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# Will *Voom* Make Electronic Discovery Costs and Spoliation Motions Zoom?

2012 will forever mark a change in electronic discovery (or "e-discovery") practice in State courts in New York. In late January 2012, the Appellate Division, First Department, issued two significant decisions, one involving the preservation of e-discovery (*Voom HD Holdings, LLC v. EchoStar Satellite, LLC* (93 A.D.3d 33 [1st Dept. 2012]), and one involving apportioning the costs of e-discovery (*U.S. Bank N.A. v. GreenPoint Mtg. Funding, Inc.* 2012 NY Slip Op 01515 [1st Dept. 2012]). This article, the first in a two-part series, addresses the preservation obligations announced in *Voom*. A second article, in a future edition of the *Nassau Lawyer*, will address apportioning e-discovery costs in the wake of *U.S. Bank*.

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## *Voom*

In 2005, Voom (a producer of television content) and EchoStar (a satellite television provider) entered into a 15-year contract ("Contract") for high-definition television programming. By June 2007, EchoStar had concluded that the Contract was a "mistake" and began looking for a reason to terminate it. Within days of having a discussion about its options for terminating the Contract, EchoStar sent letters to Voom invoking its audit rights under the Contract and accusing Voom of not living up to its contractual obligations. In mid-July 2007, EchoStar sent Voom another letter claiming that Voom had breached the Contract. EchoStar sent another breach letter in mid-November 2007 and followed with a termination letter on January 31, 2008, effective February 1, 2008. Voom commenced an action against EchoStar the following day.

Despite EchoStar's audit demand letter, two breach letters, and a termination notice, it did not implement a litigation hold until after Voom filed suit. In addition, EchoStar's e-mail system was subject to a seven-day auto-delete policy that was not suspended until June 1, 2008 – four months after the action was commenced and approximately one year after EchoStar began internal discussions about terminating the Contract. After learning of EchoStar's failure to preserve electronic evidence, Voom moved for sanctions. The trial court granted the motion, finding that that EchoStar should have reasonably anticipated litigation in mid-June 2007, and ruled that an adverse inference against EchoStar at trial was the appropriate sanction.

In affirming the trial court's decision, the First Department adopted the federal court standard that a party's e-discovery preservation obligation begins when there is a "reasonable anticipation of litigation" as set out in the seminal case of *Zubulake v. UBS Warburg, LLC* (220 F.R.D. 212 [S.D.N.Y. 2003] [Scheindlin, J.]). The First Department further adopted Judge Scheindlin's "gross negligence" standard for determining when sanctions are appropriate for e-discovery preservation failures, as established in *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC* (685 F.Supp.2d 456 [S.D.N.Y. 2010]).

## The Change in the Law

*Voom* stands for the proposition 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 preservation of relevant documents" (*Voom* at 36, quoting *Zubulake*, 220 F.R.D. at 218). While the *Voom* decision states that the *Zubulake* "standard is harmonious with New York precedent," that issue is more complex, as virtually all case citations in *Voom* are to federal court decisions.

Additionally, in September 2010, the Advisory Group to the New York State Federal Judicial Council issued a report entitled "Harmonizing the Pre-Litigation Obligation to Preserve Electronically Stored Information in New York State and Federal Courts" (the "Harmonizing Report").[1] The stated purpose of the Harmonizing Report included analyzing the "pre-litigation duty to preserve e-discovery, whether the differences may lead to inconsistent obligations in State and federal courts" (Harmonizing Report at 1). The report recognized a number of different ways that New York State and federal courts have applied different standards to determine when the pre-litigation duty to preserve e-discovery attaches and the different factors considered in

applying sanctions for spoliation.

The Harmonizing Report found that federal court pre-litigation discovery preservation obligation is triggered when "a party reasonably anticipates litigation" (Harmonizing Report at 4-5), while the State court obligation is triggered (i) when there is pending litigation; (ii) when there is notice of the possibility of a specific claim; and (iii) under certain regulatory requirements (*id.* at 6).

Prior to *Voom*, a party in a state court action could argue (as EchoStar did) that the declaration of a contractual breach and negotiations between the parties concerning that breach was insufficient to put a party on notice of "specific claim" warranting preservation of all potential discovery materials. Under *Voom*, however, it is clear that the preservation obligation begins when a party reasonably anticipates litigation and is certainly triggered when a party declares the other party in breach of a contract – even if the non-breaching party anticipates that the dispute may be resolved without litigation. Moreover, under *Voom*, the obligation may be triggered as soon as when corporate officers begin discussions about contractual breach or termination.

In addition, prior to *Voom*, in deciding whether to impose spoliation sanctions, the state courts would heavily consider the prejudice to the moving party and not the culpability of the spoliating party (*see*, Harmonizing Report at 21-22 [in analyzing New York State court spoliation motions "prejudice

is the touchstone (and not necessarily the culpability level of the offender) ...). *Voom's* adoption of Pension Committee's gross negligence standard, however, potentially removes prejudice from the equation and instead focuses on the party's conduct in failing to preserve the spoliated materials.

## The Spoliation Standard

Now, under New York law, a party seeking sanctions based on spoliation of evidence must demonstrate that: (i) the party with control over the evidence had an obligation to preserve the evidence at the time it was destroyed; (ii) the destruction occurred with a "culpable state of mind;" and (iii) the destroyed evidence was relevant to the party's claims or defenses (*Voom* at 45, citing *Zubulake* 220 F.R.D. at 220). The First Department also adopted Judge Scheindlin's gross negligence test: gross negligence can be found where a party fails to: (i) issue a written litigation hold, when appropriate;[2] (ii) identify all of the key players and ensure their electronic and other records are preserved; and (iii) cease an auto-deletion of emails (*Voom* at 45, citing Pension Comm. 685 F.Supp.2d at 471). And, if the destruction is the result of "gross negligence" relevance is presumed (and the culpable state of mind has been established). (*Id.*)

## Conclusion

Under *Voom*, a party may be automatically subject to a spoliation sanction if it should have reasonably anticipated litigation but failed to issue a litigation hold notice and destroyed (even inadvertently) emails and other electronic evidence. This stricter preservation standard will likely lead to increased e-discovery costs because litigants are now on notice that their preservation obligation is triggered not only by notice of a specific claim but rather can arise when it should reasonably anticipate litigation. Moreover, it is reasonable to expect an increase in discovery on whether, when, and to whom a litigation hold notice was issued and whether electronic evidence was preserved. This may lead to spoliation motions where the protocols announced in *Voom* are not followed.

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1. http://www.courts.state.ny.us/publications/pdfs/PreLitReport.PDF.
2. *Voom* acknowledges that a written litigation hold letter is not always required, such as when dealing with a small company (*Voom* at n 3).