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Kleen Products LLC v. Packaging Corporation of America Further Testing the Waters of Predictive Coding for eDiscovery Purposes

In *Da Silva Moore v. Publicis Groupe*, Magistrate Judge Andrew Peck of the Southern District of New York released the first official judicial opinion endorsing the usage of computer-assisted (or predictive) coding for eDiscovery purposes. (A link to the DaSilva Buzz can be found here: http://www.redgravellp.com/resources/the-buzz.aspx.)

Before issuing the order, both parties had already agreed to the usage of computer-assisted coding, but disagreed in regards to the appropriate methodology. Within his order, Magistrate Judge Peck mentioned that it would be a "slightly more difficult case . . . where the producing party wants to use computer-assisted review and the requesting party objects."

Magistrate Judge Peck likely had a current Seventh Circuit case in the back of his mind when he penned this remark. In *Kleen Products LLC v. Packaging Corporation of America, et al.*, the plaintiffs recently asked Magistrate Judge Nan Nolan to *require* the producing parties to use a form of computer-assisted review in their production of documents for eDiscovery. The plaintiffs claim that "[t]he large disparity between the effectiveness of [the computer-assisted coding] methodology and Boolean keyword search methodology demonstrates that Defendants cannot establish that their proposed [keyword] search methodology is reasonable and adequate as they are required."

The memorandum filed by the plaintiffs cites studies conducted between 1994 and 2011 that allegedly demonstrate the superiority of computer-assisted review over keyword approaches. For example, computer-assisted coding produced "70 percent (worst case) of responsive documents rather than no more than 24 percent (best case) for Defendants' Boolean, keyword search." The plaintiffs also promise that their linguistics and computer forensics expert witnesses would present further studies supporting the superiority of computer-assisted coding.

The defendants, still hoping to use the more traditional keyword search methodology for eDiscovery production, are producing their own expert witnesses that will argue that the defendants are using a reasonable search technique that has evolved over time to become more precise and cost-effective — and certainly within the zone of defensibility. Defendants' experts were also set to testify that the courts have repeatedly found that these techniques provide acceptable results when conducted using proper methods. The defendants also argue that it would be difficult to implement the computer-assisted review, a "relatively new, largely untested methodology," after already beginning to collect ESI.

Also of note is that both sides indicate significant investment in their eDiscovery production tools of choice. The plaintiffs indicate that "not only have Plaintiffs developed a [computer-assisted coding] process for reviewing Defendants [sic] ESI, but also on their own ESI." Defendants likewise cite a "very substantial investment of time and resources" in their own separate technologies and procedures.

The initial hearing on the discovery motions was held on February 21, 2012. The hearing was continued to April, and much anticipation will await Magistrate Judge Nolan's decision as to whether she will require, over objection, the use of computer-assisted review for the review and production of electronically stored information in this case. And, like the *Da Silva* case, the arguments in *Kleen Products* likely foreshadow the types of arguments, disputes, and opportunities that will likely been seen in cases across the country for years to come until there are more settled expectations as to the application of law and technology to the area of electronic discovery.

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