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E-Discovery: Who Bears The Costs? (Part II)

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In the first part of this article, E-Discovery: Who bears the costs? (Part I), the five types of data storage identified by Judge Sceindlin in *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, (S.D.N.Y. 2003) ("*Zubulake I*") were introduced.[1] Part I also discussed how the advent of Cloud computing has complicated Judge Scheindlin's analysis, concluding that electronically stored information ("ESI") on cloud servers does not fit neatly in any of Judge Scheindlin's five categories. Putting the complication of cloud computing aside, however, this article addresses the test used to determine whether cost shifting is appropriate.

Determining which party bears the cost of electronic discovery using the test enumerated in *Zubulake I* involves the application of a two-step process. First, a court must decide whether the ESI is stored in an accessible or inaccessible format. Once data is determined to be accessible, the court's inquiry is essentially at an end; the responding party must produce responsive documents, and bear the full cost of production. This makes sense; in most instances accessible data can be treated as the functional equivalent of documents stored in hard copy. Indeed, because accessible data can often be searched electronically, the cost of discovery is likely to be reduced. In light of the potentially reduced costs of discovery there is no basis for the court to find that there is an undue burden on the producing party and shift, or share, the costs. Where, however, the data is deemed to be inacces-

1 The five types of data storage identified by Judge Scheindlin are:

1. Active, online data;
2. Near-line data;
3. Offline storage/archives;
4. Backup tapes; and
5. Erased, fragmented or damaged data.

Judge Scheindlin found that data stored as active on-line data, near-line data and offline storage archives, i.e. items 1, 2 and 3 in the above list, were accessible. For all three types of data storage the information is readily available and stored in a useable format. Backup tapes and erased, fragmented or damaged data, i.e. items 4 and 5 in the above list, were found to be inaccessible.

sible, the court engages in an analysis to determine whether cost shifting is appropriate. If the court determines that the information is stored in an inaccessible format then, under *Zubulake I*, the Court will apply a balancing test to determine whether cost-shifting is appropriate.

Although Judge Scheindlin was not the first person to adopt a balancing test in order to determine whether cost-shifting was appropriate where the discovery of inaccessible ESI was at issue, the test enumerated in *Zubulake I* is the one that has been most widely adopted. Of note, Judge Gibney, Presiding Justice of the Rhode Island Superior Court, endorsed the *Zubulake I* test in her decision in *Brokaw v. Davol*, February 15, 2011.

Judge Scheindlin's test can be distinguished from those of her colleagues in at least two important ways. First, Judge Scheindlin made explicit her intention to take cognizance of the presumption, long recognized by courts, that the producing party, the party responding to the discovery, should bear the cost of the discovery. In addition, the Judge stated that all close calls should be resolved in the requesting party's favor. In fact, Judge Scheindlin specifically stated that her colleagues had approved cost-shifting too frequently. Therefore, under Judge Scheindlin's test, cost shifting is likely to be the exception and not the rule. As such, the producing party should expect to bear the cost of discovery in most instances.

The second major distinction between the test enumerated in *Zubulake I* and its predecessors is that Judge Scheindlin listed the factors to be applied in order of importance. In addition to weighting the various factors, Judge Scheindlin specifically stated that a mechanistic application of the test should be avoided. As

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such, the *Zubulake I* test is not a simple check-list but a nuanced, fact sensitive, inquiry. The seven factors enumerated by Judge Scheindlin, in order of relative importance, are as follows:

1. The extent to which the request is specifically tailored to discover relevant information.
2. The availability of such information from other sources;
3. The total cost of production, compared to the amount in controversy;
4. The total cost of production, compared to the resources available to each party;
5. The relative ability of each party to control costs and its incentive to do so;
6. The importance of the issues at stake in the litigation; and
7. The relative benefits to the parties of obtaining the information

In analyzing the facts of *Zubulake*, Judge Scheindlin found that some of the requested ESI was stored in an inaccessible form. She, therefore, proceeded to analyze the requested discovery under the seven factor test to determine whether cost shifting was appropriate. Judge Scheindlin's analysis was, however, limited by the absence of hard data upon which she could base her decision. As such, she determined that, in order to engage in the nuanced fact-specific analysis that she believed to be required - and borrowing a solution from other judges – it was necessary for the parties to engage in a limited amount of e-discovery.[2] In essence, Judge Scheindlin ordered that a test run take place in order to provide the hard data necessary to apply the test she had enumerated.

2 Judge Scheindlin ordered that the defendant/responding party UBS, restore five of the ninety-four backup tapes in question keeping a record of the costs involved and the documents produced.

Once the test run was complete Judge Scheindlin held a second hearing to decide whether cost-shifting was appropriate, *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280 (S.D.N.Y. 2003) ("*Zubulake III*"). Using the information acquired from the limited e-discovery that had taken place after *Zubulake I*, Judge Scheindlin ruled that limited cost-shifting was appropriate. Judge Scheindlin held that *Zubulake,* the requesting party, should bear 25% of the cost of the e-discovery with UBS, the responding party, paying the balance of 75%. Although the seven factor test is inherently fact specific and nuanced, Judge Scheindlin's analysis in *Zubulake III* helps illustrate how the cost shifting analysis is likely to play out in other cases.

