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Fourth Circuit Follows Recent Third Circuit Guidance on Taxable ESI Production Costs Under 28 U.S.C. § 1920(4)

By

Joseph J. McMahon, Jr.

28 U.S.C. § 1920(4) provides that "[a] judge or clerk of any court of the United States may tax as costs . . . [f]ees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case."

Last year, the United States Court of Appeals for the Third Circuit considered an appeal from a district court ruling taxing the plaintiff for a range of e-discovery services. In Race Tires America, Inc. v. Hoosier Racing Tire Corp., 674 F.3d 158 (3d Cir. 2012), the Third Circuit concluded that a wide range of pre-production services related to ESI did not constitute "exemplification" for purposes of section 1920(4) and that only scanning and file format conversion could be considered to be "making copies" for purposes of that subsection. In Race Tires, the case management order contained standard provisions related to e-discovery – specifically, the parties' respective obligations to conduct a search of ESI through the use of search terms and to produce discoverable items in a format that permits the opposing party/parties to review same. The parties retained vendors to assist them with e-discovery processing.

Ultimately, the District Court granted the defense motions for summary judgment. After the Third Circuit affirmed the summary judgment rulings, the Clerk of Court taxed approximately $365,000 in e-discovery costs, including vendor costs related to production.

The Third Circuit first considered whether the "electronic discovery consultant's charges for data collection, preservation, searching, culling, conversion, and production" constituted "exemplification" under section 1920(4). The Third Circuit looked to authorities from the Federal Circuit and the Seventh Circuit, respectively, to observe that "exemplification" has been defined narrowly as the authentication of public records or, alternatively, more broadly as the production of illustrative evidence. The Third Circuit concluded that the e-discovery services at issue did not fall within either definition. The Third Circuit also concluded that only (i) the conversion of native files to TIFF and (ii) the scanning of documents to create digital duplicates constitutes "making copies" under section 1920(4). The court noted that the panoply of production services leading up to copying were not considered taxable in the pre-digital period. At bottom, "Congress did not authorize taxation of charges necessarily incurred to discharge discovery obligations. It allowed only for the taxation of the costs of making copies." Id. at 169. Accordingly, approximately $30,000 was ultimately found to be taxable.

More recently, the United States Court of Appeals for the Fourth Circuit followed the Third Circuit's lead in construing the phrase "[f]ees for exemplification and the costs of making copies" in connection with e-discovery. In The Country Vinter of North Carolina, LLC v. E. & J. Gallo Winery, Inc., 2013 U.S. App. LEXIS 8629 (4th Cir. Apr. 29, 2013), the Fourth Circuit affirmed the district court order "taxing only the costs of converting electronic files to non-editable formats, and transferring files onto CDs," as such costs were the only costs tendered by Country Vinter that constituted "making copies" for purposes of section 1920(4). Id. at *35. Faced with Country Vinter's discovery request, Gallo filed a motion for a protective order. Country Vinter filed a motion to compel the requested discovery. The District Court denied Gallo's motion for a protective order and granted Country Vinter's motion to compel. The District Court also adopted Country Vinter's proposal for handling ESI. In the wake of the District Court's rulings, Gallo collected its ESI and forwarded a large amount (more than 62 GB) of information to its counsel for review.

Less than two months after Gallo began producing documents, the District Court issued a ruling dismissing certain claims. The District Court ultimately granted summary judgment in favor of Gallo on the remaining claims.

Gallo subsequently filed its bill of costs in the amount of $111,047.75 for ESI charges. The total figure broke down as follows:

- $71,910 for the initial processing of data (flattening and indexing);
- $15,660 for Searching/Review Set/Data Extraction (extracting metadata and preparing same for production);
- $178.59 for "TIFF Production" and "PDF Production" (converting original documents to a .TIF or .PDF format to render them non-editable);
- $74.16 for Bates numbering;
- $40 for copying images onto a CD or DVD; and
- $23,185 for miscellaneous consulting costs ("management of the processing of the electronic data," "quality assurance procedures," "analyzing corrupt documents and other errors," and "preparing the production of documents to other counsel.").

The District Court awarded Gallo $218.59 (the sum of the "TIFF Production"/"PDF Production" and "copying images onto a CD or DVD" amounts).

On appeal, Gallo sought all of the above costs, less (i) the $74.16 charge for Bates numbering, (ii) $8,897 in billable time related to Bates numbering, searching, or production-related activities," and (iii) the $218.59 awarded by the District Court. In The Country Vinter, the Fourth Circuit followed the Third Circuit's reasoning in Race Tires America and concluded that, while ESI may require substantial pre-production processing to make it intelligible, that does not mean that the services leading up to the actual production constitute "making copies" under section 1920(4). The Fourth Circuit noted that the producing party's proper remedy from excessive production-related costs is a protective order and, to the extent protection is denied by the district court, an appeal from the denial of relief; the producing party cannot attempt to remedy what it perceives to excessive

ESI production costs by attempting to shoehorn same into a section 1920(4) request, given that the statute does not permit the taxation of such costs.

At bottom, the Third Circuit and Fourth Circuit rulings, taken together, suggest that counsel involved in litigation with an e-discovery component should be preparing their client(s) for the likelihood that they will bear a substantial portion of those costs, win or lose, and to factor that likelihood into various considerations, including (i) the need to obtain protection from burdensome discovery requests, (ii) the timing of mediation, and (iii) the pursuit of settlement.