Litigants Risk Waiver in Drafting Claw-Back Agreement Provisions

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In his February 5, 2014 “Privilege Points” release, Tom Spahn discusses claw-back provisions to remedy potential waivers.

Under Federal Rule of Evidence 502, litigants can agree on a claw-back order that allows retrieval of protected documents even if the producing litigant does a sloppy job of privilege review – or conducts no privilege review at all. However, many litigants continue to draft claw-back orders that allow such retrieval only if the producing party "inadvertently" produced the protected documents, and "promptly" seeks their return. These provisions needlessly risk waiver, if the producing party falls short on one or both of these standards.

In RIPL Corp. v. Google Inc., No. 2:12-cv-02050-RSM, 2013 U.S. Dist. LEXIS 179193, at *10 (W.D. Wash. Dec. 17, 2013), the court dealt with such a claw-back order – ultimately concluding that the producing party's notice of an inadvertent production one day after discovering the mistake met the "promptly" standard. Four days earlier, a Delaware state court also dealt with a claw-back order that included both the "inadvertently" and "promptly" standards. Jefferson v. Dominion Holding, Inc., C.A. No. 8663-VCN, 2013 Del. Ch. LEXIS 301 (Del. Ch. Dec. 13, 2013). The court noted that "[t]he parties did not agree to the 'claw back' of all privileged material that was produced without the knowing intent to do so. Inadvertence was the selected standard." Id. at *6. Fortunately for the producing party, the court found that it had met the "inadvertently" standard. It also met the "promptly" standard. The producing party discovered the mistake during a deposition, and advised the other side at the next deposition break. However, the court then provided a chilling warning: "Had the concern not been raised until after completion of the deposition, the result might be different." Id. at *8.

Litigants negotiating a claw-back order might take different positions on the inclusion of the "inadvertently" and "promptly" standards, but lawyers should keep in mind that those standards are not required.