New York Law Journal

Web address: http://www.nylj.com

VOLUME 233—NO. 2 TUESDAY, JANUARY 4, 2005 ALM

WHITE-COLLAR CRIME

BY ELKAN ABRAMOWITZ AND BARRY A. BOHRER

'Martindell' Orders: A Trap for the Unwary?

With criminal investigations looming at every turn, the decision about whether to provide evidence in civil proceedings can be a difficult one, fraught with danger and consequences.

A quarter century ago, in *Martindell v. International Tel. & Tel. Co.*,[1] the U.S. Court of Appeals for the Second Circuit held that evidence subject to a Rule 26(c)[2] protective order is presumptively protected from disclosure to the government "absent a showing of improvidence in the grant of a … protective order or some extraordinary circumstance or compelling need."

A practitioner familiar with the well-developed Second Circuit case law based on *Martindell* might presume some level of protection from a *Martindell* protective order. Because of developments in courts of appeals in other circuits, however, such a presumption may be misguided. Indeed, if the government request comes from anywhere outside of the Second Circuit, a *Martindell* order may be toothless. Thus, practitioners must be aware of the entire legal landscape on protective orders before agreeing to provide evidence pursuant to one.

'Martindell' Facts

In *Martindell*, plaintiffs in a stockholder derivative suit took depositions of 12 individuals pursuant to a court-ordered stipulation providing that the deposition transcripts and documents were to be made available only to the parties to the litigation. The government subsequently asked the court for access to the deposition transcripts for use in the government's investigation into possible violations of federal law by one of the defendants in the civil litigation and two others.

Elkan Abramowitz *is a member of Morvillo, Abramowitz, Grand, Iason & Silberberg. He is a former chief of the criminal division in the U.S. Attorney's Office for the Southern District of New York.* **Barry A. Bohrer** *is also a member of Morvillo, Abramowitz and was formerly chief appellate attorney and chief of the major crimes unit in the U.S. Attorney's Office for the Southern District of New York.* **Elizabeth J. Carroll**, *an attorney, assisted in the preparation of this article.*

Elkan Abramowitz *Barry A. Bohrer*

In upholding the district court's decision not to make the transcripts available to the government, the Second Circuit emphasized "the vital function of a protective order … to 'secure the just, speedy, and inexpensive determination' of civil disputes." This objective, the court found, "represents the cornerstone of our administration of civil justice."

Although the Second Circuit acknowledged the public interest in obtaining all relevant evidence, it noted that the government has " 'awesome powers' which render unnecessary its exploitation of the fruits of private litigation," including the ability to institute grand jury proceedings, the power to subpoena witnesses (regardless of whether they have already testified in civil litigation) and the power to immunize witnesses who invoke their Fifth Amendment rights.

Accordingly, the Second Circuit held that "a witness should be entitled to rely upon the enforceability of a protective order against any third parties, including the government, and that such an order should not be vacated or modified merely to accommodate the government's desire to inspect protected testimony for possible use in a criminal investigation." The court, however, recognized the possibility that the government might be able to demonstrate circumstances of "strong overriding public need" warranting disclosure of such evidence. Such cases might include a situation where all participants had died or had been granted immunity, or where the court had "improvidently granted" the protective order.

Second Circuit Cases

The Second Circuit subsequently has applied the *Martindell* holding in a number of cases. Although in the immediate wake of *Martindell*, the court of appeals ruled for the government in two similar cases,[3] the court has been relatively consistent in refusing to allow modification of protective orders.

In a case involving state governmental authorities, *Palmieri v. State of New York*,[4] the district court modified two sealing orders in a civil antitrust action to allow a state grand jury and the state attorney general to have access to testimony and a settlement agreement and related information. Likening the powers of New York State to those of the federal government and finding that the defendants in the civil action not only had relied on a protective order in turning over documents but also would not have entered into settlement talks were it not for the assurances of confidentiality they received, the Second Circuit reversed and remanded the case to the district court to determine whether the state had shown "improvidence,"

"extraordinary circumstances" or "compelling need" under *Martindell*.

