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FEDERAL E-DISCOVERY

Broad Federal Court Powers Under Evidence Rule 502(d)


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By significantly relying on the "intent" behind Federal Rule of Evidence 502, two recent decisions hold that federal courts may enter, without party agreement, an order requiring parties to return inadvertently produced privileged documents without waiver of privilege.

The potential for federal courts to impose such "nonwaiver agreements" on non-consenting parties is now a reality.

Enacted in 2008, Federal Rule of Evidence (FRE) 502(d) permits a federal court to order that a "privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other Federal or State proceeding."[1]

Thus, with entry of a nonwaiver agreement as a court order, a party may produce privileged and protected documents in a federal proceeding and yet retain otherwise applicable attorney-client and work product immunity claims across state and federal fora. Along with the 2006 amendments to the Federal Rules of Civil Procedure (FRCP), it was hoped that this added protection would encourage parties to enter nonwaiver agreements, thereby reducing discovery costs and the burdens associated with privilege review.

Until July 2010, Rule 502(d) orders arose exclusively through agreement by the parties, which judges then ratified in a court order.[2] But beginning in that month with an opinion by Magistrate Judge David J. Waxse of the District of Kansas, two federal courts have now seized on language in the Advisory Committee Notes to Rule 502(d) that expressly contemplates entry of a nonwaiver order without an agreement of the parties. That language states that "a confidentiality order is enforceable whether or not it memorializes an agreement among the parties to the litigation" and notes that agreement of the parties "should not be a condition of enforceability of a court's order."[3]

Beginning of Trend?

In *Rajala v. McGuire Woods*[4] and then in *Radian Asset Assurance Inc. v. College of the Christian Brothers of New Mexico*,[5] federal courts entered clawback orders absent an underlying agreement by the parties. Together, these decisions outline standards that future courts may rely on in determining whether a nonwaiver agreement pursuant to Rule 502(d) can and should be entered without party agreement.


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Moreover, inasmuch as *Rajala* and *Radian Asset* involved 502(d) nonwaiver orders entered against the wishes of, and at a cost to, requesting parties who were unwilling to consent to clawback provisions proposed by producing parties, both cases serve as yet another reminder to litigants of the consequences of uncooperative behavior in the context of e-discovery.[6]

> 'Rajala' and 'Radian Asset' show that federal judges can and will make use of protective orders to shield litigants from waiving privilege if they inadvertently produce privileged documents—whether the parties desire such orders or not.

In *Rajala*, the first of the two cases to be decided, the plaintiff, as bankruptcy trustee, brought suit against the law firm McGuire Woods, alleging that one of its partners committed securities fraud.

During discovery, the plaintiff opposed McGuire Woods' proposed joint protective order because it contained a clawback provision. McGuire Woods argued that a clawback provision was necessary to prevent contentious and costly e-discovery.

Alluding to the cost of its discovery, McGuire Woods asserted that it owed a duty to protect attorney-client privileged communications to its "thousands of clients," that it had already reviewed over 13,750 documents consisting of about 108,000 pages, and that it planned to review, at minimum, an additional 15,000 to 18,400 documents.

While maintaining that it would not forego privilege review altogether and would continue to take "necessary and reasonable precautions to prevent the inadvertent disclosure of privileged and other protected materials," McGuire Woods argued that the volume and expense associated with reviewing the documents at issue warranted the "additional precaution of a clawback provision."

The plaintiff argued that a clawback provision would shift the burden and cost of reviewing McGuire Woods's documents onto plaintiff and create "the ever-present concern that any document could suddenly be taken back by McGuire Woods."

Plaintiff also contended that McGuire Woods' proposed clawback order provided an inadequate standard for determining when privileged material may be "clawed back" since it allowed for return of privileged material upon a showing of "inadvertence" alone.

The plaintiff asserted that the stricter standard of reasonableness in FRE 502(b) should govern whether McGuire Woods should be permitted to recover privileged documents.

Magistrate Judge Waxse sided with McGuire Woods, entering a protective order that allowed the law firm to produce documents pursuant to a clawback agreement and subsequently to recover any privileged documents produced inadvertently.

