

# OHRENSTEIN & BROWN

## OMNIBUS

INSIGHTS INTO THE DECISIONS THAT MOST IMPACT YOUR BUSINESS

## Holding Employees Accountable for Computer Fraud

In a recent decision written by Judge Richard Posner, The United States Court of Appeals for the Seventh Circuit determined that the Computer Fraud and Abuse Act (CFAA) may be used to bring a private cause of action against a former employee who permanently erased confidential data from his company-issued laptop before returning it to the company. *International Airport Centers, L.L.C. v. Citrin*, (Slip Op.) No. 05-1522 (7th Cir. March 8, 2006). In so holding, the Seventh Circuit becomes the first circuit court to approve companies using the CFAA as another weapon for protecting confidential information and defending themselves against the malicious and competitive acts of departing employees.

**“...the CFAA offers protection to safeguard the information on which business is built.”**

### Making the Case

In *International Airport Centers, L.L.C. (IAC) v. Citrin*, IAC hired Jacob Citrin to identify potential real estate properties for IAC and to assist IAC in acquiring those properties. In order to collect data on prospective properties, IAC lent Citrin a laptop computer to use in the course of his employment. After working for IAC for several years, Citrin decided to quit his job in order to start a competing

*continued on page 2*

## Industry Watch

On March 21st, the U.S. Supreme Court closed the Securities Litigation Uniform Standards Act of 1998 (SLUSA) loophole that had permitted class action securities litigations to be brought in either state or federal court under state law — a decision favorable to public corporations and financial firms. Our analysis of this ruling entitled, *The Impact of Merrill Lynch v. Dabit* is available online at [www.oandb.com](http://www.oandb.com). To receive this e-Alert and future time-sensitive information via email, send a request to [info@oandb.com](mailto:info@oandb.com) or subscribe at [www.oandb.com/newsroom-signup.html](http://www.oandb.com/newsroom-signup.html)



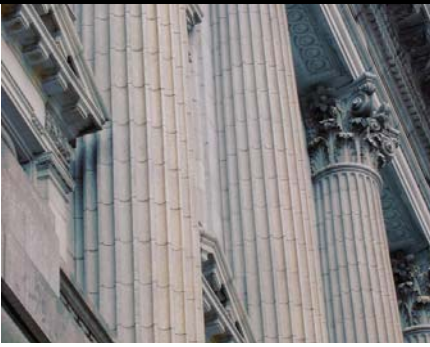
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## By the Numbers

(stats from industry-related source)

**U.S. tort costs reached  
a record**

**\$260  
billion**

**in 2004, or  
approximately**

**\$886  
per person.\***

## Computer Fraud *continued from page 1*

business. Before returning the laptop to IAC, Citrin loaded a secure-erasure program onto the laptop and permanently erased all of the data on it - including the data he had collected in the course of his employment, and presumably, evidence of his disloyalty in planning a competing business while still working for IAC.

In this case, the Seventh Circuit simply assumed without discussion that the company-issued laptop IAC loaned to Citrin was a “protected computer” within the meaning of the CFAA.

In deciding on Citrin’s use of the protected computer to be “without authorization or exceeding authorization,” Judge Posner noted that Citrin’s authority to access the laptop was based solely on his employment relationship as an agent of IAC. Accordingly, when Citrin uploaded the secure erasure program onto his company-issued laptop for the purpose of deleting his employer’s confidential information, his agency relationship terminated, he was completely “without authorization” to access the information stored on the company’s computer.

In proving Citrin’s misconduct, IAC relied on the CFAA provision that deals with unauthorized access of a computer resulting in damage to that computer, specifically, “whoever knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization to a protected computer.” The Court noted that Citrin’s transmission of “a program intended to cause damage” to a computer’s files met the CFAA requirement of

damage, which includes “any impairment to the integrity or availability of data, a program, a system or information.”

Finally, in addition to the elements listed above, a plaintiff must also prove that defendant’s misconduct resulted in at least \$5,000 in damages within a one-year period. Under the statute, “loss” is defined as “any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service.” 18 USC 1020(e)(11). It is important to note that while the \$5,000 jurisdictional threshold is met in a majority of cases, lost revenue is a “loss” as defined by the CFAA only when the revenue is lost as a result of an interruption of service -- for example, when a company’s network is damaged or impaired. *Nexans Wires SA v. Sark-USA, Inc.*, 2006 U.S. App. LEXIS 3619 (2d Cir. 2006).

### Protection Under the Law

Individuals and companies can look to the expansive reading of the CFAA by the Seventh Circuit as welcome news in the defense against computer crimes by known and unknown attackers. As companies rely more and more on computers to create and store intellectual property and proprietary work product, the CFAA offers protection to safeguard the information on which business is built.

