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SEARCH AND SEIZURE

Three Kirkland & Ellis LLP attorneys discuss the recent usage of so-called “damming warrants” by the U.S. Department of Justice to curb money laundering activities by North Korea. The authors note that while law enforcement has utilized such warrants to fight domestic crime, the use to combat international money laundering is novel.

Damming Warrants: The United States’ Latest Foreign Policy Tool?

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Introduction

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The U.S. government has recently sought to increase pressure on North Korea through a variety of mechanisms, including economic sanctions, anti-money laundering special measures, and criminal prosecutions. Earlier this year, the Department of Justice (DOJ) utilized so-called “damming warrants”—which allow the U.S. government to capture and then seize funds transferred into a bank account during a specified period of time—as a new tool to stymie North Korea’s illicit economic activity. These damming warrants required financial institutions to freeze funds that were held in or transferred through correspondent bank accounts suspected of being used by a Chinese company and its four related front companies to process U.S. dollar transactions for North Korea.

While damming warrants have been used by law enforcement to fight domestic crime, the government’s use of such warrants to target North Korean money laundering activities is novel—though not necessarily surprising. The U.S. government has increasingly relied

on a series of aggressive tools to pursue its foreign policy objectives, and damming warrants are merely the latest example.

Background

The Fourth Amendment prohibits unreasonable searches and seizures. Unless a recognized exception applies (like those for exigent circumstances or automobile searches), warrantless searches and seizures are unreasonable and, therefore, violative of the Fourth Amendment. *See Mo. v. McNeely*, 133 S. Ct. 1552, 1558 (2013). For a warrant to be issued in accordance with the Fourth Amendment, it must be supported by an affidavit from law enforcement that establishes probable cause and it must contain a particular description of the place to be searched and any property to be seized.

Historically, warrants were only granted when the government could establish that contraband or evidence of a crime was likely to be located at a specific location within the district *at the time the warrant was issued*, as Federal Rule of Criminal Procedure 41 authorized the issuance of a search warrant only by a judicial officer “within the district wherein the property or person sought *is located*.” *See* Fed. R. Crim. P. 41(a) (1989) (emphasis added). However, a 1990 amendment to the Rule paved the way for so-called anticipatory warrants by eliminating the words “is located.” (*See* Advisory Committee Notes to Fed. R. Crim. P. 41). The relevant provision now reads “a magistrate judge with authority in the district—or if none is reasonably available, a judge of a state court of record in the district—has authority to issue a warrant to search for and seize a person or property located within the district[.]” Fed. R. Crim. P. 41(b)(1) (2017).

Accordingly, when there is “reliable information that contraband will be at a certain place at a specified future time,” law enforcement can obtain advanced permission from a court through an anticipatory warrant to search the premises and seize the contraband. *United States v. Bingham*, 270 F. Supp. 2d 665, 669 (W.D. Pa. 2003).

Notwithstanding this increased flexibility, courts require that affidavits supporting anticipatory warrants meet a more fulsome standard, establishing, at the time of issuance, probable cause that “contraband, which is not yet at the place to be searched, will be there when the warrant is executed.” *Id.* To secure an anticipatory warrant, which is often conditioned on some future event occurring (other than the passage of time), the Supreme Court has explained that: “[i]t must be true not only that *if* the triggering condition occurs, there is a fair probability that contraband or evidence of a crime will be found at a particular place, but also that there is probable cause to believe the triggering condition *will occur*.” *United States v. Grubbs*, 547 U.S. 90, 96-97 (2006) (emphasis in original) (internal quotation marks and citation omitted). Predictably, the DOJ has used anticipatory warrants in connection with domestic crimes that involve easily movable evidence, like drug sales and purchases of child pornography. *See, e.g., United States v. Tellez*, 217 F.3d 547 (8th Cir. 2000) (drug sales); *United States v. Whited*, 539 F.3d 693 (7th Cir. 2008) (child pornography).

Damming Warrants

Origins A damming warrant is a particular type of anticipatory warrant. State authorities in Arizona appear to have first used damming warrants in the early 2000s to attempt to stop the flow of funds related to human trafficking transactions. *See* Terry Goddard, *How to Fix a Broken Border: Follow the Money (Part III of III)*, AMERICAN IMMIGRATION COUNCIL IMMIGRATION POLICY CENTER (May 2012).

Pursuant to the Arizona damming warrants, when wire transfer agents attempted to move funds that met certain dollar value criteria (approximately \$2,000), destination criteria (high-volume transmitters located near the Mexican border), and recipient criteria (known coyote agents), the funds were transferred to a holding account administered by Arizona state officials rather than the intended recipient. State authorities selected these criteria because they determined that coyotes charged approximately \$2,000 to smuggle individuals across the border and repeatedly relied on specific money transmitters and agents to carry out human trafficking transactions. If an intended wire transfer recipient could provide a plausible explanation for the proposed transaction, the funds would be released. If not, state authorities would bring an action to seize the money.

