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The stipulated protective order and defendant's documents

Protecting the plaintiff's interests during the protective-order process



If you are handling a products-liability case, then you will undoubtedly encounter a crossroad during discovery in which the defendant politely informs you that it is prepared to produce documents responsive to your requests, but first you need to sign a "stipulated protective order." At this point you have two choices: 1) take the easy road: sign the defendant's protective order and receive the documents; or 2) take the road less traveled: fight for an agreement that benefits your client and will not hinder your administration of the case.

Road number one may seem like the better option, but the chances are that the defendant's proposed protective order, provided to you seemingly out of convenience and courtesy by the defendant will, in fact, tie your hands as to how the documents can be used, as well as restrict whom you can share them with and what must be done with them after the case concludes.

Option number two is not an easy road: it is a tough fight. You do not have to sign the defendant's stipulated protective order, and, at the very least, you should negotiate terms that are reasonable and appropriate. If the defendant refuses to incorporate appropriate provisions, then a round of law-and-motion is warranted.

Keep in mind that the burden is on the party seeking to "protect" the documents to move for a protective order. Do not allow the defendant to refuse to produce documents until a protective order is entered. That process can drag out discovery for months or more. If the defendant will not negotiate fair terms for a stipulated protective order and will not produce documents, then file a motion to compel production of documents.

It is not a proper "excuse" for the defendant to say it will not produce documents because the plaintiff refuses to sign a stipulated protective order. What

often happens is that if the parties are unable to reach an agreement on the terms of an acceptable stipulated protective order, then the plaintiff will file a motion to compel production of documents, and the defendant will file a motion for protective order.

Beware that if you take the easy road and sign the defendant's version of the stipulated protective order, a few things will happen.

First, you can expect that the defendant will designate every single document as being subject to the protective order, even if the documents clearly do not meet the standard for warranting protection. Even if your case is dealing with a ten-year-old product that is outdated and incorporates no proprietary technology that any competitor would ever consider stealing, you can be sure the defendant will claim every document, every

Protective Order *continues*

consumer complaint, and every prior lawsuit should be covered by the protective order. And, every deposition taken that discusses a “protected” document will also be covered by the protective order.

Second, you can expect that the protective order will impose unnecessary and unreasonable procedural obstacles in your case that you should not have to deal with, but you will be forced to because you took the easy road.

Third, you can expect the defendant to celebrate another victory in the ongoing quest to hide documents and narrow the scope of what it produces in similar other lawsuits, thereby hurting all consumers.

And, *last*, you can expect the defendant will file away that stipulated protective order you signed without a fight so that if you ever decide to refuse to sign a stipulated protective order with the same terms, that old stipulated protective order will be used against you.

The purpose of this article is to help you navigate and negotiate the protective order process in order to obtain one favorable to your client, one that does not hinder your practice or hurt consumers in the future.

The counter-offer

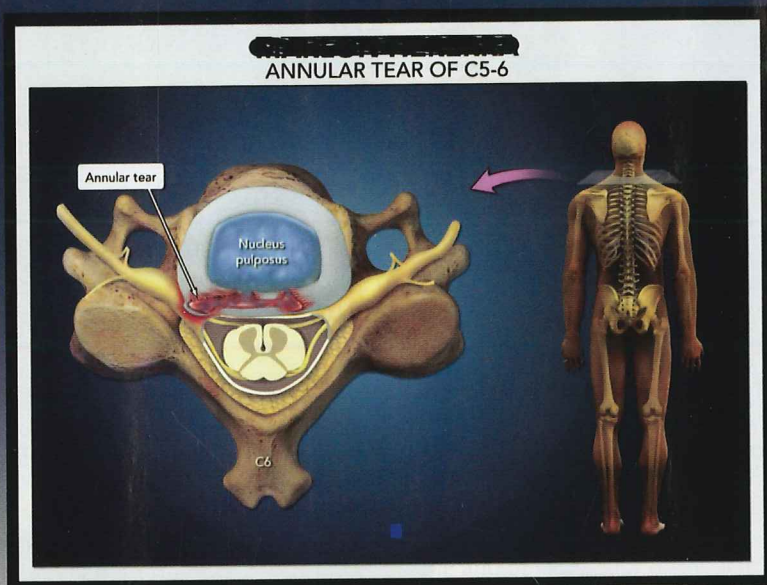
The first step after receiving any proposed protective order is to read it carefully and redline it. Chances are that the Protective Order provided to you contains a non-sharing provision that prevents you from disclosing the information obtained in discovery to third parties, utilizing the information in future cases, and requires you to obtain signed confidentiality agreements from any person, including experts, whom you share the information with.

