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Ninth Circuit Adopts New Standard for Discovery of Grand Jury Evidence

By Fusae Nara, Jacob R. Sorensen and Stephen R. Weingold

In In re: Optical Disk Drive Antitrust Litigation[1] (ODD), *the Ninth Circuit rejected the "effect test" in favor of a streamlined approach to evaluating civil discovery seeking grand jury evidence and allowed antitrust plaintiffs to access investigation material. Federal Rule of Criminal Procedure 6(e)(2)(B) limits the scope of this discovery by prohibiting the Government from disclosing a matter "occurring before a grand jury." Several tests have emerged to determine what constitutes such a matter. Most federal courts have applied the "effect test," which requires a "document-by-document" review of the information sought to evaluate whether it "will reveal some secret aspect of the inner workings of the grand jury." In* ODD, *the Ninth Circuit developed its own approach which, while still prohibiting the discovery of information exposing "the secret workings of the grand jury," rejects the need for a document-by-document analysis.*

The "Effect Test"

The effect test is the most widely applied of four approaches to the application of Federal Rule of Civil Procedure 6(e)(2)(B). Courts applying this test must (1) go "case-by-case" through each document, recording, or other piece of evidence sought to determine whether it should be discoverable, and (2) evaluate whether the evidence sought reveals the inner workings of the grand jury. The mere fact that a document was examined by a grand jury does not protect the document from subpoenas or discovery requests.

[1] No. 14-17502, 2015 WL 5255105 (9th Cir. Sept. 10, 2015).

The effect test is most easily understood by contrast with the other methods courts have adopted to implement Rule 6(e)(2)(B). Some courts, such as the Fifth Circuit, have held that documents and other evidence in the Government's possession that were provided to a grand jury are "matters occurring before a grand jury" *per se*, meaning they can never be disclosed to a third party.[2] Other circuits have taken the opposite approach, concluding that documents and other evidence in the Government's possession can *always* be disclosed to a third party, i.e., that such evidence is *per se* not "matters occurring before a grand jury." The Second Circuit has taken this approach in some instances.[3] Some courts in the Sixth Circuit have concluded that there should be a presumption against discovery, but that it can be rebutted by a plaintiff who shows that the information sought "is public or was not obtained through coercive means or that disclosure would otherwise be available by civil discovery and would not reveal the nature, scope, or direction of the grand jury inquiry."[4]

The effect test charts a middle path between the two *per se* approaches. In practice, this test tends to lead to long, tedious discovery disputes. For example, in a case in the Northern District of Illinois,[5] the district court held that documents could be produced pursuant to a subpoena only after: (1) the Government reviewed all the documents sought by the subpoena, and produced a list describing all documents and noting those claimed to reveal grand jury secrets; (2) the subject of the investigation reviewed the list and the documents and made a note of every additional entry he believed should not be disclosed and "a statement explaining, on an item-by-item basis, the basis for its disagreement with the Government's position as to each item in dispute;" and (3) any resulting discovery disputes were resolved by the court.

The *ODD* Decision

In the recent *ODD* ruling, the Ninth Circuit rejected both the effect test and the tests adopted by other circuits. It stressed that a court considering whether information constitutes a "matter occurring before a grand jury" should "consider the language of Rule 6(e), 'the factual record' before it, and the importance of protecting disclosure of the grand jury process." The Court declined to take the document-by-document approach because it "requires considerable judicial time and resources, and the ad hoc nature of the test limits its precedential value for litigants and courts."

ODD dealt with a subpoena that sought recordings of discussions between an individual ("Doe") and the FBI two months before a grand jury issued a subpoena to Doe as part of a criminal antitrust investigation. Doe was not indicted, but he claimed that the recordings could destroy his reputation and make him unemployable. A civil plaintiff wanted to access this information and use it against corporate defendants in a separate civil lawsuit. To that end, it served a subpoena seeking "'recordings of conversations' and 'verbatim transcripts'" of "conversations in which a present or former officer, director or employee of [the corporate defendant] was one of the participants." The Government acquiesced in the production of the recordings, subject to a protective order, but Doe objected. The trial court concluded that the material sought should be produced and the Ninth Circuit affirmed. The Ninth Circuit noted that the recordings were made before the grand jury ever issued a subpoena in the criminal proceeding and were sought by the civil plaintiffs because of their content, rather than to gain insight into a grand jury's deliberative process. Since the role of the recording in the grand jury proceedings was unclear, the court concluded that the transcripts

[2] See, e.g., *State of Tex. v. U.S. Steel Corp.*, 546 F.2d 626, 630 (5th Cir. 1977) (holding that information in grand jury documents are discoverable only through the "particularized need" test, an alternative exception under Rule 6(e)).

[3] See, e.g., *United States v. Weinstein*, 511 F.2d 622, 627 at n. 5 (2d Cir. 1975) (stating that it is questionable whether Rule 6(e) applied to documents marked as exhibits before a grand jury).

[4] See, e.g., *In re Grand Jury Proceedings*, 851 F.2d 860, 867 (6th Cir. 1988).

[5] See *Dexia Credit Local v. Rogan*, 395 F. Supp. 2d 709 (N.D. Ill. 2005).

and audio recordings would not expose the grand jury's inner workings. The "fundamental purpose" of Rule 6(e) is to protect the grand jury, rather than the party being investigated, so the recordings and transcripts were not "a matter occurring before a grand jury." Because the Ninth Circuit rejected the "effect test," unlike the Northern District of Illinois case described above, no additional steps were needed.

Significance of the Ninth Circuit's New Approach

The Ninth Circuit has departed from the four approaches adopted by other circuits. Its approach runs closer to the effect test than to any of the other methods for evaluating the scope of Rule 6(e). Courts in the Ninth Circuit will evaluate subpoenas of grand jury evidence with an eye towards potential secrecy issues, but will not follow a *per se* rule permitting or prohibiting disclosure. In practice, the Ninth Circuit's abandonment of the "document-by-document" approach of the "effect test" may make it easier for civil plaintiffs to access Government documents in follow-on civil litigation.

If you have any questions about the content of this alert please contact the Pillsbury attorney with whom you regularly work, or the authors below.

Fusae Nara (bio)
New York
+1.212.858.1187
fusae.nara@pillsburylaw.com

Jacob R. Sorensen (bio)
San Francisco
+1.415.983.1893
jake.sorensen@pillsburylaw.com

Stephen R. Weingold (bio)
New York
+1.212.858.1091
stephen.weingold@pillsburylaw.com

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