

Antitrust Alert

Ninth Circuit Reiterates Its Per Se Rule In Favor Of Grand Jury Subpoenas

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Grand Jury Can Subpoena Civil Parties' Lawyers to Reach Documents Covered by Protective Order in Parallel Civil Proceeding

In a striking reminder of the power of a federal grand jury, the 9th Circuit Court of Appeals earlier this month upheld the jurisdiction of a grand jury to subpoena documents held by attorneys for use in a parallel civil matter, even though the documents were covered by a protective order in the civil matter.¹ Companies facing parallel civil and criminal proceedings should take heed: actions contemplated on one side of the proceedings must be carefully evaluated for their impact on the other side of the proceedings.

The matter stems from the multinational investigations into price fixing in the LCD screen industry. A grand jury investigation of LCD screen manufacturers, as well as civil class action lawsuits against the manufacturers, is proceeding simultaneously in federal court in San Francisco. The civil litigation involves private antitrust claims brought on behalf of both direct and indirect purchasers of LCD panels or products containing them. In the civil proceedings, documents that were originally located outside the United States, including in Japan and Taiwan, were brought into the United States and held by counsel for defendants. Presumably, the defendants felt compelled to bring the documents into the United States by a civil discovery demand. The companies likely felt protected from broader disclosure of the documents by the protective order in place in the civil matter. Despite the protective order, the Department of Justice issued a grand jury subpoena to several of the law firms representing parties in the class action seeking documents, including documents that had been brought within the territory of the United States in response to the civil discovery requests. The district court quashed the subpoenas.

Companies should be aware that the federal courts of appeal have adopted different approaches to resolving similar conflicts between civil protective orders and grand jury subpoenas. If the civil proceedings in this matter had been underway in New York, for example, the outcome may have been very different. In the 2nd Circuit, there is a presumption that civil protective orders be given priority over grand jury subpoenas.² However, most circuit courts that have addressed the issue have given priority to grand jury subpoenas over protective orders. The 1st and 3rd Circuits have established a rebuttable presumption in favor of grand jury subpoenas.³ In the 9th Circuit, as in the 11th and 4th Circuits, there is a per se rule in favor of enforcing grand jury subpoenas.⁴

In a two-page order, the 9th Circuit, applying the court's per se rule, reversed the district court and upheld the grand jury subpoenas. Writing for the panel, Judge John T. Noonan said that "[b]y a chance of litigation, the documents have been moved from outside the grasp of the grand jury to within its grasp. No authority forbids the government from closing its grip on what lies within the jurisdiction of the grand jury."

This ruling illustrates the Scylla and Charybdis that must be navigated by companies facing parallel civil and criminal and proceedings. On the one hand, defendants may face sanctions for refusing to comply with discovery requests in civil proceedings.

¹ *In re Grand Jury Subpoenas*, No. 10-15758 (9th Cir. Dec. 7, 2010).

² *Martindell v. International Telephone & Telegraph Corp.*, 594 F.2d 291 (2d Cir.1979).

³ *In re Grand Jury Subpoena (Roach)*, 138 F.3d 442, 445 (1st Cir.), cert. denied, 524 U.S. 939 (1998); *In re Grand Jury*, 286 F.3d 153 (3d Cir. 2002).

⁴ *In re Grand Jury Subpoena Served on Meserve, Mumper & Hughes*, 62 F.3d 1222 (9th Cir. 1995); *In re Grand Jury Proceedings (Williams)*, 995 F.2d 1013 (11th Cir.1993); *In re Grand Jury Subpoena*, 836 F.2d 1468 (4th Cir.), cert. denied, 487 U.S. 1240 (1988).



On the other hand, complying with civil discovery seeking foreign evidence may bring evidence within the jurisdiction of the grand jury. Knowing that in most circuits there is at least a strong presumption of enforceability of grand jury subpoenas, companies must



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assume that evidence brought into the United States will be within the reach of the grand jury. It is worth remembering that maintaining the documents with company counsel cannot shield what is otherwise non-privileged information from the reach of the grand jury. And a similar dilemma exists when evidence is provided to the government in a criminal investigation in which there may be a follow-on civil component. When facing parallel proceedings, demands for foreign-located evidence from either the criminal or the civil side of the proceedings should be treated especially delicately. Companies should consider whether there are creative ways to satisfy the discovery request without also subjecting the evidence to discovery in the parallel matter. Where there is no way to avoid the discoverability of the evidence in the parallel matter, companies facing such a result should evaluate fully the costs involved with having the evidence discovered in both matters.

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