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SEARCH AND SEIZURE

Give Me Back My Books and Records: Application of Rule 41(g) in Response to Federal Search Warrants

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In the past decade, federal law enforcement has been more aggressive in white collar investigations in utilizing search warrants, as opposed to subpoenas, to seize a company's books and records.[1] The statute of limitations for most federal criminal offenses is five years, so the seizure of business records for an extended period can be highly disruptive of a company's operations. During federal investigations, the government typically will refuse to tell the company under investigation exactly when a decision on prosecution will be made.

In many cases, the federal investigators will seize voluminous hard copies and electronic data from a company's headquarters. These documents may include personnel files, tax and financial records, customer and supplier information, computers and electronically stored information (ESI). If the company does not have electronic backup of its records, or if the backup records were also seized, then the company may face a long wait for the government's return of its records if they are seized pursuant to a search warrant. Moreover, the company will be hard-pressed to conduct its own internal investigation of the allegations without access to the data.[2]

Rule 41(g)

There is a seldom utilized, but powerful, tool a company may use for obtaining relief from the court in getting business records back even when there is no pending case with the court. Rule 41(g) of the Federal Rules of Criminal Procedure can compel the government to decide whether to file charges or be forced to return the company's records.[3] This article provides an overview of Rule 41(g) to assist counsel in understanding the requirements.[4]

[1] The Justice Department has utilized more powerful investigative tools such as search warrants and Title III electronic surveillance in white collar investigations in the past decade. These tools were historically used in narcotics and organized crime investigations while subpoenas were the standard tools in white collar cases. Times have changed.

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[2] An internal investigation of the allegations is crucial to the company's determination of whether it (and employees) violated the law and, if so, whether it was an isolated instance or a more pervasive pattern exists.

[3] The authors recognize that many companies may prefer not to goad the government into making a prosecution decision on abbreviated notice because it may be devastating to the business if an indictment is filed. One remedy the government has to respond to a Rule 41(g) motion is simply to seek an indictment, which will make the motion moot. However, if the company faces a multi-year federal criminal investigation without access to its business records, there may be need for a more expeditious alternative than simply ''waiting to see what happens.''

[4] In a recent federal investigation of a business in Nevada, the authors were successful in obtaining a federal court order directing the federal agents to return all of the company's original books and records (a truck full) after they had been seized from the business pursuant to a search warrant more

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Rule 41(g)[5] provides: ''A person aggrieved by an unlawful search or seizure of property or by the deprivation of property may move for the property's return.'' The U.S. Court of Appeals for the Ninth Circuit holds that ''if a Rule [41(g)] motion is filed when no criminal proceeding is pending, the motion is treated as a civil complaint seeking equitable relief.''[6] Notably, the motion is ''governed by the Federal Rules of Civil Procedure.''[7]

The rule's Advisory Committee Notes recognize that books and records relevant to investigations can be returned to the owner if the government preserves a copy. The notes, however, point out that ''equitable considerations'' may justify a court order for the government to ''return or destroy'' all copies of seized records. The amendments to the rule and the Advisory Committee Notes, therefore, encourage courts to focus on the harmful effects the loss of the property wreaks on the movant.[8]

Elements to Consider In Ruling on Rule 41(g) Motion

Four factors—the *Richey* factors—are generally relevant to the resolution of a Rule 41(g) motion:

(1) whether the government has displayed a callous disregard for the movant's constitutional rights[9];

(2) whether the movant has an individual interest in and need for the property at issue;

(3) whether the movant faces irreparable injury in the absence of the property; and

(4) whether the movant has an adequate remedy at law.[10]

''The district court is required to balance [these] four *discretionary* factors to determine whether to allow the government to retain the property, order it returned or (as happened in *Ramsden*) craft a compromise solution that seeks to accommodate the interests of all parties.''[11] If the court determines that the ''balance of equities tilts in favor of reaching the merits of the Rule 41(g) motion, the district court should exercise its equitable jurisdiction to entertain the motion.''[12] In some cases, the government may respond to a defense request that it will provide ''reasonable access'' to the records at its agency's office. If tens or hundreds of thousands of pages of business records and ESI have been seized, it is simply impracticable to expect a company to send employees to a federal law enforcement agency to review records to conduct operations. The company possesses a clear interest in the seized records because it is a going concern and, without its records, it is difficult for the company to do business.

Turning to irreparable injury, courts infrequently find such injury in the pre-indictment context where the seized property at issue includes documents and records ''if the government either makes copies available or retains copies and returns the originals.''[13] Without providing copies or releasing the originals, the government's seizure and retention of invoices, customer records, employee files, ESI and other essential information can irreparably harm a company in its business operations.[14]

The company must establish it has no adequate remedy at law. If the company has not been served with regard to any criminal or civil proceeding concerning it or the documents, then it has a viable argument that court relief is the only option.[15] When deciding the merits of a Rule 41(g) motion, the court should look at whether the government's retention of the property is reason-

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than a year earlier. Despite earlier requests by counsel for return of the records (or at least a time frame for return), the federal law enforcement agents and prosecutor simply said, ''The investigation is ongoing and we do not know at the present time when the records will be released'' (or words to that effect). After the Rule 41(g) motion was filed and the federal court held a hearing two weeks later, the agents returned the original records to the company within 72 hours.

