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PROTECTIVE ORDERS IN PRODUCTS LIABILITY LITIGATION: STRIKING THE PROPER BALANCE

Complex litigation¹ has exploded in the products liability arena.² Both the number of cases before the courts and the time necessary to resolve each case have multiplied.³ As a result, plaintiff and defense strategies now encompass previously uncommon practices.⁴ In particular, where parties to product litigation once rarely requested protective orders, the use of confidentiality provisions has become an accepted step in conducting complex litigation.⁵ In fact, defense bar literature suggests the use of protective

1. See A.L.I., *Preliminary Study of Complex Litigation*, March 31, 1987 at 4 [hereinafter A.L.I., *Preliminary Study*] (discussing factors relevant to identification of complex litigation). The American Law Institute study characterizes complex litigation by reference to the nature of the claim or procedural aspects. *Id.* The study cites mass tort, antitrust, and patent claims as examples of claims typically characterized as complex. *Id.* Procedural aspects of complex litigation include multiple parties and class or derivative actions. *Id.* Similarly, the American College of Trial Lawyers noted that complex litigation may arise in a variety of contexts, including but not limited to antitrust cases, multidistrict litigation, class actions, common disaster cases, securities cases, civil or criminal cases with unusual multiplicity or complexity of issues and cases with a large number of parties. Recommendations of the American College of Trial Lawyers on Major Issues Affecting Complex Litigation, 90 F.R.D. 207, 211 (1981). The relevant factors for determining whether a case is complex include the type of action and the nature of discovery requested. *Id.* However, a formally accepted definition of complex litigation does not exist. A.L.I., *Preliminary Study, supra*, at 4.

2. See F. HARE, J. GILBERT & W. REMINE, CONFIDENTIALITY ORDERS § 2.1, at 7 (1988) (noting major increases in filings, days required for trial and cost); Campbell, *The Protective Order in Products Liability Litigation: Safeguard or Misnomer?*, 31 B.C.L. REV. 771, 772 (1990) (noting explosion of complex products liability and mass tort litigation); SENATE COMM. ON COMMERCE, SCIENCES, AND TRANSPORTATION, PRODUCT LIABILITY REFORM ACT S. 1400, S. Rep. No. 356, 101st Cong., 2d Sess. 2-5 (noting massive increases in product liability litigation causing inefficiency and increased cost); U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 184 (110th ed. 1990) (noting increase of personal injury product liability cases pending from 9,118 in 1980 to 32,617 in 1988).

3. See F. HARE, J. GILBERT & W. REMINE, *supra* note 2, § 2.1, at 7 (noting increases in number of cases and time required to resolve cases).

4. See Walsh & Weiser, *Public Courts, Private Justice* (pt. 1), Wash. Post, Oct. 23, 1988, at A1 (noting that use of protective orders was relatively uncommon beyond past 15 years).

5. See *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 889 (E.D. Pa. 1981) (noting frequent use of protective orders); *Ericson v. Ford Motor Co.*, 107 F.R.D. 92, 94 (E.D. Ark. 1985) (noting attorneys' propensity to seek protective order as matter of course); Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1, 1 (1983) (noting that protective orders have become accepted part of complex litigation); Note, *Sealed v. Sealed: A Public Court System Going Secretly Private*, 6 J.L. & POL. 381, 382 (1990) [hereinafter Note, *Sealed v. Sealed*] (noting trend towards increasing secrecy in complex litigation); Walsh & Weiser, *supra* note 4, at A1 (noting that broad use of protective orders in complex product litigation has arisen only in last 15 years).

Protective orders constraining the use of discovery materials, one form of confidentiality orders, should be distinguished from sealing orders that close the entire judicial record. See

orders as part of the routine of complex litigation.⁶ Along with the increasingly frequent use of protective orders, courts and commentators have concentrated on new restrictions on court discretion to grant protective orders.⁷

Generally, the discovery rules impose no confidentiality requirements on any party.⁸ In many cases, however, a protective order modifies the general rule of unrestrained discovery by limiting counsel's use of discovered information.⁹ Thus, discovery procedures use protective orders to protect the individual parties from possible adverse consequences of unrestricted disclosure, though the procedures also promote full disclosure in an effort to balance the public interest¹⁰ with the private interest.¹¹ In the federal system, for example, Federal Rule of Civil Procedure 26 (Rule 26) exem-

K. Thomas, Confidentiality Orders and Sealing Orders: Legislative Options, *PROTECTIVE & SECRECY ORDERS* 363 (distinguishing between confidentiality order, which relates to discovery, and sealing order which relates to court records and proceedings); Note, *Sealed v. Sealed*, *supra*, at 383 (characterizing three types of confidentiality orders: protective orders for discovery, judicial sealing orders for entire record, and confidential settlements). Although protective orders and sealing orders are closely related, sealing orders involve a much broader scope in terms of information involved and potential harms to competing interests, and analysis should separate the two. See *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982) (noting different standards for discovery protective orders than for sealing orders), *cert. denied*, 460 U.S. 1051 (1983); K. Thomas, *supra*, at 368 (noting relatively narrow range of information protected by Rule 26(c) as compared to an equitable sealing order); Note, *Sealed v. Sealed*, *supra*, at 392-93 (noting public's relatively stronger common-law right of access in context of sealing order than in context of discovery protective order); Note, *Sealed Out-of-Court Settlements: When Does the Public Have a Right to Know?*, 66 *NOTRE DAME L. REV.* 117, 150 (1990) (noting lower standard for discovery protective order than for sealing order).

6. See Kearney & Tracy, *Preventing Non-Party Access to Discovery Materials in Products Liability Actions: A Defendant's Primer*, 1987 *DEF. RES. INST. MONOGRAPH* 40-41 (recommending that counsel seek protective order in every complex case, even where counsel can make no special claim of confidentiality).

7. See *infra* notes 221-275 and accompanying text (discussing new restrictions on protective orders in Texas, Florida, Virginia, and Congress); see also Wash. Post, *Public Courts, Private Justice* (pts. 1-4), Oct. 23-26, 1988 at A1 (discussing examples of court secrecy in civil lawsuits).

8. See *Waelde v. Merck, Sharp & Dohme*, 94 F.R.D. 27, 28 (E.D. Mich. 1981) (noting general rule that discovery is conducted in public absent compelling reasons to deny access); F. HARE, J. GILBERT & W. REMINE, *supra* note 2, § 6.1, at 114 (noting that secrecy in discovery is exception).

9. See Bishop & Stiles, *Protecting Confidential & Privileged Information*, 2 *J. CIV. LITIGATION* 163, 164-65 (1990) (discussing use of protective orders to prevent plaintiff's dissemination of discovery information); *supra* note 5 and accompanying text (noting pervasive use of protective orders).

10. See *infra* notes 176-229 and accompanying text (discussing public interest in protective orders in terms of safety, settlement, and access).

11. See *Parsons v. General Motors Corp.*, 85 F.R.D. 724, 726 (N.D. Ga. 1980) (noting that discovery is generally open but courts may restrict disclosure to protect parties); Note, *First Amendment Interests in Trade Secrets, Private Materials, and Confidential Information: The Use of Protective Orders in Defamation Litigation*, 69 *IOWA L. REV.* 1011, 1011 (1984) [hereinafter Note, *First Amendment Interests*] (noting that purpose of protective orders is to minimize effects on parties while promoting full disclosure); *infra* notes 39-164 and accompanying text (discussing plaintiff and defendant interests in protective orders).

plifies this balancing system.¹² While Rule 26(b) adopts a broad scope that discourages adversarial discovery practices,¹³ Rule 26(c) recognizes the need to prevent discovery from causing embarrassment or prejudice to the parties.¹⁴ Protective orders therefore serve as an indispensable procedural device that represents the interests of the party from whom discovery is sought.¹⁵ Thus, the general discovery rule represents the plaintiff's interest while the protective order statute or rule represents the defendant manufacturer's interest.¹⁶

In federal courts, Rule 26(c)¹⁷ governs the application of protective orders in civil litigation.¹⁸ The replication of the Federal Rules by many

12. See *infra* notes 13-15 and accompanying text (discussing balance attempted within Rule 26 between public and private interests).

13. See FED. R. CIV. P. 26(b) (promoting broad scope for discovery); 8 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 2007, at 37-40 (1970) (noting Rule 26(b)'s unrestricted access to information in discovery).

14. See FED. R. CIV. P. 26(c) (allowing court to restrict discovery process to prevent annoyance, embarrassment, oppression, or undue burden or expense); *Hickman v. Taylor*, 329 U.S. 495, 507 (1947) (recognizing policy of full disclosure between parties in discovery); *Campbell*, *supra* note 2, at 777-78 (recognizing need for full disclosure and potential for abuse arising from policy).

15. See 8 C. WRIGHT & A. MILLER, *supra* note 13, § 2036, at 267 (recognizing adoption of Rule 26(c) as safeguard for parties and witnesses from whom discovery is sought); Note, *Protective Orders: Sword and Shield in the War of Discovery*, 12 AM. J. TRIAL ADVOC. 483, 486 (1989) [hereinafter Note, *Sword & Shield*] (noting that Rule 26(c) is the primary device that limits otherwise unlimited discovery); see also Recommendations of the American College of Trial Lawyers on Major Issues Affecting Complex Litigation, 90 F.R.D. 207 (1981) (recognizing Rule 26(c) as important safeguard against discovery abuses).

16. See *Campbell*, *supra* note 2, at 777-78 (noting need to use Rule 26(c) to balance plaintiff's need for full disclosure and defendant's need to protect privacy rights); see also Pope, Quinlan & Duston, *Protecting A Client's Secret Data*, Nat'l L.J., July 8, 1991, at 15 (noting that courts must balance need to protect trade secrets against discovery needs of each party); *infra* notes 41-169 and accompanying text (discussing plaintiff and defendant competing interests).

17. Rule 26(c) provides in pertinent part:

Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

FED. R. CIV. P. 26(c).

18. *Id.* Current Rule 26(c) was adopted in the 1970 amendments to the Federal Rules of Civil Procedure. FED. R. CIV. P. 26(c) advisory committee's notes. As part of the 1970

states, signifying a widespread acceptance by other jurisdictions, has made Rule 26(c) the model for most protective order statutes and rules.¹⁹ Even when states have applied their own statutes or rules, the courts have looked to examples of Rule 26(c) application in federal courts for guidance in determining whether to grant a protective order.²⁰ Moreover, the similar policies behind the federal rule often guide court interpretations of state protective order provisions.²¹ Principles relevant to discussion of 26(c), therefore, apply equally to a general discussion of all protective order statutes.²²

Generally, Rule 26(c) allows a court to restrict the dissemination of discovered material after the moving party has shown good cause.²³ Courts

amendments, the protective order provisions of Rules 30(b) were transferred to Rule 26(c) to make Rule 26(c) applicable to discovery generally. FED. R. CIV. P. 26-37, advisory committee 's explanatory statement concerning 1970 amendments of the discovery rules; 8 C. WRIGHT & A. MILLER, *supra* note 13, § 2035, at 261.

19. See F. JAMES & G. HAZARD, CIVIL PROCEDURE § 5.2, at 230 (1985) (noting that most states have adopted discovery provisions modeled after the federal rules); Note, *Sword & Shield*, *supra* note 15, at 485 (same).

Several states have adopted protective order provisions that are similar to Rule 26(c). See e.g., ALA. R. CIV. P. 26(c); ALASKA R. CIV. P. 30(b); ARIZ. R. CIV. P. 26(c); ARK. R. CIV. P. 26(c); COLO. R. CIV. P. 26(c); CONN. SUP. CT. CIV. R. § 221; DEL. R. CIV. P. 26(c); FLA. R. 1.280; GA. CODE ANN. § 9-11-26(c); HAW. R. CIV. P. 26(c); IDAHO R. CIV. P. 26(c); ILL. SUP. CT. R. 201(c)(1); IND. R.P. 26(c); IOWA R. CIV. P. 123; KAN. R. CIV. P. 60-226(c); KY. R. CIV. P. 26.03; LA. CODE CIV. PROC. ANN. art. 1426; ME. R. CIV. P. 26(c); MD. CIR. CT. R. CIV. P. 2-403, DIST. CT. R. CIV. P. 3-421(c); MASS. R. CIV. P. 26(c); MICH. R. CIV. P. 2.302(c); MINN. R. CIV. P. 26.03; MISS. R. CIV. P. 26(d); MO. R. CIV. P. 56.01(c); MONT. R. CIV. P. 26(c); NEB. SUP. CT. DISCOVERY R. 26(c); NEV. R. CIV. P. 26(c); N.H. SUPER. CT. ADMIN. R. 35; N.C. GEN. STAT. § 1A-1, R. CIV. P. 26(c); N.M. DIST. CT. R. CIV. P. 1-026(C); N.D.R. CIV. P. 26(c); OHIO R. CIV. P. 26(C); OKLA. STAT. ANN. tit. 12, § 3226(C); OR. R. CIV. P. 36(C); PA. R. CIV. P. 4012; R.I. DIST. CT. CIV. R. 30(b); S.C.R. CIV. P. 26(c); S.D.R. CIV. P. 15-6-26(c); TENN. R. CIV. P. 26.03; UTAH R. CIV. P. 26(c); VT. R. CIV. P. 26(c); VA. R. SUP. CT. 4:1(c); WASH. R. SUPER. CT. 26(c); W. VA. R. CIV. P. 26(c); Wis. STAT. § 804.01. Several states, however, have adopted protective order provisions that are not similar to Rule 26(c). CAL. CIV. PROC. CODE §§ 2019(b), 2025(i), 2030(e), 2031(e), 2032(g), 2033(e), 2034(e) (substantively similar but more detailed than Rule 26(c)); N.Y. CIV. PRAC. L. & R. § 3103 (Consol. 1970); TEX. R. CIV. P. 166b(5) & 76a; VA. CODE ANN. § 8.01-420.01 (affecting Virginia rule cited above).

