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Cost Allocation of Discovery Prior to Class Action Certification

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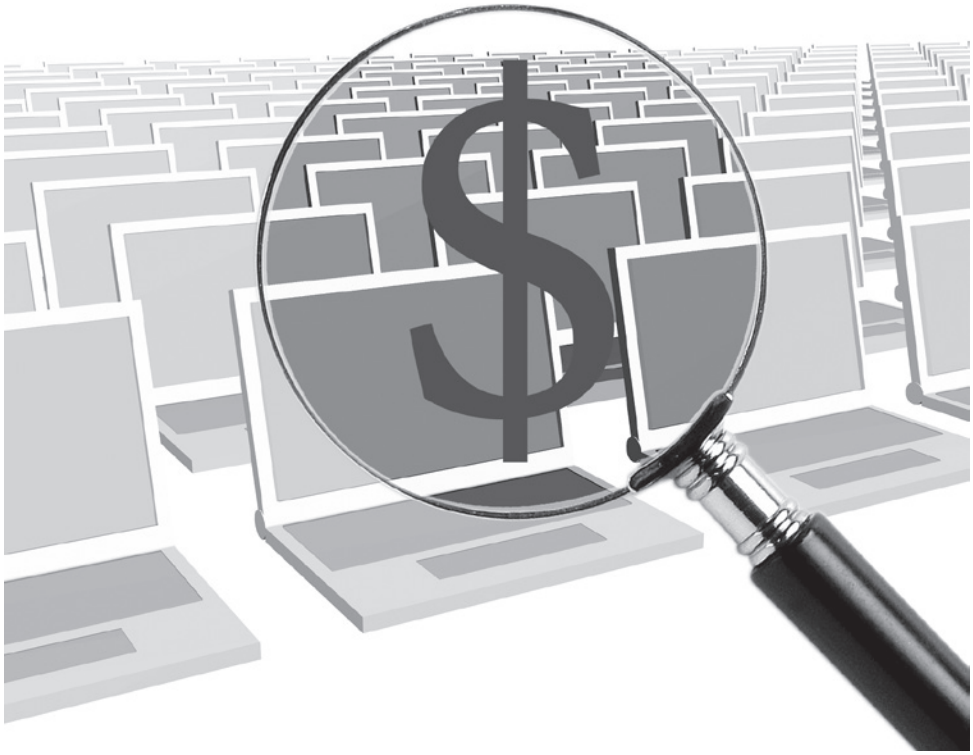
The asymmetrical nature of discovery in class action lawsuits creates a time-consuming and costly problem for defendants—a problem compounded by the complex, high-volume nature of e-discovery. While such defendants may have millions of potentially relevant documents across multitudes of systems, plaintiffs usually have a much smaller discovery burden. Given this imbalance, defendants in class actions are often vulnerable to broad, costly discovery demands.

In one recent high-profile case, the defendant in a putative class action tried to protect itself by moving for a protective order limiting the scope of its preservation obligation or shifting the preservation cost to plaintiffs. In *Pippins v. KPMG*,[1] a case discussed in this column, KPMG sought to limit its pre-class-certification preservation obligations with respect to thousands of hard drives. Although he recognized the "considerable expense" for KPMG, Magistrate Judge James L. Cott still ordered KPMG to preserve the hard drives pending class certification. In his Memorandum and Order, Judge Cott noted that KPMG had failed to demonstrate that the hard drives did not contain relevant information. Thus, KPMG did not establish "the absence of a duty to preserve the hard drives,"[2] nor were any arguments under a proportionality test applicable at the time.[3] District Judge Colleen McMahon later rejected KPMG's motion to set aside Cott's Memorandum and Order,



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stating that KPMG was "hoist on its own petard" because it failed to provide any indication of what information the hard drives contained.[4]

In the wake of *Pippins*, a recent Eastern District of Pennsylvania decision provides defendants hope that pre-class-certification discovery costs can be tempered. In *Boeynaems v. LA Fitness International,* five plaintiffs challenging LA Fitness' membership cancellation policy and practices sought additional discovery at LA Fitness' expense prior to class certification.[5] In a case of first impression, Judge Michael Baylson granted the plaintiffs access to some additional discovery, but shifted the cost to the plaintiffs. In doing so, Judge Baylson found a solution that permitted appropriate discovery while keeping the cost allocation "fair and reasonable."[6]

