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Let's Talk About 'Sex': SCOTUS Delivers Title VII Landmark Ruling: A Case Synopsis of *Bostock v. Clayton County, Georgia*

BY AZAR ALEXANDER & JOY ANDERSON

On June 15, 2020 the United State Supreme Court directly and unequivocally answered the question of whether an employer can terminate an employee for their sexual orientation and/or gender identity – the Court held employers cannot. More than more than five decades after the passage of Title VII of the Civil Rights Act, protections for the LQTBQ+ community remained uncertain, and half of state governments did not provide

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Supreme Court Releases Statement on Racial Justice, Next Steps for Judicial Branch

June 22, 2020

The events of recent days and weeks have exposed frailties in our public institutions and brought to the forefront the disproportionate impact the application of certain laws, rules, policies and practices have had on the African American population, the Latinx community, and other people of color in Illinois and nationally.

Racism exists, whether it be actualized

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and educational initiatives and analysis of public data from our disciplinary caseload. Our annual reports will contain a comprehensive discussion of our yearly efforts. In these ways, we will provide information to the Supreme Court, the profession and the public to fairly gauge and hold the ARDC accountable for the success of our efforts.

The ARDC is hopeful about the possibility of change. History shows us that significant change is possible. In the past, lawyers have taken bold actions that have championed the rights of historically marginalized communities, led to the eradication of corrupt practices in the justice system and brought improvements in the fairness of that system. Currently, called to action by the brutal killings of Black Americans, the public is sending a clear message that racism must end. We join in that call and accept the responsibility of responding to that call in the work of our own agency.

Released on behalf of the ARDC Commission, Jerome E. Larkin, ARDC Administrator, and Lea S. Gutierrez, ARDC Director of Diversity and Inclusion■

Litigants Unsuccessful in Invoking European Union's Data Protection Regulation to Prohibit U.S. Discovery

BY BRITTNEY L. DENLEY

The General Data Protection Regulation (GDPR) provides broad privacy restrictions applicable to the data of EU citizens wherever they may reside. When it became effective in 2018 litigators queried whether the GDPR would complicate discovery in cross-border disputes, or in any disputes involving the personal data of EU citizens. Several recent U.S. cases have affirmed that the GDPR will not provide a safe harbor in which parties may seek refuge from U.S. litigation discovery obligations.

History of the GDPR

The GDPR[1] changed the European Union's data privacy landscape for entities in possession of citizens' personal information. Lauded as the world's strongest set of data protection rules, the regulation imposes limits on how organizations that control or process personal data may use and provide access to such data. Key provisions authorize EU nations to enact their own data privacy legislation consistent with the regulation, guiding how the GDPR will be implemented in respective EU-member countries. The UK[2], for example, has since passed the Data Protection Act of 2018.

The wide applicability of the GDPR impacts industries and jurisdictions across the globe. Companies, including those in the U.S. that operate or service EU citizens have had to adapt to comply with GDPR mandates or face fines up 20 million euros per violation.[3]

Invocation of the GDPR to Avoid U.S. Discovery

Litigants in U.S. courts have attempted to use the GDPR to limit or avoid discovery obligations with little success. Courts have declined to protect deposition testimony based on the assertion that the GDPR creates greater confidentiality for such testimony, see, *e.g., Ironburg Inventions, Ltd. v. Valve Corp.*,[4] declined to limit data retention and production based on an assertion that the GDPR increased the data anonymization burden, *see, e.g., Corel Software, LLC v. Microsoft,*[5] and declined to prohibit a video deposition on the basis that doing so over a party's objection violated the GDPR, see, *e.g., d'Amico Dry D.A.C. v. Nikka Financial.*[6] As discussed in detail below, when faced with a challenge that the GDPR prohibits the discovery sought entirely U.S. Courts have thus far generally maintained that they will not weigh foreign nations' privacy interests over the interests of domestic parties seeking discovery.

