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Asymmetrical Warfare, or Mutually Assured Destruction?

Cost-Shifting in E-Discovery

Most attorneys are now well familiar with how expensive discovery has become because of emails and other electronic evidence ("e-discovery"). Oftentimes, the costs of e-discovery can outstrip the ultimate recovery in a litigation.

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Fear of e-discovery costs can lead to a return of a Cold War era concept: "Mutually Assured Destruction," which could be described as the use of a weapon by two opposing sides that would effectively result in the obliteration of both attacker and defender – ensuring reciprocal destruction. When that balance of power is shifted, however, parties may be more inclined to use e-discovery costs as a "weapon."

GreenPoint: The First Department Shifts The Costs

In New York State courts, e-discovery costs have been controlled, to some extent, by the long-established rule that the requesting party pays the costs associated with its discovery demands.[1]

Until recently, the Appellate Division had largely followed that principle, holding that "generally the cost of document production is borne by the party requesting the production."[2] This rule provided an incentive for the parties to narrow their discovery demands.

However, this rule has now changed, for earlier this year the First Department fully adopted the federal e-discovery "cost-shifting rules,"[3] holding that the producing party pays the costs of producing materials in its possession, subject to potential cost-shifting by the trial court in the appropriate situation.[4]

Between 2005-2006, during the height of subprime lending, GreenPoint Bank specialized in "'no-doc' and 'low-doc' loans, *i.e.*, mortgages for individuals with little to no documentation of income and assets."[5] GreenPoint pooled its loans and sold notes backed by the loans' interest income.

One cache of loans was pooled together into $1.83 billion of notes. The notes were sold, and resold, until they were ultimately purchased by U.S. Bank, N.A. Two years later, $530 million of the $1.83 billion of loans underlying the Notes were severely delinquent or were declared a total loss.

U.S. Bank brought an action against GreenPoint for "gross violations" of GreenPoint's representations and warranties of the attributes of the loans and how the loans were originated, underwritten and serviced. With the commencement of the action, U.S. Bank served GreenPoint with a demand for discovery and inspection.

Rather than respond to the demand, GreenPoint, instead moved for a protective order asking the trial court to order a "Discovery Protocol" that would require U.S. Bank to pay the costs of the production, including the attorney-review costs.

U.S. Bank, opposing the motion, argued it would be unfair to saddle it with the costs of GreenPoint's production because of the "likely asymmetry between GreenPoint's document production" and U.S. Bank's anticipated production.[6] U.S. Bank, which estimated that the cost of production could run into the millions of dollars, also argued that the court should consider allegations of GreenPoint's fraud in making this decision.[7]

The trial court denied GreenPoint's motion, but stated the denial was not a departure from "the well-settled rule in New York State that the 'party seeking discovery bears the costs incurred in its production.'"[8] Rather, it denied the motion because the "Discovery Protocol" sought "a broader rule" than the trial court would impose: the requirement that the requesting party also pay for the costs of GreenPoint's privilege review of the materials prior to production.

Believing the trial court's order to be unclear, U.S. Bank sought "a supplemental order that specifically directs a requesting party to pay the reasonable costs of the producing party (excluding attorneys' fees)."[9] The trial court granted U.S. Bank's request, and ordered the requesting party to bear the costs of responding to its discovery demands.[10] GreenPoint appealed.

On appeal the First Department reversed the trial court's decision, declaring that "it is the producing party that is to bear the cost of searching for, retrieving, and pro-

ducing documents, including electronically stored information" which could be subject to cost-shifting.[11]

In its decision, the First Department expressly adopted the seven factor test developed by Judge Shira Scheindlin in *Zubulake v. UBS Warburg, LLC*[12] for deciding when to apply cost-shifting. The guiding factors are:

1. The extent to which the request is specifically tailored to discover relevant information;
2. The availability of such information from other sources;
3. The total cost of production, compared to the amount in controversy;
4. The total cost of production, compared to the resources available to each party;
5. The relative ability of each party to control costs and its incentive to do so;
6. The importance of the issues at stake in the litigation; and,
7. The relative benefits to the parties of obtaining the information.[13]

