Knapp on EU Data Protection and US Discovery

Kristen A. Knapp has posted *Enforcement of U.S. Electronic Discovery Law Against Foreign Companies: Should U.S. Courts Give Effect to the EU Data Protection Directive?* on SSRN.

Although the U.S. Supreme Court first considered the conflict between U.S. discovery rules and foreign non-disclosure law in 1958, a clear standard regarding how to enforce U.S. law against foreign domiciled companies has yet to emerge. As a result of the 2006 ammendments to the U.S. Federal Rules of Civil Procedure concerning electronic discovery ("e-discovery") procedures "[m]ore and more companies with global operations are finding themselves enmeshed in e-discovery that requires a greater understanding of the issues and laws from a global perspective" because "[i]t is challenging to navigate and manage e-discovery when you have parent companies based overseas or U.S.-based companies with foreign subsidiaries."

This paper looks at, in light of the 2006 amendments and the lack of case law regarding the affect of the 2006 amendments, whether the enforcement techniques, as applied to "paper" discovery should be applied to e-discovery and whether there is anything specific to the nature of e-discovery that necessitates a change in the application of the law. Specifically, the paper addresses how the European data privacy regime may affect the application of paper discovery enforcement techniques to e-discovery. The paper suggests that it would be unwise for U.S. courts to afford the European Data Privacy regime significant deference. Instead, the European Data Privacy regime should be treated with skepticism, similarly to how the U.S. courts have viewed "blocking statutes" contained in foreign law. In particular, treating the EU Data Privacy regime with skepticism will help to prevent the creation of perverse incentives for companies to store their data abroad that hope to avoid legitimate discovery production requests under the Federal Rules of Civil Procedure, by raising the transaction costs for such behavior.

The paper can be freely downloaded here.