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Recommended Citation

Ramona L. Lampley, *False Security: How Courts Have Improperly Rendered the Protections of the Protective Order Illusory*, *Denver L.R. Online* (2011).

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Ramona L. Lampley, *False Security: How Courts Have Improperly Rendered the Protections of the Protective Order Illusory*, DULR Online: The Online Supplement to the Denver Law Review (March 30, 2011, 4:22 PM), <http://www.denverlawreview.org/online-articles/2011/3/31/false-security-how-courts-have-improperly-rendered-the-prote.html> .

<http://www.denverlawreview.org>

Posted on Thursday, March 31, 2011 at 4:22 PM in Practitioner Articles

False Security: How Courts Have Improperly Rendered the Protections of the Protective Order Illusory

Ramona L. Lampley[1]

The protective order is perhaps one of the most useful and “taken for granted” discovery devices contemplated by the Colorado and Federal Rules of Civil Procedure. In civil litigation, in which confidential, proprietary, and trademark information is routinely demanded through written discovery requests, the parties often ward off heated discovery disputes through the entry of a joint protective order.[2] The purpose of this type of protective order is to permit the parties to produce business information—for example, information concerning the design and testing of a particular product—without fear that the information will be disseminated publicly, and with a court order that the information be used only for purposes of the present litigation. The United States Federal District Court for the District of Colorado discussed the usefulness of such “blanket” protective orders in *Gillard v. Boulder Valley School District Re.-2*,[3]

Blanket protective orders serve the interests of a just, speedy, and less expensive determination of complex disputes by alleviating the need for and delay occasioned by extensive and repeated judicial intervention. In view of increasingly complex cases and the existing workload of the trial courts, “[b]lanket protective orders are essential to the functioning of civil discovery. [A]bsent [such orders], discovery would come to a virtual standstill...”[4]

Other courts have recognized that these “blanket” protective orders, designed to permit discovery into confidential information without fear by the producing party of its public dissemination, have become the “standard practice” in “complex cases,” because they enable the discovery process to “operate more efficiently.”[5]

Although these “blanket” protective orders are often entered into by the parties’ agreement and are orders of the court, enforceable by sanctions or contempt, many practitioners and clients may place undue reliance on the protective order’s seemingly firm restrictions on disclosure. In some jurisdictions, such as the Tenth Circuit, the standard for modification of a protective order, even by an intervening non-party after the end of the litigation, is more lenient than many clients realize at the time the protected documents are produced.

The seminal case in the Tenth Circuit Court of Appeals is *United Nuclear Corporation v. Cranford Insurance Company*. [6] In *United Nuclear*, the defendant insurance companies entered into a protective order with the plaintiff, who sought a declaration of liability under the environmental impairment insurance policy issued by the defendants.[7] The protective order declared all discovery materials to be confidential and prohibited their use or disclosure other than for preparation for or use at trial. The parties in the underlying litigation produced

documents in reliance on this protective order.[8] Pursuant to the settlement agreement, documents produced by the defendants were to be retained at United Nuclear's expense for ten years.

Three years after the case settled and the district court dismissed the suit with prejudice, litigants in other lawsuits around the country seeking determination that they had coverage pursuant to Cranford and International's insurance policies moved to intervene in United Nuclear for the purpose of modifying the protective order. In essence, these non-party litigants sought to modify a protective order in a case in which they were not involved, after the case had been dismissed, in order to obtain from United Nuclear documents produced by Cranford and International in reliance on the protective order. According to the intervening litigants, they sought access to the discovery in United Nuclear to avoid duplicating that discovery in their respective cases.[9] The defendants opposed the modification of the protective order. The court's stated reason for the defendant's opposition to the modification was "to make it more burdensome for [the] Intervenor to pursue their collateral litigation." [10] The case did not discuss what methods, if any, the Intervenor had made to obtain this discovery of this information from the defendants Cranford and International through traditional means of discovery.

The Tenth Circuit first recognized the importance of such blanket protective orders to the efficiency of civil discovery and complex litigation. The court also recognized that a number of federal courts have adopted a "presumption in favor of the continued integrity of the protective order," permitting modification only under extraordinary circumstances.[11] However, the Tenth Circuit declined to adopt this presumption, and instead held:

[W]here an appropriate modification of a protective order can place private litigants in a position they would otherwise reach only after repetition of another's discovery, such modification can be denied only where it would tangibly prejudice substantial rights of the party opposing modification. Once such prejudice is demonstrated, however, the district court has broad discretion in judging whether that injury outweighs the benefits of any possible modification of the protective order.[12]

