Seventh Circuit affirms that Omnicare’s “gun jumping” claim missed the mark

On January 10, 2011, the Seventh Circuit affirmed the district court’s decision in Omnicare v. UnitedHealth Group, Inc., et al., that granted summary judgment on Omnicare’s antitrust and fraud claims that health insurers UnitedHealth and PacifiCare conspired to depress the reimbursement rate they paid Omnicare, an institutional pharmacy, for drugs dispensed under the Medicare Part D program. Omnicare claimed that the defendants exchanged competitively sensitive information during pre-merger due diligence that allowed them to coordinate their negotiations with Omnicare and dupe the pharmacy into signing a bargain-basement contract with PacifiCare. After the companies merged, UnitedHealth abandoned its higher-rate contract and used PacifiCare’s. The problem with Omnicare’s antitrust theory, according to the district court and the Seventh Circuit, was that it rested on evidence that was consistent with independent, lawful action. That is, the information UnitedHealth and PacifiCare exchanged during due diligence did not support an inference of a conspiracy. Judge Pallmeyer of the Northern District of Illinois scrutinized the factual support for Omnicare’s claim that the insurance companies had conspired during pre-merger talks and determined that the “exchange of information was necessary to due diligence and was performed in a reasonably sensitive manner.” Judge Tinder, writing for a unanimous panel, affirmed without the fact-intensive analysis, but similarly found that Omnicare’s evidence “demonstrates only a circulation of generalized and averaged high-level pricing data, policed by outside counsel, that is more consistent with independent than collusive action.”

Robins, Kaplan, Miller & Ciresi L.L.P. defended UnitedHealth during the discovery and summary-judgment phases of the litigation, which involved millions of pages of document production, sixty-two depositions, and a dozen expert reports. Judge Pallmeyer’s summary-judgment opinion is now one of the leading authorities on when “gun jumping” can trigger liability under Section 1 of the Sherman Act.

> Continued
FCC approves acquisition of NBC Universal by Comcast

The FCC approved a $37 billion acquisition of content provider NBC Universal by cable and internet provider Comcast by a four to one vote on January 18, 2011. The approval came with conditions designed to promote competition in the online arena and to ensure that Comcast does not tie internet and cable service to NBC Universal’s content to the detriment of consumers. Among the conditions, Comcast-NBCU must provide its programming on other cable networks and bona fide online distributors, and cannot discriminate in distribution of video programming to favor its own content. Comcast-NBCU will also be required to provide more programs for Spanish-language consumers, reduce the price of broadband for schools and libraries, and offer low-cost standalone internet service to low-income households. From an antitrust perspective, the conditions are unique in that they seek to protect competition through restrictions on the joint venture’s conduct rather than requiring divestiture. Despite these conditions, critics of the merger including Minnesota Democratic Senator (and former NBC employee) Al Franken accused the FCC of not going far enough, and of opening the door to discrimination over the internet. Republican lawmakers, meanwhile, have criticized the deal for going too far. Representatives Fred Upton (MI), Greg Walden (OR), and Lee Terry (NE) warned that the FCC was imperiling the free market with “investment-harming net neutrality provisions” and regulations as part of a “Chicago-style shakedown” of the acquiring company.

Leibowitz expresses interest in changing the legal landscape in RPM, monopolization, and Section 5

On December 7, 2011, FTC Chairman, Jon Liebowitz, gave a luncheon address at the Fourth Annual Future Private Antitrust Enforcement Conference, hosted by the American Antitrust Institute. The Chairman identified three categories of cases that the FTC would like to rehabilitate after the Supreme Court “hobbled” them. He indicated that the FTC may pursue an RPM case under an “inherently suspect” analysis, in which the defendant bears the burden of justifying its practice. The inherently suspect analysis would especially apply when the RPM policies facilitate a manufacturer cartel, are urged by retailers, or are used to exclude emerging retail channels. Chairman Liebowitz also stated that the FTC may bring more monopolization cases, such as Intel and Transitions, to develop this area of the law after the Court expressed concerns about private enforcement of Section 2 in In re Linkline, Transocean, and Credit Suisse. According to Chairman Liebowitz, the FTC continues to look for cases that define the FTC’s authority under Section 5 of the FTC Act, which prohibits “unfair or deceptive…acts or practices.”

