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The Corporate Antitrust Policy—Privileged or Not?

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In a recent decision, the Eastern District of Pennsylvania became the first court in the Third Circuit to hold that the attorney-client privilege does not shield an antitrust compliance policy from disclosure in antitrust litigation.

Judge Michael M. Baylson focused on two key points: First, he found the policy at issue was drafted as a general outline of antitrust law, akin to a reference or instructional guide, rather than specific legal advice geared directly toward the client's circumstances. Although the policy was based in the law, he found it was essentially a business document and did not warrant privilege protection. Second, the court doubted the degree to which the policy was maintained in confidence. Counsel had distributed the policy to more than 120 personnel attending a training session, made it available on an internal company Internet site, and did not mark it as confidential or privileged.

The case is *In re: Domestic Drywall Antitrust Litigation*, an ongoing multidistrict litigation where class plaintiffs brought suit under the Sherman Act and state antitrust and consumer protection laws alleging price-fixing and conspiracy against numerous manufacturers and distributors of gypsum wallboard. Defendant CertainTeed Gypsum Inc. resisted discovery of its antitrust policies and other training manuals, arguing that they constituted privileged communications between its legal counsel and business personnel.

CertainTeed's policy had been drafted by internal and outside counsel to provide legal advice and assistance to employees regarding compliance with competition laws. The policy provided an overview of key antitrust and competition law principles and set forth guidelines for CertainTeed's employees to use to avoid running afoul of the antitrust laws. CertainTeed considered the policy to be part of a broader effort to provide legal guidance to its personnel; this effort also included individual counseling for employees with pricing authority and online training in antitrust compliance. CertainTeed incorporated the policy into its employee training programs, distributed it within the company, and posted it to an internal Internet site.

CertainTeed maintained that its antitrust compliance policy was attorney-client privileged under the four requirements the Third Circuit set forth in its 2007 ruling in *In re Teleglobe Commc'ns Corp.* because it: (1) is a communication; (2) between privileged persons, namely CertainTeed's counsel and its employees acting as agents for the company; (3) maintained in confidence, because the policy was never publicly posted or disseminated outside the company; and (4) created for the purpose of providing legal advice. CertainTeed also argued that the Third Circuit

recognizes a substantially broader attorney-client privilege than do other jurisdictions and that this privilege should protect policies drafted by attorneys and distributed only to employees within the company.

Recognizing that the issue was one of first impression in the Third Circuit, the court looked for guidance outside the circuit. In finding against privilege protection for CertainTeed's policy, the court relied largely on a 2006 case from the Northern District of Illinois, *In re Sulfuric Acid Antitrust Litig.*, which found that an antitrust compliance manual was not privileged because it "did not reveal client confidences, only articulated the company's policies, and provided an overview of antitrust law in various jurisdictions." After additional briefing, that district court added that hypotheticals included in the manual were "instructional devices, not responses to requests for legal advice," and thus were not privileged communications with the client company.

The court distinguished two cases relied on by CertainTeed. In the first, *In re Brand Name Prescription Drugs Antitrust Litig.*, another Northern District of Illinois court found an antitrust presentation privileged because it "provide[d] legal advice and reveal[ed] client confidences." Unlike CertainTeed's antitrust policy, the presentation in Brand Name Prescription Drugs described the application of antitrust laws to specific aspects of the company's business, rather than providing general guidance and hypotheticals. Further, this policy was distributed to only seven company executives. CertainTeed had distributed its written policy by email to approximately 120 executives and other employees, most of whom were nonlawyers, after they attended antitrust compliance training at an annual sales meeting.

In the second case cited by CertainTeed, *Faloney v. Wachovia Bank NA*, the Eastern District of Pennsylvania protected as privileged an email drafted by in-house counsel summarizing the defendant's conduct and potential legal exposure, even though there was no explicit client communication. Because the Faloney email related directly to the defendant's conduct, the court found it differed significantly from CertainTeed's more general antitrust policy.

The court also rejected the broader interpretation of the attorney-client privilege proposed by CertainTeed. It found that Teleglobe did not stand for the blanket rule that all "compliance-enhancing" communications between a company's employees and its lawyers are protected. Instead, that case instructed lower courts to determine which communications between employees and corporate counsel deserve protection. In construing the privilege more narrowly, the court held that the privilege should "ordinarily be limited to legal advice leading to a decision by the client." The attorney-client privilege therefore protects, for example, communications between CertainTeed's lawyers and its executives leading up to the adoption of the compliance policy, but does not protect the policy itself.

As a result of this decision, counsel should consider advising their corporate clients to preemptively decide whether they want to shield their antitrust policies from production. There may be value in having a widely disseminated policy drafted without revealing client confidences. If clients, however, want their policies to be more tailored, counsel drafting the policy can increase the likelihood of attorney-client privilege treatment by focusing the advice to the client's particular and concrete business circumstances.

Such policies should represent the client's decision, informed by counsel, on how to comply with antitrust law. They should not merely lay out the state of the law or list hypotheticals not directly connected to the client's business; courts find such policies to be less deserving of protection. These policies should also be labeled privileged and confidential. The downside of seeking privilege protection for corporate antitrust policies is that clients must keep such policies in strict confidence. More widely distributed policies, used for larger antitrust training sessions or posted to internal Internet sites, are less likely to be considered attorney-client privileged.

Clients that find benefit in broadly distributing their antitrust compliance policies to their employees and using them as public statements of corporate policy should carefully review them to ensure they contain no sensitive information the client wishes to keep confidential. Of course, companies may choose to have both a public and a confidential version of their policy. Whatever the choice, counsel will want to keep this latest development in mind when advising clients.