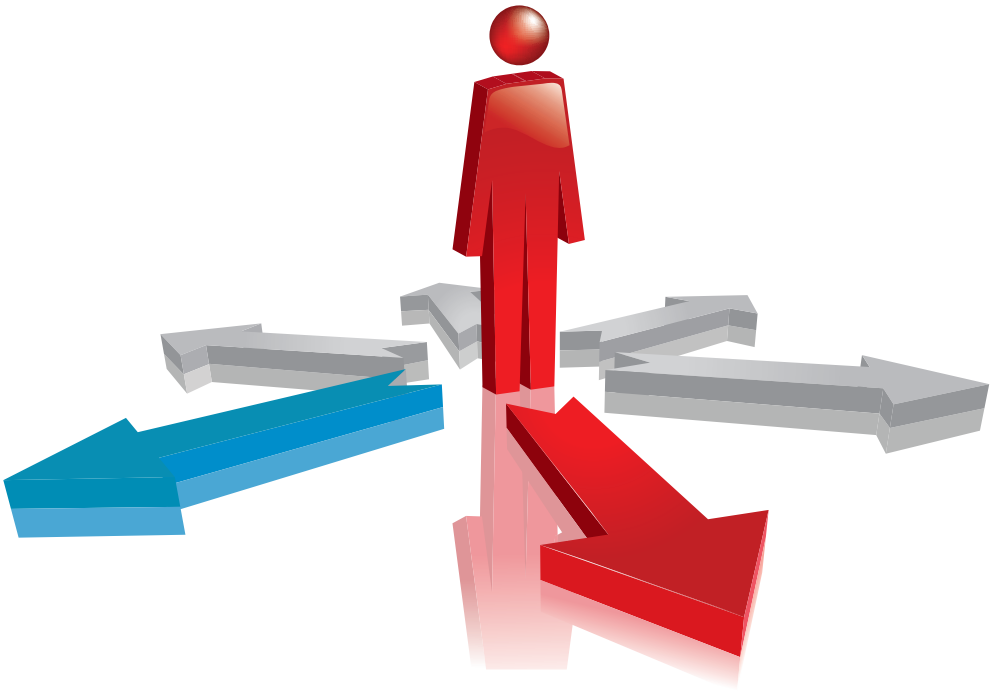
E-Discovery

WWW.NYLJ.COM

MONDAY, MARCH 21, 2011

'Pension Committee,' One Year Later

Many courts reject bright-line approaches to legal holds and document preservation.



© ISTOCK

BY WILLIAM K. DODDS, PHILIP N. YANNELLA AND BEN BARNETT

THE EXTENT OF THE DUTY to preserve documents, and the penalties imposed for failure to do so, are issues that have commanded significant attention in recent years from litigants, counsel and the courts. Despite widespread interest in achieving greater clarity and predictability, judicial efforts to set bright-line rules that inflexibly impose harsh penalties have met resistance from judges and parties who seek a more nuanced and pragmatic approach to enforcing preservation obligations.

The limits of per se rules in this controversial arena are seen in the lack of support received by a 2010 decision by a leading judicial expert on e-discovery in *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456 (S.D.N.Y. 2010). Decided by Judge Shira Scheindlin of the Southern District of New York, author of the seminal *Zubulake* opinions and one of the most well-respected jurists in the country on e-discovery matters, the February 2010 decision is subtitled "*Zubulake* Revisited: Six Years Later."

The ruling sets forth several bright lines governing the duty to preserve and, more specifically, when the failure to take specific preservation steps can give rise to sanctions. One of the more controversial aspects of the *Pension Committee* case is its holding that the failure to issue a written legal hold constitutes per se gross negligence, a ruling that touched off a debate in the e-discovery community not just about the necessity of written legal holds but the application of any per se rules to e-discovery.

In the wake of *Pension Committee*, courts have largely found its bright-line approach to be unduly inflexible in application and sometimes harsh in result.

