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Cost-Shifting in Discovery

Cost-shifting has long been recognized as a mechanism for controlling exorbitant discovery costs. There are, however, surprisingly few reported cases in the U.S. District Court for the Southern District of New York that have considered the question of cost-shifting, and even fewer that have actually shifted substantial costs to the party requesting discovery.

The recent amendments to the Federal Rules of Civil Procedure continue to permit cost-shifting, but litigants are still likely to face an uphill battle in overcoming the presumption that the party responding to discovery must bear the costs of production. While the new Federal Rules do not directly address the standards to be applied for cost-shifting, they suggest that it may be most appropriate where discovery of so-called "inaccessible" electronic data is sought.

'Inaccessible' Electronic Data

• ***'Rowe' and 'Zubulake.'*** The principles of cost-shifting have been considered most fully in the context of discovery of electronic information that is stored in formats that make it difficult and thus costly to search and retrieve. That information includes data that has been deleted but still exists in fragmented form, or that has been stored on back-up tapes or other media that are not organized for retrieval of individual documents. Because of the costs of converting or restoring such data to a form that can be read and searched, this information is now commonly referred to as "inaccessible," in contrast to "accessible" electronic data that is stored in a more readily useable form.

In his decision in *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*,[1] Southern District Magistrate Judge James C. Francis IV recognized that Rule 26(c)'s admonition that the court protect the party responding to discovery from undue burden and expense may overcome the presumption that the

responding party absorb the costs of discovery, and require that some or all of the expense of locating and extracting e-mails stored on inaccessible back-up tapes be shifted to the requesting party.[2] He articulated an eight-factor test for determining whether cost-shifting was appropriate that considered generally the need for the information, the purposes for which the requested data was maintained, the costs of retrieval, and the parties' financial resources.[3]

The following year, in her seminal decision in *Zubulake v. UBS Warburg LLC*,[4] U.S. District Judge Shira A. Scheindlin for the Southern District of New York embraced the general approach outlined by Judge James C. Francis in *Rowe*. However, she modified the *Rowe* test out of concern that "[a]ny principled approach to electronic evidence must respect [the] presumption" that the responding party bears the expense of complying with discovery, and that cost-shifting would be too readily imposed under *Rowe*.[5] The re-tooled test she devised in *Zubulake* consists of seven factors which give greatest importance to whether the inaccessible data is likely to contain relevant information not available from other sources, and which also take into account the costs of the requested discovery compared to the amount in controversy and the relative resources available to each party, as well as the ability and incentives of each party to control the costs of production and the relative benefits to the parties of obtaining the information. The *Zubulake* test also considers the importance of the issues being litigated.[6]

Amended Federal Rules

The recent amendments to the Federal Rules of Civil Procedure go a step beyond the general protections against unduly burdensome discovery afforded by Rule 26(c) which form the basis of the analysis in *Rowe* and *Zubulake*, creating a presumption against production of inaccessible electronically stored information. Rule 26(b)(2)(B) now provides that a party need not produce information from sources it considers inaccessible, and places the onus on the requesting party to establish good cause for its production once the producing party meets the initial burden of showing that the information would be unduly burdensome or costly to produce.

The Advisory Committee Notes set forth a series of factors the court should consider in determining whether good cause for the discovery has been shown. These factors incorporate many of the factors contained in the *Rowe* and *Zubulake* cost-shifting tests—although they are now being used to determine whether the information should be produced at all, rather than which party should bear the costs of production. Those factors include:

(1) the specificity of the discovery request;

(2) the quantity of information available from other and more easily accessed sources;

(3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources;

(4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources;

(5) predictions as to the importance and usefulness of the further information;

(6) the importance of the issues at stake in the litigation; and

(7) the parties' resources.

Cost-shifting continues to figure into this new framework governing the production of electronically stored information that is inaccessible in two distinct ways. First, the Advisory Committee suggests that the requesting party's willingness to absorb some or all of the costs of producing such information may be weighed by the court in its good cause analysis under Rule 26(b)(2)(B), although it cautions that "the producing party's burdens in reviewing the information

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for relevance and privilege may [nevertheless] weigh against permitting the requested discovery." Second, the inquiry into whether there is good cause for discovery of inaccessible electronic information does not supplant the general provisions of Rule 26(c) which protect against unduly burdensome discovery. The Advisory Committee Notes instruct that the good cause inquiry should be coupled with the inquiry under Rule 26(c) as to whether there are conditions, including cost-shifting, which should be imposed even where good cause for the disclosures is found. Thus, cost-shifting may be offered, proactively, by the requesting party to support its showing of good cause, or may be imposed by the court under Rule 26(c) notwithstanding the fact that the requesting party has shown good cause for the inaccessible data.

• ***Consequences of Converting Information to Inaccessible Formats.*** The Advisory Committee Notes to the revised Rule 26(b)(2)(b) inject a new factor to be considered in evaluating requests for production of inaccessible electronic data—whether the party from whom discovery is sought has failed to produce information that was formerly more easily accessed, but is no longer readily retrievable. This factor weighed heavily in the court's decision to deny cost-shifting for the bulk of the defendant's production of inaccessible e-mails in *Quinby v. WestLB AG*.[7] The defendant in that employment discrimination case sought to shift the costs of restoring and searching for documents responsive to plaintiff's document requests from the e-mails of six former employees. Those records had been converted to inaccessible back-up tapes when the employees left their employment with the defendant.

