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Fairholme Funds, Inc. v. United States: Court Compels Production for Plaintiffs' Quick Peek over Defendant's Objection

Article By
e-Discovery Analysis and Technology Group
K&L Gates
Electronic Discovery Law

- Litigation / Trial Practice
- Federal Circuit / U.S. Court of Spec. Jurisdiction

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Fairholme Funds, Inc. v. United States, No. 13-456C, 2017 WL 4768385 (Fed. Cl. Oct. 23, 2017)

In this case the court granted Plaintiffs' motion to compel a "quick peek" at approximately 1500 documents withheld as privileged pursuant to the bank authorization and deliberative process privileges despite Defendant's strong objection. In making its order, the court noted the parties' agreement that the clawback provision in their existing protective order would be governed by Rule 502(d), precluding waiver, and also reasoned, among other things, that the quick peek would expedite resolution of the dispute and avoid the need for in camera review, which Plaintiffs would inevitably request if their motion was denied.

More than once in the course of discovery, Defendant produced additional documents when challenged, including documents previously withheld as privileged pursuant to the bank authorization and deliberative process privileges, leading Plaintiffs to argue that while they did not mean to suggest bad faith, "the rate at which another review led the Government to abandon its privilege assertions [was] troubling . . . " and, ultimately, that the quick peek procedure "authorized by FRE 502(d)" was "the only way to ensure" that they received all of the documents to

which they were entitled. Defendant strongly objected, arguing that it had undertaken a "comprehensive review" of the privileged materials and that *compelling* a quick peek was not the intended use of the rule. In support of the latter argument, Defendant cited The Sedona Conference:

> [FRE] 502(d) does not authorize a court to require parties to engage in 'quick peek' … productions and should not be used directly or indirectly to do so. … Rule 502 was designed to protect producing parties, not to be used as a weapon impeding a producing parties' right to protect privileged material. Compelled disclosure of privileged information, even with a right to later claw back the information, forces a producing party to ring a bell that cannot be un-rung.

Defendant further argued that it could identify only one prior case in which such a procedure was compelled and that in that case the quick peek was ordered as an alternative to sanctions for an insufficient privilege log and failure to cooperate, which were not alleged in this instance.

Taking up the motion, the court first undertook substantial discussion of Fed. R. Evid. 502 and recognized the "general purpose" was to resolve longstanding disputes regarding inadvertent production and subject matter waiver and to address complaints about the cost of protecting privileged materials—"two issues not relevant to the current dispute." The court also noted, however, that the advisory committee note specifically stated that "a confidentiality order is enforceable whether or not it memorializes an agreement among the parties to the litigation" and went on to discuss the parties' protective order, which included a clawback provision for inadvertent production to be "governed" by FRE 502(d).

Ultimately, citing Defendant's "piecemeal" production and the desire to "facilitate the speedy and efficient conclusion of jurisdictional discovery" the court indicated it would grant Plaintiffs' motion. Further explaining its conclusion, the court reasoned, among other things, that if it denied the motion, it had "every reason to believe" that Plaintiffs would seek in camera review which, "[g]iven the court's heavy caseload and limited resources" made the quick peek procedure a "much more viable and attractive option" and that the quick peek would both relieve the court of the burden of in camera review and benefit the parties with a prompt resolution of the dispute. Returning to the purposes of the rule, despite acknowledging their lack of relevance to the facts at issue, the court reasoned that the procedure set forth was "nevertheless helpful in the instant case" and that it had the authority to order its use. Responding to Defendant's argument that the disclosure would ring a bell that could not be un-rung, the court indicated that the robust protective order in place, which limited access to "protected information," provided sufficient protection. Finally, the court indicated that it was "unpersuaded" by Defendant's reference to The Sedona Conference and explained its "sole purpose" for utilizing the procedure was to end the dispute and move the case forward, which was "eminently appropriate" in light of the court's broad discretion and the parties' "mutually-agreed-to protective order" already entered in the case.

Defendant was ordered to provide Plaintiffs with the opportunity to review the at-issue documents pursuant to the protocol laid out by the court.

A copy of the court’s full order is available here.