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Commercial and Federal Litigation Section Newsletter

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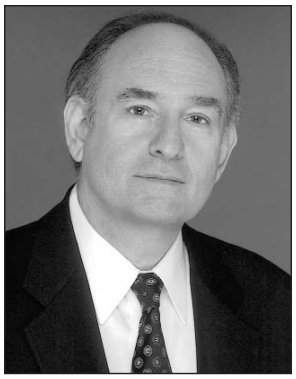
of the New York State Bar Association

A Message from the Chair



Lewis M. Smoley

During the past few months, our Section has continued to develop its relationship with the courts in New York. In June, an advisory group consisting of members of our Executive Committee met with Chief Administrative Judge Jonathan Lippman to discuss the current operations of the Commercial Division, with a view toward making recommendations for procedural and practical changes that would enhance its activities, and thereby its reputation amongst litigators and in the business community. We will be meeting again with Judge Lippman in January to make concrete proposals.

We were also asked by Chief Judge Kaye and Chief Administrative Judge Lippman to help in the planning and organization of this year's celebratory event for the tenth anniversary of the Commercial Division. OCA invited CEOs and GCs of major corporations located in the New York metropolitan area to a breakfast held on November 13, 2003, in the rotunda at 60 Centre Street. The featured guest speaker was none other than His Honor Mayor Bloomberg. The Chief Judge acknowledged our contribution to the establishment and development of the Commercial Division in her comments to the attendees.

In the evening of the same day (November 13), our Federal Court Counsel Committee hosted a program entitled "Bench Memos to Briefs: The Transition from Law Clerk to Lawyer." It was held in the Ceremonial Courtroom at the U.S. Courthouse, 500 Pearl Street, from 6:00 to 8:00 p.m., and began with a reception followed by a panel discussion. The panel included Judge Sidney Stein of the Southern District of New York, and federal court attorneys who have made the transition to private practice.

Last May our Section was asked by the Commercial Division justices to present to them a program at the new Pace Institute for the Judiciary. The program concentrated on how technological considerations affect the discovery process. It was a great success. As a result, we we gave another seminar on December 2 at Cardozo Law School on various substantive and discovery-related issues of interest to the justices.

We also sponsored a major CLE program on October 24, 2003, entitled "Advice from the Experts: Successful Strategies for Winning Commercial Cases in Federal Courts." Hosted and organized by our past chair, Robert L. Haig, this program proved to be one of the

Inside

best and most successful of its kind presented by NYSBA (444 attorneys registered). Only three days thereafter, on October 27, 2003, we sponsored another significant CLE program: "Women on the Road to Law Firm Partnership: Getting There and What to Expect When You Arrive." This half-day program featured highly regarded attorneys who are experts in partnership issues.

Our Section's presentation during the next NYSBA Annual Meeting will be held on January 28, 2004. Steve Younger, Vice Chair, has developed what promises to be a very exciting and informative program that will focus on class actions, including a mock argument of a class certification motion. Next year's Spring Meeting (May 21–23, 2004) will take us to the wilds of Connecticut (Mohegan Sun) where Lauren Wachtler, Chair-Elect, is planning a spectacular weekend, including a program on privacy and the Internet on the first day and one on arbitration and mediation, including ethical issues, on the second day. You can bet it will be a smash hit.

These activities are only the highlights of a very active year for the Section. Those of you who have yet to become an active member of one or more of our many committees, I urge you to do so. The reports, CLE programs and other activities generated by our committees have a major impact upon commercial litigation. I can assure you that your participation in these activities will be both exciting and highly rewarding.

Lewis M. Smoley

Bearing the Costs of Electronic Discovery

By Peter Brown

Most businesses are utilizing the computer to draft documents, run financial programs, and, most critically, to communicate both internally and externally. In many respects, the computer has replaced letter writing, phone calls, and the face-to-face chat with a colleague or client. The result is that all of this information becomes potentially discoverable in litigation. Hence, once litigation has commenced, the question arises: Who will pay when a requesting party seeks the discovery of materials that have now been relegated to storage on hard drives, magnetic tapes and optical discs? The broad use of technology has forced litigants to rethink their discovery strategies, and courts to become more creative in their application of existing discovery rules.

This spring, in *Zubulake v. UBS Warburg LLC*,[1] Judge Shira A. Scheindlin issued a comprehensive decision that directly addressed the issue of cost allocation in response to discovery requests of electronic information. The *Zubulake* decision, already the subject of extensive commentary, gives courts yet another framework for deciding requests for electronic discovery, and gives parties—especially individuals with meritorious claims against larger adversaries—more hope of obtaining valuable discovery without having to shoulder often substantial costs. *Zubulake* comes barely a year after another Southern District Court decision, *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*,[2] which also directly addressed costs of electronic media discovery. *Rowe* had provided some reassurance to responding parties, by putting forth an eight-factor balancing test that made the shifting of costs to the requesting party more likely. In contrast, the test propounded by Judge Scheindlin presumes that the responding party will pay for the cost of producing the requested documents, unless the information is contained in an inaccessible medium and the responding party is otherwise able to shift the presumption of cost to the requesting party by utilizing the factors outlined in the opinion. Despite the weight of *Zubulake*, it remains to be seen how future courts will handle electronic discovery issues, as *Zubulake* and *Rowe*, while persuasive authority, merely provide guidance for future courts.

