ARNOLD & PORTER LLP

CLIENT ADVISORY

April 2009

RECENT DECISIONS LIMIT "USUAL COURSE" PRODUCTION UNDER RULE 34

To minimize the expense and burden of responding to large-scale document requests, savvy litigants often invoke their option under Rule 34 to produce documents "as they are kept in the usual course of business," rather than "organiz[ing] and label[ing] them to correspond to the categories in the requests."

Two recent federal court decisions, disallowing such "usual-course" production, highlight a trend toward limiting producing parties' ability to invoke that cost-saving measure. *Ak-Chin Indian Community* v. *United States*[1] holds that, by reorganizing documents, a party may forfeit the usual-course production option. *Securities and Exchange Commission (SEC)* v. *Collins & Aikman*[2] holds that documents created or received in the course of non-routine activity, such as an investigation, may not qualify for usual-course production at all.

Fortunately, both decisions suggest measures that prudent companies can take to minimize the risk that usual-course production will be disallowed.

AK-CHIN INDIAN COMMUNITY v. *UNITED STATES*

In *Ak-Chin*, an Indian tribe sued the federal government for breach of fiduciary duty in managing assets held in trust for the tribe. Long before the litigation commenced, the government had transferred many relevant documents to the American Indian Records Repository (AIRR), which archives and manages documents from several government agencies in order to "accommodate research of those records." In the course of transfers to the AIRR, the government reorganized the documents and indexed them into a database called the Box Index Search System (BISS).

In the litigation, the government offered to produce documents as they were maintained "in the usual course" at AIRR, using the BISS database to identify boxes likely to contain relevant documents. After conducting some trial searches, the tribe objected to usual-course production, arguing that the BISS system could not reliably identify documents relating to particular tribes, that it was not possible to determine accurately the agency or office from which documents had been transferred, and that similar or identical queries of the BISS sometimes produced incongruous results.[3]

The court granted the tribe's motion to compel, holding that documents at the AIRR

1 *Ak-Chin Indian Community* v. *United States*, 85 Fed. Cl. 397 (2009), *amended by*, 85 Fed. Cl. 636 (2009).

2 *Sec. & Exch. Comm'n* v. *Collins & Aikman Corp.*, 2009 WL 94311 (S.D.N.Y. Jan. 13, 2009).

3 *Ak-Chin,* 85 Fed. Cl. at 399–402.

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did not satisfy the "usual course of business" requirement of Rule 34(b) and ordering the government to "produce the documents, organized and labeled to correspond to the categories in plaintiffs' requests" instead. The court determined that, once the documents had been "dissembled from their filing system at the agency office" and reorganized, they were no longer "kept in the usual course of business." The court explained that "documents in storage are no longer kept in the usual course of *business*, they are kept in the usual course of *storage*."[4]

The court made it clear that usual-course production remains available for archived documents in certain circumstances—when the producing party can show that the manner in which the documents are maintained in storage and the manner in which they were "kept in the usual course of business" are the same—but held that the documents housed at AIRR did not satisfy that requirement. In so holding, the court noted that the reorganization and indexing of the records in the transfer to AIRR made it impossible to retrieve information, such as reliable tribal identifiers, that would have been apparent had the government maintained the documents in their original locations.

Prior decisions, most notably the Northern District of Illinois' 2005 opinion in the *Sulfuric Acid*[5] litigation, have disallowed usual-course production for documents transferred to storage haphazardly and with no discernable organization. *Ak-Chin* extends such decisions to circumstances, in which documents have been purposefully organized and indexed for storage, in a way intended to "accommodate research," but that does not permit users to determine the original source of the documents or the way they were organized before the transfer.

In light of *Ak-Chin*, prudent parties transferring or reorganizing documents—whether for archiving, in the course of a merger or acquisition, or in order to accommodate research or another use of the document set—should take care to ensure not only that *some* organization is maintained in the transfer, but that *all* source information about the documents is preserved, preferably—as suggested in *Ak-Chin*—on a document-by-document, as opposed to a box-by-box, basis. Ideally, document-storage indices or databases should be designed to preserve the kinds of document-specific data that are routinely included in the "metadata" associated with electronic documents (*e.g.*, who created the document (and when), who received the document (and when), who modified the document (and when), where the document was located before it was sent to storage, and what other files or records relate to the document). At the very least, storage databases should include substantive information that would be reasonably apparent from the location or source of the hardcopy document in its original location, such as information that would be apparent from file jackets, drawer labels, or office descriptions.

