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Employment & Labor Law Solutions Worldwide

## EMERGING TRADE SECRET ISSUES

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# WHY IS TRADE SECRET PROTECTION IMPORTANT?

- **Broader scope**
  - **No disclosure required**
  - **Eternal, potentially**
  - **Flexible damages**
  - **Vulnerable to worst kind of theft**
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# TOOLS FOR TRADE SECRET PROTECTION

- **BEST OFFENSE IS A GOOD DEFENSE**
- **BUT IF YOUR DEFENSE FAILS YOU (I'M LOOKING AT YOU, BAYLOR FOOTBALL):**
  - **Civil Common Law**
  - **Civil Statutes**
  - **The Feds (Criminal Statutes)**



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# *Economic Espionage Act*

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# UNITED STATES v. ALEYNIKOV

- **Goldman programmer**
- **Offered 3X salary to join competitor**
- **Uploaded 500,000 lines of source code to Germany**
- **Did not go well**



# ALEYNIKOV GOES TO JAIL

- EEA = end of Cold War statute
- Criminalizes theft of trade secrets *on behalf of someone else*
- No “use” element
- Aleynikov convicted, sentenced to 8 yrs.

# ALEYNIKOV GETS OUT OF JAIL

- **Second Circuit holds HFT source code not stolen goods under EEA:**
  - **Not “produced for” or “placed in” interstate commerce**
- **Calabresi Concurrence:**
  - **EEA surely intended to cover this type of “mischief”**

# FALLOUT FROM ALEYNIKOV

- **Setback for prosecutors**
- **Do companies really want to call the Feds?**
- **Example of laws being “out-sophisticated” by technology?**







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# *Computer Fraud and Abuse Act*

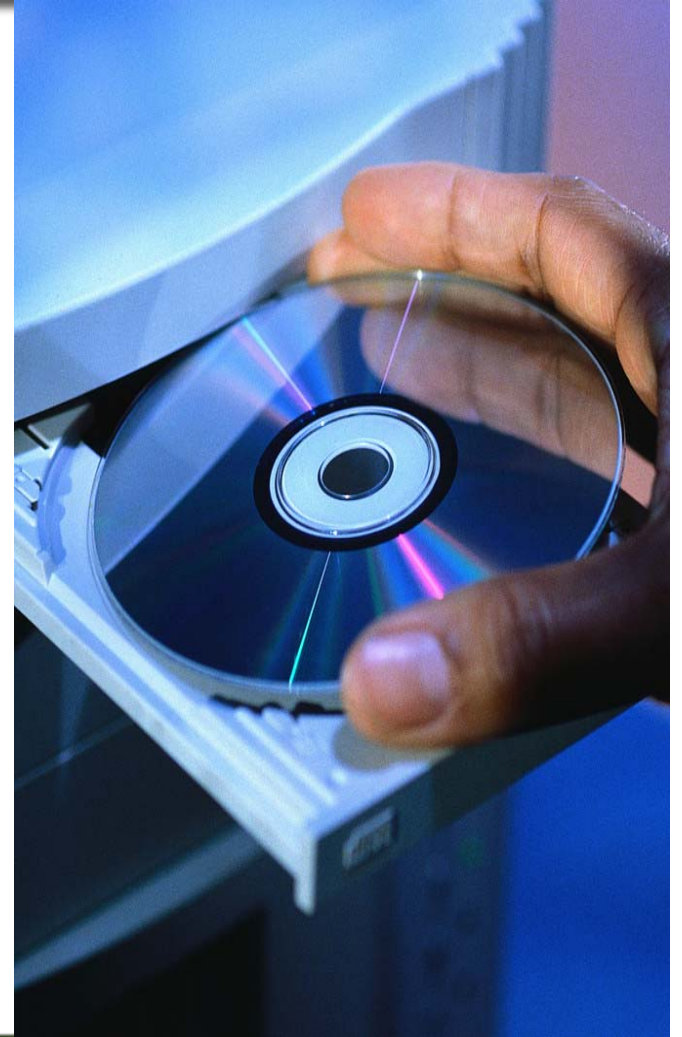
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# CFAA: A QUAGMIRE

- **Benefits of CFAA Claims**
  - **Federal court**
  - **No TS status required**
- **What does CFAA cover?**
  - **Hackers?**
  - **Lying, cheating, thieving employees?**



