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FEDERAL E-DISCOVERY

Even at High Costs, Courts Enforce Agreements


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A recent decision from the U.S. Court of Appeals for the District of Columbia Circuit affirms an order requiring a nonparty to spend $6 million (9 percent of its annual operating budget) to comply with an e-discovery subpoena.

Litigators overseeing discovery know they must assess a client's documents, and particularly a client's electronic documents, at the outset of discovery. Estimating the resources necessary to collect and produce electronically stored information (ESI) is a vital role of counsel today. Without such advance knowledge, lawyers may be blindsided by unexpected burdens and time pressure in the production process.

The D.C. Circuit's ruling in *In re Fannie Mae Securities Litigation*, 552 F.3d 814 (2009), highlights the importance of counsel understanding issues related to e-discovery, and the potential scope of that discovery, before entering into any type of agreement governing the future conduct of discovery in the case.

The circuit was unwilling to entertain an argument that the burden on a nonparty was too high to be reasonable once the nonparty had entered a stipulated discovery order. In particular, the court had little sympathy for the argument that the keyword search suggested by the requesting party resulted in an overwhelming number of documents, many of which surely would be of little probative value.[1]

In re Fannie Mae upheld a district court order holding a third party in contempt and imposing sanctions for that party's failure to comply with a stipulated discovery order. The Office of Federal Housing Enterprise Oversight (OFHEO) was the government agency charged with regulating the Federal National Mortgage Association (Fannie Mae).[2]

In 2003, OFHEO opened a special review of Fannie Mae's accounting and financial practices, and concluded that the enterprise "had departed from generally accepted accounting principles in order to manipulate its reported earnings and inflate executive compensation."[3] This report led to several private civil actions against Fannie Mae, its senior executives and others. These actions were consolidated into multidistrict litigation in the U.S. District Court for the District of Columbia.

During discovery, three individual defendants who were senior executives at Fannie Mae subpoenaed nonparty OFHEO, pursuant to FRCP 45(c)(2)(B)(ii), seeking records OFHEO had collected in preparing its investigation report. The district court denied OFHEO's motion to quash and ordered compliance. After receiving two separate one-month extensions in the summer of 2007, OFHEO reported to the district court that it had produced all documents requested. During a 30(b)(6) deposition, OFHEO admitted it had failed to search all of its off-site disaster recovery back-up tapes. In response, the requesting parties moved to hold OFHEO in contempt.

Following the first day of the contempt hearing, OFHEO and the requesting parties "entered into a stipulated order that held the contempt motions in abeyance and required OFHEO to conduct searches of its disaster-recovery backup tapes and provide all responsive documents and privilege logs by Jan. 4, 2008 [a date less than three months from the hearing]."

In language central to the D.C. Circuit opinion, the stipulated order's fifth paragraph stated:

> OFHEO will work with the Individual Defendants to provide the necessary information (without individual document review) to develop appropriate search terms. By October 19, 2007, the Individual Defendants will specify the search terms to be used.

Pursuant to the stipulated order, the individual defendants submitted over 400 search terms, which returned 660,000 documents (approximately 80 percent of the offices' e-mails). Of the 400 search terms, 150 contained wild-card characters. One such search term alone, "*le percentann percent*" returned all documents containing such words as "Fannie," "annual," "loans," "plan" and "meaningful." The terms captured clearly irrelevant documents such as e-mails between spouses forwarding family photographs and an e-mail exchange in which two spouses are contemplating a holiday cruise.[4]

OFHEO objected on the grounds that paragraph five "limited the [requesting parties] to 'appropriate search terms.'" The district court disagreed and held that the agreement left the search terms in the sole discretion of the requesting parties and provided no limitations on those terms.

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Indeed, according to the circuit, the only limit to the right of the requesting parties to designate search terms under the agreement is "the general contractual duty of good faith and fair dealing." Thus, a request for "every word in the dictionary would have been in bad faith and invalid."

Despite the breadth of the search terms and the large number of documents returned, the circuit found that this large figure "may simply indicate that most of the emails actually bear some relevance, or at least include language captured by reasonable search terms." But by this circular logic, any search list would be valid because all the documents retrieved contained the search terms—that's how they were retrieved.

This actually reveals nothing about whether these search terms were "appropriate" (as OFHEO argued was required by the contract language) or "reasonable" (as apparently read into the contract by the circuit) or whether the mass of documents returned actually have probative value in the multidistrict litigation.

