Discovery Games in Gaming Litigation

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Discovery games were taking place in a gaming case in Mississippi.

The Plaintiffs brought a motion to strike and a motion for sanctions for discovery misconduct in responding to requests for electronically stored information. *Maggette v. BL Dev. Corp.,* 2009 U.S. Dist. LEXIS 116789 (N.D. Miss. Nov. 24, 2009). The Court did not grant the sanctions motion, but took a direct shot across the Defendant's bow, stating:

> This is not to say that sanctions will not ultimately be found to be warranted. The court has already imposed sanctions upon defendants for what it views as a casual, if not arrogant, rebuff to plaintiffs' repeated efforts to obtain information which is ordinarily easily produced in litigation. *Maggette* at *6, fn 1.

The Court had earlier ordered the Defendants to ". . . search any available databases for responsive information and produce it to the plaintiffs." *Maggette* at *7.

The Defendants claimed they had search for responsive ESI pursuant to the Court order, but failed to state what databases were searched, what methodology was used, what search terms were deployed or any expert report validating the position there was no responsive electronically stored information. *Maggette* at *7-8.

The Court's frustration was evident as it summarized the discovery issues at bar:

Further, the defendants have not provided any concrete reason or rationale for the numerous discrepancies within their discovery responses and the deposition testimony of their own employees. Nor has defendant articulated a satisfactory response to the court's doubts expressed at the hearing that corporations as large and sophisticated as the defendants, which operate numerous gaming facilities across the country with various operations centers, do not have either paper files, electronic files or information or — even in light of Hurricane Katrina — backup measures and files for at least some of the information requested by plaintiffs. *Maggette* at *8.

Preservation Roulette: A Review

The Court noted that the Fifth Circuit Court of Appeals had not stated any standards for the preservation of electronically stored information and corresponding sanctions for the loss of ESI. *Maggette* at *8.

The Court looked to the *Zubulake* line of cases for guidance, citing the basic preservation obligation that the duty to preserve triggers when "the party has notice of the litigation or when it should have known that the evidence may be relevant to future litigation." *Maggette* at *8-9, citing *Zubulake v. UBS Warburg, LLC,* 220 F.R.D. 212, 216 (S.D.N.Y.2003).

Once there has been a triggering a reasonable anticipation of litigation, a party must suspend its records information management/destruction policy and enact a litigation hold. *Maggette* at *9.

Order for 3rd Party e-Discovery Expert

The Court had a big problem: It appeared the Defendants had not met their discovery obligations; however the Court could not hold so with certainty. *Maggette* at *10. As the Courts are to find the truth of an issue, the Court declined to rule on whether "the standards for preservation of electronic evidence and disclosure of all relevant evidence have been met or not met…" *Maggette* at *11.

In what some experts would call a truly magnanimous Christmas gift, the Court stated it could not make "such a determination without further review by a third-party expert in the field of electronic discovery and who has knowledge of the gaming industry." *Maggette* at *11.

Before any skeptics yell "Bah, Humbug," the Court has very valid points in using a third-party expert to determine electronic discovery issues.

The Court stated the Defendants had "failed to satisfy the court's inquiries calculated to determine the legitimacy of their searches to date or whether they have in good faith attempted to use preservation techniques reasonably available to them…" right before ordering the costs to be paid by the Defendants. *Maggette* at *11.

The Court ordered the parties to agree on an expert who not only had knowledge or electronic discovery, but also the gaming industry, to "determine whether the defendants have met the standards for preservation of electronic evidence and disclosed all relevant evidence." *Maggette* at *11.

Bow Tie Thoughts

When I was a young associate doing construction defect litigation, I did not personally rip out windows with a crowbar for destructive testing. We had experts who could testify in court as to industry standards and how the work performed met or fell below those standards. The same is true for issues with electronically stored information.

There are situations with electronic discovery requiring people with knowledge of SQL databases, CCE's for collection of electronically stored information and strategies on what search terms will be effective or not. This is a reality of the "digital age." The Court in *Maggette* not only realized this fact, but that it was necessary to have someone knowledgeable of the gaming industry as well.