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ON INFORMATION MATTERS

FEBRUARY 22, 2013

"Timely" and Complete Production Not a Guarantee Against Sanctions

Do you believe that your firm can delay production efforts until the final weeks prior to court deadlines? A plaintiff in the District of Maryland recently discovered that a court may levy fines even after a party issues a complete production prior to scheduling order deadlines. In *Branhaven, LLC v. Beeftek, Inc.*[i], the court fined a plaintiff that produced more than 100,000 pages only hours prior to a production deadline and only days before a 30(b)(6) deposition. In the five months since the defendant sent its request for production, the plaintiff had previously produced only 388 pages.[ii]

In its complaint regarding the "disorganized and last minute document production," the defendant highlighted the plaintiff's response to the Request for Production of Documents in which it stated that it would "make the responsive documents available for inspection and copying at a mutually convenient time."[iii] The court ultimately found two issues with the response. First, the court cited an earlier case in which it found that a party can provide only three types of discovery responses: "(1) an objection to the scope, time, method and manner of the requested production; (2) an answer agreeing to the requested scope, time, place and manner of the production; or (3) a response offering a good faith, reasonable alternative production which is definite in scope, time, place or manner."[iv] The court found that the defendant's vague response did not satisfy any of these options.

Second, the court further found that the plaintiff improperly certified the response under Federal Rule of Civil Procedure 26(g). At the time of its response, the plaintiff's attorney had not received discovery responses from the client and had only received an assurance that the client "was assembling its documents for production."[v] Relying on the Advisory Committee's notes to the Federal Rules, the court found that certification indicates that the attorney "has made a reasonable effort to assure that the client *has provided* all the information and documents available to him that are responsive to the discovery demand."[vi] The record further noted that counsel for the plaintiff had done little to follow up with its client to determine the amount or type of responsive documents from its client.[vii]

The court also noted the disorganized manner in which the plaintiff ultimately produced the large document set. The plaintiff made the last minute production in PDF, a format to which the defendant did not previously agree, and failed to Bates stamp each page.[viii] In its analysis of whether the format further elicited sanctions, the court conceded that the district's preference for productions to be made in TIFF is only advisory in nature.[ix] But Federal Rule of Civil Procedure 34(b)(2)(E)(ii) requires a party to produce documents in either a form that is "ordinarily maintained" or "reasonably usable."[x] The Advisory Committee notes further clarify that if a party does not identify the format in advance of production, "it runs the risk that the requesting party can show that the produced form is not

reasonably usable."[xi] In this matter, the court found the last-minute, large document production without full Bates stamping to be unreasonable—a violation of Rule 34(b)(2)(E)(ii).[xii]

The court ultimately sanctioned the plaintiff by requiring it to pay for the time spent by the defendant's litigation support team to convert the production to a reviewable format and the costs associated with bringing the Motion for Sanctions.[xiii] As to the defendant's request for attorneys' costs associated with the last-minute production, the court refused to order repayment unless the defendants could clearly demonstrate that the last-minute nature of the production resulted in unnecessary additional attorney personnel costs.[xiv]

Contact Us: For further information or if you have any questions regarding this Alert, please contact your Redgrave LLP attorney or Managing Partner Victoria Redgrave at (202) 681-2599 or vredgrave@redgravellp.com.

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[i] *Branhaven*, Civil No. WDQ-11-2344, 2013 WL 388429 (D. Md. Jan. 4, 2013).
[ii] *Id.* at *4.
[iii] *Id* at *2.
[iv] *Id.* at *3 (citing *Lee v. Flagstaff Indus. Corp.*, 173 F.R.D. 651, 950 (D. Md. 1997).
[v] *Id.* at *3.
[vi] Id. at *3 (quoting Fed. R. Civ. P. 26 advisory committee's notes).
[vii] *Id.* at *3-4.
[viii] *Id.* at *5.
[ix] *Id.*
[x] Fed. R. Civ. P. 34(b)(2)(E)(ii).
[xi] *Branhaven*, 2013 WL 388429, at *5 (quoting Fed. R. Civ. P. 34 advisory committee's notes).
[xii] The court also noted that the plaintiff did not in the normal course store its documents in PDF.
[xiii] Branhaven, 2013 WL 388429, at *6.
[xiv] *Id.*