



## Texas Supreme Court upholds German Data Protection Act

The Texas Supreme Court has upheld the German Federal Data Protection Act and prevented the plaintiffs from obtaining a copy of Volkswagen's corporate telephone book. While the Texas decision is not binding in other states, it does have some persuasive authority, as few such cases have gone to trial elsewhere in the USA. Another court would probably review this case as part of its research into precedents.

The Texas Supreme Court held that a Texas Trial Court ruling had exceeded its discretion by ordering the German corporation to allow the discovery of information which was protected by Germany's Federal Data Protection Act. The Texas Supreme Court concluded that the information sought from the company should be protected from disclosure.

### Why Volkswagen was sued

The litigant was suing both Volkswagen of America and its German parent company (VWAG) for product liability for personal injuries resulting from an accident involving their 1970 model Volkswagen.

The question at issue centred on VWAG's corporate telephone book. The plaintiff wanted it in order to identify individuals who might have relevant information concerning defects in the automobile's door latches. This book contained the names, job titles, position within the company, and direct dial work numbers of more than 20,000 employees, as well as the private home numbers of individuals in management positions.

### Volkswagen's defence on privacy law grounds

VWAG objected to this request on the basis of the German Federal Data Protection Act. The trial court had overruled VWAG's objection and had ordered it to produce the phone book.

According to the Supreme Court, the trial court had not given sufficient weight to non-binding principles designed by its authors to be used in litigation to balance United States and foreign interests.

## How the Restatement balances US and foreign interests

The Restatement (Third) of Foreign Relations Law, Section 442 (1)(c) states: "A court or agency in the U.S. when authorized by statute or rule of court, may order a person subject to its jurisdiction to produce documents, objects, or other information relevant to an action or investigation, even if the information or the person in possession of the information is outside the U.S. However, when the laws of the foreign [country] protect relevant information from discovery, the interests of the domestic court or agency must be balanced with those of the foreign [law]."

According to the Restatement, in deciding whether to issue an order directing production of information located abroad, and in framing such an order, a court or agency in the U.S. should take into account these five factors:

1. the importance to the investigation or litigation of the documents or information requested,
2. the degree of specificity of the request,
3. whether the information originated in the U.S.,
4. the availability of alternative means of securing the information,
5. the extent to which non-compliance with the request would undermine important interests of the U.S., or compliance with the request would undermine important interests of the state or country where the information is located.

Accordingly, only after a careful balancing of these interests should the trial court rule on a party's request for production."

### Conflict between U.S. and German laws

Before the Restatement's balancing test could be applied, the Supreme Court attempted to determine whether German and U.S. laws actually conflicted. Texas "discovery" rules (the pre-trial period when each party gathers fact to use during the trial) allow an opposing party to discover evidence relevant to the subject matter in the pending action. Germany's privacy laws protect from dissemination "personal data" which is defined as "information concerning the personal or



material circumstances of an identified or identifiable individual." There was clearly a conflict.

### **Phone book is personal data**

VWAG produced a plethora of authorities confirming its allegation that information contained in its current corporate phone book was, in fact, personal data. Three affidavits confirmed that production of the book would violate German Data Protection Law. One said that privacy rights under German law are "equal in rank to the right of freedom of speech." In the face of overwhelming evidence, the Supreme Court had little doubt that German privacy laws conflicted with the discovery laws of Texas.

### **Guidance towards balancing interests**

The restatement balancing test involved five factors (see above). Two of the five factors were undisputed:

1. As far as the degree of specificity of the request was concerned, the plaintiffs' request was specific. All they sought was production of the one easily identifiable current corporate directory.
2. Regarding where the document originated, VWAG is a German company and the book contained the names and other information of its German employees employed at its Wolfsburg plant and its facilities located in Brunswick, Emden, Kassel and Salztitter, all within Germany. The plaintiffs did not contest that this book originated in Germany.

The court looked to alternative sources of discovery that were available. There were numerous alternative means that the plaintiff could and did use to obtain information which is the substantial equivalent of VWAG's current corporate phone book. VWAG produced its 1969 corporate phone book and its U.S. subsidiary, Volkswagen of America, produced its own current corporate phone book.

Additionally, Erich Unrterreiner, a current engineer for VWAG who also worked there in 1969, identified 29 past and present employees knowledgeable in the design of the 1970 model Volkswagen. He also provided a great deal of information about VWAG's organisational structure, and identified by name "the man who

did most of the design and development work in door latches." Therefore, there were adequate alternatives that could have been used to discover the names of VWAG employees knowledgeable about the design of the vehicle in question.

### **Phone book required as a double check**

VWAG's current corporate phone book bore little importance to this litigation. The plaintiffs already possessed VWAG's 1969 corporate phone book that contained the names of the people who had worked on the 1970 model Volkswagen. They had Volkswagen of America's current corporate phone book. They also had the names of many VWAG employees directly responsible for the design and construction of the 1970 model Volkswagen. The plaintiffs simply desired to have the telephone book produced so they might double check the information provided in previous requests.

### **Were important U.S or German interests undermined?**

On this point, the court concluded that VWAG would be violating Germany's privacy laws if they were to comply with the plaintiff's request to produce the book. Furthermore, there was no evidence suggesting that VWAG's failure to produce this phone book would undermine any important interest of the U.S., particularly when alternative methods for obtaining the information existed.

### **Conclusion**

The trial court had failed to balance the interests of the foreign [law] with those of the U.S. based plaintiffs in any respect. In fact, the trial court had rejected any consideration of German law. This was an abuse of discretion.

The Supreme Court concluded that the trial court had also exceeded its discretion in ordering production of the book in question, and that VWAG's current corporate phone book should not be produced in contravention of German law.

**Case citation: Volkswagen v. Valdez, 909 S.W. 2d 900 (Tex. Nov, 16, 1995). PL&B gratefully acknowledges the help in the preparation of this report of Lyle H. Himmel, Legal Editor, Privacy & American Business, 2, University Plaza, Suite 414, Hackensack, N.J. 07601, USA Tel: +(1) 201 996 1154 Fax: +(1) 201 996 1883**