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Court Denies Discovery of Instant Messages, Text Messages and Voicemails

Legal Update

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With the increased use of mobile devices for business purposes, parties to litigation are more prone to seek text messages, instant messages and voicemails during discovery. A recent federal court decision addressed the discoverability of this information.

In *H.J. Heinz Co. v. Starr Surplus Lines Ins. Co.*, 2015 WL 12791338, (W.D. Pa. July 28, 2015), the defendant brought a motion to compel instant messages, text messages, voicemail and other electronically stored information (ESI) that was in the plaintiff's custody or control. The defendant argued that employees of the plaintiff frequently used instant messaging, text messaging and voicemail for routine, business communications. The plaintiff argued that the ESI sought by the defendant was not "reasonably accessible" or "proportionate" to the needs of the case.

The court initially found that the requested discovery was not disproportional "[g]iven the limited number of custodians at issue, the amount in controversy, [and] the modest cost of producing voicemail or forensically extracting text messages from mobile devices." The court also found that the plaintiff had custody and control over its employees' company-issued phones. Furthermore, the court found that, pursuant to the plaintiff's Bring Your Own Device (BYOD) program, all information and emails on these devices remained the sole property of the plaintiff. Thus, the court found that the plaintiff also had custody and control over the data present on employee-owned personal mobile devices under its BYOD program. Despite these factual findings, the court ultimately denied the motion to compel, primarily relying upon sworn declarations submitted by the plaintiff.

With respect to the instant messages, the court found that the Lync instant messaging system used by the plaintiff did not retain or store company instant messages. The court also was persuaded by sworn declarations from the two key custodians that they did not use the Lync instant messaging system to conduct substantive business.

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With respect to voicemails, the court found that the plaintiff's Cisco VOIP voicemail message system is configured to delete all employee voicemail after 14 days, unless the employee continually elects to retain a particular voicemail every 14 or 28 days. The sworn declarations provided by the two key custodians established that they did not save any voicemails related to the defendant's counterclaim and that they knew of no such voicemails.

With respect to text messages, the court again relied upon the sworn declarations from the two key custodians that they did not use their mobile devices to send or receive text messages related to the company's business or the defendant's counterclaim.

Interestingly, the court also ordered that the plaintiff interview the 10-12 other custodians who may have had potentially responsive ESI to determine whether those custodians had any voicemails and text messages relevant to the defendant's counterclaim. To the extent they did have relevant voicemails and text messages, the court ordered that such information be produced to the defendant and that the parties meet and confer regarding an appropriate search protocol to protect the privacy interests of the employees of the plaintiff.

Takeaways

The court's decision demonstrates that instant messages and text messages are not always discoverable. Moreover, this case shows the importance of counsel understanding the client's document retention policies and capabilities for preserving ESI so they can have meaningful ESI discussions with opposing counsel, and be in a position to provide evidence to the court as to why certain ESI is not reasonably accessible and would be an undue burden to collect and review.

It is also worth noting that this decision does not address the preservation of instant messages and text messages. Instead, the court focused on whether the requested discovery was reasonably accessible and proportional to the needs of the case. Given the increased use of texting and IM activity in the workplace, counsel should be prepared to advise their clients regarding their preservation obligations for such information.