Alderman
& Alderman's

Client Advisor

March 2007

In This Issue

Inadequate Notice of Tax Sale.. 1
Computer Fraud and Abuse Act 1
Did You Know?......................... 4
Establishing Patent Priority for Interfering Patent Applications 3
The Dangers of Employee Internet Use 4

Cases of Interest

Unscheduled Executory Contract "Rode Through" Bankruptcy:
The Chapter 11 reorganization had no effect on a license agreement that the Debtor did not schedule. The Court ruled that the an executory contract will "ride through" regardless of whether the failure to schedule was intentional or inadvertent. In re JZ, LLC, (Bkrtcy D. IO, 2006).

Automatic Stay — Automatic Termination:
A Creditor's repossession of a car was held to not violate the automatic stay. The court reasoned that the automatic stay terminated 30 days after the petition date because debtor indicated in his statement of intention that he intended to retain the vehicle, but did not indicate that he intended to reaffirm the debt. (Bkrtcy ND OH, 2006).

Post-Confirmation Jurisdiction:
A Bankruptcy Court retains jurisdiction post-confirmation to resolve disputes regarding interpretation of the confirmed Chapter 11 Plan. *In re: Allegiance Telecom, Inc.* (Bkrtcy S.D.N.Y. 2006).

Unbelievable:
A Ch. 7 debtor's attorney in Georgia was caught on video threatening to hunt down clients who fail to pay, sue them and "sell their children to slavery." *In re: McTyeir* (Bkrtcy MDGa, 2006).

Inadequate Notice of Tax Sale

Gary bought a house that he and his wife lived in for 26 years. When the couple separated, Gary moved out, but he continued to pay the mortgage for another four years until it was paid off in full. The loan was gone, but not the property taxes—they went unpaid when the mortgage company that had previously been paying them was out of the picture.

Gary sued the state, arguing that the state had sold his property for taxes without first affording him procedural due process.

The state attempted to notify Gary of the delinquency and of his right to redeem the property. It mailed a certified letter to him at the address of the subject property. Since nobody was home to sign for the letter, it was returned to the state marked "unclaimed." Two years later, and only weeks before the property was sold to pay the taxes, the state published a newspaper notice of public sale of the property. A buyer came forward, and the state sent Gary another certified letter stating that his house would be sold if the taxes were not paid. It, too, was returned unclaimed to the state. Only when the new owner served a notice on Gary's daughter at the house did Gary finally

Continued on page two.

Computer Fraud and Abuse Act

The federal Computer Fraud and Abuse Act (CFAA) provides civil remedies to complement the original criminal sanctions for the theft and destruction of computer data, fraudulent use of passwords, and various means of committing fraud by unauthorized access to computers. For a typical claim under the CFAA brought against a defendant who violates the statute in an attempt to gain a competitive advantage over the plaintiff, there must be a financial loss of at least $5,000 in order to maintain a civil cause of action.

The ability to obtain injunctive relief under the CFAA is at least as valuable to an injured party as the recovery of damages.

The ability to obtain injunctive relief under the CFAA is at least as valuable to an injured party as the recovery of damages. To win an injunction, however, the plaintiff must be in a position to prove not just the unauthorized intrusion into the plaintiff's computers, but also specifics as to what information was taken by the defendant and how it was used to harm the plaintiff.

In a recent case, a former officer and an employee of a party supply store were alleged to have gathered informa-

Continued on page two.

100 Pearl Street, 14th Floor | Hartford, CT 06103 | Phone: 860.249.0090 | Fax: 860.760-6296

Tax Sale

Continued from page one.

learn about the tax sale, but it was after the fact.

Gary sued the state, arguing that the state had sold his property for taxes without first affording him procedural due process, and the United States Supreme Court agreed with him. The Court did not lay down an ironclad rule on what procedures are to be followed in all cases. It did say that, upon the return of a notice as undeliverable, the government must take additional, reasonable steps to attempt to provide notice before it takes the drastic step of extinguishing someone's interest in his or her property.

While the extent of what is required will vary with the particular circumstances, the Court's comments indicate that it hardly expects the government to put a detective on the case of a "missing" property owner. Open-ended requirements, such as searching a telephone book or other government records, are not required of the government. But it is not too much to ask the government to do, in the Court's words, "a bit more." There were some follow-up options that the state should have explored and used. They include such simple measures as sending a notice by regular mail, for which no signature is required, posting the notice on the front door, or addressing the otherwise undeliverable mail to "occupant." Presumably, even a non-owner occupant would alert the owner of such a notice.

