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Zubulake Framework Adopted in GreenPoint Case

A recent New York State Appellate Decision by the First Department adopted the framework outlined in *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003) [LINK CASE CITATION TO PDF] regarding which party should bear the costs of electronic document production in litigation. In *U.S. Bank, N.A. v. GreenPoint Mortgage Funding, Inc.*, No. 600352/09, 2012 NY Slip Op. 01515 (N.Y. App. Div. Feb. 28, 2012) [LINK CASE CITATION TO PDF], the court decided the then-unsettled question under New York State Law by “requiring the producing party to bear the cost of production to be modified by the . . . court in the exercise of its discretion on a proper motion by the producing party.”

U.S. Bank, acting on behalf of noteholders and two insurance companies, alleged that GreenPoint committed gross violations in its representation of loans that it originated, including misleading investors regarding “the policies and practices under which the loans were originated, underwritten and serviced.” After an initial request for document production, GreenPoint submitted its own document production plan in a motion to the court. The court denied GreenPoint’s requested discovery protocol, but did endorse the notion that the requesting party should pay for costs associated with document production under New York law. The plaintiffs appealed this order to the Appellate Division of the New York Supreme Court.

In reversing the order, the First Department noted several New York State Court decisions that required the requesting party to pay costs associated with discovery. The court, however, reasoned that the *Zubulake* standard presents “the most practical framework for allocating all costs in discovery, including document production and searching for, retrieving and producing ESI.” Further, the court found that the flexibility of the seven-factor *Zubulake* test, allowing for cost-shifting between the parties, weighed in favor of reversing the lower court order. Thus, according to the First Department, motion courts should consider the seven factors to weigh whether a discovery request presents an undue burden and costs should be shifted.

Turning to the matter at hand, the First Department indicated that it could not endorse cost shifting due to the lack of evidence in the record supporting the listed costs.

The bottom line takeaway for entities facing matters in New York State Courts is the reality that the *Zubulake* standards have been adopted by the First Department, and any efforts to shift production costs will require evidence and arguments tailored to the seven factor standard.



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