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Ganek v. Leibowitz and a Proposal to Reform Search Warrant Procedure

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In *Ganek v. Leibowitz*, No. 16-1463, 2017 U.S. App. LEXIS 20226 (2d Cir. Oct. 17, 2017), the U.S. Court of Appeals for the Second Circuit recently reversed a district court's determination that federal prosecutors and agents were not entitled to qualified immunity from plaintiffs' *Bivens* claims for money damages for violations of the Fourth and Fifth Amendments in procuring and executing a search warrant. The court followed the relevant precedent in the area of qualified immunity in reaching its decision; civil litigation against prosecutors and agents who have made an error in the course of their work ordinarily is not permitted. But the underlying facts of *Ganek* raise the question of whether it would be appropriate to reform the use of search warrants, especially in cases where the warrants seek evidence and not contraband. Modest revisions to the procedural rules governing search warrants could prevent unintended harm from being visited upon innocent third parties.

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The Level Global Search Warrant

Plaintiff David Ganek was a co-founder of the hedge fund Level Global Investors (LG). On Nov. 22, 2010, federal agents executed a search warrant at LG's offices. The agents searched and made copies of several LG employees' files and documents, including Ganek's. The FBI's informant — LG analyst Spyridon Adondakis, whose intelligence gave rise to the search warrant — told authorities that he had knowingly received non-public information from insiders that he passed on to other LG employees, who went on to make trading decisions based on that information. But Adondakis also stated that he had "*never* told Mr. Ganek the source of the information he provided." 2017 U.S. App. LEXIS 20226, at *4 (quotation marks omitted) (emphasis in original). In spite of this fact, the search warrant affidavit sworn by an FBI agent (and approved by a prosecutor) stated, in relevant part, that the informant had "informed GANEK … of the sources of the Inside Information" given to him. *Id.* at *5.

The execution of the search warrant drew significant public attention. The "[d]efendants provided advance notice of the LG search to the *Wall Street Journal*," which published photographs of FBI agents in raid jackets carrying boxes out of LG's offices. *Id.* at *5-6. Not surprisingly, the public nature of the search warrant pushed LG into a crisis, leading many investors to withdraw from the fund. Ganek asked then-U.S. Attorney for the Southern District of New York (SDNY), Preet Bharara, to issue a press release clarifying that Ganek himself was not a target of the investigation, but his request was declined. *See id.* at *6.

Shortly thereafter, "due to the flight of investors from LG" in the wake of the publicized search, Ganek announced that he was closing the fund. *Id.* at *7. Two LG employees — Adondakis and LG co-founder Anthony Chiasson — were indicted for insider trading. Adondakis pleaded guilty and cooperated against Chiasson, who was convicted at trial. Chiasson's conviction was reversed on appeal. *See United States v. Newman*, 773

F.3d 438 (2d Cir. 2014). Ganek was never charged.

Civil Litigation Is Filed And Dismissed Based on Qualified Immunity

On Feb. 26, 2015, after the reversal of Chiasson's conviction, Ganek filed a civil action against the federal agents and prosecutors who were involved in, or who supervised the application and execution of, the warrant. The defendants moved to dismiss the complaint on qualified immunity grounds, but the district court (Pauley, J.) allowed to proceed Ganek's Fourth and Fifth Amendment claims grounded in "a deliberate or reckless misstatement of material fact in the warrant affidavit" and the potential "fabrication of evidence." 2017 U.S. App. LEXIS 20226, at *9.

The Second Circuit reversed. In an opinion by Judge Raggi, the court concluded that, even assuming the falsity of the statement in the search warrant affidavit that the informant had told Ganek about the source of his information, that statement was "not necessary to [establish] probable cause" to search Ganek's documents. *Id*. at *13. The court treated the issue as relatively straightforward, and "consider[ed] a hypothetical corrected affidavit," which it "produced by deleting any alleged misstatements from the original warrant affidavit and adding to it any relevant omitted information." *Id*.

Applying that practice to this case, the court posited a hypothetical corrected affidavit that "clearly alleges knowing insider trading by various LG employees, as well as Ganek's trading on some of the same inside information," which established the *actus rea* of insider trading and "le[ft] only [Ganek's] *mens rea* at issue." *Id*. at *16. The panel noted that these facts gave rise to a "'fair probability' that evidence of insider trading and related crimes as committed by the cooperator Adondakis" and by "*persons other than Adondakis* would be found in the LG premises, including Ganek's office." *Id*. at *21, 23 (emphasis in original). Even with a corrected affidavit, the same warrant would have issued.

For similar reasons, the court dismissed Ganek's Fifth Amendment claim and a failure-to-intercede claim against non-supervisor defendants for failing to correct the misstatement. *See id*. at *36. The court also rejected a claim for failing to issue a public statement that Ganek was not the target of the investigation: "[T]here is no constitutional right … to have law enforcement officials issue public statements clarifying a person's investigative status." *Id*. All of Ganek's claims were therefore dismissed.

