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Pursuit of a "Smoking Gun" May Be a Recipe for Disaster

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In the U.S District Court for the Northern District of Illinois, Judge Matthew F. Kennelly recently held that plaintiffs alleging price-fixing in the text messaging market were not entitled to an adverse inference after failing to prove that defendants T-Mobile and CTIA destroyed emails in bad faith. Judge Kennelly also granted the defendants' motion for summary judgment, as plaintiffs were unable to meet the elevated pleading burden for collusion to fix prices for text messages in violation of the Sherman Antitrust Act. The plaintiffs had filed suit on behalf of customers who used pay-per-text-message services from Verizon Wireless, ATandT, Sprint, and T-Mobile.

The Wall Street Journal published an article in September 2008, titled "Text Messaging Rates Come under Scrutiny," inspired primarily by the antitrust investigation of Senator Herbert Kohl.[1] The day the article was published, a T-Mobile employee allegedly sent the text of the article via e-mail to both Adrian Hurditch, the company's former Vice President of Services and Strategic Pricing, and Lisa Roddy, the company's former Director of Marketing Planning and Analysis. Hurditch and Roddy e-mailed each other about the article; however, that e-mail thread no longer exists.

The plaintiffs claimed that once Senator Kohl began contacting wireless carriers regarding his price-fixing investigation, T-Mobile had a duty to preserve all relevant electronically stored information. The plaintiffs further argued that they were prejudiced by the carrier's failure to preserve; as they would not be able access any of the emails and the potentially adverse details within them. They further argued that T-Mobile's failure to preserve and produce the e-mails reflected its "willfulness, bad faith, or fault" and warranted sanctions.[2]

Although T-Mobile admitted that the emails were probably deleted, the court nonetheless stated, "Plaintiffs have not shown that the actions of the T-Mobile personnel involved concealment of information that meets the requirement of being 'adverse' to T-Mobile."[3] The court continued, "Specifically, the record does not reflect that Hurditch, the sender of the original e-mail that was deleted and the person who called T-Mobile's price increase 'collusive,' was in a position to have knowledge of or participate in any collusion between the wireless carriers . . . Thus plaintiffs have not shown that the missing content from the Hurditch-Roddy e-mail exchange would be adverse to T-Mobile, because it is not 'relevant to proof of an issue at trial.'"[4]

The plaintiffs also alleged that CTIA destroyed e-mails and cleared the laptop profile of Mark Desautels, CTIA's Head of Wireless Internet Development, despite the litigation hold it placed on e-mails. The plaintiffs argued further that the 178 pages of e-mails CTIA did produce were not satisfactory. The court held, however, that even though plaintiffs referred to Desautels as "a fulcrum for communications among defendants," they did not

provide any evidence that would support an inference that the missing information was adverse.[5] “In fact, available evidence tends to show the opposite . . . Plaintiffs themselves provide some of the produced Desautels e-mails as an exhibit to their motion, none of which they argue provides evidence of the alleged conspiracy.”[6]

The defendants also moved for summary judgment, arguing the text message purchasers did not provide any direct evidence of price-fixing collusion. While plaintiffs adamantly argued that the Hurditch e-mail was a “smoking gun,” the Court disagreed. In doing so, it noted that Hurditch was not involved in the pricing move that resulted in the e-mail. The Court concluded there were “too many unsupported steps in the logic required” to allow an inference that Hurditch was aware of an alleged price-fixing conspiracy. The Court held the e-mail was not direct evidence of a price-fixing conspiracy, and, in the absence of any supporting circumstantial evidence, the plaintiffs failed to meet their burden of proof to survive the motion for summary judgment. Thus, it would seem that the plaintiffs’ ultimate downfall was their fixation on the pursuit the elusive evidentiary “smoking gun,” while failing to prepare an otherwise cognizable claim.

If you or your institution has any questions or concerns regarding e-discovery related issues, please email Bruce V. Miller at bmiller@cullenanddykman.com or call him at 516-296-9133.

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[1] *See* http://online.wsj.com/news/articles/SB122100918492217655 (last visited June 6, 2014).

[2]*In re Text Messaging Antitrust Litig.*, 08 C 7082, 2014 WL 2106727 at *4 (N.D. Ill. May 19, 2014).

[3] *Id*. at 6.

[4] *See id*. at 5.

[5] *See id*. at 7.

[6] *Id*.