

## Litigation

WWW.NYLJ.COM

MONDAY, OCTOBER 4, 2010

### The Price of Discovery in New York Courts

'Requester pays' rule may not be ironclad but take advantage of it whenever possible.

BY MICHAEL C. MILLER,  
EVAN GLASSMAN  
AND ANTHONY ONORATO

UNDER NEW YORK law, litigants bear the burden of financing their own lawsuits, and parties seeking discovery of documents assume the costs associated with the opposition's production.<sup>1</sup> Nonetheless, parties rarely or too infrequently seek reimbursement of significant e-discovery costs.

Attribute this, perhaps, to e-discovery anxiety, oversight or even an inability to navigate the process. This situation is also likely a result of corporate defendants' experience in federal court, where costs are typically borne by the responding party.

However, "the concerns prompting allocation of production costs in federal court are not implicated in [New York] state court" because "[u]nlike a party seeking electronic discovery in federal court, a state court litigant has a strong incentive to formulate its discovery requests in a manner as minimally burdensome as possible, since the litigant will bear the costs of production." *T.A. Ahern Contractors Corp. v. Dormitory Auth.*, 875 N.Y.S.2d 862, 868 (Sup. Ct. 2009).

At this point in the evolution of e-discovery-centric litigation, counsel should be prepared to use electronic discovery as a strategic device. In addition to saving clients' money, cost allocation under New York law can be used as leverage against your opponents and to beat back overreaching discovery demands.

Practitioners should strongly consider highlighting e-discovery issues as a focal point at the initial stages of litigation (or even pre-litigation), so they are prepared to seize opportunities at the initial discovery conference and to demand payment of reimbursable costs

with accompanying documentation at the time of production. Rule 8(b), for example, of the Rules of Practice for the Commercial Division of the New York Supreme Courts is geared toward such forward thinking.

The rule requires that prior to the preliminary conference, counsel for all parties confer concerning anticipated e-discovery issues, including to address the "anticipated cost of data recovery and proposed initial allocation of such costs." Rule 8(b)(iv).<sup>2</sup> This rule arises from statewide amendments to the Uniform Rules of the New York Trial Courts concerning preliminary conferences, providing that the

Counsel should be prepared to discuss, with his or her opposition, the likely costs of discovery of electronically stored information and cost allocation, as often is now required by court rules, and to provide, as a matter of course, a demand for payment with supporting documentation as part of its production of documents.

court may establish "the method and scope of any electronic discovery" at the preliminary conference, including the "anticipated cost of data recovery and proposed initial allocation of such cost." N.Y. Comp. Codes R. & Regs. tit. 22, §202.12(c)(3)(f) (2009).

This rule and other implementations, such as in Nassau County's Commercial Division, favor counsel who are prepared to dictate the course of e-discovery to often-unprepared counterparts.<sup>3</sup> This article identifies costs that counsel might seek to allocate to their opponents.

#### Corporate Defendants Benefit Most

The principle that the requesting party assumes costs associated with discovery

applies with equal force, and far greater salience given the burden on the responding party, to the costs associated with discovery of electronically-stored information (ESI).

These costs include, among others, loading data onto a server, vendor costs, recovery of data from back-up tapes/archives, converting paper documents, and repairing crashed hardware.<sup>4</sup> As a result, demands for cost allocation tend to benefit, to the greatest degree, the larger corporate defendant that will likely need to address among other things system-wide searches, legacy systems, proprietary software, massive volumes of data, etc.

By way of example, in *Capricorn Investors III L.P. v. CoolBrands Int'l Inc.*, the court followed the general rule that the requesting party is to bear the costs associated with the responding party's production, in particular with regard to less-accessible electronic records. No. 603795/06, slip op. at 2 (N.Y. Sup. Ct. April 30, 2008). Plaintiff was ordered to pay costs associated with the production of the electronic records except for expenses associated with the attorney review process. *Id.*

Further, the court held that the fact that plaintiff had incurred significant costs conducting searches in response to defendant's requests was not relevant to defendant's demand for payment of the costs it incurred in responding to plaintiff's requests. *Id.* Thus, neither were plaintiff's costs offset, nor were its costs material to the analysis, despite the fact that CPLR 3103(a) permits courts to use protective orders to adjust the requester pays standard if equity so requires.

