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COMMENT

ARE RULE 26(C) PROTECTIVE ORDERS VIABLE AGAINST GRAND JURIES?

THE NINTH CIRCUIT REJECTS BALANCING TEST IN FAVOR OF A *PER SE* RULE: *UNITED STATES v. JANET GREESON'S A PLACE FOR US (IN RE GRAND JURY SUBPOENA SERVED ON MESERVE)*

I. INTRODUCTION

In *United States v. Janet Greeson's A Place For Us (In re Grand Jury Subpoena Served on Meserve)*, the Ninth Circuit addressed an issue of first impression, namely whether a grand jury subpoena requesting certain information would prevail over a validly issued civil protective order sealing that same information.¹ The court adopted the Fourth and Eleventh Circuits' per se rule that a grand jury subpoena automatically prevails over a validly issued protective order, and relied on their reasoning to reject the Second Circuit's test that balances competing interests under the specific facts of each case.²

1. *United States v. Janet Greeson's A Place For Us (In re Grand Jury Subpoena Served on Meserve, Mumper & Hughes)*, 62 F.3d 1222, 1223 (9th Cir. 1995) [hereinafter "Janet Greeson's APFU"]. See *infra* notes 236-52 and accompanying text for a discussion of the Ninth Circuit case.

2. *Id.* at 1226; See *Martindell v. IT&T*, 594 F.2d 291 (2d Cir. 1979) (the *Martindell* test establishes a rebuttable presumption against modifying a protective order. The government can meet its burden and rebut this presumption using the specific facts of the case to establish improvidence in the grant of the order, ex-

By adopting the per se rule based on the Fourth and Eleventh Circuits' discussion of the issue without adding any original analysis, the Ninth Circuit also adopted the problems present in the Fourth and Eleventh Circuits' opinions.³ Specifically, these courts weighed the competing interests in the abstract and declined to establish a presumption to modify or uphold a protective order.⁴ To resolve these problems, the Ninth Circuit could have weighed the competing interests, established a presumption, and then permitted the party with the burden to overcome the presumption by showing that the initial balance of competing interests should be altered under the specific facts of the case.⁵ Instead, the Ninth Circuit adopted the Fourth and Eleventh Circuits' rejection of a balancing test in favor of a non-rebuttable presumption in the form of a per se rule that permits the government unbridled access to civil discovery material that litigants wanted kept confidential.⁶

This comment compares the Fourth, Eleventh, and Ninth Circuits' per se rule with the Second Circuit's balancing approach. It concludes that the courts adopting the per se rule made unwarranted findings by overstating the reach of protective orders by construing them as improper "de facto" grants of immunity.⁷ The courts also understated the retained power of

traordinary circumstances, or a compelling need.). See *infra* notes 253-66 and accompanying text for a discussion of Ninth Circuit's analysis.

3. See *Janet Greeson's APFU*, 62 F.3d at 1226 (based on the Fourth and Eleventh Circuits' discussion of the "various factors," the Ninth Circuit adopted the per se rule). See *infra* notes 253-66 and accompanying text for a discussion of the Ninth Circuit's analysis.

4. *In re Grand Jury Subpoena*, 836 F.2d 1468, 1478 (4th Cir. 1987), *cert. denied*, 487 U.S. 1240 (1988); *Grand Jury Proceeding (Billy J. Williams, GJ88-1)* [hereinafter "Williams"] v. United States, 995 F.2d 1013, 1017 (11th Cir. 1993). See *infra* notes 165-235 and accompanying text discussing Fourth and Eleventh Circuits' cases.

5. See *Martindell*, 594 F.2d at 296 (establishes a presumption and then permits the burdened party to overcome the presumption by demonstrating improbvidence in the grant of the order, a compelling need, or an extraordinary circumstance).

6. See *Janet Greeson's APFU*, 62 F.3d at 1226 (the Ninth Circuit adopted the Fourth and Eleventh Circuits' arguments); *Grand Jury Subpoena*, 836 F.2d at 1479 (Sprouse J. dissenting) (the per se rule permits the government unbridled access to protected discovery material). See *infra* notes 257-63 and accompanying text for a discussion of the Ninth Circuit's adoption of the per se rule.

7. See *Janet Greeson's APFU*, 62 F.3d at 1226 (the Ninth Circuit adopted the

a grand jury by declining to recognize that even when a protective order exists, a grand jury can still call witnesses, have a court compel testimony, or use leaked information for prosecution even though it is sealed.⁸ Further, these courts could have applied a balancing approach without experiencing the problems they suggest such an approach creates.

II. BACKGROUND

To determine whether a grand jury subpoena prevails over a civil protective order, a court must weigh the competing interests served by grand juries and protective orders.⁹ This background section reviews the relevant history and purpose of grand juries and protective orders under the Federal Rules of Civil Procedure (hereinafter "FRCP"). This overview should assist the reader in understanding the competing policies discussed by the courts of appeal.

A. DISCOVERY AND PROTECTIVE ORDERS UNDER THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 1 of the FRCP states that the rules "shall be construed to secure the just, speedy and inexpensive determination of every action."¹⁰ Protective orders, as authorized under Rule 26(c), must be construed to secure these goals.¹¹ Protec-

Fourth and Eleventh Circuits arguments). *Grand Jury Subpoena*, 836 F.2d at 1475; *Williams*, 995 F.2d at 1017-18 (courts overstated reach of protective orders). See also *infra* notes 301-323 and accompanying text for a discussion and critique of courts' finding that protective orders are equal to immunity.

8. *Martindell*, 594 F.2d at 296; *Grand Jury Subpoena*, 836 F.2d at 1480 (Sprouse J. dissenting) (courts understated the retained power of the grand jury). See also *infra* notes 317-322 and accompanying text for a discussion of the distinction between protective orders and immunity. See generally, Robert Heidt, *The Conjuror's Circle*, 91 YALE L.J. 1062, 1095-96 (1982) (discussing problems and proposed solutions including the use of protective orders, when a civil litigant asserts his Fifth Amendment right against self-incrimination).

9. *Martindell v. IT&T*, 594 F.2d 291, 295-96 (2d Cir. 1979); *In re Grand Jury Subpoena*, 836 F.2d 1468, 1471 (4th Cir. 1988).

10. FED. R. CIV. P. 1. The relevant part of Rule 1 states "These rules . . . shall be construed and administered to secure the just, speedy and inexpensive determination of every action." *Id.*

11. FED. R. CIV. P. 1, 26(c). Protective orders were moved to Rule 26(c) when the 1970 amendments made Rule 26 the general rule for all discovery. 8 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2003

tive orders promote the “just” determination of actions by safeguarding parties and witnesses against the almost unlimited right of discovery found in Rule 26(b)(1).¹² As discovery rules have become more liberal over time, the role of protective orders has broadened. In this section, Rule 1’s interest in a “just” determination establishes the role of protective orders to pro-

(1994). The full text of Rule 26(c) reads as follows:

Upon motion by a party or by the person from whom discovery is sought, accompanied by a certificate that the movant in good faith has conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the disclosure or discovery not be had; (2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters; (5) that the discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

FED. R. CIV. P. 26(c).

12. 8 WRIGHT & MILLER, *supra* note 11, § 2036 (citing *United States v. Columbia Broadcasting System*, 666 F.2d 364, 369 (9th Cir. 1982)). The scope of discovery is defined generally in Rule 26(b)(1) as follows:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

FED. R. CIV. P. 26(b)(1).

tect parties and witnesses from discovery abuse. Next, this section establishes how protective orders promote the “speedy and inexpensive” policy of Rule 1. Finally, Rule 26(c)’s requirement that the moving party demonstrate “good cause” before a court issues a protective order will be discussed.

1. Policy Interest in Furthering “Just” Resolution of Disputes

Prior to adoption of the FRCP, parties in civil litigation had no duty to disclose facts or evidence to the opposing party.¹³ The Supreme Court significantly broadened parties’ rights to discovery by adopting the FRCP in 1938.¹⁴ Originally, FRCP provisions regarding the scope of discovery applied only to depositions.¹⁵ In 1970, amendments expanded Rule 26, governing the scope of discovery, to become a general rule applicable to all discovery devices.¹⁶ However, in 1948, the FRCP expanded the scope of discovery further to apply to interrogatories and requests for admissions.¹⁷ Since protective orders modify the scope of discovery, they were also expanded and logically combined in the 1970 amendments within Rule 26.¹⁸

After The Supreme Court adopted the FRCP and its subsequent amendments, courts followed the Supreme Court’s direction that “the discovery provisions are to be applied as broadly and liberally as possible” to enable parties “to obtain the fullest possible knowledge of the issues and facts before trial.”¹⁹

13. Alexander Holtzoff, *Origin and Sources of the Federal Rules of Civil Procedure*, 30 N.Y.U. L. REV. 1057, 1060 (1955).

14. *Id.* The scope of discovery broadened to allow discovery of anything that might conceivably help in preparing the case. Arthur Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 447 (1991).

15. 8 WRIGHT & MILLER, *supra* note 11, § 2007. Courts applied the Rule 26 definition of scope to production and interrogatories. *Id.* This result was codified in 1948. *Id.*

16. 8 WRIGHT & MILLER, *supra* note 11, § 2003. The 1970 amendments also added trade secrets and other confidential commercial information to information that could be sealed under a protective order. FED. R. CIV. P. 26(c)(7). The advisory committee notes acknowledge that this codified standard practice. 8 WRIGHT & MILLER, *supra* note 11, § 2043.

17. Miller, *supra* note 14, at 450 n.116.

18. 8 WRIGHT & MILLER, *supra* note 11, §§ 2003, 2007. The consolidation also allowed judges to manage the discovery process more effectively. Miller, *supra* note 14, at 452.

19. Richard L. Marcus, *Myth and Reality in Protective Order Litigation*, 69

Under this liberal policy, parties could no longer object to discovery on the basis that the information sought was irrelevant or that opposing counsel was on a "fishing expedition."²⁰ Concern over litigants' abuse of liberal discovery resulted in proposals for further amendments.²¹ Subsequent amendments did not alter the scope of discovery, but the 1983 amendments gave courts responsibility for monitoring discovery.²² Because Congress was unable to form a rule to govern all the situations that might require limits on discovery, it left the responsibility to the trial judge to decide what, if any, restrictions might be warranted in a particular case.²³

CORNELL L. REV. 1, 7 (1983) (quoting *Hickman v. Taylor*, 329 U.S. 495, 506 (1947)).

20. See 8 WRIGHT & MILLER, *supra* note 11, § 2007 (expansion of Rule 26 and cases cited regarding scope of discovery).

21. Miller, *supra* note 14, at 453 (proposals included requests for tighter control over the discovery process and more effective judicially applied remedies); See also 8 WRIGHT & MILLER, *supra* note 11, § 2003.1. The ABA advisory committee's draft proposal for limiting the scope of discovery was criticized. A memorandum by the Chairman of the advisory committee on the civil rules stated that

Many believe the present rule is working well. A number disputed the assumption that there was general abuse of discovery. . . . It was objected that discovery could not be restricted to issues because one of the purposes of discovery was to determine issues Many commentators feared that if discovery were restricted to issues or claims or defenses there would be a return to detailed pleading or a resort of 'shotgun' pleading, with multitudes of issues, claims and defenses, leading to an increase in discovery motions without any reduction in discovery.

8 WRIGHT & MILLER, *supra* note 11, § 2003.1 n.12 (quoting a memorandum from Judge Walter R. Mansfield to Judge Roszel Thomsen (June 14, 1979), *reprinted in* 85 F.R.D. 538). A revised draft was criticized for not going far enough to curb discovery abuse, but no rule could be formed to deal with all the situations that may require limitations on discovery or to identify what types of limitations should be imposed in those specific cases. 8 WRIGHT & MILLER, *supra* note 11, §§ 2003.1, 2036.

22. Fed. R. Civ. P. 26(b)(1). Four years earlier, the Supreme Court held that discovery, like all of the FRCP, is subject to Rule 1 and that district courts should not neglect their Rule 26(c) power to restrict discovery and protect parties from annoyance, embarrassment, oppression, or undue burden or expense. *Hervert v. Lando*, 441 U.S. 153, 177 (1979); Miller, *supra* note 14, at 456 (amendments reflected judgment that primary problem with discovery was judicial hesitancy to seize control of the process).

23. 8 WRIGHT & MILLER, *supra* note 11, §§ 2003.1 n.15, 2036 (includes cited cases that establish trial court's discretion). Rule 26 lists eight kinds of protective orders, but a judge may be inventive in making an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. 8 WRIGHT & MILLER, *supra* note 11, § 2036.

Broad discovery was intended to improve the dispute resolution system, not to undermine parties' rights and privileges.²⁴ Nevertheless, the expanded scope of discovery, and the increased information this change generated, posed threats to privacy and confidentiality.²⁵ As a result, amendments to the FRCP fashioned protective orders as a trade-off between maintaining liberal discovery and protecting both individual and societal rights and privileges.²⁶

If a party is denied discovery because the court is unable to fashion a protective order inducing a deponent to waive a claimed privilege, individuals and society are harmed.²⁷ Protective orders can prevent harm to individuals by restricting the dissemination of private or confidential information.²⁸ Protective orders can also prevent societal harm that occurs when a party refuses to resort to the courts or settles a case to avoid producing information she does not want made public.²⁹ Additionally, protective orders reduce harm to society that occurs when parties unnecessarily contest discovery or fail to disclose all the information they have.³⁰

2. Policy Interest in Efficient Resolution of Disputes

Protective orders serve the policy interest of efficient dispute resolution because they restrict the dissemination of discovery material reducing the likelihood that information will be misused.³¹ Protective orders are well suited to alleviating protected parties' fear of disclosure by managing the flow of

24. Miller, *supra* note 14, at 466; *see also* Marcus, *supra* note 19, at 6 (the intrusive and burdensome nature of discovery is the most cited objection to litigation); *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 (1984) (sole purpose of liberal discovery is for preparation of trial or settlement of litigated disputes).

25. Miller, *supra* note 14, at 447; *Seattle Times*, 467 U.S. at 34-36 (the court recognized privacy as a right implied in Rule 26(c) and authorized the grant of protective orders).

26. Miller, *supra* note 14, at 441 (quoting *Seattle Times*, 467 U.S. at 34).

27. Marcus, *supra* note 19, at 21.

28. *Seattle Times*, 467 U.S. at 34-35.

29. Miller, *supra* note 14, at 446; *Seattle Times*, 467 U.S. at 36 n.22 (The United States Supreme court agreed with the Washington State Supreme Court that unimpeded access to the courts is an important interest.).

30. *Id.* at 446, 483; Marcus, *supra* note 19, at 21.

31. *See* Miller, *supra* note 14, at 446, 483.

information to litigants while minimizing potential discovery abuse.³² One judge noted that he was “unaware of any case in the past half-dozen years of even a modicum of complexity where an umbrella protective order . . . has not been agreed to by the parties and approved by the court.”³³ Parties and courts often stipulate to umbrella protective orders to avoid the expense and delay of debating detailed provisions.³⁴

In addition to protecting rights, protective orders reduce the burden on courts by resolving discovery disputes and enabling litigants to proceed with litigation.³⁵ Placing limitations on the court’s ability to issue protective orders would undermine the traditional discovery premise that “the need for the information is held paramount.”³⁶

Commentators and judges have identified that settlement is a legitimate and desirable goal, and recognize that far more cases are settled than tried.³⁷ Protective orders play an important role in meeting this goal since making information available can increase the likelihood of settlement.³⁸ Regarding the public’s right to sealed information, the Supreme Court held that, since protective orders serve a substantial governmental interest in curbing discovery abuse, restricting access to discovery material does not violate any First Amendment right.³⁹ The court stated that “[p]retrial depositions and interrogatories are not public components of a civil trial.”⁴⁰ Further, although a judge can vacate or modify a protective order, they remain actual restraints on discovery.⁴¹ The judge controls the level of access a party has to protected information, and can issue

32. *See id.*; *Seattle Times*, 467 U.S. at 35-36.

33. Marcus, *supra* note 19, at 9 (quoting *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 889 (E.D. Pa. 1981)).

34. *Id.*

35. *Id.* at 18.

36. Marcus, *supra* note 19, at 21 (quoting *Covey Oil Co. v. Continental Oil Co.*, 340 F.2d 993 (10th Cir. 1965)).

37. Marcus, *supra* note 19, at 27.

38. *Id.*

39. *Seattle Times*, 467 U.S. at 35-36.

40. *Id.* at 33. The court elaborated that “[d]iscovery rarely takes place in public. Depositions are scheduled at times and places most convenient to those involved. Interrogatories are answered in private.” *Id.* at 33 n.19.

