

Oklahoma Law Review

Volume 67 | Number 1

2014

Tethered to the Statute: How the Third Circuit's Narrow Interpretation of 28 U.S.C. § 1920(4) Will Shape the Future of Cost-Shifting and E-Discovery for the Better

Jason L. Callaway

Follow this and additional works at: <https://digitalcommons.law.ou.edu/olr>

 Part of the [Civil Procedure Commons](#), and the [Computer Law Commons](#)

Recommended Citation

Jason L. Callaway, *Tethered to the Statute: How the Third Circuit's Narrow Interpretation of 28 U.S.C. § 1920(4) Will Shape the Future of Cost-Shifting and E-Discovery for the Better*, 67 OKLA. L. REV. 191 (2014), <https://digitalcommons.law.ou.edu/olr/vol67/iss1/5>

This Note is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in Oklahoma Law Review by an authorized editor of University of Oklahoma College of Law Digital Commons. For more information, please contact darinfox@ou.edu.

NOTE

Tethered to the Statute: How the Third Circuit's Narrow Interpretation of 28 U.S.C. § 1920(4) Will Shape the Future of Cost-Shifting and E-Discovery for the Better

I. Introduction

Discovery has grown by orders of magnitude since the advent of the computer. Once, the largest of cases required a team of legal professionals to pore through tens of thousands of paper documents to find responsive discovery. Now, word-processing, e-mail, and ever-expanding databases ensure that the same team will face millions upon millions of potentially disclosable documents.¹ Thankfully, the same computers that generate such masses of information make sifting through those masses during discovery much easier.² Computers can do only what they are told to do, however, and lawyers often lack the technical understanding to exploit computers' potential without help.³ Thus, as a new world of electronic discovery (e-discovery) emerges, lawyers must seek assistance from those outside the legal profession.

Enter the e-discovery vendor, a third party hired to handle the technical aspects of e-discovery. These experts are hired by law firms, or even by the parties themselves, to “collect, process, set up for review, and produce” electronically stored information (ESI).⁴ ESI includes, but is not limited to,

1. There are estimates that the amount of stored, discoverable data that an average company retains will double every three years. See MICHAEL R. ARKFELD, PROLIFERATION OF “ELECTRONICALLY STORED INFORMATION” (ESI) AND REIMBURSABLE PRIVATE CLOUD COMPUTING COSTS 5 (2011), available at http://www.lexisnexis.com/documents/pdf/20110721073226_large.pdf.

2. Right now, for example, major strides are being made in the acceptance and use of predictive coding, a way to automate part of the discovery process by having human reviewers teach a computer to find responsive documents. See Adam M. Acosta, *Predictive Coding: The Beginning of a New E-Discovery Era*, RES GESTAE, Oct. 2012, at 8, 8.

3. As electronic discovery specialist Dennis Kiker said when predicting the rise of malpractice suits for electronic discovery mistakes, “Not even IT professionals pretend to understand all of the different information systems that exist in a single company. Do we really expect every trial attorney to have greater expertise and understanding than the professionals that work in the field every day?” Doug Austin, *eDiscovery Trends: Is eDiscovery Malpractice More Widespread Than You Think?*, EDISCOVERY DAILY BLOG (July 6, 2011), <http://www.ediscoverydaily.com/2011/07/ediscovery-trends-is-ediscovery-malpractice-more-widespread-than-you-think.html>.

4. ELECTRONIC DISCOVERY DESKBOOK § 3:5.3 (Thomas Y. Allman et al. eds., 2012), available at Westlaw PLIREF-EDDBK. For a thorough, though now slightly outdated, look

e-mails, documents, databases, web pages, any information stored on removable memory (e.g., flash drives), and any information held on a cloud server.⁵ Many e-discovery vendors can also perform computer forensics, data recovery, and a host of other tasks that a party may need.⁶ In a very real sense, the e-discovery vendor fills a similar role in the digital world that the team of document reviewers did in the world of paper.

To the dismay of those paying the legal bills, the services of an e-discovery vendor can be expensive.⁷ Clients have always been cost-conscious, but the recent economic downturn has increased the pressure on lawyers to save money wherever possible.⁸ Some have looked to their own financial structures for answers, attempting alternative billing arrangements or outsourcing as methods for cost-saving.⁹ Others have formulated a much simpler solution: make the losing party pay.¹⁰ Unfortunately, the American Rule requires each party to pay its own litigation expenses, denying the opportunity for cost-shifting.¹¹ Thus, the American Rule presents a potentially insurmountable barrier to this simple solution.

at the different services that an e-discovery vendor might offer, see MATTHEW I. COHEN ET AL., BEST PRACTICES FOR THE SELECTION OF ELECTRONIC DISCOVERY VENDORS: NAVIGATING THE VENDOR PROPOSAL PROCESS 21-25 (June 2007 version), available at <https://thesedonaconference.org/download-pub/80>.

5. BARBARA J. ROTHSTEIN, RONALD J. HEDGES, & ELIZABETH C. WIGGINS, MANAGING DISCOVERY OF ELECTRONIC INFORMATION: A POCKET GUIDE FOR JUDGES 2 (2d ed. 2012), available at [http://www.fjc.gov/public/pdf.nsf/lookup/eldscpkt2d_eb.pdf/\\$file/eldscpkt2d_eb.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/eldscpkt2d_eb.pdf/$file/eldscpkt2d_eb.pdf). The Federal Rules of Civil Procedure define ESI expansively as “including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained.” FED. R. CIV. P. 34(a)(1)(A).

6. COHEN ET AL., *supra* note 4, at 21-25.

7. In 2010, one thousand of the largest companies in the United States expected to spend approximately \$1.3 billion dollars on e-discovery costs as part of their corporate litigation efforts. See Nathan Koppel, *Business Technology: Using Software to Sift Digital Records—Looking to Pare Litigation Costs, Firms Use Technology to Find Relevant Electronic Documents in Legal Discovery Process*, WALL ST. J., Nov. 23, 2010, at B6.

8. Ed Poll, *Legal Fees: How to Address the Client Pressure to Lower Fees*, ABA LAW PRACTICE TODAY (May 2009), <http://apps.americanbar.org/lpm/lpt/articles/fin05091.shtml>.

9. See Rachel M. Zahorsky, *Facing the Alternative: How Does a Flat Fee System Really Work?*, ABA J., Mar. 2012, at 40; Paul Lippe, *Want Quality? Learn to Operate*, LEGAL REBELS (July 26, 2012, 1:45 PM), http://www.abajournal.com/legalrebels/article/the_age_of_operational_law/.

10. *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 674 F.3d 158, 159-60 (3d Cir. 2012), *cert. denied*, 133 S. Ct. 233 (2012).

11. BLACK’S LAW DICTIONARY 98 (9th ed. 2009); *cf.* Alyeska Pipeline Serv. Co. v. Wilderness Soc’y, 421 U.S. 240, 269 (1975) (noting that Congress’s approach to the

However, the law includes exceptions to the American Rule, one of which is 28 U.S.C. § 1920. This statute allows the victorious party to recoup some of the “relatively minor, incidental expenses” of litigation.¹² Few of the statute’s drafters likely foresaw its provisions’ effects as applying to anything like e-discovery vendors; the statute has existed in some form for more than a century.¹³ Yet, some parties now argue that e-discovery vendor costs can be placed on the losing party under § 1920(4),¹⁴ which allows the winner to recover “the costs of making copies of any materials where the copies are necessarily obtained for use in the case.”¹⁵ Prior to the computer revolution, courts understandably interpreted this provision as referring to the cost of making physical copies of documents, meaning the cost of paper.¹⁶ However, as the Supreme Court of Tennessee noted, “The law is not static and requires lawyers to push its boundaries, including seeking change therein.”¹⁷ Enterprising attorneys have attempted to capitalize on the shifting technological landscape by framing the services of e-discovery vendors as “the 21st Century equivalent of making copies.”¹⁸ If accepted, their argument would place the high costs of *both* parties’ e-discovery squarely on the loser.

The Third Circuit Court of Appeals recently rejected this expansive argument in *Race Tires America, Inc. v. Hoosier Racing Tire Corp.*¹⁹ With the American Rule as an ever-present background to its statutory analysis, the Third Circuit limited the applicability of § 1920(4) with regard to e-

American Rule has been to “carve out specific exceptions” rather than to give courts discretion to shift costs based on the facts of a case).

12. *Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 2006 (2012).

13. *See infra* Part II.C.

14. *E.g.*, Brief of Appellee Hoosier Racing Tire Corp. at 16-18, *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 674 F.3d 158 (3d Cir.), *cert. denied*, 133 S. Ct. 233 (2012) (No. 11-2316), 2011 WL 4351546, at *16-*18; Principal and Response Brief of Defendants-Cross Appellants Cisco Ironport Sys., LLC and Return Path, Inc. at 52-54, *CBT Flint Partners, LLC v. Return Path, Inc.*, 676 F. Supp. 2d 1376, 1381 (N.D. Ga. 2009), *vacated*, 654 F.3d 1353 (Fed. Cir. 2011) (Nos. 2010-1202, 2010-1203), 2010 WL 3950006, at *52-*54.

15. 28 U.S.C. § 1920(4) (2012).

