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The Second Circuit Holds that Failure to Issue a Litigation Hold Notice is Not *Per Se* Gross Negligence

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Rarely does the Second Circuit feel impelled to delve into the law relating to document preservation, the standards used to quantify discovery abuses, and the appropriate sanctions for document destruction. Such detailed jurisprudence is of course better left to the wisdom of the trial courts, subject only to an abuse of discretion review. Given this dynamic, practitioners and clients alike will take notice of the Second Circuit's recent decision in *Chin v. Port Authority of New York & New Jersey*, --- F.3d ---, 2012 WL 2760776 (2d Cir. July 10, 2012), where, with one polite sentence, the court halted the momentum of a growing body of law holding that the failure to issue a litigation hold notice is *per se* gross negligence. Instead, the Second Circuit reasoned, lower courts should adhere to the earlier standard under which the trial court would consider the failure to issue a litigation hold notice as one of several factors in analyzing the totality of the circumstances causing the document destruction. Failure to issue a hold notice is therefore no longer necessarily grossly negligent. With the change brought by *Chin*, the law is slightly less punitive, but the same common rule of thumb governs: whether plaintiff or defendant, prudent counsel and litigants must remember to circulate the litigation hold letter to the proper personnel promptly.

The *Chin* Facts

In *Chin*, several Asian Americans sued the Port Authority for violations of Title VII of the Civil Rights Act of 1964 alleging that they were passed over for promotion as a result of racial discrimination. During discovery, plaintiffs learned that the Port Authority had not implemented a document retention policy and had not issued a litigation hold letter. Partly because of this error, numerous promotion folders relevant to the claims asserted were destroyed. One of the plaintiffs, Chin, moved in the district court for sanctions in the form of an adverse inference instruction against the Port Authority. Judge Cedarbaum denied the motion and noted that the plaintiffs had "ample alternative evidence" regarding the relative qualifications of the plaintiffs. Significantly, Judge Cedarbaum also found that the Port Authority's destruction of the documents was "negligent, but not grossly so." *Chin* at *11. After a jury trial, some of the plaintiffs won, but others, including Chin, lost.

Litigation Hold Letters, the *Zubulake* Progeny, and the Second Circuit's Modification

On appeal brought by the Port Authority, Chin, now a cross-appellant, argued that the district court abused its discretion in denying his motion for sanctions. To digest Chin's argument that the district court abused its discretion, we must review a few well-known decisions from the Southern District in the last decade. Beginning with a series of decisions now commonly referred to as *Zubulake*, Judge Scheindlin authored several prominent e-discovery opinions in 2003 and 2004 clarifying the burdens placed on parties and counsel alike in connection with discovery obligations. If the practicing world had not absorbed the transformative holdings in *Zubulake*, Judge Scheindlin surely grabbed our attention with the influential opinion in *Pension Committee of Univ. of Montreal v. Banc of America*, 685 F. Supp. 2d. 456, 464-65 (S.D.N.Y 2010), in which she built on the holdings in *Zubulake*. In *Pension Committee*, Judge Scheindlin held that "[p]ossibly after October, 2003, when *Zubulake IV* was issued, and definitely after July, 2004, when the final relevant *Zubulake* opinion was issued, the failure to issue a written litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information." Applying tort-based analysis to discovery failures, Judge Scheindlin explored negligence, gross negligence, and willfulness in the discovery context, and she assessed how conduct falls into these categories. After *Pension Committee*, counsel were faced with the draconian reality that a failure to circulate a litigation hold letter was automatically deemed grossly negligent, triggering harsh sanctions.

Against the backdrop of *Pension Committee*, Chin argued on appeal that the district court's refusal to find the Port Authority's lapse grossly negligent was an abuse of discretion. Essentially, when Judge

Cedarbaum refused to apply Judge Scheindlin's standard, Chin urged the Second Circuit to endorse the tougher standard. But the effort backfired, as the Second Circuit opined: "We reject the notion that a failure to institute a 'litigation hold' constitutes gross negligence *per se*." *Chin* at *26. Instead, the Second Circuit continued, "we agree that 'the better approach is to consider [the failure to adopt good preservation practices] as one factor' in the determination of whether discovery sanctions should issue." *Id.*, citing *Orbit Communications, Inc. v. Numerex Corp.*, 271 F.R.D. 429, 441 (S.D.N.Y. 2010). Continuing on the theme of allowing district courts to exercise proper discretion, the Second Circuit also noted that even if the district court had found that the Port Authority had acted with gross negligence, the district court still had discretion as to whether to impose the adverse inference sanction. Not every finding of gross negligence dictates the harsh penalty of the adverse inference instruction: "[w]e have repeatedly held that a 'case-by-case approach to the failure to produce relevant evidence' at the discretion of the district court, is appropriate." *Id.* at *27, citing *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 107 (2d Cir. 2002). Because the Port Authority's failure to preserve the promotion folders relevant to Chin's claims had little effect on Chin's ability to prove his case, and because the Port Authority's shortcomings were only a negligent failure to preserve documents, the Second Circuit held that Judge Cedarbaum's refusal to issue the adverse inference instruction was not an abuse of discretion.

Conclusion

From the seasoned litigator to the litigant freshly pulled into the world of the lawsuit, the obligation to circulate the litigation hold letter remains entirely unchanged. Document preservation must be on the mind of lawyer and client alike at the earliest possible point. The Second Circuit's decision in *Chin*, however, allows district courts the flexibility to measure culpability and to weigh the penalty in the event that something goes wrong in discovery. For some time, the law had trended toward the harshest of penalties – the adverse inference instruction (only one step shy of the death penalty of dismissal) for the failure to issue a litigation hold letter. The Second Circuit continues to allow its district courts fair circumspection when addressing litigation hold failures, but the core message cannot be forgotten: don't forget the litigation hold notice.

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