Traditionally, the responsive documents in discovery were primarily paper records maintained in a finite number of places. Upon receiving discovery demands, counsel would typically direct the client to search for all responsive documents. Under the Federal Rules of Civil Procedure (Fed. R. Civ. P.) Rules 26 and 34, the responding party is presumptively responsible for the costs associated with the requests. Today however, that simply is not the case because electronically created information is, in many instances, shared by many more persons than the original author. With every revision, forwarding, and response, what is created is a growing digital document that effectively expands the field of discoverable information, potential witnesses, and relevant costs.

"[T]he computer has replaced letter writing, phone calls, and the face-to-face chat with a colleague or client. The result is that all of this information becomes potentially discoverable in litigation."

In most instances, information is stored, or "backed up," periodically. These back-up systems were designed for use in case of a system's failure or destruction. They were clearly not contemplated for use in discovery, and as such, retrieval of electronic information into a useable form can be quite costly. For example, in *Linnen v. A.H. Robbins Co.*,[3] the defendant was ordered to comply with a discovery request, despite the cost, ranging between $850,000 and $1.4 million, of searching through just one set of back-up tapes.

Electronic discovery creates costs at several points in the process: (i) the cost of restoring and converting information from the backup system into a usable format; (ii) the cost of designing and conducting searches to identify potentially responsive documents, e.g., using Boolean search terms, as well as eliminating duplicate documents; (iii) the cost of reviewing all information gathered in the search for privileged information, sensitive documents, and work product; and (iv) the cost of copying and Bates numbering for production.[4]

A case decided the same day as *Zubulake*—*Medtronic Sofamor Danek, Inc. v. Michelson*[5]—provides a vivid example as to both sheer volume and relevant costs of electronic discovery. At issue was a request for 996 backup tapes stored by Medtronic. The volume of the request was equivalent to 61 terabytes of data volume. By way of comparison, it would take approximately 728,178 standard 3.5-inch floppy diskettes to store one terabyte of data. Regarding costs, the court estimated the cost of producing the 996 backup tapes to be approximately $4,347,030, excluding privilege review and copy charges. Despite the fact that the potential liability of the

case was upwards of $225 million, the court determined that cost-shifting was appropriate given the excessive costs and breadth of the discovery requests. Such discovery demands have caused responding parties to seek judicial relief in the form of a protective order under Rule 26(c) of the Fed. R. Civ. P. or, alternatively, claim that compliance with the requests is unduly burdensome and expensive, thus requiring a shifting of costs to the requesting party.

Given the long-standing presumption that the responding party should bear its own costs, most courts have been hard-pressed to shift the costs of producing electronic media to the requesting parties. For example, some courts have characterized the shifting of such costs as a "dangerous development in the law" if the ease of using new technologies became a hindrance to discovery in litigation,[6] while other courts have simply adhered to the presumption that it is the duty of the responding party to bear the costs of its own production notwithstanding the related costs (provided the scope of the discovery requests are not unreasonably overbroad).[7]

"Given the long-standing presumption that the responding party should bear its own costs, most courts have been hard-pressed to shift the costs of producing electronic media to the requesting parties."

But with the ever-increasing reliance on electronic media, and the enormous cost associated with its discovery, a few courts have begun to scrutinize discovery issues that may compel a shifting of costs. For instance, courts seem more apt to shift costs where the discovery requests are overbroad (*Medtronic*, *supra*) or where there is simply no way to extract the data absent the creation of a new computer program.[8] Where the requesting party seems headed on a fishing expedition, a few courts have ordered at the very least a limited production in order to determine the costs and likelihood of discovering probative information based on the sample search.[9]

As indicated by the contrasting results, trends are difficult to determine. However, with the complexities of electronic discovery, a few courts have moved away from the seemingly bright-line rule that the responding party always pays, to an ad hoc approach based on the particulars of a given case.

One influential case is *Rowe*, in which the court noted the lack of guidance in this area, and set forth an eight-factor "balancing" test for shifting costs to the requesting party. The factors articulated are as follows: (1) the specificity of the discovery request; (2) the likelihood of discovering critical information; (3) the availability of such information from other sources; (4) the purposes for which the responding party maintains the requested data; (5) the relative benefits to the parties of obtaining the information; (6) the total cost associated with production; (7) the relative ability of each party to control costs and its incentive to do so; and (8) the resources available to each party.