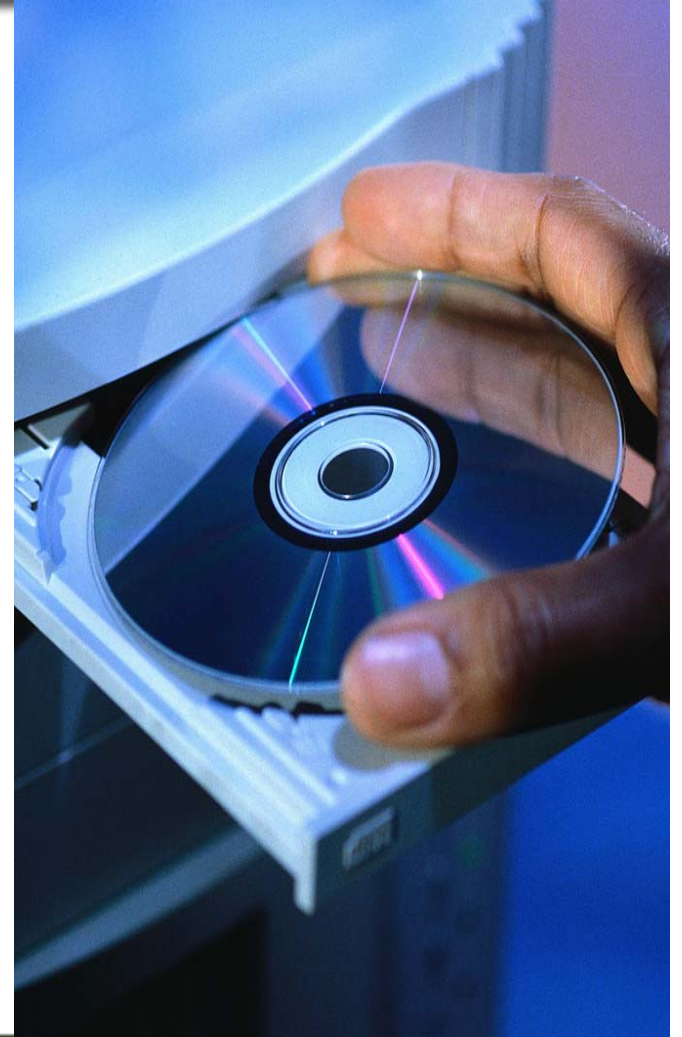
# PINING FOR A DATE WITH SCOTUS

## VERY STARK CIRCUIT SPLIT:

- What is “without authorization”?
- “Cessation of agency” theory
- Fifth Circuit position?

# UNITED STATES v. JOHN

- Citigroup account mgr.
- Stole electronic customer account information
  - *Could access info on Citigroup computers*
- John gave info to others in conspiracy to defraud



# FIFTH CIRCUIT AFFIRMS JOHN'S CFAA CONVICTIONS

- Did *not* matter that John did not hack-in
- Fifth Circuit adopts broad view of CFAA
  - Confidentiality agreement breached / agency relationship terminated
- Aligned with 1<sup>st</sup>, 7<sup>th</sup>, 11<sup>th</sup> Circuits

# UNITED STATES v. NOSAL

- **Former executive recruiter on garden leave**
- **Solicited former co-workers to start competing business**
  - **Like John, stole lots of confidential info. *to which they had access***

# ***EN BANC* NINTH CIRCUIT DISMISSES CFAA CLAIMS**

- **Ninth Circuit holding:**
  - **CFAA prohibits violations of restrictions on *access*, not restrictions on *use***
  - **CFAA generally not applicable to *thieving employees***
- **Fourth Circuit (gasp!) aligned with Ninth**

# PATH FORWARD ON CFAA

- **Resolving split is important to employers**
- **Indirectly deciding federal courts' role in trade secret disputes**
- **Will CFAA be returned to Congress's long list of things to do?**





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# *Misappropriation Claims*

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# DUPONT v. KOLON

- **Para-aramid fiber (Kevlar)**
  - **Hundreds of millions \$\$ invested by DuPont**
- **Former DuPont engineer and Kevlar marketing exec**
  - **Conspired with other former DuPont workers**
- **FBI raid**



# KOLON'S DENIALS

- **HEARD THIS BEFORE?:**
  - “Didn’t happen”
  - “Don’t need your secrets”
  - “Not secrets anyway”
- **EVIDENCE:**
  - DuPont secrets folded into Kolon manufacturing line



# JAIL TIME AND BIG VERDICT

- **Ex-DuPont exec convicted of trade secret theft**
- **Civil Jury Verdict**
  - **\$920 million**
- **Money and permanent injunction?**



# NOW THAT'S AN INJUNCTION

- **“Greatest loss”?**
  - **Loss of right not to divulge secrets**
- **Court enters aramid fiber *production* injunction**
  - **20 years, worldwide**
  - **Monitoring mechanism**

# WILL IT STICK?

- **Stay of injunction granted during appeal**
- **Takeaways, in the meantime:**
  - **Large \$\$ judgment does not foreclose injunctive relief**
  - **Production injunction warranted where secrets “inextricably connected”**



**THANKS!**

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***Keeping Your Secrets  
Secret: An Employer's  
Primer***

**(forthcoming in Texas  
Journal of Bus. Law)**