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STATE E-DISCOVERY

Case Law Remains Unclear As to Who Pays for What?

By **Mark A. Berman**

Given the significant costs associated with e-discovery, litigants appropriately ask their counsel one important question: "Who pays for what?" As the state of New York law on this issue remains unclear, the answer is, "It depends."

Three decisions from the Appellate Division, First Department, as well as recent decisions from the Commercial Division highlight the need for clearer guidance in this area.

The 2006 First Department decision in *Waltzer v. Tradescape & Co., LLC*,[1] stated what many have long believed was the rule in New York: that the party "seeking" discovery bears the cost of its production. It further noted that such a "general rule" would apply to situations where, for instance, the discovery demand sought the "retrieval" of "deleted" electronically stored information (ESI), but counterposed such "general rule" with an example of where the "cost of copying and giving"[2] ESI to the opposing side "would have been inconsequential."[3]

The court held that where, as in *Waltzer*, ESI was "readily available," the costs of production are to be borne by the producing party. The court further noted that "the cost of an examination… to see if [ESI] should not be produced due to privilege or on relevancy grounds should be borne by [the producing party]."

The First Department's 2009 decision in *Clarendon Nat. Ins. Co. v. Atlantic Risk Mgmt. Inc.*,[4] citing *Waltzer*, then held that "we see no reason to deviate from the general rule that, during the course of the action, each party should bear the expenses it incurs in responding to discovery requests."

Just recently, in *Response Personnel Inc. v. Aschenbrenner*[5]—also citing to *Waltzer* but not to *Clarendonz*—the First Department held that "generally, the cost of [electronic] document production is borne by the party *requesting* the production, and the cost of *creating*

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electronic documents here would not have been *inconsequential*." This decision reversed the motion court,[6] which had held that the producing party "fund the discovery at its own expense."[7]

These three First Department cases appear to raise as many issues as they seek to solve, and leave open such areas as:

- Under what circumstances, in accordance with *Response Personnel*, is the "cost" of "production" "inconsequential" enough to require the producing party to bear the expense of production?
- Under what circumstances, in accordance with *Response Personnel*, does the "cost" of "production," as noted in the decision, create an "undue" burden?
- What was intended in *Response Personnel* when the court referred to the "cost" of "creating" electronic documents?
- What types of expenses were intended to be covered by the statement in *Clarendon* that "during the course of an action, each party should bear the expenses it incurs in responding to discovery requests"?
- What was intended in *Waltzer* when the court noted that, where materials are "readily available," the requesting party is not required to bear the costs "incurred in production"?
- What was intended in *Waltzer* when the court noted that, where the dispute involves the "retrieval of deleted electronically stored material," such would justify requiring the requesting party to bear the costs "incurred in production"?
- Is the statement in *Waltzer* absolute that "the cost of examination…to see if [ESI] should be produced due to privilege or on relevancy grounds should be borne by [the producing party]"?

Against this backdrop of these decisions and the questions they raise, and trying to reconcile the landscape of whether the requesting or producing party is responsible to pay for certain "costs" of electronic discovery "production," various Commercial Division courts have recently sought to address these issues.

The court in *MBIA Insurance Corp. v. Countrywide Home Loans Inc.*,[8] held that the producing party is responsible for electronic discovery costs and noted that "[c]ourts have shown a greater willingness to allocate the cost of discovery when the request involves the recovery of deleted or archived electronic data, especially where allocation is consented to by the producing party."[9]

The court in *MBIA* held:

> *Waltzer v. Tradescape & Co., L.L.C.*, 31 A.D.3d 302 [1st Dept. 2006] and *Lipco Elec. Corp. v. ASG Consulting Corp.*, 4 Misc.3d 1019(A), 2004 N.Y. Slip Op. 50967(U), *8, 2004 WL 1949062 [Sup. Ct., Nassau County 2004] are often cited as settling the rule, relied upon by [the producing party], that the party seeking discovery should bear the cost incurred in the production of discovery material. However, the proposition cited stands on more precarious footing than *Waltzer*, *Lipco Elec. Corp.* and *Countrywide* suggest.
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> …
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> *Countrywide* urges that *Clarendon Natl. Ins. Co.* should be viewed as an anomaly. Far from being an anomaly, it is consistent with *Waltzer* in that application of the relevant rule in both resulted in cost allocation determinations only when the electronically-stored information to be produced was not readily available. While producing readily-available electronically-stored information (*Clarendon*—all of an insurance company's claims files; *Waltzer*—data stored on 2 compact discs) will not warrant cost-allocation, the retrieval of archived or deleted electronic information has been held to require such additional effort as to warrant cost allocation (*Samide*, 5 A.D.3d at 466, 773 N.Y.S.2d 116; *Delta Fin.*

