

Probate and Fiduciary Litigation Newsletter

November 21, 2017

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Since our last newsletter, there has been one significant development in the Probate and Family Court, and one decision of note.

First, effective as of November 20, 2017, the Probate and Family Court issued Standing Order 3-17 establishing the Fiduciary Litigation Session as a pilot project. As explained in the Standing Order, “[t]he goal of the FLS is to provide a specialized forum for the speedy resolution of contested and complex probate litigation cases and to provide individualized and collaborative case management to reduce the costs associated with fiduciary litigation.”

Second, In *Ajemian v. Yahoo!, Inc.*, 478 Mass. 169 (October 16, 2017), the Supreme Judicial Court vacated the lower court’s award of summary judgment for Yahoo!, Inc., concluding that the Stored Communications Act (SCA), 18 U.S.C. §§ 2701 et seq., did not prohibit Yahoo! from voluntarily disclosing information from the decedent’s email account to the personal representatives of the estate. Yahoo! may disclose information because the personal representatives can lawfully consent on behalf of the decedent.

By way of background, in 2002, the decedent’s brother established a Yahoo! email account for the decedent’s use. In 2006, the decedent died intestate and left no instructions regarding his email account. In 2009, the personal representatives of the estate (decedent’s brother and sister) filed a complaint in the Probate and Family Court seeking a judgment declaring that they had a right to access the decedent’s email account and requesting that the Court order Yahoo! to provide such access. The judge allowed Yahoo!’s motion to dismiss, but the Appeals Court vacated the judgment and remanded. On remand, the parties filed cross-motions for summary judgment, and the judge allowed Yahoo!’s motion on the basis that the SCA prohibited Yahoo! from disclosing information to the personal representatives.

In the second round of appeal (*i.e.*, the recent decision), the Supreme Judicial Court vacated the Probate and Family Court’s award of summary judgment for Yahoo!, reasoning that the personal representatives met the “lawful consent” exception to the SCA’s prohibition on entities that serve the public from voluntarily disclosing stored communications. This exception allows entities to disclose stored communications with the lawful consent of the originator, an addressee, or an intended recipient of the communication. The Court concluded that to interpret this exception to require actual consent by the decedent would result in a preemption of state probate and common law, which there is a presumption against without clear congressional intent. Importantly, the Court

noted that its decision does not require Yahoo! to disclose information from decedent's email, but rather that the SCA does not prohibit Yahoo! from doing so. The Court also remanded the case again, this time for a determination as to whether Yahoo!'s service agreement, which Yahoo! argues gives it the right to refuse access to the personal representatives, is an enforceable contract.

This advisory should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult your own lawyer concerning your situation and any specific legal questions you may have.

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