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Voom v. EchoStar – First Department Analyzes When Duty to Preserve Evidence is Triggered

BY KEVIN P. BROUGHEL & JAMES B. WORTHINGTON

In the recent New York Appellate Division decision of *Voom HD Holdings LLC v. EchoStar Satellite L.L.C.*[1], the First Department stated that the New York standard establishing when a party's duty to preserve evidence is triggered is the same as the standard set forth in the landmark S.D.N.Y. decision of *Zubulake v. UBS Warburg LLC*[2]: "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."[3] The decision highlights a number of important issues for parties involved in preservation disputes.

The facts of *Voom HD* are relatively straightforward. In 2005, Voom and EchoStar entered into an "affiliation agreement" requiring EchoStar to include Voom's channels as part of EchoStar's most widely distributed HD television programming package. The agreement permitted EchoStar to terminate the agreement if Voom did not meet certain spending minimums in any calendar year. It also allowed EchoStar to audit Voom's expenses and investments. By mid-2007, EchoStar allegedly determined that the affiliation agreement was no longer profitable, and as a result began to claim that Voom had failed to meet its contractual obligations. On June 19, 2007, EchoStar's vice chairman asked his subordinates "What are the breach remedies?" and told them to "prepare the breach notice." That day and the next, EchoStar's senior corporate counsel sent two letters to Voom, advising Voom that EchoStar intended "to avail itself of its audit right[s]," that "EchoStar is ... entitled to terminate the Agreement," and reserving EchoStar's "rights and remedies." In the following months, EchoStar sent additional correspondence to Voom claiming "material breaches," began consulting with in-house litigation counsel about "potential litigation," and threatened "to terminate the Agreement, effective immediately." Echostar's privilege log included privilege claims relating to potential litigation starting on November 16, 2007, the date of its breach letter to Voom. On January 30, 2008, EchoStar formally terminated the agreement and Voom filed its lawsuit the next day. EchoStar did not issue a litigation hold until Voom sued, and its hold initially consisted only of a notice to employees. EchoStar failed to suspend routine automatic deletion of e-mails until four months after the lawsuit was filed. As a result of EchoStar's actions (and inactions), EchoStar e-mails both before and after the start of the lawsuit were destroyed.

Voom moved for spoliation sanctions in the trial court, asserting that EchoStar's duty to preserve was triggered when it should have reasonably anticipated litigation — prior to Voom's filing of a complaint. The trial court agreed. Citing *Zubulake*, the court found that EchoStar should have reasonably anticipated litigation no later than June 20, 2007, the date EchoStar's corporate counsel "sent Voom a written letter containing EchoStar's express notice of breach, a demand, and an explicit reservation of

rights." The court also faulted EchoStar for failing to prevent deletion of e-mails by employees for four months after the filing of the lawsuit. The court determined that EchoStar's conduct was, at a minimum, grossly negligent, and that an adverse inference against EchoStar was an appropriate sanction.

The First Department affirmed, rejecting EchoStar's argument that the *Zubulake* "reasonably anticipates standard" was "vague and unworkable" and should be replaced with a standard requiring a litigation hold only when there is pending litigation or notice of a specific claim. The Court dismissed as "manifestly without merit" EchoStar's arguments that *Zubulake* was a departure from settled law or created an unworkable standard. The Court noted that "*Zubulake's* reasonable anticipation trigger for preservation has been widely followed" and the "reasonable anticipation of litigation" standard, as articulated in *Zubulake* and other cases, "is such a time when a party is on notice of a credible probability that it will become involved in litigation." The Court stated:

> To adopt a rule requiring actual litigation or notice of a specific claim ignores the reality of how business relationships disintegrate. Sides to a business dispute may appear, on the surface, to be attempting to work things out, while preparing frantically for litigation behind the scenes. EchoStar and amicus's approach would encourage parties who actually anticipate litigation, but do not yet have notice of a 'specific claim' to destroy their documents with impunity.

The Court thus agreed with the trial court that "EchoStar should have reasonably anticipated litigation as of June 20, 2007, the date it sent a letter to Voom demanding an audit and threatening termination of the contract." Accordingly, the First Department sanctioned EchoStar for its failure to issue a litigation hold until after the lawsuit was filed, for initially relying on non-attorney employees to determine what documents to preserve, and for failing to halt the automatic destruction of e-mails until four months later.

The First Department also affirmed the sanction of an adverse inference "in light of EchoStar's culpability and the prejudice to Voom." The Court found EchoStar acted in bad faith because, based on its prior litigation experience, it was "well aware of its preservation obligations and of the problems associated with its automatic deletion of e-mails that could be relevant to litigation to which it was a party." Further, citing to the 2010 *Pension Committee of the University of Montreal Pension Plan*[4] opinion, the Court wrote:

> In evaluating a party's state of mind, *Zubulake* and its progeny provide guidance. Failures which support a finding of gross negligence, when the duty to preserve electronic data has been 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-mail.

Applying these standards, the Court concluded EchoStar was at least grossly negligent:

> The destruction of e-mails during the critical time when the parties' business relationship was unquestionably deteriorating reflects, at best, gross negligence. Further, the destruction of e-mails after litigation had been commenced, when EchoStar was unquestionably on notice of its duty to preserve, was grossly negligent, if not intentional.

Because EchoStar acted in bad faith or with gross negligence, the Court relieved Voom of any obligation to prove the relevance of deleted e-mails (although it also found the handful of e-mails which had been recovered "highly relevant" and permitted the inference that the destroyed e-mails would have been similarly relevant). Finally, the First Department found that Voom was prejudiced, as EchoStar deprived Voom of internal communications during the critical time when EchoStar was searching for ways to terminate its contract with Voom.

The First Department's ruling has a number of important implications for parties involved in preservation disputes. First, the decision states that under New York law, a party is obligated to preserve relevant evidence when it "reasonably anticipates litigation." Actual litigation or notice of a specific claim is not required — when a party is on notice of a credible probability that it will become involved in litigation, the duty to preserve attaches. Second, parties act at their peril if they rely on non-attorney employees to properly institute litigation holds or fail to take measures to suspend automated systems whose operation could lead to the destruction of relevant evidence. An appropriate litigation hold requires oversight and management from experienced counsel and IT specialists to ensure relevant evidence is preserved. Finally, the decision provides guidance as to the factors New York state courts will consider in determining whether spoliation rises to the level of bad faith or gross negligence, and it reinforces prior cases holding that relevance may be presumed on a finding of bad faith or grossly negligent spoliation.

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If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings New York lawyers:

Kevin P. Broughel
1.212.318.6483
kevinbroughel@paulhastings.com

James B Worthington
1.212.318.6416
jamesworthington@paulhastings.com

[1] --- N.Y.S.2d ----, 2012 WL 265833 (N.Y.A.D. 1 Dept.), 2012 N.Y. Slip Op. 00658.

[2] 220 F.R.D. 212 (S.D.N.Y. 2003).

[3] Id. at 218.

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