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LITIGATION PRACTICE

Notes from the Field

Rule 502: Does It Deliver on Its Promise?

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A YEAR-AND-A-HALF HAS PASSED SINCE Congress sought to make document productions and associated pre-production privilege review less costly and less burdensome with the passage of Federal Rule of Evidence 502. In this column, we examine the new rule, describe what parties can do to maximize their protection under the rule, and highlight the potential risks the rule has left unaddressed.

Rule 502: The Basics

In September 2008, Congress enacted Federal Rule of Evidence 502: Attorney-Client Privilege and Work Product; Limitations on Waiver. The Rule principally addresses the circumstances in which attorney-client privilege or work product protection is waived as a result of the production of documents in litigation. The Advisory Committee Notes explain that the new rule has two purposes: to resolve longstanding disputes about inadvertent disclosure and subject-matter waiver; and to "respond[] to the widespread complaint" that litigation costs have soared due to efforts to protect against waiver of attorney-client or work-product privileged materials, particularly in this era of electronic discovery.

The attorney-client privilege has particular importance in the antitrust area. As one court stated:

> [I]t is not the federal government that is primarily responsible for enforcement of the federal antitrust laws but rather the lawyers who advise their corporate clients. Unless corporate personnel on a fairly low level can speak to attorneys in confidence, the enforcement of the federal antitrust laws is likely to be adversely affected.[1]

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Rule 502's objectives, and particularly the second goal, resonate with the antitrust community, whose members can become entangled in massive, expensive investigations and litigation. In public hearings that led to adoption of the new rule, the poster child was Verizon's expenditure of $13.5 million on a privilege review in an antitrust investigation.[2]

Rule 502 concentrates on four areas: the scope of a waiver (Rule 502(a)); inadvertent disclosure (Rule 502(b)); federal-state comity in an effort to achieve uniform treatment of disclosures (Rule 502(c) and (d)); and protective orders (Rule 502(e)). Importantly, the rule addresses not only litigation, but also disclosures to government offices or agencies, explicitly recognizing in the Advisory Committee Notes that "[t]he consequences of waiver, and the concomitant costs of pre-production privilege review, can be as great with respect to disclosures to offices and agencies as they are in litigation."

Subsection(b) of Rule 502, used in determining whether a disclosure operates as a waiver, has been among the most litigated of the rule's provisions. That provision states that a disclosure "made in a Federal proceeding or to a Federal office or agency" does not operate as a waiver if three criteria are met: (1) the disclosure was inadvertent; (2) the holder of the privilege took "reasonable steps to prevent disclosure"; and (3) the holder of the privilege "promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B)."

If the disclosure does operate as a waiver, the analysis proceeds to subsection (a) to determine the scope of the waiver, namely, whether there has been a "subject-matter waiver." Before Rule 502, courts had often held that the disclosure of a document could constitute the disclosure of an entire subject matter area and require the production of additional privileged documents.[3] Rule 502(a) has created a contrary presumption—that a waiver is limited and does not operate as a subject-matter waiver unless the waiver is intentional and the other materials "ought in fairness to be considered together." The Advisory Committee Notes explain that a subject-matter waiver "is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary." The Notes add, "subject matter waiver is limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner."

Subsections (c) and (d) of the rule seek to impose uniformity across state and federal proceedings. Subsection (c) provides

that a disclosure in a state-court proceeding that is not covered by a state-court order should not be treated as a waiver if it would not be a waiver in a federal proceeding.[4] Subsection (d) gives a federal court authority to order that a disclosure has not resulted in a waiver and gives that determination preclusive effect in any other federal or state proceeding.

Finally, the rule addresses protective orders, providing that an agreement between parties is not binding on any other parties unless it has been memorialized in a court order. This means that if two parties enter into an agreement that states, for example, that there will be no waiver of privilege in a production for this or any future litigation, that agreement will be controlling only for the two parties who enter into the agreement. A third party in a later litigation still might be able to argue that the privilege was waived because, absent a court order, enforcement of the agreement would be limited to the two signing parties.

