

## Litigator of the Week: E. Joshua Rosenkranz of Orrick, Herrington & Sutcliffe

By Scott Flaherty

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Orrick, Herrington & Sutcliffe's E. Joshua Rosenkranz has handled plenty of high-profile appeals, garnering a reputation for meticulous oral argument preparation and the ability to craft creative—even downright literary—legal briefs.

He recently put that acumen on display at the U.S. Court of Appeals for the Second Circuit, guiding Microsoft Corp. to victory in a case that raised largely untested questions about the reach of U.S. law enforcement in the age of cloud computing. Reversing a lower court, the Second Circuit on July 14 shot down a bid by Manhattan U.S. Attorney Preet Bharara's office to enforce a search warrant for email data stored on a Microsoft server in Dublin, Ireland.

"This was always more than a lawsuit," Rosenkranz said in an interview on Thursday. "Microsoft really saw this as an existential threat to the U.S. tech industry."

Before the Second Circuit's reversal, U.S. District Judge Loretta Preska in Manhattan had denied Microsoft's attempt to quash the warrant, issued in connection with a drug trafficking investigation. The district judge had also held the tech company in civil contempt for refusing to fully turn over the information sought in the warrant. The appellate court, however, sided with arguments from Rosenkranz that the Stored Communications Act's warrant provisions don't reach outside the U.S.



**Joshua Rosenkranz of Orrick, Herrington & Sutcliffe.**

The dispute between Microsoft and the government traced back to late 2013, when a federal magistrate judge issued a warrant under the SCA, directing the company to produce the contents of a customer's email account. The magistrate judge, James Francis IV, found probable cause that the email account was used to further a narcotics trafficking ring.

To fully comply with the warrant, Microsoft determined that it would have had to access customer data stored in Ireland, then transfer that information across borders to U.S. authorities, the Second Circuit wrote in its July 14 opinion. The company refused and, instead, sent lawyers from Covington & Burling and Petrillo Klein & Boxer into court to try to quash the warrant.

In April 2014, Francis denied Microsoft's motion to quash and Rosenkranz entered the fray soon after. He joined Covington and Petrillo while Preska, the district judge, was still considering Microsoft's motion to throw out the warrant. The Orrick appellate lawyer, who's already been recognized as Litigator of the Week twice this year, argued for Microsoft in front of Preska, and he continued to take the lead at the Second Circuit after the district judge ruled against the company.

Arguing the appeal in September, Rosenkranz cast the case as one with serious implications for both foreign policy and privacy protections within the U.S. Those broader issues had drawn close attention to the case from major players in the tech sector and Internet privacy groups; on appeal, many of them stepped in as amicus filers, advocating for Microsoft's position.

Rosenkranz told a three-judge panel in September that a holding for the government could cause global chaos. Allowing U.S. law enforcement to access Microsoft data stored in Ireland, he said, would be tantamount to letting foreign governments go after Americans' email accounts stored on U.S. servers.

"We are talking about a global free-for-all in which the courts of the United States accept the proposition that any country...can reach into any other country and plunder our emails," he said during the hearing, according to a transcript.

The government, meanwhile, maintained that it wasn't looking to extend the SCA's warrant provisions to a jurisdiction outside the U.S. Assistant U.S. Attorney Justin Anderson argued at the Second Circuit that the law compelled Microsoft to turn over the email data, regardless of where it was stored.

"It's required to disclose. That's the language in the statute, required to disclose," Anderson said, according to a transcript. "Where does a disclosure take place? In the United States. There is no question of disclosure overseas."

The Second Circuit sided with Rosenkranz and his client, with U.S. Circuit Judge Susan Carney writing, "we think that Microsoft has the better of the argument." U.S. Circuit Judge Gerard Lynch issued a concurring opinion, writing that the case raised complex questions that the court was forced to address using a "badly outdated statute." Lynch urged Congress to take action.

Reflecting on the case and the appeals court's eventual ruling, Rosenkranz said he was pleased that some of his key themes appeared to have resonated with the judges.

"The key ... was to stick to the simplest, most straightforward message—that this is an issue for Congress," he said. "The two opinions dealt with both the simplest arguments, and saw that when you layer in the complexity, it compels the same result."

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