Discovery of Regulatory Information for Use in Private Products Liability Litigation: Getting Past the Road Blocks

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DISCOVERY OF REGULATORY INFORMATION FOR USE IN PRIVATE PRODUCTS LIABILITY LITIGATION: GETTING PAST THE ROAD BLOCKS

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I. INTRODUCTION

Product liability lawsuits often coincide with governmental regulatory activities. Products at issue in litigation, for example, may also be or have been the targets of inquiries or investigations by regulators. Foreign regulators also may investigate product safety issues prior to, or during the course of litigation. In the European Union, for example, the Directive on General Product Safety governs issues of product safety.

Information pertaining to agencies' regulatory functions is often sought by product liability litigants as evidence to support or refute evidence of defect, causation, notice, or industry standard.


4. E.g., In re Nautilus Motor Tanker Co., 85 F.3d 105 (3rd Cir. 1996) (admitting a Coast Guard report that included a comment on causation).

5. E.g., Whittley v. City of Meridian, 530 So. 2d 1341 (Miss. 1988) (admitting a CPSC letter and publication, which had alerted the city to a potential threat to children created by refuse bins at issue in the litigation, to rebut the city's denial of notice of the threat).

6. E.g., Hagans v. Oliver Mach. Co., 576 F.2d 97 (5th Cir. 1978) (admitting OSHA safety standards for products comparable to defendant's saw to show the
Before litigants can use this potentially valuable information, however, they must first gain access to it. Unfortunately, even after the passage of the Freedom of Information Act (FOIA) in the United States, and the efforts of the European Union to provide for access to government information, it nevertheless remains difficult for private citizens to access more than a limited amount of information from governmental agencies.

This article will discuss the major roadblocks to getting information in the form of documents or testimony from European or United States regulators for use in private litigation. It will discuss the apparent weakening of some of these roadblocks, such as the "Housekeeping Privilege," which is used to block access to agency information in the United States, and the development of alternative roadblocks that continue to shield domestic information from disclosure. This article will also discuss the barriers to pretrial discovery in U.S. courts of European regulatory information. Finally, this article will provide some pointers on how litigants might obtain certain types of domestic and European agency information in certain circumstances.

II. ACCESS TO UNITED STATES REGULATORY INFORMATION

A. The Housekeeping Privilege

For hundreds of years, the federal government effectively resisted attempts to gain access to federal agency information by citing the "Housekeeping Privilege." The Housekeeping Privilege derives from a statute enacted in 1789 during George Washington's presidency. The statute, sometimes known as the Housekeeping Statute, enabled President Washington to "get his administration underway" by authorizing executive agency officials to set up their

7. 5 U.S.C. § 552 (1967). The FOIA is a part of the Administrative Procedure Act (APA), (codified as amended at 5 U.S.C. §§ 551 et seq. (1946)).
9. *Infra* notes 23-54 and accompanying text.
10. *Infra* notes 55-109 and accompanying text.
11. *Infra* notes 12-126 and accompanying text.
12. *Infra* notes 110-121 and 127-108 and accompanying text.
13. 3 U.S.C. § 301 (1948). As originally enacted, the statute provided that "[the] head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property." *Id.*
offices, regulate their employees, conduct business, and maintain agency records and property. Whether or not Congress intended it at the time, however, federal agencies have found this enabling statute particularly useful in resisting disclosure of agency information to the public. Indeed, even the passage of the Freedom of Information Act in 1967 barely affected the Housekeeping Statute's usefulness in this regard.

B. The Touhy Doctrine

The Supreme Court bolstered the Housekeeping Statute's protection of agency information in 1953 when it decided United States ex rel. Touhy v. Ragen. In Touhy, the Supreme Court reversed a contempt order that a federal district court had entered against an FBI agent who had defied a subpoena duces tecum. The agent refused to supply the requested documents citing FBI regulations prohibiting their disclosure. The Court held that a federal agent who acts in accordance with the agency's valid, statutorily authorized regulations cannot be held in contempt for those actions.

The court expressly declined to address the constitutionality of the regulations themselves. Nevertheless, the "Touhy doctrine," as it came to be known, became the prime authority for agencies to continue to resist disclosure of agency information. In fact, following the Touhy decision, many federal agencies' housekeeping regulations began to make express reference to the case.

Legal scholars soundly criticized the government's use of both the Housekeeping Statute and the Touhy decision to withhold in-

17. Id. at 467-68.
18. Id. at 465.
19. Id. at 467-68.
20. Id. at 467.
but the courts have paid little heed and have generally sided with the government. Even after Congress amended the Housekeeping Statute in 1958 to include the sentence: "This section does not authorize withholding information from the public or limiting the availability of records to the public," the effect of the statute, combined with the *Touhy* decision, remained virtually the same, until recently.

C. *The Weakening Of The Touhy Doctrine*

Within the last decade, federal courts have begun to seriously question the scope of *Touhy* and the Housekeeping Statute. The first federal appellate court to take a firm stand against *Touhy*, and in favor of federal agency disclosure, was the Ninth Circuit in 1994. That year, in *Exxon Shipping Co. v. United States Department of the Interior*, the Ninth Circuit determined that federal agencies had no authority to prohibit their employees from disclosing information in response to a lawful federal court subpoena.

The *Exxon Shipping Co.* case arose out of the devastating Alaskan oil spill disaster in 1989. Plaintiffs who lost property and livelihood as a result of the spill brought state and federal court actions to recover damages from Exxon Shipping Co. In defending the litigation, Exxon sought discovery from ten federal agents representing five separate federal government agencies that had investigated the oil spill.

Exxon issued deposition subpoenas to the federal agents.

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23. Exxon Shipping Co. v. United States, 34 F.3d 774, 778 n.6 (9th Cir. 1994).
26. Grech, supra note 24, at 1144 & n.39; see also Richmond, supra note 22, at 182-83 & nn.64-70.
27. 34 F.3d 774 (9th Cir. 1994).
28. Id. at 778 ("[N]either the statute’s text, its legislative history, nor Supreme Court case law supports the government’s argument that [3 U.S.C.] § 301 authorizes agency heads to withhold documents or testimony from federal courts."); see also id. at 778 n.6 (citing the works of commentators who have reached the same conclusion).
29. Id. at 775.
31. Exxon Shipping Co., 34 F.3d at 775-76.
32. Id. at 775.
None of the subpoenaed agents, however, complied with the subpoena. 33 Eight of the ten agents failed to appear for their depositions, on orders from their agency employers. 34 Two of the subpoenaed agents appeared and gave limited testimony, but were instructed not to answer many of the questions. 35 None of the agencies or subpoenaed parties had brought a motion to quash the subpoenas. 36

