New Bad Idea: Claiming You Can Produce ESI as PDF's because "Native File" is "Ambiguous"

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In *Cenveo Corp. v. Southern Graphic Sys.,* 2009 U.S. Dist. LEXIS 108623 (D. Minn. Nov. 18, 2009), the Defendant propounded the following discovery request:

"Defendant requests that these documents be produced in native format with all attachments in native format." *Cenveo Corp.,* at *2.

The Plaintiff produced all electronically stored information as PDF's. *Cenveo Corp.,* at *2.

The Plaintiff argued (and probably very forcefully) that since the Defendants did not define "native format," the PDF production complied with Federal Rule of Civil Procedure Rule 34(b)(2)(E)(ii). *Cenveo Corp.,* at *3. This Rule provision states the following:

"If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms." Fed. R. Civ. P. 34(b)(2)(E)(ii).

The Plaintiff's argument that the "failure" to define "native format" thus allowed them to produce ESI as PDF's was not quite the *Hindenburg* of "form of production" arguments, but it did go down in flames.

The Court held that the term "native format" was "unambiguous." *Cenveo Corp.,* at *3-4. Moreover, the Court found the Plaintiff failed to comply with the Defendant's request for native file production and Federal Rule of Civil Procedure Rule 34(b)(1)(C), which allows a requesting party to specify the form of production. *Cenveo Corp.,* at *4.

The Court recounted multiple cases and several secondary sources which define "native format." The reoccurring theme for the definition of "native format" is the "default format of a file," which is "typically provided through the software program on which it was created." *Cenveo Corp.,* at *4, citing *Aguilar v. Immigration and Customs Enforcement Div. of U.S. Dept. of Homeland Sec.,* 255 F.R.D. 350, 353 n.4 (S.D.N.Y. 2008).

The Court held that Plaintiff had to produce (or re-produce) responsive electronically stored information in native file format. *Cenveo Corp.,* at *7-8. The Court further found that the Defendant's requests were neither overly broad or unduly burdensome. *Id.* Moreover, the Plaintiff offered no argument why it could not produce the ESI in native file format. *Id.* As such, the Plaintiff was required to produce their electronically stored information as native files.

Bow Tie Thoughts

Courts are not tolerating parties who play games such as "I don't know what you mean by 'native format'?" Electronically stored information is part of everyday life with people using Droids and sending mobile Facebook updates. While there will always be gamesmanship in litigation, claiming "native format" is an undefined term is like asking, "what do you mean by 'paper'?"