20. See *Garcia v. Peeples*, 734 S.W.2d 343, 345 (Tex. 1987) (using federal interpretations of Rule 26(c) to interpret the Texas protective order statute); *Madison v. Travelers Ins. Co.*, 308 So. 2d 784, 786 (La. 1975) (looking to federal interpretations of Rule 26(c) to guide interpretation of La. Code Civ. Proc. 1452); 23 AM. JUR. 2D *Depositions and Discovery* § 84 (1983) (noting that courts interpreting state protective order provisions look to federal courts for guidance).

21. See 23 AM. JUR. 2D *Depositions & Discovery* § 84 (1983) (recognizing similar policies behind state and federal rules).

22. See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 29 (1986) (applying principles of federal rules to state protective order provision); *Garcia*, 734 S.W.2d at 345 (same); F. HARE, J. GILBERT & W. REMINE, *supra* note 2, § 1.2, at 3 (noting that state protective order provisions are generally equivalent to Rule 26, allowing application of principles behind federal rule); F. JAMES & G. HAZARD, *supra* note 19, § 3.22, at 179 (same); Riley & Hoefler, *Protective Orders: Machiavelli Would Be Pleased*, TRIAL, November 1984, at 31 (same).

23. FED. R. CIV. P. 26(c).

have defined good cause to require that the moving party demonstrate a clearly defined and very serious injury.²⁴ Further, the burden of persuasion as to good cause rests with the party seeking the protective order.²⁵ To carry the burden of persuasion, the moving party must show a particularized harm that would arise from unrestricted use of the specific documents.²⁶ The harm of unrestricted disclosure must be significant and may not be substantiated by conclusory statements.²⁷ After finding good cause, the court must then evaluate each of the countervailing concerns to determine whether the court should use the court's discretion to grant a protective order.²⁸

Because of changes in protective order policy in various legislatures and courts, the principles behind Rule 26(c) are no longer the exclusive focus of the protective order analysis.²⁹ Concern by legal observers that the good cause standard inadequately values plaintiff and public interests has prompted

24. See *Waelde v. Merck, Sharp & Dohme*, 94 F.R.D. 27, 28 (E.D. Mich. 1981) (requiring that moving party show that disclosure will work clearly defined and very serious injury in order to show good cause); *Citicorp v. Interbank Card Ass'n*, 478 F. Supp. 756, 765 (S.D.N.Y. 1979) (recognizing heavy burden of showing that disclosure will work clearly defined and very serious injury).

25. See *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986) (noting that party seeking order has burden of persuasion). Conversely, the party resisting an umbrella protective order bears the burden of challenging the order regarding specific documents. See *Campbell*, *supra* note 2, at 786 (describing umbrella order procedure). With umbrella protective orders, however, the protected party retains the burden of showing good cause as to the information once challenged. *Id.*

26. See *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 7 (1st Cir. 1986) (requiring particular factual demonstration of potential harm); *In re Halkin*, 598 F.2d 176, 193 (D.C. Cir. 1979) (requiring specific showing that unlimited dissemination would pose concrete threat to defendant's interests); *General Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1212 (8th Cir. 1973) (requiring "particular and specific demonstration of fact"), *cert. denied*, 414 U.S. 1162 (1974); 8 C. WRIGHT & A. MILLER, *supra* note 13, § 2035, at 264-65 (noting requirement of particular and specific demonstration of fact); Note, *Sword & Shield*, *supra* note 15, at 493 (same).

27. See *Anderson*, 805 F.2d at 7 (excluding conclusory statements from finding of good cause); *Cipollone*, 785 F.2d at 1121 (holding broad, unsubstantiated allegations insufficient to show good cause); 8 C. WRIGHT & A. MILLER, *supra* note 13, § 2035, at 265 (distinguishing stereotyped and conclusory statements as insufficient for good cause).

28. See *United States v. Hooker Chems. & Plastics Corp.*, 90 F.R.D. 421, 425 (W.D.N.Y. 1981) (holding that once good cause has been shown, court should consider countervailing considerations); Note, *Protective Orders and the Use of Discovery Materials Following Seattle Times*, 71 MINN. L. REV. 171, 192 (1986) (noting need for balancing test involved in good cause determination). Good cause involves more than just a balancing of the interests: the courts must consider the countervailing interests only after finding a particularized injury. See *Hooker Chems.*, 90 F.R.D. at 425 n.4 (arguing that merely a balancing test for good cause could not ensure broad and liberal treatment for discovery); F. HARE, J. GILBERT & W. REMINE, *supra* note 2, § 6.1, at 114 (arguing that good cause involves more than merely balancing of interests). A balancing of interests must occur when legislatures or courts draft protective order provisions, however, to ensure that protective orders will protect each parties' interests. See *Herring, Sealing Court Records*, Tex. Law., May 21, 1990, at 24 (noting difficulty of balancing interests in drafting Texas Rule 76a).

29. See *infra* notes 230-288 (discussing focus of Texas, Virginia, and Florida provisions and Congressional proposal).

both new standards and more complex procedures.³⁰ As protective order provisions become more varied, evaluation of the competing interests of the parties and the judicial system that are shaping the legislative changes becomes essential to an understanding of protective orders. Thus, in addition to the practical requirements,³¹ Rule 26(c) is the starting point for understanding other types of protective order provisions. Protective order provisions now represent a variety of balances by which the courts are to evaluate the need for confidentiality in discovery.³² The correct balance must achieve the proper measure between each of three broad categories of interests: defendant, plaintiff, and public.³³

The value of the competing interests will depend upon which of two general types of disclosure the discussion centers: public dissemination or information sharing.³⁴ Public dissemination without the restriction of a protective order allows general public access to discovery information.³⁵ Information sharing, on the other hand, refers to the ability of attorneys operating under the restrictions of a protective order to give that information to other attorneys involved in similar litigation.³⁶ Three degrees of disclosure therefore exist for purposes of protective order analysis.³⁷ First, no protective order may exist, meaning that no restrictions on disclosure exist.³⁸ Second, a protective order may allow information sharing only with attorneys

30. See *id.* (discussing new Texas, Virginia, and Florida protective order policies and procedures and Congressional proposal).

31. See *supra* note 24-28 and accompanying text (discussing practical requirements of Rule 26(c)).

32. Compare FED. R. CIV. P. 26(c) (requiring good cause) with TEX. R. CIV. P. 76a (requiring specific, serious and substantial interest to overcome presumption of openness and risk to public) and VA. CODE ANN. § 8.01-420.01 (Supp. 1990) (limiting scope of protective orders issued for good cause).

33. See *infra* notes 41-46, 102-114, 170-175 (discussing generally defendant, plaintiff, and public interests).

34. See *infra* notes 35-40 and accompanying text (discussing public dissemination versus information sharing). As an example of the change in value depending on the mechanism employed, the risk of losing a trade secret will be far less when the manufacturer discloses the material pursuant to a rule allowing information sharing only among plaintiffs and not allowing general public disclosure. See Note, *Mass Products Liability Litigation: A Proposal for Dissemination of Discovered Information Covered by a Protective Order*, 60 N.Y.U.L. REV. 1137, 1149-50 (1985) [hereinafter Note, *A Proposal*] (noting protection of defendant's interest in information through information sharing).

35. See generally Marcus, *supra* note 5, at 41-46 (discussing information sharing as alternative to public dissemination). Under information sharing, attorneys involved in similar litigation receive the information, while public dissemination allows the general public to receive the information. See *id.* at 41 (arguing that no basis exists for unrestrained public access, although basis may exist for access for collateral litigation); see also Campbell, *supra* note 2, at 774 (discussing adverse effects of uncontrolled dissemination to public).

36. See MANUAL FOR COMPLEX LITIGATION, SECOND § 21.431 (1985) (discussing advantages to allowing access to discovery information for parties in related litigation); Note, *A Proposal*, *supra* note 34, at 1137-38 (arguing that sharing of information among similarly situated plaintiffs can solve expense, delay and injustice in complex litigation).

37. See *infra* notes 38-40 and accompanying text (discussing three degrees of disclosure).

38. See *infra* note 35 and accompanying text (discussing public dissemination).

involved in similar litigation.³⁹ Finally, a protective order may create absolute restrictions on disclosure, meaning that a protective order allows no dissemination beyond the parties themselves.⁴⁰

Because of the defendant's personal and economic interest in the litigation, the defendant in products litigation has the strongest motive for highly restrictive protective orders.⁴¹ Discovery is inherently an invasionary procedure that additional disclosure exacerbates.⁴² In resisting discovery, defendants have asserted a right to privacy that would allow them to be free of the intrusive aspects of disclosed discovery.⁴³ The defendant manu-

39. See *id.* (discussing information sharing).

40. See *supra* note 8 and accompanying text (discussing general rule of unrestrained dissemination absent protective order).

41. See Campbell, *supra* note 2, at 773 (discussing defendant's interest in obtaining protective order). Despite the defendant's strong interest in obtaining a protective order, protective orders may protect anyone faced with a discovery request, including plaintiffs or third parties. See *id.* (noting possibility that other parties will seek protection from dissemination of discovery materials).

42. See *infra* note 43 and accompanying text (discussing discovery versus privacy interests).

43. See Note, *Court-Approved Confidentiality Orders: Why They Are Needed*, 57 DEFENSE COUNS. J. 89, 89 (1990) [hereinafter, Note, *Court-Approved Confidentiality Orders*] (stating that protective orders prevent invasion of privacy in discovery by public, press or adversaries); Hoeng, *Protective Confidentiality Orders*, N.Y.L.J., March 5, 1990, at 3 col. 1 (stating that protective orders alleviate statutorily allowed invasion of privacy in discovery); Ostrow, *Secrecy Accords in Product Liability Lawsuits Debated*, Los Angeles Times, April 26, 1990, at A16, col. 1 (stating that granting public access to discovery would disrupt constitutional privacy interests and judicial efficiency); Weiner, *Secret Settlements Prevent Discovery Abuse*, Manhattan Lawyer, April 1990, at 13 (noting that while plaintiff has a right to view defendant's files, the public does not). Thus, the process itself gives rise to a limited invasion of privacy.

Despite claims of privacy, a question exists as to whether a corporation may claim a legitimate right of privacy. See Anderson, *How to Use Protective Orders to Safeguard Confidential Information*, 32 PRAC. LAW. 23, 26 (1986) (noting that the laws of the particular jurisdiction will determine the extent of corporate privacy rights). The courts generally have held that corporations do not enjoy the constitutional right of privacy that individuals enjoy. See *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2925 (1989) (O'Connor, J., concurring in part, dissenting in part) (stating that corporation has no right of privacy); *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 34 (1986) (Rehnquist, J., dissenting) (stating that corporations have been denied Constitutional right of privacy); *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (holding that corporations have no equality with individuals in right of privacy); *Maysville Transit Co. v. Ort*, 296 Ky. 524, 177 S.W.2d 369 (Ct. App. 1944) (noting that right of privacy is designed to protect human beings, not business interests); *Dauer & Fittipaldi, Inc. v. Twenty First Century Communications, Inc.*, 349 N.Y. Supp. 2d 736 (App. Div. 1973) (holding that corporation has no legally protected right of privacy in New York); F. HARE, J. GILBERT & W. REMINE, *supra* note 2, § 7.9, at 199 (arguing that corporation has no right of privacy); Note, *Rule 26(c) Protective Orders and the First Amendment*, 80 COLUM. L. REV. 1645, 1663 (1980) (same). But see *Tavoulaareas v. Washington Post Co.*, 724 F.2d 1010, 1022 (D.C. Cir. 1984) (concluding that corporation has privacy interest in discovery materials not used at trial that is essentially equal to individual's privacy interest), *vacated on reh'g en banc*, 737 F.2d 1170 (D.C. Cir. 1984); Note, *Protective Orders and Commercial Information—Is Good Cause Good Enough?*, 59 ST. JOHN'S L. REV. 103, 109-13 (1984) (noting that courts have begun to recognize Constitutional

facturer has two reasons to support highly restrictive protective orders.⁴⁴ First, because the defendant has a clear property interest in trade secrets or confidential information, the defendant has a legitimate need to protect that information from public disclosure.⁴⁵ Second, the defendant gains strategic benefits from protective orders.⁴⁶

Based on the need to protect trade secrets or other confidential information, defendants usually invoke Rule 26(c)(7).⁴⁷ To take advantage of Rule 26(c)(7), the defendant must meet two requirements.⁴⁸ First, the moving party must show that the information sought is a trade secret or is confidential information within the scope of Rule 26(c)(7).⁴⁹ Second, the moving

corporate right of privacy).

A corporate defendant that asserts a violation of corporate privacy does so on the basis of a view of discovery as a matter of "legislative grace." See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984) (noting that parties obtain information through discovery as a matter of legislative grace); Hoenig, *supra*, at 3 (noting that privacy interests are included in broad purpose of Rule 26(c) (citing *Seattle Times*); Bishop & Stiles, *supra* note 9, at 169 (noting that information obtained through discovery is a matter of legislative grace, making a protective order only a limited infringement on free speech).

44. See *infra* notes 45-46 and accompanying text (noting information protection and strategic advantages of protective orders).

