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A legal update from Dechert's Antitrust/Competition and Mass Torts and Product Liability Groups

Race Tires America: District Court Identifies Another Tool to Shift E-Discovery Costs

Key Points

- A prevailing party may be able to recover at least some of its e-discovery costs at the conclusion of a case.
- Costs arising from "highly technical" e-discovery tasks not able to be performed by attorneys or paralegals are more likely to be recoverable.
- Recovery also more likely for e-discovery costs shown to be a direct result of discovery requests or of negotiated or court-ordered procedures.
- Whether e-discovery costs relating to processing paper documents and electronic documents are recoverable varies by jurisdiction.
- Any recovery requires sufficient documentation of what e-discovery tasks were performed and demonstration of the purpose of those tasks.

The high costs of e-discovery in modern litigation have prompted courts in recent years to take a hard look at who should more appropriately bear those costs. The 2006 amendments to the Federal Rules of Civil Procedure adopted a burden-shifting analysis in cases where a party demands production of documents that are particularly difficult to retrieve and process and which add little value independent of documents readily already available to the requesting party. In a May 6, 2011 decision, *Race Tires America, Inc. v. Hoosier Racing Tire Corp*, No. 2:07-cv-01294-TFM (W.D. Pa.), a federal district court in Pennsylvania highlighted another tool that prevailing parties may be able to use to recover at least a portion of their e-discovery costs.

Case Background

Plaintiff Specialty Tires of America (STA) filed suit against Hoosier Racing Tire Corp (Hoosier) and Dirt Motor Sports (DMS) alleging that Hoosier's exclusive supply contracts with DMS and other sanctioning bodies were anticompetitive and violated sections 1 and 2 of the Sherman Act. STA sought more than $80 million in damages and attorney's fees. After two years of litigation and substantial discovery, the district court in September 2009 granted summary judgment to defendants on all counts, finding that STA had failed to establish "antitrust injury" (i.e., that defendants' conduct was of the type the antitrust laws were intended to prevent and that such conduct caused STA's injury). The Court of Appeals for the Third Circuit affirmed the summary judgment ruling in July 2010.

Both Hoosier and DMS then filed bills of cost against STA under Federal Rule 54(d), which provides that "costs" be "allowed to the prevailing party." Federal statute 28 U.S.C. § 1920 enumerates the kinds of "costs" that may be awarded. Section 1920(4) was broadened in 2008: Where it formerly covered "fees for exemplifications and copies of

papers," it now covers "fees for exemplification and the costs of making copies of any materials." The court in *Race Tires* noted that even before the 2008 amendment some courts had recognized certain e-discovery costs fell under section 1920(4), and since the 2008 amendment no court has ruled that e-discovery costs are categorically excluded from this provision. After a thorough analysis of the law and the specific e-discovery costs requested by the defendants, the court affirmed the Clerk of Courts' assessment awarding $125,581 to Hoosier and $241,789 to DMS. STA has appealed the decision.

"Highly Technical" E-Discovery Costs Taxable

Following an analysis of the various interpretations of section 1920(4), the *Race Tires* court took a broad view of the kinds of e-discovery costs that could be appropriately awarded to a prevailing party. The primary factor was the court's finding that the costs requested were for work of a "highly technical" nature that attorneys and paralegals are "not trained for or capable of providing." Such work included the imaging of hard drives, the conversion of electronic documents to a searchable and reviewable format, and the creation of a litigation document database—all tasks "associated with putting electronic documents in the position to be produced to STA." That third-party vendors were hired to perform these tasks helped the court differentiate such costs from document review tasks normally performed by attorneys.

The court also emphasized that certain tasks, such as extraction and formatting of document metadata, were necessary costs to meet the production specifications set forth in the case management and scheduling order previously entered by the court. The court further highlighted that STA had been fully engaged in the discovery process, including in case management and scheduling matters and in all discovery disputes, and therefore could not plead surprise at the e-discovery costs their own conduct had caused the defendants to incur. Indeed, the court implied that STA's "aggressive" pursuit of e-discovery—including 119 distinct requests for documents over defendants' objections—significantly contributed to the size of the e-discovery bill it now had to pay.

Jurisdictional Limitations on Taxing E-Discovery Costs

While the court limited the precedential value of this decision to the facts and circumstances before it, given the court's sweeping analysis of other courts' interpretations of section 1920(4), it is likely that there will be a growing trend of prevailing parties seeking to recover at least some costs associated with "electronic discovery" as differentiated from the mere copying of paper documents. Costs to scan paper documents into an electronically reviewable or searchable form, or costs to produce paper documents in an agreed upon electronic format, are directly related to dealing with paper documents and are therefore the most common "e-discovery" costs courts have found covered by amended section 1920(4). Subject to any particular jurisdiction's constraints on taxing costs, including applicable local procedural rules, the *Race Tires* decision and the cases it cites suggest that recovery is now permitted under section 1920(4) for the processing of entirely electronic documents.

Special Master Not Required to Assess Costs

The court in *Race Tires* also denied a related motion by STA to have a Special Master with e-discovery expertise appointed to make findings and recommendations regarding the defendants' bills of cost. The court explained that a discovery master may be appropriate at the outset of discovery, but not after discovery has completed. Confident of its own ability to assess the requested costs, the court stated that "the only 'special expertise' required . . . is an understanding that e-discovery has become a necessary and sometimes costly function of civil litigation." Therefore, the court ruled, no "exceptional condition" existed that warranted the appointment of a Special Master.

Practical Points on Taxing E-Discovery Costs

The *Race Tires* decision underscores some practical points in managing litigation e-discovery. The court expressly noted in support of its award of e-discovery costs that this case was unlike another where the party requesting e-discovery costs had incurred much of those costs before discovery requests had issued or after the court's rulings had ended discovery in the case. This ruling emphasizes that an important factor in a producing party's ability to recover these costs is whether it can show that the costs were incurred

because of the requesting party's discovery requests. A defendant will want to balance the need for such a showing with the recent trends in litigation case management that encourage parties to review and consider their own e-discovery issues at the outset of the case, before the commencement of discovery, including in preparation for the initial Rule 26(f) conference. Some "highly technical" vendor costs may need to be incurred to negotiate from a more knowledgeable position about your own e-discovery strengths and weaknesses, even though such costs may not directly relate to an opposing party's specific discovery requests.

Another point, implied by the court's satisfaction with the vendor invoices specifying the costs requested by the defendants, is how important it will be to any successful recovery of e-discovery costs under Rule 54(d) to document the need for the services performed by the e-discovery vendor and how those services are tied to the discovery requests made by the requesting party. However broad a court's interpretation may be of section 1920(4), a prevailing party will likely need to have documented that e-discovery costs for which it seeks to tax the other side were incurred because of that side's propounded discovery or negotiated procedures, and not for its own case preparation or convenience. Even where certain "highly technical" e-discovery processing is performed by a law firm's internal litigation support personnel, such costs need to be documented so as to put the party in the best position to recover those costs when it wins.

Practice group contacts

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