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DEVELOPMENTS IN NEW YORK ELECTRONIC DISCOVERY NY

Electronic information is prevalent in today's corporate world. Records are kept and managed electronically, web-sites make access to information and services easy and convenient and business is routinely transacted via email. As such, electronic information discovery has become the central focus in today's litigation.

Although the Federal Rules of Civil Procedure were amended in 2006 to address the nuances and particularities of electronic discovery, practitioners rely on the often cited Southern District of New York decision in the case of *Zubulake v. U.B.S. Warburg LLC*¹ for guidance on how to preserve and exchange electronic information in the context of lawsuits.



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The First Department Adopts *Zubulake*

In the past, New York State courts have been inconsistent in their application of the protocols established in *Zubulake*. For example, at least one court has held that the requesting party should bear the entire cost of locating, retrieving and producing electronically stored information.² Other courts have acknowledged the requesting party's obligation to pay for certain electronic discovery costs, but still required the producing party to pay where the costs are less significant.³

Recently, New York courts have moved toward the more comprehensive application of the *Zubulake* standard.⁴ The First Department has expressly

adopted *Zubulake* in three decisions: *VOOM HD Holdings LLC v. EchoStar Satellite LLC*,⁵ *Ahroner v. Israel Discount Bank of New York*,⁶ and *U.S. Bank, N.A. v. GreenPoint Mtge. Funding, Inc.*⁷ In *VOOM HD Holdings*, the Court adopted the *Zubulake* standard regarding litigation holds and the duty to preserve electronic data, which are important concepts with which corporate and litigation counsel should be especially familiar. In *Ahroner*, the Court adopted the *Zubulake* standard for reviewing a motion for spoliation sanctions involving the destruction of electronic evidence. In *GreenPoint*, the Court adopted the seven-factor test delineated in *Zubulake*, discussed *infra*, which serves as a guide when considering whether cost-shifting is appropriate. These developments are significant because they finally address the inconsistencies surrounding New York State courts' application of electronic discovery rules and provide guidance for resolving discovery disputes.

The Duty to Preserve and the 'Litigation Hold'

In *VOOM HD Holdings v. EchoStar Satellite LLC*, the First Department embraced *Zubulake*, adopting the standard that "once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents[]" (emphasis added).⁸ During a litigation hold, the parties must make a concerted effort to protect and preserve any and all relevant electronic information throughout the duration of the litigation. This can be a daunting prospect, as companies routinely generate a significant amount of electronic information on a daily basis - think of the number of emails alone!

Corporate clients faced with the possibility of litigation are prudent to consult with their attorneys as soon as practicable, as electronically-stored information must be identified, located, preserved and retrieved at the very early stages of a possible dispute - when litigation is "reasonably anticipated." As stated by the *VOOM HD Holdings*



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Court, "a reasonable anticipation of litigation arises when an organization is on notice of a credible probability that it will become involved in litigation, seriously contemplates initiating litigation or when it takes specific actions to commence litigation." Consistent with this standard, the

Uniform Rules of the New York State Trial Courts⁹ and New York Rules of the Commercial Division¹⁰ each require that courts address electronic discovery issues at or before the preliminary conference stage so that the parties can establish the method of exchange and scope of any electronic discovery that may be necessary.

It is both the corporate client's and counsel's duty to identify relevant information and communicate with corporate personnel regarding the preservation of said information. Destruction or loss of electronic information may result in a claim of spoliation (*i.e.* the tampering or destruction of evidence) and penalties related thereto.¹¹ Corporate and litigation counsel could also face monetary and professional consequences resulting from a malpractice claim or disciplinary sanctions for failure to ensure a corporate

client's compliance with electronic discovery rules.¹²

Moreover, an effective spoliation claim allows a Court to instruct the jury to make an "adverse inference" that the missing or destroyed evidence was favorable to the opposing party in the lawsuit. The First Department, in *Ahroner v. Israel Discount Bank of New York*, adopted the *Zubulake* standard for granting spoliation sanctions, providing that the party seeking spoliation sanctions must establish that: (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 moving party's claim or defense.¹³ The "culpable state of mind" includes ordinary negligence and does not require proof that the destruction was reckless or willful.¹⁴

Relevance of the destroyed evidence will be inferred where the evidence was destroyed either intentionally or as a result of gross negligence, "given the inherent unfairness of asking a party to prove that the destroyed evidence is relevant even though it no longer exists and cannot be specifically identified as a result of the spoliator's own misconduct."¹⁵ For example, in *VOOM HD Holdings*, the Court found that the corporate defendant had been on notice of its "substandard document practices," yet continued to employ those practices. This constituted gross negligence and thus, the relevance of the destroyed evidence was presumed and the Court instructed the jury to make an adverse inference against the defendant.¹⁶