These provisions severely restrict your ability to use the information you obtain during discovery and will make the administration of your case burdensome. It is clear that the goal of manufacturers in product-liability cases, through the use of non-sharing protective orders, is to limit the plaintiff’s attorney’s ability to know what other claims involving the same or similar products have been made against the manufacturer, and further, to use that same protective order as a barrier to prevent attorneys with similar claims from getting discovery and depositions produced in other cases.

By trying to force plaintiffs’ attorneys to agree to protective orders without sharing provisions, the manufacturers hope to severely restrict the ability of

Protective Order *continues*

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plaintiffs' attorneys and experts to communicate, gather important discovery, and ensure that the manufacturer is being completely truthful with discovery. You cannot let this happen. If the Order does not include a sharing provision, you should not sign it and you must choose road number 2. The good news, however, is that in California the law is on your side. The most pertinent case in this arena is *Raymond Handling Concepts Corp. v. Superior Court* (1995) 39 Cal.App.4th 584 ("Raymond").

Raymond was a personal-injury action arising from a forklift accident in which the court issued a protective order permitting plaintiffs' counsel to disseminate confidential discovery to counsel in similar litigation pending against defendants. (*Raymond*, *supra*, 39 Cal.App.4th at pp. 586, 590-91). The order provided that

discoverable information that was designated as a trade secret or other confidential research, development, or commercial information could be disclosed upon execution of a stipulation by counsel in the other litigation agreeing to be bound by the protective order. (*Id.* at pp. 590-91.) This order accommodated the public interest in allowing the sharing of information with litigants in similar cases, as well as the defendant's interest in protecting confidential information and trade secrets from disclosure to its competitors. (*Ibid.*)

In ruling, the *Raymond* court analyzed *Garcia v. Peebles* (Tex. 1987) 734 S.W.2d 343 ("*Garcia*"), which focused on the benefit provided by sharing provisions in ensuring efficient and full exchange of information in product liability actions. The plaintiffs in *Garcia* sued General Motors Corporation

(GMC) for injuries suffered when their 1982 Buick burst into flames after being struck in the rear by another vehicle. (*Id.* at pp. 344-47.) The plaintiff alleged that the fuel-fed fire was the result of a design defect in the Buick's fuel system. (*Id.* at p. 344.) The plaintiff protested a discovery order that would have precluded him from sharing confidential information, including alleged trade secrets, in other cases similar to his action. (*Id.* at pp. 345-47.) GMC contended it would be injured if competitors gained access to the information it sought to protect. (*Id.* at pp. 347-48.) The reviewing court in *Garcia* held that the trial court abused its discretion in the blanket order. (*Ibid.*) It balanced the legitimate need of GMC to protect its trade secrets against the public policies favoring the exchange of

Protective Order *continues*



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information; i.e., full disclosure and efficiency in the trial system. (*Ibid.*)

The *Garcia* court concluded its discussion of this issue by remarking: “Out of an abundance of caution, the trial court, after determining which documents are true trade secrets, can require those wishing to share the discovered material to certify that they will not release it to competitors or others who would exploit it for their own economic gain. Such an order would guard GMC’s proprietary information, while promoting efficiency in the trial process.”

(*Garcia*, *supra*, 734 S.W.2d at p. 348.)

Other persuasive authorities supporting sharing provisions include *Kraszewski v. State Farm General Ins. Co.* (N.D.Cal. 1991) 139 F.R.D. 156 (“*Kraszewski*”). In *Kraszewski*, the court was asked to modify a protective order that requires any document marked confidential to “be used only for the purposes of this litigation and not for any other purpose whatsoever” to allow discovery to be used in a similar sex-discrimination suit against State Farm. (*Id.* at p. 158). The court analyzed the issue in reference to the principles applied by the Court of Appeals, Ninth Circuit in *Olympic Refining Company v. Carter* (9th Cir. 1964) 332 F.2d 260 (“*Olympic*”), an antitrust