How to Maximize Benefit from the Rule

Case law since the rule's adoption has revealed several steps that a producing party can take to maximize the chances that an inadvertent disclosure will not be deemed a waiver:

Actions to Take at the Outset of Litigation.

- **Obtain a protective order from the court.** Under subsection (e), a confidentiality agreement protects the parties only from claims by the parties—not from third-party claims. In order to gain the full coverage of the rule, parties should submit a protective order to the court for approval. While it is often advisable for the protective order to reference and incorporate Rule 502 and Federal Rule of Civil Procedure 26(b)(5)(B), at least one court has held that it is not necessary, and could in fact be confusing, for the protective order to include procedures for the recovery of inadvertently produced documents unless the parties specifically agree to different procedures from those set forth in the rules.[5]

Two additional important notes about protective orders: First, unlike Rule 502(b), Rule 502(d) (giving a federal court authority to order that a disclosure has not resulted in a waiver and giving that determination preclusive effect in any other state or federal proceeding) is not limited to inadvertent disclosures. Therefore, parties may draft protective orders to cover any disclosure of protected materials. As the Advisory Notes explain, "the court order may provide for return of documents without waiver irrespective of the care taken by the disclosing party."

Second, protective orders do not need to be agreed to by the parties. The court may enter a protective order on a motion from either party or on the court's own motion. Therefore, if it is not possible to get agreement as to broad language sought by a producing party, it may be possible to convince a court that such language is necessary, given, for example, the size of the production or the time within which documents must be produced.

Actions to Take at the Time of Document Review.

- **Develop a protocol for review.** Although the rule is intended to minimize costs associated with electronic production, courts at times have not allowed parties to get away with only cursory reviews and searches. Under the rule, a court must determine whether the holder of the privilege "took reasonable steps to prevent disclosure." The term "reasonable steps" is undefined, but the Advisory Committee Notes provide a non-dispositive and non-mandatory list of factors that a court might consider in making this determination. These include the scope of discovery, the extent of disclosure, the number of documents produced, the time constraints for production, the use of advanced analytical software applications and linguistic tools in screening for privilege and work product, and whether there is an "efficient system of records management before litigation."

The size of the production appears to be a significant factor in courts' determinations. Thus, for example, where a party produced only 850 pages of documents, the court noted that "[t]his was not a case in which the document was produced as part of a voluminous production," contrasting the situation with another case in which 22 privileged documents were mistakenly produced along with 16,000 other documents.[6] The courts generally have been more forgiving in the case of a large production and have suggested that a party producing only a relatively small number of documents should conduct some review and have a system and structure for identifying and segregating privileged documents. In determining whether reasonable steps were taken, courts have also considered whether documents were reviewed and Bates-stamped, and whether privileged documents were segregated by counsel in a separate location.[7]

Parties can select from a range of possible approaches, ranging from no review, to search terms, to spot-checking, to a more comprehensive analysis of all documents. Parties seeking to minimize time and expense may benefit from the use of a well-crafted, court-endorsed protective order that includes specific, detailed discussion of the treatment of produced materials—whether produced inadvertently or not.

Whatever kind of protocol for review is developed, it is generally useful to memorialize the protocol in writing. If search terms are to be used, for example, a memorandum, reviewed by counsel and technical professionals, that sets out the terms to be used and the procedures to be followed, may help in establishing that reasonable steps were taken. (Of course, parties should then ensure that they follow the protocol or that they revise the written protocol to confirm any procedural changes that circumstances warranted.)

- **In litigation over a privileged document, include a specific, detailed explanation of the protocol, including, but not limited to, the size of the production.**[8] When seeking the return of a privileged document, or to preclude the admission of such information, the producing party should provide an affidavit describing in concrete and specific detail the particular steps the party took to prevent inadvertent production and, if possible, how it was that, despite such efforts, the document nevertheless was produced. Lack of detail can defeat a motion for return. For example, where a party stated only that "'several reviews of the documents to be disclosed were undertaken, [and] this document was inadvertently produced,'" the court held that reasonable steps had not been taken to prevent disclosure. "There can be no reasonable efforts unless there are efforts in the first place."[9] Once you have gone through the trouble of developing a system to identify privileged

documents, be sure to explain those practices to the court, so that you can maximize the benefit from them.