Exxon, thereafter, filed a complaint in federal district court alleging violations of the Housekeeping Statute and the Administrative Procedure Act. 37 The government resisted, citing the Touhy Doctrine and claiming the federal agents' actions were proper and authorized by the Housekeeping Statute. 38

The Ninth Circuit disagreed. 39 The court determined that the federal Housekeeping Statute does not, by its own force, authorize federal agency heads to withhold evidence sought under a valid federal court subpoena. 40 The court looked to the legislative history, and found that the 1958 amendment was dispositive. 41 The amendment, the court found, was made specifically in response to the perceived evolution of the Housekeeping Statute from a tool for federal agencies to maintain internal order to a claim of authority to keep information from the public. 42

In addition, the court rejected the government's assertion that agency heads' discretion to allow their employees to testify was a fundamental issue of the federal government's sovereign immunity. 43 The court saw this argument as antithetical to the concept of separation of powers, 44 quoting United States v. Reynolds, 45 "[J]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." 46

33. Id. at 776.
34. Id.
35. Id.
36. Id.
37. Specifically, Exxon alleged the government's actions were in violation of 5 U.S.C. § 706(2)(A). Id. at 776.
38. Id. at 776.
39. Id. at 778.
40. Id.
41. Id. at 777-78.
42. Id.
43. Id. at 778.
44. Id.
45. 345 U.S. 1 (1953).
46. Id. at 9-10.
Finally, the court addressed the government’s concerns regarding both the conservation of its agencies’ employee resources and the minimization of governmental involvement in controversial private litigation. The court felt both these concerns could be addressed under the general rules of discovery. Under the Ninth Circuit’s decision in Exxon Shipping Co., therefore, federal agencies are held to the same standards as any other non-party served with a valid subpoena in federal court. The agency is compelled to respond to the subpoena, subject only to the limitations set forth in Rules 26 and 45.

D. Another Roadblock: Federal Sovereign Immunity

As recently as 1999, however, the Fourth Circuit, in COMSAT v. National Science Foundation, declined to follow the Ninth Circuit’s lead in Exxon Shipping Co. Instead, it upheld the NSF’s refusal to comply with a subpoena issued by an arbitrator under the Federal Arbitration Act. The court did not, however, directly take issue with the Ninth Circuit’s decision regarding Touhy. Rather, the Fourth Circuit relied on a somewhat different analysis based on federal sovereign immunity.

47. Exxon Shipping Co., 34 F.3d at 779.
48. Id. at 779.
We acknowledge the government’s serious and legitimate concern that its employee resources not be commandeered into service by private litigants to the detriment of the smooth functioning of government operations. However, we are confident that district courts can, and will, balance the government’s concerns under the general rules of discovery. The Federal Rules of Civil Procedure explicitly provide for limitations on discovery in cases such as this.

49. See also Houston Bus. J., Inc. v. Comptroller of the Currency, 86 F.3d 1208 (D.C. Cir. 1996). "[N]either the Federal Housekeeping Statute nor the Touhy decision authorizes a federal agency to withhold documents from a federal court." Id. at 1212 (citing Exxon Shipping Co., 34 F.3d at 777-78) (dictum).
50. See, e.g., Fed. R. Civ. P. 26(c) ("[T]he court...may make any order which justice requires to protect a party...from annoyance, embarrassment, oppression, or undue burden or expense...."); Fed. R. Civ. P. 45(c)(3) ("[T]he court...shall quash or modify the subpoena if it...subjects a person to undue burden...").
51. 190 F.3d 269 (4th Cir. 1999).
52. Id. at 277.
53. 9 U.S.C. § 7 (1999) ("[A]rbitrators...may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book record, document, or paper, which may be deemed material...").
54. COMSAT, 190 F.3d at 277 ("[I]t is sovereign immunity, not housekeeping
The principle of federal sovereign immunity, which holds that no action may be made against the United States government without its consent, is firmly entrenched in our country's jurisprudence. The authority for the principle, however, remains unclear. It is generally considered to have derived from the English common law rule that "the King can do no wrong." In any case, the prevailing rule is clear that Congress alone may consent to suits brought against the United States, and such Congressional consent must be explicit.

Sovereign immunity applies to suits against federal officers as well as to suits against the United States whenever the relief sought would "operate against the latter." The Supreme Court has further declared that

[a]ctions of an officer [that] do not conflict with the terms of his valid statutory authority...are the actions of the sovereign, whether or not they are tortious under general law, if [those actions] would be regarded as the actions of a private principal under the normal rules of agency.

Thus, a federal agent who acts in accordance with the agency's valid, statutorily authorized regulations is deemed to act on behalf

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56. Id. at 590 (citing United States v. Lee, 106 U.S. 196, 207) (1882) ("The principle has never been discussed or the reasons for it given, but it has always been treated as an established doctrine.").
57. Id. Chemerinsky notes that commentators have often criticized the doctrine of federal sovereign immunity, believing it to be an "anachronistic relic," finding that it places the federal government "above the law," and observing that it appears to be nothing more than a "common law principle borrowed from the English common law."—No mention of the principle exists anywhere within the US Constitution. Id. at 591-92. Chemerinsky notes that even President Lincoln disapproved of the doctrine, declaring it to be "as much the duty of government to render prompt justice against itself in favor of citizens as it is to administer the same between private individuals." Id. at 591 (citing JAMES D. RICHARDSON, A COMPILATION OF MESSAGES AND PAPERS OF THE PRESIDENTS, 3245, 3252, quoted in Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573, 580 (1946) (Frankfurter, J., dissenting)).
58. Id. at 590.
61. Here is where the Fourth Circuit's sovereign immunity analysis and the
of the United States government. In some circuits it has been recognized, however, that the principle of sovereign immunity does not apply to federal court subpoenas directed to the federal government.\(^{62}\)

In 1989, the Fourth Circuit held in *Boron Oil Co. v. Downie*\(^{63}\) that enforcement of a subpoena of a federal agent is subject to the government's sovereign immunity.\(^{64}\) More recently, in *United States v. Williams*,\(^{65}\) the Fourth Circuit held that although Congress waived sovereign immunity in enacting the Administrative Procedure Act (APA),\(^{66}\) the waiver is limited.\(^{67}\) Thus, according to the Fourth Circuit, if the agency reaches a final decision not to comply with a subpoena, the court's review is limited to determining whether the agency's decision is in accordance with the agency's own housekeeping procedures and whether the agency's decision is arbitrary or capricious.\(^{68}\)