45. See *United States v. IBM Corp.*, 82 F.R.D. 183, 184 (S.D.N.Y. 1979) (stating that company has right to protection of confidential information); Note, *Anti-Dissemination Orders in Product Liability Suits*, 5 AM. J. TRIAL ADVOC. 507, 510 (1982) [hereinafter, Note, *Anti-Dissemination Orders*] (noting that existence of trade secret gives rise to property right that disclosure destroys); Note, *Court-Approved Confidentiality Orders*, *supra* note 43, at 91 (noting defendant's property interest in trade secret). By definition, disclosure of a trade secret would cause competitive disadvantage to the party disclosing. *Id.* Further, the specific exception in Rule 26(c) for trade secrets or other confidential commercial information demonstrates the legitimacy of the defendant's claim of proprietary rights. See FED. R. CIV. P. 26(c)(7) (allowing courts to issue protective orders for trade secrets or confidential commercial information). However, the relative rarity of a trade secret that satisfies the Rule 26 standard makes the defendant's interest in protective orders a less viable argument in favor of highly restrictive confidentiality provisions. See *Legal Times*, Jan. 8, 1990, at 28 (noting that the risk of exposing actual trade secrets in litigation is relatively rare); *infra* note 51 and accompanying text (noting difficulty of meeting court-imposed criteria for trade secret protection); see also UNIF. TRADE SECRETS ACT (UTSA) § 1(4), 14 U.L.A. 437, 438 (1985) (defining trade secret). The UTSA omits the Restatement of Torts § 757 requirement that the defendant use the trade secret continuously in business, arguably broadening the criteria for evaluating trade secrets. See Hoenig, *supra* note 43, at 3 (noting broader UTSA definition).

46. See *infra* notes 82-88 and accompanying text (discussing strategic benefits of protective orders).

47. See 8 C. WRIGHT & A. MILLER, *supra* note 13, § 2035, at 261 (noting that subsection (c)(7) is provision that products liability defendants usually employ); Note, *A Proposal*, *supra* note 34, at 1145 (same). Until 1970, Rule 30(b) had allowed protective orders for secret processes, developments, or research. 8 C. WRIGHT & A. MILLER, *supra* note 13, § 2043, at 300. Confidential information refers to material encompassed by the Rule 26(c)(7) "other confidential research, development, or commercial information" language. FED. R. CIV. P. 26(c)(7).

48. See *infra* notes 49-50 and accompanying text (outlining Rule 26(c)(7) requirements).

49. FED. R. CIV. P. 26(c). See F. HARE, J. GILBERT & W. REMINE, *supra* note 2, § 6.1, at 116, § 7.8, at 180 (describing defendant's burden as showing that documents are trade secrets); 8 C. WRIGHT & A. MILLER, *supra* note 13, § 2043, at 301 (noting that party resisting disclosure must show that information is within scope of Rule 26(c)).

party must show that disclosure would cause harm to the party.⁵⁰

Despite the Rule 26(c)(7) provisions, courts have defined "trade secret" so narrowly that courts rarely issue protective orders on the basis of a trade secret.⁵¹ The Restatement of Torts (Restatement) section 757 (section 757) provides the narrow definition of trade secret that most courts have applied.⁵² The Restatement requires that the information provide an advantage over competitors by virtue of the information's secrecy.⁵³ To determine whether information rises to the level of a trade secret, section 757 cites six factors as determinative of whether a trade secret exists: the extent to which the information is known outside the business; the extent to which the information is known within the business; the measures taken to insure secrecy; the value of the information; the amount of effort or money used to develop the information; and the difficulty that others would have in properly acquiring or duplicating the information.⁵⁴

50. See *Waelde v. Merck, Sharp & Dohme*, 94 F.R.D. 27, 28 (E.D. Mich. 1981) (requiring specific examples of competitive harm); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 889 (E.D. Pa. 1981) (requiring cognizable harm sufficient to warrant a protective order); *F. HARE, J. GILBERT & W. REMINE*, *supra* note 2, § 6.1, at 116, § 7.8, at 180 (describing defendant's burden as showing that documents are trade secrets and that disclosure would cause harm); *8 C. WRIGHT & A. MILLER*, *supra* note 13, § 2043, at 301 (requiring showing of harm by disclosure of information).

51. See *Campbell*, *supra* note 2, at 780 (noting difficulty of designating information as trade secret pursuant to Rule 26(c)(7)); Note, *A Proposal*, *supra* note 34, at 1145-46 (same).

52. See *Waelde*, 94 F.R.D. at 27 (stating that courts have adopted § 757 of the Restatement of Torts as the criteria to use in evaluating trade secrets); *Reliance Ins. Co. v. Barron's*, 428 F. Supp. 200, 202-203 (S.D.N.Y. 1977) (same); see also *Campbell*, *supra* note 2, at 779 (outlining Restatement criteria).

53. RESTATEMENT OF TORTS § 757 comment b (1939). The Restatement defines trade secret as:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. . . . A trade secret is a process or device for continuous use in the operation of the business.

RESTATEMENT OF TORTS § 757 comment b. Section 757 was not included in the second Restatement because the issue of trade secrets was placed within the area of unfair competition and trade regulation. RESTATEMENT (SECOND) OF TORTS 1-2 (1977). Nevertheless, courts continue to cite the 1939 version as the controlling definition for protective order purposes. See *United States v. IBM Corp.*, 67 F.R.D. 40, 46 n.9 (S.D.N.Y. 1975) (citing Restatement of Torts § 757).

Alternatively, the Uniform Trade Secrets Act defines a trade secret as: information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

- (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and
- (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

UTSA § 1(4), 14 U.L.A. at 438.

54. RESTATEMENT OF TORTS § 757 comment b. See *Waelde* 94 F.R.D. at 28-29 (employing Restatement factors); *Reliance Ins. Co. v. Barron's*, 428 F. Supp. 200, 202-03 (S.D.N.Y. 1977) (applying Restatement § 757 factors); *United States v. IBM Corp.*, 67 F.R.D. at 46 (same).

The leading case in the area of trade secret protection is *United States v. IBM Corp.*,⁵⁵ an antitrust action in which a New York district court issued a protective order allowing deposed witnesses to designate certain parts of the deposition as confidential within the meaning of Rule 26(c)(7).⁵⁶ The witnesses later requested continuation of the protective order.⁵⁷ In applying the section 757 factors, the court found that one of the parties seeking continuation of the order, the Burroughs Corporation, had not shown that the information had been kept secret within the company and had not demonstrated that any measures had been taken to insure secrecy.⁵⁸ Further, the court found that the data was no longer current and questioned as too speculative the allegations of value.⁵⁹ Additionally, the court denied continued protection to a second party, the Honeywell Corporation, because the data was not current and so disclosure would have little impact on the corporation's current competitive ability.⁶⁰ The court relied heavily on the currency of information, finding that information three to fifteen years old presents only speculative issues of competitive value.⁶¹ Thus, the value of

55. 67 F.R.D. 40 (S.D.N.Y. 1975).

56. *United States v. IBM Corp.*, 67 F.R.D. 40, 42 (S.D.N.Y. 1975).

Waelde v. Merck, Sharp & Dohme, 94 F.R.D. 27 (E.D. Mich. 1981) is a leading case applying section 757 to the products liability context. In *Waelde*, the defendant drug company moved for a Rule 26(c)(7) protective order to prevent disclosure of product information contained in a Food and Drug Administration New Drug Application file. *Id.* at 17-18. Citing *IBM*, the Michigan district court applied the section 757 standards. *Id.* at 28-29. Because the defendant had asserted merely that the file contained trade secrets without making particularized showings that the trade secrets did exist, the court found that the defendant had not met the burdens of Rule 26(c)(7) and denied the motion. *Id.* at 29-30. The court also noted that the plaintiff was not a competitor. *Id.* If the plaintiff had been a competitor, the likelihood of competitive injury would have increased and the court would have been more likely to grant the protective order. *Id.* *Waelde* thus demonstrates the importance of the identity of the party seeking disclosure and the role which that party plays in proving competitive injury. *Id.* See *American Standard, Inc. v. Pfizer, Inc.*, 828 F.2d 734 (Fed. Cir. 1987) (stating that courts generally find disclosure to competitor more harmful than disclosure to noncompetitor); *Parsons v. General Motors Corp.*, 85 F.R.D. 724, 726 n.1 (N.D. Ga. 1980) (rejecting justification for order on basis of plaintiff's intent to collaborate among other litigants, as long as discovery is not sought solely for that purpose); *Johnson Foils, Inc. v. Huyck Corp.*, 61 F.R.D. 405, 410 (N.D.N.Y. 1973) (requiring evidence of bad faith on part of plaintiff before a court will limit use of discovery); F. HARE, J. GILBERT & W. REMINE, *supra* note 2, § 7.8, at 175 (noting importance of whether party seeking information is competitor); *Campbell*, *supra* note 2, at 780 (noting that courts usually find that disclosure to competitor is more harmful than disclosure to noncompetitor).

57. *IBM*, 67 F.R.D. at 42-43.

58. *Id.* at 47. The court also rejected continued protection for another witness, Dr. Sidney Fernbach, because his services were commercial in character and he had not represented those services as being provided on a confidential basis to the company. *Id.*

59. *Id.* at 47-48.

60. *Id.* at 48-49.

61. *Id.* at 47-48. Courts have held that the age of the information involved is significant in determining whether to issue a protective order. See *Deford v. Schmid Prods. Co.*, 120 F.R.D. 648, 653-54 (D. Md. 1987) (holding that staleness of information must be overcome by specific showing of present harm); *Rosenblatt v. Northwest Airlines, Inc.*, 54 F.R.D. 21,

the information, the fourth Restatement factor, usually will be of paramount concern in a court's application of Rule 26(c)(7), particularly in instances where the staleness of the information affects the value.⁶²

Because of the difficulty of characterizing information as a trade secret, parties requesting protective orders often rely on the confidential information provision of Rule 26(c)(7).⁶³ Unlike the strict test for trade secret claims, the confidential information exception does not require a stringent application of a section 757-type criteria.⁶⁴ In fact, courts often define confidential information in terms of the harm alone, without reference to the nature of the discovered information.⁶⁵ However, the confidential information standard of Rule 26(c)(7) requires both a showing that the information is

23 (S.D.N.Y. 1971) (finding that year-old information did not warrant Rule 26(c)(7) protection where information could not harm defendant competitively); *United States v. Lever Bros. Co.*, 193 F. Supp. 254, 257 (S.D.N.Y. 1961) (denying protection for company financial information three to eight years old), *cert. denied*, 371 U.S. 932 (1962).

62. See *Campbell*, *supra* note 2, at 781-82 (noting importance of staleness of information in proving harm of disclosure); *supra* note 61 (noting examples of cases in which staleness as affecting value of information was major concern).

63. See *Campbell*, *supra* note 2, at 780-81 (noting less restrictive standard for confidential information than for trade secrets under Rule 26(c)(7)); Note, *A Proposal*, *supra* note 34, at 1145-46 (noting that defendants requesting protective order usually employ confidential information provision of Rule 26(c)(7)).

64. See *Campbell*, *supra* note 2, at 780-81 (noting that information that does not rise to the level of trade secret may be entitled to protection as confidential information). Some confusion exists as to the test that courts should apply to the confidential information provision of Rule 26(c)(7). Compare *Parsons v. General Motors Corp.*, 85 F.R.D. 724, 725 (N.D. Ga. 1980) (setting up new criteria for confidential information when defendant had admitted that information was not trade secret) and *Campbell*, *supra* note 2, at 780-81 (differentiating between test for trade secrets and test for confidential information) with *American Standard Inc. v. Pfizer Inc.*, 828 F.2d 734, 740 (Fed. Cir. 1987) (using the terms "trade secret" and "confidential information" interchangeably) and *F. HARE, J. GILBERT & W. REMINE*, *supra* note 2, § 7.8, at 177-80 (arguing that trade secret and confidential information should not be divided by separate tests) and Note, *A Proposal*, *supra* note 34, at 1144-45 (differentiating between trade secrets and confidential information but applying same test). While both trade secrets and confidential information require the same showing of competitive harm resulting from disclosure, the courts sometimes differentiate between the nature of the information involved. See *Parsons*, 85 F.R.D. at 725 (analyzing validity of claim even after party admitted that no trade secret existed). Distinguishing characteristics are, however, difficult to identify because both types of information are characterized by similar sets of criteria. See *Parsons*, 85 F.R.D. at 726 (identifying confidential information on basis of five factors); RESTATEMENT OF TORTS § 757 (identifying trade secrets on basis of six factors).

65. See, e.g., *Reliance Ins. Co. v. Barron's*, 428 F. Supp. 200, 202-03 (S.D.N.Y. 1977) (defining confidential information as that which would cause clearly defined, serious injury to defendant's business if disclosed); *United States v. IBM Corp.*, 67 F.R.D. 40, 46 (S.D.N.Y. 1975) (same); *Bishop & Stiles*, *supra* note 9, at 169 (defining confidential research and/or development or commercial information as information that, if disclosed, will cause a clearly defined and very serious injury); *Campbell*, *supra* note 2, at 781; Note, *A Proposal*, *supra* note 34, at 1146-47 (stating that there is no test for determining whether information is confidential information); Note, *Court Approved Confidentiality Orders*, *supra* note 43, at 91 (defining confidential information as information that, if disclosed, would cause clearly defined and very serious injury to party's business).

confidential and that a particular harm will result from disclosure.⁶⁶

The seminal case on the confidential information standard is *Parsons v. General Motors Corp.*⁶⁷ In *Parsons* the plaintiff had received burns when another car struck her automobile from behind, causing the fuel tank to ignite.⁶⁸ The plaintiff, suing for alleged defects in the placement of the fuel tank, requested discovery of crash tests and design information.⁶⁹ Although admitting that the information was not a trade secret, the defendant claimed that the requested material was confidential within the meaning of Rule 26(c)(7).⁷⁰ The Georgia district court denied the motion for a protective order.⁷¹ The court defined good cause for purposes of the confidential information provision of Rule 26(c)(7) to require the defendant to show both that the material was confidential and that disclosure would cause competitive harm.⁷² In finding that the material was not confidential, the court found five factors significant: no claim had been made as to the number of people to whom the material already had been disclosed; no measures to insure secrecy had been alleged; no claim had been made as to the confidentiality of aged information; some information would have to be disclosed to the government; and no claim had been made as to which information was already part of the public record.⁷³ Thus, the defendant had not met the threshold requirements for confidentiality pursuant to Rule 26(c)(7).⁷⁴ In ruling on the harm requirement, the court held that good cause required specific examples where the defendant had alleged only vague and conclusory injuries.⁷⁵

The *Parsons* court noted that once the party shows that a trade secret or confidential information exists, the party requesting a protective order must still show the harm that disclosure would cause.⁷⁶ The courts require a showing that disclosure of the information will work a clearly defined and very serious competitive injury to the defendant.⁷⁷ Additionally, to

66. See *infra* notes 72-75 and accompanying text (noting *Parsons* court's requirement that defendant prove both confidential nature of information and competitive harm to be caused by disclosure).