The Second Circuit has held that the government's right to access evidence from a civil suit is even weaker when an administrative action is involved, as opposed to a criminal investigation. The court of appeals in *Minpeco S.A. v. ContiCommodity Services, Inc.*[5] upheld the district court's denial of a motion by the Commodities Futures Trading Commission (CFTC) to modify a protective order entered in a civil suit against defendants who also were named in a CFTC enforcement action. The court found that although the CFTC's goals — including "ascertain[ing] the truth of much of what it ha[d] independently discovered" — were "certainly permissible," the CFTC too had "awesome powers" and their goals did not "rise to the level of a 'compelling need' under *Martindell*."

The Second Circuit has not been blind to developments concerning protective orders in other circuits. In 1989 in *Andover Data Services v. Statistical Tabulating Corp.*,[6] influenced in part by a recently decided U.S. Court of Appeals for the Fourth Circuit case (discussed below), the court acknowledged "the reality that [a Rule 26(c) protective order in a Second Circuit case] could very possibly be overturned or modified by another court in a subsequent proceeding."[7]

In *In re Grand Jury Subpoena Duces Tecum Dated April 19, 1991*,[8] the Second Circuit remanded the case to the district court, which had failed to make any finding as to whether the protective order at issue there, issued by a bankruptcy court and similar to a Rule 26(c) order, was "improvidently granted" or whether the government had made a showing of "exceptional circumstances" or "compelling need." The court also "respectfully decline[d] to follow the Fourth Circuit's apparent per se rule that a grand jury subpoena will always be enforced despite the existence of an otherwise valid protective order."

Two more recent Second Circuit cases have applied *Martindell* but found that its presumption against access did not apply. In *SEC v. TheStreet.com*,[9] the Second Circuit found that the "strong presumption" against access under *Martindell* did not apply where interested third parties who had not agreed to abide by a protective order were present at the depositions at issue. The party seeking access to the deposition transcripts in that case was an online business news service, not a government entity. The Second Circuit, however, emphasized in a footnote that, contrary to the interpretations of several district courts, the "logic of [*Martindell*] is not restricted to government requests, nor did our opinion in *Martindell* suggest otherwise."[10]

The court of appeals in *Gambale v. Deutsche Bank AG*,[11] decided in August, found that the defendant bank could not reasonably have relied on a seal order because it was "explicitly temporary." Therefore, the court held, citing *Martindell* and *TheStreet.com*, "there [wa]s no presumption against access."

Other Circuits

Although the Second Circuit has indicated that modification of a protective order is acceptable in certain circumstances under *Martindell*, and although the *Martindell* holding arguably has become less absolute over the years, this circuit has remained steadfast in its stance that, when a valid protective order is in place, a presumption against access exists. This position is in contrast to that of the U.S. Court of Appeals for the Fourth Circuit — as noted above — as well as the U.S. Court of Appeals for the Eleventh, Ninth, First and Third circuits. Indeed, no other circuit has adopted the reasoning of the Second Circuit, which now stands as a minority of one on this issue. (Other circuit courts of appeals have not ruled directly on the protective order issue.)

Of the federal courts of appeal to consider the issue, fully half have adopted the per se rule that evidence must be produced in response to a grand jury subpoena, even if subject to a valid protective order. The first court of appeals to reach this conclusion, the Fourth Circuit, in a decidedly proprosecution opinion in *In re Grand Jury Subpoena*,[12] turned the Second Circuit's "awesome powers" argument on its head, emphasizing "the sweeping power of the grand jury to compel the production of evidence" in arguing for the per se rule. "Because the grand jury enjoys important constitutional status," the court of appeals observed, "the grand jury is not subject to the direction of the court with respect to these essential functions."

Although the court recognized that protective orders "do aid the civil courts in facilitating resolution of private disputes," it noted that such orders are "not totally effective" in furthering this result, in part because the parties are aware of the risk that such evidence may be leaked or disclosed at trial and because the orders normally are subject to modification. Even if a protective order is entered, the Fourth Circuit wrote, parties still are entitled to assert their Fifth Amendment privilege against self-incrimination and to refuse to answer questions.