DOJ investigates competitor’s claims that UPS and FedEx conspired to refuse to deal

United Parcel Service (“UPS”) and FedEx Corp. are under scrutiny from the Department of Justice in connection with claims from an antitrust lawsuit that alleges that they conspired to refuse to deal with shipping consultants. AFMS LLC, a third-party consulting firm, brought a lawsuit against UPS and FedEx in August after the two companies implemented similar policies that prevented their customers from working with, or otherwise sharing any information with, third-party shipping consultants. It has been reported that these shipping consultants have historically reduced costs incurred by shippers. AFMS argues that in practice this policy—preventing shippers the ability to work with third-party shipping consultants—is a form of price fixing. This investigation highlights a recent trend at the DOJ of initiating investigations into practices challenged in private lawsuits.

Seventh Circuit states that allegations of direct evidence of an agreement in an antitrust lawsuit is not essential to survive Twombly

In a recent opinion authored by Judge Posner, the Seventh Circuit refined the standards for surviving motions to dismiss under Twombly. In that case—in re Text Messaging Antitrust Litigation—the plaintiffs claimed that major cellular-phone providers conspired to fix prices of text-messaging services. The plaintiffs’ complaint alleged that the defendants implemented a policy of “co-opetition” by exchanging price information at trade-association meetings, increasing prices despite falling costs, and simultaneously adopting a common pricing structure. The Seventh Circuit affirmed the district court’s denial of a motion to dismiss, and concluded that the plaintiffs’ complaint provided a sufficiently plausible case of price fixing to meet Twombly and Iqbal pleading standards. The court noted that even though the second amended complaint did not have a “smoking gun,” the post-Twombly law does not require that the allegations “compel an inference of conspiracy,” and continues to allow plaintiffs to rely on circumstantial evidence at the pleading stage.
Two recent orders arising out of the FTC’s investigation of condom-manufacturer Church & Dwight serve as a stern warning to companies that believe that simply ignoring a government investigation will make it go away.

On October 29, 2010, Magistrate Judge John M. Facciola of the federal district court in Washington, D.C. gave Church & Dwight two weeks to respond to the entirety of a Civil Investigative Demand (“CID”) and subpoena that the FTC issued in early 2009.1 The FTC issued the CID as part of an investigation into the marketing and distribution practices of Church & Dwight, the maker of Trojan condoms, which the FTC alleges to hold a 70% share of the U.S. condom market.2 The FTC’s investigation centers on whether Church & Dwight monopolized the condom market by paying retailers large promotional allowances on the condition that the retailers dedicate a certain percentage of their shelf space to Trojan condoms.3 Thus, the CID that the FTC issued centered on Church & Dwight’s distribution practices including pricing, discount, and sales information for condoms, information on marketing programs, and information on the competitive landscape in the condom market.

Instead of cooperating with the FTC staff to narrow the scope of the CID—as targets of government investigations typically do—Church & Dwight refused to cooperate with the subpoena. It sent a detailed list of objections after the CID’s initial compliance deadline and—instead of complying within a new deadline that the FTC set—filed a motion with the Commission to quash the CID.4 Church & Dwight took particularly aggressive positions in its response to the CID and motion to quash—it refused to produce any documents located in Canada, it balked at the CID’s requirement that it redact materials only for attorney-client privilege, and it refused to produce information relating to products other than condoms. The Commission denied Church & Dwight’s motion as untimely. The FTC staff then filed a motion in federal court to enforce the subpoena and CID, which resulted in the order requiring full compliance.5

But even a court order could not persuade Church & Dwight to comply with the CID. Church & Dwight insisted on redacting documents to exclude information not relating to condoms and moved the court to stay its October 29 order to allow it to pursue an appeal.6 Church & Dwight claimed that the court’s interpretation of D.C. Circuit precedent regarding the breadth of CIDs raised important legal issues, which justified relieving it of its obligation to produce unredacted documents until the appeal was resolved.7 The court rejected this argument, denied Church & Dwight’s motion, and granted the FTC’s parallel motion to require full compliance with the CID or to show cause why it should not be held in civil contempt for not doing so.8