41. Marcus, *supra* note 19, at 18-19.

additional restrictions regarding any modification.⁴²

3. "Good Cause" as a Prerequisite to Issuing a Protective Order

To request a Rule 26(c) protective order, a moving party must show "good cause" for her motion.⁴³ The outcome of a motion to modify or vacate a protective order is likely to depend on whether there is or was "good cause" for the order.⁴⁴ However, the FRCP does not define "good cause."⁴⁵ The Second Circuit used "improvidence" as a measure of the necessary "good cause."⁴⁶ Other courts, including the Supreme Court, have found that "good cause" is satisfied if the order curbs discovery abuse.⁴⁷ Using either of these tests, the "good cause" requirement has not created an insurmountable barrier to upholding a protective order.⁴⁸

42. FED. R. CIV. P. 26(c); Marcus, *supra* note 19, at 18-19; Miller, *supra* note 14, at 435 n.23 (citing 8 WRIGHT & MILLER § 2043 and quoting Justice Holmes' classic statement:

It will be understood that if in the opinion of the trial judge, it is or should become necessary to reveal the secrets to others, it will rest in the judges discretion to determine whether, to whom, and under what precautions, the revelation should be made.

E.I. Du Pont de Nemours Powder Co. v. Masland, 244 U.S. 100, 103 (1917)).

43. FED. R. CIV. P. 26(c) (a court may grant a protective order limiting, eliminating, or shielding discovery from public disclosure upon a showing of good cause.).

44. See generally, Jacqueline S. Guenego, *Trends in Protective Orders Under Federal Rule of Civil Procedure 26(c): Why Some Cases Fumble While Others Score*, 60 FORDHAM L. REV. 541 (1991) (discussing methods for obtaining protective orders and the validity of each).

45. See FED. R. CIV. P. 26(c).

46. See *Palmieri*, 779 F.2d at 865-66 (defining improvidence as when the order should not have been granted because it would facilitate or further criminal activity).

47. See *Seattle Times*, 467 U.S. at 35-36 (the purpose of protective orders is to curb abuse stemming from liberal discovery. An order protecting privacy establishes good cause and is sufficient to overcome a First Amendment challenge.); see also Guenego, *supra* note 44, at 563, 569-71 (discussing what has constituted "good cause").

48. Guenego, *supra* note 44, at 569-71.

B. HISTORY OF THE GRAND JURY'S POWER

Historians trace the grand jury to 1166, the year of King Henry II's Assize of Clarendon.⁴⁹ In creating a grand jury, the King did not intend to create a shield for citizens.⁵⁰ Instead, he established the grand jury as a weapon against the church and feudal barons.⁵¹ An accusation by the Grand Assize instigated a "trial by ordeal."⁵² In 1215, trial by ordeal was abolished, but the accused was still tried by his accusers.⁵³ Secrecy of deliberations and jurors separate from those who had accused the defendant did not become common practice until the middle of the fourteenth century.⁵⁴ The modern concept of the grand jury as a protector of citizens against unfounded charges and oppressive government did not substantially emerge until 1681.⁵⁵

Early colonists brought the grand jury concept to the United States.⁵⁶ The Founders incorporated the role of the grand jury in the Constitution.⁵⁷ According to the Supreme Court, grand juries were "to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes."⁵⁸ The grand jury serves as the citizens' primary security against the possibility of hasty, malicious or oppres-

49. MARVIN E. FRANKEL AND GARY P. NAFTALIS, *THE GRAND JURY* 6 (1977).

50. *Id.* at 7.

51. *Id.*

52. *Id.* Four methods of trial by ordeal were available; all very similar in result. One method involved throwing the accused into water. If he sank he was innocent, but if he swam he would be found guilty. *Id.*

53. *Id.* at 9. Grand juries were still likely to find defendants guilty since royal judges could fine and imprison jurors who attempted to acquit. *Id.*

54. *Frankel, supra* note 49 at 9.

55. *Id.* The case of Anthony, Earl of Shaftesbury, and Stephen Colledge established this role for the grand jury. *Id.* King Charles II convened the grand jury against these two vocal Protestants who opposed his attempt to reestablish the Catholic Church in England. *Id.* The grand jury insisted upon secrecy in its proceedings. *Id.* Thus, jurors could not be fined or imprisoned for not returning an indictment. *Id.* The jurors did not return an indictment, however, the King simply convened a second grand jury in the friendlier town of Oxford, which complied with the King's wishes. *Id.* at 9-10.

56. *Costello v. United States*, 350 U.S. 359, 362 (1955).

57. *Id.*

58. *Id.* Historically, grand jurors were noted to be "neither accusers, nor witnesses exactly; they simply give voice to common repute." *Wood v. Georgia*, 370 U.S. 375, 390 (1962).

sive prosecution.⁵⁹ However, the grand jury is also an important instrument of effective law enforcement, which requires extensive and thorough investigations to serve society's interest in determining whether a crime has been committed and who committed it.⁶⁰ The Supreme Court identified these conflicting roles finding the grand jury responsible for both determining whether probable cause exists to believe a crime has been committed and protecting citizens from unfounded criminal prosecutions.⁶¹

To adequately determine whether and against whom criminal proceedings should be instituted, the grand jury requires broad investigative powers.⁶² The United States Supreme Court has found this investigative role to be fundamental to secure the safety of citizens and their property.⁶³ Courts look to the grand jury's history to define its scope, because the Supreme Court held that "our constitutional grand jury was intended to operate substantially like its English progenitor."⁶⁴ Regarding the availability of evidence, the Supreme Court held that, like the English, American grand juries can request a court to compel a witness to appear and testify concerning any pending cause or matter.⁶⁵ The court found this "sacrifice" to be a necessary individual contribution for the public's wel-

59. *Wood*, 370 U.S. at 390.

60. *Id.* at 392.

61. *Branzburg v. Hayes*, 408 U.S. 665, 686-87 (1972).

62. *Id.* at 700.

63. *Id.*

64. *Costello*, 350 U.S. at 362. English grand juries were not hampered by evidentiary, procedural, or technical rules and eventually freed themselves from the crown and judges' control. *Id.* As late as 1927, proceedings were held in secrecy and English jurors could act on their own knowledge about the case. *Id.* The modern result is that courts will not challenge indictments on the ground that they are not supported by adequate or competent evidence. *Id.* at 364. In 1955, the United States Supreme Court upheld an indictment based on hearsay. *Id.* at 361. The Supreme Court also approved of an indictment based on evidence obtained in violation of defendant's Fifth Amendment privilege. *Lawn v. United States*, 355 U.S. 339 (1958).

65. *Blair v. United States*, 250 U.S. 273, 278 (1918). As early as 1612, England declared that "all subjects, without distinction of degrees, owe to the King tribute and service, not only of their deed and hand, but of their knowledge and discovery. *Id.* at 279-80. The power of federal courts to compel persons to appear and testify has been well established. *Kastigar v. United States*, 406 U.S. 441 (1972). The Supreme Court has also recognized the obligation of every citizen to testify. *Blackmer v. United States*, 284 U.S. 421, 438 (1932); *United States v. Bryan*, 339 U.S. 323, 331 (1950).

fare.⁶⁶ The Supreme Court also held that the duty to testify is so necessary to the administration of justice that an individual's burden, embarrassment, injury to economic and social status, and interest in privacy must yield to the overriding public interest in full disclosure.⁶⁷ The court further held that "the inquisitorial function of the grand jury and the compulsion of witnesses were recognized as incidents of the judicial power of the United States."⁶⁸

To protect the grand jury's power, courts have rejected numerous challenges to its authority.⁶⁹ For example, the Supreme Court held that a grand jury subpoena is not a search and seizure within the definition of the Fourth Amendment; therefore, the Fourth Amendment's protection from governmental intrusion of privacy does not apply to grand jury subpoenas.⁷⁰ The Supreme Court has also refused to issue any holding that interferes with a grand jury's effective and expeditious discharge of its duties.⁷¹

However, a grand jury's broad investigative powers are not absolute, and a valid claim of privilege may prevent the grand jury from obtaining evidence.⁷² The grand jury has no absolute right to information if a party invokes a valid privilege.⁷³ Privileges include the right against self-incrimination, the attorney-client, clergy-penitent and other recognized statutory

66. *Blair*, 250 U.S. at 281.

67. *United States v. Calandra*, 414 U.S. 338, 345 (1973) (quoting *Blair*, 250 U.S. at 281).

68. *Blair*, 250 U.S. at 280.

69. See Frankel, *supra* note 49, at 20-23.

70. *United States v. Dionisio*, 410 U.S. 1, 10 (1973) (quoting *Fraser v. United States*, 452 F.2d 616, 620 (7th Cir. 1971)). However, if the subpoena is "far too sweeping to be reasonable," it may be invalid under the Fourth Amendment. *Hale v. Henkel*, 201 U.S. 43, 76 (1906). But, a subpoena covering twenty-one years was upheld despite the fact that an earlier subpoena covering only ten years had kept twenty-six men working for two months to produce the records. Frankel, *supra* note 49, at 21 (quoting *Petition of Borden Co.*, 75 F. Supp. 857 (N.D. Ill. 1948)).

71. *Calandra*, 414 U.S. at 350. Arguments that create litigation prior to the grand jury gaining access, including preliminary showings, probably would interfere. *Id.*

72. See generally 1 SARA S. BEALE ET AL, FEDERAL GRAND JURY PRACTICE AND PROCEDURE § 6:01 (1986) (discussing grand jury's investigative authority and right to evidence).

73. PAUL S. DIAMOND, FEDERAL GRAND JURY PRACTICE AND PROCEDURE § 7 (2d ed. 1993).

privileges.⁷⁴ However, a grand jury may have some conditional or limited right to the information.⁷⁵ In addition to a claim of privilege, the following subsection demonstrates that a court order can also limit the grand jury's broad investigative powers.

C. THE COURT'S AUTHORITY REGARDING GRAND JURIES

Although a grand jury is independent in many ways, it formally and technically remains an appendage of the court.⁷⁶ Since courts control and supervise subpoenas, a grand jury relies completely on an overseeing court for its investigative powers.⁷⁷ Only a court order, not a grand jury, can compel a witness to appear and testify.⁷⁸ Additionally, if a subpoena is challenged, a grand jury must obtain a judicial ruling before it can exert its force.⁷⁹ Courts also limit grand jury investigations by denying the grand jury subpoenas when it clearly exceeds its historic authority or indiscriminately summons witnesses with no articulable objective.⁸⁰

Recognizing that indictments are generally not challenged, Judge Kennedy wrote "where the prosecutor has the clear purpose to enter a privileged area and it is demonstrated that there is a high potential for violation of the privilege, a court is not required to defer relief until after issuance of the indictment."⁸¹ The holding cited a Supreme Court decision approving of a protective order that limited the questions the grand jury could ask confirming that the judiciary has authority to

74. *Id.*

75. Frankel, *supra* note 49, at 20 (a witness' Fifth Amendment claim may be overcome by a grant of immunity). A privilege under the Right to Financial Privacy Act, 12 U.S.C. §§ 3401-22, will limit the grand jury's use of the information. DIAMOND, *supra* note 73, § 7.07. In cases involving protective orders, the privilege has generally been waived, but these examples show the grand jury's power in overcoming the policies behind privileges. *Id.*

76. *Brown v. United States*, 359 U.S. 41, 49 (1958).

77. *Dionisio*, 410 U.S. at 10.

78. *Id.*

79. Frankel, *supra* note 49, at 20.

80. BEALE, *supra* note 72, § 4.01(D) n.69 (citing 1 FGJP at 72 (quoting *Hale*, 201 U.S. 43, 63 (1906))).

81. *In re Grand Jury Investigation of Huggle*, 754 F.2d 863, 865 (9th Cir. 1985).

limit grand jury investigations under some circumstances.⁸² The Supreme Court also recognized a district court's authority over the grand jury by holding judicial supervision proper to prevent a wrong before it occurs if a grand jury seeks to invade a valid privilege.⁸³

III. CIRCUIT COURT CASES REGARDING WHETHER A GRAND JURY SUBPOENA PREVAILS OVER A CIVIL PROTECTIVE ORDER

Prior to the Ninth Circuit's decision in *United States v. Janet Greeson's A Place For Us (In re Grand Jury Subpoena Served on Meserve, Mumper & Hughes)*,⁸⁴ three circuits, the Second,⁸⁵ Fourth,⁸⁶ and Eleventh,⁸⁷ had considered whether to allow the government access to sealed civil discovery material for a criminal investigative purpose. The historic and broad powers of the grand jury to obtain all evidence necessary for fair indictment, and the purpose of protective orders in facilitating the civil system's process, were briefly considered by the courts.⁸⁸ The Second Circuit found that the interests served by protective orders outweigh the public's interest in having access to the sealed material.⁸⁹ It established a presumption to uphold protective orders unless the government could demonstrate improvidence in the grant of the protective order, some extraordinary circumstance, or a compelling need.⁹⁰ The

82. *Id.* (citing *Gravel v. United States*, 408 U.S. 606 (1972)). The court issued the protective order to protect a Congressional privilege regarding legislative process. *Gravel*, 408 U.S. at 628-29. BEALE, *supra* note 72, § 4.01(D).

83. *Calandra*, 414 U.S. at 346.

84. 62 F.3d 1222 (9th Cir. 1995).

85. *Martindell v. IT&T*, 594 F.2d 291 (2d Cir. 1979); *United States v. Davis*, 702 F.2d 418 (2d Cir. 1983), *cert. denied*, 463 U.S. 1215 (1983); *Palmieri v. New York*, 779 F.2d 861 (2d Cir. 1985); *Andover Data Services v. Statistical Tabulating Corp.*, 876 F.2d 1080 (2d Cir. 1989); *In re Grand Jury Subpoena Deuces Tecum*, 945 F.2d 1221 (2d Cir. 1991).

86. *In re Grand Jury Subpoena*, 836 F.2d 1468 (4th Cir. 1987), *cert. denied*, 487 U.S. 1240 (1988).

87. *Williams v. United States*, 995 F.2d 1013 (11th Cir. 1993).

88. *Martindell*, 594 F.2d at 295-96; *Palmieri*, 779 F.2d at 864; *Grand Jury Subpoena*, 836 F.2d at 1471; *Grand Jury Subpoena Deuces Tecum*, 945 F.2d at 1224; *Williams*, 995 F.2d at 1014.

89. *Martindell*, 594 F.2d at 296. See *infra* notes 98-109 and accompanying text for a discussion of *Martindell*.

90. *Id.* (the rebuttable presumption to uphold a protective order, which places

Fourth and Eleventh Circuits rejected the Second Circuit's approach by adopting a per se rule that grand jury subpoenas automatically prevail over validly issued protective orders.⁹¹ The Ninth Circuit, after a cursory discussion, rejected the Second Circuit's balancing approach relying almost exclusively on the Fourth and Eleventh Circuits' opinions to adopt their per se rule.⁹² This section reviews the relevant cases in these four circuits.

A. THE SECOND CIRCUIT

The Second Circuit has addressed more cases regarding grand juries subpoenaing sealed civil discovery material than any other circuit.⁹³ The five relevant Second Circuit cases are presented in chronological order and illustrate three primary points. First, the Second Circuit balanced the competing policy interests and established a rebuttable presumption to uphold protective orders against grand jury subpoenas.⁹⁴ Second, the court developed a test to allow the government to rebut this presumption.⁹⁵ The Second Circuit cases, taken as a whole, define this test and demonstrate its application to specific facts of a case. Third, these cases demonstrate that the Second Circuit has considered and dismissed the relevant issues raised later by courts adopting a per se rule in place of a balancing test.⁹⁶

the burden on the government to show improvidence in the grant of the order, a compelling need, or an extraordinary circumstance, is referred to as the *Martindell* test.). See *infra* notes 107-09 and accompanying text discussing the presumption.

91. *Grand Jury Subpoena*, 836 F.2d at 1477-78; *Williams*, 995 F.2d at 1017, 1020.

92. *Janet Greeson's APFU*, 62 F.3d at 1226-27. See *infra* notes 253-66 and accompanying text for a discussion of the Ninth Circuit's analysis.

93. Compare, *In re Grand Jury Subpoena Deuces Tecum*, 945 F.2d 1221 (2d Cir. 1991) (discussing five relevant Second Circuit cases) with *In re Grand Jury Subpoena*, 836 F.2d 1468 (4th Cir. 1987) (case of first impression) and *Williams*, 995 F.2d 1013 (case of first impression).

94. *Martindell*, 594 F.2d at 295-96.