16. *E.g.*, *Alexander v. Nat’l Farmers Org.*, 696 F.2d 1210, 1212 (8th Cir. 1982); *Roberts v. Charter Nat’l Life Ins. Co.*, 112 F.R.D. 411, 414 (S.D. Fla. 1986).

17. *Flowers v. Bd. of Prof’l Responsibility*, 314 S.W.3d 882, 897 (Tenn. 2010) (discussing the ethics underlying the requirement that lawyers advocate zealously for their clients).

18. *CBT Flint Partners, LLC v. Return Path, Inc.*, 676 F. Supp. 2d 1376, 1381 (N.D. Ga. 2009), *vacated*, 654 F.3d 1353 (Fed. Cir. 2011).

19. 674 F.3d 158, 171 (3d Cir.), *cert. denied*, 133 S. Ct. 233 (2012).

discovery.²⁰ It concluded that only a few of the services performed by the e-discovery vendor fell within the meaning of § 1920(4); the bulk of the vendors' services remained outside the statute.²¹ The Third Circuit's narrow ruling is an accurate analysis of both the precedent and policy surrounding cost-shifting and § 1920, and it should become the prototype for federal courts' treatment of future cases.

This Note explores the Third Circuit's ruling and, in so doing, demonstrates why it is both legally sound and likely to become the majority view across the country. Part II presents the existing policy and statutes underlying the taxation of copying costs. Part III discusses the Third Circuit's decision in *Race Tires*, including the factual and procedural background. Part IV follows the Third Circuit's analysis of the law, showing how it comports with the Supreme Court's opinions on § 1920 and is supported by other precedents and policies. Part V predicts how other courts will view *Race Tires* based on their own precedents and discusses the potentially negative implications of the Third Circuit's ruling for the legal community.

II. Summary of Existing Law: The Rules and Policies at Play

Both the American Rule and exceptions like 28 U.S.C. § 1920 are the product of centuries of American jurisprudence and tradition, stretching back as far as the early days of the Supreme Court.²² Understanding the American Rule and its place in federal court is central to understanding the Third Circuit's ruling in *Race Tires* and, moreover, why that ruling is correct.

A. Foundation: How the American Rule Affects Potential Cost-Shifting

The American Rule's prohibition on cost-shifting has rested at the heart of any question of costs in the United States almost as long as there has been a United States. The American Rule is "[t]he general policy that all litigants, even the prevailing one, must bear their own attorney's fees."²³ Although it most often appears in the context of suits for attorney's fees, courts interpret the American Rule expansively to encompass most expenses of litigation.²⁴ The American Rule breaks from the English Rule,

20. *Id.* at 164, 169.

21. *Id.* at 171-72.

22. *See infra* Parts II.A, C.

23. BLACK'S LAW DICTIONARY 98 (9th ed. 2009).

24. *See, e.g.,* *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 678 F.3d 1199, 1201 (11th Cir. 2012) (noting that the American Rule requires all parties to "pay their own

which places the burden of the all legal fees on the losing party.²⁵ The English Rule, as its name implies, is followed in the United Kingdom as well as in most civil law countries.²⁶

It is unknown precisely when colonial courts began to move away from the English tradition, but the Supreme Court settled the matter for federal courts in 1796.²⁷ In *Arcambel v. Wiseman*, where a defeated party objected to paying his opponent's attorney's fee, the Court wrote:

We do not think that this charge ought to be allowed. The general practice of the United States is in oposition [sic] to it; and even if that practice were not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute.²⁸

The Court has repeatedly upheld the American Rule in later cases.²⁹ Beginning with its initial ruling in *Arcambel*, the Court has been incredibly wary of allowing any exception to the American Rule that Congress did not create.³⁰

The policies underlying the American Rule are fundamental to the American legal system. First and foremost, courts do not want to punish or discourage poor parties from bringing suit, especially when "litigation is at best uncertain."³¹ Were the rule not in place, wealthy litigants could intimidate opponents with the fear of being spent out of civil court and into bankruptcy court.³² Such a result would violate our long-standing ideal that

fees and costs in connection with bringing a law suit"); *Fednav Int'l Ltd. v. Cont'l Ins. Co.*, 624 F.3d 834, 839-40 (7th Cir. 2010) (differentiating attorney's fees from costs and other expenses).

25. BLACK'S LAW DICTIONARY 609 (9th ed. 2009).

26. Brandon Chad Bungard, *Fee! Fie! Foe! Fum!: I Smell the Efficiency of the English Rule Finding the Right Approach to Tort Reform*, 31 SETON HALL LEGIS. J. 1, 34 (2006).

27. For an extensive look at the history of the American Rule in the Supreme Court, see *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247-57 (1975).

28. 3 U.S. (3 Dall.) 306, 306 (1796).

29. See *Alyeska Pipeline*, 421 U.S. at 250 (gathering cases).

30. *Id.* at 247 ("[W]e are convinced that it would be inappropriate for the Judiciary, without legislative guidance, to reallocate the burdens of litigation in the manner and to the extent urged by respondents . . .").

31. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967).

32. Consider the story of Pauline Hughes, who on appeal lost her negligence suit against a group of physicians in connection with her husband's death during surgery. Having tried her case in the United Kingdom, Mrs. Hughes was left with her own attorney's bill of \$146,000 and the opposing attorney's bill of \$144,000. See John F. Vargo, *The American*

each person should have their day in court.³³ Moreover, allowing fees and costs would create what the Court has called “a second major litigation” for every case,³⁴ with two effects. First, the legal battle over costs would necessarily create new, additional legal fees for a party that has already lost on the merits. Second, the dispute over costs “would pose substantial burdens for judicial administration” by doubling every judge’s caseload.³⁵ Some commentators nevertheless urge courts to ignore or create judicial exceptions to the American Rule.³⁶ Despite these voices, most courts continue to follow the American Rule and, like the Supreme Court in *Arcambel*, accept only legislative exceptions.

B. Bridging the Gap: How Rule 54(d)(1) Connects § 1920(4) to the American Rule

Under most circumstances, the American Rule prevents the majority of litigation expenses from being shifted between parties. Yet Congress, occasionally with the assistance of the judicial branch, can and has crafted specific exceptions to that rule.³⁷ Federal Rule of Civil Procedure 54 has contained the exception for litigation costs like copying since the Rules were first introduced.³⁸ Rule 54(d)(1) now reads, in pertinent part: “Unless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney’s fees—should be allowed to the prevailing party.”³⁹ Recall that the Supreme Court in *Arcambel* required a statute to modify the

Rule on Attorney Fee Allocation: The Injured Person’s Access to Justice, 42 AM. U. L. REV. 1567, 1568-69 (1993).

33. Although the origin of the phrase “day in court” remains unclear, it was a regular part of the legal discourse by the beginning of the eighteenth century. JAMES E. CLAPP ET AL., LAW TALK: THE UNKNOWN STORIES BEHIND FAMILIAR LEGAL EXPRESSIONS 80-81 (2011).

34. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 609 (2001) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)).

35. *Fleischmann Distilling*, 386 U.S. at 718.

36. *E.g.*, Bungard, *supra* note 26; James Windon, *Fee Shifting in Libel Litigation: How the American Approach to Costs Allocation Inhibits the Achievement of Libel Law’s Substantive Goals*, 3 J. INT’L MEDIA & ENT. L. 175 (2010).

37. For a discussion of allowable exceptions to the American Rule, see *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 257-62 (1975).

38. In the 1940 United States Code, the first to include the Federal Rules of Civil Procedure, the cost-shifting provision read as follows: “Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs.” FED. R. CIV. P. 54(d) (1940) (current version at FED. R. CIV. P. 54(d)(1)).

39. FED. R. CIV. P. 54(d)(1).

American Rule.⁴⁰ Because the Federal Rules of Civil Procedure are as much statutes as the rest of the United States Code, Rule 54(d)(1) serves as the statutory predicate necessary for cost-shifting.⁴¹ Although not a major piece of *Race Tires*, Rule 54(d)(1)'s allowance of costs in federal actions connects the overarching policy of the American Rule to the specific exception at play in the case.

While Rule 54(d)(1) serves as the statutory exception necessary to set aside the American Rule, its language is incredibly vague. Neither the rule nor the subsequent comments define what could be considered a “cost.”⁴² That definition instead lies in 28 U.S.C. § 1920, the current incarnation of one of Congress’s exceptions to the American Rule and the statute at issue in *Race Tires*.⁴³

C. Exception in Action: How 28 U.S.C. § 1920(4) Circumvents the American Rule

Congress began allowing some recovery of litigation costs as part of the Act of February 26, 1853, its first major attempt to incorporate an exception to the American Rule into statute.⁴⁴ According to the Supreme Court, Congress sought to “standardize the costs allowable in federal litigation” in order to prevent “losing litigants . . . [from] being unfairly saddled with exorbitant fees.”⁴⁵ The exception for copying costs became part of the first United States Code,⁴⁶ and Congress retained the substance of the provision in the Revised Code of 1948 to ensure “rigid controls on cost-shifting in federal courts.”⁴⁷ The legislature’s most recent interaction with the statute

40. See *supra* notes 27-30 and accompanying text.

41. See, e.g., *United States v. Brandt*, 8 F.R.D. 163, 164 (D. Mont. 1948) (holding that the Federal Rules of Civil Procedure “have the same force and effect as other statutory enactments by Congress”).

