

Technological Incompetence Doesn't Excuse Discovery Failures

By Gareth Evans

In imposing strict evidentiary and monetary sanctions for a party's repeated failure to produce requested electronically stored information, the Delaware Court of Chancery recently observed that counsel's "professed technological incompetence is not an excuse for discovery misconduct."

In *James v. National Financial LLC*, C.A. No. 8931 VCL (Del. Ch. Dec. 5, 2014), Vice Chancellor J. Travis Laster found fault both in the lead defense counsel's explanation that he was "not computer-literate" and in Delaware counsel's failure to play an active role in the discovery process. The ruling illustrates the importance of having counsel or consultants with e-discovery expertise involved in Delaware business litigation.

James involves class action claims for violations of the Delaware Consumer Fraud Act and the federal Truth in Lending Act. Doing business as Loan Till Payday LLC, the defendant advertises, markets and makes small-dollar, high-interest loans commonly known as "payday loans."

The name plaintiff, Gloria James,

borrowed \$200 to pay for rent and groceries. The loan agreement imposed "onerous terms," according to the court. "It contemplated 26 biweekly payments of \$60 with a final balloon payment of \$260." The total payments added up to \$1,620, with finance charges of \$1,420. The annual percentage rate (APR) was a whopping 838.45 percent.

The plaintiff alleged that National Financial LLC violated the Truth in Lending Act's requirement that a loan's APR must be disclosed accurately in the loan documents. In response to a motion to compel, the court ordered National to produce electronically stored information about each of the loans it made between September 2010 and September 2013, including the amount financed, the payment schedule, the total payments, the finance charges and the APR.

National initially produced a spreadsheet that purported to include the APR for each loan, but it failed to include any information in the columns for payment schedule, total amount of payments, and finance charges



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(from which the stated APR could have been verified). Moreover, the APRs listed in the spreadsheet did not match the APRs in hard copies of loan agreements, to the extent they had been produced.

National's principal testified that he personally created the spreadsheet by exporting data from its loan database system. He initially attributed the discrepancies in the APRs to errors he must have made in exporting the data, but later suggested that the errors were due to "software updates." National's counsel agreed to provide an updated spreadsheet, but later reneged.

James brought a second motion

to compel, which the court granted. The court ordered National to produce an updated spreadsheet with accurate APRs and the additional loan history information that was omitted in the initial spreadsheet. The court also required National to retain an IT consultant to extract the data from National's database system and to provide an affidavit describing the procedures followed to extract the data.

When National provided an "updated" spreadsheet, however, it still did not contain either the required loan history information or accurate APRs. Moreover, rather than providing an affidavit from the IT consultant, National's counsel produced a letter from the consultant that only addressed the burden of converting information from hard copy to digital format.

It became apparent that National had not asked the consultant to extract the required information. Indeed, National's counsel represented that the APR information was not available in digital form, which was inconsistent with previous discovery responses and deposition testimony that the information was available on National's system.

The court, not surprisingly, did not look kindly on these developments. In contrast with the duties of "candor and fair-dealing," which "are, or should be ... required attributes of those who resort to the judicial process" in Delaware, the court cited the "series of evolving explanations" that could

not be reconciled with one another and "the casual relationship that National and its counsel seem to have with the truth."

In its ruling on the plaintiff's motion for sanctions, the court stated, "Entry of a default judgment would be warranted on these facts." Nevertheless, it imposed the lesser—but still very serious—sanction of a deemed admission that National did not accurately disclose APRs within the tolerances of the Truth in Lending Act.

In doing so, the court stated that it was heeding the proscription of the Delaware Supreme Court that default judgment is "the ultimate sanction for discovery violations and should be used sparingly." Additionally, the court based its ruling on the guidance of state Supreme Court Chief Justice (then-Vice Chancellor) Leo E. Strine Jr., writing in *TR Investors LLC v. Genger*, C.A. No. 3994 VCS (Del. Ch. Dec. 9, 2009), that the appropriate sanction should "deprive [the defendant] of any evidentiary gaps that his own misbehavior might have caused."

The court imposed monetary sanctions as well, holding that they are mandatory for violation of a discovery order.

The court expressed particular chagrin at the lead counsel's explanation: "I have to confess to this court, I am not computer-literate. I have not found presence in the cybernetic revolution. ... This was out of my bailiwick." The court

referred to amended Comment 8 to Rule 1.1 of the Delaware Lawyers' Rules of Professional Conduct, which addresses competence, including technological competence, and states that "a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology."

Quoting a law review article, the court stated that "deliberate ignorance of technology is inexcusable. ... If a lawyer cannot master the technology suitable for that lawyer's practice, the lawyer should either hire tech-savvy lawyers tasked with responsibility to keep current, or hire an outside technology consultant."

Finally, the court expressed displeasure with local Delaware counsel's failure to play an active role in the discovery process, stating, "Had Delaware counsel been more involved, the current regrettable situation might have been avoided." It explained that the Court of Chancery does not recognize the role of purely local counsel and that "Delaware counsel are expected to police the behavior of their out-of-state colleagues," particularly in the discovery process.

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