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## The State of Louisiana and the Vermilion Parish School Board v. Louisiana Land and Exploration Company

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**METADATA AND PROCEDURAL LAW: *THE STATE OF  
LOUISIANA AND THE VERMILION PARISH SCHOOL BOARD  
V. LOUISIANA LAND AND EXPLORATION COMPANY***

Kadence Haskett\*

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I. INTRODUCTION

As the world continues to evolve, new legal issues expand along with it. In this technology-centered world, courts are faced with new challenges and must be ready to adapt and apply new concepts. One of these new concepts is document metadata, the hidden part of electronic documents that do not appear when in print, and can be useful when researching documents and sorting the data they contain.<sup>1</sup>

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1. For a definition of “metadata,” *see infra*, § IV.A.

When documents are exchanged in the discovery phase of cases, must they be produced in the original electronic form possibly giving access to the metadata or can they simply be in printed (or electronic) but non-searchable form? The role of document metadata continues to present a problem for courts as they try to determine whether metadata should be included or scrubbed from any document production. The Louisiana Third Circuit Court of Appeal attempts to tackle the procedural issues metadata creates in the process of producing documents for a discovery request. Even after *The State of Louisiana and the Vermilion Parish School Board v. Louisiana Land and Exploration Company, et al.*,<sup>2</sup> Louisianans are left with more questions than answers.

## II. BACKGROUND

In *Louisiana Land & Expl. Co.*, the plaintiffs sued for property damage caused by the defendants' oil and gas exploration activities. The trial court found Union Oil Company of California (UNOCAL), one of the defendants, liable for environmental damages, and referred the case to the Louisiana Department of Natural Resources, Office of Conservation to develop a remediation plan for the environmental damage.

The legal issue of this case is procedural and stems from the motion for costs and attorney's fees by the plaintiffs. In response to the defendant's request for discovery relating to the motion, the plaintiffs produced 153 separate spreadsheets that totaled 1,341 pages.<sup>3</sup> However, the defendants complained that the plaintiffs had converted the spreadsheets into non-searchable, static image portable document formats (PDF). That is, UNOCAL argued that the plaintiffs removed or altered the metadata from their documents, thereby

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2. *The State of Louisiana and the Vermilion Parish School Board v. Louisiana Land & Exploration Company*, 17-755 (La. App. 3 Cir. 12/20/2017); 2017 WL 6503800.

3. *Id.* at 2.

limiting their search capabilities and placing a burden on the defendants. Accordingly, UNOCAL filed a motion to compel the production of the spreadsheets in their original electronic form, which the trial court denied. UNOCAL sought review of the trial court's ruling on this issue.

### III. DECISION OF THE COURT

After many well-reasoned arguments on both sides, the Third Circuit Court of Appeal held that the trial court did not err or abuse its discretion in denying UNOCAL's motion to compel. The appellate court reasoned that UNOCAL had not shown how or why the information produced in a PDF format was not satisfactory or reasonably useable to its defense.<sup>4</sup>

### IV. COMMENTARY

#### A. *The Basics of Metadata*

It is important to understand the basics of the technology discussed in this case before determining how it impacts legal procedure. While not a new concept within the technology industry or related fields, metadata has started to play a larger role in the legal world. Metadata refers to information that is embedded in the native format of documents that are transmitted in electronic form.<sup>5</sup> Metadata is used to create a document or file and will reflect any modifications to the document. It also improves the ability to efficiently access, search and sort a large number of documents, and provides the ability to view the underlying formula output in each cell. If the document is printed or converted to a static image file, the metadata is no longer accessible.

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4. *Id.* at 10.

5. FRANK L. MARAIST, N. GREGORY SMITH, JUDGE THOMAS F. DALEY, THOMAS C. GALLIGAN, JR. & CATHERINE M. MARAIST, 21 LOUISIANA CIVIL LAW TREATISE—LOUISIANA LAWYERING §9.4 117 (SUPP. 2018) (Thomson/West 2007).

The American Bar Association Model Rules of Professional Conduct and their comments, which are in force in Louisiana, address the ethical issue of how an attorney should respond if they were to unknowingly send or receive documents with important metadata intact.<sup>6</sup> However, the issue in this case developed because of the intentional scrubbing of metadata, and the ramifications of that scrubbing in the context of document production for discovery purposes.

*B. The Louisiana Code of Civil Procedure*

Metadata of electronic documents becomes a potential issue for litigation when dealing with production of discovery under the Louisiana Code of Civil Procedure article 1462. Code. Civ. Pro. Art. 1462(c) reads:

A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories of the request. If a request does not specify the form or forms for producing information, including electronically stored information, a responding party shall produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable. When electronically stored information is produced, the responding party shall identify the specific means for electronically accessing the information.

