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Client Alert

California Court of Appeal Applies Cost-Shifting Provision In Discovery Dispute: Requesting Party To Pay Reasonable Costs Of Recovering Useable Information

Litigation Practice **December 14, 2004**

In a rare appellate writ proceeding on a discovery issue, a California Court of Appeal has confirmed that the California rule on shifting the potentially substantial costs of electronic discovery is different from federal law, and the requesting party should pay the reasonable costs (possibly as much as $1.9 million) for recovering usable information from the responding party's computer backup tapes. Toshiba America Electronic Components, Inc. v. Superior Court, 2004 WL 2757873 (December 3, 2004).

The Setting

The facts were uncomplicated and fairly typical for Silicon Valley. Plaintiff Lexar Media, Inc., sued Toshiba America Components and its parent company for misappropriation of trade secrets, breach of fiduciary duty and unfair competition. During discovery, plaintiff sought 60 categories of documents, defined to include electronically stored information. Toshiba America produced some 20,000 pages of documents, but a dispute arose over who should pay for the recovery of additional responsive material – specifically email – stored on Toshiba America's more than 800 backup tapes for the pertinent period, which stretched back to 1994. Restoring all the tapes was estimated to cost $1.5 - $1.9 million. Processing a selection of 130 tapes surrounding 15 key dates would cost at least $211,250.

Plaintiff refused to shoulder some or all of the cost, and filed a motion to compel production of all responsive documents contained on the backup tapes. The situation was complicated because the tapes were not well organized or labeled, some involved legacy systems that had become obsolete so as to require substantial costs for conversion tools, and some of the tapes had deteriorated with age. In their trial court papers, the parties debated whether those circumstances would justify the use of a cost-shifting analysis, such as those articulated in several recent federal court decisions. See, e.g., Wiginton v. C.B. Richard Ellis, 2004 U.S. Dist. LEXIS 15722 (N.D. Ill. 2004); Zubulake v. UBS Warburg LLC, 217 F.R.D. 309 (S.D.N.Y. 2003); Medtronic Sofamor Danek, Inc. v. Michelson, 2003 U.S. Dist. LEXIS 24231 (W.D. Tenn. 2003); Rowe Entmt., Inc. v. William Morris Agency, Inc., 205 F.R.D. 421 (S.D.N.Y. 2002).

The trial court granted plaintiff's motion without comment or explanation. Toshiba America petitioned for a writ of mandate. On appeal, Toshiba America argued that California Code of Civil Procedure, section 2031(g)(1), requires cost-shifting to the requesting party.

The Discovery Ruling

The discovery ruling in the case was not particularly surprising. After all, the California Code of Civil Procedure states in pertinent part:

> Any documents demanded shall either be produced as they are kept in the usual course of business, or be organized and labeled to correspond with the categories in the demand. If necessary, the responding party at the reasonable expense of the demanding party shall, through detection devices, translate any data compilations included in the demand into reasonably usable form. Code of Civil Procedure § 2031(g)(1) (emphasis of the court.)

While the presumption of this rule is different from the traditional rule in federal practice (which is that the responding party bears the costs of reviewing and producing documents), the Court of Appeal relied on the plain language of the statute and stated:

> The clause [requiring the requesting party to pay] is unequivocal. We need not engage in protracted statutory analysis because its plain language clearly states that if translation is necessary, the responding party must do it at the demanding party's reasonable expense.

This provision has been on the books since 1986. (Indeed, Pillsbury lawyers have successfully invoked the provision, for example, to shift 80% of the costs of restoring backup tapes in a securities class action to Bill Lerach's firm.)

Surprisingly, Toshiba America had failed to cite section 2031(g)(1) in support of its argument, and consequently the trial court did not consider the section in its ruling. Nonetheless, the appellate court held that the trial court's decision was an abuse of discretion, which the court defined as "action that transgresses the confines of the applicable principles of law." Because the trial court's ruling was based on the general (federal) rule that the responding party bears the expense, it was faulty legal analysis and therefore an abuse of discretion that had to be reversed.

Perhaps as important for future electronic discovery disputes, the court emphasized that, while appellate courts rarely review discovery orders by way of an extraordinary writ, the question presented was of first impression (in the appellate courts of California), was bound to arise with increasing frequency and was of general importance to trial courts and the legal profession. Accordingly, the bar should not anticipate that the appellate courts will be liberal with extraordinary writs on such issues. On the other hand, the court also underscored that trial courts are authorized to and should manage discovery so as to prevent misuse of discovery procedures.

The plaintiff argued that cost-shifting would encourage gamesmanship in litigation. However, the court flatly rejected this argument. In the court's view, the potential for discovery abuse is no greater when the demanding party is expected to bear the expense of translating a data compilation into useable form than it is when the responding party pays. If the demanding party were required to bear the expense, then presumably that party would only demand what it really needs.

The court also made abundantly clear that the California statute only requires the requesting party to pay the *reasonable* expense for a *necessary* translation. "Reasonableness and necessity are purely factual issues (undoubtedly there are others), which, when disputed are properly submitted to the discretion of the trial court." Thus, the court signals that it expects the state's trial courts will increasingly be asked to consider issues relating to discovery of electronically stored information, and

that the courts have an obligation to manage those discovery requests and prevent misuse of discovery vehicles.

Moreover, the court observed that a requesting party could seek relief from the state's presumptive rule by way of a protective order. Finally, and perhaps most relevant for the practicing bar, the court stated:

> Since it may be impossible to determine in advance whether or to what extent the backup tapes will yield relevant material, the court should encourage the parties to meet and confer about translating a sample of the tapes … and to otherwise develop information in order to inform the analysis of the extent to which [the requesting party] should bear the expenses ….

This last suggestion – that the parties should meet and confer – is of course consistent with one of the recently proposed amendments to the Federal Rules of Civil Procedure.

Conclusion

The Toshiba America decision received substantial publicity in the press. As noted above, the result in the case was not all that surprising, given the clear language of the California statute. Certainly, cost-shifting is only one of the many thorny issues surrounding the discovery of electronically stored information, and the days when a company retained 800 backup tapes may be waning as technologies and retention policies evolve. Moreover, the cost-shifting provision does not apply to the costs of producing all electronically stored information, but only that which must be translated into reasonably usable form (e.g., old-fashioned backup tapes). On the other hand, the forces that led the court to take the case – the prevalence of electronic information in litigation today – likely will fuel state-court interest in modernizing rules for dealing with electronically stored information, just as the federal cases on cost-shifting spawned similar interest and movement in federal court practice during the last few years. For example, former San Francisco Superior Court Commissioner Richard Best is currently circulating for comment a proposed set of California rules for handling electronic discovery based in part on a recent "standard" adopted in the federal court in Delaware. These efforts deserve our attention and, as developments warrant, Pillsbury Winthrop will provide additional Client Alerts.

For Further Information

If you wish either to obtain a more detailed explanation of these rulings, please contact the litigation Pillsbury Winthrop attorney with whom you work. Questions regarding this alert may be directed to Charles R. Ragan (415.983.1709 or *chuck.ragan@pillsburywinthrop.com*) or Shannon L. Waggoner (415.983.1843 or *swaggoner@pillsburywinthrop.com*) in San Francisco.