

## **Third Circuit Clarifies Appellate Review of Orders to Produce Allegedly Privileged Documents**

On May 24, 2012, the United States Court of Appeals for the Third Circuit held, in a split decision in *In Re Grand Jury: ABC Corp.; John Doe 1; John Doe 2*, that to obtain appellate review of orders to produce allegedly privileged documents the privilege holder must disobey the disclosure order, be held in contempt, and then appeal the contempt order. The court's decision narrowly construed the exception to the contempt rule in *Perlman v. United States*, 247 U.S. 7 (1918).<sup>1</sup>

Appellants argued that the documents at issue were in the possession of a third party (their counsel) who was not willing to suffer contempt for the sake of an immediate appeal, and thus that the limited exception to the contempt rule found in *Perlman* applied. The panel majority (Circuit Judges Ambro and Hardiman) disagreed, holding that “*Perlman* does not allow an immediate appeal of a district court’s order mandating the production of supposedly privileged documents when (1) the court’s order directs the privilege holder itself to produce the documents and (2) the privilege holder, has, or may obtain, custody of the documents. . . . If ABC Corp. wants preconviction appellate review of the District Court’s crime-fraud ruling, it must take possession of the documents and defy that Court’s disclosure order before appealing any resulting contempt sanctions. Because it has not yet met these preconditions, we dismiss for lack of appellate jurisdiction.”<sup>2</sup> The dissent (Circuit Judge Vanaskie) would instead have found jurisdiction and affirmed on the merits.

### **I. Background**

Appellant ABC, the privilege holder, is an administratively dissolved corporation which was formed in early 2004 and ceased business operations in late 2005. Appellant John Doe 1 was ABC President and sole indirect shareholder. Both ABC and John Doe 1 were represented by LaCheen Wittels & Greenberg LLP (“Wittels”). John Doe 2 is John Doe 1’s son and was represented by Blank Rome LLP (“Blank Rome”), the custodian of the documents.

In mid-2010, the Appellants learned that the Government was investigating the tax implications of ABC’s acquisition and sale of certain closely held companies. In December 2010, the Government issued a grand jury subpoena to ABC’s former vice president of corporate acquisitions, seeking any and all records relating to transactions and business dealings between ABC and specific entities and individuals. A law firm that had previously represented ABC released some documents but withheld others claiming attorney-client privilege. No privilege log was provided to the Government. ABC transferred the documents to Blank Rome upon Wittels and Blank Rome assuming their current representations. Wittels took the position that ABC had never been effectively served a subpoena. In March 2011, Wittels and Blank Rome provided the Government with a privilege log which was updated in June 2011; it included the documents withheld by ABC’s former firm. In May 2011, the Government issued Wittels and Blank Rome with a grand jury subpoena seeking all documents they had received from ABC’s former law firm relating to ABC and another entity. The firms released the same documents the former firm had already released to the Government and withheld the documents noted in the privilege log.

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<sup>1</sup> *Grand Jury v. ABC Corp.*, No. 12-1697 (3<sup>rd</sup> Cir. May 24, 2012), available at <https://apps.fastcase.com/Research/Pages/Document.aspx?LTID=gLS4KK8JhMVEqWKYozf5Q2ifHopxy9IVjjkR0UKBfbvP5nvrHrXz52LywJWhq4djmqoPO901WR5p3B%2bsggSyHwNGIb%2bTuqLuf8Wd58AbaHJE7taHfluid9M%2bqAQgapCH> (hereinafter “*In re: Grand Jury*”).

<sup>2</sup> *Id.* at 3-4.

The Government filed an ex parte motion to compel ABC, Blank Rome and Wittels to produce 171 of the 303 documents identified as privileged arguing that the crime fraud exception applied. On March 8, 2012, the District Court agreed with the Government and ordered production of the documents. Appellants filed a notice of appeal and a motion for a stay, five days later. The Court of Appeals determined that it had no jurisdiction to review the District Court order as it was not an immediately appealable decision.

