



Maryland Judge Expounds on Importance of Authenticating Electronic Evidence

At first glance, a recent court decision out of the Maryland District Court involving a lightning-struck yacht seems to have few implications for the electronic record keeping practices of businesses. But upon closer inspection the decision in *Lorraine v. Markel*, authored by Chief United States Magistrate Judge Paul W. Grimm, provides tremendous detail and expertise for those interested in court use of electronically stored information (ESI).

The facts of the case begin simply: Jack Lorraine and Beverly Mack owned a yacht called *Chessie*, which was anchored in the Chesapeake Bay in May 2004, when it was struck by lightning. Lorraine and Mack made a claim to their insurance company, Markel American Insurance Company, and Markel paid for part of the damages as specified by the insurance contract. Problems arose when Lorraine and Mack discovered further damage to the boat several months later. It was unclear if the damage was caused by the lightning strike and thus, if Markel was responsible for payment. The case was submitted to a private arbitrator whose decision was the basis for the Maryland District Court case. Both parties were seeking enforcement of separate parts of an arbitrator's decision as to how much Markel owed for damage discovered subsequent to the original claim. The parties differed in their opinion as to the scope of the arbitration and thus, the amount of payment owed Lorraine and Mack by Markel.

Electronic evidence was important to the case because it provided a way for Judge Grimm to determine the agreed-upon scope of the arbitrator's decision. Various e-mails between the parties and the arbitrator framed the arbitration hearing and the scope of the arbitrator's decision. Judge Grimm noted that the Court was unable to accept e-mails into evidence because they "were not authenticated" (*Lorraine and Mack v. Markel Insurance Company*, Maryland District Court Civil Action No. PWG-06-1893 at p. 7). Without these e-mails as evidence, the Court was unable to determine the scope of the arbitration agreement and the parties were left to pursue further costly and time-consuming litigation.

Judge Grimm, a U.S. Magistrate Judge since 1997, used his decision in the case as a forum to provide further explanation of the importance of admissibility for electronically stored information. Grimm explained, "[g]iven the pervasiveness today of electronically prepared and stored records...counsel must be prepared to recognize and appropriately deal with the admissibility of electronically generated and stored evidence" (*Id.* at p.7).

Judge Grimm explained that, despite the significant costs associated with discovery of electronic evidence, many businesses and their counsel neglect to follow proper procedures for ensuring that discovered data is admissible (*Id.* at p. 8). "[T]he inability to get evidence admitted because of a failure to authenticate it almost always is a self-inflicted injury which can be avoided by thoughtful advance preparation," he notes (*Id.* at p. 17). Judge Grimm outlines some of the necessary steps for having ESI admitted into evidence, stating that ESI must meet the same criteria as traditional evidence, specifically noting that ESI must be authenticated, meaning it must be shown to be trustworthy and safe from alteration or tampering. Judge Grimm points out that one method of authenticating ESI is to use hash values, unique numerical identifiers, to guarantee authenticity.

While simple hashing has its virtues, it does not go far enough in protecting data integrity. Using a linked-token third-party time stamping solution such as Surety's AbsoluteProof goes further than simple hashing to guarantee the content integrity and timing of electronic records. Whereas simple hashing is susceptible to hash value alterations by application developers, vendor or administrators, AbsoluteProof's hash value is widely published every week, making it auditable by any third party and impervious to forgery or compromise. Added layers of protection make records sealed by AbsoluteProof ease the concerns of judges and juries and make these records more likely to be admitted into evidence, giving AbsoluteProof users a distinct competitive advantage.

Judge Grimm's opinion in the case serves as a warning to businesses and lawyers across the country, demonstrating that without proper authentication, important electronic records that could help win your case may not be admitted. Judge Grimm cautions, "[i]f it is critical to the success of your case to admit into evidence computer stored records, it would be prudent to plan to authenticate the record by the most rigorous standard that may be applied."

As the proliferation of electronic records continues, ensuring admissibility of these crucial records will become even more important. As the facts of the Lorraine v. Markel case show, electronic data authentication can be a turning point for a lawsuit. The ease with which electronic data can be tampered concerns many judges who are reluctant to allow ESI into evidence. Companies and attorneys have a duty to implement best practices in ESI authentication so that if they find themselves in a legal battle, their important electronic records can easily be authenticated. Judge Grimm's opinion does an excellent job not only explaining why ESI management is important, but also providing businesses with a strong foundation to become litigation ready.