

## WHITE-COLLAR CRIME

## Expert Analysis

# Rajaratnam, 'Necessity' And the Path for Future Wiretaps



By  
**Robert J.  
Anello**

And  
**Richard F.  
Albert**

Although the “pioneering nature”<sup>1</sup> of the use of wire-taps in the insider trading case of *United States v. Rajaratnam*<sup>2</sup> has received a great deal of media attention, the statutory prerequisites to wiretapping have received little prior close legal scrutiny in white-collar cases. Of particular note is the “necessity” requirement, which is intended to limit the use of wiretaps by requiring the government to demonstrate that no reasonable alternative investigative techniques will suffice. This element could provide a fertile area to limit unwarranted expansion of wiretapping in the investigation of business cases.

In the Rajaratnam appeal, the defense argument on necessity focuses on the government’s virtual failure to mention in its initial wiretap application a multi-year and very active Securities and Exchange Commission investigation of the same conduct, the rich fruits of which the SEC had fully shared with criminal investigators. The government can simply avoid this problem in the future by including in its wiretap applications information regarding parallel efforts of regulatory agencies like the SEC.

More significant would be for the U.S. Court of Appeals for the Second Circuit to use the opportunity presented by Rajaratnam to define necessity more rigorously than it has thus far, largely in decisions issued in narcotics cases. Taken together, prior rulings addressing necessity tend to show that whenever law enforcement is investigating misconduct of at least moderate scope or sophistication involving some as yet unidentified individuals, the government need make only a modest effort to adapt its standardized necessity boilerplate to pass legal muster. Unless the necessity standard is tightened, the legal path for future wiretaps in securities fraud and other white-collar cases will be wide open.

### The Necessity Requirement

The federal wiretap statute, Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Title III), was enacted after the Supreme Court struck down certain state wiretapping laws as insufficiently sensitive to individual privacy

interests protected by the Fourth Amendment.<sup>3</sup> Title III was intended to strike a balance between privacy interests and the needs of law enforcement by recognizing a narrowly constrained exception, subject to close judicial supervision, to the general rule that wiretapping is illegal.<sup>4</sup>

The principal prerequisites for law enforcement to obtain wiretap authorization are probable cause to believe a suspect is using a telephone line to communicate about specific crimes designated in the statute and a showing of the necessity of the interception.<sup>5</sup> To show necessity, the government must set forth “a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous.”<sup>6</sup> The necessity requirement is intended to ensure that “wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime.”<sup>7</sup>

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### Second Circuit Interpretation

The Second Circuit has explained that through Title III’s necessity requirement, Congress has “evinced the clear intent to make doubly sure that the statutory authority be used with restraint.”<sup>8</sup> The court has observed that although wiretaps might be the most efficient investigative technique whenever a telephone is used to facilitate the commission of a crime, Congress has made the judgment “that the cost of such efficiency in terms of privacy interests is too high.”<sup>9</sup>

Nevertheless, as actually applied in the Second Circuit, largely in drug cases, Title III’s necessity requirement has not proven a difficult hurdle. *United States v. Lilla*,<sup>10</sup> the only reported Second Circuit decision striking down a wiretap for failure to demonstrate necessity, is a rather extreme case. Notably, in contrast to the vast majority of wiretap applications considered by the federal courts in

this circuit, the application in *Lilla* was submitted by a state officer and the wiretap authorization was issued by a state court judge.<sup>11</sup>

The supporting affidavit stated that an informant had introduced an undercover officer to *Lilla*, and that *Lilla* was willing to discuss drug sales with the undercover; had provided the undercover information identifying his sources of supply; had given the undercover his telephone numbers; and had readily sold the undercover a pound of marijuana during their first meeting. Regarding the need for a wiretap, the affidavit did not describe any other steps the officer attempted to further the investigation. The affidavit said nothing about any specific efforts to conduct surveillance, nor why such efforts would have failed. The affidavit contained only generalized statements that “the common practice” of narcotics traffickers is “to conduct their business on the telephone only with persons known to them” and that executing search or arrest warrants at this time would preclude the arrest of the other persons involved, and rather only cause the narcotics operation “to continue elsewhere.”

