If you have comments, questions or suggestions for future topics, please contact Bill Michael at michael.william@dorsey.com or (612) 492-6753.

Michael Named as Co-Chair of Dorsey’s White Collar Practice Group

Dorsey & Whitney is pleased to announce that Bill Michael has been named as Co-Chair of the firm’s White Collar Crime and Civil Fraud practice group. Michael joins Zach Carter and Ed Magarian, heading up one of the country’s most experienced White Collar practice groups. Michael joined Dorsey in October of 2006 after more than 10 years as a federal prosecutor in both South Florida and Minnesota and recently heading up the White Collar practice at another law firm. With more than 100 jury trials, he is an experienced trial attorney in the areas of health care, securities fraud, criminal tax, financial institutions litigation and internal investigations.

“Bill’s broad experience in complex criminal litigation strengthens Dorsey’s White Collar platform and deepens our trial capacity,” said group Co-Chair Zachary Carter. “He is a welcome addition to the leadership of Dorsey’s White Collar Practice Group.”

“I look forward to assisting Ed and Zach in continuing the reputation of excellent representation and results that this practice group has achieved throughout the country and to mentoring and training the superb associates that have become the tradition at Dorsey,” said Michael.

Conversion of E-Data

By Nick Akerman


Little did William the Conqueror know that when he won the Battle of Hastings in 1066, his victory would have ramifications for protecting computer data. The Norman Conquest established a system for addressing the theft of chattels that evolved to the present-day cause of action for conversion. This ancient common law civil remedy has recently emerged as a potential key legal theory in the fight against computer crime. Conversion “is the civil analog of the criminal actions of robbery and larceny,” which has long provided victims redress against the “unlawful taking or retention of tangible personal property” as opposed to intangible computer data. In re Robert R. Fox, 370 B.R. 104, 121 (B.A.P. 6th Cir. 2007). Since computer data have been viewed as intangible property, their theft has not been traditionally viewed as conversion. See e.g. Slim CD Inc. v. Heartland Payment Systems Inc., No. 06-2256, 2007 WL 2459349, at *12 (D.N.J. Aug. 24, 2007).

When company data are stolen or maliciously destroyed, the modern cause of action is the federal Computer Fraud and Abuse Act (CFAA), 18 U.S.C. 1030, a criminal statute that expressly provides for a civil action for damages and injunctive relief for anyone “who suffers damage or loss by reason of a violation of” the statute. 18 U.S.C. 1030(g). The CFAA was intended to provide law enforcement and private litigants with updated tools to combat criminal activity directed at computers. Pacific Aerospace & Electronics Inc. v. Taylor, 295 F. Supp. 2d 1188, 1194-95 (E.D. Wash. 2003). Based on the...
CFAA, a company is empowered to file a federal suit to recover its stolen computer data, seek an injunction to prevent their use and dissemination, and recover damages for stolen and destroyed data.

‘Thyroff’ opened another route to remedy data theft

The CFAA’s monopoly on the protection of computer data changed dramatically early this year with a decision from New York’s highest court in *Thyroff v. Nationwide Mutual Insurance Co.*, 8 N.Y.3d 283 (N.Y. 2007). The court abandoned the tangible/intangible property distinction and held that conversion applies to computer data. This article examines the holding in *Thyroff*, how it extended the law of conversion that has been developing in other state jurisdictions and the practical differences between conversion and a cause of action based on the CFAA.

Louis E. Thyroff, an insurance agent, was simultaneously discharged from Nationwide and denied access to “his customer information and other personal information that was stored on the [company] computers.” Id. at 285. As a result, Thyroff sued Nationwide in federal court for, among other things, “the conversion of his business and personal information.” Id. The district court dismissed Thyroff’s claim on the ground that conversion does not apply to intangible computer data. On appeal, the 2d U.S. Circuit Court of Appeals determined that New York law was not clear as to whether a claim for conversion could be based on computer data, and certified the following question of law to the New York Court of Appeals, the state’s highest court: “Is a claim for the conversion of electronic data cognizable under New York law?” Id. at 285-86.