67. 85 F.R.D. 724 (N.D. Ga. 1980).

68. *Parsons v. General Motors Corp.*, 85 F.R.D. 724 (N.D. Ga. 1980).

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 726.

74. *Id.*

75. *Id.*

76. *Id.* See *American Standard Inc. v. Pfizer Inc.*, 828 F.2d 734, 740 (Fed. Cir. 1987) (requiring party seeking protective order to show that disclosure might be harmful after showing that information is confidential).

77. See *In re Agent Orange Prod. Liab. Litig.*, 104 F.R.D. 559 (E.D.N.Y. 1985) (applying clearly defined and very serious injury test); *Parsons*, 85 F.R.D. at 726 (requiring showing that disclosure will cause competitive disadvantage); *Reliance Ins. Co. v. Barron's*, 428 F. Supp. 200, 203 (S.D.N.Y. 1977) (applying clearly defined and serious injury to business standard); *United States v. IBM Corp.*, 67 F.R.D. 40 (S.D.N.Y. 1975) (applying very serious

show good cause the defendant must provide specific examples of potential harm to business.⁷⁸ Further, conclusory statements or vague allegations are insufficient.⁷⁹ Likewise, affidavits by the attorney alleging competitive harm are insufficient to show a definite injury.⁸⁰ Further, to alert the public to possible safety concerns, the court may allow dissemination to the public even if the information does constitute a trade secret.⁸¹

In addition to the legitimate, judicially recognized objectives of protecting discovery information from disclosure that could cause competitive harm, defendant manufacturers also use protective orders to impede collateral lawsuits.⁸² Protective orders that restrict dissemination to all but the parties of the immediate lawsuit have several strategic advantages for the defendant.⁸³ Initially, protective orders serve the defendant's interests by isolating each plaintiff and precluding consultation or collaboration among similarly situated plaintiffs.⁸⁴ The order may increase greatly the expense of discovery by forcing each plaintiff to conduct formal, duplicative, and

injury standard). *But see Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 891 n.43 (E.D. Penn. 1981) (questioning the higher standard used in *IBM*).

78. *See Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 891 (E.D. Pa. 1981) (holding that party must show specific instances where disclosure will cause competitive disadvantage); *United States v. Hooker Chems. & Plastics Corp.*, 90 F.R.D. 421 (W.D.N.Y. 1981) (denying motion for order because defendant cited no specific instances where disclosure would cause competitive disadvantage); *Parsons*, 85 F.R.D. at 726 (same); *Rosenblatt v. Northwest Airlines, Inc.*, 54 F.R.D. 21 (S.D.N.Y. 1971) (requiring showing of particularity that confidential information will be revealed). Allegations that the plaintiff will share the information with collateral litigants are not sufficient to show good cause for a protective order. *See Hooker*, 90 F.R.D. at 426 (holding that sharing of discovery information with collateral litigants is within purposes of Federal Rules of Civil Procedure); *Parsons*, 85 F.R.D. at 726 n.1 (holding that possibility that plaintiff will share discovery information with other litigants does not constitute good cause); Note, *Anti-Dissemination Orders*, *supra* note 45, at 512 (noting that possibility of information sharing with other litigants is not good cause).

79. *See Zenith*, 529 F. Supp. at 891 (holding conclusory statements insufficient); *United States v. Hooker Chems. & Plastics Corp.*, 90 F.R.D. 421, 425 (W.D.N.Y. 1981) (same); *Parsons v. General Motors Corp.*, 85 F.R.D. 724, 726 (N.D. Ga. 1980) (same).

80. *See Zenith*, 529 F. Supp. at 891 (stating that hearsay allegations in counsel's brief or affidavit are insufficient); *Reliance Ins. Co. v. Barron's*, 428 F. Supp. 200, 203 (S.D.N.Y. 1977) (same). The *Reliance* court, however, considered hearsay allegations in affidavits after recognizing that the plaintiff could have produced non-hearsay affidavits given time. 428 F. Supp. at 203.

81. *See Hooker Chems.*, 90 F.R.D. at 424-45 (recognizing that countervailing interests may mandate denial of protective order despite existence of good cause).

82. *See F. HARE, J. GILBERT & W. REMINE, supra* note 2, § 7.6, at 169-72 (noting tactical advantages that defendants obtain by use of protective orders); Devine, *Litigation Groups Aid Plaintiffs*, 11 LEADER'S PROD. LIAB. 1, 6 (1985) (arguing that manufacturers use protective orders to isolate plaintiffs); Riley & Hoefer, *supra* note 22, at 32 (arguing that manufacturers use protective orders to inhibit cooperation between plaintiffs).

83. *See infra* notes 84-87 and accompanying text (discussing strategic advantages).

84. *See F. HARE, J. GILBERT & W. REMINE, supra* note 2, § 6.6, at 126 (noting isolation of plaintiffs through protective orders); Coben, *Protective Orders: Manufacturers Hide Behind Them*, TRIAL, August 1986, at 36 (same); *see also infra* notes 115-139 (discussing plaintiff's information sharing).

extensive discovery in each case.⁸⁵ In fact, plaintiffs' attorneys have asserted that the strategic interest is actually the primary objective of the defendant's motion for a protective order.⁸⁶ Empirically, manufacturers have attempted to limit the ability of the plaintiffs' attorneys to organize and share information through the use of protective orders.⁸⁷ Although impeding lawsuits by making the discovery process more difficult and expensive clearly is not a legitimate interest, defendants can obtain a strategic advantage by using protective orders to impede lawsuits.⁸⁸

In resisting discovery, defendant manufacturers often request a type of protective order called an "umbrella order."⁸⁹ Umbrella orders allow the disclosing party to designate large amounts of documents as confidential and then require the plaintiff to challenge the order for specific documents.⁹⁰ A court may issue an umbrella order upon a threshold showing of good

85. See Note, *A Proposal*, *supra* note 34, at 1151 (noting savings to plaintiffs who are permitted to share information); Corboy, *Masked and Muzzled, Litigants Tell No Evil: Is This Blind Justice?*, *Legal Times*, Jan. 8, 1990, at 29, col. 1 (same). In *Graham v. Wyeth Laboratories*, 118 F.R.D. 511 (D. Kan. 1988), involving birth defects from the DPT vaccine, discovery costs reached \$200,000. *Id.* The *Graham* court rejected a confidentiality order on the basis of judicial efficiency and the possibility of prohibitive costs to future plaintiffs. *Id.*

86. See T. KIELY, *PREPARING PRODUCTS LIABILITY CASES* 225 (1986) (arguing that corporate fear of information sharing is major factor in protective order requests); Hare & Gilbert, *Resisting Confidentiality Orders*, *TRIAL*, October 1990, at 50 (arguing that manufacturers seek protective orders to isolate plaintiff's counsel, not to protect trade secrets); Riley & Hoefler, *supra* note 22, at 32 (stating that defendant's purpose is to prevent coordination of plaintiff's efforts); Blum, *Protective Orders Under Attack*, *Nat'l L.J.*, May 8, 1989, at 3 (describing Association of Trial Lawyers of America resolution condemning protective orders when used to protect defendant from other litigation).

87. See *Cipollone v. Liggett Group, Inc.*, 113 F.R.D. 86, 90-93 (D.N.J. 1986) (rejecting defendant's claim that protective order was justified on basis of injury to be caused by use in collateral litigation), *aff'd*, 822 F.2d 335 (3d Cir.), *cert. denied*, 484 U.S. 976 (1987); M. DOMBROFF, *DISCOVERY* § 1.20, at 47-48 (1986) (noting use of protective orders as method to impede collateral litigation); T. KIELY, *supra* note 86, § 7.21, at 225 (same); Devine, *supra* note 82, at 6 (same); Riley & Hoefler, *supra* note 22, at 33 (arguing that manufacturer's motive in requesting protective order is to prevent other litigants' access to information).

As an alternative to a protective order, defendants may copyright certain documents. Fanning, *The Ultimate Paper Chase*, *FORBES*, May 2, 1988, at 108 (noting new defense strategy of copyrighting documents). Copyrighting discovery documents prevents copying and inhibits exchange among plaintiffs' attorneys even when information sharing is allowed. *Id.*

88. Thomas, *supra* note 2, at 363-64 (noting strategic purpose of protective orders when used to inhibit litigation and avoid government regulators).

89. See *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990) (noting that stipulated umbrella protective orders have become standard practice in complex cases); *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1111 (3d Cir. 1986) (approving of use of umbrella orders in complex litigation); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 889 (E.D. Pa. 1981) (noting virtual unanimity of use of protective orders by courts involved in complex litigation); Marcus, *supra*, note 5, at 9 (noting that stipulated umbrella orders have become standard practice).

90. See Campbell, *supra* note 2, at 786 (describing umbrella order procedure). Once the order is entered, the plaintiff may challenge the confidentiality of specific documents. *Id.* The defendant must demonstrate the validity of the order with regard to the challenged documents. *Id.*

cause and, therefore, potentially negate the requirements of particularized harm and of showing that the information is confidential.⁹¹ For example, in *Cipollone v. Liggett Group, Inc.*,⁹² cigarette smokers instituted a products liability action against several cigarette manufacturers, who requested an umbrella protective order.⁹³ The Third Circuit approved of the magistrate's umbrella order approach as an advantageous technique for cases with large-scale discovery.⁹⁴ The court reasoned that the burden of proving confidentiality remained with the moving party, although the burden of raising the issue with respect to specific documents would shift to the party resisting the protective order.⁹⁵

The umbrella order has several drawbacks, however, both to the plaintiff and to judicial efficiency generally.⁹⁶ First, an umbrella order merely defers the inquiry into specific documents until a later point in the litigation.⁹⁷

91. See F. HARE, J. GILBERT & W. REMINE, *supra* note 2, § 4.10, at 54 (noting negation of traditional burdens of party seeking protective order). As evidence of the negation of Rule 26(c)'s burdens, umbrella orders allow the parties to meet the confidential information requirement merely by stating that the information is confidential. See *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 875 (E.D. Pa. 1981) (defining confidential information for purposes of protective order as any information that is designated confidential by parties at time of disclosure).

92. 785 F.2d 1108 (3d Cir. 1986).

93. *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1111-12 (3d Cir. 1986). In *Cipollone*, the Third Circuit considered the validity of umbrella orders that would allow the moving party to designate a number of documents confidential upon a threshold showing of good cause. *Id.* at 1121-23. In two cases involving product suits against cigarette manufacturers, a federal magistrate issued a broad umbrella protective orders that the district court subsequently revised heavily. *Id.* at 1110. The magistrate's umbrella protective order would have allowed the defendant to designate any documents as confidential. *Id.* at 1112. The district court amended the order to require document-by-document inspection to determine confidentiality. *Id.* at 1115-16. The district court also amended the order by limiting the protective order to items designated confidential, allowing the plaintiff's counsel to use the material in successive litigation and eliminating the requirement to return or destroy the material. *Id.* at 1115. The revised orders allowed later public dissemination and use of the documents by plaintiff's counsel in other cases. *Id.* at 1110-11. On appeal of the order, the Third Circuit specifically approved of the use of umbrella orders, saying that although the moving party had the burden of justifying the confidentiality of every document, the district court could enter an order to deal with large-scale litigation. *Id.* at 1122-23.

94. *Id.* at 1122. The MANUAL FOR COMPLEX LITIGATION SECOND also approves of the umbrella order approach as an alternative to a costly and time-consuming document-by-document approach. See MANUAL FOR COMPLEX LITIGATION, SECOND § 21.431, at 51-54 (1986) (approving of umbrella protective orders); see also *Chambers Dev. Co. v. Browning-Ferris Indus.*, 104 F.R.D. 133, 135 (W.D. Pa. 1985) (approving of umbrella orders); *In re Agent Orange Prod. Liab. Litig.*, 96 F.R.D. 582, 583 (E.D.N.Y. 1983) (same); Campbell, *supra* note 2, at 785-88 (approving of umbrella orders as preventing delay and improving judicial efficiency).

95. *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1122-23 (3d Cir. 1986).

