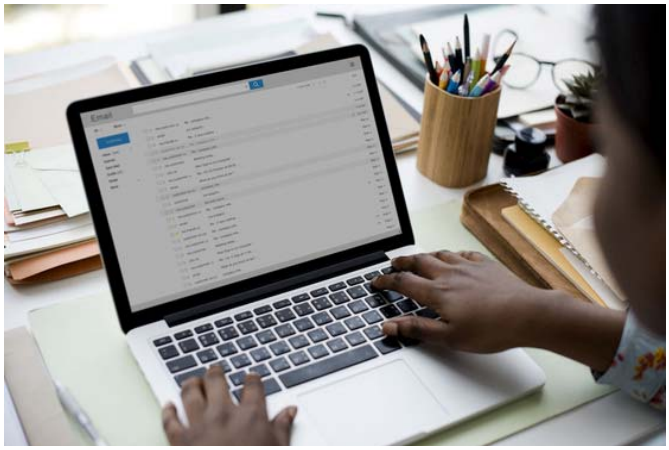
New York Law Journal

Access by Fiduciaries to Digital Assets

In this Elder Law column, Renee R. Roth and Daniel G. Fish write: The conflict that has surfaced between fiduciaries of an estate and the Internet companies could be headed for a decision by the Supreme Court of the United States.

By **Renee R. Roth and Daniel G. Fish** | February 20, 2018



The conflict that has surfaced between fiduciaries of an estate and the Internet companies could be headed for a decision by the Supreme Court of the United States. Although letters and photographs, for example, are clearly an estate asset, emails and digital images are not fully recognized in the same way. Agents under powers of attorney, trustees, guardians and estate administrators need access to digital information to fulfill their fiduciary obligations. Although such access seemed axiomatic (a fiduciary of an estate is required to marshal all the decedent's assets and stands in the decedent's shoes) there has been serious opposition from the Internet providers. They argued that disclosure to the fiduciary is prohibited by federal law, namely the Stored Communications Act (SCA), 18 U.S.C. §2702 and the terms of their own service agreements.

In response, most states, including New York, have enacted legislation enabling a fiduciary to gain access to the decedent's various types of electronic communications. New York's statute, EPTL 13-A, like the legislation enacted in

the other states, was based upon a recommendation of the Uniform Law Commission, Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA).

This debate, which most thought was settled after the states acted, has unfortunately continued in a new forum—the courts. The highest court in Massachusetts ruled on one case and two trial courts in New York have construed our statute. These cases illustrate two important points. The first arises from the fact that there are both federal and New York state statutes which govern electronic communication. A concomitant feature of this point is that in the case of a conflict, the federal statute is preemptive under the supremacy clause of the U.S. Constitution.

Illustrative of this point is the recent decision by Massachusetts' highest court, *Ajemian v. Yahoo*, 84 N.E.3d 766 (Supreme Judicial Court of Mass, 2017). Although 43-year-old John Ajemian died intestate, he did have a Yahoo account. The administrators of his estate asked Yahoo for the contents of his email account. They were provided with a catalogue that identified each person with whom the decedent had sent to, or received from, an electronic communication, but not the contents of the emails themselves.

Yahoo opposed the request from the fiduciaries for the contents, arguing that disclosure was prohibited by the SCA, which was enacted in 1986, at the infancy of digital records, to protect the privacy of users of electronic communications. One of the exceptions to the prohibition against disclosure is if it is "with the lawful consent of the originator." The fiduciaries argued that they could give such consent. Yahoo argued that only the decedent was authorized to consent.

The *Ajemian* court rejected Yahoo's argument and held that consent could be given by a fiduciary of the user's estate and Yahoo would not have any liability under the SCA. In so deciding, one of the reasons was the finding by the court

that in enacting the SCA, Congress did not indicate an intent to preempt state laws such as EPTL 11-1 which gives the personal representatives the power and duty to marshal and take possession of all of decedent's assets.

The court remanded the case on the issue raised by Yahoo that its terms of service agreement authorized it to refuse access to the estate representative. A dissenting opinion, however, observed:

Section thirteen allows Yahoo "for any reason" to terminate a user's password, account, or use of service, and to "remove and discard any Content within the service." It further provides that Yahoo is not liable "for any termination of your access to the Service."

Yahoo does not and cannot contend that the authority claimed in this termination provision gives it any ownership interest in a user's content. In fact, section eight of the terms of service provides, "Yahoo does not claim ownership of Content you submit or make available for inclusion on the Service."

All that section thirteen does is allow Yahoo to discard any of the content owned by the user (or, here, the estate of the user) on its servers without the risk of liability for doing so.

It is important to note that instead of returning to the Probate Court, Yahoo (now "Oath Holding") on Jan. 16, 2018, petitioned the Supreme Court of the United States for certiorari, requesting a decision on the question of whether a personal representative of the estate of a deceased user may consent to disclosure of contents stored in such user's account. The action of Yahoo in this regard is somewhat at odds with the stance that service providers took in the course of the negotiations which led to RUFADAA in New York. Specifically, the service providers' position was that their objections stemmed from the fear of liability under the federal act. In effect, however, the Massachusetts

decision actually protects the service providers from liability under such act. It is difficult, therefore, to understand why Yahoo would seek to have the decision overturned by the U.S. Supreme Court—which in turn leads to the suspicion that liability under the federal act was not the real driving force of their objections to RUFADAA. In its filing in the Supreme Court, Yahoo points to the user's privacy. But the fiduciary of the user's estate has possession of the user's letters, diary, mementoes, etc. Are not the digital assets just a technological advance of the usual asset, i.e., a new form of the same?

The second point of distinction, illustrated by two recently decided New York Surrogate Court cases, is the difference in the substantive requirements under RUFADAA, for the disclosure of the contents of communications, as opposed to disclosure of the so-called "catalogue" of the communications (the name and email address of the recipient, and the time of the communication)—the major difference being that disclosure of content requires consent or a court order, whereas a disclosure of a catalogue is satisfied by a lack of prohibition of disclosure by the originator. See *Estate of Serrano*, 54 N.Y.S.3d 564 (2017); *Estate of White*, 2017 NYLJ Lexis 2780.

In addition to the substantive distinction between catalogue and content, however, there is a troublesome procedural point evinced by both cases, namely that the courts appear to sanction the notion that in in every case, in order to get the information desired from a provider such as Google or Yahoo, the executor or administrator must seek a court order if the provider requests one. Clearly, the requirement of a court order would be expensive and time consuming and surely was not the expectation of those who recommended the New York statute.

For the time being, in light of the unsettled issues arising from the cases discussed above, it is up to the attorneys and their clients to plan for digital access after death, by, for example, specifically providing in the client's will for consent to disclosure.

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