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Standing To Challenge Corporate Searches?

Law360, New York (August 03, 2009) -- Your client, the chief executive officer of a corporation, calls you to tell you excitedly that federal agents are at that moment executing a court-authorized search warrant of the company's headquarters.

Pursuant to the search warrant, obtained in the course of a U.S. Justice Department investigation into financial fraud at the company, the government seizes accounting records from the company's finance department, located several floors away from the CEO's personal office in the executive suite.

The government later obtains an indictment charging your client with participating in a securities fraud scheme and seeks to use the seized accounting records against him.

But in reviewing the affidavit submitted to the court to obtain the search warrant, you believe it is defective in various respects and would like to file a motion to suppress the seized records and prevent their use against your client at trial.

Does the CEO have standing to challenge the search and seizure of the records taken from the finance department of his company?

A recent appellate decision addressing a similar issue set a high threshold for corporate executives to meet in challenging such government searches of their business premises.

While an individual generally has standing under the Fourth Amendment to contest a search of his own personal internal office, the Ninth Circuit's decision in *United States v. SDI Future Health Inc., et al.*[1], addressed the "novel issue" of whether a corporate official may challenge the seizure of records found in areas of the company's business premises other than his own office.

In *SDI*, which was decided earlier this year but recently amended by a panel of the Ninth Circuit, the court ruled that an executive will not have standing to challenge the

search for corporate records outside of his personal internal office unless he has "a personal connection" to the area searched or the documents seized, and narrowly interpreted the factors that would establish such a "personal connection."^[2]

The SDI decision serves as an important reminder that the threshold issue of standing to challenge a government search can be crucial to the defense of document-intensive securities or accounting fraud investigations.

Moreover, since the type of complex corporate and financial fraud cases prosecuted today frequently involve records that are maintained in corporate departments or offices far removed from the physical location of the company's top officials, such as in a corporation's accounting or billing departments, the SDI decision may ultimately mean that the executives most likely to be prosecuted for corporate wrongdoing, such as CEOs and CFOs, may be precluded from challenging the seizure of some of the most probative evidence against them.

The Ninth Circuit's Decision

In SDI, two corporate officers and the company they jointly owned were indicted in the District of Nevada for health care fraud in connection with an alleged false billing scheme designed to defraud the federal Medicare program and private health insurers.

Part of the evidence the government sought to use against the defendants was obtained from a search warrant executed at the company's offices by IRS agents.

During this search, agents seized materials from both the executives' personal and internal offices, as well as other areas of SDI's business premises.

The corporate officers filed a motion to suppress the evidence obtained during the search. In its ruling granting the motion, the District Court made no distinction regarding the location of the materials seized, holding that the defendants had standing to seek suppression of all the materials seized during the search.

In finding that they had a reasonable expectation of privacy in SDI's offices and therefore had standing, the court cited several factors: their ownership interests in SDI; their authority over the operations of SDI; and the affirmative measures taken by SDI to maintain the security and confidentiality of its business records.^[3]

On appeal, the government conceded that SDI, which had also been named in the indictment as a defendant, had standing to challenge the seizure of all records taken from its business premises, but argued that the individual executives had no right to object to the search of areas outside their personal offices.

In reversing the district court's suppression order, the Ninth Circuit addressed the issue of whether corporate executives may seek to suppress evidence seized during a law

enforcement search from areas of their company's premises which are "not reserved for the executives' exclusive use." [4]

The court began its analysis by rejecting the significance of the factors relied upon by the district court to establish standing, describing them as "too broad and generalized" to support the trial court's finding.

The Ninth Circuit held that an individual executive's managerial authority or control over company operations did not necessarily give him an expectation of privacy in all physical areas of the corporate premises.

The court similarly ruled that an executive's status as a shareholder or owner of a company also does not automatically confer standing on the individual.

The Ninth Circuit also found that the security measures taken by SDI to ensure the privacy of its business records were relevant only to the standing of the corporation, not of its individual officers. [5]

Instead, the court ruled that an individual corporate employee challenging the search of workplace areas beyond his own internal office "must generally show some personal connection to the places searched and the materials seized." [6]

Absent such a personal connection or exclusive use, a defendant cannot establish standing for Fourth Amendment purposes.

