

COA Opinion: Businesses are not entitled to Fifth Amendment protection

12. March 2011 By Jeanne Long

On Tuesday, March 8, the Court of Appeals decided *PCS4LESS, LLC & Wholesale Cellutions v Stockton et al*, No. 296870. The Court held that even where an individual may be criminally implicated, a business cannot be refused to produce information or make a statement on the basis of the Fifth Amendment's privilege against self incrimination.

PCS4LESS and Wholesale Cellutions sued the defendants, including several individuals and a business, for misappropriation of the plaintiffs' exclusive software. Among other things, the plaintiffs requested a temporary restraining order to prevent the defendants from using or destroying the software.

The trial court granted the TRO and ordered the defendants to turn over the software. The defendants did not produce one of the software programs, however, and claimed that they never had it. The trial court therefore ordered them to submit sworn affidavits that they had never received, possessed, or used the program in any way. Instead, the defendants submitted affidavits in which they stated that the information at issue was protected by their rights against self-incrimination under the Fifth Amendment.

The plaintiffs then filed a motion to compel. In response, the defendants stated that the plaintiffs had instigated a federal criminal investigation against them, but they did not describe any direct contact with federal authorities or any specific law under which they might be prosecuted. The trial court granted the motion, holding that the defendants had failed to provide the court with sufficient information to establish the testimonial and incriminating character of the requested affidavits. The court then ordered the defendants either to produce the software or to submit proper affidavits.

The defendants appealed, contending that the trial court's orders denied their Fifth Amendment right against compelled self-incrimination. On appeal, the Court of Appeals reversed in part and affirmed in part for other reasons. It held that the trial court's order violated the individual defendants' Fifth Amendment right against self incrimination, but it held that the corporation also possessed the information and no such constitutional right.

The Court of Appeals first held that the Fifth Amendment applied to the question generally because the defendant's statements or failure to make a statement regarding possession of the software would furnish a link in the chain of evidence needed to prosecute them. The defendants were essentially being asked whether they wrongfully possessed what the plaintiffs alleged to be trade secrets. The Court held that it should have been clear that possession of the trade-secret software might well lead to criminal sanctions. Accordingly, answering questions about possession of the software might force the defendants to furnish a link in the chain of evidence needed to prosecute. Additionally, turning over the software might be privileged under the Fifth Amendment, even if the contents of the software were not themselves privileged, because doing so had testimonial aspects and an incriminating

effect: An admission that the defendants possessed the software. Accordingly, the Fifth Amendment was violated by the trial court's order requiring the individual defendants either to produce the program or submit the affidavit that they did not possess it.

The Court of Appeals held, however, that organizations generally are not protected by the Fifth Amendment privilege. Indeed, the custodian of an organization's records may not refuse to produce records even if those records might incriminate the custodian personally. A corporation is not permitted to hide behind an individual's Fifth Amendment privilege. Applying a three-factor test for determining whether a corporation holds a document, the Court held that the software was a record of the business and not of the individual defendants. Accordingly, the Fifth Amendment did not prohibit the compelled production of the program from the business defendant. The Court therefore affirmed the trial court's order that the company produce either the software or the affidavit stating it did not have the software.