In *COMSAT*, the Fourth Circuit was highly critical of the Ninth Circuit's decision in *Exxon Shipping Co.*, finding that the Ninth Circuit's decision "abrogates the doctrine of sovereign immunity to a significant degree."\(^{69}\) According to the Fourth Circuit, the *Exxon* court wrongly overlooked "an important limitation" on the APA's waiver of sovereign immunity, stating that "courts may reverse an agency's decision not to comply [with a subpoena] only when the agency has acted unreasonably."\(^{70}\)

\(\footnote{62. \text{Northrup Corp. v. McDonnell Douglas Corp., 751 F.2d 395, 399 n.2 (D.C. Cir. 1984) (noting both the court's and the parties' inability to find any case in which the issue of federal sovereign immunity in connection with federal court subpoena process had even been explicitly discussed; asserting that "[s]ince at least 1965, however, this court has assumed the nonapplicability of sovereign immunity to such a subpoena."). \text{But see Houston Bus. J. v. Office of the Comptroller of the Currency, 86 F.3d 1208 (D.C. Cir. 1996) (stating, albeit in dicta, that federal court litigants can obtain federal agency discovery by means of a subpoena because \"the federal government has waived its sovereign immunity,\" (emphasis added))(citing APA ).}}\)

\(\footnote{63. \text{873 F.2d 67 (4th Cir. 1989).}}\)

\(\footnote{64. \text{id. at 69.}}\)

\(\footnote{65. \text{170 F.3d 431 (4th Cir. 1999).}}\)

\(\footnote{66. \text{5 U.S.C. §§ 701-706 (1946).}}\)

\(\footnote{67. \text{Williams, 170 F.3d at 434.}}\)


\(\footnote{69. \text{COMSAT, 190 F.3d at 277.}}\)

\(\footnote{70. \text{id. (citation omitted).}}\)
The COMSAT court, however, misread the Exxon decision and failed to consider the full scope of judicial review provided by the APA.71 In Exxon, the Ninth Circuit took a step back from Touhy to determine whether the agency's housekeeping regulation itself was valid and determined that it was not. This review of the validity of the agency's regulation was well within the court's authority under the APA, which provides that a reviewing court "shall . . . set aside agency action...found to be...in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."72 Once the Ninth Circuit made the determination that the regulation was invalid, it had no further need to assess the reasonableness of the agency in acting upon that regulation. The Ninth Circuit's ruling did not abrogate sovereign immunity because the court's review was well within the Congressional waiver of sovereign immunity set forth in the APA.73

E. The Special Problem For State Court Litigants

State court litigants are even more limited in their options for obtaining federal agency information than are federal court litigants. The principle of sovereign immunity takes on a different significance in state court where it is generally assumed there is no

71. 5 U.S.C. § 706(2) (West 1996). The full text of this section is as follows: To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—compel agency action unlawfully withheld or unreasonably delayed; and hold unlawful and set aside agency action, findings, and conclusions found to be—arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; without observance of procedure required by law; unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Id.


73. See also Gregory S. Coleman, Note, Touhy and the Housekeeping Privilege: Dead but not Buried?, 70 Tex. L. Rev. 685, 701 (1992). "[T]he sovereign immunity analysis presupposes that the official has acted within the scope of his delegated authority." Id.
jurisdiction over the United States government.74 Accordingly, a subpoena issued by a state court to a federal agency is unenforceable.75

State court litigants have attempted to gain federal subpoena authority with no success. In *Houston Business Journal, Inc. v. United States*,76 for example, a Texas newspaper attempted to obtain records from the United States Comptroller using this method, having failed in two earlier attempts using more conventional procedures. The newspaper, defending against a libel suit in Texas state court, sought to obtain what it expected would be exculpatory materials from the United States Comptroller of the Currency.77 The newspaper served a subpoena *duces tecum*, issued by the Texas state court, on the Comptroller's office in Houston.78 The Comptroller responded by referring the newspaper to its administrative information request procedure promulgated under the Housekeeping Statute.79

After an exchange of correspondence, the Comptroller eventually released some but not all of the documents the newspaper requested.80 It provided the documents along with a letter decision which stated that all the requested documents were protected by an executive privilege. It further stated that the letter decision constituted "final agency action" for purposes of the APA.81 The newspaper, dissatisfied with the limited production, obtained an order from the Texas state court compelling the Comptroller to comply with its subpoena *duces tecum*.82

At this stage, the Comptroller removed the matter to federal

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75. *Infra* note 83 and cases cited therein.
76. 86 F.3d 1208 (D.C. Cir. 1996).
77. *Id.* at 1210.
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.* at 1210-11.
82. *Id.* at 1211.
court and moved to quash the state-court subpoena. The newspaper added claims in the federal court action under the Freedom of Information Act (FOIA) and the APA. The court granted the motion to quash, denied the FOIA claim citing the newspaper's failure to file an FOIA request, and denied the APA claim on grounds that the Comptroller's decision was "not arbitrary and capricious or contrary to law." The newspaper appealed to the Fifth Circuit, which affirmed.

The newspaper, however, was not yet ready to give up. It proceeded to bring an action in the United States District Court for the District of Columbia for purposes of obtaining a federal court subpoena. The Comptroller, however, disregarded the federal court subpoena, and the newspaper moved the federal district court for an order to compel production. The court denied the motion on grounds of issue preclusion. On appeal to the D.C. Circuit, the court affirmed, not on collateral estoppel or issue preclusion grounds, but rather, on grounds that the district court lacked subject matter jurisdiction.

83. Federal agents have the right to remove to federal court any state court civil or criminal action against them. 28 U.S.C. § 1442 (West 1994). Moreover, their right of removal is "absolute for conduct performed under color of federal office." Arizona v. Manypenny, 451 U.S. 232, 242 (1981). This right extends to contempt proceedings arising from discovery disputes between a party to a state court action and a nonparty federal officer. Bosaw v. Nat'l Treasury Employees' Union, 887 F. Supp. 1199, 1206 (S.D. Ind. 1995) (citing Edwards v. United States, 43 F.3d 312 (7th Cir. 1994); Louisiana v. Sparks, 978 F.2d 226 (5th Cir. 1992); Florida v. Cohen, 887 F.2d 1451 (11th Cir. 1989); Boron Oil Co. v. Downie, 873 F.2d 67 (4th Cir. 1989); Nationwide Investors v. Miller, 793 F.2d 1044 (9th Cir. 1986); Swett v. Schenk, 792 F.2d 1447 (9th Cir. 1986); Wisconsin v. Hamdia, 765 F.2d 612 (7th Cir. 1985); Carr v. North Carolina, 386 F.2d 129 (4th Cir. 1967); Ferrell v. Yarborry, 848 F. Supp. 121 (E.D. Ark. 1994); California v. Reyes, 816 F. Supp. 619 (E.D. Cal. 1992); Reynolds Metals v. Crowther, 572 F. Supp. 288 (D. Mass. 1982)).