Use of Damming Warrants to Target North Korean Money Launderers Earlier this year, the DOJ applied for damming warrants for accounts at eight U.S. financial institutions. Each bank had purportedly processed tens of millions of dollars for the Chi Yupeng Network. *See United States v. All Wire Transactions Involving Dandong Zhicheng Metallic Material Co., Ltd.*, No. 17-mj-217-DAR-BAH, Dkt. 13 at 1 (D. D.C.) (May 22, 2017 order granting damming warrants). The DOJ’s April 2017 warrant applications alleged that the Chi Yupeng Network (comprised of a Chinese company and its four related front companies) purchases coal from North Korea in U.S. dollar transactions and that the North Korean government uses revenue derived from such transactions to support its military and nuclear programs. According to the DOJ, the eight banks at issue processed over \$700 million for the Chi Yupeng Network since 2009, \$52 million of which was processed in the seven months prior to the damming warrant requests. *Id.* at 9.

Through these warrants, the DOJ sought to allow funds to continue to be transferred into the Chi Yupeng Network’s accounts, but to trap all funds intended to be transferred during the pendency of the warrants, such that once inside the accounts, the funds would not be allowed to flow back out. To this end, the warrants mandated that financial institutions reject any attempted withdrawals from the accounts when the damming warrant was in effect.

A magistrate judge initially denied the damming warrant requests, finding that the Court lacked the authority to issue such warrants and that the funds at issue were neither located in the United States, nor located in an interbank account such that they could be seized pursuant to the USA Patriot Act. *Id.* at 6. However, the district court subsequently vacated the magistrate judge’s ruling and granted the warrant applications, concluding that the damming warrants were authorized

during the specified two-week period and that the funds would be subject to forfeiture.

The district court found that the damming warrants were permissible under the line of authority allowing for anticipatory warrants. *See generally, id.* Because the damming warrants were anticipatory in nature and arose in the forfeiture context, the district court concluded that law enforcement was required to show that (i) at some future time during the damming warrant's execution period, funds *will be* in the account; and (ii) such funds *will be subject to forfeiture* (i.e., a crime for which forfeiture is appropriate will have occurred). *Id.* at 8.

The district court found a supporting affidavit from the DOJ “amply establishe[d]” both that:

(i) the attempted deposit or withdrawal of funds from the accounts at issue (i.e., the triggering condition) would occur; and

(ii) if the triggering condition occurred, funds subject to forfeiture would be in the accounts at issue. *Id.* at 9-10.

With respect to the former finding, the district court looked to the long and substantial history of transactions involving the Chi Yupeng Network and the correspondent accounts. With respect to the latter finding, the district court noted that the DOJ had submitted 80 pages describing how the Chi Yupeng Network engaged in transactions meant to conceal the origin and destination of the funds, such that the transactions were consistent with North Korean money laundering patterns identified by DOJ sources.

After the issuance of the damming warrants, the banks were required to capture all funds flowing into and moving out of the accounts for a period of fourteen days. *Id.* at 1, note 2. These financial institutions were required to hold funds as they were transferred into the accounts, unbeknownst to the account holders. The financial institutions were then required to seize any property collected and provide it to law enforcement at the end of the two weeks. The effectiveness of the damming warrants is unclear, as the U.S. government has not announced whether it seized funds through the damming warrants.

Use of Damming Warrants To Target Money Launderers And Sanctions Evaders

The DOJ's use of damming warrants to target the funds of money launderers and sanctions evaders is a

new development. The damming warrants, however, are in line with the increasingly creative measures that the U.S. has taken in recent years to advance its foreign policy objectives. In the last decade, the U.S. government has implemented a secondary sanctions program designed to force foreign persons to choose between doing business with the U.S. and Iran. In addition, OFAC has unveiled sectoral sanctions aimed at Russia that limit the ability of persons subject to U.S. jurisdiction from dealing in newly issued debt and equity of specific companies operating in certain industrial sectors. In August 2017, the U.S. rolled out complex new sanctions that prohibit, among other things, U.S. companies from dealing in new equity and new debt issued by the Government of Venezuela, as well as transacting in bonds issued by the Government of Venezuela.

The damming warrants are also consistent with the United States' recent methods for applying diplomatic pressure on North Korea. After initially relaxing sanctions in 2008, the U.S. methodically imposed more aggressive sanctions on North Korea beginning in 2010 and continuing through 2016, at which point the U.S. government prohibited nearly all exports to and imports from North Korea. During the fall of 2016, the U.S. sought to further ratchet up economic pressure by designating North Korea as a jurisdiction of primary money laundering concern. Since that time, the FinCEN imposed anti-money laundering special measures on Chinese banks that act on behalf of North Korea, and President Trump issued an Executive Order that authorizes OFAC, among other things, to sanction foreign companies and banks that engage in commercial transactions with North Korea unrelated to its nuclear or ballistic missile programs. In light of these developments, the DOJ's use of damming warrants to further America's national security interests is not surprising, but rather is properly viewed as another tool that the U.S. can use to impose economic pain on North Korea.

Conclusion

The recent use of damming warrants illustrates the DOJ's willingness to pursue novel methods to prevent money laundering and to advance the America's national security interests. In light of the complicated foreign policy issues facing the U.S., as well as the DOJ's success in obtaining damming warrants, we should expect to see to more damming warrants—and potentially other increasingly creative measures designed to fight money laundering and corruption—in the future.