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Federal Court Upholds Validity of Advance Conflict Waiver by Client with In-House Counsel

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Galderma Laboratories, L.P. v. Actavis Mid Atlantic LLC, 2013 U.S. Dist LEXIS 24171 (2013)

Brief Summary

The U.S. District Court for the Northern District of Texas held that a general advance conflict waiver that included an agreed-upon course of conduct for conflicts, an explanation of risk, and a statement of alternatives was valid against a client that is a sophisticated user of legal services with in-house counsel.

Complete Summary

Plaintiff in this intellectual property dispute moved to disqualify defendant's counsel because that same firm concurrently represented plaintiff in unrelated employment law matters.

Following Fifth Circuit precedent, the Northern District of Texas considered multiple disqualification standards, but primarily focused on Model Rule 1.7, which requires informed consent to such conflicts.

Plaintiff had signed a so-called advance conflict waiver when the firm commenced representation on the employment law matters. The firm's engagement letter stated, in pertinent part:

We understand and agree that this is not an exclusive agreement, and you are free to retain any other counsel of your choosing. We recognize that we shall be disqualified from representing any other client with interest materially and directly adverse to yours (i) in any matter which is substantially related to our representation of you and (ii) with respect to any matter where there is a reasonable probability that confidential information you furnished to us could be used to your disadvantage. You understand and agree that, with those exceptions, we are free to represent other clients, including clients whose interests may conflict with yours in litigation, business transactions, or other legal matters. You agree that our representing you in this matter will not prevent or disqualify us from representing clients adverse to you in other matters and that you consent in advance to our undertaking such adverse representations.

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The court analyzed whether this advance waiver gave enough information to support informed consent and whether the information was reasonably adequate for the particular client.

Regarding the sufficiency of the information in general, the court held that the firm provided enough information for three reasons. First, the waiver “agreed to a course of conduct” for handling conflicts by specifying when the firm would and when it would not handle matters for other clients with adverse interests. Second, the waiver included an “explanation of the material risk of waiving future conflicts of interest” because it specified that the firm would be able to represent clients adverse to plaintiff. Third, the waiver explained “reasonably available alternatives to the proposed course of conduct” by specifying that plaintiff could retain any other counsel of its choosing.

Regarding this particular client, the court held that the firm provided reasonably adequate information to plaintiff for several reasons. The court recognized plaintiff’s size and sophistication, noting how it held itself out to the general public, its revenues, the quantity of its patent applications, and that it “routinely retains different, large law firms to advise the corporation on various matters across the country.” Additionally, plaintiff’s in-house counsel was an attorney with more than 20 years’ experience who had actually initialled advance conflict waivers with other outside counsel. The court stated: “When a client has their own lawyer who reviews the waivers, the client does not need the same type of explanation from the lawyer seeking the waiver because the client’s own lawyer can review what the language of the waiver plainly says and advise the client accordingly.”

Significance of Opinion

This opinion demonstrates that a relatively undetailed and broad advance conflict waiver may be valid as against a sophisticated client with in-house counsel. But in this context, state law variations on informed consent are pivotal. The court effectively decided this case under the Model Rules but took note of the fact that Texas Rules of Professional Conduct do not require any informed consent for concurrent representations of adverse parties in unrelated matters. In contrast, plaintiff relied on *Celegene Corp. et. al. v. KV Pharmaceutical Co.*, 2008 U.S. Dist. LEXIS 58735 (D. N.J.), in support of its argument that the waiver was insufficient. The court rejected this argument as being based on the more stringent New Jersey standard for informed consent.

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