## II. Decision

Final decisions of the District Court are appealable under 28 U.S.C. §1291.<sup>3</sup> The court explained that generally a final decision is a decision which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. An order to produce documents is generally not considered an immediately appealable final decision. To appeal a discovery order prior to final judgment the witness/privilege holder must refuse compliance, be held in contempt and appeal the contempt order. A contempt order is considered immediately appealable.<sup>4</sup>

An exception to the contempt doctrine was established by the Supreme Court in *Perlman* applies where the custodian of the documents is not the privilege holder and thus it is impossible for the privilege holder itself to disobey the discovery order, effectively denying the privilege holder any method of immediate appellate review. A prerequisite for the *Perlman* doctrine to apply is that the traditional contempt route be closed to the privilege holder (an exception being when the US President is the privilege holder). Pursuant to this exception an immediate appeal of a disclosure order adverse to an assertion of attorney-client privilege has been permitted where the privilege holder was not subpoenaed.<sup>5</sup> This application of the *Perlman* doctrine has been adopted by the Second, Seventh and Tenth Circuits.<sup>6</sup>

In *In re: Grand Jury* the privilege holder as well as third parties were subpoenaed. The order was directed at ABC. While ABC did not have custody of the allegedly privileged documents, unlike *Perlman* where there was no ability on the part of the privilege holder to obtain custody of the documents, ABC could obtain custody of the documents as they were being held by its counsel. The court found that as ABC had the ability to obtain the documents it had the ability to not comply with the court order. The court assumed that the agent would have to comply with its principal's request to return the documents and that it would not be considered an obstruction of justice for the agent to comply with such a request.<sup>7</sup>

The court refused to reach the question of whether *Perlman* requires the subpoena to be directed at a disinterested third party, because once it is established that the contempt route is available *Perlman* cannot apply and so there was no need to determine the nature of the third parties involved in this instance.<sup>8</sup>

On this basis, the court ruled that it had no jurisdiction to hear the appeal and dismissed the appeal in its entirety.

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<sup>3</sup> Under 28 U.S.C. § 1291, "The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States,..."

<sup>4</sup> *In re: Grand Jury*, 7-10 (citations and quotations omitted).

<sup>5</sup> *In re: Grand Jury*, 13-14 (citing *In re Grand Jury Proceedings (Appeal of FMC Corp.)*, 604 F.2d 798 (3d Cir. 1979)).

<sup>6</sup> *In re: Grand Jury*, 14-15 (citations and quotations omitted).

<sup>7</sup> *In re: Grand Jury*, 16-18 (citations and quotations omitted).

<sup>8</sup> *Id.* at 20 (citations omitted).

### III. Dissent

To the extent the District Court order applied to ABC, the privilege holder, Circuit Judge Vanaskie concurred with the majority that the *Perlman* exception is not applicable because the privilege holder has control over their own actions and so has the ability to disobey the court order and act in contempt. He dissented however, in so far as the order related to the third parties, Wittels and Blank Rome.

The dissent argued that the *Perlman* doctrine applies to the extent the order is addressed to third parties. ABC does not have control over the third parties' actions. ABC cannot compel them to act in contempt of a court order. Without immediate appeal ABC has no way of reviewing the District Court order until after the privilege has already been breached. In addition, even if the third parties transferred the documents to ABC, they are not protected from contempt charges despite the majority's opinion that it would not amount to an obstruction of justice if they were to so transfer the documents. Precedent dictates otherwise and the Court of Appeals cannot guarantee how a District Court would rule. With the risk of facing contempt of court charges third parties are more likely to comply with the court order than the privilege holder's command to return the documents removing the contempt route from the privilege holder.<sup>9</sup>

### IV. Significance of decision

The decision from the Court of Appeals for the Third Circuit follows the established precedent of several circuits that *Perlman* only applies where the route of contempt is closed to the privilege holder. It tightly controls under what circumstances the route of contempt is unavailable holding that when the documents are held by an agent of the privilege holder the privilege holder's control over their agent makes the route of contempt available regardless whether the agent is an interested or disinterested third party.

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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 email Charles A. Gilman at 212.701.3403 or [cgilman@cahill.com](mailto:cgilman@cahill.com); Jon Mark at 212.701.3100 or [jmark@cahill.com](mailto:jmark@cahill.com); John Schuster at 212.701.3323 or [jschuster@cahill.com](mailto:jschuster@cahill.com).

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<sup>9</sup> *Id.* at 6-10 (dissenting opinion) (citations and quotations omitted).