As previously noted, this decision provided encouragement to responding parties (mainly corporate defendants) because a clear set of rules was provided which generally favored cost-shifting. What distinguished *Rowe* from earlier decisions was that it rejected the proposition that, if a party chooses an electronic storage method, the need for a retrieval program was thus "an ordinary and foreseeable risk." The court found that this proposition "does not translate well into the realm of electronic data," as the cost for electronic storage for most documents is nominal. Most importantly, the *Rowe* court recognized that modern technologies allow companies to retain and store substantial amounts of information, but that retrieval costs can be staggering, as demonstrated by *Medtronic*. Therefore, it sought a method of shifting all or some of the costs of production under the proper circumstances utilizing its balancing test. However, it is noteworthy that the utilization of the test set forth in *Rowe* does not necessitate an automatic shifting of costs. For instance, in *Computer Associates International, Inc. v. Quest Software, Inc.*,[10] a case decided after *Zubulake* but applying the *Rowe* test, the court determined that cost-shifting was not warranted, as the plaintiff's requests were narrowly tailored and the costs associated with the electronic discovery in the case were analogous to a review of documents for privileged information.

Despite the guidance of *Rowe* on cost-shifting, *Zubulake* took a different approach. The court noted that the *Rowe* test effectively favored cost-shifting, in contrast to the presumption in the Fed. R. Civ. P. that the responding party bear the cost of complying with discovery requests. Additionally, the court held that the *Rowe* test was incomplete. Specifically, it failed to consider two factors provided in Rule 26: (i) the amount in controversy; and (ii) the importance of the issues at stake. Thus, the factors set forth in *Zubulake* are as follows: (1) the extent to which the request is specifically tailored to discover relevant information; (2) the availability of such information; (3) the total cost of production, compared to the amount in controversy; (4) the total cost of production, compared to the resources of each party; (5) the relative ability of each party to control costs, and its incentive to do so; (6) the importance of the issues at stake in the litigation; and (7) the relative benefits to the parties of obtaining the information.

In contrast to *Rowe*, Judge Scheindlin expressly stated that the factors are provided in order of importance, and that they should not be weighted equally. An uncomplicated approach to the seven *Zubulake* factors is to break them into three groups. The first group is comprised of factors one and two, also referred to as the "marginal utility test," which provides that the more likely it is that backup tapes contain relevant information to a claim or defense, the fairer it is to impose the cost on the responding party. Conversely, the less likely it is that they contain relevant information, the more unjust it is to impose the burden of costs on the responding party. The second group consists of factors three through five; these factors directly consider the cost of production, review, resources of the parties, and their incentive to control costs. The third group is factor six, which stands alone because it will rarely come into consideration, but where it does, this factor has the potential to predominate over the other factors. Collectively, these groups correspond to the three explicit considerations of Rule 26(b)(2)(iii). The court considered the seventh factor as the least important because it is fair to assume that the response to a discovery request generally benefits the requesting party. As with prior tests, the courts have found that the facts will dictate whether cost-shifting is merited. Thus, in *Zubulake*, relevant documents were discovered in a preliminary production of 100 e-mails. This discovery may have been a factor which ultimately led the court's order of a further sample production of electronic documents for review by plaintiff.

In July 2003, Judge Scheindlin issued a subsequent ruling in *Zubulake* holding that plaintiff would have to bear 25% of the costs of the production she sought.[11] In reaching this conclusion, Judge Scheindlin applied the seven-factor test she propounded in her May 13 decision. Despite the fact that the first six factors mitigated against shifting costs, the seventh factor, "the relative benefit to the party seeking the production of materials," led to Judge Scheindlin's conclusion that, because plaintiff was likely to receive the vast majority of the benefit of production, plaintiff should be required to bear at least some portion of the costs. Therefore, the plaintiff was ordered to pay $68,400 of the total cost of $273,649 for the information she sought.

Although *Zubulake* does not supersede *Rowe*, its test—if widely adopted—will make the cost of discovery a factor in how cases are litigated and in settlements. As the rapid evolution of the case law demonstrates, the issue of electronic discovery cost allocation will likely remain a source of continued litigation and refinement.

"Although Zubulake *does not supersede* Rowe, *its test—if widely adopted—will make the cost of discovery a factor in how cases are litigated and in settlements."*