'Victor Stanley II'

One of the most important cases to challenge *Pension Committee*'s per se rule of gross negligence for failing to issue a written legal hold is *Victor Stanley Inc. v. Creative Pipe Inc.*, 2010 U.S. Dist. LEXIS 93644 (D. Md. Sept. 9, 2010) (*Victor Stanley II*).[1]

The opinion was written by Magistrate Judge Paul Grimm of the District of Maryland, another of the country's leading judicial voices on e-discovery issues, and gently but unambiguously rebukes *Pension Committee* for its apparent harshness and inflexibility.

In the 100-plus page opinion, Judge Grimm notes that *Pension Committee*'s requirement of a written legal hold in all cases, when combined with its holding that gross negligence can give rise to a presumption of relevance and prejudice, operates to create a de facto finding of spoliation every time a party fails to issue a written legal hold: "[I]f a party fails to issue a written litigation hold, the court finds that it is grossly negligent, in which case relevance and prejudice are presumed. Point. Game. Match."[2]

WILLIAM K. DODDS *is a partner in the New York office of Dechert and* PHILIP N. YANNELLA *and* BEN BARNETT *are partners in the firm's Philadelphia office.*

A few pages later, in a discussion of *Pension Committee*'s ruling that an adverse jury instruction may be warranted for grossly negligent, but unintentional, conduct, Judge Grimm write: "If…a court adopts the position of *Pension Committee*…that a failure to institute a written litigation hold is gross negligence per se, and therefore presumes relevance and prejudice, it is inexorably poised to give an adverse jury instruction without further analysis[.]"[3]

Other Federal Courts Appear to Agree

If *Victor Stanley II* and *Pension Committee* represent two opposing views in the debate over the per se gross negligence rule, Judge Grimm's view appears to be gaining favor.

In the months since *Pension Committee* was published, a number of federal courts have issued decisions addressing the topic, and the distinct trend is toward a rejection of the per se gross negligence rule. Indeed, there are clues to suggest that even in the district courts within the Second Circuit the rule of per se gross negligence for failure to issue a written legal hold may not carry the day.

For example, last September the Southern District of Florida considered a sanctions motion in a case involving a dentist's office that "did not alter its routine practice of purging patient files in accordance with Florida law, even though the records are germane to these proceedings." *Socas v. Northwestern Mut. Life Ins. Co.*, 2010 U.S. Dist. LEXIS 108696 at *5 (S.D. Fla. Sept. 30, 2010). The court found that the destruction of patient files constituted mere negligence.

The court's finding of negligence, rather than gross negligence, is important because in many ways *Socas* involved a clear-cut case of spoliation. The court found that at the time the dental practice hired counsel, it "certainly should have been aware of the possibility of litigation" and "should reasonably have anticipated the need to preserve records"[4] and as a result "spoliated relevant evidence by failing to suspend [its] ordinary policy of destroying inactive patient files."[5]

This is conduct that would arguably result in a finding of gross negligence under *Pension Committee*'s per se rule. Instead, the *Socas* court found the party's conduct to constitute ordinary negligence.

The holding in *Socas* is consistent with an earlier decision from the Middle District of Florida, wherein the district court held that the failure to issue a litigation hold constitutes mere negligence. See *Southeastern Mech. Servs. v. Brody*, 2009 U.S. Dist. LEXIS 69830 (M.D. Fla. July 24, 2009) ("*[m]ere negligence* in losing or destroying records is not enough for an adverse inference instruction") (emphasis added).

Similarly, in *Major Tours Inc. v. Colorel*, 2010 U.S. Dist. LEXIS 62948 (D.N.J. June 22, 2010), the District Court of New Jersey considered a preservation issue with a slight twist: What happens when a party's failure to institute a litigation hold results not in complete loss of relevant evidence, but in the evidence becoming "not reasonably accessible" under Fed. R. Civ. P. 26(b)(2)(B).

The plaintiff asked the court to find that the failure to implement a legal hold was per se good cause for requiring the restoration and production of inaccessible materials. The court, while acknowledging the significance of the *Pension Committee* decision, declined to impose such a bright-line rule, characterizing the defendant's failure to issue a litigation hold as "negligent."

