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CORPORATE LAW NEWSLETTER

Cloud Computing *by Robert E. Braun*

On October 29, 2009, the City of Los Angeles announced that it is outsourcing its e-mail services to Google, becoming the largest governmental body to outsource such a key computer function to an Internet-based provider. Before and since, companies large and small have elected to move key entity functions to services that are accessed through the Internet. This growing trend toward Internet-based computing services - commonly referred to as "cloud computing" - is one of the most significant developments in computing services. This is the first of a series of articles that will examine cloud computing as it impacts users of those services. This article will define cloud computing and discuss some of its benefits; future articles will review the business and strategic challenges of cloud computing, the legal challenges, and tips for addressing those challenges.

Using cloud computing can be part of a plan to attract and retain key, motivated personnel.

What is Cloud Computing?

While there are many concepts of cloud computing, it generally refers to delivering computing services – whether software, storage capacity or other products and services — over the Internet. Cloud computing makes documents, e-mails and other data accessible from any personal computer or mobile device with access to the Internet. This is not really a new development — many things work this way already, from online search engines to e-mail and photo albums to calendars and shared documents. Most of us use the cloud every day, by accessing search engines, social networks and e-mail. Cloud computing,

however, is different because companies use it to transfer essential business functions from in-house operations to Internet-based services.

Benefits of Cloud Computing

Users find cloud computing is attractive because of some clear benefits:

Cost Savings

First and foremost, promoters and adherents of cloud computing argue that it is less expensive than providing the same computing services in-house. While the per-unit costs of computer hardware and software — computers, servers, routers, operating systems and computer programs — have fallen over the years, it is still expensive to establish and maintain extensive computer systems that are necessary for businesses. Many users find that moving computing services onto the Internet moves those data center costs from the customer to the cloud computing vendor, including software and hardware acquisition, operating and maintenance costs. Even if the hardware and the software is no less expensive, outsourcing computer services allows companies to reduce real estate costs (through reduction in operating space), payroll, benefits and insurance costs. Many companies find the savings to be compelling.

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Creditors' Rights: California Now Allows Personal Property Judgment Liens to be Extended for More Than Five Years *by Richard A. Rogan*

You've gotten a judgment against that troublesome borrower who hides assets and plays games, but you are afraid that it will be many moons before you are able to collect. You know that one of the best ways to get this kind of person to deal with you is to get a statewide judgment lien against him. This is because that judgment lien will show up on his credit reports and effectively block him from getting a car loan or a credit card. Faced with the prospect of paying cash for a clunker, this borrower would rather pay you off than pay cash for a new ride. Fortunately, most borrowers are not like this, but there are a few, and you know the type!

Starting on January 1, 2010, California will finally bring its personal property judgment lien into parity with its real property judgment lien. Up until then, a California real property judgment lien had a life of 10 years and could not be renewed. But a judgment creditor could only get a lien on personal property for 5 years, and renewal was not available.

Somehow, the California Legislature passed, and the Governator signed a bill to amend Section 697.510 of the California Code of Civil Procedure that permits a judgment creditor to renew a notice of judgment lien filed with the California Secretary of State. In California, personal property judgment liens are created by filing a notice of judgment lien with the California Secretary of State in a manner similar

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SPOTLIGHT ON DISTRESSED ASSETS & REAL ESTATE

Jeffer Mangels Butler & Marmaro LLP is a full-service law firm. This column features an article from the Chair of our Special Assets Team.

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Property Judgment Liens

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to filing a UCC-1 financing statement. Judgment liens are indexed in the same manner as security interests and have the same priority.

The practical effect of the new law is to allow a judgment creditor to file a continuation statement to extend a judgment lien. The process will be similar to what is now done to continue a financing statement for more than five years. In order to extend the validity of a personal property judgment lien, the creditor will have to file a continuation statement in the final six months of the life of the judgment lien. There are no limits to how many times a personal property judgment lien can be extended.

As experienced workout professionals know, all too often securing a judgment is not the end but rather the beginning of collecting on a troubled loan. It is critical to record judgment liens promptly in counties where the borrower owns (or is likely to own) real property and to calendar the expiration of those liens so they can be renewed. Similarly, it is important to promptly file a notice of judgment lien with the California Secretary of State to create a statewide lien on personal property owned by the borrower. When AB 121 becomes effective on January 1, 2010, creditors will also have to calendar the expiration date of personal property judgment liens and remember to file continuation statements every five years.

It is a good idea to review all of your existing personal property judgment liens now. If those liens expire after January 1, 2010, calendar the date and don't forget to file a continuation statement in the last six months before the lien expires.

The JMBM Special Assets Team has collected many judgments over the years. We know what it takes to uncover hidden assets and to protect the investment that our creditor clients have made in getting the judgment in the first place.

