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Apple Peels Away At DOJ Bid To Unlock Phones With NY Win

By **Allison Grande**

Law360, New York (March 1, 2016, 11:33 PM ET) -- A New York federal judge on Monday broke ranks with a California counterpart in ruling that Apple doesn't have to help the government unlock a drug dealer's iPhone, a decision that undermines prosecutors' arguments that accessing the suspected San Bernardino shooter's phone is an isolated request that wouldn't harm Apple's future business.

In a **scathing 50-page opinion** in which he used some form of the word "absurd" nine times, U.S. Magistrate Judge James Orenstein roundly rejected the government's contention that under the All Writs Act of 1789, the court could require Apple to help the government break into confessed drug dealer Jun Feng's iPhone 5S.

The ruling directly contradicted the **headline-grabbing order** issued by a California magistrate judge on Feb. 16, which directed Apple to provide federal authorities with special software that would allow them to unlock the iPhone 5C of Syed Farook, who, along with his wife, is accused of going on a shooting rampage in December that killed 14 people in San Bernardino.

"Judge Orenstein not only denied the government's request but plainly offered guidance, if not outright lobbying, to the magistrate judge in California considering the FBI's similar request to access the iPhone of the San Bernardino terrorists," Dorsey & Whitney LLP partner Robert Cattanaich said.

In pushing for assistance in the California case, prosecutors argued that their request was both "discrete and limited" to the one Apple device seized from the shooting suspect. They also claimed that there was no danger that the creation of a tool to bypass the unlock and auto-delete functions on the iPhone would lead to a backdoor that could be used to hack into anyone's device.

But in pushing the New York case, the federal government is casting doubt on this stance, attorneys noted.

"While the New York order is not directly binding outside this particular case, it does boost Apple because it undercuts the government's argument that what is being requested in the San Bernardino case is minimal and unique by showing that these types of requests are being made all over the country," said Paul Schwartz, special counsel at Paul Hastings LLP and a professor at the University of California, Berkeley School of Law.

The New York order also deals a blow to the government's position in the California case that complying with the assistance order wouldn't be unduly burdensome for Apple, attorneys said.

The consideration of whether or not compliance with an All Writs Act order would place an undue burden on a company is one of the three factors for assessing such directives that were established by the U.S. Supreme Court in its 1977 decision in *U.S. v. New York Telephone Co.*, which upheld an order directing a phone company to help the government execute a pen register search warrant.

In issuing the order *ex parte*, the California magistrate judge agreed with the government that building the special tool would not impose such a burden on Apple. But the New York judge's resounding declaration that helping the government unlock the drug dealer's phone would be a hardship for the tech giant may help Apple in disputing the California judge's conclusion, attorneys said.

And the fact that the two phones at issue use different operating systems could further help Apple's argument on undue burden.

The phone used by the drug dealer ran iOS 7, an older version of the operating system that Apple is typically able to break into using existing technology. But in the San Bernardino case, the subject phone ran iOS 8, the first version of the operating system to feature **novel default encryption settings** that even Apple does not hold the key to unlock, necessitating the issuance of a more involved order in the California case that requires the tech giant to build new technology.

Given the success that Apple had with the burden issue before the New York judge, the issue is likely to loom large in the company's brewing bid to vacate the California order, according to McDonnell Boehnen Hulbert & Berghoff LLP partner Joshua Rich.

"Even without being required to build a code [as was ordered in the California case], the New York judge said that this is stretching the All Writs Act too far, and the burden on Apple is too great," he said.

Despite the setback dealt by the New York order, the federal government is unlikely to back down from the demands it makes on not only Apple but also other tech companies for assistance with getting around increasingly difficult-to-crack technology. But the New York judge's decision to take a stand against the government is likely to give these companies more confidence to fight back against these demands, sparking a wealth of future court battles, attorneys said.

"With the New York judge issuing a different kind of ruling and taking a different kind of approach than the California judge, that may embolden companies to fight against the use of the All Writs Act," Schwartz said.

Attorneys anticipate that companies will have plenty of chances to contest such calls for help, especially as businesses such as Apple continue to dial up the encryption and other data safeguards associated with their products.

"We should expect to see more decisions from more courts and a growing disparity in terms of the outcome and the reasoning in support of the outcome," Ballard Spahr LLP partner and former federal cybercrime prosecutor Edward McAndrew said.

But given that it will take years for a more sweeping ruling to emerge from the appellate courts, companies will have to live with a patchwork of inconsistent rulings that will complicate not only decisions to comply with assistance demands but also the raging debate over the proper balance between privacy and security.

"An interesting component of all of this is that a bedrock principle of digital security is encryption, and regulators will be the first to tell companies that they must encrypt in order to take reasonable steps to secure data, and if they don't, they will sue you," McAndrew

said. "So on the one hand, companies are being told by regulators that encrypting is increasingly important, and on the other hand, law enforcement agencies are telling companies that they have to help them decrypt devices."

The tension is further fanned by the lack of congressional guidance on the issue. Because there are no specific laws governing how far service providers such as Apple need to go to aid the government in its investigations, prosecutors have relied on the centuries-old All Writs Act, which gives the courts broad power to issue "all writs necessary or appropriate" to achieve the "rational ends of law."

While the government has been using the statute on a more frequent basis in recent years with little resistance — according to Monday's order, prosecutors have to date successfully invoked the All Writs Act to secure Apple's compelled assistance in bypassing the pass code security of Apple devices at least 70 times in the past — Judge Orenstein has taken a notable stand against the practice.

"By holding that the All Writs Act doesn't permit the government to require Apple to bypass the pass code security, the court recognized yet another limitation upon the awesome powers of the All Writs Act," said Fernando Pinguelo, the chairman of the cybersecurity and data protection group at Scarinci Hollenbeck LLC.

In doing so, the judge put the ball squarely in Congress' court. But though lawmakers heard testimony from Apple and the FBI during a hearing on Tuesday and introduced legislation Monday that would establish a commission to consider digital security issues, attorneys forecasted that the dispute is most likely to be decided by the courts and not by Congress.

"I don't see any quick fix coming from the Legislature," McAndrew said. "While creating a commission would be an important step because these issues are too critical for decisions to be made in a patchwork way by various courts, sausage-making takes time, and we're likely to be on the iPhone 15 before Congress or courts resolve these issues."

Apple is represented in the New York case by Ken Dreifach, Marc Zwillinger and Jeffrey Landis of ZwillGen PLLC.

The government is represented by Robert L. Capers, Lauren Howard Elbert, Ameet Kabrawala and Saritha Komatireddy of the U.S. Department of Justice.

The case is *In re: Order requiring Apple Inc. to assist in the execution of a search warrant issued by the court, case number 1:15-mc-01902*, in the U.S. District Court for the Eastern District of New York.

--Editing by Christine Chun and Mark Lebetkin.

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