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NINTH CIRCUIT ORDERS ENFORCEMENT OF GRAND JURY SUBPOENA FOR FOREIGN-ORIGIN DOCUMENTS PRODUCED PURSUANT TO PROTECTIVE ORDER IN CIVIL TRIAL BETWEEN PRIVATE PARTIES

In a recent decision, *In re Grand Jury Subpoenas*, No. 10-15758, 2010 WL 4948545 (9th Cir. Dec. 7, 2010), the United States Court of Appeals for the Ninth Circuit ruled that documents of foreign origin which had been produced in U.S. civil litigation subject to a protective order could be obtained by the government in a criminal antitrust investigation through the use of subpoenas. The decision is a stark reminder to foreign entities that producing documents in the United States during civil litigation potentially exposes those documents to production in U.S. criminal proceedings, even though the documents originally might have been beyond the reach of the government's subpoena power.

Background

In 2006, a United States criminal antitrust investigation became public. Private plaintiffs subsequently filed civil suits against the companies under investigation. In the civil suits, the companies produced documents that originated outside the United States subject to a civil protective order. The law firms representing the companies in the civil litigation retained the produced documents.

The government then subpoenaed the documents, and the law firms holding the documents moved to quash. The United States District Court for the Northern District of California granted the law firms' motion, and the government appealed.

The Ninth Circuit's Decision

The United States Court of Appeals for the Ninth Circuit cited *In re Grand Jury Subpoenas*, 62 F.3d 1222, 1226–27 (9th Cir. 1995) for the *per se* rule that a grand jury subpoena takes precedence over a civil protective order. Thus, the protective order in the civil litigation could not block the government from obtaining the documents.

The court then noted that the government's request for the documents did not represent any collusion between the government and civil plaintiffs, nor did it suggest any bad-faith tactics by the government. The documents sought were also unprotected by attorney-client privilege. The court stated: "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."

Because the documents were within the reach of a federal grand jury subpoena and were not privileged, and because the subpoena took precedence over the civil protective order, the court held that the District Court had erred in quashing the subpoena. The Court of Appeals thus reversed the ruling of the lower court, and allowed the subpoenas to be enforced.

Conclusion

Thanks to production in civil litigation between private parties, the government was able to gather evidence for a criminal antitrust investigation that otherwise would have been beyond its grasp. This result was obtained because the documents at issue were placed within the reach of the government's subpoena power and because of the fundamental principle reflected in *In re Grand Jury Subpoenas* that courts will not enforce a confidentiality agreement if it would obstruct a legitimate criminal investigation.

A party to civil litigation facing prospective criminal liability may thus be confronted with difficult issues to resolve concerning discovery in the civil proceeding, including the scope of discovery, the steps taken to protect that discovery from being used in other proceedings, and whether there are any Fifth Amendment implications in resisting civil discovery due to the threat of criminal liability. These issues merit serious consideration during negotiations over the proper scope of discovery, and parties should be wary of possible evidentiary windfalls to subsequent criminal investigations if material, otherwise unavailable to the U.S. government, is produced civilly.

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