This framework has been referenced by collateral litigants in later cases seeking to obtain discovery they could not otherwise obtain through a third-party who became privy to the information via a protective order.[13] And some litigants have misconstrued the Tenth Circuit's holding in United Nuclear and the Seventh Circuit's holding in Wilk as creating a presumption in favor of modifying a protective order to avoid repetitious discovery, unless the party resisting production (the party who presumably relied on the protective order) can show it would "tangibly prejudice" its "substantial rights." Although the United Nuclear court's holding did contain strong language suggesting that a protective order should be modified, it was based on the facts of that case, in which the defendant's only basis for contesting the modification was the "desire to make it more burdensome for Intervenor to pursue their collateral litigation." [14]

Litigants and courts who construe the language set forth above in United Nuclear as creating a presumption in favor of modification of a protective order for any collateral litigants do an injustice to the remaining language of the case, and to the importance of the protective order as a necessary discovery measure in complex litigation. First, the United Nuclear court also

recognized that once the opponent to modification has demonstrated that modification would prejudice its substantial rights, “the district court has broad discretion in judging whether that injury outweighs the benefits of any possible modification of the protective order.”[15] In cases in which parties produce discovery to an opposing party in reliance on a protective order, it is difficult to envision how modification would not prejudice the producing parties’ substantial rights. The producing party has an expectation of confidentiality, and based on this expectation, produces to the other party confidential, perhaps, proprietary business information relevant to that underlying lawsuit only. For an adversarial party in unrelated litigation to attempt to obtain that discovery, produced pursuant to a protective order, via the collateral adversary instead of through normal discovery procedures, is to effectively lift any gate-keeping function of the court in the collateral litigation in confining discovery to the scope of Rule 26. If litigants were aware that discovery produced, pursuant to a protective order, to an opposing party could then be subject to a subpoena by an adversary in another case, and possible production by that initial adversary, document production would screech to a halt in many complex cases.

Perhaps the United Nuclear court recognized this possibility when it acknowledged that, “a collateral litigant has no right to obtain discovery materials that are privileged or otherwise immune from eventual involuntary discovery in collateral litigation.”[16] The problem, of course, arises in enforcing these restrictions under the framework of a subpoena to a third-party, who was at one time, adversarial to the party opposing production.

Therefore, to the extent the United Nuclear court failed to recognize, in 1990, the extreme consequences of diluting the protections offered by a protective order in a civil case by subjecting it to post-litigation modification, that decision should be modified. Other courts have already begun to retract from case law that suggested protective orders could be easily modified after the litigation had ceased. For example, the United Nuclear court relied heavily on *Wilk v. American Medical Association*[17] in adopting *Wilk*’s holding that modification of a protective order designed to prevent repetitious discovery should only be denied where it would tangibly prejudice the opposing parties’ substantial rights.[18] This portion of *Wilk*, directly relied on by United Nuclear, was based on the presumption that, “as a general proposition, pre-trial discovery must take place in the [sic] public unless compelling reasons exist for denying the public access to the proceedings.”[19] According to the *Wilk* court, “[t]his presumption should operate with all the more force when litigants seek to use discovery in aid of collateral litigation on similar issues.”[20]

However, the Seventh Circuit has recently eroded *Wilk*’s premise that pre-trial discovery should take place in the public absent compelling reasons. In *Bond v. Utreras*,[21] the Seventh Circuit stated that

[t]o the extent . . . that these cases [referencing *Wilk*] are premised upon a principle that “pre-trial discovery must take place in ... public unless compelling reasons exist for denying the public access to the proceedings,” they have been superseded by the 2000 amendment to Rule 5 of the Federal Rules of Civil Procedure.[22]

Thus, the *Bond* court appropriately recognized that, “Pre-trial discovery [tools]... ‘are not public components of a civil trial,’ ‘were not open to the public at common law,’ and ‘in general, are

conducted in private as a matter of modern practice.”[23] Because there is no public right of access to information exchanged between private litigants in pre-trial discovery, the entire premise of Wilk and its progeny (including United Nuclear) is called into question.

Thus, if this issue is re-addressed in the Tenth Circuit, the court will presumably examine the authority in other jurisdictions, including the Seventh Circuit, retracting from a standard that allows modification of protective orders without a showing of exigent circumstances.[24] Further, if Colorado courts address a similar situation, in the present age of mass discovery production, one would hope that Colorado courts would adopt the Second Circuit’s standard of requiring extraordinary circumstances. Although no court has set forth a list of factors that may present exigent circumstances, one would think that the intervening party seeking to modify the protective order in order to obtain documents produced in collateral litigation would be required to show that it cannot obtain that discovery by other means. In short, a party should not be permitted to circumvent the normal discovery procedures in litigation by obtaining modification of a protective order that was previously relied upon by an adversary in a different case.[25]

For present day purposes however, it would behoove practitioners and their clients to be wary of relying too much on the perceived protections of a blanket protective order. One knows not who may seek to modify that protective order and obtain discovery from one’s adversary in litigation, in the future. Until Wilk and its progeny are modified, that possibility looms on the horizon.

