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FEDERAL E-DISCOVERY

Cost Shifting Warranted For Production of Inaccessible ESI


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Cost shifting is back. Complaints about production costs have been ever present. And such concerns are most often heard when an opposing party requests electronically stored information (ESI) that will be unusually expensive or difficult to produce, such as information contained on backup media that exists purely for disaster recovery purposes. Cost shifting, though rarely used, is one way courts can manage the large burden such production requests can create for the producing party.

In a recent case, *United States ex rel. Carter v. Bridgepoint Education*, Magistrate Judge William Gallo of the U.S. District Court for the Southern District of California employed cost shifting when the requesting party demanded production of ESI stored on backup tapes and a reformatted production of previously produced active email files.[1] *Carter* is a qui tam action concerning allegedly fraudulent use of federal funds under Title IV of the Higher Education Act of 1965. Under Title IV, the federal government provides funds to institutions of higher education for the purpose of giving financial assistance to students. Several constraints are placed on participation in this program. The relevant constraint, known as the Incentive Compensation Ban, prohibits participating institutions from "provid[ing] any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any persons or entities engaged in any student recruiting or admission activities."[2] Under the False Claims Act, two former recruiters for Bridgepoint Education (collectively the plaintiffs) sued Bridgepoint on behalf of the federal government. The plaintiffs alleged that, in violation of the Incentive Compensation Ban, Bridgepoint based recruiter compensation directly on enrollment activities. Bridgepoint argued that enrollment activity was just one of many factors considered when determining pay.[3]

BIGSTOCK

Discovery Disputes

Discovery between the parties was contentious. Numerous disputes arose, several of which the parties ultimately resolved at the urging of the court. Of the three remaining disputes, two were subject to a cost shifting analysis by Gallo. The first dispute concerned the production of certain backup tapes

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maintained by Bridgepoint. The backup tapes were alleged to contain email exchanges among Bridgepoint recruiters and between these recruiters and third parties. The plaintiffs wanted Bridgepoint to produce the contents of these tapes in their original (i.e., pre-backup) native format. The second dispute related to whether the plaintiffs were entitled to have active email, which Bridgepoint had already produced in Bates-stamped TIFF image format, produced again in native email format, notwithstanding that plaintiffs did not specify a format preference in their initial production request and, if so, whether any related costs should be shifted to the plaintiffs. The third dispute was whether Bridgepoint was required to produce full metadata for the ESI when, again, the plaintiffs had failed to ask for it in their production request.

The plaintiffs presented several arguments why the productions should be ordered according to their terms, centering around the alleged benefits of producing documents in native rather than TIFF format, as well as unsupported claims that Bridgepoint intentionally moved data to backup tapes in an effort to make the data inaccessible and, thereby, less likely to be deemed discoverable.[4]

Discoverability and Constraints

Gallo explained that even when ESI is considered discoverable, an analysis of accessibility under Rule 26(b)(2)(B) and of the proportionality factors outlined in Rule 26(b)(2)(C) is necessary to determine potential limits on discovery and potential cost shifting for some or all of the production costs.[5]

Backup Tapes

The first dispute concerned the plaintiffs' request for native format production of email files contained on specific sets of Bridgepoint's backup tapes. Bridgepoint opposed this request, arguing that such ESI was not reasonably accessible because of undue burden and cost. In support of this argument, Bridgepoint cited precedent holding that backup tapes created for disaster recovery should be considered inaccessible and not subject to review or production, argued that restoration of the ESI would take months and cost over $2 million to complete, claimed that the backup tapes were created as part of a longstanding data retention practice, asserted that there was no intentional spoliation since the move of the ESI to backup tapes occurred prior to the case's unsealing and as part of standard data retention, and noted that there was no valid reason to require native production since TIFF format was satisfactory.[6]