Year after year, day after day, workout professionals in the know rely on JMBM's Special Assets Team to handle problem commercial and real estate loans. Whatever problem loans you have, chances are, we've seen it. Give us a call.

Richard A. Rogan is Chair of the JMBM Special Assets Team. He also serves as the co-managing partner of JMBM's San Francisco office and co-chair of its Bankruptcy Practice Group. For more information, contact Dick at 415.398.8080 or RRogan@JMBM.com. To subscribe to the Special Assets blog, please visit www.SpecialAssetsLawyer.com.

Cloud Computing

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Economies of Scale

These savings are achieved in large part because of economies of scale - a vendor can offer the service for less than similar services on an in-house standalone basis. Cloud computing vendors can choose the most efficient locations for services, and share resources among multiple clients that would otherwise have to be replicated by each individual client. Vendors can also focus on utilizing their resources more efficiently. Inherent in this thought is that companies that limit their services to providing computing resources are experts; companies that use computers to support their core businesses cannot focus as clearly on a support service.

Reductions in Personal Staff

Along with economies of scale, customers of cloud services are able to reduce their technical staff. The technical personnel required to maintain the data center move from the customer to the vendor, and while customers may still need desktop technical support, cloud computing vendors reduce this cost through remote tools, allowing the vendor to access workstations on-site to diagnose and resolve issues. It should be noted that reductions in personnel (without, presumably, a reduction in service) not only reduce direct personnel costs for salaries, benefits, office space and the like; the personnel issues related to having a data center move from the customer to the vendor can shift potential liability associated with a workforce.

Scalability

Particularly important in uncertain economic times, cloud computing is typically scalable. Customers can, with relative ease and speed, increase or decrease resources to reflect their needs. The cost of the cloud service typically fluctuates with the increases and decreases, subject to contract restrictions. As a result, a customer does not have to maintain unused resources to meet fluctuating demands or to anticipate growth, and can eliminate unnecessary resources if business declines; cloud computing services can be contracted on an as-needed, when-needed basis, without requiring the client to create substantial infrastructure which may not be needed. And as companies grow, they can quickly add resources which allow them to take advantage of business opportunities and secure additional revenue, often at a marginally additional cost.

Mobile Workforce

Cloud computing accommodates mobile users and mobile applications quite effectively because it is accessible through the Internet, a factor that is particularly important as a workforce becomes more mobile. While much of the evidence is anecdotal, as companies seek ways to reduce costs, reducing their

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real estate footprint becomes desirable, and one way to achieve that is through a mobile workforce. Since cloud services are accessed through the Internet, there is no appreciable difference or advantaged gained by having a localized workforce. Just as importantly, workers more often seek a mobile platform that can be accessed from multiple locations. Using cloud computing can be part of a plan to attract and retain key, motivated personnel.

> Cloud computing services can be contracted on an as-needed, when-needed basis.

Quality and Responsiveness

Vendors of cloud computing services also argue that the quality of technical services will increase. Cloud computing services are commonly focused on a small number of specialized programs or services – for example, customer relationship management, or data storage. With this kind of focus, vendors can develop a level of expertise and redundancy that cannot be expected by typical technical staff, particularly for small and mid-sized companies. Again, by making the service or product a core function of a company, rather than an expensive support mechanism, customers seek to gain a benefit not just in cost, but in quality. Since the cloud vendor spreads the costs of these expensive resources across a group of customers, it can afford to retain the highest quality personnel and the per-unit cost can be less than the cost for comparable resources on an individual customer basis.

Disaster Recovery and Business Continuation

An added benefit of cloud computing is its dual purpose as both a current, functioning service and a business continuation and disaster recovery service. Internet-provided services have this capability because, unlike an in-house data center, they are by definition off-site and not bound to any location. Moreover, a customer of a cloud computing service can require that the service maintain a disaster recovery system – this is, again, a potentially expensive and difficult undertaking for the customer, but part of the essential, core competency of a cloud computing vendor.

Information Security

Cloud computing vendors also argue that they have more robust, state of the art information security systems, incorporating the most developed firewalls, encryption, physical security and other steps which cannot be effectively implemented by most individual companies. Cloud vendors can also keep not only information technology, but security personnel, on staff to maintain the security of the system; typically, a customer would have the information technology personnel serve double duty in this area.

Regulatory compliance

Finally, cloud computing vendors can provide services which meet various legal and regulatory requirements of clients that are outside the clients' core competency, most commonly auditing standards (particularly SAS 70) and Sarbanes-Oxley Act requirements, both of which require assessment of the internal controls of a service organization. Cloud computing services can assist and streamline auditors' opinions on internal controls by providing services which are designed with compliance in mind.

