

Client Bulletin

December 2006

Application Of The E-Discovery Amendments To The Federal Rules Of Civil Procedure: Could They Retroactively Apply To Actions Pending Before The Amendments Went Into Effect?

The Federal Rules of Civil Procedure were amended on December 1, 2006 to address “electronically stored information” (*i.e.*, “writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained...”) Under amended Rule 26(a)(1)(B), a party must disclose “all documents, electronically stored information, and tangible things” that it may use to support its claims or defenses without awaiting a discovery request. Furthermore, under amended Rule 33, a party now has the option to produce business records “derived or ascertained from...electronically stored information” in certain circumstances. In addition, amended Rule 34 now expressly provides that a party can be required to produce “electronically stored information” in response to document requests. Similarly, amended Rule 45 provides that such information can be sought by subpoena.

These amendments, along with the corresponding e-discovery amendments to Rules 16 and 37, apply to all actions commenced in federal court on or after December 1, 2006. However, it also is possible that these amendments could retroactively apply to actions pending when the amendments went into effect.

The determination whether the amendments could be given retroactive application is based upon the interpretation of the Rules Enabling Act, by which Congress delegated to the U.S. Supreme Court the authority to make amendments to the Federal Rules of Civil Procedure retroactive, and the Supreme Court promulgating order relating to the amendments. *See* 14 James Wm. Moore et al., *Moore’s Federal Practice* § 86.02-.03 (3d ed. 2006); *see also* *Lundy v. Adamar of New Jersey Inc.*,

Civ. A. No. 91-3183, 1993 WL 724802, at *6 (D.N.J. Mar. 31, 1993) (“Whether an amendment to the Federal Rules of Civil Procedure should receive retroactive application depends upon the interpretation given to the Rules Enabling Act”), *aff’d*, 34 F.3d 1173, 1187 n.6 (3d Cir. 1994).

The Enabling Act provides that the Supreme Court “may fix” the extent to which a rule shall apply to pending proceedings, but that the court in which the case is pending must determine whether “the application of such rule in such proceedings would not be feasible or would work injustice, in which event the former rule applies.” *Lundy*, 1993 WL 724802, at *6; 28 U.S.C. § 2074(a) (West 2006). Furthermore, the U.S. Supreme Court, in the promulgating order relating to the e-discovery amendments, provided that the amendments “shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.” U.S. Order 6-20 (2006).

It thus seems likely that the amendments could retroactively apply to actions pending when the amendments went into effect. A more definitive determination whether this is a probable outcome in a particular action requires analysis of the case law in the jurisdiction where the action is pending addressing the Rules Enabling Act and the “just and practicable” language of U.S. Supreme Court promulgating orders.



If you have any questions or would like any further information about how to prepare your company for the discoverability of electronically stored information, please contact:

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