The requester pays rule is not without exception. Some courts have allocated costs associated with e-discovery to the responding party, and other courts have reserved the right to re-allocate costs at a later date. Those cases have generally required the producing party to pay the cost of discovery of readily accessible information, a formulation that tracks more closely to the federal model.<sup>5</sup>

Recently, the court in *MBIA Ins. Co. v. Countrywide Home Loans Inc.* analyzed the

MICHAEL C. MILLER and EVAN GLASSMAN are partners, and ANTHONY ONORATO is an associate, in the New York office of Steptoe & Johnson. Messrs. Miller and Glassman represented defendants in the "*Capricorn Investors III L.P. v. CoolBrands Int'l Inc.*" case discussed in this article.

contours of the “requester pays” rule. 895 N.Y.S.2d 643, 653 (Sup. Ct. 2010). In that case, MBIA filed a motion to compel discovery related to two Countrywide securitizations for which MBIA provided financial guaranty insurance. Countrywide objected on relevance grounds and as to the cost and effort required to produce documents.

With regard to the issue of who should bear the cost of production, the court first noted that although the “rule” is often regarded as “settled,” the “proposition...stands on more precarious footing than *Waltzer, Lipco Elec. Corp.* and Countrywide suggest.” Id. The court first noted that the oft-cited *Lipco Elec. Corp. v. ASG Consulting Corp.*, 2004 N.Y. Slip Op. 50967(U), \*8 (Sup. Ct. 2004), and the two Second Department cases it cites (*Schroeder v. Centro Pariso Tropical*, 649 N.Y.S.2d 820 (2d Dept. 1996); *Rubin v. Alamo Rent-A-Car*, 593 N.Y.S.2d 284 (2d Dept. 1993)), all trace their interpretation of the CPLR’s requester pays requirement back to the case of *Rosado v. Mercedes-Benz of North America Inc.*, 480 N.Y.S.2d 124 (2d Dept. 1984).

The MBIA court observed that, in *Rosado*, the court had more narrowly held that the party seeking discovery should pay the cost to have certain documents translated, and had not necessarily enunciated a broader rule based on the CPLR providing that the requester pay for all discovery. Id. at 653-54.

In addition, the MBIA court observed that the Appellate Division had perhaps cast doubt on the requester pays rule in *Clarendon Natl. Ins. Co. v. Atlantic Risk Mgt. Inc.*, 873 N.Y.S.2d 69 (1st Dept. 2009) (citing *Waltzer*, 819 N.Y.S.2d 38) where it directed plaintiff to produce all of its claims files and 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.” Id. at 654.

Accordingly, the MBIA court held that both *Waltzer* and *Clarendon* stand for the proposition that costs should be allocated to the requesting party only when the electronically stored information to be produced was not readily available. Id. The court grounded its ruling in the fact that 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.’” Id. Notably, the court reserved the right to re-allocate costs, implicitly on a showing of “unreasonable” costs. Id.

Although MBIA called into question the conventional wisdom that requester pays is unwavering in its application, there is substantial support for the rule in New York case law, and the rule’s application in e-discovery circumstances, especially where requests for searches of vast company-wide systems can result in serious costs for corporate defendants, should be vigorously pursued by counsel.

In addition to recouping some or all of a

client’s expenses, such a strategy can deter the requesting party from overreaching, or at least yield negotiated, pared-down search criteria.

### What Costs Are Recoverable?

The seeming tension between the literal reading of the requester pays rule and the qualified reading, that the requester pays only for unreasonable costs, should not deter a party from seeking reimbursement, but counsels in favor of assigning the task of careful accounting for the numerous and aggregate costs associated with a production, especially searches for ESI conducted on a system-wide basis in a larger corporate environment, to a trusted colleague or vendor.

Costs generally recoverable under requester pays include: identifying, preserving, collecting, processing, reviewing, analyzing and producing responsive materials. In addition, the costs of discovery directed to third parties generally will be borne by the requesting party (see *In re Maura; Finkleman; Lipp v. Zigman*<sup>6</sup>).

Even under a more conservative view of the rule, recoverable costs likely include the cost of retrieving, searching, de-duplicating and producing inaccessible ESI (e.g., ESI on a legacy system, back-up tapes, deleted data).

Other costs are recoverable, but might require a fight, including:

- costs for “readily available” ESI (see *MBIA Insurance; Clarendon; Waltzer; CoolBrands*);
- costs for the attorney review process to determine privilege and relevance (see *CoolBrands; Waltzer; Delta Financial* (ordering plaintiff initially to bear 100 percent of expenses of additional back-up tape restoration, search and de-duplication, *as well as defendant’s attorney’s fees and costs for a privilege review*)<sup>7</sup>);
- “unreasonable” costs, including excessive per-hour charges for review by over-qualified persons (see *Klein v. Persaud*<sup>8</sup>);
- costs of producing documents if those documents are not actually printed, but are instead produced electronically (see *Klein*); and
- costs for the producing party’s computer expert (see *Etzion*<sup>9</sup>).

