A Timely Analysis of Legal Developments

ASAP®

In This Issue:

April 2009

In a cautionary tale for all employers, the United States Court of Appeals for the Fourth Circuit recently held that an employer who accessed a former employee's personal e-mail account could be held liable for punitive damages and attorneys' fees under the federal Stored Communications Act, even without employee's proving any actual damages.

Recent Fourth Circuit Ruling Demonstrates Risks to Employers of Accessing Employees' Personal E-Mail Accounts

By Philip L. Gordon and Justin A. Morello

In a cautionary tale for all employers, the United States Court of Appeals for the Fourth Circuit recently held in *Van Alstyne v. Electronic Scriptorium Limited*,[1] that an employer who accessed a former employee's personal e-mail account could be held liable for punitive damages and attorneys' fees under the federal Stored Communications Act (SCA), even without proof of any actual damages. Notably, this ruling *narrowly* construed the available remedies under the SCA by holding that minimum statutory damages of $1,000 per violation can be recovered only with proof of actual damages. By contrast, three federal district courts previously had ruled that statutory damages (in addition to punitive damages and attorneys' fees) can be recovered even without proof of actual damages.

Van Alstyne's Facts and the Plaintiff's $400,000 Recovery in the Trial Court

Edward Leonard, the president of Electronic Scriptorium Limited (ESL), gained access to the personal e-mail account of Bonnie Van Alstyne, ESL's former Vice President of Marketing, and could not resist the temptation of reviewing Van Alstyne's personal e-mail, especially after Van Alstyne initiated three separate proceedings against ESL alleging employment-related claims. Van Alstyne learned of Leonard's snooping through discovery in a separate lawsuit that ESL had filed against Van Alstyne. In that lawsuit, Leonard ultimately admitted, according to the Fourth Circuit's opinion, that for more than one year after Van Alstyne's termination, he had accessed "Van Alstyne's AOL account at all hours of the day, from home and internet cafes, and from locales as diverse as London, Paris, and Hong Kong." Leonard eventually produced copies of 258 different emails he had downloaded from Van Alstyne's personal AOL account.

Van Alstyne promptly sued ESL and Leonard for violating the Stored Communications Act. The SCA criminalizes unauthorized access to "electronic communications" in "electronic storage" at an "electronic communications service." The Act also authorizes a private right of action to recover monetary damages for such conduct. The SCA provides for recovery of" (a) "the actual damages suffered by the plaintiff ... but in no

case shall a person entitled to recover less than the sum of $1,000," (b) punitive damages for willful or intentional violations, (c) and attorneys' fees.

ESL and Leonard attacked Van Alstyne's SCA claim based on her admission that Leonard's conduct had caused no actual damages. They contend that absent such proof, Van Alstyne could not recover statutory or punitive damages or attorneys' fees. After the district court rejected this argument, a jury returned a verdict in Van Alstyne's favor and against Leonard for $150,000 in compensatory damages and $75,00 in punitive damages and against ESL for $25,000 in compensatory damages and $25,000 in punitive damages. The compensatory damages awards represented a statutory damages award of $1,000 for each SCA violation. The district court awarded nearly $125,000 in attorneys' fees and nearly $11,000 in costs against ESL and Leonard, jointly and severally. The defendants appealed.

The Fourth Circuit's Reversal and Narrow Reading of the Stored Communications Act

The Fourth Circuit held that statutory damages are not available under the SCA absent proof of actual damages. The court relied principally on the U.S. Supreme Court's interpretation in *Doe v. Chao*,[2] of the nearly identical damages provision in the Privacy Act.[3] In *Doe*, the Court held the phrase "actual damages sustained" — which, according to the Fourth Circuit, is not materially different from the phrase "actual damages suffered" in the SCA — meant that Congress intended to require a plaintiff to prove actual harm, and that the subsequent phrase "but in no case shall a person be entitled to recover less than the sum of $1,000" merely referred back to the prior phrase. Because Van Alstyne had not pleaded or proved actual damages, she, therefore, could not recover statutory damages.

Van Alstyne is one of the first circuit court decisions to interpret the SCA's damages provision. Notably, in reaching this conclusion, the Fourth Circuit departed from decisions reached by district courts in Hawaii, Connecticut, and Illinois that permitted the recovery of statutory damages absent proof of actual damages. Consequently, a circuit split may emerge between courts that hold no proof of actual damages is required to recover statutory damages under the SCA and courts that hold proof of actual damages is a prerequisite to recovering statutory damages.

While adopting defendants' position on statutory damages, the Fourth Circuit rejected their contention that, like statutory damages, punitive damages and attorneys' fees are not recoverable under the SCA absent proof of actual damages. The court noted that the limiting language contained in the SCA's provision authorizing an award of statutory damages is absent from the SCA's provision that authorize the recovery of punitive damages and attorneys' fees. The sole limitation on the recovery of punitive damages, the court held, is a showing that the SCA violation was "willful or intentional." The court read the SCA to authorize an award of attorneys' fees to a successful plaintiff without "any requirement that damages, actual or otherwise, be recovered."

These additional rulings were only a silver lining of sorts for Van Alstyne. The Fourth Circuit vacated and remanded the awards of punitive damages and attorneys' fees. The court reasoned that both awards should be re-evaluated "in light of Van Alstyne's lower degree of success." By remanding the question of the proper amount of punitive damages to be awarded Van Alstyne, the Fourth Circuit effectively forced the district court to consider whether punitive damages could be awarded when no actual damages are shown. U.S. Supreme Court jurisprudence imposes a constitutional limitation on punitive damages awards, requiring that they be rationally related to the actual harm suffered.

Lessons for Employers

Employers can take two main points away from the Van Alstyne case:

Be Careful How You Gather Evidence

When pursuing claims against a former employee, employers should recognize the important distinction, in the eyes of the law, between recovering and reconstructing e-mails and correspondence from an employer-issued computer or from an employer's own corporate

network, on the one hand, and gathering e-mails and information form a third-party's server, on the other. Unauthorized collection of evidence from a third-party server almost always will be unlawful. Moreover, *Van Alstyne* shows that the former employee likely will be able to maintain (and survive summary judgment on) a claim for punitive damages and attorneys' fees under the SCA.

But *Van Alstyne* and the SCA do not prevent an employer from obtaining an employee's relevant web-based e-mail from other sources. The SCA prohibits only the unauthorized access to such e-mails when it is stored on a third party's server. Employers considering pursuing claims against a former employee and who are in the process of gathering evidence against an employee should consult with counsel at an early stage to determine the best method to gather necessary evidence while minimizing potential exposure to liability.

The SCA Applies to Former Employees Attempting to Access E-Mail Stored on the Employer's Server

Just as employers may be exposed to liability when accessing e-mail stored on a third-party's server, a former employee may be liable under the SCA for accessing e-mail stored on the former employer's server. This situation may arise where an employer does not promptly end a terminated employee's access to the employer's network, or where a coworker has shared his or her user ID and password with the terminated employee. While it may be difficult to show damages flowing directly from the terminated employee's access to the former employer's e-mail system, an employer most likely would be able to show that such access was willful or intentional and, under *Van Alstyne*, be entitled to recover punitive damages and attorneys' fees.

Philip L. Gordon is a Shareholder in Littler Mendelson's Denver office. Justin A. Morello is an Associate in Littler Mendelson's San Diego office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Mr. Gordon at pgordon@littler.com or Mr. Morello at jmorello@littler.com.

[1] 560 F.3d 199 (4th Cir. 2009).

[2] 540 U.S. 614 (2004).

[3] 5 U.S.C. § 522a.