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Global Reach

by Pamela A. MacLean

Officials in the Department of Justice antitrust division have learned how to walk on water--or so it must seem to corporate defense counsel. Without ever getting their feet wet, prosecutors are using the power of the federal grand jury subpoena to retrieve documents compelled from foreign defendants in civil discovery.

The antitrust division's first successful foray came in a long-standing criminal investigation into price-fixing by the manufacturers of liquid crystal displays (LCDs), including Sharp, Hitachi, NEC Technologies, Samsung, LGPhillips, and Panasonic. Since 2006 the DOJ's probe has produced more than \$890 million in fines, as well as criminal charges against eight companies and 22 executives.

But federal prosecutors wanted more: copies of foreign documents that were produced in civil discovery. Early reports of the criminal investigation had prompted a number of follow-on civil suits, which were consolidated and assigned to U.S. District Judge Susan Y. Illston in San Francisco (*In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. MDL 07-1827 (N.D. Cal.)). Plaintiffs attorneys in that massive case had compelled production of nonprivileged foreign documents. So using its subpoena power, the DOJ sought a court order to obtain documents--even material covered by civil protective order--from the law firms holding the papers.

The defense firms promptly moved to quash. Courts have long held that parties availing themselves of U.S. courts are subject to discovery demands. But defendants in the LCD case didn't enter U.S. courts voluntarily. "[T]hey were hauled, kicking and screaming, into our courts," former federal Judge Fern M. Smith, acting as special master, pointed out in court filings. Smith recommended that Illston quash the subpoenas, and Illston agreed. Noting she could locate no authority governing the case, Illston said she found it "more prudent to quash the subpoenas and allow the DOJ to raise these issues on appeal."

In December the Ninth Circuit reversed, holding that the subpoenas may be enforced. "By a chance of litigation, the documents have been moved from outside the grasp of the grand jury to within its grasp," wrote Senior Circuit Judge John T. Noonan. "No authority forbids the government from closing its grip on what lies within the jurisdiction of the grand jury." (*In re Grand Jury Subpoenas*, 627 F.3d 1143, 1144 (9th Cir. 2010).)

Strong Reaction

Noonan's two-page opinion sent defense counsel into orbit. "Taken to its logical conclusion, the government does not have to do an investigation, but can wait until discovery is produced in a civil case and then subpoena it," says Kirk C. Jenkins, an appellate specialist with Sedgwick, Detert, Moran & Arnold in Chicago who is defending AU Optronics in the criminal appeal. "We think that's an impermissible intrusion into civil litigation. It blurs the line between civil and criminal litigation."

Christopher A. Nedeau, a partner at Nossaman's San Francisco office who also represents AU Optronics, adds "The DOJ may simply use the civil case as a stalking horse for the criminal case. It sets a terribly dangerous precedent to subpoena a law firm. That means the Justice Department can go fishing to subpoena any law firm, any time."

Serving subpoenas on law firms can be "alarming, to say the least," says James L. McGinnis, a partner in the San Francisco office of Sheppard Mullin Richter & Hampton who represents another of the criminal defendants. Even turning over a list of documents that corporate counsel chooses to import, he contends, "gives the Justice Department a road map, and an unfair look at what is considered most important."

The Implications

The DOJ may have its own concerns about the consequences of using subpoena power. If prosecutors are seen as complicit with plaintiffs counsel in bringing documents into U.S. courts, the DOJ could face accusations of bad faith and risk a court-ordered bar to access. Case law is clear that civil discovery can't be used to aid a criminal investigation, according to White & Case court filings. Prosecutors also want to preserve their ability to interview witnesses first and discover facts before potential targets see the material. But because Noonan found no

collusion or bad faith tactics between the civil plaintiffs and the government, the grand jury was free to grab whatever came within its reach under 18 U.S.C. section 3332.

In going after material that defendants have been compelled to produce in civil discovery, the DOJ also risks offending foreign governments by sidestepping elaborate diplomatic procedures for requesting private documents. Those procedures include sending letters rogatory--requests from the U.S. State Department to another nation's ministry of foreign affairs for specific material. Though the process is time-consuming and potentially futile, ignoring it could invite retaliation against U.S. companies.

On the other hand, the government may gain an advantage by exercising grand jury subpoena power because of the dilemma it creates for defendants. "A defendant can shield the documents by refusing to comply--which could lead to civil sanctions," says J. Brady Dugan, an antitrust partner in the Washington, D.C., office of Akin Gump Strauss Hauer & Feld. "Or the defendant can comply with the request--which could bring the documents within the jurisdiction of the grand jury and potentially open the door to criminal liability." According to the Ninth Circuit, Dugan says, protective orders do not appear to shield those documents from federal prosecutors.

But whether grand jury subpoenas trump protective orders depends on the appellate circuit. A per se rule in the Ninth Circuit, as in the Fourth and Eleventh circuits, stipulates that grand jury subpoenas take precedence over a protective order (*In re Grand Jury Subpoena Served on Meserve, Mumper & Hughes*, 62 F.3d 1222 (9th Cir. 1995)). In the Second Circuit, the protective order takes precedence, and only a showing that the order was improvidently granted will allow a grand jury to intrude (*Martindell v. Int'l Tel. & Tel. Corp.*, 594 F.2d 291 (2nd Cir. 1979)). The First and Third circuits acknowledge there may be exceptional circumstances in which a protective order should override a subpoena. Appellate specialist Jenkins considers these differences a three-way circuit split, and the subpoenaed firms in the LCD litigation are preparing a petition for review by the U.S. Supreme Court.

Strategy Shifts

Opening the door to foreign discovery--and potentially to a defendant's criminal liability--is bound to affect strategy for both sides in civil litigation. "What happens if parties assert attorney-client or work-product privileges?" asks Elizabeth C. Pritzker, a partner at San Francisco's Girard Gibbs and liaison counsel for direct purchaser plaintiffs in the LCD case. "The [Ninth Circuit] doesn't address it."

For plaintiffs, parallel criminal proceedings in a case may add to delays in getting foreign-based discovery, Pritzker says. Other nations may have higher walls around confidential business records, which could lead to discovery fights in foreign courts or questions about which nation's laws apply to U.S.-based subpoenas. But Pritzker says this potential for increased conflict could also encourage more cooperation between lawyers in civil and criminal cases.

For the defense, parallel proceedings may mean negotiating with plaintiffs to provide what they need without importing foreign documents, says Akin Gump's Dugan. Broader use of subpoena power, he says, may bolster arguments for stays on discovery in civil actions while a criminal probe is under way.

In the future, suggests one defense lawyer, companies targeted by federal prosecutors may have three choices: Refuse to provide requested material and face a default judgment; seek a court-ordered stay of civil discovery; or turn over the documents. In the meantime, there may be another option: review by the U.S. Supreme Court.

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