The Church & Dwight order serves as a reminder to companies that face governmental investigations—whether by the FTC, DOJ, or a state attorney general—that early cooperation is usually the most effective way to minimize the time, expense and business disruption entailed in the investigation. If Church & Dwight would have pursued an early negotiation strategy, it likely could have reduced the number of custodians it had to...
search and the amount of information that it had to turn over. As a practical matter, many CIDs are written in boilerplate form, with the expectation that the government staff attorneys will negotiate the actual scope with the target’s counsel. Moreover, negotiations over document-production requests may provide the company receiving the CID with insight into the theories that the government is pursuing in its investigation. This is especially true if the CID recipient is not a party to the investigation. Finally, at least before the FTC, motions to quash are rarely if ever successful, in part because the movant must convince the Commission to quash the very CID that it issued. Especially in light of these odds, companies would be wise to learn from the experience of Church & Dwight that cooperation is often the most effective way to minimize the burden of government investigations.

2 Court Orders Subpoena, CID Compliance in Condom Investigation, 773 FTC: Watch at 1 (Nov. 8, 2010).
3 Church & Dwight, 2010 U.S. Dist LEXIS 115202, at *1.
4 Id. at *3.
5 See id.
7 Id. at *3-7.
8 Id. at *14.
9 The publication, FTC: Watch, which tracks activities at the FTC, states that it is unaware of any successful petition to quash before the FTC in the past 30 years. 773 FTC: Watch at 3.
The Department of Justice's Antitrust Division Criminal Enforcement Section had another banner year in 2010. The Section collected hundreds of millions of dollars in fines through criminal price-fixing investigations involving the TFT-LCD (Flat-Panel) industry, international-airline transportation, environmental services, and municipal bonds, among others. The Section also issued dozens of indictments and secured several dozen corporate and individual pleas, while continuing to press for jail time for non-cooperative, culpable officers and employees.

The Division directly attributes the Section's successful cartel enforcement to its Amnesty Program (or Corporate Leniency Policy as it is formally known).

Companies operating in industries tinged by anticompetitive behavior should therefore reacquaint themselves with the Amnesty Program and its synergies with criminal and civil-enforcement activities—particularly because 2010 also brought Congress' reauthorization of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 ("ACPERA"), which contains further, civil-suit incentives for companies to "rat out" cartel activity.

The Antitrust Division's Corporate Leniency Policy

In August 1993, the Antitrust Division created its revised Amnesty Program, radically changing the rules of the game for cartel enforcement. Although the DOJ had maintained a corporate-amnesty policy for years, the revised program diverged in at least two critical respects.

First, it expanded the circumstances under which a leniency applicant could receive amnesty. Amnesty became automatic for companies that reported illegal activity before an investigation formally commenced when:

1. The Division had not already received information about the illegal activity from another source;
2. The company promptly and effectively terminates its participation;
3. The company reports the wrongdoing and cooperates in the investigation;
4. The confession is a corporate act, as opposed to that of individual executives or officials;
5. The corporation makes appropriate restitution; and
6. The company did not originate or lead the activity, nor coerce others to participate.

Under the program’s “Alternative Requirements for Leniency,” even after an investigation had begun, a corporation could receive leniency by being the “first in,” if the Division did “not yet have evidence against the company that is likely to result in a sustainable conviction,” and if granting leniency would not be unfair to other participants.

Second—and of paramount importance to those making the decision to come forward—senior management could avoid indictment if a corporation qualified for leniency based on a report before an investigation began.

By the numbers: A statistical explosion in cartel enforcement

Enforcement figures from the last two decades reveal the Amnesty Program's jarring impact. Criminal fines have increased significantly since the Program's adoption. Although the Division imposed $1.6 billion in criminal fines in the 1990s, 87% of this amount was collected after 1996. That year, the new Amnesty Program netted a $105 million fine against ADM. That record fine was surpassed in 1999, by a $500 million fine against F. Hoffman La Roche in the Vitamins case. Over the last decade, however,
the Division has imposed $4.2 billion in fines – more than two-and-a-half times the amount of fines imposed on corporations in the prior decade.

The number and percent of corporate employees imprisoned for antitrust violations, and the length of their sentences, have also increased sharply since the Program’s adoption. Unlike the prior decade, in every year since 2002 at least half of the corporate employees sentenced for antitrust crimes received prison time. Nearly two thirds of them received prison time for the period from 2002 through 2009. And remarkably, corporate employees sentenced over the last decade received on average nearly two-and-a-half times the prison time received in the prior decade; with the longest average sentences meted out over the last several years.

