TEXAS SUPREME COURT PROVIDES TIMELY GUIDANCE REGARDING THE SCOPE OF DISOCVERY AND EDISCOVERY

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On May 26, 2017, the Texas Supreme Court issued an extensive opinion addressing the proper interpretation of the Texas Rules of Civil Procedure governing discovery of electronically stored information ("ESI") and illuminating the central role of proportionality in discovery. In particular, the Court's opinion guides all Texas state courts on the proper application of Rules 196.4 and 192.4 of the Texas Rules of Civil Procedure are tied to the polestar of Rule 1. The Court also reiterated its prior precedent directing that the Texas Rules of Civil Procedure should be read and interpreted in close alignment with the procedures and standards applied by federal courts under Federal Rules of Civil Procedure even if the language of the different rules is not the same. *In re State Farm Lloyds*, Nos. 15-0903 and 15-905, 2017 WL 2323099 (Tex. May 26, 2017) http://www.txcourts.gov/media/1438182/150903.pdf.

At issue in this mandamus proceeding was an underlying ESI protocol that required State Farm to produce ESI in native format, regardless of whether a more convenient, less expensive and "reasonably usable" format was readily available. In particular, the trial court's ESI protocol provided only one exception to native format production, a "near native" alternative which was only available if State Farm could demonstrate production in native format was "infeasible"— a novel standard not found anywhere in the Texas Rules of Civil Procedure. The trial court imposed the plaintiffs' ESI protocol despite State Farm's evidence that the burden and expense for State Farm to produce in native format outweighed its likely benefit, particularly because State Farm proffered searchable static image formats that are reasonably usable. State Farm initially sought mandamus relief with the Texas Court of Appeals, which denied the petition. State Farm, supported by several amici, including the United States Chamber of Commerce and Lawyers for Civil Justice, subsequently sought mandamus relief from the Texas Supreme Court.

The Court held that under the Texas Rules of Civil Procedure, "neither party may dictate the form of electronic discovery." *Id.* at 2. In particular, the Court noted that although the requesting party must specify the desired form of production under Texas Rule 196.4, "all discovery is subject

to the proportionality overlay embedded in our discovery rules and inherent in the reasonableness standard to which our electronic-discovery rule is tethered." *Id.* Moreover, the Court concurred with State Farm that "when a party asserts that unreasonable efforts are required to produce ESI in the requested form and a 'reasonably usable' alternative form is readily available, the trial court must balance any burden or expense of producing in the requested form against the relative benefits of doing so, the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the requested format in resolving the issues." *Id.* at 3. The Court affirmed that the proportionality inquiry requires a "case-by-case balancing" of these factors. The Court further held that the requesting party must show a "particularized need" to obtain production in an alternate form and, if permitted, must pay any additional costs imposed.

The Court's opinion provides litigants in Texas State courts with additional clarity regarding discovery. Complete copies of the parties' briefs, oral argument video, and the Court's opinion in may be found online at: http://www.txcourts.gov/supreme.

Jonathan Redgrave argued the matter in the Texas Supreme Court and was assisted in the briefing by Mathea Bulander and Ambre McLaughlin. This information is not intended as legal advice. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.

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