Despite widespread interest in achieving **greater clarity** and **predictability**, judicial efforts to set bright-line rules that **inflexibly** impose **harsh penalties** have met **resistance** from judges and parties who seek a **more nuanced** and pragmatic approach to enforcing preservation obligations.

Other district courts within the Third Circuit have previously found the failure to implement a litigation hold to be something less than gross negligence. In *Phillips v. Potter*, 2009 U.S. Dist. LEXIS 40550 (W.D. Pa. May 14, 2009), for example, the defendant (the Postal Service) did not timely institute a hold. The court declined to sanction based on that failure alone, saying that "[n]egligent conduct alone does not allow for the inference that the missing emails or the shredded document was relevant."[6]

District courts in the Seventh Circuit also appear to reject *Pension Committee*'s per se rule. *Kaufman v. Am. Express Travel Related Servs. Co.*, 2010 U.S. Dist. LEXIS 86494 (N.D. Ill. Aug. 19, 2010) was a putative class action against American Express, which failed to suspend the routine destruction of data, including customer-identifying information that would unquestionably be relevant to the class notice process. The court found that American Express knew the information was relevant but nonetheless "continu[ed] to delete its customer-identifying information in the midst of a suit in which such customers are Class members."[7]

Under *Pension Committee*'s per se rule, this failure to place a hold on relevant information, without more, would be enough to find defendant grossly negligent. But the *Kaufman* court found that, without further information, it "[could] not reach any definite conclusions regarding American Express's culpability."[8]

The same court, just five days before the *Pension Committee* opinion was issued, had ruled that the failure to institute a litigation hold is "relevant to the court's consideration, but it is not per se evidence of sanctionable conduct." *Haynes v. Dart*, 2010 U.S. Dist. LEXIS 1901 at *11 (N.D. Ill. Jan. 11, 2010). In *Haynes*, the court found that "the steps a party must take to satisfy its obligation to preserve evidence may vary from case to case… [T]he court cannot conclude that the absence of a large-scale litigation hold was objectively unreasonable."[9]

In other words, even unreasonableness, the touchstone of an ordinary negligence analysis, could not be presumed when a party failed to issue a litigation hold.

Within the Second Circuit

There are also recent indications that not all judges within the Second Circuit accept *Pension Committee*'s bright-line approach toward the issuance of legal holds.

For example, in *Merck Eprova AG v. Gnosis S.P.A.*, 2010 U.S. Dist. LEXIS 38867 at *4 (S.D.N.Y. April 20, 2010), the court expressly recognized that "there might be circumstances in which a non-written litigation hold could suffice—for example, when the party…is a small company whose intra-office communications are primarily oral."

In *Orbit One Commc'ns Inc. v. Numerex Corp.*, 2010 WL 4615547 at *6 (S.D.N.Y. Oct. 26, 2010), the court made a similar observation, albeit dicta:

"[D]epending upon the circumstances of an individual case, the failure to abide by such standards [i.e., *Pension Committee*'s list of failures, including failure to issue written lit hold, that constitute gross negligence per se] does not necessarily constitute negligence, and certainly does not warrant sanctions if no relevant information is lost."

Judge Scheindlin herself has acknowledged the debate over the issuance of written legal holds, and recognized that in certain narrow instances it may not be necessary to issue a written legal hold. In a recent panel discussion on the issue at Georgetown Law Center's Advanced E-Discovery Institute, Judge Scheindlin said:

> So some people say, "Well, I have a company of one person, do I have to issue a written legal hold to myself?" Now that's kind of ridiculous, and I'd like to think that judges aren't that dumb. So no, if you are one person, don't write a letter to yourself.[10]

Still, Judge Scheindlin has not signaled any change in her general view on the importance of issuing written legal holds:

> But primarily what we're talking about is with big companies with lots of employees and lots of locations. What's the problem? Send out a blast email. Tell people what to do, and then if they don't do that, then that's a different issue, but at least you showed me in good faith how you went about preservation in good faith. So there you have a little bit of prevention.[11]