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Corp., 13 Misc.3d at 614, 819 N.Y.S.2d 908; *Etzion*, 7 Misc.3d at 944-45, 796 N.Y.S.2d 844). Furthermore, under CPLR 3103(a), the lodestar in granting a protective order granting allocation of discovery costs is the prevention of 'unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.' Hewing to this principle and the applicable case law, it is eminently reasonable to refrain from allocating discovery costs at this juncture.[10]

The court in *T.D. Bank, N.A. v. J&T Hobby, LLC*,[11] then reiterated the "general rule" from *Clarendon* that "each party should bear the expenses it incurs in responding to discovery requests."

The court, however, noted that "an exception to the general rule allows discovery cost allocation determinations when the discovery costs at issue concern electronically stored information that is not readily available."

The court noted that "it follows that discovery cost allocation determinations are not allowable for discovery issues concerning electronically stored information that is readily available," even though that court had noted that it had previously concluded that "cost shifting may be appropriate on proper application."

Finally, in *Silverman v. Shaoul*,[12] the court denied defendants' motion to compel plaintiffs to reimburse them for the costs incurred in "collecting, processing and hosting electronic data" resulting from plaintiff's requests for disclosure. Defendants argued that New York law places such costs on the shoulders of the requesting party and that the data requested was not "readily available," and thus they should not be required to pay for its production.

The court noted that:

> the First Department recently stated that it saw 'no reason' to deviate from the general rule that, during the course of the action, each party should bear the expenses it incurs in responding to discovery requests (*Clarendon Nat. Ins. Co. v. Atlantic Risk Management Inc.*, 59 A.D.2d 284, 286 (1st Dept. 2009). Reading *Clarendon* with *Waltzer*, precedent shows that the requesting party bears the cost of electronic discovery when the data sought is not 'readily available.' Data is not readily available upon a showing of undue burden by the producing party to obtain the data. [citation omitted].
>
> The data at issue in the instant case was neither archived nor deleted; it was simply stored in a number of places and interspersed with defendants' various documents for their several business entities. The fact that Defendants were required to 'process' the data discloses no undue burden, but merely the normal burden of litigation. Indeed, Defendants suggest they keep their records in accordance with the general expectations of the business world. We do not suggest that retrieving archived data is the only circumstance that renders electronic data not 'readily available.' However, Defendants' documents requested by Plaintiffs have not been shown to be unduly difficult or burdensome to obtain and produce. Defendants repeatedly suggest that their allegedly incurred high cost of producing the requested documents is a product of producing responsive documents. This is a cost that *Waltzer* places squarely on the shoulders of the producing party: The cost of an examination by Defendants' agents to see if [material] should not be produced due to privilege or on relevancy grounds should be borne by the [producing party].

Clearly, New York courts look to the cost of the electronic production in determining which side should bear the burden of paying for it, but what specific expenses are included and what factors should be considered are not clear.

The meaning of the terminology "readily available" and the cost of "creating" ESI used by the Appellate Division also will need to be fleshed out in its decisions.

Further, the use by the Appellate Division of the word "inconsequential" would seem to imply that a court should be weighing ESI discovery expenses against a party's ability to perhaps afford them.

Litigating the issues of whether an expense will be "consequential" to a party and the concomitant question of what is meant by "undue burden" and what specific ESI discovery expenses are to be paid for by each side in a litigation, likewise, will need to addressed by the courts.

Litigating the issues of whether an expense will be "consequential" to a party and the concomitant question of what is meant by "undue burden" and what specific ESI discovery expenses are to be paid for by each side need to be addressed by the courts.

In the end, without an agreement between the parties, cost allocation issues that will need to be decided by the courts will include whether the expense of ESI production includes the use of a technology expert (whether in-house or one specifically retained for litigation), and does it include the use of such expert's time for preservation and collection purposes.

- Does the expense include the process of analyzing ESI to determine whether it is relevant to a party's prosecution or defense of an action, or only expenses incurred in specifically responding to a document demand seeking ESI?
- Do expenses include the creation of a "data room" to host ESI that is available to both the producing side as well as to the requesting side?
- Does it make a difference for cost allocation purposes whether costs are incurred in producing ESI that had been maintained for disaster recovery purposes or whether the ESI was maintained in a manner that is more "accessible" or "readily available" or will the magnitude of the expense of production govern the allocation determination?
- Further, are attorney's fees for privilege review and related production review always borne by either the producing or requesting party or does it depend on the specific facts of the case?