The conflict between the GDPR and the right to discovery in U.S. litigation has been confronted by courts across the United States. In a California patent infringement suit, *Finjan, Inc. v. Zscaler, Inc.*, the defendant contended that the production of its former sales director's emails would violate the GDPR unless costly redactions and anonymization were applied.[7] In South Carolina, the plaintiffs in *Rollins Ranches, LLC, v. Watson* raised claims of defamation, tortious interference, and civil conspiracy against a U.K. citizen based on her social media communications. The defendant opposed the plaintiffs' initial and renewed motions to compel discovery responses and the production of records, asserting that the UK Data Protection Act blocks access to these communications.[8] In Pennsylvania, in *Giorgi Global Holdings, Inc. v. Smulski*, an action for civil RICO and breach of contract, among other claims, Defendants argued that Polish privacy law and the GDPR prohibited them from producing

otherwise discoverable documents. In New Jersey, in *In re Mercedes-Benz Emissions Litigation,* the defendants sought to overturn an appointed special master's finding that sought after discovery could not be withheld under GDPR protections, but rather could be produced and designated as "Highly Confidential."[9]

Where a party has met its burden to prove that a foreign law bars production of discovery, courts will engage in a case-by-case comity analysis to determine its application.[10] In *Societe Nationale Industrielle Aerospatiale v. U.S. District Court for Southern District of Iowa,* the Supreme Court followed the "particularized analysis," set forth in the Restatement (Third) of Foreign Relations Law § 442(1)(c), to weigh the privacy interests of the foreign nation against the disclosure interests of the U.S. based on the following factors:

1. The Importance to the Litigation of the Documents or Other Information Requested

The importance of the documents weighs in favor of disclosure when the evidence is "directly relevant" to the claims[11] and there is a "substantial likelihood" that the documents will be important to prove the claims.[12]

2. The Degree of Specificity of the Request

Where a party makes a specific request directly related to relevant information from relevant documents this factor weighs in favor of production. This factor weighs against production where a party seeks irrelevant, sensitive, personal information and unduly burdens the opposing party with "generalized searches for information."[13]

3. Whether the Information Originated in the United States

This factor weighs against production where it is found that the majority of the sought-after documents and their custodians are located in a foreign nation.

4. The Availability of Alternative Means of Securing the Information

Where there is no alternative means for a plaintiff to obtain the sought-after information, this factor weighs in favor of production.[14]

5. The Extent to Which Noncompliance Would Undermine Important Interests of the United States, or Compliance Would Undermine Important Interests of the Foreign State

Arguably the most important factor, the Courts recognize that the U.S. "has a substantial interest in fully and fairly adjudicating matters before its courts – an interest only realized if parties have access to relevant discovery – and in vindicating the rights of American plaintiffs."[15] Where this goal can be accomplished while respecting foreign privacy interests (i.e., through protective orders and confidentiality agreements), this factor weighs in favor of production.[16] Likewise, this factor weighs in favor of production where respecting foreign privacy interests would impede the pursuit of serious claims with significant impact (i.e., impacting American consumers *en masse*).[17]

The *Finjan, Rollins Ranches, In re Mercedes-Benz Emissions Litig.,* and *Giorgi* courts rejected the invocation of the GDPR and implementing regulations. Those courts found that the parties resisting discovery failed to meet their burden, to demonstrate that the regulations should apply and, upon evaluation of the aforementioned factors, found that the interests of the U.S. and the party seeking discovery outweighed the interest of the foreign nation privacy interests.[18] Accordingly, the GDPR and implementing legislation did not result in a prohibition against the requested discovery.

Chapter 6 GDPR provides that a "legal requirement" may be a basis for which a company can make a compliant disclosure of personal information.[19] Article 49 of the GDPR further provides that personal data can be transferred to a third country where it is "necessary for the establishment, exercise or defence of legal claims."[20] However the European Data Protection Board ("EDPB"), which was created by the GDPR to create guidance on its application, has advised that a legal requirement is not established merely by an order of a U.S. Court, and the Article 49 derogation is not granted for every foreign legal proceeding—only those in which pass a strict "necessity test." While balancing the interests of domestic parties seeking discovery U.S. courts must also be aware of the reality that action may be taken against litigants for their disclosures in discovery.

Implications of U.S. GDPR Rulings and Beyond

U.S. courts' rulings in favor of disclosure over litigants' invocation of the GDPR and other foreign data protection laws are likely to make waves for companies with an EU presence. Where courts determine that litigants must comply with discovery requests, the companies involved in maintaining relevant personal data run the risk of violating the GDPR. While not the focus of regulators thus far, document production in litigation may soon garner their attention, as enforcement efforts have been aggressive, and the imposition of fines has been significant.