Case Background

The plaintiffs filed their third amended and consolidated class action complaint on Oct. 12, 2011, alleging that LA Fitness, a fitness club operator, breached membership contracts and violated both Florida's Deceptive and Unfair Practices Act and Washington's Consumer Protection Act by charging additional membership fees after the plaintiffs tried to cancel their memberships. According to the third amended complaint, LA Fitness deceived its members by ignoring requests to cancel memberships, requiring members to use preprinted forms from LA Fitness when cancelling, and falsely stating that only 30 days' notice was needed for cancellation.[7] In addition, the plaintiffs cited hundreds of complaints to the Better Business Bureau and online forums where posters identifying themselves as LA Fitness members and LA Fitness employees discussed the difficulty of membership cancellation.[8]

The plaintiffs sought broad discovery from LA Fitness before class certification, including customer complaints about cancellation practices and documents showing how LA Fitness employees implemented its cancellation policy. In particular, the plaintiffs' May 4, 2012 Motion to Compel Discovery requested production of all "Member Notes," LA Fitness' term for all electronic data relating to individual members, over a 60-month period from five states where LA Fitness operated. In four discovery conferences between January and May 2012, the parties attempted to create a workable discovery plan.[9] When those conferences failed, the plaintiffs submitted a letter to the court on July 31, 2012 reiterating some of the same concerns stated in the Motion to Compel.

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The discovery requests that were the subject of the July 31 letter fell into five basic categories: (1) internal memoranda and correspondence relating to LA Fitness' policies on cancellations; (2) documents relating to LA Fitness' response to consumer complaints; (3) interrogatory responses regarding the identity of the defendant's managers directly involved with customer cancellation notices and complaints; (4) interrogatories regarding LA Fitness' reasons why cancellations were not processed; and (5) privilege logs.[10] The exchanges between the plaintiffs and LA Fitness after the July 31 letter created, in the words of Baylson, a dialogue "similar to a Verdian opera scene where a tenor and a bass boast of their qualities to compete to win over the fair princess."[11] Ultimately, the parties' inability to create a workable discovery plan led to Baylson's Memorandum and Order on the Motion to Compel.

Shifting the Cost Burden

The *LA Fitness* ruling gives defendants in class actions hope in two ways. First, Baylson limited the discovery available to the plaintiffs. While the plaintiffs had sought "all responsive internal documents" on particular issues, the court rejected the request as a "sweeping characterization of a defendant's obligation…prior to class action certification."[12] The court laid out five categories of discovery that it deemed outside the "discovery fence," and thus unavailable before class certification, regardless of whether the plaintiffs were willing to pay the costs. Those categories included any request for "all" documents of a general category, LA Fitness' responses to consumer complaints, and documents regarding the processing of individual cancellation notices.[13]

Second, Baylson shifted the cost of future pre-class-certification discovery to the plaintiffs. According to *LA Fitness*, when the class certification determination is still pending and the plaintiffs seek "very extensive discovery, compliance with which will be very expensive," the plaintiffs should bear the discovery cost absent some equitable circumstances to the contrary.[14] In contrast to the *Pippins* rulings, Baylson required the plaintiffs to pay for both the preservation and further inspection of the Member Notes stored by LA Fitness at an Iron Mountain facility. While LA Fitness had preserved these documents as part of a litigation hold, it successfully argued that the documents contained little relevant information and that it should not bear the burden of further preservation. Baylson also shifted the cost of any other discovery to the plaintiffs, stating a concern that "discovery burdens should not force either party to succumb to a settlement that is based on the cost of litigation rather than the merits of the case."[15] In so doing, Baylson kept open the possibility of additional discovery for the plaintiffs while avoiding additional pre-class-certification discovery costs for the defendant.