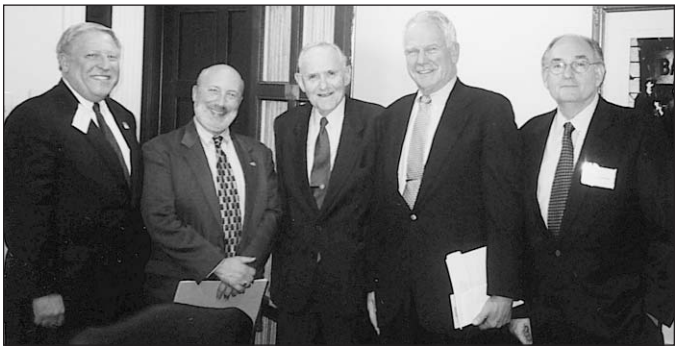
Endnotes

1. No. 02 Civ. 1243, 2003 U.S. Dist. LEXIS 7939 (S.D.N.Y., May 13, 2003).
2. 205 F.R.D. 421 (S.D.N.Y., 2002).
3. No. 97-2307, 1999 Mass. Super. LEXIS 240 (Mass. Super., June 16, 1999).
4. *Medtronic Sofamor Danek, Inc. v. Michelson*, No. 01-2373, 2003 U.S. Dist. LEXIS 8587 (W. Dist. Tenn., May 13, 2003) (applying the test established in *Rowe*, the court held that several factors favored shifting discovery costs).
5. *Id.*
6. *See Daewoo Elec. v. United States*, 650 F. Supp. 1003 (Ct. Int'l Trade 1986).
7. *See In re Brand Name Prescription Drugs Antitrust Litigation*, 1995 WL 360526 (N.D. Ill., June 15, 1995).
8. *See, e.g., Anti-Monopoly, Inc. v. Hasbro, Inc.*, 94 Civ. 2120, 1996 WL 22976 (S.D.N.Y., Jan. 23, 1996).
9. *See Zubulake v. UBS Warburg LLC*; 2003 U.S. Dist. LEXIS 7939 (S.D.N.Y., May 13, 2003); *McPeek*, 202 F.R.D. 31 (D.D.C. 2001).
10. No. 02-C-4721, 2003 U.S. Dist. LEXIS 9198 (N. Dist. Ill., June 2, 2003).
11. *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280 (S.D.N.Y., July 24, 2003).

Peter Brown is a partner at Brown Raysman Millstein Felder & Steiner LLP in New York. He is the chairman of the Section's Intellectual Property Litigation Committee. Theodore J. Ghorra, a law clerk at the firm, assisted in the preparation of this article.

NEWS flash

Member News



(l-r) A. Thomas Levin (NYSBA President); Hon. Leonard B. Austin (Nassau Commercial Division); Hon. Arthur D. Spatt (E.D.N.Y.); Hon. George C. Pratt (retired, 2nd Circuit); Lewis M. Smoley (Section Chair).

Riding Circuit

On October 15, the Executive Committee held its monthly meeting in Nassau County, at Domus, the remarkable, cathedral-like home of the Nassau County Bar Association. The Executive Committee was further privileged to have the presence of not one or two but no less than four eminent guests. Eastern District Judge Arthur D. Spatt and former Second Circuit Judge George C. Pratt each shared their views on the variety of forums available for the resolution of commercial disputes, including arbitration, the Commercial Division courts, and the federal courts. NYSBA President A. Thomas Levin praised the Section for its good work and gave an informative update on the Association's many current projects. Commercial Division Justice Leonard B. Austin was also in attendance.

There was also a great deal of substantive work to address. The Executive Committee discussed, among other things, plans for the Annual Meeting (January 28, 2004); the Spring Meeting (May 21–23, 2004, at Mohegan Sun); the sold-out "Advice From the Experts" CLE Program on October 24, 2003; the Commercial Division Celebration on November 13, of which NYSBA—and specifically our Section—was the only professional association involved; the Section's next seminar for the Commercial Division justices; and a pending report on proposed amendments to the Revised Uniform Arbitration Act.

Michael B. Smith
Section Secretary

The Federal Procedure Committee Is Doing a Stellar Job

Over the past two years, the Federal Procedure Committee, under the direction of Chair Gregory Arenson of Kaplan Fox and Kilsheimer, LLP, has been doing an excellent job of identifying issues and making recommendations for change. On this committee with Greg and active in the researching and drafting of these reports are Thomas McGanney of White & Case, Charles Miller of Pennie & Edmonds, and James Parver of Schiff & Tisman.

The committee has produced four written reports in the past two years that have been adopted by the Section and forwarded to the appropriate legislative body for consideration. The most recent report examined the history of Rule 50 of the Federal Rules of Civil Procedure, which deals with obtaining a judgment as a matter of law in jury trials. The committee found that the rule as written can be a trap for the unwary and has led to contradictory rulings in the trial courts. The committee recommended an amendment to this rule which would eliminate the requirement that a party renew its post-evidence motion prior to submission to the jury.

The committee also has examined the issue of when it is appropriate for counsel to consult with their client during the client's deposition. It has recommended changes in Rule 68 of the Federal Rules of Civil Procedure which would give that rule broader applicability to both plaintiffs and defendants and stronger effects. The other recent report of this committee examined the propriety of citing to unpublished decisions as precedent and recommended opposing the local rules of federal courts of appeals to the extent they prohibit citation to unpublished opinions.

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Members in the News

Lew Smoley, Chair of the Section, joined Davidoff & Malito, LLP, as of counsel on September 1, 2003, handling commercial litigation and financial transactions.

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Meeting Notice

The Section's Executive Committee will continue to ride circuit, holding its March 11, 2004, meeting in Westchester, at a location to be announced. As always, participation by telephone is also possible.