The Second Circuit criticized the bare bones statements and lack of specifics in the *Lilla* affidavit. Noting the disconnect between its generalized statements and the officer’s highly successful limited initial efforts, the court found that “[t]he affidavit does not enlighten us as to why this narcotics case presented problems different from any other small-time narcotics case; if anything, *Lilla* operated more openly than most and with less care in terms of evading detection.” The court ultimately agreed with defense counsel that “the only useful purpose that might be served by the trooper’s affidavit in this case is as an exhibit at a police training academy of how not to conform to the federal and state statutory requirements.”

Other Second Circuit decisions addressing the necessity requirement stress the deference to be given to the issuing court’s decision to grant the wiretap, and apply a standard of review requiring only that the affidavit be “at least ‘minimally adequate to support’” that initial determination.<sup>12</sup> For example, in *United States v. Young*,<sup>13</sup> the Second Circuit rejected the defendants’ wiretap challenge based on claimed lack of necessity. After a Drug Enforcement Administration investigation uncovered evidence that one of the defendants, Juan George, was dealing cocaine, the Albany

ROBERT J. ANELLO and RICHARD F. ALBERT are partners at *Morville, Abramowitz, Grand, Iason, Anello & Bohrer*. GRETCHAN R. OHLIG, an attorney, assisted in the preparation of this article.

police obtained a wiretap of George's home and office phones, revealing that at least nine others were involved with him in a narcotics conspiracy.

The affidavit in support of the wiretap application stated that surveillance of George's home was impractical because it was located in a residential neighborhood and surveillance was likely to be conspicuous. Outside surveillance of George's office building was unlikely to be useful, and inside surveillance would be too conspicuous. The affidavit also recited that no informants were available to infiltrate the conspiracy and that although some telephone toll records had been obtained to no avail, the acquisition of further such records and the use of pen registers would not be useful because they do not identify the call participants and thus would be "unlikely to uncover [George's] partners in crime."

The Second Circuit held that these rather commonplace facts and conclusory statements sufficed to show necessity, finding that defendants' arguments to the contrary merited "little comment." The court observed that "there is no requirement that any particular investigative procedures be exhausted before a wiretap may be authorized."<sup>14</sup>

In *United States v. Concepcion*,<sup>15</sup> the Second Circuit reversed an order by Southern District of New York Judge Shira Scheindlin suppressing wiretap evidence for failure to demonstrate necessity. Scheindlin found that the government had done little other than wiretapping, and had taken an "impermissible shortcut."<sup>16</sup> The investigation arose from a jailhouse informant's tip that his former cellmate, Concepcion, was about to assist in a terrorist attack. An initial wiretap revealed no evidence of terrorism, but appeared to reveal drug and weapons trafficking, and the government applied for a renewed wiretap.

Regarding necessity, the renewal application stated that the informant was of limited use because he was incarcerated; that the informant had introduced an undercover officer, but Concepcion would not engage with him; and that limited physical surveillance had been undertaken, but it was difficult because Concepcion repeatedly changed cars and drove erratically. The affidavit also recited the usual general statements that drug and weapons traffickers were typically surveillance conscious, that telephone records would be of limited utility in identifying coconspirators, that grand jury subpoenas would be ineffective because witnesses had not been identified, and that search warrants were not appropriate because the locations where contraband was stored remained unknown.

In reversing Scheindlin's suppression order, the Second Circuit referred to the case as "exceptionally close," and criticized the wiretap application's lack of thoroughness and specifics. The court observed that "[t]his was not the type of large criminal drug conspiracy that often requires the aid of a wiretap," and that many of the affidavit's general statements regarding necessity would apply in all drug cases.<sup>17</sup> Nevertheless, relying on what it referred to as a "commonsense approach," the court held that the affidavit's general explanations regarding the unavailability of traditional investigative techniques were "minimally adequate" and thus

passed muster under Title III. "Unlike Lilla, the Government here set forth just enough facts to indicate that other techniques were not working, and because of the unusual origin of the case, it could not find new leads."

### Rajaratnam's Challenge

In challenging the wiretap of his telephone in district court, Raj Rajaratnam focused on the government's virtual failure in the affidavit in support of its wiretap application to mention, much less provide a "full and complete statement" regarding the SEC's years-long, "extensive investigation into the very same activity the wiretap was intended to expose using many of the same techniques the affidavit casually affirmed had been or were unlikely to be successful."<sup>18</sup> Southern District of New York Judge Richard J. Holwell held a Franks hearing, and later issued a detailed opinion finding that the omissions were not material because after curing the omissions and disregarding any misstatements, the affidavit sufficed to show necessity under Second Circuit precedent.

