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Legal Update
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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 excusive 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.

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