CPLR Amendments
2003 Legislative Session (Chapters 1-698[1])

CPLR §	Chapter (§)	Change	Eff. Date
304	261 (1)	Extends pilot program on commencement of actions by fax or e-mail until 9/1/05	7/29/03
1012(b)	296 (7)	Requires notice to city, county, town, or village where constitutionality of a local law, ordinance, rule, or regulation is involved and the municipality is not a party	1/1/05
1101(f)	16 (20)	Extends effective date for 1101(f) until 9/1/05	3/31/03
2103(b)(7)	261 (1)	Extends pilot program on service of interlocutory papers by e-mail until 9/1/05	7/29/03
2104	62 (Part J, 28)	Requires defendant to file stipulations of settlement with county clerk	7/14/03
2303(a)	547	Requires service of copy of subpoena on each party so that it is received before the production	1/1/04
3017(c)	694 (1)	Expands to all personal injury and wrongful death cases prohibition on dollar amount in *ad damnum*	11/27/03
3217(d)	62 (Part J, 29)	Requires that all notices, stipulations, and certificates pursuant to CPLR 3217 be filed by defendant with county clerk	7/14/03
4016(b)	694 (2)	Adds provision on reference at trial to dollar amount in personal injury and wrongful death cases	11/27/03
4111(d)	86 (1)	Replaces section with new CPLR 4111(d) on itemized verdict in medical, dental, or podiatric malpractice actions	7/26/03[2]
5031	86 (2)	Replaces section with new CPLR 5031 on basis for determining judgment to be entered	7/26/03[2]
5035	86 (3)	REPEALS CPLR 5035, relating to effect of death of judgment creditor	7/26/03[2]
7803(5)	492 (2)	Adds provision on proceedings to review final determination or order of State Review Officer	9/1/03[3]
8011(h)(1), (2)	11 (2)	Increases sheriff's fees	2/24/03
8018(a)(1)	62 (Part J, 23)	Increases index number fee to $190 (plus $20 under CPLR 8018(a)(3)), for a total of $210)	7/14/03
8019(f)	62 (Part J, 24)	Increases fees for copies of records	7/14/03
8020(a)	62 (Part J, 25)	Increases RJI fee to $95 and subsequent calendaring fee to $30; imposes $45 fee for motions and cross-motions	7/14/03
8020(c)	62 (Part J, 25)	Increases jury demand fee to $65	7/14/03
8020(d)	62 (Part J, 25)	Imposes $35 fee for filing stipulation of settlement pursuant to CPLR 2104 or notice, stipulation, or certificate pursuant to CPLR 3217(d)	7/14/03
8022(a)	62 (Part J, 27)	Increases notice of appeal filing fee to $65	7/14/03
8022(b)	62 (Part J, 27); 686 (Part B, 6)	Increases filing fee to $315 for record on appeal pursuant to CPLR 5530 & imposes $45 filing fee for motions and cross-motions	7/14/03
8023	261 (1)	Extends pilot program on payment of fee by credit card until 9/1/05	7/29/03

Endnotes

1. Chapters 2-3, 443, 480, 609, 628, and 636 are not yet available.
2. Applies to actions and proceedings commenced on or after 7/26/03.
3. Applies to proceedings commenced on or after 9/1/03.

2003 Amendments to the Uniform Rules for Supreme and County Courts, Rules Governing Appeals in the Court of Appeals and the Appellate Division, and Certain Other Rules of Interest to Civil Litigators

22 N.Y.C.R.R. §	Court	Subject (Change)
202.5-a	Sup./County	Filing by facsimile transmission (changes in applicability)
202.5-b	Sup./County	Filing by electronic means (changes in applicability and procedures)
202.28	Sup./County	Filing by defendant's attorney of stipulation or statement of discontinuance with county clerk
500.14	Ct. App.	Replacement of $250 filing fee for record with cross-reference to CPLR 8022; addition of filing fee for motions
600.10(a), (d)	A.D., 1st Dep't	Addition of requirements for typeface, page format, length, and printing specifications statement for records, appendices, and briefs
600.15(a)(5)	A.D., 1st Dep't	Increase in fee for filing record on appeal to $315
600.15(a)(6)	A.D., 1st Dep't	Addition of $45 fee for filing motions and cross-motions
670.4	A.D., 2d Dep't	Management of causes (adds Active Management procedures)
670.8(d)	A.D., 2d Dep't	Enlargements of time (requires court permission for extensions)
670.8(e)-(f)	A.D., 2d Dep't	Abandonment of appeals for failure to perfect (replaces motions to extend with cross-reference to 670.8(d))
670.9(a), (b)(4), (c)	A.D., 2d Dep't	Changes cross reference to 670.10.1 and 670.10.2
670.10.1-670.10.3	A.D., 2d Dep't	Replacement of 670.10 (eff. 1/1/04) with new sections governing form and content of records, appendices, and briefs generally; form and content of records and appendices; and form and content of briefs
670.22(a)(1)	A.D., 2d Dep't	Increase in fee for filing record on appeal to $315
670.22(a)(2)	A.D., 2d Dep't	Addition of $45 fee for filing motions and cross-motions
670.22(b)(7)	A.D., 2d Dep't	Deletion of $2 fee for filing and entering order, affidavit, or other paper changing name of attorney
800.17	A.D., 3d Dep't	Change of address in unemployment insurance appeals
800.23(b)	A.D., 3d Dep't	Addition of $45 fee for filing motions and cross-motions
800.23(c)	A.D., 3d Dep't	Renumbering of former 800.23(b) to 800.23(c)
1000.13(a)(5)	A.D., 4th Dep't	Addition of $45 fee for filing motions and cross-motions

New York Southern District Forges Ahead in Deciding When to Shift Financial Burden of Forensic Discovery

By Beth Mazzagetti

On May 13, 2003, in *Zubulake v. UBS Warburg LLC*,[1] Judge Shira Scheindlin of New York's Southern District created a unique test for determining when the financial burden of forensic discovery should be shifted from the party who must *produce* documents to the party who *requests* them. Traditionally each party pays its own document production costs in pre-trial discovery,[2] but in accordance with Federal Rules of Civil Procedure (Fed. R. Civ. P.) 26(b)(2)[3] a court can limit a burdensome discovery request and shift the financial burden of the document production when certain factors are present.[4] On July 24th, Judge Scheindlin applied her seven-part test to a preliminary group of e-mails produced by Defendant UBS Warburg at her direction.[5] In this decision she demonstrated the delicate and somewhat complicated fashion with which she intends that her test be applied.