95. *Id.* at 296.

96. See *Andover*, 876 F.2d at 1083-84 (protective orders cannot be "de facto" grants of immunity); see also *Palmieri*, 779 F.2d at 865 (rejected Fourth Circuit's per se rule).

1. Establishing a Presumption and a Test to Rebut it:
Martindell v. IT&T

In *Martindell v. IT&T*,⁹⁷ the Second Circuit became the first federal appellate court to address the government's attempt to gain access to sealed civil discovery material for use in a criminal investigation.⁹⁸ The government sought access to written discovery material sealed under a protective order resulting from a court approved settlement.⁹⁹ The government requested access to the sealed information by calling and sending a letter to the district judge rather than issuing a grand jury subpoena or intervening and moving to modify the order.¹⁰⁰

In *Martindell*, the Second Circuit held that the FRCP's goal, to "secure the just, speedy, and inexpensive determination" of civil disputes, is "the cornerstone of our civil justice administration."¹⁰¹ The court also held that protective orders serve this goal by encouraging full disclosure of all relevant information.¹⁰² If parties could not rely on protective orders to keep privileged information from the government, they would not waive their privilege and offer this information.¹⁰³ Therefore, protective orders would no longer promote efficiency.¹⁰⁴ The court also recognized the public's interest in permitting law enforcement agencies access to all relevant evidence.¹⁰⁵ In weighing this countervailing factor, the court noted District Court Judge Frankel's prior finding that the gov-

97. 594 F.2d 291 (2d Cir. 1979).

98. *Id.* The charges included perjury and conspiracy. *Id.* at 293. However, the court never reached the issue of whether the government could obtain this information for perjury charges since the government, in its reply brief, stated that it did not seek the information to prove false statements. *Id.* at 295.

99. *Id.* at 292.

100. *Id.* at 293-94. The Second Circuit found that the district court had granted informal permission to the government to intervene and that the parties had waived any potential objection they may have had to the government's standing. *Id.* at 294.

101. *Martindell*, 594 F.2d at 295 (quoting FED. R. CIV. P. 1).

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 296.

ernment has awesome powers that should make exploitation of civil litigation unnecessary.¹⁰⁶

The Second Circuit concluded that parties' reliance on protective orders increases efficiency in civil litigation, and therefore, presumptively outweighs the government's need for access to discovery produced in private litigation.¹⁰⁷ The court held that "absent a showing of improvidence in the grant of a Rule 26(c) protective order or some extraordinary circumstance or compelling need . . . a witness should be entitled to rely upon the enforceability of a protective order against any third party, including the government."¹⁰⁸ The court further held that protective orders should not be vacated or modified merely to accommodate the government, regardless of whether the material is sought for evidence or a possible perjury charge.¹⁰⁹

2. Creating an Exception to the Presumption by Defining Extraordinary Circumstance: *United States v. Davis*

The Second Circuit revisited the situation of a grand jury subpoenaing a presumably protected deposition transcript and business documents produced during discovery in a bankruptcy proceeding.¹¹⁰ The deponent testified on a condition of an oral, rather than written, agreement that the information would not be made public.¹¹¹ The court distinguished the case from *Martindell* because there was no formal written order or evidence that the deponent testified only in reliance on a prom-

106. *Martindell*, 594 F.2d at 296 (citing *GAF Corp. v. Eastman Kodak*, 415 F. Supp. 129 (S.D.N.Y. 1976)). The court noted that the government could convene a grand jury, subpoena witnesses, and grant immunity if witnesses claimed their Fifth Amendment privileges. *Id.* at n.6.

107. *Id.* at 296. The court expressly stated that it was not deciding whether the government would be entitled to enforcement of a subpoena for the discovery material. *Id.*

108. *Id.*

109. *Id.* The concurrence took an even stricter stance by agreeing with the outcome, but rejecting the balancing test. *Id.* at 297 (Medina J., concurring). The concurrence would vacate or modify a protective order only if it was "improperly or 'improvidently' granted." *Id.*

110. *Davis*, 702 F.2d at 418, *cert. denied*, 463 U.S. 1215 (1983).

111. *Id.* at 422-23.

ise of protection.¹¹² Also, unlike its informal request in *Martindell*, the government had issued a subpoena for the information.¹¹³

Unlike the deposition in *Martindell*, the business documents were protected by a written court order.¹¹⁴ Nevertheless, the Second Circuit permitted the grand jury access to these documents for two reasons not present in *Martindell*. First, the protective order stated that either party could disclose any of its own information to third parties without violating the order.¹¹⁵ Second, the court found that since the documents existed and were not protected by any valid privilege, the grand jury could have subpoenaed the documents prior to the litigation.¹¹⁶ For these reasons, the court held that parties could not keep information from a grand jury by deciding, as private litigants, to withhold the material from the public.¹¹⁷

3. Extension of Test to Grand Jury Subpoenas & Standard for Improbvidence: *Palmieri v. New York*

The Second Circuit subsequently extended the *Martindell* test to situations where the government intervened to modify a protective order or issued a grand jury subpoena for protected material.¹¹⁸ In *Palmieri v. New York*, the magistrate oversee-

112. *Id.* at 422.

113. *Id.* *Martindell* dealt only with the government's informal request for the sealed material, not a grand jury subpoena. *Martindell*, 594 F.2d at 293-94.

114. *Davis*, 702 F.2d at 423.

115. *Id.* The party could choose to give information to the grand jury and therefore the party, not the protective order, would actually prevent the grand jury access. *See id.*

116. *Davis*, 594 F.2d at 423. *Davis* limited *Martindell* by only protecting litigants that specifically rely upon a written and validly issued protective order. *See id.* The court also recognized that the scope of protective orders may be limited. *Id.* In addition, only information produced during litigation or which would not otherwise have been available to a grand jury is protected. *Id.*

117. *Id.* The court analyzed this case under *Martindell*, but did not explicitly call the factual situations on which they based modification of the orders, an extraordinary circumstance. *See id.* However, the court found that specific facts in this case, which distinguished it from *Martindell*, warranted modifying the order. *Id.* at 422-23. Hence, the author construes this case as one example implicitly defining the term "extraordinary circumstance."

118. *Palmieri*, 779 F.2d at 863.

ing pre-trial discovery in the prior civil action issued the protective order as part of a settlement agreement and noted that the parties had given information in reliance upon the protective order.¹¹⁹ The protective order expressly prohibited disclosure of the information to anyone, including the government.¹²⁰ Nevertheless, the government moved to modify the protective order to gain access to the information.¹²¹ While the motion was pending, the government issued a grand jury subpoena for the documents.¹²²

In its analysis, the Second Circuit considered the competing interests of the grand jury's need to gather evidence for criminal investigations and the district court and civil litigants' desire to facilitate efficient resolution of disputes through negotiated settlements.¹²³ Here, the court found that modifying the order would inhibit efficient resolution of the civil dispute.¹²⁴ The parties substantially relied on the protective order, and meaningful discovery or settlement would have been difficult, if not impossible, without it.¹²⁵ Conversely, the public's interest in permitting the grand jury access to all information would not be significantly harmed by modifying the order, because the information would not have existed but for the protective order.¹²⁶ Additionally, the court found that the government's special investigative powers provide alternative methods of obtaining the information, which justifies imposing a rebuttable presumption against modification.¹²⁷ The govern-

119. *Id.*

120. The magistrate sent two letters to the Attorney General making clear that the protective orders were issued to insulate the information from the government. *Id.* at 864.

121. *Id.* The government had already obtained a copy of a deposition transcript after it was inadvertently filed unsealed. *Id.* Nonetheless, the government also wanted access to the terms of the settlement agreement, motivating its motion to modify the order. *Id.*

122. *Palmieri*, 779 F.2d at 863. The district judge enjoined the government from enforcing the subpoena until the motion for modifying the order had been decided. *Id.*

123. *Id.* at 864.

124. *Id.*

125. *Id.* The court noted that a person's extensive reliance on the protective order renders the government's burden heavier than it might otherwise be and, assuming no improvidence in the grant of the order, the court presumes the order to be proper. *Id.* at 864-65.

126. *Palmieri*, 779 F.2d at 865.

127. *Id.* at 866.

ment can overcome this presumption by showing that no reasonable alternative exists.¹²⁸

The Second Circuit remanded the case for resolution of two issues. First, the district court had made insufficient findings to determine whether a compelling need or extraordinary circumstance overcame the government's burden.¹²⁹ The second remanded issue was whether the order had been granted improvidently.¹³⁰ The Second Circuit held that "if, at the time he issued the sealing orders, the magistrate should have recognized that the settlement would likely further criminal activity, then he acted improvidently in granting those orders."¹³¹

4. Protective Order is not a "De Facto" Grant of Immunity: *Andover Data Services v. Statistical Tabulating Corporation*

The Second Circuit reviewed a case in which a district court issued a protective order to compel testimony from a witness claiming his Fifth Amendment right against self-incrimination.¹³² The Second Circuit recognized that a protective order is not equal to a grant of immunity.¹³³ The Second Circuit held that witnesses exercising a Fifth Amendment right cannot be compelled to testify because civil courts have no means to fashion a sufficiently durable safeguard to fully protect the witness.¹³⁴

128. *Id.*

129. *Id.* at 866.

130. *Id.* at 865-66.

131. *Palmieri*, 779 F.2d at 865. The New York State Attorney General had previously filed affidavits in state court alleging that earlier settlements with certain defendants to this civil suit involved "unusual and possibly unlawful circumstances." *Id.* at 863. However, the district court stated that "the magistrate, while acting in good faith . . . should not have entered sealing orders . . .", *Palmieri v. DIC Concrete*, 81 Civ. 6217 (Tr. May 28, 1985) at 23-24, *cited in id.* at 865, the appellate court held this was not a proper finding of improvidence. *Palmieri*, 779 F.2d at 865. Instead, the court held the relevant inquiry was whether the official reasonably should have recognized a substantial likelihood that the settlement would facilitate or further criminal activity. *Id.* at 865-66.

132. *Andover*, 876 F.2d at 1081.

133. *Id.* at 1082-84.

134. *Id.* at 1084.

The Second Circuit followed the Supreme Court's rule that a witness may invoke the right against self-incrimination in any civil, criminal or administrative proceeding so long as a reasonable basis for asserting the right exists.¹³⁵ The rule further states that district courts may not compel a witness in a civil case to testify over a valid assertion of her Fifth Amendment right.¹³⁶ Based on this authority, the Second Circuit held that only a grant of statutory immunity is sufficiently co-extensive with the scope of the Fifth Amendment to abridge the fundamental right against self-incrimination.¹³⁷

Since a court can overturn or modify a protective order, the Second Circuit found its protection to be more limited than a statutory grant of immunity.¹³⁸ The court also recognized that only the Executive Branch has authority to grant a witness immunity.¹³⁹ The court concluded that the distinction between protective orders and immunity would disappear if courts could compel testimony based on protective orders.¹⁴⁰ A protective order construed in this manner "might very well amount to an impermissible 'de facto' grant of immunity," which the court would have to reject.¹⁴¹

The Second Circuit expressed that this decision did not abrogate the *Martindell* line of cases, and distinguished them based on whether the witness had voluntarily consented to testify.¹⁴² When a witness asserts her right against self-in-

135. *Id.* at 1082 (citing *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972)). A witness' reasonable belief that his testimony may be used for criminal prosecution or may lead to evidence that might be so used is a reasonable basis. *Id.*

136. *Andover*, 876 F.2d at 1082 (citing *Pillsbury Co. v. Conboy*, 459 U.S. 248, 256-57 (1972)).

137. *Id.* at 1083. A grant of immunity displaces a Fifth Amendment privilege because it leaves the witness in substantially the same position as if he had never testified. *Id.* (citing *Kastigar*, 406 U.S. at 458-59 (quoting *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 79 (1964))).

138. *Id.* (citing *Martindell* line of cases).

139. *Id.* at 1084.

140. *Andover*, 876 F.2d at 1084.

141. *Id.* The court cited the Fourth Circuit's decision, *Grand Jury Subpoena*, 836 F.2d at 1475, to support its finding that protective orders are an impermissible judicial grant of immunity when they deny access to the government for use in a criminal proceeding. *Id.* However, the Second Circuit declined to follow the general application of the Fourth Circuit's rule, holding that the present decision did not abrogate the *Martindell* line of cases. *Andover*, 876 F.2d at 1084.

142. *Id.*

crimination and continues to refuse to testify, as in *Andover*, a court must provide equivalent protection before it can compel testimony.¹⁴³ Therefore, a court's use of a protective order to displace a valid privilege and compel a witness' testimony could be construed as a "de facto" grant of immunity.¹⁴⁴ However, where a witness voluntarily consents to testify under a protective order, the court is under no obligation to assure equivalent protection.¹⁴⁵

5. Affirming *Martindell* and Rejecting the Per Se Rule: *In re Grand Jury Subpoena Deuces Tecum*

In 1991, the Second Circuit affirmed *Martindell* and again expressly rejected the notion of construing a protective order as a "de facto" grant of immunity.¹⁴⁶ A district court appointed an examiner to investigate allegedly fraudulent pre-Chapter 11 transactions.¹⁴⁷ The bankrupt corporation refused to produce documents voluntarily unless they would be kept confidential and used exclusively in the bankruptcy proceeding.¹⁴⁸ The bankruptcy judge issued a protective order to expedite the investigation.¹⁴⁹ Subsequently, the government issued a grand jury subpoena to both the investigator and the corporation, requesting the sealed depositions taken by the examiner during the investigation.¹⁵⁰

Both parties moved to quash the subpoena, but the district court, construing the order as an express agreement to with-

143. *See id.* (protective orders cannot be used to compel testimony when a party claims a valid Fifth Amendment right because only immunity offers equivalent protection).

144. *See id.* (use of a protective order to displace a Fifth Amendment right eliminates any meaningful distinction between a protective order and immunity).

145. *See Andover* 876 F.2d at 1084 (the court's decision does not abrogate the *Martindell* line of cases, which all involved parties *voluntarily* consenting to testify).

146. *Grand Jury Subpoena Deuces Tecum*, 945 F.2d at 1221 (citing *Grand Jury Subpoena*, 836 F.2d at 1475.).

147. *Id.* at 1222.

148. *Id.*

149. *Id.* The creditors believed that the corporation was a wasting asset. *Id.* The judge approved and signed the order stating "the order was in the best interest of the Debtor's estate and the requirements of justice. . . ." *Id.*

150. *Id.* at 1223.

hold information from the government, denied the motions.¹⁵¹ On appeal, the Second Circuit disagreed with the district court's finding that the protective order violated public policy by facilitating concealment of information relevant to the commission of a crime.¹⁵² Since any order may conceal information from the government, the Second Circuit noted that following the district court's ruling might render all protective orders void.¹⁵³ As a result, the Second Circuit upheld its previous decision in *Andover* that protective orders are not grants of immunity because, unlike immunity, the *Martindell* test permits a court to modify protective orders.¹⁵⁴

Additionally, the district court placed the burden on the movants to demonstrate why the subpoena should be quashed, rather than on the government to show improvidence, compelling need, or an extraordinary circumstance as outlined by Second Circuit precedent.¹⁵⁵ Since the district court did not place the burden on the government and "improperly" construed the order, the appellate court remanded the case to allow the district court to apply the *Martindell* test.¹⁵⁶

B. THE FOURTH CIRCUIT: *IN RE GRAND JURY SUBPOENA*

The Fourth Circuit decided only one case regarding whether a grand jury subpoena should prevail over a protective order.¹⁵⁷ The majority stated that the issue involved three interests, but later found one invalid.¹⁵⁸ Of the two remaining interests, the court accorded great weight to the public's in-

151. *Grand Jury Subpoena Deuces Tecum*, 945 F.2d at 1223. The district court held that the order was contrary to the public policy against agreements that conceal information regarding the commission of a crime. *Id.*

152. *Id.* at 1225. The Second Circuit held that *Palmieri* expressed the appropriate test for improvidence. *Id.* See *supra* note 131 and accompanying text for a discussion of the test used to find improvidence.

153. *Id.*

154. *Grand Jury Subpoena Deuces Tecum*, 945 F.2d at 1224-25. The Second Circuit expressly declined to follow the Fourth Circuit's per se rule favoring grand jury subpoenas. *Id.* at 1225.

155. *Id.* at 1224.

156. *Id.* at 1225-26.

157. *In re Grand Jury Subpoena*, 836 F.2d 1468 (4th Cir. 1988).

