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Bench Press

For your eyes only

In business litigation, some information must be kept from prying eyes.

By Brian J. Hunt

MOST SMART BUSINESS PROFESSIONALS WILL AVOID LITIGATION IF they possibly can. The corollary is that, when they do become involved in litigation, the dispute is likely central to the business. As a result, business litigation often involves information that is sensitive, confidential and, perhaps, proprietary.

The degree to which courts are concerned about confidentiality objections often depends on the extent to which the objecting party has put the substance of the confidential information in issue. A more difficult concern arises when a party to the litigation requests confidential information either from another party regarding a non-party (i.e. an entity not otherwise involved in the litigation), or directly from the non-party.

This issue was recently addressed in *International Truck v. Caterpillar*, 351 Ill. App. 3rd 576, 814 NE2nd 182 (2nd Dist. 2004), in which International Truck filed suit against Caterpillar, claiming that the company had breached an agreement to sell heavy-duty trucks at specified prices. As is often the case, the parties stipulated that confidential information would be designated as such, and that access to that information would be restricted. The parties further stipulated that certain information could be designated as for "outside counsel's eyes only." Based on those stipulations, the trial court entered a protective order.

During the course of discovery, Caterpillar propounded a document request to International Truck, seeking all documents relating to the company's negotiations for supply agreements with any third-party, including Cummins Engine, one of Caterpillar's competitors.

Cummins intervened in the case, asserting that the documents sought contained

information that was subject to a prior confidentiality agreement with International, and should not be disclosed to Caterpillar—its competitor. The trial court initially ordered that Cummins be included in the protective order, and that International Truck produce the requested documents redacted of Cummins' information.

The trial court later revised that ruling, ordering International to produce all documents in unredacted form, and stated that all documents were subject to the prior protective order. It also stated that none of the Cummins-related documents were to be reviewed by consulting or testifying experts. The trial court then certified a question for the appellate court: "What is the appropriate legal standard to determine whether a party to an action can obtain discovery of confidential information from or related to a non-party competitor?"

The appellate court based the answer on the following context: When should a trial court determine that a discovery request causes such unreasonable annoyance, expense, embarrassment, disadvantage or oppression, that justice requires the denial of the request? The appellate court then identified the competing interests: The discovery rules are in place so that parties may obtain the information necessary to prosecute or defend their causes of action, and to reach a just result. On the other hand, the disclosure of certain types of commercial information may be very damaging, and fairness requires that non-parties be protected from disclosure—absent a need—because the non-party did not put the matters in issue.

The appellate court concluded that a "balancing test" is the best mechanism to resolve these competing interests. First, the non-party seeking to prevent confidential information discovery must establish that the information is, indeed, confidential. The trial court is to make this determination by assessing both the nature of the information and the steps taken by the non-party to protect it. If the requested information is deemed confidential, the parties seeking the discovery must establish that the relevance and need for the discovery outweigh any harm caused by disclosure.

The appellate court stated that the harm to both the affected non-party and to any party must always be considered, and that the trial court has the discretion to determine how much weight to assign to such harm. The appellate court also stated that, in assessing the harm, the trial court should consider both the likelihood that the harm will occur and the magnitude of the harm in the event that it does occur.

The appellate court also noted that the trial court may allow redaction of information to the point where the balance shifts in favor of discovery, or where redaction removes all confidential information. Furthermore, it noted that the trial court may consider a protective order, limiting access to disclosed information, when considering the likelihood and the magnitude of the harm. The appellate court then returned the case to the trial court for application of the stated framework to the Cummins dispute.

International Truck validates that common business practice—whether you are a party to litigation and responding to discovery or a non-party to litigation and responding to a subpoena—is to notify clients or business partners who may be affected before making the disclosure.

The case also succeeds in defining the battleground for those who seek and those

who resist discovery of information of or from a non-party: Those who seek to prevent disclosure must be prepared to establish the costs incurred and time invested to collect, refine or develop the information, and to establish the information's relationship to the core of the business. Those who seek disclosure will assert the more pedestrian nature of the information.

Furthermore, those seeking to prevent disclosure must be prepared to establish the steps taken to protect the information—including restricting access, stamping the information "confidential" and making access to the information the subject of contractual agreements, both with employees and business partners—and past efforts to prevent or restrict disclosure in the context of litigation. And those seeking disclosure will assert that the same or similar information was not adequately protected or that the objector failed to object or restrict prior disclosures.

Finally, those seeking to prevent disclosure will want to establish, in terms as concrete as possible, both the likelihood and the magnitude of the potential harm. And those seeking the disclosure will pooh-pooh those concerns.

About the Author
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