

The importance of protective orders in product liability cases

By Aaron L. Osten

Litigating most any product liability case will inevitably include the moment when a product defendant refuses to produce any documents until you first sign a protective order to safeguard its “proprietary” or “trade secret” information. Because document requests in product cases typically include internal testing protocols, manufacturing and design specifications, and data compilations related to prior defects/incidents, it is no surprise a product defendant will only produce such documents pursuant to a protective order. Such information is highly important to proving your case and often unveils a documented history of defects dating back several years. The need to receive such important information can often hasten the negotiation over a protective order, but just a couple hours of review and a few meet and confer exchanges can save significant time and effort in discovery disputes down the road.

While agreeing to a protective order is common practice and needn't be avoided altogether, it is critical to review and scrutinize the proposed language of any protective order. A defendant will commonly provide you with the first draft, often claiming something to the effect that they have “used this exact protective

order in several other cases” and that you simply need to sign it and a document production will soon follow. At first blush it may appear harmless, since, after all, how could signing a protective order which simply agrees to keep trade secret material confidential impact your ability to litigate your case? It shouldn't, but if you gloss over the proposed language and sign the protective order, it very well can. This is because many protective orders proposed by a product defendant contain terms heavily favoring the defendant, inconsistent with California law, and are designed to delay and muddy the discovery process, ultimately curtailing a plaintiff's ability to effectively litigate the case.

The following are specific areas of protective orders most commonly abused by a product defendant. These, along with the entire protective order, should always be highly scrutinized before any execution occurs.

Definition of “confidential information”

The definition of “confidential” seems incredibly basic, but what definition is agreed to will ultimately dictate what qualifies under the protective order as confidential, and will operate as the applicable standard should a discovery dispute arise and be taken before a court. Defendant will often propose an overbroad and circular confidential definition such as “*information which Defendant believes is trade secret and/or proprietary.*” Agreeing to such a definition does nothing but leave the discretion with the defendant to determine what is confidential and what is not. Do not leave it up to a product defendant to

set the legal standard for what types of its own material constitutes confidential or trade secret information. Instead, demand the defendant use Civil Code § 3426.1(d), which is the legal California standard for trade secret information, that states:

“Trade secret” means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

- (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and
- (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

This definition narrows the parameters and will force the defendant to meet a much more stringent burden should the court be forced to decide whether a document is entitled to protection. Oftentimes, a defendant will designate every document relating to its product as “trade secret” regardless of whether there exists an independent economic value, or such information is already known to the public. This standard will force a defendant to only designate information which is legally recognized as a trade secret, not information which it just doesn't want disclosed.

Using the legal trade secret standard is also important, since under California law, trade secret privilege is not absolute, and “requires a balancing of the need for protecting the trade secret with the needs of the case.” (*Davis v. Leal* (E.D. Cal. 1999) 43 F. Supp.2d 1102, 1110; see also *Raymond Handling Concepts Corp. v. Superior Court* (1995) 39 Cal.App.4th 584, 590.) Further, a trade secret “is not simply



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any material the withholding party would rather 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.” (*Davis* at 1110, citing Law Revision Comment to 1060 (1995).) “Where a business is the party seeking protection it will have to show that disclosure would cause significant harm to its competitive and financial position. That showing requires a specific demonstration of facts, supported where possible by concrete examples, rather than broad,

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conclusory allegations of harm.” (*Bank of America v. Hensley Properties, L.P.* (E.D. Cal. 2008) 2008 WL 3272077 *3.)

Should a defendant push back and refuse to agree to Civil Code section 3426.1, tell the defendant to go ahead and make its motion before the court. This would leave the court to decide a dispute as to

whether to apply settled California law or a defendant’s self-serving standard, which is almost always a losing argument for a defendant.

Burden of bringing a discovery motion

A defendant will often include a provision stating that if a party challenges the confidential designation of a specific document, the *challenging party* will have the burden of bringing a discovery motion within a specified time frame challenging the confidential designation. The provision will also state that if such a motion is not brought within the specified time frame, then the document will be deemed as confidential under the protective order. Do not agree to this. The burden of bringing a discovery motion over whether a document is confidential or not must sit with the party claiming confidentiality. After all, it is the party who seeks the confidential protection who is seeking the benefit of protection, and thus carries the burden. It often helps to remind the defendant that the document has not even been ruled confidential by the court, and you are doing them a favor by even agreeing to a protective order. Defendants often use this tactic to muddy a discovery

dispute since it forces a challenging party to work backwards and bring a discovery motion which presupposes the challenged document already qualifies as confidential before the court has even ruled whether it is or not. This process incorrectly places the burden on the challenging party. Forcing the defendant to bring a motion to designate a document confidential under a protective order correctly places the burden on the party asserting the protection of its trade secrets to make a bona fide determination that its documents contain trade secrets as defined by California Civil Code section 3426.1(d) or contain confidential technical information or other commercially sensitive information, the dissemination of which would damage that party’s competitive position. Not until this burden has been met would the burden then shift to a plaintiff to justify the necessity for such disclosure. (*Davis*, 43 F.Supp.2d at 1110; *Raymond Handling*, 39 Cal.App.4th at 590; *Bridgestone/Firestone v. Superior Court* (1992) 7 Cal.App.4th 1384, 1393.)