42. FED. R. CIV. P. 54(d)(1) and Advisory Committee notes.

43. *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 674 F.3d 158, 163 (3d Cir.), *cert. denied*, 133 S. Ct. 233 (2012).

44. *Alyeska Pipeline*, 421 U.S. at 251-53.

45. *Id.* at 251.

46. 28 U.S.C. § 830 (1925). The statute allowed “lawful fees for exemplifications and copies of papers . . . [to] be included in and form a portion of a judgment or decree against the losing party.” *Id.*

47. *Race Tires*, 674 F.3d at 164 (quoting *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987)), *cert. denied*, 133 S. Ct. 233 (2012). It was at this point that the exception’s designation became 28 U.S.C. § 1920(4). *Alyeska Pipeline*, 421 U.S. at 255.

came in 2008, when it revised the language to refer to “materials” rather than “papers” in recognition of advancing technology.⁴⁸

Section 1920(4) seems relatively straightforward, but it hides a potentially enormous ambiguity for a digital world. It allows “[a] judge or clerk . . . [to] tax as costs . . . [f]ees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case.”⁴⁹ For most of the statute’s existence, the meaning of copying was clear—it referred to the creation of a physical duplicate of a document.⁵⁰ The method of creating that duplicate may have changed, most notably with the introduction of the modern copy machine,⁵¹ but the material requirements remained the same: one piece of paper became two (roughly) identical pieces of paper.

The Supreme Court has made it clear that Congress “comprehensively addressed” the statutory limitations on fees in § 1920 and in a companion statute not at issue here.⁵² However, the introduction of digital documents clouded the meaning of “copy,” and the Supreme Court has not examined § 1920(4) since the digital revolution began.⁵³ Lower courts have split on the breadth of the word “copy.” Courts applying the so-called broad interpretation allow the winner to recover all or nearly all e-discovery costs, while those employing the narrow interpretation limit costs to only a small

48. Judicial Administration and Technical Amendments Act of 2008, Pub. L. No. 110-406, 122 Stat. 4291. Although it is beyond the scope of this Note, it is worth considering whether the cost to use additive manufacturing (also called “3-D printing”) to create copies of physical objects (for exhibits, etc.) could be considered a cost to “mak[e] copies of any materials” and, thus, within the bounds of the § 1920. For a primer on the topic, see *AM Basics*, ADDITIVE MANUFACTURING (2013), <http://additivemanufacturing.com/basics/>.

49. 28 U.S.C. § 1920(4) (2012). Although it is fertile ground for contention, the Third Circuit did not address the exact meaning of the phrase “necessarily obtained for use in the case.” Its ruling is limited solely to interpreting the meaning of the word “copy,” and this Note will only address that aspect of the statute. For more information on the topic of necessity, see Steven C. Bennett, *Are E-Discovery Costs Recoverable by a Prevailing Party?*, 20 ALB. L.J. SCI. & TECH. 537, 545-47 (2010).

50. *Cf.* *Fogleman v. ARAMCO (Arabian Am. Oil Co.)*, 920 F.2d 278, 286 (5th Cir. 1991) (using the “xerox copy” as the standard for a copied document).

51. For an entertaining look at one law professor’s experience with the history of modern copying, see David D. Siegel, *My Life in Paper*, 78 N.Y. ST. BAR J. 46 (2006).

52. *Crawford Fitting*, 482 U.S. at 442. The other statute, 28 U.S.C. § 1821, describes costs allowable to witnesses for their expenses in being part of a trial (e.g., subsistence, mileage, etc.).

53. Of the few cases interpreting any part of § 1920, most have dealt with § 1920(3) (witness fees) and § 1920(6) (fees for court-appointed experts and interpreters). *See, e.g., Crawford Fitting*, 482 U.S. at 438; *Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 1998 (2012).

portion of the total.⁵⁴ As a result of this confusion, the questions to be resolved in *Race Tires* emerge: what exactly is a copy of a wholly-electronic document? And more importantly, who should pay for it?

III. Presentation of the Case: The Running of Race Tires

A. Preparing for Race Day: The Events Leading to the Third Circuit's Opinion

Race Tires was a bitterly fought case from beginning to end.⁵⁵ It began in the Western District of Pennsylvania as a relatively straightforward antitrust case brought under the Sherman Act.⁵⁶ Race Tires America (Race), the plaintiff in the district court suit, and Hoosier Racing Tire (Hoosier), one of the two defendants in the case, were tire suppliers contesting for economic victory in the world of competitive motor sports.⁵⁷ The other named defendant, Dirt Motor Sports, Inc. (DMS), was a sanctioning body in the racing world.⁵⁸

Race brought suit after DMS instituted a “single tire rule” for its races and selected Hoosier as its exclusive supplier.⁵⁹ A single-tire rule, as its name suggests, requires all competitors in a particular race to use the same brand and type of tire on their vehicles.⁶⁰ Competition to be the chosen

54. Compare, e.g., *Windy City Innovations, LLC v. Am. Online, Inc.*, No. 04 C 4240, 2006 WL 2224057, at *3 (N.D. Ill. July 31, 2006) (disallowing fees for optical character recognition, document coding, and keyword searching services), and *Fast Memory Erase, LLC v. Spansion, Inc.*, No. 3-10-CV-0481-M-BD, 2010 WL 5093945, at *7 (N.D. Tex. Nov. 10, 2010) (disallowing “costs for collecting and processing ESI”), with *In re Ricoh Co. Patent Litig.*, 661 F.3d 1361, 1365-66 (Fed. Cir. 2011) (holding that, absent an agreement between the parties, the cost of creating a database is recoverable).

55. The district court described the parties as having a “lengthy and contentious” history, and it “noted on numerous occasions the considerable tension among the respective parties and their attorneys.” *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 660 F. Supp. 2d 590, 595 (W.D. Pa. 2009).

56. *Id.* at 594.

57. *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 674 F.3d 158, 160 (3d Cir.), cert. denied, 133 S. Ct. 233 (2012).

58. *Id.*

59. *Id.*

60. *Race Tires*, 660 F. Supp. 2d at 596. The Third Circuit discussed in some depth the advantages and disadvantages of single-tire rules as compared to “open tire” rules. See *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 614 F.3d 57, 69-72 (3d Cir. 2010). Both the district and appellate courts noted that tires were not unusual in being restricted; other racing associations have restricted carburetors, mufflers, cylinder heads, and even engines and chassis. See *id.* at 63; *Race Tires*, 660 F. Supp. 2d at 597.

supplier is understandably fierce, as the supplier gains exclusive access to a market that will require a large amount of its product.⁶¹ Race and Hoosier were among those that submitted bids to DMS for its exclusive contract, and DMS chose Hoosier after a thorough investigation of all of the bids.⁶² Race estimated its damages as a result of not receiving the contract exceeded thirty million dollars.⁶³ That number would triple if the court found that Hoosier and DMS violated the Sherman Act.⁶⁴

Unfortunately for Race, it would never lay claim to those damages. The district court granted summary judgment to both Hoosier and DMS, holding that there could be no violation of the Sherman Act where “a sanctioning body *freely* decides to adopt a single tire rule, and then *freely* selects a supplier.”⁶⁵ On appeal, the Third Circuit affirmed the district court’s ruling.⁶⁶ The appellate court expanded on the district court’s reasoning and created a bright-line standard for single-product rules and antitrust liability: as long as the sanctioning body “freely” chooses its rule and has “sufficient pro-competitive or business justifications” for making the rule, there will be no antitrust liability for its exclusive contracts with suppliers.⁶⁷

As part of litigating the case, the parties made extensive requests for ESI from each other.⁶⁸ The district court’s Case Management Order required the parties to agree to a list of search terms for database searches, convert all files to Tagged Image File Format (TIFF), produce certain metadata fields, and create searchable versions of any text file.⁶⁹ Each of the parties hired an e-discovery vendor to manage its part in the discovery process.⁷⁰ The court accepted Race’s categorization of the vendors’ activities: “(1) preservation and collection of ESI; (2) processing the collected ESI; (3) keyword

61. *Race Tires*, 674 F.3d at 160.

62. *Race Tires*, 660 F. Supp. 2d at 599-600. It is worth noting that Race, though unsuccessful in this bid, had received single-tire rule contracts previously. *Race Tires*, 614 F.3d at 65.

63. *Race Tires*, 674 F.3d at 161.

64. Any domestic party injured by an antitrust violation can, under the Sherman Act, “recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.” 15 U.S.C. § 15(a) (2012).

65. *Race Tires*, 660 F. Supp. 2d at 606.

66. *Race Tires*, 614 F.3d at 85.

67. *Id.* at 81.

68. *Race Tires*, 674 F.3d at 161.

69. *Id.* “Metadata” is information, sometimes visible and sometimes hidden, that provides additional information about the ESI, such as dates of creation and editing, author’s or editor’s identity, etc. ROTHSTEIN ET AL., *supra* note 5, at 3. For a glossary of basic e-discovery terms, see *id.* at 22-26.