Balancing the harms: To report, or not to report?

Despite the explosion in fines and individual sentences, some strong disincentives to cooperation remain for many companies. For example, given the secrecy of grand-jury proceedings, discerning the availability of “automatic” amnesty under the traditional amnesty tract may require determining whether or not an investigation has actually begun.

And even if a company has confidence that an investigation has not yet begun or, under the alternative requirements for leniency—that there is not yet “evidence against the company that is likely to result in a sustainable conviction”—the company must nevertheless evaluate the likelihood that it can satisfy the other mandatory criteria for leniency. Then, it must balance the perceived benefits of self-reporting against the risks of nondisclosure, including the real impact of a possible indictment of the company – e.g., the ability to continue in business, reputational harm, effects on stock price, fines, and the costs associated with investigation, litigation, and possible conviction. In addition, a company considering participation in the Amnesty Program must also assess other, important issues that self-reporting implicates, including:

- The relationship between the company and the Division;
- The potential waiver of the attorney-client privilege and the impact on privileges arising from work-product doctrine;
- Ongoing criminal exposure for employees who may sue the company for civil damages; and
- Exposure from employees who choose to cooperate with the Division on their own.

Limiting civil liability: The 2010 Reenactment of The Antitrust Criminal Penalty Enhancement and Reform Act of 2004

In 2004, Congress sought to clarify existing civil incentives and encourage self-reporting by passing the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (“ACPERA”). Section 213 of ACPERA limits damages in civil actions brought under Sections 1 or 3 of the Sherman Act (or any similar state law) if the conduct that serves as the basis of the antitrust claims is covered by a leniency agreement. In those cases the plaintiff may recover only actual damages against a leniency applicant and cooperating individuals, but cannot recover treble damages. Cooperation under ACPERA also lets the leniency applicant avoid joint-and-several liability. Shortly before it was set to sunset this past June, President Obama signed legislation extending ACPERA’s key amnesty provisions to 2020.

Section 213(b) requires that an antitrust leniency applicant provide “satisfactory cooperation” to civil claimants in order to receive ACPERA’s protections. Satisfactory cooperation includes:

- Providing a full account of all potentially relevant facts;
- Furnishing all potentially relevant writings; and
- Being available for, and completely and truthfully responding in, interviews, depositions, and testimony, and using best efforts to secure individuals for interviews, depositions, and testimony.

The Court presiding over the civil action determines whether the leniency applicant or cooperating individual has cooperated sufficiently to avail itself of the limitations on damages. The 2010 reenactment added the requirement to cooperate with civil claimants "without unreasonable delay” following the expiration of any civil stay obtained by the Division.

Despite ACPERA’s clarification of incentives, much remains in
dispute about what constitutes “satisfactory cooperation,”—including at what stage of civil proceedings a leniency applicant or cooperating individual should be required or compelled by the court to assist civil plaintiffs. Unfortunately, there is a paucity of authority on these questions so far, though the following decisions provide some insight on managing the timing of a satisfactory cooperation.

In the pending case In re TFT-LCD (Flat Panel) Antitrust Litigation, a class of direct-purchaser plaintiffs moved to compel an unidentified leniency applicant to identify itself in accordance with ACPERA or else forfeit any right to claim reduced civil liability. The prosecutors in the parallel criminal case had confirmed that the DOJ entered into a conditional leniency agreement with a company that manufactured and sold TFT-LCD panels. The plaintiffs sought an order requiring the applicant to immediately disclose its identity and “provide the cooperation it owes Plaintiffs as required by [ACPERA],” or affirmatively state that it would not seek reduced civil liability.\(^6\) The court concluded that the language of the statute “suggests that the court’s assessment of an applicant’s cooperation occurs at the time of imposing judgment or otherwise determining liability and damages.”\(^8\) At the same time, the court warned that the plaintiffs’ argument that the value of cooperation diminishes with time was persuasive, and that plaintiffs were poised to embark upon costly discovery that could be obviated if the unknown leniency applicant agreed to cooperate.