84. Houston Bus. J, 86 F.3d at 1211.

85. Id.

86. The opinion does not state the grounds on which the court granted the Comptroller's motion to quash. Id. Presumably, it was on grounds of derivative jurisdiction. Bosaw, 887 F. Supp. at 1209 ("When an action against federal officers is removed pursuant to § 1442, the federal district court acquires no independent jurisdiction on removal. Rather, its jurisdiction is derivative of that of the state court.").


88. Id.

89. Id.

90. Id.

91. Id.

92. Id.
The D.C. Circuit framed the issue as follows: "[W]hen the underlying litigation is in state court, can a litigant eager to avoid the limitations on the state court's subpoena power obtain a federal-court subpoena instead?" The court held in the negative.

Citing to Article III of the Constitution, the court observed that the federal courts' subpoena power is limited to cases in which the federal court has subject-matter jurisdiction over the underlying action. The court determined that the D.C. District Court had no jurisdiction over the underlying state court libel claims, and therefore, had no jurisdiction to issue the subpoena upon the Comptroller. Accordingly, the court affirmed the district court's denial of the newspaper's motion to compel. Presumably, the newspaper never obtained the exculpatory information it sought.

F. Procedure For Obtaining Federal Agency Information

1. File A Request For Information Under The Freedom Of Information Act

Each federal agency has promulgated its own rules regarding access of information under the FOIA. In addition, many agencies have published on the Internet procedures for accessing information. Provided here are the procedures for accessing information from the Consumer Product Safety Commission (CPSC).

The CPSC's "housekeeping" regulations, governing access to information for use in private litigation, are codified at 16 C.F.R. Part 1016 (1999). The Commission's stated policy in this regard is "to make official records available to private litigants, to the fullest extent possible" while conserving "the time of its employees for work on Commission projects and activities."

As for CPSC records in private litigation, the CPSC requires that parties request the information in accordance with its general FOIA procedures. These procedures require that requests be

93. Id. at 1212.
94. Id.
95. Id. at 1213. The court noted that the federal court's subpoena power may also extend to certain circumstances in which an action is cognizable in federal court or in cases in which the subpoenaed information is necessary for the court to ascertain its own jurisdiction. Id.
96. Id.
97. Id. at 1214.
99. Id. § 1016.1(b).
100. 16 C.F.R. Part 1015 (1999) (codifying CPSC's procedures for FOIA re-
made in writing, reasonably describing the records sought.\textsuperscript{101} The CPSC "shall respond to all written requests within twenty (20) working days (excepting Saturdays, Sundays, and legal public holidays)."\textsuperscript{102} The twenty days begin as of the date CPSC receives and date-stamps the request.

The CPSC has reserved for itself the right to withhold from production certain categories of records it terms "exempt."\textsuperscript{104} These include such things as: documents classified by Executive Order as "secret;"\textsuperscript{105} the Commission's internal personnel rules and procedures;\textsuperscript{106} trade secrets and confidential commercial information the Commission has obtained from other sources;\textsuperscript{107} personnel and medical files, "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;"\textsuperscript{108} and certain records and information compiled for law enforcement purposes, particularly where disclosure of such information could interfere with the investigation or the investigated party's civil rights.\textsuperscript{109}

Parties dissatisfied with the CPSC's response to their requests for information may appeal the denial to the CPSC's General Counsel.\textsuperscript{110} The appeal must be made within thirty days of the requester's receipt of the CPSC's denial of information.\textsuperscript{111} The General Counsel will respond to the appeal within twenty days of the date the CPSC receives the appeal.\textsuperscript{112} The General Counsel's decision constitutes final agency action, of which the requesting party...
may seek judicial review according to the APA. 113

The procedure for obtaining testimony of CPSC employees in private litigation is less straightforward. Requests for agency employee testimony must be made directly to the Commission's General Counsel. 114 The General Counsel's decision to grant or deny permission is reviewable by the Commission at its discretion. 115 The General Counsel may, at the General Counsel's discretion, authorize the testimony of a CPSC employee in private litigation in which the General Counsel believes such testimony would be in the best interests of the CPSC. 116

2. Obtain A Federal Court Subpoena If The Action Is Pending In Federal Court

Litigants in federal court may attempt to obtain CPSC information by subpoena. The CPSC has anticipated this likelihood, and its housekeeping regulations have provided a procedure for responding to subpoenas. Generally speaking, all subpoenas served upon the CPSC are to be handled directly by the General Counsel. 117 The CPSC will respond to a subpoena duces tecum that does not seek testimony as if it were any other FOIA request. 118 Likewise, a subpoena for testimony is treated as any other request for agency testimony as provided above. CPSC employees served with a subpoena are instructed to immediately notify the Office of the General Counsel. 119 The General Counsel is directed to take steps, in conjunction with the Department of Justice, to quash such subpoenas or seek protective orders if necessary to prevent improper disclosure of documents. 120

In short, the CPSC's response to a subpoena will be the same as its response to any written request for documents or testimony. From a federal court litigant's perspective, however, it may be ad-

113. Id. § 1015.7(c); see also 5 U.S.C. § 552(a)(4)(B) (1999).
114. 16 C.F.R. § 1016.4(a) (1999) ("No Commission employee shall testify in his or her official capacity in any private litigation, without express authorization from the Commission's General Counsel.").
115. Id. Presumably, if the Commission denies review of the General Counsel's decision to refuse permission to testify, the General Counsel's decision is deemed final agency action subject to judicial review according to the APA.
116. Id. § 1016.4(b).
117. Id. §§ 1016.3(c); 1016.4.
118. Id. § 1016.3(a).
119. Id. § 1016.4(b).
120. Id. § 1016.3(c); see also id. at § 1016.4(b) (stating the Commission's response to subpoenas for testimony from Commission employees).
vantageous to make both a standard FOIA written request for information and serve a subpoena for the same information. In this way, the litigant has two avenues of recourse available if all the requested information is not provided: (1) judicial review of the agency's final decision according to the APA; and (2) subpoena enforcement procedures.

III. ACCESS TO EUROPEAN REGULATORY INFORMATION

While there is at least limited precedent for obtaining testimony from United States regulators, a party's ability to obtain testimony from European or European Union regulators is severely limited by the nature of litigation in civil law countries and their view of pretrial discovery. Most if not all European countries look unfavorably upon American style discovery and avoid exhaustive pretrial discovery, especially of non-parties. In civil law countries, such as France and Germany, discovery is controlled by the judge and often is conducted during the course of trial.