70. *Race Tires*, 674 F.3d at 161.

searching; (4) culling privileged material; (5) scanning and TIFF conversion; (6) optical character recognition ('OCR') conversion; and (7) conversion of racing videos from VHS format to DVD format.⁷¹ With the help of their e-discovery vendors, DMS and Hoosier together produced slightly over 600,000 electronic documents in response to Race's discovery requests.⁷²

While Hoosier and DMS were likely enthusiastic about winning on summary judgment, their e-discovery costs undoubtedly tempered their joy. Hoosier's vendor presented a bill for more than \$125,000, while DMS's vendor sought almost \$330,000.⁷³ Maneuvering for some relief, Hoosier and DMS included the vendors' charges on the bills of costs they presented to the district court clerk.⁷⁴ Following Race's objection, DMS dropped its claim to slightly more than \$240,000, stating that its vendor's invoices "were exceedingly confusing and inconsistent."⁷⁵ Noting the lack of Supreme Court precedent and the circuit split on whether e-discovery costs could be considered within the statute,⁷⁶ the clerk decided to allow almost all of the vendors' bills as costs under § 1920(4) because the vendors' "expertise [was] necessary to retrieve and prepare" the responsive documents, making the vendors "an indispensable part of the process."⁷⁷

Understandably, Race appealed the clerk's decision, which would force it to pay over \$360,000 to the parties it had just unsuccessfully sued.⁷⁸ However, the district court issued a memorandum opinion upholding the clerk's finding.⁷⁹ The district court, like the clerk, felt that the indispensability of the vendors to the e-discovery process brought them within the bounds of § 1920(4).⁸⁰ Race appealed once more, bringing the case to the Third Circuit Court of Appeals.⁸¹

71. *Id.* at 161-62.

72. *Id.* at 162.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 162-63.

78. *Id.* at 163.

79. *Id.* The memorandum opinion is styled *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, No. 2:07-cv-1294, 2011 WL 1748620 (W.D. Pa. May 6, 2011).

80. *Race Tires*, 674 F.3d at 163.

81. *Id.*

B. It's Race Day! The Third Circuit's Opinion Finds the Narrow Interpretation Beating the Broad by a Wide Margin

The Third Circuit's decision, despite its modern topic, is a fairly standard case of statutory interpretation. The court opened the opinion by narrowing its gaze to the piece of the § 1920 at issue.⁸² In interpreting the statute, the court defined its terms and then looked to both past precedent and present policy for direction.⁸³ The court also examined the common arguments given in favor of the broad interpretation of the statute, but it found those arguments "untethered from the statutory mooring."⁸⁴ The Third Circuit concluded that the narrow interpretation of the statute was correct and prevented Hoosier and DMS from recovering most of their e-discovery costs.⁸⁵

1. Pole Position: The Third Circuit Resolves Preliminary Matters

The court began its inquiry by focusing on the specific language of 28 U.S.C. § 1920(4) at issue. The statute allows a court to award "[f]ees for exemplification and the costs of making copies of any materials."⁸⁶ No party's brief distinguished between exemplification and copying, despite the "well-established canon of statutory interpretation" that Congress's use of different words in a statute signals its intent for those words to have different meanings.⁸⁷ Like copying, the Supreme Court has not defined exemplification, and lower courts are split as to its meaning.⁸⁸ The Federal Circuit, applying the Sixth Circuit's narrow interpretation, found exemplification to be "an official transcript of a public record, authenticated as a true copy for use as evidence."⁸⁹ By contrast, the Seventh Circuit has followed a broad interpretation, ruling that exemplification fees could be awarded for the cost to create any exhibit "[s]o long as the means of presentation furthers the illustrative purpose of [the] exhibit."⁹⁰ The Third

82. *Id.* at 165-66.

83. *Id.* at 163-65.

84. *Id.* at 169.

85. *Id.* at 171.

86. 28 U.S.C. § 1920(4) (2012).

87. *Race Tires*, 674 F.3d at 165 (citing *SEC v. McCarthy*, 332 F.3d 650, 656 (9th Cir. 2003)).

88. *Id.* at 159.

89. *Kohus v. Cosco, Inc.*, 282 F.3d 1355, 1359 (Fed. Cir. 2002) (quoting *BLACK'S LAW DICTIONARY*, 593 (7th ed. 1999)) (refusing under Sixth Circuit precedent to award costs for creating a video exhibit).

90. *Cefalu v. Vill. of Elk Grove*, 211 F.3d 416, 428 (7th Cir. 2000).

Circuit found, however, that there was no possible definition of exemplification that could apply to the case at bar, ending its consideration of the issue.⁹¹

The Third Circuit also saw fit to address a small but important procedural aspect of § 1920 before beginning its analysis.⁹² Seemingly exasperated, the court chastised Hoosier and DMS for the “lack of specificity and clarity” in their bills of costs.⁹³ In the context of awards for attorney’s fees, the Supreme Court stated that the party seeking fees has the burden of demonstrating its claim.⁹⁴ In some circuits, this language has been taken to mean that the bill’s proponent should provide “an itemized list with sufficient specificity” to allow the clerk or court to understand how the cost is within one of the allowable categories.⁹⁵ Both vendors’ invoices included pseudo-technical terms like “EDD Processing” and “Performing Searching/Filtering/Exporting” that tried to hide the invoices’ lack of actual information about the vendors’ services.⁹⁶ The Third Circuit did not approve.⁹⁷ It also took issue with the fact that neither invoice included either a rationale for the vendors’ activities or any measure of results.⁹⁸ The court eventually accepted Race’s categorization of the vendors’ services in order to move forward with its analysis.⁹⁹ However, the implication of this section of the opinion is that the court will expect the same level of detail from vendors seeking fees that it does from attorneys.¹⁰⁰

91. *Race Tires*, 674 F.3d at 166. Given the methods it used to define copying, the Third Circuit would likely follow the Sixth Circuit’s narrow interpretation of exemplification.

92. *Id.* at 166-67.

93. *Id.* at 166.

94. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

95. *Oracle Am., Inc. v. Google Inc.*, No. C 10-03561 WHA, 2012 WL 3822129, at *3 (N.D. Cal. Sept. 4, 2012) (citing *In re Ricoh Co. Ltd. Patent Litigation*, 661 F.3d 1361, 1368 (Fed. Cir 2011)).

96. *Race Tires*, 674 F.3d at 167.

97. *Id.* at 166.

98. *Id.* at 167.

99. *Id.*

100. In *Hensley v. Eckerhart*, the Supreme Court held that an attorney seeking a fee must “exercise ‘billing judgment’ with respect to hours worked” and “maintain billing time records in a manner that will enable a reviewing court to identify distinct claims.” 461 U.S. 424, 437 (1983). In the Third Circuit, courts have a duty to “exclude from counsel’s fee request ‘hours that are excessive, redundant or otherwise unnecessary.’” *Holmes v. Millcreek Twp. Sch. Dist.*, 205 F.3d 583, 595 (3d Cir. 2000) (citing *Hensley*, 461 U.S. at 434). Interestingly, in broad interpretation jurisdictions the need to create a detailed fee request under § 1920(4) could spawn the “second major litigation” that the Supreme Court wanted to avoid in *Hensley*, except the litigation would be between the vendor with an

2. *Green Flag: The Third Circuit Starts Its Analytical Engines*

With frustration vented and focus narrowed, the Third Circuit began its statutory analysis by defining a “copy” in the context of § 1920(4).¹⁰¹ It adopted the definition of *Webster’s Third New International Dictionary*, where a copy is “an imitation, transcript, or reproduction of an original work.”¹⁰² The definition’s most important feature is the emphasis placed on duality; there can only be a copy when there is an original. The Third Circuit referenced the photocopy as a prominent example of an allowable copy.¹⁰³ Although a simple point, the rest of *Race Tires*—indeed, the entirety of the narrow interpretation—can be framed as the characterization of a specific e-discovery activity as one of two acts: finding an original; or creating a copy of that original. Under the Third Circuit’s definition, only the latter is within the scope of § 1920(4).

Based on its definition, the Third Circuit allowed costs for those activities within the scope of the statute under the narrow interpretation (which, unsurprisingly, are also allowed under the broad interpretation).¹⁰⁴ The court maintained that scanning hard-copy documents to create digital versions and converting files from their native format to the court-prescribed production format fell within the statute.¹⁰⁵ Additionally, the Third Circuit allowed the costs to reformat VHS recordings as DVD recordings, presumably as a type of format conversion.¹⁰⁶

The court did not emphasize the point, but broad interpretation courts often argue that all of the services of e-discovery vendors are “the 21st Century equivalent of making copies.”¹⁰⁷ By allowing these specific costs, the Third Circuit agreed that there are electronic equivalents to making copies but limited them to format conversion and document scanning

unclear invoice and the employer who, because of that invoice, could not recover its costs. 461 U.S. at 437.

101. *Race Tires*, 674 F.3d at 166.

102. *Id.* Nearly identical, *Black’s Law Dictionary* defines a copy as “[a]n imitation or reproduction of an original.” BLACK’S LAW DICTIONARY 385 (9th ed. 2009).

103. *Race Tires*, 674 F.3d at 166.

104. *Id.* at 167.

105. *Id.* (citing *Hecker v. Deere & Co.*, 556 F.3d 575, 591 (7th Cir. 2009); *BDT Prods., Inc. v. Lexmark Int’l, Inc.*, 405 F.3d 415, 420 (6th Cir. 2005), *abrogated in part on other grounds by Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997 (2012); *Brown v. McGraw-Hill Cos.*, 526 F. Supp. 2d 950, 959 (N.D. Iowa 2007)).

