

The Florida Bar Business Law Section Computer Law and Technology Committee Hot Topics

Winter Meeting

January 18, 2018

1. Wiretap Act, Title I of the Electronic Communications Privacy Act of 1986, 18 U.S.C. §§ 2510-22 U.S. Data broker Navistone and ecommerce companies accused of violating Wiretap Act
Allen v. Quicken Loans, Inc and Navistone, Inc., Case No. 2:17-cv-12352 (D. N.J.)
(Filed 12/1/17)
Cohen v. Casper Sleep, Inc. and Navistone, Inc., Case No. 1:17-cv-09325 (S.D.N.Y.)
(Filed 11/28/17)

From the Complaint in *Cohen*:

Defendant NaviStone is a marketing company and data broker that deals in U.S. consumer data. NaviStone's business model involves entering into voluntary partnerships with various ecommerce websites. Upon partnering with NaviStone, these e-commerce websites will agree to insert a small parcel of computer code into their websites, which is provided by NaviStone (and is written by NaviStone). This small parcel of computer code serves as a so-called "back door" in computer terminology – its function is to retrieve and execute a much larger portion of JavaScript code that is remotely hosted on NaviStone's servers. As NaviStone explains on navistone.com, "[a]dding a simple line of code to each page of your website enables a wealth of new marketing data."

This "back door" code permits NaviStone to execute its own computer code on the websites of its e-commerce partners. Stated otherwise, the "simple line of code" that NaviStone requests its partners add "to each page of [their] website[s]" serves to call and execute remote computer code that is: (i) provided by NaviStone, (ii) written by NaviStone, and (iii) hosted on a remote server by NaviStone.

As currently deployed, NaviStone's remote code functions as a wiretap. That is, when connecting to a website that runs this remote code from NaviStone, a visitor's IP address and other PII is sent to NaviStone in real-time. NaviStone's code will then continue to spy on the visitor as he or she browses the website, capturing and redirecting the visitor's keystrokes, mouse clicks and other electronic communications to NaviStone. This real-time interception and transmission of visitors' electronic communications begins as soon as the visitor loads casper.com into their web browser. The intercepted communications include, among other things, information typed on forms located on casper.com, regardless of whether the user completes the form or clicks "Submit." NaviStone then uses this information to attempt to de-anonymize website visitors.

2. Statement on Cryptocurrencies and Initial Coin Offerings by SEC Chairman Jay Clayton
12/11/17

Initial Coin Offerings. Coinciding with the substantial growth in cryptocurrencies, companies and individuals increasingly have been using initial coin offerings to raise capital for their businesses and projects. Typically these offerings involve the opportunity for individual investors to exchange currency such as U.S. dollars or cryptocurrencies in return for a digital asset labeled as a coin or token.

These offerings can take many different forms, and the rights and interests a coin is purported to provide the holder can vary widely. **A key question for all ICO market participants: “Is the coin or token a security?”** As securities law practitioners know well, the answer depends on the facts. For example, a token that represents a participation interest in a book-of-the-month club may not implicate our securities laws, and may well be an efficient way for the club’s operators to fund the future acquisition of books and facilitate the distribution of those books to token holders. In contrast, many token offerings appear to have gone beyond this construct and are more analogous to interests in a yet-to-be-built publishing house with the authors, books and distribution networks all to come.

It is especially troubling when the promoters of these offerings emphasize the secondary market trading potential of these tokens. Prospective purchasers are being sold on the potential for tokens to increase in value – with the ability to lock in those increases by reselling the tokens on a secondary market – or to otherwise profit from the tokens based on the efforts of others. These are key hallmarks of a security and a securities offering.

By and large, the structures of initial coin offerings that I have seen promoted involve the offer and sale of securities and directly implicate the securities registration requirements and other investor protection provisions of our federal securities laws. Generally speaking, these laws provide that investors deserve to know what they are investing in and the relevant risks involved.

I have asked the SEC’s Division of Enforcement to continue to police this area vigorously and recommend enforcement actions against those that conduct initial coin offerings in violation of the federal securities laws.

3. Net Neutrality Repeal Status – “Restoring Internet Freedom” Rule

The Federal Communications Commission voted to repeal net neutrality rules on December 14, 2017 but the FCC is still making edits to the repeal order and hasn’t released the final version as of January 2, 2018. The final order should be similar to the draft released by FCC Chairman Ajit Pai three weeks before the vote, but some changes will be made. Once the final order is available, groups that want to overturn the repeal will be able to file lawsuits against the FCC.