The focus on the language of the stipulated order highlights the importance for practitioners of negotiating these terms in advance. Agreeing that the requesting parties could designate search terms opened the door for the designation of broad and far reaching search terms. If counsel had fully appreciated the possible problems with a large search request, perhaps the stipulated order would have been drafted to offer OFHEO some protection against such burdens.

No Excuse Delays

On Nov. 29, 2007, the day before an interim deadline for production of several categories of material, OFHEO informed the district court that it would be unable to meet that deadline and moved for an extension until Dec. 21. The court granted the motion, but two days before the extended deadline, OFHEO informed the court that it would be unable to comply with the extended interim deadline, and that although it could produce all non-privileged documents by the ultimate Jan. 4, 2008, deadline, it would be unable to produce all the required privilege logs until Feb. 29.

OFHEO hired 50 contract attorneys and incurred over $6 million in expenses (more than 9 percent of the agency's entire annual budget). Despite the high costs and "extensive efforts" undertaken by OFHEO, the district court found that its efforts were "not only legally insufficient, but too little, too late."

Moreover, the district court admonished OFHEO for "treat[ing] its court-ordered deadlines as movable goal posts and… repeatedly miscalculat[ing] the efforts required for compliance and [seeking] thereafter to move them." For this reason, the court held OFHEO in contempt.

As a sanction, the district court ordered production of all documents withheld on the sole basis of qualified deliberative process privilege and not logged by the Jan. 4, 2008 deadline. The court ordered that these documents would be produced only to counsel and that the production would not waive privilege.

OFHEO also argued that the contempt finding was an abuse of discretion because the district court compelled compliance without considering cost-shifting, narrowing the scope of the requests, or finding that defendants demonstrated good cause for forcing OFHEO to retrieve its inaccessible data.

'In re Fannie Mae' serves as a cautionary tale to all practitioners faced with discovery demands. Agreements should be carefully negotiated and counsel should not agree to unmitigated key word searches without reserving the right to negotiate search terms and without waiving the right to pursue cost shifting.

The circuit was unsympathetic, holding that OFHEO waived these arguments by entering into the stipulated discovery order. If OFHEO wished to pursue these arguments, the circuit suggested that OFHEO should have continued the hearing scheduled to consider the subpoenas, and if the district court nonetheless compelled production, OFHEO could have "defied the adverse ruling and appealed any ensuing contempt finding."

In response to OFHEO's argument that it substantially complied with the order, the circuit stated that "[w]ere we deciding this matter in the first instance, we might not have held OFHEO in contempt." However, the circuit could not find that the district court had abused its discretion, given "even two and a half weeks after the final deadline set forth in the stipulated order, OFHEO had produced just six of the required thirty-one privilege logs. Not until after the district court held OFHEO in contempt did it provide the remaining logs, and according to the individual defendants even these are incomplete."

The district court had also noted producer's repeated extension requests, "ultimately concluding that OFHEO had requested one extension too many and that strict enforcement of its deadline was warranted."

Conclusion

In re Fannie Mae serves as a cautionary tale to all practitioners faced with discovery demands. Agreements should be carefully negotiated and counsel should not agree to unmitigated key word searches without reserving the right to negotiate search terms and without waiving the right to pursue cost shifting.

If the producing party cannot reach a fair agreement with the requesting parties, nonparties may be better served by refusing to comply with subpoenas until the court considers the burdens and rules on cost-shifting rather than entering into broad agreements.

1. The High Court in the United Kingdom has also been unsympathetic to the complaints of parties that electronic discovery would impose high costs. In *Digicel (St. Lucia) Ltd v. Cable & Wireless PLC*, [2008] EWHC 2522 (Ch) (Oct. 23, 2008), the court found that despite an expenditure of over two million pounds and 6700 hours of attorney time, the producing party would be required to do a further production after failing to properly meet and confer about electronic discovery prior to collecting documents.

2. OFHEO has since been succeeded by the Federal Housing Finance Agency.

3. *In re Fannie Mae Sec. Litig.*, 552 F.3d at 816.

4. Brief for Appellant United States Office of Federal Housing Enterprise Oversight (Aug. 5, 2008) at 13; Status Report of OFHEO's Production and Request for Forbearance of Interim Deadline by Office of Federal Housing Enterprise Oversight (Nov. 29, 2007) at 2-3.