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5 | 24 | 2011 by Eric O'Connor

Prevailing Antitrust Defendants Recover $367,000 in e-Discovery Costs

Recently, prevailing antitrust defendants were awarded $367,000 in e-discovery costs incurred by their vendor. *See* *Race Tires America v. Hoosier Racing Tire Corp.*, 2011 WL 1748620 (W.D. Pa. May 6, 2011). While the Court labeled the facts as "unique" and that its holding was limited, the Court's opinion is very thorough and the facts may be familiar to many antitrust defendants.

In today's age where the costs of e-discovery can run several hundred thousand dollars or more and outside vendors are routinely hired to help, this holding can be used as a shield and a sword. During discovery, a party can alert the other side that aggressive discovery requests and a demand for many electronic search terms is a major factor in awarding costs of e-discovery – if the responding party prevails. And, if a party should prevail, the potential for an award of the costs of e-discovery can be an additional bonus and/or leverage for any post-verdict resolution without appeal.

The facts are simple. Plaintiff Specialty Tires America (STA) brought antitrust claims against Hoosier Racing, its tire supplier competitor, and Dirt Motor Sports, Inc. d/b/a World Racing Group, a motorsports racing sanctioning body. STA claimed that a so-called "single tire rule" by various sanctioning bodies like Dirt Motor Sports, as well as the related exclusive supply contracts between some of these sanctioning bodies and Hoosier violated Section 1 and 2 of the Sherman Act and caused STA in excess of $80 million in damages. *See* *Race Tires America v. Hoosier Racing Tire Corp.*, 614 F. 3d 57, 62-73 (3d Cir. 2010). The District Court granted summary judgment in favor of defendants finding that STA had failed to demonstrate antitrust injury, and the Third Circuit Court of Appeals affirmed. *Id*. at 83-84.

The normal rule that "costs — other than attorney's fees — should be allowed to the prevailing party" (Fed. R. Civ. P. 54(d)(1)) creates a "strong presumption" that all costs authorized for payment will be awarded to the prevailing party, so long as the costs are enumerated in 28 U.S.C. § 1920, the general taxation-of-costs statute. As prevailing parties, the defendants each filed a Bill of Costs in which the majority of amounts requested were e-discovery costs. Plaintiff objected arguing that e-discovery costs were not taxable under 28 U.S.C. § 1920(4).

Section 1920(4) allows recovery of "[f]ees for exemplification and the costs of making copies … necessarily obtained for use in the case." 28 U.S.C. § 1920(4). There are two

statutory interpretation questions that have divided Courts. First, costs of electronic scanning of documents can be recoverable as “necessary” or unrecoverable as a mere “convenience.”

The other issue takes a few different forms, but focuses on whether the terms “exemplification” and “copying”, which originated in the world of paper, should be limited to physical preparation or rather updated to take into account changing technology and e-discovery. The Court discussed a litany of these cases. Some courts that have applied § 1920(4) to today’s e-discovery demands, have limited exemplification and copying to just the costs for scanning of documents, which is considered merely reproducing paper documents in electronic form, and refused to extend the statute to cover processing records, extracting data, and converting files. Courts are also divided on whether extracting, searching, and storing work by outside vendors are unrecoverable paralegal-like tasks, or whether such costs are recoverable because outside vendors provide highly technical and necessary services in the electronic age and which are not the type of services that paralegals are trained for or are capable of providing.

In this case, because the Court and the parties anticipated that discovery would be in the form of electronically stored information and because plaintiff aggressively pursued e-discovery (*e.g.*, directing 273 discovery requests to one defendant and imposing over 442 search terms), defendants’ use of e-discovery vendors to retrieve and prepare e-discovery documents for production was recoverable as an indispensable part of the discovery process. The Court also found that the vendor’s fees were reasonable, especially because the costs were incurred by defendants when they did not know if they would prevail at trial.

The Court also denied the plaintiff’s request for a Special Master to assess the reasonableness of e-discovery costs incurred by the prevailing defendants as an unnecessary cost and delay.