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E-Discovery Cost-Shifting Approaches Get New Attention From Courts

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The question of e-discovery-related cost-shifting typically arises in two settings: (1) when a party seeks to shift the cost of electronically stored information production during litigation to the requesting party pursuant to Fed.R.Civ. P. 26(b)(2)(B); and (2) when a prevailing party seeks to recover its costs after judgment has been entered in its favor pursuant to Fed.R.Civ.P. 54(d). This article will discuss both scenarios as they have been addressed in two recent cases – Boeynaems v. LA Fitness Int'l, 2012 U.S. Dist. LEXIS 115272 (E.D. Pa., Aug. 16, 2012), a decision involving cost-shifting prior to class action certification, and Race Tires America v. Hoosier Racing Tire, 674 F.3d 158 (3d Cir. 2012), in which the U.S. Court of Appeals for the Third Circuit addressed applications to recover e-discovery-related costs under 28 U.S.C. §1920.

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COST-SHIFTING PRIOR TO CLASS CERTIFICATION

While there is substantial precedent regarding cost-shifting during active litigations pursuant to Fed.R.Civ.P. 26(b)(2)(B), the U.S. District Court for the Eastern District of Pennsylvania's decision in Boeynaems is noteworthy because it appears to be the first decision in which e-discovery costs have been shifted prior to class certification on the rationale that even where the discovery sought is relevant to class certification (i.e., is appropriate initial stage discovery), it can be excessive and burdensome enough to warrant a directive that the requesting party share in (or bear entirely) the cost.

After incurring significant expenses in responding to the plaintiffs' first set of discovery requests, LA Fitness sought to shift the costs related to responding to the plaintiffs' second requests. In the latter, the plaintiffs asked for extensive information, some of which was irrelevant to class certification. The defendants claimed that the information was excessive, even if it related to certification, and would be "very expensive." The court agreed. In assessing fairness concerns, the Judge Michael M. Baylson of the Eastern District pointed out that the parties' respective discovery burdens, as in many employment class action matters, were "asymmetrical," and further noted that in determining whether a class is appropriate pursuant to Fed.R.Civ.P. 23, virtually all of the discovery throughout the case (and especially post-certification) will be directed to LA Fitness. Accordingly, with regard to initial phase discovery, the court held:

"The court is persuaded, it appearing that defendant has borne all of the costs of complying with plaintiffs' discovery to date, that the cost burdens must now shift to plaintiffs, if plaintiffs believe that they need additional discovery. In other words, given the large amount of information defendant has already provided, plaintiffs need to assess the value of additional discovery for their class action motion. If plaintiffs conclude that additional discovery is not only relevant, but important to proving that a class should be certified, then plaintiffs should pay for that additional discovery from this date forward, at least until the class action determination is made."

While it currently appears to be an outlier decision, Boeynaems could prove to be an important precedent for defendants in cases involving staged discovery, such as putative class actions. The holding is significant, as it illustrates that litigants who actively participate in the e-discovery process are able to demonstrate sound and good-faith efforts to comply with ESI discovery obligations, and those who cooperate with their adversaries can be rewarded with a balancing of costs under a Fed.R.Civ.P. 26 analysis.

POST-JUDGMENT E-DISCOVERY-RELATED COST RECOVERY UNDER 28 U.S.C. §1920(4)

In Race Tires, the Third Circuit addressed the issue of "whether [28 U.S.C.] §1920(4) authorizes the taxation of an electronic discovery consultant's charges for data collection, preservation, searching, culling, conversion and production as either 'exemplification [or] the … making [of] copies of any materials where the copies are necessarily obtained for use in the case.'" 28 U.S.C. §1920 outlines the scope of costs that may be taxable in favor of a prevailing party pursuant to Fed.R.Civ.P. 54(d). Specifically, §1920(4) permits the taxation of "fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case." In Race Tires, the defendants made an application pursuant to §1920(4) to recoup in excess of $365,000 in costs for e-discovery-related activities, including preservation and collection of ESI, processing of the collected ESI, keyword searching, culling for privileged material, scanning and TIFF conversion, optical character recognition and conversion of videos to DVD format.

The District Court found these charges taxable under §1920(4) as "the electronic equivalent of exemplification and copying" and awarded all costs to the defendants. However, in a detailed opinion espousing a strict and plain-meaning interpretation of §1920, the Third Circuit disagreed. The court acknowledged a split in the circuits on this issue, and that certain e-discovery vendor activities – including "the scanning of hard copy documents, the conversion of native files to TIFF, and the transfer of VHS tapes to DVD" – could be reimbursed under the statute as the electronic equivalent of "copying."

However, it drew the line at other e-discovery costs, like a consultant's charges for data collection, preservation, searching, culling, conversion and production, which it held do not fall with in the restricted ambit of §1920(4). The plaintiffs' petition for a writ of certiorari to the U.S. Supreme Court was denied October 1, 2012.

The question now remains whether the Third Circuit's narrow view as to what constitutes "exemplification" and "making copies" will be embraced as the majority rule. In fact, since the Third Circuit's opinion in Race Tires, courts have been divided as to whether §1920 should be afforded a narrow or expansive interpretation when awarding e-discovery-related costs.