106. *Id.*

107. *CBT Flint Partners, LLC v. Return Path, Inc.*, 676 F. Supp. 2d 1376, 1381 (N.D. Ga. 2009), *vacated*, 654 F.3d 1353 (Fed. Cir. 2011).

only.¹⁰⁸ This restriction comports with its definition of a copy, a duplicate of an original, because both scanning and converting documents clearly begin with a single document and result in an exact reproduction of that document.

3. Red Flag: The Third Circuit Finds the Broad Interpretation Divorced from the Statute

Having adopted a meaning of copying, the Third Circuit's remaining task was to determine whether the broad or narrow interpretation of § 1920(4) more closely aligned with its definition.

The Third Circuit focused its analysis on the statute's language, rejecting the broad interpretation argument that the complexity of the services made them taxable.¹⁰⁹ Broad interpretation courts have made the complex nature of e-discovery services their touchstone, emphasizing a pair of policy considerations tied to that complexity. First, modern e-discovery requires technical expertise well beyond that of most lawyers.¹¹⁰ As a result, the e-discovery vendor is indispensable to the discovery phase of the case being completed.¹¹¹ Second, using an expert as part of the discovery process can be a major cost savings for the parties, so courts should encourage their use.¹¹² As a corollary, some courts maintain that shifting vendor costs also serves as an effective limit on parties' unreasonable discovery requests.¹¹³

The Third Circuit found the entire broad interpretation to be "untethered from the statutory mooring."¹¹⁴ The court drew a sharp distinction between permitted, taxable activities and the preliminary steps that make such activities possible.¹¹⁵ Although the court opined that ESI may need "extensive 'processing' . . . to make a comprehensive and intelligible production," it stated that the statute "does not authorize taxation merely

108. *Race Tires*, 674 F.3d at 169-70.

109. *Id.* at 169.

110. *See Austin*, *supra* note 3. The district court in *Race Tires* supported this aspect of the broad interpretation, finding e-discovery "'highly technical' . . . [and] not 'the type of services that attorneys or paralegals are trained for or are capable of providing.'" *Race Tires*, 674 F.3d at 168 (quoting *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, No. 2:07-cv-1294, 2011 WL 178620, at *9 (W.D. Pa. May 6, 2011)).

111. *CBT Flint*, 676 F. Supp. 2d at 1381 ("The services [of an e-discovery vendor] are certainly necessary in the electronic age. The enormous burden and expense of electronic discovery are well known.").

112. *See In re Aspartame Antitrust Litig.*, 817 F. Supp. 2d 608, 615 (E.D. Pa. 2011).

113. *CBT Flint*, 676 F. Supp. 2d at 1381.

114. *Race Tires*, 674 F.3d at 169.

115. *Id.*

because today's technology requires technical expertise not ordinarily possessed by the typical legal professional."¹¹⁶ The court's position accords with pre-digital interpretations of the statute, which did not award costs for document review even when the responsive documents were later copied.¹¹⁷ The Third Circuit concluded that "Congress did not authorize taxation of charges necessarily incurred to discharge discovery obligations. It allowed only for the taxation of the costs of making copies."¹¹⁸

4. *Checkered Flag: The Third Circuit Adopts the Narrow Interpretation*

Although Hoosier and DMS made a few additional arguments in favor of being awarded costs, the Third Circuit found these arguments unimportant and dismissed them with little discussion.¹¹⁹ Hoosier argued that the costs of producing and the costs of copying discovery ESI could not be separated, so all should be allowed.¹²⁰ The circuit court pointed to other courts that have separated the two and noted that it is the proponent's burden to prove that a cost fits within the statutory structure.¹²¹ The court also found insignificant the argument that the provision in the Federal Rules of Civil Procedure for e-discovery somehow brought production of e-discovery within the bounds of § 1920(4).¹²²

Ultimately, the court allowed only \$30,370.42 in costs, less than one-tenth of the approximately \$365,000 Hoosier and DMS sought.¹²³ The award covered only the costs of scanning paper documents to create electronic versions and converting documents and videos from their native format to the agreed-upon production format.¹²⁴ The court disallowed all of the costs associated with producing the discovery, as they did not fall

116. *Id.* It is worth noting that modern cases, especially involving e-discovery on the scale of *Race Tires*, almost certainly *will* require processing from a specialist. As noted in Part I above, modern parties are generating too much ESI for traditional discovery processes to be feasible. And while some companies may have employees with the necessary technical expertise, the majority will likely need to hire an outside vendor to manage the e-discovery process.

117. *See, e.g.*, *Romero v. City of Pomona*, 883 F.2d 1418, 1428 (9th Cir. 1989) ("[F]ees are permitted only for the physical preparation and duplication of documents, not the intellectual effort involved in their production."), *abrogated on other grounds by* *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1363 (9th Cir. 1990).

118. *Race Tires*, 674 F.3d at 169.

119. *Id.* at 170-71.

120. *Id.* at 170.

121. *Id.*

122. *Id.* at 170-71.

123. *Id.* at 171.

124. *Id.*

within § 1920(4).¹²⁵ In doing so, it rejected the broad interpretation in favor of what it saw as the interpretation more closely aligned with the definition of copying.¹²⁶

IV. After the Race Is Run: Analysis of the Narrow Interpretation in Light of the Third Circuit's Opinion

The narrow interpretation of § 1920(4), as exemplified by the Third Circuit's decision in *Race Tires*, aptly applies the classical, accepted understanding of cost-shifting to modern e-discovery. Most importantly, the narrow interpretation of § 1920(4) echoes Supreme Court opinions on similar topics. It also melds with several of the Federal Rules of Civil Procedure applicable to discovery, a point the Third Circuit did not explore. Finally, the narrow interpretation avoids the trap of technological fear by rejecting ignorance and requiring both judges and practitioners to understand e-discovery. It is by far the better of the two interpretations of § 1920(4) and should be adopted wholesale by U.S. courts.

A. The Narrow Interpretation Mimics Supreme Court Decision Making on § 1920

The Third Circuit's narrow interpretation aligns well with the Supreme Court's opinions on cost-shifting and the American Rule. In a recent opinion, the Court held that Congress intended the taxable costs allowed under § 1920 to be "modest in scope" rather than major exceptions.¹²⁷ The narrow interpretation, which essentially allows only minor cost-shifting, fits firmly within this limited philosophy of the American Rule. Moreover, the Court has unequivocally stated that, when it comes to cost-shifting and § 1920, lower courts have little discretion.¹²⁸ Instead, courts are strictly limited to the express provisions of the cost-shifting statute.¹²⁹ If it were to take a case on § 1920(4), the Supreme Court would likely find the latitude of the broad interpretation to be so far from that position as to be ludicrous. By contrast, the Court would likely view the Third Circuit's decision in *Race Tires*, and the narrow interpretation as a whole, as the logical extension of its past precedent on cost-shifting and the American Rule.

125. *Id.* at 171-72.

126. *Id.*

127. *Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 2006 (2012).

128. *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 442-43 (1987).

129. *Id.* at 445.

The Third Circuit's methodology in deciding the case was extraordinarily similar to that used by the Supreme Court in its recent interpretation of § 1920, and thus it would likely be upheld on appeal. While the Court has not recently examined § 1920(4), two months after the Third Circuit handed down its decision the Court interpreted § 1920(6) in *Taniguchi v. Kan Pacific Saipan, Ltd.*¹³⁰ In that case, the Supreme Court needed to define "interpreter" in order to apply the cost-shifting statute.¹³¹ The Court first surveyed modern dictionaries in an effort to find the term's "ordinary meaning."¹³² Having done so, the Court then reviewed the history and context of the statute as well as how prior courts had enforced the phrase in order to determine whether the word had a meaning outside of the ordinary.¹³³ Finally, it applied its definition to the facts of the case at bar.¹³⁴ Although the issue was not framed in exactly the same way, the Third Circuit followed a similar pattern in deciding *Race Tires*. The fact that the Third Circuit's decision so closely parallels the higher court's suggests that the Third Circuit's process for arriving at the narrow interpretation was likely correct. When taken together, the two cases present a template for future courts to use when interpreting § 1920.

B. An Unexplored Connection Between the Narrow Interpretation and Rule 34

Although not discussed by the Third Circuit, the narrow interpretation of § 1920(4) and Rule 34 of the Federal Rules of Civil Procedure share an interesting and unexpected symmetry. Rule 34 states that a responding party must "produce and *permit the requesting party . . . to inspect, copy, test, or sample*" any responsive discovery.¹³⁵ Producing responsive discovery documents is part of the responding party's Rule 34 duty to respond.¹³⁶ As a cost of litigation, the American Rule would therefore require the responding party to pay the associated expenses, including the

130. *Taniguchi*, 132 S. Ct. at 1997. Section 1920(6) allows a court to award as costs "[c]ompensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services." *Id.* at 2002.

131. *Id.*

132. *Id.* (citing *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995)).

133. *Id.* at 2004-05.

134. *Id.* at 2006-07.

