COMMERCIAL LITIGATION

Litigation Holds and Preservation of ESI in Light of VOOM HD Holdings, LLC

By Leo K. Barnes Jr.

In commercial litigation cases, issuing a litigation hold to preserve electronically stored information (ESI) is paramount once a party reasonably anticipates that litigation may ensue, which may be well before litigation actually commences. In the electronic discovery context, the First Department's decision in *Voom HD Holdings, LLC v. EchoStar Satellite, LLC*, 93 A.D.3d. 33, 939 N.Y.S.2d 321 (1st Dept. 2012), recently adopted the federal standard for preservation of electronically stored information as promulgated in *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003).

In *Voom*, plaintiff VOOM HD Holdings, LLC moved for discovery sanctions against defendant EchoStar Satellite, LLC ("EchoStar") for the spoliation of electronic e-mail evidence, where a litigation hold of the automatic deletion of employee e-mails was not instituted until one year after EchoStar was on notice of anticipated litigation between the parties.

At the outset, the court noted that:

> This case requires us to determine the scope of a party's duties in the electronic discovery context, and the appropriate sanction for failure to preserve electronically stored information (ESI). We hold that in deciding these questions, the motion court properly invoked the standard for preservation set forth in *Zubulake v UBS Warburg LLC* (220 FRD 212 [SD NY 2003]; *Pension Comm. of Univ. of Montreal Pension Plan v Banc of Am. Sec.*, 685 F Supp 2d 456, 473 [SD NY 2010]), which has been widely adopted by federal and state courts. In *Zubulake*, the federal district court stated, "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" (*Zubulake*, 220 FRD at 218). The *Zubulake* standard 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.

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According to the decision, EchoStar not only failed to preserve electronic data upon reasonable anticipation of litigation, but it also wholly failed to prevent the purging of e-mails by its employees during the four-month period after commencement of the action. The *Voom* Court explained:

> A party seeking sanctions based on the spoliation of evidence must demonstrate: (1) that the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a "culpable state of mind"; and finally, (3) that the destroyed evidence was relevant to the party's claim or defense such that the tryer of fact could find that the evidence would support that claim or defense. A "culpable state of mind" for purposes of a spoliation sanction includes ordinary negligence. 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. The intentional or willful destruction of evidence is sufficient to presume relevance, as is destruction that is the result of gross negligence. (Id., at 45).

The *Voom* Court also explained when a duty to initiate a litigation hold accrues and what the hold must entail:

> Once a party reasonably anticipates litigation, it must, at a minimum, institute an appropriate litigation hold to prevent the routine destruction of electronic data. Regardless of its nature, a hold must direct appropriate employees to preserve all relevant 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. (Id., at 41-42).

The *Voom* Court ultimately found that EchoStar's conduct was "gross negligence at the very least" (Id., at 41) and that EchoStar's reliance on its employees to preserve evidence "does not meet the standard for a litigation hold." (Id., at 44). As such, the court held that an adverse inference was an appropriate sanction for EchoStar's bad faith, or at least gross negligence in not implementing "litigation hold" to prevent routine destruction of relevant information once it could reasonably anticipate litigation.

In this light, counsel must advise clients that a duty to preserve electronically stored information may arise prior to the commencement of litigation, and to send a litigation hold letter as soon as litigation is anticipated, in order to avoid such discovery sanctions as an adverse inference or even a striking of the pleadings.

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