

#### **4. An opinion from the U.S. District Court for the Eastern District of Pennsylvania compelling a nonparty to produce data that was encrypted, over the nonparty's objection that the encryption rendered the data inaccessible, and compelling the party to identify the individual who could decrypt the data.**

In *Estate of Daher, by and through Daher v. LSH Co.*, No. 23-0088, 2023 WL 4670997 (E.D. Pa. July 12, 2023), U.S. District Court Judge Nitza I. Quiñones Alejandro addressed whether a nonparty could be compelled to produce data in the possession of a sister company, over the nonparty's objection that the data was encrypted and therefore inaccessible.

In this action seeking to recover the proceeds of a life insurance policy, the Plaintiff served subpoenas on nonparty Coventry related to a finance program administered by Coventry under which Plaintiff claimed the policy at issue was generated. *Id.* at \*1. Plaintiff later moved to compel certain categories of documents from Coventry, including documents related to the deceased obtained by Coventry from American Viatical Services (AVS), a now-defunct company that prepared life expectancy reports on insureds. Coventry had purchased AVS data, a computer server, and software systems after AVS' closure. *Id.* at \*2.

Coventry opposed the motion to compel AVS documents and data on several different grounds. First, Coventry argued that it should not be required to produce an AVS database because it contained confidential information pertaining to tens of thousands of people. Judge Quiñones Alejandro rejected this argument because Plaintiff sought AVS documents and information concerning only the deceased, not any other person. As a result, no confidential information concerning people not involved in the litigation would necessarily be disclosed through compliance with the subpoena.

Second, Coventry argued that the requested AVS documents and data were not within Coventry's possession, custody, or control but rather were owned by a sister company. Judge Quiñones Alejandro rejected this argument as well. She noted that Rule 45(a)(1)(A)(iii) requires production of documents that are in a party's "possession, custody, or control," and when a corporate entity is requested to produce documents owned by another entity, "separate and distinct corporate identities are not readily disregarded." *Id.* at \*2-3 (citing cases). However, she explained that Coventry clearly had the "ability to obtain upon demand" the requested documents from its sister company because some of its personnel had limited access to the AVS server, including access to "search for life expectancy reports." *Id.* at \*3.

Third, Coventry argued that much of the requested AVS data was encrypted and thus inaccessible. Coventry claimed that it would need to engage a third-party information technology consultant to decrypt the data and that doing so would pose an undue burden on Coventry. Judge Quiñones Alejandro explained that Rule 26(b)(2)(B) provides that a party need not produce ESI upon a showing that the information is "not reasonably accessible because of undue burden or cost." Fed. R. Civ. P. 26(b)(2)(B). However, she noted that Coventry had not shown that engaging a consultant to decrypt the AVS data would pose an undue burden or cost "beyond its bald assertion." As such, she found that Coventry's undue burden argument was insufficient to overcome its disclosure obligation under the rules.

Finally, Coventry argued that it could not be compelled to provide the name and contact information of a data consultant who could decrypt the AVS data, on the grounds that Rule 45 does not "require the creation of documents that do not already exist." Judge Quiñones Alejandro also rejected this argument because Coventry had informed Plaintiff that it possessed the requested contact information for the consultant who could decrypt the AVS data. As such, Coventry's compliance with the subpoena would not require Coventry to create new documents that do not already exist.