The Fourth Circuit also was troubled by civil courts "usurp[ing] the proper authority of the executive branch." The court noted that preventing law enforcement from obtaining evidence allowed the court issuing the protective order de facto to immunize the deponent, a power that it viewed as belonging to the executive branch. Accordingly, the court refused to permit "judicial intervention into executive prerogatives."

The court of appeals rejected the use of a balancing test between the need for the protective order and the need for the evidence by the criminal investigation, citing again to the courts' "lack [of] constitutional authority to engage in such an exercise." The court expressed particular concern that "a court would be left to balance the needs of law enforcement against the concerns of the parties without government officials being present to state their interest in the matter."

Finally, the Fourth Circuit expressed fear that protective orders would become tools to thwart investigations because "[e]ven if the government ultimately prevailed, this additional litigation would delay the grand jury investigation, and possibly for no purpose, because unsealing protected materials might only reveal that the deponents asserted their fifth amendment privilege during discovery despite the existence of the protective order."

The Eleventh Circuit in 1993 explicitly rejected the Second Circuit's *Martindell* approach and adopted the Fourth Circuit's per se rule in *In re Grand Jury Proceedings (Williams)*.[13] The Eleventh Circuit, in an opinion that focused on the importance of a powerful and independent grand jury, refuted the Second Circuit's characterization of protective orders as the "corner-

stone of our administration of civil justice" and found fault with the Second Circuit for failing to define the terms "improvidently granted," "compelling need" and "extraordinary circumstances" or to explain exactly how prosecutors might prove these conditions.

In addition to relying on the reasons set forth by the Fourth Circuit, the Eleventh Circuit also concluded that a balancing test risked erosion of grand jury secrecy and would be impossible to use in practice. A judge would be forced to choose either to "go[] back on his word (thus breeding disrespect for the law in the eyes of the witness, if not the public in general) by honoring the grand jury subpoena" or to "deny[] the public its 'right to every man's evidence.' " The judge thus faces "a Hobson's choice," the court wrote, where "[e]ither way, the public suffers."

In 1995, the Ninth Circuit, borrowing heavily from the Fourth and Eleventh circuit opinions, also adopted the per se rule and required a law firm to produce all documents produced to it pursuant to a protective order during civil litigation, in *In re Grand Jury Subpoena Served on Meserve, Mumper & Hughes*.[14] The Ninth Circuit emphasized the constitutional and historical role of the grand jury and the lack of any suggestion in the civil rules governing protective orders that indicated the rules were intended to permit judicial interference with criminal investigations.

Two other circuit courts of appeals have rejected the Second Circuit's singular approach, but they have adopted a modified version of the per se rule's emphasis on the virtually unfettered right of the grand jury to evidence. The First and Third circuits have held that a grand jury subpoena supersedes a protective order unless the party seeking to quash the subpoena can demonstrate exceptional circumstances that would clearly outweigh the need of the government for the evidence.

The First Circuit confronted the issue in an appeal from a district court that had adopted the *Martindell* rule from the Second Circuit but had held that the interests of the criminal investigation outweighed the interest of the parties in maintaining the confidentiality of the record in a parallel civil case. The First Circuit, in its opinion in *In re Grand Jury Subpoena (Roach)*,[15] after noting that "[t]he Second Circuit's rule … has received a cool reception elsewhere," agreed with the Fourth, Ninth, and Eleventh circuits that *Martindell's* "creation of a presumption favoring the sanctity of civil protective orders tilts the scales in exactly the wrong direction." The court found, however, that the per se rule "manifests a different vice: inflexibility" and "overlooks that the balance nonetheless is variable and that the confluence of the relevant interests — generally, those of society at large and of the parties who are seeking to keep a civil protective order inviolate — occasionally may militate in favor of blunting a grand jury's subpoena."