In another pending antitrust class action, In re Municipal Derivatives Litigation, the antitrust leniency applicant, Bank of America (“BofA”), entered into a formal, written agreement with class counsel rather than relying upon the district court to assess the quality of cooperation post hoc. Under the agreement, class counsel agreed not to seek treble damages against BofA in exchange for BofA providing information and evidence pertaining to the alleged conspiracy to rig bids in the municipal-derivatives market.\(^9\) This agreement gave BofA the certainty that it would not face treble damages while giving the class access to information that it might need to survive a Twombly motion.

Practical realities: Increased convictions and longer prison sentences

As the number of convictions for cartel activity continues to rise and prison sentences get longer, the practical realities of the Amnesty Program will continue to unfold. So too will the bounds of what cooperation is required to cut off the right to enhanced damages. Savvy corporate counsel interested in mitigating antitrust exposure may be well advised to seek the kind of agreement used in the Municipal Derivatives Litigation in order to mitigate civil as well as criminal exposure. Plaintiffs, likewise, should understand the incentives facing amnesty applicants so that, in exchange for helping to clarify the applicant’s rights, they may receive something of value in their own antitrust proceedings.

Despite ACPERA’s clarification of incentives, much remains in dispute about what constitutes “satisfactory cooperation,”—including at what stage of civil proceedings a leniency applicant or cooperating individual should be required or compelled by the court to assist civil plaintiffs.

\(^5\) Pub. L. No. 111-190, § 3.
\(^6\) 618 F.Supp.2d 1194 (N.D. Cal. 2009).
\(^7\) Id. at 1195-96.
\(^8\) Id. at 1196.

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Class actions can benefit both plaintiffs and defendants in complex litigation because they allow the efficient resolution of multi-party-impact disputes. As single proceedings with claim-preclusive effects for all involved, class actions should save resources, particularly when compared to repetitive lawsuits. But two recent cases challenge the ability of the class-action device to deliver its intended fast(er) and final outcome. In the first case, a panel of the Third Circuit rejected a class settlement because it included people who did not have viable legal claims under all aspects of the pleading—though the *en banc* Third Circuit has vacated that decision pending rehearing. In the second case, the Supreme Court has taken review of an Eighth Circuit opinion affirming an injunction that prevents attorneys from seeking class certification in a lawsuit identical to one where certification had been previously denied. The Supreme Court’s decision to address the extent of claim preclusion in situations involving denial of class certification may signal a coming realignment of the class action’s key perceived efficiency benefit.

I. *Sullivan v. DB Investments, Inc.* — Overbroad settlement class leads Third Circuit to reject comprehensive class settlement.

Aggregated claims multiply a defendant’s financial risks. To manage that risk, the class-action defendant often looks to include the claims of as many potential claimants as possible in the settlement class. But in *Sullivan v. DB Investments, Inc.*, the Third Circuit challenged this accepted practice, finding that the parties had employed a too-broad definition of the class for settlement purposes. In *Sullivan*, the putative class alleged that De Beers, S.A had long fixed prices in the diamond industry. The class argued the price-fixing affected both direct purchasers, like diamond wholesalers, as well indirect purchasers, like end consumers of diamond jewelry. The suit alleged violations of the Sherman Act and also included state-law antitrust, consumer-protection, and unjust-enrichment claims.

Some of the state antitrust-law claims presented the putative class with a problem. Not every state permits indirect purchasers to bring suit and nationwide class actions generally cannot be certified when there are material variations in state law. Despite this problem, plaintiffs and De Beers agreed to a $295 million nationwide-class settlement. Because the class included both direct and indirect purchasers, the settlement meant that even persons residing in states that do not permit indirect purchaser antitrust claims would obtain relief. To overcome the differences in state law, De Beers stipulated to liability in every state and plaintiffs argued that, as a result, the state law differences could be ignored for settlement purposes.

The district court approved the settlement, but a panel of the Third Circuit reversed. The Third Circuit noted that, even for settlements, class proponents must demonstrate that all class members share common legal or factual issues that predominate over matters requiring individual proof. Because of the variations in state law regarding standing for antitrust claims, not all members of the indirect-purchaser class have a right to recover. The Third Circuit balked at approving a settlement that provides relief to persons who lack viable claims. It reasoned—based upon the Rules Enabling Act—that Federal Rules of Procedure cannot be used to provide a right of recovery where state substantive law did not endorse such a right. Thus, De Beers’s desire to pay persons who would have received nothing under state law led to a reversal of the class certification and settlement.

