

Small Stakes Claims Can Mean Big ESI Headaches (Feb. 28, 2013)

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BNA INSIGHTS

The authors write in an effort to open consideration of the issues that inform how attorneys who practice outside of the Fortune 500 conduct eDiscovery.

Small Stakes Claims Can Mean Big ESI Headaches



BY SHERRY B. HARRIS AND RONALD J. HEDGES

The vast majority of civil actions in the United States are brought in state courts. For all those that are considered “small stakes” actions, irrespective of venue, guidance is needed on how electronically stored information (ESI) should be addressed, recognizing that discovery costs should not dwarf the “value” of any given small action.

A Definition

A small stakes action can be defined as one in which relatively small sums are sought and where the costs of electronic discovery can “swallow” the monetary value of any recovery or loss. Other indicia of small stakes claims could include:

- In federal courts, the minimum amount in controversy (must exceed \$75,000) for diversity jurisdiction; that amount provides only a floor, which makes it less useful as a benchmark.

- In state courts, the *ad damnum* amount that must be pled in a complaint; this is a possibility, if the amount pled is a realistic one.

Emery G. Lee III, senior research associate at the Federal Judicial Center, Washington, D.C., suggests focusing on the experience and resources of the parties to

determine what constitutes a small stakes matter. Doing so points out the knowledge gap that makes eDiscovery in these cases so problematic.

Lee observes, “. . . [I]f you’re talking about a relatively unsophisticated non-repeat player making a worker’s compensation claim, you’re looking at things like contemporaneous Facebook posts, maybe emails . . . things not made in the regular course of business. . . . [And] very small enterprises might not be that sophisticated”

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in small actions for several reasons.

The Importance of Small Stakes Claims

Neither the ESI market nor ESI thought leaders have given much consideration to the small stakes action, except as it impacts the course of asymmetrical litigation. Rather, the focus to date—and the source of the majority of the relevant case law—has been on the complex action and the ever-increasing volume of ESI that has come to be associated with, for example, patent infringement and class actions.

ESI is becoming a factor in small actions for several reasons. First, the vast majority of information that exists today is created and stored electronically. Thus, “evidence” is going to be “electronic” in nearly every action.

Moreover, new “sources” of ESI (to use a phrase from the Federal Rules of Civil Procedure) seem to appear daily. Consider the proliferation of portable personal devices (smart phones, tablets, etc.) and the ubiquitous use of social media (Facebook, Twitter, You-

Tube, FourSquare, Instagram, etc.) across population demographics.

Accordingly, unless a practitioner obtains the informed consent of the client to forego e-discovery (and the adversary concurs), ESI is likely to be relevant across a broad spectrum of civil actions. For example:

In a contested divorce action—

- ▶ A spouse might have used the internet or social media to communicate with a paramour;
- ▶ A spouse might have surreptitiously tracked the other spouse through a GPS device;
- ▶ The tag on a particular vehicle might have passed through a certain toll at a certain time.

In a personal injury action where a plaintiff alleges serious and permanent injuries—

- ▶ Social media posts might hold corroborating or conflicting evidence.

In a motor vehicle action—

- ▶ The driver of a vehicle that rear-ended another vehicle might have been texting or speaking on a cell phone at the time of the collision.

These examples of relevant and (presumably) non-privileged ESI demonstrate that any civil practitioner, whether a solo or a member of a small firm, must be educated on, and have some knowledge of, ESI.

A Competence Checklist

Some elementary considerations for determining basic ESI competence include:

- Whether the practitioner understands the “basics” of ESI and how discovery related to—and admissibility of—ESI should be approached;

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▶ If not, whether the practitioner recognizes that consultation with someone who has that knowledge is both appropriate and essential to be competent and to represent the client adequately;

■ Whether the practitioner understands when it would be appropriate to consult with a technical expert to explore issues of, among other things, preservation, collection, search, and form of production;

■ Whether the practitioner has sufficient knowledge to engage in a meaningful discussion with opposing counsel to attempt to reach agreement with respect to, for example, the sources of ESI to be preserved and searched, methods of collection and culling, and the form or forms of production;

■ Whether the practitioner knows how to preserve and collect a client’s ESI and, having done so, how to conduct a search for the practitioner’s use and for production in response to an adversary’s discovery requests;

■ Whether the practitioner knows that “manual,” as opposed to some form of automated review of ESI for relevance or privilege/work product protection, is sometimes appropriate;

■ Whether the practitioner understands how the automated search for relevant, non privileged ESI might be conducted through the use of “simple” search terms as opposed to automated processes;

■ Whether the practitioner knows if ESI that should be subject to a litigation hold has been, or may become, deleted as a result of the routine, good-faith operation of an electronic information system; and

■ Whether the practitioner understands how to review an adversary’s production of ESI and when to inquire about the adversary’s collection methods (if that is placed in issue).

Avoiding Excessive Costs and Delay

These concerns implicate, in addition to attorney competence, questions of excessive cost and undue delay, the two factors that make apparent why practitioners fear eDiscovery. Some strategies for keeping cost and delay under control include:

■ Knowing what to ask the client or adversary about their ESI;

■ Assuming Fed. R. Civ. P. 26(f) or its state equivalent is applicable, knowing what to be prepared to discuss at the meet and confer;

■ In the absence of a meaningful 26(f) conference, or 26(f) equivalent in state court, knowing how and when to frame discovery requests and what the pre-framing process should entail?

The Meaning of ‘Proportionality’ In a Small Action

Small actions may well present an opportune forum for proportionality arguments, as proportionality factors include, among others, the nature and complexity

of a matter, resources of the parties, and the costs and burdens associated with discovery of ESI.

However, a practitioner cannot thoroughly understand and successfully assert proportionality arguments without the knowledge and expertise to assess the ESI involved and the associated costs and initiatives required to address the ESI in discovery. *The Sedona Conference® Commentary on Proportionality in Electronic Discovery* is an excellent, free resource for the practitioner interested in a detailed discussion of proportionality.

Consequences and Solutions

The cost of—and delay associated with—eDiscovery in the typical small action may be disproportionate to the merits of the action, especially when the practitioner is not equipped to deal with ESI.

Lack of knowledge, as well as an unwillingness to at least talk with an adversary about ESI, can also lead to so-called “satellite” discovery (or “discovery about discovery”) that can also be disproportionate to the merits. These circumstances can be avoided if:

- The practitioner acquires sufficient knowledge or affordable tools, or works with a competent technical advisor to do whatever discovery of ESI is reasonable;

- The practitioner turns to resources such as *The Sedona Conference® Cooperation Guidance for Litigators & In-House Counsel* and other publications from The Sedona Conference® to acquire that knowledge or to, at the least, understand what the practitioner needs to become competent.

The real solution lies with the availability of increased education for practitioners involved in small actions so that they may provide competent and reasonable representation.