

SECOND CIRCUIT REVIEW

Expert Analysis

Disclosure of Wiretapped Conversations

In this month's column, we discuss *S.E.C. v. Rajaratnam*,¹ in which the U.S. Court of Appeals for the Second Circuit addressed the circumstances in which a party to a civil litigation can be compelled to disclose wiretapped conversations provided to that party by the government as part of a parallel criminal proceeding. This decision, written by Judge Gerard E. Lynch and joined by Judges Denny Chin and Reena Raggi, stems from the Galleon hedge fund insider trading case and highlights the potential issues facing litigants who are parties to simultaneous criminal and civil proceedings.

Background

In October 2009, the U.S. Attorney's Office for the Southern District of New York unsealed criminal complaints alleging insider trading at several hedge funds, including Galleon Management, LP, a firm founded by the appellant Raj Rajaratnam, and New Castle Funds LLC, where the appellant Danielle Chiesi was a hedge fund manager. The same day as criminal complaints were unsealed, the Securities and Exchange Commission filed a civil complaint against Mr. Rajaratnam, Ms. Chiesi and others, charging them with insider trading and conspiracy based on the same conduct at issue in the criminal case. The criminal case against Mr. Rajaratnam and Ms. Chiesi was assigned to Judge Richard Holwell while a separate indictment charging similar crimes against other defendants, arising from the same investigation, was assigned to Judge Richard Sullivan. The civil SEC action was assigned to yet a third judge, Judge Jed Rakoff.

In connection with the criminal investigation, the government wiretapped communications



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between Mr. Rajaratnam, Ms. Chiesi and others over a 16-month period. In all, some 18,150 communications, involving 550 separate individuals, were intercepted from 10 separate telephones including the home, office and mobile phones of Mr. Rajaratnam and Ms. Chiesi. As part of criminal discovery, the U.S. Attorney's Office provided copies of these wiretapped communications, the orders authorizing the wiretaps, and the government's applications for those orders to Mr. Rajaratnam and Ms. Chiesi. However, the U.S. Attorney's Office did not share these materials with the SEC, taking the position that it lacked the authority to do so.

The SEC sought access to wiretap recordings by demanding them directly from the defendants as part of discovery in the civil case against them.

The SEC instead sought access to the wiretap recordings by demanding them directly from Mr. Rajaratnam and Ms. Chiesi as part of discovery in the civil case before Judge Rakoff. After Mr. Rajaratnam and Ms. Chiesi opposed the demand on the grounds that the materials were not relevant and that disclosure was prohibited by Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Title III)²—the statute authorizing the wiretaps—the SEC moved to compel disclosure. The district court ultimately

ordered Mr. Rajaratnam and Ms. Chiesi to produce all wiretapped conversations to the SEC and to any other party to the civil action that demanded them. Mr. Rajaratnam and Ms. Chiesi appealed, and the Second Circuit granted a stay of the district court's discovery order during the pendency of the appeal.³

Lack of Appellate Jurisdiction

Before turning to the substantive issues on appeal, the court first addressed whether it had jurisdiction to review the district court's interlocutory order and concluded that jurisdiction was lacking. As the court explained, federal courts of appeals are provided with jurisdiction to review a small set of prejudgment orders that are "collateral to" the merits of an action and "too important" to be denied immediate review which are therefore also considered "final decisions" for purposes of appellate jurisdiction. This small set of interlocutory orders that are deemed "final" includes only decisions (i) that are conclusive, (ii) that resolve important questions separate from the merits, and (iii) that are effectively unreviewable on appeal from the final judgment in the underlying action.

Further, to determine whether an interlocutory order fits within this exception, a court should not engage in an "individualized jurisdictional inquiry" into the specific order appealed from but rather focus on "the entire category to which a claim belongs." Obviously, the parties to this appeal disagreed about how to define the category of orders to which the challenged discovery order belonged. The SEC sought to define the category as "civil discovery orders requiring disclosure of wiretap materials," while Mr. Rajaratnam and Ms. Chiesi argued it should be defined as "wiretap disclosures to third parties."

