



## Alerts

### New York Appellate Court Adopts Zubulake, Imposes Spoliation Sanctions

February 22, 2012

*Lawyers for the Profession® Alert*

*Voom HD Holdings LLC v. Echostar Satellite LLC*, 2012 WL 265833 (N.Y.A.D. 1 Dept. 2012)

#### Brief Summary

A New York Supreme Court, Appellate Division, unanimously adopted a rule promulgated by the U.S. District Court for the Southern District of New York which requires a party to cease destruction of potentially relevant evidence by issuing a litigation hold letter when the party reasonably anticipates litigation—the failure to do so resulting in a high risk of sanctions.

#### Complete Summary

In a breach of contract action between a television programmer and a distributor, the former sought sanctions against the latter for spoliation of evidence. The New York Supreme Court, Appellate Division, First Department, affirmed the imposition of sanctions, and, in the process, adopted the legal standard set forth in *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003).

A party seeking sanctions for spoliation of evidence must establish (1) an obligation to preserve the evidence, (2) a culpable mental state, and (3) relevance to the moving party's claim(s). The court, applying *Zubulake*, noted that the obligation to preserve evidence is triggered when a party reasonably anticipates litigation. At that point, the party must institute a litigation hold letter which, among other requirements, directs employees to preserve all potentially relevant information (e.g., by suspending the automatic deletion of electronically stored information). The distributor did not issue a litigation hold letter until four months after the instant litigation was initiated. Again applying *Zubulake*, the court held that failure to timely issue a litigation hold letter is indicative of a grossly negligent mental state.

The court then held, under the third prong of the spoliation test, that gross negligence results in a rebuttable presumption that the destroyed evidence was relevant. The distributor attempted to rebut that presumption by arguing that the missing evidence was cumulative of other evidence, and that the television programmer therefore was not prejudiced. The court found that argument unavailing, noting that the evidence was not entirely duplicative. But given that the television programmer did have other evidence available to prove its case,

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the court held that an adverse inference was the appropriate sanction.

### **Significance of Opinion**

This case marks the first adoption of *Zubulake* by a New York appellate court. The *Zubulake* standard has been increasingly adopted in jurisdictions throughout the U.S., and has provided guidance to lawyers and clients alike in determining when and how to issue litigation hold letters.

*This alert has been prepared by Hinshaw & Culbertson LLP to provide information on recent legal developments of interest to our readers. It is not intended to provide legal advice for a specific situation or to create an attorney-client relationship.*