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FEDERAL E-DISCOVERY

Kansas Case Casts Doubt On Usefulness of Rule 502

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Just when you thought it was safe to enter into "quick peek" and "clawback" agreements, along comes *Spieker v. Quest Cherokee, LLC*. The decision's comments concerning the application of recently enacted Federal Rule of Evidence 502 seem entirely at odds with the purpose and history behind the adoption of Rule 502. One can only hope other courts adopt a more limited reading of *Spieker*, No. 07-1225-EFM, 2009 WL 2168892 (D. Kan. July 21, 2009).

A major goal of the 2006 amendments to Rules 16 and 26 of the Federal Rules of Civil Procedure and new Federal Rule of Evidence 502 was to reduce the cost of electronic discovery by minimizing pre-production privilege review of electronically stored information (ESI) through the endorsement of "quick peek"[1] and "clawback"[2] agreements in those cases were the parties jointly agreed to such procedures.

However, *Spieker* demonstrates that not all courts will interpret these provisions in light of the stated goals of the new rules, raising the risk that courts will decline to approve orders including "quick peek" and "clawback" agreements unless the parties can first establish they have undertaken a reasonable pre-production privilege review.

Spieker was a dispute over oil and gas royalties allegedly owed by Quest Cherokee LLC—the defendant lessee—to Spieker and others—the plaintiff lessors—and allegedly to other similarly situated lessors throughout Kansas' Cherokee Basin region. In pressing their claims, plaintiffs sought to certify the case as a class action under Federal Rules of Civil Procedure 23(a) and requested discovery of documents and ESI to bolster the claims of commonality and typicality necessary for class certification.

Discovery was contentious from the outset: While Quest made some tangible documents available to plaintiffs for inspection and copying, it objected generally to the request for the production of ESI as unduly burdensome.

A meet-and-confer failed to resolve the issue and plaintiffs subsequently filed their first motion to compel production of ESI. In responding to this motion, Quest estimated the cost of compliance at up to $375,000; including some $125,000 to retrieve and process the ESI and $250,000 to conduct a privilege review.

The Court dismissed plaintiffs' initial motion without prejudice[3] because defendant's estimated cost was substantial and the plaintiffs had failed to explain "how the disputed ESI discovery [was] relevant to the issue of class certification."

After further meet-and-confer efforts failed to stop the acrimony, plaintiffs filed a second motion to compel the production of the ESI and argued, inter alia, that defendant's privilege review costs could be significantly lowered by the use of a "quick peek" or "clawback" agreement contemplated by Federal Rules of Civil Procedure 26(b)(5)(B) and endorsed by the recently enacted Federal Rules of Evidence 502.

In a July 21, 2009 opinion, the Court granted plaintiffs' request to compel production on other grounds.[4] Notably, however, the magistrate judge did not accept the argument that defendant's privilege review could be avoided by the use of a "quick peek" or "clawback" agreement under Federal Rules of Civil Procedure 26(b)(5)(B) and Federal Rules of Evidence 502. Instead, he suggested that this arrangement would in fact result in defendant's waiver of privilege and work-product protection over the produced material, finding that:

> [T]he difficulty with [plaintiffs'] argument is that Rule 502(b) preserves the privilege if "the holder of the privilege or protection took reasonable steps to prevent disclosure" of the privileged material. Simply turning over all ESI materials does not show that a party has taken "the reasonable steps" to prevent disclosure of its privileged materials and plaintiffs' proposal is flawed.

In an accompanying footnote, the court elaborated on this point:

> The nature of "the reasonable steps" necessary for Rule 502(b) are best determined on a case-by-case basis. Although the precise contours are not defined in this opinion, simply turning over *all* ESI information [sic] without some effort to protect privileged material does not rise to the level of "reasonable steps" set forth in Rule 502(b).

On its face, this language seems to suggest that a court should decline to enter an order endorsing a party-approved quick peek or clawback agreement unless the parties can demonstrate that "reasonable steps" will be taken in pre-production privilege review. But, as explained below, that is not what was intended by Rule 502.

One way to square the outcome in *Spieker* with Rule 502 is to read it as recognizing that without party agreement—and in *Spieker* it appears the plaintiff was alone in pressing for a quick peek or clawback agreement—a court will not limit or otherwise order a party to forego its right to engage in a full pre-production privilege review.

The danger, of course, is that future courts will simply read what *Spieker* says and decline to endorse a joint proposal for a quick peek or clawback agreement absent proof of some level of pre-production privilege review consistent with Federal Rules of Evidence 502(b).

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2006 Amendments

Before *Spieker*, it appeared the clear answer to this question was that litigants could be confident the 2006 amendments to the Federal Rules of Civil Procedure and the new Federal Rule of Evidence 502 constituted judicial and Congressional approval of party-approved "quick peek" and "clawback" agreements. Indeed, the rules explicitly contemplate that parties could reach such agreements and seem to authorize judges to mandate their effectiveness without need for pre-production privilege review.

In the 2006 amendments, Federal Rules of Civil Procedure 16 was changed to allow federal courts to address issues of ESI production—and attendant agreements regarding waiver of privilege and work-product protection in discovery scheduling orders; the rule makes no mention of pre-production review as a prerequisite for the entrance of such an order.[5]

Federal Rules of Civil Procedure 26 was also amended, now requiring parties submitting a discovery plan to state their "views and proposals" on "any issues about disclosure or discovery of electronically stored information" and also compelling the parties to address claims of privilege including, "if the parties agree on a procedure to assert these claims after production, whether to ask the court to include their agreement in an order."[6] Like Rule 16, Rule 26 prescribes no content for the parties' agreement, nor does it condition effectiveness on pre-production privilege review.