action. *These allow sharing of information in similar cases in order to ease the tasks of courts and litigants in the discovery process.* (*Kraszewski*, *supra*, 139 F.R.D. at p.159.) As to State Farm’s argument that some of the information covered by the protective order constituted trade secrets important to State Farm, the *Kraszewski* court again relied on the Ninth Circuit’s discussion of trade secrets in *Olympic*, where the court stated that no rule or statute “authorizes a district court to protect trade secrets and sensitive competitive information from such disclosure as is relevant to the subject matter involved in a pending action. All that may be done is to afford such protection from disclosure as is practicable, consistent with the right of access thereto for purposes of litigation.” (*Olympic*, *supra*, 332 F.2d at p. 265.)

California is not alone in its approval of “sharing” protective orders in the discovery process. For many decades, federal courts across the country have overwhelmingly and decisively come down on the side of liberal sharing of protective orders as a sound and effective means of ensuring a speedy, just, and less expensive determination of products liability actions. (*Burlington City Board of Education v. United States Mineral Prods. Co.*

(M.D.N.C. 1987) 115 F.R.D. 188, 190 [“the sharing of information between even diverse plaintiffs promotes speedy, efficient and inexpensive litigation by facilitating the dissemination of discovery material necessary to analyze one’s case and prepare for trial”]; *Kamp Implement Co., Inc. v. J.I. Case Co.* (D. Mont. 1986) 630 F. Supp. 218, 219 [“of the courts that have considered protective orders of the nature proposed by defendant, an overwhelming majority have refused to grant any type of protection from dissemination”]; *Wolhar v. General Motors Corp.* (Del. 1997) 712 A.2d 464, 467 [“The great weight of authority in other jurisdictions holds that such sharing is not only theoretically sound but also justified as an efficient use of the resources of the courts and the parties”]; *Grange Mut. Ins. Co. v. Trude* (Ky. 2004) 151 S.W.3d 803, 814 [“That discovery might be useful in other litigation or other proceedings is actually a good thing because it furthers one of the driving forces behind the Civil Rules by allowing the cost of repeating the discovery process to be avoided and thereby encouraging the efficient administration of justice”]; *Patterson v. Ford* (W.D. Texas 1980) 85 F.R.D. 152; and *Koval v. General*

Protective Order continues

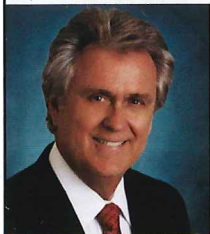
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Protective Order — continued

Motors, (Com. Pl. Ohio 1990) 610 N.E.2d 1199.)

As can be seen above, there exists extensive law supporting the inclusion of a sharing provision in a protective order; law that you must apply in your case to fight any non-sharing protective order.

In addition to the legal issues involved, you may discover that the defendant has previously entered into stipulated protective orders that included sharing provisions. Maybe the case was from a different state involving different counsel, but the critical issue is whether the same defendant previously agreed to a sharing provision. If it had previously agreed, then the defendant will be hard pressed to tell your court why it now cannot agree to a sharing provision.

In addition to the fight for a sharing provision, when reviewing a proposed protective order you should also pay attention to whether the following provisions are included in the order; and, if not, counter with an order that includes them:

- An authentication provision;
- A reasonable challenge provision;
- A provision that the protective order does not apply to use of documents at trial; and,
- An express good-faith provision.

Authentication provision

An authentication provision simply says that any document produced by the defendant subject to the protective order is a business record. Some defendants will fight this provision, but logic is on your side: if the document allegedly constitutes a trade secret or otherwise contains allegedly proprietary information, then it *must* be a business record. Remember, you are not under any obligation to sign a stipulated protective order. But, if you do agree to do so, then the defendant should remove the hurdle of laying a foundation that a document produced pursuant to a protective order is a business record. This does not mean the document is admissible at trial, it simply establishes the foundation. (Evid.Code, § 803(6).)

Protective Order *continues*

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Protective Order – continued

Challenge provision

California law states that the burden is on the moving party to show by a preponderance of the evidence that the issuance of a protective order is proper. (*Stadish v. Superior Court* (1999) 71 Cal.App.4th 1130, 1144.) Despite this, defendants will often propose a protective order that shifts the burden for challenging whether a document is truly deserving of protected status to the party doing the challenging. That is not the law in California.

