

# Client Alert

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Litigation Department

## A New Approach to Cost-Shifting?

### Federal Court Orders Plaintiffs' Counsel to Pay for Class-Certification Discovery

In a decision that could mark a significant shift in the allocation of costs and risk in high-stakes class actions, Judge Baylson of the United States District Court for the Eastern District of Pennsylvania recently ordered plaintiffs' counsel in a putative class action, *Boeynaems v. LA Fitness Int'l LLC (Boeynaems)*, to pay for extensive discovery that plaintiff said it needed in anticipation of a hearing on whether a class could be certified.<sup>1</sup> As Judge Baylson summarized it:

Where (1) class certification is pending, and (2) the plaintiffs have asked for very extensive discovery, compliance with which will be very expensive, absent compelling equitable circumstances to the contrary, the plaintiffs should pay for the discovery they seek.<sup>2</sup>

Although the *Boeynaems* court treated the case as one of first impression, it was not issued in a vacuum. Cost shifting has been addressed by many courts in the past. Most of these courts, however, have addressed the question after a class has been certified, and most have based their decisions on the inquiry whether the data at issue is reasonably inaccessible.<sup>3</sup> In 2008, however, a case out of the Northern District of Ohio under similar circumstances prefigured the *Boeynaems* approach.<sup>4</sup> In *Schweinfurth v. Motorola, Inc. (Schweinfurth)* — another putative class action addressing the allocation of costs incurred by the defendant in pre-certification class discovery — the court required plaintiffs' counsel to pay 50 percent of the cost of document production without addressing the accessibility issue, but instead focusing on the “sheer size and scope of discovery,” as well as its concern that discovery “could be used as a weapon to compel settlement.”

It is too early to tell the extent to which other courts will follow the *Boeynaems/Schweinfurth* approach to cost shifting in the class action context, but both plaintiff and defense counsel will be watching closely to determine whether they represent the beginning of a trend.

### A Break From The Past

In cost-shifting cases, courts have typically made a preliminary determination as to whether the data at issue can be considered “reasonably accessible.” If it is inaccessible, cost-shifting can be considered.<sup>5</sup> If it is accessible, cost-shifting cannot be considered.<sup>6</sup> Courts focus on this requirement from

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*Zubulake v. UBS Warburg LLC* despite the fact that Federal Rule of Civil Procedure 26(c) gives federal courts discretion to condition discovery on certain terms, including the apportionment of costs.<sup>7</sup> As the oft-cited Sedona Principles express the inquiry:

Absent a specific objection, party agreement or court order, the reasonable costs of retrieving and reviewing electronically stored information should be borne by the responding party, unless the information sought is not reasonably available to the responding party in the ordinary course of business. If the information sought is not reasonably available to the responding party in the ordinary course of business, then, absent special circumstances, the costs of retrieving and reviewing such electronic information may be shared or shifted to the requesting party.<sup>8</sup>

Neither *Schweinfurth* nor *Boeynaems* makes a determination as to whether the data in question is accessible or inaccessible before addressing cost-shifting. Instead, *Schweinfurth* proceeds directly from the determination that some class-certification-related discovery is appropriate to a discussion of “the immense size of the discovery now ordered to be produced” and, purely on that basis, concludes that “cost shifting is reasonable and fair.”<sup>9</sup> The *Boeynaems* court takes that analysis one step farther and engages in an extended discussion of the economic aspects of class action discovery, the asymmetric discovery burden on defendants and the resulting incentive for plaintiffs to make overbroad discovery requests.

## **Boeynaems: Leveling the Playing Field?**

In *Boeynaems*, Judge Baylson engaged in a theoretical discussion of the immense economic pressure on defendants when a class is certified, and also of the impact of asymmetric discovery on litigation. He noted that “economic motivation and fairness are relevant factors in determining cost shifting of disputed discovery burdens.” He also reviewed caselaw on cost-shifting, particularly noting cases that had shifted costs where discovery burdens were asymmetrical.

Judge Baylson went on to provide defense counsel with a nice judicial soundbite that echoes a common defense argument: “If Plaintiffs’ counsel has confidence in the merits of its case, they should not object to making an investment in the cost of securing documents from Defendant and sharing costs with Defendant.” He supported this approach by noting that, if the class were certified and if a settlement were reached, those costs would be returned to plaintiffs’ counsel as part of the settlement disbursement.

