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Secret Email Forwarding May Violate Wiretap Act: 7th Circ.

By **Diana Novak Jones**

Law360, Chicago (December 15, 2016, 4:05 PM EST) -- Secretly setting an email account to forward messages it receives and sends could be grounds for a violation of the federal Wiretap Act, the Seventh Circuit said Wednesday, a decision the court acknowledged could expand the use of the act beyond Congress' original intent.

In reviving a lawsuit brought by a husband against his estranged wife over her alleged tampering with his email account, the appellate panel said the court's current understanding of the act would cover the wife's efforts to uncover evidence of adultery in her husband's email without his consent.

But the district court hadn't given the husband, Barry Epstein, the chance to investigate whether the emails were intercepted as the term is used within the act before dismissing his claims, the appellate panel said in remanding the case.

"The allegations against Paula [the wife] ... technically fall within the language of the act, though Congress probably didn't anticipate its use as a tactical weapon in a divorce proceeding," wrote Circuit Judge Diane Sykes in the majority opinion.

Though the Seventh Circuit has not ruled on the issue, several circuits have said a Wiretap Act violation requires contemporaneous interception of messages. But whether or not the emails are proven to be contemporaneous, U.S. District Judge Thomas Durkin's cursory examination of the time stamps on the forwarded emails Barry Epstein attached to his complaint isn't enough to reject his claims before discovery, the panel said.

An attorney for Barry Epstein, Nejla Lane of Lane Keyfli Law Ltd., told Law360 Thursday that Epstein will amend his complaint in district court following the appellate court's ruling, calling the case a potential landmark in the field of privacy.

With the internet age comes more opportunities for privacy violation, requiring more legal protection, Lane said.

"Time is changing, so we have to also," she added.

An attorney for Paula Epstein declined to comment Thursday. A representative for her attorney, Jay Frank, who was also named in the suit, did not respond to requests for comment Thursday.

In 2014, amid their divorce proceedings, Barry Epstein sued Paula and her attorney after Frank turned over emails during discovery that appeared to be forwarded to Paula's email from Barry's account without his knowledge.

Barry claimed the emails were intercepted because they were in his and Paula's accounts at the same time. But Judge Durkin disagreed, pointing to a gap in the time stamps on the emails from Paula's account and Barry's as evidence there was a lag time between when Barry's account received or forwarded the email and when Paula received it.

Judge Durkin dismissed Frank from the suit, finding he can't be liable for disclosing Barry's own emails in response to Barry's discovery request.

The panel affirmed Frank's dismissal but had questions about how well the timestamps could actually show when the email provider used by Paula actually received the messages from Barry.

"Because Barry's case was dismissed on the pleadings, we do not know how Paula's auto-forwarding rule worked," Judge Sykes wrote. "For example, we cannot tell if a server immediately copied Barry's emails — at which point the interception would be complete — even though Paula's email client may not have received them until later."

Plus, the court doesn't know anything about the forwarded emails that Barry sent since there was no discovery done on when the emails' recipients received them, the panel said. And there's some suggestion the forwarding was in place for five years, so the emails Judge Durkin examined are likely just a fraction of those sent.

Circuit Judge Richard Posner concurred with the majority opinion but asked in a separate opinion whether the act should be interpreted to prevent disclosure of "genuine misconduct" like Barry's alleged infidelity.

"I don't understand why federal, or for that matter state, law should protect an interest so lacking in any social benefit, especially when one considers that adultery remains a crime in 20 of the nation's 50 states — including Illinois," Judge Posner wrote.

Judge Posner likened Paula Epstein to a bounty hunter or a private person who promotes a governmental interest, deserving of a reward for discovering criminal conduct.

By comparison, Barry Epstein's suit is "more than a pure waste of judicial resources: it is a suit seeking a reward for concealing criminal activity," Judge Posner said, adding that if this line of argument had been pursued he would have voted to protect the use of wiretaps to uncover likely criminal activity.

Barry Epstein's attorney rejected Judge Posner's categorization of the emails as evidence her client cheated on his wife.

"It was really not about infidelity. There's nothing in the emails suggesting that," Lane said. "It was nothing, but Judge Posner had to of course poison as best he could."

Circuit Judges Diane Sykes, Richard Posner and Daniel Manion sat on the panel.

Barry Epstein is represented by Nejla Lane of Lane Keyfli Law Ltd.

Paula Epstein is represented by Scott Schaefer of Brotschul Potts.

Jay Frank is represented by Norman J. Barry Jr. and Karen Kies DeGrand of Donohue Brown Mathewson and Smyth.

The case is Barry Epstein v. Paula Epstein, et al., case number 15-2076, in the Seventh Circuit Court of Appeals.

--Editing by Jack Karp.