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Electronic Discovery Costs: Loser Pays (for what?)

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To what extent might it be possible to recoup costs associated with electronic discovery as part of a trial judgment? Federal Rule of Civil Procedure 54(d) gives the prevailing party the right to recover costs where authorized by statute. 28 U.S.C. § 1920(4) provides that "fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case" can be assessed as costs. Working to equate "exemplification" and "making copies" with electronic discovery processes, two courts have recently reached substantially different conclusions about the scope of what may be recovered.

***Mann v. Heckler & Koch Defense, Inc.*[1]**

In *Mann*, Jason Mann asserted defamation and retaliation claims against his former employer, Heckler & Koch Defense, Inc. (HKD). After succeeding in having certain claims dismissed and ultimately winning summary judgment, HKD sought to recover more than $36,000 in expenses paid to a third-party vendor for various electronic discovery services, including compiling a database, converting documents from native into image format, applying Bates numbers, and burning CDs for production. The court held that only the costs associated with burning the CDs (referred to by the court as the "production costs" of the case) qualified as "copying" for purposes of Section 1920(4).[2] Relying heavily on *Fells v. Virginia Department of Transportation*,[3] the court distinguished between tasks that were more appropriately described as "creating" electronic documents and those that were truly just "copying." The court felt that searching and de-duplicating documents, metadata extraction, and other tasks associated with creating the database were more akin to creating new electronic documents. Refusing to expand the definition of "copying" in this case, the court held that the majority of the expenses paid to the third-party vendor were not reimbursable.

1. 2011 U.S. Dist. LEXIS 46045 (E.D. Va. Apr. 28, 2011).

2. It is unclear from the opinion how the court's approval of $1,561.34 in electronic copying costs (*23) lines up with the chart of taxed costs (*24).

3. 605 F. Supp. 2d 740 (E.D. Va. 2009).

Race Tires America, Inc. v. Hoosier Racing Tire Corp. (*Race Tires II*)[4]

The defendants in *Race Tires II* also sought to recover their electronic discovery expenses after obtaining summary judgment in this antitrust case. Combined, the defendants accrued approximately $390,000 in electronic discovery expenses due to a particularly contentious discovery process. The parties together filed a total of 11 discovery motions and the plaintiffs aggressively pursued electronically stored information, propounding 273 discovery requests and requiring more than 442 search terms, over the objections of the defendants. To respond adequately to the plaintiffs' demands, the defendants hired computer experts to collect hundreds of gigabytes of data from their servers, scan documents, process and index the data, extract metadata, enable documents to be searchable, and convert the documents to the required format.

The court held that the defendants were entitled to receive more than $367,000, reimbursing almost all of their electronic discovery expenses. In reaching its decision, the court focused on the difference between services that could be performed by attorneys and legal staff (i.e., the document review) and those that are more technical in nature (i.e., the document production). The court distinguished *Klayman v. Freedom's Watch, Inc.*,[5] in which the district court refused to reimburse as costs the work performed by outside consultants to search for and retrieve discoverable documents, noting that in *Klayman* much of the work performed by the vendor was done before the discovery request was issued or after the court ruling had ended the discovery process. The *Race Tires II* court noted that neither of the defendants sought reimbursement for review work done by attorneys and paralegals; rather, the defendants sought reimbursement for the "highly technical" services provided by experts in actually producing the documents as requested by the plaintiffs.

Further, the court felt that because the defendants could not have anticipated prevailing in the matter, the costs incurred, though significant, were likely to be the accurate and necessary expenses and not "puffed, exorbitant, or contrived." Finally, the court pointed out again that the costs were incurred "in significant respects at the discovery demands of Plaintiffs." Noting that a reasonable defense to the imposition of prevailing party costs can be the actual inability to pay, the court declined to examine this further, as it was not asserted by the nonprevailing party.

Conclusion

While it is too early to say if "loser pays" will become the standard with regard to electronic discovery costs, courts may consider the idea, especially in cases where one party is responsible for driving up the costs. Parties should strive to meet and confer regarding electronic discovery issues early in the case, negotiating a Case Management Plan that focuses on minimizing these expenses and is designed to identify responsive information. This may include limiting the number of custodians and agreeing on search terms and other filtering criteria.

If you have any questions or would like more information on the issues discussed in this LawFlash, please contact any of the following Morgan Lewis eData attorneys:

4. 2011 U.S. Dist. LEXIS 48847 (W.D. Pa. May 6, 2011).

5. 2008 U.S. Dist. LEXIS 98188 (S.D. Fla. Dec. 4, 2008).

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