Moreover, an affidavit generally should not rely solely on the number of documents produced. While courts have emphasized the importance of disclosing the size of the production—treating more leniently an inadvertent disclosure in the case of a large production than a smaller one—courts also have required more than simply this detail. In *Comrie v. Ipsco, Inc.*,[10] the court determined that privilege as to a single email communication was waived where defendants had produced 5500 documents and reviewed several thousand more. The court wrote:

> Although Defendants claimed they inadvertently produced documents, they failed, with the exception of stating the number of documents produced, to support that assertion with facts. Without such information, the Court cannot find that the Defendants met their burden to show either that the disclosure was inadvertent, or that Defendants took reasonable steps to prevent disclosure.[11]

- **Justify the use of non-lawyers to review documents.** In general, courts have rejected efforts by a party to claim that the use of non-lawyers to review documents renders a review unreasonable for purposes of Rule 502(b)(2). At the same time, however, courts have been similarly reluctant to grant across the board approval to the use of non-lawyers for reviews. Thus, while approving the use of non-lawyers, courts have used cautionary language and have stated that the type of individual conducting the review may be a relevant factor in evaluating whether reasonable steps were taken to prevent disclosure.[12] If possible, seek agreement in advance from your adversary, and perhaps even the Court, that it is reasonable to use non-lawyers in screening a production for privilege.

- **Determine whether you will be protected under the rule if no pre-production review is to be conducted.** There are times when a production is so massive that pre-production page-by-page document review is not economically feasible. When that happens, counsel should address this subject explicitly in the protective order to be entered in the case. However, be aware that courts have not yet made clear whether they will honor a non-waiver provision in a protective order or instead will apply Rule 502 to any waiver. Indeed, at least one court has disregarded a protective order under these circumstances.

In *Luna Gaming-San Diego, LLC v. Dorsey & Whitney, LLP*,[13] the parties had entered into a protective order signed by both parties and the magistrate judge; the order provided that the fact that a privileged document was produced would not constitute a waiver. Nevertheless, when a dispute arose over the inadvertent production of a set of documents, the court held that the protective

Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(a) DISCLOSURE MADE IN A FEDERAL PROCEEDING OR TO A FEDERAL OFFICE OR AGENCY; SCOPE OF A WAIVER.—When the disclosure is made in a Federal proceeding or to a Federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a Federal or State proceeding only if:
  (1) the waiver is intentional;
  (2) the disclosed and undisclosed communications or information concern the same subject matter; and
  (3) they ought in fairness to be considered together.

(b) INADVERTENT DISCLOSURE.—When made in a Federal proceedingor to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if:
  (1) the disclosure is inadvertent;
  (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and
  (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

(c) DISCLOSURE MADE IN A STATE PROCEEDING.—When the disclosure is made in a State proceeding and is not the subject of a State-court order concerning waiver, the disclosure does not operate as a waiver in a Federal proceeding if the disclosure:
  (1) would not be a waiver under this rule if it had been made in a Federal proceeding; or
  (2) is not a waiver under the law of the State where the disclosure occurred.

(d) CONTROLLING EFFECT OF A COURT ORDER.—A Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other Federal or State proceeding.

(e) CONTROLLING EFFECT OF A PARTY AGREEMENT.—An agreement on the effect of disclosure in a Federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(f) CONTROLLING EFFECT OF THIS RULE.—Notwithstanding Rules 101 and 1101, this rule applies to State proceedings and to Federal court-annexed and Federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if State law provides the rule of decision.

