

October 23, 2000

## COURT ISSUES ORDER PROTECTING CONFIDENTIAL BUSINESS INFORMATION

*(Rutigliano v. Valley Business Forms)*

Last week the Washington Legal Foundation (WLF) was handed a victory when the U.S. District Court for the District of New Jersey ordered parties in a defunct product liability case to continue protecting certain confidential business information from being disclosed.

In its opinion the court rejected efforts to lift a protective order originally imposed to protect trade secrets and other confidential business information belonging to Valley Business Forms, Appleton Papers, and other manufacturers of carbonless copy paper (CCP). The plaintiffs' key argument was that the companies' interest in confidentiality was outweighed by the public's need to know about health hazards. The court ruled to the contrary, reasoning that the plaintiffs had failed to produce "competent evidence of the connection between medical illnesses and the CCP manufactured by defendants." It also declined to lift the order for the benefit of plaintiffs in other product liability cases brought against CCP manufacturers. In addition, the court went out of its way to rebuff the constitutional arguments raised by Ralph Nader's organization, Public Citizen. Instead the court adopted WLF's position, holding that a protective order imposed during civil litigation to protect the interests of the parties does not violate the First Amendment.

"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. The court's decision in this case should discourage plaintiffs lawyers from trying to eliminate protective orders, merely to fatten their wallets at the expense of legitimate businesses."

This case arose from a product liability suit brought in the early 1990s by the employees of several CCP manufacturers. 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 that 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 then 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 district court, WLF had argued that the court ought to leave the protective order in place for three reasons. First, contrary to arguments made by 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 taking of private property, 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 would avoid that possibility by leaving the protective order in place.

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.