

Case Summary

Comrie v. Ipsco, Inc.

2009 WL 4403364 (N.D. Ill. Nov. 30, 2009)

Defendant's Failure to Support Assertion Waives Attorney-Client Privilege

On the plaintiff's motion to compel production of ESI, the Northern District ruled that the defendant's failure to support its assertion that an email was inadvertently produced waived the attorney-client privilege.

During the discovery phase of a suit under the Employee Retirement Income Security Act (ERISA), the defendant produced more than 5500 documents, including a relevant email sent from its general counsel to its outside counsel. Plaintiff's counsel read the email and questioned the general counsel about its meaning during a deposition. At that point, the defense claimed the email was protected by the attorney-client privilege and should be returned pursuant to the parties' protective order.

The plaintiff complied but filed the instant motion to compel, arguing that (1) the email did not fall under the privilege; (2) even if the email were privileged, the privilege had been waived; and (3) the email fell within the fiduciary exception to the privilege.

Decision

After finding that the email was protected by the attorney-client privilege, the court applied Federal Rule of Evidence 502(b) on waiver, as interpreted by the recent case, *Heriot v. Byrne*, 2009 U.S. Dist. LEXIS 22552 (N.D.Ill.2009). Whether a disclosure was inadvertent and whether the holder of the privilege took reasonable steps to prevent disclosure are dependent on a number of considerations, including the number of documents and how they were reviewed prior to production.

Here, the defendant asserted that the email was inadvertently produced but had not presented any evidence informing the court of its efforts to review and control the disclosure of documents. The failure to meet this burden constituted waiver of the attorney-client privilege. The court also found that the email fell within the fiduciary exception and, therefore, granted the plaintiff's motion to compel production of the email.