### Proposed Strategies

At the outset of litigation or in the pre-litigation context, the practitioner should consider highlighting to an actual or potential adversary that it will be required to cover costs. Such an admonition can result in more limited, more focused, and therefore, less burdensome discovery demands.

Counsel should be prepared to discuss with his or her opposition the likely costs of ESI discovery and cost allocation, as often is now required by court rules, and to provide, as a matter of course, a demand for payment with supporting documentation as part of its production of documents.

As a matter of course, in thinking about the demands of e-discovery and costs, counsel should consider:

- a letter staking out that costs will be

sought;

- defining a position with regard to what metadata will be considered discoverable;
- the scope of the litigation hold to be instituted by the client;
- the client’s weaknesses with regard to ESI policy, retention policy and/or systems management;
- who will keep a record of costs incurred and for what costs;
- the form of production of ESI;
- likely number of the client’s relevant document custodians;
- relative costs of differing search models and the benefits (or lack thereof) of sampling;
- need for e-discovery/forensic specialists; and,
- costs related to maintenance of data in native format, or alternatively of conversion.

Early preparation requires early coordination with the client and IT personnel to properly identify and substantiate the costs of the discovery. Although the New York requester pays rule might have exceptions, such preparation affords counsel one of the few clear chances in litigation to “out lawyer” the opposition and potentially to yield a significant advantage for the client.

.....●●.....

1. Often cited as interpreting the CPLR to require the requesting party to pay the costs associated with discovery are *Waltzer v. Tradescape & Co., L.L.C.*, 819 N.Y.S. 2d 38 (1st Dept. 2006); *Rubin v. Alamo Rent-a-Car*, 593 N.Y.S.2d 284 (2d Dept. 1993); *Lipco Elec. Corp. v. ASG Consulting Corp.*, 4 Misc.3d 1019(A) (N.Y. Sup. Ct. 2004). An excellent canvass of the case law in this area is found in “The Manual for State Trial Courts Regarding Electronic Discovery Cost-Allocation,” authored by the Joint E-Discovery Subcommittee of the New York City Bar, available at <http://www.nycbar.org/pdf/report/uploads/20071733-ManualforStateTrialCourtsRegardingE-DiscoveryCostAllocation.pdf>.

2. Available at <http://www.nycourts.gov/rules/trialcourts/202.shtml#70> (last visited Sept. 13, 2010).

3. “Commercial Division, Nassau County Guidelines for Discovery of Electronically Stored Information (‘ESI’),” available at [nycourts.gov/courts/comdiv/PDFs/Nassau-E-Filing\\_Guidelines.pdf](http://nycourts.gov/courts/comdiv/PDFs/Nassau-E-Filing_Guidelines.pdf).

4. Cases applying the general rule that requester pays to particular aspects of discovery include *Samide v. Roman Catholic Diocese of Brooklyn*, 773 N.Y.S.2d 116, 117-118 (2d Dept. 2004); *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn LLP*, 743 N.Y.S.2d 72, 74 (1st Dept. 2002); *Schroeder v. Centro Pariso Tropical*, 649 N.Y.S.2d 820 (2d Dept. 1996); *Rubin*, 593 N.Y.S.2d at 286; *T.A. Ahern Contractors*, 875 N.Y.S.2d at 423-24; *CoolBrands*, No. 603795/06, slip op. at 2; *Finkelman v. Klaus*, 17 Misc.3d 1138(A), at \*6 (N.Y. Sup. Ct. 2007); *Delta Fin. Corp. v. Morrison*, 819 N.Y.S.2d 908, 917-18 (Sup. Ct. 2006); *Waltzer*, 819 N.Y.S.2d at 38; *Etzion v. Etzion*, 796 N.Y.S.2d 844, 847 (Sup. Ct. 2005); *Lipco*, 4 Misc.3d 1019(A), at \*8; *In re Maura*, 842 N.Y.S.2d 851, 859 (Sur. Ct. 2007).

5. See *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 284-91 (S.D.N.Y. 2003).

6. *Lipp v. Zigman*, 18 Misc.3d 1127(A), at \*4 (N.Y. Sup. Ct. Jan. 24, 2008).

7. *Delta Fin. Corp.*, 819 N.Y.S.2d at 917-18.

8. *Klein v. Persaud*, 25 Misc.3d 1244(A), at \*1-5 (N.Y. Sup. Ct. Dec. 21, 2009).

9. *Etzion*, 796 N.Y.S.2d at 847.