Cost-Shifting

Justice Scheindlin's well-reasoned decisions in *Zubulake* are also illustrative of the Court's attempt to balance the competing interests of having broad discovery (a cornerstone of the litigation process) and keeping discovery-related costs manageable in the electronic discovery age. Following *Zubulake*, courts provide for "cost-shifting" to the requesting party when the production of the electronic information involves significant costs or imposes an undue burden on the producing party. The New York practitioner can now look to recent decisions by the First Department which finally embraced the *Zubulake* standard. In *U.S. Bank, N.A. v. GreenPoint Mtge. Funding, Inc.*, the Court recognized that "the adoption of the *Zubulake* standard is consistent with the long-standing rule in New York that the expenses incurred in connection with disclosure are to be paid by the respective producing parties and said expenses may be taxed as disbursements by the prevail-

ing litigant."¹⁷ Although the *GreenPoint* Court did not ultimately shift the discovery costs, the Court stated that "*Zubulake* presents the most practical framework for allocating all costs in discovery, including document production and searching for, retrieving and producing ESI."¹⁸



The comprehensive *Zubulake* "framework" adopted by the First Department includes a seven-factor analysis to consider when deciding whether to shift the costs of discovery: 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.¹⁹ This review provides the Court with a clear understanding of the factors necessary to properly allocate the costs of electronic discovery.

In *Zubulake*, the defendant was required to produce all emails relevant to the case, including those which had been deleted and as such, existed only in backup tapes and other archived media. The cost to retrieve the emails was significant – approximately \$175,000, not including attorney time in reviewing the emails prior to production. The Court distinguished between information that is kept in an "accessible" format (readily usable once retrieved, such as a hard drive) versus an "inaccessible" format (not readily usable once retrieved, such as back-up tapes). The Court determined that discovery costs related to information kept in an accessible format must always be borne by the responding party, whereas courts will consider shifting the discovery costs onto the requesting party where data is inaccessible.

In sum, corporate clients and counsel have an obligation to take affirmative action in identifying and preserving relevant electronic information as soon as they are made aware of a foreseeable litigation or, at the very latest, at the commencement of the lawsuit. Electronic discovery can be quite costly and potentially disruptive to normal operations. As such, because fortune favors the prepared, counsel should advise their corporate clients to consider implementation of a consistent electronic-information storage policy, including archiving technologies and search capabilities, during the regular course of business while addressing their general information technology policies and programs, rather than wait until after a dispute arises. This will enable adequate preservation and cost effectiveness and will alleviate the pressures of locating and retrieving electronic information in time to meet discovery deadlines.

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1. *Zubulake v. UBS Warburg*, 217 F.R.D.309 (S.D.N.Y. 2003).
2. *Lipco Elec. Corp. v. ASG Consulting Corp.*, 4 Misc.3d 1019[A] (Sup.Ct. Nassau Co. 2004).
3. *Response Personnel, Inc. v. Aschenbrenner*, 77 A.D.3d 518 (1st Dept. 2010).
4. *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 27 Misc.3d 1061 (Sup.Ct.N.Y.Co. 2010); *T.D. Bank v. J&T Hobby LLC*, 2010 WL 3617135 (Sup.Ct. Nassau Co., September 1, 2010); *Silverman v. Shaoul*, 30 Misc.3d 491 (Sup.Ct.N.Y.Co 2010).
5. *VOOM HD Holdings LLC v. EchoStar Satellite LLC*, 93 A.D.3d 33 (1st Dept. 2012).
6. *Ahroner v. Israel Discount Bank of New York*, 79 A.D.3d 481 (1st Dept. 2010).
7. *U.S. Bank, NA v. GreenPoint Mtge. Funding, Inc.* 94 A.D.3d 58, 63 (1st Dept. 2012).
8. *VOOM HD Holdings LLC*, 93 A.D.3d at 41.
9. Uniform Rules of the New York State Trial Courts, §202.12(c)(3).
10. 22 NYCRR 202.70.
11. *VOOM HD Holdings LLC v. EchoStar Satellite LLC*, 93 A.D.3d 33 (1st Dept. 2012).
12. Albert Barsocchini, *Electronic Data Discovery Primer*, L. TECH. NEWS, April 28, 2002, <http://www.law.com/jsp/article.jsp?id=1029171611801>.
13. *Ahroner v. Israel Discount Bank of New York*, 79 A.D.3d 481 (1st Dept. 2010).
14. *Id.* at 482.
15. *915 Broadway Associates LLC v. Paul, Hastings, Janofsky & Walker, LLP*, 34 Misc.3d 1229(A) (Sup.Ct. N.Y.Co. 2012), citing *Sage Realty Corp. v. Proskauer Rose LLP*, 275 A.D.2d 11 (1st Dept. 2000).
16. *Id.* at 40-41.
17. *Id.* at 64.
18. *U.S. Bank, NA v. GreenPoint Mtge. Funding, Inc.*, 94 A.D.3d at 63.
19. *Zubulake*, 217 FRD at 322.