European discovery practices, the general litigation environment, and certain countries' product liability laws make it difficult for litigants in U.S. courts to obtain European regulatory records. Obtaining the testimony of a European Union or Member State regulator in an American court, much less foreign state courts, is unprecedented. There are no decisions from American or European courts that address whether courts can force foreign regulators to testify when the testimony could be relevant to issues in a product liability case or any other type of private tort litigation.

The EU has adopted a directive on access to documents, known as the "Transparency Doctrine." This directive, like the

121. To prevent undue delay and duplication of effort, litigants should deliver their written requests pursuant to the FOIA together with the court's subpoena.
122. Societe Nationale Industrielle Aerospatiale v. United States Dist. Ct. for the Dist. of Iowa, 482 U.S. 522, 561 n.18 (1987) (Blackmun, J., dissenting) ("In England, for example, though document discovery is available, depositions do not exist, interrogatories have a strictly limited use, and discovery as to third parties is generally not allowed." (quoting S. SEIDEL, EXTRATERRITORIAL DISCOVERY IN INTERNATIONAL LITIGATION 24 (1984))).
123. In France, which applies strict liability in products litigation, it is not a defense that a device meets certain regulatory standards. C.Civ. art. 1386-10 (Fr.) ("The manufacturer can be held responsible for the defect even if the product was manufactured according to the rules of the art or to existing standards, or was the object of an administrative authorization."). Id. Therefore, a civil law judge would have no reason to interrogate a regulator about such compliance.
FOIA in the United States, allows citizens of European Union countries to request documents of the Commission or its constituent institutions. Obtaining documents in this indirect fashion may be more informative than attempting to challenge the sovereignty of Member States or EU institutions by seeking to directly interrogate regulators or other government officials, even if the admissibility of such documents and the information they contain may be more challenging.

A. Methods For Attempting To Gather Testimony From Regulators In Europe

Obtaining discovery in European countries under the Federal Rules of Civil Procedure relies almost entirely on the voluntary cooperation of the witness or the discretionary authority of foreign courts and governments through vehicles such as Letters of Request under Rule 28(b) or the Hague Convention. Particularly in civil law countries, there is an unwillingness by judges to participate in broad pre-trial discovery of non-parties and they are not likely to allow broad inquiries from foreign courts. However, the Federal Rules of Civil Procedure do provide certain methods by which litigants can attempt to discover non-parties in foreign countries.

1. Deposition By Written Stipulation

Before attempting to compel the deposition of a non-party foreign regulator, a party may try to secure the testimony by agreement. Federal Rule of Civil Procedure 29 states:

[u]nless otherwise directed by the Court, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify other proce-
dures governing or limitations placed upon discovery.... 127

Obviously, stipulated procedures are only effective when the witness is cooperative and the terms of the agreement do not violate the law of the country where the deposition will take place. 128 This means that the stipulation cannot usurp the function of the foreign judiciary or infringe upon the host country's sovereignty.

It would be unlikely, however, that a foreign regulator would voluntarily submit to the jurisdiction of a court in the United States. It would be even more unlikely that all parties would agree that such discovery would be beneficial. This is not to say that such regulators would be unwilling to discuss decisions related to the approval or investigation of the products involved in litigation in an informal setting, but there is no good reason to voluntarily submit to a procedure from which they are protected pursuant to the applicable foreign state law.

2. Letters Of Request And The Hague Convention

Federal Rule of Civil Procedure 28(b) covers the taking of depositions in foreign countries. It provides that in cases where a witness will not voluntarily appear, "depositions may be taken in a foreign country (1) pursuant to any applicable treaty or convention, or (2) pursuant to a Letter of Request . . . ." 129 Recognizing that foreign proceedings do not always follow the American pattern, Rule 28(b) specifically states:

[e]vidence obtained in response to a Letter of Request need not be excluded merely because it is not a verbatim transcript, because the testimony was not taken under oath, or because any similar departure from the requirements for depositions taken within the United States under these rules. 130

The standard for obtaining a Letter of Request under Rule 28(b) is relatively low. The rule provides that the court "shall" issue a Letter of Request "upon application and notice and on terms that are just and appropriate." 131 Moreover, the moving party is not required to show that "taking of the deposition in any other matter is

127. FED. R. CIV. P. 29.
129. FED. R. CIV. P. 28 (b).
130. Id.
131. Id.
impracticable or inconvenient" in order to obtain a Letter of Request.

Where federal courts lack the power to obtain evidence from a non-party located abroad, it is clear from the advisory committee's notes that the court may resort to a Letter of Request. The advisory committee notes state that, with respect to Rule 45(e), "the second paragraph continues the present procedure applicable to certain witnesses who are in foreign countries." Ultimately, unless the uncooperative witness in a European country is a United States national or resident, litigants should be required to apply to the court to issue a Letter of Request to compel the production of evidence by that witness.

The Supreme Court, in *Societe Nationale Industrielle Aerospatiale v. United States*, stated that the Hague Evidence Convention is not the only means by which to pursue discovery in a foreign jurisdiction. Nevertheless, in seeking the testimony of foreign government officials, the special issues of comity probably require that Hague Convention procedures be used. Some courts consider three major factors to determine whether parties must utilize the Hague Convention to obtain discovery: (1) the particular facts of the case; (2) the sovereign interests involved; and (3) the likelihood that resort to the Hague Convention would be an effective

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132. *Id.*
134. FED. R. CIV. P. 45, advisory committee's note.
135. The United States Code, at 28 U.S.C. section 1783, provides for an important exception to the territorial limits placed on a court's authority to enforce a subpoena under Rule 45 where United States nationals or residents are involved. In civil litigation, courts may issue a subpoena requiring "a national or resident of the United States who is in a foreign country" to appear to give testimony or to produce a specified document or other thing, if the Court finds that the particular testimony or the production of the document or other thing by him is necessary in the interest of justice, and it is not possible to obtain his testimony in admissible form without his personal appearance to obtain the production of the document or other thing in any other manner. 28 U.S.C. § 1783 (West 1994).
discovery device.\textsuperscript{139}

The \textit{Aerospatiale} court did not provide any specific guidance to the lower courts for making the comity analysis.\textsuperscript{140} Ultimately, the \textit{Aerospatiale} Supreme Court held that the Hague Convention clearly applies to evidence in the possession of non-U.S. litigants. The Court stated that "[t]he degree of friction created by discovery requests... and the differing perceptions of the acceptability of American-style discovery under national and international law, suggests some efforts to moderate the application abroad of US procedural techniques, consistent with the overall principle of reasonableness and the exercise of jurisdiction."\textsuperscript{141} Clearly, use of the Hague Convention would be the most potentially effective means to compel the testimony of foreign regulators.