The court responded affirmatively, holding that electronic records maintained on a computer are “subject to a claim of conversion in New York.” Id. at 293. In doing so, the court reviewed the evolution of the tort of conversion in accordance “with emerging societal values” beginning with “the Norman Conquest of England in 1066” when a thief was either summarily executed or “rightful ownership of the property was usually determined by a ‘wager of battle’—a physical altercation or duel between the victim and thief...with the victor taking title to the goods.” Id. at 286-88.

These medieval practices were eventually replaced by legal actions for trespass, trover and ultimately conversion. New York later modified conversion's strict requirement for tangible property, holding “that an intangible property right can be united with a tangible object for conversion purposes.” Id at 286-89. This required connection between the intangible property and a tangible object is known as the “merger doctrine,” and was adopted by the *Restatement (Second) of Torts* § 242 (1965).

Thus, intangible shares of stock in a company were considered to be the proper subject of a conversion claim because the shares are represented by a tangible stock certificate. *Thyroff* abandoned the merger doctrine for two reasons. First, it recognized that “[a] document stored on a computer hard drive has the same value as a paper document kept in a file cabinet.” Id. at 292. Second, the court relied on the pervasive use of computer data to replace paper documents and determined that “the tort of conversion must keep pace with the contemporary realities of widespread computer use.” Id. at 292. As the court stated, “society’s reliance on computers and electronic data is substantial, if not essential,” and “[c]omputers and digital information are ubiquitous and pervade all aspects of business, financial and personal communication activities.” Id. at 291-92.

*Thyroff* undoubtedly is the future direction of the law in this country. While there are still jurisdictions that strictly apply the merger doctrine (see, e.g., *Northeast Coating Technologies Inc. v. Vacuum Metallurgical Co. Ltd.*, 684 A.2d 1322, 1324 (Maine 1996)), the trend is with *Thyroff*. For example, in *Kremen v. Cohen*, 337 F.3d 1024, 1031 (9th Cir. 2003), the 9th Circuit held that California “does not follow the Restatement’s strict merger requirement” in upholding a conversion claim for the intangible property right in the domain name, “sex.com,” a profitable porn site. Courts in other cases, such as *Perk v. Vector Resources Group Ltd.*, 253 Va. 310, 315 (Va. 1997) (conversion of “computer programs, data, and software”) and *Mundy v. Decker*, No. A-97-882, 1999 WL 14479, at *4-*5 (Neb. Ct. App. Jan. 5, 1999) (conversion by the plaintiff’s former secretary who had permanently “deleted the entire contents of the WordPerfect directory” from the company computer), have assumed that computer data are subject to a claim for conversion without reference to the tangible/intangible property distinction.

The message in *Thyroff* is clear: Any company deciding to pursue self help through the courts to protect and retrieve its computer data or seek damages after a theft or destruction of
Conversion of E-Data

(continued)

its data would be well advised to base its complaint not only on violations of the CFAA, but also on conversion. Even if the state in which a suit is contemplated is one that currently adopts the merger doctrine or applies conversion only to tangible property, Thyroff is a well reasoned and powerful precedent to argue for a change in the law. While both causes of action provide for compensatory damages and injunctive relief to obtain the return of data and prevent their dissemination, there may be clear advantages to using conversion over the CFAA.

Depending on the state jurisdiction, a plaintiff is usually permitted to seek punitive damages for conversion. For example, Cole v. Control Data Corp., 947 F.2d 313, 319-20 (8th Cir. 1991), held that punitive damages could be awarded for the conversion of a software program when the plaintiff demonstrated under Missouri law that the defendants’ “conduct was outrageous.” Damages under the CFAA, however, are limited to compensatory damages “by the plain language of the statute.” Garland-Sash v. Lewis, No. 05 Civ. 6827, 2007 WL 935013, at *2 (S.D.N.Y. March 26, 2007).