*Sullivan*’s impact on class-action practice remains unclear. In August 2010, the Third Circuit vacated the panel’s judgment and will soon rehear the case *en banc*.

II. *In re Baycol Products Litigation* — Class denial, claim preclusion and the coming Supreme Court decision.

Class actions can result in efficiencies when they have *res judicata*
effect. Now, however, a case before the United States Supreme Court challenges the exact scope of claim preclusion following a denial of class certification.

The case that the Supreme Court has agreed to hear arises from a product-liability class action involving the prescription cholesterol-lowering medication Baycol. The In re Baycol Products Litigation began after Bayer Corporation removed Baycol from the market following several use-related deaths. Thousands of former Baycol consumers then filed suit and the Judicial Panel on Multidistrict Litigation transferred the federal cases to the United States District Court for the District of Minnesota for coordinated pretrial proceedings.

One of the cases transferred to Minnesota came from a federal court in West Virginia. Brought on behalf of a class, it alleged that Bayer breached its warranties and violated the West Virginia consumer protection laws. A second lawsuit filed in state court in West Virginia remained in West Virginia, outside the purview of the MDL litigation. That litigation purported to represent a similar class and alleged nearly identical claims. In 2008, the district court in Minnesota denied class certification in the transferred West Virginia case, concluding that individual issues of fact predominated as to each claim pled under West Virginia law. Undeterred by this ruling on identical facts, plaintiffs in the state court then moved for class certification.

In order to preserve its favorable ruling denying class certification on the identical claims, Bayer requested that the federal court enjoin the state court proceeding. The second group of West Virginia plaintiffs opposed, arguing that the district court could not assert personal jurisdiction over them absent notice and an opportunity to opt out of the previously proposed class. They did not receive any notice or opportunity to opt out because the class was never certified.

The district court held for Bayer and issued an injunction, which the Eighth Circuit affirmed. The Eighth Circuit reasoned that, though the Anti-Injunction Act generally prohibits federal courts from interfering in state proceedings, the Act does permit injunctions necessary to “protect or effectuate [federal-court] judgments.” The Eighth Circuit concluded that the district court had already decided the class-certification issue because it appropriately determined that plaintiffs could not pursue a claim under West Virginia law without proof of injury.

On September 28, 2010, the Supreme Court granted plaintiffs’ petition for a writ of certiorari. The Supreme Court will likely decide the circumstances under which a denial of class certification precludes others from asserting identical claims on behalf of a class. This issue is important. As the Seventh Circuit recently noted, if a putative class can argue class certification multiple times in multiple courts, then the probability of eventually obtaining class certification somewhere significantly increases.

Conclusion

Both plaintiffs and defendants appreciate the utility of the class-action device and the assistance it provides in reaching efficient, final resolutions of disputes affecting many. Recent challenges to the efficacy of class actions include whether a class can be so broadly defined for settlement purposes that it may include persons without valid claims, and whether a denial of class certification by one court precludes class certification by other courts. The upcoming Third Circuit en banc decision in Sullivan, and the Supreme Court decision in Smith v. Bayer, may provide clarity and serve to reestablish—or redesign—the utilitarian benefit at the core of the class action proceeding. The outcome of these cases will impact the strategies of plaintiffs in multidistrict litigation and defendants that wish to settle nationwide class actions.

2 Sullivan v. DB Investments, Inc., 613 F.3d 134 (3d. Cir. 2010), reh'g en banc granted, opinion vacated, 619 F.3d 287 (3d Cir. Aug. 27, 2010).
3 Id. at 138.
4 In re Bridgestone/Firestone & Ford Motor Co. Prods. Liab. Tire Litig., 288 F.3d 1012, 1015 (7th Cir. 2002); Castano v. Am. Tobacco Co., 84 F.3d 734, 743 n.15 (5th Cir. 1996).
5 Sullivan, 613 F.3d at 141.
6 Id. at 148.
7 Id. at 149.
8 Id.
9 Id. at 146.
10 Id. at 149, 151 (citing Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938)).
13 Id. at 719.
14 Id. at 720.
15 Id.
16 Id.
17 Id. at 720-21.
18 Baycol, 593 F.3d at 725.
19 Id.
20 Id. (citing 28 U.S.C. § 2283).
21 Id. at 722.