All these factors can make cloud computing services attractive to a variety of companies. As we will discuss in the next issue, however, cloud computing services also come with drawbacks and concerns.

Robert Braun is a Partner at Jeffer Mangels Butler and Marmaro LLP in the Firm's Corporate Department. Bob's practice, spanning more than 20 years, focuses on corporate, finance, and securities law with an emphasis on emerging technologies, hospitality and business transactions. For more information, contact Bob at 310.785.5331 or RBraun@JMBM.com.

EVENTS

THE JMBM CORPORATE COUNSEL ROUNDTABLE - YOU ARE INVITED

Once a month, the Corporate Department at Jeffer Mangels Butler & Marmaro LLP, hosts an informative breakfast roundtable addressing current issues affecting the Corporate world. There is no charge for in-house counsel to attend the MCLE approved Corporate Counsel Roundtable. Complimentary parking and breakfast is provided.

December 9, 2009 Roundtable: Techniques for Renegotiating Real Estate Leases

"*Techniques for Renegotiating Real Estate Leases*," featured a discussion giving in-house lawyers a practical frame of reference on common opportunities, issues, interests, techniques and problems in attempting to renegotiate real estate leases in the current depressed economy. The roundtable was conducted by Bill Capps, Chair of JMBM's Corporate Department and Gray DeFevere, Senior Vice President of PAR Commercial Brokerage. *If you would like to request a copy of presentation materials from this roundtable, please contact Bill Capps at 310.201.3513 or wcapps@jmbm.com.*

January 19, 2010 Roundtable: How to Effectively Plan and Execute Employee Terminations in Uncertain Economic Times

"*How to Effectively Plan and Execute Employee Terminations in Uncertain Economic Times,*" will feature a roundtable discussion on issues confronting in-house counsel when faced with an employee termination, as well as techniques for managing them. The discussion will be led by Bill Capps, Chair of JMBM's Corporate Department and Scott Brink, Partner in JMBM's Labor & Employment Group. *If you would like to attend this roundtable, please contact Jessica Hekmatjah at 310.201.3567 or jh7@jmbm.com.*

Employee Monitoring in an Electronic Age

by Maryam Maleki and Louise Ann Fernandez

JMBM'S LABOR & EMPLOYMENT GROUP

Internet and e-mail in the workplace, now used by nearly 40 million Americans, have become valuable assets to business enterprises. Unfortunately, the way these tools are used — or abused — can become a disaster waiting to happen. A survey of 1,000 American workers revealed that 64 percent of those with Internet access at work use it for personal interests during working hours. A majority of employers now think they must (and do) monitor their employees' Internet and e-mail usage to enhance productivity and avoid potential workplace liability (although, not surprisingly, a substantial percentage of employees disagree). But can monitoring employee Internet and e-mail be a problem for employers?

A Reasonable Expectation Of Privacy

The balance between an employee's right to privacy and a corporate employer's right to monitor often favors employers. Indeed, courts set a high standard for employees to prove that a company violated an employee's reasonable expectation of privacy. This seemingly provides wide latitude for employers to monitor employees' electronic workplace communications. However, there are no absolutes with regard to the question of privacy in the workplace. While there appears to be great latitude, whether an employer can monitor employees is, in actuality, a fact-specific inquiry dependent upon an analysis of specific company practices.

In three past cases, courts have found that employees have no reasonable expectation of privacy where employers' policies clearly outlined impermissible e-mail content, identified that a violation could result in disciplinary action (including termination), and reserved the Company's right to access e-mail messages and track websites visited by the employees. In *Garrity v. John Hancock Mutual Life Insurance Co.* 2002 U.S. Dist. LEXIS 8343 (D. Mass. 2002), employees who used the employer's e-mail system to share sexual jokes were terminated. Since the employees in question knew of the employer's electronic communications policy and also knew that recipients of their e-mails could forward them to third parties, no valid reasonable expectation of privacy existed.

> 35 percent of employees indicated that they resented employer monitoring and felt it hurt their productivity.

Similarly, in *TBG Insurance Services Corp. v. Superior Court*, 96 Cal. App. 4th 443 (Cal. App. 2d Dist. 2002), an employee terminated for accessing pornographic websites consented to having his employer-provided home computer monitored by authorized company personnel. The court determined that because he had consented to company monitoring, he had no reasonable expectation of privacy in such computer. And in *Muick v. Glenayre Electronics*, 280 F.3d 741 (7th Cir. Ill. 2002), an employee receiving and possessing child pornography on a company laptop intended for office use had no reasonable expectation of privacy because the employer informed the employee that it could inspect the computer.

The key common element to each of these cases is that the employer had a pre-existing policy that it communicated to its employees, so that employees understood the scope of their employer's intentions.

