

Court Holds That Bartered Services May Qualify as "Loss" Under the Computer Fraud & Abuse Act

Insights

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Lost Employee Productivity and Attorneys' Fees Also Count Toward "Loss" Required to Meet \$5,000 Jurisdictional Requirement



An increasing number of courts have weighed in recently on whether the Computer Fraud & Abuse Act ("CFAA") applies in the context of a faithless employee. Despite this onslaught of decisions, there are still relatively few cases that delve into the details of what qualifies as a "loss" under the statute. The definition matters because without a "loss" of \$5,000 or more, employers (or anyone else) cannot bring a civil claim under the CFAA.

In *Animators At Law, Inc. v. Capital Legal Solutions, LLC*, the U.S. District Court for the Eastern District of Virginia recently took on this issue and offered its view on whether an actual payment of money is required to establish a "loss." The Court also addressed whether bartered services, lost employee time, and attorneys' fees may qualify. The result is a decision that will make it easier to

employee time, and attorneys' fees may qualify. The result is a decision that will make it easier to assert such claims if it is followed by other courts. (A copy of the court's decision is available in pdf format below.)

In *Animators*, an employer sued two former employees who allegedly took a laptop computer with them when they resigned. The former employer, Animators At Law ("Animators"), hired a computer forensic firm to analyze the laptop computer after it was returned. The overall investigation was spearheaded by Animators' president and its outside counsel.

Animators sued the former employees and their new employer in federal court asserting a claim under the CFAA. Animators sought to satisfy the \$5,000 jurisdictional threshold in three ways. First, it noted that the services performed by its computer forensic firm were valued at nearly \$20,000. Second, it argued that its president normally charges \$300 per hour for his time as a consultant, and he spent in excess of 72 hours overseeing the investigation. Third, Animators stated that its lawyer chimed in with an hourly rate of \$445 for an additional \$14,000.

The defendants argued that Animators' alleged "losses" did not qualify as the type of "loss" required by the CFAA. First, with respect to the computer forensic fees, the defendants pointed out that Animators did not actually pay these fees. Instead, in accordance with a "longstanding, ongoing business relationship," Animators obtained the services of its computer forensic firm "in trade for other services" to be performed by Animators in the future. The Court sided with Animators noting that "the CFAA does not require losses to be paid for in cash." According to the Court, "it would be passing strange for [the computer forensic firm] to spend more than sixty hours of time analyzing Animators' data ... without any expectation of compensation in some form....Thus, a jury could reasonably conclude that the costs of [the computer forensic firm's] service were internalized by Animators and thus qualify as CFAA losses."

Second, the defendants challenged Animators' "loss" by arguing that the time spent by its president investigating the alleged violations should not count. Relying on prior precedent, the Court noted that "'many hours of valuable time away from day-to-day responsibilities" are contemplated within the CFAA's definition of 'loss.'"

Finally, the defendants argued that the all of the fees incurred by Animators, including its attorney, were unreasonable. On this point, the defendants made the most progress, but still were unable to persuade the Court. Although the Court agreed that the CFAA "requires a plaintiff to prove that the losses in issue were reasonable," it found that the amount of money that should be spent on an investigation is often easy to criticize in hindsight. In the Court's words:

[A]n investigation is often required to determine the cause and scope of a computer intrusion, and the financial impact of even a relatively narrow intrusion can be extensive. In this case, had Animators' confidential information about clients been compromised, Animators might well have had to address the security breach on a client-by-client basis, potentially adversely affecting Animators' business activities....A jury...may reasonably conclude that, in light of this risk, Animators acted reasonably. In the end, Animators' investigation may disclose that no files were

acted reasonably....In the end, Animators' investigation may disclose that no files were compromised.... Yet, hindsight must not guide such an analysis of whether such actions were reasonably necessary in response to a CFAA violation; instead, as with any reasonableness inquiry, the analysis should focus on whether reasonable prudence was exercised in light of the risks and circumstances presented.

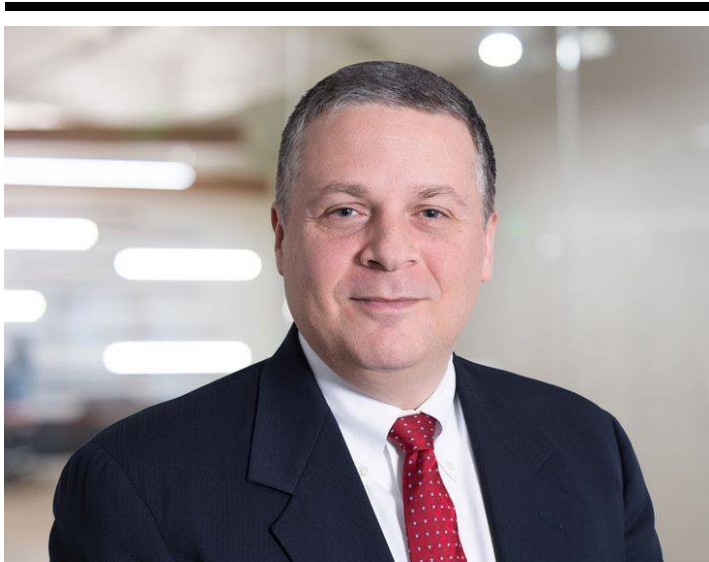
The Court summed up its decision by stating: “[P]erpetrators of unauthorized access should foresee that their actions may result in significant investigations and costs far exceeding the actual damage to the system.”

If other courts fall in line with this opinion from the Eastern District of Virginia, it will be easier for aggrieved parties to assert civil CFAA claims. Between lost employee productivity and attorneys' fees, the \$5,000 jurisdictional threshold is likely to be established quite easily.

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