



Judge Scheindlin Amends *Pension Committee*: Clarifying the Bar for Negligence, Sort Of...

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On May 28th Judge Scheindlin amended her recent opinion in *Pension Committee of the University of Montreal Pension Plan, et al. v. Banc of America Securities, LLC, et al.* for a second time:

At page 10, lines 7-10 replace <By contrast, the failure to obtain records from *all* employees (some of whom may have had only a passing encounter with the issued in the litigation), as opposed to key players, likely constitutes negligence as opposed to a higher degree of culpability.> with <By contrast, the failure to obtain records from all those employees who had any involvement with the issues raised in the litigation or anticipated litigation, as opposed to key players, could constitute negligence.>¹

With these changes, Scheindlin attempts to clarify the measures that litigants must take to satisfy their preservation obligations and conduct defensible collections efforts. The original opinion could easily be construed as requiring an extremely broad collections effort in, order to avoid any claims of negligence. Scheindlin attempts to limit what could easily be construed as a requirement for an extremely broad collections effort: including “all” employees.

Scheindlin also addresses the standard of negligence under *Pension Committee* by changing the word “likely” to “could”. The importance of this change is that activity that once swayed toward an assumption that negligence took place, will now fall into a more central position on the culpability scales.

It is important that parties keep in mind that rulings made pursuant to the standard set forth in *Pension Committee* are still very fact specific. Specific best practices have yet to be etched in marble. Essentially, the status quo remains, in that you must always act in a reasonable manner, make informed proportionality determinations, document your processes and, when in doubt, preserve and collect.

For the full text of the Amended Order click here:

[LINK] <http://ralphlosey.files.wordpress.com/2010/05/pension-comm-order-may-28-2010.pdf>

[http://www.ediscoverylaw.com/uploads/file/Pension%20Order\(1\).pdf](http://www.ediscoverylaw.com/uploads/file/Pension%20Order(1).pdf)

¹ *Pension Committee of the University of Montreal Pension Plan, et al. v. Banc of America Securities, LLC, et al.*, Case No. 05 Civ. 9016 (S.D.N.Y. January 15, 2010)