Sharing provisions

Sharing provisions allow plaintiff attorneys litigating similar cases against the same defendants to share confidential

documents and testimony with other plaintiff attorneys across the country. Such provisions are incredibly important tools in both avoiding needless discovery motions and keeping a product defendant transparent and consistent in discovery. While sharing provisions are not always approved by a court, there is ample law on point supporting such provisions and thus they should always be sought – to benefit not only your case, but numerous other plaintiffs across the country.

Sharing provisions are not a new concept in the product liability realm. California courts have consistently held that the exchange of information through “shared discovery is an effective means to insure full and fair disclosure.” (*Raymond, supra*, 39 Cal.App.4th at 588, citing *Garcia v. Peeples* (1987) 734 S.W.2d 343, 347. See also, *Olympic Refining Company v. Carter* (9th Cir. 1964) 332 F.2d 260, 264; *Kraszewski v. State Farm General Ins. Co.* (N.D. Cal. 1991) 139 F.R.D. 156, 159-60.) Permitting the “sharing of information in similar cases eases the tasks of courtrooms and litigants in the discovery process.”

(*Raymond, supra*, 39 Cal.App.4th at 587-88.) Unfortunately, in product cases, manufacturers are frequently reluctant to turn over materials during discovery. Discovery disputes requiring numerous motions to compel production of documents are the norm. Sharing of relevant information between counsel in similar cases provides a vehicle for ensuring that litigants are not handicapped by their inability to obtain documents in discovery. Courts have consistently held that it is indeed proper, efficient, and in the public interest, for litigants in similar cases to share information.

In addition to making discovery more truthful, shared discovery makes the system itself more efficient. The current discovery process forces similarly situated parties to go through the same discovery process time and time again, even though the issues involved are virtually identical. Benefiting from restrictions on discovery, one party facing a number of adversaries can require his opponents to duplicate another’s discovery efforts, even though

the opponents share similar discovery needs and will litigate similar issues. Discovery costs are no small part of the overall trial expense.

(*Raymond, supra*, 39 Cal.App.4th at 588, citing *Garcia, supra*, 734 S.W.2d at 347.)

Furthermore, the Ninth Circuit in *Foltz v. State Farm Mutual Automobile Ins. Co.* (9th Cir. 2003) 331 F.3d 1122, 1131-32 also recognized the right of access to discovery materials by attorneys handling similar litigation. The court stated that it “strongly favors access to discovery materials to meet the needs of parties engaged in collateral litigation Allowing the fruits of one litigation to facilitate preparation of other cases advances the interests of judicial economy by avoiding the wasteful duplication of discovery.” (*Id.*)

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 protective orders as a sound and effective means of ensuring a speedy, just and less expensive determination of products liability actions. (See e.g. *Patterson v. Ford* (1980) 85 F.R.D. 152; *Burlington City Board of Education v. United States Mineral Prods. Co.* (M.D.N.C., 1987) 115 F.R.D. 188; *Koval v. General Motors* (1990) 610 N.E.2d 1199; *U.S. v. Hooker Chemical & Plastics Corp.* (D.C.N.Y., 1981) 90 F.R.D. 421, 426 [“Use of the discovery fruits disclosed in one lawsuit in connection with other litigation ... promotes the speedy and inexpensive determination of every action as well as conservation of judicial resources.”])

Sharing provisions in protective orders promote efficiency, minimize discovery costs, ensure full and fair disclosure by defendants, and promote judicial economy. The majority of courts across the country have allowed the sharing of information between plaintiff attorneys. (See e.g., *Kamp Implement Co., Inc. v. J.I. Case Co.* (D. Mont. 1986) 630 F. Supp. 218, 219 [Collecting cases and recognizing, “of the courts that have considered protective orders ... an overwhelming majority have refused to grant any type of protection from dissemination”]; *Wolhar v. General Motors Corp.* (Del. Super. 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.”)] These courts have recognized that information exchange between plaintiffs’ counsel is not only authorized, it is also encouraged and can be done without risking the unbridled dissemination of a defendant’s confidential information. (*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.”])

