Cullen | Dykman

Court Shifts Costs of Discovery to Plaintiffs Prior to Class Certification

September 27, 2012

Boeynaems v. LA Fitness Int'l, LLC, Nos. 10-2326, 11-2644, 2012 WL 3536306 (E.D.Pa. Aug. 16, 2012).

In a case of first impression for the U.S. District Court in the Eastern District of Pennsylvania, federal Judge Baylson shifted the costs of e-discovery to the Plaintiffs before deciding whether to grant a class certification.

In *Boeynaems*, the Plaintiffs alleged that the Defendant breached its membership contracts and engaged in deceptive conduct when the Plaintiffs attempted to cancel their memberships to the Defendant's gym facility. In bringing their claim, the Plaintiffs sought class certification for all similarly situated customers, which, as noted by the Court, if granted, would likely subject the Defendant to drastic financial exposure in defending the case. For this reason, the parties could not agree on the appropriate scope of discovery or the allocation of discovery costs.

In ruling on the Plaintiffs' motion to compel discovery, the Court applied a "discovery fence" analogy to set the boundaries of what ESI should be produced. That is, any facts that are within the "fence" should be discovered and produced, but facts outside should not be produced. In defining the outer parameter, the Court determined that the fence should be "flexible" in that it must "bulge or contract as case-specific circumstances require" and noted that judges must be willing to redefine the contour of the fence as new information changes the judge's perception about what is fair.

The Court then turned to the issue of which party should bear the cost of discovery and examined the seven *Zubulake**[1]* factors judges should consider when making decisions about cost allocation.[2] Due to what the Court described as the "asymmetrical" nature of discovery (namely that the Defendant would have to produce millions of documents while the Plaintiffs would have to produce relatively few documents), the Court held the costs of discovery could be allocated among the parties in the interest of fairness. More specifically,

> *The Court concludes that where (1) class certification is pending, and (2) the plaintiffs have asked for very extensive discovery, compliance with which will be very expensive, that absent compelling equitable circumstances to the contrary, the plaintiffs should pay for the discovery they seek. If the plaintiffs have confidence in their contention that the Court should certify the class, then the plaintiffs should have no objection to making an investment. Where the burden of discovery expense is almost entirely on the defendant, principally because the plaintiffs seek class certification, then the plaintiffs should share the costs.*

Under this ruling, the Defendants were able to breathe a sigh of relief as the Plaintiffs were ordered to bear the costs of any additional discovery they needed in order to make their motion “at least until the class action determination is made.”

[1] *Zubulake v. UBS Warburg LLC (“Zubulake I”),* 217 F.R.D. 309 (S.D.N.Y 2003).

[2] Those factors are: (1) The degree to which the request for information is designed to discover germane information; (2) The availability of the same information from different sources; (3) The cost of production as compared to the amount in controversy; (4) The cost of production as compared to the resources of each party; (5) The parties’ relative abilities to control discovery costs and their incentives to control costs; (6) The degree of importance of the issues being decided in the litigation; and (7) The relative benefits to each of the parties in obtaining the information at issue.