The court, instead, concluded that the category should be described more broadly as discovery orders allegedly adverse to a claim of privilege

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or privacy. The court further held that, under its recent ruling in *In re City of New York*,⁴ disclosure orders adverse to a claim of privilege are categorically not immediately reviewable and, as such, the court lacked jurisdiction to review the district court's discovery order.

Mandamus Review

Even though the court concluded that it lacked interlocutory jurisdiction, it nevertheless determined that a writ of mandamus permitting review was appropriate as the conditions necessary to issue the writ—(i) that the party seeking issuance of the writ have no other adequate means to attain the relief it desires; (ii) that the issuing court, in the exercise of its discretion, be satisfied that the writ is appropriate under the circumstances; and (iii) that the petitioner demonstrate that the right of issuance of the writ is clear and indisputable—had been satisfied.

In reaching this conclusion, the court found that the distinct privacy right against the disclosure of wiretapped private communications could not be adequately vindicated on final appeal. Further, the court held that the writ was appropriate as the petition raised a “novel and significant question of law” with respect to when a civil discovery order requiring defendants to disclose wiretap materials to a civil enforcement agency would be appropriate.⁵ Finally, the court concluded that Mr. Rajaratnam and Ms. Chiesi demonstrated a “clear and indisputable right” to the writ as the district court's order “undeniably failed to weigh properly the privacy interests at stake against the SEC's right to disclosure.”

Title III and Civil Discovery

Having determined that mandamus review of the district court's discovery order was appropriate, the court rejected outright appellants' argument that Title III—which specifically authorizes certain methods of disclosing wiretap materials—forbids civil discovery orders requiring disclosure of wiretap materials from criminal defendants.

As the court explained, Title III established a comprehensive scheme for the regulation of wiretapping and electronic surveillance and permits the use and disclosure of lawfully obtained wiretap materials in certain circumstances. Mr. Rajaratnam and Ms. Chiesi argued that because Title III does not permit the U.S. Attorney's Office to provide the wiretapped conversations to the SEC, these provisions must implicitly bar the SEC from acquiring the conversations from Mr. Rajaratnam and Ms. Chiesi directly. The U.S. Attorney's Office supported the first part of this proposition in an amicus curiae brief agreeing that

it could not provide the wiretap conversations to the SEC “without any law enforcement purpose and solely to assist the SEC in a civil case.”

However, without ruling on whether the position of the U.S. Attorney's Office was correct, the court concluded that even if Title III did not authorize the U.S. Attorney's Office to disclose the wiretap contents to the SEC, it did not follow that Title III prohibits the disclosure where the U.S. Attorney's Office has lawfully disclosed wiretapped communications to criminal defendants. The court noted that nothing in the provisions of Title III cited by Mr. Rajaratnam and Ms. Chiesi addressed the rights or duties of criminal defendants to whom intercepted communications are lawfully disclosed to engage in further disclosures.⁶

The court concluded that while the district court correctly found that the SEC had a legitimate right of access to the materials, the district court exceeded its discretion in finding—on the record before it—that this right of access outweighed the privacy interests implicated by the order.

Explaining that the purpose behind a prohibition on the U.S. Attorney's Office sharing wiretap contents with a civil enforcement agency was to limit law enforcement uses of the materials to those prescribed in the statute, the court concluded that this limitation did not suggest that the SEC should not receive these materials from a civil defendant in the instant case. According to the court, disclosure in a civil case implicates completely different interests relating to the role of discovery in ensuring informational equality between parties: “Giving [criminal defendants] access to these wiretap communications while denying the civil enforcement agency plaintiff the ability to seek those materials in discovery would create an informational imbalance between civil litigants” that “would give the defendants an unfair advantage in the civil proceeding.”

Mr. Rajaratnam and Ms. Chiesi additionally asserted that Title III's failure to permit expressly the disclosure at issue implicitly prohibited it. The Second Circuit, however, rejected this argument too. Applying its ruling in *In re Newsday Inc.*,⁷ the court reiterated that “Title III does not prohibit all disclosures of legally intercepted wire communications that it does not expressly permit, and that in determining whether a right of access should lead to disclosure of Title III materials, the right of access should be weighed

against the relevant privacy interests at stake.” Mr. Rajaratnam and Ms. Chiesi, however, attempted to distinguish *Newsday* by arguing that other circuit precedent counseled against applying *Newsday*'s balancing test.

