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The 9th Circ.'s Rule 6(e) Test For Private Antitrust Cases

Law360, New York (October 20, 2015, 10:19 AM ET) --


Kellie Lerner


Michelle Zolnoski

In In re Optical Disk Drive Antitrust Litigation ("ODD"),[1] the Ninth Circuit recently clarified when materials created as part of a criminal government investigation should be barred from disclosure in civil litigation under Federal Rule of Criminal Procedure 6(e). While over half of the federal circuits that have analyzed the issue coalesced behind the fact-intensive "effect test" (described herein), the Ninth Circuit decisively announced in ODD that it would not endorse that test. Instead, the Ninth Circuit created a new, ostensibly straightforward, approach to determine whether materials are protected under Rule 6(e).

Under this approach, the Ninth Circuit focuses on whether the party's purpose for seeking the materials is to discover what took place during the grand jury's proceedings, rather than what the effect of disclosure may be. In ODD, the Ninth Circuit held that, where civil plaintiffs sought the subpoenaed materials for their own sake and not to learn about the grand jury's inner workings, disclosure would not compromise the secrecy and integrity of the grand jury's deliberative process and, thus, Rule 6(e) did not apply to bar their disclosure.[2]

Background and History of Rule 6(e)

Rule 6(e) imposes a general prohibition against disclosure of "a matter occurring before the grand jury."[3] The long-established policy behind Rule 6(e) is to maintain the secrecy of grand jury proceedings so that, among other things, witnesses may "testify freely without fear of retaliation."[4] The grand jury institution would, under common-sense principles, be undermined if witnesses knew that the secrecy of their testimony would not be preserved as a general rule and could be easily lifted.[5] This is particularly true in antitrust cases, where witnesses "may be employees or even officers of potential

defendants, or their customers, their competitors, their suppliers."[6] Another concern behind Rule 6(e) is that information may be inadvertently released in civil litigation that compromises the grand jury process and sidesteps the limits placed on civil discovery.[7]

Nevertheless, while Rule 6(e) is meant to protect what takes place in the grand jury room, it is not intended to shield from disclosure all information that may be presented to the grand jury.[8] According to the Ninth Circuit, "if a document is sought for its own sake rather than to learn what took place before the grand jury, and if its disclosure will not compromise the integrity of the grand jury process, Rule 6(e) does not prohibit its release."[9]

What Is "a Matter Occurring Before the Grand Jury"?

Under Rule 6(e), a civil plaintiff is prohibited from obtaining grand jury materials unless a "particularized need" for the materials is demonstrated.[10] Still, the question in the first instance is whether the materials sought constitute grand jury materials.[11] Unfortunately, the plain language of Rule 6(e) does not shed any light on what constitutes "a matter occurring before the grand jury." Consequently, federal courts have been left to grapple with the language and its nebulous legislative history to determine when matters may be disclosed to private litigants. What has emerged is a variety of standards to evaluate the applicability of Rule 6(e), creating even more uncertainty for private litigants and grand jury witnesses who are left to wrestle the applicability of the rule on a case-by-case and district-by-district basis.

Of the 10 federal circuit courts to clearly address the issue, six have applied what is known as an "effect test." To be specific, the Third, Fourth, Seventh, Eighth, Tenth and D.C. Circuits all examine "whether disclosure of a particular requested item will reveal some secret aspect of the inner workings of the grand jury," such as what transpired before the grand jury and what information was shown to the jury.[12] To make this determination, the test requires a court to "'make a factual inquiry on a document-by-document basis.'"[13] Thus, the "factual analysis will turn not on the purpose of the party seeking disclosure but rather on the effect of disclosure."[14]

Courts within the remaining federal circuits to address the issue have applied a series of tests adopting broader presumptions about the applicability of Rule 6(e) to grand jury materials. Under the per se approach, subpoenaed documents are never characterized as matters occurring before the grand jury and, thus, are not subject to Rule 6(e).[15] Under the opposite per se rule, subpoenaed documents are always subject to Rule 6(e) and, thus, are protected from disclosure.[16] The Sixth Circuit, by contrast, attempted to reach a middle ground by adopting a "rebuttable presumption" approach, which assumes that subpoenaed materials are "matters occurring before the grand jury," but permits a moving party to rebut that presumption by showing that information sought "is public or was not obtained through coercive means" or that it would not otherwise be "'available by civil discovery and would not reveal the nature, scope or direction of the grand jury inquiry.'"[17]

The ODD Case and the Emergence of a New Analysis

In 2009, the U.S. Department of Justice announced that it had launched a criminal investigation into whether certain optical disk drive manufacturers violated the federal antitrust laws. During the investigation, the Federal Bureau of Investigation recorded secret conversations among various individuals, including "John Doe," an employee of Toshiba Samsung Storage Technology Korea Corporation. After Doe's conversation was recorded, a grand jury subpoenaed Doe seeking his testimony. The grand jury investigation concluded with settlements and guilty pleas from corporations

and executives. Doe, however, was not ultimately indicted.