A complete discussion of the Hague Convention is not warranted in this article, but a brief description of Convention procedures may be helpful for those who wish to proceed according to its requirements in an attempt to secure testimony from foreign regulators located in countries which are signatories.

3. Proceeding Pursuant To The Hague Convention

There are two primary procedures set out in the Hague Convention in an effort to bridge the gap between common law and civil law methods of international assistance. The first is the Letter of Request procedure which is the method of international judicial assistance most commonly utilized by civil law systems. The second is the taking of evidence by diplomatic officers or commissioners. This procedure is roughly analogous to the common law practice of taking evidence abroad by notice, stipulation or through court appointed commissioners.

\hspace{0.5cm} a. Letters Of Request

Letters of Request consist of written requests for evidence (generally document requests or requests to interrogate witnesses)

\begin{itemize}
  \item \textsuperscript{140} \textit{Aerospatiale}, 482 U.S. at 546. ("[W]e do not articulate specific rules to guide this delicate task of adjudication."). \textit{Id}.
  \item \textsuperscript{141} \textit{Id.} at 556 n.29 (quoting RESTAMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 437).
\end{itemize}
from a United States judge to the foreign sovereign asking that evidence be provided under the Convention. They are generally sought in the U.S. court on motion and notice under Federal Rule of Civil Procedure 28(b). 142

The Letter of Request should include a description of the action, the identity of the person to be examined, a list of questions to be put to the witness or a statement of the subject matter of the examination, a specification of documents requested, and a request for execution utilizing "special procedures." 143 After the Letter of Request is issued by the U.S. court, it is sent (generally by the lawyer for the requesting party) to the central authority of the nation in which execution is to take place. 144

Convention signatories should honor Letters of Request submitted in conformance with the Convention's procedures, unless the requests do not fall within the functions of the judiciary or the addressed state considers that its sovereignty or security would be prejudiced. Execution may not be refused either on the ground that the executing state asserts exclusive jurisdiction over the subject matter of the action or on ground that it does not recognize the right of action being pursued in the U.S. court. 145

Here, if the request relates to testimony by government authorities, Letters of Request will run into a significant roadblock because they may be perceived to challenge or infringe on the sovereignty of the receiving state. In addition, civil law systems generally consider evidence gathering to be a judicial function performed as an aspect of a state's sovereign power. The examination of a witness is conducted by the judge and usually results in a written summary prepared by the examining judge rather than a verbatim transcript of the witness's testimony. Therefore, in essence, a Letter of Request seeking testimony of a foreign regulator will be asking a judge to examine a government official. This is unlikely to occur, especially when that official is a non-party witness in foreign litigation.

b. Taking Of Evidence By Diplomatic Officers Or Commissions

Taking of evidence by diplomatic officers or commissioners,

143. Hague Convention, art. 3.
144. Hague Convention, art. 2, note 1.
145. Hague Convention, art. 12.
while familiar to the common law world, represents a significant departure from civil law systems where evidence gathering for civil litigation is a judicial function. Thus, this process is not a likely option for compelling the testimony of foreign regulator. The Hague Convention gives contracting states the right at the time of ratification to exclude, in whole or in part, the taking of evidence by diplomatic officers or commissioners.

The taking of evidence by these methods is subject to supervision by the states where the evidence is to be taken, and the degree of supervision depends on whether the evidence is to be taken from a national of the requesting or executing state or from a third state. In this way, the Hague Convention allows contracting states to exercise a degree of supervision over procedures they may consider alien and intrusive. Compulsion of witnesses is not available under these methods of evidence gathering, unless the executing state has made a declaration that it will make such compulsion available. Thus, the taking of evidence by commissioners or councils will likely be useful only where the witness will appear voluntarily.\(^{146}\)

c. Other Roadblocks For Discovery Of Foreign Regulators

There are other significant roadblocks for compelling the testimony of foreign regulators. Generally, American courts have determined that foreign regulatory or judicial action is not discoverable. For example, in the area of drugs and medical devices, the courts have stated that the Food and Drug Administration (FDA) is uniquely qualified to determine product safety in the regulatory context.\(^{147}\) In *Potter v. Lederle Labs*,\(^ {148}\) for example, the court acknowledged the FDA's "exclusive" regulatory authority over safety regulation of drug design and testing.\(^{149}\) Therefore, courts faced with evidence from foreign regulators may refuse to accept it because they believe determinations by foreign regulatory bodies em-

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149. Id. at 748.
ploying different procedures and standards are not relevant to any issue in litigation pending in the United States courts.

A New York court determined that foreign standards are not admissible in a product liability suit pending in the United States because the standards did not relate to the central issue in dispute. In a dispute regarding tractors sold by the defendant in a foreign country, the court held that evidence sought was "irrelevant, overly broad and burdensome" because that information had nothing to do with the "central issue in the dispute," that is, regulatory and liability standards regarding such safety devices in the United States.

The Act of State Doctrine may also prevent discovery of foreign regulatory and judicial decisions. The "Act of State Doctrine" prohibits United States courts from inquiring into the validity of actions or policies of a foreign government acting within its own sovereignty. The Doctrine is based upon the premise that domestic courts cannot reexamine or modify the decisions of a foreign country. Arguably, consideration of evidence regarding regulation of a product by foreign countries would lead to an analysis of the motivation and intent behind each of those countries' regulatory actions.

B. Obtaining Regulatory Documents In Europe

If having failed to secure the testimony of a European regulator, a party still wishes to obtain information on European regulatory activity, the party should consider making a request under the public access directives. The European Union has established a specific Code of Conduct, and has now proposed specific regulations, for how citizens can request documents of the European

151. Id. at 196.
156. Proposal for Regulation Regarding Public Access to Documents of the
Commission and its constituent institutions. These directives and regulations provide a vehicle by which American litigants, with the assistance of a citizen of a Member State, can obtain some documents at the European Commission level. These documents might even include some Member State regulatory documents that have found their way into the hands of Commission institutions because of the Commission's product safety reporting requirements.