Mr. Rajaratnam and Ms. Chiesi relied heavily upon *National Broadcasting Co. v. U.S. Department of Justice* (“NBC”)⁸ which, as the court noted, was the only precedent involving wiretap materials in the context of a civil discovery dispute as opposed to a common-law or First Amendment right of access. *NBC* involved a libel suit brought by Wayne Newton against NBC based on broadcasts concerning organized crime investigations involving attempts to extort money from Mr. Newton and others. To defend against the libel action, NBC sought discovery from the government of the wiretap applications, orders, and recordings. The Second Circuit held that disclosure was not appropriate and noted that “turning Title III into a general civil discovery mechanism would simply ignore the privacy rights of those whose conversations are overheard.”

Here, however, the court found that *NBC* was distinguishable in two important ways: First, *NBC* addressed whether a court could compel the government to disclose previously undisclosed wiretap recordings against its wishes in a civil proceeding unrelated to the government's criminal case as opposed to compelling disclosure by a party to a civil action. Second, the court noted that, as neither civil litigant had access to the wiretap materials in *NBC*, there was no relevant informational imbalance; in contrast, here Mr. Rajaratnam and Ms. Chiesi had free access to the wiretap materials to prepare their defense while the SEC did not.

The court therefore concluded that “while *NBC* establishes that Title III is not meant to make wiretap materials a repository of information available from the government by subpoena to civil litigants for use in private disputes, it does not address the legitimacy of ordering the discovery from a private litigant of Title III materials that have already been disclosed to that litigant by the government, in order to create a level playing field between a civil enforcement agency and that litigant.”⁹

Court Exceeded Discretion

Having established that, before ordering disclosure of wiretap materials, a court must balance the right of access against privacy interests as articulated in *Newsday*, the court turned to whether the district court's discovery order constituted an abuse of discretion. The court concluded that while the district court

correctly found that the SEC had a legitimate right of access to the materials, the district court exceeded its discretion in finding—on the record before it—that this right of access outweighed the privacy interests implicated by the order. The court further held that, where the civil defendant has properly received the Title III materials at issue from the government, the other party had a presumptive right to discovery of those materials from its adversary based on the civil discovery principle of equal information.

While noting that the SEC had a right of access to the wiretap materials, the court explained that this right must be balanced against the strong privacy interests at stake in connection with the fruits of electronic surveillance. As such, further inquiry was necessary into the legality of the wiretaps and the relevancy of the recordings to be disclosed, before any conclusion could be reached as to the balancing of interests.

The court concluded that the privacy interests at issue here merited particular attention as the district court's order implicated thousands of conversations of hundreds of innocent parties, and that the district court ordered disclosure prior to any ruling on the legality of the interceptions and without limiting the disclosure to relevant conversations. As the court noted, "we have reiterated the importance of the privacy interests embodied in Title III time and again" and "[t]he fact that Title III does not impose an absolute ban on civil discovery orders of the kind at issue here does not mean that the concerns for privacy that underlie Title III are irrelevant or can be disregarded." Moreover, "those concerns, and the evident desire of Congress to limit disclosures of the fruits even of lawful wiretapping, must be carefully weighed before discovery is ordered."

The court found that "a definitive balancing of the interests at stake in this case is impossible, because the record is not adequately developed to support the broad order appealed from" and, as such, "the order appealed from, for those very reasons, cannot be sustained." The court held that the district court exceeded its discretion in failing to balance properly the relevant privacy interests against the SEC's right of access in two major ways: (i) by ordering the disclosure of the conversations prior to a ruling on the legality of the interceptions, and (ii) by failing to limit the disclosure order to relevant conversations.

With respect to the legality of the wiretaps themselves, the court broadly concluded that "a district court could not effectively balance these competing interests while the legality of the wiretaps is at issue" as "[i]f the wiretaps are found to have been unlawful, the privacy rights at issue

would already have been grievously infringed, and further dissemination of conversations that had been illegally intercepted would only compound the injury." The court further noted that while Title III limits the proper dissemination and use of lawfully authorized electronic surveillance, it absolutely prohibits the intentional disclosure of the fruits of unlawful wiretapping.