158. *Id.* at 1471-72. See *infra* notes 170-81 and accompanying text discussing the three interests.

terest in permitting the government access to all information involving criminal investigations.¹⁵⁹ The court also discussed the importance of protective orders in facilitating civil disputes.¹⁶⁰ Rather than developing a test or finding that one interest presumptively outweighs the other, the court concluded that protective orders that shield information from the government serve neither interest because they are improper “de facto” grants of immunity.¹⁶¹ Therefore, the court ruled that a grand jury subpoena should automatically prevail over a protective order.¹⁶² To support this “per se” rule, the Fourth Circuit held that district courts had other means to substitute for protective orders and that a case by case balancing would be ineffective.¹⁶³ The dissent would have followed the Second Circuit’s balancing test.¹⁶⁴

1. The Majority - Creation of the Per Se Rule

The Fourth Circuit’s majority affirmed a district court’s holding that a civil protective order cannot be used to shield discovery materials from a grand jury.¹⁶⁵ During civil discovery, some deponents had expressed concern about giving testimony because of an ongoing grand jury investigation.¹⁶⁶ They moved for a stay of discovery until the grand jury completed its investigation to avoid choosing between incriminating them-

159. *Id.* at 1471, 1474-75. See *infra* notes 171-72 and accompanying text discussing the importance of the grand jury.

160. *Id.* at 1472-73. See *infra* notes 177-81 and accompanying text discussing the importance of protective orders.

161. *Id.* at 1475. See *infra* note 181 and accompanying text for a discussion of court’s finding that protective orders are “de facto” grants of immunity.

162. *Id.* at 1476-77. See *infra* notes 185-88 and accompanying text discussing court’s adoption of the per se rule.

163. *In re Grand Jury Subpoena*, 836 F.2d at 1476-77. See *infra* notes 183-87 and accompanying text discussing support for the rule.

164. *Id.* at 1478-81 (Sprouse J. dissenting). See *infra* notes 189-204 and accompanying text for a discussion of the dissent.

165. *Id.* at 1469. When the State of Maryland put Community Savings and Loan into conservatorship, its parent corporation filed for bankruptcy. *Id.* Subsequently, several mortgage insurers who insured mortgages held by the parent corporation, brought suit against Community, its parent corporation, and others. *Id.* During discovery, some deponents became concerned about giving testimony because of an ongoing grand jury investigation regarding the collapse of Community Savings and Loan. *Id.*

166. *Id.* The investigation concerned the collapse of Community Savings and Loan. *Id.*

selves and asserting their Fifth Amendment rights.¹⁶⁷ Instead of staying discovery, the parties and the deponents agreed to seal the deposition transcripts with a protective order.¹⁶⁸ Subsequently, the grand jury issued subpoenas to the deponents and both parties' attorneys, requesting the sealed deposition transcripts.¹⁶⁹

The Fourth Circuit considered three intersecting interests to resolve this issue of first impression. The three interests were: "[1] the authority of a grand jury to gather evidence in a criminal investigation; [2] the deponents' right against self-incrimination; and [3] the goals of liberal discovery and efficient dispute resolution in civil proceedings."¹⁷⁰ The Fourth Circuit reviewed numerous Supreme Court cases to establish that grand juries have broad constitutional and statutory powers to investigate criminal wrongdoing.¹⁷¹ The Fourth Circuit also pointed to numerous cases holding that courts should not interfere with grand jury investigations.¹⁷²

The Fourth Circuit found deponents' Fifth Amendment rights to be invalid interests because they do "not require, nor may it depend on, the shield of civil protective orders."¹⁷³ The

167. *Id.*

168. *Grand Jury Subpoena*, 836 F.2d at 1469. The order expressly stated that the depositions were "not to be made available to any state or federal investigating agency or authority . . .," and limited use of the information to the proceeding, but allowed for modification of the order. *Id.* at 1469-70.

169. *Id.* at 1469-70.

170. *Id.* at 1471. The district court did not consider the government's argument that the protective order was issued improvidently because it was issued to protect deponent's Fifth Amendment rights. *Id.* The appellate court agreed that this issue was not necessary to decide this case. *Id.* at 1471.

171. *Id.* (citing *Blair v. United States*, 250 U.S. 273, 280, 282 (1919) (sweeping power to compel production of evidence, right to consider all relevant information to determine nature of crime and identity of accused); *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972) (creating a right to all evidence because "the public . . . has a right to every man's evidence"); *United States v. Calandra*, 414 U.S. 338, 343 (1974) (gathering evidence is an essential task "unrestrained by the technical procedural and evidentiary rules. . . ."))

172. *Grand Jury Subpoena*, 836 F.2d at 1471 (citing *United States v. United States Dist. Ct.*, 238 F.2d 713 (4th Cir. 1956), *cert. denied sub nom.*, *Valley Bell Dairy Co. v. United States*, 352 U.S. 981 (1957)) (investigative function not subject to court's direction because of constitutional status); *United States v. Dionisio*, 410 U.S. 1, 16-18 (1973) (court intervention requires a compelling reason).

173. *Grand Jury Subpoena*, 836 F.2d at 1471.

deponents waived their Fifth Amendment rights in reliance on a protective order, but argued that the burden of silence may unduly punish individuals for asserting their Fifth Amendment rights.¹⁷⁴ The Fourth Circuit, relying on Supreme Court precedent, held that the adverse inference a court creates by requiring a party to invoke her Fifth Amendment right is not protected by the Fifth Amendment.¹⁷⁵ The court concluded that only a party's silence or a grant of immunity could eliminate the risk of waiving a Fifth Amendment right against self-incrimination.¹⁷⁶

The third interest was the civil courts' need to facilitate resolution of private disputes.¹⁷⁷ The court recognized that claims of Fifth Amendment privilege can thwart civil litigation.¹⁷⁸ The FRCP authorizes judges to mitigate this problem by issuing protective orders which encourage full disclosure and promote the "just, speedy, and inexpensive determination" of civil disputes.¹⁷⁹ However, the court concluded that, since protective orders cannot eliminate the risk of the information finding its way to the government through leaks, disclosure during trial, or modification of the order, deponents cannot and will not rely on protective orders in their decisions to waive privileges.¹⁸⁰ Further, the court found that the judiciary does not have authority to weigh the various interests, since a finding against the government would be equivalent to an improper "de facto" grant of immunity.¹⁸¹

174. *Id.* at 1472. Silence may bar a party from asserting facts that would allow him to prevail and would result in adverse financial consequences. *Id.*

175. *Id.* at 1471-72 (citing *Baxter v. Palmigiano*, 425 U.S. 308 (1976); *Pillsbury*, 459 U.S. 248). The burden of an adverse interference that the Fifth Amendment does not protect is that silence in civil litigation may burden a party by not allowing them to assert possibly incriminating facts that would allow that party to prevail. *Id.*

176. *Id.* at 1471.

177. *Grand Jury Subpoena*, 836 F.2d at 1472-73.

178. *Id.* at 1472 (citing FED. R. CIV. P. 1, 26(c)). See generally, Robert Heidt, *The Conjuror's Circle*, 91 YALE L.J. 1062 (May 1982) (discussion of problems and alternatives when parties and non-parties invoke their Fifth Amendment right during civil proceedings).

179. *Id.* See *supra* notes 18-26, 31-42 and accompanying text discussing the role of protective orders.

180. *Grand Jury Subpoena*, 836 F.2d at 1478. The court found that if witnesses do not rely on protective orders, they will not waive their privileges, which will not further the court's interest in increasing efficiency. See *id.*

181. *Id.* The court found that granting a protective order would be improper be-

The Fourth Circuit appeared to uphold the district court's finding that the grand jury's investigation outweighs and better benefits the public than encouraging witnesses to be cooperative during civil discovery.¹⁸² The Fourth Circuit questioned whether protective orders further the fair resolution of civil disputes since they may protect deponents from perjury charges.¹⁸³ Additionally, the court recognized that civil courts have tools other than protective orders to facilitate civil litigation.¹⁸⁴

After analyzing the relevant interests, the Fourth Circuit held that grand jury subpoenas are enforceable despite the presence of protective orders.¹⁸⁵ The court rejected the Second Circuit's case-by-case balancing approach, noting that, since government officials are not present to state their interest when an order is entered, a court could rarely balance competing interests effectively at that time.¹⁸⁶ Additionally, the Fourth Circuit found that courts' routine grants of protective orders did not promote "effective balancing."¹⁸⁷ Therefore, by declining to find valid interests to weigh against the need for grand jury investigations, the Fourth Circuit adopted a per se rule that grand jury subpoenas automatically prevail over otherwise valid protective orders.¹⁸⁸

cause only the Executive Branch of government, which has exclusive authority to grant immunity, can conduct a balancing of these interests. *Id.*

182. *Id.* at 1474. See also *supra* notes 301-23 and accompanying text for a discussion and critique of protective orders construed as immunity.

183. *Id.* at 1475-76. The mere existence of a protective order would make it more difficult for the government to know whether a person may have committed perjury. *Id.*

184. *Id.* at 1476. The additional tools include judicial authority to grant a stay in the civil discovery until the criminal investigation is completed, shifting the burden in the case to the party claiming the privilege, or excluding evidence from the case that had been previously claimed as privileged. *Id.* at 1476-77; see generally Heidt, *supra* note 178, at 1062 (discussion of problems and alternatives when parties and non-parties invoke their Fifth Amendment right during civil proceedings).

185. *Grand Jury Subpoena*, 836 F.2d at 1477.

186. *Id.* at 1477-78.

187. *Id.*

188. *Id.* at 1478.

2. The Dissent - Rejection of the Per Se Rule

The dissent in the Fourth Circuit case rejected the majority's balancing of abstract interests and adoption of a per se rule.¹⁸⁹ The dissent identified only two relevant interests; the government's interest in collecting information for ongoing criminal investigations and the civil process' interest in efficient resolution of private disputes.¹⁹⁰

The dissent agreed generally with the Second Circuit's balancing approach.¹⁹¹ It found that refusing to modify a protective order would barely affect the public's interest in promoting government access to information.¹⁹² The Fourth Circuit's dissent noted that by modifying the order spawning the deposition, the majority gave the government access to evidence that would not have been available without a grant of immunity.¹⁹³ The dissent also recognized the grand jury's "awesome" investigative power, but found it to be an additional reason to uphold the protective order.¹⁹⁴ With this analysis, the dissent rejected the majority's finding that protective orders impede criminal investigations.¹⁹⁵

The Fourth Circuit's dissent found the interest served by protective orders significant.¹⁹⁶ Conversely, the majority held that protective orders were of little value since confidentiality could be breached by possible leaks or the information becoming public at trial.¹⁹⁷ The dissent found that these factors formed valid tactical concerns for parties considering using a protective order.¹⁹⁸ The dissent further explained that, be-

189. *Grand Jury Subpoena*, 836 F.2d at 1479 (Sprouse J., dissenting).

190. *Id.*

191. *Id.* at 1479-80.

192. *Id.*

193. *Id.*

194. *Grand Jury Subpoena*, 836 F.2d at 1479. The dissent agreed with a Seventh Circuit finding that "the explicit grant of such extensive investigative power should be construed to preclude the implication of supplemental powers, absent unusual circumstances." *Id.* (quoting *Wilk v. Am. Medical Assoc.*, 635 F.2d 1295 (7th Cir. 1980)).

195. *Id.* at 1480.

196. *Id.* at 1479

197. *See Grand Jury Subpoena*, 836 F.2d at 1476.

198. *Grand Jury Subpoena*, 836 F.2d at 1481 (Sprouse J., dissenting). The ma-

cause no separation of powers problem existed, a protective order was not a “de facto” grant of immunity.¹⁹⁹ It found that, unlike immunity, a protective order does not alter a deponent’s potential culpability, usurp powers of the grand jury, or affect the continued conduct of the grand jury investigation.²⁰⁰ Instead, the dissent found that protective orders reflect the trial judge’s authority to manage discovery.²⁰¹

After finding that the public’s interest in permitting the government access to sealed discovery material did not outweigh the interests served by protective orders, the dissent held that a protective order should not be issued if the presiding judge knows that the grand jury may desire to review the sealed material.²⁰² The dissent also noted that perjury would be an obvious justification to modify a protective order.²⁰³ Finally, the dissent rejected the majority’s argument that alternative pre-trial management tools are adequate substitutes for protective orders. Instead, the dissenting judge found that these alternative tools could not replace protective orders in facilitating resolution of civil disputes.²⁰⁴

C. THE ELEVENTH CIRCUIT - ADOPTION OF THE FOURTH CIRCUIT’S PER SE RULE: *WILLIAMS V. UNITED STATES*

The Eleventh Circuit, like the Fourth Circuit, addressed only one case regarding whether a grand jury subpoena should prevail over a protective order.²⁰⁵ Weighing the competing interests, the court held that the interest in fostering grand jury investigations outweighs the interest in the efficient disposi-

jority found that parties cannot and will not rely on protective orders because sealed discovery becomes public at trial. *Id.* at 1476. The dissent responded that litigants may decide that the wide-ranging, successful discovery that protective orders promote will forestall or eliminate the public trial. *Id.* at 1481.

199. *Grand Jury Subpoena*, 836 F.2d at 1480 (Sprouse J., dissenting).

200. *Id.*

201. *Id.* (citing *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984)).

202. *Id.* This appears similar to the Second Circuit’s standard for finding impropriety. Compare, *id. with Palmieri*, 779 F.2d at 865-66.

203. *Id.*

204. *Grand Jury Subpoena*, 836 F.2d at 1480. See also *supra* note 184 and accompanying text for the Fourth Circuit’s discussion of alternative tools.

205. See *Williams*, 995 F.2d at 1014 (case presented issue of first impression).

tion of civil cases.²⁰⁶ Therefore, the Eleventh Circuit adopted the Fourth Circuit's per se rule.²⁰⁷ The court concluded that the Second Circuit had misunderstood the importance of the grand jury's role.²⁰⁸ Like the Fourth Circuit, the Eleventh Circuit found that courts lack the authority to grant protective orders that act as "de facto" grants of immunity.²⁰⁹

The Eleventh Circuit, reversing a district court's order quashing a grand jury subpoena, held that "the essential and historic purpose of the grand jury" outweighs the utility of protective orders.²¹⁰ To establish the strong public interest in permitting the grand jury access to all information, the Eleventh Circuit cited a Supreme Court holding that grand juries have sweeping powers to investigate criminal activity.²¹¹ The Eleventh Circuit also found that, since the grand jury, on behalf of the public, has a right to all evidence²¹² and every person has a duty to comply with a grand jury subpoena,²¹³ courts must compel those subpoenaed to appear and testify.²¹⁴ The Eleventh Circuit also noted that a grand jury can-

206. *Id.* at 1017.

207. *Id.* at 1020.

208. *Id.* at 1017.

209. *Id.* at 1017-20.

210. *Williams*, 995 F.2d at 1015, 1020. The settled civil action involved an insurance salesman's suit against his employer to collect allegedly unpaid commission. *Id.* at 1013. The employer claimed the commission had been rebated by the salesman to the customer, an illegal practice under state law. *Id.* During this litigation, the government was investigating whether the salesman's actions were criminal. *Id.* at 1013-14. Out of fear that his testimony might incriminate him, the salesman moved for a protective order, which the court granted. *Id.* at 1014. Soon after the salesman gave his testimony, the suit was settled, but the protective order remained in force. *Id.* Nevertheless, the grand jury subpoenaed a court reporter's notes regarding the sealed testimony. *Id.* The deponent from the civil case intervened to move the court to quash the subpoena. *Id.* The district court quashed the subpoena, relying on the Second Circuit and rejecting the Fourth Circuit's per se rule. *Id.* at 1015. However, the district judge did none of the analysis required by *Martindell's* three prong test. *Id.* The government appealed. *Id.* at 1015 n.5.

211. *Id.* at 1015-16 (citing *Branzburg v. Hayes*, 408 U.S. 665, 686-87 (1972); *United States v. Calandra*, 414 U.S. 338, 345 (1974); *Blair v. United States*, 250 U.S. 273, 279-80 (1919); *United States v. Mandujano*, 425 U.S. 564, 573 (1976)). The grand jury requires wide latitude to investigate criminal activity to effectively carry out its role of protecting citizens from unsupported indictments by ensuring that it issues accurate indictments and dismisses baseless charges. *Id.*

212. *Williams*, 995 F.2d at 1016 (citing *Branzburg*, 408 U.S. at 686-87).

213. *Id.* (citing *Calandra*, 414 U.S. at 345).