Conversion action requires no minimum amount of loss

Conversion, unlike the CFAA, does not require proof of a jurisdictional amount of damage. As a predicate to obtaining the federal question jurisdiction under the CFAA, the plaintiff must prove $5,000 in “loss,” which is defined by statute to include various costs caused by the theft or destruction of computer data. See § 1030(e)(11). Failure to allege and prove $5,000 in loss automatically results in dismissal of the claim. See, e.g., Nexans Wires S.A. v. Sank-USA Inc., 166 Fed. Appx. 559, 562-63 (2d Cir. 2006). No such loss need be alleged or proven for conversion. Conversion, of course, is a state cause of action, and, as such, does not confer federal question jurisdiction, as does the CFAA.

Finally, conversion provides a backstop for federal courts that may be hostile to the use of the CFAA against company insiders who have stolen data from their employer’s computers for use in competition against their employer at a new job. Four of the seven causes of action available in the CFAA are based on “unauthorized access” to the computers. There are several federal district courts that have held that an employee with access to the company computers does not have unauthorized access since an employee, as a part of the job, is authorized to access the company computers. See, e.g., Brett Senior & Associates v. Fitzgerald, No. 06-1412, 2007 WL 2043377, at *3 -5 (E.D. Pa. July 13, 2007).

To date, the law in the federal circuit courts, and the other federal district courts, runs counter to these few decisions. International Airport Centers LLC v. Citrin, 440 F.3d 418, 420-21 (7th Cir. 2006), held that an employee's authorization to the company computers is governed by the law of agency, which is terminated when the employee enters the company computers to take data to compete against his employer. There are also courts that allow employers to define authorization to its computers though company rules. See, e.g., Doe v. Dartmouth-Hitchcock Medical Center, No. CIV. 00-100-M, 2001 WL 873063, at *2 (D.N.H. July 19, 2001). See also U.S. v. Phillips, 477 F.3d 215, 221 (5th Cir. 2007) (summarizing the various ways “unauthorized access” can be proven under the CFAA). Nonetheless, while the law interpreting the CFAA continues to develop, it is important not to ignore the ancient law handed down to us by the Norman Conquest. Conversion provides a plaintiff company with an alternative means to achieve many of the same remedies available under the CFAA.
General Counsels Beware

Although a proposed regulation governing the practice of mandatory reporting of corporate bad behavior by a company’s general counsel (“GC”) was struck down, general counsels across the U.S. may be feeling the heat from the Securities and Exchange Commission.

Under current law, a GC may voluntarily report suspected wrongdoing to government officials. However, a wave of crackdowns on GCs—nine and counting since the beginning of 2007—has resulted in those GCs being personally charged with or pleading to federal civil or criminal fraud. Between 1999 and 2001, the SEC brought 49 actions against lawyers (not limited to GCs) mostly related to insider trading. Between 2002 and 2005, the number increased to 76 cases, again mostly not against GCs. In the cases brought this year, they include actions against GCs who allegedly participated in fraudulent schemes and those who filed misleading financial documents.

“For the past several years the Department of Justice and the Securities and Exchange Commission have focused on the professionals and outside consultants involved with or approving transactions viewed as problematic. Those investigations have now reached maturation and the filing of fraud charges against corporate counsel is becoming somewhat routine. It is a real misfortune that the result of overzealousness in many instances, as well as a lack of true understanding of the complexities of the business world by prosecutors and regulators has led to a tremendous amount of unnecessary stress, loss of reputation and potential loss of liberty for many general counsel,” according to William Michael, co-chair of Dorsey & Whitney’s White Collar Practice Group.

While some of the cases are black and white, others fall into more of a grey area. The SEC has taken the approach of bringing cases on a standard of strict liability, which is a harsh standard since it involves holding someone automatically responsible without having to prove negligence. Under this standard, a GC does not have to have knowledge of the problem, but may be held liable if the problem merely occurred while working for the corporation.

