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POLISHING THE "GOLD STANDARD" ON THE E-DISCOVERY COST-SHIFTING ANALYSIS: *ZUBULAKE V. UBS WARBURG, LLC*

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I. INTRODUCTION

By now, the critical importance of e-discovery should be well-known to the Bar. Numerous articles have appeared in legal industry periodicals and various continuing legal education programs have been held regarding the subject. However, for those still relying on document production in paper form, here are the critical facts:

- Approximately 95% of all documents are now created electronically.
- All electronically created documents are discoverable.
- Electronic documents have important information imbedded in their associated electronic files that is not observable when viewing a printed version of the document.
- The vast majority of electronic documents are in the form of either e-mail, a word processing document, or a spreadsheet, with e-mail typically the most prevalent.
- Most companies archive back-up tapes from their e-mail servers, providing a snapshot of all existing e-mail at the time the back-up was created.
- And, the cost of identifying, gathering, reviewing for privilege, and producing e-documents is high, especially in a paper format.

As you probably also know, e-mail has nearly replaced the casual phone call and individuals frequently put in writing what should never be spoken. Chances are that such comments and other potentially useful evidence exist on a back-up tape in the defendant's e-mail archive, *even if all other copies have been "deleted" by the author and recipients*. Moreover, those back-up tapes are readily searchable using key term searches to identify relevant dates, authors, recipients, subject or reference lines, and words used within the text.[1] Understandably, the fear of electronic discovery is keeping both the defense bar and in-house corporate counsel up at night. For that reason, corporate counsel are scrambling to develop rational e-data document retention plans and practices, and the courts have been racing to develop case law to address the discovery issues arising in this area.

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1. There are a number of techniques to locate this and other electronic information, and exploit weaknesses or conflicts in defendants' e-document retention practices, but those techniques are beyond the scope of this Article.

The purpose of this Article is to discuss the recent series of decisions in *Zubulake v. UBS Warburg, LLC* (*Zubulake I*),[2] that modified the eight-factor analysis established in *Rowe Entertainment, Inc. v. William Morris Agency*,[3] to assist in determining who pays for the costs associated with producing electronic data. While the *Rowe* test has been described as the "gold standard for courts resolving electronic discovery disputes,"[4] in the future, the *Zubulake* decisions will become the seminal reference on this issue.[5]

II. THE *ROWE* DECISION

In *Rowe*, a group of concert promoters brought suit alleging defendants' discriminatory and anti-competitive practices froze them out of the market for promoting events for certain bands. Plaintiffs' discovery requests — characterized as "sweeping" — encompassed e-mail potentially contained in defendants' archived back-up tapes.[6] Several defendants moved for a protective order asserting the burden and expense involved in identifying and producing the documents outweighed the benefit of any additional discovery. Alternatively, defendants requested that if production was ordered, plaintiffs should bear the cost.[7]

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2. 217 F.R.D. 309 (S.D.N.Y. 2003).

3. 205 F.R.D. 421, 429 (S.D.N.Y. 2002).

4. Zubulake v. UBS Warburg, 217 F.R.D. 309, 320 (S.D.N.Y. 2003).

5. *See, e.g.*, Xpedior Creditor Trust v. Credit Suisse First Boston, No. 02 Civ. 9149 (SAS), 2003 WL 22283835 (S.D.N.Y., Oct. 2, 2003) (appying *Zubulake* factors); OpenTV v. Liberate Technologies, 219 F.R.D. 474 (N.D. Cal. Nov. 18, 2003) (adopting *Zubulake* cost-shifting approach); Thompson v. United States HUD, 2003 U.S. Dist. LEXIS 22739 (D. Md. Dec. 13, 2003) (citing *Zubulake* cost-shifting approach with approval).

6. Among other things, plaintiffs demanded production of "all documents concerning": (1) "any communication between any defendants relating to the selection of concert promoters and bids to promote concerts"; (2) "the selection of concert promoters, and the solicitation, and bidding processes relating to concert promotions"; and (3) "market shares, market share values, market conditions, or geographic boundaries in which any . . . concert promoter operates." *Rowe*, 205 F.R.D. at 424.

