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CLIENT BULLETIN

Intercepting Electronic Communications: Risking a Claim for Violations of the Wiretapping and Electronic Surveillance Act, 18 U.S.C. §§ 2510-2522

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Epstein v. Epstein, No. 14 C 8431, 2016 WL 7232145, at *1 (7th Cir. Dec. 14, 2016) is a Seventh Circuit decision sure to be of interest not only to domestic relations practitioners, but to attorneys with any clients who have intercepted or are contemplating intercepting electronic communications sent by or to other parties. In *Epstein*, Barry Epstein's ("Barry") suit against his wife, Paula Epstein ("Paula"), and her attorney for violations of the federal Wiretapping and Electronic Surveillance Act (the "Act"), 18 U.S.C. §§ 2510-2522, stemmed from the couple's pending marital dissolution action in Illinois, in which Paula accused Barry of "serial infidelity." *Id*. at *1. During discovery, Barry requested "'any and all communications, documents, e-mails, text messages … or other document whatsoever, which allegedly relate to Paula's allegation of infidelity.'" *Id*. Among the documents Paula's attorney produced in response to that request were emails between Barry and other women. Barry assumed that Paula secretly had Barry's emails forwarded to her. *Id*.

Barry alleged in his amended complaint that Paula violated the Act when she secretly "placed an auto-forwarding 'rule' on [Barry's] email accounts that automatically forwarded the messages on his email [computer program] to her." *Id*. He alleged the emails were intercepted contemporaneously with their transmission "'insofar as the electronic messages destined for Barry were forwarded to Paula at the same time they were received by Barry's email servers.'" *Id*. at *2. Barry also alleged Paula's lawyer violated the Act by "disclosing" Barry's intercepted emails in responding to Barry's discovery request. *Id*. at *1. Paula and her attorney argued that the emails, which were attached to the amended complaint, had time and date markings that showed the intercepted emails might not have been intercepted contemporaneously with the transmission of the emails. *Id*. at *2. Paula's attorney also argued he could not be liable under the Act for disclosing Barry's own emails in response to Barry's discovery request. *Id*.

The trial court noted that the shortest time between when Barry sent or received an email and when Paula received the intercepted email was about three hours. *Id*. at *3. Agreeing with Paula and her attorney that intercepting an email does not violate the Act unless the intercepted email is acquired contemporaneously with the transmission of the email, and with Paula's attorney that he could not be liable under the Act for disclosing Barry's emails to Barry, the trial court granted their Rule 12(b)(6) motions to dismiss for failure to state a claim. *Id*.

Judge Posner, in his concurrence:

"[A]dultery remains a crime in 20 of the nation's 50 states—including Illinois … Her husband's suit … is more than a pure waste of judicial resources: it is a suit seeking a reward for concealing criminal activity."
***Epstein v. Epstein*, No. 14 C 8431, 2016 WL 7232145, at *5 (7th Cir. Dec. 14, 2016).**

On appeal, the parties debated whether the "Act requires a 'contemporaneous' interception of an electronic communication …." *Id*. at *2. Although several circuit courts other than the Seventh Circuit have held the Act does require contemporaneous interceptions, the Seventh Circuit stated it did not need to decide that issue as part of its decision. *Id*. The Seventh Circuit reversed the dismissal of Barry's

amended complaint as against Paula, holding that Barry stated a claim against her under the Act. *Id*. at *2. It noted that, even if the Act "covers only contemporaneous interceptions," the interception of an email does not necessarily happen when the interceptor received the email. Rather, "'the copying at the server was the unlawful interception.'" *Id*. at *3 (quoting *United States v. Szymuszkiewicz*, 622 F.3d 701, 704 (7th Cir. 2010)). It further noted that at the pleadings stage, it could not discern whether a computer server copied the emails immediately. *Id*. In addition, it stated the trial court erroneously "conflated" the emails Barry sent and received, noting that it could not tell from the pleadings when the intended recipients of Barry's sent emails received them. *Id*. Accordingly, the Seventh Circuit held those sent emails were possibly intercepted contemporaneously. *Id*. It noted "it's highly unlikely that the exhibit attached to the complaint contains all the emails that were forwarded to Paula's email addresses. *Id*. The Seventh Circuit concluded that "[b]ecause the emails attached to the complaint do not conclusively establish that there was no contemporaneous interception … the judge was wrong to dismiss the case against Paula on this ground." *Id*. at *4.

The Seventh Circuit, however, affirmed the dismissal of Barry's claim against Paula's attorney. Barry alleged the attorney violated Sections 2511(1)(c) and (d) of the Act because he disclosed the contents of the emails by producing them, and used them in relation to the marital dissolution to embarrass Barry. *Id*. The Seventh Circuit held Barry's disclosure theory failed because he knew the emails' contents already and "invited their disclosure by requesting them in discovery …." *Id*. In addition, it held the "use" theory failed because Barry's Amended Complaint did not identify any use the attorney made of the intercepted emails, but only the attorney's intent to use them for leverage in obtaining a financial settlement in Paula's favor. *Id*. The Seventh Circuit noted the Act "does not prohibit inchoate intent." *Id*.

Judge Posner's concurrence is notable. He wrote that if the parties had raised the issue, he would have voted "to interpret the Act as being inapplicable to – and therefore failing to create a remedy for – wiretaps intended, and reasonably likely, to obtain evidence of crime, as in this case, in which the plaintiff invoked the Act in an effort to hid evidence of his adultery from his wife." *Id*. at *5. Judge Posner's position was based in part on the fact that "adultery remains a crime in 20 … states—including Illinois, see 720 ILCS 5/11-35, where the parties reside—though it is a crime that is very rarely prosecuted." *Id*.

While Judge Posner's specific example of the crime of adultery here might seem extreme, the broader point lies in the context of privacy concerns and when the Act should apply to invasion of privacy claims. If concealment of communications is motivated to cover up "genuine misconduct," Judge Posner noted he was "unclear why it should be protected by the law." *Id*.

This decision is significant because it serves as a warning to clients, whether they are involved in marital dissolution proceedings or other matters, of the pitfalls of surreptitiously intercepting electronic communications sent by or to other individuals. The concurrence, in addition to handing Paula an argument to use in further proceedings on remand, adds to the ongoing debate of which laws are applicable in the privacy arena. That debate will continue for the foreseeable future.

If you have any questions about this Client Bulletin, please feel free to contact any of the attorneys listed or the CMN attorney with whom you regularly work.

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