1. A ruling from the U.S. District Court for the District of Minnesota declining to compel a defendant to produce text messages from certain of its employees' personal cellphones but enforcing in part subpoenas directed to the employees for the same data.

In *In re Pork Antitrust Litigation*, No. 18-cv-1776 (JRT/HB), 2022 WL 972401 (D. Minn. March 31, 2022), U.S. Magistrate Judge Hildy Bowbeer declined to compel a defendant to produce text messages from certain of its employees' personal cellphones based on the defendant's bring-your-own-device (BYOD) policy but enforced in part subpoenas directed to the employees for the same data.

In this multidistrict class action litigation, major American pork producers and integrators were alleged to have conspired to fix pork prices in violation of state and federal antitrust laws. In 2018, Plaintiffs requested that one defendant, Hormel, preserve data from the personal cellphones of five company executives through forensic imaging. *Id*. at *1. These parties agreed to an electronically stored information (ESI) protocol and protocol for preservation of phone records in which Hormel named 30 current and former employees as custodians.

Hormel responded to a number of Plaintiffs' discovery requests by claiming it did not have possession, custody, or control of the custodians' personal cellphone data. In November 2018 (before the ESI protocol was finalized), Plaintiffs served requests for production seeking communications between Defendants or documents containing facts relevant to the lawsuit or about supply, demand, and price of pork products. "Document" was defined to include text messages and cloud backups or archived text message data. Interrogatories served in November 2020 sought further information about the make, model, and use of the custodians' cellphones. Hormel initially responded only with cellphone numbers and later informed Plaintiffs that it would not produce the requested text data.

Plaintiffs subpoenaed the custodians directly for their cellphone and text data. *Id*. at *2. Plaintiffs proposed searches of text messages from individuals associated with any Defendant or other pork integrators and all text messages containing any of a set of keywords. Plaintiffs also proposed a review and production of relevant messages from the keyword searches but demanded that all "inter-defendant" text messages be produced without a relevance review. The custodians all responded that they were using different personal cellphones at the time of the subpoenas than they used during the relevant time period, and most stated they either did not use their personal cellphones for work-related communications or did so only with other Hormel employees. The custodians further argued that Plaintiffs failed to show that they were likely to have responsive documents and that the searches were overly broad and unduly burdensome,

and there was disagreement about who would bear the costs of the proposed searches if they were undertaken. *Id*. at *3.

Because the parties and the custodians could not reach agreement, Plaintiffs filed this motion seeking to compel Hormel and the custodians to produce the relevant text messages. Plaintiffs also sought a declaration that Hormel had the obligation from the outset of the litigation to image text message content from all of its custodians' mobile devices and cloud backups and an order for Hormel to do so at this point.

Magistrate Judge Bowbeer began her analysis by examining whether Hormel had the requisite possession, custody, or control over the text messages sent by and to its employees on their personal cellphones, a point that Hormel disputed. Magistrate Judge Bowbeer stated that district courts in the Eighth Circuit applied varying definitions of "control." Some have interpreted "control" to mean the legal right to obtain the documents, while other courts (including the District of Minnesota) have held that it also includes the "practical ability" to obtain the documents. Magistrate Judge Bowbeer stated that in this latter case, "the burden of demonstrating that the party from whom discovery is sought has the practical ability to obtain the documents at issue lies with the party seeking discovery." *Id*. at *4. She continued:

In assessing whether a party has the practical ability to obtain documents from a non-party, courts have focused on the "mutuality" of the responding party's relationship with the document owner, including whether the documents sought are considered records which the party is apt to request and obtain in the normal course of business, or whether the prior history of the case demonstrates cooperation by the non-party, including the production of documents and other assistance in conducting discovery, and the non-party has a financial interest in the outcome of the litigation.

