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## Feds Lose Leverage With Breakthrough In Apple Phone Fight

By **Allison Grande**

Law360, New York (March 30, 2016, 9:57 PM ET) -- A California federal judge on Tuesday granted the FBI's request to close the books on its contentious battle with Apple over data on a mass shooting suspect's iPhone, completing an abrupt about-face that is likely to make both service providers and judges more wary of immediately bending to the government's future demands for assistance.

The government shocked observers last week when, on the eve of a highly anticipated hearing on Apple's bid to strike down an order requiring it to assist the FBI in unlocking an iPhone used by one of the suspects in the December shootings in San Bernardino, California, it **made the surprising admission** that it may have found a way to break into the phone without the tech giant's help after all.

The disclosure, which the government **confirmed in a filing Monday** that asked the judge to vacate the contested order, represented a stark departure from the government's constant refrain throughout litigation that it needed Apple's assistance. This inconsistency could have a grave impact on the next inevitable high-stakes battle between a law enforcement agency and a service provider, attorneys say.

"Tech companies are likely to be much more circumspect when faced with requests from intelligence-gathering agencies for assistance, and if the FBI has to go to court to seek relief against a tech company in the future, that bar likely just got a little higher because they said that something was necessary when it turned out it wasn't," Dorsey & Whitney LLP partner Robert Cattanach said.

Given the outcome of the California dispute, attorneys predict that both service providers and judges are going to have tougher questions for the government the next time it comes knocking for assistance, including why the provider's help is necessary and what else the government has done to try to get the information it needs.

"Because of this case, there's now more information out there, so instead of just rubber-stamping or quickly perusing a warrant, in future cases, magistrate judges might be a little bit more cautious," said McDonnell Boehnen Hulbert & Berghoff LLP partner Joshua Rich.

The overall tone of the parties' fight, which was in the public eye for less than two months but gained a wide following and much hype, is also likely to affect how the government's requests are received in the future, attorneys say.

"The case in San Bernardino undoubtedly strained the relationship between Apple and the Department of Justice," said Eric A. Berg, a litigation lawyer and special counsel with Foley & Lardner LLP.

During the course of the litigation, Apple and its amici supporters — which **included major tech companies** such as Google Inc., Microsoft Corp. and Yahoo Inc. — repeatedly pointed to the hundreds of government data requests that they have fielded and complied with from law enforcement in recent years.

Though attorneys expect that cooperation to continue in the more straightforward and less severe matters that don't require service providers to build entirely new technology to circumvent built-in security features, the disputes that appear to be asking them to cross the line drawn by Apple in the San Bernardino case likely just got much tougher on the government's end.

"At the end of the day, tech companies want to be good citizens and don't want to give the FBI a hard time for sheer sport," Cattanaich said. "But if they sense that the FBI is overplaying their hand or pushing too hard, they might be less reluctant now to push back."

The government came out swinging in the battle, taking the **unusual and aggressive step** of filing a motion to compel compliance before Apple had formally appealed the Feb. 16 order to provide special software to federal officials that would allow them to use an infinite number of passwords to unlock the iPhone 5C of deceased shooter Syed Farook without triggering the auto-delete function when too many incorrect passwords are entered.

The FBI contended that the tech giant had wildly mischaracterized the directive and that compliance would not spell the end of privacy. **Apple hit back** less than a week later with a brief arguing that the broad demand violated constitutional principles and would inflict significant harm to national security.

Prosecutors **escalated the fight** earlier this month when they told the court that Apple itself had manufactured any perceived hardships by making the "deliberate marketing decision" to outfit its products with unbreakable encryption.

In a conference call with reporters, Apple general counsel Bruce Sewell called the government's filing a "cheap shot" that "reads like an indictment," adding that in his 30-year career, he had never seen a legal brief "that was more intended to smear the other side with false accusations and innuendo and less intended to focus on the real merits of the case." The company followed up Sewell's comments with **a March 15 brief** asserting that it would find it "offensive" to build the requested phone-cracking software, which it crowned with the name "GovtOS."

"Apple and the government have been dealing with these issues for years, so this isn't new to the parties," Ballard Spahr LLP partner Edward McAndrew said. "What's different about this case is that it played out in public and involved an attempt to craft a software code to respond to a particular investigative need."

While the publicity likely contributed to the demise of the suit, which was precipitated by an unidentified third party providing the government with a way to unlock the phone that eliminated the need for Apple's help, the attention given to the battle is likely to lead Apple and other service providers to step up their security games in a way they might not have if the fight had remained in the shadows, attorneys noted.

"A takeaway for Internet service providers and tech companies is that the government is going to be coming for us, so we need to continue to make our protections even stronger," said Paul

Schwartz, special counsel at Paul Hastings LLP and a professor at the University of California, Berkeley School of Law.

The public nature of the dispute is also likely to prompt service providers, app developers and the array of other companies that are likely to face assistance requests down the road to do some soul-searching to figure out how they would respond if they were in Apple's shoes.

"Companies would be well-advised to think through what their position is going to be before they actually have an order in hand," McAndrew said. "Essentially, it comes down to the question of how far do we push back when an investigation comes up against encryption or some other data security standards that make data inaccessible or less accessible."

Apple has clearly drawn its own line in the San Bernardino case and is unlikely to back down from that stance in future fights, especially if the government continues to refuse to let it in on how it cracked the phone, attorneys say.

"If Apple doesn't get much help from the FBI in pinpointing the exact problem and give it a chance to fix it, that probably doesn't bode well for future cooperation between the FBI and Apple," Rich said.

Despite the strain that the San Bernardino case put on law enforcement's historically close and cooperative relationship with the private sector, the sides will continue to cross paths on a regular basis, attorneys noted.

The government is most likely currently pursuing dozens of assistance requests across the country, including a highly publicized appeal of a New York federal judge's refusal to force Apple to unlock a confessed drug dealer's iPhone, which **may be scrapped** in light of the California case. The strength of the government's use of the centuries-old All Writs Act to demand such assistance also remains largely unresolved, making it more than likely that another battle will be teed up sooner rather than later.

"We may have the next issue under our noses right now and not know it," McAndrew said.

The government is represented by Eileen M. Decker, Patricia Donahue and Tracy L. Wilkinson of the U.S. Department of Justice.

Apple is represented by Theodore B. Olson, Eric David Vandeveld, Nicola T. Hanna and Theodore J. Boutros Jr. of Gibson Dunn and Marc Zwillinger and Jeffrey Landis of ZwillGen PLLC.

The case is In the Matter of the Search of an Apple iPhone Seized During the Execution of a Search Warrant on a Black Lexus IS300, California License Plate 35KGD203, case number 5:16-cm-00010, in the U.S. District Court for the Central District of California.

--Editing by Christine Chun and Kat Laskowski.

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