

RULINGS OFFER GUIDANCE ON MAINTAINING PROTECTIVE ORDERS

by
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Any company in litigation which believes that entry of a protective order covering its trade secret and other confidential facts lays to rest for all time its concern over disclosure of that information should think again. Protective orders are always subject to attack, not only during the course of litigation, but, as this LEGAL BACKGROUNDER will explain, long after as well.

Federal courts have the authority under Rule 26(c) of the Federal Rules of Civil Procedure to enter orders “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” Most states also have similar rules permitting the entry of such Protective Orders.¹ These orders may bar information from disclosure, or allow disclosure only in a designated way. Their protection may cover “trade secret or other confidential research, development, or commercial information.” FED. R. CIV. P. 26(c)(7). Federal courts in New Jersey and Pennsylvania have adopted the Restatement definition of a trade secret — it may, *inter alia*, consist of any formula, pattern, device, or compilation of information used in a business which gives the business an opportunity to obtain an advantage over competitors. RESTATEMENT OF TORTS §757, cmt. b (1939).

Parties to complex litigation, faced with the prospect of producing thousands and sometimes millions of pages of corporate documents, have routinely sought entry of “umbrella” protective orders. Such orders serve the interests of both plaintiffs and defendants. On the one hand, they protect trade secrets or other competitive information and facilitate production without the need for a document by document analysis and redaction of protectable information. On the other hand, they give the plaintiff his or her “best shot” at proving liability by allowing plaintiff’s counsel and experts full unredacted access to all relevant or even irrelevant information. The

¹Some states, such as Florida (FLA. STAT. ANN. ch. 69.081(3)) and Texas (TEX. R. CIV. P. 76a2(c)), have, under pressure from plaintiffs’ organizations, entered orders precluding or severely restricting such orders.

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terms of these orders often permit the producing party to exercise broad discretion in designating documents as “Confidential” or, in competitive industries, “Highly Confidential,” thereby restricting access to litigation counsel and experts while precluding the party or even co-defendant in-house counsel from seeing the documents.

Beginning in the late 1980’s, the plaintiffs’ bar made protective orders, and particularly umbrella orders, its top agenda item, lobbying in state legislatures and Congress for elimination or restrictions on such orders whenever an allegation of risk to the public health was made. *See Protective Orders and Nest Feathering*, Robert N. Weiner, LEGAL TIMES, Sept. 25, 1991. Although this activity waned somewhat in the mid-to-late 1990’s, recent public concern over Firestone tires and related litigation have added fuel to the smoldering flame. Thus, although courts have long recognized that umbrella protective orders are a useful and legitimate means of streamlining discovery in complex tort actions, *see Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786-87 (3d Cir. 1994) citing *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1122 (3d Cir. 1986), *cert. denied*, 484 U.S. 976 (1987), corporate defendants find it increasingly difficult to secure court-sanctioned entry of such orders, even with an adversary’s consent. The danger of production without such an order is, of course, that the mere filing of a lawsuit, whether meritless or not, permits an adversary or his counsel to forage through a company’s confidential documents and use those documents to further a private agenda.

Even where a party is successful in securing a protective order, an unfortunate by-product is that, where the litigation or product is for some reason high on the public or media “radar screen,” companies that seek to protect legitimate business information from public scrutiny are invariably accused of nefarious conduct. They are claimed to be using “secrecy orders” as a subterfuge to conceal, for corporate gain and to the detriment of the public, corporate misconduct or product dangers. The corporate victim of such charges finds itself caught between Scylla and Charybdis — unable to prove the claims are false without releasing the very marketing, research, or trade secret information the company seeks to protect.

Another unfortunate fact of litigation is that such orders have no finality. Public interest groups, the media, and even disgruntled plaintiffs in other prior or pending litigation may, in order to further their own private interests, seek to overturn protective orders many years after they were entered, even where such orders were agreed to by the parties and those parties have shown no concern about the information in the documents or interest in vacating the orders. *See, e.g., Pansy, supra*. Such challenges can be made even after the litigation is long concluded and the plaintiff’s suit has been shown to have no merit. If such a late challenge occurs, the company’s reputation may not only be at risk due to false allegations of suppression of information allegedly important to the public health, but it may also be faced with the daunting task of undertaking the expensive and burdensome document-by-document review which the umbrella protective order sought years before to avoid.

Recently, federal courts in New Jersey and Pennsylvania have rejected challenges to umbrella protective orders, denying motions by third parties and public interest groups to vacate orders entered many years ago. The cases involve trade secret documents relating to carbonless copy paper (CCP). *Rutigliano v. Valley Business Forms*, No. 90-1432 (JCL) (D.N.J. Oct. 6, 2000); *Hayden v. Appleton Papers Inc.*, No. 86-5232 (E.D. Pa. Oct. 13, 2000).

Appleton Papers Inc. is a manufacturer of carbonless copy paper (CCP).² In 1990, plaintiff Nancy Rutigliano sued Appleton, The Mead Corporation (another CCP manufacturer) and other defendants, claiming she developed formaldehyde sensitization from using CCP at her job in 1984 and 1985. In 1991, the parties agreed to the entry of a protective order permitting Appleton and Mead to designate documents as “Confidential” or “Highly Confidential.”^{3 4} In reliance on the protective order, Appleton and Mead produced several thousand pages of unredacted documents containing trade secrets and other competitively significant information.

