COMPLIANCE WEEK
THE LEADING INFORMATION SERVICE ON CORPORATE GOVERNANCE, RISK AND COMPLIANCE

Government e-Discovery Tactics Broadened

By Jaclyn Jaeger — October 19, 2010

A federal appeals court reversed a landmark data-privacy ruling it issued last year, which had restored broad powers for computer search and seizure by government agents.

In a highly unusual move, the California-based 9th Circuit Court of Appeals retreated from a series of protocols and restrictions it issued last year in *U.S. v. Comprehensive Drug-Testing* because the Obama Administration asked the court to reconsider. The original decision spelled out tight controls on what methods government agents could use to review and retain electronic information seized during a criminal investigation; the government claimed those rules had brought investigations to a standstill.

RELATED RESOURCES

Latest Decision in Balco Ruling (Sept. 13, 2010)

Comprehensive Drug Testing, Inc. Brief

Related Coverage

e-Discovery Challenges in Criminal Probes (Dec. 23, 2008)

Court Ruling Expands e-Discovery Protections (Sept. 22, 2009)

The case is an offshoot of the federal government's criminal case against the Bay Area Laboratory Co-Operative, more notoriously known as BALCO—a case that started as a probe of steroid abuse among professional baseball players and has since spawned all manner of secondary legal headaches.

In 2002, government agents in the BALCO probe executed a search warrant for the records of 10 baseball players. Comprehensive Drug Testing is an independent company used by Major League Baseball to administer drug testing on its athletes and retain the records. In the course of executing the warrant, agents also obtained confidential medical records of hundreds of other players, and used that data to get more search warrants. Government lawyers argued that they should be allowed to retain and use information not included in their original search warrant because it came into "plain view."

The 9th Circuit ruled against that theory in August 2009. To drive home its point, it stated five criteria that investigators' searches had to meet, including segregation of data (ideally done by a third party), destruction of irrelevant data, and several other points governing how a federal magistrate should oversee the search.


Kagan

Following the decision, however, the Obama Administration—led by then-solicitor general, now Supreme Court justice Elena Kagan—urged the court to rehear and reverse its decision, arguing that the guidelines had grounded criminal investigations to a "complete halt," and have "delayed or impeded" investigations all over the West Coast. Kagan noted the unprecedented nature of such a request (the 9th Circuit has never granted reconsideration before, and the executive branch has never asked for one), but stressed that, "the broad issues unnecessarily addressed in the [court's] opinion are of surpassing importance and compel that extraordinary action."

Message received. In a new 58-page decision handed down last month, the appellate court adhered to its earlier rulings that law enforcement cannot use seized materials in a computer search that are beyond the scope of the warrant, but downgraded its five-point criteria to a non-binding concurrent opinion.

Chief Judge Alex Kozinski wrote in the concurring opinion that he had wanted to provide guidance "about how to deal with searches of electronically stored data in the future, so that the public, the government, and the courts of our circuit can be confident such searches and seizures are conducted lawfully."

Only four other 9th Circuit judges signed on to Kozinski's new opinion, in contrast to seven who had endorsed his original

The latest decision is especially unusual, because it's "very rare that the full court will be willing to rehear a case that's already been before the court."

—Brian Whisler, Partner,

ruling last year. Instead, the judges urged "greater vigilance on the part of judicial officers in striking the right balance between the government's interest in law enforcement and the right of individuals to be free from unreasonable searches and seizures."

Baker & McKenzie

Whisler

Legal observers say such an about-face is extremely rare. "The standard for obtaining *en banc* review is so high, litigants typically find little benefit to pursuing a rehearing," says Brian Whisler, a partner with the law firm Baker & McKenzie. "It also represents the first time the Ninth Circuit granted full *en banc* review in the Court's history, revealing the exceptional importance of the issues presented."

Striking a Balance

As federal courts apply the ruling, the practical result will probably be that government investigators will have an easier time getting warrants and subpoenas, says Geoffrey Vance, a partner in the law firm McDermott Will & Emery. But the path won't necessarily be free and clear; Justin Murphy, a securities lawyer at the law firm Crowell & Moring, says companies will still have "more ammunition" to make additional arguments.

Murphy

"It's certainly going to continue to put constraints on government fishing expeditions," Murphy says.

Given how complex criminal matters can now be, and the huge volumes of data they can now involve, "the federal courts ... are always looking for help in how to strike the proper balance between privacy and law enforcement interests in these types of cases," Whisler says. "So while the BALCO case isn't binding outside the Ninth Circuit, it will certainly help inform the decision of other jurisdictions that confront similar issues."

But ultimately, Whistler says, the new *Comprehensive Drug Testing* decision won't do much to tamper the federal government's pursuit of electronic evidence: "The government will continue to look for ways to aggressively pursue criminal cases against companies it believes are involved in wrongdoing."

FROM RULES TO GUIDELINES

When the 9th Circuit Court of Appeals was asked by the Obama Administration to revisit a ruling on the methods government agents could uses to review and retain electronic evidence, it turned the following rules into mere guidance. The reversal could mean broader powers for computer search and seizure by government agents::

- Magistrates should insist that the government waive reliance on the plain-view doctrine in digital evidence cases.
- Segregation and redaction must be either done by specialized personnel or an independent third party. If the segregation is to be done by government computer personnel, the government must agree in the warrant application that the computer personnel will not disclose to the investigators any information other than that which is the target of the warrant.
- Warrants and subpoenas must disclose the actual risks of destruction of information, as well as prior efforts to seize that information in other judicial settings.
- The government's search protocol must be designed to uncover only the information for which it has probable cause, and only that information may be examined by the case agents.
- The government must destroy or (if the recipient can lawfully possess it), return non-responsive data, keeping the issuing magistrate informed about when it has done so and what it has kept.

—Source: 9th Circuit Court of Appeals.

Vance

The latest ruling does shut the door on any further petitions for rehearing. Any new appeals now must go to the U.S. Supreme Court, which isn't likely to happen. "When you take something that was law and make it mere guidance, it makes it less likely that the Supreme Court will review the newer BALCO decision," Vance says.

Then again, a broader Supreme Court review regarding Fourth Amendment search warrants and the seizure of electronically stored information isn't out of the question. It's possible, Murphy says, "given that we have contradictory jurisprudence on the application of the Fourth Amendment's requirements in the electronic information age."