Vendor Registration

House Bill 488 does not only address income taxes; it adds new section 48-8-14 (sales and use tax statutes). That section prohibits a state agency from entering into a contract with a nongovernmental vendor for the sale of goods and/or services in an amount exceeding $100,000 if the vendor, or an affiliate of the vendor, is a "dealer" under O.C.G.A. § 48-8-2(3) but fails or refuses to collect Georgia sales or use taxes on sales delivered to Georgia.[32] This amendment is effective upon approval by the Governor or upon it becoming law without approval.[33]

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Endnotes

1. This list is intended to provide a summary of the more significant tax legislation from the 2005 session and is not intended to be exclusive.
2. H.B. 191, Laws 2005, Section 3, adding new Code section 48-7-28.3. All future references will be to the new Code section.
3. The statute also applies to individual taxpayers, but this article will focus on the corporate taxpayer.
4. O.C.G.A. § 48-7-28.3(a)(5).
5. O.C.G.A. § 48-7-28.3(b).
6. O.C.G.A. § 48-7-28.3(a)(7), (a)(8).
7. O.C.G.A. § 48-7-28.3(d).
8. O.C.G.A. § 48-7-28.3(a)(9).
9. O.C.G.A. § 48-7-28.3(e).
10. O.C.G.A. § 48-7-28.3(f).
11. O.C.G.A. § 48-7-28.3(j).
12. H.B. 191, Laws 2005, Section 4.
13. H.B. 191, Laws 2005, Section 5.
14. H.B. 191, Laws 2005, Section 6.
15. H.B. 488, Laws 2005, Section 2, amending Code section 48-1-2(14); H.B. 488, Laws 2005, Section 27(a).
16. H.B. 488, Laws 2005, Section 2, amending Code section 48-1-2(14).
17. *See* O.C.G.A. § 48-1-2(14).
18. *See* O.C.G.A. § 48-7-1(11)(A), effective prior to January 1, 2005.
19. H.B. 488, Laws 2005, Section 7, amending Code section 48-7-1(11)(A); H.B. 488, Laws 2005, Section 27(c).
20. H.B. 488, Laws 2005, Section 9, amending Code section 48-7-21(b)(5).
21. H.B. 488, Laws 2005, Section 27(h).
22. *See* Ga. Reg. Rule 560-7-3-.06(3).
23. H.B. 488, Laws 2005, Section 11, amending Code section 48-7-21(b)(10).
24. *Id*.
25. *Id*.
26. H.B. 488, Laws 2005, Section 27(c).
27. H.B. 488, Laws 2005, Section 12, amending Code section 48-7-24(c).
28. H.B. 488, Laws 2005, Section 27(f).
29. H.B. 488, Laws 2005, Section 15, amending Code section 48-7-31(a).
30. These regulations were amended effective for tax years beginning on or after January 1, 2002 to subject corporate limited partners of limited partnerships that are doing business in Georgia to the corporate income tax.
31. H.B. 488, Laws 2005, Section 27(f).
32. H.B. 488, Laws 2005, Section 22, adding new Code section 48-8-14.
33. H.B. 488, Laws 2005, Section 27(f).

RECENT DEVELOPMENTS IN TECHNOLOGY LAW

By Mari L. Myer

This article will provide Georgia attorneys with a summary of some recent state and federal court decisions pertaining to technology matters.

Employment Law and Restrictive Covenant Agreements

Injunctive Relief is Available to Employees Across State Lines Once Final Judgment is Entered

The Georgia Court of Appeals recently held that a permanent injunction may bar a former employer from enforcing restrictive covenants in an employment agreement, even in the other states referenced in the covenants.[1] The Court of Appeals first applied Georgia law to determine that restrictive covenants in an employment agreement specifying a Florida choice of law, but binding a Georgia resident, were not enforceable as a matter of Georgia public policy. The injunction at issue prevented the employer from continuing pending litigation in Florida, and protected against the possibility of inconsistent results in other jurisdictions.

