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Recent Decisions from Appellate Courts: Updates and Practical Impacts

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Recent Decisions from Appellate Courts: Updates and Practical Impacts

By Jennifer S. Freel[1]

During the past two years, appellate courts have weighed in on statutes and issues that fill every white collar attorney's tool box. In this article, we summarize recent decisions interpreting the Computer Fraud and Abuse Act, Wire Fraud statute, and the Aggravated Identity Theft statute. The article also looks at Supreme Court cases focused on the remedies—restitution and disgorgement—available to the FTC and SEC. Finally, it looks at search and seizure issues, including recent Fifth Circuit cases examining how to protect privileged documents and the amount of particularity required for a search warrant.

I. Cases from the U.S. Supreme Court

Van Buren v. United States, 141 S. Ct. 1648 (2021)

The Computer Fraud and Abuse Act ("CFAA")[2] was designed to stop hacking and other forms of cybercrime. For many years, multiple courts of appeals and the DOJ have taken one provision of the CFAA to mean that individuals can be civilly or criminally liable for abusing their permission to use a computer to access information for improper purposes.[3] On June 3, 2021, the Supreme Court decided that the CFAA does not cut so broadly, holding that defendants "exceed authorized access" under the CFAA only in situations where they "obtain information to which their computer access does not extend."[4]

In *Van Buren v. United States*, a 6-3 opinion, the Court reversed the conviction of a former Georgia police officer who had been accused of violating a provision of the CFAA that makes it illegal to "intentionally access a computer without authorization or [in a manner that] exceeds authorized access."[5] In finding for the officer, the Court held that the CFAA's "exceeds authorized access" provision only applies to situations where an individual has permission to access a computer but then obtains information from areas in that system (such as folders or restricted files) he or she is not authorized to access.

The Court found that it did not extend to the circumstances at issue here, where the police officer had lawful access to the database and the information within it. Instead, the Court determined that the "exceeds authorized access" provision is only in play where a person "accesses a computer with authorization but then obtains information located in particular areas of the computer—such as files, folders, or databases—that are off limits" to that person.[6] In addition to

[1] The author provides sincere thanks to the White Collar and Government Enforcement attorneys at Vinson & Elkins, many of whom contributed the source material for this paper. The V&E Report, https://www.velaw.com/series/the-ve-report/, is a firm publication that serves as a good source for anyone who wants to keep up with topics affecting white collar investigations and prosecutions.

[2] Computer Fraud and Abuse Act of 1986, Pub. L. No. 99-474, 100 Stat. 1213 (codified at 18 U.S.C. § 1030)).

[3] *See, e.g.*, *United States v. John*, 597 F.3d 263 (5th Cir. 2010).

[4] The Court's opinion is in the case of *Van Buren v. United States*, 141 S. Ct. 1648 (2021).

[5] *Id.* at 1652.

[6] *Id.*

providing clarity to the scope of the law, the Supreme Court has significantly narrowed the reach of the CFAA to foreclose criminal and civil liability for "a breathtaking amount of commonplace computer activity,"[7] such as violations of a website's terms of service or using a work computer to access personal email.

A. Background and Procedural History

Nathan Van Buren was a police officer in Georgia, who was the subject of a sting operation by the FBI investigating possible corruption on his part.[8] A criminal informant working with the FBI offered Van Buren $5,000 to run the license plate number of an exotic dancer in the Georgia Crime Information Center database ("GCIC").[9] As a police officer, Van Buren had access to the GCIC and was authorized to use the database for purposes related to law enforcement. Van Buren performed the search and told the informant that he had the requested information. He was subsequently arrested and charged with honest services fraud in the form of bribery and violating the CFAA, a federal statute that criminalizes computer hacking, among other things.[10] Specifically, Van Buren was accused of a criminal violation of a CFAA provision that prohibits anyone from "accessing a computer without authorization or exceed[ing] authorized access" to obtain information from a protected computer.[11] After a jury trial, Van Buren was convicted and sentenced to 18 months in prison.

Under the text of the CFAA, a defendant "exceeds authorized access" when he or she accesses "a computer with authorization," but such access is used "to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter."[12] Van Buren argued that his conduct did not meet the definition of "exceeds authorized access" because obtaining license plate information was not beyond the scope of information he was "entitled to obtain" as an authorized user of the GCIC.[13] The government pushed for a much broader reading of the statute, arguing that individuals exceed authorization any time they access information on a computer that they are otherwise authorized to access if done for an improper purpose. Siding with the government, the Eleventh Circuit upheld Van Buren's conviction under the CFAA.[14]

The Supreme Court granted certiorari to resolve a circuit split. The First, Fifth, and Seventh Circuits shared the Eleventh Circuit's view, but the Second, Fourth, and Ninth Circuits favored Van Buren's narrower reading of the CFAA.

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[7] *Id.* at 1661.
[8] *Id.* at 1653.
[9] *Id.*
[10] H.R. Rep. No. 98-894 (1984), at 10.
[11] *Id.* § 1030(a)(2).
[12] *Id.* § 1030(e)(6).
[13] *Van Buren*, 141 S. Ct. 1654.
[14] The Eleventh Circuit, however, vacated Van Buren's conviction for honest services fraud due to an error in jury instruction, and remanded the case for a new trial on those charges. *United States v. Van Buren*, 940 F.3d 1192, 1204-05 (11th Cir. 2019).

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