Accordingly, the First Circuit held that "a grand jury's subpoena trumps a Rule 26(c) protective order unless the person seeking to avoid the subpoena can demonstrate the existence of exceptional circumstances that clearly favor subordinating the subpoena to the protective order." In evaluating this balance, the court outlined several factors that might be relevant in considering whether exceptional circumstances exist, including the government's need for the information (including the availability of other sources); the interests served by continued maintenance of complete confidentiality in the civil litigation; and the harm to the party who sought the protective order if the information is revealed to the grand jury.[16]

The court concluded, however, that "society's interest in the assiduous prosecution of criminal wrongdoing almost always will outweigh its interest in the resolution of a civil matter between private parties."

In a 2002 case, the Third Circuit reached the same conclusion as the First Circuit and held in *In re Grand Jury*[17] that there is "a strong presumption that a grand jury subpoena supercedes a protective order." The Third Circuit adopted the same set of factors as the First Circuit, but observed — as had the First Circuit — that the list was not exhaustive and that the district court need not weigh every factor.[18]

Conclusion

Given the development of the law concerning the applicability of civil protective orders in criminal investigations, counsel must be sure to consider the possible sources from which grand jury subpoenas may come and the case law of relevant circuits before relying on a *Martindell* protective order.

1. 594 F2d 291 (2d Cir. 1979).
2. Fed. R. Civ. P. 26(c).
3. See *United States v. Davis*, 702 F2d 418 (2d Cir.), cert. denied, 463 U.S. 1215 (1983) (refusing to quash grand jury subpoena seeking depositions in civil case given with "understanding of confidentiality," not formal protective order); *United States v. GAF*, 596 F2d 10 (2d Cir. 1979) (allowing DOJ to use CID to reach discovery materials in private litigation under protective order, with certain limitations).
4. 779 F2d 861 (2d Cir. 1985).
5. 832 F2d 739 (2d Cir. 1987).
6. 876 F2d 1080 (2d Cir. 1989).
7. The court in *Andover* considered the situation of a witness who asserts a valid Fifth Amendment right and refuses to testify in a civil action. A Rule 26(c) protective order, the court held, cannot be used to compel the testimony of such witnesses. The court noted that its holding was "in no way intended to abrogate the *Martindell* line of cases, wherein we have upheld the use of protective orders limiting disclosure of potentially incriminating testimony where parties have voluntarily consented to testify in civil cases in reliance upon such protective orders."
8. 945 F2d 1221 (2d Cir. 1991).
9. 273 F3d 222 (2d Cir. 2001).
10. Id., at 229 n.7 (citing *Bristol-Meyers Squibb Co. v. Rhone-Poulenc Rorer, Inc.*, No. 95-CIV. 8833 RPP, 1999 WL 76938 (SDNY Feb. 16, 1999); *Bayer AG and Miles, Inc. v. Barr Labs., Inc.*, 162 FRD 456 (S.D.N.Y. 1995)).
11. 377 F3d 133 (2d Cir. 2004).
12. 836 F2d 1468 (4th Cir.), cert. denied, 487 U.S. 1240 (1988).
13. 995 F2d 1013 (11th Cir. 1993).
14. 62 F3d 1222 (9th Cir. 1995).
15. 138 F3d 442 (1st Cir.), cert. denied, 524 U.S. 939 (1998).
16. The other factors cited by the First Circuit are the severity of the contemplated criminal charges; the harm to society should the alleged criminal wrongdoing go unpunished; the value of the protective order to the timely resolution of the civil litigation; the severity of the harm alleged by the civil-suit plaintiff; and the harm to society and the parties should the encroachment upon the protective order hamper the prosecution or defense of the civil case.
17. 286 F3d 153 (3d Cir. 2002).
18. The court also noted examples of the types of civil proceedings where a protective order might be enforced against a criminal investigation, including a large bankruptcy of national importance that "requires swift resolution"; the settling of affairs of failing financial institutions; or certain mass tort litigation where interference with discovery might threaten the compensation of thousands of victims.

This article is reprinted with permission from the January 4, 2005 edition of the NEW YORK LAW JOURNAL. © 2005 ALM Properties, Inc. All rights reserved. Further duplication without permission is prohibited. For information, contact American Lawyer Media, Reprint Department at 800-888-8300 x6111. #070-01-05-0019