Forensic discovery[6] is the identification, preservation, and documentation of relevant electronic data in a manner that ensures its admissibility in a legal proceeding.[7] The forensic process becomes increasingly expensive as parties request deleted e-mails which can often be retrieved only through extraction from a computer system's back-up tapes.[8] Companies use back-up tapes, essentially snapshots of a computer system's database, to save e-mails on a daily or weekly basis and prepare for the possibility of a system crash or other disaster. Such back-up copies are usually retained for a period of several weeks or months and then recycled. Parties can extract information on back-up tapes for discovery purposes; however, this extraction process often becomes costly and burdensome for the producing party.[9]

The determination of which party should absorb these rising costs remains a delicate issue. The current producer-pays method allows small litigants access to the judicial system despite their inability to pay for the production of documents requested in discovery. Courts have found that the presence of smaller litigants in the court system provides a necessary check on corporations, and plaintiffs argue that companies choosing to use expensive computer systems in their daily business should be responsible for absorbing this foreseeable expense.[10] On the other hand, the present approach encourages small plaintiffs to blackmail sizable companies to agree to large settlements by making unreasonably expensive document requests at no risk to themselves.[11]

Judge Scheindlin formulated her seven factor test by revamping the eight factor balancing test established by another Southern District Judge, James C. Francis, in the precedent-setting January 2002 case *Rowe Entertainment, Inc. v. William Morris Agency, Inc*.[12] Judge Francis' test for determining when the burden should shift considered: 1) specificity of discovery requests, 2) likelihood of finding critical information, 3) availability of the same materials from other sources, 4) purpose of retention, 5) benefit to the requesting party, 6) total costs, 7) ability and incentive to control costs, and 8) available resources of each party.[13] The *Rowe* test was applied and adopted by the 5th, 6th, 7th and 8th Circuits. Because Justice Francis did not specify the amount of weight to be assigned each factor during the test's application, circuit courts following *Rowe* have applied the test by issuing equal weight to each factor.[14]

"The determination of which party should absorb . . . [the] rising costs [of forensic discovery] remains a delicate issue."

Finding that Judge Francis' test weighed too heavily in favor of shifting the burden to the requestor and thus "undercut the presumption"[15] that the responding party should pay discovery costs, Judge Scheindlin established a new balancing test in *Zubulake v. Warburg LLC*,[16] a case in which the plaintiff alleged sexual discrimination against her former employer. The Scheindlin test consolidates and eliminates factors from the *Rowe* test, incorporates additional new factors, and assigns various weight values to each one. The result is a seven-factor test that considers: 1) extent to which the request is specifically tailored to discover relevant information, 2) availability of such information from other sources, 3) total cost of production compared to the amount in controversy, 4) total cost of production compared to the resources available to each party, 5) relative ability of each party to control costs and its incentive to do so, 6) importance of the issues at stake in the litigation, and 7) relative benefit to the parties of obtaining the information.[17]

Was this laborious effort necessary? Is the Scheindlin test an improvement?

The unique and yet potentially troublesome aspect of the Scheindlin test is the varying degree of emphasis which one must apply to each factor in determining the outcome of the balance. She held that the first two factors of the test (the degree to which the requests are tailored and the availability of the information) are the most important and should be given the most weight; the sixth factor (importance of issues at stake) only rarely comes into play, but when it does should have the "potential to predominate over the others;"[18] the seventh factor (relative benefit to the parties) which tends to favor the requesting party, should be given the least amount of weight except in the rare situation where production provides a benefit to the responding party.[19] Several of the factors, such as number four, which balances the total cost of production compared to the resources available to each party, are mini-balancing tests of their own, requiring definite and perhaps time-consuming deliberation.

"Judge Scheindlin's efforts are contributing significantly to accomplishing the daunting task of shaping viable guidelines to deal with issues of electronic discovery."