Post-Enron, the SEC has pulled the reins even tighter on lawyers making them report securities law violations up the corporate ladder, to senior management. In a speech to the Corporate Counsel Institute, SEC Chairman Christopher Cox stated that when lawyers “fail to live up to their responsibility, the commission will bring enforcement actions.”

At an American Bar Association roundtable hosted recently by the group’s Section of Litigation’s Corporate Counsel and Class Actions and Derivative Suits Committees, panel members discussed the changing roles of GCs. Many participating GCs stated that they have two roles—one as part of the executive team and another as the company’s attorney. In today’s business environment, GCs and CEOs naturally desire to have a close-working relationship with senior management. However, GCs must be able to give objective legal advice to their managers and when this advice is viewed retrospectively by regulators the perceived failure to provide clearly objective, sound advice will result in focused, personal attention on the general counsel.

The Fall and Fallout of Milberg Weiss

Earlier this year, the law firm of Milberg Weiss Bershad & Shulman, as well as two of its big-name partners, were indicted by a federal grand jury for allegedly participating in a scheme in which multiple individuals were paid millions of dollars in secret kickbacks in return for serving as named plaintiffs in more than 150 class action lawsuits. The government alleges that the payment of kickbacks to lead class plaintiffs is an illegal arrangement because, among other things, the named plaintiff will then have a different interest from other class members, which the named plaintiff supposedly represents.

The indictment came on the heels of a five-year investigation into the alleged abuse of so-called “referral fees” paid by the
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firm. The charges contain 20 counts alleging various acts including conspiracy, obstruction of justice, perjury, bribery, and fraud. The government alleges that three plaintiffs were paid $11.4 million in illegal kickbacks in over 150 cases over the course of 25 years. Additionally, it is alleged that the firm continued to pay kickbacks into 2005 after it learned that it was under investigation.

A second superseding indictment was issued in September, expanding the charges against the firm and adding charges against Melvyn Weiss. The additional charges against the firm include allegations that it received in excess of $250 million in legal fees from those class actions in which it had paid kickbacks to named plaintiffs, that some of the payments were made through intermediary law firms in order to conceal them, that kickback payments were omitted from or mischaracterized on the firm’s accounting books and records, and that the firm prepared false tax documents.

To date most of those charged as a result of the investigation have decided to plead guilty.

Bill Lerach. A former partner of the firm, Lerach pled guilty to conspiracy to obstruct justice and making false statements, and agreed to pay $8 million to the government. Under the terms of his plea agreement, he could face up to two years in prison.

Steve Schulman. Another former Milberg Weiss partner, Schulman pled guilty to racketeering, agreed to pay $2.1 million to the government, and agreed to cooperate with federal authorities.

David Bershad. Bershad was the first to plead guilty and appears key to the government’s case since he was former managing partner of the firm and had worked with Melvyn Weiss for almost 40 years. He also agreed to cooperate with the government.

Melvyn Weiss. He has pleaded not guilty and is awaiting trial on the charges of conspiracy, making false statements, and obstruction of justice.

White Collar Crime and Civil Fraud Breakfast Briefing

March 14, 2008
Dorsey’s Salt Lake City Office will host a White Collar Crime and Civil Fraud Breakfast Briefing, “Current Concerns for all General Counsel.”

Join the attorneys of Dorsey Salt Lake City for breakfast and a fascinating program on White Collar Crime and Civil Fraud. Utah CLE credit will be applied for.

Registration information and other details will arrive via email or regular mail in early 2008, for Update readers in the Salt Lake City area. Contact Bill Michael at 612.492.6753 or michael.william@dorsey.com for more information.
Attorney Profile: Roger Magnuson

Roger Magnuson is the head of Dorsey and Whitney’s National Strategic Litigation Group, which handles high profile and bet-the-company cases across a range of substantive areas, including white collar crime.