Furthermore, as domestic data privacy legislation expands in the U.S.—California's enactment of the California Consumer Privacy Act (CCPA)[21] is expected to be followed by additional states enacting similarly restrictive data privacy laws—similar discovery objections and claims are likely to be raised, based instead on state law.■

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1.General Data Protection Regulation, EUR-Lex (May 25, 2018), https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1552662547490&uri=CELEX%3A32016R0679.
2. The UK will continue to be subject to the GDPR through its Brexit transition period, until December 2020. Brexit and data protection in the UK, IT Governance (Feb. 5, 2020), https://www.itgovernance.co.uk/eu-gdpr-uk-dpa-2018-uk-gdpr.
3. Ryan Browne, Europe's privacy overhaul has led to $126 million in fines — but regulators are just getting started, CNBC (Jan. 19, 2020) https://www.cnbc.com/2020/01/19/eu-gdpr-privacy-law-led-to-over-100-million-in-fines.html; Ivana Kottasová, These companies are getting killed by GDPR, CNN Business (May 11, 2018), https://money.cnn.com/2018/05/11/technology/gdpr-tech-companies-losers/index.html.
4. *Ironburg Inventions v. Valve Corp.*, Case No. C17-1182-TSZ (W.D. Wash. Aug. 22, 2018).
5. *Corel Software, LLC v. Microsoft*, Case No. 2:15-cv-00528-JNP-PMW (D. Utah Oct. 5, 2018).
6. *d'Amico Dry D.A.C. v. Nikka Financial*, CA 18-0284-KD-MU, Dkt. No. 140 (Adm. S.D. Ala. Oct. 19, 2018).
7. *Finjan, Inc. v. Zscaler, Inc.*, No. 17CV06946JSTKAW, 2019 WL 618554, 1 (N.D. Cal. Feb. 14, 2019).
8. *Rollins Ranches, LLC v. Watson*, 2020 BL 192422, 4 (D.S.C. May 22, 2020).
9. *In re Mercedes-Benz Emissions Litig.*, No. 16-CV-881, 2020 WL 487288, 3 (D.N.J. Jan. 30, 2020).
10. *Id.* at *6 ; *Royal Park Investments SA/NV v. HSBC Bank USA, N.A.*, No. 14 CIV. 8175 (LGS), 2018 WL 745994, *11 (S.D.N.Y. Feb. 6, 2018)); *In re Air Crash at Taipei, Taiwan on Oct. 31, 2000*, 211 F.R.D. 374, 377 (C.D. Cal. 2002).

11. *In re Mercedes-Benz Emissions Litig*., No. 16-CV-881, 2020 WL 487288, 6 (D.N.J. Jan. 30, 2020; *AstraZeneca LP v. Breath Ltd*., No. CIV. 08-1512 (RMB/AM), 2011 WL 1421800, 13 (citing *In re Air Crash at Taipei*, 211 F.R.D. at 377).
12. *Giorgi Glob. Holdings, Inc. v. Smulski*, No. CV 17-4416, 2020 WL 2571177, 1 (E.D. Pa. May 21, 2020); quoting *Laydon v. Mizuho Bank, Ltd*., 183 F.Supp.3d 409, 420 (S.D.N.Y. 2016).
13. *In re Mercedes-Benz Emissions Litig*., 7.
14. "Where 'the information sought in discovery can easily be obtained elsewhere, there is little or no reason to require a party to violate foreign law.'" *AstraZeneca LP v. Breath Ltd*., No. CIV. 08-1512 (RMB/AM), 2011 WL 1421800, *14 (D.N.J. Mar. 31, 2011); *In re Air Crash at Taipei*, 211 F.R.D. at 378 (citing *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1475 (9th Cir.1992)).
15. *Giorgi Glob. Holdings, Inc. v. Smulski*, No. CV 17-4416, 2020 WL 2571177, *2 (E.D. Pa. May 21, 2020); quoting *Fenerjian v. Nong Shim Co*., Ltd., 2016 WL 245263, *5 (N.D. Cal. Jan. 21, 2016).
16. *In re Mercedes-Benz Emissions Litig*., 3.
17. *See, e.g., In re Mercedes-Benz Emissions Litig*., No. 16-CV-881 (KM) (ESK), 2020 WL 487288, at *8 (D.N.J. Jan. 30, 2020) (noting the unlawful misleading of American consumers).
18. *Rollins Ranches, LLC v. Watson, at *4* (holding that the defendant offered no support for her assertion that the UK Data Protection Act applied to limit her discovery responses, in reliance upon *Societe Nationale Industrielle Aerospatiale's* holding that that "[foreign] statutes do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute;" *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 544, 107 S. Ct. 2542, 2556, 96 L. Ed. 2d 461 (1987); *Giorgi Glob. Holdings, Inc. v. Smulski,* at *2 (holding that defendants failed to meet their burden to prove that GDPR protections should apply to their documents even where the defendants' documents originated or were located outside of the U.S., as an analysis of all the Restatement factors weighed in in favor of disclosure); *In re Mercedes-Benz Emissions Litig.*, at *8 (holding that the Special Master did an appropriate comity analysis and did not abuse his discretion in finding that the GDPR did not preclude disclosure of evidence where the information could be protected under a Discovery Confidentiality Order); *Finjan, Inc*., at *3 (holding that the defendant did not meet its burden to prove that the GDPR barred production or that disclosure would result in a GDPR enforcement action, even where sales director from whom the discovery was sought was physically located in the U.K.).
19. EDPB Guidelines 2/2018 on derogations of Article 49 under Regulation 2016/679, adopted on 25 May 2018, https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_guidelines_2_2018_derogations_en.pdf.
20. *Id*.
21. California enacted its own data privacy legislation at the top 2020—the first legislation of its kind in the U.S. The California Consumer Privacy Act (CCPA) applies to companies operating in California that either a) earn at least $25 million in annual revenue, b) gather, buy, or sell data on more than 50,000 of its users, or c) generate more than half of their revenue from the sale of user data. Similar to the GDPR, the CCPA aims to protect consumers' personal information. Key provisions detail consumers' legal rights to know what personal information covered entities possess and disclose about them, to request the deletion of personal information, to request to opt in or out of the sale of personal information, to name a few.

