DechertOnPoint

October 2011 / Special Alert

A legal update from Dechert's eDiscovery and Data Management Group

Related Practices

- Antitrust/Competition
- Mass Torts and Product Liability

In re Aspartame: Be Careful What You Ask for—You May Have to Pay for It—District Court Affirms Clerk's Broad Award of eDiscovery Costs

Key Points

- Judge Davis's opinion largely affirming the Clerk's substantial award of eDiscovery costs to the prevailing antitrust defendants extends a growing trend of federal courts willing to shift eDiscovery costs through taxation.
- The opinion contains the broadest and most detailed list of taxable eDiscovery services to date by a federal court and creates a useful roadmap for prevailing parties to seek eDiscovery costs.
- The Court's denial of certain requested costs underscores the importance of keeping detailed documentation of eDiscovery costs and services.

The costs of eDiscovery continue to be a critical concern of clients and their litigation counsel. Even with cost-shifting provisions in federal and state rules, substantial eDiscovery costs continue to fall heavily on producing parties—often defendants in complex litigation—and can rise to a level that impacts both pre-trial and settlement strategy.

While not explicitly referencing this concern, a growing number of federal courts have begun to permit prevailing parties to tax the losing party for certain eDiscovery costs. Adding considerable weight to this trend, on October 5, 2011, the District Court for the Eastern District of Pennsylvania predominantly affirmed the Clerk of Court's award of substantial eDiscovery costs to the prevailing defendants. *In re Aspartame Antitrust Litigation*, No. 2:06-cv-01732-LDD.

Taxation of eDiscovery costs provides litigants another avenue by which to seek to shift or recover eDiscovery costs in litigation. Indeed, the award in *In re Aspartame* should give pause to litigants who request broad and burdensome eDiscovery without regard to the attendant costs.

Case Background

In re Aspartame involved a Bill of Costs (including eDiscovery costs) filed by defendant aspartame manufacturers following dismissal of plaintiffs' Sherman Act price-fixing class action as time-barred. *In re Aspartame*, 416 Fed. Appx. 208 (3d Cir. 2011). Defendants' claim for costs was based on Federal Rule of Civil Procedure 54(d)(1) which provides that "costs" be "allowed to the prevailing party" and 28 U.S.C. § 1920(2) and (4) which enumerate the kinds of "costs" (other than attorney's fees) that may be awarded under Rule 54(d)(1), including costs for "making copies of any materials where the copies are necessarily obtained for use in the case."

Defendants' application for costs was first considered by the Clerk of Court of the Eastern District. In his July 26, 2011 opinion, the Clerk awarded defendants more than

Dechert LLP

$565,000 in eDiscovery costs. *In re Aspartame Antitrust Litigation*, No. 06-cv-01732. As noted in our August 2011 *DechertOnPoint* analysis, the Clerk found a "heavy presumption" to tax eDiscovery costs and imposed on the losing party the burden to show that costs should not be awarded.

eDiscovery Services Covered by the District Court's Award

The District Court largely affirmed the Clerk of Court's award of eDiscovery costs, awarding roughly $500,000 in total eDiscovery costs to the three prevailing defendants. The District Court's opinion acknowledged the divergence among courts as to whether, and for which services, eDiscovery costs are properly taxable against a losing party. In largely affirming the Clerk's award, the District Court focused on the efficiencies and savings to all parties from eDiscovery services—especially in complex cases—and left untouched the issues of presumption and burden in a taxation claim.

Applying *de novo* review, the District Court provided a detailed enumeration and analysis of the tasks involved in complying with plaintiffs' discovery requests. Specifically, the District Court found that costs arising from the following eDiscovery services were taxable under Rule 54(d)(1) and 28 U.S.C. § 1920:

- Creating a litigation database;
- Processing electronic data;
- Hosting or storing electronic data through trial;
- Conducting keyword and privilege searches of the electronic data;
- Using Optical Character Recognition (OCR) software to make the documents searchable;
- Extracting metadata;
- Imaging hard drives;
- De-duplicating data;
- Creating "load" files so that the requesting party could access the produced documents;
- Creating CDs and DVDs of the electronic documents;
- Using electronic data recovery systems to open and restore password-protected files;
- Using tape restoration to convert archived data to a usable format; and
- Technical support to complete the above services.

This approved list of eDiscovery services is far broader than that previously granted by other federal courts. This outcome is likely the result of two factors. First, the District Court characterized the volume of discovery in *Aspartame* as "staggering," although the volume of documents produced by at least one of the defendants (approximately 87 gigabytes from 28 custodians) is far from unusual in modern-day litigation. Second, the Court noted that "in cases of this complexity, e-discovery saves costs overall by allowing discovery to be conducted in an efficient and cost-effective manner." The complexity of the antitrust litigation and the benefit provided to all counsel from certain eDiscovery services, such as rendering paper documents searchable through Optical Character Recognition (OCR) software, appears to have been an important factor in the District Court's approval of such costs.

Limitations on eDiscovery Costs Awarded in the District Court's Ruling

The District Court did not award the Aspartame defendants all the eDiscovery costs they requested. Following similar rulings in other jurisdictions, the Court rejected costs associated with applying Bates numbers and confidentiality labels on the ground that these services were not among the types of costs taxable under § 1920. Significantly, the Court also rejected the cost of one defendant's use of advanced "analytics" technology to aid its document review—not because the technology was used improperly or was ineffective, but rather because the Court concluded it was used for the convenience of the producing party's counsel and was not "necessary" to respond to discovery.

Most importantly, the Court's opinion carefully scrutinized defendants' submissions and invoices for eDiscovery costs and rejected certain claimed costs because of a lack of adequate documentation of need (e.g., color scanning of documents lacking significant color content) or because costs were combined or bundled in invoice line items.

The Impact of *In re Aspartame*

The most immediate impact of this decision is to underscore—in bold print—the absolute necessity for litigants to capture accurate and detailed data regarding their eDiscovery costs. Absent such evidence, it appears that federal courts will not tax such costs even if the court believes the services are taxable under Rule 54(d) and Section 1920. In short, a party cannot recover what it cannot prove.

The broader impact of *In re Aspartame* is difficult to state with certainty at this time. Without question, the decision adds considerable volume to the growing chorus of federal court decisions that permit prevailing parties to recover costs associated with eDiscovery services. This trend should prompt litigants faced with significant document and data discovery productions to plan and prepare for submission of a Bill of Costs in the event that they prevail in the litigation by motion or after trial. The broader question is whether this decision and others permitting taxation of eDiscovery costs will change the current discovery dynamic. Some litigants attempt to use broad eDiscovery requests as a litigation sword to drive settlement. The prospect that those same litigants may be assessed some—or all—of the costs of complying with their own broad requests may well turn that sword into a shield for the producing party. At a minimum, the leverage created by cases like *In re Aspartame* should prompt all parties to give additional thought as to whether the risk of a broad discovery request is worth the expected reward.

Practice group contact

For more information, please contact one of the attorneys listed or any Dechert attorney with whom you regularly work. If you would like to receive any of our other *DechertOnPoints*, please click here.

Ben Barnett
Philadelphia
+1 215 994 2887
ben.barnett@dechert.com

Michael I. Frankel
Philadelphia
+1 215 994 2388
michael.frankel@dechert.com