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E-Discovery Practice Pointer: Famous Last Words, "No Need For a Litigation Hold, We May Work This Thing Out Without Even Calling Litigation Counsel"

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You renegotiate contracts all the time. Nine times out of 10 you do it without any litigation. You and your corporate counsel look at the contract, write the other side a letter saying there's some kind of breach and a new deal has to be worked out. Then you try to work something out. You've just sent the letter. Should you issue a litigation hold and slam the brakes on the automatic email purging that's been keeping your company's email server stable?

You spend some time considering it. That email system has been working so well since it was tuned up a few years ago in response to that snippy court opinion about your old document preservation policy. You haven't even gotten a response to your letter, so you don't even know if the other guys will put up a fight. You haven't even brought your in-house litigation counsel into the loop. You're safe, right? Maybe not.

In *Voom Holdings, LLC v. EchoStar Satellite, LLC*, 2012 NY Slip Op 00658 (N.Y. App. Div. Jan. 31, 2012), the court affirmed an adverse inference spoliation sanction against EchoStar in just this situation.

What The Court Decided

The *Voom* court held that EchoStar's preservation obligation arose when it sent its "breach letter." Before Voom responded saying it hadn't breached and that it would sue if EchoStar terminated the contract. Before EchoStar asked its own in-house litigation counsel to get involved. Before EchoStar sent its auditors to look into the facts of the alleged breach. Before EchoStar sent a letter terminating the contract. And before Voom filed suit.

EchoStar didn't actually implement a litigation hold until after Voom filed suit. Even then, the hold didn't interrupt routine deletion of email (on a seven-day rolling cycle) until four months after Voom filed suit. Voom pursued the spoliation issue and recovered a series of highly relevant and fairly incriminating emails that had been saved from deletion by a "snapshot" of a few email boxes that had been taken for purposes of *other litigation*. These emails had apparently not been manually preserved, despite EchoStar's direction to the people involved to save anything relevant.

As a result, the court concluded that EchoStar had acted in bad faith by, at a minimum, exhibiting gross negligence in handling its preservation obligation. Relevant material had been lost. And even though some evidence remained available to help Voom prove its case, the court ruled that an adverse inference instruction to the jury was the right sanction.

What We Can Learn From It

The best lesson we can take from *Voom* is a slight variation on an old saying: if you want to be lucky, you had better be good.

Settlement Negotiations Don't Postpone Your Preservation Obligation. EchoStar's main argument was that it didn't reasonably anticipate litigation because it was actively trying to renegotiate its contract with Voom to settle the matter, not litigate it. The court quickly dispensed with that, responding that anticipation of litigation existed, stating "EchoStar's argument ignores the practical reality that parties often engage in settlement discussions before and during litigation, but this does not vitiate the duty to preserve. EchoStar's argument would allow parties to freely shred documents and purge e-mails, simply by faking a willingness to engage in settlement negotiations." Why did the court take such a cynical view of EchoStar's position? There's no way to know for sure, but the court might have concluding that EchoStar simply wasn't being good. The court looked to a number of comments in the recovered emails that suggested that EchoStar had ginned up a fake breach to use as "leverage" in the renegotiation, even as its corporate counsel testified that EchoStar knew Voom would sue if it cancelled the contract. The court simply doubted that EchoStar was negotiating in good faith.

If Your Defective Litigation Hold Doesn't Work, You're On The Hook. Does this case really mean that a full-fledged litigation hold complete with interruption of automatic deletion processes is always required early in a contract renegotiation? Probably not. Again, we can't know for sure, but this case might well have come out differently if it hadn't been so obvious that EchoStar hadn't properly preserved highly relevant documents early on. Had EchoStar's personnel manually retained all the emails that later turned up in the "snapshot" from other litigation, Voom might not have been able to show that any spoliation actually occurred. The court might have cautioned EchoStar that its reliance on manual retention efforts were risky, but it could easily have let EchoStar off the hook on a "no

harm, no foul" analysis. Instead, EchoStar's deletion of such obviously incriminating messages left EchoStar in a tough spot. So, if you decide to rely on less than a full-fledged litigation hold, take care to make sure that your less formal preservation efforts really work.

Your Past Sins *Will* Count Against You. The court also held that the trial court was right to take into account EchoStar's past spoliation offenses when considering whether it had acted in bad faith. EchoStar had been sanctioned for spoliation in *Broccoli v. EchoStar Communications Corp.*, 229 FRD 506 (D. Md. 2005). And the court derisively noted that even after it was sanctioned in *Broccoli*, EchoStar saw fit to reduce hold time on its automatic email deletion system from 21 to seven days. Did that make one bit of difference to the material preserved or deleted in this case? No. But that's cold comfort to EchoStar at this point. The point is, once a court concludes it's dealing with a bad actor, a wide variety of otherwise insignificant facts fall pretty easily into an decision that goes against you. So, if you want to be lucky, it's better to be good.