214. *Id.*

not complete its investigation and determine whether a crime has been committed until all evidence is collected.²¹⁵ Based on these findings, the Eleventh Circuit accorded significant weight to the public's interest in facilitating grand jury investigations.²¹⁶

The Eleventh Circuit placed much less significance on the countervailing interests served by protective orders, holding that they were merely facilitation devices that "should not be used to shield relevant information from a valid grand jury subpoena."²¹⁷ Further, the court found nothing in Rule 26(c) or its advisory committee notes to suggest any legislative intent to circumscribe the grand jury's subpoena power.²¹⁸ The Eleventh Circuit agreed with the Fourth Circuit that an investigative grand jury need not heed a district court's direction.²¹⁹ Also like the Fourth Circuit, the Eleventh Circuit noted the alternatives available as "substitutes" for protective orders.²²⁰ The court concluded that enforcing protective orders against grand jury subpoenas disrupts the grand jury process.²²¹ In addition, the court found that the efficiency gained by the civil process did not outweigh the interest in facilitating grand jury investigations.²²²

The Eleventh Circuit found that deponents requesting protective orders expect guaranteed confidentiality.²²³ The court found that courts could not satisfy this expectation for two reasons. First, neither courts, parties nor deponents know in advance whether a court will modify an order or whether the government might obtain the information in another manner.²²⁴ Second, the Eleventh Circuit, like the Fourth Circuit, found that this protection would require a grant of immunity

215. *Id.*

216. *See id.* at 1015-16, 1020.

217. *Williams*, 995 F.2d at 1017.

218. *Id.*

219. *Id.* (quoting *Grand Jury Subpoena*, 836 F.2d at 1471).

220. *Id.* at 1017-18; see *supra* note 184 and accompanying text for a discussion of alternatives the court suggested.

221. *Id.* at 1017-18.

222. *Williams*, 995 F.2d at 1017-18.

223. *Id.* at 1017.

224. *Id.* at 1019.

which the judicial branch lacks authority to provide.²²⁵ The Eleventh Circuit concluded that the district court had issued the protective order with a guarantee of confidentiality; therefore, it was an improper “de facto” grant of immunity.²²⁶

The Eleventh Circuit rejected the *Martindell* test as administratively unworkable.²²⁷ The court found that the Second Circuit had not defined “improvident grant,” “compelling need,” “extraordinary circumstance,” or how a prosecutor might satisfy the burden under *Martindell*.²²⁸ The court also found *Martindell* administratively unworkable due to the potential for conflicts if one judge issued an order and another decided to quash the related subpoena.²²⁹ Additionally, because deponents cannot know in advance whether an order will be modified, the court found that a *post facto* balancing of the interests presents a judge with a “Hobson’s choice.”²³⁰ This problem arises when a judge must consider whether to modify the order after having “induced the witness to incriminate himself by promising to enforce the protective order.”²³¹

In summary, the Eleventh Circuit held that the Second Circuit misunderstood the importance of the grand jury’s role and rejected *Martindell’s* balancing test as administratively

225. *Id.* at 1017-18.

226. *Id.*

227. *Williams*, 995 F.2d at 1018.

228. *Id.* at 1018-19. The Eleventh Circuit reasoned that to find improvidence, only the evidence at the time the order was granted could be used, which makes a finding of improvidence unlikely. *Id.* Otherwise, the court concluded, if a judge considered information available after the order was granted, the improvidence test would collapse into the compelling need or extraordinary circumstance parts of the test. *Id.* at 1019. The court did not recognize the Second Circuit’s decision in *Palmieri*, 779 F.2d at 865-66, that established a test for improvidence. The Eleventh Circuit’s concern in defining how the prosecutor is to meet her burden is to ensure that the prosecutor does not have to expose so much about her investigation that the policy behind grand jury secrecy is defeated. *Id.* at 1019.

229. *Id.* at 1020. According to the Eleventh Circuit, inter-judge conflict occurs when a judge modifies a protective order, because the judge that issued the original protective order may threaten contempt if documents are produced to comply with a modified order, while the judge that modified the order also threatens contempt if the documents are not produced. *Id.*

230. *Williams*, 995 F.2d at 1019-20. The “Hobson’s choice” that the judge supposedly faces is between going back on his word or denying the public its right to every man’s evidence. *Id.*

231. *Id.*

unworkable.²³² The Eleventh Circuit reviewed the competing interests and determined that protective orders cannot shield information from grand juries.²³³ The court held that by granting protective orders to deponents who expect absolute protection from the government, courts improperly grant them “de facto” immunity.²³⁴ As a result, the Eleventh Circuit adopted the Fourth Circuit’s per se rule.²³⁵

D. THE NINTH CIRCUIT

1. Facts & Procedural History: *United States v. Janet Greeson’s A Place For Us (In re Grand Jury Subpoena Served on Meserve)*

In *United States v. Janet Greeson’s APFU*, the Ninth Circuit decided an issue of first impression in that circuit by adopting the Fourth and Eleventh Circuits’ per se rule.²³⁶ The Ninth Circuit held that the Fourth and Eleventh Circuits “convincingly explained that a grand jury subpoena should, as a matter of course, prevail over a protective order.”²³⁷ In adopting this per se rule, the Ninth Circuit did not do any original analysis or consider the specific facts of the case.²³⁸ Instead, the court relied on the Fourth and Eleventh Circuits’ abstract discussion of the issue to adopt a per se rule.²³⁹

This Ninth Circuit case involved a chain of weight loss clinics operated through hospital psychiatric units.²⁴⁰ The

232. *Id.* at 1020.

233. *Id.*

234. *Id.* at 1017-18.

235. See *Williams*, 995 F.2d at 1015 (*per se* rule permits grand jury subpoenas to automatically prevail over protective orders).

236. *Janet Greeson’s APFU*, 62 F.3d at 1223, 1226-27.

237. *Id.* at 1226.

238. See *id.* at 1223-27 (the Ninth Circuit based its entire discussion on the Fourth and Eleventh Circuits’ cases). See *infra* notes 263-66 and accompanying text discussing Ninth Circuit’s analysis.

239. See *id.* at 1224-27 (the Ninth Circuit based its holding on the Fourth and Eleventh Circuits’ discussion). See also *infra* notes 245-48 and accompanying text for a discussion of the Ninth Circuit’s adoption of the Fourth and Eleventh Circuits’ opinions.

240. Thomas Mulligan, *Diet Clinic Tactics Draw Fire*, LOS ANGELES TIMES, April 10, 1994, at A1, A24; see also Jeff Testerman, *More Cash than Pounds Lost at Centers*, ST. PETERSBURG TIMES, November 15, 1993, at A7.

clinics typically diagnosed patients with psychiatric disorders, such as major depression, psychotic depression or bulimia.²⁴¹ By providing weight-loss services in psychiatric units and diagnosing clients with psychiatric disorders, APFU could bill the patients' insurance for "psychiatric" care.²⁴²

Beginning in 1991, insurance companies investigated claims submitted by APFU,²⁴³ determined they were fraudulent, and refused payment.²⁴⁴ In 1992, the insurance companies filed suit in federal court alleging that APFU had fraudulently billed them in excess of one hundred million dollars.²⁴⁵ The parties reached an oral pre-trial settlement agreement in 1994.²⁴⁶ Although a court had granted both parties protective orders during discovery, the district court, as a material part of the settlement agreement, issued a much more restrictive protective order sealing all discovery.²⁴⁷

241. Mulligan, *supra* note 240, at A24.

242. *Id.* at A1, A24. According to APFU employees, APFU staff members falsified medical records to support these allegedly fraudulent insurance claims for psychiatric care. *Id.* at A24. Most insurance companies cover psychiatric disorders, but not weight-loss treatment. Thus, APFU allegedly had to masquerade as a facility treating psychiatric disorders so that patients' insurance would cover the treatment. *Id.*

243. *Id.* Blue Cross' investigation began after receiving an unsigned letter discussing a meeting where the clinic's psychiatrist instructed staff members on how to falsify medical records. *Id.* The letter also alleged that staff members were cautioned against documenting patient improvement to enable APFU to justify coverage for the four week maximum most insurance policies cover for inpatient care. *Id.*

244. *Id.* at A24.

245. *Empire Blue Cross v. Janet Greeson's A Place For Us*, 62 F.3d 1218 (9th Cir. 1995). Although APFU billed the insurance companies for psychiatric care, the insurance companies' allegation was that APFU rendered weight-loss services, not psychiatric care. Mulligan, *supra* note 240, at A1.

246. *Empire Blue Cross*, 62 F.3d at 1219.

247. *Id.* at 1218-19. Paragraphs one and two of the protective order read as follows:

1. All discovery produced to date and any evidence obtained directly or indirectly by any party during the preparation or course of this litigation, including but not limited to documents, files, records, exhibits, deposition transcripts, video tapes, statements, and exhibits thereto, shall be kept confidential, shall not be disclosed to any non-party and shall be protected from any evidentiary or non-evidentiary use. Any disclosure prior to the filing of this order shall not be deemed to be in violation of this order by any party.
2. All pleadings filed or served in this case, including

Subsequently, the United States Attorney's Office served one of the plaintiff's attorneys from the prior civil action with a grand jury subpoena requesting copies of all discovery material.²⁴⁸ In response, the attorneys filed a motion in district court to quash the grand jury subpoena.²⁴⁹ The defendant in the prior civil action, the weight-loss clinic, subsequently filed a motion to intervene, and moved to quash the grand jury subpoena.²⁵⁰ The district court granted the motion to intervene, but denied both parties' motions to quash.²⁵¹ The weight-loss clinic appealed the district court's ruling to the Ninth Circuit Court of Appeals.²⁵²

2. The Ninth Circuit's Adoption of the Fourth and Eleventh Circuits' Opinions In Lieu of Original Analysis

The Ninth Circuit reviewed the three circuits' holdings previously addressing whether a grand jury subpoena should prevail over a protective order.²⁵³ In its opinion, the Ninth Circuit reviewed *Martindell*, but declined to discuss the Second Circuit's four other cases construing *Martindell*.²⁵⁴ Next, the Ninth Circuit reviewed the Fourth and Eleventh Circuits' "balancing" of the public's interest in permitting grand jury access to all information against the civil process' interest in facilitating dispute resolution.²⁵⁵ The Ninth Circuit also reviewed the

exhibits thereto, shall be kept confidential, shall not be disclosed to any non-party from this date forward and shall be protected from any evidentiary or non-evidentiary use.

Appellants' Opening Brief at 2, *Janet Greeson's APFU* (No. 94-56125).

248. *Janet Greeson's APFU*, 62 F.3d at 1223.

249. *Id.* at 1223.

250. *Id.*

251. Appellants' Opening Brief at 3, *Janet Greeson's APFU* (No. 94-56125).

252. See *Janet Greeson's APFU*, 62 F.3d at 1222.

253. *Id.* at 1223-26.

254. *Janet Greeson's APFU*, 62 F.3d at 1223-24. The Ninth Circuit noted two other cases that reaffirmed *Martindell*, but declined to mention any of the other Second Circuit cases or discuss how the two cases that the Ninth Circuit did cite expanded upon *Martindell*. *Id.* (citing *Palmieri v. New York*, 779 F.2d 861 (2d Cir. 1985); *In re Grand Jury Subpoena Deuces Tecum*, 945 F.2d 1221 (2d Cir. 1991)); see also *supra* notes 98-156 and accompanying text discussing Second Circuit cases.

255. *Janet Greeson's APFU*, 62 F.3d at 1224-26 (citing *Williams v. United States*, 995 F.2d 1013 (11th Cir. 1993); *In re Grand Jury Subpoena*, 836 F.2d 1468 (4th Cir. 1988) *cert. denied*, 487 U.S. 1240 (1988)).

Fourth and Eleventh Circuits' reasons for rejecting the *Martindell* test.²⁵⁶

The Ninth Circuit agreed with the Fourth and Eleventh Circuits that facilitating grand jury investigations is a significant interest.²⁵⁷ The Ninth Circuit also cited Supreme Court precedent supporting the grand jury's independent role and the judiciary's limited supervisory power to prescribe grand jury procedure.²⁵⁸ The court relied on the Fourth Circuit's finding that enforcing protective orders does not facilitate the resolution of civil disputes, since parties will not use protective orders if courts do not guarantee their enforcement.²⁵⁹ The Ninth Circuit also agreed with the Eleventh Circuit that Congress, by enacting FRCP 26(c), did not intend "to abrogate the historical investigative powers of the grand jury."²⁶⁰ The Ninth Circuit independently held that neither the language nor commentary of FRCP 26 supported a Congressional intent to extend to the judiciary the executive's exclusive power to grant immunity.²⁶¹

Having relied on the Fourth and Eleventh Circuits to find that protective orders cannot shield information from a grand jury, the Ninth Circuit rejected *Martindell's* case-by-case bal-

256. *Id.*

257. *Id.* at 1224-27 (citing *Grand Jury Subpoena*, 836 F.2d at 1475 (grand jury has a right to all evidence and protective orders that impede the grand jury process are invalid); *Williams*, 995 F.2d at 1015-16 (discussing grand jury's important historical and independent role and courts limited authority over it)). See also *supra* notes 170-72, 211-16 and accompanying text for a discussion of the Fourth and Eleventh Circuits' analyses regarding the interest that the grand jury serves and its significance.

258. *Janet Greeson's APFU*, 62 F.3d at 1226 (citing *United States v. Williams*, 504 U.S. 36, 47-50 (1992)).

259. *Id.* at 1224-26 (citing *Grand Jury Subpoena*, 836 F.2d at 1475). Three reasons a court cannot guarantee that a protective order will be enforced are that a court may modify the order, the information may become public if the case goes to trial, or someone may leak the information. *Id.* at 1225. See also *supra* notes 180-81 and accompanying text for a discussion of the Fourth Circuit's finding that protective orders cannot facilitate resolution of civil disputes.

260. *Id.* at 1225. See *supra* note 218 and accompanying text discussing the Eleventh Circuit's finding of no congressional intent.

261. *Id.* at 1226-27 (citing 18 U.S.C. § 6002, 6003; *Pillsbury*, 459 U.S. at 261). The court continued by stating that "such a significant shift in the allocation of traditional powers presumably would have been stated explicitly." *Id.*

ancing approach in favor of a per se rule.²⁶² The Ninth Circuit relied on the Fourth and Eleventh Circuits' "discussion of the factors weighing on both sides, [which] convincingly explain that a grand jury subpoena should, as a matter of course, prevail over a protective order."²⁶³ However, the Ninth Circuit declined to enumerate the "factors" that the Fourth and Eleventh Circuit discussed in its holding.²⁶⁴ Instead, the court only discussed "factors" in its review of the Fourth and Eleventh Circuits' cases.²⁶⁵ Therefore, the author assumes that the Ninth Circuit adopted the Fourth and Eleventh Circuits' opinions in their entirety.²⁶⁶

IV. CRITIQUE OF THE PER SE RULE

Since the Ninth Circuit relied exclusively on the Fourth and Eleventh Circuits' opinions to develop its opinion, the Ninth Circuit's opinion is critiqued through its adoption of these circuits' arguments. This critique contains two sections. The first reviews and critiques the circuits' findings and analyses of the competing interests. The Second Circuit resulted in a rebuttable presumption to uphold protective orders.²⁶⁷ The Fourth and Eleventh Circuits, and therefore the Ninth Circuit, evaluated the competing interests to find that protective orders should not shield information from grand juries.²⁶⁸ They

262. *Id.* at 1226.

263. *Id.*

264. *See id.*

265. *Id.* at 1224-26 (Ninth Circuit's review of the Fourth and Eleventh Circuit's cases).

266. Compare, *Janet Greeson's APFU*, 62 F.3d at 1224-26 with *Williams*, 995 F.2d 1013 and *Grand Jury Subpoena*, 836 F.2d 1468 (the Ninth Circuit reviewed all the arguments made by the Fourth and Eleventh Circuits). The Fourth and Eleventh Circuits' arguments included finding that a protective order was a "de facto" grant of immunity. *Janet Greeson's APFU*, 62 F.3d at 1224, 1226 (citing *Grand Jury Subpoena*, 836 F.2d at 1475; *Williams*, 995 F.2d at 1017-18). The Ninth Circuit also reviewed both circuits' arguments that *Martindell's* case-by-case balancing was unworkable. *Janet Greeson's APFU*, 62 F.3d at 1225, 1226 (citing *Grand Jury Subpoena*, 836 F.2d at 1477-78; *Williams*, 995 F.2d at 1017-20). The Ninth Circuit also reviewed, but did not enumerate, that district judges' pre-trial management tools are adequate substitutes for protective orders. *Janet Greeson's APFU*, 62 F.3d at 1225 (citing *Grand Jury Subpoena*, 836 F.2d at 1476-77); see also *supra* note 184 and accompanying notes for a discussion of the Fourth Circuit's findings regarding alternative pre-trial management tools.