After finding the backup tapes to be discoverable under Rule 34,[7] Gallo turned to whether the backup tapes should be deemed inaccessible under Rule 26(b)(2)(B), and, if so, whether a cost-shifting analysis should be applied with respect to the production of the tapes. He noted that otherwise discoverable ESI is considered "inaccessible" when the "expenditure of resources required to access the contents is itself unreasonable."[8] Importantly, this analysis focuses on the resources that must be expended to access the data rather than any particular attribute of the ESI's state or storage format. Gallo noted that established precedent indeed suggests that backup tapes are inaccessible and that a cost-shifting analysis may be applied, but that cost shifting is not available where a party made ESI inaccessible despite knowledge of a probable litigation.[9] Looking at the facts in *Carter*, Gallo found that Bridgepoint's backup tapes were indeed inaccessible disaster recovery tapes and that the ESI was placed on the backup tapes as part of Bridgepoint's "typical data retention schematic" and the plaintiffs had "presented no evidence that Defendants were under a duty to preserve the data in active format."[10]

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As a result, cost shifting was appropriate. Judge Gallo next determined how production costs for the backup tapes should be distributed.[11] Having noted that the requesting party must demonstrate that the need and relevance of the backup tapes "outweigh the costs and burdens of retrieving and processing this inaccessible information,"[12] Gallo then relied on the seven factor test articulated in *Zubulake v. UBS Warburg*[13] to guide his decision on cost shifting. Summarizing the *Zubulake* factors and also the proportionality factors in Rule 26(b)(2)(C), Gallo explained that "when balancing the cost, burden, and need for ESI in a particular format, the court should consider the technological feasibility and realistic cost of preserving, retrieving, reviewing, and producing ESI as well as the nature of the litigation and amount in controversy."[14] He noted the central question of the inquiry is "how important … the sought after evidence [is] in comparison to the cost of production"[15] and observed that the plaintiffs had not effectively countered Bridgepoint's cost estimates.[16]

Gallo held that the factors cut in favor of cost shifting for two reasons. First, since the contents of the backup tapes were email messages between specific parties that likely had little relevance to the issues in the matter, these tapes had "minimal apparent relevance."[17] Second, the plaintiffs did not show a particular need for a different production format—backup tapes were appropriately created under a "common ESI polic[y]"[18] and "the Rules compel no more than production of ESI in its usual form."[19] The Federal Rules of Civil Procedure did not require Bridgepoint to pay to produce the inaccessible ESI "in the form most helpful" to the plaintiffs' case.[20] Instead, Gallo ruled, they required Bridgepoint to produce the materials on the backup tapes in the "usual form," with the plaintiffs paying for "production of inaccessible ESI in an accessible form."[21]

The decision in *Carter* regarding back-

up tapes illustrates several important points. First, courts may still presumptively classify backup tapes as inaccessible ESI. Courts that follow the reasoning in *Carter* will be most likely to consider backup media inaccessible when maintained principally or exclusively for disaster recovery purposes, pursuant to a pre-established data management program, and when the company is in compliance with any preservation obligations with respect to accessible ESI. Second, the relevance of the data stored on the backup tapes is particularly persuasive for determining which party bears production costs.

Production Format

Gallo next addressed the parties' second dispute, over the production format of active emails—native or TIFF. He determined that such a dispute, even concerning active, accessible ESI, "is governed by a similar cost-shifting analysis."[22] He reasoned that because the plaintiffs originally failed to demand production in their desired native format, he needed to determine which party, if any, would pay for another production in the desired format. Citing Rule 26(b)(2)(C), Gallo stated that the relevant inquiry focuses on burden versus benefit, "'considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.'"[23] Reviewing Rule 34(b)[24] and the proportionality factors in Rule 26(b)(2)(C), Gallo concluded that production of active emails in native format was not required. The court listed three reasons for this decision: The TIFF format was "reasonably usable" and searchable, the plaintiffs did not show that production in TIFF format altered the data in a way that affected their ability to pursue their claims, and Bridgepoint was not required to produce documents in multiple formats.[25] Having found that TIFF format was acceptable, the court did not explicitly rule on the issue of cost shifting.