135. FED. R. CIV. P. 34(a)(1) (emphasis added).

136. According to FED. R. CIV. P. 34(b)(2)(B), a party's response "must either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons." Thus, the responding party's actions are limited to either acquiescence or objection, nothing more.

collection and review tasks e-discovery vendors commonly perform.¹³⁷ However, nothing in Rule 34 requires delivery of a copy of the responsive discovery to the requesting party, only that the responding party make the discovery available.¹³⁸ The Rule allows copying, but it implies that the requesting party, not the responding party, is the one who will actually make the copy.¹³⁹ Just as it places the cost of production on the responding party, Rule 34 seems to place the cost of transmission squarely on the requesting party.¹⁴⁰

In this, Rule 34 seems to match the narrow interpretation of § 1920(4). The production requirement in Rule 34 does not distinguish between whether the document is physical or electronic.¹⁴¹ Neither does the Third Circuit's narrow interpretation of § 1920(4).¹⁴² In either case, only those costs associated with transmitting the document to the requesting party (i.e., those beyond the minimal requirements of Rule 34) are recoverable. Thus, under both Rule 34 and § 1920(4) many of the costs associated with e-discovery vendors—including the data extraction, processing, and searching done by Hoosier's and DMS's vendors—are the responsibility of the responding party.¹⁴³ The fact that it is the e-discovery vendor, and not

137. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978) (“[T]he presumption is that the responding party must bear the expense of complying with discovery requests.”).

138. FED. R. CIV. P. 34(a)(1).

139. *Id.*

140. Section 1920(4), viewed in the light of Rule 34, creates an exception to the American Rule that is, in reality, the reverse of what it appears on the surface. At first glance, it seems like § 1920(4) allows a suit's winner to recover the money it spent on copying from the loser, which the American Rule normally would not permit. However, when reading Rule 34 it seems clear that each party's cost of making copies during discovery is in fact a litigation expense for the other party. Conceptually, the American Rule would always require the losing party to pay the winner for those expenses because, although the losing party asked the winning party to make the copies and bear the costs until the end of the case, the ultimate expense always belonged to the losing party. The Rule does not actually require either party to repay what the other party spent complying with discovery requests. Where § 1920(4) is an exception to the American Rule, then, is in denying the loser the opportunity to seek recompense from the winner.

141. While Rule 34 does give additional requirements for requests of ESI in subsection (b)(2)(D), the basic requirements for producing both electronic and paper documents are the same. FED. R. CIV. P. 34(b)(2)(E).

142. *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 674 F.3d 158, 170 (3d Cir.), *cert. denied*, 133 S. Ct. 233 (2012).

143. As Judge Rosenthal noted in *Kellogg Brown & Root Intern., Inc. v. Altanmia Commercial Mktg. Co.*, such acts are “more like the work of an attorney or legal assistant in locating and segregating documents that may be responsive to discovery than it is like

the attorney, who is producing the discovery is irrelevant; cost-shifting is allowable only for acts involved in transmitting discovery from responding to requesting parties. There is no evidence that the drafters of the Rules of Civil Procedure had § 1920(4) in mind when they updated Rule 34 to include e-discovery,¹⁴⁴ so there is no way to determine if the harmony between statute and Rule is more than coincidence. If nothing else, though, the degree of symmetry between the two lends additional, correlative support for the narrow interpretation of § 1920(4).

C. The Fear of Technology Is Not a Sound Basis for Decision

Perhaps implicit in the Third Circuit's argument is a condemnation of broad interpretation courts that awarded costs based on an unwillingness to face the changing technological landscape. The policies on which the broad interpretation is based—expertise beyond the lawyer's ken, cost savings, and controlling discovery—are conspicuously absent from the language of the statute, yet courts found them persuasive nevertheless.¹⁴⁵ The difference may lie in how very alien new technology can be, as illustrated by analogy. In the pre-digital world, a lawyer with no understanding of the Dewey Decimal System may have needed the assistance of an experienced librarian in order to locate and copy books in a library, but no one would have argued that the librarian's efforts were taxable under § 1920(4). Even one unfamiliar with finding books in a library would know that the librarian was not involved in the act of copying, only in finding the materials to be copied. The same likely was not true for e-discovery, especially given the legal profession's notoriety for refusing to adopt modern technology in favor of cherished archaisms.¹⁴⁶ It may have been easier simply to call

copying those documents for use in a case.” Civ. Action No. H-07-2684, 2009 WL 1457632, at *5 (S.D. Tex. May 26, 2009).

144. FED. R. CIV. P. 34 and Advisory Committee notes.

145. *Id.*

146. Some judges are notorious for not fully understanding, much less embracing, changes in technology. Although accepted now, even innocuous courtroom technology like digital projectors faced stiff opposition from the bench when initially introduced. Stan Gibson, *Evolving Courtroom Technology*, GPSOLO TECHNOLOGY & PRACTICE GUIDE (June 2006), http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/courtroomtechnology.html. Justice Breyer has spoken openly about the need for judges to understand modern technology, pointing to examples of his own and other high court justices' misunderstandings of modern technology. Erik Shelzig, *Supreme Court Justices Must Adapt to Facebook World, Says Breyer*, NBC NEWS (Nov. 16, 2010, 8:14 PM), http://www.msnbc.msn.com/id/40224302/ns/technology_and_science-tech_and_gadgets/t/supreme-court-justices-must-adapt-facebook-world-says-breyer/#.UJ116Id9u.

everything “the 21st Century equivalent of making copies” than to dig into the expanding, and confounding, world of ESI.¹⁴⁷ However, the emerging world of e-discovery requires the same careful consideration given to more traditional legal issues, even though it is likely unfamiliar. Both lawyers and judges must banish their fear and expand their knowledge of this new area in order to give parties good counsel and sound decisions.

As the Third Circuit explained, neither the language of the statute, nor its history and context would support the adoption of anything but the narrow interpretation.¹⁴⁸ The broad interpretation, appealing though it may be, is fundamentally flawed because its underlying policy concerns have no basis in the language of the statute. The narrow interpretation, on the other hand, is rooted in both the tradition of the American Rule and the current language of § 1920. Moreover, the language of Rule 34 gives additional support to the narrow interpretation. Although *Hoosier* and *DMS* undoubtedly hoped for a different outcome, the Third Circuit’s decision is the best possible interpretation of § 1920(4).

V. The Post-Race Press Conference: The State of § 1920(4) After Race Tires

The real question following any major case is a simple one: What happens now? For the parties seeking costs in *Race Tires*, they are left with the bill for their e-discovery vendors, slightly souring an otherwise impressive victory on the merits. But for the legal community as a whole, the Third Circuit’s opinion returns an old paradigm to a new world, creating uncertainty. This section addresses some of the varied consequences of *Race Tires*, including the likelihood of its adoption in other circuits and new areas of concern for clients and attorneys in those circuits where it is adopted.

A. The Adoption of Race Tires in Other Circuits

Despite the logic of the *Race Tires* opinion, the holding is binding law only on the Third Circuit and related lower courts. The Supreme Court denied certiorari on appeal,¹⁴⁹ with two effects: First, *Race Tires* remains good law in the Third Circuit. And second, the chance to create national

147. *CBT Flint Partners, LLC v. Return Path, Inc.*, 676 F. Supp. 2d 1376, 1381 (N.D. Ga. 2009), *vacated*, 654 F.3d 1353 (Fed. Cir. 2011).

148. *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 674 F.3d 158, 171 (3d Cir.), *cert. denied*, 133 S. Ct. 233 (2012).

149. *Hoosier Racing Tire Corp. v. Race Tires Am., Inc.*, 133 S. Ct. 233 (2012).

precedent on the issue has passed for at least one more term. But the dearth of appellate cases on point could (and should) lead the district courts of other circuits to use *Race Tires* as a model for their own decisions.¹⁵⁰ While the future remains uncertain, the signs point toward other circuits adopting the narrow interpretation of § 1920(4).

Some courts have already cited *Race Tires* approvingly, while others have shown a willingness to adopt its reasoning. At present, district courts in the Fifth, Sixth, Seventh, and Tenth Circuits have already cited to and followed the Third Circuit's reasoning in *Race Tires*.¹⁵¹ And the Fourth Circuit Court of Appeals recently adopted the Third Circuit's approach.¹⁵² Although not unanimous, there is a definite trend toward adopting the narrow interpretation of § 1920(4) set out in *Race Tires*.

Of the circuits that have not yet adopted *Race Tires*, some simply have not had occasion to address it. As of January 2014, no court in the First, Second, or D.C. Circuits, at either the appellate or district court level, has addressed the definition of "copying" in the last five years. Most of those courts' § 1920(4) cases have focused on exemplification or necessity, rather than the nature of a copy and the increasing role of e-discovery vendors.¹⁵³ As such, it is not possible at present to determine how those circuits will react when presented with the issue. However, given the large number of

150. As the Third Circuit itself stated in an earlier case, "Opinions on cost disputes seldom reach official reporters." *In re Penn Cent. Transp. Co.*, 630 F.2d 183, 191 (3d Cir. 1980). While many recent appellate cases discuss cost-shifting, they are far more often in the context of determining whether the particular amount awarded was an abuse of the district court's discretion. *See, e.g.*, *Ford v. Donley*, 485 F. App'x 305, 310 (10th Cir. 2012); *Little Rock Cardiology Clinic PA v. Baptist Health*, 591 F.3d 591, 602 (8th Cir. 2009).

