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New Federal Rules Provide Welcome Relief to Businesses Facing Electronic Document Preservation Concerns, but a Recent Decision by the New York State Court of Appeals Could Deny That Relief to Businesses Operating in New York

A recent amendment to Federal Rule of Civil Procedure 37(e) abrogates a series of federal court decisions that imposed harsh "adverse inference" sanctions on litigants that failed to initiate litigation holds to preserve electronically stored information. Just weeks after the amendment took effect, however, New York State's highest court expressly adopted the now-outdated federal jurisprudence. Businesses subject to jurisdiction in New York will find no safe harbor in the recent rule change if they find themselves litigating in state court rather than federal, and should therefore continue to comply with the stricter preservation standards as a best practice.

The topic of preservation of electronically stored information rose to national prominence when Judge Shira A. Scheindlin of the United States District Court for the Southern District of New York issued a series of decisions on electronic discovery issues in *Zubulake v. UBS Warburg LLC*. In the fourth of five landmark decisions in that case, Judge Scheindlin held that the obligation to preserve documents and electronically stored information arises as soon as litigation can reasonably be anticipated. Failure to comply with this duty can result in various sanctions, including an adverse inference charge to the jury, upon a showing: "(1) that the party having 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 (3) that the destroyed evidence was 'relevant' to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense."

Importantly, Judge Scheindlin held that mere negligence is a sufficient "culpable state of mind" to give rise to a negative inference. She also held that upon a showing of gross negligence or intentional destruction the party seeking sanctions is entitled to a presumption that the destroyed evidence was relevant, automatically satisfying the third factor of the negative inference test.

Within a matter of a few years, *Zubulake IV* had been cited to approvingly by federal district courts around the country, as well as a number of state courts. In New York, trial courts have cited *Zubulake IV* since 2003, with broader reference beginning in 2009. In 2012, the First Department of New York's Appellate Division adopted the *Zubulake*'s test for issuing sanctions in a widely reported case called *VOOM HD Holdings, LLC v. EchoStar Satellite, L.L.C.* On December 15, 2015, New York's highest court, the Court of Appeals, adopted the holdings in *VOOM HD Holdings* and *Zubulake IV* in a case titled *Pegasus Aviation I, Inc. v. Varig Logistica S.A.*

In *Pegasus*, the trial court had ruled that defendants' failure to institute a litigation hold, which resulted in the loss of electronically stored information, was grossly negligent and therefore granted an adverse inference instruction. The First Department reversed, finding that the failure was negligent, but not grossly negligent, and denied the adverse inference request. Writing for a four-judge majority of the seven member Court of Appeals, Judge Pigott agreed with the Appellate Division that the facts did not give rise to gross negligence and that the failure to institute a litigation hold was merely

negligent. The majority also held that "a party's failure to institute a litigation hold is but one factor that a trial court can consider in making a determination as to the alleged spoliator's culpable state of mind." Because the Appellate Division had disregarded plaintiff's arguments as to the third *Zubulake* prong—the relevancy of the evidence destroyed—the Court of Appeals remanded the matter to the trial court for a determination on relevancy and any appropriate sanction.

The high court's decision to apply the widespread federal *Zubulake* standard reflects the State of New York's desire that its court system should compete as the venue of choice for complex business disputes. New York frequently takes steps to ensure that the rules governing its courts are aligned with federal rules. An example of this intentional alignment can be seen in New York's adoption of language requiring proportionality in the scope of discovery within months of the announcement of similar changes to Federal Rule of Civil Procedure 26. Yet in *Pegasus* the Court of Appeals adopted what is essentially the 2003 version of federal law on preservation of electronically stored information just weeks after Federal Rule of Civil Procedure 37—which deals with sanctions for the failure to preserve or produce electronically stored information—was amended to purposely depart from the *Zubulake IV* holding.

As amended, Rule 37 still provides for the possibility of sanctions where a party suffers prejudice from the loss of electronically stored information due to the other party's failure to take reasonable preservation steps. The sanctions for this negligent conduct, however, are limited now, and must be tailored to the minimal level necessary to cure the prejudice. Most important, under the new Rule 37 the court cannot impose harsher sanctions—such as presumptions of the unfavorability of the destroyed information, negative inference instructions to jurors and even dismissal of the action—without proof that the spoliating party intentionally deprived the other party of the information.

The latest federal standard is not in line with the *Zubulake* rule adopted by New York's highest court in *Pegasus*. Like *Zubulake*, Rule 37 allows for sanctions necessary to address a party's negligent destruction of discoverable material. However, contrary to the *Zubulake* rule which now applies in all New York State courts under *Pegasus*, comments to the recent amendment to Rule 37 note that it "rejects cases … that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence," limiting the use of such extreme sanctions to cases involving intentional destruction of evidence. It remains to be seen whether in a future case the Court of Appeals will seek to reconcile the majority's holding in *Pegasus* with the new Rule 37—perhaps, for instance, by elaborating upon its ruling in *Pegasus* that negligence, such as the failure to initiate a litigation hold, is but one factor in determining the spoliator's culpability.

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