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## ARTICLE

# OBTAINING THE RELEASE OF GRAND JURY EVIDENCE IN PONZI CASES

*THE HONORABLE STEVEN RHODES\**

### I. INTRODUCTION—THE SCOPE OF FEDERAL RULE OF CRIMINAL PROCEDURE 6(e)

Evidence that law enforcement authorities obtain through the grand jury process is generally secret.<sup>1</sup> Federal Rule of Criminal Procedure 6(e)(2) states:

(B) Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury:

- (i) a grand juror;
- (ii) an interpreter;
- (iii) a court reporter;
- (iv) an operator of a recording device;
- (v) a person who transcribes recorded testimony;
- (vi) an attorney for the government; or
- (vii) a person to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii).<sup>2</sup>

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This paper is partially derived and excerpted from Kathy Bazoian Phelps & Hon. Steven Rhodes, *The Ponzi Book: A Legal Resource for Unraveling Ponzi Schemes* (LexisNexis, March 2012). For more information, go to [www.ThePonziBook.com](http://www.ThePonziBook.com).

<sup>1</sup> FED. R. CRIM. P. 6(e)(2); *see also* *Douglas Oil Co. of Cal. v. Petrol Stops Nw.*, 441 U.S. 211, 218, 99 S. Ct. 1667, 1672 (1979) (“We consistently have recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings.”).

<sup>2</sup> FED. R. CRIM. P. 6(e)(2).

Nevertheless, case law can provide a powerful basis for a trustee, a receiver or any party in a Ponzi case to obtain evidence that the government has in its possession as a result of its investigation of a Ponzi scheme.

This Article considers the extent to which parties in a Ponzi scheme insolvency proceeding might be able to obtain evidence presented in a criminal grand jury proceeding relating to the Ponzi scheme.

## II. THE SECRECY OF GRAND JURY EVIDENCE

Grand jury evidence can be obtained on either of two grounds—the evidence is not subject to the secrecy rule;<sup>3</sup> or the evidence, though secret, is subject to release under Rule 6(e)(3)(E)(i).<sup>4</sup>

Under Rule 6(e)(3)(E), “[t]he court may authorize disclosure—at a time, in a manner, and subject to any other conditions that it directs—of a grand-jury matter: (i) preliminarily to or in connection with a judicial proceeding . . . .”<sup>5</sup>

The standards for releasing grand jury evidence under Rule 6 are developed by case law, discussed below.

## III. OBTAINING THE RELEASE OF GRAND JURY TESTIMONY

There is a distinction between the release of testimony and the release of documents. Addressing the disclosure of testimony, the Supreme Court stated in *Douglas Oil Co. of California v. Petrol Stops Northwest*:

Parties seeking grand jury transcripts under Rule 6(e) must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed.<sup>6</sup>

In *In re Application of Executive Securities Corp.*,<sup>7</sup> the Second Circuit granted a SIPA liquidating trustee release of grand jury testimony where the witness had waived his right to object to the release of his

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<sup>3</sup> See *infra* Part IV referring to the release of Grand Jury documents.

<sup>4</sup> FED. R. CRIM. P. 6(e)(3)(E)(i).

<sup>5</sup> FED. R. CRIM. P. 6(e)(3)(E).

<sup>6</sup> *Douglas Oil Co. of Cal.*, 441 U.S. at 222; see also *McAninch v. Wintermute*, 491 F.3d 759, 767 (8th Cir. 2007) (applying *Douglas Oil* and denying motion for disclosure where “[Movant] failed to make any showing of a particularized need for the requested materials because he admitted that the ‘exact same testimony’ could probably be obtained from the witness through deposition.”).

