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Cost Shifting Under the New Rules: Is the Landscape Changing?

PRIOR TO THE December 2006 amendments to the Federal Rules of Civil Procedure, courts had promulgated several tests to resolve the issue of cost-shifting in the context of electronic discovery, including the marginal utility test set forth in *McPeek v. Ashcroft*,[1] as well as the multifactor tests set forth in *Rowe Entertainment Inc. v. William Morris Agency Inc.*[2] and in the leading case of *Zubulake v. UBS Warburg LLC*.[3] All these tests sought to balance the benefits and costs in deciding who should pay for the requested discovery.

In *Zubulake*, the court limited the issue of cost-shifting to inaccessible data and concluded that only the costs associated with restoring and searching the inaccessible data (in that case, backup tapes) could be considered and shifted to the requesting party. The court held that the costs associated with reviewing the data for responsiveness and privilege must always be borne by the producing party and are never appropriate for cost-shifting.[4]

Not all courts agreed with the limitations imposed by *Zubulake*. For example, in *Multitechnology Services L.P. v. Verizon Southwest*,[5] the defendant, Verizon, sought to shift to the plaintiff the costs associated with responding to interrogatories seeking customer information from electronic databases. Verizon estimated that the costs associated with responding to those interrogatories would be approximately $60,000. Relying on *Zubulake*, the plaintiff argued that cost-shifting was inappropriate because the request sought only accessible information. The court rejected the plaintiff's argument, noting that "Zubulake is a district court opinion without binding authority."[6] The court then analyzed the costs and benefits of the discovery and ordered the plaintiff to pay 50 percent of the costs associated with responding to the interrogatories, because a 50/50 split balanced the benefits of discovery to the plaintiff and provided incentives to Verizon to manage its costs.

The 2006 amendments to the Federal Rules of Civil Procedure now provide for a two-tiered approach to electronic discovery. Under new Rule 26(b)(2)(B), "A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or expense." The rule further provides that if, on a motion, the producing party meets its burden of showing that the requested discovery is not reasonably accessible because of undue burden or cost, the court may still order the discovery if the requesting party shows good cause, considering the limitations set forth in Rule 26(b)(2)(C).[7]

The committee note identifies seven factors that should be considered in determining whether good cause exists:

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.

Lastly, the new rule provides that "the court may specify conditions for the discovery." What that is all about is cost-shifting.

The new rule presents a number of important questions that will need to be resolved as courts wrestle with its meaning. For example, what does "not reasonably accessible" mean? Are backup tapes always "not reasonably accessible," and will they become more reasonably accessible as technology changes? Can active, accessible data ever be considered "not reasonably accessible" because of the costs to review such data for responsiveness and privilege? Will the new rules result in more cost-shifting or less cost-shifting to the requesting party? Some recent decisions provide some early guidance to these questions.

In *Peskoff v. Faber*,[8] the court ordered the defendant to search all sources of electronically stored information that were reasonably expected to include e-mail addressed to or from the plaintiff or e-mail that contained the plaintiff's name. The court noted that the new federal rules explicitly require a producing party to search available electronic systems for responsive

information. As the court explained,

> Under the new pertinent rule, the producing party is relieved of producing specifically identified *inaccessible* data only upon a showing of undue burden or cost. Fed. R. Civ. P. 26(b)(2)(B). Even then, the court may order discovery of the data identified as inaccessible, if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C), i.e., the rule that balances the costs of the discovery demanded against its benefits.[9]

The court then commented that "[t]he obvious negative corollary to this rule is that *accessible* data must be produced at the cost of the producing party; cost-shifting does not even become a possibility unless there is first a showing of inaccessibility."[10] Thus, the court held that the defendant was required to produce the requested information, because "it cannot be argued that a party should ever be relieved of its obligation to produce accessible data merely because it may take time and effort to find what is necessary."[11]

Whether other courts will follow the *Peskoff* decision is yet to be seen, but there are a number of issues with its analysis that suggest the case was wrongfully decided. First, the court stated that Rule 26(b)(2)(B) relieves a party of producing information in the first instance only if it is "inaccessible." But the rule does not use the term "inaccessible"; instead, it states "not reasonably accessible because of undue burden or cost." Thus, the rule as literally written is not limited to inaccessible data, such as backup tapes or deleted e-mail, but also should apply to accessible data as long as it is unduly burdensome to review and produce. Second, despite the court's statement that cost-shifting cannot be considered for accessible data, the committee notes suggest just the opposite. Specifically, the committee notes to Rule 26(b)(2)(B) provide the following: "But the producing party's burdens in reviewing information for relevance and privilege may weigh against permitting the requesting discovery." If a court can deny a request for production of accessible data because of the significant costs in reviewing it for relevance and privilege, then surely a court can require such data to be produced but only on the condition that the requesting party share some of the costs associated with that production. Indeed, Rule 26(c), which allows a court to enter an order limiting discovery to specified terms and conditions, appears to permit a court to impose costs as a condition to production and has no "inaccessible" restriction.

Lastly, other courts have not followed the limited application of Rule 26(b)(2)(B) espoused in *Peskoff*. For example, in *Ameriwood Indus. Inc. v. Liberman*,[12] the court found that the defendants' request for documents—involving 52,124 potentially responsive e-mails and 4,413 additional computer files—was not reasonably accessible because of undue burden based solely on the volume of potentially responsive information. The court then held that the defendant had failed to meet its burden of showing good cause, because the defendant's requests were not narrowly tailored to seek only relevant information directed to its affirmative defense and, accordingly, denied the request for production.

As for the costs associated with restoring backup tapes, which are arguably inaccessible under the new rules, courts have appeared receptive to requests for cost-shifting. For example, in *In re Veeco Instruments Inc. Secur. Litig.*,[13] the court, with little analysis, found that restoring the backup tapes at issue would be burdensome and held that they were not reasonably accessible. The court next concluded that the plaintiff had shown good cause for receiving the requested information and ordered the defendant to produce the requested information at its own expense. However, the court stated that the defendant should prepare an affidavit detailing the results of the search as well as the time and money spent, and the court would then conduct a *Zubulake* cost-shifting analysis, thus suggesting that at least some of the costs would ultimately be shifted to the requesting party.[14]

Even in cases when courts have denied requests for cost-shifting, they have appeared willing to limit the scope of discovery, resulting in significant savings to producing parties. For example, in *Semsroth v. City of Wichita*,[15] the court applied the factors set forth above from the committee note as well as the *Zubulake* factors and concluded that the city had not met its burden of showing that the cost of restoring and searching the backup tape at issue was not reasonably accessible because of undue burden or cost. Although the court did not shift any costs to the plaintiff, its ruling still significantly limited the scope of discovery under Rule 26(b)(2), including limiting the number of search terms requested by the plaintiff and limiting the number of mailboxes that needed to be searched.

The new rules provide a real opportunity for litigants to reduce the costs of electronic discovery. Parties are now required to discuss electronic discovery at the initial Rule 26 conference. When efforts to agree on limiting the scope of electronic discovery fail, litigants should consider cost-shifting. Litigants also should consider thinking broadly about cost-shifting, not just in the context of document production, as courts have appeared willing to consider it in other contexts, including responding to written discovery and even to defray preservation costs.[16] What is important is that, even when a cost-shifting request is denied, the court may still be receptive to limiting the scope of the discovery request, thereby reducing the costs of the discovery. **TFL**

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