Not long after the Race Tires decision, the Northern District of California endorsed a more expansive interpretation of taxable costs under §1920(4) when it authorized taxation of more than $700,000 in costs – much of which was related to electronic discovery services, including data processing – in In re Online DVD Rental Antitrust Litigation, 2012 U.S. Dist. LEXIS 55951 (N.D. Cal., Apr. 20, 2012). The court specifically noted the contrary Race Tires holding, but elected to take a more expansive view of taxable costs under the statute in light of the absence of Ninth Circuit authority on the issue.

More recently, in Johnson v. Allstate Insurance, 2012 U.S. Dist. LEXIS 148282 (S.D. Ill., Oct. 16, 2012), the defendant sought costs associated with "processing ESI, extraction of metadata, rendering ESI word searchable, deduplication of ESI, creation of TIFF images, electronic data hosting and preparation of productions of ESI," as well as generation of trial graphics and traditional photocopying services. More than half of the total costs sought were for database hosting, which the court disallowed, determining that such expenses fell within Race Tires' prohibition on taxing costs for "collecting and preserving" data. At least one other court adopted similar reasoning in a subsequent opinion. (See Abbott Point of Care v. Epocal, 2012 U.S. Dist. LEXIS 159042 (N.D. Ala., Nov. 5 2012) (rejecting a request for costs associated with preparing and maintaining an electronic database).) Moreover, Allstate's request for more than $100,000 in costs associated with "preparation of productions of ESI" did not, in the court's opinion, qualify as exemplification or copies of necessary materials and was, therefore, also not taxable.

Consistent with Race Tires, however, the Johnson court did allow taxation of costs for creation of TIFF images, as this item was "compensable as copies" under the statute. Other courts have also followed Race Tires in this regard. (See, e.g., Rawal v. United Air Lines, 2012 U.S. Dist. LEXIS 21880 (N.D. Ill., Feb. 22, 2012); Cordance v. Amazon.com, 2012 U.S. Dist. LEXIS 51268 (D. Del., Apr. 11, 2012).) Interestingly, however, §1920(4)'s qualification that the "copies are necessarily obtained for use in the case" appears to have derailed at least one party's attempt to recoup such conversion related fees. In Eolas Technologies v. Regents of the University of California, 2012 U.S. Dist. LEXIS 134114 (E.D. Tex., Jul. 19, 2012), the court ruled that conversion of native files to TIFF format, while allowable and desirable to avoid disclosing metadata, was not necessary to allow for production and, therefore, not taxable under §1920(4).

Thus, absent a more expansive reading of §1920 than afforded by Race Tires and other courts that have followed its precedent, a prevailing party may find its ability to recover its e-discovery costs limited, at least until the U.S. Supreme Court addresses the split in the circuits. Some have speculated, however, that the high court's recent decision in Taniguchi v. Kan Pacific Saipan Ltd., __ US __, 132 S.Ct. 1997 (May. 21, 2012), makes further consideration of the scope of §1920 unlikely in the near term.

In Taniguchi, the Supreme Court addressed the issue of whether the cost of translating documents falls within the ambit of "compensation of interpreters" pursuant to §1920(6). The Supreme Court reversed the Ninth Circuit's decision that it does, dispelling the notion that "Rule 54(d) creates a presumption of statutory construction in favor of the broadest possible reading of the costs enumerated in §1920." Instead, the court explained that "because taxable costs are limited by statute and are modest in scope, we see no compelling reason to stretch the ordinary meaning of the cost items Congress authorized in §1920." The court's narrow reading of allowable costs under §1920 is quite in line with the Third Circuit's Race Tires interpretation of the statute, and calls into question more expansive views such as that in Online DVD Rental. Interestingly, the latter decision is on appeal, and it is anticipated that the Ninth Circuit will be issuing its decision in early 2013. It will be interesting to see if, in light of Taniguchi, the Ninth Circuit feels compelled to apply a more narrow interpretation of §1920.

Notwithstanding the split in the circuits, there is enough guidance in the case law to discern a number of steps that litigants can take to improve the likelihood of an award of e-discovery-related costs under §1920(4). First, when negotiating the terms of a discovery agreement, parties should attempt to specify that e-discovery costs are recoverable by the prevailing party as taxable costs, and be as specific as possible regarding e-discovery-related tasks that can be taxed. (See Tampa Bay Water v. HDR Engineering, 2012 U.S. Dist. LEXIS 157631 (M.D Fla., Nov. 2, 2012).) Even in jurisdictions where the restrictive view is adopted, the courts will allow more leeway where the parties mutually assent to shifting of specific costs. Second, as with any cost application, parties should be prepared to support §1920 applications with thorough and detailed documentation, including itemized estimates and bills from e-discovery vendors that contain enough detail to allow the reviewing court to identify each discovery task and related cost.

CONCLUSION

The Boeynaems decision demonstrates that courts may be receptive to some fee-shifting applications where a producing party cooperates and honors its discovery obligations in good faith. Similarly, Race Tires and recent decisions following it regarding the scope of cost recovery under 28 U.S.C. §1920(4) reveal that, depending on the jurisdiction, a party may recover some, but not necessarily all, of its e-discovery costs after prevailing in a case. Notwithstanding these developments, the Race Tires and the Supreme Court's Taniguchi decisions signal adherence to the long-standing rule that a producing party will generally bear most – if not all – of the cost of retrieving, processing and producing ESI. •

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