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COURT ASKED TO PROTECT CONFIDENTIAL BUSINESS INFORMATION

(Rutigliano v. Valley Business Forms, et al.)

Today the Washington Legal Foundation (WLF) filed a brief asking the U.S. District Court for the District of New Jersey to continue protecting certain confidential business information from being disclosed.

Litigation often requires companies to turn over confidential documents to opposing counsel during the process of discovery. To encourage such disclosure, while at the same time protecting those documents from becoming public knowledge, the parties often agree to a protective order, issued by a court, that prohibits the release of certain materials except to those engaged in a particular lawsuit. However, protective orders are currently under attack by activists who want to publicize confidential information about businesses as a means of subjecting them to massive litigation, allegedly in the public interest. WLF has opposed these attacks, believing instead that legitimate businesses should be allowed to protect the confidentiality of their records and that plaintiffs' lawyers should not be allowed to turn a single lawsuit into an opportunity for stirring up further litigation.

This case arose from a product liability suit brought in the early 1990s by the employees of several manufacturers of carbonless copy paper (CCP). These employees claimed that chemicals used to produce CCP caused them to suffer from multiple chemical sensitivity disorder. (The court ultimately ruled in favor of the companies, refusing to let a jury hear the case.) In August 1991, during the course of discovery, the parties agreed to a protective order that prohibited the release of certain confidential materials. These included documents describing trade secrets, such as chemical processes and other information vital to the companies.

Earlier this year, the CCP manufacturers learned that those materials had been disclosed to others, in violation of the protective order. In fact, one of the losing plaintiffs, along with others, had created a website where they fulminated against CCP and its supposed health hazards. The manufacturers quickly obtained a preliminary injunction prohibiting the disclosure of any materials within the scope of the 1991 protective order.

However, the plaintiff and her allies have filed a motion asking the court to set aside both the 1991 order and the preliminary injunction, in effect asking the court for permission to publish trade secrets and other confidential business information.

In its brief, filed with the U.S. District Court for the District of New Jersey, WLF argued that the court ought to leave the protective order in place for three reasons. First, contrary to arguments made by Ralph Nader's organization, Public Citizen, in support of setting aside the order, the law allows companies to successfully defend the confidentiality of their privileged and proprietary materials without submitting each and every document for separate review. Second, the protective order does not violate the First Amendment. Third, setting aside the protective order could operate as a regulatory taking, by publicizing confidential and proprietary information. Under the Fifth Amendment, the companies could then sue the government for compensation to make good their loss. WLF pointed out that the Court can avoid that possibility by leaving the protective order in place.

"Protective orders serve a vital purpose in our civil justice system," said Shawn Gunnarson, WLF's Senior Counsel for Litigation Affairs. "They allow companies to cooperate with document requests during litigation without giving up the confidentiality of their trade secrets and other intellectual property. Plaintiffs lawyers should not be allowed to eliminate protective orders, merely to fatten their wallets at the expense of legitimate businesses."

The Washington Legal Foundation is a public interest law and policy center with supporters in all 50 states. It devotes a significant portion of its resources to defending and promoting the principles of free enterprise and individual rights. David Kott of the Newark, New Jersey law firm of McCarter & English served as local counsel.

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For further information, contact WLF Senior Counsel for Litigation Affairs Shawn Gunnarson at (202) 588-0302.