267. See, e.g., *Martindell v. IT&T*, 594 F.2d 291, 296 (2d Cir. 1979).

268. *In re Grand Jury Subpoena*, 836 F.2d 1468, 1477 (4th Cir. 1988); *Williams*

found reasons why a rebuttable presumption should be rejected in favor of a per se rule.²⁶⁹ This section concludes that the Second Circuit's presumption should prevail when courts properly weigh the interests. The second section compares *Martindell's* balancing approach with the per se rule. It demonstrates that *Martindell* should be adopted over a per se rule.

A. THE SECOND CIRCUIT'S PRESUMPTION SHOULD PREVAIL WHEN THE INTERESTS ARE PROPERLY WEIGHED

1. The Second Circuit's Initial Balancing of the Competing Interests: Finding a Presumption

The Second Circuit found that protective orders further the purpose of the FRCP by encouraging full disclosure.²⁷⁰ If parties can not rely on protective orders to keep information from the government, parties will not waive their privileges.²⁷¹ In that instance, protective orders would not promote the FRCP's goal of "just, speedy and inexpensive" resolution of private disputes.²⁷² To tie the FRCP's goals to the issue in *Martindell*, the Second Circuit narrowly characterized the interest to be weighed against the grand jury's need for information as the party's reliance on the protective order.²⁷³ With this action, the Second Circuit recognized a policy interest in using protective orders to facilitate resolution of civil disputes, but ignored a second interest of protecting individual and societal rights and privileges against discovery abuse.²⁷⁴ Never-

v. United States, 995 F.2d 1013, 1017 (11th Cir. 1993).

269. *Grand Jury Subpoena*, 836 F.2d at 1477-78 (courts have alternative tools available and protective orders that shield information from the government are improper "de facto" grants of immunity); *Williams*, 995 F.2d at 1017-20 (*Martindell* is administratively unworkable, may lead to inter-judge conflict, and protective orders cannot act as "de facto" grants of immunity).

270. *Martindell*, 594 F.2d at 295; See also *supra* notes 102-104 and accompanying text.

271. *Id.*

272. *Martindell*, 594 F.2d at 295 (quoting FED. R. CIV. P. 1).

273. *Martindell*, 594 F.2d at 295-96; *Palmieri v. New York*, 779 F.2d 861, 864 (2d Cir. 1985); see also *supra* notes 101-07, 123-27 and accompanying text for a discussion of interests the Second Circuit considered.

274. See *Martindell*, 594 F.2d at 295-96; *Palmieri*, 779 F.2d at 864. See also 8 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2036 (1994) (purpose of protective orders is to protect against liberal discovery); Arthur Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*,

theless, by finding that facilitating civil disputes is “the cornerstone of our civil justice administration,” the court afforded significant weight to upholding protective orders.²⁷⁵

The Second Circuit also recognized the government’s interest in obtaining information for criminal prosecution, but accorded the interest less weight when the information sought was produced during civil litigation.²⁷⁶ The court found that the government’s awesome investigative powers provide it alternative methods to obtain the information, which makes exploitation of civil disputes unnecessary.²⁷⁷ Additionally, the court recognized that the sealed information sought by the government would not exist but for the protective order.²⁷⁸ Since the Second Circuit found a strong interest in upholding protective orders and found no strong countervailing governmental interest, it held that the facilitation of civil disputes presumptively outweighs the grand jury’s need for information produced during private litigation.²⁷⁹

105 HARV. L. REV. 427, 441 (1991) (quoting *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 (1984) (protective orders guard against liberal discovery abuse); FED. R. CIV. P. 1 (protective orders are authorized under Rule 26(c), which is subject to Rule 1). See also *supra* notes 10-42 and accompanying text discussing the role of protective orders.

275. *Martindell*, 594 F.2d at 295; see also *supra* note 101-107 and accompanying text discussing *Martindell’s* evaluation of the competing interests.

276. *Martindell*, 594 F.2d at 296; see also *supra* note 101-107 and accompanying text.

277. *Martindell*, 594 F.2d at 296; *Palmieri*, 779 F.2d at 866; see also *supra* note 106, 127 and accompanying text for a discussion of the courts’ finding that the government has “awesome” powers.

278. *Palmieri*, 779 F.2d at 865; see also *supra* note 126 and accompanying text discussing this court’s finding.

279. See *Martindell*, 594 F.2d at 295-96. See also *Palmieri*, 779 F.2d at 864-66; *In re Grand Jury Subpoena Deuces Tecum*, 945 F.2d 1222, 1226 (2d Cir. 1991). See also *supra* notes 108, 127-29, 155-56 and accompanying text discussing the Second Circuit’s findings that the government has the burden of rebutting the presumption.

2. The Fourth and Eleventh Circuits' Initial Balancing of the Competing Interests

a. *Facilitating Resolution of Civil Disputes is an Insufficient Interest on Which to Base a Protective Order*

Both the Fourth and Eleventh Circuits considered the need for protective orders to facilitate resolution of civil disputes and the grand jury's need for access to information.²⁸⁰ Both circuits found that grand juries have broad investigative powers with which the courts should not interfere.²⁸¹ However, neither circuit discussed limitations of any judicial authority over a grand jury's power.²⁸²

The Fourth and Eleventh Circuits, like the Second Circuit, defined the countervailing interest narrowly as the facilitation of private litigation.²⁸³ Like the Second Circuit, neither the Fourth Circuit nor the Eleventh Circuit recognized the additional policy interest in having protective orders protect individual and societal rights and privileges.²⁸⁴ This narrow characterization of the interests did not create a problem for the Second Circuit.²⁸⁵ It found facilitating dispute resolution more significant than the grand jury's need for access to information.²⁸⁶ The Fourth and Eleventh Circuits, however, char-

280. *In re Grand Jury Subpoena*, 836 F.2d 1468, 1471 (4th Cir. 1988), *cert. denied*, 487 U.S. 1240 (1988); *Williams*, 995 F.2d at 1015. The Fourth Circuit mentioned the witness' right against self-incrimination as an interest to be considered, but concluded that no interest existed, leaving the Fourth Circuit weighing the same interests as the Eleventh Circuit had. *Grand Jury Subpoena*, 836 F.2d at 1471. See also *supra* notes 173-76 and accompanying text for Fourth Circuit's finding that no valid interest existed.

281. *Williams*, 995 F.2d at 1016-17; *Grand Jury Subpoena*, 836 F.2d at 1471; see also *supra* notes 171-72, 211-15, 219 and accompanying text discussing the Fourth and Eleventh Circuits' findings regarding the grand jury's power.

282. See *Grand Jury Subpoena*, 836 F.2d 1468; see also *Williams*, 995 F.2d 1013. See also *supra* notes 72-83 and accompanying text for a discussion of limitations on the grand jury and the court's authority over it.

283. *Grand Jury Subpoena*, 836 F.2d at 1472-73; *Williams*, 995 F.2d at 1016.

284. See *Grand Jury Subpoena*, 836 F.2d at 1472-74; see also *Williams*, 995 F.2d at 1016-17; see also *supra* notes 13-30 and accompanying text discussing protective orders as a safeguard against discovery abuse.

285. *Martindell*, 594 F.2d at 296; *Palmieri*, 779 F.2d at 865-66.

286. *Martindell*, 594 F.2d at 296; *Palmieri*, 779 F.2d at 865-66; see also *supra* notes 103-06, 125-27 and accompanying text for a discussion of the Second

acterized protective orders as mere facilitating devices and found them insufficient to outweigh the grand jury's interest in obtaining access to information.²⁸⁷ Had these courts considered the restraints on the grand jury and the role of protective orders as a safeguard against liberal discovery, the courts' balancing of the competing interests may have been altered.

The Eleventh Circuit found no congressional intent to impinge on the grand jury's subpoena power.²⁸⁸ The Ninth Circuit agreed, adding that if Congress had intended this result, it would have been explicitly stated.²⁸⁹ The Fourth Circuit held that many people will not agree to testify under a protective order because their protection is less than absolute.²⁹⁰ Therefore, protective orders cannot effectively facilitate the resolution of civil disputes unless parties are justified in relying on their protection.²⁹¹

The policy of protecting parties from abuses of liberal discovery does not suggest that protective orders are merely facilitating devices.²⁹² The courts did not discuss the history and policy of protective orders, and ignored the integral role protective orders play in the administration of civil disputes under the FRCP.²⁹³ As for a lack of Congressional intent, neither the Eleventh Circuit nor the Ninth Circuits recognized that it would have been easier for Congress to adopt a per se

Circuit's findings that reduced the weight it accorded to the grand jury's need to obtain access to sealed discovery material.

287. See *Grand Jury Subpoena*, 836 F.2d at 1475-76; see also *Williams*, 995 F.2d at 1017. See also *supra* notes 170-88, 211-226 and accompanying text for a discussion of the Fourth and Eleventh Circuits' findings.

288. *Williams*, 995 F.2d at 1017-18; see also *supra* note 218 and accompanying text discussing the Eleventh Circuit's finding.

289. *Janet Greeson's APFU*, 62 F.3d at 1226-27.

290. *Grand Jury Subpoena*, 836 F.2d at 1475-76. The Fourth Circuit held that parties would not rely on protective orders, because the information might be leaked to the government, and the order may be modified or become public at trial. *Id.*

291. *Id.*

292. See *Williams*, 995 F.2d at 1016-18 (considering only the interest of facilitating civil disputes); 8 Wright & MILLER § 2036 (role of protective orders); Miller, *supra* note 274, at 441, 447; See also *supra* notes 13-30 and accompanying text discussing the role of protective orders.

293. See *Grand Jury Subpoena*, 836 F.2d at 1475-76; see also *Williams*, 995 F.2d at 1017-18. See also *supra* notes 13-42 discussing the interests protective orders serve.

rule than to create a test.²⁹⁴ The problem inherent in creating a single test to apply to the many variables of such an abstract rule is precisely why Congress delegated to the courts the discretion to issue and uphold protective orders.²⁹⁵ Before finding that protective orders serve an insufficient interest, courts should consider all the relevant interests and reconsider Congressional intent regarding Rule 26(c).

The Fourth Circuit's finding, that litigants will not rely on protective orders because they are subject to modification, ignores that litigants have testified under protective orders with full knowledge of their imperfect protection.²⁹⁶ The court's finding ignores parties who need to protect information but are not aware that the government would want it. If the government clearly can overcome a protective order without showing any need, parties will be reluctant to waive their privileges.²⁹⁷ The court also ignores parties willing to weigh whether the government will be able to meet its *Martindell* burden to get the information.²⁹⁸ A per se rule, however, not only assures parties that if the government wants the information it will get it, but that the government will be more likely to seek information knowing it is available.²⁹⁹ Therefore, parties concerned about the dissemination of their information will be less likely to disclose it once they become aware of the per se rule.³⁰⁰

294. *Janet Greeson's APFU*, 62 F.3d at 1226-27; *Williams*, 995 F.2d at 1018; see also 8 WRIGHT & MILLER § 2036 (need for trial courts to have discretion). See *supra* notes 21-23 and accompanying text discussing the difficulty in formulating a rule and the decision to permit judges' to use their discretion to decide each case.

295. 8 WRIGHT & MILLER § 2036 (the trial courts were given discretion because of the many variables involved in each specific case); see also *supra* notes 21-23 and accompanying text for a discussion of why discretion was delegated to the courts.

296. *Grand Jury Subpoena*, 836 F.2d at 1478; See, e.g., *Martindell*, 594 F.2d at 296 (Second Circuit cases gave notice that protective orders may be modified or vacated).

297. *Martindell*, 594 F.2d at 295-96.

298. See *Grand Jury Subpoena*, 836 F.2d at 1481 (Sprouse J. dissenting) (the decision to seek a protective order is a tactical one that should be left to the parties).

299. *Id.* at 1477, 1479; see also *Williams*, 995 F.2d at 1015, 1017 (a court will not balance competing interests under the per se rule).

300. *Grand Jury Subpoena*, 836 F.2d at 1479 (Sprouse J. dissenting).

b. *Protective Orders Serve No Valid Interest Because They are Improper "De Facto" Grants of Immunity*

The Fourth and Eleventh Circuits diminished the balancing of competing interests by holding that using protective orders to facilitate the resolution of civil disputes would improperly create a judicial "de facto" grant of immunity.³⁰¹ The courts held that protective orders cannot outweigh the significant interest accorded to facilitating grand jury investigations.³⁰² Since protective orders serve no policy interests, the courts adopted the per se rule that the grand jury's need for information automatically prevails over a protective order.³⁰³

To reach this conclusion, the Fourth and Eleventh Circuits made two preliminary findings. First, the courts found that a person waiving a right or privilege in return for a protective order expects absolute protection which only a grant of immunity can provide.³⁰⁴ The courts made a leap in logic to find that the party's expectation required the court to provide a "de facto" grant of immunity.³⁰⁵ The courts then found a judicial "de facto" grant of immunity to be invalid, since only the Executive branch of government has authority to grant immunity.³⁰⁶ The Fourth Circuit concluded that protective orders cannot facilitate resolution of civil disputes because no one would waive their privilege without an absolute guarantee of

301. *Grand Jury Subpoena*, 836 F.2d at 1475, 1478; *Williams*, 995 F.2d at 1017-18. The Eleventh Circuit made a separate finding that protective orders might facilitate civil disputes, but held that this was not a compelling reason to shield information from a grand jury. *Williams*, 995 F.2d at 1017-18. However, this finding only considered the interest of facilitating civil disputes and not the interest of protecting rights and privileges. *See id.* (the court considered only the first interest, not the second); *see also supra* notes 13-30 and accompanying notes discussing the interest of protective orders in protecting rights and privileges.

302. *See Williams*, 995 F.2d at 1016-17; *Grand Jury Subpoena*, 836 F.2d at 1471, 1478 (protective orders that are "de facto" grants of immunity are not valid).

303. *See Williams*, 995 F.2d at 1016-18; *see also Grand Jury Subpoena*, 836 F.2d at 1471-73, 1475, 1478.

304. *Williams*, 995 F.2d at 1017-18; *Grand Jury Subpoena*, 836 F.2d at 1477-78.

305. *Grand Jury Subpoena*, 836 F.2d at 1478; *Williams*, 995 F.2d at 1017-18.

306. *Williams*, 995 F.2d at 1017-18 (citing 18 U.S.C. § 6003 and Supreme Court cases); *Grand Jury Subpoena*, 836 F.2d at 1475 (citing Supreme Court cases and discussing separation of power problem).

confidentiality.³⁰⁷ Since courts cannot grant immunity, which is the only form of absolute protection, the Fourth Circuit concluded that no interest exists to balance against allowing the grand jury access to all information.³⁰⁸ Therefore, the Eleventh Circuit held protective orders that shield information from the government to be automatically invalid as improper “de facto” grants of immunity.³⁰⁹

The Fourth and Eleventh Circuits’ analyses and conclusions are flawed. First, the leap in logic from a party expecting an absolute guarantee of confidentiality to finding that a court actually provided the guarantee rejects the idea that although a protective order might not be equal to the protection of the waived right, a party may voluntarily accept less than complete protection as sufficient consideration.³¹⁰ This is entirely different than a court not being able to *compel* a witness to waive a right or privilege, which would require complete protection.³¹¹ However, since the issue is whether a party can

307. *Grand Jury Subpoena*, 836 F.2d at 1475-76, 1478.

308. *See id.* at 1478 (only a grant of immunity would induce a party to forsake a privilege. Also, courts do not have authority to balance the competing interests.).

309. *See Williams*, 995 F.2d at 1017-18.

310. *Grand Jury Subpoena*, 836 F.2d at 1475 (deponents seek “de facto” grant of immunity); *Williams*, 995 F.2d at 1017 (“federal courts lack the power to provide witnesses with the broad protection that witnesses seek.”). No circumstance exists where protective orders offer the same protection as a waived privilege. If the Fourth and Eleventh Circuits’ lines of reasoning prevailed all protective orders would be invalid. *Andover Data Services v. Statistical Tabulating Corp.*, 876 F.2d 1080, 1084 (2d Cir. 1989); *Grand Jury Subpoena Deuces Tecum*, 945 F.2d at 1225. For example, any valid right to privacy, attorney-client, physician, or spousal privilege is absolute against a third party. However, once a party waives the privilege and the information is protected only by a protective order, the order can be modified and the information released based on a compelling need. The compelling need would not have invalidated the original privilege. Previous cases gave notice that a protective order could be modified or vacated. *See Grand Jury Subpoena*, 836 F.2d 1468 (notice that at least one court would automatically allow the government access to sealed information through per se rule). The Second Circuit also clarified that a protective order may be modified by showing improvidence in the grant of the order, a compelling need or extraordinary circumstance. *See, e.g., Martindell*, 594 F.2d at 296. *See also* FED. R. CIV. P. 26(c) (protective orders have independent authority to protect information. This power is not derived from the right or privilege that the party or deponent waives.). Both the Fourth and Eleventh Circuits have held that protective orders do not offer protection equivalent to a party’s right or privilege. *Williams*, 995 F.2d at 1018; *Grand Jury Subpoena*, 836 F.2d at 1475. *See supra* notes 138-45, 199-201 and accompanying text for a discussion of the distinction between protective orders and immunity.