Appleton and Mead won dismissal of Rutigliano’s case on “junk science” grounds in 1996. *Rutigliano v. Valley Business Forms*, 929 F. Supp. 779 (D.N.J. 1996), *aff’d*. 118 F.3d 1577 (3d Cir. 1997). The recent motions arose out of Rutigliano’s counsel’s release of the protected documents directly to Rutigliano in violation of the protective order. Rutigliano shared the contents of the protected documents with Brenda Smith, a self-appointed crusader who had unsuccessfully sued Appleton and Mead in 1995. Rutigliano also sent copies of the documents to another plaintiff, Sharon McLaughlin, who owns a website with Smith. McLaughlin and Smith posted information from some of Appleton’s and Mead’s confidential documents on their website, claiming that they show that CCP is harmful to human health and that Appleton acted improperly in “hiding” them. Smith also contacted several media sources, public interest groups, and governmental agencies, claiming she had discovered confidential information which showed that Appleton and Mead knew of purported health risks associated with CCP.

Upon Appleton’s motion, the court entered a permanent injunction against further dissemination of the documents, ordered removal of all references to them from the website, and ordered that the documents be returned to the company. Rutigliano herself appeared on the return date of the motion and agreed to the relief sought by Appleton. Nonetheless, in response to the entry of the permanent injunction, Smith moved to vacate the protective orders in both *Rutigliano* and another CCP case, *Hayden v. Appleton Papers*, which had been litigated several years earlier in Pennsylvania. At Smith’s urging, Public Citizen and the Communication Workers of America sought leave to join the motions as *amici*. Washington Legal Foundation filed an *amicus* brief on behalf of Appleton, defending the propriety and validity of protective orders in complex litigation.

On October 6, 2000, Judge John C. Lifland, of the U.S. District Court for the District of New Jersey, issued a lengthy opinion denying Smith’s motion to vacate the *Rutigliano* protective order. While recognizing that district courts retain the power to modify earlier-entered protective orders even in terminated litigation, and referencing the balancing test required when such modification is sought, Lifland noted that Smith was unable to provide any “competent evidence of the connection between medical illnesses and the CCP manufactured by the defendants.” The Court called Smith’s speculative allegations about CCP “conjecture, as opposed to scientific evidence.” Finding that plaintiff had failed to make the requisite showing that the documents

²Carbonless copy paper permits the transfer of a written image on the top sheet of two or more sheets of paper to the bottom sheets without the use of carbon paper. Typical examples are credit card receipts or business forms. The product was first developed in the mid-1950’s. Today, several U.S. manufacturers produce hundreds of thousands of tons of CCP annually.

³The order also contained a provision for a court determination of confidentiality upon any party’s challenge to the propriety of the designation on any particular document. No party ever brought such a challenge.

⁴At plaintiff’s request, the parties also agreed to a protective order precluding dissemination of Rutigliano’s medical records.

contained information important to public health and safety, Lifland commented that, at the time he dismissed Rutigliano's action under *Daubert v. Merrell Dow* for lack of scientific validity, the documents subject to the protective order, in combination with expert testimony, failed to establish any scientific basis for the claim.

Judge Lifland also found that Smith's motivation was "less than universally philanthropic," citing the fact that she and McLaughlin had just recently offered to return the documents to Appleton and to stop their publicity campaign against the company and the product in return for a payment of \$30 million.

In addition, the court cited affidavits submitted by Appleton describing the competitive significance of the information contained in the documents and Appleton's reliance upon the Protective Order when it originally produced the documents in 1991.

In rejecting the claim that Appleton should now be compelled to defend document-by-document the propriety of protection, Judge Lifland cited *Pansy's* approbation of umbrella protective orders in cases involving large-scale discovery. He also rejected Public Citizen's argument that the protective order violated the First Amendment, citing *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 37 (1984). *Seattle Times* stands for the proposition that, even where a lawsuit has been filed, the public has no unfettered right of access to a party's private information.

Judge Lifland's opinion was followed in short order by entry of a decision by Judge Thomas N. O'Neill, Jr., of the Eastern District of Pennsylvania. In denying Smith's motion to vacate the *Hayden* protective order, Judge O'Neill relied upon Judge Lifland's rationale and opinion.

Unfortunately, Judge Lifland's opinion is not currently scheduled for publication. However, at a time when protective orders are increasingly under public attack, it may give helpful guidance to parties seeking to support the necessity and propriety of such orders in complex litigation.

When securing a protective order, the careful practitioner would be wise to include certain provisions to increase the likelihood that the order will remain viable if challenged. For example, at a minimum, the order should provide for a method of challenging individual designations of confidentiality, and should explicitly state that it will remain in effect after conclusion of the litigation. The producing party should also affirmatively state that, in reliance upon the protective order, it has not redacted trade secrets, research, or other competitively significant information. Further, if the case is settled, a provision for continuance of the protective order should be part of the settlement agreement. Although these precautions will not guarantee that a protective order will never be vacated, they will at least provide some protection from arguments that the order is overbroad or that termination of the litigation also terminated the protection afforded to the company's trade secrets.