

## Case Summary

### Heriot v. Byrne

257 F.R.D. 645, 2009 U.S. Dist. LEXIS 22552 (N.D. Ill. 2009)

Error in ESI Production Allows Plaintiff to “Claw Back” Documents

On cross-motions to compel ESI production of documents related to a copyright infringement suit, the Northern District examined the application of the amended Federal Rule of Evidence 502 in finding that the Plaintiff’s disclosure was inadvertent and did not cause a waiver of the attorney-client privilege.

Plaintiff alleged that Defendant’s made-for-TV documentary infringed its copyrights and unjustly enriched the Defendant. In response to the Defendant’s motion to compel ESI production, the Plaintiff hired a Vendor to electronically scan and provide optical character recognition for documents in its production. Due to the Vendor’s error, 196 documents containing attorney-client communications were produced to the Defendant. Within 24 hours of discovering the mistake, the Plaintiff notified the Defendant, and the Defendant sealed the documents for its motion to the Court.

The Defendant argued that the Plaintiff should not be permitted to “claw back” the documents in its ESI production. The parties disputed whether the newly-amended Federal Rule of Evidence 502 applied and, if so, whether it would supersede the test formulated in the 7th Circuit decision *Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec*, 529 F.3d 371, 387-88 (7th Cir. 2008). The Court concluded that it must first determine whether the documents in question were privileged and then apply FRE 502. The *Judson* factors could, however, be used in the FRE 502 analysis.

#### Decision

Here, the Court examined the documents in question and found that the majority were protected by the attorney-client privilege. The Court then applied FRE 502, finding that, even though a large percentage of the privileged documents were produced, the disclosure was inadvertent because the Plaintiff used reasonable procedures to review the documents and the disclosure would not have occurred but for the Vendor’s error. The Plaintiff’s notice to the Defendant was also reasonably prompt. Because the Plaintiff had satisfied FRE 502, the Court found that the disclosure did not waive the attorney-client privilege. Reasoning that it would be unfair to punish the Plaintiff for a disclosure it neither caused nor anticipated, the Court allowed the Plaintiff to “claw back” the documents.