Congressional Intent

Without noting that the text of Rule 502(d) is silent regarding a federal court's power to issue a clawback provision without party consent, he turned to the Advisory Committee Notes to the FRE and the Statement of Congressional Intent Regarding Rule 502, the latter of which explains that subsection (d) "is designed to enable a court to enter an order, whether on motion of one or more parties or on its own motion, that will allow the parties to conduct and respond to discovery expeditiously, without the need for exhaustive pre-production privilege reviews, while still preserving each party's right assert the privilege."[7]

But Rule 502(d) itself merely speaks to the enforceability of a court-imposed clawback provision and does not expressly give a federal judge the

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power to issue an order containing such a provision. Magistrate Judge Waxse therefore turned to Federal Rule of Civil Procedure 26(c)(1), which states, in relevant part, that the court may "for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense."

Under Rule 26, the moving party (here, McGuire Woods) "must make a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements that it is entitled to a protective order."

Magistrate Judge Waxse held that McGuire Woods met its burden—the law firm's arguments concerning the volume of ESI and its special duty as a law firm to protect its clients' privileged materials met the good cause requirement of Rule 26(c)(1).

Regarding plaintiff's argument that the clawback provision would abrogate McGuire Woods' duty to review its ESI, the magistrate judge noted that the clawback provision at issue would only allow recovery of "inadvertent" production of protected documents. That is, the clawback provision at issue did not relieve McGuire Woods of its duty to engage in pre-production document review. In addition, he explicitly reminded the parties that the plaintiff could always petition the court for relief if evidence surfaced of abuse by McGuire Woods.

This potentially precedent-setting interpretation of 502(d) and exercise of the court's inherent power to enter a nonwaiver order without underlying party agreement was also employed in *Radian Asset*, a ruling by Judge James Browning of the District of New Mexico. Like Magistrate Judge Waxse in *Rajala*, Judge Browning found authority in the FRCP to enter an order that preserves privilege claims.[8]

Of significant import (and unlike Magistrate Judge Waxse), Judge Browning used his authority under the FRCP and the FRE to allow a producing party to maintain privilege claims over ESI without imposing any burden on that party to search its own ESI.

'Radian Asset'

Radian Asset involved a dispute over whether a proposed order for the defendant to produce 52 backup tapes should be subject to a Rule 502(d) order that would preserve the defendant's claims of privilege over protected documents on the tapes.

In opposing this order, Radian Asset argued that the defendant, College of Christian Brothers, "should be required to search its own ESI and produce discoverable materials…and that the burden of doing so should not be shifted."

Notwithstanding the absence of any agreement between the parties, the court ordered the college to produce the 52 backup tapes to the plaintiff, Radian Asset, under instructions that Radian Asset would then restore and search the college's tapes, but that this production nonetheless would be subject to an order under Rule 502(d) and that the college's privilege claims therefore would be preserved.

Responding to Radian Asset's threshold contention that the court lacked good cause to enter a nonwaiver agreement, the court found that the college's cost of production (estimated at over $300,000) and the likely relevance of the data at issue (plaintiff conceded the data was "largely non-responsive") provided cause for the court to act over Radian Asset's objection.

The court rested its determination that good cause existed on the college's assertion that its ESI was stored on relatively inaccessible backup drives.

In a footnote, the court cited *Zubulake v. UBS Warburg LLC* for the proposition that backup tapes "are generally inaccessible" and reasoned that, as a result, the college had satisfied its burden of producing particularized facts to support a clawback order.[9]

While the court also stated that good cause for the order—and therefore issuance of the order itself—was contingent upon production of an affidavit or declaration supporting the high cost of restoring the backup tapes, the court's citation to *Zubulake* suggests that the existence of difficult-to-access backup tapes militates in favor of issuing a nonwaiver order sua sponte.

Given the expenses associated with reviewing 52 backup tapes of ESI, Radian Asset also argued that the court's proposed order impermissibly used Rule 502(d) as a cost-shifting mechanism. To this point, Judge Browning candidly recognized that "the Court is in effect forcing Radian Asset to bear the cost of that review if it wants certain data."

Nevertheless, he held that by simply ordering production of ESI without waiver of privilege, he was not per se granting a request to shift costs onto an opposing party. He stated that Rule 502(d) simply provides a mechanism to enter an enforceable confidentiality order, and any resulting costs are merely incidental.

'Document Dump'

Another unsuccessful argument advanced by Radian Asset was that the court's order would result in a "document dump."

