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CASE ALERT, NO. 35

NOVEMBER 4, 2008



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Ninth Circuit Refuses Return of Inadvertently Produced Document

On October 28, 2008, the United States Court of Appeals for the Ninth Circuit, in Truckstop.net, LLC v. Sprint Corp., Docket No. 07-35123 (9th Cir. Oct. 28, 2008), refused Sprint's request to return an email message that Sprint claimed contained attorney-client privileged communications, despite the fact that Sprint had inadvertently produced the document in connection with a multi-phase document production. Notwithstanding the fact that a thorough "privilege review" may require a significant dedication of resources, this decision underscores the necessity of a careful review of documents, in particular email messages, before production in litigation.

This lawsuit arose out of a dispute between Truckstop.net ("Truckstop") and Sprint Communications Company L.P. ("Sprint") regarding Sprint's agreement to design, install, and test standardized wireless local area networks. In connection with its discovery obligations, Sprint produced over 470,000 electronic images to Truckstop. As part of Sprint's sixteenth supplemental production of documents, Sprint inadvertently produced an allegedly privileged, September 2004 e-mail message between Sprint employees that included impressions and recollections of a meeting with Sprint's legal department and various statements of

fact from other sources.

After realizing that the email was inadvertently produced, Sprint filed a motion seeking the return of the document. The district court held that most of the communication did not contain privileged information and was discoverable. Sprint filed an interlocutory appeal to the Ninth Circuit.

The issue on appeal was whether the allegedly privileged email message should be returned to Sprint. Even though the disclosure was inadvertent and Sprint sought to reverse its error, the Court found that no such remedy existed; Sprint was not allowed to "unring the bell." Instead, because the irreparable harm associated with the disclosure could not be undone and Sprint would sustain no additional harm if the email message remained disclosed, the Court refused to reverse the district court's decision.

The Truckstop decision highlights the importance of a thorough "privilege review." So much information is passed via email messages today that a "privilege review" can be a massive undertaking in the context of litigation. Failure to perform a "privilege review," however, can have serious negative consequences on a party's

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litigation position. One inadvertently produced document with sensitive, privileged information that was never intended to be disclosed can wreak havoc on a party's litigation strategy and the potential settlement value of a matter.

The Truckstop decision serves as yet another warning of the perils faced by litigants in the complex world of electronic discovery. Litigants must be vigilant with their "privilege review" of documents, particularly email messages, to avoid the pitfall illustrated in Truckstop.

Should you have any questions about this decision, please do not hesitate to contact us.