

To the Victor Go the E-Discovery Costs?

Has your organization sought to recover e-discovery costs after prevailing in a federal litigation? If not, you may be missing out on a way to manage, reduce and control litigation costs.

The “taxation of costs” under the Federal Rules of Civil Procedure, where a federal court awards certain expenses to the prevailing party, is a statutory option that is currently making a clumsy transition into the digital age. Two recent decisions highlight the difficulties involved with attempting to fit e-discovery costs into a statutory framework “developed in the world of paper.”

In *Race Tires America, Inc. v. Hoosier Racing Tire Corp.*,¹ a Pennsylvania district court awarded approximately \$367,400 in e-discovery costs to the prevailing defendants in a civil antitrust suit. But in *Mann v. Heckler & Koch Defense Inc.*,² a Virginia district court largely rejected a prevailing party’s request for taxation of e-discovery costs in an employment dispute.

The plaintiff in *Race Tires*, a tire supplier named Specialty Tires of America (SPA), alleged that its competitor, Hoosier Racing Tire Corp. (Hoosier), violated the antitrust laws by entering into exclusive dealing contracts with Dirt Motor Sports (DMS), a motorsports racing sanctioning body involved in thousands of races each year. DMS adopted a “single-tire rule,” requiring racers participating in its events to use a specific tire brand for the entire season. The plaintiffs alleged that the single-tire rule shut-out SPA from competing in the market in violation of the

Sherman Act. The Pennsylvania district court granted summary judgment in favor of the defendants. On appeal, the Third Circuit affirmed the district court’s decision.

In *Mann*, an individual alleged that his former employer fired him in retaliation for his objection to company conduct he believed defrauded a federal government customer. The Virginia district court ultimately dismissed or granted summary judgment on all counts in favor of the defendant.

Following their victories, the defendants in each action moved to recover certain e-discovery costs from the plaintiffs pursuant to Federal Rule of Civil Procedure 54(d) and 28 U.S.C. §1920. Hoosiers and DMS, the *Race Tire*-defendants, requested approximately \$400,000 for vendor e-discovery expenses relating to imaging hard drives and servers, processing data and formatting electronically stored information. The defendant in *Mann* sought to recover \$36,676 in e-discovery expenses for converting files from native to TIFF format, Bates numbering and loading information onto CDs (referred to by the court as “production costs” totaling \$1,561) and creation of a searchable database (\$35,115).

The victor in a lawsuit may recover costs pursuant to Federal Rule of Civil Procedure 54(d), which provides “[u]nless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney’s fees—should be allowed to the prevailing party.” However, a court may only allow those costs authorized under 28 U.S.C. §1920. The question before both

the *Race Tire* and *Mann* courts was whether the statute allows recovery for e-discovery costs under §1920(4): “Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case.”

While both courts acknowledged that Federal Rule 56 creates a presumption that the prevailing party will be awarded costs, each court applied a very different burden of proof when determining which costs would be awarded. Judge McVerry in *Race Tire* noted that “[t]he losing party, therefore, bears the burden of showing why costs should not be taxed against it.” In contrast, Judge Cacheris, in *Mann*, emphasized that “the prevailing party bears the burden of showing that its requested costs are allowable under the relevant statute ...”

The courts reached different decisions regarding which costs were recoverable, despite the fact that they were interpreting the same statute. The *Mann* court summarily determined that costs associated with a searchable electronic database (including searching and de-duping or extracting metadata) are more like costs associated with *creating* a document, and not like *copying* a document (for which §1920(4) permits recovery). Thus, that court awarded the production costs of \$1,561 but refused to award the database expenses of \$35,115. The *Race Tire* court issued a thorough opinion concluding that the majority of e-discovery costs were recoverable under the law.

As a starting point, Judge McVerry observed that the Judicial Administrations and Technical Amendments Act of 2008 changed the language of §1920(4) to allow for recovery of “copies of any materials” rather than the previous phrase, “copies of paper.” Next, in a review of nationwide trends on the topic, the opinion illustrates the broad spectrum of positions on the subject. In one case, for example, the court awarded \$4.6 million to create a litigation database, while in another case, a different court disallowed any such taxation. Notably, the Sixth Circuit—the only Circuit Court to opine on the matter—held

that the costs associated with the electronic scanning and imaging of documents are recoverable under the statute.