151. *See, e.g.*, *Phillip M. Adams & Assocs., L.L.C. v. Sony Electrs. Inc.*, No. 1:05-CV-64 TS, 2013 WL 5964288, at *4 (D. Utah Nov. 7, 2013); *Johnson v. Allstate Ins. Co.*, No. 07-CV-0781-SCW, 2012 WL 4936598, at *4 (S.D. Ill. Oct. 16, 2012); *El Camino Res., Ltd. v. Huntington Nat. Bank*, No. 1:07-CV-598, 2012 WL 4808741, at *7 (W.D. Mich. May 3, 2012), *report and recommendation approved*, No. 1:07-CV-598, 2012 WL 4808736 (W.D. Mich. Oct. 10, 2012); *Eolas Techs. Inc. v. Adobe Sys., Inc.*, No. 6:09-CV-446, 2012 WL 4092586, at *5 (E.D. Tex. July 19, 2012).

152. *Country Vintner of N.C., LLC v. E. & J. Gallo Winery, Inc.*, 718 F.3d 249, 260-61 (4th Cir. 2013).

153. *See, e.g.*, *Haemonetics Corp. v. Fenwal, Inc.*, 863 F. Supp. 2d 110, 116 (D. Mass. 2012) (determining whether computer-generated graphics qualified as both exemplification and reasonably necessary); *Youssef v. F.B.I.*, 762 F. Supp. 2d 76, 87-88 (D.D.C. 2011) (interpreting § 1920(4) and a similar local rule regarding copies of exhibits); *Hamptons Locations, Inc. v. Rubens*, No. 01-CV-5477(DRH)(WDW), 2010 WL 3522808, at *8 (E.D.N.Y. Sept. 2, 2010) (discussing whether certified copies of documents that could have been, but were not, provided during discovery could be taxed).

other courts adopting the Third Circuit's reasoning, it seems more likely than not that all three circuits would follow suit.

The Eighth, Ninth, and Eleventh Circuits present a more interesting scenario because the courts in those circuits face conflicting precedents. Past district court decisions in the Eighth Circuit have followed both the broad and narrow interpretations of § 1920(4).¹⁵⁴ Recent decisions seem to show that district courts in the Eighth Circuit view *Race Tires* as persuasive.¹⁵⁵ However, with support for both positions, there is a basis for any potential decision a district court could make. Until the appellate court takes up the issue, there can be no predicting the results in the Eighth Circuit.

The situation is similar for the Ninth Circuit. There, at least one district court rejected *Race Tires* in favor of a previous Ninth Circuit decision employing the broad interpretation.¹⁵⁶ However, following the district court decision the Supreme Court reversed the appellate precedent on which it relied.¹⁵⁷ No court in the Ninth Circuit has followed *Race Tires* explicitly, but two recent decisions have followed similar arguments and upheld a narrow interpretation of § 1920.¹⁵⁸ The conflicting precedents in the Eighth and Ninth Circuits make prediction in those circuits less accurate, but the narrow interpretation of § 1920(4) nonetheless seems to be gaining traction in both.

Courts in the Eleventh Circuit may be attempting to find a middle ground between the broad and narrow interpretations. One district court has firmly sided with the narrow interpretation espoused by the Third Circuit,¹⁵⁹ while

154. *Compare* B & B Hardware, Inc. v. Fastenal Co., No. 4:10-cv-00317-SWW, 2011 WL 6829625, at *7 (E.D. Ark. Dec. 16, 2011) (allowing vendor costs to be recovered) *with* Little Rock Cardiology Clinic, P.A. v. Baptist Health, No. 4:06CV01594 JLH, 2009 WL 763556, at *4 (E.D. Ark. Mar. 19, 2009) (denying recovery of vendor costs).

155. *See* Trip Mate, Inc. v. Stonebridge Cas. Ins. Co., Nos. 10-0793-CV-W-ODS, 11-1097-CV-W-ODS, 2013 WL 3336631, at *1 (W.D. Mo. July 2, 2013); Hallmark Cards, Inc. v. Monitor Clipper Partners, Inc., No. 08-0840-CV-W-ODS, 2013 WL 1155245, at *1 (W.D. Mo. Mar. 20, 2013); Amana Soc'y, Inc. v. Excel Eng'g, Inc., No. 10-CV-168-LRR, 2013 WL 427394, at *5-6 (N.D. Iowa Feb. 4, 2013).

156. *See In re* Online DVD Rental Antitrust Litig., No. M 09-2029 PJH, 2012 WL 1414111, at *1 (N.D. Cal. Apr. 20, 2012) (citing *Taniguchi v. Kan Pac. Saipan, Ltd.*, 633 F.3d 1218, 1221 (9th Cir. 2011)).

157. *Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 2007 (2012).

158. *See* Plantronics, Inc. v. Aliph, Inc., No. C 09-01714 WHA (LB), 2012 WL 5269667, at *16 (N.D. Cal. Oct. 23, 2012); Oracle Am., Inc. v. Google Inc., No. C 10-03561 WHA, 2012 WL 3822129, at *3 (N.D. Cal. Sept. 4, 2012).

159. *Finnerty v. Stiefel Labs., Inc.*, 900 F. Supp. 2d 1317, 1322 (S.D. Fla. Oct. 16, 2012).

another, older decision fell in line with the broad interpretation.¹⁶⁰ The Federal Circuit, applying Eleventh Circuit law, adopted the narrow interpretation in the main but differed from *Race Tires* on the subject of metadata.¹⁶¹ The court found that the Third Circuit's classification of metadata extraction as unrecoverable under § 1920(4) was too restrictive, stating: "It seems to us that there is no good reason, as a default matter, to distinguish copying one part of an electronic document (i.e., the part that is visible when printed) from copying other parts (i.e., parts not immediately visible) when both parts are requested."¹⁶² However, the majority's reasoning faced a stiff dissent on that point, which argued that the majority was "rewrit[ing] § 1920(4) to address the increasing cost of electronic discovery."¹⁶³ After the Federal Circuit's ruling, it is unclear exactly what the boundaries are of this expanded narrow interpretation or whether the middle ground interpretation will spread beyond the Eleventh Circuit.

It is too soon to tell if the narrow interpretation will become the only interpretation of § 1920(4), but that day seems fast approaching. Courts in a majority of circuits have already adopted the Third Circuit's reasoning, and other circuits are likely to do so when the opportunity arises in light of its sound reasoning and easy application.¹⁶⁴ There are some courts where the broad interpretation remains, but it seems to be losing its hold. Although an accurate prediction is not wholly possible, the trend among the various circuits swings toward embracing the narrow interpretation espoused by *Race Tires*.¹⁶⁵

160. *Klayman v. Freedom's Watch, Inc.*, No. 07-22433-CIV, 2008 WL 4194881, at *7 (S.D. Fla. Sept. 12, 2008), *superseded by statute*, Judicial Administration and Technical Amendments Act of 2008, Pub. L. No. 110-406, 122 Stat. 4291, *as recognized in Finnerty*, 900 F. Supp. 2d at 1322.

161. *CBT Flint Partners, LLC v. Return Path, Inc.*, No. 2013-1036, 2013 WL 6510953, at *10 (Fed. Cir. Dec. 13, 2013).

162. *Id.*

163. *Id.* at *13 (O'Malley, J., concurring in part and dissenting in part).

164. *Country Vintner of N.C., LLC v. E. & J. Gallo Winery, Inc.*, 718 F.3d 249, 260 (4th Cir. 2013) ("The [Third Circuit] properly took into account the statute's history, its plain language, and the Supreme Court's narrow contemporary interpretation of the costs taxable under § 1920.").

165. It is important to remember that the Third Circuit dealt with only one piece of § 1920(4), the meaning of "copying." The Court did not deal with the necessity aspect of the statute, so circuits may continue to differ in their treatment of § 1920(4) as a whole even if all of them adopt the *Race Tires* interpretation of "copying." *See, e.g., Mann v. Heckler & Koch Def., Inc.*, No. 1:08cv611, 2011 WL 1599580, at *7 (E.D. Virg. Apr. 28, 2011) (collecting cases).

B. Potential Consequences of the Narrow Interpretation's Adoption

With the majority of courts adopting or likely to adopt a narrow interpretation of § 1920(4), the next step is to examine the consequences of that adoption for the justice system. As with any issue involving the American Rule, the most important consequences revolve around money. The Third Circuit closed the door some lawyers were using to secure additional funds for their clients. Now, lawyers and their clients will need to address a new set of potentially unpleasant issues, including the possibility of discovery sanctions, the likelihood of similar rulings in other areas of law, and the need for additional clarity in § 1920 motions.

1. The Narrow Interpretation As the Cause of Discovery Sanctions in E-Discovery Cases

The Third Circuit's decision creates the possibility for discovery sanctions against lawyers with clients who cannot afford an e-discovery vendor. By requiring all parties to pay for their own expenses, the American Rule attempts to prevent a party from forgoing a suit for fear of financial ruin if it loses.¹⁶⁶ However, by preventing the suit's winner from securing recompense for its e-discovery costs the Third Circuit may unintentionally bar poor parties from suits. Parties use vendors' services because those services are almost mandatory in modern cases; that concern was one of the bases of the broad interpretation for good reason.¹⁶⁷ If a party cannot pay a vendor to manage its e-discovery needs, it may not be able to comply with a legitimate discovery request or the subsequent order to compel.¹⁶⁸ Such a failure could open the party to sanctions under Federal Rule of Civil Procedure 37.¹⁶⁹ While it seems unlikely a judge would levy a major penalty for this type of violation,¹⁷⁰ even a minor penalty (e.g., a single

166. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967).

