



New Jersey Court Excuses Plaintiff from the Burden of Reviewing ESI from Unallocated Space

January 3, 2012

**I-Med Pharma Inc. v. Biomatrix, Inc., 2011 U.S. Dist. LEXIS 141614
(D.N.J. Dec. 9, 2011)**

Earlier this month, the United States District Court for the District of New Jersey ruled on whether the burden involved in reviewing the results received by a party after it used a series of broad search terms outweighed the benefit of conducting such a review.

The case involved the use of approximately 60 stipulated search terms, which an expert ran across all of the data on the plaintiff's computer system, including unallocated space. The search was not targeted to specific custodians, relevant time periods, or active files, but instead searched through the plaintiff's computer network. As stated by the court, "[t]he results should come as no surprise. The broad search terms hit millions of times across the large data set. In the unallocated space alone, the terms generated 64,382,929 hits. These hits represent an estimated 95 million pages of data."

After receiving the results, the plaintiff realized it should not have agreed to the use of such broad search terms without limiting the search to active files or a particular time period. Therefore, the plaintiff asked the Magistrate Judge in the case for relief from the stipulation. In ruling on whether conducting a privilege review of the large data set was overly burdensome, the Magistrate Judge found that:

1. "Good cause" existed to modify the original discovery order as the "burden on [the plaintiff]" would "outweigh any potential benefit that may result" ;
2. The defendants had not met its burden of demonstrating the complete relevancy of the information sought, including that the Defendant had not actually identified any information actually destroyed by Plaintiff; and
3. The overbroad search terms made the likelihood of finding relevant information that would be admissible at trial "minimal."

On appeal, a New Jersey district judge upheld the Magistrate Judge's decision. The court acknowledged the overwhelming burden – in both time and money – that would be placed on plaintiff if it had to review the documents from the unallocated space. Moreover, the court found that the money the plaintiffs spent to obtain the data "pale[d] in comparison" to the cost both parties would incur to review the same data. The court then analyzed whether the search terms the parties used are reasonable. In doing so, the court listed a variety of

factors, including:

- (1) the scope of documents searched and whether the search is restricted to specific computers, file systems, or document custodians;*
- (2) any date restrictions imposed on the search;*
- (3) whether the search terms contain proper names, uncommon abbreviations, or other terms unlikely to occur in irrelevant documents;*
- (4) whether operators such as “and”, “not”, or “near” are used to restrict the universe of possible results;*
- (5) whether the number of results obtained could be practically reviewed given the economics of the case and the amount of money at issue.*

Ultimately, the court upheld the Magistrate Judge’s order, and provided a cautionary message on the use of broad search terms: “while [the] Plaintiff should have known better than to agree to the search terms used here, the interests of justice and basic fairness are little served by forcing Plaintiff to undertake an enormously expensive privilege review of material that is unlikely to contain non-duplicative evidence.”