EMAIL DISCLOSURE

Federal Law Permits Disclosure of Decedent's Emails

The Massachusetts Supreme Judicial Court has held that the Stored Communications Act allows but does not require disclosure of emails to a decedent's personal representative.

Author: KATIE VON KOHORN

KATIE VON KOHORN is a partner at Casner & Edwards LLP in Boston, Massachusetts. She specializes in trusts and estates and exempt organizations.

On 10/16/2017, the Massachusetts Supreme Judicial Court (SJC) issued its decision in *Ajemian v. Yahoo!, Inc.*, **1** holding that the federal Stored Communications Act (SCA) allows Yahoo to divulge the contents of a decedent's email account based solely on the personal representatives' consent. Although the decision does not order Yahoo to immediately disclose the emails to the personal representatives, the court held that the SCA *permits* such disclosure.

As background, Massachusetts is one of a minority of states (currently 13) that have not adopted the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA). In addition, Massachusetts has no other laws on the books dealing with fiduciaries' access to digital assets, although there are several pending bills in the state legislature. The case was one of first impression, presenting the issue of whether the SCA prohibited disclosure of the content of the decedent's email account.

Personal representatives attempt to gain access

In 2006, John Ajemian died in a motorcycle accident. He died intestate **2** and left behind a Yahoo email account, which he and his brother Robert had opened a few years before. Although it was a shared email account, Robert had forgotten the password. John's siblings Robert and Marianne Ajemian were

appointed as co-personal representatives of John's estate. They asked Yahoo for access to the email account. Yahoo provided confirmation that the account existed, but refused to release the content of the emails to the personal representatives, claiming that disclosure was prohibited by the SCA.

In 2009, the personal representatives sought to obtain access to the account in the Massachusetts Probate and Family Court. Their action was first dismissed; on appeal to the Massachusetts Appeals Court, the court vacated that judgment and remanded to the Probate and Family court for a determination on whether the SCA proscribed Yahoo from disclosing the content of the email account. Yahoo and the personal representatives filed cross motions for summary judgment, and the probate court ruled in favor of Yahoo, holding that the SCA barred disclosure of the email account. The personal representatives then appealed to the SJC.

Stored Communications Act

The SJC first outlined the framework of the SCA. The SCA:

(1) Prohibits unauthorized third parties from accessing stored communications.
(2) Regulates when service providers may voluntarily disclose stored communications.
(3) Sets forth when and how a government entity may compel a service provider to release stored communications.

The issue in the *Ajemian* case was under item 2, above: whether the SCA prohibited Yahoo from voluntarily disclosing the content of the decedent's email account, or whether the case fell into one of the exceptions provided within the SCA.

The SJC then examined the question of whether the personal representatives fell within the "agency exception" to the SCA's requirement of consent. Using the common law definition of "agency," the court noted that an agent is subject to the principal's control and acts on the principal's behalf. However, the decedent's personal representatives were appointed by, and thus subject to the control of, the Massachusetts probate court. They were not under the decedent's control, and thus the agency exception to the SCA did not apply.

What is "lawful consent"?

The personal representatives also argued that they could "lawfully consent," under the SCA, to the release of the contents of the email account, in order to take possession of it as property of the estate. Massachusetts General Laws provides in its version of the Uniform Probate Code that "Except as otherwise provided by a decedent's will, every personal representative has a right to, and shall take possession or control of, the decedent's property." In a footnote, the court noted that its opinion did not address the probate judge's previous ruling "that the estate had a common-law property right in the contents of the account," but went on to state that "numerous commentators have concluded" that a user possesses a property right in the contents of his or her email account.

The opinion grappled with the "novel question whether lawful consent for purposes of access to stored communications properly is limited to actual consent, such that it would exclude a personal representative from consenting on a decedent's behalf." The court noted that there were no existing federal or state cases construing the meaning of "lawful consent" under the SCA in the context of an email account.

The SJC held that interpreting "lawful consent" as limited to "actual consent" would:

(1) Prohibit personal representatives from accessing a decedent's stored communications.
(2) Preempt state probate and common law.
(3) "Result in the creation of a class of digital assets-stored communications-that could not be marshaled."
(4) "Significantly curtail" the ability of personal representatives to perform their duties in administering a decedent's estate.

The SJC noted that in interpreting a federal statute, there is a presumption against preemption of state regulation or common law, unless the legislative history indicates Congress's clear intent to preempt. Nothing in the legislative history of the SCA indicated such an intention to preempt state law.

The court next turned to the statutory language of the SCA. Unfortunately, the SCA did not define the term "lawful consent," and there was no common-law analogue to the definition of "agent." The court looked to the "ordinary meaning" of the words, concluding that the "plain meaning of the term 'lawful consent' thus is consent permitted by law." This definition did not seem to suggest that "lawful consent" precluded consent by a personal representative. The SJC noted that personal representatives are already able to grant consent on behalf of a decedent in a variety of other situations:

- Giving permission to disclose health information under the Health Insurance Portability and Accountability Act of 1996.
- Consenting to a government search of a decedent's property.
- Consenting on a decedent's behalf to the waiver of the attorney-client, physician-patient, and psychotherapist-patient privilege.