1. Background

The final act of the treaty on EU, signed at Maastricht on February 7, 1992, contains a declaration on the right to access to information, which states:

[t]he conference considers that transparency of the decision-making process strengthens the democratic nature of the institutions and the public's confidence in the administration. The conference accordingly recommends that the Commission submit to the counsel no later than 1993 a report on measures to improve the public access to the information available to the institutions.157

At the close of the European Council held in Birmingham on October 16, 1992, the heads of state of the governments issued a further declaration entitled "A Community Close to Its Citizens,"158 in which they stressed the necessity of making the Community more open. That commitment was yet again reaffirmed by the European Council at Edinburgh on December 12, 1992, and the Commission was again invited to continue to work on improving access to the information available to Community institutions.159

On May 5, 1993, the Commission adopted Communication 93/C 156/05 on public access to the institutions' documents.160 This Communication contained the results of the survey on public access to documents in different Member States and concluded that there was a case for developing further access to documents at the Community level. Subsequently, on June 2, 1993 the Commission adopted Communication 93/C 166/04 on openness in the European Parliament, the Council and the Commission, January 26, 2000 200/0032 COD (Brussels).

160. 1993 O.J. (C 156) 5.
Community. In it, the Commission elaborated the basic principles governing access to documents.

On December 6, 1993, within the framework of these preliminary steps toward implementing the principle of transparency, the Council and the Commission approved a Code of Conduct concerning public access to Council and Commission documents aimed at establishing principles to govern access to Council and Commission documents. The Code of Conduct provides that "[t]he public will have the widest possible access to documents held by the Commission and the Council." However, the Code of Conduct also provides that the institutions are to refuse access to any document, disclosure of which would undermine specific interests, including the protection of public and individual interests, and of privacy. Institutions may also deny access to documents in order to protect the institution's interest in the confidentiality of its proceedings.

The Code of Conduct further states that "[t]he Commission and the Council will severally take steps to implement these principles before January 1, 1994." On the same day, December 6, 1993, the Council adopted its rules of procedure by Decision 93/662/EC. Article 4 of those Rules provides that meetings of the Council are not to be public except in the cases referred to in Article 6. Article 5 provides:

1. Without prejudice to Article 7(5) and other applicable provisions, the deliberations of the Council shall be covered by the obligation of professional secrecy, except in so far as the Council decides otherwise....

2. The Council may authorize the production of a copy or an extract from its minutes for use in legal proceedings.

Article 9 of the Council's rules of procedures provides, inter alia, that minutes of Council meetings are generally to indicate, as to each item on the agenda, the documents submitted to the Council, the decisions taken or the conclusions reached by the Council, and the statements made by the Council and those whose entry has been requested by a Member of the Council or the

161. 1993 O.J. (C 166) 4.
162. Code of Conduct, supra note 155, at 41.
163. Id.
164. Id. at 42.
166. Id. at 3.
167. Id.
Article 22 states: "[t]he detailed arrangements for public access to Council documents disclosure which is without serious or prejudicial consequences shall be adopted by the Council."\(^{169}\)

On December 20, 1993, the Council adopted Decision 93/731/EC on public access to Council documents,\(^{170}\) the aim of which was to implement the principles established by the Code of Conduct.\(^{171}\) Under Article 1 of that decision: "The public shall have access to Council documents under the conditions laid down in this Decision...."\(^{172}\) Nevertheless, Article 4(1) of Decision 93/731 provides that:

Access to a Council document shall not be granted where its disclosure could undermine:

1. The protection of the public interest (public security, international relations, monetary stability, court proceedings, inspections and investigation),
2. The protection of the individual and of privacy,
3. The protection of commercial and industrial secrecy,
4. The protection of the Community's financial interest,
5. The protection of confidentiality as requested by the natural or legal person who supplied any of the information contained in the document or has required by the legislation of the Member State which supplied any of that information.\(^{173}\)

Finally, access to a Council document may be refused in order to protect the confidentiality of the Council's proceedings.\(^{174}\)

The Commission is now considering proposed regulations relating to access to documents. Under new Article 255, the Commission is to prepare draft legislation on the general principles and limits governing the right of access to documents in the three institutions which must be adopted under the code decision procedure

\(^{168}\) Id. at 4-5.

\(^{169}\) Id.


\(^{171}\) On February 8, 1994, the Commission adopted Decision 94/90 ECSC, EC, Euratom on public access to Commission documents under the Code of Conduct Article 1, on the basis of Article 162 of the EC Treaty. 1994 O.J. (L 46) 58.

\(^{172}\) Id.

\(^{173}\) Id. at 63.

\(^{174}\) Id.
within two years of the entry into force of the Amsterdam Treaty, i.e., before May 1, 2001. Each institution must also lay down specific provisions regarding access to its documents and its rules of procedure.

In drawing up the proposed regulation of the European Parliament under the Council regarding public access to documents, the Commission has given special consideration to the following:

Member States' legislation on access to documents, in particular good practice in the Nordic countries, which have a long tradition of opening up their documents to the public;

The report by the European Parliament's Committee on Institutional Affairs on Openness Within the European Union, adopted by Parliament at its plenary sitting on January 12, 1999;

The UN/ECE Convention on Access to Information, Public Participation and Decision-Making and Access to Justice in Environmental Matters, signed in Arhus in June 1998;

The Special Report from the European Ombudsman to the European Parliament following the own-initiative inquiry into public access to documents held by Community institutions and bodies;

The Green Paper on public sector information and the Information Society; and

The "positive experience" from the last five years of operation of the system introduced voluntarily by the Council, the Commission and Parliament.

The new regulation will apply to documents of the European Parliament, the Council, and the Commission, as well as to their documents relating to common foreign and security policy, police and judicial cooperation in criminal matters, and to activities under ECSC and Euratom Treaties. The legislation will cover all documents held by the three institutions, i.e., documents drawn up by

176. Id.
177. Id. at 1-2.
them or emanating from third parties in the possession of the institutions.\textsuperscript{179} This widening in the scope of access is a major step forward compared to the current system, which only covers documents produced by the institutions. Exceptions to production, however, will still be applicable.

The regulation will attempt to more firmly establish that the exceptions to the right of access to documents are based on a "harm test."\textsuperscript{180} This means that access to documents will be granted unless disclosure might seriously harm the specific interests set out in the directives. The regulation is designed to commit the institutions covered by the regulation to take the necessary steps to inform citizens of their rights, set up public registers of documents, and remind the institutions that they must lay down rules of procedure with specific provisions for both implementation of the general principles and limits laid down by the regulation.\textsuperscript{181}

2. Procedures For Obtaining Documents

The procedures for requesting and obtaining documents under Decision 93/731 are fairly straightforward. Any citizen of a European Union country can request documents by either writing directly to the Commission in Brussels or Luxembourg; or to Commission representatives in Members States or Commission delegations in nonmember countries.\textsuperscript{182} The only other guidelines are that the request should be precise and give as much information as available to identify the document or documents requested. If additional information about how to obtain access to documents is needed, one can write to:

The Secretary-General of the European Commission  
Unit SG/C/2 Europe and the citizen one  
N-9, 2/11  
Rue de la Loi/Wetstraat 200  
D-1049 Brussels\textsuperscript{183}