7. In support, defendants asserted (1) "to the extent an e-mail was deemed important, it would likely have been printed and saved in the appropriate concert file — files that have been produced for inspection by the plaintiffs"; (2) "production . . . would be exorbitantly expensive and, to some extent, a technical impossibility [because the] e-mail files were backed up using a software program . . . no longer commercially available and [defendant] . . . has neither the computer hardware nor the software to read these tapes"; (3) "[t]he agents' personal computers use a variety of different e-mail programs, so that all files cannot be reviewed by a single search program"; (4) individual employees' privacy interests could be adversely affected by a broad e-mail search; (5) the cost of conducting a privilege review on potentially responsive documents is high; and (6)

Plaintiffs responded that the requested e-mail was critical to their case. They disputed defendants' claim that little business was conducted "through e-mail and that important e-mails would have been reduced to hard copy in any event."[8] Plaintiffs also asserted that defendants' cost estimates in producing the archived e-mail were "wildly inflated"; instead plaintiffs proposed to reduce costs by a variety of means.[9]

Having determined that plaintiffs' discovery requests were both relevant and discoverable, the *Rowe* court denied defendants' motion for a blanket protective order.[10] However, it then determined to shift the cost of the discovery onto plaintiffs, establishing an eight-factor test in its analysis of who bears the burden of paying for "locating and extracting responsive e-mail" from a defendants' archived back-up tapes:[11]

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the extensive number of back-up tapes that exist had not been cataloged as to their contents. *Id.* at 424-26.

8. *Id.* at 426.

9. For example, plaintiffs suggested that the production costs could be reduced by, among other things: (1) retrieving e-mail only from key personnel rather than from all employees; (2) limiting the portion of back-up tapes restored with date restrictions and sampling techniques; (3) not producing documents on paper (i.e., production in electronic form but not TIFF files); and (4) using key word searches to identify potentially privileged and responsive documents, rather than a detailed human review. *See id.* at 427.

10. Rejecting defendants' implausible assertion that they were unlikely to have any previously unproduced and relevant e-mail in their back-up archive because they originally would have printed any important e-mail and filed it with the same materials defendants already produced to plaintiffs, the *Rowe* court noted:

> In general, nearly one-third of all electronically stored data is never printed out. Here, the defendants have not alleged that they had any corporate policy defining which e-mail messages should be reduced to hard copy because they are "important." Finally, to the extent that any employee of the defendants was engaged in discriminatory or anti-competitive practices, it is less likely that communications about such activities would be memorialized in an easily accessible form such as a filed paper document.

Id. at 428 (internal citations omitted). The defendants' employee privacy concerns were rejected, citing the protection afforded by the existing confidentiality order and the "severe" limitations on the employees' privacy expectations. *Id.*

11. The "unassailable" principle that a producing party bear all costs in producing paper records, according to the *Rowe* court, did "not translate well into the realm of electronic data." *Rowe*, 205 F.R.D. at 429. The *Rowe* court reasoned that the underlying assumption of that principle — that "the party retaining information does so because that information is useful to it, as demonstrated by the fact that it is willing to bear the costs of retention" — did not apply in the context of electronic data "because the costs of storage are virtually nil." *Id.* Rather, the *Rowe* court believed that electronic "[i]nformation is retained not because it is expected to be used, but because there is no compelling reason to discard it." *Id.* Thus, the *Rowe* court concluded that it was "not

(1) the specificity of the discovery requests;
(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 benefit 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.[12]

Applying these factors on an apparently equally weighted basis, the *Rowe* court determined that the balance "tip[ped] heavily in favor" of shifting the discovery costs onto plaintiffs.[13] It went on to suggest a protocol for plaintiffs to identify and pay for the production of responsive documents, although it further ruled defendants would have to bear any additional cost of conducting a privilege review.[14]

III. *ZUBULAKE I*

In *Zubulake I*,[15] Judge Scheindlin was highly critical of *Rowe*'s eight-factor test, "as applied," because it "undercut" the presumption that a responding party usually pays the costs associated with producing requested discovery.[16] Judge Scheindlin noted that, "[i]ndeed, of the handful of reported opinions that apply *Rowe* or some modification

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enough to say that because a party retained electronic information, it should necessarily bear the cost of producing it." *Id.* As discussed *infra*, this logic was implicitly overruled in *Zubulake I* when Judge Scheindlin expressly held "the purposes for which the responding party maintains the requested data . . . is typically unimportant," eliminating this factor from the *Rowe* test. Zubulake v. UBS Warburg, 217 F.R.D. 309, 321 (S.D.N.Y. 2003) ("As long as the data is accessible, it must be produced.").