Although this interpretation is now Georgia law, the U.S. Court of Appeals for the Eleventh Circuit has rejected this approach.[2] Instead of seeking injunctive relief, a party challenging the enforceability of a restrictive covenant encompassing territory located in another state must seek a declaratory judgment that a restrictive covenant is not enforceable, as the Eleventh Circuit limits the enforceability of an injunction to the state in which the litigation is pending. The Eleventh Circuit leaves it to the courts of the other states referenced in the covenants to reach their own interpretation of the declaratory judg-

ment, and to enter injunctive relief only to the extent that the other courts deem appropriate.[3]

Trial Court May Examine Enforceability of Restrictive Covenants Prior to Referring Matter for Mandatory Arbitration

The Court of Appeals has affirmed a Superior Court's ruling on the enforceability of a covenant not to compete prior to referring a case to arbitration pursuant to an arbitration clause in the parties' contract, even though the result was that the arbitrator was denied the right to consider the covenant not to compete.[4]

Covenants Not to Solicit Employees May Stand or Fall With Other Restrictive Covenants

The Georgia Court of Appeals appears to have included covenants not to solicit employees within the scope of its determination that restrictive covenants stand or fall together, with the result being that an invalid covenant not to compete, covenant not to solicit customers or covenant not to solicit employees will fatally taint all of the otherwise valid covenants in the same agreement.[5]

First Amendment/ Child Online Protection Act

The U.S. Supreme Court has held that Internet content providers and civil liberties groups are likely to prevail on their claim that the Child Online Protection Act (COPA)[6] violates the First Amendment to the United States Constitution by burdening adults' access to some protected speech.[7] As occurred with respect to an earlier effort by Congress to restrict content on the Internet,[8] the Supreme Court held that COPA is constitutionally suspect. For this reason, the Court upheld the district court's imposition of a preliminary injunction against the enforcement of COPA pending a trial on the merits.[9]

The Court concluded that the government would be unlikely to meet its burden of proof that COPA is narrowly tailored to serve a compelling governmental interest, is not overbroad and is not the least restrictive means available for the government to serve the interest of preventing minors from using the Internet to gain access to materials that are harmful to them. Blocking and filtering software was among less restrictive, and more effective, means that the Court instructed the district court to consider upon remand. The Court surmised that filters, restricting speech at the receiving end, would be as effective in protecting minors as COPA would be, without forcing adults who seek access to adult content on the Internet to identify themselves or provide credit card information as COPA requires. Thus, with the use of filters there would be no chilling effect on free speech on the Internet, but children would still be protected.

Wiretap Act Claims

Pirate Access Devices[10]

The intentional manufacture, distribution, possession, and advertising of pirate access devices is a criminal offense.[11] In recent years, the United States District Courts, including the Northern District of Georgia, have been inundated by suits by DirecTV[12] against individuals whom DirecTV accuses of civil violations of the Wiretap Act[13] by virtue of the individuals having allegedly purchased or otherwise acquired pirate access devices. The Eleventh Circuit has rejected DirecTV's premise that the mere possession of a pirate access device creates a private right of action in favor of the entity that allegedly has been harmed by such conduct.[14] Instead, the Eleventh Circuit held that "[p]ossession of a pirate access device alone …creates nothing more than conjectural or hypothetical harm."[15] Because mere possession of a pirate access device is still a criminal violation, those defendants who have escaped civil penalties may still be subject to criminal prosecution.

Computer Hacking

Interception in violation of the Wiretap Act requires an acquisition of the information *during its transmission*.[16] In other words, the interception must occur in "real time", while the information is in transit. In the case at issue, a computer hacker had posted on a Web site a message containing a "Trojan Horse" virus attachment. When Steiger clicked on the message, the hacker gained access to Steiger's computer hard drive. Because there was no contemporaneous acquisition of an electronic communication while in transit—but instead access to information already stored on Steiger's computer—this conduct did not constitute an interception of electronic communications in violation of the Wiretap Act.[17]

