ARNOLD & PORTER LLP

ADVISORY

December 2010

Ninth Circuit Decision on Grand Jury Subpoenas Shows Risks for Civil Defendants

The Ninth Circuit's recent decision in the case of *In re Grand Jury Subpoenas* highlights the potential risks facing civil defendants who may bring foreign documents into the US during the discovery process, whenever a related grand jury investigation is in progress or merely a realistic possibility. This terse, 2-page decision by Judge Noonan held that the US Department of Justice (DOJ) could require, through grand jury subpoenas, three US law firms to turn over documents that an unindicted foreign corporation had produced in civil litigation, notwithstanding the facts that (a) the documents were within the jurisdictional reach of the grand jury's subpoena power because they were brought into the US to comply with civil discovery obligations and (b) a protective order in the civil litigation prohibited use of the documents outside the scope of the civil litigation.[1]

As a matter of policy, and in recognition of the jurisdictional hurdles it could face in doing so, the Department of Justice generally does not attempt to use the grand jury subpoena process to reach documents outside the United States.[2] By contrast, it is not uncommon for civil discovery requests for relevant documents located outside of the US to be enforced based upon the court's personal jurisdiction over the defendant having possession, custody, or control of the documents.[3] In this most recent case, the DOJ has sought to obtain relevant foreign documents for its criminal investigation by taking advantage of the discovery process in a related civil litigation.

This alerter will discuss the relevant background, the decision, its implications, and some potential precautions that civil defendants may wish to consider.

1 *In re Grand Jury Subpoenas*, No. 10-15758, slip op. at 4 (9th Cir. Dec. 7, 2010).

2 *See* United States Attorneys' Manual § 9-11.140, available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/11mcrm.htm (indicating that "[t]here are special considerations" when seeking evidence outside of the United States and that the Criminal Division should be contacted before any such requests are made); *see also* United States' Objections to Special Master's Report & Recommendation RE: Toshiba Entities Motion for Modifications to the Discovery Schedule and Plan at 6, No. M 07-1827 SI (N.D. Cal. October 9, 2009) (noting that "in the interest of international comity" the Department of Justice does not generally subpoena "foreign-located documents").

3 *See,* e.g., *In re Uranium Antitrust Litigation,* 480 F. Supp. 1138, 1144 (N.D. Ill. 1979) (holding that court can order party to produce foreign-located documents during discovery as long as it has personal jurisdiction over party and party is in control of documents).

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Background

Since at least 2006, the DOJ has been conducting a criminal investigation into potential cartel conduct, including price-fixing, by manufacturers of liquid crystal display (LCD) panels, such as those used in flat-screen televisions and computer monitors.

Shortly after the DOJ's investigation became public, multiple purported civil class actions were filed against these companies by direct and indirect purchasers of LCD panels in the US, and the actions were consolidated as a multi-district litigation in the Northern District of California before Judge Susan Illston. Early in the civil action, Judge Illston allowed the Department of Justice to intervene in the case in order to request a partial stay of discovery, which was granted.[4]

In the order granting a partial stay, the district court stated that it would allow the DOJ to review non-privileged business documents that had been produced in the civil cases, though the government was not permitted to reproduce these files.[5] This included "foreign" documents, which originally had been found only in defendants' files outside the US, but which had been brought into the country and provided to civil plaintiffs in response to civil discovery requests. In May 2009, the DOJ moved for an order giving it the right to copy documents that had been produced in the civil litigation so that it could obtain its own copies of foreign-produced documents.[6] Judge Illston denied this request.[7]

The DOJ then sought the documents directly by serving grand jury subpoenas for copies of a defendant's civil litigation document production on two US law firms representing defendants and one plaintiffs' law firm. The defense firms moved to quash the subpoenas and Judge Illston granted their motion, stating that the court could not find precedent for enforcing such a subpoena and did not wish to establish such precedent on its own.[8] The DOJ then appealed to the Ninth Circuit, which reversed.

Ninth Circuit Decision

The Court of Appeals ruled that the subpoenas could be enforced by offering only the following reasoning:

> No collusion between the civil suitors and the government has been established or even suggested by the Law Firms. Indeed, the district court determined that the government had not engaged in any bad faith tactics. Moreover, the Law Firms do not claim that the documents are privileged. Accordingly, we apply our per se rule that a grand jury subpoena takes precedence over a civil protective order. By 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.[9]

The parties have fourteen days in which to petition the Ninth Circuit for a panel or *en banc* rehearing, and ninety days to petition the US Supreme Court for certiorari.

Implications

The Ninth Circuit's sparse decision lacks reasoning either limiting it to certain facts present in the case or endorsing a broad use of grand jury subpoenas to obtain non-privileged foreign documents in other contexts. Here is what we believe can fairly be said regarding the decision's implications:

- Civil litigants should presume that foreign documents brought into the US and produced to adversaries in civil litigation, especially in the Ninth Circuit, will be available to be subpoenaed by a grand jury.