Reform of the Search Warrant Process

It is not surprising, perhaps, that Ganek reached for civil litigation. The public execution of a search warrant at his business led to its closure. Even though Ganek was never charged, let alone convicted, and his partner, Chiasson, was vindicated on appeal, the collateral harm to his business could not be undone. A search warrant is based on probable cause, not proof beyond a reasonable doubt. The execution of a search warrant should not be punitive in and of itself. The civil lawsuit against the prosecutors and agents was Ganek's reaction to these events.

The Second Circuit made clear that qualified immunity will bar lawsuits like these. This rule is not likely to change. It is generally accepted that qualified immunity is necessary to prevent a situation in which prosecutors or agents would face civil litigation every time they make a mistake.

The rationale behind the qualified immunity doctrine is beyond reproach, and the doctrine is not going anywhere. But other possible institutional reforms would help protect innocent parties in future investigations. What harmed Ganek was not really the error in the search warrant, but rather the public nature of the warrant's execution. We are not privy to all of the circumstances that led the government to seek a search warrant, but we know that the government was not seeking contraband. When contraband or weapons are to be seized, there may be no viable alternative to a search warrant. But in many white-collar cases, the government seeks to obtain evidence of the crime: documents (paper and electronic), computers, handheld devices.

In most cases, there is no reason why these cannot be obtained through the use of a grand jury subpoena, and in most cases that is how they are obtained. Grand jury subpoenas reduce the risk of harmful disclosure because grand jury proceedings are secret. *See* Fed. R. Crim P. 6(e). Absent a leak or a required disclosure by a regulated company, their existence is not known to the public, and no photographers are present during the response to a subpoena. The possibility of collateral damage from the investigative step itself is much reduced.

How might the judicial system protect the rights of innocent third parties and avoid a situation in which the search warrant itself is punitive?

Federal Rule of Criminal Procedure 41, which governs search warrant procedure in federal court, could be amended to provide for additional requirements when the object of the search warrant is evidence of a crime, rather than contraband or weapons used to commit a crime.

Three possible amendments come to mind. First, when applying for a search warrant to collect evidence, the prosecutor could be asked to explain why alternative means — such as a grand jury subpoena — are insufficient. Prosecutors are already familiar with this standard because an alternative means showing is required to obtain a Title III wiretap. *See* 18 U.S.C. § 2518(1)(c).

As DOJ policy explains, the requirement "ensures that highly intrusive electronic surveillance techniques are not resorted to in situations where traditional investigative techniques would suffice to expose the crime." U.S. Attorney's Manual, CRM 29. Execution of a search warrant in a place of business by agents wearing raid jackets is hardly any less intrusive than the installation of a wiretap. Let the prosecutor explain why a subpoena is not sufficient to get the job done. In some cases, there will be good reasons, most notably, where there is a reasonable fear of spoliation of evidence. But if there is no reason, then let the prosecutor use a subpoena. Financial institutions and big businesses typically comply with subpoenas in order to demonstrate cooperation with the investigation, and so in many cases it may not be possible to show that a search warrant is needed.

Second, the government could be required to have a higher level of supervisory approval to obtain a search warrant seeking only evidence of a crime. In many offices, a unit chief's permission is sufficient for a prosecutor to obtain a search warrant. However, to make sure that the request is appropriate, there could be a requirement that the Criminal Division Chief or his or her designee also approve such requests. This will also be a familiar requirement; in many offices, senior white-collar units have such a mandate for obtaining an indictment. A supervisory approval requirement could be made mandatory through Rule 41, or DOJ could impose such an internal rule.

Third, Rule 41 could require that the search warrant application expressly address the risk that the execution of a search warrant will cause undue financial or other harm by virtue of its execution. The prosecutor might also be required to explain the steps to be taken to minimize the risk of such an occurrence. This is something akin to the familiar concept of minimization in Title III wiretaps. Agents who monitor a wiretap must take care to minimize — that is, to not listen to — phone calls that are not pertinent to the purpose of the wiretap. This is meant to respect the privacy interests of those who communicate on the wiretapped facility, even if they may have committed a crime. It seems reasonable to ask that the court consider these factors when deciding to authorize a search warrant.

One additional observation: Prosecutors and agents should not bring unnecessary publicity upon the subject of a search warrant. In *Ganek*, it appears that the *Wall Street Journal* was tipped off that a search warrant would be executed, presumably either to place increased pressure on the subjects of the investigation or to secure favorable press coverage conveying the impression that the government was taking on financial crime. Neither reason outweighs the harm visited on people like Ganek, who was never accused of a crime, but whose company was forced to close its doors due to the widely publicized nature of the search. If law enforcement cannot police itself, then the courts should step in to protect the public interest.

Finally, continued careful judicial scrutiny of the scope of search warrants may also provide a disincentive. When federal courts suppress the fruits of a search, it no doubt is a reminder to prosecutors not to overuse this powerful investigative tool. *See United States v. Wey*, 256 F. Supp. 3d 355 (S.D.N.Y. 2017).

Conclusion

Ganek is a reminder that civil litigation against prosecutors and agents is not the way to regulate the government's use of search warrants. The better course for reducing the potential for collateral harm from a search warrant is to address the issue directly through a revision to Rule 41 and/or modifications of DOJ policy.

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