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An Email State of Mind: Confessions of an Online Fraudaholic

By Joshua C. Gilliland, Esq
Professional Development Manager

A Criminal Defendant maintained an online business that was a shame: Orders were made and money paid, but the items ordered were either not sent or non-conforming goods instead. This is all fun and games for the Defendant until an undercover FBI agent placed orders in a sting operation.

The Defendant challenged the admission of customer email messages from the trial as they “were hearsay and that their admission was highly prejudicial and violated the spirit of the Confrontation Clause of the Sixth Amendment.” *United States v. Levy*, 2009 U.S. App. LEXIS 14163, 8-9 (4th Cir. Va. June 30, 2009). The Court did not agree.

Background Facts: Online Business Fraud

An online business owner ran two companies selling women’s fashions. The Defendant served as the victim’s supplier. *Levy*, 1-2. Both online businesses failed because of customer’s complaining they did not receive the ordered merchandise and demanded refunds. *Levy*, 2-3.

The Defendant set up her own online business, with a laundry list of people not getting what they ordered for several years.

One person made several attempts to get her merchandise through the Defendant’s website, which cost the Defendant a transaction fee with each attempt. The Defendant sent the customer fraudulent documents from a make believe law firm that included a falsified complaint, apparently to scare the victim off. *Levy*, 3-4.

An undercover FBI agent placed an order through the Defendant’s website and true to form, did not get what she ordered. The FBI eventually searched the Defendant’s house after the FBI orders were never shipped. *Levy*, 4.





The Government introduced into evidence at trial emails collected from the Defendant's computer. The emails were exchanges with angry customers and the Defendant's replies. *Levy*, 5.

The Defendant was convicted of three counts of mail fraud and four counts of wire fraud. *Levy*, 5-6. The Court estimated at least eighty-two victims who suffered \$ 168,300.77 in damages. *Id.* The Defendant was sentenced to 46 months' imprisonment and pay \$ 168,300.77 in restitution. *Levy*, 1.

The Defendant's appeal followed.

Email & Hearsay: The Truth of the Matter Asserted

The Defendant challenged the customer email evidence on appeal as 1) hearsay and 2) the evidence was highly prejudicial and violated the 6th Amendment Confrontation Clause. *Levy*, 8-9.

The Court did not agree. The Court held the email messages were not hearsay, because they were not offered for the truth of the matter asserted. *Levy*, 9.

The customer email messages were offered so the Defendant's party admissions in her email would show the context of the Defendant's "intent, lack of mistake, and notice." *Levy*, 9.

As such, the customer email messages were not hearsay and thusly did not violate the Confrontation Clause. *Levy*, 9.

The Defendant's conviction was upheld, but her sentence was vacated on sentencing grounds and remanded. *Levy*, 13.

Bow Tie Thoughts

Many of the e-Discovery admissibility examples are coming from criminal cases, since they go to trial more. As more civil cases go to trial, Courts will likely look to the "e-admissibility" cases from criminal convictions for guidance in authenticating ESI, addressing hearsay and other evidentiary issues.