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CertainTeed Must Produce Antitrust Docs In Drywall MDL

By **Paul DeBenedetto**

Law360, New York (October 14, 2014, 4:06 PM ET) -- A Pennsylvania judge on Thursday ordered CertainTeed Gypsum Inc. to produce its antitrust compliance policy in a multidistrict litigation over alleged price fixing, despite arguments from the drywall company that the information is protected by attorney-client privilege.

CertainTeed argued in Pennsylvania's Eastern District Court that their policy, which summarizes anti-competitive guidelines and practices to avoid as well as listing possible sanctions for violations, was never released outside the company, and constitutes legal advice from corporate counsel to employees.

But Judge Michael M. Baylson on Thursday rejected those claims, saying that while communication between the company's lawyers and executives leading up to the policy's adoption was privileged, the release of the policy directly to more than 120 employees and on the company's internal website negated any privilege.

"Because the evidence shows CertainTeed has adopted this antitrust compliance policy and distributed it widely throughout its organization, the policy has lost any privileged communication status," Judge Baylson said in a memorandum.

According to CertainTeed, the policy was privileged because it was a communication between privileged persons — in this case, lawyers and employees — which was maintained in confidence due to never having been released to the public. It also constituted legal advice to employees who could be involved in antitrust issues, lawyers for the company argued.

Judge Baylson disagreed, saying that even if the policy had not been widely distributed, the policy is "more akin to a reference or instructional guide" than privileged legal information.

"CertainTeed's argument is no better than a company arguing that because its decision on how to market or advertise a product... was based on legal advice subject to the attorney-client privilege, the company's business policies are themselves privileged," Judge Baylson said.

The companies — which include CertainTeed, Georgia-Pacific LLC, American Gypsum Co. LLC, USG Corp., PABCO Building Products LLC, Spangler Cos. Inc. and U.S. Gypsum Co. — collectively account for 99 percent of drywall sold in U.S. and Canada, according to the original complaint.

The case was originally merged by the U.S. Judicial Panel on Multidistrict Litigation in April of last year, bringing together six lawsuits filed in Pennsylvania, Illinois and North Carolina by regional drywall purchasers accusing CertainTeed and other companies with coordinating large price hikes.

According to Sierra Drywall, one of the plaintiffs involved, the alleged hikes in January of 2012 were the biggest in more than a decade, and did not reflect greater demand or increased costs.

The companies also allegedly stopped using "job quotes," characterized by the plaintiffs as a

common practice, in which customers can lock in gypsum board prices for the entirety of a construction project. The plaintiffs added that the alleged job quote stoppage made pricing more consistent and made it easier to detect any deviation.

It isn't the first time the gypsum board industry has faced scrutiny, according to the original complaint. In 2002, the European Union fined four gypsum companies more than \$450 million over similar allegations in the 1990s, and in the 1970s, six gypsum makers were convicted of criminal antitrust violations, Sierra Drywall said.

Those six convictions were eventually overturned because of faulty jury instructions, according to the complaint.

Attorneys for both sides did not immediately return requests for comment.

The plaintiffs are represented by Jeffrey J. Corrigan, Eugene A. Spector, Rachel E. Kopp and Jeffrey L. Spector of Spector Roseman Kodroff & Willis PC; H. Laddie Montague Jr., Ruthanne Gordon, Michael C. Dell'Angelo and Candice J. Enders of Berger & Montague PC; Kit A. Pierson, Richard A. Koffman, Brent W. Johnson and David A. Young of Cohen Milstein Sellers & Toll PLLC; Robert S. Green, James Robert Noblin and Lesley E. Weaver of Green & Noblin PC; Whitney E. Street of Block & Leviton LLP; and Michael G. McLellan, Douglas G. Thompson Jr., L. Kendall Satterfield and Eugene J. Benick of Finkelstein Thompson LLP.

The defendants are represented by Thomas S. Brown and Michael J. McLaughlin of Butler Pappas Weihmuller Katz Craig LLP; and David L. Hanselman Jr. and Megan Morley of McDermott Will & Emery LLP, among others.

The case is *In re: Domestic Drywall Antitrust Litigation*, 2:13-md-02437, in the U.S. District Court for the Eastern District of Pennsylvania.

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