<sup>7</sup> *In re Application of Exec. Sec. Corp.*, 702 F.2d 406 (2d Cir. 1983).

testimony.<sup>8</sup> The court found that there was minimal harm and that the trustee's application was attempting to vindicate substantial public interests.<sup>9</sup>

#### IV. OBTAINING THE RELEASE OF GRAND JURY DOCUMENTS

A different standard is applied to a request for the release of grand jury documents. In *S.E.C. v. Everest Management Corp.*,<sup>10</sup> the United States District Court for the Southern District of New York stated: "A request for grand jury documents evokes different, and less exacting, considerations than a request for transcripts of grand jury testimony."<sup>11</sup> The court further noted: "Disclosure is appropriate where documents are sought to further legitimate purposes in connection with lawful investigations or judicial proceedings."<sup>12</sup>

Under these principles, bankruptcy trustees in several cases have successfully obtained documents that had been submitted to a grand jury. For example, in *In re Grand Jury Proceedings*,<sup>13</sup> the court granted the bankruptcy trustee's motion for release of grand jury subpoenaed documents, as well as documents seized pursuant to a search warrant.<sup>14</sup>

The court in *In re Grand Jury Proceedings* further concluded that other documents that the trustee sought from the government were not protected at all by the secrecy requirement of Rule 6(e). These were identified as "all public records or documents held by the grand jury and all documents voluntarily provided to that body."<sup>15</sup> In so concluding, the court applied this test adopted by the Sixth Circuit:<sup>16</sup>

[C]onfidential documentary information not otherwise public obtained by the grand jury by coercive means is presumed to be "matters occurring before the grand jury" just as much as testimony before the grand jury. The moving party may seek to rebut that presumption by showing that the information is public or was not obtained through coercive means or that disclosure would be otherwise available by

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<sup>8</sup> *Id.* at 409-10.

<sup>9</sup> *Id.*

<sup>10</sup> *S.E.C. v. Everest Mgmt. Corp.*, 87 F.R.D. 100 (S.D.N.Y. 1980).

<sup>11</sup> *Id.* at 105.

<sup>12</sup> *Id.*; see also *Alexander v. F.B.I.*, 186 F.R.D. 102, 108 (D.D.C. 1998) (citations omitted) (noting that "documents are not cloaked with secrecy merely because they are presented to a grand jury").

<sup>13</sup> *In re Grand Jury Proceedings*, 196 F.R.D. 57 (S.D. Ohio 2000).

<sup>14</sup> *Id.* at 63; see also *In re Grand Jury Empanelled March 8, 1983, 1988 U.S. App. LEXIS 19426*, at \*1 (6th Cir. Aug. 30, 1988).

<sup>15</sup> *In re Grand Jury Proceedings*, 196 F.R.D. at 63 (internal quotation marks omitted).

<sup>16</sup> *In re Grand Jury Proceedings*, 851 F.2d 860, 866-67 (6th Cir. 1988).

civil discovery and would not reveal the nature, scope, or direction of the grand jury inquiry, but it must bear the burden of making that showing . . . .<sup>17</sup>

Similarly, the court in *United States v. Theron*<sup>18</sup> allowed a trustee to obtain the debtor's books and records that the grand jury had subpoenaed because the records were not subject to Rule 6(e).<sup>19</sup> In the alternative, if the records were subject to the rule, the court concluded that the trustee had met the standard for the release of the records.<sup>20</sup> Additionally, in *In re Butcher*,<sup>21</sup> the court granted the trustee's request to release the debtor's papers that had been seized by the government pursuant to a search warrant.<sup>22</sup>

In Ponzi cases, the perpetrator's insolvency proceedings often run parallel to a grand jury investigation and the subsequent criminal proceedings. Important evidence that a party, trustee, or receiver needs is likely in the hands of the government as a result of its grand jury investigation. While the obstacles imposed by grand jury secrecy can be significant, there is precedent to overcome that secrecy and obtain the needed evidence.

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<sup>17</sup> *In re Grand Jury Proceedings*, 196 F.R.D. at 62-63.

<sup>18</sup> *United States v. Theron*, 116 F.R.D. 58 (D. Kan. 1987).

<sup>19</sup> *Id.* at 62.

<sup>20</sup> *Id.*

<sup>21</sup> *In re Butcher*, 38 B.R. 796 (Bankr. E.D. Tenn. 1984).

<sup>22</sup> *Id.* at 801-02.