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On appeal, Rajaratnam argues principally that the district court's analysis was flawed because in curing the omissions, the court improperly considered new facts that were not put before the judge who initially approved the wiretap, undermining the issuing judge's critical role in the process and allowing the government to support the wiretap with post-hoc facts and argument, in violation of the requirements of Title III and the Fourth Amendment.<sup>19</sup>

The information regarding the progress of the SEC investigation that came to light in the Franks hearing, and the district court's finding of sufficiency to demonstrate necessity, are instructive. The district court found that although the SEC's investigation had identified certain sources of inside information, a wiretap could still be necessary "to confirm those sources and fully uncover Rajaratnam's network of sources," that although the government had success in "flipping" one witness, a reasonable basis existed to believe that it would be difficult and risky to try to flip others, and that the close-knit nature of the conspiracy provided a valid basis to doubt that an undercover officer could be introduced.

The court further found that obtaining additional documents was unlikely to substantially advance the investigation because the SEC's document analysis thus far suggested that the "defendants were careful not to leave a paper trail" and "confirmed what one would expect: insider trading is typically conducted verbally." The district court also observed that although the SEC had conducted numerous witness interviews,

including that of Rajaratnam, none of the witnesses had admitted insider trading despite substantial circumstantial evidence thereof; the court found that in light of such "stonewalling" by witnesses the case for wiretapping is surely strengthened."

A good number of these facts will likely be present in future alleged insider trading or other securities fraud schemes of any size or sophistication. That the district court accepted these facts as meeting Title III's necessity requirement, and that Rajaratnam's appeal does not focus on directly challenging that finding, but rather on whether the district court was free to consider such facts at all, illustrates how the current interpretation of Title III's necessity requirement is not likely to pose a significant obstacle to increased future use of wiretaps in this area.

Those who are deeply concerned about the privacy implications of more common use of wiretaps in white-collar investigations may well hope that the idiosyncratic issue in Rajaratnam leads the Second Circuit to reverse and suppress, so that the case's "lore" becomes that wiretaps are particularly problematic in securities and other white-collar cases. But unless the Second Circuit uses this occasion to tighten up its rather malleable interpretation of Title III's "necessity" requirement, the case law will continue to raise few significant hurdles to more routine use of wiretaps in future white-collar cases.



1. Reed Albergotti, "Rajaratnam Appeal Targets Wiretaps," *Wall Street Journal* (Oct. 25, 2012).

2. 11-4416cr (2d Cir. Jan. 25, 2012).

3. See *Berger v. New York*, 388 U.S. 41 (1967).

4. See *United States v. Miller*, 116 F.3d 641, 663 (2d Cir. 1997), cert. denied, 118 S. Ct. 2063 (1998).

5. 18 U.S.C. §2518.

6. 18 U.S.C. §2518(1)(c).

7. *United States v. Kahn*, 415 U.S. 143, 153 n. 12 (1974).

8. *United States v. Lilla*, 699 F.2d 99, 102 (2d Cir. 1983) (citing *United States v. Giordano*, 416 U.S. 505, 515 (1974)).

9. *Id.* at 105 n.7.

10. 669 F.2d 99.

11. Although the district court decision upholding the wiretap evaluated it under New York state law, the Second Circuit observed that there was no difference between the applicable state and federal standards.

12. *United States v. Concepcion*, 579 F.3d 214 (2d Cir. 2009).

13. 822 F.2d 1234 (2d Cir. 1987).

14. *Id.* at 1237 (citing *Lilla*, 699 F.2d at 104).

15. 579 F.3d 214.

16. *Id.* at 217.

17. *Id.* at 219.

18. 2010 WL 4867402 (S.D.N.Y. Nov. 24, 2010).

19. Rajaratnam does not assert on appeal an argument he made below, that the wiretap was invalid because securities fraud is not one of the criminal statutes included in Title III as a predicate to obtain a wiretap. The district court rejected this argument because the wiretap application, while openly disclosing that the investigation focused on securities fraud, also relied upon the wire fraud statute, which is a specified predicate under Title III. The district court found that there was no carve-out from Title III for wire fraud schemes that also entail securities fraud.