Judge Scheindlin chose not to apply her new test on May 13th; she followed the course laid out in *McPeek v. Ashcroft*,[20] ordering that a preliminary small sampling of back-up tapes be extracted by the producing party, in the hope of retrieving evidence of what the back-up tapes might contain as a whole. She explained: "By requiring a sample restoration of back-up tapes, the entire cost-shifting analysis can be grounded in fact rather than guesswork."[21] On July 24, 2003, Judge Scheindlin evaluated the sampling of produced e-mails and ultimately decided that plaintiff Zubulake should share twenty-five percent of the cost of retrieving and extracting e-mails from back-up tapes.[22] She applied her seven-part test to the circumstances of the *Zubulake* case with particularity and determined that Zubulake must pay enough of the cost to ease defendant's burden, but that UBS Warburg must continue to shoulder the "lion's share."[23]

The Scheindlin test is thorough and deliberate. Her knowledge in this field is evident from the depth and complexity of her factors. [24] She addresses the issues presented by Rule 26(b)(2) in combination with the concerns articulated by Judge Francis in the *Rowe* decision.[25] The single cause for unease surrounding the Scheindlin test is that Judge Scheindlin may be one of the few able to correctly apply it. Throughout the July 24th decision, Judge Scheindlin fine-tuned the scale to a remarkable degree. Her analysis included numerous hazy approximations. For example, her opinion states:

> Factors one through four tip against the cost shifting (although factor two only slightly so). Factors five and six are neutral, and factor seven favors cost-shifting . . . Because some of the factors cut against cost shifting, but only *slightly so*—in particular, the possibility that the continued production will produce valuable new information—some cost shifting is appropriate in this case although UBS should pay the majority of the costs.[26]

Judge Scheindlin rendered the sixth factor in the test neutral, acknowledging that sexual discrimination in the workplace is a "weighty issue," but determining that it is not "unique."[27] By equating the concept of "importance of the issues at stake in the litigation" with the "uniqueness" of the issues, the Scheindlin test begins to assume an ambiguous nature. Future questions may arise when courts face deliberation on trivial but "unique" issues.

Assigning the appropriate amount of weight to each of the factors might prove too complex or time-consuming for judges burdened by heavy caseloads to apply. Rather than follow the traditional practice of absorbing production costs, corporate defendants will inevitably seek to have this elaborate test applied in the hope of shifting all or a portion of the burden, adding to the overall cost of the plaintiff's litigation. This in turn will place increased pressure on the courts, as well as lengthen the discovery process, as judges try to comprehend the formula behind Justice Sheindlin's understanding of "slightly so"[28] or "the lion's share."[29]

In contrast to the complexity of the balancing test, Judge Scheindlin's clear determination that the plaintiff's mandatory 25 percent contribution should be applied to the *restoration* of the back-up tapes only and not to the *entire cost* of production[30] (which would include attorney and paralegal fees spent on determining privilege issues), will likely set a clear standard for other courts to follow. In the same manner, her decision to follow *McPeek v. Ashcroft*,[31] and require an initial sampling of tapes, provides other courts with a practical method of tackling these discovery disputes. Judge Scheindlin's efforts are contributing significantly to accomplishing the daunting task of shaping viable guidelines to deal with issues of electronic discovery.[32] She and Judge Francis have strategically positioned the Southern District to forge ahead, setting a precedent, even if a difficult one, on these crucial pre-trial discovery issues. The months ahead will tell who wants to devote the time and energy necessary to follow their lead.

