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‘Martindell’ Presumption Doesn’t Extend To Protective Orders in Arbitrations

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Pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, Article III judges have the authority, upon a showing of “good cause,” to enter a “protective order” that limits the disclosure of civil discovery materials. Protective orders have the force of law and are enforceable through contempt.

For 45 years, even in the case of grand jury subpoenas, the U.S. Court of Appeals for the Second Circuit has employed a presumption against access to Rule 26(c) protected materials, “absent a showing of improvidence in the grant of [the] protective order or some extraordinary circumstance or compelling need.” *Martindell v. International Telephone & Telegraph*, 594 F.2d 291, 296 (2d Cir. 1979); *see also In re Grand Jury Subpoena Duces Tecum Dated Apr. 19, 1991*, 945 F.2d 1221, 1224 (2d Cir. 1991).

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The five other courts of appeal to confront the issue, however, have rejected the Second Circuit’s approach, emphasizing, among other things, the grand jury’s independent constitutional status, sweeping power, and furtherance of the public interest in obtaining all relevant evidence for law enforcement purposes.

In *In re Grand Jury Subpoena Dated February 22, 2024*, 2024 WL 1363711 (S.D.N.Y. March 26, 2024), in a matter of first impression, Judge Jesse M. Furman of the U.S. District Court for the Southern District of New York confronted whether the Second Circuit’s *Martindell* test extends to protective orders issued by an arbitrator rather than by a district judge. In *In re Grand*

Jury, the government had moved to compel an undisclosed entity (ABC Corp.) to comply with a grand jury subpoena after ABC Corp., based on *Martindell*, had refused to produce materials subject to an arbitrator-issued protective order.

After detailing the "salient differences" between court proceedings and arbitrations, Furman held that the *Martindell* test does not apply in the arbitration context and granted the government's motion to compel.

'In re Grand Jury Subpoena Dated February 23, 2024'

In the matter of *In re Grand Jury Subpoena Dated February 23, 2024*, the U.S. Attorney's Office for the Southern District of New York served a grand jury subpoena (the subpoena) on ABC Corp., along with a non-disclosure order signed by Magistrate Judge Sarah Cave prohibiting ABC Corp. from disclosing the subpoena's existence to anyone for 180 days.

In 'Martindell', in connection with a criminal investigation, the government sought via a grand jury subpoena transcripts that were subject to a protective order in a civil case.

ABC Corp. accepted service of the subpoena but refused to comply absent a court order on the ground that doing so would violate a stipulated protective order that ABC Corp. had entered as part of an arbitration proceeding (the protective order). The protective order, among other things, prohibited the parties to the arbitration from producing in response to a subpoena documents that were designated as confidential in the arbitration without first giving notice of the subpoena to the designating party.

On March 8, 2024, the government moved to compel ABC Corp. to comply with the subpoena, raising three arguments: (1) ABC Corp. would not violate the protective order by complying with the subpoena; (2) the Second Circuit's *Martindell* rule should not be applied to protective orders issued by arbitrators in arbitration proceedings; and (3) even if *Martindell* applied, the government's "compelling need" for the materials supersedes any basis ABC Corp. has raised for noncompliance. ABC Corp. opposed each ground.

Furman first addressed the factual dispute as to whether the protective order prohibits ABC Corp.'s compliance, because if it did not, then "the court would not need to address the novel question of whether the *Martindell* test applies." *In re Grand Jury Subpoena*, 2024 WL 1363711, at *2.

Furman found, however, that ABC Corp. could not comply with the subpoena without violating the protective order because (1) the materials sought by the Subpoena had been designated as confidential in the arbitration, (2) the Protective Order therefore required that prior to complying with the subpoena, ABC Corp. would have to disclose the subpoena to the designating party, and (3) ABC Corp. could not give notice of the subpoena by virtue of Cave's nondisclosure order.

The 'Martindell' Test

Having found that the protective order covered the materials at issue, Furman next addressed whether the *Martindell* test applies to protective orders entered by an arbitrator rather than by a district court.

In *Martindell*, in connection with a criminal investigation, the government sought via a grand jury subpoena transcripts that were subject to a

protective order in a civil case. The Second Circuit weighed "the public interest in obtaining all relevant evidence required for law enforcement purposes" against the purpose of a Rule 26(c) protective order, which is to "'secure the just, speedy, and inexpensive determination' of civil disputes." *Martindell*, 594 F.2d at 295-96 (quoting Fed. R. Civ. P. 1).

The Second Circuit concluded that the objective of Rule 26(c) outweighed the government's need to "exploit[ ]…the fruits of private litigation," and absent a showing by the government of an "improvidence in the grant of [the] protective order or some extraordinary circumstance or compelling need," a strong presumption against public access exists.

