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New York State Court Applies *Zubulake* Preservation Standard

Appellate court finds that parties reasonably anticipating litigation, even in the face of settlement discussions, must preserve information.

When a business relationship turns sour, at what point must a party put in place a litigation hold? In a recent decision applying the federal "reasonable anticipation of litigation" standard, a New York state appellate court held that requiring actual litigation or notice of a specific claim before imposing a duty to preserve information "ignores the reality of how business relationships disintegrate" and "would encourage parties who actually anticipate litigation, but do not yet have notice of a 'specified claim' to destroy their documents with impunity."

In its January 31, 2012, ruling in *Voom v. EchoStar*[1] the New York Supreme Court, Appellate Division, First Department, affirmed an order of the Supreme Court, New York County, imposing an adverse inference spoliation sanction for failure to implement a timely litigation hold. In doing so, the appellate court ruled that the "reasonable anticipation of litigation" standard for triggering preservation set forth in *Zubulake IV*[2] "is harmonious with New York precedent in the traditional discovery context, and provides litigants with sufficient certainty as to the nature of their obligations in the electronic discovery context and when those obligations are triggered."

Background

EchoStar, a provider of direct broadcast satellite television services, entered into a 15-year programming distribution agreement with Voom, which EchoStar could terminate if Voom failed to spend $100 million in any calendar year. In June 2007, EchoStar's senior corporate counsel advised Voom of EchoStar's intent "to avail itself of its audit right[s]." The following day, EchoStar sent another letter expressing its belief that Voom failed to spend $100 million in 2006, thus entitling EchoStar to terminate the agreement, and reserving EchoStar's "rights and remedies." After a series of negotiations and accusations between the parties, in January 2008, EchoStar formally terminated the agreement. Voom sued the next day, alleging EchoStar falsely claimed Voom had fallen short of its $100 million commitment.

According to its privilege log, EchoStar consulted with in-house litigation counsel regarding the agreement dispute as early as June 2007 and regarding potential litigation in October 2007. Despite this consultation and months of often contentious exchanges, EchoStar did not implement a litigation hold until after Voom filed suit, and the hold did not suspend automatic destruction of email until June 2008. Even though it had been sanctioned for similar conduct in a prior landmark case,[3] EchoStar continued on the same "pre-set path of destruction." For four months after litigation commenced, and almost a year after deciding to declare a breach of the Voom contract, EchoStar continued the automatic destruction of any sent or deleted emails after seven days and relied on employees to determine which emails were relevant and to preserve those emails by moving them to a separate folder.

From "snapshots" of certain executives' email accounts taken in connection with other litigations, Voom discovered emails reflecting EchoStar's intention to terminate the agreement. Voom moved for spoliation

1. *VOOM HD Holdings LLC v. EchoStar Satellite L.L.C.*, 93 A.D.3d 33 (N.Y. App. Div. 2012).
2. *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003).
3. *Broccoli v. EchoStar Commc'ns Corp.*, 229 F.R.D. 506 (D. Md. 2005).

sanctions, which the lower court granted.

Lower Court Decision

EchoStar asserted that it did not anticipate litigation because it was seeking an "amicable business solution." The lower court rejected this argument, noting "EchoStar's argument would allow parties to freely shred documents and purge e-mails, simply by faking a willingness to engage in settlement negotiations." Instead, the lower court found EchoStar should reasonably have anticipated litigation in June 2007 when it sent a letter to Voom containing notice of a breach, a demand, and a reservation of rights well before Voom filed suit. The court further relied upon EchoStar's own work product claims as evidence that EchoStar anticipated litigation.

The lower court determined that, at a minimum, EchoStar's conduct constituted gross negligence. Even though EchoStar was on notice of its "substandard document practices" from having been found guilty of "gross spoliation" for failing to suspend its automatic deletion of emails or otherwise preserve emails in a prior case, EchoStar failed to change its practices. Given this gross negligence, relevance of the destroyed data could be presumed, although the evidence showed that it was indeed relevant. In assessing the sanction, the lower court refused to strike EchoStar's answer because other evidence remained available to Voom and instead imposed a negative or adverse inference charge.

Appellate Court Ruling

On appeal, the First Department affirmed the sanction and ruled that the lower court properly invoked the federal standards for preservation set forth by Judge Shira Scheindlin in *Zubulake IV* and *Pension Committee*,[4] which the First Department noted are widely followed and have been adopted by courts in all four federal districts in New York.

In its ruling, the First Department found that the lower court properly determined that EchoStar should have reasonably anticipated litigation as early as June 2007 and certainly no later than when it formally terminated the agreement; that EchoStar was grossly negligent in failing to implement a litigation hold until after litigation had already commenced; that EchoStar was grossly negligent in failing to take snapshots of relevant email accounts until four days after the action commenced; that EchoStar was grossly negligent in failing to cease the automatic deletion of emails until four months after the lawsuit was filed; and that EchoStar did not implement an appropriate litigation hold until June 2008, approximately four months after the litigation commenced. These failures entitled a finder of fact to presume the relevancy of the destroyed electronic data, making an adverse inference charge appropriate.

Implications

Besides confirming the application of the federal "reasonable anticipation of litigation" standard for preservation (i.e., such time when a party is on notice of a credible probability that it will become involved in litigation), this case provides practical guidance on several additional matters:

- A party seeking an "amicable business solution" to a dispute where there is nevertheless a credible probability of litigation is not relieved of its duty to preserve evidence.
- A party must promptly suspend its automatic email deletion function or otherwise preserve emails as part of a litigation hold.
- A party should implement a litigation hold when it first claims work product protection.
- Relying solely on employees to preserve evidence does not meet the standard for a litigation hold.

4. *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC.*, 685 F. Supp. 2d 456, 473 (S.D.N.Y. 2010).

- In determining gross negligence, a court may consider events from prior cases that establish a "pattern of misbehavior."
- Where a party acted in bad faith or with gross negligence in destroying evidence, the relevance of the evidence is presumed and need not be demonstrated.

At a time when the New York state court system is increasingly turning its attention to electronic discovery, the explicit adoption of the federal standard by the state court suggests that litigants should take a uniform approach to preservation, regardless of venue.

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