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E-Discovery Practice Pointer: Boosting Your Chances of Recovering Electronic Discovery Costs

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Federal district courts across the country are divided on whether prevailing parties can recover their vendor's charges for electronic discovery activities as costs under 28 U.S.C. §1920(4). As the mechanics of electronic discovery are increasingly borne by third-party technical vendors, not law firms, the ability to shift the related costs has become increasingly important to litigants. But the U.S. Court of Appeals for the Third Circuit threw a bucket of cold water on a litigant's ability to recover most of these costs in *Race Tires America, Inc. v. Hoosier Racing Tire Corp.*, Case No. 11-2316, 2012 WL 887593 (3d Cir. Mar. 16, 2012). The Court held that the only electronic discovery costs that can be shifted under §1920(4) are those for scanning and file format conversion. **What the Court Decided** After successfully defending an antitrust suit, the district court awarded defendants more than $365,000 in electronic discovery charges that they paid their third-party vendors. The vendors' invoices were "notable for their lack of specificity as to the services actually performed…replete with technical jargon that makes it difficult to decipher what exactly was done." 2012 WL 887593 at *7. But the plaintiff grouped the defendants' vendors' activities into these sensible categories: (1) collecting and preserving electronically stored information (ESI); (2) processing and indexing ESI; (3) keyword search for responsive and privileged ESI; (4) converting native format ESI to TIFF format for production; and (5) scanning paper documents for production. The Third Circuit began its opinion by examining §1920's history as a very narrow exception to the American rule that each side bears its own fees and costs. Next, it considered opinions from courts that had allowed broad shifting of ESI costs, concluding that these courts were motivated by the "highly technical" nature of ESI vendors' services, their "indispensability" in modern litigation, and the efficiency and cost savings they can create. But the court held that these considerations don't come into play, since §1920(4)'s reach is limited to the activity of "making copies," and doesn't extend to the processes of identifying what must be copied and culling those copies into a discovery production, no matter how technical, indispensable, or efficient those processes might be. Under this analysis, only (a) converting native

format ESI to TIFF format for production and (b) scanning paper documents for production, were enough like the traditional "making copies" to fall within §1920(4). All the other vendor activities were more like "a room full of reviewers physically examining documents. Just as the cost of reviewers examining documents is not taxable, so too the task of keyword searching is not taxable." *Id.* at *10. **What We Can Learn** *Race Tires* may well frustrate litigants who would like very much to shift the substantial costs of electronic discovery when they prevail. However, it underscores two important pointers for electronic discovery practitioners. **1. Take care of cost-shifting *during* discovery, not afterward.** Remember, *Race Tires* considered only cost-shifting under §1920, and the court itself acknowledged that "[c]ost-shifting may be effected during the course of litigation, either by agreement or pursuant to court order issued under the authority of Fed. R. Civ. P. 26." *Id.* at *11, n. 12. While the cost-shifting statute doesn't reach beyond "making copies," the parties and the court are free to shift almost any electronic discovery costs. So, consider cost-shifting early. Try to get your opponent to enter into a cost-shifting agreement. This has an added benefit: parties who have agreed to share the costs of producing ESI are less likely to send each other onerous and overbroad discovery requests. As with many other electronic discovery issues, litigants help themselves by taking a proactive and transparent approach. **2. Demand clearer invoices from your e-discovery vendors.** The *Race Tires* court wasn't shy about criticizing the kind of barely decipherable invoices that practitioners routinely see. To overcome the "presumption…that the responding party must bear the expense of complying with discovery requests", *id.* at * 11, a vendor's invoices should clearly and easily identify those activities that are most like "making copies," and should allow the court to readily determine whether those copies were "necessarily obtained for use in the case," as §1920(4) also requires. Litigants should demand helpful, clear, and descriptive invoices from their vendors to maximize their chances of eventually recovering what they pay for these services.