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In-house attorneys for global companies in the United States may already experience challenges in bridging U.S. laws and regulations with those of other countries where they do business. That task is now all the more complex after the European Union’s highest court upheld a ruling last September that legal-professional privilege does not shield communications with in-house counsel.

Akzo Nobel Chemicals Ltd., et al. v. Commission of the European Communities, et al. involved a dispute over the privileged nature of company documents. The Court of Justice of the European Union’s opinion in Akzo is significant for its decision on the scope of legal-professional privilege in the European Union and European Economic Area. The Court held that the legal-professional privilege protects only communications with an “independent lawyer.” Thus, the legal-professional privilege does not cover communications with in-house lawyers who are bound by an employment relationship.

The underlying facts

On February 12 and 13, 2003, Commission officials, assisted by representatives of the Office of Fair Trading in Manchester, England, conducted an inspection (a “dawn raid”) at the premises of an Akzo subsidiary, seeking evidence that the company had violated Articles 81 and 82 of the Treaty Establishing the European Community (now Articles 101 and 102 of the Treaty on the Functioning of the European Union). During the investigation, Commission officials seized a number of documents. Akzo representatives claimed that some of these documents were covered by the legal-professional privilege that protected confidential communications between lawyers and their clients. Over Akzo’s objections, Commission officials examined the documents to determine whether the privilege applied. During the examination, Commission officials disagreed with Akzo over the privileged nature of five documents.

The first disputed document was a typewritten memorandum from the subsidiary’s general manager to his superior, describing information he had gathered during an internal investigation of employees. Akzo asserted that it gathered the information for the purpose of obtaining outside legal advice on its competition-law compliance program. The second document was a copy of the same memorandum with handwritten notes that referred to the name of Akzo’s outside counsel. Because Commission officials were not able to quickly conclude whether these documents were protected by the legal-professional privilege, they placed them in a sealed envelope and took the envelope with them after completing the investigation. These two documents are referred to as “Set A.”

The third document contained the general manager's handwritten notes, made during discussions with the internal employees and used to prepare the typewritten memorandum in Set A. The last two documents were e-mails exchanged between the general manager and Akzo's in-house attorney about competition law. The Commission officials decided that these documents were not privileged, and placed copies of these documents with the rest of the documents gathered during the investigation. These three documents are referred to as “Set B.”

The general court proceeding

The General Court held that documents exchanged with in-house attorneys, as with the e-mails in Set B, are not protected by the legal-professional privilege. In reaching this holding, the court cited AM&S Europe Ltd. v. European Commission, reasoning that the Legal-professional privilege protects communications only with an “independent” lawyer who is “structurally, hierarchically and functionally” a third party to the legal advice. The court also

> Continued
The scope of the legal-professional privilege does protect preparatory documents created **exclusively** for the purpose of seeking legal advice for a client’s defense rights.

In considering whether the documents in Set A were privileged, the court cited *AM&S Europe Ltd. v. European Commission*, holding that the legal-professional privilege protects confidential communications between a lawyer and client if the communications are made for the purpose of exercising a client’s defense rights and the lawyer is “independent.” This privilege protects all written communications concerning the subject matter of the client’s defense. The Court also cited *Hilti v. European Commission*, holding that the legal-professional privilege extends to a company’s internal notes, including notes between an in-house attorney and the client, when those notes report the text or content of an “independent” counsel’s legal advice. In this case, the Court concluded that the memoranda in Set A were not written communications with an “independent” lawyer or internal notes that reported on the content of communications with an “independent” lawyer. The Court also noted that Akzo had not claimed the memoranda were prepared in order to be sent physically to an “independent” lawyer. For these reasons, the Court found that the documents in Set A were not protected by the privilege.

The Court then expanded the *AM&S* decision, finding that documents a client prepares are covered by the legal-professional privilege, even if they were not exchanged with an outside lawyer or created for the purpose of being sent physically to an outside lawyer, as long as the documents were prepared exclusively for the purpose of seeking legal advice from a lawyer who exercises the client’s defense rights. The Court cautioned that the mere fact that the client discusses the preparatory documents with a lawyer is not sufficient for the protection to apply. The protection also will not apply simply because the documents were drafted in connection with a compliance program created or coordinated by outside counsel, because such programs often encompass information that goes beyond the exercise of the rights of the defense. According to the Court, the client has the burden to “prove” by “unambiguously clear” means that the documents in question were created for the sole purpose of seeking legal advice.

