



Court Rules Privilege Waived due to Party's Laissez-Faire Approach to Discovery

August 30, 2011

Thorncreek Apartments III, LLC v. Vill. of Park Forest, Nos. 8 C 1225, 08-C-0869, 08-C-4303, 2011 WL 3489828 (N.D. Ill. Aug. 9, 2011)

In a recent Northern District of Illinois decision, District Judge Feinerman held that a defendant's privilege was waived with respect to inadvertently produced documents after the defendant took a laissez-faire approach to the discovery process and failed "to check the production database created by [a third-party e-discovery vendor] before it went live online and became available to [opposing] counsel."

This case involves an all-too-familiar fact pattern when using a third-party vendor for e-discovery. The defendant's discovery procedure included hiring a third-party vendor to retrieve documents containing certain key-words from back up tapes; having the third-party vendor enter those documents in a database so that defendant's counsel could review and mark the documents containing privileged information; and lastly, withholding the privileged documents from the database and making the updated database accessible to plaintiff's counsel for review.

Nearly two months after discovery ended, a few documents inadvertently produced came to the attention of the defendants after the plaintiffs attempted to use the documents during a deposition. Four months after the deposition, the defendants produced a privilege log, which contained 159 documents that had been inadvertently entered into the database. The parties were able to independently resolve their dispute with regards to all but six of the documents listed in the privilege log.

The Court first ruled on whether the six documents contained privileged information, and determined that each did. It then took up the question whether the privilege that originally existed in portions of these six documents had been waived. When making its decision, the Court looked at the "reasonableness of the precautions" taken by the defendant during the review process. In particular, the Court noted:

- The only evidence in support of the precautions taken by the defendant was "an email written by [defendant]'s counsel explaining to [the plaintiff] that he 'spent countless hours reviewing' a relatively large amount of documents and marked each document either 'responsive,' 'non-responsive,' or 'privileged' in [the database]." The Court ruled, "This level of description falls well short of what we would expect for an adequate account of the review procedure."

- Additionally, the Court “ [had] little confidence in the reasonableness of the [defendant]’s precautions when the most the defendant [could] say [was] that it “thought” that marking a document as “privileged” during its review process would cause [the third-party vendor] to withhold it from the production database.”
- Finally, and “perhaps most telling in assessing the adequacy of the safeguards is the abject failure of the Village’s process to protect allegedly privileged documents. The [defendant] did not succeed in identifying and withholding from production even a single privileged document. The privilege log that the [defendant] belatedly served in April 2010 logged 159 documents as privileged – and, every single one of them had been produced to [the plaintiff].”

Ultimately, the Court found “no unfairness” in allowing plaintiffs access to the privileged documents, and “thus [held] the [defendant] responsible for its failure to take reasonable care to safeguard the privilege or to rectify the inadvertent error once it occurred.”

A special thanks to Sean Gajewski for helping with this post. Sean is a third-year law student at Hofstra University School of Law. You can reach him by email at [srgajewski \[at\] gmail dot com](mailto:srgajewski@gmail.com). Bio: www.sgajewski.com.