311. *Andover*, 876 F.2d at 1082-83 (a completely different issue exists depending

rely on a protective order while voluntarily waiving a right or privilege, and not whether a court could compel discovery, courts should not consider whether the order gives sufficient protection.³¹² Rather than eliminating the interest based on insufficient protection, the circuits should have analyzed and balanced the policies establishing protective orders and grand juries.³¹³ Finding protective orders that shield information from the government equal to grants of immunity simply allows the courts to avoid weighing the competing policy interests.³¹⁴

Neither the Fourth or Eleventh Circuit recognized that the Second Circuit had already addressed a protective order as a “de facto” grant of immunity.³¹⁵ The Second Circuit held that a protective order could not be used to compel testimony from a witness claiming her Fifth Amendment privilege because only a grant of immunity could provide equivalent protection.³¹⁶ However, the court also held that a protective order is not equivalent to a grant of immunity because an order can be modified or the government may gain access to the information in another way.³¹⁷ The Second Circuit expressly stated that

on whether the party testifies or provides information voluntarily). See also *supra* notes 133-37, 143-44 and accompanying text for a discussion of why courts can use nothing less than immunity to compel testimony when a party claims a Fifth Amendment privilege.

312. *Andover*, 876 F.2d at 1082 (citing *Pillsbury Co. v. Conboy*, 459 U.S. 248, 256-57 (1972)) (protective orders are insufficient to compel privileged testimony). See FED. R. CIV. P. 26(c) (to be valid, protective orders are not required to guarantee absolute confidentiality, offer protection equal to what the deponent wants, or to a privilege that may be waived).

313. See *Grand Jury Subpoena*, 836 F.2d at 1478 (diminished and eliminated interest); see also *Williams*, 995 F.2d at 1017 (diminished interest by finding that protective orders are mere facilitating devices and eliminated the interest by finding the protective order to be a “de facto” grant of immunity).

314. *Grand Jury Subpoena*, 836 F.2d at 1475 (finding protective orders to be a “de facto” grant of immunity allowed the court to invalidate the interests served by protective orders); *Williams*, 995 F.2d at 1017-18 (court did not have authority to immunize witness; therefore, district court should not have quashed grand jury subpoena.).

315. See *Andover*, 876 F.2d at 1083-84 (court could not use a protective order to compel testimony because it offered less protection than immunity).

316. *Id.* at 1083.

317. *Id.* at 1083-84; *Grand Jury Subpoena Deuces Tecum*, 945 F.2d at 1224-25 (“The *Martindell* test . . . does not transform a protective order into a grant of immunity because the test allows a protective order to be overcome. . . .”); see also *supra* notes 138-45 and accompanying text for a discussion of the court’s

even a protective order issued specifically to conceal information from the government was not a “de facto” grant of immunity.³¹⁸

A protective order is not a “de facto” grant of immunity, even if its purpose is to shield criminal activity from the government, because immunity guarantees that information given or derived will not be used to prosecute the source.³¹⁹ Unlike immunity, a protective order simply restricts dissemination of information.³²⁰ Additionally, protective orders do not prevent the government from using sealed information for prosecution if they can gain access to it.³²¹ A “de facto” grant of immunity would occur only if a court interfered in a grand jury investigation by refusing to enforce a subpoena compelling testimony or trying to stop a grand jury from prosecuting based on leaked information by enforcing an order protecting it.³²² Since these are not the facts of any case presented, the Fourth, Eleventh and Ninth Circuits should consider the interests protective orders serve rather than construing protective orders as “de facto” grants of immunity.³²³

holding. Both the Fourth and Eleventh Circuits held that a protective order could not guarantee confidentiality. *Williams*, 995 F.2d at 1017-18; *Grand Jury Subpoena*, 836 F.2d at 1478.

318. *Grand Jury Subpoena Deuces Tecum*, 945 F.2d at 1224-25. The Second Circuit held that improvidence was the appropriate test to overturn the protective order, rather than finding an improper “de facto” grant of immunity. *Id.*

319. *Martindell*, 594 F.2d at 296 (protective orders do not prevent the grand jury from continuing its investigation and, unlike immunity, can be modified or vacated); *Grand Jury Subpoena*, 836 F.2d at 1480 (Sprouse J. dissenting) (protective orders do not alter the deponent’s potential culpability and are not “de facto” grants of immunity); see also 18 U.S.C. § 6002.

320. Compare, Fed. R. Civ. P. 26(c) with 18 U.S.C. §§ 6002, 6003.

321. See Fed. R. Civ. P. 26(c) (the grant of a protective order directly affects only the people involved in the civil litigation). The Fourth and Eleventh Circuits both expressed that protective orders do not guarantee that the government will not obtain and use the information. *Grand Jury Subpoena*, 836 F.2d at 1478; *Williams*, 995 F.2d at 1017-18.

322. Cf., 18 U.S.C. §§ 6002-03.

323. *Grand Jury Subpoena*, 836 F.2d at 1475 (the protective order is a “de facto” grant of immunity); *Williams*, 995 F.2d at 1017-18 (the protective order is an improper grant of immunity). The Ninth Circuit adopted the Fourth and Eleventh Circuits’ findings that a protective order is an improper “de facto” grant of immunity by relying on the Fourth and Eleventh Circuits’ “discussion of the factors” in adopting the per se rule. *Janet Greeson’s APFU*, 62 F.3d at 1226; see also *supra* notes 257-69 and accompanying text discussing the Ninth Circuit’s reliance on the Fourth and Eleventh Circuits for adopting the per se rule. Additionally, the

3. Comparison of the Circuits' Balancing of Competing Interests

When courts recognize and weigh competing interests, they should apply the Second Circuit's rebuttable presumption to uphold protective orders.³²⁴ Although the Second and Eleventh Circuits did not recognize all the relevant policy interests, they alone attempted to balance the competing interests.³²⁵ The Eleventh Circuit found that facilitating civil justice does not outweigh the interest in allowing the grand jury access to information.³²⁶ In contrast, the Second Circuit held that the grand jury did not have a significant need under the circumstances, and favored the policy interest in facilitating civil disputes.³²⁷ One factor accounting for this difference is that courts adopting the per se rule weigh the competing interests in the abstract while the Second Circuit determines the significance of each interest in the context of the specific case.³²⁸

By analyzing interests in the specific context presented, the Second Circuit found that modifying protective orders in favor of grand jury subpoenas did not further the public's interest in law enforcement.³²⁹ If protective orders may be easi-

government's position is unaltered because it can still grant immunity, compel testimony, or obtain the sealed information in some other way and use it for prosecution. *Martindell*, 594 F.2d at 296; *Grand Jury Subpoena*, 836 F.2d at 1480 (Sprouse J. dissenting); see also *supra* notes 138-45, 199-201 and accompanying text for a discussion of why a protective order is not a "de facto" grant of immunity; see also Robert Heidt, *The Conjurer's Circle*, 91 YALE L.J. 1062, 1095-96 (1982) (discussion of using protective orders when a party or non-party invokes a Fifth Amendment privilege in a civil case).

324. See *Grand Jury Subpoena*, 945 F.2d at 1225 (court expressly rejected Fourth Circuit's per se rule).

325. See *Williams*, 995 F.2d at 1016-17; see, e.g., *Martindell*, 594 F.2d at 295-96; see also *Grand Jury Subpoena*, 836 F.2d 1468 (the Fourth Circuit never balanced the competing interests because it found protective orders did not further an interest since they were improper "de facto" grants of immunity).

326. *Williams*, 995 F.2d at 1017.

327. *Martindell*, 594 F.2d at 296; *Palmieri*, 779 F.2d at 866; *Grand Jury Subpoena Deuces Tecum*, 945 F.2d at 1225-26; see also *supra* notes 107-108, 129, 155-56 and accompanying text discussing the Second Circuit's findings that the government has the burden of rebutting the presumption to uphold protective orders.

328. See *Grand Jury Subpoena*, 836 F.2d at 1479 (Sprouse J. dissenting).

329. See *Martindell*, 594 F.2d at 296; see *Palmieri*, 779 F.2d at 866; see *Grand Jury Subpoena Deuces Tecum*, 945 F.2d at 1225-26; see also *supra* notes 103-108, 124-29, 155-56 and accompanying text discussing the Second Circuit's findings that

ly modified, litigants will likely claim their right or privilege rather than rely on protective orders.³³⁰ If parties refuse to disclose privileged information, allowing a grand jury access to the information will serve no purpose because no information will be available.³³¹ The end result of modifying protective orders in favor of grand jury subpoenas will cause a significant harm to the civil process with no offsetting benefit.³³²

The Eleventh Circuit, by considering the competing interests in the abstract, concluded that the public's interest weighed more heavily than private interests.³³³ The Eleventh Circuit incorrectly held that the Second Circuit misunderstood the importance of the grand jury's role.³³⁴ The Second Circuit clearly recognized that the grand jury serves an important public interest, but where information exists only due to a protective order, the public's interest in permitting the grand jury access to the information is not furthered by modifying the protective order.³³⁵

the government has the burden of rebutting the presumption since modification would not further the public's interest.

330. *See, e.g., Martindell*, 594 F.2d at 295-96. Both the Fourth and Eleventh Circuits found that a party or deponent must claim their privilege rather than relying on a protective order. *Grand Jury Subpoena*, 836 F.2d at 1477-78; *Williams*, 995 F.2d at 1018.

331. *Palmieri*, 779 F.2d at 865.

332. *See id.* (without a protective order, parties will not divulge information; thus, no information will be available for the government to subpoena. If no information is available to the government, the public's interest in allowing the government access to all information is hampered.); *see also Martindell*, 594 F.2d at 295 (modifying protective orders disrupts the civil process).

333. *See Williams*, 995 F.2d at 1016-17 (the court identified the importance of each interest, but did not discuss how each would be furthered or harmed if the order was modified).

334. *Williams*, 995 F.2d at 1020.

335. *See Martindell*, 594 F.2d at 295-96. All of the Second Circuit's cases recognize the public's interest in allowing the government access to information as significant. However, the public's interest is served only in the individual case, not in the long-run, since a court's refusal to grant a protective order will result in the party claiming his or her privilege. *See also Palmieri*, 779 F.2d at 865 (information would not exist, but for the protective order). *See also supra* notes 101-108, 124-28 and accompanying text discussing the benefit and harm resulting from modifying an order.

B. THE BALANCING TEST SHOULD PREVAIL OVER A PER SE RULE

1. Review of The *Martindell* Test

In *Martindell*, the Second Circuit held that the government may rebut the presumption against modifying a protective order by showing a compelling need, extraordinary circumstance, or that the court granted the order improvidently.³³⁶ The court defined an improvident grant as one in which the granting judge knew or reasonably should have known that the order would facilitate or further criminal activity.³³⁷ The Second Circuit indicated that a compelling need may exist if there is no alternative method for obtaining the information.³³⁸ Although the court did not use a strict application of the *Martindell* test, the court's modification of a protective order can be viewed as an example of an extraordinary circumstance.³³⁹ The court also implicitly found an extraordinary circumstance when it modified a protective order regarding business documents that the government could have subpoenaed prior to the civil litigation.³⁴⁰

Judges applying the *Martindell* test can exercise discretion while using case specific facts and evaluating the competing

336. *Martindell*, 594 F.2d at 296 (the government can rebut the presumption to uphold a protective order by showing specific facts or circumstances surrounding the case that demonstrate a compelling need, extraordinary circumstance or improvidence in the grant of the order). See also *supra* note 108 and accompanying text for a discussion of the Second Circuit's test. *United States v. Davis*, 702 F.2d 418 (2d Cir. 1983), *cert. denied*, 463 U.S. 1215 (1983) (specific facts permitted the court to vacate a protective order); *Palmieri*, 779 F.2d at 866 (case remanded to determine if facts were sufficient for the government to rebut the presumption to uphold the protective order absent improvidence, compelling need or extraordinary circumstance).

337. *Palmieri*, 779 F.2d at 865-66 (2d Cir. 1985); see also *supra* note 130 and accompanying text discussing the standard for improvidence.

338. *Palmieri*, 779 F.2d at 866; see *supra* note 128 and accompanying text discussing the Second Circuit's finding.

339. *Davis*, 702 F.2d at 422-23; see also *supra* notes 110-17 and accompanying text discussing the court's holding.

340. *Davis*, 594 F.2d at 423. The fact that either party could disclose the information without the court's consent can also be viewed as an extraordinary circumstance requiring modification under *Martindell*. *Id.*; see also *supra* notes 110-17 and accompanying text discussing the courts use of specific facts to modify the order.

interests.³⁴¹ For example, since the policies supporting protective orders are not meant to increase efficiency at any cost, the protective order may protect an illegitimate interest.³⁴² The improvidence portion of the *Martindell* test addresses this possibility.³⁴³ If a court grants an order improvidently, the order protects an illegitimate interest.³⁴⁴ In such a case, modifying the order would not harm the interests of facilitating civil disputes or protecting a deponent's rights and privileges.³⁴⁵ Therefore, by finding improvidence under *Martindell*, a court finds that no interest exists to prevent the grand jury from obtaining the information.³⁴⁶

When an order protects an illegitimate interest, a court applying the *Martindell* test could invalidate the order without harming the civil process.³⁴⁷ Conversely, if the order protects a legitimate interest, a judicial modification would harm the civil judicial process.³⁴⁸ Therefore, if an order protects a legit-

341. See *Martindell*, 594 F.2d at 296 (government can overcome presumption by showing specific facts or circumstances surrounding the case that demonstrate compelling need, extraordinary circumstance or improvidence in the grant of the order); see also *Davis*, 702 F.2d at 422-423 (court uses specific facts of the case).

342. See *Martindell*, 594 F.2d at 296 (order can be modified if a "stronger" interest is shown); see also *Palmieri*, 779 F.2d at 865-66 (aiding criminal activity is improper; therefore, a court may not use a protective order to do so.).

343. *Palmieri*, 779 F.2d at 865-66 (protective order that furthers criminal activity does not protect a legitimate interest and would be granted improvidently).

344. *Id.*; see also *Grand Jury Subpoena*, 836 F.2d at 1480 (Rule 26 does not usurp the powers of the grand jury and perjury "would obviously justify modifying the protective order").

345. See, e.g., *Davis*, 702 F.2d at 422-23 (modification of the order results in no harm because whether the order can ensure confidentiality is not decisive whether to waive a right or privilege in reliance on the protective order).

346. See *Martindell*, 594 F.2d at 295-96 (the *Martindell* test is a balancing approach and a finding of improvidence permits a court to vacate the protective order; thus, improvidence eliminates the interest served by protective orders and tilts the balance in the government's favor.). The other circuits' holdings, that no protective order shielding information from the government can be "valid," are similar to the Second Circuit's finding of improvidence. However, these other circuits have concluded without establishing a procedural test by simply holding protective orders invalid as "de facto" grants of immunity. See generally, *Grand Jury Subpoena*, 836 F.2d at 1474-78; *Williams*, 995 F.2d at 1017-18; see also *supra* notes 310-323 and accompanying text discussing the analytical leap in finding that protective orders are "de facto" grants of immunity.

347. See *Davis*, 702 F.2d at 422 (no harm results by modifying the protective order so long as the party had not relied on it).

348. See *Martindell*, 594 F.2d at 295-96 (protective orders are upheld unless the government meets its burden since, absent specific facts to the contrary, protecting

imate interest, the government must show that refusing the grand jury access would cause greater harm than protecting the sealed information.³⁴⁹ The *Martindell* test addresses this premise by allowing a court to modify the protective order if the government shows a compelling need or extraordinary circumstance.³⁵⁰

2. The Per Se Rule

Courts that adopt the per se rule generally reject the *Martindell* test as unworkable.³⁵¹ The Eleventh Circuit complained that the Second Circuit had not defined the test's terms.³⁵² However, in *Palmieri*, the Second Circuit defined an improvident grant of a protective order as when the judge knew or should have known that the order would aid or promote criminal activity.³⁵³ The Second Circuit also suggested that if the court knew or should have known that the government may want the information, granting the order without including this interest in its weighing of the competing interests would be an "improvident" grant.³⁵⁴ The Eleventh Circuit's opinion did not mention these standards.³⁵⁵

As for "compelling need" or "extraordinary circumstance", the dissent in the Fourth Circuit opined that perjury would

the civil process from harm outweighs the benefits derived by permitting the government access to sealed information).

