New York Law Journal
TODAY
TECHNOLOGY

Web address: http://www.nylj.com

VOLUME 237—NO. 68 TUESDAY, APRIL 24, 2007 ALM

Ruling Leaves Ownership Issue Unresolved

• ELECTRONIC DISCOVERY •

Given the expansion of the common law conversion doctrine under 'Thyroff,' it seems certain the decision will serve as a starting point for employees seeking access to electronic files that they are unable to retrieve from their employer following a departure or termination.

BY H. CHRISTOPHER BOEHNING AND DANIEL J. TOAL

A recent decision by New York's highest court has expanded the common law cause of action for conversion—long reserved for tangible property—into the realm of the intangible. In *Thyroff v. Nationwide Mutual Insurance Company*, the Court of Appeals ruled that a claim for conversion can be maintained in connection with the appropriation of electronically stored data.

This holding follows recent developments that have expanded the scope of conversion to include more categories of intangible property. As a result, the holding in *Thyroff* raises a number of practical questions

regarding the use and control of electronically stored data in the context of agency and, potentially, employment relationships.

In *Thyroff*, the plaintiff, Louis Thyroff, worked as an insurance agent for Nationwide Mutual Insurance Company from 1988 until 2000. Pursuant to his Agent's Agreement, Thyroff leased computer hardware and software from Nationwide, which he used to collect and transfer information to Nationwide, and to store personal information, e-mail messages and information concerning his own customers. In 2000, Nationwide terminated the Agent's Agreement, and reclaimed the leased computer equipment.

Thyroff sued Nationwide in the Western District of New York for, among other things, conversion of the information stored on the reclaimed computer. The district court dismissed Thyroff's conversion claim because Thyroff failed to allege that "Nationwide exercised dominion over the electronic data to his exclusion and it was undisputed that Nationwide owned the [computer] system."

When Thyroff appealed the district court's decision, Nationwide argued that New York does not recognize a cause of action for conversion of intangible property. Before deciding the appeal, the U.S. Court of Appeals for the Second Circuit certified the following question to the Court of Appeals: Is a claim for the conversion of electronic data cognizable under New York law?

The Court answered in the affirmative, holding that "electronic records that… were indistinguishable from printed documents…are subject to a claim of conversion in New York." In reaching its decision, the Court engaged in a lengthy discussion of the evolution of conversion doctrine, and noted that "it generally is not the physical nature of

H. Christopher Boehning *and* **Daniel J. Toal** *are litigation partners at Paul, Weiss, Rifkind, Wharton & Garrison LLP.* **David Mark Cave** *and* **Anouck C. Giovanola,** *litigation associates at the firm, assisted in the preparation of this article.*

a document that determines its worth, it is the information memorialized in the document that has intrinsic value." Consequently, "[i]n 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."

For purposes of its decision, the Court presumed that Thyroff owned the data in question, and as a result left unresolved one of the most compelling questions raised in the case: Who owned the electronic files? However, a 2005 decision by a Manhattan Supreme Court in *Shmueli v. Corcoran Group*, 802 N.Y.S.2d 871 (2005), which *Thyroff* cites favorably, does provide some guidance on the question.

Shmueli involved a real estate broker for the Corcoran Group who was terminated and then blocked by Corcoran from data on the Corcoran computer that she had used to store records of all the real estate transactions she worked on in her career.

As in *Thyroff*, the *Shmueli* court found that the electronic data in question was properly the subject of a conversion claim. *Shmueli* also decided the related question of ownership, holding that, for purposes of its summary judgment motion, Corcoran could not assert that it owned the electronic files simply because it owned the computer on which they were stored.

Because there was no dispute that the real estate broker was an independent contractor working with Corcoran, the *Shmueli* court reasoned that the documents stored on Corcoran's computer were no different from documents stored by an independent contractor in Corcoran's file cabinets. Thus, the real estate broker had a valid claim of ownership over the electronic files on the computer, and a valid claim for conversion.

In reaching this conclusion, the *Shmueli* court was careful to limit its holding to the independent contractor setting, noting: "The within holdings are not intended to extend to cases involving employees (as opposed to independent contractors), as it is generally held that an employee's work product is proprietary to the employer."

Taken together, *Thyroff* and *Shmueli* set forth a relatively straightforward approach for specific categories of electronic files maintained by independent contractors. However, the decisions could have much broader implications, as parties seek to apply the holdings to new categories of electronic documents and extend the holdings into the employee-employer context.

The holdings in both *Thyroff* and *Shmueli* are carefully limited to the precise types of electronic files at issue in those cases. But, as those decisions observe, other courts have gone beyond such file types to reach an Internet domain name (*Kremen v. Cohen*, 337 F.3d 1024 (9th Cir. 2003)) and even an "Internet web-based business" (*Astroworks, Inc. v. Astroexhibit, Inc.*, 257 F.Supp.2d 609 [S.D.N.Y. 2003]).

Given the reasoning in *Thyroff*, it seems likely that we will see over time an expansion of the types of electronic data that may properly be the subject of a conversion claim.

Similarly, both *Thyroff* and *Shmueli* are expressly limited to the independent contractor setting. As *Shmueli* notes, this limitation follows from the general rule that employees do not have independent ownership rights to documents created in connection with their employment. *Pullman Group, LLC v. Prudential Ins. Co.*, 288 A.D.2d 2 (1st Dept. 2001), lv. denied, 98 N.Y.2d 602 (2002).

Because ownership is necessary for a conversion claim, this general rule presents an obstacle for employees to claim conversion in connection with documents stored on their employer's computer systems.

Even so, some courts have held that an employee does have a valid claim against his or her employer for the conversion of personal files, including files that tread the line between the "personal" and "work-related." See, e.g., *Leming v. US West Information Systems, Inc.*, 892 F.2d 83 (9th Cir. 1989) (lead files) (unpublished opinion); *Long v. Rubloff*, 327 N.E.2d 346 (Ill. App. Ct. 1975); *Paine Webber Jackson and Curtis, Inc. v. Winters*, 579 A.2d 545, 547 n.1 (Conn. App. Ct. 1990).

Thus it seems safe that the key issue in any employee conversion claim will be that left unresolved in *Thyroff*—the question of "ownership" of files that an employee maintains on an employer's computer system. Nevertheless, given *Thyroff*'s expansion of the common law conversion doctrine, it seems certain the ruling will serve as a starting point for employees seeking access to electronic files that they are unable to retrieve from their employer following a departure or termination.