

New York Law Journal

ALM Properties, Inc.

Page printed from: [New York Law Journal](#)

[Back to Article](#)

State Panel Adopts 'Zubulake' in Faulting Handling of E-Mails

Brendan Pierson

New York Law Journal

02-01-2012

TV broadcasting company EchoStar Satellite failed in its duty to preserve relevant e-mails leading up to a \$2.5 billion contract dispute with a Cablevision Inc. subsidiary, a unanimous state appeals panel ruled in imposing a sanction of adverse inference at trial.

The Jan. 31 decision of the Appellate Division, First Department, in [Voom HD Holdings v. EchoStar Satellite LLC](#), 600292/08, written by Justice Sallie Manzanet-Daniels ([See Profile](#)), was the first by a New York state appellate court to apply the standard for spoliation of electronic evidence set forth by Southern District Judge Shira Scheindlin ([See Profile](#)) in 2003 in [Zubulake v. UBS Warburg LLC](#), 220 FRD 212.

The *Zubulake* standard holds that "once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents."

It is "harmonious with New York precedent in the traditional discovery context, and provides litigants with sufficient certainty as to the nature of their obligations in the electronic discovery context and when those obligations are triggered," Justice Manzanet-Daniels wrote. She was joined by Justices Peter Tom ([See Profile](#)), David B. Saxe ([See Profile](#)), James M. Catterson ([See Profile](#)) and Karla Moskowitz ([See Profile](#)).

The lawsuit concerns a 2005 contract between EchoStar and Cablevision subsidiary Voom HD Holdings, under which Voom agreed to provide EchoStar rights to broadcast Voom's programming. As part of the contract, EchoStar agreed that it could not "tier" the Voom channels—that is, offer them only to customers paying a higher than standard fee for a wider variety of programming. EchoStar had the option to terminate the deal if Voom failed to spend at least \$100 million on "service" every year.

Voom alleges in the suit that EchoStar decided in 2007 to terminate the contract for business reasons. According to Voom, EchoStar told Voom in bad faith that Voom had failed to spend \$100 million on service and EchoStar invoked its right to audit Voom. In October 2007, EchoStar's own auditor delivered a report that Voom's accounting checked out.

Despite that recommendation, EchoStar told Voom in November 2007 that it believed Voom was in violation of the contract and that EchoStar would terminate the contract unless Voom agreed that its programming would be tiered beginning in February 2008. Voom refused, and EchoStar terminated the agreement on Feb. 1, 2008. Voom sued the next day.

Once the suit was filed, EchoStar put in place a litigation hold, instructing employees to save anything that they deemed potentially relevant to the litigation. However, this hold did not extend to halting the automatic deletion of e-mails from EchoStar's computers. EchoStar finally suspended automatic deletion of e-mails four months later, in June 2008.

The communications between EchoStar and Voom before the suit that did survive were only preserved because they happened to be captured in "snapshots" of executives' e-mail accounts taken for purposes of other, unrelated litigations, according to Justice Manzanet-Daniels' opinion.

Voom moved for spoliation sanctions against EchoStar for failing to preserve its e-mails. Manhattan Supreme Court Justice Richard B. Lowe III ([See Profile](#)), citing *Zubulake*, granted the motion, finding that EchoStar should have put in place a litigation hold—including a stop to automatic deletion of e-mails—on June 20, 2007, at the earliest, when its corporate counsel sent Voom a letter containing a notice of breach, a demand and an explicit reservation of rights.

Justice Lowe also said that EchoStar had not only been negligent, but had acted in bad faith, noting that the company had been sanctioned for similar conduct in 2005 by the District of Maryland in *Broccoli v. EchoStar Communications Corp.*, 229 FRD 506.

On appeal before the First Department, EchoStar argued that the court should not adopt the *Zubulake* standard because it does not provide a clear meaning of "reasonably anticipated." EchoStar urged the appellate court to adopt a rule that a company must preserve documents when litigation is pending or when it has "notice of a specific claim."

Lawyers for Civil Justice, a non-profit civil defense lawyers' group based in Washington, D.C. filed an amicus brief on EchoStar's side.

The First Department, which heard oral arguments in April 2011, rejected the proposal.

"To adopt a rule requiring actual litigation or notice of a specific claim ignores the reality of how business relationships disintegrate," Justice Manzanet-Daniels wrote. "Sides to a business dispute may appear, on the surface, to be attempting to work things out, while preparing frantically for litigation behind the scenes. EchoStar and amicus's approach would encourage parties who actually anticipate litigation, but do not yet have notice of a 'specific claim' to destroy their documents with impunity."

"An adverse inference was a reasonable sanction in light of EchoStar's culpability and the prejudice to Voom. The record shows that EchoStar acted in bad faith in destroying electronically stored evidence," the panel said.

"The destruction of e-mails during the critical time when the parties' business relationship was unquestionably deteriorating reflects, at best, gross negligence," the panel added. "Further, the destruction of e-mails after litigation had been commenced, when EchoStar was unquestionably on notice of its duty to preserve, was grossly negligent, if not intentional."

"Today's ruling confirms that EchoStar destroyed evidence in blatant violation of the law and will now be held accountable for its misconduct," said Orin Snyder of Gibson Dunn & Crutcher, counsel to Voom. "We look forward to trial."

Roy L. Reardon of Simpson Thacher & Bartlett and Charles L. Kerr of Morrison & Foerster, counsel to EchoStar, did not return calls for comment.

@|Brendan Pierson can be contacted at bperson@alm.com.

Copyright 2012. ALM Media Properties, LLC. All rights reserved.