Because a dispute over whether to include a sharing provision will most always end up before the court, it is critical to remind the court that the purpose of a protective order is only to protect trade secret information or confidential research, development, or commercial information, where disclosure would enable competitors of the defendant to exploit the information or would put the defendant at a competitive disadvantage. (See, e.g., *Raymond Handling Concepts Corp. v. Superior Court* (1995) 39 Cal.App.4th 584; *Westinghouse Electric Corp. v. Newman & Holtzinger* (1995) 39 Cal.App.4th 1194.) It is not a proper purpose to impose undue hurdles on the discovery of information relevant to litigation. Testimony given by corporate representatives under oath in other cases involving the same product has a high level of relevance, and imposing conditions that make such testimony immune from discovery would have the effect of allowing the witnesses to give inconsistent statements without fear of impeachment.

The “taking” defense to sharing provisions

Don’t be surprised if a product defendant attempts to combat a sharing provision by arguing that it forces disclosure of trade secrets through the discovery process and constitutes a “taking” under the Fifth Amendment. This is a flawed rationale. Indeed, if the defendant was correct, then *any* form of discovery that

Sharing provisions are not a new concept in the product liability realm.

yielded a trade secret would be a taking. This is particularly incorrect with respect to lawsuits against product manufacturers. Nonetheless, product defendants will improperly make this argument and rely on *Ruckelshaus v. Monsanto Company* (1984) 467 U.S. 986 for this proposition. *Ruckelshaus* involved a data-consideration and data-disclosure provision mandated by federal law. Defendant Monsanto’s fear was that trade information would become generally available to the public due to its gathering by a federal agency, itself open to public scrutiny. Even assuming the case has some application to sharing provisions and their applicability, *Ruckelshaus* is distinguishable, as its holding hinges on the notion that a taking of any property rights vested in trade secrets occurs, “if an individual discloses his trade secret to others *who are under no obligation to protect the confidentiality of the information or otherwise publicly discloses the secret.*” (*Id.* at 1002, emphasis added.) Remind the court that a product defendant is not faced with disclosing trade secrets to others not obligated to protect the information. Any sharing will take place within the confines of an agreement drafted to protect the confidentiality of the material pursuant to the terms of the protective order approved by the court. Beyond mere speculation, a product defendant cannot offer any evidence to establish any plan, intent, motive or design of plaintiffs to distribute any trade secrets gleaned except as described within the protective order.

Forcing premature expert disclosure

Product defendants will often include a clause requiring plaintiffs to provide prior notice of any persons who are receiving and reviewing confidential documents. These persons are described as “qualified persons” and often include “competitors or consultants to a competitor of the producing party.” A defendant will request that the identity of such qualified persons be disclosed within a specific time frame prior to any production of confidential documents among plaintiffs’ consultants. Agreeing to provide a defendant with prior notice will require a plaintiff to prematurely disclose

the identity of its expert witnesses, since experts will clearly be the individuals receiving and reviewing the technical, internal documents. A defendant will often claim that it is entitled to know if competitors are reviewing its documents, which is an argument designed to distract the court from Code of Civil Procedure section 2034.010, et seq., which contains no provision compelling early disclosure of persons who may at one time or another have worked for a competitor of a corporation being sued. Request the defendant provide authority that mandates such advance disclosure, or authority that states defendant trumps the Code of Civil Procedure. Early disclosure of such persons constitutes a violation of the attorney work product doctrine to the extent it invades the attorney’s thought processes, strategy and approach to the case or other relevant litigation matters. (See, e.g., Code of Civil Procedure § 2018; *Payless Drug v. Superior Court* (1976) 54 Cal.App.3d 988; *Travelers Insurance Company v. Superior Court* (1983) 143 Cal.App.3d 436; and *Nacht & Lewis, Inc. v. Superior Court* (1996) 47 Cal.App.4th 214.)

Conclusion

During the negotiations over the protective order language keep in mind that you, as the attorney for the injured plaintiff, hold the cards. There is no law that requires you to stipulate that a product defendant be permitted to designate its own documents as confidential and that they receive confidential treatment from you and anyone else who reviews them. If the negotiations become unproductive, remind the defendant you are doing them a favor by agreeing to a protective order, and that the benefit is primarily to the defendant. If the defendant refuses to budge on the critical issues, simply tell a defendant to go make its motion for a protective order to the court. Doing so will either force a defendant to cave on some critical issues where it knows the law is against it, or will get the issues before the court. Either way, this will ensure that you are only agreeing to a protective order which will allow you to effectively and efficiently litigate your case, and potentially assist other plaintiff attorneys across the country do the same. ■