96. See *infra* notes 97-101 and accompanying text (discussing disadvantages of umbrella orders).

97. See F. HARE, J. GILBERT & W. REMINE, *supra* note 2, § 4.10, at 55 (noting umbrella order's tendency to postpone inquiry until later date). Because the court conducts no close scrutiny of the information until a challenge occurs, umbrella orders create a potential for

Second, the umbrella order, by shifting the burden of challenge to the plaintiff, may induce a court to place a greater burden than appropriate on the plaintiff when challenging the designation of specific documents.⁹⁸ Additionally, the plaintiff may wish to avoid incurring the court's disfavor with repeated challenges and, therefore, not make challenges that normally would have been appropriate.⁹⁹ Further, the umbrella order provides a monitoring advantage to the defendant, who is able to keep track of the plaintiff's preparation by examining the documents that the plaintiff is challenging.¹⁰⁰ Finally, umbrella orders exacerbate the disadvantages of protective orders generally by allowing courts to use a shortcut that elevates judicial efficiency to the level of an overriding interest.¹⁰¹

With judicial efficiency as one of the primary goals of the Federal Rules, the plaintiff's interest coincides to a great degree with the aims of Federal Rule of Civil Procedure 1 (Rule 1).¹⁰² Rule 1 guides construction

overdesignation of material as confidential. See *Cipollone*, 785 F.2d at 1122 n.17 (noting danger that counsel will designate as confidential material that is not entitled to protection); MANUAL FOR COMPLEX LITIGATION, SECOND § 21.431 (1986) (noting tendency of counsel to designate as confidential any potentially sensitive documents). The MANUAL FOR COMPLEX LITIGATION, SECOND suggests that courts view the confidentiality designation as a motion for a protective order, making the designation subject to Rule 26(g) sanctions. *Id.*

98. In *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866 (E.D. Pa. 1981), an antitrust action with particularly large-scale discovery, the district court entered an umbrella protective order that both parties used. *Id.* at 874-75. The order allowed the disclosing party to designate any disclosed information as confidential. *Id.* at 875. After summary judgment for the defendants, the plaintiffs moved to declassify the protected information. *Id.* at 873. In upholding the continuing validity of the protective order, the court charged that the plaintiffs had ratified the protective order on three bases. *Id.* at 875. First, the plaintiffs had used the protective order themselves. *Id.* Second, the plaintiffs had failed to challenge the order during the course of the litigation. *Id.* Finally, the plaintiffs had failed to challenge specific documents made confidential by the order. *Id.* at 875. The factors cited by the *Zenith* court demonstrate the possibility that the court will impose additional burdens on the plaintiff, negating the burden requirements of Rule 26(c). *Id.* See F. HARE, J. GILBERT & W. REMINE, *supra* note 2, § 4.10, at 55-56 (noting possibility that courts will overlook necessary inquiries with umbrella orders). The *Zenith* court required that the plaintiff perform in certain ways during the course of the litigation, or risk ratification of the court's order as to each document protected by the umbrella order. See *Zenith*, 529 F. Supp. at 873-75. The court ignored the question of whether the documents actually were entitled to protection, focusing instead on the plaintiff's conduct with respect to the umbrella order. *Id.*

99. See F. HARE, J. GILBERT & W. REMINE, *supra* note 2, § 4.10, at 56 (noting that plaintiff's counsel will wish to avoid disfavor created by motion for wholesale declassification); MANUAL FOR COMPLEX LITIGATION, SECOND § 21.431 (1986) (noting possibility of major problems involved with later declassification of information covered by umbrella order).

100. See F. HARE, J. GILBERT & W. REMINE, *supra* note 2, § 4.10, at 55-56 (discussing monitoring advantage). The plaintiff is unlikely to challenge any but those documents that are most crucial to the case. See *id.* (noting counterproductivity of challenging designation of nonessential documents). Thus, the defendant is able to discover on which parts of the case the plaintiff intends to concentrate. See *id.* (noting that defendants can discover thought processes of plaintiff by analyzing which documents are challenged).

101. See *id.* at 56 (noting danger of viewing umbrella orders as shortcut).

102. FED. R. CIV. P. 1. See *Patterson v. Ford Motor Co.*, 85 F.R.D. 152, 153-54 (W.D.

of the Federal Rules of Civil Procedure towards just, speedy, and inexpensive resolution of suits.¹⁰³ Drawn-out litigation and excessive costs often benefit the defendant exclusively, making the plaintiff's interest in the goals of Rule 1 more significant than the defendant's interest.¹⁰⁴ Moreover, discussion of the plaintiff's interest involves a broader perspective, focusing on plaintiffs as a group instead of as individual parties to an action.¹⁰⁵ When resisting highly restrictive protective orders, plaintiffs as a group, therefore, use the two related interests of information sharing¹⁰⁶ and First Amendment rights¹⁰⁷ to support their resistance.

Despite having the role of initiator of the legal conflict, the plaintiff is often the victim of a process that makes litigation a financial burden.¹⁰⁸ Depositions, expert consultants, court reporters, exhibits, and attorneys fees make complex civil litigation a very expensive undertaking.¹⁰⁹ Protective orders multiply litigation costs by forcing individual plaintiffs in similar cases to repeat the same costly discovery process to obtain the same information from the same defendant.¹¹⁰ Operating under the restriction of a protective order also forces the plaintiff to evaluate a huge amount of documents that other plaintiffs have already evaluated.¹¹¹ Additionally, the plaintiff must take the time to consult with experts who must also analyze

Tex. 1980) (noting that information sharing between plaintiffs coincides with goals of Rule 1); Note, *A Proposal*, *supra* note 34, at 1140-42 (discussing plaintiffs' interests as coinciding with goals of Rule 1). The discovery provisions of the Federal Rules are subject to the guidance of Rule 1. See *Herbert v. Lando*, 441 U.S. 153, 177 (1979) (subjecting discovery provisions to Rule 1).

103. FED. R. CIV. P. 1.

104. See *supra* note 85 (discussing relative benefits of inexpensive litigation to plaintiffs and defendants).

105. See generally *Garcia v. Peeples*, 734 S.W.2d 343, 347 (Tex. 1987) (discussing benefits of information sharing in terms of plaintiffs as a class); F. HARE, J. GILBERT & W. REMINE, *supra* note 2, § 2.5 (discussing cooperative efforts of plaintiffs as class); Note, *A Proposal*, *supra* note 34, at 1151-53 (resolving plaintiffs' problems of expense, delay, injustice, and First Amendment concerns by reference to cooperation of plaintiffs).

106. See *infra* notes 115-139 and accompanying text (discussing information sharing).

107. See *infra* notes 140-169 and accompanying text (discussing First Amendment rights).

108. See Note, *A Proposal*, *supra* note 34, at 1140-41 (discussing burden on plaintiff of expensive products liability litigation). Several prominent products cases have had discovery costing hundreds of thousands of dollars. See *id.* (reporting plaintiff's discovery costs in two Rely tampon cases as \$72,000 and \$50,000); Legal Times, Jan. 8, 1990, at 28, col. 3 (noting that plaintiff discovery cost in DPT vaccine litigation was \$200,000).

109. See Note, *A Proposal*, *supra* note 34, at 1140-41 (discussing excessive discovery costs in complex litigation).

110. See *Graham v. Wyeth Laboratories*, 118 F.R.D. 511, 513 (D. Kan. 1988) (setting aside protective order because of potential of unnecessary repetition and expense); *Garcia v. Peeples*, 734 S.W.2d 343, 347 (Tex. 1987) (noting that current system forces parties unnecessarily to repeat discovery); F. HARE, J. GILBERT & W. REMINE, *supra* note 2, § 2.4, at 15 (noting proliferation of costs by isolation of plaintiffs through protective orders).

111. See F. HARE, J. GILBERT & W. REMINE, *supra* note 2, § 2.4, at 14 (noting protective orders' tendency to force plaintiffs to repetitively evaluate information); Ranii, *How the Plaintiffs' Bar Shares Its Information*, Nat'l L.J., July 23, 1984, at 1 (noting advantage of litigation groups that may have already discovered smoking guns in mass of documents).

the documents.¹¹² Challenging an umbrella protective order further complicates the plaintiff's task by imposing additional burdens on plaintiffs.¹¹³ Thus, protective orders that allow information sharing can substantially reduce the burdens that the discovery process imposes on the plaintiff.¹¹⁴

Information sharing refers to the exchange of discovery between plaintiffs involved in similar litigation, implicating both plaintiff and public interests.¹¹⁵ Collaborative mechanisms for defendants are routine in complex litigation.¹¹⁶ Moreover, plaintiffs in multidistrict or class action cases have

112. See F. HARE, J. GILBERT & W. REMINE, *supra* note 2, § 2.4, at 14 (discussing plaintiff's need to consult with experts).

113. See *supra* notes 89-101 (discussing burdens imposed on plaintiff by umbrella orders).

114. See *infra* notes 115-139 and accompanying text (discussing advantages of information sharing). As an example of one court's novel attempt to resolve the problem of increasing litigation costs, *Graham v. Wyeth Laboratories*, 118 F.R.D. 511 (D. Kan. 1988), demonstrates both the need for a solution to rising costs and the difficulties involved with piecemeal judicial efforts to solve the problems inherent in closing discovery to future litigants. See *id.* (resolving problem of costs involved with mass product litigation by creation of litigation library). *Graham* was a product liability case involving the DTP vaccine. *Id.* The DTP vaccine is used to immunize children against diphtheria, tetanus (lockjaw), and pertussis (whooping cough). See *Graham v. Wyeth Laboratories*, 906 F.2d 1399, 1402 (10th Cir.) (describing DTP vaccine), *cert. denied*, 111 S. Ct. 811 (1990). The pertussis vaccine allegedly caused severe reactions in some children, including permanent physical and neurological damage. See *Jones v. Lederle Laboratories*, 695 F. Supp. 700, 704 (E.D.N.Y. 1988) (describing damage allegedly caused by DTP vaccine). In *Graham*, discovery costs amounted to approximately \$200,000. See *supra* note 108 and accompanying text (noting costs of litigation in DTP vaccine case). The jury entered a verdict for the plaintiff against a manufacturer of the DTP vaccine. *Id.* at 512. The plaintiff subsequently requested modification of the protective order that the court had issued to prevent dissemination of trade secrets and confidential information that the defendant supplied. *Id.* The *Graham* court noted that no trade secrets had been revealed by the record, that the company had quit producing the vaccine, and thus the defendant faced no risk of competitive injury by disclosure. *Id.* In modifying the order the *Graham* court ordered the creation of a DTP vaccine library to include all discovery documents that the parties produced, to be used by other DTP vaccine litigants. *Id.* at 513. The *Graham* court recognized that the library could substantially reduce costs and discovery repetition, maximizing judicial efficiency. *Id.* On appeal, the Tenth Circuit approved of the protective order modification, but held that the district court had no authority to establish such a library. *Wyeth Laboratories v. United States Dist. Court*, 851 F.2d 321 (10th Cir. 1988).

Despite reversing the mechanism employed by the court, the Tenth Circuit recognized the district court's goal as laudable and just. *Id.* at 324. Specifically, the appellate court noted that eliminating the need for duplicative discovery by providing previously disclosed information to similarly situated litigants would result in lower costs and delay. *Id.* at 323-24. Although not specifically mentioned by the *Wyeth* court, the language demonstrates the desirability of information sharing as a mechanism to reduce litigation costs. See *id.* at 323 (discussing desirability of mechanisms to reduce litigation costs).

115. See T. KIELY, *supra* note 86, at 226-228 (describing information sharing and collision of defendant and plaintiff interests).

116. See S.M.U. PROD. LIAB. INST., DISCOVERY, EVIDENCE AND TACTICS IN THE TRIAL OF A PRODUCTS LIABILITY LAWSUIT § 4.02[3] [b] (1987) (discussing defendant's access to collaborative mechanism); Coben, *supra* note 84, at 34 (same); Devine, *supra* note 82, at 1 (1985) (same); Mason & Hare, *The Use of FRCP 26(c)(7) to Prevent or Limit the Dissemination of "Internal Documents"*, 7 J. PROD. LIAB. 1 (1984) (same); Weiner, *Coordinating the Defense of Similar Lawsuits*, FOR THE DEFENSE, May, 1990, at 5 (same); Ranii, *For the Other Side:*

the right to share information; plaintiffs in non-grouped cases hope that, as a matter of consistency, the courts will not burden them with additional disclosure restrictions.¹¹⁷ Protective orders that completely restrict dissemination beyond the parties block collaborative efforts that could streamline the judicial process and lower litigation costs.¹¹⁸

*Patterson v. Ford Motor Co.*¹¹⁹ is the seminal products liability case in the area of information sharing and recognizes the desirable effects of information sharing.¹²⁰ In *Patterson* the defendant moved for a restrictive protective order for the stated purpose of preventing use of the discovered information by the plaintiff's attorneys in subsequent litigation.¹²¹ The district court explicitly rejected the possibility of information sharing among plaintiff's attorneys as a ground for a protective order.¹²² Further, the court adopted the view that information sharing is a desirable method of reducing litigation time and cost that coincides with the three-part objective of the Federal Rules of Civil Procedure of the just, speedy, and inexpensive resolution of litigation.¹²³

In *Garcia v. Peebles*, however, the wider-reaching advantages of information sharing were achieved to a great degree.¹²⁴ In *Garcia* the plaintiff's automobile was struck from behind, causing it to burst into flames.¹²⁵ The

Defense Lawyer Group Gaining New Vitality, Nat'l L.J., Sept. 13, 1983, at 1 (same); Legal Times, Jan. 8, 1990, at 28 (same).

117. See 28 U.S.C. § 1407(a) (1976) (allowing multidistrict consolidation of claims with common questions of fact); FED. R. CIV. P. 23 (allowing class actions if joinder is impracticable, claims present common questions of law or fact, claims are representative of class, and fair and adequate protection of class interests)

118. See F. HARE, J. GILBERT, & W. REMINE *supra* note 2, § 5.2, at 76-77 (discussing importance of promoting collaborative efforts). The increasing activities of plaintiff support groups like the Association of Trial Lawyers of America, the Attorneys Information Exchange Group and Trial Lawyers for Public Justice (or Project Access), in both the legislative and judicial arenas has contributed to greater organization in the plaintiff's bar, especially with respect to information sharing. See Ranii, *supra* note 111, at 1 (noting benefits of organization among plaintiff's attorneys); Weiner, *supra* note 43, at 5 (same); see also Rheingold, *The MER/29 Story—An Instance of Successful Mass Disaster Litigation*, 56 CALIF. L. REV. 116, 122 (1968) (describing Association of Trial Lawyers of America convention to coordinate strategy in anti-cholesterol drug litigation).

119. 85 F.R.D. 152 (W.D. Tex. 1980).

120. *Patterson v. Ford Motor Co.*, 85 F.R.D. 152 (W.D. Tex. 1980).

