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Justice Sallie Manzanet-Daniels

FIRST DEPARTMENT ADOPTS *ZUBULAKE* IN THE ELECTRONIC DISCOVERY CONTEXT

*Justice Sallie Manzanet-Daniels**

In *Voom HD Holdings LLC v. EchoStar Satellite L.L.C.*,[1] the First Department of the New York State Appellate Division addressed when the duty to preserve electronically-stored information ("ESI") is triggered, and the showing necessary to impose sanctions on a party who destroys ESI.[2] In *U.S. Bank National Ass'n v. Greenpoint Mortgage Funding, Inc.*,[3] issued shortly after *Voom*, the First Department addressed the appropriate allocation of the costs of production of ESI.[4]

The First Department adopted the standard for preservation set forth in *Zubulake v. UBS Warburg LLC*,[5] as further explicated in subsequent cases such as *Pension Committee of University of Montreal Pension Plan v. Banc of America Securities, LLC*.[6] Under the *Zubulake* standard, "[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."[7] This standard comports with precedent in the traditional discovery context, and is flexible enough to allow consideration of circumstances on a case-by-case basis, while allowing parties clear guidance concerning the scope of their responsibilities. In *Voom*, the First Department ruled that defendant EchoStar should have reasonably anticipated litigation as of the date EchoStar sent a letter to Voom demanding an audit and threatening termination of the parties' affiliation agreement.[8] However, EchoStar did not issue a litigation hold on electronic evidence until after

* Justice Manzenet-Daniels is Associate Justice of the N.Y. State Appellate Division, First Department.

1. 939 N.Y.S.2d 321 (App. Div. 2012).
2. *Id.* at 324.
3. 939 N.Y.S.2d 395 (App. Div. 2012).
4. *Id.* at 396.
5. 220 F.R.D. 212 (S.D.N.Y. 2003).
6. 685 F. Supp. 2d 456 (S.D.N.Y. 2010).
7. *Zubulake*, 220 F.R.D. at 218.
8. *Voom HD Holdings LLC v. EchoStar Satellite L.L.C.*, 939 N.Y.S.2d 321, 329 (App. Div. 2012).

the action had been commenced, and did not cease the automatic destruction of e-mails until four months after the action had been instituted.[9]

In determining whether to impose sanctions for spoliation of ESI, the First Department stated that a court must consider: (1) whether "the party with control over the evidence had an obligation to preserve it at the time it was destroyed"; (2) whether the ESI was destroyed with a "culpable state of mind"; and (3) whether the destroyed ESI "was relevant to the [other] party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense."[10] A threshold consideration in any such case, often overlooked or simply presumed, is whether the party seeking discovery sanctions has demonstrated discovery relevance—namely, whether any material "destroyed was likely relevant even for purposes of discovery."[11] As one court observed, "[f]or sanctions to be appropriate, it is a necessary, but insufficient, condition that the sought-after evidence *actually existed and was destroyed*."[12]

In determining a party's culpable state of mind, *Zubulake* and its progeny provide guidance. Failures which may support a finding of gross negligence, once the duty to preserve ESI is triggered, include: "(1) the failure to issue a written litigation hold, when appropriate; (2) the failure to identify all of the key players and to ensure that their electronic and other records are preserved; and (3) the failure to cease the deletion of e-mails."[13] As one court noted:

> in the world of electronic data, the preservation obligation is not limited simply to avoiding affirmative acts of destruction. Since computer systems generally have automatic deletion features that periodically purge electronic documents such as e-mail, it is necessary for a party facing litigation to take active steps to halt that process.[14]

In *Voom*, the First Department also discussed the nature of an appropriate litigation hold.[15] While recognizing that in certain instances, for example, the case of a small company with only a few employees, an oral hold would suffice; the First Department stated that it was

9. *Id.* at 326.

10. *Id.* at 330.

11. Orbit One Commc'ns, Inc. v. Numerex Corp., 271 F.R.D. 429, 440 (S.D.N.Y. 2010).

12. *Id.* at 441 (quoting Farella v. City of New York, No. 05 Civ. 5711(NRB), 2007 WL 193867, at *2 (S.D.N.Y. Jan. 25, 2007)).

13. *Voom*, 939 N.Y.S.2d at 330.