12. *Rowe*, 205 F.R.D. at 429.
13. *Id.* at 432.
14. *Id.* at 433.
15. *Zubulake*, 217 F.R.D. at 320.
16. Quoting the Supreme Court, Judge Scheindlin noted that

> [u]nder [the discovery] rules, the presumption is that the responding party must bear the expense of complying with discovery requests, but [it] may invoke the district court's discretion under Rule 26(c) to grant orders protecting [it] from "undue burden or expense" in doing so, including orders conditioning discovery on the requesting party's payment of the costs of discovery.

Id. at 316 (quoting Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 358 (1978)).

thereof, *all of them* have ordered the cost of discovery to be shifted to the requesting party."[17] Judge Scheindlin reasoned that, "[i]n order to maintain the presumption that the responding party pays, the cost-shifting analysis must be neutral; close calls should be resolved in favor of the presumption."[18] Judge Scheindlin proceeded to revise the *Rowe* test, eliminating and adding certain factors and, most importantly, weighting and prioritizing the revised seven-factor list to fulfill the purposes and requirements of both Rule 26 of the Federal Rules of Civil Procedure and the presumption that the responding party pays discovery costs.

Outlining the facts of *Zubulake I*, Judge Scheindlin described the case as "a textbook example of the difficulty of balancing the competing needs of broad discovery and manageable costs."[19] Zubulake brought suit against UBS Warburg alleging gender discrimination and illegal retaliation. She claimed that key evidence, internal UBS e-mail, existed only on archived back-up tape and other storage media. Dissatisfied with UBS's initial production, Zubulake moved to compel UBS to produce the e-mail at its own expense.[20]

UBS responded that the cost of restoring its archived e-mail would be about $175,000, not including the cost associated with an attorney review of that e-mail. Like many other major companies, UBS had extensive e-mail back-up and preservation protocols. For example, e-mails were backed up on both back-up tapes[21] and optical disks.[22]

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17. *Id.* (emphasis in original) (citations omitted).

18. *Id.*

19. *Id.* at 311.

20. In her first round of discovery Zubulake demanded that UBS produce "[a]ll documents concerning any communication by or between UBS employees concerning Plaintiff." Zubulake's demand defined the term "document" to "includ[e], without limitation, electronic or computerized data compilations." *Zubulake*, 217 F.R.D. at 312. UBS initially produced about 100 pages of e-mail, but never examined its back-up tapes for responsive e-mail, objecting to the associated costs as "prohibitive." *Id.* at 312-13. Zubulake produced approximately 450 pages of e-mail herself; "clearly, numerous responsive e-mails had been created and deleted." *Id.* at 313.

21. Regarding UBS's back-up of e-mail on tape, the *Zubulake* court expressly found that:

> *all* e-mails sent or received by *any* UBS employee are stored onto backup tapes. To do so, UBS employs a program called Veritas NetBackup, which creates a "snapshot" of all e-mails that exist on a given server at the time the backup is taken. . . . Using NetBackup, UBS backed up its e-mails at three intervals: (1) daily, at the end of each day, (2) weekly, on Friday nights, and (3) monthly, on the last business day of the month. Nightly backup tapes were kept for twenty working days, weekly tapes for one year, and monthly tapes for three years. After the relevant time period elapsed, the tapes were recycled. . . . NetBackup also created indexes of each backup tape. Thus, [UBS] was able to search through the tapes

IV. COST-SHIFTING DOES NOT APPLY TO ALL E-DISCOVERY

After determining that Zubulake was entitled to the discovery she demanded, and that UBS admittedly had not produced all of its responsive documents, Judge Scheindlin considered UBS's request to "protect [it] . . . from undue burden or expense."[23] Judge Scheindlin first examined the cardinal issue of "whether cost-shifting must be considered in every case involving the discovery of electronic data, which — in today's world — includes virtually all cases." Relying on the "accepted principle" under Rule 34(a) "that electronic evidence is no less discoverable than paper evidence," she emphatically answered this question "[n]o."[24] Instead, she stressed that "any principled approach to electronic evidence must respect th[e] presumption" in *Oppenheimer Fund, Inc. v. Sanders*,[25] "that the responding party must bear the expense of complying with discovery requests."[26] Her rationale is particularly instructive:

> Courts must remember that cost-shifting may effectively end discovery, especially when private parties are engaged in litigation with large corporations. As large companies increasingly move to entirely paper-free environments, the frequent use of cost-shifting will have the effect of crippling discovery in discrimination and retaliation cases. This will both undermine the "strong public policy

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> from the relevant time period and determine that the e-mail files responsive to Zubulake's requests are contained on a total of ninety-four backup tapes.

Id. at 314 (emphasis in original).

22. With respect to UBS's use of optical disks to store e-mail, the *Zubulake* court found that:

> a copy of *all* e-mails sent to or received from outside sources (*i.e.*, e-mails from a "registered trader" at UBS to someone at another entity, or vice versa) was simultaneously written onto a series of optical disks. Internal e-mails, however, were not stored on this system. . . . UBS has retained each optical disk used since the system was put into place in mid-1998. Moreover, the optical disks are neither erasable nor rewritable. Thus, UBS has *every* e-mail sent or received by registered traders (except internal e-mails) during the period of Zubulake's employment, even if the e-mail was deleted instantaneously on that trader's system. The optical disks are easily searchable.

Id. at 315 (emphasis in original).

23. *Id.* at 317.

24. *Id.*

25. 437 U.S. 340, 358 (1978).

26. *Zubulake*, 217 F.R.D. at 316.

favor[ing] resolving disputes on their merits," and may ultimately deter the filing of potentially meritorious claims.

Thus, cost-shifting should be considered *only* when electronic discovery imposes an "undue burden or expense" on the responding party. The burden or expense of discovery is, in turn, "undue" when it "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."

Many courts have automatically assumed that an undue burden or expense may arise simply because electronic evidence is involved. This makes no sense. Electronic evidence is frequently cheaper and easier to produce than paper evidence because it can be searched automatically, key words can be run for privilege checks, and the production can be made in electronic form obviating the need for mass photocopying.[27]

V. ONLY INACCESSIBLE DATA IS SUBJECT TO COST-SHIFTING

To determine if a demanded production of electronic data is unduly burdensome or expensive, Judge Scheindlin focused on whether the data is "kept in an *accessible or inaccessible* format (a distinction that corresponds closely to the expense of production)."[28] This question, she found, "turns largely on the media on which it is stored."[29] Judge Scheindlin then listed five major categories of data in order from the most accessible to the least accessible: (1) "Active, online data" (e.g., hard drives); (2) "Near-line data" (e.g., "a robotic storage device . . . that houses removable media" such as magnetic tape or optical disks); (3) "Offline storage/archives" (e.g., "removable optical disk or magnetic tape media that can be labeled and stored in a shelf or rack" for archival use or back-up as a disaster recovery); (4) "Back-up tapes" (essentially a type of media used in item 3 with the disadvantages that they typically compress data and require "sequential-access" such that in order "to read any particular block of data, you need to read all the preceding blocks"); and (5) "Erased, fragmented or damaged data" (can be accessed only after significant

27. *Id.* at 317-18 (citations omitted) (emphasis in original).
28. *Id.* at 318 (emphasis in original).
29. *Id.*

processing).[30] Judge Scheindlin characterized the first three categories of data as "accessible" and the last two categories "inaccessible."[31]

Applying the facts before her, Judge Scheindlin ruled that "it would be wholly inappropriate to even consider cost-shifting" with respect to the data UBS maintained in an "accessible and usable format."[32] As to UBS's e-mail stored on back-up tape — an "inaccessible" form — the *Zubulake* court turned to the *Rowe* test to determine whether the associated production cost should be shifted from UBS to Zubulake. However, as noted above, Judge Scheindlin found the *Rowe* factors, as applied in *Rowe* and its progeny, "undercut" the presumption that the responding party should pay its production costs.[33]