121. *Id.*

122. *Id.* See *Garcia v. Peebles*, 734 S.W.2d 343 (Tex. 1987) (recognizing value of cooperative discovery efforts); *Ward v. Ford Motor Co.*, 93 F.R.D. 579 (D. Colo. 1982) (same); *In re Upjohn Co. Antibiotic Cleocin Prods. Liab. Litig.*, 81 F.R.D. 482, 484-85 (E.D. Mich. 1979) (same); *Johnson Foils, Inc. v. Huyck Corp.*, 61 F.R.D. 405, 410 (N.D.N.Y. 1973) (same); *Williams v. Johnson & Johnson*, 50 F.R.D. 31, 32-33 (S.D.N.Y. 1970) (same); *Farnum v. G.D. Searle & Co.*, 339 N.W.2d 384, 390 (Iowa 1983) (same); *Earl v. Gulf & W. Mfg. Co.*, 123 Wis. 2d 200, —, 366 N.W.2d 160, 164-65 (Ct. App. 1985) (same).

123. *Patterson*, 85 F.R.D. at 154 (recognizing value of cooperative efforts). See Marcus, *supra* note 5, at 41 (noting that modification of protective order to allow information sharing furthers goals of Rule 1).

124. 734 S.W.2d 343 (Tex. 1987).

125. *Garcia v. Peebles*, 734 S.W.2d 343, 344 (Tex. 1987). In *Garcia*, the survivor of a

plaintiff sued the manufacturer and dealer, alleging that a defect in the design of the fuel system had caused the fuel-fed fire.¹²⁶ In *Garcia* the Texas Supreme Court considered whether protective orders should allow information sharing among attorneys involved in similar litigation.¹²⁷ The *Garcia* court reasoned that even if trade secrets existed, the court must weigh the strong public policy favoring shared discovery against the defendant's interest in preserving trade secrets.¹²⁸ The Texas Supreme Court, therefore, required lower courts to tailor protective orders to allow information sharing.¹²⁹ The *Garcia* court found that information sharing furthered two substantial goals: making discovery more truthful by forcing parties to be consistent in their responses,¹³⁰ and streamlining the discovery process.¹³¹ Moreover, because information sharing does not diminish the value of the property, there is no significant harm in allowing such exchanges.¹³² Because substantial case law supports the position adopted by the *Garcia* court in favor of information sharing, information sharing has achieved some acceptance as a judicial policy.¹³³ In Texas, for example, *Garcia* independently

car crash whose vehicle burst into flames after being hit from behind by another car sued the manufacturer and the dealership based on a defect in the design of the fuel system. *Id.* The trial court entered an umbrella protective order restricting the plaintiff from disseminating discovery materials. *Id.* at 344-45. The Texas Supreme Court found that, although trade secrets did exist, public policy favored shared discovery, which had the benefits of encouraging truthful discovery and judicial efficiency. *Id.* at 347-48. The court found that a balance of these interests mandates that the protective order block dissemination only to the defendant's competitors. *Id.* at 348.

126. *Id.* at 344.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 347. See also *Buehler v. Whalen*, 374 N.E.2d 460, 467 (Ill. 1977) (discussing vital test information withheld from plaintiff that plaintiff had obtained through collateral litigation); *F. HARE, J. GILBERT & W. REMINE*, *supra* note 2, § 2.6, at 17-18 (discussing verification advantage of information sharing).

131. *Garcia v. Peebles*, 734 S.W.2d 343, 347 (Tex. 1987); see also *Wilk v. American Medical Ass'n*, 635 F.2d 1295, 1299 (7th Cir. 1980) (noting efficiency advantages of information sharing); *AT&T v. Grady*, 594 F.2d 594, 597 (7th Cir.) (same), *cert. denied*, 440 U.S. 971 (1979); *Phillips Petroleum Co. v. Pickens*, 105 F.R.D. 545, 551 (N.D. Tex. 1985) (same); *Ward v. Ford Motor Co.*, 93 F.R.D. 579, 580 (D. Colo. 1982) (same); *Patterson v. Ford Motor Co.*, 85 F.R.D. 152, 154 (W.D. Tex. 1980) (same); *MANUAL FOR COMPLEX LITIGATION* § 3.11 (5th ed. 1982) (same); *F. HARE, J. GILBERT & W. REMINE*, *supra* note 2, at 14-15; *Note, A Proposal*, *supra* note 34, at 1140 (same).

132. See *Garcia*, 734 S.W.2d at 348, n.4 (noting lack of harm to defendant's value in property through information sharing).

133. See *id.* at 347 (noting that majority of federal courts have supported information sharing); *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1428 (10th Cir. 1990) (adopting policy in favor of sharing discovery with collateral litigants absent prejudice to party opposing dissemination), *cert. denied*, 111 S. Ct. 799 (1991); *Wilk v. American Medical Ass'n*, 635 F.2d 1295, 1299 (7th Cir. 1980) (supporting information sharing as advantageous method to cut costs and increase efficiency); *AT&T v. Grady*, 594 F.2d 594, 597 (7th Cir.) (same), *cert. denied*, 440 U.S. 971 (1979); *Phillips Petroleum Co. v. Pickens*, 105 F.R.D. 545, 551 (N.D. Tex. 1985) (same); *Ward v. Ford Motor Co.*, 93 F.R.D. 579, 580 (D. Colo. 1982)

has created a requirement that protective orders allow information sharing among plaintiffs involved in similar litigation.¹³⁴ The one limitation placed on the generally accepted policy of information sharing is that the plaintiff may not seek discovery merely for the purpose of assisting in the litigation of another case.¹³⁵

Supporters of highly restrictive orders suggest that the risk of a leak beyond the parties entitled to share information justifies prohibiting the exchange between plaintiffs' attorneys.¹³⁶ However, the courts generally have rejected this contention as entirely speculative.¹³⁷ Moreover, the overwhelming support that the courts have given to information sharing as an aid to litigation in general indicates that the policy of information sharing has relatively minor disadvantages.¹³⁸ Given the continued ability of defendants to acquire protective orders that prevent competitive losses, information sharing as a policy successfully balances the defendant's interest with the plaintiff's need to avoid expensive and duplicative litigation.¹³⁹

A more controversial aspect of protective order analysis concerns the First Amendment rights of plaintiffs.¹⁴⁰ The debate over whether a consti-

(same); *Carter-Wallace, Inc. v. Hartz Mountain Indus.*, 92 F.R.D. 67, 70 (S.D.N.Y. 1981) (same); *Patterson v. Ford Motor Co.*, 85 F.R.D. 152, 154 (W.D. Tex. 1980) (noting lack of criticism of information sharing); *Parsons v. General Motors Corp.*, 85 F.R.D. 724, 726 (N.D. Ga. 1980) (noting that possibility of information sharing is not good cause for a protective order); *Johnson Foils, Inc. v. Huyck Corp.*, 61 F.R.D. 405 (N.D.N.Y. 1973) (same).

The sale of information presents a somewhat different problem and raises ethical considerations. See Ranii, *How the Plaintiff's Bar Shares its Information*, Nat'l L.J., July 23, 1984 at 1 (discussing sale of information to other attorneys). In *In re Upjohn Co. Antibiotic Cleocin Prods. Liab. Litig.*, 81 F.R.D. 482 (E.D. Mich. 1979), *aff'd*, 664 F.2d 114 (6th Cir. 1981), the court allowed the sale of information to other plaintiffs under court supervision. *Id.* However, courts will fine attorneys who violate protective orders by selling information. See Marcus, *supra* note 5, at 42-43 n.177 (noting fine of \$10,000 levied against one attorney in Toxic Shock Syndrome litigation who violated protective order by selling information).

134. See *American Honda Motor Co. v. Dibrell*, 736 S.W.2d 257 (Tx. Ct. App. 1987) (holding that *Garcia* requires trial court to balance competing interests and allow information sharing); Tex. Sup. Ct. Adv. Comm., *Rule 76a: Transcripts, Agendas, Correspondence 1989-90 v. 1* at 266 (Nov. 31, 1989 hearing before Supreme Court of Texas) (available through Texas State Law Library) (noting that *Garcia* already requires information sharing in Texas).

135. See *Parsons v. General Motors Corp.*, 85 F.R.D. 724, 726 n.1 (N.D. Ga. 1980) (noting that protective order is justified to prevent information sharing in cases where discovery is used merely to assist in other litigation).

136. See Note, *Court-Approved Confidentiality Orders*, *supra* note 43, at 93 (arguing that allowing dissemination would result in competitive loss of confidentiality).

137. See *Waelde v. Merck, Sharp & Dohme*, 94 F.R.D. 27, 29-30 (E.D. Mich. 1981) (rejecting defendant's contention that competitors would get information as speculative); *Johnson Foils, Inc. v. Huyck Corp.*, 61 F.R.D. 405, 410 (N.D.N.Y. 1973) (rejecting contention that plaintiff would use information in illegitimate manner).

138. See *supra* note 133 and accompanying text (discussing strong judicial support for information sharing policy).

139. See *supra* notes 136-138 and accompanying text (discussing balance between defendant and plaintiff interests with information sharing).

140. See *infra* notes 141-169 and accompanying text (discussing First Amendment concerns).

tutional right to disseminate discovery exists has continued even in the wake of the United States Supreme Court decision in *Seattle Times Co. v. Rhinehart*.¹⁴¹ In *Seattle Times* the Supreme Court recognized that discovery is a matter of legislative grace.¹⁴² Therefore, a First Amendment right of access does not attach to information made available for purposes of the suit.¹⁴³ Further, the Court noted that discovery traditionally is not a public source of information and that protective orders are not a classic prior restraint that would require exacting First Amendment scrutiny.¹⁴⁴ The *Seattle Times* Court therefore held that a protective order that limits dissemination of discovered information does not violate the First Amendment, as long as the court issues the order on good cause, limits the order to the context of discovery, and does not restrict the dissemination of the information if available from other sources.¹⁴⁵ By implication, *Seattle Times* also forecloses the public right of access, as distinguished from the right to disseminate, because allowing public access to information makes no sense if the court has prohibited the parties from disseminating the information to the public.¹⁴⁶ In the wake of *Seattle Times*, the circuit courts of appeal have offered two interpretations of the Supreme Court's holding, and the controversy over the First Amendment right to disseminate discovery materials has continued.¹⁴⁷

First, the District of Columbia and Third Circuits have read *Seattle Times* as completely eliminating the First Amendment as a consideration in protective order analysis.¹⁴⁸ For example, in *Cipollone v. Liggett Group*,

141. 467 U.S. 20 (1984).

142. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984). In *Seattle Times*, the Supreme Court considered whether a protective order that restricted dissemination of discovered information constituted a violation of First Amendment freedoms. *Id.* at 27. A religious leader, bringing a defamation suit against two newspapers, obtained a protective order to prevent dissemination of a list of members and donors to the religious organization. *Id.* The trial court initially had denied the motion, but granted the motion after affidavits detailed threats against individuals affiliated with the organization. *Id.* at 26-27. The court issued the order pursuant to the state of Washington's protective order provision. *Id.* at 26-27. The state had modeled its provision after Federal Rule 26(c). *Id.* at 29 n.14; see WASH. SUPER. CT. CIV. R. 26(c). The Supreme Court first held that because discovery is a matter of legislative grace, there is no First Amendment right of access to information available for purposes of the suit. *Seattle Times*, 467 U.S. at 32. The Court further noted that restrictions on discovered material were not a restriction on a traditionally public source of information. *Id.* at 33. Finally, the court found that a protective order was not a classic prior restraint which would require exacting First Amendment scrutiny. *Id.* at 33-34.

143. *Seattle Times*, 467 U.S. at 32.

144. *Id.* at 33-34.

145. *Id.* at 37.

146. See Campbell, *supra* note 2, at 796 (noting logical conclusion that public can have no right of access if parties themselves have no right to disseminate to public).

147. See Bishop & Stiles, *supra* note 9, at 169 (analyzing different interpretations of *Seattle Times* among First, Second, and Third Circuits); *infra* notes 148-161 (discussing interpretations of First, Second, Third and D.C. Circuits).

148. See *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1119 (3d Cir. 1986) (holding that *Seattle Times* prohibits a court from considering First Amendment rights), *cert. denied*,

*Inc.*¹⁴⁹ the Third Circuit ruled that the district court improperly had applied a least restrictive alternative test¹⁵⁰ to the First Amendment analysis of a protective order.¹⁵¹ In *Cipollone* the court explicitly rejected any First Amendment factors in protective order analysis as irrelevant.¹⁵² The *Seattle Times* language cited by the district court appears to require that the restrictions on First Amendment freedoms be as minimal as possible, thus supporting the district court's conclusion in favor of a least restrictive alternative test.¹⁵³ Although the Third Circuit recognized that its holding was inconsistent with the *Seattle Times* language, the Third Circuit held that the least restrictive means test was merely dictum that did not affect the rest of the Supreme Court's holding.¹⁵⁴

Second, the First Circuit has interpreted *Seattle Times* to require First Amendment scrutiny with a lower standard than for traditional restraints on expression.¹⁵⁵ In *Anderson v. Cryovac, Inc.*,¹⁵⁶ the First Circuit specifi-

479 U.S. 1043 (1987); *New York v. United States Metals Ref. Co.*, 771 F.2d 796, 802-03 (3d Cir. 1985) (holding that *Seattle Times* supports view that protective orders do not implicate First Amendment); *Tavoulaareas v. Washington Post Co.*, 737 F.2d 1170, 1172 (D.C. Cir. 1984) (recognizing *Seattle Times* as rejecting First Amendment interests in protective order analysis); *Ericson v. Ford Motor Co.*, 107 F.R.D. 92, 94 (E.D. Ark. 1985) (analyzing *Seattle Times* as holding that First Amendment protection is unwarranted for discovery materials).

149. 785 F.2d 1108 (3d Cir. 1986).

150. *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1113-14 (3d Cir. 1986). With reference to the least restrictive means test, the Supreme Court in *Seattle Times* stated that part of the question of whether a party had the right to disseminate discovered information involved analysis of whether the restrictions on the party's First Amendment rights were no greater than necessary for protection of the governmental interest. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984) (quoting *Procunier v. Martinez*, 416 U.S. 396, 413 (1974)).

