

# One Minute Memo™



## New York Court of Appeals Decision Arms Cybertheft Victims

In a decision issued March 22, 2007, the New York Court of Appeals for the first time applied the common-law doctrine of conversion to theft of electronic documents. Noting in its opinion that computers and electronically stored information are now “ubiquitous” in American society, the Court wrote, “We cannot conceive of any reason in law or logic why this process of virtual creation should be treated any differently from production by pen on paper or quill on parchment.” The decision represents a potentially powerful tool for plaintiffs in theft of information cases, as plaintiffs alleging conversion might be able to recover attorney’s fees, or, in egregious cases, even punitive damages.

The case, *Thyroff v. Nationwide Mutual Insurance Co.*, concerned an insurance company’s decision to terminate a contract with one of its agents. While working as an agent for the defendant, the plaintiff leased and used certain computer equipment from the defendant. The day after the agency contract was terminated, the plaintiff argued, the defendant took possession of that equipment, along with information stored on the machine. The information included personal correspondence and client files that the plaintiff said were necessary to his career as an agent.

After a federal district court dismissed the plaintiff’s case, the Second Circuit held that the plaintiff’s conversion claim touched on an unsettled point of state law—specifically, the scope of New York’s conversion doctrine—and certified the issue to New York’s Court of Appeals. The state court recognized that the doctrine of conversion has evolved continuously over the centuries, and that extending it to non-tangible documents and information made sense in today’s society. Suggesting that it might consider erasing the distinction between tangible and intangible materials within the conversion doctrine, the Court wrote, “In the absence of a significant difference in the value of the information, the protections of the law should apply equally to both forms—physical and virtual.”

The remedies potentially available to an employer alleging conversion of electronic information are somewhat similar to those afforded by a federal statute, the Computer Fraud and Abuse Act (CFAA). Under CFAA, which was enacted in 1984 to protect information stored on government and financial institution computers, an employer must show that the employee either fraudulently or intentionally accessed information without authorization, and that damages of at least \$5,000 resulted. However, the recent Court of Appeals decision may provide broader relief because many employees who convert electronic information from an employer may have, at the time of

the theft, had authorization to access such information. Moreover, because conversion is a tort, a plaintiff alleging theft of digital information might also be entitled to recover punitive damages from a defendant and special damages, *i.e.*, damages peculiar to that plaintiff's circumstances and condition. Indeed, in many jurisdictions, including several federal circuit courts, a plaintiff is permitted to show that attorney's fees are recoverable as special damages.

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