

Alerts and Updates

PENNSYLVANIA DISTRICT COURT PREVENTS DISCLOSURE OF HUNDREDS OF CONFIDENTIAL SETTLEMENT AGREEMENTS

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In a scrimmage over the legality of settlement agreements relating to only one drug, the U.S. District Court for the Eastern District of Pennsylvania—in *FTC v. Cephalon*—provided what may be considered a win-win scenario for much of the pharmaceutical industry and for the Federal Trade Commission (FTC). The court is allowing the FTC to cite its report, which compiles data from hundreds of settlement agreements, while simultaneously ruling against the disclosure of those settlement agreements for one pharmaceutical company to examine.¹

The case involves an FTC challenge to Cephalon's settlements in patent-infringement cases for the drug Provigil® (modafinil). The FTC cited two studies in support of its contentions that the Provigil® settlement agreements were illegal "pay-for-delay"-type agreements, including the FTC studies entitled "Generic Drug Entry Prior to Patent Expiration: An FTC Study" and "Pay for Delay: How Drug Company Pay-Offs Cost Consumers Billions." These FTC studies compiled data from hundreds of settlement agreements on other, unrelated drugs. The FTC stipulated that it did not intend to offer the studies into evidence and had not provided the underlying agreements (except the Provigil® agreements) to its experts. Nonetheless, the FTC's citation of its studies prompted Cephalon to file a motion to compel the production of the underlying documents. Had the motion been granted, the unrelated settlement agreements—which involve much of the pharmaceutical industry—would have been disclosed to Cephalon's outside counsel.

Cephalon's motion caused opposition from the FTC and incited some third-party pharmaceutical companies to file a motion for a protective order to prevent disclosure of their own confidential, unrelated settlement agreements.² In their motion, the third-party pharmaceutical companies emphasized: (1) that disclosure of the settlement agreements was contrary to the confidentiality provisions of both the Medicare Prescription Drug, Improvement, and Modernization Act of 2003³ and the Federal Trade Commission Act⁴ and (2) that disclosure of the settlement agreements to outside counsel, who repeatedly represent pharmaceutical companies, would put at risk highly proprietary information of many companies not involved in the Provigil® dispute.

The court was ultimately swayed by the arguments of both the third-party pharmaceutical companies and the FTC: Its order denies Cephalon's motion to compel the production of hundreds of unrelated settlement agreements—but still allows the FTC to cite its report.

For Further Information

If you have any questions about this *Alert*, please contact [Frederick \(Rick\) R. Ball](#), [Else Hanson](#), any member of the [Pharmaceutical, Pharmacy & Food](#) industry group or the attorney in the firm with whom you are regularly in contact.

Notes

1. See *FTC v. Cephalon*, No. 08-2141 (E.D. Pa. Feb. 28, 2011).

2. See Mem. of Law in Supp. of Third-Party Pharm. Cos.' Mot. for Protective Order, D.I. 88-1. The Motion for a Protective Order was denied as moot in light of the court's decision.
3. Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, 117 Stat. 2006 (2003).
4. Federal Trade Commission Act, 15 U.S.C. § 41 et seq.

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