Factors 1 and 2:

Although Judge Scheindlin found that the original request for production propounded by *Zubulake*, asking for all communications between UBS employees concerning Zubulake, could be deemed to be overbroad and, therefore, would fail the specificity test, she noted that subsequent, voluntary limitations to the request, including specification of the five UBS employee's whose communications were sought, and a limitation of the time period involved, rendered the request sufficiently specific to weigh in favor of cost shifting.

Alongside her consideration of the specificity of the requested documents, Judge Scheindlin addressed the second factor of the test. The test run had produced 68 emails that were deemed relevant. However, none of the discovered documents provided direct evidence of the alleged discrimination. Judge Scheindlin also noted that there were a significant number of emails that had not been

previously produced and, thus, were only available on the backup tapes. Although the substance of the emails was known to the parties through other sources, much of the material discovered was not previously available to the parties.

Although Judge Scheindlin noted that the existence of a "smoking gun," and indeed any useful evidence, remained somewhat speculative, she held that Factors one and two weighed slightly against cost-shifting.

Factors 3, 4 and 5:

Judge Scheindlin noted that the cost of restoring the back-up tapes was estimated to be approximately $2,304.93 per tape. It was, therefore, expected that the total cost of restoring the remaining back-up tapes would be $165,954.67. In contrast, the Judge noted that this was a multi-million dollar case with damage estimates between $1,265,000 (Defendant) and $15,271,361 to $19,227,361 (Plaintiff). As such, she held that the cost of restoring the inaccessible date was not "significantly disproportionate" to the value of the case. Judge Scheindlin found that factor three weighed against cost-shifting.

In relation to factor four, Judge Scheindlin noted that the resources of UBS were exponentially greater than those available to Zubulake. However, she also noted that Zubulake had the ability to finance some of the e-discovery. The Judge found that this factor weighed against, but did not absolutely bar, cost shifting.

Because the cost of restoring the back-up tapes was outside the control of both parties, being determined by the vendor/contractor chosen to store and/or restore the data, Judge Scheindlin held that factor five was neutral.

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Factor 6:

Although Judge Scheindlin noted that discrimination is a weighty issue, she noted that Zubulake was not unique. Since many discrimination cases are filed, Judge Scheindlin deemed factor six to be neutral in the analysis.

Factor 7:

As Zubulake clearly had more to gain from cost-shifting than UBS, factor seven was deemed to weigh in favor of cost-shifting.

Judge Scheindlin concluded that factors one through four cut against cost shifting, but only slightly so, factors five and six were neutral and factor seven weighed in favor of cost-shifting. In addition, Judge Scheindlin noted that although relevant evidence had been discovered as a result of the test-run, none of the evidence had been shown to be indispensable to Zubulake's case. Based on this analysis, Judge Scheindlin ruled that some limited cost-shifting was appropriate, and ordered that Zubulake, the requesting party, bear 25% of the cost of e-discovery. The Judge, however, noted that the only costs that would be split were the costs for the restoration of the data, and the search of the restored data. All other costs, including review of the restored documents by attorneys, were found to be normal incidents of discovery and, as such, properly borne by the responding party.[3]

3 Judge Scheindlin stated:

> As a general rule, where cost-shifting is appropriate, only the costs of restoration and searching should be shifted. Restoration, of course, is the act of making inaccessible material accessible. That "special purpose" or "extraordinary step" should be the subject of cost-shifting. Search costs should also be shifted because they are so intertwined with the

Although Judge Gibney, in her decision in *Brokaw v. Davol*, appears to have endorsed the seven factors outlined by Judge Scheindlin in Zubulake, she did not engage in an analysis under the *Zubulake* test because the issue of cost-shifting had not been fully briefed and argued by the parties. Therefore, while the seven factor test has been tentatively endorsed by one Rhode Island judge, its exact application is not yet clear.

Ultimately, several conclusions can be drawn from *Zubulake*. First, it is clear that the question of whether the cost of e-discovery will be shifted or shared between the parties will have to be determined on a case by case basis, taking into account the specific facts at issue in each case. However, one also can conclude that, as long as Judge Scheindlin's reliance on the presumption that the responding party should bear the cost of discovery is followed, cost-shifting will be the exception rather than the rule. In addition, to the extent there is cost-shifting, the decision in *Zubulake* suggests that the requesting party may only have to bear a limited proportion of the costs. Finally, and perhaps most importantly, the decision in *Zubulake* reinforces the position that hard data, obtained by way of limited e-discovery, is necessary before an informed and accurate decision as to the cost of e-discovery can be made.

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restoration process; a vendor like Pinkerton will not only develop and refine the search script, but also necessarily execute the search as it conducts the restoration. However, the responding party should always bear the cost of reviewing and producing electronic data once it has been converted to an accessible form.

Zubulake, 216 F.R.D. at 290.