These are just some of the questions raised by the recent New York decisions concerning ESI and which need to be further refined by the courts.

1. *Waltzer*, 31 A.D.3d 302, 819 N.Y.S.2d 38 (1st Dept. 2006); see *T.A. Ahern Contractors Corp. v. Dormitory Authority*, 24 Misc. 3d 416, 422-23, 875 N.Y.S.2d 862, 868 (Sup. Ct. N.Y. Co. 2009) ("courts have noted that a clear distinction exists between the CPLR and the Federal Rules of Civil Procedure with respect to the cost of producing disclosure [(see *Lipco Elec. Corp. v. ASG Consulting Corp.*, 4 Misc. 3d 1019(A), 709 N.Y.S.2d 345 2004 WL 1949062 (Sup. Ct. Nassau Co. 2004)] *8 (holding that, while the cost shifting model exists in federal court since the Federal Rules 'start[] with the presumption that…the party responding to the discovery demand bears the cost of complying with discovery demands…cost shifting of electronic discovery is not an issue in New York since the courts have held that, under the CPLR, the party seeking discovery should incur the costs incurred in the production of discovery material.') …Justice Austin [in *Lipco*] rightly found that, given the New York rule that cost of producing discovery falls upon the party seeking discovery rather than the responding party, the concerns prompting allocation of production costs in federal court are not implicated in state court… Although one Supreme Court decision entertained the *possibility* of cost shifting at a later juncture [(see *Delta Fin. Corp. v. Morrison*, 13 Misc. 3d 604, 612-13, 819 N.Y.S.2d 908, 917 (Sup. Ct. Nassau Co. 2006)], and the court is mindful of the fact that electronic discovery is a new and presently evolving body of law unanticipated at the time the CPLR was drafted (see *Lipco* at *6), it is the opinion of this court that it is not empowered—by statute or by case law—to overturn the well-settled rule in New York state that the party seeking discovery bear the cost incurred in its production (see *Waltzer v. Tradescape & Co., L.L.C.*, 31 AD3d 302, 304 [1st Dept. 2006])" (emphasis in original).

2. The amount of ESI totaled 160,000 pages on two CDs.

3. 31 A.D.3d at 304, 819 N.Y.S.2d at 40.

4. 59 A.D.3d 284, 73 N.Y.S.2d 69 (1st Dept. 2009).

5. 77 A.D.3d 518, 909 N.Y.S.2d 433 (1st Dept. 2010) (emphasis added).

6. The motion court ruled that plaintiff, as the producing party:

> [a]ffix a "Bates stamp" number to each document referred to above, and to convert each document from paper into electronic form, to enable each document to be accessed electronically and viewed on a computer monitor. The plaintiff is directed to prepare one or more compact disks containing all of the stamped and numbered documents in electronic form, and to provide such disk(s) to the defendant. The plaintiff shall bear the entire cost of numbering the documents, converting them into electronic form, and preparing the compact disk(s).

Response Personnel Inc. v. Aschenbrenner, Index No. 106509/08 at *2 (Sup. Ct. N.Y. Co., Jan. 6, 2010) (Bransten, J.).

7. 77 A.D.3d at 519, 909 N.Y.S.2d at 433.

8. 27 Misc. 3d 1061, 895 N.Y.S.2d 643 (Sup. Ct. N.Y. Co. 2010) (Bransten J.).

9. See, e.g., *Samide v. Roman Catholic Diocese of Brooklyn*, 5 A.D.3d 463, 466, 773 N.Y.S.2d 116 (2d Dept. 2004) ("In accordance with the consent of the plaintiff's attorney at oral argument of this appeal, all costs related to the recovery of the hard drive data shall be borne solely by the plaintiff"); see also *Delta Fin. Corp. v. Morrison*, 13 Misc.3d 604, 614, 819 N.Y.S.2d 908 (Sup. Ct. Nassau County 2006) (requesting party held responsible for 100 percent of the costs and expenses of searching through restored backup tapes); see generally *Etzion v. Etzion*, 7 Misc.3d 940, 944-45, 796 N.Y.S.2d 844 (Sup. Ct. Nassau County 2005) (party requesting discovery directed to bear the cost of cloning or copying the hard drives of computers containing deleted business records).

10. 27 Misc. 3d at 1075-76, 895 N.Y.S.2d at 654.

11. 2010 WL 3617135, Index No. 021293/2009 (Sup. Ct. Nassau Co., Sept. 1, 2010) (Warshawsky, J.).

12. __Misc. 3d.__, __N.Y.S.2d__, 2010 WL5116967, at *1 (Sup. Ct. N.Y. Co., Nov. 3, 2010) (Bransten, J).