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Federal Court Shifts ESI Cost Burden From Subpoenaed Non-Party

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By [Carl C. Butzer](#) and [Nicole L. Ruble](#)

A federal district court in Indiana recently held that a party requesting electronically stored information from a non-party must pay for the discovery it seeks, unless it can establish that the non-party's burden is in fact *de minimis*.

In ***Guy Chemical Co. v. Romaco AG, et al.***, Cause No. 3:07-MC-016 RLM (N.D. Ind. May 22, 2007), Romaco, a defendant in an original action pending in Pennsylvania federal court, served ABRO, a non-party, with a request for documents. Although ABRO did not object to the material sought, it did object to the cost of production, indicating that it stores everything electronically and that it is a complex task to search and locate specific documents. ABRO insisted, as a condition precedent to production, that Romaco pay the \$7,200 ABRO was invoiced by the outside computer firm handling its electronic data in connection with responding to the subpoena. Romaco filed a motion to compel, and the Court was forced to resolve the question of who will pay for the costs of production.

Although the Court reiterated the presumption that the responding party must bear the expense of complying with discovery requests, it found that the "most crucial factor" is that ABRO is a non-party. The Court also emphasized that Romaco had failed to persuade the Court that the costs of production were *de minimis*. Instead, the Court determined that the "amount of money required for ABRO to search and locate the discovery Romaco requests indicates to this Court that the information is not reasonably accessible absent undue burden."

In what may become an oft-quoted passage by third parties seeking to shift the costs of responding to Rule 45 document subpoenas, the Court wrote:

Simply put, it is not ABRO's lawsuit and they should not have to pay for the costs associated with someone else's dispute. Not only is it fundamentally unfair for non-parties to bear the significant litigation costs of others, but also if this Court were to allow litigating parties like Romaco to impose such a burden on nonparties, then the likelihood of cooperation by nonparties in the future would be placed in jeopardy.

Although it granted Romaco's motion to compel on the condition that Romaco reimburse ABRO for all costs of production, the Court denied ABRO's request for attorneys' fees on the basis that the "issues of electronic discovery and who bears the costs of production of such discovery is a novel issue."

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