Southern District Magistrate Judge Henry Pitman found that the defendant should have reasonably anticipated that e-mails from five of the six employees in question would be discoverable at the time those e-mails were converted to inaccessible formats for storage. He noted that although conversion to an inaccessible format does not give rise to a claim for spoliation of evidence because a party is free to preserve evidence in any format it chooses,[8] it does inhibit the party's ability to shift the costs of restoring that data to accessible form. He concluded that "if a party creates its own burden or expense by converting into an inaccessible format data that it should have reasonably foreseen would be discoverable material…, then it should not be entitled to shift the costs of restoring and searching the data." He observed that this approach will discourage parties in likely litigation from converting evidence to inaccessible formats and will prevent parties from "taking unfair advantage of a self-inflicted burden by shifting part of the costs of undoing the burden to an adversary."[9] Accordingly, he denied the defendant's request to shift the costs of restoring the e-mails of the five employees which were converted to back-up tapes after the defendant should reasonably have anticipated they would be subject to discovery.

Cost-Shifting Factors Applied

Having found that production of one former employee's e-mails was potentially amenable to cost-shifting, Magistrate Judge Pitman went on to apply the *Zubulake* factors to determine what, if any, portion of those costs should be shifted to the plaintiff. He noted that the first two factors—the extent to which the request was specifically tailored to discover relevant information, and the availability of that information from other sources—are sometimes referred to as the "marginal utility test." He concluded that this test, which carries more weight than the five remaining factors, weighed in favor of cost-shifting. Specifically, because he determined that a relatively low percentage of the restored e-mails was relevant to plaintiff's claims, he concluded that her document request was not narrowly tailored.[10]

The presumption that the producing party will bear its own discovery costs is strong and only overcome with a showing that the cost of requested discovery is disproportionate to its value.

Significantly, Magistrate Judge Pitman rejected plaintiff's argument that her request was per se reasonably tailored because it had been pared down from its original scope by an earlier court order. He found that narrowing a document request under Rule 26(b)(2) does not preclude the court from also shifting the costs of production pursuant to a protective order under Rule 26(c)[11]—an approach consistent with the framework set forth in the Advisory Committee Notes coupling the Rule 26(b)(2) analysis with a determination under 26(c) as to whether conditions, including cost-shifting, should also be imposed. Another interesting aspect of Magistrate Judge Pitman's analysis of the marginal utility of plaintiff's request was that despite the fact that cost-shifting was, in this case, limited to restoring and searching the e-mails of only one employee, he appears to have considered materials produced from the back-up files of all the former employees in determining the universe of documents produced as well as the number of relevant documents yielded.

Magistrate Judge Pitman found that some of the remaining factors weighed against costs shifting (the amount in controversy compared to the cost of production, and the cost of production compared to the resources of each party), while others weighed in favor (the parties' abilities and incentives to control the costs and the relative benefits of the information to the parties). Giving greatest weight to the earlier factors, Magistrate Judge Pitman concluded that 30 percent of the costs of restoring and searching the single former employee's e-mails should be shifted to the plaintiff.[12]

Photocopying Costs

Electronic discovery is not the only context in which parties seek to shift the costs of complying with discovery. Earlier this year, in a decision filed in *Clever View Investments, Ltd. v. Oshatz*,[13] Southern District Magistrate Judge Ronald L. Ellis ordered that 40 percent of the photocopying costs incurred in connection with plaintiff's production of documents be shifted to the defendants because the defendants had arranged with a copying service to copy the documents, without clarifying that it expected plaintiff to bear the duplicating costs. The plaintiff had made the requested documents available for the defendants' inspection, after which defendants informed plaintiff that they would arrange with their own copying service to pick up and copy the documents.

Plaintiff maintained that the photocopying was unnecessary because it had offered to provide defendants access to the documents throughout the litigation in lieu of copying. Alternatively, it argued that some of the photocopied information was available through other sources. Magistrate Judge Ellis found that plaintiff had demonstrated "good cause" for a partial shifting of the costs to defendants because plaintiff had been misled by defendants' statement that their copying service would retrieve the documents. Specifically, he found that this statement did not adequately clarify defendants' position that copying was necessary and that plaintiff should bear the costs of production, and thus "effectively deprived [plaintiff] of an opportunity to raise the issue of burden with the Court before the copying took place." He rejected defendants' arguments that all of the copying was appropriate, holding that "the solution should have been to seek assistance from the Court rather than engage in expensive reproduction and send the bill to [plaintiff] without further discussion."

Conclusion

Cost-shifting is a potent but relatively rarely invoked antidote for truly burdensome discovery costs. The presumption that the producing party will shoulder its own costs is strong and will only be overcome with a particularized showing that the cost of the requested discovery is disproportionate to its value. As the cases discussed above demonstrate, a party seeking to shift the costs of production to the requesting party should notify the court of its concerns in advance of incurring the expense, and must be able to show that the costs of the discovery outweigh its benefits and that it has not contributed to the expense that it seeks to shift to its adversary.

1. 205 FRD 421 (SDNY 2002), aff'd, 2002 WL 975713 (SDNY May 9, 2002) (Patterson, J.).
2. Id. at 428-29 (citing *Oppenheimer Fund, Inc. v. Sanders*, 437 US 340, 358 (1978)).
3. Id. at 429-32.
4. 217 FRD 309 (SDNY 2003).
5. Id. at 317, 320.
6. Id. at 321-22.
7. 2006 WL 2597900 (Sept. 5, 2006).
8. Id. at *9 (citing *Zubulake v. UBS Warburg LLC*, 220 FRD 212, 218 (SDNY 2003)).
9. Id. at *9.
10. Id. at *14-15.
11. Id. at *11.
12. Id. at *16.
13. 233 FRD 393 (SDNY 2006).