This code article first requires that any documents should be produced in the same format that they are kept in the usual course of business. As the defendants argued, this suggests that any producible Excel spreadsheets should not be converted to PDF files before being handed over, because they are kept as Excel spreadsheets in the usual course of the plaintiffs' business.<sup>7</sup> Unfortunately, the Third Circuit Court of Appeals did not address this issue.

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6. MODEL RULES OF PROF'L CONDUCT r. 4.4 cmt. 2 (AM. BAR ASS'N 1983).

7. *Louisiana Land & Expl. Co.*, 2017 WL 6503800 at \*3.

The defendants also argued for the interpretation of the second sentence of art. 1462(c), stating that even though they did not request a specific form of producing the information, the plaintiffs should have produced it in the form in which it was ordinarily maintained or a form that is “reasonably usable.” The next logical question is: What is “reasonably usable”? The Third Circuit agreed that it would be burdensome for the defendants to convert the produced Excel spreadsheets back into searchable text format, but they overlooked this fact by concluding that the defendants failed to show “how or why the information produced in a PDF format is not satisfactory or reasonably useable.”<sup>8</sup>

Plaintiffs in this case argued that the PDF format is so commonly used in civil discovery that litigation has not ensued about whether this format complies.<sup>9</sup> Once again, the Third Circuit did not address this issue once they determined that the original form of the documents would contain attorney work product.

### *C. Attorney Work Product*

Under the Louisiana Code of Civil Procedure, attorney work product is not discoverable.<sup>10</sup> Attorney work product is any part of the writing, or electronically stored information that reflects the mental impressions, conclusions, opinions or theories of an attorney.<sup>11</sup> The court did not accept the defendant’s arguments above based on the plaintiffs’ counter-argument that the Excel spreadsheets (with metadata intact) contained attorney client work product protected under the Louisiana Code of Civil Procedure. Putting aside the issue of the format of the requested documents, in this case, the plaintiffs argued that their Excel spreadsheets contained privileged information. While this may be the case, not all of the information in the document is attorney work product, and therefore,

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8. *Id.* at 10.

9. *Id.* at 7.

10. LA. CODE CIV. PROC. ANN. art. 1424(A) (2007).

11. *Id.*

some of it would be discoverable. This further shows issues with the production of metadata; we would presumably also need a general rule regarding how to handle issues relating to attorney work product. When dealing with physical hard copies of documents, one can easily leave out work product out or redact it. On the other hand, the disposal of metadata is not as easy. Perhaps the solution would be to create a log of redacted items, much like when dealing with medical records. Once again, the civil law, at least in Louisiana, does not have an answer to these procedural questions and will soon need one.

#### *D. The Federal Common Law Solution*

In this case, both plaintiffs and defendants relied on United States federal decisions, attempting to apply common law principles to this civil law case. The most important argument and source mentioned is the Federal Rule of Civil Procedure Rule 34 (hereinafter “Fed. R. Civ. P. 34”), which is said to be analogous to Louisiana Code of Civil Procedure art. 1462. The defendants in our case attempted to analyze the advisory committee notes of Fed. R. Civ. P. 34 in which the committee stated the following:

*But the option to produce in a reasonably useable form does not mean that a responding party is free to convert electronically stored information from the form in which it is ordinarily maintained to a different form that makes it more difficult or burdensome for the requesting party to use the information efficiently in the litigation. If the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature.<sup>12</sup>*

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12. FED. R. CIV. P. 34 committee’s notes to 2006 amendment, subdivision (b) (emphasis added).

While federal court cases are persuasive in Louisiana courts, they are not controlling. The Third Circuit seems to refuse to interpret and apply the Federal Rules of Civil Procedure, but it may still play a role in helping to come up with a solution for Louisiana.

#### V. CONCLUSION

The Third Circuit Court of Appeals seems to side-step the issue of producing electronic documents with or without metadata by stating that the defendants never fully proved their case. Perhaps if UNOCAL had shown how, or why, the information produced in a PDF format is not satisfactory or reasonably useable, the Court would have ruled differently requiring the production of the Excel Spreadsheets with metadata. On the other hand, had defendants requested the documents with the metadata intact, would it still be an issue?

Unfortunately, the Court did not give a full application of the Louisiana code article, interpreting it in the light of the technological changes. The Court also had the opportunity to develop and impact Louisiana law by interpreting and applying the Federal Rules of Civil Procedure. Regretfully, since the Court did not utilize these options, the standard for producing document metadata in Louisiana will continue to be determined on a case-by-case basis.