Similar language is found in *In re Halkin*, 598 F.2d 176, 191-195 (D.C. Cir. 1979), and in *In re San Juan Star Co.*, 662 F.2d 108 (1st Cir. 1981), which were the cases giving rise to the conflict between the circuits that *Seattle Times* attempted to resolve. See Note, *Clear Standards for Discovery Protective Orders: A Missed Opportunity* in *Rhinehart v. Seattle Times Co.*, 8 U. PUGET SOUND L. REV. 123, 137 (1984) (noting Supreme Court's attempt to resolve conflicts between *Halkin*, *San Juan Star*, and *Seattle Times*). The *Halkin* court held that judges restricting the dissemination of discovery pursuant to Rule 26(c) must evaluate the First Amendment restriction based on three criteria. *Halkin*, 598 F.2d at 191. The harm of dissemination must be substantial and serious, the restraining order must be narrow and precise, and there must be no alternative means of protecting the public interest that intrudes less directly on expression. *Id.* Likewise, the *San Juan Star* court, although applying a less stringent First Amendment test, still required an evaluation of the availability of less restrictive means of preventing the harm. *San Juan Star*, 662 F.2d at 116.

151. *Cipollone*, 785 F.2d at 1118-19. The district court analyzed the protective order based on whether the order limited First Amendment freedoms more than was necessary to protect the governmental interest involved. *Id.* at 1114. The Third Circuit, however, held that despite the Supreme Court's language, the holding of *Seattle Times* involved an entirely different analysis that did not require a least restrictive means test. *Id.* The court noted that a least restrictive means analysis of protective orders would be a more stringent First Amendment test than the good cause analysis. *Id.* at 1118-19.

152. *Id.* at 1119.

153. *Id.* at 1113-14.

154. *Id.* at 1119.

155. See *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 7 (1st Cir. 1986). The *Anderson* court

cally rejected the Third Circuit's interpretation, holding that *Seattle Times* did not eliminate First Amendment consideration in protective order analysis, but merely that protective orders implicate the First Amendment to a lesser degree than in other contexts.¹⁵⁷ The *Anderson* court's First Amendment analysis revolved around the three criteria that the Supreme Court articulated in *Seattle Times*.¹⁵⁸ A protective order issued on a showing of good cause, limited to discovery, and not restricting the dissemination of information gained from other sources would be valid under the *Anderson* court's First Amendment analysis.¹⁵⁹ A prominent district court case affirmed on other grounds by the Second Circuit reached a similar conclusion, holding that a showing of good cause was sufficient to allow a limitation of First Amendment rights.¹⁶⁰ The good cause standard enunciated in Rule 26(c) is thus the threshold for the First Circuit and at least one district court for determining whether the protective order violates the First Amendment.¹⁶¹

Because the three qualifications expressed by *Seattle Times* coincide with the proper scope of a protective order, a properly entered order will not violate the constitutional right of access.¹⁶² However, to be consistent with the Supreme Court's language in *Seattle Times*, a court also must ensure that the protective order is the least restrictive means necessary to ensure protection of the specific interests.¹⁶³ The *Cipollone* court simply

found that the First Amendment was still a factor requiring scrutiny within the framework of the good cause requirement of Rule 26(c). *Id.* The *Anderson* court interpreted *Seattle Times* as indicating that protective orders are restraints, although they affect the First Amendment less than other types of restraints. *Id.*

156. 805 F.2d 1 (1st Cir. 1986).

157. *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 7 (1st Cir. 1986). *Seattle Times* forced the First Circuit to reconsider its holding in *In re San Juan Star Co.*, 662 F.2d 108 (1st Cir. 1981). *Anderson*, 805 F.2d at 5. In *San Juan Star*, the First Circuit applied the heightened scrutiny test to the First Amendment in protective order analysis. *See id.* at 116 (applying heightened First Amendment scrutiny to protective orders); *Anderson*, 805 F.2d at 6 (discussing *San Juan Star*).

158. *See Anderson*, 805 F.2d at 7 (holding that First Amendment is not implicated if protective order meets *Seattle Times* criteria).

159. *See id.* (discussing *Seattle Times* criteria).

160. *See In re Agent Orange Prod. Liab. Litig.*, 104 F.R.D. 559, 570 (E.D.N.Y.) (holding that in the absence of showing of good cause, First Amendment would be violated by protection), *aff'd on other grounds*, 821 F.2d 139 (2d Cir. 1985), *cert. denied*, 108 S. Ct. 344 (1987); *see also* Bishop & Stiles, *supra* note 9, at 170 (describing positions of First, Second and Third Circuits); Campbell, *supra* note 2, at 798-801 (same). The *Agent Orange* appellate court affirmed based on the statutory presumption argument, avoiding the First Amendment issue. *Agent Orange*, 821 F.2d at 145 (holding that statutory argument sufficiently supported district court's conclusion).

161. *See Anderson*, 805 F.2d at 7 (discussing First Circuit's good cause framework for First Amendment scrutiny); *Agent Orange*, 104 F.R.D. at 566 (allowing limitation of public access to discovery materials upon a showing of good cause).

162. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 37 (1984).

163. *See id.* at 32 (requiring inquiry as to whether restrictions on First Amendment are least restrictive means necessary for protection of governmental interest); *supra* notes 150-151 and accompanying text (discussing least restrictive means test).

ignored the parts of *Seattle Times* that did not fit into the *Cipollone* interpretation, instead of fashioning a theory which would be consistent with the entire opinion.¹⁶⁴ The First Circuit, although recognizing the least restrictive means language in *Seattle Times*, did not apply the language in enunciating First Amendment criteria in *Anderson*.¹⁶⁵ The Second Circuit failed to recognize even that the Supreme Court had enunciated a least restrictive means test.¹⁶⁶ Given the language in *Seattle Times*, as well as the inclusion of a least restrictive means requirement in both of the major pre-*Seattle Times* cases,¹⁶⁷ a proper interpretation of *Seattle Times* should account for the language concerning the lower threshold for First Amendment violations in protective orders as well as the least restrictive means policy.¹⁶⁸ Application of the least restrictive means test theoretically would require that protective orders allow information sharing, as long as the practice is not abusive and continues to support the goals of Rule 26(c).¹⁶⁹

While the *Seattle Times* First Amendment analysis focuses entirely on the plaintiff's interest, some of the plaintiff's or defendant's aims may be identical to the aims of the public interest.¹⁷⁰ Because both public interest and plaintiff needs favor inexpensive litigation, the public interest may coincide in particular areas with the plaintiff's interest. To that extent, information sharing represents an advantageous method for achieving plaintiff and public goals of judicial efficiency in discovery.¹⁷¹ The public interest, however, simultaneously coincides with the defendant interest in protecting trade secrets or confidential information.¹⁷² For example, the adoption of the Uniform Trade Secrets Act (UTSA) by many jurisdictions is a manifestation of the public interest in protecting trade secrets.¹⁷³ Additionally, Rule

164. See *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1119 (3d Cir. 1986) (holding that least restrictive means language of *Seattle Times* is merely dicta which does not overcome contrary direction of Court's holding).

165. See *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 6-7 (1st Cir. 1986) (outlining First Amendment criteria as based on good cause framework).

166. See *In re Agent Orange Prod. Liab. Litig.*, 104 F.R.D. 559 (E.D.N.Y. 1985), *aff'd*, 821 F.2d 139 (2d Cir.), *cert. denied*, 108 S. Ct. 344 (1987) (omitting least restrictive means from First Amendment analysis).

167. See *supra* note 150-151 (discussing least restrictive means tests in *Seattle Times*, *Halkin*, and *San Juan Star*).

168. See *supra* notes 150-151 and accompanying text (discussing least restrictive means test as part of *Seattle Times*).

169. See *supra* note 150 and accompanying text (defining least restrictive means test as requiring that restriction on dissemination is no more than is necessary to prevent harm).

170. See Note, *A Proposal*, *supra* note 34, at 1148 (noting that judicial system shares most of plaintiff and defendant interests).

171. See *supra* notes 115-139 and accompanying text (discussing information sharing).

172. See *infra* notes 173-174 and accompanying text (noting public interest in maintaining competitive business practices).

173. Uniform Trade Secrets Act § 1, 14 U.L.A. 437 (1985). As of 1990, 34 jurisdictions have adopted the UTSA. *Id.* The UTSA's purpose as a manifestation of the public interest is thus to protect valuable business assets. See *Kozuch v. CRA-MAR Video Center, Inc.*, 478 N.E.2d 110 (Ind. Ct. App. 1985) (noting that legislature's purpose in enacting UTSA was to serve public interest by protecting trade secrets).

26(c) and the state counterparts limit disclosure of trade secrets or confidential information, representing a general public interest in preserving competitive practices.¹⁷⁴ However, the public interest also represents the three unique interests of public welfare, settlement, and public rights of access that do not correspond to the personal goals of either plaintiff or defendant.¹⁷⁵

Of the plaintiff, defendant, and public interests, the public interest is the most socially significant because of the intense scrutiny of products liability cases that reveal potential public hazards.¹⁷⁶ Consumer products that pose safety hazards constitute a significant concern to the public.¹⁷⁷ Because the judicial process has been the traditional avenue by which the public and regulatory agencies learn of public hazards, protective orders have limited the ability of the public and regulators to acquire that information.¹⁷⁸ By shielding the manufacturer's liability or settlements from the public, protective orders exacerbate the harms of defective products.¹⁷⁹ Although no statutory criteria exists for evaluating the public interest, several courts have indicated that public welfare may be an overriding interest in deciding whether to grant a protective order.¹⁸⁰ Moreover, legislative revisions of protective order policy indicate a trend towards recognizing public safety as a more important factor in protective order analysis.¹⁸¹

174. See *supra* notes 18-21 and accompanying text (discussing Rule 26(c) and state protective order statutes).

175. See *infra* notes 176-229 and accompanying text (discussing specific goals of the public interest).

176. See F. HARE, J. GILBERT & W. REMINE, *supra* note 2, at 66-67 (noting consumer concern for products which pose safety hazards); Note, *Use of Discovery Materials*, *supra* note 28, at 200 (noting public importance of information produced in product liability actions); see also Legal Times, March 26, 1990, at 6, col. 1 (discussing Pfizer defective heart-valve litigation); USA Today, March 16, 1989 at 6A (discussing Pfizer, Inc. heart-valve, Xerox chemical contamination, General Motors fuel tank and Johnson & Johnson painkiller litigations); Wash. Post, Feb. 20, 1989, at B1 (noting that General Motors and Johnson & Johnson used protective orders to avoid public debates about safety); Wash. Post, October 23, 1988, at A1 (noting General Motors' strategy of nondisclosure of auto safety documents).

177. See F. HARE, J. GILBERT & W. REMINE, *supra* note 2, at 66, 127 (noting public interest in mass-marketed hazardous products).

178. See Note, *Sealed v. Sealed*, *supra* note 5, at 397 n.85 (noting concern in media and consumer groups that secrecy is concealing public hazards). But see Weiner, *Keeping Confidences: Protective Orders Not for Dirty Little Secrets*, Legal Times, January 29, 1990, at 24 (arguing that there is no safety problem because plaintiffs still may complain to regulatory agencies or have order lifted).

179. See F. HARE, J. GILBERT & W. REMINE, *supra* note 2, at 68 (noting that secrecy agreements impede regulatory and law enforcement actions).

180. See *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1180 (6th Cir. 1983) (allowing unsealing of documents because information relevant to public health), *cert. denied*, 465 U.S. 1100 (1984); see also *Anchorage School Dist. v. Anchorage Daily News*, 779 P.2d 1191 (Alaska 1989) (finding public's right to know paramount); Freeman & Jenner, *Just Say No: Resisting Protective Orders*, TRIAL, March, 1990, at 70 (noting that recent decisions have stressed value of public health and welfare over interest in promoting settlement).

181. See *infra* notes 246-247, 261, 284-288 and accompanying text (discussing goals of public safety in legislative action).

The public safety goal of litigation poses several problems.¹⁸² Rule 26(c) allows a judge to weigh the public interest after a determination of good cause, balancing the interests before deciding whether a protective order is necessary.¹⁸³ Because discovery information has not been subjected to the trial process, the information may not be sufficiently reliable to warrant disclosure.¹⁸⁴ Inaccurate information may damage the manufacturer's reputation and business.¹⁸⁵ Limiting the judges' discretion to balance the interests when public safety is at issue risks damage to the public in the form of unfounded allegations of public hazard and risks greater competitive damage to the litigants.¹⁸⁶

As a shift from the public goal of safety, the public interest in settlements focuses on the desirability of judicial efficiency.¹⁸⁷ Protective orders facilitate the settlement process in two ways.¹⁸⁸ First, because the lack of available protection may cause parties to resist discovery, protective orders may promote full disclosure between the parties.¹⁸⁹ Unless the defendant abuses discovery, however, full disclosure should not depend on the existence of a protective order.¹⁹⁰ Resistive discovery practices undermine the goals of full disclosure that the federal rules and modern case law mandate.¹⁹¹ Because protective order provisions are not enforcement mechanisms to ensure discovery, to impose the role of policeman on protective orders is inappropriate.¹⁹²

Second, protective orders encourage settlement by allowing limits on disclosure to become part of the settlement agreement.¹⁹³ The parties may

182. See *infra* notes 183-186 (discussing problems of imposing public interest on protective order determination).

183. See *supra* note 180 and accompanying text (discussing public interest as part of balance between competing interests in protective order analysis); Miller, *Privacy, Secrecy and the Public Interest*, FOR THE DEFENSE, Sept. 1990, at 9 (arguing that judge is uniquely qualified to make decisions concerning public welfare).

184. See Miller, *supra* note 183 and accompanying text (noting that information must be subjected to full trial process because pretrial information is inherently unreliable).