VI. MODIFICATIONS TO THE *ROWE* TEST

Addressing her criticism that the "*Rowe* test [wa]s incomplete," Judge Scheindlin held Rule 26 required consideration of both "the amount in controversy" and "the importance of the issues at stake in the litigation."[34] Adding these two factors to the test, "would balance the *Rowe* factor that typically weighs most heavily in favor of cost-shifting, 'the total cost associated with production.'"[35] She reasoned "the cost of production is almost always an objectively large number in cases where litigating cost-shifting is worthwhile. But the cost of production when compared to 'the amount in controversy' may tell a different story."[36] In addition, she criticized *Rowe*'s focus on "the resources available to each party"; i.e. "the absolute wealth of the parties" as not relevant.[37] Instead, she held the "focus should be on the total cost of production as compared to the resources available to each party. Thus, discovery that would be too expensive for one defendant to bear would be a drop in the bucket for another."[38] As to "the importance of the issues at stake in the litigation" factor, Judge Scheindlin found this a "critical consideration, even if it is

30. *Id.* at 318-19.
31. *Zubulake*, 217 F.R.D. at 319-20.
32. *Id.* at 320.
33. *Id.*
34. *Id.* at 320-21.
35. *Id.* at 321.
36. *Zubulake*, 217 F.R.D. at 321.
37. *Id.*
38. *Id.*

one that will rarely be invoked."[39] Thus, if a case has "the potential for broad public impact, then public policy weighs heavily in favor of permitting extensive discovery."[40]

After adding the new factors, Judge Scheindlin further modified the *Rowe* test to combine "the specificity of the discovery request" (the first *Rowe* factor) with "the likelihood of discovering critical information" (the second *Rowe* factor) to eliminate the redundancy.[41] Thus, the "first factor should be: the extent to which the request is specifically tailored to discover relevant information."[42] Because the fourth *Rowe* factor — "the purposes for which the responding party maintains the requested data" — "is typically unimportant," Judge Scheindlin eliminated it. "As long as the data is accessible, it must be produced."[43]

In response to her second criticism of *Rowe* — that courts should not simply give equal weight to all of the factors when certain factors should predominate — Judge Scheindlin organized the new factors in order of importance. Thus, as modified, the new list of *Rowe* factors in descending order of importance are:

1. The extent to which the request is specifically tailored to discover relevant information;
2. The availability of such information from other sources;
3. The total cost of production, compared to the amount in controversy;
4. The total cost of production, compared to the resources available to 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.[44]

VII. WEIGHING THE FACTORS

Judge Scheindlin, however, cautioned against a "mechanical" application of these factors. Rather, she held the test must be applied in

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39. *Id.*

40. *Id.*

41. *Zubulake*, 217 F.R.D. at 321.

42. *Id.*

43. As previously noted, this factor was an important consideration to the *Rowe* court in justifying cost-shifting in the first place. *See supra* text accompanying note 9.

44. *Zubulake*, 217 F.R.D. at 322.

light of its purpose, i.e. in order to evaluate the importance of "the sought-after evidence in comparison to the cost of production."[45] She noted the "first two factors — comprising the marginal utility test — are the most important."[46] Second in the hierarchy are the three factors addressing cost issues.[47] Third is the "importance of the issues in litigation itself."[48] Judge Scheindlin noted that, while this factor "will only rarely come into play," she stressed that, "where it does, this factor has the potential to predominate over the others."[49] The least important factor is the "relative benefits of production as between the requesting and producing parties."[50] Judge Scheindlin reasoned this was "because it is fair to presume that the response to a discovery request generally benefits the requesting party. But in the unusual case where production will also provide a tangible or strategic benefit to the responding party, that fact may weigh *against* shifting costs."[51]

VIII. ESTABLISHING A FACTUAL BASIS

Finally, Judge Scheindlin also addressed her criticism that courts applying the *Rowe* test had "not always developed a full factual record." She noted those courts had "uniformly favored cost-shifting largely because of assumptions made concerning the likelihood that relevant information will be found."[52] However, *Zubulake I* flatly rejected this approach:

> [P]roof [of relevant information] will rarely exist in advance of obtaining the requested discovery. The suggestion that a plaintiff must not only demonstrate that probative evidence exists, but also prove that electronic discovery will yield a "gold mine," is contrary to the plain language of Rule 26(b)(1), which permits discovery of "any matter" that is "relevant to [a] claim or defense."[53]

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45. *Id.* at 322-23.
46. *Id.* at 323.
47. *Id.*
48. *Id.*
49. *Zubulake*, 217 F.R.D. at 323.
50. *Id.*
51. *Id.* (emphasis in original).
52. *Id.*
53. *Id.*

Judge Scheindlin's solution, adopted from *McPeek v. Ashcroft*,[54] a decision prior to *Rowe*, was to have the responding party, UBS, "restore and produce responsive documents from a small sample of backup tapes [that] will inform the cost-shifting analysis laid out above."[55] In this manner, after a sample restoration of backup tapes is run, "the entire cost-shifting analysis can be grounded in fact rather than guesswork."[56] Consequently, Judge Scheindlin ordered UBS to pay the cost of conducting a sample test on five back-up tapes selected by Zubulake. Thereafter, UBS was to report the detailed results of the search, and the time and money it spent, so the *Zubulake* court could then "conduct the appropriate cost-shifting analysis."[57]

IX. *ZUBULAKE III*

In a follow-up ruling,[58] *Zubulake v. UBS Warburg (Zubulake III)*,[59] issued on July 24, 2003, after UBS had run the test searches on samples of its archived data and reported its findings, Judge Scheindlin took up the cost-shifting analysis previously laid out in *Zubulake I*.[60] Applying the seven-factor test, Judge Scheindlin determined "some cost-shifting" was appropriate, requiring plaintiffs to pay twenty-five percent of the cost of restoring the back-up tapes.[61] With the first four factors weighing against cost-shifting and the next two factors deemed neutral, the court's decisive factor favoring the cost-shifting was the last factor — "the relative benefits to the parties of obtaining the information."[62] This was because Judge Scheindlin found Zubulake had "not been able to show that there [wa]s indispensable evidence" on the back-up tapes.[63]

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54. 202 F.R.D. 31, 34-35 (D.D.C. 2001).

55. *Zubulake*, 217 F.R.D. at 323.

56. *Id.*

57. *Id.* at 324.

58. In *Zubulake II*, a related issue in conjunction with *Zubulake I* also on May 13, 2003, Zubulake's request to disclose confidential deposition testimony regarding her former employer's compliance with its document retention obligations were addressed. Zubulake v. UBS Warburg, LLC, No. 02 Civ. 1243, 2003 WL 21087136 (S.D.N.Y. May 13, 2002). That decision, however, is not relevant to the issues addressed in this Article.

59. Zubulake v. UBS Warburg, LLC, 216 F.R.D. 280 (S.D.N.Y. 2003).

60. *See id.*

61. *Id.* at 289.

62. *Id.*

63. During its sample searches on five archived back-up tapes, UBS had identified and produced approximately 600 e-mails. Of those, plaintiffs produced 68 to the *Zubulake II* court,

More importantly, however, *Zubulake III* made clear Zubulake's partially-shifted cost obligation was limited strictly to the cost associated with making UBS's "inaccessible" archived data "accessible."[64] Thus, Zubulake was not responsible for bearing any portion of UBS's relevance and privilege review once the archived e-mail was restored.[65] Judge Scheindlin reasoned that this was supported by: (1) the fact the "producing party has the exclusive ability to control the cost of reviewing the documents . . . and unilaterally decides on the review protocol"; and (2) "the nature of the cost-shifting inquiry" itself.[66] Judge Scheindlin aptly summarized her holding on the issue:

> The point is simple: technology may increasingly permit litigants to reconstruct lost or inaccessible information, but once restored to an accessible form, the usual rules of discovery apply.[67]

X. *ZUBULAKE IV*

On October 22, 2003, Judge Scheindlin addressed Zubulake's subsequent motion for an award of sanctions against UBS for its failure to preserve certain back-up tapes containing potentially relevant e-mail between several key employee witnesses.[68] Zubulake's motion was based on the fact that during the court-ordered back-up tape restoration process on July 24, 2003, it was discovered that several of the back-up tapes had been lost and that a number of individual e-mail messages had been deleted after UBS ordered its employees to preserve such materials.[69]

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characterizing them as "highly relevant." *Id.* at 285. Judge Scheindlin expressly found that, although relevant, "*none* of them provide[d] any direct evidence of discrimination." *Id.* at 286.