Two Noteworthy Elements

Class Actions. For Baylson, two elements of the case merited particular attention. The first was that *LA Fitness* was a putative class action complaint. The concept of a class action "dramatically changes the strategies and economic considerations of the parties and their counsel."[16] While ordinary

civil actions usually have a set range of economic consequence, a class action "dramatically increases the economic pressure on the defendant."[17]

Asymmetrical Discovery. The second, related element was that discovery in *LA Fitness* was asymmetrical. While the five plaintiffs may have been joined by others, in the absence of class certification, their total document production would have been limited to their membership agreements and perhaps some correspondence with LA Fitness. For LA Fitness, however, even in a non-class action, its millions of documents and vast quantities of electronically stored information (ESI) could potentially create preservation and production costs that could be a significant factor in the case's defense. Moreover, because *LA Fitness* was a putative class action, the scope of potential discovery was even larger. As Baylson observed, while expanding discovery in a class action may be necessary to decide class certification, this additional discovery burden would fall only on LA Fitness.[18] For Baylson, the asymmetrical nature of discovery in *LA Fitness* did not require halting discovery, but it created a situation in which allocating the discovery costs between the parties was fair.

Factors in 'LA Fitness' Decision

While Baylson's decision does not pinpoint one overriding consideration for shifting pre-class-certification discovery costs to the plaintiff, it highlights several key factors. The first was the court's belief that a confident plaintiff, especially one with financial means, can make its own investment in a case by paying for discovery. The decision noted that the plaintiffs' attorneys were a successful plaintiffs' firm that had won hundreds of millions of dollars for its clients.[19] Given the firm's success, Baylson saw no reason why it could not invest in discovery if it believed the case was meritorious and worthy of the investment.

The second factor was LA Fitness' diligent participation in the discovery process leading up to Baylson's Order and Memorandum. Unlike KPMG in *Pippins*, which could not come up with a sampling plan and thus never provided any information on what its hard drives contained, LA Fitness asserted that it had reviewed (1) over 500,000 Member Notes looking for certain terms, (2) over 1,000 boxes of cancellation requests, (3) over 19,000 pages of documents, and (4) over 32,000 emails.[20] Not only did such efforts demonstrate a good faith effort to cooperate with the discovery process, it allowed LA Fitness to argue that the remaining discovery in dispute contained few relevant documents. This proportionality argument, though not explicitly referenced by Baylson, was offered by KPMG and rejected by the court in *Pippins* because KPMG never reviewed any of its hard drives.

Furthermore, LA Fitness' cooperation provided Baylson with evidence that it had already borne significant costs in complying with the plaintiffs' discovery requests. The extensive discovery already provided justified LA Fitness' resistance to more costly discovery at its expense, and for Baylson, the already produced documents gave the plaintiffs plenty of materials that could be probative as to class action certification.[21] If the plaintiffs truly needed more documentation on this issue, Baylson ruled, they should be required to pay for them themselves.

Conclusion

While *LA Fitness* is not a complete repudiation of *Pippins*' support for broad preservation obligations prior to class certification, it may guide class action defendants seeking to limit expensive pre-class-certification discovery. Perhaps the most encouraging takeaway from *LA Fitness* is its willingness to allocate the costs not only of pre-class-certification discovery, but also of pre-class-certification preservation.

1. *Pippins v. KPMG*, No. 11-cv-0377, 2011 WL 4701849, at *2 (S.D.N.Y. Oct. 7, 2011).
2. Id. at *8.
3. Id.
4. *Pippins v. KPMG*, 279 F.R.D. 245, 256 (S.D.N.Y. 2012).
5. *Boeynaems v. LA Fitness Int'l*, No. 10-cv-2326, 2012 WL 3536306, at *1 (E.D. Pa. Aug. 16, 2012).
6. Id. at *11.
7. Third Amended and Consolidated Class Action Complaint at 2, *Silver v. LA Fitness International*, No. 10-cv-2326 (E.D. Pa. Oct. 12, 2011).
8. Id. at 13.
9. *Boeynaems*, 2012 WL 3536306, at *2.
10. Id. at *9-10.
11. Id.
12. Id. at *11.
13. Id. at *13-14.
14. Id.
15. Id. at *12.
16. Id. at *2.
17. Id.
18. Id. at *3.
19. *Pippins*, 2011 WL 4701849, at *4.
20. *Boeynaems*, 2012 WL 3536306, at *10.
21. Id. at *12.