This section of the decision demonstrates three main points. First, while courts are more likely to shift the cost of producing inaccessible ESI, they may still consider the possibility of cost shifting when the ESI sought is accessible. Second, a party must explicitly request its desired production format; otherwise, it risks losing the ability to specify a format or bearing the costs of altering the format. Third, TIFF remains a reasonably usable format for production under the Federal Rules of Civil Procedure.

On the final issue of whether Bridgepoint was required to produce full metadata for any active ESI, the court held that it was not required to do so because the plaintiffs neither explicitly requested metadata nor did they later articulate how the metadata was relevant to the claims at issue.[26]

Conclusion

Although not commonly seen in e-discovery disputes, cost shifting remains alive and well, particularly where parties face aggressive discovery demands. Gallo ultimately determined that some cost shifting would be appropriate, holding that "Plaintiffs will have much ESI to sift through in the months ahead; if they want more … it is fair they pay the price of its production in the Native form they deem so invaluable for the prosecution of their own case."[27]

The decision in *Carter* reiterates that the balance between burden and benefit is central to determining which party should pay the costs of production. And, while not dispositive, the accessibility of ESI is an important consideration for courts deciding whether to cost-shift.

For the time being, parties can feel confident that backup tapes will be deemed inaccessible, particularly when maintained as part of a standard policy. Further, *Carter* reassures that a producing party is not at the whim of a requesting party who, after an initial discovery request, demands production in another format.

1. 305 F.R.D. 225 (S.D. Cal. 2015).
2. 20 U.S.C. §1094(a)(20).
3. *Carter*, 305 F.R.D. at 230.
4. Id. at 234-35.
5. Id. at 236-37.
6. Id. at 234.
7. Id. at 240.
8. Id. at 239.
9. Id. at 241. See, e.g., *Quinby v. WestLB AG*, 245 F.R.D. 94 (S.D.N.Y. 2006), *Semsroth v. City of Wichita*, 239 F.R.D. 630 (D. Kan. 2006).
10. *Carter*, 305 F.R.D. at 241.
11. See id. at 242.
12. Id. at 239.
13. 217 F.R.D. 309 (S.D.N.Y. 2003) (*Zubulake I*). *Zubulake I* was the first in a series of seminal e-discovery decisions by U.S. District Judge Shira Scheindlin. The seven factors articulated in *Zubulake I* are: "(1) '[t]he extent to which the request is specifically tailored to discover relevant information'; (2) '[t]he availability of such information from other sources'; (3) '[t]he total costs of production, compared to the amount in controversy'; (4) '[t]he total costs of production, compared to the resources available to each party'; (5) '[t]he relative ability of each party to control costs and its incentive to do so'; (6) '[t]he importance of the issues at stake in the litigation'; and (7) '[t]he relative benefits to the parties of obtaining the information.'" *Carter*, 305 F.R.D. at 242 (citing *Zubulake I*, 217 F.R.D. at 322).
14. Id.
15. Id.
16. Id. at 243.
17. Id. at 242.
18. See id.
19. Id.
20. Id.
21. Id.
22. Id.; see also id. at 240.
23. Id. at 245 (quoting Fed. R. Civ. P. 26(b)(2)(C)).
24. According to the court, Rule 34(b) allows for production in TIFF format, absent a request that specifies a format. Further, under the Rule, parties are not required to produce materials in more than one format and, therefore, case law supports that "court[s] should consider shifting some or all of the cost of the second production to the requesting party." Id. at 244 (internal quotation marks omitted).
25. Id. at 245.
26. Id. at 246.
27. Id. at 244. Judge Gallo additionally determined that for "all ESI, whether accessible or inaccessible, post-dating this suit's unsealing in January 1, 2013, Plaintiffs will bear the cost of searching and recovery. Defendants, however, will bear the cost of production." Id. at 247. The judge noted that "it can be reasonably presumed that at that point in time Defendants were surely aware of their legal liability and future plaintiffs' likely need for active data." Id. at 244.