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CORPORATE & FINANCIAL
WEEKLY DIGEST

Corporate & Financial Weekly Digest

March 30, 2012 by Emily Stern

Third Circuit Court of Appeals Limits Electronic Discovery Costs That Can Be Awarded to Prevailing Party

The U.S. Court of Appeals for the Third Circuit recently addressed the question of whether production costs related to electronically stored information (ESI) are assessable to a losing party under the applicable federal statute, as "[f]ees for exemplification [or] the costs of making copies of any materials where the copies are necessarily obtained for the use in the case." The context was an antitrust case, which was dismissed on summary judgment after extensive electronic discovery. After prevailing, the defendants sought to recover as costs approximately $365,000 to outside ESI vendors in order to collect, process, and produce ESI. The U.S. District Court for the Western District of Pennsylvania ruled that these charges were assessable against the losing party under the statute. The District Court reasoned that since the vendors' services were indispensable and highly technical, it was appropriate to assess the cost of their work against the losing party. The plaintiff appealed this ruling to the Court of Appeals for the Third Circuit, which addressed the issue as a matter of first impression in the Circuit. The Court also noted conflicts between other Circuits that have previously addressed the issue.

The Court of Appeals rejected the District Court's broad interpretation of the statute, and held that only two narrow categories of electronic discovery costs are assessable. The Court of Appeals ruled that "exemplification," as used in the statute, only covered the production of illustrative evidence or the authentication of public records. Since the electronic vendors' work in this case did neither, none of their charges were taxable on exemplification grounds. With respect to the costs of "making copies" of ESI, the Court of Appeals ruled that only the conversion of native electronic files to TIFF format and the scanning of documents to create digital duplicates should be considered assessable under the statute. In this case, scanning and duplicating costs were estimated at $30,000, which the losing plaintiff would be required to pay. The Court of Appeals held that the remaining electronic discovery costs were not assessable against the plaintiff. Accordingly, the Court of Appeals vacated the District Court's ruling and remanded the case to the District Court to re-assess costs in accordance with this opinion.

Race Tires America, Inc., et. al. v. Hoosier Racing Tire Corp., et. al., No. 11-2316, 2012 WL 887593 (3rd Cir. Mar. 16, 2012).