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6th Circuit Rejects 'Taint Team' For Privilege Screens On Grand Jury Subpoenas

On July, 13, 2006, the United States Court of Appeals for the Sixth Circuit decided *In re Grand Jury Subpoenas 04-124-03 and 04-124-05*[1], addressing the issue of who has the right to conduct a privilege screen of documents subject to a grand jury subpoena directed to an entity that possesses the documents but has not yet produced them to the government. The court held that a third party's interest in protecting its privilege in the documents outweighed the government interest in using a taint team. However, the court mandated the appointment of a Special Master to conduct the initial segregation of documents.

I. FACTS AND PROCEDURAL HISTORY

This case arose out of a dispute between Venture Holdings LCC ("Venture") and Larry Winget, Venture's former Chairman and Chief Executive Officer. After Venture's new management conducted an internal investigation, the company filed suit against Winget for allegedly fraudulent conveyances of goods and services from Venture to other entities that Winget owned or controlled (the "Affiliated Companies"). Shortly thereafter, the federal government began an investigation. In the fall of 2004, a federal grand jury issued two subpoenas *duces tecum*, filed under seal, to Venture. The documents in question were under Venture's control and both sides conceded that some of the documents demanded may be protected by either Winget's or the Affiliated Companies' attorney-client or work-product privileges. The court was thus confronted with the issue of how these documents were going to be reviewed for privilege.

Both Winget and the government asserted the right to conduct their own privilege assessment with varying procedures. Winget proposed what the court termed a "standard practice by which law firms conduct privilege reviews when responding to government subpoenas or discovery requests."[2] Winget's counsel would provide the government and Venture with a list of the law firms, attorneys, and

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1 *In re Grand Jury Subpoenas 04-124-03 and 04-124-05*, Nos. 05-2274/2275, 2006 WL 1915386 (6th Cir. July 13, 2006).

2 *Id*. at 5 citing *Cheney* v. *United States Dist. Ct. for D.C.*, 542 U.S. 367, 399 n. 5 (2004); *Lexicon, Inc.* v. *Safeco Ins. Co. of Am.*, 436 F.3d 662, 665-73 (6th Cir. 2006); *McAlpin* v. *Lexington 76 Auto Truck Stop, Inc.*, 229 F.3d 491, 499 (6th Cir. 2000).

agents who represented them. Then, a paralegal retained by Winget's counsel would review the implicated documents in Venture's offices, and segregate those documents based on that list. Winget's counsel would review copies of the segregated documents and prepare a privilege log, and the parties would bring any privilege dispute to the court.

The government characterized Winget's request as "unprecedented" in that it would insert him into the middle of a grand jury investigation so that he could be the first to screen documents produced in response to the subpoenas. The government proposed that a 'taint team' consisting of at least one Assistant United States Attorney and at least one Postal Inspector who were both not involved in the grand jury investigation segregate privileged documents from non-privileged documents. The taint team would make privilege determinations and for documents determined to be privileged, the team would return them to Venture and send a copy to Winget where appropriate. For documents determined to be potentially protected by privilege, the team would submit them to Winget and the district court for final adjudication. For documents the taint team deemed not to be protected by appellant's privilege, the team would send them directly to the grand jury without providing the appellant an opportunity to review or challenge the team's privilege determinations with respect to those documents. The government argued that this procedure was necessary to maintain a grand jury investigation and grand jury secrecy.

After conducting a closed hearing, the district court agreed with the government and directed the 'taint team' privilege screening, finding, in effect, that the "public policy underlying grand jury secrecy and the effective investigation of criminal activity outweighed the appellants' privilege claims."[3]

II. RATIONALE OF THE COURT

The Court of Appeals posed the following questions: "whether the grand jury's investigative authority trumps appellants' claims of privilege [and] whether the government's claims regarding the importance of grand jury secrecy countervails the possible protections of privilege that appellants may enjoy."[4] Answering both of the questions that it posed in the negative, the Court of Appeals reversed the district court order directing taint team review of the subject documents.

After tracking the historic roots of the grand jury process from before the accession of King Richard I in 1189 A.D. to its incorporation into our Constitution, the Court of Appeals concluded that the district court overstated the scope of grand jury secrecy and the necessity for effective investigation in relation to protections of privilege. The Court of Appeals stated: "[G]rand juries are not empowered to override private rights in all cases. . . [and] grand juries may not use their investigatory authority 'to violate a valid privilege, whether established by the Constitution, statutes, or the common law.'"[5]

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[3] *Id.* at 6.

[4] *Id.*

[5] *Id*. at 7, citing *In re Grand Jury Investigation (Detroit Police Dep't Special Cash Fund)*, 922 F. 2d 1266, 1269-70 (6th Cir. 1991).

Recognizing the importance of grand jury secrecy, the Court of Appeals nevertheless observed that '"this is not to say that a grand jury subpoena is some talisman that dissolves all constitutional protections.'"[6] The Court of Appeals noted that "[w]hile it is certain that matters before a grand jury are protected by Criminal Rule 6(e)(2)(B), it is equally certain that not all documents reviewed by a grand jury constitute 'matters occurring before a grand jury'."[7]

The Court of Appeals emphasized that the government did not contend that the appellants would not have had the opportunity for review if the subpoena had been directed at them, and also could not claim that the appellants would not have had independent access to the documents in the ordinary course of business, concluding that the risk that the appellants could divine or reverse-engineer the grand jury's investigative purpose by reviewing a set of their own documents that involved some sort of communication between them and their counsel was minimal.

