

MARCH 23, 2012

Third Circuit Narrows Scope Of Expenses That Can Be Awarded To A Prevailing Party

The Third Circuit recently announced a decision significantly narrowing the scope of which expenses a court can award a prevailing party under the taxation of costs statute 28 U.S.C. § 1920(4)—at least in the Third Circuit. In *Race Tires America, Inc. v. Hoosier Racing Tire Corp.*, No. 11-2316, ___ F.3d ___ (3d Cir. Mar. 16, 2012) (link to the full opinion here: <http://www.ca3.uscourts.gov/opinarch/112316p.pdf>), the court addressed whether a court can tax a losing party for the costs associated with retaining an eDiscovery vendor to collect, process and produce electronically stored information. After a detailed account of the history of the taxation of cost statute, the court substantially reduced the taxable costs (set by the district court at more than \$365,000) to the conversion of files to the TIFF format and the scanning of hard copy documents (which was approximately \$30,000).

The court began its analysis by deconstructing §1920(4) to fees associated with “exemplification” and fees for “the costs of making copies of any materials.” First, the decision bypassed the varying interpretations of whether exemplification related to eDiscovery output by stating that “[t]he electronic discovery vendors’ work in this case did not produce illustrative evidence or the authentication of public records.” As a result, the court could not interpret expenses associated with eDiscovery as falling under the exemplification category. Next, the court looked at each category of work itemized in the invoice supplied by the vendor and found that only the conversion of files to the TIFF format and scanning of paper documents qualified as “copies.” The court refused to tax costs associated with the collection, preservation, processing, indexing, and keyword searching for responsive and privileged documents. The court viewed these steps as akin to manual collection and review procedures, of which it found that Congress, and indeed other courts, did not deem taxable. The court eschewed arguments highlighting the technical complexity of the process and noted that “the services leading up to the actual production [does not] constitute “making copies.”” The court indicated that the additional level of expertise required to produce electronically stored information does not affect which tasks a court can indeed tax.

In addition to the narrowing of which costs a court can tax in the Third Circuit for eDiscovery, counsel should note two additional themes from the decision. First, a party that submits eDiscovery expenses to a court in the Bill of Costs must clearly itemize and explain the expenses associated with the process. The court refused to tax expenses associated with a particular vendor because of a lack of clarity in its billing, while it awarded limited costs to another prevailing party because the invoice from the eDiscovery vendor indicated the fees associated with scanning and the changing of the format. Second, the court noted that “there may be strong policy reasons in general, or compelling equitable



circumstances in a particular case, to award the full cost of electronic discovery to the prevailing party,” but the court could not do so without further action from Congress.

In light of the continued split of authorities, parties and counsel should carefully assess the issues surrounding the potential taxation of costs in each jurisdiction as it may relate to eDiscovery costs.

This newsletter is an information source for clients and friends of Redgrave LLP. The content should not be construed as legal advice, and readers should not act upon information in this publication without professional counsel. This material may be considered advertising under certain rules of Professional Conduct. ©2012 Redgrave LLP. All Rights Reserved.

Contact Us: For further information or if you have any questions regarding this Alert, please contact your Redgrave LLP attorney or Managing Partner Victoria Redgrave at (202) 681-2599 or vredgrave@redgravellp.com.