The Ninth Circuit ruled that, in determining the strength of a defendant's personal connection to a specific location or set of materials, trial courts should evaluate all the surrounding circumstances, but should specifically evaluate three key factors:

- 1) whether the seized item is personal property of the defendant, or otherwise "kept in a private place separate from other work-related material;"
- 2) whether the defendant had custody or immediate control of the item when officers seized it; and
- 3) whether the defendant took precautions on his own to secure the place searched or things seized from any interference without his authorization. [7]

Noting that none of the items seized were the personal property of the SDI executives, or were taken from their individual custody, the court indicated that the determination of whether they had a "personal connection" to the items seized or place searched would turn on the extent to which they took steps to "keep the items private and segregated from other general business materials."

The Ninth Circuit remanded the case to the district court to conduct a factual inquiry on this issue. [8]

Implications for Corporate Executives

The Ninth Circuit's narrow conception of what factors could establish a "personal connection" to seized records offers little help to corporate executives in the scenario they are most likely to encounter, where corporate records are seized from a department or location outside of their personal work areas.

If the materials seized are corporate records, as opposed to the personal items of the executive, the first factor cited by the court will not be satisfied.

Similarly, in the context of the seizure of corporate records, as opposed to the seizure of an item from the person of an individual, it would seem highly unlikely that most executives would be able to satisfy the Ninth Circuit's second factor, namely that they had custody or immediate control of the item when it was seized.

To begin with, if an executive had custody of corporate records at the time of seizure, it would likely be in his office or its immediate surrounding area, locations in which he presumably has exclusive use and therefore an acknowledged expectation of privacy, and he would not need to demonstrate a personal connection in order to establish standing.

Moreover, while there may be random circumstances in which an individual executive happens to have a key file in his possession outside of the area of his personal office at the time of the execution of a search warrant, this factor offers little help in the most common scenario where corporate records from various locations and departments of a company outside of an executive's personal custody are seized pursuant to a law enforcement search.

The third factor cited by the Ninth Circuit — whether the defendant took precautions on his own to secure the place searched or things seized from any interference without his authorization — also would seem to have limited applicability to the typical corporate executive seeking to challenge the search of his corporate premises.

Although the court did not explain what sort of security measures would be relevant to the analysis of this factor, it seems focused on steps taken to physically segregate or otherwise restrict access to materials, such as whether the materials were placed in a separate room or file cabinet, whether the room or file cabinet was kept locked, and who was permitted access to the materials and for what purpose.

As a result, documents maintained in areas or departments of a company physically removed from the defendant executive's office will likely not be covered by an executive's legitimate expectation of privacy unless some concrete steps have been taken to limit the access of other employees to the items.

Moreover, the Ninth Circuit's decision appeared to give little weight in the standing analysis to factors such as an executive's corporate position, supervisory or

management authority or ownership stake in the business searched. The court's opinion made clear that, at a minimum, these factors alone are not sufficient to confer standing.

However, even the district court's factual findings that the SDI executives held "significant" ownership interests in the company, exercised a "high" level of authority over the company's operations, and had put in place security and confidentiality policies with respect to its records did not establish the basis for standing.[9]

As a result, even though the court noted that all the surrounding circumstances must still be considered in the standing analysis, these factors appear less probative than those set out in the court's "personal connection" test.

Thus, the SDI decision would seem, as a practical matter, to leave little room for executives to successfully challenge law enforcement searches of their corporate premises.

At a time of great public clamor for aggressive prosecution of alleged financial fraud and corporate wrongdoing, the Ninth Circuit's decision effectively limits the ability of high-level corporate executives — the most likely targets of such investigations — to fully defend themselves.

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[1] 553 F.3d 1246, 1254 (9th Cir. 2009). The Ninth Circuit panel's decision was originally issued earlier this year, but was amended in June 2009. See 2009 U.S. App. LEXIS 12997 (9th Cir. June 1, 2009). Following the original panel decision, the government sought rehearing en banc with respect to another aspect of the decision, which was denied on June 1, 2009.

[2] 553 F.3d at 1257.

[3] *Id.* at 1253.

[4] *Id.* at 1250.

[5] *Id.* at 1255-57.

[6] *Id.* at 1257.

[7] *Id.*

[8] Id. at 1257-58.

[9] Id. at 1253; 2009 U.S. App. LEXIS12997 at *4-6.