Although the Second Circuit has reaffirmed *Martindell*, each of the five other circuits that has addressed the issue has rejected the test. The U.S. Court of Appeals for the Fourth, Ninth and Eleventh Circuits employ a *per se* rule that grand jury subpoenas always trump Rule 26(c) protective orders. *See, e.g., In re Grand Jury Subpoena Served on Meserve, Mumper & Hughes*, 62 F.3d 1222, 1224 (9th Cir. 1995). The First and Third Circuits apply the inverse of the *Martindell* test, holding that "a grand jury subpoena supercedes a civil protective order unless the party seeking to avoid the subpoena demonstrates the existence of exceptional circumstances that clearly favor enforcement of the protective order." *In re Grand Jury*, 286 F.3d 153, 156 (3d Cir. 2002).

These courts have criticized the *Martindell* test because it "fails to pay proper respect to … society's profound interest in the thorough investigation of potential criminal wrongdoing." *In re Grand Jury Subpoena (Served Upon Stephen A. Roach, Esquire)*, 138 F.3d 442, 444 (1st Cir. 1998).

Application of 'Martindell' to Arbitration Proceedings

In deciding whether the *Martindell* test should apply in the arbitration context, Furman analyzed "the interests at stake" in the arbitration context as compared to those at stake in a judicial proceeding. *In re Grand Jury*, 2024 WL 1363711, at *5.

Furman first addressed the stature of the federal courts, which the *Martindell* court called the "cornerstone of our administration of justice" (quoting *Martindell*, 594 F.2d at 295), and compared the judicial system to the arbitration system. Judge Furman explained that the judicial branch is on equal constitutional footing as the executive branch, and serves as the counterweight to the executive branch when it comes to enforcing grand jury subpoenas. The arbitration system, on the other hand, is merely a creature of contract.

As a matter of public policy, Furman concluded that an agreement between private parties regarding the entry of a protective order in an arbitration proceeding cannot supersede a grand jury investigation in the same manner as a protective order entered by a court.

Relatedly, Furman relied on the "material difference" between an arbitrator and a federal judge. Although Article III judges are subject to the "good cause" standard governing the entry of a Rule 26(c) protective order and the prospect of appellate review, arbitrators are not. Because of this lower standard, Furman reasoned that extending *Martindell* to the arbitration context would be problematic—it is not clear how the government could show if an order was "improvidently granted," an important part of the *Martindell* test.

Finally, Furman identified other "meaningful checks on abuse of protective orders" in the judicial system that are absent in arbitrations. He observed that unlike in an arbitration, which is typically private and confidential, the strong presumption in favor of public access applies to federal court proceedings and provides the government with an opportunity to intervene and seek modification or vacation of a protective order entered by a judge.

Additionally, Furman found problematic that arbitrators typically are bound by the protective orders they enter (and the overall confidentiality that typically applies to arbitration proceedings), and, therefore, unlike judges, will not themselves refer matters to law enforcement.

The foregoing "salient differences" between federal court proceedings and arbitration proceedings led Furman to conclude that the *Martindell* test (and its presumption against disclosure) should not apply to protective orders issued by arbitrators. He did not, however, adopt either of the alternative approaches followed by the First, Third, Fourth, Ninth or Eleventh Circuits.

He reasoned that under either approach (*i.e.*, the rule followed by the Fourth, Ninth and Eleventh Circuits that grand jury subpoenas will always trump arbitral protective orders and the rule followed by the First and Third Circuits that grand jury subpoenas will overcome arbitral protective orders unless the party resisting disclosure can demonstrate that exceptional circumstances exist that warrant enforcing the protective orders), ABC Corp. would be required to disclose the materials sought by the subpoena because ABC Corp. could not demonstrate that exceptional circumstances existed that favor enforcement of the Protective Order.

Accordingly, Furman granted the government's motion to compel compliance with the subpoena.

Conclusion

In declining to extend the *Martindell* test to the arbitration context, Furman observed that "*Martindell*'s frosty reception in other circuits is reason enough to hesitate before extending its reach," but he ultimately concluded that the above-referenced differences between judicial and arbitral proceedings provided "compelling reasons to do more than hesitate and to decline such an extension of *Martindell*."

Moreover, although *Martindell* continues to apply in this circuit, the Second Circuit has cabined its reach by holding that its presumption against disclosure does not apply when the party or deponent claiming confidentiality could not have reasonably relied on the protective order, *see SEC v. TheStreet.com*, 273 F.3d 222, 234 (2d Cir. 2001), and district courts have been willing to find that an "extraordinary circumstance or compelling need" exists sufficient to overcome the presumption, *see, e.g.*, *United States v. Maxwell*, 545 F.Supp.3d 72, 85 (S.D.N.Y. 2001).

Accordingly, whether in the judicial or arbitral context, parties should not assume that protective orders will block the government from obtaining discovery designated as confidential under a protective order.