Interestingly, in response to this contention, the court seems to have acknowledged that its order relieved the college of any serious duty to engage in pre-production privilege review. The court focused its analysis on the "central question" of "whether the tape backups will be restored and searched before or after they are produced."

Reasoning that the parties had already agreed to a narrow category of search terms and that Radian Asset was just as competent to search the backup tapes as the college, the court found little risk that the college was hiding "the proverbial 'smoking gun' in 'an ocean of production.'"

Curiously, the actual order issued in *Radian Asset* states that the "burden of conducting [a privilege] review and notifying Radian Asset of such claims shall remain on the College at all times," which appears inconsistent with Judge Browning's premise that the backup tapes may be searched after production.

In *Rajala*, when faced with fear of a "document dump," Magistrate Judge Waxse clearly stated that his order did not relieve McGuire Woods, the producing party, of its burden to conduct a privilege review. Indeed, he explicitly reminded the requesting party of its ability to petition the court for relief if McGuire Woods abused the court's order.

Judge Browning offered no similar assurances and, at least implicitly, authorizes a party to maintain privilege claims while turning over massive amounts of ESI without engaging in pre-production review.

Conclusion

Rajala and *Radian Asset* show that federal judges can and will make use of protective orders to shield litigants from waiving privilege if they inadvertently produce privileged documents—whether the parties desire such orders or not.

It is particularly important to note that both cases imported the standard of good cause in Federal Rule of Civil Procedure 26(c)(1). Although each case focused on different sets of facts in determining whether good cause existed for issuance of a nonwaiver order without party consent, minimum standards for good cause seem to have taken shape.

Both courts found that the high cost of production and the volume of ESI militates in favor of entering an order, and the nonwaiver agreements in both cases arose only after a series of other discovery disputes. In addition, both courts emphasized—by employing different styles of reasoning—that sua sponte issuance of a nonwaiver agreement would not result in a "document dump."

However, whereas Magistrate Judge Waxse in *Rajala* made clear that the producing party would not be relieved of its burden to engage in pre-production review, Judge Browning in *Radian Asset* seems to have implied that, at least under some circumstances, producing parties may comply with the federal rules and preserve claims of privilege by simply turning over non-reviewed ESI to an opposing party. This difference can be extremely significant in cases that involve substantial amounts of ESI.

Those who objected to recent reforms due to their promotion of nonwaiver agreements will not be comforted by *Rajala* and *Radian Asset*. It remains true that tactical advantages, trade secrets and the like may be lost forever once an opposing party has seen a protected document—regardless of whether such a document can be "clawed back."

These risks notwithstanding, with *Rajala* and *Radian Asset* as precedents, parties are at risk of being subject to nonwaiver agreements over their objection.

Finally, both cases show the lengths judges may go to in order to flesh out the intent of the drafters of Rule 502. Nothing in the text of Rule 502 gives federal courts the power to enter a nonwaiver agreement sua sponte.

Armed with a mandate to effectuate Congress' and the Advisory Committee's desire to reduce litigation costs through Rule 502, however, judges may now be able to order parties to enter clawback agreements, as in *Rajala*, or go even further and require parties to accept documents that have not been reviewed, yet remain subject to clawback as in *Radian Asset*.

1. Fed. R. Evid. 502.
2. See, e.g., *SEC v. Bank of Am. Corp.*, 09 Civ. 6829, 2009 WL 3297493 (S.D.N.Y. Oct. 14, 2009).
3. See Advisory Committee Notes to Fed. R. Evid. 502.
4. *Rajala v. McGuire Woods, LLP*, No. 08-2638-CM-DJW, 2010 WL 2949582 (D. Kan. July 22, 2010).
5. *Radian Asset Assurance Inc. v. Coll. of Christian Bros. of New Mexico*, No. CIV 09-0885 JB/DJS, 2010 WL 4928866 (D.N.M. Oct. 22, 2010).
6. For a more detailed discussion of recent calls for cooperation in the context of e-discovery, see H. Christopher Boehning & Daniel J. Toal, "Litigants Fail to Heed Lessons of 'Victor Stanley,'" NYLJ, Aug. 3, 2010.
7. *Rajala*, at *4 (quoting and citing Statement of Congressional Intent Regarding Fed. R. Evid. 502, Addendum to Advisory Committee Notes).
8. *Radian Asset*, 2010 WL 4928866, at *4.
9. Id. at *5 n.1 (citing *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 323 (S.D.N.Y. 2003).