A graduate of Stanford, Harvard and Oxford Universities, he joined Dorsey and Whitney in 1971 and has been in its Trial group ever since, interrupted only by a stint as Chief Public Defender in Hennepin County, Minn. During his tenure at Dorsey, he has tried over fifty jury trials and an equivalent number of Court trials in both civil and criminal proceedings in a large number of jurisdictions stretching from Washington to Florida and from California to Massachusetts. He has obtained complete acquittals in a large number of high profile criminal prosecutions, ranging from allegations of tax fraud, DOD contract fraud, customs fraud, securities fraud, and a variety of other criminal provisions.

He is admitted to practice in Minnesota and before the U.S. Supreme Court, the federal circuit courts for the Fourth, Fifth, Eighth, Ninth, Tenth, and Eleventh Circuits, and has been admitted pro haec vice for individual trial matters in approximately half of the fifty states.

His successes in trial work have led to his inclusion in the LawDragon 500, a list of the top five hundred trial lawyers in the U.S., and listings in Best Lawyers in America, SuperLawyers, Who’s Who in America and a number of similar recognitions. In 2003, Minnesota Lawyer named him a “Minnesota Attorney of the Year,” after his victory in a dispute regarding management of the internationally known Mall of America. The highly regarded Chambers USA Client’s Guide lists him as one the top seven trial lawyers in Minnesota and characterizes him as “polished and ferocious” and “the smartest lawyer in town.” A Journal of Law and Politics survey named him ‘Judges’ Choice ‘Wins Most Cases’.”

Roger is a frequent presenter on continuing legal education panels and has been a featured speaker for CEO seminars sponsored by Business Week and Institutional Investor. He has written a number of law review and legal articles, has provided comments for the New York Times on litigation matters and has appeared on a variety of radio and television programs, including Nightline.

His clients on civil matters have included the Florida Legislature in the 2000 presidential election controversies, the Minnesota Twins and Major League baseball, and a variety of major national and international entities, including the commercial Bank of Portugal.

A prolific author, Roger’s books include White Collar Crime Explosion (McGraw-Hill) and Shareholder Litigation (Thomson West) among others. A multivolume treatise on advising corporations is forthcoming in 2008 under a book contract with Juris. His most recent book is Barracuda Bait 2007, (Landsen-Holm) which deals with litigation strategy in an age of increasing litigation risks to business.

Spring/Summer 2007: The Wall Street Journal quoted Dorsey partner Mike Piazza in a story on the criminal investigation of ex-Gemstar-TV Guide International Inc., CEO Henry C. Yuen. Another Wall Street Journal article quoted Mike on potential conflict-of-interest scenarios in Kirk Kerkorian’s bid for two flagship MGM Mirage casinos. In the cover story for a recent issue of Bankruptcy Court Decisions, Mike discussed the perception of increased SEC scrutiny of insider trading, particularly by hedge funds and investments banks sitting on creditor committees while simultaneously trading in the debtor’s securities.

Spring/Summer 2007: Dorsey partner Bill Michael offered his insights on a variety of legal topics at several educational events. He discussed “Democracy in an Age of Terror” in a class at the University of Minnesota; he presented on legal ethics and other topics at corporate events at Time Warner and “Best Practices in Corporate Leadership and Ethics,” at Bristol Myers Squibb; and he was a featured presenter at the Illinois Institute of Continuing Legal Education. In addition, Bill authored an article for the Minnesota Lawyer, “Corporations Face a Hobson’s Choice on Privilege Waivers.” In August, Bill was named a “Minnesota Super Lawyer” by Law and Politics magazine.


Summer 2007: Roger Magnuson was quoted in a Corporate Crime Reporter story, “Eighty Percent of White Collar Criminal Defense Attorneys Would Preserve Corporate Criminal Liability.”

Summer 2007: Dorsey partner Nick Burkill was among several Dorsey London attorneys who earned high marks from the Legal 500, the largest and most in-depth survey of the UK legal market.