4 *In re TFT-LCD (Flat Panel) Antitrust Litigation*, No. M 07-1827 SI (N.D. Cal. July 10, 2007) (order granting United States' motion to intervene); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, No. M 07-1827 SI (N.D. Cal. Sept. 25, 2007) (order granting United States' motion to stay discovery).

5 *In re TFT-LCD (Flat Panel) Antitrust Litigation*, No. M 07-1827 SI (N.D. Cal. Sept. 25, 2007) (order granting United States' motion to stay discovery).

6 United States' Notice of Motion and Motion to Modify the Court's September 25, 2007 Order Granting United States' Motion to Stay Discovery; Memorandum of Points and Authorities in Support Thereof at 3, No. M 07-1827 SI (N.D. Cal. May 15, 2009).

7 *In re TFT-LCD (Flat Panel) Antitrust Litigation*, No. M 07-1827 SI (N.D. Cal. Oct. 20, 2009) (order denying United States' objections to Special Master's August 24, 2009 report and recommendation; adopting report and recommendation).

8 *In re TFT-LCD (Flat Panel) Antitrust Litigation,* No. M 07-1827 SI (N.D. Cal. Mar. 29, 2010) (statement of reasoning involved in court's order of February 11, 2010).

9 *In re Grand Jury Subpoenas*, No. 10-15758, slip op. at 4 (9th Cir. Dec. 7, 2010) (internal citations omitted).

- Civil litigants can continue to rely on applicable privileges to prevent disclosure of attorney work product or attorney-client communications. The subpoenas at issue in *In re Grand Jury Subpoenas* apparently did not seek attorney work product documents or privileged communications between a foreign client and its US law firm. Although the Ninth Circuit elected to say very little about the basis for its decision, it did note expressly that "the Law Firms do not claim that the documents are privileged."[10]
- The decision does not address whether the DOJ could (or would) use a grand jury subpoena to obtain non-privileged foreign documents that were not produced to plaintiffs in litigation. Such documents were **not** ordered to be produced by *In re Grand Jury Subpoenas*, and the DOJ had not requested them. However, there is nothing in the Ninth Circuit's rationale to suggest its decision is so limited or that the result would have been different if the DOJ had requested non-privileged documents that had not been produced to plaintiffs.

Potential Precautions

Companies facing potential criminal investigations involving facts or conduct at issue in ongoing civil litigation should consider the effectiveness and costs of legitimate ways to minimize the risk that documents located outside the US and not otherwise subject to a grand jury subpoena may enter the country during litigation.

While a defendant may have little flexibility with regard to non-privileged documents that are responsive to a valid discovery request, a company does have options to keep other important foreign documents from being brought into the United States. For example, defendants can interpose valid objections to discovery requests on grounds such as burden and relevance, and those objections may have a stronger factual basis when the documents sought are found in remote foreign locations and/or are written in languages other than English. Litigants also may consider having foreign documents reviewed for privilege and responsiveness outside the US prior to production. A company making this decision would need to consider several factors, including the cost of an "overseas" review compared to a US review and the likelihood that documents responsive to civil discovery, and therefore destined to enter the US eventually, also are those most likely to be of interest to the DOJ in any related criminal investigation.

Litigants also should consider whether to adjust how they informally share information with their counsel about potentially-relevant foreign documents and related facts. For example, in the early stages of a litigation, a company may want to provide its US counsel with key documents or allow it to search through foreign company documents in connection with an internal investigation. Generally speaking, such ordinary-course business documents do not become privileged by virtue of their having been shared with counsel, although depending on the circumstances a work product privilege may attach to a specific collection or set of documents assembled by counsel, where disclosure of the collection necessarily would reveal the attorney's mental processes or legal strategy.[11]

Where such documents are responsive to a civil discovery request, they would need to be produced to plaintiffs in any event. But if there is any doubt that the documents would be produced in civil discovery, then before sending the documents, the company should consider the risk that a grand jury might subpoena the documents from the US law firm and weigh that risk against the benefit of efficiently communicating relevant facts to outside counsel. When the risk of subpoena is great, clients may prefer to have the documents reviewed by US counsel or foreign counsel at their facilities outside the United States.

10 *Id.*

11 Protection against disclosure as counsel's opinion work product is afforded when disclosure of "the work product will reveal counsel's thought process 'in relation to pending or anticipated litigation.'" *In re Grand Jury Subpoena Dated July 6, 2005*, 510 F.3d 180, 183-84 (2d Cir. 2007); *accord Sporck* v. *Peil,* 759 F.2d 312, 315 (3d Cir. 1985) (protecting as attorney opinion work product documents selected for deponent's review, as the "identification of the documents as a group [would] reveal defense counsel's selection process, and thus his mental impressions").

We hope that you have found this client advisory useful. If you have additional questions, please contact your Arnold & Porter attorney or:

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