Magistrate Judge Bowbeer stated that the Eighth Circuit never decided whether the "legal right" or "practical ability" standard should apply, and other circuits were split on the issue. She cited the Sedona Conference's commentary urging the "adoption of a consistent, reliable, objective approach that defined control as the legal right to obtain and produce the Documents and ESI on demand." *Id*. (internal quotations omitted). She continued that the Sedona Conference criticized the "practical ability" standard as inherently vague, unevenly applied, and having the potential to lead to disparate, futile, and inconsistent results. The commentary elaborated on the futility, noting that even if a court ordered an employer to collect and produce personal emails of its employees, there was not necessarily authority under which an employer could force the employees to turn them over. However, Magistrate Judge Bowbeer noted a potential counterargument that if a party routinely obtained certain kinds of documents in the ordinary course of business and might have even leveraged that access for use in the

litigation, "fairness would require that it also be required to do so for purposes of responding to discovery."

Magistrate Judge Bowbeer determined that she did not have to choose between the two standards because Plaintiffs had not shown that Hormel had control. Plaintiffs argued that Hormel had control of the custodians' personal text messages because it required employees to use their cellphones to conduct business, and Hormel controlled all data on the phones, including the ability to wipe all data on personally owned phones when it deemed it necessary. Hormel responded that it did not have the legal authority to access, view, image, or control the text messages and therefore lacked control.

Magistrate Judge Bowbeer explained that Hormel's BYOD policy allowed employees to use their personal cellphones to interact with Hormel's corporate systems and for employees to be reimbursed for their mobile plan. *Id*. at *5. She stated that Hormel claimed ownership of data synced between mobile devices and Hormel's servers, which included primarily company email, calendars, and contacts but not text messages or information on the personal devices. Hormel required employees to install the MobileIron app on their phones, which prevented employees from copying or backing up Hormel-owned data on their phone. It did not, however, affect employees' ability to copy, delete, or back up text messages or enable Hormel to access those text messages. The BYOD policy allowed Hormel to remotely remove MobileIron and the company data it controlled and allowed the company to remotely wipe all the data on the phone through a factory reset.

Magistrate Judge Bowbeer stated that Plaintiffs misconstrued the BYOD policy to mean that Hormel employees were required to use their personal cellphones for business. In reality, employees had to request Hormel's permission to use a personal device to access Hormel's system and be reimbursed for their mobile plan. Requests were approved if the employee had a defined business need.

Magistrate Judge Bowbeer also disagreed with Plaintiffs' argument that the ability to remotely wipe phones gave Hormel control over employees' text messages. Hormel did not have access to text messages. While Hormel could perform a remote factory reset in the event of a security concern under some circumstances, the BYOD policy only asserted Hormel's control over company data. Magistrate Judge Bowbeer noted the Sedona Conference's position that an employer with a BYOD policy "does not legally control personal text messages … when the policy does not assert employer ownership over the texts and the employer cannot legally demand access to the texts." She distinguished cases cited by Plaintiffs by pointing out that the cases did not involve the company's control over personal text messages and did not suggest that the company had ownership over them. *Id*. at *6.

Magistrate Judge Bowbeer then disagreed with Plaintiffs' argument that Hormel had the practical ability to demand access to its employees' text messages because Hormel had previously asked for and received permission to image the personal cellphones of five executives. She distinguished the *request* for data from the *demand* for data that would give Hormel "control." While Magistrate Judge Bowbeer acknowledged the power dynamic that might pressure employees to accede to an employer's request, she stated that control instead referred to where access would be provided in the ordinary course of business. She found that there was "no evidence that in the ordinary course of business Hormel seeks, needs, or expects to gain access to the content of employees' text messages on their personally-owned phones." *Id*. at *7. The employees who agreed to have their phones imaged did not establish that Hormel had the practical ability to *demand* that it be allowed to inspect or produce the data or that other employees would agree to do so.

Magistrate Judge Bowbeer continued that the fact that Hormel employees willingly disclosed the extent they conducted company business over text message did not establish a practical ability to demand that data be turned over to Hormel. While Hormel had a legal right to demand company data within a text message, Magistrate Judge Bowbeer explained that Plaintiffs were "demanding … that Hormel leverage that putative right in order to demand access to *all* text messages so that it can review and produce those deemed responsive to discovery in this case, regardless of whether they include company data over which Hormel claims ownership per the BYOD policy." Magistrate Judge Bowbeer stated that she "shares the Sedona Conference's view that organizations should not be compelled to terminate or threaten employees who refuse to turn over their devices for preservation or collection." *Id*. (quoting 19 Sedona Conf. J. at 531).

