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New York District Court Decision Impacts Usual-Course-of-Business Option in Document Discovery Production

Areas of Interest

Electronic Discovery & Records Management

United States

A decision that will be of interest to companies that have invested in reviewing and organizing discovery documents that may be relevant to adversaries or third parties in related cases has recently been issued by Judge Scheindlin of the US District Court for the Southern District of New York. In *SEC v. Collins & Aikman Corp.*, No. 07 Civ. 2419, 2009 WL 94311 (S.D.N.Y. Jan. 13, 2009), the court ruled that discovery respondents may not be permitted to produce an entire litigation database as it is "kept in the usual course of business," normally one option under Rule 34 of Federal Rules of Civil Procedure, but, rather, must identify and produce particular documents that are responsive to specific document requests.

In *Collins & Aikman*, a securities fraud case, the SEC had gathered from various sources "1.7 million documents (10.6 million pages)" that the SEC "maintained in thirty-six separate Concordance databases – many of which use different metadata protocols." The SEC also had culled from that mass of data 175 file folders that were relevant to particular issues in the case. The SEC did not explain whether this was accomplished solely by electronic searches or also by human review. Finally, another set of 1,500 of the documents were tagged by an SEC expert using 45 subject and witness designations. When one of the defendants subsequently served document requests asking for documents relevant to 54 subjects, the SEC, electing to produce under the usual-course-of-business option, produced the entire source databases rather than the small set of documents that it already knew were relevant to the requests.

The defendant objected to the production and sought the culled subsets that the SEC had created. Judge Scheindlin agreed with the defendant, ruling that "[i]t is patently inequitable to require a party to search ten million pages to find documents already identified by its adversary as supporting the allegations of a complaint." Judge Scheindlin rejected the SEC's work product objection, observing that the "first step in responding to any document request is an attorney's assessment of relevance," and that it would "make no sense" to allow the very act of identifying relevant documents to then "shield[] the selection of responsive documents from production." The opinion analyzes the protections afforded opinion or "core" work product and fact or "ordinary" work product and finds neither applies. Judge Scheindlin further reasoned that the usual-course-of-business option was not available in the first place because the documents were from a particular investigation, which she found did not qualify as a regularly conducted business activity. That left only the option of producing the documents organized by document request, leading indirectly to the same result. In short, she directed the culled subsets of documents to be produced.

How does this rationale apply in a case where the responding party has not already undertaken to identify the documents that are relevant to the requests within a massive collection of litigation documents? Under Judge Scheindlin's analysis, work product protection would not apply, and the usual-course-of-business option might not be available. Therefore, the discovery respondent would have to review all of

the documents and organize them for its adversary. This is an obviously absurd result.

While Judge Scheindlin does not address the question in terms of waiver, it may be better to think of the question in those terms. When there is a culled set of organized documents, the unorganized source materials do not represent the way the documents are maintained in the usual course of business. Thus, choosing the usual-course-of-business option essentially waives the work product protection for any compilations that have already been created (at least if those compilations happen to track the requests at hand). This alternative rationale will be important in cases in which the responding party has not already organized the collected documents into neatly responsive subsets.

In summary, where massive litigation databases are the subject of discovery, it may be difficult to prevent the party making the demand from benefiting from the producing party's investment in litigation preparation. Choosing to produce under the usual-course-of-business approach may open the door to work product compilations. Yet choosing the alternative of producing according to the individual requests may yield largely the same result. Moreover, it is unclear to what extent respondents can simply offer up the whole litigation database in response to discovery even where the respondent has not already culled and organized documents relevant to the particular requests.

For inquiries related to this Client Alert, please contact the authors, Tom Lidbury at tlidbury@mayerbrown.com or Zach Ziliak at zziliak@mayerbrown.com.

For information about Mayer Brown's Electronic Discovery & Records Management practice, please contact Anthony Diana at adiana@mayerbrown.com, Michael Lackey at mlackey@mayerbrown.com, Tom Lidbury at tlidbury@mayerbrown.com or Edmund Sautter at esautter@mayerbrown.com.

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