Endnotes

1. *See Zubulake v. Warburg LLC*, No. 02 Civ. 1243, 2003 U.S. Dist. LEXIS 7939, at *1 (S.D.N.Y., May 13, 2003).
2. *See* Eric Van Buskirk, *Raging Debate: Who Should Pay for Digital Discovery?*, 229 N.Y.L.J., Jan. 27, 2003. *See* Hon. Shira A. Scheindlin & Jeffrey Rabkin., *Electronic Discovery in Federal Civil Litigation: Is Rule 34 up to the Task?*, 41 B.C. L. Rev. 327, 371 (2002).
3. Fed. R. Civ. P. 26(b)(2); *See* Michael Marron, *Discoverability of "Deleted" E-Mail: Time for a Closer Examination.*, 25 Seattle Univ. L.R. 895, 911 (2002).
4. *See* Fed. R. Civ. P. 26(b)(2) ("Limitations . . . The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rule 26(c).")
5. *See Zubulake v. Warburg LLC*, No. 02 Civ. 1243 (SAS), 2003 U.S. Dist. LEXIS 12643, at *1 (S.D.N.Y., July 24, 2003).
6. The word *forensics* is derived from the Latin word *forum*, meaning "court."
7. *See Deloitte & Touche Presentation: Analytic and Forensic Technology* (2003).
8. *See* Marron *supra* note 3, at 909. *See* Scheindlin *supra* note 2, at 336–338.
9. *See* Lisa A. Aren, Robert D. Brownstone & William A. Fenwick, *E-Discovery: Preserving, Requesting & Producing Electronic Information.*, 19 Santa Clara Computer & High Tech. L.J. 131, 151–154 (2002).
10. *See* Van Buskirk *supra* note 2. *See Zubulake v. Warburg LLC,* No. 02 Civ. 1243 (SAS), 2003 U.S. Dist. LEXIS 12643, at *31 (S.D.N.Y., July 24, 2003).
11. *See* Van Buskirk, *supra* note 2.
12. *See Rowe Entm't v. William Morris Agency*, 205 F.R.D. 421, 421 (S.D.N.Y., Jan. 2002).
13. *Rowe*, 205 F.R.D. at 428–433.
14. *See Zubulake v. Warburg LLC*, No. 02 Civ. 1243, 2003 U.S. Dist. LEXIS 7939, at *37 (S.D.N.Y., May 13, 2003).
15. *Id*.
16. *Id.*
17. *See id*. at *50.
18. *Id*. at *46.
19. *See id*.
20. *McPeek v. Ashcroft*, 202 F.R.D. 31, 34 (D.C. Cir. 2001).
21. *Zubulake v. Warburg LLC*, No. 02 Civ. 1243, 2003 U.S. Dist. LEXIS 7939, at *47-48 (S.D.N.Y., May 13, 2003).
22. *See Zubulake v. Warburg LLC*, No. 02 Civ. 1243 (SAS), 2003 U.S. Dist. LEXIS 12643, at *31 (S.D.N.Y., July 24, 2003).
23. *Id*.
24. *See generally* Scheindlin *supra* note 2, at 327.
25. *See* Mark Hamblett, *New Standards for Cost Shifting Proposed in Electronic Discovery*, 229 N.Y.L.J. 1, 1 (May 14, 2003).
26. *Zubulake v. Warburg LLC*, No. 02 Civ. 1243 (SAS), 2003 U.S. Dist. LEXIS 12643, at *30 (S.D.N.Y., July 24, 2003).
27. *See id*. at *28.
28. *Id*. at *30.
29. *Id*. at *31.
30. *Id*. at *32.
31. *McPeek*, 202 F.R.D. at 34.
32. On October 22nd in a fourth *Zubulake* decision, Judge Scheindlin denied plaintiff's motion for an adverse inference instruction and for reconsideration of her July 24th decision. Although UBS Warburg destroyed back-up tapes that it had a duty to preserve, the court held that no adverse inference instruction was to be given to the jury because plaintiff could not prove that the lost evidence would have supported her claims. *Zubulake v. Warburg LLC*, No. 02 Civ. 1243, 2003 U.S. Dist. LEXIS 18771, *30 (S.D.N.Y. Oct. 22 2003). An adverse inference instruction is appropriate only when 1) the party with 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 a claim or defense. *Zubulake v. Warburg LLC*, No. 02 Civ. 1243, 2003 U.S. Dist. LEXIS 18771, *22–23 (S.D.N.Y. Oct. 22 2003).

    In another recent October decision, *Xpedior Creditor Trust v. Credit Suisse First Boston Inc*., Judge Scheindlin applied her own seven factor test again, this time determining that cost shifting was inappropriate. Her rationale was based in part on the fact that plaintiff's requests were narrowly tailored, the cost of the production was relatively insignificant in comparison with the $7 billion value of the litigation, the documents were unavailable to plaintiff through any other source, and the requestor was a bankrupt corporation. *Xpedior Creditor Trust v. Credit Suisse First Boston Inc.,* No. 02 Civ. 9149, 2003, U.S. Dist. LEXIS 17497, *15–20 (S.D.N.Y. Oct. 1 2003).

Notes of the Section's Executive Committee Meetings

June 18, 2003

Guest speaker Hon. Ariel Belen, one of two Justices presiding over the Commercial Division, Supreme Court, Kings County, discussed the guidelines for assignments and rules of the Commercial Division, as well as his practice.

The Executive Committee deferred action on the report of the Security Committee on the ABA Corporate Governance Report. The Executive Committee also discussed disclosure of information on the Internet in the wake of e-filing, as well as an upcoming report of the Class Action Committee on the tension between Fed. R. Civ. P. 23 and 68.

July 16, 2003

Guest speaker Hon. Alvin K. Hellerstein, U.S. District Judge for the Southern District of New York, addressed the types of cases he hears and his general practices and preferences.

The Executive Committee discussed and approved the Class Action Committee's report "'Picking Off' a Named Plaintiff Before a Class is Certified: A Proposal to Resolve the Remaining Conflicts between Rules 68 and 23 of the Federal Rules of Civil Procedure after *Colbert v. Dymacol, Inc.*" The Executive Committee also approved the Antitrust Committee's report on State Antitrust Enforcement, as well as the comments of the Securities Litigation Committee on the Report of the ABA Task Force on Corporate Responsibility.

The Executive Committee approved the comments of the Technology Committee to the Commission on Public Access to Court Records and voted to table consideration of a report of the Class Action Committee on the Class Action Fairness Act of 2003 (H.R. 1115; S. 274).

September 17, 2003

Guest speaker Hon. Gerard E. Lynch, U.S. District Judge for the Southern District of New York, discussed his experience of dealing with civil cases as a judge with a criminal law background, and shared his views about the Sentencing Guidelines, mediation, and the use of technology in the courtroom.

The Executive Committee approved, with changes, the Class Action Committee's report on "Class Action Committee Reports on the Class Action Fairness Act of 2003; H.R. 1115; S. 274" and accepted the recommendation of the Class Action Committee that any review of the Uniform Securities Act be deferred until there is active consideration of the act by the legislature.

The Executive Committee also approved the Association's Tax Section's Report on Trust Fund Liability for the Collection of Sales Tax.

October 15, 2003

See report by Section Secretary Michael B. Smith on page 6 in this issue.

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