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'Zubulake IV'

New Guidelines for Duty to Preserve Backup Data

Southern District Judge Shira Scheindlin's fourth published discovery order in *Zubulake v. UBS Warburg LLC*, 2003 U.S. Dist. LEXIS 18771 (Oct. 22, 2003), addresses another hot topic in the world of electronic discovery: the scope of the duty to preserve information stored on backup tapes.

In the opinion known as *Zubulake IV*, the court considered the scope of a litigant's duty to preserve electronic documents and the consequences of a failure to preserve documents that fall within the scope of that duty. The court's ruling signals a fundamental shift in the way corporations must preserve backup data in the face of pending or imminent litigation.

Discovering Backup Data

Laura Zubulake filed suit against UBS, her former employer, alleging gender discrimination and retaliation. In assessing plaintiff's request for discovery of data contained on backup tapes, the court issued a prior order (*Zubulake I*) that established a three-pronged analysis for deciding disputes regarding the scope and cost of discovery of electronic data. *Zubulake I* also established a method for examining electronic discovery disputes in the context of whether requested data is stored in "accessible" or "inaccessible" format. In subsequent opinions, the court applied the analysis to the particular facts of the case, and made a ruling regarding cost-shifting.

Throughout the case, Ms. Zubulake claimed that evidence she needed to prove her case existed in e-mails sent among UBS

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ELECTRONIC DISCOVERY



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employees and stored only on the company's computer systems.

In *Zubulake IV*, the court addressed Ms. Zubulake's claim that critical evidence was contained on monthly backup tapes that were found to be missing when UBS undertook the restoration ordered by the court in *Zubulake III*.

Ms. Zubulake also claimed that certain individual e-mails (created after UBS allegedly began retaining all relevant e-mails) were deleted from the UBS computer systems, although they should have been saved on the backup tapes.

Discovery Sanctions

The court examined these issues on Ms. Zubulake's motion for discovery sanctions. She asked the court for: (a) an order requiring UBS to pay the full costs of restoring the remainder of the monthly backup tapes; (b) an

adverse inference instruction against UBS with respect to the missing backup tapes; and (c) an order directing UBS to bear the costs of re-deposing certain key witnesses concerning issues raised in newly produced e-mails.

In considering the appropriateness of spoliation sanctions, the court examined whether UBS had a duty to preserve the evidence at issue. The court discussed the extent of a party's duty to preserve evidence "when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to further litigation." In this case, the court determined the duty to preserve was triggered in April 2001, when talk of litigation first arose.

Next, the court addressed the scope of the duty to preserve:

Must a corporation, upon recognizing the threat of litigation, preserve every shred of paper, every e-mail or electronic document, and every backup tape? The answer is clearly, 'no.' Such a rule would cripple large corporations, like UBS, that are almost always involved in litigation. As a general rule, then, a party need not preserve all backup tapes even when it reasonably anticipates litigation.

However, the court noted that anyone who is a party or anticipates being a party to a lawsuit "must not destroy unique, relevant evidence that might be useful to an adversary." Noting that the duty to preserve extends to all employees likely to have relevant information, or the "key players" in the case, the court determined that all the individuals whose backup tapes were lost fell into this category in this case.

In assessing the duty of a litigant to preserve evidence, the court noted that electronic data presents some unique issues.

A party or anticipated party must retain all relevant documents (but not multiple identical copies) in existence at the time the duty to preserve attaches, and any relevant documents created thereafter. In recognition of the fact that there are many ways to manage electronic data, litigants are free to choose how this task is accomplished.

The court went on to summarize a party's preservation obligations with regard to electronic data in general, and backup tapes in particular:

The scope of a party's preservation obligation can be described as follows: 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. As a general rule, that litigation hold does not apply to inaccessible backup tapes (e.g. those typically maintained solely for the purpose of disaster recovery), which may continue to be recycled on the schedule set forth in the company's policy. On the other hand, if backup tapes are accessible (i.e. actively used for information retrieval), then such tapes would likely be subject to the litigation hold.

However, it does make sense to create one exception to this general rule. If a company can identify where particular employee documents are stored on backup tapes, then the tapes storing the documents of 'key players' to the existing or threatened litigation should be preserved if the information contained on those tapes is not otherwise available. This exception applies to all backup tapes.

By creating the "key players" exception, the court effectively put corporations on notice of a very early duty to assess the facts surrounding threatened or pending litigation. If a corporation reasonably believes that litigation is imminent, action must be taken to quickly analyze the facts at issue, identify all potential "key players," and then take immediate action to suspend destruction of any data related to those individuals.

In *Zubulake IV*, UBS demonstrated preservation efforts at the directive of counsel beginning in August 2002. UBS thereafter attempted to preserve all backup tapes that

existed in August 2001 (when Ms. Zubulake filed an EEOC charge). In August 2001, employees had been instructed to maintain active electronic documents pertaining to Ms. Zubulake in separate files. Had these directives been followed, the court noted that UBS would have met its preservation obligations by maintaining one copy of all relevant documents that existed at, or were created after, the time when the duty to preserve attached. UBS employees failed to follow these directives, however, and backup tapes and individual e-mails were lost.

The court then turned to consideration of each of Ms. Zubulake's requested remedies.

Reconsideration of the Cost-Shifting Order: The court determined that Ms. Zubulake's request for reconsideration of the cost-shifting order issued in *Zubulake III* was

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inappropriate because the court had already considered the evidence indicating that some e-mails had not been retained and that some backup tapes were missing, and that this evidence already played a role in the court's analysis. Reconsideration of the cost-shifting order was denied.

Adverse Inference Instruction: The court noted that the adverse inference instruction is an extreme sanction that generally means "the party suffering this instruction will be hard-pressed to prevail on the merits." The three elements that must be met by a party seeking an adverse inference instruction are: (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. The court noted that the Second Circuit defines "culpable state of mind" to include ordinary negligence. When there is evidence of bad faith or intentional destruction of evidence, that alone is enough to demonstrate relevance. When destruction is merely negligent, the party seeking the adverse inference instruction must prove relevance.

Factor (1), the duty to preserve the information at issue, was established.

The court determined that factor (2), the culpable state of mind, was proven so far as UBS's actions were negligent with regard to most of the missing data, but were grossly negligent, or even reckless, with regard to data from one of the key witnesses. The second factor of the test was therefore proven. Because the state of mind did not rise to the level of "willful," it was up to Ms. Zubulake to prove that the lost information was relevant, and that it would have been favorable to her claims.

Reviewing the facts of the case and the information uncovered in particular e-mails during prior discovery, the court determined that Ms. Zubulake was unable to prove factor (3), that the lost tapes contained relevant information that would have been favorable to her case. The request for an adverse inference instruction was denied.

Costs of Additional Depositions: The court ordered UBS to bear the costs for Ms. Zubulake to re-depose certain witnesses for the limited purpose of inquiring into issues raised by the destruction of evidence and any newly discovered e-mails.

Conclusion

In the wake of *Zubulake IV*, corporations and their attorneys must reconsider backup schedules and electronic data retention policies, ensuring that early and effective action can be taken to preserve necessary backup data for "key players" when litigation is pending or imminent.

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