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FEDERAL E-DISCOVERY

Recent Developments In Recovering E-Discovery Costs


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Although litigation has always been expensive, the substantial costs of e-discovery have only made matters worse. The potential for a prevailing party to recover costs arising from e-discovery therefore has assumed increasing importance. In a recent article, we wrote about what seemed to be an emerging consensus that much of e-discovery was analogous to physical reproduction of documents and, as a result, should be deemed a recoverable cost under 28 U.S.C. §1920.[1] But the U.S. Court of Appeals for the Third Circuit has now reversed that decision in substantial part, even as courts elsewhere have embraced its logic. This article is intended to serve as an update in this rapidly changing area of e-discovery law.

As discussed in our prior column on this subject, a party who wishes to recover its e-discovery costs must establish that the costs it hopes to recover fall within the ambit of 28 U.S.C. §1920. That section permits recovery of "[f]ees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case."

In May 2011, a court in the Western District of Pennsylvania issued an opinion that read §1920 expansively, allowing the victorious party to recover its e-discovery costs for expenses including the preservation, collection and processing of ESI, keyword searches, and screening for privileged documents.[2] This decision could have opened the door for greater recovery of e-discovery costs. However, the Third Circuit recently issued its own opinion in the direct appeal of *Race Tires*.[3] After a careful analysis of both the language of §1920 and the types of costs that the prevailing party was trying to recover, the Third Circuit vacated the district court's decision in part, finding that the lower court had gone beyond the limits of §1920 and had improperly taxed e-discovery costs.[4] The story does not end there, however, as over the past few months, a federal judge in the Ninth Circuit has decided in two cases to follow the broader and more liberal reading of §1920 originally offered by the Western District of Pennsylvania.

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This article examines the Third Circuit's *Race Tires* opinion in detail and explores the consequences for litigants contending with the often crushing costs of e-discovery.

Right Track to Wrong Turn?

The original Western District of Pennsylvania *Race Tires* case was an antitrust dispute.[5] The plaintiff, Race Tires America (RTA), sued both its competitor Hoosier Racing Tire (Hoosier) and a motorsports racing sanctioning body, Dirt Motor Sports (DMS). Defendants Hoosier and DMS were granted summary judgment, which was affirmed on appeal. After prevailing on the merits, both defendants sought recovery of their e-discovery costs from the unsuccessful plaintiff. The clerk of court ultimately granted them approximately $365,000 in e-discovery costs. It was this decision that plaintiff RTA challenged, arguing that the bulk of the costs awarded were not taxable pursuant to §1920.

In its decision, the district court made it clear that "the court has wide latitude to award costs, so long as the costs are enumerated in 28 U.S.C. §1920."[6] Recognizing that "[s]ome courts have defined the terms [of §1920] narrowly" while "[o]ther courts have taken a broader view taking into account changes in technology," the district court ultimately found that "the requirements and expertise necessary to retrieve and prepare these e-discovery documents for production were an indispensable part of the discovery process."[7] Accordingly, the district court denied plaintiff's objection to the taxation of the e-discovery costs, and ordered plaintiffs to pay.[8] The district court explicitly acknowledged, however, that the Third Circuit "has not yet addressed the issue of whether e-discovery costs are taxable pursuant to 28 U.S.C. §1920(4)."[9]

Less than one year later, the Third Circuit issued its own opinion in the *Race Tires* case, affirming in part and vacating in part the district court's opinion. In contrast to the district court, which emphasized factors such as whether the e-discovery was indispensable, the need for courts to be responsive to new technology, and the efficiency to the parties, the Third Circuit instead focused almost exclusively on the strict language of §1920. In no uncertain terms, the Third Circuit made it clear that if there are to be more expansive interpretations of "exemplification" and "making copies," these changes would need to come from Congress, not the courts.

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Rather than starting with the dispute at issue, the court began by exploring the history of §1920 and its predecessor statutory provision, the Fee Act of 1853.[10] By outlining the statute's history and its original purpose, the court noted that §1920

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"define[d] the full extent of a federal court's power to shift litigation costs absent express statutory authority."[11] From this limiting principle, the court turned its attention to the actual language used in §1920.

The court first considered what types of services could be considered "exemplification." Acknowledging that some courts have taken a narrow reading[12] of the term, while others have been more expansive,[13] the Third Circuit avoided the dispute altogether because it concluded that the e-discovery costs awarded by the district court did not constitute "exemplification" under either interpretation. As for "making copies," the Third Circuit turned to the dictionary, which defined the term to mean "an imitation, transcript, or reproduction of an original work."[14] The court also recognized that a recent amendment to §1920 had expanded the term beyond mere paper copying to encompass the reproduction of "materials."[15]

Having defined the terms at issue, the court began to review the actual costs for which Hoosier and DMS sought recovery. Importantly, the court noted that the invoices submitted had a "lack of specificity and clarity as to the services actually performed."[16] On the same point, the court noted that other invoices were "similarly replete with technical jargon that makes it difficult to decipher what exactly was done."[17] This reflects the importance of obtaining detailed, clear invoices from vendors if parties hope to recover their e-discovery costs, as a vague bill may cause a court to question an otherwise appropriate expense.

Applying the definition of "copying" to the facts, the Third Circuit found that the conversion of native files to TIFF, the scanning of documents, and the transfer of VHS recordings to DVD format were properly found taxable as modern equivalents of making copies.[18] Although the plaintiff argued that the actual amounts taxed were improper because not all of the resulting copies were used in the litigation, the court pointed out that "[o]nce statutory authority to tax costs has been established, the amount awarded is reviewed only for abuse of discretion."[19] For these limited expenses, the Third Circuit thus affirmed the district court's decision to award costs to the prevailing party.

