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Expert Analysis

Conflicting Needs of International Bankruptcy Cases and Internet Privacy

By **Shmuel Vasser**

You have the right to not send that email, but if you do, anything you say can be used against you in a court of law. Business professionals do not need a Miranda warning to understand that their email correspondences can be subject to the discovery process and compelled to disclosure if related to an issue in litigation. But can a court compel an email service provider like Yahoo to turn over a user's email account content without that user's involvement or consent? The Bankruptcy Court for the District of Delaware recently decided it cannot, at least on the specific facts facing it in the Irish Bank case.[1]

Background

The issue arose in a multi-jurisdiction liquidation of Irish Bank Resolution Corporation, including a Chapter 15 cross-border bankruptcy proceeding filed in the Delaware Bankruptcy Court. Irish Bank had extended approximately €2.8 billion in loans to the Quinn Group, a vast family-run empire spanning several industries. The patriarch, Seán Quinn, was widely considered the richest man in Ireland before the collapse of financial markets in 2008.

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After the crash, a dispute arose between Quinn and Irish Bank over the loans. The Irish Supreme Court held that the bank's repayment claims were enforceable, but Quinn and his five adult children were found to be engaged in a sophisticated scheme to evade repayment of the loans.

The foreign representatives (Representatives) appointed for the bank obtained discovery orders from the Bankruptcy Court relating to certain email addresses identified by informants as being used in connection with the evasion scheme. Yahoo! Inc. complied with the first order to provide to the Representatives the subscriber details, login and IP address history, and other metadata associated with the private Yahoo email account of Abdullah Rasimov, believed to be involved in the Quinn family's evasion scheme.

But when the Representatives served a subsequent subpoena requesting production of all electronically stored information contained in Rasimov's Yahoo account,

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including any and all emails and other content, Yahoo objected and argued that it was barred from complying under its own internal policies as well as under the Stored Communications Act (SCA), federal law under which service providers may not disclose electronic communications to third parties without the "lawful consent" of either the "originator" or "addressee or intended recipient" of the communication, or the "subscriber" of the electronic account. Following several failed attempts to compel (or even contact or locate) the elusive Rasimov to produce the account content, the Representatives obtained an order from the court allowing them to provide "lawful consent" under the SCA to release the email content on behalf of Rasimov. Yahoo refused to comply, however, alleging the Representatives did not fall into any of the specified categories permitted to consent under section 2702(b)(3) of the SCA.

Undeterred, the Representatives sought to be designated as the "subscriber" of the Yahoo account. The Representatives did not present arguments that they were in fact the account's subscriber, but the Representatives alleged that making such a designation was within the court's equitable powers under section 105(a) of the Bankruptcy Code, and was a natural consequence of the relief already granted in the prior order allowing them to perform any act necessary to provide "lawful consent" on behalf of Rasimov.

The court agreed and issued a "subscriber" order designating the Representatives as such, but Yahoo argued that this type of imputed consent still fell short. Facing Yahoo's refusal to comply, the Representatives filed a motion seeking to compel Yahoo to turn over the account contents as property of the debtor's estate under section 542 of the Bankruptcy Code. The court denied the motion.

The Decision

First, the court found that additional relief that may be available in Chapter 15 cases includes the turnover provisions of section 542(a), pursuant to which a court may order the turn-over of property in which the debtor's estate had a legal but not a possessory interest at the time of bankruptcy filing. The court found, however, that the Representatives failed to establish that the Yahoo account's content was property of the estate.

The Representatives presented mere assertions that they received information from informants about certain email accounts believed to be connected to the Quinn family evasion scheme, "without providing any details of the informant's information or bases for their beliefs." As a result, the court also had no basis to find the email account to be information sufficiently related to the debtor's property or financial affairs justifying turnover under section 542(e).

Second, the court rejected the Representatives' argument that the Yahoo account contents became property of the estate when the court ordered the Representatives be designated the account's "subscriber" for three reasons: One, since the court already concluded that the Representatives failed to establish that the property, i.e. the account, was property of the estate, their designation as the "subscriber" did not transform the account's content into property of the estate.

Two, it is not clear that the designation order, deeming the Representatives as the "subscriber" of the account, creates a property interest in the account's content. Third, even if the "subscriber" order did create property rights, sections 105 and 1506 of the Bankruptcy Code permit a court to use its equitable powers to refuse to enforce rights if they would be manifestly contrary to the public policy of the United States. The court found the SCA to present such public policy.

Stored Communications Act. The SCA was passed as part of the Electronic Communications Privacy Act in 1986 to protect

digital communications for which Congress was concerned the Fourth Amendment may not clearly provide a refuge. Both parties agreed on the court's authority to compel a user refusing discovery to provide coerced consent for third-party disclosures, but disagreed whether this authority extends to compel the service provider to produce the sought after communications.

The Representatives thought it did in this case, given Rasimov's utter absence from the bankruptcy proceedings and the court's authority to fashion appropriate remedies, such as by using the Code's turnover provisions to obtain constructive consent. The court disagreed and sided with Yahoo's interpretation of the SCA, which together with prior case law clearly prohibits third parties from compelling a service provider to disclose a user's communications on a theory of imputed consent. While the court found no cases in which courts had compelled disclosure absent actual consent by one of the three categories enumerated in the SCA, it cited several cases demonstrating an unwillingness by courts to find judicially manufactured consent sufficiently "lawful" to permit disclosure by a service provider.

For example, in *Negro v. Superior Court*, 179 Cal.Rptr.3d. 215 (Ct. App. 2014), the California Court of Appeals reversed a lower court's ruling imputing an employer's consent to its employee for the disclosure of the employee's Gmail account contents, holding that "lawful consent" under the SCA "is not satisfied by consent that is merely constructive, implied in law, or otherwise imputed to the user by a court," but rather requires "consent in fact." Other cases reached the same result when the user is a foreign citizen, or is a litigant who left the country and refused to appear in court; these situations, however, are distinguishable from cases where users were held to have impliedly consented to disclosure by their affirmative participation in the judicial process. Rasimov's utter absence made it impossible for the court to find such implied consent.

The Irish Bank court found this case to closely resemble *In re Toft*, 453 B.R. 186 (Bankr. S.D.N.Y. 2011), which involved the interplay between a bankruptcy court's authority under Chapter 15 and the SCA. In *Toft*, the Bankruptcy Court declined to enforce a German court order authorizing the debtor's foreign representatives to intercept a recalcitrant debtor's Yahoo email account contents because such enforcement would be contrary to the SCA and thus U.S. public policy. The court agreed with Toft that its authority did not trump the SCA's prohibitions on disclosure and thereby denied the Representatives' requested relief.

What's Next?

Although *Irish Bank* is a win for email service providers, their customers, and Internet privacy, business email users should beware. For an email user who is more affirmatively participatory in a judicial proceeding than the absentee Rasimov, the court could compel that user to disclose his or her email account content, even if the service provider cannot be so compelled. It is also likely that a party seeking the disclosure of email content from the email service provider may fare better than the Representatives in this case when it provides a more compelling factual basis for its contention that the email account content constitutes, or relates to, a debtor's estate property.

1. *In re Irish Bank Resolution Corp. Ltd. (in Special Liquidation)*, 559 B.R. 627 (Bankr. D. Del. 2016).