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HEADLINE: Mold case sidetracked by fight over ediscovery

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BODY:

A group of military families suing over mold exposure in government housing has survived an effort to shut down their case because of their halting production of social media during discovery.

The plaintiff families made serial efforts to respond to the defendants' discovery demands for emails, Facebook posts and text messages, and even called in experts to harvest data.

But the defendants, contractors hired to manage housing used by active-duty personnel, said the plaintiffs' discovery responses - over 5,000 items - were so deficient the suit should be dismissed.

The Norfolk federal court refused to go that far, finding neither bad faith nor critical damage to the contractors' ability to defend the lawsuit.

Instead, U.S. Magistrate Judge Douglas E. Miller ordered the plaintiffs to pay a portion of the $64,514 in attorney's fees for the defendants' motion for sanctions. Miller also said the plaintiffs had to bear the $29,220 cost for expert production of electronic media, an expense they had tried to shift to the defendants.

The Dec. 31 decision in Federico v. Lincoln Military Housing LLC (VLW015-3-001) highlights the challenge for plaintiffs' lawyers in trying to marshal data from non-business clients, which ultimately may have limited value in a given case. It also represents an exercise in "proportionality review" – the Federal Rules' cost-benefit calculus used in ediscovery disputes.

Heavy use of electronic media

In the 16 consolidated cases, the military families alleged various illnesses and property damage caused by Lincoln's failure to maintain the properties or properly remediate the living quarters after mold was discovered.

The parties sparred early and often over discovery.

Discovery disputes in the toxic mold case "produced 28 contested motions, including several motions for sanctions and reciprocal requests for costs and fees related to the parties' alleged non-compliance," Miller wrote.

Military families in particular rely heavily on Facebook and emails to stay in touch with family and friends all over the world, as they are subject to frequent moves, according to Richmond lawyer David S. Bailey, one of the attorneys representing the plaintiffs. Currently, the plaintiffs are "scattered all over the country," he said.

"You are talking about a lot of 'stuff,' a lot of expense and a lot of effort to try and resurrect it and get it into a format" for production, Bailey said.

Defense counsel began checking out the plaintiffs' public Facebook pages, even before the plaintiffs filed suit, along with Facebook groups and other pages set up to deal with mold and mold-related injuries.

In January 2012, defense counsel sent a preservation letter to lead plaintiff Shelley Federico, three months before she moved out of the housing at issue. The four-page letter asked her to preserve Internet and web browser history files, potentially relevant texts and email messages, social media postings concerning their legal claims and any photo or video images of the subject properties.

In their initial discovery responses, most of the plaintiffs produced no electronic media of any kind. Those who anted up provided only a "few printed copies of emails, but no original emails, no social media posts and no text messages," Miller said. Despite guidance from the court, the plaintiffs were slow to gather the information, although they continued to communicate with counsel about their efforts to search for electronic media.

The defendants were "justifiably troubled" by the plaintiffs' initial production which included no posts at all, Miller said.

Certain plaintiffs had created or posted to special interest Facebook pages, including "Families Affected by Military Housing Mold," "the Truth About Lincoln

Military Housing in Hampton Roads," and "Victims of Toxic Mold. "

On July 10, Miller detailed what he expected the plaintiffs to do within one week's time: have every plaintiff produce a list of all the email accounts they had used, all the social media accounts they used and an explanation of their efforts to search those accounts for responsive information.

"I'm not going to accept from them 'I don't have them anymore. ' ... I want to know what folders they looked in, how far back those folders go, when the latest email reflected in those folders is dated," and "how far back their social media posts" go, Miller said.

At one point, the plaintiffs brought in Sensei Enterprises, which estimated it would cost $22,450 to perform email and social media recovery. The court declined to order the defendants to pay the fee, believing that a "self-directed search would yield sufficient results. "

"This data is available to them and they should be able to get it, and it's crazy to have to pay somebody $22,000.00 to do what they should be able to do within a matter of an hour or an hour and a half of looking through their own files," the court said. But the court warned that if the plaintiffs didn't comply, possible sanctions could include the cost of using computer experts.

The plaintiffs failed to meet a production deadline, but did provide letters describing their efforts to comply. "The letters varied widely in the diligence reported," Miller said.

