WILMER CUTLER PICKERING LLP

Appellate Update

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Wilmer and EC Work Together in U.S. Supreme Court

On April 20, 2004, Wilmer partner Seth Waxman argued an historic case before the U.S. Supreme Court that could have a great impact on the relationship between the legal systems of the European Union and the United States. Indeed, the European Commission found the issues at stake to be of such importance that it took the nearly unprecedented step of filing briefs *amicus curiae* first urging the Court to hear the case and then addressing the merits of the issues at stake. WCP also facilitated further participation by the EC in the case by ceding a portion of its allotted time for argument to allow the EC to present its first-ever oral argument before the Court.

The case, *Intel Corp.* v. *Advanced Micro Devices, Inc.*, No. 02-572, concerns whether Advanced Micro Devices, Inc. (AMD), a U.S.-based company, can use U.S. discovery laws to obtain sensitive documents from a competitor, Intel Corporation, merely by filing a complaint with the EC Directorate General for Competition alleging that Intel engaged in anticompetitive behavior. EC law does not provide complainants with any discovery rights, and U.S. law similarly would not have permitted discovery in the U.S. if AMD had complained to U.S. authorities.

AMD, however, sought to exploit a provision of the United States Code to create an anomalous form of international discovery rights. After filing its complaint with the EC, AMD filed a discovery request in a California federal court, pursuant to 28 U.S.C. § 1782, a statute permitting U.S. courts to grant discovery in aid of proceedings before foreign and international tribunals. The trial court denied AMD's request on the ground that the EC proceeding did not constitute a "tribunal." The U.S. Court of Appeals for the Ninth Circuit, however, reversed that decision on the theory that § 1782 permits discovery even by a non-litigant, so long as a foreign administrative agency is conducting a preliminary investigation that could eventually lead to a "quasi-judicial proceeding."

Mr. Waxman argued that the Ninth Circuit erred in its reading of § 1782, because a nonlitigant like AMD that enjoys no discovery rights whatsoever in the international forum is not an "interested person" within the meaning of the statute; moreover, EC investigations do not constitute, or even necessarily lead to, a "proceeding" before a "tribunal."

In its brief to the Supreme Court, the EC expressed its concern that, if the Ninth Circuit's ruling were to stand, U.S. companies would flood EC agencies with speculative and burdensome complaints as a means of obtaining discovery under § 1782. The EC also expressed concern that it would be forced to take the drastic step of monitoring ongoing litigation across the U.S. in order to prevent discovery that would hinder, rather than aid, its investigatory responsibilities.

The Supreme Court is expected to issue a decision in the case by the end of its current Term in late June.

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