Antitrust Principles in the Telecommunications Context

The Federal Telecommunications Act of 1996 (FTCA)[18] has been held

to preempt the application of traditional antitrust principles;[19] thus, a complaint that an incumbent local exchange carrier (ILEC) had breached its duty to share its network with competitors did not state a monopolization claim under Section 2 of the Sherman Antitrust Act.[20]

In the case at issue, New York State's ILEC, Verizon, was accused of failing to offer access to its operations support systems, even though the FTCA requires ILECs to make those systems available to competitive local exchange carriers (CLECs). This failure to offer access allegedly resulted in an inability of CLECs to electronically interface with Verizon's ordering system in order to relay service orders. A customer of CLEC AT&T alleged that Verizon violated Section 2 of the Sherman Act when it either delayed filling, or failed to fill, orders placed by CLECs' customers, in an effort to discourage customers from becoming or remaining CLEC customers. The Court rejected these and other allegations, concluding that the FTCA created a broad regulatory environment that abrogated the need for antitrust scrutiny. The remedy was to seek a regulatory review rather than proceed in court.

Arbitration

In an intersection of the law governing both arbitration and insurance, the Eleventh Circuit has held[21] that the provision of the Georgia Arbitration Code[22] excluding arbitration clauses in insurance contracts from its coverage is not preempted by the Federal Arbitration Act[23]. Instead, a provision of the McCarran-Ferguson Act[24] leaves regulation of the insurance industry to the states.

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Endnotes

1. Hostetler v. Answerthink, 599 S.E.2d 271 (Ga. App. 2004).
2. Palmer & Cay v. Marsh & McLennan Companies, 2005 WL 737048, n. 16 (11th Cir. April 1, 2005).
3. Id.
4. BellSouth v. Forsee, 265 Ga. App. 589 (Ga. App. 2004), *cert. denied*.
5. Dent Wizard Int'l. Corp. v. Brown, 2005 WL 704349 (Ga. App. March 29, 2005).
6. 47 U.S.C. §231. COPA prohibits the knowing posting, for commercial purposes, of World Wide Web content that is "harmful to minors", with material that is "harmful to minors" (*e.g.*, anyone under 17 years of age) being defined as: "any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest; (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors." 47 U.S.C. §231(e)(6). Speech which falls within these definitions is deemed criminal under the statute, but those who employ specified means to prevent minors from gaining access to such prohibited materials on their web site have an affirmative defense. Such approved means include restricting access to minors by requiring the use of a credit card, debit card, adult access code, adult personal identification number, digital certificate that verifies age, or other reasonable measure. 47 U.S.C. §231(c)(1).
7. Ashcroft v. American Civil Liberties Union, 124 S.Ct. 2783 (2004).
8. *See, e.g.*, Reno v. American Civil Liberties Union, 117 S.Ct. 2329 (1997).
9. Ashcroft v. ACLU, 124 S.Ct. at 2788-89. The decision was 5-4, with Kennedy, Stevens, Souter, Thomas and Ginsburg in the majority and Scalia, Breyer, Rehnquist and O'Connor in the dissent.
10. This is a term of art used to describe devices that illegally decrypt satellite transmissions.
11. 18 U.S.C. §2512.
12. The author has represented clients in litigation against DirecTV in the past, but is not currently handling any such litigation.
13. Electronic Communications Privacy Act of 1986, 18 U.S.C. §§2510-2522. DirecTV has also alleged violations of 47 U.S.C. §605, 18 U.S.C. §2511 and 18 U.S.C. §2512.
14. DirecTV, Inc. v. Treworgy, 373 F.3d 1124 (11th Cir. 2004).
15. Treworgy, 373 F.3d at 1127.
16. United States v. Steiger, 318 F.3d 1048-1049 (11th Cir. 2003).
17. Steiger, 318 F.3d at 1050.
18. Pub.L.104-104, 110 Stat. 56.
19. Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, 124 S.Ct. 872 (2004).
20. 15 U.S.C. §2.
21. McKnight v. Chicago Title Insurance Co., Inc., 358 F.3d 854 (11th Cir. 2004).
22. O.C.G.A. §9-9-2.
23. 9 U.S.C. §§1 et seq.
24. 15 U.S.C. 1012(b).