Court Requires DOJ to Disclose Audio Recordings Obtained in Criminal Antitrust Investigation to Civil Plaintiffs

Judge Paul Borman, District Judge for the Eastern District of Michigan, recently ordered the Department of Justice ("DOJ") to produce tape recordings to the direct purchaser plaintiffs in the *In re Packaged Ice* multidistrict price-fixing litigation. By rejecting DOJ's claims of sovereign immunity, privilege, and work product, the decision may signal a growing willingness to permit disclosure in subsequent civil actions of otherwise confidential investigative materials.

Background and Ruling

In re Packaged Ice Antitrust Litig., No. 08-md-01952 (E.D. Mich. May 10, 2011), involves an alleged conspiracy among ice companies to maintain high packaged ice prices. In 2004, DOJ began a criminal investigation into the alleged anticompetitive conduct of major packaged ice players. During the course of the investigation, DOJ, with the cooperation of certain individuals, obtained taped recordings of conversations with persons of interest. As part of a separate cooperation agreement with one of the defendants, the direct purchaser plaintiffs learned of these taped recordings and, following the termination of DOJ's investigation, served a subpoena on DOJ seeking the recordings and transcripts. Although the cooperating witnesses (including employees of the cooperating companies) did not oppose disclosure, DOJ objected to the subpoena on grounds of sovereign immunity, the investigatory files privilege, the law enforcement privilege, and work product protection.

Judge Borman rejected DOJ's sovereign immunity argument. According to Judge Borman, the circuits are split on whether sovereign immunity can bar a federal court from enforcing a federal subpoena against a non-party federal agency. Judge Borman observed that the Fourth and Eleventh Circuits have agreed with DOJ's argument that sovereign immunity applies absent a waiver. (p. 4). These courts held that "a proceeding under the APA, and the APA's 'arbitrary and capricious' standard of review, is the only avenue of relief." (*Id.*). However, the Ninth and D.C. Circuits have ruled that sovereign immunity does not bar a federal court from enforcing a federal subpoena against a non-party federal agency subject to the discovery limitations in the Federal Rules of Civil Procedure. (pp. 4-5). Judge Borman concluded that, although the Sixth Circuit has not expressly decided the issue, he would join the courts "that have concluded that Federal Rule of Civil Procedure 45 and various available privilege rules provide sufficient limitations on discovery to adequately address legitimate governmental interests in objecting to a motion to compel compliance with a valid federal court subpoena." (p. 4).

Judge Borman also rejected DOJ's privilege and work product contentions. *First*, Judge Borman rejected DOJ's argument that its internal subpoena control regulations (28 C.F.R. §§ 16.21-29) immunized its refusal to produce the requested tapes. The Sixth Circuit has held that the statute providing DOJ authority to promulgate these regulations "is nothing more than a general housekeeping statute and does not provide 'substantive' rules regulating disclosure of government information." (p. 7). *Second*, Judge Borman held that DOJ's privilege assertion based on 28 C.F.R. § 16.26(b)(4), which prohibits disclosure that would reveal a confidential source or informant, was inapplicable because (i) the cooperating witnesses have waived any objection to disclosure and (ii) an *in camera* review of the recordings would enable the court to limit disclosure

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of private information. (pp. 10-11). *Third*, Judge Borman rejected DOJ's assertion of the federal law enforcement privilege. Judge Borman applied *Tuite v. Henry*, a case from the District Court of the District of Columbia, which listed ten non-exclusive factors with which courts can weigh a party's need for the requested materials against the government's interest in secrecy. (pp. 11-12). Because (i) the information sought would not reveal investigatory techniques, (ii) the identities of cooperating witnesses were publicly known and those witnesses acquiesced to disclosing the tapes, (iii) DOJ's investigation had concluded, and (iv) the information was important to the plaintiffs' case and not reasonably available by other means, Judge Borman ruled that the *Tuite* factors weighed in favor of disclosure. (pp. 12-14). *Finally*, the court rejected work product protection because the requested tapes did not reveal attorneys' mental processes. Notably, Judge Borman rejected DOJ's contention that justice required revealing the tapes only to the target of a criminal investigation and cited the Second Circuit's high-profile ruling in the Galleon securities fraud probe (*SEC v. Rajaratnam*) to support his balancing of the plaintiffs' interest against the interest for privacy, concluding that disclosure could "prevent a Government-caused information imbalance prejudicing Plaintiffs preparation for the civil trial." (pp. 16-17).

Implications

In re Packaged Ice signals courts' willingness to second-guess sweeping immunity and privilege arguments advanced by DOJ. When prosecutors possess factual information pertinent to a plaintiff's case, courts may grant discovery if the criminal investigation has ended, cooperating witnesses agreed to waive objections to disclosure, and the information is not otherwise available to the plaintiff. Disclosure may be more likely when, as part of a criminal prosecution, the prosecutors delivered the requested information to the defendants. Firms that have faced or are facing governmental investigations accordingly should be aware of the circuit split described above and of the possibility that civil plaintiffs may obtain information discovered during criminal prosecutions even if not produced by the defendant to the government.

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