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The CFAA: Is It in Your Game Plan?

It's the Computer Fraud and Abuse Act.
Useful claim or legal oddity?

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I. THE CFAA: IS IT IN YOUR GAME PLAN?

The question presented is whether the Computer Fraud and Abuse Act (CFAA) is a useful tool for an attorney to have in his or her toolbox when dealing with non-compete issues. There are pros and cons to discuss, which are more appropriate for the presentation than for written legal analysis, but the simple answer is "yes."

The CFAA is like any other tool. It is made for a specific purpose and, when that specific purpose is needed, it is indispensable. It is a specialized tool, however. One that appears to be deceptively easy to use on the surface but, once understood with more depth, becomes more difficult to use properly. For that reason, the CFAA is a tool that should not be used without good reasons for doing so.

Because of its specialized and somewhat exotic nature, it has the potential to cause confusion and bring unnecessary complexity into the litigation process—and any experienced trial lawyer knows that confusion and complexity can be their worst enemies.

But, in the appropriate situation, this tool can be extremely effective and efficient. The CFAA is designed to protect against the misuse of computers by prohibiting the wrongful "access" to such computers. In the Fifth Circuit, if a company has implemented appropriate policies and procedures to place limitations on authorization and use of access, such misuse can include misuse (1) of both the computers *and the data* stored on those computers (2) by company "insiders" such as current and departing employees, as well as former employees.

In those situations where company data has been—or legitimately may be—improperly taken or used by a former employee, the CFAA can have the power of a sledge-hammer driving a roofing nail! It has the ability to bring litigation to a heightened crisis-point within a matter of days to apply maximum pressure and a vigorous injunctive remedy that courts have shown a

willingness to use to protect such company data. Because there is concurrent jurisdiction over the CFAA, it can be used in state or federal courts.

Given that non-competes are generally used to protect valuable company information, in appropriate cases, the two can work hand-in-hand and be very effective at addressing both the former employee's wrongful taking and use of company data as well as wrongfully competing against his or her former employer.

Ultimately, the CFAA is not a law that most practicioners will look to frequently, but when the situation is right, it is a useful claim and certainly not a legal oddity. For those who may find a need to use this law in the future, included below are excerpts from some of the author's other publications that provide helpful analysis and guidance.

II. ADDITIONAL RESOURCES

Included in this paper are excerpts from two additional resources that help explain important issues that could not be explained during the presentation, due to time limitations.

Appendix 1: In Search of the Golden Mean: Examining the Impact of the President's Proposed Changes to the CFAA on Combatting Insider Misuse

The excerpts from the first article focus on insider (*i.e.*, employee) misuse. Specifically, the article addresses the seven most common scenarios of insider misuse of computers and data and how courts deal with CFAA claims based on such misuse.

For context for this article, the author was asked to analyze the President Obama 2015 proposed amendments to the CFAA and analyze how they would impact the issue of insider misuse. In this article, the author proposes abandoning the "Circuit Split" trilogy of access approaches and, instead, analyzing these issues based upon the specific factual categories that

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