U.S. Bank National Association v. Greenpoint Mortgage Funding, Inc.: First Department Holds That Producing Party Is Responsible for Cost of Production

On February 28, 2012, the New York State Supreme Court, Appellate Division for the First Department issued a decision in *U.S. Bank National Association* v. *GreenPoint Mortgage Funding, Inc.*, adopting standards generally governing electronic discovery in federal court – i.e., the general rule articulated in *Zubulake* v. *UBS Warburg LLC* that the producing party is to bear the cost of searching for, retrieving and producing documents – including electronically stored information ("ESI") – in response to discovery requests.[1] Consistent with the *Zubulake* opinion, the court also permitted the shifting of costs between the parties at the trial court's discretion, upon proper motion by the producing party.

I. Procedural History

Along with its original complaint, plaintiff U.S. Bank served on defendant GreenPoint its first request for the production of documents. GreenPoint responded with a letter to the court seeking, among other things, a ruling regarding "whether production should be conditioned on U.S. Bank's confirmation it would pay the cost of production."[2] GreenPoint later filed a motion to stay discovery and for a protective order conditioning the production of documents on "compliance with a proposed discovery protocol that provided, among other things, that each party would pay for its own discovery requests . . . and that U.S. Bank would pay for GreenPoint's pre-production attorney review time for the purposes of privilege and confidentiality assertions."[3]

The court approved GreenPoint's suggested discovery protocol, though rejected its request that the requesting party also bear the cost associated with attorney review of documents for responsiveness and privilege. In a subsequent conference intended to clarify its opinion, the court reiterated that in New York, "the party requesting discovery bears the costs incurred in its production and that the parties [are] not required to pay each other's attorneys' fees."[4] The court further explained that each party may still apply for allocation of discovery costs at a later date, if warranted.

II. The First Department's Decision

The First Department disagreed with the motion court's conclusion and adopted the framework set forth in *Zubulake*, which, in its opinion, "presents the most practical framework for allocating all costs in discovery, including document production and searching for, retrieving and producing ESI."[5] "*Zubulake* requires, consistent with the Federal Rules of Civil Procedure, the producing party to bear the initial cost of searching for, retrieving and producing discovery, but permits the shifting of costs between the parties" where the motion court determines, in its discretion, that the discovery request is unduly burdensome or expensive for the responding party.[6] In making the determination whether to shift discovery costs, a motion court should be guided by the seven factors set forth in *Zubulake*, namely:

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[1] *See U.S. Bank National Association* v. *GreenPoint Mortgage Funding, Inc.*, 2012 NY Slip. Op. 01515 (1st Dept. Feb. 28, 2012), adopting the general standards set forth by Judge Shira Scheindlin in *Zubulake* v. *UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003).

[2] *Id*. at *3.

[3] *Id*.

[4] *Id*. at *4.

[5] *Id*. at *5.

[6] *Id*.

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

Applying its newly adopted standards, the First Department reversed the order of the motion court insofar as it required the plaintiff to bear, at least initially, the costs related to the production of discovery and directed the defendant to bear its own discovery costs, subject to possible reallocation on a proper showing. The First Department remanded the matter to the Supreme Court for further proceedings consistent with its opinion.

III. Significance of the Decision

The First Department's decision brings clarity to an issue that has heretofore been unsettled in New York, namely which party is responsible for the often high cost of producing discovery, particularly ESI. The First Department brings the standard in New York for allocation of discovery costs into alignment with the rule articulated in *Zubulake* with respect to discovery in federal court actions.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Jon Mark at 212.701.3100 or jmark@cahill.com; John Schuster at 212.701.3323 or jschuster@cahill.com; or Yafit Cohn at 212.701.3089 or ycohn@cahill.com.

[7] *Id*. (quoting *Zubulake* v. *UBS Warburg LLC,* 217 F.R.D. 309, 322 (S.D.N.Y. 2003)) (brackets in original).