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Adopting Zubulake Cost-Shifting Procedures In NY

Law360, New York (March 20, 2012, 1:58 PM ET) -- Following on the heels of its decision in Voom HD Holdings LLC v. Echostar Satellite LLC, -- N.Y.S.2d --, (1st Dep't. Jan 31, 2012), which adopts the standards for preserving electronically stored information and implementing a litigation hold set out in Zubulake v. UBS Warburg LLC, 220 F.R.D. 212 (S.D.N.Y. 2003) (Scheindlin, J.) ("Zubulake II"), the New York State Supreme Court Appellate Division, First Department, has adopted the cost-shifting standards set out in Zubulake v. UBS Warburg LLC, 217 F.R.D. 309 (S.D.N.Y. 2003) (Scheindlin, J.) ("Zubulake").

Ruling on a dispute over the burdensome costs of electronic discovery, the First Department held in U.S. Bank Nat'l Ass'n v. GreenPoint Mtg. Funding Inc. "that Zubulake should be the rule in this Department, requiring the producing party to bear the cost of production as modified by the IAS court in the exercise of its discretion on a proper motion by the producing party." --- N.Y.S.2d ----, (1st Dep't Feb. 28, 2012).

Background

U.S. Bank National Association, as the indenture trustee of a residential mortgage-backed securitization trust, commenced an action against GreenPoint Mortgage Funding Inc. ("GreenPoint"), alleging that GreenPoint breached certain representations and warranties related to loans that were part of the securitization trust.

In response to document requests that were issued by U.S. Bank, GreenPoint submitted a letter to the trial court seeking a determination, among other things, that its production of documents would be conditioned upon confirmation that U.S. Bank (the requesting party) would pay for the production of the requested documents. GreenPoint subsequently filed a motion for a stay of discovery or for a protective order seeking relief similar to the relief requested in the letter.

The court denied the stay, but granted GreenPoint a portion of the relief it requested stating that it would follow "the well-settled rule in New York state" that the "party seeking discovery bears the costs incurred in its production" and required U.S. Bank to pay for the productions. U.S. Bank sought clarification from the court regarding the distribution of costs among the parties.

At a hearing on the matter, the court reiterated its holding that the rule in New York is that the party seeking discovery bears the responsibility for the costs of production. It clarified, however, that its holding did not prevent a party from subsequently making an application to the court requesting that the costs should be shifted. U.S. Bank appealed.

The First Department's Decision

Earlier opinions by New York courts reached conflicting conclusions about which party should pay for the costs associated with the review and production of ESI. Justice Rolando Acosta, writing for the U.S. Bank panel, settled the question: "[w]e are now persuaded that the courts adopting the Zubulake standard are moving discovery, in all contexts, in the proper direction. Zubulake presents the most practical framework for allocating all costs in discovery, including document production and searching for, retrieving and producing ESI."

Considering the relevant policy arguments, the panel reasoned that the public policy of having disputes determined on their merits favored a rule requiring the producing party to bear the costs. The alternative, the court noted, may deter litigants from bringing claims, especially in instances in which the plaintiff is an individual. Id. This rationale is consistent with the policy arguments considered by Judge Scheindlin in Zubulake. 217 F.R.D at 317-18.

Second, the panel questioned the precedent relied upon by courts that have concluded that the requestor must pay for the costs of discovery. Finally, the court determined that "the Zubulake standard is consistent with the long-standing rule in New York that the expenses incurred in connection with disclosure" should be paid by the party making that disclosure.

Zubulake

In Zubulake, Judge Scheindlin concluded that cost-shifting is appropriate "only when electronic discovery imposes an 'undue burden or expense' on the responding party." Zubulake, 217 F.R.D. at 318. She outlined a three-step analysis for determining when the costs of discovery should be shifted from the producing party to the requesting party.

First, the court must determine whether the requested information is inaccessible. Cost-shifting is appropriate only where the data is "inaccessible." Zubulake, 217 F.R.D. at 324. Typically, "inaccessible" data is information that is stored in a format, such as a backup tape, that would be costly to process for purposes of searching and producing.

Second, the court must consider whether responsive documents exist on the inaccessible media. Zubulake, 217 F.R.D. at 324. This can be done through sampling. Id.

Finally, the court must conduct a balancing test, addressing seven factors: "(1) [t]he extent to which the request is specifically tailored to discover relevant information; (2) [t]he availability of such information from other sources; (3) [t]he total cost of production, compared to the amount in controversy; (4) [t]he total cost of production compared to the resources available to each party; (5) [t]he relative ability of each party to control the costs and its incentive to do so; (6) [t]he importance of the issues at stake in the litigation; and (7) [t]he relative benefits to the parties of obtaining the information." Zubulake, 217 F.R.D. at 324.

These factors should not be weighed equally, and close calls should be determined consistently with the presumption that the producing party should bear the costs of production. Zubulake, 217 F.R.D. at 320, 322-23. Cost-shifting will be appropriate where the court determines that the burden and expense of discovery "outweigh[] its likely benefit[.]"Zubulake, 217 F.R.D. at 318.

Procedure

In the opinion, the First Department set out the proper procedure for seeking cost-shifting. The "prudent course of action" would be for a producing party to first make a motion to limit or strike discovery as being overly broad, irrelevant or unduly burdensome. If the producing party does not believe that the decision on that motion sufficiently limits the burdens imposed by the request, the producing party should then file a motion requesting that the costs be shifted.

Practitioners should welcome the First Department's guidance in this time-consuming and costly aspect of modern litigation. The court's adoption of Zubulake is consistent with the recommendations of the New York State Bar Association, published in July 2011. See "Best Practices in E-Discovery in New York State and Federal Court," available at http://www.nysba.org/AM/Template.cfm?Section=Home&ContentID=58331&Template=/CM/ContentDisplay.cfm (the "NYSBA Recommendations").

Guidelines 1 through 3 of the NYSBA Recommendations address the implementation of a legal hold. In particular, Guideline 1 states that "[t]he duty to preserve arises, not only when a client receives notice of litigation or a claim or cause of action, but it may also arise when a client reasonably anticipates litigation or knew or should have known that information may be relevant to a future litigation." NYSBA Recommendations at 3. Consistent with the cost-shifting analysis in Zubulake, Guideline 13 reflects the general principle that the parties should discuss the costs and burdens associated with discovery of ESI and, if necessary, move the court for an order shifting or allocating the costs of discovery.

Further, courts have recognized that the Zubulake opinions are the leading precedents for issues related to electronic discovery. See, e.g., Consolidated Aluminum Corp. v.Alcoa Inc., 244 F.R.D. 335 (M.D. La. 2006); Semsroth v. City of Wichita, 239 F.R.D. 630 (D. Kan. 2006).

The adoption of the Zubulake opinions helps to align the discovery rules in federal courts and state courts in New York. This should aid inside counsel in implementing streamlined procedures that will meet the standards in both federal and state courts in New York, and help outside counsel in counseling their clients regarding defensible discovery strategies, particularly where related matters may be pending in different courts.

The First Department's decision in U.S. Bank, however, may be less welcome to New York state trial courts. Instead of an easily applied, bright-line rule, trial courts will be required to assume the burden of resolving the complex, cost-shifting motions that certainly will ensue in the wake of U.S. Bank.

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