



## The Plumbing of a Motion to Compel

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In a product defect case about brass plumbing fittings, the Defendants fought a motion to compel electronically stored information relevant to class certification, because of undue burden and cost. They lost...in large part. *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 2009 U.S. Dist. LEXIS 47636, 1 (D. Minn. June 5, 2009).

### Paper Clogging the Drain

The Court initially required the parties at the beginning of the litigation to only focus on hard copy documents out of the concern the electronically stored information would drive up the cost. 2. The Court stated:

“ESI may prove to be relevant to the first stage of discovery, we cannot meaningfully make that prediction now, and require the parties to engage in what could be vastly more expensive, and yet utterly futile, discovery.” *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 2.

The Court further stated on electronically stored information:

“[S]hould the parties uncover voids in the information disclosed in hard copy form, they are . . . at liberty to press for further discovery including electronically stored information.” *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 2.

### The Defendants’ Electronically Stored Information

Deposition testimony revealed the Defendants’ electronically stored information includes employee email folders and files on the network system. Additionally, the ESI of former employees’ were archived on DVD. There was also a separate network drive that contained un-segregated folders from over 600 employees. *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 2-3.

### Enter the Litigation Hold and Search Terms

The Defendants produced a list of individuals who were issued a litigation hold. *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 3.

The Plaintiffs in turn requested searches across the different databases with 26 key words.

The Defendants opposed the request as being “not necessary for class certification and that the request was overly broad and would be extremely costly.” *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 3.



## The Defendants' Arguments Going Down the Drain

The Defendants argued that 1) the first Court Order did not allow for any ESI productions; and 2) producing ESI would be unduly burdensome and costly.

The first Court order did NOT foreclose electronic discovery. *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 4. The Court stated the first Order allowed for electronic discovery if there were “voids in the information disclosed in hard copy form.” *Id.* The Court noted email messages showed possible gaps over fittings failures and aggressive water compared to the paper documents. *Id.*



The purpose of civil discovery is to allow parties to “obtain the factual information needed to prepare a case for trial.” *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 5. Despite the discovery being limited to class action certification, the Court stated there was a presumption in favor of production the Defendants' electronically stored information. *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 4-5.

## Cost Counts

The Defendants were able to stop a complete rout with their cost arguments.

The Defendants had approximately 61 gigabytes of data, which would have totaled around 27 million pages if printed. The Defendants estimated searching all of the databases to cost around \$1,150,000 and take seventeen weeks to perform. That did not include collection and processing. *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 6-7.

## The Court Order

The Court did not buy the Defendants' burdensome arguments, especially considering a lawyer who was not an expert on searches made the claim. *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 6.

The Court did try to limit false hits from the search terms by limiting the number of search terms to 14 specific terms. The Defendants's searches were limited to the network drives, custodian emails and the DVDs of the former employees. *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 6-7.

## Bow Tie Thoughts:

The parties would have been better served addressing electronically stored information at the beginning of the lawsuit, instead of delaying it for over a year. Both sides would have been in a better position to judge class certification or settlement options if they knew the big picture. Moreover, the Defendants had over a 600 person company. Using email would be a fact of life.

The collection, processing, data reduction and review of 61GB would not be cheap, but \$1,150,000.00 for the searches alone over 17 weeks sounds inflated.

The perceived cost might be inflated by thinking of electronically stored information as the same as

reviewing 27 million pieces of paper. ESI can be reduced by targeted collections, pre-discovery tools to reduce the data set that are then fully searchable in a litigation support software. With paper review, lawyers, contract attorneys and paralegals are digging through boxes of paper only searchable by the human eye. One can see where a seventeen week estimate comes from such a brut force search.

Processing costs, which include data reduction to cull down electronically stored information, is approximately \$600 to \$1000 a gigabyte, depending on the vendor's services. Attorney review in a litigation support software is reduced by having to review less ESI, such as not reviewing any email newsletters, spam and focusing on specific date ranges. With that said, estimating the cost to search 61GB that also did NOT include collection and processing to be over a million dollars seems high on the facts presented.