Judge Baylson stopped short, however, of articulating a rule that automatically shifts the costs of pre-class-certification discovery to plaintiffs. While defense counsel will focus on the portions of the decision that emphasize the need to level the playing field in asymmetrical discovery situations, plaintiffs will undoubtedly argue that *Boeynaems* should be limited to the narrow facts of the case.

In *Boeynaems*, the court had previously ordered discovery to proceed simultaneously on issues related to class certification as well as issues related to the merits of the case if those issues bore on certification. The parties were unable to agree on the scope and burden of the requested discovery and the issue ended up before the judge again. So at the point that Judge Baylson was addressing the cost-shifting issue, the defendant had already produced a substantial number of documents at its own expense. There are indications in the opinion that the court felt it was time for plaintiffs to share the burden: “Plaintiffs need to assess the

value of additional discovery for their class action motion...Plaintiffs should pay for that additional discovery from this date forward, at least until the class action determination is made." The court gave no hint as to whether the result would have been different if defendants had not already provided substantial discovery before the issue of cost-shifting was addressed, or at what point a plaintiff should be expected to pitch in.

## **Are These Cases Outliers or Indications of a Trend?**

While there is nothing new about courts mentioning equitable considerations — generally in terms of the financial situations of the relevant parties — in determining whether cost-shifting is appropriate, the *Boeynaems* and *Schweinfurth* decisions appear to stand alone in their reliance on the asymmetry in discovery burdens particular to putative class actions. So do these cases mark an attempt by two judges to put the brakes on over-reaching plaintiffs' counsel, or might they indicate the start of a trend to use cost-shifting to balance unequal discovery burdens? While it is too early to answer this question definitively, certainly the opinions provide fodder for future courts that may see the equities tipping in favor of plaintiffs' counsel bearing some of the burden of class-action discovery in the pre-certification phase.

*Boeynaems* leaves other questions unanswered as well, particularly in terms of what costs exactly would be covered. The order references the defendant's "internal costs," and specifies that those costs may include "appropriately allocated salaries" of people employed by the defendant who had to participate in gathering and producing the requested information. It does not, however, clearly include costs paid to hire an ediscovery vendor, for example, or the expense of outside counsel to review documents.<sup>10</sup>

Even with these limitations, however, the *Boeynaems* opinion in particular represents a fascinating development — particularly for class action defense counsel — looking for ways to limit the cost to their clients of complying with often onerous discovery requests prior to class certification. By focusing on the asymmetry of class discovery as well as the economic realities of certification of a class, such cases provide added impetus to the argument that the costs of class certification fishing expeditions should, in the right circumstances, be borne by plaintiffs' counsel rather than perceived deep-pocket defendants.

### **Endnotes**

<sup>1</sup> See *Boeynaems v. LA Fitness Int'l LLC*, 2012 WL 3536306 (August 16, 2012, E.D. Pa.).

<sup>2</sup> *Id.* at \*11.

<sup>3</sup> See, e.g., *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003).

<sup>4</sup> See *Schweinfurth v. Motorola, Inc.*, 2008 WL 4449081 (Sept. 30, 2008, N.D. Ohio).

<sup>5</sup> See, e.g., *Universal Delaware, Inc. v. Comdata Corp.*, 2010 WL 1381225 (March 31, 2010, E.D. Pa.).

<sup>6</sup> See, e.g., *Cason-Merenda v. Detroit Medical Center*, 2008 WL 2714239 (July 7, 2008, E.D. Mich.).

<sup>7</sup> See, e.g., *Foreclosure Management Co. v. Asset Management Holdings LLC*, 2008 WL 3822773 (August 13, 2008, D. Kan.).

<sup>8</sup> Principle 13, *The Sedona Principles*, Second Edition (June 2007).

<sup>9</sup> 2008 WL 4449081, at \*2.

<sup>10</sup> The court also noted that it is possible the costs at issue would not be considered taxable under 28 U.S.C. § 1920, but did not consider that a relevant consideration at the case's present procedural juncture.

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