While most legal disputes regarding employer monitoring of Internet and e-mail use have upheld the company's right to monitor finding no general reasonable expectation of privacy, there are cases holding for the employee. In *State v. Young*, 974 So. 2d 601 (Fla. Dist. Ct. App. 1st Dist. 2008), a pastor employee who stored child pornography on his church-provided computer had a reasonable expectation of privacy. In this instance, the employee was successful because the employer failed to have a policy advising employees that computer usage would be monitored nor was there any indication that company personnel had routine access to employee computers. Again, this case hinged on the existence and communication of a company policy.

The Conflict Of Employee Monitoring

The cost and disruption of litigation by disaffected employees (or former employees) is just one downside to not having and communicating an effective Internet and e-mail policy. Even if a company is lucky enough to avoid litigation, employee monitoring may be damaging to employee productivity if it is not implemented effectively. While monitoring might deter company provided Internet and e-mail abuse, it may also cause resentment in employees if they do not see the justification of monitoring. In a recent survey, 35 percent of employees indicated that they resented employer monitoring and felt it hurt their productivity. Knowledge of Internet and

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e-mail use policies is essential for companies and employees alike. If a company approaches the situation from a realistic and business perspective and explains the reasons why it imposes monitoring policies, then it becomes less personal and more work oriented and employees are more apt to accept this reason. Moreover, since employees often spend the better part of their waking hours in the office, conducting some personal business via e-mail or the Internet (such as online banking) may be a convenience that employees' cannot do without. Company policies must consider the practical detriment of an overly restrictive policy.

> The key common element to each of these cases is that the employer had a pre-existing policy, so that employees understood the scope of their employer's intentions.

Another issue arises with regard to what an employer can do with information that it gathers through employee monitoring. While employees might come to accept monitoring of work by a corporate employer, the thought that employers might have access to their private information via monitoring e-mail and Internet use might not be accepted as easily. Does an employer assume any responsibility to safeguard confidential employee information not of a public nature? There is a growing body of case law and state statutes requiring employers to do just that. Among other things, employers must take reasonable steps to protect the confidential information of their employees and disclose when that information has been accessed without authorization. Consequently, employers must decide in advance the scope of information it will access, what information will kept confidential, who in the company hierarchy must have access to it, and who must be able to make changes to it. If a business develops a method to protect confidential information and implements those methods by ensuring employees understand new procedures, it could go a long way to easing employees' fears and avoiding costly litigation.

What's A Corporation To Do? Drafting An Effective Policy

In order to avoid litigation and better maintain employer/employee harmony, more companies are not waiting for law suits to deal with Internet and e-mail abuse. They are implementing and enforcing Internet and e-mail use policies prior to the threat of litigation. The key to an effective policy is consistently enforcing a realistic plan that takes into account the realities of the workplace. A good policy should take into account the following components:

Step 1
Place Restrictions On Internet and E-mail Use

Policies should include specific restrictions pertaining to the content of electronic messages, prohibiting messages that are defamatory, abusive, profane, obscene, sexually oriented, threatening, racially offensive, tortuous, or wrongful. A successful e-mail and Internet policy should also contain procedures encouraging early reporting by employees of offensive conduct.

Step 2
Communicate The Policy To Employees

The company should employ internal procedures to perform a prompt investigation of complaints regarding the misuse of Internet and e-mail communications, informing employees that inappropriate conduct will lead to disciplinary action, up to and including termination.

Step 3
Reserve the Right To Monitor

Most importantly, a corporate employer should reserve the right to monitor, have employees consent to monitoring, and state that a failure to monitor in particular situations is not a waiver of the company's right to monitor. A good corporate policy should warn employees that company computers and e-mails stored on the company server are company property and that employees have no reasonable expectation of privacy in same. Corporate employers should also be sure to periodically review e-mail and Internet policies to ensure compliance with current law, update them in light of changed circumstances, and continue to inform employees about the policy and their rights. ■

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About JMBM's Labor & Employment Group

JMBM's Labor & Employment Department counsels businesses and management on workplace issues, with special emphasis on reductions in force, discrimination, harassment, wage and hour disputes, and labor-management matters including collective bargaining negotiations and arbitrations. Our labor attorneys work closely with employers to develop proactive compliance and dispute resolution strategies to successfully solve workplace problems or avoid them altogether. Each of our lawyers works closely and personally with employer clients to develop proactive compliance and dispute resolution strategies. We believe this one-on-one counseling is far more efficient than an unwieldy team. We work with clients to help them avoid workplace problems, but where controversy is unavoidable, we have handled literally hundreds of jury trials, administrative trials and appeals before courts and administrative agencies nationwide. We would be pleased to discuss our experience as it relates to your specific needs.

What's Inside?

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