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WHITE-COLLAR CRIME

Expert Analysis

Crossroads Between Grand Jury Subpoenas and Civil Protective Orders

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Because of the breadth of government theories extending the reach of federal criminal law, particularly in white-collar cases, many civil proceedings containing an allegation of fraud pose a danger to defendants with respect to potential cross-pollination of evidence. Defense attorneys often seek to prevent such spillover through the use of protective orders. But, a gray area exists as to how effective a civil protective order is in the face of a grand jury subpoena.

Civil protective orders, issued by a court for "good cause,"[1] play an indispensible role in the judicial system, mitigating the effects of the federal system's liberal discovery rules by protecting the parties' privacy and confidentiality concerns. Currently, federal circuit courts disagree as to the rules to be applied when the power given a grand jury conflicts with a court's authority to protect the confidentiality and secrecy of the information sought. This disagreement raises serious issues for practitioners representing clients in parallel proceedings.

In *Grand Jury Subpoena Duces Tecum Dated April 19, 2009 v. Doe*,[2] (*April 19, 2009 v. Doe*), the U.S. Court of Appeals for the Second Circuit found that a grand jury subpoena should not be enforced as against an otherwise valid protective order absent a showing: 1) that the order was improvidently granted; or 2) of extraordinary circumstances or compelling need. At issue were deposition transcripts[3] obtained by a bankruptcy trustee pursuant to a bankruptcy court's protective order, which the U.S. attorney for the Eastern District of New York sought to obtain pursuant to a grand jury subpoena.

In considering whether the government could subpoena the protected transcripts, the court relied on its seminal holding in *Martindell v. International Telephone & Telegraph Corp.*,[4] which affirmed a district court's decision that the government could not have access to deposition transcripts taken pursuant to a court-ordered stipulation that the depositions should be treated as "confidential and used solely by the parties for prosecution or defense of the action." In *Martindell*, the Second Circuit balanced the interest of the government in obtaining the evidence for law enforcement purposes against the interest in the "just, speedy, and inexpensive" determination of civil disputes through full disclosure.

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Applying *Martindell* in *April 19, 2009 v. Doe*, the Second Circuit rejected the government's argument that "quashing a grand jury subpoena because of a protective order would have the effect of giving 'civil deponents de facto grants of immunity in the guise of Rule 26 protective orders.'"[5] Rather, the court found that because a protective order could be overcome where the proper showing was made by the government, a protective order did not automatically serve to immunize individuals who "'*voluntarily* consented to testify in civil cases in reliance upon such protective orders.'"[6]

Although the decision in *April 19, 2009 v. Doe* served to resolve disagreement within the Second Circuit regarding the supremacy of grand jury subpoenas over evidence produced in civil cases,[7] the test articulated in *Martindell* and its progeny has been criticized as vague[8] and there is no case law clarifying the type of factual support needed to prove either the improvidence of the protective order or extraordinary circumstances or compelling need. The Second Circuit's decision also highlights the differing approaches taken by the federal circuit courts.

In *April 19, 2009 v. Doe*, the Second Circuit specifically rejected the "per se" rule that a grand jury subpoena will always be enforced despite the existence of a valid protective order, which has been adopted by the Ninth Circuit,[9] the Eleventh Circuit,[10] and a divided panel of the Fourth Circuit.[11] The First and Third circuits have sought to reconcile the per se rule with the Second Circuit's position by establishing a third intermediate position "which presumes that grand jury subpoenas take priority over civil protective orders, but permits that presumption to be rebutted based on circumstances."[12]

Foreign Documents

A recent case from the U.S. Court of Appeals for the Ninth Circuit, which adheres to the "per se" rule, not only underscores the continu-

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ing circuit split in this area, but also raises questions about the government's ability to manipulate the process to obtain documents beyond its subpoena power. In *In re Grand Jury Subpoenas*,[13] the United States appealed a district court order quashing grand jury subpoenas seeking non-privileged material obtained by various law firms during civil discovery in an antitrust lawsuit.

In 2006, the government initiated a criminal antitrust investigation against a number of companies which spawned multiple civil antitrust suits filed by private plaintiffs. The civil lawsuits were consolidated in the Northern District of California. Pursuant to a protective order issued in that consolidated action, a number of foreign corporations named as civil defendants produced documents from outside the United States. The government sought to obtain these documents from the law firms representing those companies, and the law firms moved to quash. In an unreported, sealed decision, the district court found it prudent to quash the subpoena and allow the government to appeal the "novel issues with potentially far-reaching implications about the power of the grand jury and the relationship between the grand jury proceedings and civil discovery of unindicted foreign defendants" to the Ninth Circuit.[14]

In a brief decision with two paragraphs of analysis, the Ninth Circuit found that "a chance of litigation" had brought the documents into the United States and that "[n]o authority forbids the government from closing its grip on what lies within the jurisdiction of the grand jury." Finding no suggestion of collusion between the civil plaintiffs and the government or bad faith tactics, the court applied the per se rule that a grand jury subpoena takes precedence over a civil protective order and reversed the district court's decision.