*—By Christopher Hitchcock  
and Amber Whitfield*

For an in-depth review of the CFAA log onto [www.OandB.com](http://www.OandB.com)



# Improper Reservation of Rights Will Cost Insurers

Reservation of rights letters must be broad enough to cover specific coverage defenses.

— By: Bennett Katz and Blaise Chow

On March 1, 2006 the District Court for the Southern District of New York granted partial summary judgment in *Olin Corp. v. Ins. Co. North America, et al*, reaffirming the rule that the insurers must state with specificity all grounds upon which they reserve their rights. Justice Thomas P. Griesa held that insurer, certain Underwriters of Lloyds (“Underwriters”), had waived its late notice defense.

The insured, Olin Corp., had discovered in the early 1980s that one of its manufacturing sites was contaminating ground water from activities occurring in the 1950s and 1960s. On February 15, 1984, Olin had notified by letter London Underwriters of potential environmental damage liability. In that letter, Olin stated that tests had been conducted since 1980; the Alabama Division of Solid and Hazardous Waste was informed and involved in the tests; Olin had submitted a

plan to Alabama to remediate in September 1983; and, in November 1983, Alabama approved the plan. Olin’s notice letter also estimated remediation costs.

39 days later on March 26th, 1984, Underwriters responded with a reservation of rights letter, stating, “Underwriters reserve their right re coverage and punitive damages.” Significantly, the letter did not assert any reservation of rights with respect to a late notice defense. As well, Underwriters did not follow up with a broader reservation of rights letter for possible late notice until November 1993, when it was made part of an affirmative defense in litigation. The Court took a rigid stance on Underwriters’ deficient reservation of rights letter.

Log onto [www.OandB.com](http://www.OandB.com) to read more of this article.

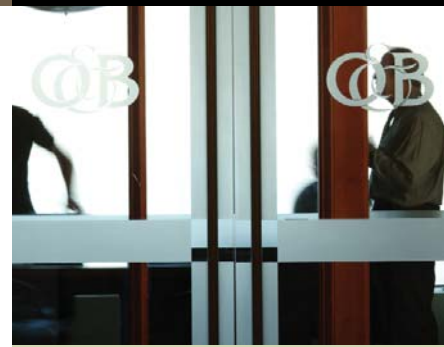
## Meet Jennifer Robinson



Counsel to the firm, Ms. Robinson has been helping clients with insurance coverage matters since 1998. Her interest and expertise is in directors’ and officers’ liability coverage, professional liability coverage and fiduciary liability coverage matters. Over the last eight years, Jennifer has broadened her practice to include the healthcare, financial and brokerage industries where she is involved in ongoing litigation stemming from New York Stock Exchange and SEC

investigations of Specialist floor trading activities as well as litigation arising out of the Bid Rigging Investigations and Market Timing and Broker's Steering and Excessive Fees Litigation. Prior to joining O&B, Jennifer gained invaluable experience at the Washington, D.C. office of Gilberg & Kurent and the New York office of Thurm & Heller, LLP.

When not devoting herself to the complexities of client matters, Jennifer enjoys spending time with her daughters, painting and the theatre.



## O&B NEWS

**Associate Jonathan D.**

**Beekman** rejoins O&B effective May 15, 2006.

Jonathan will be working from the Garden City office and can be reached via email at [jonathan.beekman@oandb.com](mailto:jonathan.beekman@oandb.com)

### Notable Verdicts:

- **Geoff Heineman** received a favorable ruling in an insurance coverage case involving multiple towers of directors' and officers' and company insurance liability policies. This ruling insulated from exposure two of his clients' policies which afforded \$40 million in coverage.
- **Teddy Stefas** successfully argued an appeal in *Richard Molyneaux v. City of New York, Van Tag Contracting Corp.* before the Appellate Division, Second Department.

For complete details, visit: [www.oandb.com/newsroom-368.html](http://www.oandb.com/newsroom-368.html)

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## Join Us at these Events:

- 8/13 **O&B Sprint for the Arts**  
Time: 8:30 a.m.  
For the Benefit of the  
Nassau County Museum of Art  
Race will be on the grounds of the museum located at:  
One Museum Drive, Roslyn Harbor, NY 11576  
Runners, walkers welcome. Prizes, refreshments & fun  
for the entire family. Get details at [www.OandB.com](http://www.OandB.com)
- 10/23 **ACCA Annual Conference**  
Topic: Insurance Claims and the Board of Directors: Is  
There a Conflict of Interest?  
Time: 2:30 - 4:00 p.m.  
Location: Manchester Grand Hyatt, San Diego, CA  
Registration: [www.acca.com/am/06/](http://www.acca.com/am/06/)

Information contained in this publication should not be construed as legal advice or opinion, or as a substitute for the advice of counsel. The enclosed materials may have been abridged from other sources and are provided only for educational and informational purposes.

\*U.S. Tort Costs and Cross-Border Perspectives: 2005 Update from the Tillinghast business of Towers Perrin.



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