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FEDERAL E-DISCOVERY

Confidentiality Order Sufficiently Protects EU Data in U.S. Discovery


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In 1987, the U.S. Supreme Court addressed a dispute highlighting the tension between the broad discovery allowable in U.S. civil litigation and the fundamental protection of personal data abroad and adopted a five factor comity analysis to balance these competing needs. U.S. courts applying this test have generally found the balance tilted in favor of disclosure of discovery materials.

The 33 years since, however, have brought significant change both to U.S. discovery and to data privacy. Discovery is no longer boxes from office filing cabinets; it is terabytes of electronic materials that can contain both business and personal information. And, data privacy is not a treaty of the Council of Europe; it is binding, long-arm laws around the world, led by the European Union's General Data Protection Regulation (GDPR) and followed by similar laws worldwide—including in U.S. states.

In a recent case, a court was faced with these modern realities as it weighed the competing interests of discovery and international data privacy. Conducting a comity analysis, it issued a decision that confirmed the value of a protective order when producing names and positions in response to a discovery request—information considered benign by U.S. discovery standards, but protected under international data privacy laws.

SHUTTERSTOCK

> The decision in 'In re Mercedes-Benz' is a helpful reminder that it is critical for courts to conduct a thoughtful comity analysis when considering the impact of international data privacy laws.

'In re Mercedes-Benz'

In the class action *In re Mercedes-Benz Emissions Litig.*, 2020 WL 487288 (D.N.J. Jan. 30, 2020), the parties were involved in a discovery dispute over the production of certain personal information of German citizens held by defendants Daimler AG and Mercedes Benz USA (the Mercedes defendants). The court described it as "an ongoing and overarching dispute over the balancing of plaintiffs' discovery needs pursuant to Federal Rule of Civil Procedure 26 and the Mercedes defendants' compliance with privacy regulations pursuant to the GDPR." Id. at *1. The plaintiffs had requested information commonly provided as part of civil discovery and, as the court noted, "generally considered benign"—the names and

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positions of the Mercedes defendants' employees who may have information relevant to the dispute. Id. The Mercedes defendants argued that, as personal data protected by the GDPR, name and position information must be redacted; otherwise, such a production would violate the GDPR's restrictions on the onward transfer of personal data. See id.

Over the course of several meet and confers, the parties agreed to a Discovery Confidentiality Order covering confidentiality and privacy for U.S. discovery data, but were at an impasse regarding "a Discovery Privacy Order governing the confidentiality and disclosure of foreign private data that may otherwise be subject to certain protections under the GDPR." Id. at *2. In short, the plaintiffs wanted the employee information produced in full, while the Mercedes defendants wanted to produce such information in redacted form.

After a number of applications, rulings, and appeals involving the parties and a Special Master, the Special Master ordered the information produced without redactions. In a "GDPR Ruling," he determined that the "Discovery Confidentiality Order provision allowing a producing party to designate and protect as 'Highly Confidential' information that the producing party claims to be Foreign Private Data[,] such as employee names, sufficiently balances the EU's interest in protecting its citizens['] private data and the U.S. legal system's interest in preserving and maintaining the integrity of the broad discovery provisions set forth in the Federal Rules of Civil Procedure." Id. at *3 (citation omitted). Thus, the Special Master "ruled that considerations of international comity do not relieve the Mercedes defendants of [their] obligations under U.S. law and that the Discovery Confidentiality Order provision sufficiently protects unredacted personal data of EU Citizens." Id. at *5. The Mercedes defendants appealed the GDPR Ruling, arguing that full disclosure, even under the Discovery Confidentiality Order, still violated the GDPR. See id. at *4.

> When U.S. discovery involves protected personal data, parties and their counsel should be mindful of the impact and related risks of any applicable data privacy or other laws and strongly consider entering into a protective order governing the handling, designation, and protection of such information.

Comity Analysis Review

On appeal, Magistrate Judge Joseph Dickson reviewed the Special Master's GDPR Ruling, specifically "whether the names of certain current and former Daimler AG employees who are European Union citizens should be produced subject to the Discovery Confidentiality Order or redacted." Id. at *3. In the GDPR Ruling, the Special Master had weighed the competing interests of U.S. discovery and EU privacy laws using the five factor international comity analysis adopted by the Supreme Court in *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522 (1987): "(1) the importance to the litigation of the documents or other information requested; (2) the degree of specificity of the request; (3) whether the information originated in the United States; (4) the availability of alternative means of securing the information; and (5) the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interest of the state where the information is located." Id. at *6 (citation omitted).

Here, the court reviewed the Special Master's comity analysis, factor-by-factor, under an abuse of discretion standard. The court agreed that the first factor weighed in favor of unredacted disclosure because "the names, positions, titles, and professional contact information of relevant current or former employees of any defendant or third party identified in relevant documents, data or information produced by discovery is by its very nature directly relevant to plaintiffs' claims." Id. (citation omitted). The second factor bore similar weight

because the request sought "the production of unredacted documents commonly produced in U.S. litigation." Id. at *7 (citation omitted). However, the third factor weighed in the defendants' favor as the court found it "logical to assume, as the Special Master did, that the majority of documents to be produced from Daimler, a German company, originated in the EU." Id. (citation omitted). The court found that the fourth factor favored full disclosure, reasoning that the "Special Master correctly concluded that there is not an alternative means for plaintiffs to obtain the relevant current or former employees' names, positions, titles, or professional contact information." Id. (citation omitted).

As for the fifth and most important factor, the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interest of the state where the information is located, the Special Master had flagged that the "weight of the foreign privacy interest to be considered is 'diminished where the court has entered a protective order preventing disclosure of the secret information.'" Id. at *8 (citations omitted). Moreover, in light of the automobile emissions-related issues in the case, the Special Master had "found that, on balance, the U.S. had a stronger interest in protecting its consumers than the EU did in protecting its citizens' private data, particularly with a Discovery Confidentiality Order provision allowing producing parties to designate and protect foreign private data as 'Highly Confidential' information." Id. (citations omitted). The court agreed and found the fifth factor favored full disclosure.

Concluding that the Special Master's GDPR Ruling was not an abuse of his discretion, the court affirmed the decision and ordered the defendants to produce the requested documents, including the personal information from European Union citizens, in unredacted form. See id.

Takeaways

The decision in *In re Mercedes-Benz* is a helpful reminder that it is critical for courts to conduct a thoughtful comity analysis when considering the impact of international data privacy laws. Parties looking to this decision as a broader statement about the importance of U.S. discovery relative to considerations of data privacy, however, should be sensitive to the limitations of the ruling given its facts. In situations where less "benign" personal data is involved, or where rights and freedoms of individuals might be more heavily impacted due to the production of protected data, courts could easily strike a different balance. Additionally, other factors such as the involvement of works councils, the impact of blocking statutes, and the applicability of data secrecy laws could all be significant considerations both in courts' comity analyses by courts and companies' risk assessments.

When U.S. discovery involves protected personal data, parties and their counsel should be mindful of the impact and related risks of any applicable data privacy or other laws and strongly consider entering into a protective order governing the handling, designation, and protection of such information. In some situations, especially where limited, relevant information is at issue, thoughtfully crafted protective orders may be considered sufficient to ensure protection of such personal data. Though parties should be aware that, as the *In re Mercedes-Benz* court noted, "whether an EU authority aggressively polices this type of data production in the context of pre-trial discovery in U.S. litigation remains to be seen."