If documents are produced, they will either be sent to the requestor or the requestor will be offered an appointment to be seen

\begin{thebibliography}{99}
\bibitem{179} Supra note 175, at 3.
\bibitem{180} Id. at 4.
\bibitem{181} Id. at 5.
\bibitem{183} Id. at http://europa.eu.int/comm/secretariat_general/sgc/citguide/en/citgu23.htm
\end{thebibliography}
at the Commission. If there is no possibility for such a visit, you may be urged to view the documents at the Commission Central Library in Brussels, Luxembourg, at one of the Commission representations in the Member States, or at a commission delegation in a nonmember country.¹⁸⁴

After application is made, the relevant department of the general secretary will inform applicants in writing within a month that their application has been approved or that there is an intention to reject it. In the latter case, the applicant will be informed of the reasons for this intention and that he or she has one month to make a confirmatory application for that position to be reconsidered. Failure by the Commission to reply to an application within a month of submission is deemed a refusal, except where the applicant makes a confirmatory application.¹⁸⁵ The rules require that any decision to reject a confirmatory application should state the grounds on which it is based and notify the applicant of the decision in writing as soon as possible.

### 3. Summary Of Case Law

Case law is beginning to define the parameters of the exceptions to access to documents pursuant to Code of Conduct exceptions to access to documents.¹⁸⁶ The court's decisions illustrate that despite the best intentions of the articulated terms of the transparency policy, the exceptions to disclosure have made it difficult to obtain documents related to important commission decisions and the processes by which those decisions are made.

Minimally, however, the published decisions have established that:

1. Any Member State citizen may request access to any unpublished documents and is not required to give a

reason for the request. \[187\]

2. Any person may request access to any unpublished documents and is not required to give a reason for the request. \[188\]

3. The Council is obligated to consider in respect of each requested document whether, in light of the information available to it, disclosure is likely to undermine one of the exceptions to the general rule allowing access. \[189\]

4. The exceptions should be construed and applied strictly, in a manner which does not defeat the application of the general rule. In particular, the grounds for refusing requests for access to Commission documents, set out in the Code of Conduct as exceptions, should be construed in a manner which will not render it impossible to obtain the objective of transparency. \[190\]

5. Decisions must discuss specifically why categories of documents are protected by the public interest exception or there must be a balancing of interests if the confidentiality of Commission procedures is invoked as a reason for failure to produce documents. \[191\]

There are two primary categories of exceptions to the disclosure of documents: (1) mandatory public interest reasons which include public security, international relations, monetary stability, court proceedings, inspections and investigations, the protection of the individual and of privacy, commercial and industrial secrecy and the Community's financial interests: these relate to the interests of third parties; and (2) protection of the institutions' interest in the confidentiality of its proceedings, which is discretionary. \[192\] In theory, if there is a third-party protectable interest threatened by production of the documents, the Council must refuse such production, and at the same time explain why such interests are

\[189\] Id. at ¶ 117.
\[191\] Id. at ¶¶ 58 - 60.
\[192\] Case T-174/95, Svenska Journalistenforbundet, at ¶¶ 110-114.
threatened.\textsuperscript{193}

When dealing with the discretionary confidentiality aspect of the decision, the Commission has a duty to undertake a general balancing of the interests involved as required by the \textit{Code of Conduct}.\textsuperscript{194} While the case law does not restrict the breadth of the exceptions in the \textit{Code of Conduct} in any material way, they do annul decisions where no proper explanation is provided or balancing of interests is made by the institution in question.\textsuperscript{195}

The European courts are still attempting to set parameters of the Transparency Doctrine in the \textit{Code of Conduct}. Now, however, the courts will be dealing with a broader regulation which allows access to third party documents, which should theoretically minimize the mandatory non-production decisions set out in the exceptions. The new regulation, may in fact provide greater access and minimize the impact of all of the exceptions to the point where the system operates in a similar fashion to the United States' FOIA.

4. Access To Product Liability Regulatory Decisions

The European Commission and constituent institutions have several product liability regulatory responsibilities. For example, the Council directive on General Product Safety sets out specific Community provisions for safe products and specific rules for national laws of Member States.\textsuperscript{196} Therefore, safety standards are a Union-wide responsibility. In addition, the Product Safety Doctrine provides for access to its documents in a manner consistent with the greater Transparency Doctrine.

The Product Safety Directive requires that certain information relating to the regulation of products must pass from Member States to the Commission. For example, individual companies must inform competent authorities as soon as they become aware that a product they have supplied is dangerous; Member States must identify authorities competent to monitor the compliance of products; Member States must take measures to inform the Commission of problems with products; and Member States must report to the Commission their decisions to restrict the sale of or recall a product.

\textsuperscript{193} Id. at ¶ 111.
\textsuperscript{194} Id. at ¶ 113.
\textsuperscript{195} W.W.F. (U.K.) \textit{v. Council} at ¶ 77.
As for access to documents, Article 12 states that [t]he Member States and the Commission shall take the steps necessary to ensure that their officials and agents are required not to disclose information obtained for purposes of this directive which by its nature is covered by professional secrecy, except for information relating to the safety properties of a given product which must be made public if circumstances so require, in order to protect the health and safety of persons.\footnote{Id. at 12.}

The language to Article 12 proposed in December 1999, however, adds that "[a]ll information available to the authorities of the Member States or the Commission, related to risk to consumer health and safety posed by products shall be available to the public on request."\footnote{Draft directive replacing Council Directive 92/59/E.E.C., art. 12, on General Product Safety, December 12, 1999.}

This language clearly is meant to be consistent with the transparency doctrine and access to documents. This is another avenue by which documents might be obtained regarding the regulation of products by the European Commission or even potentially Member States through their various reporting requirements.

IV. CONCLUSION

Agencies that regulate the manufacture of products, both in the U.S. and in Europe, are often in possession of a treasure trove of information which product liability litigants might use to support their claims and defenses. In those cases in which the agency has conducted an investigation of the very product at issue in the case, the investigation records, and the personal knowledge possessed by the agency investigators themselves, might even save the parties considerable effort and expense, as well as include data and information the parties could not get on their own.\footnote{European Courts have yet to address the issue, whether as a result of a request from a U.S. Court or for its own purposes in the tort litigation context.}

Regulatory agencies anywhere, however, have a vested interest in limiting access to much of the information under their control. The roadblocks to access in the United States and in Europe, however, are weakening. It may be only a matter of time before these governments' well-worn shields finally give way to full disclosure.
and access to "every man's evidence." In the meantime, litigants will continue to navigate the obstacle course and hope for the best.