(g) DEFINITIONS.—In this rule:
  (1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and
  (2) "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

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order did not govern the particular situation. Although the protective order stated that inadvertent disclosure "'shall not constitute the waiver of any privilege,'" the court held that the order did not address "under what circumstances failure to object to the use of privileged documents waives the privilege," and, even if the protective order did apply, the "repeated failures to object to the use of the Privileged Documents . . . waived any protections which [Luna Gaming] could have invoked under the Protective Order."[14] Some readers might view this decision as alarming evidence that courts will not protect parties unless they perform an organized, methodical review before turning over documents even in the presence of a protective order. However, such an approach is antithetical to the purpose of the rule. The more reasonable response to *Luna Gaming* should be to limit it to its facts—namely, when a party fails to object to the use of inadvertently produced privileged documents during depositions. It may also be that a more precise protective order, including discussion, for example, of the size of the production or the speed with which the production had to be completed, as well as the fact that no pre-production review would be conducted and stating that failure to object does not result in a waiver, could have helped avoid the result in Luna Gaming.

Actions to Take Following Production.

- **Is it necessary to continue to review the document production after production has been completed?** Prior to the adoption of Rule 502, at least one court had held:

> While Defendants' counsel did assert privilege and inadvertent production promptly after being notified by the Plaintiff of possible privileged/protected information, the more important period of delay in this case is the one-week period between production by the Defendants and the time of the discovery by the Plaintiff of the disclosures—a period during which the Defendants failed to discover the disclosure.[15]

This suggested that in addition to the need to perform pre-production review, a producing party retained the obligation to continue review even after production.

Although there was initially some concern that this obligation might survive the adoption of the rule, the Notes to the rule indicate that no such post-production review is necessary. However, they caution that "the rule does require the producing party to follow up on any obvious indications that a protected communication or information has been produced inadvertently." This "follow up" has been held to include not only the immediate request for the return of a document, but also a reassessment of a document production once a party has learned that a privileged document has been produced. While this does not appear to be the parade of horribles that might have resulted from the case holding discussed above, the specific extent of "follow up" that is necessary is still being worked out in the courts.[16] If you learn of an inadvertent production of your client's privileged documents, you should determine how the disclosure occurred and whether any other such protected documents were also inadvertently produced for the same reasons. This assessment (and appropriate corrective measures) should be documented in anticipation of litigation about the impact of the disclosure. You may also confirm the adequacy of your post-disclosure efforts by raising the subject with opposing counsel and the court, much the same as you would have raised other search-obligation issues before the start of document production.

- **How quickly and persistently do you need to respond once you discover a privileged document has been inadvertently produced?** Courts have made clear that a party must quickly and persistently pursue the return of a privileged or work-product protected document. Requests one week after discovery have been held reasonable.[17] However, objections must be raised at a deposition if a privileged document is produced there.[18]

Courts also have emphasized *how* a party rectifies an inadvertent disclosure can be as important as *how quickly* it does so. A party that discovers that a document has been inadvertently produced must act quickly to notify the other side, demand the return of the document, and, if necessary, seek assistance from the court in order to effectuate the document's return.

What Rule 502 Doesn't Do

Although the steps described above can help a party achieve the maximum protection and assistance from Rule 502, the rule leaves open various questions, and other potential pitfalls remain.

Selective Waiver. Rule 502 does not address the voluntary provision of information in connection with, for example, a government investigation, such as disclosures made in an antitrust amnesty submission. There was some hope that Rule 502 might endorse "selective waiver," by which an intentional disclosure of privileged documents to a government agency by a party cooperating with an investigation would not waive privilege over those documents in, for example, subsequent follow-on civil litigation. Congress, however, declined to address this issue in the rule.[19] While, as noted above, Rule 502 may protect against subject matter waiver when documents are inadvertently produced to the government in connection with an investigation, it does not protect against waiver when documents are deliberately produced. Parties may try to reach an agreement with the government under which privileged documents would be returned and the privilege would not be deemed waived, but it is not clear whether the government will enter into such agreements or, in the absence of a court order, how much weight such agreements would carry.

