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NEW YORK COURT ADOPTS E-DISCOVERY COST-SHIFTING STANDARDS SET OUT BY FEDERAL DISTRICT COURT IN *ZUBULAKE*

A unanimous panel of the New York Appellate Division for the First Department last week adopted the standards articulated in *Zubulake v. UBS Warburg LLC*, 220 F.R.D 212 (S.D.N.Y 2003) for determining which party should incur the costs of searching for, retrieving, and producing both electronically stored information ("ESI") and physical documents requested as part of the discovery process. *See U.S. Bank N.A. v. GreenPoint Mortgage Funding, Inc.*, 2012 N.Y. App. Div. LEXIS 1487 (App. Div. Feb. 28, 2012). This decision settles an open question in the New York courts regarding the determination of which party is responsible for the costs of discovery.

Background

U.S. Bank, N.A. ("U.S. Bank") alleged that GreenPoint Mortgage Funding, Inc. ("GreenPoint") violated the representations and warranties regarding the loans underlying notes that GreenPoint sold on pools of securitized residential mortgages that were ultimately assigned to U.S. Bank.

In February 2009, U.S. Bank filed its original complaint and served its first request for the production of documents on GreenPoint. GreenPoint submitted a letter to the court seeking a ruling on several discovery issues including, in relevant part, whether production should be conditioned on U.S. Bank's agreement to pay the costs of production. GreenPoint moved to stay discovery, and for a protective order conditioning production of discovery on a proposed discovery protocol, which included the proposal that each party should pay for its own discovery requests. GreenPoint also requested that U.S. Bank pay for any pre-production attorney review time that GreenPoint determined was necessary for privilege and confidentiality assertions. U.S. Bank opposed GreenPoint's motion, arguing that the merits of the bank's allegations in the action, the relevance of the document requests, and the likely asymmetry between the volume of documents produced by the two parties militated in favor of denying GreenPoint's motion.

On April 13, 2010, the motion court denied GreenPoint's request for a protective order, rejected GreenPoint's request for U.S. Bank to pay the costs associated with pre-production attorney review, but agreed with GreenPoint that in New York State the party requesting discovery bears the costs incurred in its production. This appeal followed.

For further information about this Client Alert, please contact:

Sander Bak
212-530-5125
sbak@milbank.com

Elise Kent Bernanke
212-530-5239
ebernanke@milbank.com

You may also contact any member of Milbank's Litigation Group. Contact information can be found at the end of this Client Alert. In addition, if you would like copies of our other Client Alerts, please visit our website at www.milbank.com and choose "Client Alerts" under "News."

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The Appellate Court's Holding

The question of which party is responsible for the cost of searching for, retrieving, and producing discovery is a significant and often-debated issue due to the high costs associated with locating and producing ESI. The CPLR does not provide any guidance and, while New York courts have attempted to provide working guidelines, there had been no clear authority concerning cost allocation.

In *U.S. Bank*, the court reversed the decision of the New York trial court that required the party requesting discovery to bear the production costs, and instead adopted the *Zubulake* standard, holding that the standards set by the District Court are "moving discovery, in all contexts, in the proper direction." The *Zubulake* standard requires "the producing party to bear the initial cost of searching for, retrieving and producing discovery, but permits the shifting of costs between the parties." *Zubulake* set forth the following seven factors for courts to consider as part of their evaluation of whether costs should be shifted[1]:

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

The court addressed and rejected Greenpoint's policy arguments against adopting the *Zubulake* standard. The court disagreed with the defendants that requiring the requesting party to pay all costs associated with discovery is a more sound judicial practice and policy. Instead, the court agreed with the opinion in *Zubulake* that requiring the producing party to bear its own cost of discovery supports the "strong public policy favoring resolving disputes on their merits," and noted that forcing the requestor to pay might deter the filing of potentially meritorious claims, particularly where the party requesting discovery is an individual.

Conclusion

This decision answers a longstanding question in the New York State courts regarding which party should bear the initial costs of discovery in litigation. The decision should provide clarity for parties preparing to enter discovery in a litigation pending in the New York courts, as well as offer guidance to New York courts facing discovery disputes between parties concerning the costs and burdens of production.

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1 *See U.S. Bank*, 2012 WL 612361, at *4 (citing Zubulake, 217 F.R.D. at 322).

Please feel free to discuss any aspect of this Client Alert with your regular Milbank contacts or with any member of our Litigation and Arbitration Group listed below.

New York

Wayne M. Aaron	212-530-5284	waaron@milbank.com
Thomas A. Arena	212-530-5328	tarena@milbank.com
Sander Bak	212-530-5125	sbak@milbank.com
James N. Benedict, *Chair*	212-530-5696	jbenedict@milbank.com
James G. Cavoli	212-530-5172	jcavoli@milbank.com
Christopher E. Chalsen	212-530-5380	cchalsen@milbank.com
Scott A. Edelman, *Firm Vice Chairman*	212-530-5149	sedelman@milbank.com
Christopher J. Gaspar	212-530-5019	cgaspar@milbank.com
David R. Gelfand	212-530-5520	dgelfand@milbank.com
Douglas W. Henkin	212-530-5393	dhenkin@milbank.com
Michael L. Hirschfeld	212-530-5832	mhirschfeld@milbank.com
Lawrence T. Kass	212-530-5178	lkass@milbank.com
Atara Miller	212-530-5421	amiller@milbank.com
Sean M. Murphy	212-530-5688	smurphy@milbank.com
Daniel Perry	212-530-5083	dperry@milbank.com
Stacey J. Rappaport	212-530-5347	srappaport@milbank.com
Richard Sharp	212-530-5209	rsharp@milbank.com
Alan J. Stone, *Practice Group Leader*	212-530-5285	astone@milbank.com
Errol B. Taylor	212-530-5545	etaylor@milbank.com
Fredrick M. Zullow	212-530-5533	fzullow@milbank.com

Washington, DC

David S. Cohen	202-835-7517	dcohen2@milbank.com
Robert J. Koch	202-835-7520	rkoch@milbank.com
Andrew M. Leblanc	202-835-7574	aleblanc@milbank.com
Michael D. Nolan	202-835-7524	mnolan@milbank.com

Los Angeles

Linda Dakin-Grimm	213-892-4404	ldakin-grimm@milbank.com
Robert J. Liubicic	213-892-4525	rliubicic@milbank.com
Jerry L. Marks	213-892-4550	jmarks@milbank.com
Mark Scarsi	213-892-4580	mscarsi@milbank.com

London

Tom Canning	44-20-7615-3047	tcanning@milbank.com
Julian Stait	44-20-7615-3005	jstait@milbank.com