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FIGHTING FOR PROTECTIVE ORDERS THAT ALLOW FOR INFORMATION TO BE USED IN OTHER CASES ~ BY: NOAH BREAZEALE

If you commonly handle cases against the same defendant, possessing the ability to use discovery from one case in your other cases against the same party can be invaluable to both you and your clients. This ability is particularly valuable in ERISA cases, in which discovery is rarely obtainable unless a plaintiff can show a basis to delve into the insurance company's conflict of interest.

In this article, we discuss the law favoring protective orders that allow for the use of discovered information in collateral litigation, the arguments most commonly raised by defendants against such protective orders, and some practical ways to address those arguments.

Legal Support for Protective Orders Allowing Use of Discovery in Collateral Litigation:

There is strong support that parties can use information discovered in one case in similar, later cases against the same party. See McDaniel v. Freightliner Corp., 2000 WL 303293 (S.D. NY, March 23, 2000) ("…protective orders which do not restrict the use of a party's documents to a particular case are frequently employed so that 'each plaintiff in every similar action need not run the same gauntlet over and over again'").

A long-standing legal presumption requires that judicial records, including discovery filed into the record, are generally available to the public. See Nixon v. Warner Communications Inc., 435 U.S. 589 (1978). Although recognizing the importance of protecting certain information, our jurisprudence generally dictates that courts should avoid, as much as possible, the use of protective orders that overly restrict the use of information.

Rule 1 of the Federal Rules of Civil Procedure instructs that all rules and procedures are to be "construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." See Fed. R. Civ. P. R. 1; see also Nestle Foods Corp. v. Aetna Cas. and Sur. Co., 129 F.R.D. 483 (D.N.J., 1990). Because discovery is often long and expensive,

many courts find that allowing the use of discovered information in later cases through the terms of a protective order is an effective way to speed up the process and minimize costs in future cases. See Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1131 -31 (9th Cir. 2003); see also Stokes v. Life Ins. Co. of N. America, 2009 WL 8397036 (D. Idaho, August 31, 2009).

Aside from promoting efficiency and helping litigants avoid unnecessary expenses, many courts have found that allowing the use of discovered information in subsequent litigation "is an effective means to ensure full and fair disclosure. Parties subject to a number of suits concerning the same subject matter are forced to be consistent in their responses by the knowledge that their opponents can compare those responses." See Garcia v. Peeples, 734 S.W.2d 343, 347 (Tex. 1987); see also Miller v. General Motors Corp., 192 F.R.D. 230 (E.D. TN, March 14, 2000).

Common Arguments and Concerns Raised by the Other Side.

Despite all the above law to the contrary, protective orders that preclude the use of information in other litigation remain common-place in many jurisdictions. Obtaining an order allowing use in other cases continues to be an uphill and contentious battle. After nearly a decade of fighting these battles, our firm has become familiar with many of the most common arguments raised by defendants against such protective orders and have developed some practical ways to address them. In general, we've found that the best way to address concerns over the terms of a protective order is to address those concerns head-on through the specific terms of our proposed order.

The Administrative Burden Argument:

Insurance companies often argue that a protective order allowing the use of protected information in collateral litigation would place an extreme burden on the court. They assert that this type of protective order would force the court to oversee hearing-after-hearing every time we intended to use protected information in other cases. To place this burden on the court, defendants commonly assert, would conflict with the mandate of FRCP Rule 1 that legal actions should be adjudicated speedily and inexpensively. In the face of such a looming burden, insurance companies try hard to persuade courts to order the parties to return or destroy all protected information at the end of the case.

One way to deflate this argument is to include terms in the protective order allowing the party who wants the information protected the chance to object to the use of that information in the court presiding over the subsequent case after notice from the party wishing to use the information. These terms put the burden more on the parties, and the court presiding over the subsequent case. The notice requirement also addresses arguments that the use of protected information would go untracked.

The "Multiple Bites" Argument:

Defendants also argue that this kind of protective order is unworkable because, under such an order, there would be no way to protect against attempts to undermine the court's prior rulings on confidentiality or prevent the re-challenging of earlier confidentiality designations in each subsequent case. Because of limits on jurisdictional authority, defendants assert that such protective orders would leave the court and defendants powerless to stop plaintiffs from trying to take multiple bites at the confidential apple. This assertion commonly caused courts outright to prohibit the use of information in collateral litigation.

One way to counter this argument is to include language in the protective order conditioning using any information in collateral litigation on the adoption or entry of a "child" protective order in each of those cases. This "child" protective order is virtually identical to the original and includes language prohibiting a party from challenging any pending confidentiality designations or re-challenging previously ruled-on designations. By conditioning the use of protected information on the entry of a "child" order, we successfully addressed concerns about information being treated inconsistently in later cases.

The Personal Confidential Argument:

In some cases, defendants argue that this type of protective order is inappropriate because it would allow for insurance company employees' personal information- such as employee records, home address-

es- to be used in other cases. By enabling the use of this information in other cases, the court would, thereby, unnecessarily increase the risk of that information becoming unprotected. In truth, the information we want to use in our other cases has nothing to do with insurance company employees' personal information and instead relates to a defendant insurance company's financial conflict of interest and whether that conflict influenced that defendant's claim-handling procedures. Despite repeated attempts to explain this to courts, we found time-and-time-again that the potential that personal information could become unprotected or misused was enough to cause the court outright to prohibit the use of any information in other cases.

We found that an effective way to address this argument was to include language in the proposed order creating two different "confidential" designations, allowing the producing party to identify and distinguish personal information from other types of information. We also included language prohibiting any personal confidential information from being kept or used in collateral litigation. By including language allowing defendants to distinguish between personal information and other types, and by including language clarifying that personal information was exempt from use in other cases, we addressed concerns about the improper use of personal information.

Conclusion:

Although still far from guaranteed in many jurisdictions, the above terms have exponentially increased our success in obtaining a protective order allowing us to keep and use information in our collateral cases against the defendant.

If you have any questions about protective orders, the arguments and techniques discussed in this article, or are interested in seeing a copy of our protective order, please give us a call anytime.

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