In ODD, the related civil multidistrict litigation, computer manufacturers (including Dell Inc. and Dell Products LP (the "Dell plaintiffs")), other direct purchasers and indirect purchasers of optical disk drives brought lawsuits against certain manufacturers for conspiring to fixing prices of the drives in violation of Section 1 of the Sherman Act[18] and state antitrust laws. In those actions, the plaintiffs deposed Doe, who invoked his Fifth Amendment right against self-incrimination in light of the pending criminal investigation. Subsequently, after the grand jury's investigation was complete, the Dell plaintiffs subpoenaed the DOJ for copies of the recordings and transcripts of Doe's conversations. The plaintiffs sought to use these materials while redeposing Doe to refresh his recollection of events that transpired over six years prior to his deposition. Additionally, the Dell plaintiffs and plaintiff Hewlett-Packard Company argued that the recordings were critical to their case and damages calculations. After negotiations, the DOJ agreed to produce the materials under a protective order.

Doe intervened and sought to quash the DOJ subpoena, claiming that producing these materials would "seriously harm and possibly destroy his personal and professional reputation, and quite possibly deprive him of his livelihood."[19] A magistrate judge denied the motion to quash and the district court affirmed, finding that the materials sought did not constitute matters occurring before the grand jury under Rule 6(e).[20] The district court explained that, even if it was reasonable to assume that the materials sought were presented to the grand jury, the subpoena did not specifically seek information related to the grand jury's inner workings. Moreover, according to the district court, the production of the subpoenaed materials would not reveal whether they were actually presented to the grand jury or mere products of the DOJ's investigation.[21] To be sure, production of the documents alone would not reveal whether the materials were gathered at the grand jury's direction or through its subpoena power.[22]

On appeal, the Ninth Circuit, in a decision authored by Judge Milan D. Smith Jr., affirmed the district court's ruling, finding that it was not clearly erroneous or contrary to law.[23] Doe had argued that the district court abused its discretion by failing to apply the "effect test" used by other federal circuits to determine whether the recordings constituted protected grand jury materials under Rule 6(e). Rejecting Doe's argument, the Ninth Circuit unequivocally stated: "We have never adopted the 'effect test,' and we decline to do so now."[24] While the Ninth Circuit previously recognized that the effect test can offer "greater assurance of grand jury secrecy,"[25] in ODD the court criticized the ad hoc approach as "requir[ing] considerable judicial time and resources" and "limit[ing] the value of the precedent for both litigants and courts."[26]

Ultimately, the Ninth Circuit crafted its own approach to determine whether Rule 6(e)'s protections apply to materials that predate a grand jury investigation. The Ninth Circuit found that it was appropriate to focus on the language of Rule 6(e), its underlying policy considerations, and the purpose for which the subpoenaing party is seeking the information.[27] The Ninth Circuit stated that the fundamental policy behind Rule 6(e) is to "'protect against disclosure of what is said or takes place in the grand jury room.'"[28] Focusing on the subpoenaing party's purpose for requesting the information, the Ninth Circuit held that, "'if a document is sought for its own sake rather than to learn what took place before the grand jury, and if its disclosure will not compromise the integrity of the grand jury process, Rule 6(e) does not prohibit its release.'"[29] The court found that the fact that the recordings were created two months before the grand jury issued its subpoena weighed strongly in the plaintiffs' favor. Even if the materials were subsequently reviewed by the grand jury, the Ninth Circuit found that "it is not the purpose of the Rule to foreclose from all future revelation ... the same information or documents which were presented to the grand jury.'"[30]

Conclusion

The Ninth Circuit's decision in ODD provides clarity to civil practitioners in that circuit, who no longer need to navigate the web of inconsistent tests utilized among federal circuits to determine whether subpoenaed material constitutes "a matter before the grand jury" that is barred from disclosure under Rule 6(e). The Ninth Circuit made clear that, by focusing on the language of Rule 6(e), its policy of protecting the grand jury process from disclosure, and the factual record before it, it will not unreasonably prevent a plaintiff from obtaining materials created or utilized in government investigations. Under this approach, if subpoenaed materials were created prior to a grand jury investigation and they are not sought to uncover what took place in the grand jury room, it is unlikely that they will be barred from disclosure under Rule 6(e).