14. Convolve, Inc. v. Compaq Computer Corp., 223 F.R.D. 162, 175-76 (S.D.N.Y. 2004).

15. *Voom*, 939 N.Y.S.2d at 328.

nonetheless best practice to reduce a litigation hold to writing.[16] The litigation hold should direct the appropriate employees "to preserve all relevant records, electronic or otherwise, and create a mechanism for collecting the preserved records . . . . The hold should, with as much specificity as possible, describe the ESI at issue, [and] direct that routine destruction policies such as auto-delete functions and rewriting over e-mails cease."[17] In implementing such a hold, it is generally insufficient "to vest total discretion in [an] employee to search and select what [records] the employee deems relevant without the guidance and supervision of counsel."[18] While earlier federal district court cases suggested that the failure to issue a litigation hold in and of itself constituted gross negligence, the Second Circuit recently clarified in *Chin v. Port Authority of New York and New Jersey*[19] that the failure to institute a litigation hold does not constitute gross negligence per se.[20]

The degree of culpability and relevance factors are often entwined. In *Voom*, the First Department followed *Pension Committee* and other cases in ruling that relevance may be presumed or inferred depending upon the party's degree of culpability.[21] Where a party intentionally destroys ESI, a presumption generally arises that the missing evidence would have been favorable to the party seeking sanctions. If a party's destruction of ESI may be characterized as merely negligent, however, the party seeking sanctions is not entitled to an inference, and must prove the relevance of the destroyed ESI. Where a party is grossly negligent in destroying ESI, courts differ as to whether such culpable conduct compels or merely permits a presumption of relevance, and whether any such presumption is rebuttable. According to the federal district court in *Pension Committee*, any such presumption of relevance is rebuttable.[22] The federal district court noted that a spoliating party could rebut the presumption:

> by demonstrating that the innocent party had access to the evidence alleged to have been destroyed or that the evidence would not support the innocent party's claims or defenses. If the spoliating party demonstrates to a court's satisfaction that there could not have been

16. *Id.* at 328 n.2.
17. *Id.* at 328 (footnote omitted).
18. *Id.*
19. 685 F.3d 135 (2d Cir. 2012).
20. *Id.* at 162.
21. *Voom*, 939 N.Y.S.2d at 327, 331; Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 685 F. Supp. 2d 456, 467-68 (S.D.N.Y. 2010).
22. *Pension Comm.*, 685 F. Supp. 2d at 468.

> any prejudice to the innocent party, then no jury instruction will be warranted, although a lesser sanction might still be required.[23]

In *Voom*, the First Department ruled that "[a]n adverse inference was a reasonable sanction in light of EchoStar's culpability and the prejudice to Voom."[24] The court noted that EchoStar had been sanctioned for identical behavior in a previous case, demonstrating "that EchoStar was well aware of its preservation obligations and of the problems associated with its automatic deletion of e-mails."[25] The First Department found that EchoStar's destruction of e-mails "was grossly negligent, if not intentional."[26] As such, the relevance of the destroyed evidence was presumed.[27] The First Department noted, in any event, that Voom had in fact been prejudiced, since "snapshot" e-mails, "only fortuitously recovered," demonstrated EchoStar's intention to declare various breaches of the parties' affiliation agreement.[28] The First Department found that the existence of the snapshot e-mails "permitted the inference that the unrecoverable e-mails, of which the snapshots were but a representative sampling, would have also been relevant."[29]

The First Department rejected EchoStar's argument that Voom could not have been prejudiced because "the missing e-mails were merely cumulative of other evidence."[30] The court rejected the premise that "since Voom had other means to prove its case," it had not suffered prejudice.[31] In the First Department's view, the motion court's sanction—the imposition of an adverse inference rather than a more severe sanction such as striking the answer—had already taken this evidentiary overlap into account.[32]

In *U.S. Bank National Ass'n*, issued shortly after *Voom*, the First Department adopted the *Zubulake* framework regarding allocation of the costs of production of ESI.[33] The court ruled that the producing party should bear the initial costs associated with searching for, retrieving, and producing electronically-stored information and physical documents.[34] Thereafter, a court may consider whether cost-shifting may in the

23. *Id.* at 469.
24. *Voom*, 939 N.Y.S.2d at 331.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.* at 331-32.
29. *Id.*
30. *Id.* at 332.
31. *Id.*
32. *Id.*
33. U.S. Bank Nat'l Ass'n v. Greenpoint Mortg. Funding, Inc., 939 N.Y.S.2d 395, 399 (App. Div. 2012).
34. *Id.*

exercise of its discretion be appropriate, evaluating the seven factors articulated by *Zubulake*, namely:

> (1) [t]he extent to which the request is specifically tailored to discover relevant information; (2) [t]he availability of the information from other sources; (3) [t]he total cost of production, compared to the amount in controversy; (4) [t]he total cost of production, compared to the resources available to each party; (5) [t]he relative ability of each party to control costs and its incentive to do so; (6) [t]he importance of the issues at stake in the litigation; and, (7) [t]he relative benefits to the parties of obtaining the information.[35]

Together, *Voom* and *U.S. Bank National Ass'n*, address important issues in the electronic discovery context, including the scope of a party's duties and when those duties are triggered, the factors governing imposition of an appropriate sanction for spoliation of ESI, the content and scope of an appropriate litigation hold, and the allocation of the costs of production in the context of electronic discovery. In adopting the *Zubulake* framework, the First Department followed the majority of federal courts considering the issue, furnishing litigants with clarity concerning their obligations in the electronic discovery context.

35. *Id.* (alterations in original) (quoting Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 322 (S.D.N.Y. 2003)) (internal quotation marks omitted).

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