

ClientAlert

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Pennsylvania District Court Taxes E-Discovery Costs Against Losing Party

In a May 6, 2011 ruling in the case of Rare Tires America, Inc. v. Hoosier Racing Tire Corp., Judge Terrence F. McVerry of the Western District of Pennsylvania denied a motion objecting to the taxation of nearly \$375,000 in e-discovery costs incurred by the prevailing parties. As the court recognized, the Federal Rules of Civil Procedure impose a "strong presumption" that costs of litigation other than attorneys' fees should be awarded to the prevailing party, but the statute governing the taxation of costs in civil litigation, 28 U.S.C. § 1920, was drafted in a pre-electronic era, and courts have struggled over the extent to which e-discovery costs are taxable. Finding that the services of a vendor to harvest, host, search, format, and produce electronically stored information ("ESI") are "the electronic equivalents of exemplification and copying" as those terms are used in § 1920 and not the type of services that attorneys or paralegals are capable of providing, Judge McVerry ruled that the majority of the e-discovery costs incurred by the defendants were taxable costs. This decision will likely be welcomed by practitioners and litigants who presently find themselves overwhelmed with the costs and burdens associated with e-discovery, inasmuch as the potential for shifting such costs to the opposing party represents one of the few available checks on an overzealous litigant inclined towards excessive and profligate discovery demands.

FACTS

Rare Tires was an antitrust case initiated by a tire supplier against a competitor, Hoosier Racing Tire Corp., and a motorsports standards organization, Dirt Motor Sports, Inc., alleged to have entered into exclusive supply contracts with Hoosier. The discovery process appears to have been acrimonious. The plaintiff imposed 442 search terms to be used to search ESI for potentially discoverable material over the defendants' objection, and propounded 273 discovery requests, including 119 requests for the production of documents and ESI, on one of the defendants. (The number of requests on the other defendant is not mentioned.) The parties (mostly the plaintiff) filed eleven separate discovery-related motions, including a number of motions to compel.

The e-discovery costs incurred by the defendants included the retention of "computer experts to forensically collect and image hard drives, scan documents to create electronic images, process and index electronic discovery data, extract the required metadata fields from electronic records, enable documents to be OCR searchable, and convert documents to the required .tif format." One defendant imaged 19 hard drives and processed data from five custodians, while the other defendant imaged four servers containing 490 gigabytes of data and over 270,000 files.

In 2009, finding that the plaintiff failed to demonstrate antitrust injury, the District Court entered summary judgment in the defendants' favor, a ruling affirmed by the Third Circuit Court of Appeals. Defendants then filed bills of costs consisting primarily of e-discovery costs. The Clerk of Court allowed the majority of the costs sought, taxing the plaintiff \$125,580.55 out of the \$143,007.05 sought for e-discovery by Hoosier and \$241,788.81 out of the \$246,101.41 sought for e-discovery by Dirt Motor Sports.

The plaintiff filed a motion petitioning the District Court, among other things, to review the e-discovery component of the taxation of costs.

THE DISTRICT COURT'S RULING

Among the costs taxable to the losing party under § 1920 are "[f]ees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case." Given that "[t]he terms 'exemplification' and 'copying' originated in and were developed in the world of papers," courts have queried "how to apply these § 1920 terms to the world of electronically stored information." Kellogg Brown & Root Int'l v. Altanmia Commercial Marketing Co., No. 07-2684, 2009 WL 1457632, *3 (N.D. Tex. 2009). The Rare Tires court discussed a range of cases construing them narrowly or broadly, but the most important development for purposes of ESI costs appears to have been Congress's 2008 amendment of § 1920 to change the phrase "copies of papers" to "copies of any materials." "After that amendment," the District Court noted, "no court has categorically excluded e-discovery costs from allowable costs."

Several precedent cases had deemed scanning and imaging services the electronic equivalent of the "exemplification" and "copying" of materials, see BDT Prods., Inc. v. Lexmark Int'l, Inc., 405 F.3d 415, 420 (6th Cir. 2005); CBT Flint Partners, LLC v. Return Path, Inc., 676 F. Supp. 2d 1376, 1380-81 (N.D. Ga. 2009); Brown v. McGraw-Hill Cos., 526 F. Supp. 2d 950 (N.D. Iowa 2007); El Dorado Irrigation Dist. v. Traylor Bros., Inc., No. 03-0949, 2007 WL 512428, *10 (E.D. Cal. 2007), but courts also distinguished between services necessary for the proceedings and services solely for the convenience of counsel. In the case at bar, however, there seemed little doubt that the vendors' services were necessary for the proceedings given that the parties and the court had contemplated document production in electronic format from the outset and entered into a case management plan setting forth the requisite specifications. Given the highly technical nature of the services performed by the vendor, the court also had little trouble concluding that they were not the type of services that attorneys or paralegals were trained for or capable of providing, and thus the costs at issue were confined to "exemplification" and "copying" within the meaning of the statute and did not impermissibly extend to the recovery of fees for professional work. The court refused to credit the plaintiff's protestations that the costs were unreasonable or excessive, quoting another court's statement that it is unlikely that a party would "increase its costs unnecessarily without knowing that it would prevail." Petersen v. Union Pac. R.R. Co., No. 06-3084, 2009 WL 2163470, *4 (C.D. Ill. July 17, 2009).

Notably, the opportunity for the prevailing party to recover costs pursuant to § 1920 also extends to cases brought by the United States or a federal agency. Particularly in contexts such as antitrust where a federal agency is as likely to initiate litigation as a private party, litigants should take note of 28 U.S.C. § 2412, which provides that "a judgment for costs, as enumerated in section 1920 . . . , may be awarded to the prevailing party in any civil action brought by . . . the United States or any agency or any official of the United States. . . ." Commentators have said of § 2412 that it puts the United States on the same footing as private parties with respect to the award of costs in civil cases.

CONCLUSION

The court in Rare Tires added "a final note" stating that "the facts and circumstances of this case were unique and for that reason, this Memorandum Opinion should *not* be read as a pronouncement or representation of how this Court or any other member of this Court will rule on future disputes regarding costs of e-discovery." In fact, however, the document demands, the volume of data, the nature and expense of the vendors' services, and even the chronic discovery disputes between the parties in Rare Tires

are not at all atypical in commercial litigation. Litigants should consider the risk of eventually having to bear those costs before propounding discovery requests of dubious value, while parties on the other side of an aggressive seeker of ESI should use Rare Tires and like cases as leverage in negotiating agreements to confine e-discovery within a manageable scope.

For More Information

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