Judge McVerry placed a great deal of emphasis on the fact that the parties negotiated and agreed upon an electronic production format. Indeed, in keeping with their obligations under the Rules, the parties held a 26(f) Conference and agreed on a Case Management/Scheduling Order addressing e-discovery issues, including keyword searches, claw-back provisions, metadata and the format for document production. Judge McVerry also observed that much of the defendant’s expenses were incurred because of the plaintiff’s aggressive approach to discovery. It is unclear whether the parties in *Mann* similarly negotiated e-discovery matters.

Ultimately, litigants should be aware of the wide array of considerations that courts will consider when determining whether to allow for the taxation of e-discovery costs at the end of a case. These considerations include:

- Are the copies or exemplifications necessary or merely convenient/aesthetic?
- Did the final product require technological expertise or was it (or could it be) accomplished by associate attorneys or paralegals?
- Did the party opposing costs demand production in a certain format?
- Did the parties agree that responsive documents would be provided in electronic format?
- Was there a large volume of documents requiring electronic processing?

What both *Race Tire* and *Mann* indicate, despite their differences, is that upfront planning and assessment of e-discovery strategy is essential, not only to control climbing costs, but also to best position a prevailing litigant to recover e-discovery costs at the end of the litigation day.

Endnotes

¹ No. 2:07-cv-1294, 2011 WL 1748620 (W.D. Penn. May 6, 2011).

² No. 08-cv-611, 2011 WL 1599580 E.D. Va. Apr. 28, 2011).

For more information about the Race Tire or Mann opinions, or any other matter raised in this Legal Update, please contact one of the authors listed below.

Anthony J. Diana

+1 212 506 2542

adiana@mayerbrown.com

Therese Craparo

+1 212 506 2312

teraparo@mayerbrown.com

Patrick M. Kellermann

+1 202 263 3437

pkellermann@mayerbrown.com

Mayer Brown is a leading global law firm that serves many of the world's largest companies, including a significant portion of the Fortune 100, FTSE 100, DAX and Hang Seng Index companies and more than half of the world's largest banks. Our legal services include banking and finance; corporate and securities; litigation and dispute resolution; antitrust and competition; US Supreme Court and appellate; employment and benefits; environmental; financial services regulatory and enforcement; government and global trade; intellectual property; real estate; tax; restructuring, bankruptcy and insolvency; and wealth management.

OFFICE LOCATIONS AMERICAS: Charlotte, Chicago, Houston, Los Angeles, New York, Palo Alto, São Paulo, Washington DC
ASIA: Bangkok, Beijing, Guangzhou, Hanoi, Ho Chi Minh City, Hong Kong, Shanghai
EUROPE: Berlin, Brussels, Cologne, Frankfurt, London, Paris
TAUIL & CHEQUER AVOGADOS in association with Mayer Brown LLP: São Paulo, Rio de Janeiro
ALLIANCE LAW FIRMS: Spain (Ramón & Cajal); Italy and Eastern Europe (Tonucci & Partners)

Please visit our web site for comprehensive contact information for all Mayer Brown offices. www.mayerbrown.com

IRS CIRCULAR 230 NOTICE. Any advice expressed herein as to tax matters was neither written nor intended by Mayer Brown LLP to be used and cannot be used by any taxpayer for the purpose of avoiding tax penalties that may be imposed under US tax law. If any person uses or refers to any such tax advice in promoting, marketing or recommending a partnership or other entity, investment plan or arrangement to any taxpayer, then (i) the advice was written to support the promotion or marketing (by a person other than Mayer Brown LLP) of that transaction or matter, and (ii) such taxpayer should seek advice based on the taxpayer's particular circumstances from an independent tax advisor.

Mayer Brown is a global legal services organization comprising legal practices that are separate entities (the Mayer Brown Practices). The Mayer Brown Practices are: Mayer Brown LLP, a limited liability partnership established in the United States; Mayer Brown International LLP, a limited liability partnership incorporated in England and Wales; Mayer Brown JSM, a Hong Kong partnership, and its associated entities in Asia; and Tauil & Chequer Advogados, a Brazilian law partnership with which Mayer Brown is associated. "Mayer Brown" and the Mayer Brown logo are the trademarks of the Mayer Brown Practices in their respective jurisdictions.

This Mayer Brown publication provides information and comments on legal issues and developments of interest to our clients and friends. The foregoing is not a comprehensive treatment of the subject matter covered and is not intended to provide legal advice. Readers should seek specific legal advice before taking any action with respect to the matters discussed herein.

© 2011. The Mayer Brown Practices. All rights reserved.