Must “Clawback” Orders Limit Retrieval to “Inadvertently” Produced Protected Documents? Part II

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In his September 19, 2012 “Privilege Points” release, Tom Spahn discusses the use of an “inadvertence” standard in clawback agreements:

Last week's Privilege Point described the availability under Rule 502 of a clawback order allowing retrieval of protected documents regardless of the care taken by the producing party. Despite the availability of this forgiving standard, many litigants and courts continue to explicitly incorporate an "inadvertence" standard into their clawback agreements and orders.

In U.S. Home Corp. v. Settlers Crossing, LLC, Civ. A. No. DKC 08-1863, 2012 U.S. Dist. LEXIS 101778, at *7 (D. Md. July 23, 2012), the court dealt with a clawback order that allowed retrieval of "'documents the producing party deems to have been inadvertently disclosed.'" The court held that in determining whether the producing party had taken the proper "precautionary measures" and fulfilled its "post-production responsibilities" sufficient to "escape waiver," the court "will default to Rule 502(b) to fill in the gaps in controlling law." Id. at *19. The court assessed Womble Carlyle's [plaintiffs’ counsel] actions in responding to an adversary's third party subpoena of documents in the possession of Womble's predecessor firm Greenberg Traurig. Greenberg had produced several protected documents when responding to the subpoena. The court ultimately concluded that Womble Carlyle's "acceptance of Greenberg Traurig's statements that they 'got it' and 'know how to respond' to the subpoena does not constitute a reasonable precaution to protect the attorney-client privilege or work product protection." Id. at *33-34. The court therefore refused to allow clawback of the protected documents Greenberg Traurig had produced.

Companies litigating in federal court should consider agreeing on a clawback order allowing retrieval of protected documents "irrespective of the care" the producing company takes in a privilege review. Fed. R. Evid. 502(d) Advisory Committee Explanatory Note (rev. Nov. 28, 2007). There may be strategic reasons to incorporate an "inadvertent" standard, but doing so needlessly invites a court's scrutiny of the privilege review process and might thwart an effort to retrieve protected documents.