One of the law firms, White & Case, has filed a petition for certiorari to the Supreme Court seeking resolution of the issues raised by the case.[15] As pointed out by the firm in its certiorari petition and by amici briefs filed in support of the petitioner,[16] the conflicting case law has a significant impact in a judicial system in which criminal investigations and civil lawsuits—often prompted by the criminal investigation—happen simultaneously and necessitates guidance from the high Court. White & Case argues that the different rules applied in different circuits create inequitable results for defendants in different locations, may result in forum shopping by the government, and discourage compliance with discovery in civil cases.

Further, the law firm argues that the Ninth Circuit's recent decision "exacerbates the circuit conflict by enabling DOJ, apparently for the first time in a reported case, to circumvent the U.S. territorial limitations on grand jury subpoena authority."[17] Indeed, the government's behavior in the case leaves the impression that the system may be manipulated to allow the government to have its cake and eat it too by preventing civil discovery where inconvenient, but relying on the same to obtain otherwise unavailable evidence.

Until the Supreme Court resolves the conflict, litigants involved in parallel civil and criminal investigations are presented with a dilemma—either produce evidence in the civil litigation which may be subject to a grand jury subpoena despite the existence of a protective order, or incur penalties for non-compliance with discovery rules.

The certiorari petition details how the government obtained a stay of discovery on all issues except the issue of class-certification in the consolidated civil actions and was permitted to review, but not copy, the limited discovery produced in the action to ensure no "sensitive information about the grand jury investigation" was revealed. The government later sought a modification of this order, however, to allow it to obtain copies of all civil discovery, including foreign documents and deposition testimony originating outside the United States.

Noting that foreign discovery is "generally outside the United States subpoena power in criminal proceedings," the district court denied the government's request as to foreign evidence from defendants who had not been indicted in the criminal action and prohibited the presentation of any such material to the grand jury. Indeed, the court recognized that certain non-indicted foreign entities were compelled to bring foreign discovery into the United States only as a result of civil cases resulting from the government's grand jury investigation.[18]

Although the certiorari petition filed by White & Case does not specifically advocate for the adoption of the Second Circuit rule or the intermediate position taken by the First and Third circuits, it notes several problems with the per se rule. Specifically, petitioner notes the rule's "complete lack of flexibility to consider important case-specific circumstances that could tip the balance in favor of enforcing a protective order against a grand jury subpoena."[19]

Further, petitioner argues that the per se rule cannot prevent the government from circumventing territorial limitations on the grand jury subpoena power, which has particular implications in the context of international litigation. For instance, in *In re Grand Jury Subpoenas*, the evidence was generated and maintained entirely overseas in the normal course of business and would otherwise have been outside the reach of the grand jury. Rather than pursue usual diplomatic channels or permissible discovery such as letters rogatory or MLATs, however, the government sought to "exploit civil discovery to obtain what DOJ could not obtain directly by grand jury subpoena."[20]

In its responsive papers opposing certiorari,[21] the government asserts that further review by the Court is unnecessary because regardless of the test applied, no other court of appeals would have decided the case differently. First, the government argues there is "little if any functional difference" between the per se rule followed by the Ninth Circuit and the approach taken by the First and Third circuits in applying a presumption favoring grand jury subpoenas over protective orders—a presumption which has never been rebutted. Further, the government insists that the Second Circuit would have enforced the grand jury subpoena in this case as well because petitioners do not claim the deposition testimony at issue was given in reliance on the limited protective order in the civil case, citing *Martindell* for the proposition that a party must "reasonably rely" on a protective order in order for the presumption in favor of such order to come into play.[22]

Finally, the government argues that the Ninth Circuit's decision was consistent with the policy that a grand jury's investigative function should be broadly enforced. "The contrary position—that materials can be provided to

private class action antitrust plaintiffs but withheld from a federal grand jury—turns on its head the settled principle that 'it is the Attorney General…who [is] primarily charged by Congress with the duty of protecting the public interest under the[] antitrust laws' and that private actions merely 'supplement[] government enforcement of the antitrust laws.'"[23]

The amici brief submitted by the National Association of Criminal Defense Lawyers and Association of Criminal Defense Lawyers of New Jersey agrees with petitioner, however, that the current three-way conflict allows the government to manipulate the discovery process to obtain inaccessible information. Noting that the Department of Justice has broad discretion to determine the federal district in which a grand jury subpoena is issued, the amici opine that a litigant may be "lured, intentionally or otherwise, into a false sense of security provided by a protective order issued by a federal court, only to find the order invalid if DOJ causes a grand jury subpoena to issue."[24] Moreover, amici reject the per se rule, arguing that it effectively eliminates a federal court's authority pursuant to Rule 17 of the Federal Rules of Criminal Procedure to quash or modify a subpoena resulting in unchecked prosecutorial power.[25]