When the defendants filed their motion for discovery sanctions, they sought a single penalty: dismissal of the plaintiffs' claims for failure to comply with discovery orders.

In response, the plaintiffs went to court with their IT consultant, who said a records analysis had produced 4.5 million "artifacts" from 15 different Facebook accounts. The consultant said he expected the eventual production culled by search terms to include thousands to tens of thousands of records.

Ultimately, the plaintiffs produced over 5,500 Facebook posts and over 1,300

emails, by their account. The court battle produced 2,233 pages of briefs and exhibits on the sanctions motion alone, Miller said.

Rule 37 of the Federal Rules of Civil Procedure authorizes a court to reallocate the costs of compelled production, but Miller decided to leave the plaintiffs to pick up the $29,000 tab, as "extensive additional production occurred after the expired deadlines set by the Court's initial orders" on the motion to compel.

Dismissal is the harshest sanction under the Rules, usually reserved for intentional bad faith destruction of evidence that is central to the issues in dispute, the court said.

Here, the limited relevance of the "voluminous material produced suggest that any gaps in production were not likely intentional and do not prejudice Lincoln's defense," Miller said.

No text message retrieval

The court did not sanction the plaintiffs for "text messages lost as a result of good faith operation" of their smartphones.

Unless they intentionally backed up their text messages, the content would only be stored on their devices, and most carriers do not retain text message content, the court said.

The plaintiffs "did not have a duty to take the steps necessary to preserve text message content at a time when any relevant content could have been preserved," and sanctions were not warranted, Miller said.

And the plaintiffs' "nearly complete" production of emails also did not warrant sanction, "given the volume of material which were produced and their marginal relevance," the court said.

Miller pointed out that Lincoln likely already had evidence of their contacts with the plaintiffs about mold complaints and remediation efforts, as it was Lincoln's responsibility to respond to complaints about the property it managed. Some plaintiffs separately engaged various cleaning or remediation contractors,

with whom they may have had email correspondence, which prompted the court to order the email production.

But any third party emails would be substantially less probative on liability issues, Miller said. An unused account named militarymoldwarriors@gmail.com contained no responsive email. Defendants had not identified a single email originating from the account.

Miller reviewed the 200 Facebook posts attached to the defendants' sanction motion and concluded that most of the Facebook records were cumulative of other discovery in the case and less probative than other evidence on the liability issues set for trial of the case in April.

In particular, the plaintiffs' ill will toward the defendants already had been amply documented, Miller said.

Focus on 'proportionality'

"Proportionality requirements of Rule 26(b)(2)(C) require the Court to consider costs to the Plaintiff in evaluating any sanction" for discovery abuse, Miller said.

One Facebook posting in particular illustrated the difficulty the court faced in trying to achieve proportionality in ediscovery of social media, according to Miller.

The defendants pointed to a Facebook posting by Federico on the date contractors opened the wall of her Lincoln-managed apartment on Oct. 13, 2011. When workers discovered black mold on the back of the drywall, Federico posted a picture of the mold on Facebook, with the comment, "Gotta love base housing," and said, "I'm moving out!" Lincoln argued this post undermined Federico's allegations that when the wall was opened up she became ill with severe headaches, dizziness and "projectile vomiting. "

But the plaintiffs saw no inconsistency. They said the photos in the post had already been produced, and that the complaint did not provide an exact timeline of Federico's illness.

Yes, the court said, the post was potentially relevant to Federico's credibility, but "it is difficult for the Plaintiff or her attorney to understand in advance how describing these already disclosed facts in a Facebook post might have independent significance. "

Even if the court decided the plaintiffs "acted culpably, by failing to produce social media in a timely fashion, the cumulative nature of the material and its subsequent production has significantly limited, it not eliminated, any prejudice" to the defendants, Miller said.

Lawyers know a single email can bring down a case - or a lawyer - and both sides have to cope with demands of digital discovery.

Any time you have a class action or consolidated cases, the discovery process gets to be quite enormous, Bailey said. "It's all discoverable, but whether it will produce very much" is a different question, he said.

Washington, D.C. lawyer Connie Bertram, lead counsel for the defendants, could not be reached for comment.

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