The Court drew an analogy to a state official handing notices meant for delinquent taxpayers to a mail carrier, then watching as they were accidentally dropped down a storm drain. One would expect new notices to be prepared and sent again. Just as it would be unreasonable for the official under those circumstances simply to shrug his shoulders and say "I tried," the state in Gary's case owed him more than inaction when the notices meant for him were returned "unclaimed."

Did You Know?

The IRS recently began a pilot project that uses private debt-collection agencies to collect back taxes. The controversial program will employ three private collection agencies to target 40,000 delinquent accounts of taxpayers who are in the red to Uncle Sam for $25,000 or less. The agencies get to keep up to 25% of what they collect.

Criticism of the program includes the fear that tax delinquents will be harassed illegally, even though the agencies will be subject to fair debt collection laws. There is also concern about turning over sensitive personal and financial information to private companies.

If you are one of the 40,000 accounts targeted, the IRS must inform you in writing. However, you will be allowed to opt out at that time and deal directly with the IRS.

Giving Back

Firm Attorney To Serve Human Rights Commission:
Myles Alderman was appointed to serve another term on the Human Rights Commission for the Town of West Hartford.

HSO Business Partner of 2007:
Alderman & Alderman is proud to support the Hartford Symphony Orchestra's ongoing contributions to arts in Connecticut.

CFAA

Continued from page one.

tion from their former employer's computer without authorization, so as to get a leg up on the plaintiff in their new, competing business. The elements for the claim were in place, except for the critical proof as to what data records of the plaintiff's were accessed and whether such records had been downloaded, copied, or printed by the defendants. The plaintiff business was denied an injunction in federal court because of this gap in its proof.

The case of the competing party-supply businesses offers object lessons for how businesses can best put themselves in a position to take full advantage of the Act if they have been victimized. One advisable technical step is to include an auditing function in a computer system that automatically records what documents have been accessed and what happens to the documents when they are accessed. The resulting "audit trail" can be a valuable piece of evidence in an action under the CFAA. When employees are allowed to work at home on their computers, employers should have policies allowing them to inspect those computers when the employment ends and to retrieve any of their data.

Although technical measures and policies on computer technology are important, simple use of imagination can also produce relevant noncomputer evidence for a CFAA claim. The court in the unsuccessful action by the party-supply store observed that the plaintiff could have presented evidence that the defendants had taken particular actions to the competitive disadvantage of the plaintiff very soon after their unauthorized access to the plaintiff's computers. This would have allowed an inference that secrets had been taken from, and then used against, the plaintiff.

Establishing Patent Priority for Interfering Patent Applications

Under the United States patent system, patents are awarded to inventors who are the first to invent, as opposed to the first to file a patent application. Unless another inventor can show that he conceived of an invention first, and was reasonably diligent in later reducing the invention to practice, the inventor who first reduces the invention to practice is entitled to the patent. "Reduction to practice" can be either constructive, such as by filing a patent application, or actual, such as by constructing a working model or prototype of a product, carrying out the steps of the invented method, or producing the composition of an invented material.

In litigation over competing, sometimes called "interfering," patent applications for the same invention, evidence of actual reduction to practice is pivotal in establishing the priority of an invention. Such evidence is the "meat on the bones" of a legal case for establishing priority in an interference proceeding. The winning party will have to show that it constructed the claimed embodiment or performed the claimed process, that the embodiment or process functioned for the intended purpose, and that there is sufficient evidence to corroborate the inventor's testimony as to the first two requirements.

The importance of unassailable evidence of reducing an invention to practice is illustrated by a case in which two companies were competing for a patent for making an active ingredient in an allergy medication. Neither party relied on a date of conception, so the case turned on who first reduced the invention to practice. One company had the earlier filing date on its application, but the second company claimed that it had earlier reduced the invention to practice.

Given the subject matter of the invention, the second company's evidence was in the form of laboratory data and notebooks kept by individuals closely associated with the inventive process. Unfortunately for that company, flaws in this evidence greatly diminished its weight and led the court to rule in favor of the first company. Essentially, the evidence lacked sufficient corroboration, such as by signing notebooks, using witnesses to vouch for their authenticity, or having individuals testify as to the genuineness of the notebooks' contents. Such shortcomings likely would have been enough by themselves to tip the balance, but evidence of fraudulent backdating of notebook entries was another fatal blow to the second company's case.