Even before the adoption of the 2006 amendments to Federal Rules of Civil Procedure 16 and 26, the utility of the then-proposed rules was called into serious doubt by Magistrate Judge Paul W. Grimm's now famous decision in *Hopson v. City of Baltimore*, 232 F.R.D. 228 (D. Md. 2005). In that opinion, Magistrate Judge Grimm observed that "no prudent" litigant would agree to the "quick peek" and "clawback" procedures imagined by the proposed rules without the assurance—by court order or otherwise—that such a procedure would not operate as a waiver of privilege in a separate action.[7]

It is not a stretch to say that the language of Federal Rules of Evidence 502 was adopted because of the concerns expressed in *Hopson*. Thus, new Federal Rule of Evidence 502 extends the effect of court-endorsed "quick peek" and "clawback" agreements to eliminate the collateral consequences of privilege waiver by providing that "a Federal court may order that the 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."[8]

Aside from the requirement that the shielded disclosure be made in litigation pending before that court, the text of Rule 502 offers no limit to a court's authority to declare that a party's production of potentially privileged material does not constitute a waiver of privilege. Thus, all three of these rule changes endorse "quick peek" and "clawback" agreements to lower review costs by eliminating the necessity of pre-production review.

The advisory committee's note to each provision further supports this interpretation of the new rules. The note to the new Rule 16 makes clear that non-waiver agreements were contemplated at the drafting stage, allowing the parties to enter "various arrangements" to minimize pre-production privilege review.[9]

Providing an example, the advisory committee imagines that parties "may agree to initial provision of requested materials without waiver of privilege or protection to enable the party seeking production to designate the materials desired or protection for actual production, *with the privilege review of only those materials to follow*."[10]

While the note to Rule 16 does not address "quick peek" and "clawback" agreements by name, the note to the new Rule 26 specifically references and validates these tools in the context of amendments meant to "minimize the costs and delays" of privilege review by encouraging parties to adopt "protocols that minimize the risk of waiver."[11]

Indeed, the commentary accompanying new Federal Rule of Evidence 502 leaves no doubt about the efficacy of court orders insulating disclosures from waiver of privilege and work-product protection.

In explaining the significance of the new Rule 502, the advisory committee states: "the court order may provide for return of documents without waiver irrespective of the care taken by the disclosing party; the rule contemplates enforcement of 'clawback' and 'quick peek' arrangements as a way to avoid the excessive costs of pre-production review for privilege and work product."[12]

Conclusion

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For instance, limiting the application of Federal Rules of Evidence 502(b)'s "reasonable steps" rule to cases without party-agreed to "quick peek" or "clawback" agreements is the only reading of that provision consistent with reducing privilege review costs, but the rule's text contains no such limitation.

In another example, the commentary to the new Federal Rules of Civil Procedure 16(b) says the rule "does not provide the court with authority to enter [an order ratifying a 'quick peek' or 'clawback'] without party agreement," but the note to Federal Rules of Evidence 502(d) states that "a confidentiality order is enforceable whether or not it memorializes an agreement among the parties to the litigation."[13]

Thus, the lack of coherence between the rules' text and the committee's policy goals has created ambiguities and left space for courts to arrive at decisions that undercut the very policies the rules were meant to promote.

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1. "Quick peek" agreements allow the requesting party to take a "quick peek" at all the producing party's ESI without any pre-production review. The requesting party then identifies the particular documents it wants and the producing party can limit its privilege review to just those documents. In exchange, the requesting party agrees that it will not use and not claim waiver over any document it saw during the "quick peek."
2. In "clawback" agreements, the parties agree that material will be produced without the intent to waive privilege or work-product protection. However, if privileged or protected material is produced, the producing party may inform the requesting party, who must then return the material and not use it in the litigation.
3. In dismissing the motion without prejudice, the Court took note of the fact that Quest was upgrading its computer system (leaving the Court unable accurately to assess future production costs) and the possibility that recently enacted Federal Rules of Evidence 502 would obviate the need for privilege review.
4. The Court simply did not believe the defendant's estimated cost of production, concluding that "defendant's estimate of $250,000 to conduct a 'privilege and relevance' review is excessive" and "greatly exaggerated." Id. at *3. Judge Humphreys also discounted Quest's cost arguments because, despite the passage of time, several conferrals with the plaintiffs, and upgrades to defendant's computer system, the "defendant fail[ed] to present any modification of its original [cost] estimate." Id.
5. See Federal Rules of Civil Procedure 16(b)(3)(B)(iv).
6. See Federal Rules of Civil Procedure 26(f)(3)(C)-(D).
7. *Hopson*, 232 F.R.D. at 234.
8. See Federal Rules of Evidence 502(d).
9. Federal Rules of Civil Procedure 16 advisory committee's note.
10. Id. (emphasis added).
11. See Federal Rules of Civil Procedure 26 advisory committee's note.
12. See Federal Rules of Evidence 502 advisory committee's note.
13. Compare Federal Rules of Evidence 502 advisory committee's note, with Federal Rules of Civil Procedure 16 advisory committee's note.