Ultimately, Magistrate Judge Bowbeer denied Plaintiffs' motion to compel Hormel to collect, review, and produce responsive text messages on its employees' personal cellphones. *Id*. at *7.

Magistrate Judge Bowbeer next addressed Plaintiffs' motion to enforce their subpoenas for the custodians' text messages. She first laid out the scope of discovery under a Rule 45 subpoena and each party's evidentiary burden. *Id*. at *7-8. She then evaluated the objections made by the custodians in turn. *Id*. at *9.

First, Magistrate Judge Bowbeer evaluated whether the custodians had adequately demonstrated that they did not have responsive texts. She explained that courts will deny motions to compel where the "evidence shows that the responding party has searched for the information but cannot find it or disclaims its existence after the search, and the movant shows no evidence to suggest the information exists." Magistrate Judge Bowbeer explained that this standard "strikes a balance between two interests in

discovery:" a responding party's duty under the Federal Rules of Civil Procedure to "affirmatively, reasonably search for responsive information available to it" and that "the Court must accept, at face value, a party's representation that it has fully produced all materials that are discoverable." *Id*. at *10 (internal quotations omitted).

Magistrate Judge Bowbeer found that she "cannot conclude from the responses that adequate steps were taken to describe to the custodians what kinds of communications might be relevant and responsive information in the context of this complex litigation, or to test the accuracy of their recall about whether, at some point over the relevant period or periods, they sent or received relevant or responsive texts." The one exception to this was the one employee who unequivocally stated that she never used her personal cellphones for work-related communications. Magistrate Judge Bowbeer acknowledged that the evidence that there were responsive texts was weak; while Plaintiffs declared that telephone records showed several custodians texting work-related contacts, the records did not show that the communications were work-related, let alone relevant to the claims or defenses of this lawsuit. Plaintiffs also argued that some custodians were more likely to have responsive texts by the nature of their work and that some had suggested in their subpoena responses that they used text messaging for work to some degree.

Magistrate Judge Bowbeer concluded that she would not enforce the subpoena against the one employee who clearly stated that she never used her personal phone for work-related texts provided she submitted a sworn declaration. For the remaining custodians, however, Magistrate Judge Bowbeer found that the inquiries by counsel to the custodians did not adequately demonstrate a reasonable search for responsive texts such that the court could conclude that such texts were "almost certainly nonexistent." She stated that the custodians either admitted they used their personal phones for some work-related communications or made no statement on the matter. Further, it did not appear that custodians were asked only to rely on their memories when asked if there were responsive communications, and their memories were not tested, nor was the scope of responsive communications clarified. Therefore, Magistrate Judge Bowbeer found that the evidence did not show a reasonable search or that responsive texts were almost certainly nonexistent, and therefore she could not decline to enforce the subpoenas on the remaining custodians. *Id*. at *11.

Magistrate Judge Bowbeer next overruled the objection that the information sought was equally available from cellphone providers. While the providers showed that certain of the custodians had texted one another, they did not show the content of any texts, and the carrier data would not reveal iMessage to iMessage content that was available only on the custodians' iPhones. Because the custodians failed to provide concrete support for the claim that responsive text messages would be available from another source, Magistrate Judge Bowbeer found that the record did not substantiate the objection.

Magistrate Judge Bowbeer then addressed the objection that the imposition of the request for cellphone data imposed an undue burden on the custodians that was disproportionate to the needs of the case. She laid out the rules on proportionality under Rule 45 before addressing the custodians' arguments surrounding the burden. *Id*. at *11-12. First, the custodians alleged that the imaging would cost an estimated $65,000 to $85,000 and take between three hours and more than a day, and some custodians would have to mail their phones from rural Minnesota to the forensic imaging provider. *Id*. at *12. Further, imaging would capture private and confidential information not relevant to the case.

Magistrate Judge Bowbeer pointed out that there were no affidavits or evidence establishing the technical concerns surrounding the imaging or that the phones would need to be imaged in their entirety rather than having the text messages extracted "more economically." Additionally, phones that were not in use in the relevant time period would not need to be imaged. Magistrate Judge Bowbeer stated that the custodians acknowledged they did not know how many relevant texts would be captured and reviewed under the Plaintiffs' search methods and had not proposed an alternate means to capture and filter the data more effectively.

