Aspartame Assessment Of E-Discovery Costs Largely Affirmed

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Last August we posted about a notable clerk's order in the Eastern District of Pennsylvania that taxed, as costs, several hundred thousand dollar's worth of e-discovery expenses against the losing party in an antitrust case.

We thought that was notable because, in prescription medical product liability litigation, our clients' e-discovery costs are typically orders of magnitude greater than anything the other side has to spend. Thus, when it comes to taxing e-discovery as costs that the prevailing party can recover, we're probably going to have lots more costs to tax than does the other side when they win.

Anyway, we're now able to report that the clerk's opinion has been largely affirmed by the District Court, which strengthens the precedential value of the taxation order immeasurably. See In re Aspartame Antitrust Litigation, No. 2:06-cv-01732-LDD, slip op. (E.D. Pa. Oct. 5, 2011).

The clerk awarded the three prevailing defendants some $565,000 in e-discovery costs, on the basis of a "heavy presumption" in favor of taxation of costs generally against the loser. The District Court (Davis, J.) affirmed about 90% of the clerk's award. The affirmance contains a useful discussion of the current split of authority about the taxability of e-discovery costs, and what particular e-discovery expenses are properly taxable. Aspartame, slip op. at 3-6 (collecting cases). Siding with the opinions that support taxation of e-discovery costs, the court emphasized that all parties benefited from various efficiencies and savings arising from the availability of e-discovery, and significantly the court applied the same burden of proof in e-discovery as in other types of cost taxation. Id. at 2-3.

As interesting as the reasoning of Aspartame is, the guts of the decision – as with any taxation of costs – is what the court did, and did not, allow the prevailing defendants to recover. The following e-discovery items/services were properly taxed, according to Judge Davis:

- Creating the litigation database;
- Processing the electronic data that went into the database;
- Hosting and storing electronic data through trial;
- Reviewing the electronic data via keyword and privilege searches;
- Using Optical Character Recognition ("OCR") software that enabled the electronic documents to be searchable;
- Extracting metadata;
- Imaging hard drives;
- De-duplicating (removal of duplicate copies) data;
- Creating "load" files that enabled the requesting party to access the documents that were electronically produced;
- Scanning and copying;
- Creating CDs and DVDs containing various electronic documents;
- Using electronic data recovery systems to access and sometimes to restore password-protected files;
- Using tape restoration to convert old archived data to current, usable formats; and
- Technical support for all of the services found taxable.

Slip op. at 5-14.

This list of approved items is key because: (1) it's a lot broader than what other federal courts applying the same rules have granted, and (2) a number of these services are analogous, if not identical, to the e-discovery used in other cases. While the opinion emphasizes the

"staggering," amount of e-discovery in the Aspertame litigation, slip op. at 4, the stated volume of information (88 gigabytes, 6.1 million pages, 28 custodians, id.) would hardly be considered unusual in the MDL mass torts we've been involved in.

The prevailing defendants didn't get everything, however. The following items were disallowed:

- Using advanced "analytics" technology (solely for convenience of the producing party). Slip op. at 6-7.
- Certain inadequately separated out items. Id. at 7, 12, 13. Moral of story: keep precise expense records.
- Including Bates numbers and confidentiality labels (not a category of taxable costs). Id. at 10-11.
- Using color scanning for documents that were not in color (unnecessary). Id. at 12.
- Converting TIFF documents to PDF format (solely for convenience of the producing party). Id. at 13.

As we said before, we support taxation of e-discovery costs because, it creates at least some restraining counterbalance upon excessive and burdensome e-discovery demands – particularly in cases, such as prescription medical product liability litigation, where these costs fall disproportionately on the defendants. To the extent, however, that plaintiffs are subject to e-discovery, and thereby incur similar costs, we would be remiss if we did not point out that our own clients could conceivably be on the receiving end of such a motion. Still, the key word is "disproportionate," and until plaintiffs have databases and email systems comparable to our clients (which we expect will be "never"), we have to consider taxation of e-discovery costs to prevailing parties to be overwhelmingly a good thing.