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As data volumes in discovery increase and the cost of handling electronic evidence rises, there may be a silver lining developing: some courts have awarded costs to prevailing parties related to eDiscovery. While opinions are fact-driven and vary by jurisdiction, eDiscovery-related costs may be recoverable in some instances if they are found to be necessary and reasonable.

eDiscovery costs may be recoverable under U.S. law

Prevailing parties have been able to recover costs, other than attorneys' fees, under Federal Rule of Civil Procedure 54(d)(1). Under Title 28 United States Code, section 1920(4), recoverable costs may include those related to making copies "where the copies are necessarily obtained for use in the case." Prevailing parties cite this section to recover traditional litigation support costs. Although this statute may appear limited in scope, several courts have interpreted it broadly, allowing recovery for a wide range of costs, including: forensic investigations, collection, file conversion, scanning and other processing tasks, consulting, project management and production. Indeed, courts are starting to view eDiscovery-related tasks as "the 21st Century equivalent of making copies."¹

Costs must be necessary and reasonable

Although courts have significant discretion in determining recoverability, the matter "must be given careful scrutiny."² And, the party requesting costs bears the burden of showing that the costs "were necessarily incurred and reasonable."³ In *Race Tires America, Inc. v. Hoosier Racing Tire Corp.*, plaintiff alleged antitrust violations arising out of an exclusivity agreement between defendants. Both defendants prevailed and requested eDiscovery-related costs totaling almost \$400,000. Although the plaintiff asserted that some vendor invoices were "exorbitant and unreasonable," the court indicated that the clerk of the court had "carefully examined" them and that the costs were in line with case law, but reduced them slightly.⁴ In a case from the Central District of California, the court awarded costs after determining that an eDiscovery vendor's charges were comparable to market rate, finding it persuasive that the requesting party had engaged in a competitive bidding process.⁵

Standards in this area will continue to emerge. An appeal in *Race Tires America* is currently pending before the United States Court of Appeal for the Third Circuit and that ruling may shed some additional light. Until then, to strengthen a showing of necessity and reasonableness (knowing there are no guarantees of recovery), decisions related to the electronic discovery process should be documented throughout the discovery process.

Costs may not be recoverable if deemed merely "convenient"

Losing parties usually challenge requests to tax eDiscovery costs by asserting that work was done for an attorney's "convenience" rather than out of necessity. One court refused a request for costs for advanced search and categorization technology that helped attorneys quickly identify irrelevant categories holding that visual clustering of documents for review based upon concept searching fell "squarely within the realm of costs that are not necessary for litigation but rather are acquired for the convenience of counsel."⁶

However, the tide may be changing on this view. Some judges are recognizing that these "bells and whistles" actually reduce litigation costs overall. The ability to identify relevant categories and defensibly eliminate large swaths of irrelevant information using technology can reduce the number of documents that humans must review—one of the most expensive parts of discovery with traditional, linear review approaches. U.S. Magistrate Judge Peck in the Southern District of New York recently published an article addressing the need to go beyond traditional search methods and employ advanced analytics to increase the accuracy of reviews.⁷ Additionally, several studies over the past few years suggest that a combination of human input and advanced analytics in the

early stages of eDiscovery can effectively cull out irrelevant information and point attorneys more accurately to the relevant information, reducing cost and increasing efficiency.⁸

Takeaways

Certain measures can be taken, throughout the litigation lifecycle, to increase the chances of recovering eDiscovery costs, in the event of a favorable judgment:

- Create and follow a proportional and reasonable eDiscovery plan and document the process.
- Leverage advanced technology in combination with human input to create demonstrable efficiencies. Approval of costs are more likely if such "services are highly technical" and "necessary in the electronic age."⁹
- ESI discovery agreements or protocols regarding form of production may help: Courts have allowed recovery for imaging costs when imaging was agreed to between the parties.¹⁰

Thoughtful planning, a sound process and thorough documentation are key. Parties need to be able to take the complexities of discovery technology and present it to the court to show necessity and reasonableness. Contact us with questions regarding litigation preparedness, proactive information management and practical planning for your eDiscovery requirements.

Notes

1 *CBT Flint Partners, LLC v. Return Path, Inc.*, 676 F.Supp.2d 1376, 1381 (N.D. Ga. 2009), *vacated on other grounds by CBT Flint Partners, LLC v. Return Path, Inc.*, 654 F.3d 1353 (11th Cir. 2011); *see also Jardin v. Datallegro, Inc.* No. 08-CV-1462-IEG, 2011 WL 4835742, at *8 (S.D. Cal. Oct. 12, 2011).

2 *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, No. 2:07-CV-01294, 2011 U.S. Dist. LEXIS 48847, at *30 (W.D. Pa. May 6, 2011).

3 *Id.* at 31.

4 *Id.* at 33-35.

5 *Glenn Tibble et al v. Edison Int'l et al.*, CV 07-5359 SVW (AGRx) (C.D. Cal. August 22, 2011) at 10.

6 *In re Aspartame Antitrust Litig.*, No. 2:06-CV-1732-LDD, 2011 WL 4793239, at *4 (E.D. Pa Oct. 5, 2011).

7 *Predictive Coding: Reading the Judicial Tea Leaves* (Law Tech. News, Oct. 17, 2011)

8 Maura R. Grossman & Gordon V. Cormack, *Technology-Assisted Review in eDiscovery Can Be More Effective and More Efficient Than Exhaustive Manual Review*, XVII RICH. J.L. & TECH. 11 (2011).

9 *CBT Flint Partners, LLC v. Return Path, Inc.*, 676 F.Supp.2d 1376, 1381 (N.D. Ga. 2009).

10 *Jardin v. Datallegro, Inc.* No. 08-CV-1462-IEG, 2011 WL 4835742, at *8 (S.D. Cal. Oct. 12, 2011); *Race Tires*, No. 2:07-CV-01294, 2011 U.S. Dist. LEXIS 48847, at *10 (W.D. Pa. May 6, 2011); *see also In re Ricoh Co., Ltd. Patent Litig.*, No. 2011-1199, 2011 WL 5928689 (Fed. Cir. Nov. 23, 2011) (finding that an agreement to share costs relating to a third-party electronic database service, and used to produce documents, trumped allowable taxation of costs under 28 U.S.C. § 1920(4)).

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