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IN THIS ISSUE

This article addresses protection of confidential documents subpoenaed from a third party and the insufficiency of self-executing protective orders to preclude public filing of those confidential documents. Relatedly, this article also addresses appellate jurisdiction over orders denying a motion to seal pursuant to the collateral order doctrine.

Trade Secrets Lost – The Self-Executing Protective Order is not Sufficient to Require Filing of Documents Under Seal

ABOUT THE AUTHOR

Neville H. Boschert is a Partner in the Business and Commercial Litigation group of Jones Walker LLP. Mr. Boschert has extensive trial experience in antitrust, intellectual property, business torts and products liability matters. He practices in the Jackson, Mississippi office. He can be reached at nboschert@joneswalker.com.

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Sandra Wunderlich
Committee Chair
Tucker Ellis LLP
sandra.wunderlich@tuckerellis.com

Self-executing protective orders are commonplace and allow discovery to proceed in cases involving confidential documents with minimal court involvement. These protective orders generally govern the use and disclosure of documents produced in discovery by parties to the litigation and often govern the use and disclosure of documents produced by third parties as well. But these protective orders are usually insufficient, on their own, to protect the interests of the parties to the litigation or third parties from the possible filing of confidential documents in the court file where they are available to the public. The recent opinion by the Fifth Circuit Court of Appeals in *Vantage Health Plan v. Willis–Knighton Med. Ctr.*, 2019 U.S. App. LEXIS 711; 2019 WL 138810 (5th Cir. Jan. 9, 2019), illustrates the shortcomings of a self-executing protective order and the need for a third-party to protect the confidentiality of its documents produced pursuant to a subpoena in both the district court and on appeal.

The District Court Ruling

Humana was not a party to the antitrust action that Vantage Health Plan filed against Willis-Knighton Medical Center. Humana's involvement in the case was merely as the recipient of two document subpoenas issued at the request of Vantage. Humana objected to the subpoenas, but the Court granted Vantage's motion to compel and ordered Humana to produce the requested documents, which included emails and draft contracts between Humana and Willis-Knighton. In accordance with an agreed self-executing protective order entered by the court that allowed the parties and third parties to designate documents as confidential, Humana produced the documents marked "confidential" and "attorneys' eyes only." The protective order required that if designated documents were filed with the court, they must be filed under seal.

During summary judgment briefing, the parties needed to file many documents that had been marked "confidential" and "attorneys' eyes only," and the parties attempted to file them under seal. When the parties began filing numerous boilerplate motions to seal, the district judge became aware that the parties and Humana had designated almost all documents as "confidential" and "attorneys' eyes only." The district judge denied thirty-nine pending motions to file documents under seal and amended the protective order to require the party seeking to file marked documents to request permission to file the documents from the producing party or third party. The producing party or third party was not to unreasonably deny permission to file. If permission to file was denied, the party seeking to file was to file a motion to file under seal or a motion to show cause, demanding the producing party or third party appear and show cause why the documents should not be filed publicly. The producing party or third party had the burden to demonstrate that the documents should not be filed in the public record.

During the motion process, Vantage designated fifty Humana documents marked

"confidential" or "attorneys' eyes only" that it considered filing in the public record. Humana would not consent to the documents being filed publicly, so Vantage filed motions to show cause regarding the documents. The court scheduled two full days of hearings to review each of the documents page-by-page to determine which documents could be filed in the open record (with or without redactions) or if particular documents should be filed under seal. Humana's attorneys participated in this process and argued generally that public filing of Humana's proprietary information could cause it competitive harm. But "Humana offered no specific reasons for confidentiality and was wholly unprepared to engage in the court's painstaking process." 2019 U.S. App. LEXIS 711 at *5. Upon conclusion of the hearing, the court ruled that none of the Humana documents could be filed under seal, but there should be redactions of "information that revealed reimbursement rates and percentages, fee schedules, overall percentage increases from year to year and amounts and percentages of bonuses." *Id*. Humana sought an appeal to the Fifth Circuit.

Appellate Jurisdiction – The Collateral Order Doctrine

Appellate jurisdiction is generally limited to final decisions of the district court. The collateral order doctrine is a narrow exception to the requirement of a final judgment for appellate jurisdiction. The collateral order doctrine requires that an "order must (1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action and (3) be effectively unreviewable on appeal." 2019 U.S. App. LEXIS 711 at *7 (quoting *Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164, 171 (5th Cir. 2009) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978))).

The Fifth Circuit concluded that the elements for application of the collateral order doctrine were met in this case. While pretrial discovery orders are generally not reviewable on appeal prior to conclusion of the case in the trial court, the court concluded that sealing and unsealing orders -- especially when the documents are those of a third party -- are effectively unreviewable on appeal unless they are immediately appealable under the collateral order doctrine.

Public Policy Favors Public Access

There is a presumption in favor of public access to documents filed with the court during the course of litigation. "This presumption reflects the fact that '[p]ublic confidence [in our judicial system] cannot long be maintained where important judicial decisions are made behind closed doors and then announced in conclusive terms to the public, with the record supporting the court's decision sealed from public view.'" 2019 U.S. App. LEXIS 711 at *10-11 (citation omitted). While some circuits have found the public access presumption to be strong, the Fifth Circuit and others have concluded that the issue of filing under seal is considered under an abuse of discretion analysis on a case-by-case basis.

The Fifth Circuit concluded that the district court did not abuse its discretion by not sealing Humana's documents. "When Humana could not articulate any specific harm created by the disclosure, offered nothing but conclusory statements to support a blanket claim of confidentiality, and was unprepared to defend its claim that specific portions of the documents were confidential, the district court did not abuse its discretion by concluding that the public access presumption overbore Humana's interest in confidentiality." 2019 U.S. App. LEXIS 711 at *12. The Court further noted that bald assertions of competitive harm from the disclosure of information such as "negotiating strategy, prices, rates, projections, and other financial information" was not sufficient evidence of potential harm and that Humana had not articulated any specific harm that would result from the document disclosure. 2019 U.S. App. LEXIS 711 at *13. Finally, the Court found that specific redaction of the documents protected Humana's interests and that unfiled documents were safe from general disclosure by the protective order in the case.

Lessons Learned

If your client is served with a subpoena as a third-party for documents containing confidential and proprietary information, you should treat the subpoena seriously and make sure to raise all appropriate objections to avoid the production. If the documents must be produced, you should ensure that there is a protective order in place to ensure that the documents are not disseminated any further than absolutely necessary. It is also important to work with your client early on to develop specific objections and evidence to enable you to articulate precisely how disclosure of a particular document can cause harm to your client. Clichés and conclusory assertions of potential harm are not sufficient to protect confidential information from being filed publicly. Finally, if the district court allows confidential materials to be filed in the public record, you should consider an immediate appeal under the collateral order doctrine.

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