Moreover, the SCA did not use language such as "actual consent" or "express consent," in contrast with other federal statutes. Finally, the legislative history of the SCA illuminated Congress's chief concern: The purpose of the Electronic Communications Privacy Act (the broader statute including the SCA) was to "protect against the unauthorized interception of electronic communications" and to update federal privacy standards for new (at the time) technologies. Congress, by contrast, did not express any concern "over personal representatives accessing stored communications in conjunction with their duty to manage estate assets." The SJC held that Congress intended "lawful consent to encompass certain forms of implicit consent."

The SJC concluded that the SCA allowed personal representatives to "lawfully consent" to the release of a decedent's stored communications, in accordance "with the broad authority of a lawfully appointed personal representative to act on behalf of a decedent." However, the court cautioned that its holding did

not *require* Yahoo to release the contents of the email account to the personal representatives, only that the SCA did not prohibit such disclosure.

What about the terms of service?

Finally, the court turned to Yahoo's argument that its terms of service agreement prevented it from disclosing the contents of the decedent's email account, or in other words, that "the terms of service trump the personal representatives' asserted property interest." The court noted that (1) the probate judge could not determine whether the terms of service agreement was an enforceable contract, and (2) the SJC could see no error in that determination. To the dismay of many practitioners, the SJC declined to address the issue of whether the terms of service would prohibit disclosure. Per the court's order, the *Ajemian* case will now return to the Probate and Family Court for a determination on whether Yahoo's terms of service agreement blocks disclosure.

Concurrence/dissent, and a warning

Chief Justice Gants, writing separately, concurred in part and dissented in part. He looked ahead to the possibility that the Probate and Family Court, on remand, might not order disclosure of the email account to the personal representatives. He would have ruled as a matter of law that the personal representatives could obtain access to the contents of the decedent's email account, noting that the terms of service "cannot reasonably be interpreted to mean that Yahoo has the contractual right to destroy a user's email messages after the user initiates a court action to obtain the messages." He further warned that if the probate court were to rule that Yahoo could destroy the contents of the decedent's email account rather than releasing it, "we would surely reverse that ruling," and chided that the personal representatives should not have to spend any more money to gain access to the decedent's email account.

What happens now?

Going forward, as the *Ajemian* case heads back to the Probate and Family Court in Massachusetts for further proceedings, what will happen if the probate court finds that Yahoo's terms of service *do*, in fact, prohibit disclosure? Justice Gants' opinion may serve as a warning to Yahoo that it had better settle the case, provide access to the content of the emails, and not risk a future holding by the SJC that its terms of service do not prevent disclosure.

More broadly, the *Ajemian* opinion points to a public policy argument in favor of disclosure: If email contents are assets of the estate, how can a personal representative properly administer a decedent's estate if he or she is barred from properly marshaling the estate's assets? At this point, as the SJC noted in *Ajemian*, the case law is sparse on the ground. The opinion, in a footnote, declined to address the

public policy argument, stating: "Other considerations, such as consistency with public policy or any putative unconscionability of the terms of service, had yet to be reached [in the probate court proceeding]."

Does RUFADAA help?

For those in a state that has adopted RUFADAA, that statute provides a blueprint for disclosure. It is *opt-in* rather than *opt-out*, in contrast with the first version of UFADAA, which was promptly shut down by industry opposition. RUFADAA provides a three-tiered approach to consent:

- First, user direction with an "online tool," like Google's Inactive Account Manager or Facebook's Legacy Contact, will prevail over terms of service if it can be modified at any time.
- Second, user direction in a will, trust, or power of attorney will also prevail over the terms of service.
- Third, if there is no user direction, the terms of service control.

In the coming years, future cases may arise in estates where the decedent did not incorporate consent into his or her estate planning documents. Unfortunately, we may not know where we stand until, as in *Ajemian*, fiduciaries try and fail to obtain access, then sue for access, and the courts develop the common law of fiduciary access to digital assets.

In RUFADAA states, without the decedent's consent and in the absence of an online tool, the terms of service will control. Given the industry's bias toward nondisclosure and frequent revisions of terms of service agreements, where does that leave future fiduciaries? How would an executor of an estate in which the decedent had failed to update his or her will, or actively withheld his or her consent in the will, or directed that his or her email accounts (or computer) be destroyed at death, go about obtaining access to the decedent's online financial accounts? With the prevalence of paperless statements, if a decedent's consent is not given, will fiduciaries need to hire forensic accountants in every estate to examine the decedent's computer? Will the services of professional fiduciaries grow too expensive for all but the largest of estates? Will lists of abandoned property grow exponentially in every state, as personal representatives and executors are unable to claim a decedent's property?

Advise caution to clients

Clients should know that the law is uncertain in this area, particularly for those in states without RUFADAA and with no other statutes contemplating how fiduciaries might access digital assets. Recommending a shared password manager to allow access might be the best solution for client couples and others who name family fiduciaries. Counsel clients to keep, and update, an off-line list of their online accounts, so their named fiduciaries are not left scrambling. Practitioners should strongly consider writing "lawful consent" under the SCA into documents. However, caution clients that the language in the documents may not do the trick to unlock access for their named fiduciaries. The wait for

clarity is not over.

1 2017 WL 458270 (Mass. 2017).

2 The decision applies to personal representatives in all estates in Massachusetts, whether the decedent died without a will (i.e., intestate) or with a will (i.e., testate).