Nathan Order Adds to 'Mini-Tidal Wave' of Concern Over Warrants

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The white-collar defense bar is crowing over Judge **Alison Nathan**'s sweeping 92-page warrant **suppression order** in the Southern District U.S. Attorney's securities fraud case against financier Benjamin Wey, in *U.S. v. Wey,* 15-cr-00611.

Wey was charged in an eight-count indictment in September 2015 with, among other charges,

securities and wire fraud conspiracy, and money laundering. On Jan. 25, 2012, federal agents conducted searches at both the company's offices and Wey's apartment. Federal agents seized thousands of pages from the two locations, along with computers, drug prescriptions, X-rays of Wey's family, children's test scores, divorce papers from Wey's first marriage, photograms of the family and "rural landscapes."

In her opinion granting the suppression motion, Nathan wrote that the warrants were, on their face, deficient because the warrants failed to properly describe the suspected criminal conduct, while the seizure was so broad that, rather than being focused on securities fraud, they were "consistent with an investigation into almost any form of financial crime (or even concealment of the fruits of some nonfinancial crime)." While Nathan found no reason to believe the agents acted with malice in the request and execution of the warrants, the court found that "their conduct cannot be credibly explained by exigent circumstance, by simple mistake, or by mere negligence."

For some, the order on the motion by Wey's attorney, **Haynes and Boone** partner David Siegal, represents something of a small revolution inside the Southern District, as some judges there have been willing as of late to challenge the government's "good faith" protections under the long-standing *United States v. Leon* decision by the U.S. Supreme Court.

Hughes Hubbard & Reed partner Marc Weinstein likened the potential "mini-tidal wave" to a similar ripple effect on the bench caused by Southern District Judge **Jed Rakoff**'s securities **settlement rejection** stance a few years ago.

"I think that for a long time, especially for computer seizures, there's been kind of a copy-and-paste job from affidavit to affidavit," he said. "I think it was time for a court to say more needs to be done to make these things appropriate."

For the past 40 years, courts have been "incredibly tolerant" of potential "misbehavior" in the drafting and execution of warrants, according to Sercarz & Riopelle name attorney Roland Riopelle. Now, "things

are starting to swing back the other way" with decisions like Nathan's.

"I think this is just the beginning of the Titanic turning around here," Riopelle, a former prosecutor in the Southern District, said. "For many, many, many years we just have not had an effective Fourth Amendment limit on law enforcement behavior."

Riopelle pointed to the *U.S. v. Zemlyansky* decision and judgment by Judge **J. Paul Oetken** as a forerunner to the *Wey* order. As Nathan notes in her own reference to the decision, Oetken "engaged in a thoughtful and persuasive synthesis" of a number of other critical decisions involving Fourth Amendment good faith concerns. Ultimately, in *Zemlyansky*, Oetken found that the culpability standards and deterrence considerations that protect law enforcement even when it's acted in an "objectively unreasonable manner" still allow for "daylight" to consider granting a suppression motion.

This should lead to courts "independently test[ing] each requirement before suppressing," Oetken wrote. Nathan, then, applied this set of standards to *Wey*, ultimately finding that the government had been overbroad and too indiscriminate in its search and seizure actions at Wey's offices and home.

Fordham University School of Law professor James Kainen said Nathan's "significant opinion," which went "into exquisite detail," represented a "real attempt to seriously draw a line and say, 'You can actually go over this line.'" Law enforcement, he said, has too often proceeded as if catching those they believe are engaged in criminal acts outweighs constitutional considerations in their way. Nathan's suppression order, along with the questions being asked from others on the bench in the Southern District, represent an attempt to "buck the tide" of unexamined acceptance of law enforcement's good faith efforts, he said.

"All she did here was really take a look here seriously, and not sweep it under the rug."

Still, others, such as **Shearman & Sterling**'s partner Stephen Fishbein, see Nathan's decision in narrower terms, as "a fairly extreme case of a warrant executed in an usually general way," rather than some radical new precedent.

However, he said the decision is an unavoidable message to law enforcement to take care of "basic blocking and tackling" when it comes to warrants.

"They need to make sure they're dotting the 'i's and crossing the 't's every time," Fishbein said.

The decision is also the latest attempt to address the growing concern over how digital material is handled by law enforcement. Some, like New York University School of Law professor Barry Friedman, founder of the school's Policing Project, want "front-end rules put in place by legislative bodies" to address search and seizure "in a completely technological environment."

Others, like **Dentons** partner Glenn Colton, see case law eventually providing further clarity and greater restrictions on not only what can be taken digitally, but how, and for how long. In the current environment, the seizure of a phone or a computer means "you have basically their entire lives in there," he said.

"Even if there's a justification for taking the entire computer, how long the government keeps it and feels free to rummage through it, is of real concern," Colton said.

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