Summer 2007: Earlier in the year, Dorsey partner Ed Magarian testified at an arbitration on behalf of a corporate client regarding the results of an extensive internal investigation into numerous allegations of collusion and misconduct. In August the arbitrator, relying heavily on that investigation and characterizing it as “thorough” and “credible”, found in favor of the corporate client on all issues.

Fall 2007: Dorsey’s support of the Innocence Project of Minnesota yields results. Ten years ago, Sherman Townsend was convicted of burglary and sentenced to twenty years in prison in Hennepin County. Sherman Townsend did not commit that crime. It turns out that the person who actually committed the crime was the witness who provided the primary testimony against Sherman at his original trial in Hennepin County. That witness has now testified in specific detail about the crime, including things that only the person who committed the crime could know. After an evidentiary hearing, and a last minute deal with Hennepin County, Sherman walked out of jail a free man. Dorsey & Whitney has been a strong supporter of the Innocence Project of Minnesota, an organization whose mission is to prevent convictions of innocent persons, and to free those who were convicted of crimes they did not commit. Ed Magarian has served on the Board of the Innocence Project of Minnesota since it was founded, and for two
Dorsey in the News

years served as its Chair. Magarian also heads a wrongful conviction team at Dorsey which assists the Innocence Project on some of its cases. The team includes Shari Jerde, Heather Redmond, Tom Jancik, George Maxwell, Sara Stenberg and John Marsalek.

Fall 2007: Dorsey partner Chris Shaheen was quoted in a *St. Paul Pioneer Press* article, “Buca Cleans Its Legal Plate,” about Dorsey client BUCA, Inc., the owner and operator of 91 Buca di Beppo restaurants. BUCA reached a settlement agreement with the Securities and Exchange Commission (SEC) over certain accounting practices and other actions by former BUCA officials. Under terms of the settlement, BUCA agreed, without admitting or denying any wrongdoing, to be enjoined from future violations of U.S. securities laws. The company was not required to pay any monetary fine in connection with the settlement. Shaheen, who represented BUCA in the investigation and settlement negotiations, said the company was able to resolve the matter satisfactorily because it installed an entirely new management team and made a variety of changes to improve the company’s processes and procedures.
So Strange, It Must Be True

Man Busted While Drunk Driving in Wheelchair
BERLIN (Reuters) - A wheelchair-bound German man stunned police when they pulled him over for using the road and found he was 10 times over the legal alcohol limit for drivers. "He was right in the middle of the road," said a spokesman for police in the northeastern city of Schwerin. "The officers couldn't quite believe it when they saw the results of the breath test. That's a life-threatening figure." The 31-year-old told police he had been out drinking with a friend and was a little over a mile from home when a squad car stopped him as he passed through the village of Ventschow. Police said that because the man was technically traveling as a pedestrian, he could not be charged with a driving offence. "It's not like we can impound his wheelchair," the spokesman said. "But he is facing some sort of punishment. It's just not clear yet what exactly that will be."

Burglar Leaves His Resume At Scene Of The Crime
BROOKLYN (CBS) - At least we know he was actively pursuing a real career. Police in Brooklyn apprehended a man suspected of burglarizing a home and leaving his resume behind at the scene of the crime. Al Waxter, 39, faces burglary and other charges after police say he broke into the Clinton Hill home of Deputy Brooklyn Borough President Yvonne Graham. Police say Waxter made off with some money and valuables, but he left behind a bag containing his keys and his resume. Waxter didn't waste time blowing his cover when police found him either -- he was apparently wearing Graham's diamond studded earrings when he was placed under arrest.

Texas Man Charged in Skittles Heist
DALLAS (Associated Press) - A little candy can add up to a rainbow of trouble. A man caught removing tires from a truck has been charged with stealing the tractor-trailer containing $250,000 worth of Skittles, police said. Seven pallets of the 28 in the truck are still missing, authorities said. Alan Chavez, 22, has been charged with first-degree felony theft. Chavez said he had paid someone else $500 for the truck's rims and tires, police said. The truck has an estimated value of $85,000, and the trailer’s value is $30,000.
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