—By Kellie Lerner and Michelle Zolnoski, Robins Kaplan LLP

Kellie Lerner is a partner and Michelle Zolnoski is an associate in Robins Kaplan's New York office.

DISCLOSURE: Robins Kaplan LLP represented Best Buy Enterprise Services Inc. with regard to a nonparty subpoena it received in In re Optical Disk Drive Antitrust Litigation, Case No. 3:10-MD-2143 RS (N.D. Cal.).

[1] Case No. 14-17502, 2015 U.S. App. LEXIS 16081 (9th Cir. Sept. 10, 2015).

[2] Id. at *12-13.

[3] Fed. R. Crim. Pro. 6(e)(2)(b).

[4] United States v. Procter, 356 U.S. 677, 681-82 (1958).

[5] Id. at 682.

[6] Id.

[7] See United States v. Dynavac, 6 F.3d 1407, 1411 (9th Cir. 1993).

[8] Id. (quoting United States v. Interstate Dress Carriers, Inc., 280 F.2d 52, 54 (2d Cir. 1960)).

[9] Id. at 1411-12; accord U.S. Department of Justice Grand Jury Manual § 9-11.254 ("documents not covered by Rule 6(e) include materials obtained or created independently of the grand jury, so long as their disclosure does not otherwise reveal what transpired before or at the direction of the grand jury . . . . Similarly, Rule 6(e) does not cover documents, even subpoenaed documents, that are sought for the information they contain, rather than to reveal the direction or strategy of the grand jury") (internal citations omitted).

[10] In re Optical Disk Drive Antitrust Litig., Case No. 3:10-md-2143-RS, 2014 U.S. Dist. LEXIS 184714 at

*35 (N.D. Cal. Dec. 19, 2014).

[11] Id.

[12] ODD, 2015 U.S. App. LEXIS 16081 at *10-11 (citing Dynavac, 6 F.3d at 1412-13).

[13] Id. at *5 (citing Dynavac, 6 F.3d at 1413).

[14] In re Grand Jury Proceedings, 851 F.2d 860, 863 (6th Cir. 1988) (citing In re John Doe Grand Jury Proceedings, 537 F. Supp. 1038 (D.R.I. 1982)) (emphasis added).

[15] Id; see also Dynavac, 6 F.3d at 1412 (citing United States v. Weinstein, 511 F.2d 622, 627 n.5 (2d Cir.) ("in any event it is questionable whether Rule 6(e) applies to documents"); In re Grand Jury Investigation of Ven-Fuel, 441 F. Supp. 1299, 1303 (M.D. Fla. 1977) ("it is doubtful whether mere documentary information was ever included within the scope of Rule 6(e)").

[16] Id. (citing, e.g., Texas v. United States Steel, 546 F.2d 626 (5th Cir. 1977).

[17] Dynavac, 6 F.3d at 1413 (quoting In re Grand Jury Proceedings, 851 F.2d at 867).

[18] 15 U.S.C. § 1.

[19] ODD, 2015 U.S. App. LEXIS 16081 at *7.

[20] In re Optical Disk Drive Antitrust Litig., 2014 U.S. Dist. LEXIS 184714 at *40.

[21] Id. at *36; see also ODD, 2015 U.S. App. LEXIS 16081 at *13.

[22] Optical Disk Drive Antitrust Litig., 2014 U.S. Dist. LEXIS 184714 at *39.

[23] ODD, 2015 U.S. App. LEXIS 16081 at *10.

[24] Id. at *11.

[25] Dynavac, 6 F.3d at 1413.

[26] ODD, 2015 U.S. App. LEXIS 16081 at *11 (quoting Dynavac, 6 F.3d at 1413).

[27] Id. at *13.

[28] Id. at *12 (quoting Dynavac, 6 F.3d at 1411-12).

[29] Id.

[30] Id. at *14 (citing Dynavac, 6 F.3d at 1411).