SECURITIES EXCHANGE COMMISSION v. *COLLINS & AIKMAN CORPORATION*

In *Collins & Aikman*, the SEC responded to Defendant Stockman's document requests for SEC information on Collins & Aikman by producing its entire 1.7 million document investigative file (minus only privileged documents). The investigative file consisted of several Concordance databases, which the court described as an "omnibus collection of indices, investigative documents, scanned paper documents, and audio/visual media."[6] In responding to Stockman's document requests, the SEC stated that it "does not maintain a document collection relating specifically to the subject addressed," and proffered the documents in the manner in which they were kept by the SEC in the "usual course" of its business. Stockman objected to the production as a "document dump" and moved to compel the SEC to organize and label the documents to correspond to the 54 specific document requests. The SEC objected, pointing out that Stockman had the same ability to search the databases and organize the produced documents as the SEC.

Judge Scheindlin granted Stockman's motion to compel based on her analysis of Rule 34 and what constitutes the "usual course of business." Under Rule 34, the producing party must either organize and label documents according to the request to which they are responsive, or produce the documents "as they are kept in the usual course of

4 *Id.* at 400 (emphasis in the original; embedded quotation marks and citation omitted).

5 *In re Sulfuric Acid Antitrust Litigation*, 231 F.R.D. 351 (N.D. Ill. 2005).

6 *Collins & Aikman Corp.*, 2009 WL 94311, at *3.

business;" the rule provides no other option. As the court explained, the policy rationale is that, "regardless of the form chosen, the production will be useful to the requesting party, and neither choice will inject unnecessary time and cost into the litigation."[7] Because "usual course of business" is not defined in Rule 34 or the corresponding advisory committee notes, Judge Scheindlin turned to *Black's Law Dictionary* and to Federal Rule of Evidence 803(6), which creates an exception to the hearsay rule for records of a regularly conducted business activity. Drawing by analogy on Rule 803(6), Judge Scheindlin held that Rule 34 requires parties to meet either of two conditions if they wish to produce documents as "kept in the usual course of business"—they must either be "commercial enterprises or entities that function in the manner of commercial enterprises," or the records being produced must result from "regularly conducted activity."[8]

Turning to the SEC's production, Judge Scheindlin noted that the SEC, in its investigatory capacity, was not functioning like a commercial entity and that investigations are, by their "very nature," *sui generis*, *ad hoc* undertakings rather than "routine and repetitive" activity.

> Where a producing party's activities are not 'routine and repetitive' such as to require a well-organized record-keeping system—in other words when the records do not result from an 'ordinary course of business'—the party must produce documents' …to correspond to the categories in the request.'[9]

Based on this reasoning, Judge Scheindlin concluded that the SEC needed to review and organize its production to correspond to the defendant's document requests.

The *Collins & Aikman* decision highlights the importance of being able to demonstrate that responsive documents were *created and compiled*—not merely *maintained*—in the "usual course of business." The less routine the activity leading to the creation or compilation of documents, the less likely a court will permit usual-course production of the documents. Accordingly, prudent companies should "routinize" as much activity as possible, by establishing policies and procedures that clearly delineate how documents will be created, organized, and maintained for recurrent but atypical activities, such as internal investigations or due diligence reviews.

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Many litigants have relied on producing documents as maintained in the "ordinary course of business" to mitigate the tremendous burdens in cost and time of document-by-document review and categorization. The adoption of Rule 502 of the Federal Rules of Evidence, which protects against waiver in the event of an inadvertent disclosure of privileged material to an opposing party, strongly mitigates one of the most significant disincentives for producing documents as "kept in the ordinary course of business." The *Ak-Chin* and *Collins & Aikman* decisions highlight limitations litigants may face in availing themselves of this option. The analysis and the rationales offered for the holding in each case offer potential litigants guidance on steps they can take to maximize their ability to realize the savings that accompany producing documents as "kept in the ordinary course."

Arnold & Porter LLP attorneys, who have studied *Ak-Chin*, *Collins & Aikman* and similar cases, stand ready to advise clients seeking to adapt their record retention policies and document organization systems, so as to reduce the risk that a court would disallow usual-course production of documents in litigation.

We hope that you have found this client advisory useful. If you have additional questions, please contact your Arnold & Porter attorney or:

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7 *Id.* at *6.

8 *Id.* at *7.

9 *Id.* at *7.