References

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[2] Colo. R. Civ. P. 26(c)(7) (specifically permitting the court to enter an order “that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way.”). See also Fed. R. Civ. P. 26(c)(1)(G).

[3] 196 F.R.D. 382 (D. Colo. 2000).

[4] *Id.* at 386 (quoting *Bayer AG & Miles, Inc. v. Barr Lab., Inc.*, 162 F.R.D. 456, 465-66 (S.D.N.Y. 1995)). Appendix A to Gillard has been used as a model protective order in a number of civil cases. Normally the protective order requires that counsel for a producing party only designate information it believes, in good faith, is confidential or otherwise entitled to protection. *Id.* at 386. This good faith requirement should preclude producing parties from designating public information as confidential.

[5] *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990). In *United Nuclear*, the United States Court of Appeals for the Tenth Circuit acknowledged that these types of protective orders “allow the parties to make full disclosure in discovery without fear of public access to sensitive information and without the expense and delay of protracted disputes over every item of sensitive information, thereby promoting the overriding goal of the Federal Rules of Civil Procedure, ‘to secure the just, speedy, and inexpensive determination of every action.’” *Id.* See also *Manual for Complex Litigation (Fourth)* § 11.432.

[6] 905 F.2d at 1424.

[7] *Id.* at 1426.

[8] *Id.*

[9] *Id.* at 1427-28.

[10] *Id.* at 1428.

[11] *Id.*

[12] *Id.* (quoting *Wilk v. Am. Med. Ass'n*, 635 F.2d 1295, 1299 (7th Cir. 1980)).

[13] For example, see e.g., Memorandum of Law in Support of Third-party Syngenta Seeds, Inc.'s Motion to Intervene to Modify Protective Orders and Secure Release of Evidence, *Pioneer Hi-Bred Int'l Inc. v. Asgrow Seed Co. et al.*, No. 498CV90578, 2003 WL 25754812 (S.D. Iowa June 20, 2003) (non-party Syngenta sought to modify a protective order in a closed case for the purpose of obtaining discovery from parties to whom it was produced in reliance on that protective order); see also Memorandum of Points and Authorities in Support of Motion of Intervenors Netscape Communications Corporation and Excite, Inc. to Modify Protective Order, *Playboy Enter. Inc. v. Welles, Inc.*, No. 398CV00413, 2000 WL 35750625 (S.D. Cal. July 19, 2000) (non-parties Netscape and Excite sought to intervene in a case on appeal to obtain discovery from Playboy's adversary's counsel in another case, which had been obtained pursuant to a protective order).

[14] *United Nuclear*, 905 F.2d at 1428.

[15] *Id.*

[16] *Id.*

[17] 635 F.2d 1295, 1299 (7th Cir. 1981)

[18] *United Nuclear*, 905 P.2d at 1428 (quoting *Wilk*, 635 F.2d at 1299, stating the United States Court of Appeals for the Seventh Circuit held that a protective order should have been modified to permit an adversarial party to the defendant American Medical Association to produce documents it obtained in that underlying litigation to the state of New York, who was the AMA's adversary in a similar, but not identical, anti-trust case.).

[19] *Wilk*, 635 F.2d at 1299.

[20] *Id.*

[21] 585 F.3d 1061, 1068 n.4 (7th Cir. 2009)

[22] Id. (quoting Wilk, 635 F.2d at 1299). In 2000, Federal Rule of Civil Procedure 5(d) was amended such that information exchanged in discovery pursuant to Fed. R. Civ. P. 26(a)(1) & (a)(2) and discovery requests and responses need not be filed with the court unless they are used in the action. See Fed. R. Civ. P. 5(d) 2000 amend.

[23] Id. at 1074-75 (quoting *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984)).

[24] According to the Second Circuit, “Where there has been reasonable reliance by a party or deponent, a District Court should not modify a protective order granted under Rule 26(c) “absent a showing of improvidence in the grant of [the] order or some extraordinary circumstance or compelling need.” *S.E.C. v. TheStreet.Com*, 273 F.3d 222, 229 (2d Cir. 2001).

[25] This article does not address the entirely different situation of when parties to a protective order in the case in which the protective order was entered later seek modification of that protective order. Because those parties were represented, and at times, even agreed to the protective order at issue, they presumably have a higher interest in seeing it modified.