Make Sure to Carefully Document Evidence

There is no single, exclusive method for marshaling and authenticating evidence for use in a patent priority battle, but the case of the allergy medication ingredient suggests that a meticulous approach is prudent. Examples of practices that should be in place include bound notebooks for inventors, with each page signed and dated in permanent ink not only by the creator of the notebook, but also by a disinterested but informed noninventor; placement of entries in chronological order; and initialing and dating of any corrections. Inventors should record as much detail as possible about their activities and conclusions relating to the invention, and there should be a full explanation for any supplementary materials. Finally, all of this attention to detail and following of procedures could be for naught unless the information is kept in a secure place to which there is authorized access only.

Just as scientific methods must be followed in the very work that leads to a patented invention, a company should adopt and rigorously follow procedural guidelines for recordkeeping in connection with any of its work that could lead to a patent. Otherwise, there is a great risk of wasted effort and the loss of what could be very valuable intellectual property.

Alderman & Alderman Attorney Recognized as Connecticut SuperLawyers

Myles Alderman was recognized as a Connecticut SuperLawyer for his work in the practice areas of Business Reorganizations and Business Litigation again in 2007. Connecticut Super Lawyers are named by their peers through independent research conducted by *Law & Politics*. *Law & Politics* uses a rigorous selection process and requested evaluations from more than 13,000 active lawyers in Connecticut.

The selected individuals represent the top 5% of Connecticut attorneys in more than 50 practice areas. Myles and Linda Alderman had each been named Connecticut SuperLawyers in the 2006 survey. Linda is on inactive status from the practice of law while she dedicates her energy to recovering from her long battle with Cushing's Syndrome.

Actual resolution of legal issues depends upon many factors, including variations of facts and state laws. This newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking action on matters covered by this newsletter.

The Dangers of Employee Internet Use

By some accounts, a large majority of employees access the Internet on company computers for personal reasons while at work. The obvious adverse effects of this on productivity are only the tip of the iceberg with regard to the potential headaches that such activities can cause for employers. Personal Internet activity by employees can pose security risks to the company's computer network itself, such as by exposing a network to a computer virus.

Less immediate but just as serious is the threat of legal liability of the employer to injured third parties. Some scenarios are not difficult to imagine. An employee uses his computer as a tool for sexually harassing fellow workers by visiting pornographic websites. Or, an employee embroiled in a bitter domestic dispute uses his office computer to communicate threats to his spouse, and the employer fails to take action.

In a recent case, one such nightmare scenario was all too real for an employer that had to defend itself against the alleged victims of an employee who used a workplace computer for conduct that was criminal, not just indicative of poor judgment. This case may be the first reported decision on the matter of an employer's liability to a third party for having failed to take action to stop an employee from using a company computer in a manner that harmed the third party. It most certainly will not be the last such case.

The case involved an employee who used his company's computer at work to visit pornographic sites, including some relating to child pornography. Over a period of time, a supervisor and some coemployees became aware of this activity and complained to management. Eventually, the offending employee was confronted and was told to stop such use of the computer, but, a few months later, he was again discovered to have accessed pornographic sites.

Eventually, the employee was arrested on child pornography charges, including allegations that he had transmitted nude pictures of his 10-year-old stepdaughter over his office computer to a child pornography site. The employee's wife, who divorced him, sued the employer for failing to investigate and for failing to report the employee's viewing of child pornography. The case was settled, but not until a precedent was set when the lawsuit survived attempts to have it dismissed before trial.

There are limits to what companies can or should do to prevent improper use of company computers, but it is only prudent to take at least some basic measures. It makes sense to have a written e-mail and Internet use policy that clearly informs employees of what, perhaps, they should already know—that the employer has and reserves the right to monitor employees' use of the company's computers and to discipline violators. In addition, there needs to be even-handed enforcement of the policy. Even the best written policy will do little to convince a jury, if it comes to that, that a company has done all it reasonably could have done, if the evidence is that the policy was toothless or rarely enforced.

The Book

Chapter 11 Business Reorganizations For Business Leaders, Accountants and Lawyers
Author: Myles Alderman, Jr.
Publisher: Outskirts Press, Inc.
ISBN -10: 1-59800-413-1
Retail Price: $39.95
Available at Amazon.com and other fine booksellers.

Alderman & Alderman's
Client Advisor
100 Pearl Street, 14th Floor
Hartford, CT 06103

RETURN SERVICE REQUESTED

PRSRT STD
U.S. Postage
PAID
Charlottesville, VA
Permit #186