Magistrate Judge Bowbeer agreed that the cost to the custodians was high, but she determined to compel the custodians to search for and produce text messages within certain parameters and to preserve data in the event the searches were expanded. Magistrate Judge Bowbeer also exercised her discretion to order the reasonable costs be split between the class Plaintiffs and Hormel. *Id*. at *13. She justified the cost-sharing by pointing to Rule 45(d)(1) placing on the party serving the subpoena "the obligation to avoid imposing undue burden or expense on the person subject to the subpoena" and to Hormel's BYOD policy that allowed and, to some extent, financially supported the use of personal cellphones for work purposes.

Magistrate Judge Bowbeer was not convinced that any custodians would need to mail in a phone as opposed to dropping it off in person and so could not sustain these aspects of the burden to the custodians, emphasizing their obligation to diligently explore alternatives that would reduce that burden. She also maintained that any privacy concerns could be managed through targeted searches and were not a basis to decline to enforce the subpoenas. She cited Plaintiffs' argument that forensic imaging vendors can target specific apps or types of data, and the custodians made no argument that they tried and failed to find options for more targeted data extraction. Additionally, her order would "provide that only relevant and responsive information will be delivered to Plaintiffs" and the information would be subject to a protective order.

Magistrate Judge Bowbeer did conclude that the requests in the subpoenas "extend[ed] beyond the bounds of relevance" and therefore had to be "narrowed to target relevant

and proportional information." Among other things, she observed that one request did not actually seek texts but rather any information accessible to a forensic vendor, including cloud backups, older cellphones, or noninternet archives, without regard to subject matter.

A key element of Plaintiffs' argument was that all texts between any defendant or Hormel affiliate and any of the 781 numbers associated with the defendants, Hormel affiliates, and pork producers were presumptively relevant. *Id*. at *14. While Magistrate Judge Bowbeer agreed that some information in the requests were relevant, including that relevant information could be found on old cellphones and in cloud backups, she stated that "not all texts to all individuals on the 781 phone numbers connected to Defendants and pork integrators will involve this subject matter." She stated that "[j]ust because there may be some relevant texts within a data set does not make all texts within that set presumptively relevant." She extended this reasoning to the requests demanding access to all archived text messaging data from all the custodians' phones.

Magistrate Judge Bowbeer objected to the time period of the requested production, over 10 years, as "not tailored to the job responsibilities of the individual custodians, and therefore also … overly broad." Because Plaintiffs ignored distinctions in the job duties or dates for individual custodians in favor of a "one size fits all" approach, she found the time period inappropriate and not proportional.

Magistrate Judge Bowbeer accordingly held that the subpoenas would be enforced as to the requests at issue except for the one excluded custodian and ordered the remaining custodians to search for and produce relevant text messages within a modified scope and subject to a modified search protocol. *Id*. at *15. She held that each subpoena must be limited to the time period or periods within which that custodian held the relevant position and required Plaintiffs, Hormel, and the custodians' counsel to meet and confer to confirm they had a common understanding on that front. Then, the custodians must search the text messaging data from the custodians' current and older phones or archive and backup data from those phones to identify the texts exchanged among the 781 phone numbers identified by Plaintiffs within the relevant time periods for each custodian, and report the number to Plaintiffs' counsel. Counsel to the custodians could then undergo a relevance search and "meet and confer with Plaintiffs' counsel about a threshold volume of messages for a custodian that would trigger the application of search terms." The results of any application of search terms could be further reviewed for relevance.

Magistrate Judge Bowbeer ordered the custodians, including the excluded custodian, to preserve all text messaging data, including archived and cloud-stored data, for the relevant time period until December 2022 in the event that the resulting productions or other future discovery justify a more expanded search.

Finally, Magistrate Judge Bowbeer addressed Plaintiffs' claim that Hormel knew or should have known that its custodians were conducting work-related business over text and therefore was obligated to image those phones and preserve cloud backups at the start of litigation. After laying out the standards for preserving relevant evidence, she denied Plaintiffs' motion for a declaration that Hormel had such a duty, reasoning that she had already found that Hormel did not control the texts on the custodians' personal phones and did communicate litigation holds to reasonably anticipated custodians.