The Second Circuit further found that the district court clearly exceeded its discretion by failing to limit the disclosure of the wiretapped conversations to relevant conversations. As the court noted, "[t]he point assumes particular significance here where ordering the disclosure of all the conversations without limiting discovery to relevant material could infringe the privacy rights of hundreds of individuals, whose irrelevant, and potentially highly personal, conversations with the Appellants would needlessly be disclosed to the SEC and other parties, without furthering any legitimate countervailing interest."

Given the conclusion that the district court clearly exceeded its discretion by compelling disclosure, the Second Circuit, having granted the writ of mandamus, vacated the district court's discovery order compelling disclosure of the wiretap materials.¹⁰

1. ___F.3d___, 2010 WL 3768060 (2d Cir. Sept. 29, 2010).

2. 18 U.S.C. §§2510-2522.

3. Appellants had moved in the district court for a stay pending appeal and a certification permitting immediate appeal pursuant to 28 U.S.C. §1292(b); however, the district court denied both, noting that it regarded the motion for a stay as "highly prejudicial" to the SEC, and the motion for certification as "frivolous."

4. 607 F.3d 923 (2d Cir. 2010). *City of New York* addressed whether or not a writ of mandamus was appropriate to review a discovery order requiring the City of New York to produce "sensitive intelligence reports" prepared by undercover police officers to class action plaintiffs. The Second Circuit held that petition for mandamus was the only "adequate means" for the city to seek review of the order and that it was "clear that the City cannot challenge the District Court's order by means of an interlocutory appeal." Citing *Mohawk Indus. Inc. v. Carpenter*, ___U.S. ___, 130 S.Ct. 599 (2009), the court noted that the Supreme Court has made clear that when a court rejects a claim of privilege, the losing party must pursue other avenues of review apart from collateral order appeal, including, in extraordinary circumstances, a petition to the court of appeals for a writ of mandamus.

5. As the court noted, while the Second Circuit had addressed the propriety of disclosures of wiretap evidence in civil proceedings, its prior cases did not involve the circumstances presented here; namely, parallel civil and criminal proceedings in which the government has disclosed materials to a criminal defendant, where the legality of the wiretaps had yet to be adjudicated, and where a civil enforcement agency suing

the defendant in parallel proceedings sought access to the materials from the defendant.

6. Mr. Rajaratnam and Ms. Chiesi additionally advanced arguments that other sections of Title III barring and permitting certain types of disclosures and interceptions also precluded disclosure. The court rejected these arguments as these provisions addressed "disclosures and interceptions not at issue in the instant case." 2010 WL 3768060, at *9-10.

7. 895 F.2d 74 (2d Cir. 1990). In *Newsday*, a newspaper sought access to a search warrant application containing wiretap communications sealed by the district court. Following a guilty plea by the subject of the wiretap, the government withdrew its objection to unsealing the application, and the district court released a redacted copy of the warrant materials. The subject of the wiretap appealed, and the court ruled that there was a common law right of access to the judicial documents at issue, but that the right of access needed to be balanced against the privacy rights at issue.

8. 735 F.2d 51 (2d Cir. 1984).

9. 2010 WL 3768060 at *14. Mr. Rajaratnam and Ms. Chiesi additionally relied upon the Second Circuit's statement in *In re New York Times Co.*, 577 F.3d 401, 406 (2d Cir. 2009) that there is a "strong presumption against disclosure of the fruits of wiretap applications." The court, however, concluded that, even if there were a presumption against disclosure of wiretap contents, that presumption could be overcome with a sufficient showing of need based on a *Newsday*-type balancing.

10. In addition to reversing the lower court, the Second Circuit suggested that "[t]he more prudent course in the instant case may have been to adjourn the civil trial until after the criminal trial," noting that "all the parties agreed to such a request, yet the district court declined to grant it." 2010 WL 3768060 at *21. On Nov. 9, 2010, the district court postponed all depositions at least until the wiretap suppression motion pending before Judge Holwell was decided. It should be noted that the remaining parties in the case had jointly applied on Nov. 5, 2010, for a delay of depositions until the conclusion of the pending related criminal trial before Judge Holwell; however, the district court was "reluctant to grant such an open-ended and lengthy postponement."