First Department Provides "High-Definition" Clarity for Document Preservation Standard

In *Voom HD Holdings LLC v. EchoStar Satellite L.L.C.*, No. 600292/08 (1st Dep't Jan. 31, 2012), the First Department became the first New York state appellate court to adopt the preservation of evidence standard set forth in *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003). In *Zubulake*, Judge Shira Scheindlin 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."

Background Facts

Voom HD created a group of high-definition television channels that were carried on EchoStar's DISH Network. In November 2005, Voom and EchoStar entered into an affiliation agreement for EchoStar to distribute Voom's programming for a 15-year term. Under the agreement, EchoStar had to include the Voom programming in its standard pricing package and could not tier the Voom channels in order to charge customers a premium for the Voom programming. In exchange, Voom promised to spend at least $100 million per calendar year on the service. If Voom failed to meet this level of spending, EchoStar had the right to terminate the agreement. *Slip op*. at 2.

In June 2007, EchoStar decided that the Voom deal was "a 'mistake' by prior senior management" and began seeking a way to either terminate the agreement or tier Voom's channels to make them more profitable. *Id*. Over the next eight months, EchoStar: (1) sent several letters to Voom claiming that Voom breached its obligation to spend $100 million; (2) exercised certain audit rights under the agreement; (3) discussed internally the possibility of litigation; (4) decided to terminate the agreement; and (5) on January 30, 2008, terminated the agreement. *Id*. at 3–4. EchoStar's termination of the agreement led to litigation. The next day, on January 31, 2008, Voom filed suit against EchoStar in the New York Supreme Court, claiming that the termination breached the agreement. *Id*.

EchoStar issued a litigation hold shortly after the litigation commenced, but did not disable its automatic deletion of e-mails for four months. *Id*. at 4–5, 8. During that time, EchoStar's e-mail system continued to permanently delete any e-mail kept in the user's sent e-mail folder or deleted e-mail folder for longer than seven days. *Id*. at 4. Rather than disable the auto-delete function, EchoStar asked its employees to move potentially relevant e-mails to e-mail folders that were not subject to the auto-delete. *Id*. at 4–5.

EchoStar's preservation efforts proved insufficient. EchoStar had not instituted a litigation hold prior to the lawsuit, even though it anticipated that litigation would result from its actions. Its February 2008 hold was not effective, and its e-mails continued to be auto-deleted even after the hold was issued. Indeed, the court noted that EchoStar was able to produce certain relevant e-mails only because it took snapshots of relevant e-mail accounts for other unrelated litigations. *Id*. at 4.

Voom moved for sanctions for EchoStar's spoliation of 2007 and 2008 e-mails. The motion court found that, under the *Zubulake* standard, EchoStar should have reasonably anticipated litigation as early as June 2007 and certainly no later than the date the complaint was filed. *See id*. at 10. The court found that EchoStar was grossly negligent in failing to implement a litigation hold until after litigation had already been commenced and that EchoStar did not implement an appropriate litigation hold until June 2008, approximately four months after the complaint was filed. *Id*. The court held that EchoStar's failures entitled the finder of fact to presume that the destroyed electronic data was relevant and that an adverse inference charge was an appropriate sanction. *Id*. at 5, 10–11.

First Department's Opinion

On appeal, the First Department affirmed, holding that the motion court properly invoked the standard for preservation set forth in *Zubulake*. *Id*. at 7, 10–11. EchoStar and *amicus curiae*, Lawyers for Civil Justice, urged the appellate court to reject the *Zubulake* standard as "vague and unworkable because it provides no guideline for what 'reasonably anticipated' means." *Id*. at 7. They argued that, absent actual litigation or notice of a specific claim, EchoStar should not be sanctioned for discarding documents pursuant to normal business practices. *Id*. The First Department rejected this argument, noting that even where "[s]ides to a business dispute

may appear, on the surface, to be attempting to work things out," they may be "preparing frantically for litigation behind the scenes." *Id*. Parties who anticipate litigation, but do not yet have notice of a "specific claim," should not be permitted to destroy their documents with impunity. *Id*.

The First Department found that EchoStar should have reasonably anticipated litigation as of June 20, 2007, the date on which it sent a letter to Voom demanding an audit and threatening termination of the agreement. *Id*. The testimony of EchoStar's in-house litigation counsel established that EchoStar knew, at that point in time, that Voom would sue if EchoStar terminated the agreement. *Id*.

The court's conclusion was apparently bolstered by other factors. First, the chronology showed that EchoStar had repeatedly threatened to terminate the agreement and that the discussions between the two sides were contentious. *See id*. at 7–8. In contrast to EchoStar, by July 31, 2007, Voom's extreme concern that the matter would reach litigation led it to issue a written document hold and disable its auto-deletion of e-mails. *Id*. at 3.

Second, during discovery in the case, EchoStar had claimed "work product" protection for documents prepared in anticipation of the "potential litigation" as early as November 16, 2007. *Id*. at 4. The First Department observed that if EchoStar had the contemplation of litigation necessary to establish a work product claim, it reasonably anticipated litigation so as to trigger its document preservation obligations. *Id*.

Third, the First Department was troubled by EchoStar's failure to "suspend its automatic-deletion function or otherwise preserve e-mails as part of [its] litigation hold." *Id*. at 8. While EchoStar instructed employees to circumvent the auto-delete, the court found that its reliance on individual employees was not sufficient in this case to satisfy its document preservation obligation. *Id*. at 6. The court found EchoStar's failure to comply with this obligation to be particularly egregious because EchoStar had previously been sanctioned for similar conduct in *Broccoli v. EchoStar Communications Corp*., 229 F.R.D. 506 (D. Md. 2005). *Id*. at 8.

High-Definition Clarity for the Document Preservation Standard

The court's opinion clarifies that litigants in the First Department are subject to the same "reasonable anticipation of litigation" standard that applies in the federal courts serving New York. The court's opinion also makes clear that a "reasonable anticipation of litigation" may arise well before the commencement of a lawsuit. Parties are often reluctant to issue a litigation hold if they think they may be able to work things out, but the First Department's opinion indicates that this is no guarantee. If, under the circumstances, you reasonably anticipate that the dispute will proceed to litigation, you must begin preserving potentially relevant information.

We have moved into the age of high-definition television, yet too many organizations continue to follow document preservation plans from the days of black-and-white TV. Hughes Hubbard's e-Discovery Group can assist clients in bringing their document preservation systems up to date and ensuring that they can effectively preserve potentially relevant data when necessary.

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