If a stipulated protective order is agreed to, and a defendant is afforded the benefit of having the protective order in place, which allows it to unilaterally designate vast “collections” of documents as protected, then under California law it should bear the burden of proving that the documents are entitled to such trade-secret protection should their designation be challenged.

From a practical standpoint, the way this works is as follows. Suppose the defendant designates its entire production of documents as being covered by the protective order in place, but after reviewing the documents, plaintiff’s counsel believes many of the documents should not be protected. Plaintiff’s counsel can then notify defense counsel in writing which specific documents he believes should not be protected. Defense counsel then has a specified period of time – such as 30 days after the initial notification by plaintiff’s counsel – either to justify why the challenged documents should remain protected or to file a motion with the court to establish why the challenged documents should remain protected.

In addition to the fact that there may not be any legitimate basis for the documents to be protected, a few other circumstances may cause plaintiff’s counsel to challenge whether the documents should be protected.

One circumstance is where plaintiff’s counsel learns from other sources that the documents in question were produced by the defendant in other litigation and were not subject to a protective order. If the documents were previously

Protective Order *continues*

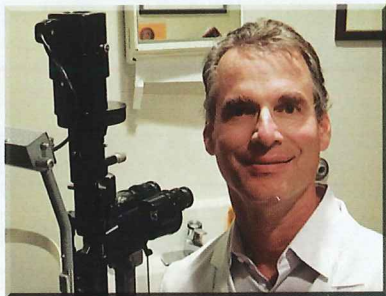
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produced to third parties and were not deserving of protected status in prior litigation, the defendant will be hard-pressed to justify why now in your case the documents should be protected.

A second circumstance is one where the documents may be important to government authorities, such as the Consumer Product Safety Commission or the National Highway Traffic Safety Administration, but the plaintiff's attorney is prevented from sharing those documents with government authorities because the protective order prevents doing so.

A third circumstance is one where the documents were entered as exhibits at a trial, and the trial court's rules dictated that any document used in open court is not protected. If that is the case, then there would be no basis for the

defendant in your case to claim that the documents must be protected.

Use of documents at trial provision

Use of documents during trial involves circumstances much different than the pre-trial arena. If this is not contemplated in a protective order, then the terms could make it difficult for you to use documents during trial. Therefore, if a protective order is entered, it should include a provision stating that the protective order does not apply to the use of documents at trial. Most courts have rules governing how documents used during trial are to be handled.

Good-faith provision

Last, although this may seem redundant, and the defendant will often argue that it is, you should request that a protective order include an express Good-Faith Provision. A Good-Faith Provision states that the defendant must not designate a document as confidential without first having made a good-faith determination that a factual and legal basis exists to assert a specific identified privilege applicable to that particular document. It is also good to include express language that the document being marked does not include information that has been received from or disclosed within the public domain, such as advertising materials, customer complaints, materials submitted to the government, or that have not otherwise received confidential treatment. *(Contact the authors for samples of any of the provisions referenced above.)*

Law-and-motion

As always, the goal is to resolve things informally and negotiate an acceptable order through the meet-and-confer process. However, if it becomes clear that the defendant in your case will not agree to include a sharing provision, then the discussion should end there. Tell counsel to file the motion and proceed to the outline below. If they will agree to include a sharing provision, but are fighting you on other provisions, then you must make a careful balancing to determine what provisions are most important

in your particular case before you agree to a stipulated protective order.

Once it is clear that law-and-motion is inevitable, do not concede that a protective order is warranted. Simply because you were discussing reaching an agreement to a stipulated protective order, once it comes to law and motion then the first question to ask is whether a protective order is even necessary. Undoubtedly, the defense will say it is, but you must carefully analyze your case, and, based on the facts, determine if it truly is.