64. *Zubulake*, 216 F.R.D. at 287.

65. *Id.*

66. "Recalling that cost-shifting is only appropriate for inaccessible — but otherwise discoverable — data, it necessarily follows that once the data has been restored to an accessible format and responsive documents located, cost-shifting is no longer appropriate." *Id.* at 291 (emphasis in original).

67. *Id.* (citations omitted).

68. Zubulake v. UBS Warburg, 220 F.R.D. 212, 215-16 (S.D.N.Y. 2003).

69. The deleted e-mails apparently were discovered on other back-up tapes. It is worthwhile noting that only "after Zubulake specifically requested e-mail stored on backup tapes, UBS's outside counsel orally instructed UBS's information technology personnel to stop recycling backup tapes." *Id.* at 215. Had Zubulake not made that request, all evidence of the deleted e-mail messages might have been lost forever.

In finding that UBS had a duty to preserve the missing back-up tapes, Judge Scheindlin held that the trigger date of the duty to preserve was "at the time that litigation was reasonably anticipated," but certainly not later than the date that Zubulake filed her complaint.[70] While Judge Scheindlin noted that a corporation did not have to "preserve every shred of paper, every e-mail or electronic document, and every backup tape" at the anticipation of litigation, she did recognize that "anyone who anticipates being a party or is a party to a lawsuit must not destroy unique, relevant evidence that might be useful to an adversary."[71] Thus, Judge Scheindlin held that the duty to preserve

- certainly extend(s) to any document or tangible things (as defined by Rule 34(a)) made by individuals likely to have discoverable information that the disclosing party may use to support its claims or defenses;
- includes documents prepared *for* those individuals, to the extent those documents can be readily identified (e.g., from the "to" field in e-mails);
- extends to information that is relevant to the claims or defenses of *any* party, or which is "relevant to the subject matter involved in the action";
- extends to those employees likely to have relevant information — the "key players" in the case; and
- requires that "[a] party or anticipated party must retain all relevant documents (but not multiple identical copies) in existence at the time the duty to preserve attaches, and any relevant documents created thereafter.[72]

Judge Scheindlin found that UBS had a duty to preserve the missing back-up tapes and was negligent, if not reckless, in breaching that duty.[73] Because UBS's conduct did not rise to the level of willful and because Zubulake could not show that the missing back-up tapes and e-mail contained relevant evidence that would have been favorable to her case, Judge Scheindlin declined to award Zubulake the "extreme sanction" of an adverse inference instruction.[74] Nevertheless, Judge Scheindlin ordered UBS to pay for Zubulake's costs in re-deposing certain witnesses on the

70. *Id.* at 216-17.
71. *Id.* at 217.
72. *Id.* at 218 (emphasis in original).
73. *Zubulake IV*, LLC 220 F.R.D. at 221.
74. *Id.* at 222.

subject of "issues raided by the destruction of evidence and any newly discovered e-mails."[75]

XI. CONCLUSION

The *Zubulake* decisions will have a substantial impact on electronic discovery practices. Before these cases, the trend was shifting toward requiring plaintiffs to bear the burden of defendants' electronic discovery costs, especially where the data was archived. Frequently, those costs can be enormous. Had that trend continued, there is no doubt it would have had a chilling effect on plaintiffs' ability to obtain discoverable information, the overwhelming majority of which is now created and stored in electronic form.[76]

The *Zubulake* decisions make clear that cost-shifting is not appropriate for electronic discovery as a general matter. Rather, it is appropriate only to the extent discovery is required of certain archived, or otherwise "inaccessible," data. To the extent plaintiffs may be required to share in the cost of such discovery, plaintiffs' share of the cost stops at making inaccessible data accessible. Finally, as demonstrated in *Zubulake IV*, parties risk a variety of sanctions should they choose to ignore their duty to preserve electronic evidence.

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75. *Id.*

76. *See supra* text accompanying note 27 (discussing the possibility of cost-shifting effectively ending discovery).