

Client Alert

A report
for clients
and friends
of the firm **March 2006**

Exiting Employee's Deletion of Important Computer Files Creates Federal Law Liability Under New Seventh Circuit Decision

Under a March 8, 2006 ruling of the United States Court of Appeals for the Seventh Circuit, a departing employee who scrubs clean the hard drive of an employer-provided computer may face civil, and potentially criminal, liability under the federal Computer Fraud and Abuse Act, 18 U.S.C. §1030 et seq. Employers thus have a potential new tool to deal with malicious departing employees.

In *International Airport Centers, L.L.C. v. Citrin*, (Slip Op.) No. 05-1522 (7th Cir. March 8, 2006), the plaintiff employer provided its employee with a laptop computer for business use. Citrin's job was to find real estate locations for International Airport Centers (IAC) to purchase, and he entered information on prospective properties onto the IAC laptop given to him. Just before quitting his job to start a competing business and before returning the employer's computer, Citrin used a "secure-eraser" program to permanently delete files on the laptop. According to the complaint, the deleted files included work-related materials as well as evidence of the employee's disloyalty in planning a competing business while still working for IAC.

The district court in the Northern District of Illinois dismissed the Computer Fraud and Abuse Act claim, holding that the installation of a program to delete the material off the computer did not constitute a "transmission" as contemplated by the Act. The Computer Fraud and Abuse Act imposes liability

upon a person who "knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer." 18 U.S.C. §1030(a)(5)(A)(1).

The Seventh Circuit, in a 3-0 decision authored by Judge Richard Posner, reversed the decision of the lower court and disagreed with the conclusion by the trial court that a "transmission" under the Computer Fraud and Abuse Act requires physical "shipment or delivery of a code or a program". The Seventh Circuit concluded that how the transmission of the program onto the computer occurred was unimportant. The court found that the installation of the program, through a download over the Internet, or through use of a CD or floppy disk, was enough to constitute a "transmission." The court also concluded that a contractual provision allowing Citrin to "return or destroy" data was nullified by his disloyalty in planning a new business and, in any event, was not intended to cover malicious destruction of irretrievable and important business information but only was intended as a control over routine data. It also addressed the issue of Citrin's "authorization" to access the computer, concluded that such authorization (which could be a defense under the Act) ended when he engaged in self-dealing.

In the era of laptops, PDA's and the Internet, employers faced with disloyal departing employees should keep in mind the Computer Fraud and Abuse Act and its extension in *Citrin* to employee misuse of technology. While the Act does not provide for exemplary damages or attorneys fees, it does permit federal court jurisdiction and injunctive remedies, as well as compensatory damages, and also raises the spectre of criminal prosecution, since the Act has both criminal and civil components.

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Privacy and data security law is a relatively new area of law, but it is one of increasing importance to business. Although the United States does not have an across-the-board privacy law, there is a wide array of legislation and case law affecting specific information and industries.

Watch for the first Practising Law Institute treatise on privacy and data security law, "Proskauer on Privacy", to be published later in 2006.

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