The court went on to examine the level of intrusion to the appellant's privilege. First, the court pointed out that taint teams are used primarily in limited, exigent circumstances in which government officials have already obtained the physical control through the execution of a search warrant. In those cases, since the documents are already possessed by the government, according to the court, the use of a taint team is actually respectful, rather than injurious, to privilege. Since the government did not actually possess the potentially privileged materials, the government could not claim the exigency in this case. The second risk to the appellants was the obvious one that taint teams present the foreseeable risk of leaks of confidential information to prosecutors. Thus, the court concluded that the possible damage to the appellants interest in protecting privilege exceeds the possible damage to the government's interest in grand jury secrecy and exigency in this case.

While the court disagreed with the government regarding the scope of grand jury secrecy, the court agreed that there was a legitimate concern that appellant's proposal would permit the unreasonable delay of the proceedings. In order to address this interest, and to prevent "the appellants from themselves reviewing the entire set of subpoenaed documents," the court mandated that the district court employ a Special Master to perform the initial segregation of documents. According to the court's instructions, the Special Master would conduct a word search based on the list provided by the appellants and then separate documents containing any of those words from the rest. The master would then provide appellants with copies of the documents containing the words on the appellants list, returning the originals to Venture, and provide the responsive documents not containing any of the list's words to the grand jury. Throughout this process, appellants would conduct a privilege review and provide all documents that their attorneys find not to be privileged, as well as a standard privilege log respecting documents over which they claim privilege protection, on "a timely and rolling basis to the grand jury." Any dispute over the assertion of privilege would be resolved by the District Judge.

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6 *Id*. at 9, quoting *United States* v. *Dionisio*, 410 U.S. 1, 11 (1973).

7 *Id*. citing *Douglas Oil Co. of Cal.* v. *Petrol Stops Nw.*, 441 U.S. 211 (1979); *In re Antitrust Grand Jury*, 805 F.2d 155 (6th Cir. 1986); *In re Grand Jury Proceeding Relative to Perl*, 838 F.2d 304, 306 (8th Cir. 1988).

III. SIGNIFICANCE OF DECISION

The use of government taint teams has often been questioned or outright rejected by the courts.[8] In those cases where the use of taint teams has been approved, the government generally is already in possession of the subject documents through execution of a search warrant.[9] The Sixth Circuit's holding that the grand jury's investigative authority does not trump claims of privilege, and its rejection of a government taint team to review potentially privileged documents under subpoena for privilege, addresses the issue in a new context. Its analysis of the competing interests is worthy of review.

While third parties do not intervene in the disposition of grand jury subpoenas frequently, this case also reaffirms the principle that third parties can intervene in and appeal district court decisions where complying with the subpoena may impair the third party's cognizable interest, such as attorney-client or work-product privilege.[10]

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or e-mail Charles A. Gilman at (212) 701-3403 or cgilman@cahill.com; David N. Kelley at (212) 701-3050 or dkelley@cahill.com Jonathan I. Mark at (212) 701-3100 or jmark@cahill.com; or John Schuster at (212) 701-3323 or jschuster@cahill.com.

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8 *In the Matter of the Search of the Scranton Housing Authority*, 2006 WL 1722565 at 5 (M.D.Pa. 2006) citing e.g., *Klitzman, Klitzman & Gallagher* v. *Krut*, 744 F.2d 955 (3d Cir. 1984); *In re the Seizure of all Funds on Deposit in Accounts in the Names of National Electronics, Inc., at JP Morgan Chase Bank*, 2005 WL 2174052 (S.D.N.Y. 2005); *U.S.* v. *Stewart*, 2002 WL 1300059 (S.D.N.Y. 2002); *U.S.* v. *Neill*, 952 F.Supp. 834 (D.D.C. 1997); *U.S.* v. *Abbell*, 914 F.Supp. 519 (S.D.Fla. 1995), *In re Search Warrant for Law Offices*, 153 F.R.D. 55 (S.D.N.Y. 1994).

9 *In re Search of 5444 Westheimer Road Suite 1570, Houston, Texas*, 2006 WL 1881370 (S.D.Tex. 2006); *U.S. v. Skeddle*, 989 F.Supp. 890 (N.D.Ohio 1997). *U.S. v. Altiere*, 2006 WL 515609 at 1 (N.D.Ohio 2006)

10 *In re Grand Jury Proceedings*, 655 F.2d 882, 884, 9 Fed. R. Evid. Serv. 129 (8th Cir. 1981) citing *Perlman v. United States*, 247 U.S. 7 (1918); See also *United States v. Nixon*, 418 U.S. 683, 691 (1974); *In re Grand Jury*, 286 F.3d 153, 52 Fed.R.Serv.3d 881 (3d Cir. 2002); *In re Grand Jury Subpoena*, 204 F.3d 516, 46 Fed.R.Serv.3d 165 (4th Cir. 2000); *Grand Jury Proceedings v. U.S.*, 156 F.3d 1038, 41 Fed.R.Serv.3d 851 (10th Cir. 1998); *In re Grand Jury Subpoena Dated Jan. 30, 1986 to Bronx Democratic Party*, 784 F.2d 116 (2d. Cir. 1986); *In re Grand Jury Subpoena*, 274 F.3d 563, 51, Fed.R.Serv.3d 936 (1st Cir. 2001); *In re Sealed Case*, 146 F.3d 881, 40 Fed.R.Serv.3d 1141, (D.C. Cir. 1998).