

The Difficulties Of Challenging An FTC Subpoena

Law360, New York (January 20, 2012, 1:01 PM ET) -- The U.S. Court of Appeals for the District of Columbia recently issued a decision that underscores how difficult it is to defeat a subpoena issued by the Federal Trade Commission (FTC).

In *FTC v. Church & Dwight Co. Inc.*, the court deferred to the FTC's broad interpretation of its own compulsory process resolution and required Church & Dwight (C&D), the nation's leading manufacturer of condoms and household products, to produce documents in accordance with that interpretation.

The court's decision indicates that ambiguities in FTC compulsory process resolutions will be resolved in the FTC's favor, and that courts will not scrutinize other aspects of FTC investigations for contextual evidence regarding scope.

The decision also underscores that a company may not redact information merely because it believes that the information is not responsive to the subpoena.

If a company wishes to oppose an FTC subpoena, the company must arm itself with a strong argument that can counterbalance the deference that courts are likely to pay to the FTC's position — including deference to a legal theory the court believes is not even cognizable in its circuit.

C&D is the leading manufacturer of condoms in the United States, with a 70 percent market share in Trojan latex condoms. In addition to condoms, C&D markets household products such as cat litter, baking soda, detergents and toothpaste. C&D offers retailers discounts based on the amount of shelf space they devote to its products.

In June 2009, the FTC began an investigation to determine whether C&D violated the FTC Act by conditioning discounts or rebates to retailers on the percentage of shelf or display space dedicated to its "Trojan brand condoms and other products distributed or sold by Church & Dwight."

The FTC issued a document subpoena and a civil investigative demand to C&D seeking information about cost, pricing, production and sales of C&D's condoms in the United States and Canada. While the FTC did not explicitly request information on products other than condoms, the subpoena contained standard language that documents must be produced "in complete form, unredacted unless privileged."

C&D produced documents, but redacted information about products other than condoms. The issue before the court was whether information about C&D's "other products" fell within the scope of the FTC's Resolution, a document describing the nature of the FTC's investigation that is itself a prerequisite to issuing compulsory process.

The FTC argued that its Resolution encompassed all of C&D's product lines, and that such breadth was necessary to evaluate the strength of an antitrust claim premised on bundling or tying.

Emphasizing that courts defer to agency determinations of their own investigative authority, the Court of Appeals found the FTC's broader interpretation of the Resolution language to be reasonable, noting that bundling is within the FTC's antitrust enforcement authority.

The court also noted that any inconsistencies between the document request at issue in the case and the claims made by the FTC regarding its theories of liabilities could be cured with additional document requests.

Finally, the court found that the FTC may pursue legal theories that have been validated by any circuit, such as the Third Circuit's bundling decision in *LePage's v. 3M*, which has not been widely adopted and was criticized by the D.C. circuit.

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