349. *See, e.g., id.* (*Martindell* establishes a rebuttable presumption to uphold the protective order unless the government can show that the order serves no valid interest because it was granted improvidently or that significant harm will result if the order is not modified due to an extraordinary circumstance or compelling governmental need.).

350. *Id.* An extraordinary circumstance may result in a decreased significance to the interest of facilitating civil disputes or an increased significance to the public's interest or a larger harm accruing to the public interest if the order is not modified. Compelling need only addresses a greater harm accruing to the public's interest if a court does not modify the order. *See generally, id.* at 291-296.

351. *Grand Jury Subpoena*, 836 F.2d at 1476-78; *Williams*, 995 F.2d at 1018-20.

352. *Williams*, 995 F.2d at 1018-19; see also *supra* note 228 and accompanying text discussing the Eleventh Circuit's argument.

353. *Palmieri*, 779 F.2d at 865; see also *supra* notes 292-31 and accompanying text discussing an appropriate standard for improvidence.

354. *Id.* Knowledge of a grand jury investigation is sufficient for a judge to know that the government is likely to want the information. *Id.*

355. *See Williams*, 995 F.2d 1013.

justify modifying an order.³⁵⁶ Moreover, when a party other than the government seeks to modify an order, courts conduct a balancing of competing interests similar to *Martindell's* requirements.³⁵⁷ Hence, it is difficult to understand why the test must be rejected for the government, but retained when the party seeking the information is a private litigant.³⁵⁸ Although different interests may be involved, the procedural test should not be altered.³⁵⁹

The Eleventh Circuit also rejected the *Martindell* test because it found that judges would face a "Hobson's choice" in deciding whether to modify an order.³⁶⁰ The "Hobson's choice" is based on a judge who must decide whether to modify an order after having assured protection when compelling the testimony.³⁶¹ However, this argument fails because courts have established that a protective order cannot be used to compel testimony.³⁶² Additionally, all of the cases decided by courts adopting the per se rule involved a party's *voluntary* waiver of a privilege, rather than one compelled by the court.³⁶³ Since none of these circuits have used or can use a

356. *Grand Jury Subpoena*, 836 F.2d at 1480 (Sprouse J. dissenting). Since immunity does not protect testimony from perjury charges, a protective order probably cannot protect it either. See 18 U.S.C. § 6002.

357. 8 WRIGHT & MILLER § 2044.1 (courts balance interests when a third party seeks modification of a protective order).

358. *Martindell*, 594 F.2d at 296 (The government, in comparison to private parties, has much greater power (i.e., not all privileges apply, able to grant immunity); therefore, the government is more likely to have access to the information.).

359. *Compare, e.g., Palmieri*, 779 F.2d at 864 (recognized competing interests as the facilitation of civil disputes and the public's interest in permitting government access to all information for criminal investigations) with 8 WRIGHT & MILLER § 2044.1 (courts consider various interests including facilitating civil litigation, harm to parties if modified, movant's ability to duplicate discovery, expense of duplication, timeliness of request, etc.).

360. *Williams*, 995 F.2d at 1019. See also *supra* notes 229-31 and accompanying text regarding the Eleventh Circuit's discussion of the "Hobson's choice" that the *Martindell* test allegedly creates for judges.

361. *Id.*

362. *Andover*, 876 F.2d at 1082 (citing *Kastigar v. United States*, 406 U.S. 441-45 (1972); *Pillsbury*, 459 U.S. 248, 256-257 (1972)).

363. *Grand Jury Subpoena*, 836 F.2d at 1469 (all parties and deponents consented); *Williams*, 995 F.2d at 1014 (party refused to testify until there was consent to a protective order, court did not compel testimony); *Janet Greeson's APFU*, 62 F.3d at 1223 (order entered as part of settlement agreement after testimony had been voluntarily given).

protective order to compel testimony, they have not and will not face this "Hobson's choice."³⁶⁴

The Fourth Circuit rejected the *Martindell* approach because the government is not generally present when a court issues an order, which prevents a court from effectively balancing the competing interests.³⁶⁵ However, courts do not seem to have a problem balancing these interests when a private party seeks modification.³⁶⁶ When a private party moves to modify a protective order, courts have not invalidated protective orders simply because parties who may want or need the information in the future cannot be predicted at the time the order is granted.³⁶⁷ The per se rule clearly differentiates between private parties and the government, holding that the government has a special need that mandates courts to weigh the governmental interest before the order is issued.³⁶⁸ Since courts cannot predict the future, the per se rule invalidates those protective orders that shield information from the government.³⁶⁹

The Fourth and Eleventh Circuits both have found that alternatives exist which make protective orders unnecessary.³⁷⁰ If the courts actually weighed the competing policy

364. *Andover*, 876 F.2d at 1082 (citing *Kastigar v. United States*, 406 U.S. 441-45 (1972); *Pillsbury*, 459 U.S. 248, 256-257 (1972)) (cannot use protective orders to compel testimony). *Williams*, 995 F.2d at 1019 (part of the "Hobson's choice" is that a court has compelled the testimony).

365. *Grand Jury Subpoena*, 836 F.2d at 1477-78.

366. 8 WRIGHT & MILLER § 2044.1.

367. *See id.* (discussing foresight and hindsight regarding protective orders).

368. *See id.* (courts have not applied the per se rule when a private party seeks to modify the protective order). *See Grand Jury Subpoena*, 836 F.2d 1468 (no discussion of why government's, but not private parties', interests must be weighed before the order is issued); *Williams*, 995 F.2d 1013 (no discussion of why government's, but not private parties', interests must be weighed before the order is issued); *Janet Greeson's APFU*, 62 F.3d 1222 (no discussion of why government's, but not private parties', interests must be weighed before the order is issued). The Ninth Circuit explicitly held that it analyzes "whether to modify its protective orders for the benefit of a private litigant, and for a grand jury, distinctly differently." *Janet Greeson's APFU*, 62 F.3d at 1223 n.1.

369. *See Grand Jury Subpoena*, 836 F.2d at 1477; *see generally, Williams*, 995 F.2d 1013.

370. *Grand Jury Subpoena*, 836 F.2d at 1476; *Williams*, 995 F.2d at 1018; *See also supra* note 184 and accompanying text for a discussion of the alternative tools.

interests, alternatives to protective orders would be one factor of many considered in deciding whether a grand jury subpoena should prevail.³⁷¹ However, as used, alternatives are presented as collateral support for a conclusion reached without proper analysis.³⁷² Additionally, unlike these alternatives, procedural rules governing protective orders were moved to FRCP 26 and made applicable to all forms of discovery to curb discovery abuse.³⁷³ These alternatives are not adequate replacements for “the long-standing role played by Rule 26(c) [protective orders].”³⁷⁴

3. Comparison of the Balancing Test with the Per Se Rule

The Fourth, Eleventh, and Ninth Circuits claimed they weighed the competing interests to find that protective orders improperly shielded information from the grand jury.³⁷⁵ However, these courts identified and weighed these interests in the abstract, rather than in relation to the particular facts of the cases.³⁷⁶ The courts identified only the “efficient and speedy” interest outlined in FRCP 1 and served by protective orders, rather than the “just” portion permitting orders to protect individual and societal rights and privileges from discovery abuse.³⁷⁷ These courts also declined to temper the importance of grand jury investigations by recognizing established limits on judicial authority over grand juries.³⁷⁸ To fairly weigh the

371. See e.g., *Martindell*, 594 F.2d at 295-96 (a number of factors must be considered).

372. See generally *Grand Jury Subpoena*, 836 F.2d 1468 (lack of analysis).

373. See 8 WRIGHT & MILLER §§ 2036, 2043; Miller, *supra* note 274, at 452.

374. *Grand Jury Subpoena*, 836 F.2d at 1481 (Sprouse J. dissenting).

375. *Id.* at 1477; *Williams*, 995 F.2d at 1017; *Janet Greeson's APFU*, 62 F.3d at 1226-27.

376. *Grand Jury Subpoena*, 836 F.2d at 1471-73; *Williams*, 995 F.2d at 1016-18. See also *supra* notes 328-35 and accompanying text discussing the courts' balancing in the abstract.

377. See *Grand Jury Subpoena*, 836 F.2d at 1471-73; see also *Williams*, 995 F.2d at 1016-18. Rule 1 of the FRCP calls for the “just, speedy and inexpensive determination of every action,” not simply the “speedy and inexpensive” resolution. Fed. R. Civ. P. 1. See also *supra* notes 13-42, 282-87, 292-93 for a discussion of protective orders under the FRCP and the courts' narrow construction of this interest.

378. See *Grand Jury Subpoena*, 836 F.2d at 1471-73; see also *Williams*, 995 F.2d at 1016-18. See also *supra* notes 72-83 and accompanying text discussing the limits of the grand jury and the courts authority over it.

competing interests, the courts should fully identify them to clarify their relevance to the case being addressed.

Regardless of a court's conclusion regarding the competing interests, the specific facts or circumstances of the case must be allowed to alter the balance.³⁷⁹ The Fourth, Eleventh, and Ninth Circuits' per se rule eliminates this possibility by rejecting a balancing approach as unworkable and construing protective orders that shield information from the government as improper "de facto" grants of immunity.³⁸⁰ Noting that protective orders cannot be considered equal to immunity and that a similar balancing is undertaken when private parties are involved, courts should recognize that modifying protective orders can harm relevant interests.³⁸¹ Whether the public's interest in facilitating grand jury investigations is greater than the interest in upholding protective orders can only be determined using a balancing approach that integrates the facts of the case.³⁸²

If the Ninth Circuit had applied *Martindell*, the court could have found a rebuttable presumption to modify the protective order. Had that occurred, the burden would be placed on appellants to overcome the presumption. The facts of the case do not suggest that appellants had a compelling need or that an extraordinary circumstance existed, other than appellant's reliance upon the protective order when waiving her Fifth Amendment right.³⁸³ Therefore, the Ninth Circuit could have applied the *Martindell* test to find that appellant's

379. See *Martindell*, 594 F.2d at 296 (the *Martindell* test permits a judge to modify an order if the specific facts demonstrate a compelling need, extraordinary circumstance, or that the order was granted improvidently). See also *supra* notes 357-59 and accompanying text discussing courts consideration of specific facts when balancing interests where a private litigant has moved to modify an order.

380. See *Grand Jury Subpoena*, 836 F.2d at 1471-73; see also *Williams*, 995 F.2d at 1016-18.

381. *Martindell*, 594 F.2d at 1226 (a vital function of protective orders under the FRCP is to ensure that the goals of Rule 1 are met). See also *supra* notes 13-42 discussing the role of protective orders under the FRCP as both facilitating the civil process and safeguarding litigants against the broad scope of discovery.

382. Compare, *Martindell*, 594 F.2d at 1224 (the *Martindell* test allows an order to be modified using the specific facts of the case) with *Grand Jury Subpoena*, 836 F.2d at 1477 (the per se rule is automatic and does not permit judges to consider interests or facts).

383. *Janet Greeson's APFU*, 62 F.3d at 1222-23.

Fifth Amendment right did not merit court protection since it implied shielding criminal activity.³⁸⁴ Unless the appellant could have shown otherwise, the Ninth Circuit could have found improvidence in granting the order having weighed all relevant interests in the context of the case's specific facts.

Although the per se rule is easily applied and litigants face no uncertainty as to whether a protective order will be modified if the government wants the information, the "price" of its clarity is very high. The per se rule eliminates the judiciary's role in applying specific facts to the law and takes away litigants' rights to decide whether to rely on a protective order.³⁸⁵ The legislature, not the judiciary, should decide whether a per se rule is an appropriate policy solution.³⁸⁶ Until then, courts should use a balancing approach, like *Martindell*, which allows them to weigh the competing interests in light of facts and circumstances of a particular case.³⁸⁷

384. See *Palmieri*, 779 F.2d at 866 (if the judge knew or should have known that the order would further or aid criminal activity, it was granted improvidently); see also *supra* note 131 and accompanying text discussing this standard of improvidence.

385. *Grand Jury Subpoena*, 836 F.2d at 1481 (Sprouse J. dissenting).

386. See *The Supreme Court, 1990 Term-Leading Cases*, 105 HARV. L. REV. 177, 346-47 (1991) (prospective law making is a legislative function). See also T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 979-80, 984-87 (1987) (arguing that balancing interests is a legislative function, but "ad hoc" balancing is more justifiable for the judiciary than "definitional" balancing that results in a per se rule).

387. See generally, David P. Leonard, *Power and Responsibility in Evidence Law*, 63 S. CAL. L. REV. 937 (1990) (judges need to have discretion and flexibility). There has been a general trend in legal reform over the last century toward flexible standards and away from fixed "per se" rules. *Id.* at 956; see also Aleinikoff, *supra* note 386, at 343 n.6 (citing articles revealing the persuasiveness of moving from rules to balancing across many doctrinal areas). See also *The Supreme Court, 1994 Term-Leading Cases*, 109 HARV. L. REV. 111, 234-36 (1995) (per se rule applied to security law is inappropriate because it fails to account for specific circumstances); see also Aleinikoff, *supra* note 386, at 979-80 (opposing per se rule because there will generally be special circumstances deserving of an exception). See also Thomas E. Kauper, *Anticipating Antitrust's Centennial*, 75 CALIF. L. REV. 893-94 (1987) (advocating a very limited role for per se rules under antitrust law). The idea that courts should adjudicate cases using their "best current understanding" of the law supports the Second Circuit's case-by-case balancing. See *The Supreme Court, 1990 Term-Leading Cases*, 105 HARV. L. REV. 177, 346-47 (1991) (courts should adjudicate cases using "their best current understanding" of the law).

V. CONCLUSION

The Fourth, Eleventh, and Ninth Circuits have considered whether a party providing potentially incriminating discovery material in a civil case, and of which the court was aware, had authority to shield that evidence from a grand jury.³⁸⁸ The per se rule, adopted by the Ninth Circuit, provides that grand jury subpoenas prevail over all protective orders regardless of a litigant's motivation for requesting the order or the circumstances and knowledge surrounding its issuance.³⁸⁹ The Ninth Circuit, adopting the Fourth and Eleventh Circuits' arguments, rejected the Second Circuit's balancing approach. That approach would have allowed the court to invalidate the protective order by finding that the orders had been granted improvidently. The Ninth Circuit, in its cursory review of Second Circuit cases, declined to discuss this Second Circuit holding.³⁹⁰ By adopting the per se rule, the Ninth Circuit held that it wished to promote the public's significant interest in facilitating grand jury investigations. However, the Ninth Circuit's decision went well beyond the narrow issue presented.

388. *In re Grand Jury Subpoena*, 836 F.2d 1468, 1469 (4th Cir. 1988) (deponents requested protective order due to an on-going grand jury investigation and their concern that their testimony may incriminate them). *Williams v. United States*, 995 F.2d 1013, 1014 (11th Cir. 1993) (Williams requested a protective order to prevent a grand jury that was investigating him from using his testimony to indict him). Appellant's Opening Brief at 1-2, *United States v. Janet Greeson's APFU*, 62 F.3d 1222 (9th Cir. 1995) (No. 94-56125) (concern over on-going grand jury investigation led to request of protective order); Appellant's Reply Brief at 2, *United States v. Janet Greeson's APFU*, 62 F.3d 1222 (9th Cir. 1995) (No. 94-56125) (appellant's alleged that confidentiality order indicated concern over Fifth Amendment right throughout litigation).

389. *Janet Greeson's APFU*, 62 F.3d at 1226-27 (grand jury subpoenas automatically "trump" protective orders).

390. *Palmieri v. New York*, 779 F.2d 861, 866 (2d Cir. 1985) (the Second Circuit held that if the court knew or reasonably should have known that issuing the protective order would further or aid criminal activity, the court acted with improvidence in granting the order). The Ninth Circuit read this case as reaffirming *Martindell*, but declined to discuss the case any further. *Janet Greeson's APFU*, 62 F.3d at 1223-24.

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Although the Ninth Circuit suggests an offsetting benefit, it is minimal compared to the significant harm the per se rule causes to the civil process.

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