Use of Information in Privileged Documents. The rule makes no effort to limit a party's strategic choices based on what he or she has learned from an inadvertent disclosure. Although a particular document might be returned and inadmissible because its disclosure was inadvertent, the disclosing party still must live with the fact that the other side now knows that the document exists and is fully aware of its contents.

Other Privileges Are Not Covered. By its terms, Rule 502 addresses only attorney-client privilege and work product protection. Therefore, any disclosed documents that might be subject to another privilege would not have any protection under the rule. Parties may want to address these issues through the inclusion of language in a protective order.

"Reasonable Steps" May Be an Arbitrary Term. As discussed above, the Advisory Notes to subsection (b) of the rule discuss various factors on which courts should rely in determining whether there has been a waiver, including the scope of discovery, the

extent of disclosure, the size of the production, and the time constraints on the production, but they emphasize that the determination must be made on a case-by-case basis. Therefore, even a company that takes numerous steps to protect itself may find that a particular judge weighs the various factors differently. One court, for example, found that four of the five factors it considered weighed in favor of finding a waiver, but then, based on the fifth factor, the interests of justice, determined that there had been no waiver.[20] While this result may have been reassuring to a producing party, it nevertheless highlights the potentially arbitrary nature of the determination, as well as the risk that a waiver determination might vary significantly from forum to forum. At this time, case law interpreting Rule 502 is concentrated in the district courts; additional predictability may develop if waiver determinations reach the appellate courts.

Protective Orders Under Rule 502(d) Are Limited to Orders in Connection "with the Litigation Pending Before the Court." An agreement entered into between the government and a party during an investigation is not enforceable under the rule unless there is litigation pending before the court. While it is possible that a party could initiate litigation through, for example, a motion to quash a subpoena, in order to obtain a court-approved protective order, in many instances that avenue may not be open as a practical matter (for example, where the producing party does not want to risk a nonpublic investigation's becoming public).

It Is Unclear Whether the Rule Will, in Practice, Apply to States. The rule explicitly is intended to apply to state proceedings. However, it remains to be seen whether states will abide by the rule's provisions.[21] In addition, although a waiver in a state proceeding is protected in a federal proceeding, there is no "state-to-state" protection, so an inadvertent disclosure protected in one state (and therefore in a federal proceeding under subsection (c)) might be deemed a waiver in a proceeding in another state absent additional protection through that second state's procedural rules or case law.

Conclusion

Rule 502 provides some protection for producing parties and, by taking various steps, those parties may seek to ensure that they achieve the maximum benefit from the rule, protecting their privileged documents and perhaps minimizing some of the exorbitant costs of discovery. However, the rule does not resolve all of the problems associated with the inadvertent disclosure of protected documents or all of the costs necessary for document review, and a number of risks remain. Disclosing parties must continue to be wary even after the adoption of Rule 502. ■

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1 Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1164 (D.S.C. 1974).

2 *See* Joint Written Submission of Anne Kershaw and Patrick L. Oot, Esq., to Peter G. McCabe, Secretary Committee on Rules of Practice and Procedure, *available at* http://www.electronicdiscoveryinstitute.com/pubs/Joint_Written_Submission_of_Anne_Kershaw_and_Patrick_Oot_(5).pdf (dated February 22, 2007).

3 *See, e.g.*, PaineWebber Group, Inc. v. Zinsmeyer Trusts P'ship, 187 F.3d 988, 991 (8th Cir. 1999) ("The attorney/client privilege is waived by the voluntary disclosure of privileged communications, and courts typically apply such a waiver to all communications on the same subject matter.").

4 The rule adds further protection if the state's procedure is more protective of the privilege: if there would be no waiver under the state's law, then there is likewise no waiver under Rule 502.

5 *See* Cleancut, LLC v. Rug Doctor, No. 2:08-cv-836, 2010 WL 149877 (D. Utah Jan. 14, 2010).

