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New York Appellate Court Adopts *Zubulake* in Imposing Adverse Inference for Handling of E-Mails

By Seth E. Spitzer

A leading appellate court in New York has now adopted the stringent rules applied in federal courts prescribing an early date by when documents and information must be preserved and imposing the tough sanction of adverse inference for failure to do so. New York Southern District Judge Shira Scheindlin in the seminal case *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003), held that "[o]nce 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." 220 F.R.D. at 218. Although the New York Appellate Division, First Department had previously adopted the *Zubulake* standard when reviewing a motion for sanctions involving the destruction of electronic evidence, *Voom HD Holdings LLC v. EchoStar Satellite LLC*, Index No. 600292/08, 2012 NY Slip Op 00658 (January 31, 2012), marks the first New York State appellate court decision to apply the *Zubulake* standard as it pertains to e-mail preservation and litigation holds. While litigation hold requirements have existed for decades, this is the first instance where a state court has gone the way of the federal courts and sanctioned a party for improper conduct in this regard.

In *EchoStar*, a unanimous First Department panel found that EchoStar Satellite LLC, the owner of the DISH Network satellite broadcasting company, failed in its duty to preserve relevant emails leading up to a contract dispute with Voom HD Holdings LLC, a subsidiary of Cablevision. In adopting *Zubulake*, the First Department held that it "provides litigants with sufficient certainty as to the nature of their obligations in the electronic discovery context and when those obligations are triggered." The First Department found that the trial court "properly invoked the [*Zubulake*] standard for preservation" and affirmed the imposition of sanctions for spoliation.

The dispute in *EchoStar* centered around a 15-year "affiliation agreement" whereby EchoStar agreed to distribute television programming belonging to Voom. As part of the agreement, EchoStar had the right to terminate the agreement if Voom failed to spend $100 million in any calendar year, and also retained the right to conduct an audit of Voom's expenses and investments. In June 2007, EchoStar asserted that Voom had not met its financial commitment in 2006 or had failed to meet its programming obligations and decided to exercise its audit rights and examine Voom's balance sheet. EchoStar notified Voom of its intent "to avail itself of its audit right[s]." In July 2007, EchoStar's Vice Chairman directed an executive to draft a "breach letter" to be sent to Voom. A letter claiming material breaches was ultimately sent to Voom on July 13, 2007. According to EchoStar's privilege log, EchoStar began consulting with in-house litigation counsel regarding this matter on July 23, 2007. Voom, "extremely concerned" that the matter would end up in litigation, implemented a litigation hold, including the automatic preservation of e-mails, on July 31, 2007. On January 30, 2008, EchoStar formally terminated the agreement. Voom commenced litigation the next day.

The first problem for EchoStar is that while Voom implemented a litigation hold in July 2007, EchoStar did not implement a litigation hold until *after* Voom filed suit. The second problem was that the litigation hold

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did not suspend the automatic deletion of emails and, in accordance with EchoStar's retention policy, any e-mails sent and any emails deleted by an EchoStar employee were "automatically deleted and permanently purged after seven days." "It was not until June 1, 2008 — four months after the commencement of the lawsuit, and nearly one year after EchoStar was on notice of anticipated litigation — that EchoStar suspended the automatic deletion of relevant e-mails." By coincidence, a handful of relevant e-mails were salvaged because they were captured in previous searches of certain executives' e-mail accounts taken in connection with other unrelated litigation. Voom moved for spoliation sanctions, arguing that "EchoStar's actions and correspondence demonstrated that it should have reasonably anticipated litigation prior to Voom's commencement of this action."

Justice Richard B. Lowe, III granted Voom's motion for spoliation sanctions at the trial court level finding that "EchoStar's concession that termination would lead to litigation, together with the evidence establishing EchoStar's intent to terminate, its various breach notices sent to VOOM HD, its demands and express reservation of rights, all support the conclusion that EchoStar must have reasonably anticipated litigation prior to the commencement of this action." Citing *Zubulake*, Justice Lowe concluded that EchoStar should have *reasonably anticipated* litigation no later than June 20, 2007, the date that EchoStar's corporate counsel sent Voom a letter containing EchoStar's express notice of breach. The trial court also noted that in addition to "failing to preserve electronic data upon reasonable anticipation of litigation, no steps whatsoever had been taken to prevent the purging of emails by employees during the four-month period after commencement of the action" and instead relied on employees to determine which e-mails were relevant and to preserve them by moving them into separate e-mail folders thereby removing them "from EchoStar's pre-set path of destruction."

EchoStar countered Voom's request for sanctions by arguing that it had no reasonable anticipation of litigation because the parties were "seeking an 'amicable business solution.'" Justice Lowe did not accept this, stating "EchoStar's argument ignores the practical reality that parties often engage in settlement discussions before and during litigation, but this does not vitiate the duty to preserve. EchoStar's argument would allow parties to freely shred documents and purge e-mails, simply by faking a willingness to engage in settlement negotiations." It also did not sit well with Justice Lowe that EchoStar had once before been sanctioned for the same "bad faith" conduct in a prior case and was thus on notice of its "substandard document practices…, yet continued those very same practices."

Justice Lowe ruled that a negative or adverse inference against EchoStar at trial was the appropriate sanction and the First Department agreed. The First Department rejected EchoStar's argument that the *Zubulake* standard is "vague and unworkable because it provides no guidance for what 'reasonably anticipated' means." EchoStar argued that "in the absence of pending litigation or notice of a specific claim defendant should not be sanctioned for discarding items in good faith and pursuant to normal business practices." This, too, was rejected with the court stating "[t]o adopt a rule requiring actual litigation or notice of a specific claim ignores the reality of how business relationships disintegrate… The 'reasonable anticipation of litigation,' as discussed by *Zubulake* and its progeny, is such time when a party is on notice of a credible probability that it will become involved in litigation." Agreeing with Justice Lowe, the First Department concluded that EchoStar should have reasonably anticipated litigation as early as the date it sent a letter to Voom demanding an audit and threatening termination, especially in light of testimony from EchoStar's in-house counsel that it knew Voom would commence litigation if EchoStar terminated the agreement and coupled with the fact that EchoStar had previously been sanctioned for similar conduct.

As for the mechanics of the litigation hold, the First Department provided this guidance:

> Regardless of its nature, a hold must direct appropriate employees to preserve all rel-

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> evant records, electronic or otherwise, and create a mechanism for collecting the preserved records so they might be searched by someone other than the employee. The hold should, with as much specificity as possible, describe the ESI at issue, direct that routine destruction policies such as auto-delete functions and rewriting over e-mails cease, and describe the consequences for failure to so preserve electronically stored evidence. In certain circumstances, like those here, where a party is a large company, it is insufficient, in implementing such a litigation hold, to vest total discretion in the employee to search and select what the employee deems relevant without the guidance and supervision of counsel.

In sum, an adverse inference sanction was deemed "appropriate and proportionate" "in light of EchoStar's culpability and the prejudice to Voom. The record shows that EchoStar acted in bad faith in destroying electronically stored evidence."

This adoption by a leading appellate court in New York is significant. Parties now, more than ever, must be acutely aware of their litigation hold and e-mail preservation practices or run the risk of an imposition of the sanction of an adverse inference. An important lesson for in-house counsel and litigators alike is that engaging in good faith negotiations to resolve or stave off a potential dispute does not vitiate the duty to preserve electronically stored information. Accordingly, litigation hold and document preservation practices must firmly be in place and put into effect at the earliest possible moment when there is a prospect of litigation. ◆

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