167. *See supra* notes 110-113 and accompanying text.

168. *Cf. In re Seroquel Prods. Liab. Litig.*, 244 F.R.D. 650, 661-64 (M.D. Fla. 2007) (finding that failure to meet e-discovery requests merited sanctions, even though attempts at production were made).

169. The potential sanctions are listed in FED. R. CIV. P. 37(b)(2)(A). Sanctions often will not be given if the party has shown "an impossibility to comply with the discovery orders." *In re Chase & Sanborn Corp.*, 872 F.2d 397, 400 (11th Cir. 1989).

170. Many courts approach sanction motions using a multi-factor analysis, with possible factors including the reason for the failure to disclose, the prejudice to the other party's case from the non-disclosure, and whether the party was warned that sanctions were a possibility. *See, e.g.*, *Phelan v. Campbell*, No. 12-736, 2013 WL 28361, at *1 (2d Cir. Jan. 3, 2013); *Universal Health Grp. v. Allstate Ins. Co.*, No. 12-1323, 2013 WL 28363, at *2 (6th Cir. Jan. 3, 2013).

disputed fact being admitted for the opposing party's benefit) could prove decisive. In essence, preventing cost shifting could lead to parties being unable or unwilling to continue a case, for fear of discovery sanctions ending their hope of victory.

The Federal Rules of Civil Procedure do have a solution in place to permit cost-shifting in these situations, but even that solution is not foolproof. Under Rule 26(c), a party can seek an order protecting them from an "undue burden or expense" resulting from discovery requests.¹⁷¹ The Supreme Court has not addressed cost-shifting under Rule 26(c) in the context of e-discovery, but in the past it has affirmed the ability of courts to shift costs when necessary while reiterating the importance of the American Rule.¹⁷² Rule 26(c) was not an issue in *Race Tires*, as neither party sought a cost-shifting order from the court.¹⁷³ However, when a party seeks a 26(c) order in the context of e-discovery, many courts will require it to satisfy the two-part *Zubulake* test.¹⁷⁴ At a basic level, the test requires both that the data sought be "inaccessible" and that several of seven possible factors be present.¹⁷⁵ Meeting that burden is certainly not as easily achieved as simply presenting one's financial inability to the court.¹⁷⁶ Thus, even though the Rules of Civil Procedure create the potential for parties to shift costs and

171. FED. R. CIV. P. 26(c)(1).

172. See *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358-59 (1978).

173. *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 674 F.3d 158, 171 (3d Cir.), cert. denied, 133 S. Ct. 233 (2012).

174. The *Zubulake* test was conceived as part of a series of cases, the first being *Zubulake v. UBS Warburg, LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003). A full inspection of the *Zubulake* test is well beyond the scope of this note.

175. *Zubulake v. UBS Warburg, LLC*, 216 F.R.D. 280, 284 (S.D.N.Y. 2003). The seven factors are:

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.

Id. (citing *Zubulake*, 217 F.R.D. at 324).

176. For a discussion of the *Zubulake* analysis and its potential problems, see generally Andrew Mast, Note, *Cost-Shifting in E-Discovery: Reexamining Zubulake and 28 U.S.C. § 1920*, 56 WAYNE L. REV. 1825 (2010); John T. Yip, Comment, *Addressing the Cost and Comity Concerns of International E-Discovery*, 87 WASH. L. REV. 595 (2012).

avoid sanctions, the solution is not so easily achieved that a party worried about paying an e-discovery vendor could rely on it.¹⁷⁷

The Third Circuit's decision has the definite potential to create problems for clients who lack the funds to pay an e-discovery vendor. Without the vendor's help, the party may be sanctioned for not meeting their discovery obligations. The broad interpretation of § 1920(4) gave parties the ability to force the loser to pay for all e-discovery costs. Thus, the *Race Tires* decision created an increased incentive for cost-shifting during the discovery process, as the parties can no longer hope for recovery after a victory. However, the uncertainties surrounding the *Zubulake* test make cost-shifting protective orders a dubious refuge. Practitioners and clients will need to address this issue in the planning and discovery stages of the suit in order to avoid the potential pitfalls of a post-*Race Tires* judgment.

2. *Race Tires and the Narrowing of the Cost-Shifting Statute*

Another potential consequence of the Third Circuit's decision could come in the form of narrower rulings on other parts of § 1920. As noted above, many district courts have already adopted the Third Circuit's narrow interpretation of § 1920(4).¹⁷⁸ However, in conjunction with the Supreme Court's decision in *Taniguchi v. Kan Pacific Saipan, Ltd.*,¹⁷⁹ the Third Circuit's decision may serve as the impetus to impose a narrow construction on all cost-shifting, or at least that governed by § 1920. Thus, a practitioner whose case hinges on the broad interpretation of the word "exemplification," which was not an issue in either *Race Tires* or *Taniguchi*, now may nevertheless be facing an adverse ruling if the judge feels the term should be defined as narrowly as "copy" and "interpreter."¹⁸⁰ The same could be true for whether, and to what extent, the fees of a private process server could be recovered under § 1920(1).¹⁸¹ Together, *Taniguchi* and *Race Tires* could spell the end of the broad interpretation of any piece

177. The Rules of Civil Procedure do not prohibit parties from creating an enforceable cost-sharing agreement prior to discovery, but even that solution requires pre-planning and agreement among the parties. See *In re Ricoh Co. Patent Litig.*, 661 F.3d 1361, 1366-67 (Fed. Cir. 2011). In a contentious case like *Race Tires*, such agreement would have been, at the least, unlikely.

178. See *supra* note 151 and accompanying text.

179. *Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 2006 (2012).

180. An example of a case where changing from the broad to narrow interpretation of "exemplification" would have been decisive is *Cefalu v. Village of Elk Grove*, 211 F.3d 416, 428 (7th Cir. 2000).

181. *Schwartz & Schwartz of Virg., LLC v. Certain Underwriters at Lloyd's*, No. 6:07-CV-00042, 2010 WL 452743, at *3 (W.D. Virg. Feb. 8, 2010) (collecting cases).

of § 1920, and practitioners will need to be aware of this potential shift in interpretation.

3. *Presenting the Bill to a Narrow Interpretation Court*

One final consequence could be the imposition of tighter requirements on the bills that parties present. As noted above, a party must justify its motion for cost-shifting under § 1920 by demonstrating the costs fit within the statutory limits.¹⁸² As the Third Circuit's ire reveals, some parties' proof of statutory compliance has been to give the court the invoices that they were given by their e-discovery vendors.¹⁸³ However, those bills can be vague and confusing, which could lead a court either to deny the motion for failure to meet the statutory requirements or to create its own estimate of the costs.¹⁸⁴ There are two possible paths forward: either pressure the vendor to provide a more detailed breakdown of its charges or supplement a less-than-adequate bill with additional explanation. In either case, parties and their lawyers will need to pay much closer attention to what is on their vendor's bill as a result of *Race Tires*.

The Third Circuit's decision created a variety of possible consequences. Attorneys and clients involved in cost-shifting cases will need to exercise extra care in order to avoid previously unknown pitfalls. Lawyers in e-discovery cases will need to factor in the cost of an e-discovery vendor when discussing the cost of a suit with their clients, along with the potential ramifications of discovery sanctions. Any party attempting to recover costs under § 1920 will need to be aware that recent decisions, *Race Tires* prominent among them, make a narrow interpretation of the statute more likely than in the past. And parties will need to examine their bills of costs much more closely, possibly with some pressure on vendors, to ensure that the bills meet statutory requirements. While the Third Circuit's reasoning in *Race Tires* cannot be faulted, practitioners should not underestimate the potential consequences for clients and themselves.

VI. Conclusion

With its decision in *Race Tires*, the Third Circuit explored the definition of "copying" in 28 U.S.C. § 1920(4). Prior to the computer revolution, when the dominant medium of discovery was paper, no one questioned

182. See *supra* notes 174-177 and accompanying text.

183. *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 674 F.3d 158, 166-67 (3d Cir.), *cert. denied*, 133 S. Ct. 233 (2012).

184. Bennett, *supra* note 49, at 552.

what a copying cost was—it was the cost to duplicate a piece of paper. The proliferation of computers, and the subsequent rise of e-discovery, led some courts to expand the meaning of “copy” to include all e-discovery activities and vendor costs. In reality, these courts were misguided; as the Third Circuit’s opinion shows, the statute is much narrower than such a reading.

A copy, either paper or electronic, is a duplicate of an original. While the means of duplicating an electronic document differ from those used to duplicate physical documents, the end result is the same. The Third Circuit’s opinion was grounded on this bedrock principle, and its adoption of the narrow interpretation of § 1920(4) logically followed. Its decision returns an analysis, fraught with traps of modern technology, to its traditional roots in the American Rule. It can and does serve as a model for other courts, and as such it will have long-lasting consequences for judges, lawyers, clients, and vendors. With its holding in *Race Tires*, the Third Circuit crafted a dominant interpretation of 28 U.S.C. § 1920(4) and created a cost-shifting precedent that is likely to last until the next technological revolution.

Jason L. Callaway