6 DJ Coleman, Inc. v. Nufarm Americas, Inc., No. 1:08-cv-051, 2010 WL 731110 (D.N.D. Feb. 25, 2010).

7 Njenga v. San Mateo County Superintendent of Schools, No. C-08-04019 EDL, 2010 WL 1261493 (N.D. Cal. Mar. 30, 2010).

8 Although Rule 502 leaves open the question of which party has the burden of establishing waiver, relying on pre-Rule 502 case law, courts have held that the burden is on the party asserting the privilege. *See, e.g.*, Allan v. Christian Audigier, Inc., 263 F.R.D. 564, 565-66 (C.D. Cal. 2009) (citing *In re* Sulfuric Acid Antitrust Litig., 235 F.R.D. 407, 417 (N.D. Ill. 2006)).

9 Amobi v. District of Columbia Dep't of Corrections, 262 F.R.D. 45, 54–55 (D.D.C. 2009).

10 Comrie v. Ipsco, Inc., No. 08 C 3060, 2009 WL 4403364 (N.D. Ill. Nov. 30, 2009).

11 *Id.* at *2. The parties in *Comrie* had entered into a protective order which stated "how to mark confidential documents and describe[d] the procedures for 'clawing back' documents." It also stated that the provisions of Rule 502 would "'apply to and govern the effect of the disclosure of communications or information covered by the attorney-client privilege.'" *Id.* at *1. Nevertheless, the court found: "Although the protective order provides a method for marking documents, it does not detail the procedures or methods for reviewing them." *Id.* at *2. Such a description may seem unnecessary given the Advisory Committee Notes that, as discussed above, state that a court order may provide for the return of documents without waiver "irrespective of the care taken by the disclosing party," but in this case, the lack of such a description was apparently damaging to the producing party.

12 *See, e.g.*, Coburn Group, LLC v. Whitecap Advisors LLC, 640 F. Supp. 2d 1032, 1039 (N.D. Ill. 2009) ("Although the experience and training of the persons who conducted the review is certainly relevant to the reasonableness of the review, this court joins with *Heriot* in declining to hold that the use of paralegals or non-lawyers for document review is unreasonable in every case."); Heriot v. Byrne, 257 F.R.D. 645, 660 (N.D. Ill. 2009).

13 Luna Gaming-San Diego, LLC v. Dorsey & Whitney, LLP, No. 06cv2804 BTM (WMc), 2010 WL 275083 (S.D. Cal. Jan. 13, 2010).

14 *Id.* at *4.

15 Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251, 263 (D. Md. 2008).

16 *See Luna Gaming-San Diego*, 2010 WL 275083, at *6 (holding that once a producing party learned that a privileged document had been inadvertently turned over, "Luna Gaming should have taken prompt and diligent steps to reassess its document production."); *see also* United States v. Sensient Colors, Inc., No. 07-1275 (JHR/JS), 2009 WL 2905474, at *5–*6 (D.N.J. Sept. 9, 2009) (holding that waiver occurred because the producing party failed to promptly reassess its production after it learned of an inadvertent disclosure); Preferred Care Partners Holding Corp. v. Humana, Inc., 258 F.R.D. 684, 700 (S.D. Fla. 2009) ("In light of the fact that Humana was aware that it inadvertently produced a number of documents which it believed to contain privileged information, Humana had an obligation . . . to ensure that no additional privileged documents were divulged.").

17 *See Njenga*, 2010 WL 1261493, at *17 n.2.

18 *See, e.g.*, *Luna Gaming-San Diego*, 2010 WL 275083, at *6.

19 For an extensive discussion of selective waiver, see *In re* Initial Pub. Offerings Sec. Litig., 249 F.R.D. 457 (S.D.N.Y. 2008). Certain practitioners objected to Rule 502's addressing selective waiver on the theory that no production to the government was, in fact, voluntary. *See id.* 249 F.3d at 463–64.

20 Rhoads Indus., Inc. v. Bldg. Materials Corp., 254 F.R.D. 216 (E.D. Pa. 2008).

21 As of this date, no state cases appear to have addressed this issue.