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Third Circuit Limits Recoverable E-Discovery Costs

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On March 16, 2012, the Third Circuit Court of Appeals weighed into a debate raging among district courts on whether broad e-discovery costs are taxable on the bill of costs under 28 U.S.C.A. § 1920 and thus recoverable by the prevailing party. *Race Tires America, Inc. v. Hoosier Racing Tire Corp.*, No. 11-2316 (3d Cir. Mar. 16, 2012).

The court's analysis starts with Fed. R. Civ. P. 54(d)(1), which states that "unless a federal statute, these rules, or a court order provides otherwise, costs — other than attorney's fees — should be allowed to the prevailing party." These costs include "fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case." 28 U.S.C.A. § 1920(4). Thus, the critical determinations are which e-discovery tasks constitute "exemplification" or "making copies" and whether these costs were "necessary" for use in the case.

In *Race Tires*, the district court held that the prevailing defendants could recover all charges incurred by e-discovery vendors for the collection, processing, and production of electronically stored information. The case was an antitrust lawsuit filed by Race Tires America, a tire supplier, against a competitor, Hoosier Racing Tire Corp., and Dirt Motor Sport (DMS), a motor sports sanctioning body. During the litigation, Hoosier hired an e-discovery vendor to help produce 430,733 pages of ESI, costing over $125,000. DMS produced over 178,413 documents in electronic format, also using a vendor, for a cost of $240,000. The district court awarded the prevailing defendants all costs, noting that plaintiff had agreed to the defendants' ESI procedures, that plaintiff was aggressive with its discovery requests, and that defendants' vendors had performed highly specialized tasks not akin to mere paralegal work. *Cf. Klayman v. Freedom's Watch, Inc.*, No. 07-22433 2008 WL 5111298, *2 (S.D. Fla. Dec. 4, 2008) (denying costs for vendor collection and processing of ESI because tasks — to "search for and retrieve discoverable . . . documents" — would be done by paralegals and attorneys in a case with paper records).

On appeal, the Third Circuit noted the conflict among courts on taxation of e-discovery expenses and analyzed the legislative history and the purpose and public policy behind limiting taxable costs. Starting with the U.S. rule that litigants generally bear their own costs to ensure open access to courts, the Third Circuit viewed the costs statute as an exception to this important principle, an exception limited to the express language of the statute. The court rejected consideration of whether the activities are performed by third party consultants with "technical expertise," explaining that "[n]either the degree of expertise necessary to perform the work nor the identity of the party performing the work of making copies is a factor that can be gleaned from §1920(4)."

The *Race Tires* analysis rejected considerations relied upon by other district court cost awards in the Third Circuit, such as the recent decision in *In re Aspartame Antitrust Litigation.* No. 07-CV-1732, 2011 WL 4793239 (E. D. Pa., Oct. 5, 2011). The *Aspartame* decision methodically reviewed e-discovery costs in itemized fashion, noting that "e-discovery saves costs overall by allowing discovery to be conducted in an efficient and cost-effective manner." The court awarded costs for actions that significantly "reduced the pool of potentially responsive documents" — e.g. data storage, imaging hard drives, keyword searches,

deduplication, data extraction, and processing. *Aspartame*, at *3. Costs also were awarded for the creation of load files (specifically requested in discovery), OCR (because "searchable documents are essential in a case of this complexity and benefit all parties"), privilege screens, hosting data, and related technical support. *Id*. The *Race Tires* decision makes this cost-savings and efficiency analysis irrelevant.

The Third Circuit in *Race Tires* also rejected equitable concerns as justification for an award "of costs that Congress has not made taxable." This does not affect the possibility of cost-shifting sanctions under other federal rules (e.g. if a request proves unduly burdensome). Focusing exclusively on the language in the costs statute that permits taxation for "making copies," the Third Circuit also rejected costs for word searching and deduplication, noting that this cost was more akin to an attorney searching paper records to determine whether they were responsive to a request, a task that has never been taxable as a cost.

The court concluded that only a narrow band of e-discovery costs was taxable. As the court explained:

> The decisions that allow taxation of all, or essentially all, electronic discovery consultant charges, such as the District Court's ruling in this case, are untethered from the statutory mooring. Section 1920(4) does not state that all steps that lead up to the production of copies of materials are taxable. It does not authorize taxation merely because today's technology requires technical expertise not ordinarily possessed by the typical legal professional. It does not say that activities that encourage cost savings may be taxed.

The court then limited taxable costs to scanning and file format conversion and awarded only $30,370 in costs to Hoosier's electronic discovery vendors. Noting that the vendors' bills were too brief, full of jargon, and in some instances outright unintelligible, the court left open the door to a case-by-case consideration of e-discovery costs as taxable so long as they fit within the rubric of "making copies." For example, in some instances, the cost of copying a hard drive, not allowed in this case, may be taxable. The decision offers guidance to practitioners in the Third Circuit, but in other jurisdictions it may add fuel to the raging debate because so little of the costs were taxable under the costs statute.

Two practice pointers can be drawn from the Third Circuit decision. In cases with high e-discovery bills, counsel should seek advance relief under Rule 26(b)(2)(B) to limit, share, or shift vendor costs. The standards for relief give the district court more options than the narrow "copy" standard for taxable costs. And courts are more likely to award costs if vendor bills are detailed and in plain English, a consideration to make clear at the outset of the retention. An affidavit from the vendor when the application for costs is filed may also serve to explain otherwise obtuse technical jargon for the court.

If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

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