Because the Court concluded that the memoranda in Set A were not privileged, it found that the handwritten notes in Set B that related to those memoranda were also not privileged. The Court further rejected the argument that the documents in Set A were preparatory, finding that they did not constitute a communication with an outside lawyer, did not report any legal advice, and were not made exclusively for the purpose of seeking legal advice from an outside lawyer.

The Commission must follow specific procedures to preserve any claimed legal-professional privilege.

The Court also concluded that a company may refuse to permit Commission officials to make a “cursory” review of documents it claims is covered by the legal-professional privilege if such a review is impossible without revealing the documents’ contents. The company must nevertheless provide Commission officials with relevant material to prove why the legal-professional privilege applies. Such evidence may include the author of the document and his duties and responsibilities, the person for whom the document was intended and his duties and responsibilities, the objective and context for creating the document, where the document was found, the manner in which it was filed, and related documents. If the Commission disagrees with the Legal-professional privilege claim, it may place a copy of the documents in a sealed envelope and refrain from reading its contents. The Commission may not read the documents until after it has issued a formal decision about the documents’ privileged status and the company has had an opportunity to appeal that decision with the court.

**Court of Justice of the European Union’s decision on appeal**

On appeal, the Court of Justice of the European Union rejected Akzo Nobel’s claims and ruled that the decision in *AM&S Europe Ltd. v. European Commission* was binding. The Court reasoned that because an in-house attorney does not hold the same degree of independence from his employer as a lawyer who works in an external law firm, in-house counsel is “less able to deal effectively with any conflicts between his professional obligations and the aims of his client.” The Court found that an in-house attorney’s position as an employee, “by its very nature, does not allow him to ignore the commercial strategies pursued by his employer, and thereby affects his ability to exercise professional independence.”

The Court also rejected other challenges to the privilege ruling, including that in-house attorneys and outside counsel must be treated equally under the law. The Court found that an in-house attorney, whose economic dependence and personal identification are connected to the employer, does not hold a level of professional independence equal to that of an outside attorney.

And the Court rejected arguments by trade groups who intervened that the law of the European Union’s member states...
had evolved to recognize protection for in-house-attorney communications.\(^4\) The court found that no uniformity or predominant trend toward the in-house counsel role existed among the member states.\(^5\)

Finally, the court rejected arguments that the development of competition law in the European Union has increased the need for in-house legal advice on such matters, which necessitates the privileged nature of such communications.\(^6\) The court noted that such developments do not change the privilege scope as applied to in-house attorneys.\(^7\)

Ultimately, the court dismissed the appeal.

2 Id. ¶ 35.
3 Case C-5500/07, Akzo at ¶ 44.
5 Id. ¶ 2.
6 Id. ¶ 3.
7 Id. ¶ 4.
8 Id. ¶ 5.
9 Id. ¶ 6.
10 Joined Cases T-125/03 & T-253/03, 2007 E.C.R. 11-3532, 3535
11 Id.
12 Id. ¶ 7.
13 Id.
14 Id. ¶ 8.
15 Id.
16 Id. ¶ 9.
17 Id.
18 Id. ¶ 169.
19 Id. (citing Case 155/79, AM&S Europe Ltd v. European Commn, 1982 E.C.R. 1575).
20 Akzo at ¶ 168.
21 Id. at ¶¶ 166, 171
23 Akzo at ¶ 117 (citing AM&S, at ¶¶ 21, 22, 27).
24 Id. (citing AM&S, at ¶ 23).
26 Id. (citing Hilti at ¶¶ 13, 16-18).
27 Akzo, at ¶ 118.
28 Id.
29 Id.
30 Id. ¶ 123.
31 Id.
32 Id. ¶ 127.
33 Id. ¶ 124.
34 Id. ¶ 138.
35 Id. ¶ 139.
36 Id. ¶ 82.
37 Id. ¶ 80.
38 Id.
39 Id.
40 Id.
41 Id. ¶ 41-42.
43 Id. ¶ 47.
44 Id. ¶ 59.
45 Id. ¶¶ 56-57.
46 Id. ¶ 76.
47 Id. ¶ 73-74.
48 Id. ¶ 79.
49 Id. ¶ 82.

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