Finally, in another amicus brief, the American Bar Association urged the rejection of a policy of per se enforcement of subpoenas in a broader sense, arguing that requiring courts to enforce subpoenas can have a deleterious impact on the attorney-client relationship. "This is because a client under grand jury investigation will know that, without inquiry, including whether the government has other available means for obtaining the information, the lawyer may be compelled to produce to the government information that was disclosed to the lawyer through the attorney-client relationship."[26]

Conclusion

Under the "per se" rule, a civil protective order will not shield evidence produced in a civil case from grand jury subpoenas issued in the context of a criminal investigation. Thus, a party to a civil lawsuit facing prospective criminal liability must consider a number of issues in complying with its civil discovery obligations, including how much to produce in discovery and whether confidential or potentially incriminating evidence produced under the guise of a protective order will fall into the hands of the government. Consideration must be given to the assertion of Fifth Amendment rights, despite the unpleasant consequences of such a tactic in the civil case.

Moreover, the Ninth Circuit's recent decision has significant consequences for foreign and multinational corporations involved in such litigation and the production of foreign evidence in an action in the United States. Until the Supreme Court resolves the conflict, litigants involved in parallel civil and criminal investigations are presented with a dilemma—either produce evidence in the civil litigation which may be subject to a grand jury subpoena despite the existence of a protective order (even if the civil litigant is not the subject or target of the investigation) or incur penalties for non-compliance with discovery rules.

1. Fed. R. Civ. P. 26(c).

2. 945 F.2d 1221 (2d Cir. 1991). The authors' firm represented the intervenors-appellants in this action.

3. The subpoena also sought documents produced in the bankruptcy proceeding which subsequently were produced and not at issue in the case.

4. 594 F.2d 291 (2d Cir. 1979).

5. 945 F.2d at 1225 (citing *In re Grand Jury Subpoena*, 836 F.2d 1468, 1475 (4th Cir.), cert. denied, 487 U.S. 1240 (1988)).

6. Id. at 1225 (citing *Andover Data Services v. Statistical Tabulating Corp.*, 876 F.2d 1080, 1084 (2d Cir. 1989) (emphasis in original)).

7. See, e.g., *United States v. Davis*, 702 F.2d 418 (2d Cir.), cert. denied, 463 U.S. 1215 (1983) (grand jury subpoena requesting transcript of deposition from bankruptcy proceeding enforced where there was no written stipulation of confidentiality, no formal protective order and no "indication" that the witness testified in reliance on an assurance of confidentiality); *Palmieri v. State of New York*, 779 F.2d 861 (2d Cir. 1985) (motion by State Attorney General to modify a protective order to allow a state grand jury access to certain sealed information remanded for fact-finding pursuant to *Martindell*).

8. Ajit V. Pai, "Should a Grand Jury Subpoena Override a District Court's Protective Order?" Univ. Chicago L.R. (Winter 1997).

9. *In re Grand Jury Subpoenas*, 627 F.3d 1143 (9th Cir. 2010).

10. *In re Grand Jury Proceedings* (Williams), 995 F.2d 1013 (11th Cir. 1993).

11. *In re Grand Jury Subpoena*, 836 F.2d 1468 (4th Cir. 1988) (divided panel).

12. 2011 WL 970482, at *15 (referring to *In re Grand Jury*, 286 F.3d 153 (3d Cir. 2002); *In re Grand Jury Subpoena* (*Roach*), 138 F.3d 442 (1st Cir. 1998)).

13. 627 F.3d 1143.

14. The district court issued this explanation in an unsealed "Statement of Reasoning." Id. at 1144.

15. Petition for a Writ of Certiorari, *White & Case LLP v. United States*, No. 10-1147, 2011 WL 970482 (Feb. 25, 2011).

16. Brief of the National Association of Criminal Defense Attorneys and Association of Criminal Defense Lawyer of New Jersey as Amici Curiae in Support of Petitioner, White & Case, LLP, *White & Case LLP v. United States*, No. 10-1147; Amicus Brief for the American Bar Association in Support of Petitioner, *White & Case LLP v. United States*, No. 10-1147.

17. Id. at *29.

18. Id. at *8-11.

19. Id. at *22 (citing *Roach*, 138 F.3d at 445; *In re Grand Jury*, 286 F.3d at 162) (First and Third circuits identifying this inflexibility as a "vice" in the per se rule).

20. Id. at *29.

21. Brief for the United States in Opposition, *White & Case LLP v. United States*, 10-1147 (May 26, 2011).

22. Id. at 11-12.

23. Id. at 17-18 (citing *United States v. Borden Co.*, 347 U.S. 514, 518 (1954)).

24. NACDL Amici Brief at 8.

25. Id. at 16-18.

26. ABA Amicus Brief at 7-8.