Motions to Compel ESI Denied

Courts Balance Benefits and Burdens

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Two recent decisions demonstrate that, in the words of *Hopson v. Mayor*, "[t]he days when the requesting party can expect to 'get it all' and the producing party to produce whatever they feel like producing are long gone."

In both *Kay Beer Distributing v. Energy Brands* and *Kilpatrick v. Breg*, courts, while partially granting motions to compel, put the brakes on requests for discovery of electronically stored information (ESI), applying the cost-benefit balancing principles of Fed. R. Civ. P. 26(b)(2)(C), as well as traditional concepts defining the scope of discovery, Fed. R. Civ. P. 26(b)(1).

"The decisions reflect the changing tide in the permissible scope of discovery and the judge's more active role in making sure that a balance is struck on the front end of the discovery process," notes Jacqueline Becerra, Miami, cochair of the Section of Litigation's Elevating Your Game Task Force.

Kay Beer sued Energy Brands over an alleged exclusive dealership agreement. At the outset, the parties erroneously predicted to the court that ESI would not be a "significant feature" of the case. Kay served 313 document requests, 52 interrogatories, and 154 requests for admission.

Energy's electronic search generated five DVDs with 17 gigabytes of data, comprising 56,547 documents and hundreds of thousands of pages, and Energy produced the subset of all email containing "Kay Beer" in the text. Kay, however, demanded production of the DVDs.

The court concluded that the "sheer number" of discovery requests demonstrated "that discovery has spiraled out of control," and that Kay had no right to all potentially discoverable information regardless of the cost and effort needed to gather it. Kay sought access to the DVDs, and production with metadata, pointing out that Energy had erroneously represented that it had produced "everything," only to state three days later that there was more to produce.

The court, however, noted that Kay was demanding every email on which any variation of its name (e.g., "Kay Distributing" or "Kay") appears. It held that the mere fact that Kay's name was on a document did not make the document discoverable, and that Energy had no obligation to turn over non-discoverable information.

The court expressly noted that Energy had offered to "work with" Kay's counsel in formulating search terms, however, Kay had refused. Considering the nature of the case, "[t]he mere possibility of locating some needle in the haystack" did not warrant the expense Energy would incur in reviewing the DVDs.

Instead, the court ordered only a more thorough search for variants of Kay's name, such as "Kay Distributing," citing Fed. R. Civ. P. 26(g)(discovery responses require "reasonable inquiry").

In *Kilpatrick v. Breg*, the plaintiff sued a manufacturer for alleged injury from a medical device. The court was faced with the assertion, shortly before trial, that recently discovered email showed that Breg had knowledge of facts of which it had previously denied awareness.

The court noted that Breg had failed to produce responsive documents that contradicted depositions of its employees. On the other hand, Kilpatrick's concerns were admittedly circumstantial, and the newly discovered information was "not a smoking gun," was made at the eleventh hour, and granting the motion to compel threatened Breg's trial preparation.

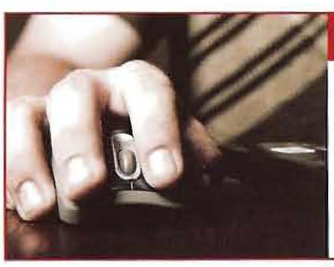
Balancing the potential relevance with the burden and cost of production on the eve of trial, the court permitted Kilpatrick to retain an outside vendor to confirm the completeness of Breg's document production by using a limited methodology (e.g., search of only five backup tapes with limited search terms).

Neither Kilpatrick's circumstantial concerns, nor Kay's "needle in a haystack," was sufficient to support a full-scale order compelling discovery of ESI; however, the courts carefully engaged in fact-sensitive, cost-benefit balancing to reach an equitable result.

The courts "got it exactly right in their approach," says Scott J. Atlas, Houston, Section past chair and member of the Section's Federal Practice Task Force. There is a need for courts to be "active referees," balancing discovery costs against the needs of the case, when one side asks for too much, and the other offers too little, especially in the area of e-discovery, Atlas notes.

RESOURCES

- *Kay Beer Distributing, Inc. v. Energy Brands, Inc.*, 2009 U.S.Dist.Lexis 1773 (E.D.Wisc. Feb. 20, 2009), *subsequent opinion*, 2009 WL 1649592 (June 10, 2009), *subsequent opinion*, 2009 U.S. Dist. Lexis 49792 (E.D.Wisc. June 12, 2009).
- *Kilpatrick v. Breg, Inc.*, 2009 U.S. Dist. Lexis 3092 (S.D. Fl. Jan. 9, 2009), *subsequent opinion*, 2009 U.S. Dist. Lexis 8480 (S.D. Fl. Jan. 28, 2009), *subsequent opinion*, 2009 U.S. Dist. Lexis 52723 (S.D. Fl. Jun. 22, 2009).
- *Hopson v. Mayor & City Council of Baltimore*, 232 F.R.D. 228, 245 (D. Md. 2005).
- Fed. R. Civ. P. 26(b)(1) and (2)(C).



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