Ask whether the product at issue constitutes an old design that has been on the marketplace for years where it has been reviewed, studied, and even reverse-engineered. Remember California law states that the burden is on the moving party to show by a preponderance of the evidence that the issuance of a protective order is proper. *(Stadish, supra, 71 Cal.App.4th at p. 1144.)* The *Stadish* Court set forth that the moving party has in fact a "substantial burden" to meet in requesting a protective order and must demonstrate both "good cause" and that "justice requires" the issuance of the protective order. *(Ibid.)*

Therefore, while the defendants would like it to appear that they are relieving you of a burden by "drafting" the protective order for you, in reality, it is they who are seeking to have you relieve them of a very significant burden by agreeing to one. Do not let them off the hook lightly. The law is clear that it is the obligation of the party requesting the protective order to prove a trade secret exists and to offer evidence to the Court that *each document it seeks to protect truly qualifies as a bona fide trade secret.* *(Bridgestone/Firestone, Inc. v. Superior Court (1992) 7 Cal.App.4th 1384.)* *A trade secret or proprietary information is not simply any material the withholding party would prefer to keep confidential, but is "secret information essential to the continued operation of a business or industry [that] may be afforded some measure of protection against unnecessary disclosure."* (Law Revision Comment to Evid. Code, § 1060 (1995), italics added.)

Furthermore, the owner of a trade secret has a privilege to prevent another
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from disclosing it *only* “if the allowance of the privilege *will not tend to conceal fraud or otherwise work injustice.*” (Evid. Code, § 1060, italics added.)

The test a defendant must pass in order to establish this prima facie burden is set forth in *Bridgestone/Firestone, Inc. v. Superior Court* (1992) 7 Cal.App.4th 1384, and requires proof that:

- The information claimed as trade secret is not generally known or readily ascertainable;
- That it derives independent economic value from the secrecy of the information; and
- That it has made reasonable efforts to maintain its secrecy. (*Id.* at p. 1393, fn. 3, citing Civ. Code, § 3426.1, subd.(d).)

At this stage you must now pay particular attention to the circumstances of the product that the defendant is claiming is entitled to privilege protection. Courts have held that facts such as product age, product dispersal, and how well known a product is are all facts demonstrating a likelihood of greater dissemination of the product, and weigh against the imposition of a protective order. (See *Nestle Foods Corp. v. Aetna Cas. & Sur. Co.* (D.N.J. 1990) 129 F.R.D. 483.) “The purported need for protection is substantially diminished where the passage of time has made such documents stale.” (*Id.* at p. 485). Furthermore, situations in which a product has been available and sold to the general public for a longer period of time demonstrate that the product was avail-

able for disassembly and inspection, and could therefore be purchased and reverse-engineered by the precise audience that is supposed to be excluded from knowing the purported confidential information, providing additional weight against the need for protection.

Another key issue to note during the law-and-motion stage is that the defendant bears the burden to prove it is entitled to trade-secret protection by presenting “*competent*” evidence. Often the only evidence accompanying a motion for protective order will be one or more declarations from various company representatives, all attesting to the need for a protective order. Case law exists supporting the argument that this type of “evidence” is wholly conclusory and insufficient to establish a prima facie case of trade secret protection:

As noted at the outset, the party seeking protection has the burden of establishing that (1) the information is a trade secret or confidential commercial information and (2) that disclosure would cause a significant identifiable harm. . . . This showing requires specific demonstrations of fact, rather than broad allegations of potential harm. Raychem has not met its burden.

Raychem’s statement that disclosure of the end results of testing will necessarily reveal their systems, techniques, and methods of testing is wholly conclusory.

(*Culinary Foods, Inc. v. Raychem Corp.* (N.D. Ill. 1993) 151 F.R.D. 297, 303.)

Give the court options

If the facts warrant it, and should you find yourself embroiled in the law-and-motion phase, then begin your opposition by applying the above principles and arguing that no grounds for a protective order even exist. However, this should constitute only one portion of your opposition and thus, you should next present in the alternative the more reasonable protective order you have proposed during negotiations with defense counsel. Lay out concisely the additional provisions discussed earlier that you wish the court to review and include.

Protective Order *continues*

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alternative, and the alternative that truly balances the purported needs for privacy claimed by the defendant, while still pre-

serving the policy of shared discovery favored by multiple courts across the nation.

Suffice to say, this opposition can become quite lengthy and vary in complexity depending on the issues in your case; however, it is a necessary battle to pursue if negotiations break down with defendants, in order to preserve the documents you fight so hard to obtain in a products liability case. (For a sample *Opposition to a Motion for Protective Order* please contact the authors).

Conclusion

By applying the principles in this article, you will often be able to negotiate an acceptable stipulated protective order and avoid law and motion. However, when it does get to that phase, it is important to force the defendant to establish why a protective order is truly justified, and if it is, make sure the terms of the protective order are fair, reasonable, and consistent with the law.

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