E-Discovery Fee Shifting?

Friday, June 17, 2011

Maybe.

From what we can tell from the recent opinion in Race Tires America Inc. v. Hoosier Racing Tire Corp., 2011 WL 1748620 (E.D. Pa. May 6, 2011), that case was one of those e-discovery wars where the parties went at one another hammer and tong, and for long periods e-discovery disputes all-but-obscured the merits of the suit. Id. at *5.

The underlying facts almost don't matter. Suffice it to say that the plaintiff, a tire manufacturer, was caught outside looking in when the governing body for the "sport" of dirt-track auto racing signed an exclusive tire supply contract with a competitor. Plaintiff filed an anti-trust action as a result. That's enough about the merits.

Plaintiff lost. Race Tires America, Inc. v. Hoosier Racing Tire Corp., 660 F. Supp.2d 590 (W.D. Pa. 2009). Plaintiff lost again on appeal. Race Tires America, Inc. v. Hoosier Racing Tire Corp., 614 F.3d 57 (3d Cir. 2010).

Then it came time to pay the piper for all those e-discovery follies.

The victorious defendants filed a bill of costs seeking to recover nearly $400,000 in e-discovery costs. 2011 WL 1748620, at *3. The court clerk allowed taxation of about 90% of the expenses sought. Id.

The statute covering costs, 28 U.S.C. §1920, enacted in 1948, doesn't specifically cover e-discovery, but it was amended in 2008 to bring it at least somewhat into the 21st Century. Subsection 4 now reads: "Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case" – instead of just "papers."

Also under §1920, a prevailing party is presumptively entitled to an award of statutorily authorized costs.

So in the e-discovery world, the taxation of e-discovery costs under §1920(4) comes down to what is “exemplification” and what is “necessary.”

The restrictive viewpoint considers the time and effort of e-discovery not to be “exemplification” – which only means “physical preparation and duplicating.” A similarly restrictive viewpoint considers electronic storage of documents to be merely for “convenience of counsel.” 2011 WL 1748620, at *6-7.

The court in Race Tires America, however, was sophisticated in the ways of e-discovery. At the request of the parties the court had entered a detailed pre-trial order governing such issues. 2011 WL 1748620, at *5-6 (quoting order). The court found that neither of these conservative approaches to taxation of e-discovery was appealing in today's real world of litigation. The parties had agreed to mutual electronic productions according to detailed criteria, reflected in the court’s order. The loser could not now be heard to argue that electronic “exemplification” was not contemplated. Nor could it come back, after agreeing to electronic production, and claim that was a mere “convenience”:

> “[I]t is undisputed that Defendants produced to Plaintiff a massive quantity of ESI in response to written discovery requests. As discussed supra, the parties had previously agreed that document production would be made in electronic format. . . . During the collection process, [plaintiff] imposed – over [defendant’s] objections – over 442 search terms . . .[, which] resulted in over seven million “hits.”

Id. at *9. To comply with plaintiff’s 119 different e-discovery requests, the defendants had to engage consultants, create a litigation database, review various forms of electronic storage, extract documents and metadata, and convert everything to the formats specified in the agreed-upon order. Id. All that required spending a lot of money.

In light of the agreed-upon order, the ardor with which plaintiffs pursued electronic discovery, and the all-electronic nature of the case, the court found the prevailing defendant’s e-discovery expenses – including consultant’s fees – to be taxable because “the requirements and expertise necessary to retrieve and prepare these e-discovery documents for production were an indispensable part of the discovery process.” 2011 WL 1748620, at *9.

That’s the important part. The plaintiffs also quibbled about costs being inflated, but the court

wasn't very impressed. The e-discovery costs weren't out of line with amounts mentioned in comparable litigation, and any claim of deliberate inflation of such costs was implausible:

> "[T]he assessment is reflective of the amounts incurred by the prevailing parties without respect to their anticipation of being prevailing parties and, in that regard, can hardly be considered as "puffed," exorbitant, or contrived. Such costs were, in fact, incurred – and in significant respects at the discovery demands of Plaintiffs."

2011 WL 1748620, at *11.

We have complained in the past (and we're hardly alone) about the exorbitant and disproportionate costs that e-discovery imposes on defendants in our neck of the woods. While reliance on §1920(4) to tax costs, as in Race Tires America, is hardly the best way to attack the e-discovery problem – at least it's **a way**. There will still be problems with who "prevails" in an MDL proceeding and whether well-healed plaintiffs' litigation consortia will be allowed to maintain the fiction of penurious individual plaintiffs. But the reasoning in Race Tires America is at least a start towards a more equitable distribution of litigation expense and, equally importantly, towards some curbs on the tendency of counsel to make extravagant e-discovery demands as a way of augmenting the settlement value of their cases. Anything that puts the possibility of a "return to sender" on e-discovery costs has got to help.