[5] Rule 41(g) was previously known as Rule 41(e).

[6] *United States v. Ritchie*, 342 F.3d 903, 906 (9th Cir. 2003).

[7] *United States v. Ibrahim*, 522 F.3d 1003, 1007 (9th Cir. 2008).

[8] See *United States v. Law Offices of Brown and Norton (In re Search of Law Office, Residence, and Storage Unit)*, 341 F.3d 404, 415 (5th Cir. 2003).

[9] There is a strong argument that the ''callous disregard'' prong does not apply outside the context of a motion to suppress. See *Mr. Lucky Messenger Serv. Inc. v. United States*, 587 F.2d 15, 17 (7th Cir. 1978) (holding that the circumstances of a seizure are irrelevant for motions requesting return of property and not suppression but that callous disregard can be analyzed as whether the government has held the seized property for an unreasonable amount of time).

[10] See *Ramsden v. United States*, 2 F.3d 322, 325 (9th Cir. 1993) (adopting *Richey v. Smith*, 515 F.2d 1239 (5th Cir. 1975)); see also *Gmach Shefa Chaim v. United States*, 692 F. Supp. 2d 461, 469 (D.N.J. 2010) (adopting *Ramsden* and collecting cases applying same or similar factors). The *Richey* factors were enunciated before Rule 41(g) was substantively changed in 1989. Based on substantive changes to Rule 41 in 1989, the judicially imposed equitable jurisdiction factors *Ramsden* adopted from *Richey* are neither appropriate under the plain language of Rule 41(g) nor warranted following the 1989 amendment to the rule. Courts have held that the plain language of Rule 41(g) does not permit a court to defer its decision or to engraft an irreparable-harm requirement that is not set forth in the text of Rule 41. As Magistrate Judge James C. Francis IV has noted, ''The decisions that require the movant to demonstrate irreparable harm before considering a pre-indictment *Rule 41[g]* motion have erected an unjustified barrier.'' *Doane v. United States*, No. 09-Mag. 0017 (HBP), 2009 U.S. Dist. LEXIS 61908 (S.D.N.Y. 2009) (extensive discussion of history of Rule 41(g)). Courts' adoption of this test is in tension with the plain language of the Advisory Committee Notes, which contemplate return of property whenever ''the United States' legitimate interests can be satisfied,'' and not when the factors listed above are met. Now that property may be returned under conditions that protect reasonable access to it and may still be used in later court proceedings, the equitable-jurisdiction inquiry as formulated is unnecessary, particularly when the post-1989 rule specifically provides for the recovery of property lawfully seized.

[11] *United States v. Comprehensive Drug Testing Inc.*, 621 F.3d 1162, 1173, 05 WCR 649 (9th Cir. 2010) (emphasis added).

[12] *United States v. Kama*, 394 F.3d 1236 (9th Cir. 2005).

[13] *Mikra United Inc. v. Cuomo*, No. 06-cv-14292, 2007 U.S. Dist. LEXIS 87385, *23 (S.D.N.Y. Nov. 27, 2007) (quoting *In re Search Warrant Executed Feb. 1, 1995*, Mag. No. 18-65, 1995 U.S. Dist. LEXIS 9475, *2 (S.D.N.Y. July 7, 1995)).

[14] See *Ramsden*, 2 F.3d at 325 (irreparable harm may be shown by establishing that property is used to run the business).

[15] See *United States v. Martinson*, 809 F.2d 1364, 1367 (9th Cir. 1987) (explaining that ''district court has jurisdiction over independent, pre-indictment suits in equity seeking return of illegally obtained evidence'').

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able under the totality of the circumstances.[16] As the Ninth Circuit has made clear, the seizure of property need not be unlawful for the court to order its return. [17]

''Reasonableness under all of the circumstances must be the test when a person seeks to obtain the return of property. If the United States has a need for the property in an investigation or prosecution, its retention of the property generally is reasonable. But, if the United States' legitimate interest can be satisfied even if the property is returned, continued retention of the property would become unreasonable.''[18] The court ''may impose reasonable conditions to protect access to the property and its use in later proceedings.''[19]

Weigh the Risks and Choose Carefully

Rule 41(g) provides a company with a viable option when its business records have been seized by federal law enforcement and there is no time frame for return of the records. To the extent that the company can demonstrate that its rights or interests are affected by the search and seizure, Rule 41(g) provides a remedy—quite apart from the more traditional motion to suppress evidence. Counsel must carefully consider the requirements of Rule 41(g) and weigh the risks of forcing the government to either bring a criminal case or return the business records.

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[16] See *Ramsden*, 2 F.3d at 326 (citing Advisory Committee Notes to the 1989 Amendment to Rule 41(e)).

[17] *Comprehensive Drug Testing*, 621 F.3d at 1173.

[18] See the Advisory Committee's Notes, 1989 Amendments to Rule 41(e).

[19] See Rule 41(g).