The First Department cautioned, however, that trial courts "should not follow" these factors as "a checklist, but rather [as] a guide to exercise their discretion in determining whether or not the request constitutes an undue burden or expenses on the responding party."[14]

U.S. Bank, arguing against the adoption of the *Zubulake* seven-factor test, asserted that the requesting-party-pays rule promotes judicial efficiency because it acts as a reason for restraint; a party will not ask for overbroad discovery if it knows it will have to pay the costs associated with that discovery. The First Department rejected that argument, however, countering that the requesting-party-pays model may deter the filing of meritorious claims, especially when the requesting party is an individual.[15]

The *GreenPoint* court also provided a suggested formula to be followed when a party receives discovery demands that are onerously burdensome and expensive and are unable to come to a resolution after a "meet and confer" with counsel.

First, the producing party should make a motion to limit or strike the overbroad, irrelevant or unduly burdensome discovery demands. Second, following the resolution of that motion, if the producing party still believes the costs involved in "searching for, retrieving and producing e-discovery to be prohibitive" the producing party can file a motion for the costs to be shifted to the requesting party.

The court stated that the moving party should provide support for the motion, including "what experts, if any, will be used to restore deleted or missing documents" and the costs involved with the allegedly burdensome e-discovery production.

Notably, the First Department's formula results in a determination on the cost-shifting before production, alleviating a notorious problem with the producing-party-pays model, namely, that cost-shifting never occurs because the parties settle the litigation after production, but well before a cost-shifting motion is ever considered.

Conclusion

The First Department's holding *GreenPoint* puts the cost, initially, on the producing party – giving the requesting party free rein to ask for overbroad e-discovery. The counterweight to this bludgeon is the First Department's protocol suggesting that a cost-shifting analysis be performed pre-production, allowing the trial court to decide these issues before the production costs are incurred.

While this protocol has the potential to delay litigation if a significant number of litigants were to ask for an advisory ruling on discovery cost-shifting prior to production, it would likely also result in a fairer allocation of discovery costs.

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1. *See Rubin v. Alamo Rent-a-Car et al.*, 190 A.D.2d 661 (2d Dept. 1993); *Schroeder v. Centro Pariso Tropical et al.*, 233 A.D.2d 314 (2d Dept. 1996); 3 N.Y. Prac., Com. Litig. In New York State Courts § 25:44 (3d ed).
2. *Response Personnel Inc. v. Aschenbrenner*, 77 A.D.3d 518 (1st Dept. 2010).
3. This is the First Department's second decision adopting federal e-discovery rules. *See VOOM HD Holdings, LLC v. EchoStar Satellite, LLC* (2012 NY Slip Op 00658 [1st Dept. 2012]) (addressed in Will Voom Make Electronic Discovery Costs and Spoliation Motions Zoom? Nassau Lawyer, June 2012).
4. *U.S. Bank N.A. v. GreenPoint Mtg. Funding, Inc.* 94 A.D.3d 58 (1st Dept. 2012).
5. *Id.* at 60.
6. *Id.*
7. *Id.*
8. *U.S. Bank N.A. v. GreenPoint Mtg. Funding, Inc.*, No. 600352/09 (Sup. Ct., N.Y. Co. Apr. 12, 2012)(citing *T.A. Ahern Contractors Corp. v. Dormitory Authority*, 24 Misc.3d 416, ** 7-8 (Sup. Ct. N.Y. Co. 2009).
9. Letter from U.S. Bank's counsel to the Court dated September 27, 2010.
10. Transcript from Hearing held on 9/28/10.
11. *U.S. Bank*, 94 A.D.3d at 64.
12. 217 F.R.D. 309 (S.D.N.Y. 2003).
13. *Id.* (quoting *Zubulake*, 217 F.R.D. at 322).
14. *U.S. Bank*, 94 A.D.3d at 64 (emphasis added).
15. *Id.* at 65.
16. *U.S. Bank*, 94 A.D.3d at 65.