While the Third Circuit allowed the recovery of some additional e-discovery costs such as scanning, the court nonetheless drew a line in the sand and reversed the district court's decision regarding the vast majority of e-discovery expenses. Noting that rulings allowing the recovery of essentially all e-discovery costs are "untethered from the statutory mooring [of §1920]," the Third Circuit was comparatively stingy.[20] In clear terms, the court acknowledged that many e-discovery services may be essential and indispensable to complete a document production, but nonetheless may not be recoverable under the law. Examples may include the imaging of hard drives and searching through files for specific information.

The court compared this harsh reality with the process of document production in the past. In order to produce documents, a litigant would have to go through several time-intensive and expensive steps including physically finding and organizing the documents, traveling to their location, reading them manually, and undertaking a substantive and privilege review.[21] Just as these costs would not have been recoverable as the equivalent of "making copies," neither are the modern day steps in the e-discovery process.

The court was equally unwilling to consider the technical expertise of the person acting, stating 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)."[22] Further tying the hands of lower courts who otherwise might be persuaded to exercise discretion, the court denied that even equitable concerns could justify going beyond §1920. Although the Third Circuit acknowledged that "there may be strong policy reasons in general, or compelling equitable circumstances in a particular case, to award the full cost of electronic discovery to the prevailing party, the federal courts lack the authority to do so…."[23]

Ultimately, the Third Circuit allowed the successful defendants to recover only the costs for scanning, conversion to TIFF and transfer of VHS tapes to DVD—a total of approximately $30,000.[24] This was a reduction of more than 90 percent from the district court's original decision.

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A Different Approach

Although the Third Circuit now has clear guidance limiting the types of e-discovery costs that a court may allow, only time will tell how courts elsewhere respond. Over the past few months, two decisions by Judge Phyllis Hamilton in the Northern District of California have been issued that take a position contrary to the Third Circuit.[25]

In these opinions, unsuccessful litigants moved for review of the taxation of costs that had been awarded by the clerk of the court. The victorious defendants in both cases were allowed to recover various e-discovery costs, including professional fees for visual aids, TIFF conversions, productions that were not delivered, "blowback" costs and other work "necessary to convert computer data into a readable format."[26]

After deciding that it would in fact allow for the cost recovery, in both cases the court addressed the Third Circuit's decision. Acknowledging the contrary position taken by *Race Tires*, the court determined that "in the absence of directly analogous Ninth Circuit authority, broad construction of §1920 with respect to electronic discovery costs—under the facts of this case—is appropriate."[27]

What's Next?

By openly choosing to take a broader reading of §1920 in explicit,direct contrast with the Third Circuit, Hamilton from the Northern District of California has highlighted the potential for a circuit split. It remains to be seen how other courts will respond. Until the issue is resolved, litigants would be well advised to monitor closely the controlling authority in their jurisdiction. Outside the Third Circuit, at least, litigants may be able to persuade courts to adopt a more expansive reading of §1920 in view of the realities of modern litigation. The stakes are clearly high for all parties involved, and this will likely only increase as e-discovery costs continue to mount.

1. H. Christopher Boehning & Daniel J. Toal, "Cost Recovery in the Digital Age," 247 *NYLJ*, 20 (Jan. 31, 2012).
2. *Race Tires America v. Hoosier Racing Tire*, No. 2:07-cv-1294, 2011 WL 1748620 (May 6, 2011).
3. *Race Tires America v. Hoosier Racing Tire*, 674 F.3d 158 (3d Cir. 2012).
4. *Race Tires*, 674 F.3d at 171-72.
5. *Race Tires*, 2011 WL 1748620 at *2-3.
6. Id. at *4 (citing *Crawford Fitting v. J.T. Gibbons*, 482 U.S. 437, 444-45 (1987)).
7. *Race Tires*, 2011 WL 1748620 at *6-9 (internal quotation omitted).
8 Id. at *12.
9. Id. at *7.
10. *Race Tires*, 674 F.3d at 164.
11. Id. at 164 (citing *W. Va. Univ. Hosps. v. Casey*, 499 U.S. 83, 86 (1991)).
12. *Race Tires*, 674 F.3d at 166 ("an official transcript of a public record, authenticated as a true copy for use as evidence") (citing Black's Law Dictionary 593 (7th ed. 1999)).
13. Id. ("the act of illustration by example.") (citing *Cefalu v. Vill. of Elk Grove*, 211 F.3d 416, 427 (7th Cir. 2000)).
14. Id. (citing Webster's Third New International Dictionary 504 (3d ed. 1993)).
15. Id.
16. Id. at 166-67.
17. Id. at 167.
18. Id. at 167-68.
19. Id. at 167.
20. Id. at 169.
21. Id.
22. Id. at 169.
23. Id. at 171.
24.Id. at 171-72.
25. See *In re Online DVD Rental Antitrust Litig.*, No. M 09-2029 PJH, 2012 WL 1414111 (N.D.Cal. April 20, 2012); *Petroliam Nasional Berhad v. GoDaddy.com*, No. C 09-5939 PJH, 2012 WL 1610979 (N.D.Cal. May 8, 2012).
26. *In re Online DVD*, 2012 WL 1414111 at *1; *Petroliam*, 2012 WL 1610979 at *4.
27. *Petroliam*, 2012 WL 1610979 at *4; see also *In re Online DVD*, 2012 WL 1414111 at *1 ("[I]n the absence of directly analogous Ninth Circuit authority, and in view of the court's prior order in connection with the…plaintiffs' motion for review of the clerk's taxation of costs, broad construction of section 1920 with respect to electronic discovery production costs—under the facts of this case—is appropriate").