'Rimkus' and a Rule of Reasonableness

Perhaps the most important of the decisions to come out in opposition to *Pension Committee*'s bright-line rule of per se gross negligence is district judge Lee Rosenthal's lengthy opinion in *Rimkus Consulting Group Inc. v. Cammarata*, 688 F. Supp. 2d 598 (S.D. Tex. 2010). (Judge Grimm relies heavily on *Rimkus* in his *Victor Stanley II* opinion). *Rimkus*, which deals with an employer's suit against former employees arising out of the employees' formation of a competing firm, stands for the proposition that, contra *Pension Committee*, bright lines are generally not discernible in the realm of e-discovery:

> It can be difficult to draw bright-line distinctions between acceptable and unacceptable conduct in preserving information and in conducting discovery, either prospectively or with the benefit (and distortion) of hindsight. Whether preservation or discovery conduct is acceptable in a case depends on what is reasonable, and that in turn depends on whether what was done, or not done, was proportional to that case and consistent with clearly established applicable standards.[12]

While *Rimkus* does not directly address whether the failure to issue a written legal hold constitutes negligence, its general observation that "[w]hether preservation or discovery conduct is acceptable in a case depends on what is reasonable," stands in opposition to all per se rules in this area.

The touchstone of *Rimkus* is reasonableness and proportionality, and its influence has been felt around the e-discovery world.

Victor Stanley II, calling *Rimkus* "highly instructive," includes a discussion of proportionality that culminates with the observation that the duty to preserve "should not be analyzed in absolute terms; it requires nuance, because the duty cannot be defined with precision."[13] Instead, "[p]roper analysis requires the Court to determine reasonableness under the circumstances—reasonable and good faith efforts to retain information that may be relevant to pending or threatened litigation"; or, "[p]ut another way, the scope of preservation should somehow be proportional to the amount in controversy and the costs and burdens of preservation."[14]

Likewise, the influential Sedona Conference recently released its Commentary on Legal Holds, which cites *Rimkus* and says that "[t]he test is what was reasonable under the circumstances, with an eye towards the ultimate end goal (e.g., whether relevant information was preserved). Thus, *there is no per se negligence rule*."[15]

Conclusion

If the trend exemplified by *Victor Stanley II* and *Rimkus* is any indication, *Pension Committee*'s bright-line rule that failing to issue a written legal hold constitutes per se gross negligence may not be widely accepted by other judges. To the contrary, the consensus view appears to be moving away from per se rules governing the conduct of e-discovery in favor of case-by-case analysis.

It should, nonetheless, be stressed that the issuance of a written legal hold is good practice and in many cases the failure to do so may constitute negligence or even gross negligence. Litigants should not interpret judicial embrace of the concepts of reasonableness and proportionality as a signal that doing less to preserve documents is now acceptable business practice.

1. This is Judge Grimm's second significant e-discovery opinion in this case. The first, reported at 250 F.R.D. 251 ("*Victor Stanley I*"), dealt with inadvertent production of putative privileged electronically stored information (ESI).
2. Id. at *126-*127 n. 34.
3. Id. at *141 n. 37.
4. 2010 U.S. Dist. LEXIS 108696 at *18.
5. Id. at *24.
6. 2009 U.S. Dist. LEXIS 40550 at *16.
7. 2010 U.S. Dist. LEXIS 86494 at *15.
8. Id.
9. 2010 U.S. Dist. LEXIS 1901 at *11-12.
10. The rough transcript of the presentations is available at http://blog.legalholdpro.com/2010/11/19/rush-transcript-judge-scheindlin-defends-pension-committee-by-saying-%E2%80%9Cjust-do-it%E2%80%9D-to-legal-holds/.
11. Id.
12. 688 F. Supp. 2d at 613 (footnotes omitted).
13. 2010 U.S. Dist. LEXIS 93644 at *88 (internal citations omitted).
14. Id.
15. 11 Sedona Conf. J. 265, 280 (2010) (emphasis added).