Time to Allow Possession of Cell Phones in Courthouses and Courtrooms

BY EVAN BRUNO

As part of its 2020-2023 Strategic Plan, the Illinois Supreme Court Commission on Access to Justice plans to draft a uniform policy, to be presented to the Illinois Supreme Court, allowing greater use of cell phones in courthouses and encouraging adoption of a uniform policy statewide.

I believe it's high time to permit cell phones in courthouses and courtrooms, not just for lawyers, but for *pro se* litigants and members of the public as well. In January 2020, the Michigan Supreme Court adopted a new statewide policy allowing just that. Under Michigan's new policy, cell phones must be silenced, they cannot be used for photography, recording, or communication with witnesses or jurors, and the judge retains ultimate discretion to determine what cell phone activity is disruptive or likely to compromise courthouse security. Michigan's policy is eminently reasonable and loaded with appropriate safeguards. Illinois should follow suit.

The Michigan Supreme Court's order came with a dissenting opinion by Justice Stephen Markman, who characterized the use of cell phones as "a mere individual convenience" and laid out his arguments against the new statewide policy. First, he criticized the new policy's one-size-fits-all approach, opining that policing the new rules will be more difficult in large, busy courtrooms than in small courtrooms. Second, he expressed his worry that cell phones will threaten the "solemn proceedings" and "compromise the necessarily formal and focused atmosphere of the courtroom." Third, he warned that cell phones could be used to capture photos or recordings "to gain information about witnesses and jurors in order to intimidate, compromise, or embarrass these persons." Justice Markman's parade of horribles could be better described as a parade of *dagnabbits*.

His argument against the one-size-fits-all approach—an argument that could be made against *any* rule of general applicability—is a mischaracterization of the new Michigan policy, which gives courtroom judges discretion to "terminate activity that is disruptive or distracting to a court proceeding, or that is otherwise contrary to the administration of justice."

Justice Markman's second fear, that the introduction of cell phones will destroy the solemnity of the courtroom, rests on the faulty assumptions that (1) cell phones are not already ubiquitous in courtrooms (they are, in the hands of lawyers) and (2) cell phone possession cannot coexist with solemnity (it can, as is obvious to anyone who has attended a church service, wedding, or funeral during the age of cell phones). Similar curmudgeonly arguments were made against allowing extended media coverage, closed-circuit video arraignments, and doing away with the powdered wig. And although Justice Markman is correct that occasional "beeps, buzzes, and personalized ringtones" could invade the serenity of the courtroom from time to time, the justice system is not so fragile as to collapse under such trivial disturbances, if they occur.

Finally, the claim that cell phones will be used to somehow tamper with