185. See *id.* (discussing risks of unreliable discovery information).

186. See *id.* (arguing that only judge can make decision regarding public safety interests).

187. See Miller, *supra* note 183, at 11 (noting that availability of discovery may save court system and litigants expense of litigation by encouraging settlement).

188. See *infra* notes 189-199 and accompanying text (discussing protective orders effect on settlements).

189. See Note, *Court-Approved Confidentiality Orders*, *supra* note 43, at 92 (noting risk that lack of protective orders will inhibit full disclosure and likelihood of settlement); Wittner & Campbell, *Protective Orders Under Attack*, American Corp. Counsel Assoc. Docket, at 14 (Jan. 1990) (arguing that full discovery encourages settlement); Miller, *supra* note 183, at 11 (arguing that the availability of discovery leads parties to settle and that protective orders will cause resistance to discovery).

190. See *Hickman v. Taylor*, 329 U.S. 495, 507 (1947) (recognizing truth-seeking function of discovery).

191. See FED. R. CIV. P. 26(b) (advocating broad disclosure); *Hickman*, 329 U.S. at 507 (same); Campbell, *supra* note 2, at 776-77 (noting that discovery rules, and Rule 26(b) in particular, advocate full disclosure).

192. See FED. R. CIV. P. 37 (detailing sanctions for abuse of discovery process).

193. See *infra* notes 194-199 and accompanying text (discussing settlements that incorporate terms of protective order).

condition their willingness to settle on the guarantee in an agreement that the protective order will continue to protect discovery information.¹⁹⁴ A general public right of access to discovered materials or to the terms of a settlement would diminish the defendant's motivation for settlement.¹⁹⁵ However, a less than absolute right of access, such as allowing information sharing among plaintiffs, would retain substantial benefits for the defendant when proposing settlement.¹⁹⁶ Moreover, the public interest in settlement should not override other policies favoring greater access to discovery.¹⁹⁷ To that extent, the public interest in health or judicial efficiency should override any possible adverse effect to settlements.¹⁹⁸ Additionally, the lower discovery expenses associated with information sharing may contribute to an increase in settlements, as the parties are less likely to settle if unnecessary amounts of money are spent to conduct duplicitous discovery.¹⁹⁹

The public interest in protective orders also concerns the question of a public right of access to judicial proceedings.²⁰⁰ Despite the *Seattle Times* holding, which largely forecloses the First Amendment arguments for access to discovery materials by members of the general public,²⁰¹ the common law provides non-constitutional support for a public right of access to discovery materials.²⁰² The courts have recognized a common-law presump-

194. See Wittner & Campbell, *supra* note 189, at 14 (noting that both plaintiffs and defendants may condition settlement on nondisclosure of terms or discovery). The parties' willingness to settle may depend upon nondisclosure of the terms of the agreement. See Note, *Sealed v. Sealed*, *supra* note 5, at 405-408 (discussing settlement process and interests involved in obtaining sealed settlements). However, the sealing of settlement agreements is beyond the scope of a discussion concerning protective orders for discovery. See *id.* at 383-84 (distinguishing between types of confidentiality orders). While several states have dealt with the two problems concurrently, analysis of the balances created in discovery requires a more limited discussion. See *id.* (discussing secrecy in terms of settlement agreements and total sealing orders).

195. See Marcus, *supra* note 5, at 28 (discussing party's willingness to settle based on court order blocking disclosure of settlement terms or discovery information); Note, *Court-Approved Confidentiality Orders*, *supra* note 43, at 92 (same); Weiner, *supra* note 43, at 13 (noting that defendants are less likely to give generous settlements if terms are publicized).

196. See Note, *A Proposal*, *supra* note 34, at 1149-50 (noting that information sharing would continue to protect defendant's interests).

197. See Note, *Sealed v. Sealed*, *supra* note 5, at 407 (stating that public policy favoring settlements should not override other strong public policies).

198. See *supra* note 180 and accompanying text (noting instances of unsealing of records when public welfare is implicated).

199. See F. HARE, J. GILBERT & W. REMINE, *supra* note 2, at 15 (noting verification, decreased expense, and decreased delay advantages of information sharing); Note, *Court-Approved Confidentiality Orders*, *supra* note 43, at 92 (citing expense and delay as two factors relevant to decision to settle).

200. See *supra* notes 140-169 (discussing constitutional theory of access); *infra* notes 203-228 and accompanying text (discussing common-law and statutory theories of access).

201. See *supra* notes 140-169 and accompanying text (discussing plaintiff's First Amendment right to disseminate).

202. See *infra* notes 203-228 and accompanying text (discussing common-law presumption of public access).

tion that the public may inspect judicial records.²⁰³ The common-law right derives from the need for a public watchdog to guarantee democratic processes.²⁰⁴ However, like the constitutional right of access, the courts have not extended to discovery the common-law right of access to judicial proceedings.²⁰⁵ Moreover, the trial judge has discretion to deny common-law access.²⁰⁶ Given the validity of a properly entered protective order, the common-law right of access will not overcome the protections of either Rule 26(c) or similar state provisions.²⁰⁷

An alternative and more novel argument for access to discovery materials involves the presumptions inherent in both Rule 26(c) and Rule 5(d).²⁰⁸ This presumptive right of access based on the federal rules is independent of either the First Amendment or common-law rights of access, depending instead on the policies embodied in the legislative scheme behind the federal rules.²⁰⁹ Rule 5(d) requires that the parties file all discovery with the district court, absent an order to the contrary.²¹⁰ The filing requirements of Rule

203. See *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978) (recognizing presumption that public may inspect judicial records); *In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 355 (11th Cir. 1987) (noting press and public common-law right to inspect and copy judicial records).

204. See *Nixon*, 435 U.S. at 598 (recognizing common-law right of access for purpose of keeping watch over public agencies); *United States v. Mitchell*, 551 F.2d 1252, 1258 (D.C. Cir. 1976) (recognizing common-law right of access as check upon public officials), *rev'd on other grounds sub nom. Nixon v. Warner Communications*, 435 U.S. 589 (1978); *Campbell*, *supra* note 2, at 791 (discussing common-law right of access as outgrowth of judicial watchdog concept). Given the fact that no judge is present in most cases in pretrial discovery, the judicial watchdog concept has a very tenuous logical link to arguments for public access to discovery. See *Marcus*, *supra* note 5, at 40 (rejecting judicial watchdog concept as having no application in context of pretrial discovery).

205. See *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 13 (1st Cir. 1986) (rejecting common-law right of access to discovery); *In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 355 (11th Cir. 1987) (noting that discovery documents are not judicial records); *In re Reporters Committee for Freedom of the Press*, 773 F.2d 1325, 1340, 1342 n.3 (D.C. Cir. 1985) (recognizing that common-law right of access does not extend beyond evidence used to determine substantive claims); *Campbell*, *supra* note 2, at 802 (arguing that even if judicial watchdog concept can be applied to courts generally, concept cannot be applied to pretrial discovery).

206. See *Nixon*, 435 U.S. at 598 (recognizing court's supervisory power over its own records and files); *Times Herald Printing Co. v. Jones*, 717 S.W.2d 933, 936 (Tex. Ct. App. 1986) (recognizing judges' discretion over common-law right of access), *vacated*, 730 S.W.2d 648 (Tex. 1987).

207. See *Marcus*, *supra* note 5, at 40-41 (rejecting connection between availability of protective orders and myth that pretrial discovery is public).

208. See *Campbell*, *supra* note 2, at 806-07 (discussing statutory rights of access based on Rules 5(d) and 26(c)).

209. See *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 789 (1st Cir. 1988) (recognizing independence of federal rule access from common-law or First Amendment access), *cert. denied*, 488 U.S. 1030 (1989).

210. Federal Rule of Civil Procedure 5(d) provides:

All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter, but the court may on motion of a party or on its own initiative order that depositions upon oral

5(d) are an affirmation of the public interest in discovery materials, to which there would be no access without Rule 5(d).²¹¹ Thus, Rule 5(d) presumes that parties will file discovery materials, making the information part of the public record.²¹² Similarly, implicit in Rule 26(c) is a presumption of public access to discovery because absent a protective order, no limits exist for dissemination to the public.²¹³ Thus, absent a showing of good cause pursuant to Rule 26(c), the federal rules evince an intent to allow public access to discovery materials.²¹⁴ To that extent, a general public right of access may exist independent of either the First Amendment or the common law.²¹⁵ Additionally, Rule 5(d), by requiring filing in the interests of similarly situated litigants, reinforces the legitimate goals of information sharing as a proper judicial policy.²¹⁶

The Second Circuit initially defined this statutory approach to the presumption of public access to discovery in *In re Agent Orange Product Liability Litigation*.²¹⁷ In *Agent Orange* the defendant chemical companies in a class action suit obtained an umbrella protective order allowing them to designate discovery material as confidential.²¹⁸ On motion by the Vietnam Veterans of America as an intervenor, the magistrate lifted the protective orders.²¹⁹ On appeal from the district court's approval of the magistrate's order, the Second Circuit upheld both the magistrate's action and rationale.²²⁰ The *Agent Orange* court concluded that both Rule 26(c) and Rule 5(d) manifest a statutory intent to allow general public access to discovery information whenever possible.²²¹

Succeeding cases have taken varied approaches to the statutory presumption.²²² In *Public Citizen v. Liggett Group, Inc.*,²²³ the First Circuit

examination and interrogatories, requests for documents, requests for admission, and answers and responses thereto not be filed unless on order of the court or for use in the proceeding.

FED. R. CIV. P. 5(d).

211. See FED. R. CIV. P. 5(d) advisory committee's note. The advisory committee notes to Rule 5(d) clarify that parties ordinarily must file discovery materials. *Id.* The rule allows a court order exemption from filing in order to resolve expense and storage problems associated with the filing of discovery materials. *Id.* The continued general requirement that parties file discovery materials is in deference to the interests of a class, similarly situated litigants or the public. *Id.*

212. *Id.*

213. See Bishop & Stiles, *supra* note 9, at 170 (discussing *Agent Orange's* recognition of presumptive right of access based on Rule 26(c)).

214. See *id.* (describing presumptive right of access outlined in *Agent Orange*).

215. See *id.* (discussing presumptive public right of access)b

216. See FED. R. CIV. P. 5(d) advisory committee's note.

217. 821 F.2d 139 (2d Cir. 1987).

218. *In re Agent Orange Prod. Liab. Litig.*, 821 F.2d 139, 142 (2d Cir. 1987).

219. *Id.* at 143-44.

220. *Id.* at 145-47.

221. *Id.* at 146-47.

222. See *infra* notes 223-228 and accompanying text (discussing succeeding cases concerning statutory presumptions).

223. 858 F.2d 775 (1st Cir. 1988).

upheld the statutory presumption over objections that upholding the statutory presumption would subvert privacy and efficiency interests.²²⁴ The *Public Citizen* court reasoned that privacy and efficiency interests do not operate independently of the federal rules, but depend on the rules as the mechanism that protects the privacy and efficiency interests.²²⁵ Thus, both Rule 26(c) and Rule 5(d) enforce the proposition that absent good cause, discovery must take place in the public.²²⁶ However, not all courts share this view.²²⁷ In rejecting the presumption, courts have cited the possibility that general public access would undermine the discovery process.²²⁸ However, this argument ignores the fact that Rule 26(c) and its state counterparts exist for the purpose of curbing possible abuse of discovery.²²⁹

The various public access theories combined with each of the other competing interests lay the foundation for understanding the current state of protective orders. Because of the recent success of the plaintiff's bar in a campaign against restrictive protective orders,²³⁰ several legislatures have begun placing limits on judicial use of protective orders.²³¹ A variety of

224. *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 789-90 (1st Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989). In *Public Citizen*, the First Circuit considered the validity of a statutory presumption of public access to discovery based on Rules 26(c) and 5(d). *Id.* at 787-90. The wife of a smoker who died of lung cancer sued the cigarette manufacturer. *Id.* at 776. The defendant obtained a protective order for documents from a consulting firm that did research work for Liggett. *Id.* *Public Citizen*, representing a group of public health organizations, requested modification of the order. *Id.* The First Circuit reasoned that Rule 5(d) created a presumption of public access to discovery documents because of the requirement that the material be filed with the court. *Id.* at 788-89. Additionally, the court held that Rule 26(c) creates a presumption that discovery will take place in the public absent a showing of good cause. *Id.* at 789-90. Therefore, the court ordered modification of the protective order to allow free dissemination of discovery materials. *Id.* at 792.

225. *Id.* at 789.

226. *Id.* at 789.

227. *See Palm Beach Newspapers, Inc. v. Burk*, 504 So. 2d 378 (Fla.) (rejecting statutory right of access based on Florida criminal and civil rule of procedure and public records law), *cert. denied*, 484 U.S. 954 (1987). A dissent in the Florida Supreme Court noted that unfiled discovery should be allowed the same access as filed discovery. *Id.* (Shaw, J., concurring and dissenting) (arguing that because filed discovery is a public record, unfiled discovery should be public). Likewise, Vermont rejected a presumption based on the state equivalent to Rule 5(d). *See Herald Ass'n, Inc. v. Judicial Conduct Bd.*, 149 Vt. 233, 544 A.2d 596 (1988) (holding that rule mandating filing of discovery does not require public access to discovery).

228. *See Palm Beach*, 504 So. 2d at 384 (fearing possible chilling effect on discovery).

229. *See Herbert v. Lando*, 441 U.S. 153, 177 (1979) (urging courts to protect parties from abuse in discovery by application of Rule 26(c)); C. WRIGHT & A. MILLER, *supra* note 13, § 2036, at 267 (noting Rule 26(c)'s role as safeguard in view of broad discovery allowed by Rule 26(b)); Campbell, *supra* note 2, at 778 (noting role of 26(c) as protection from harmful side effects of liberal discovery).

230. *See Wittner & Campbell, supra* note 189, at 14 (discussing campaign against protective orders in products liability litigation).

231. *See infra* notes 238-288 and accompanying text (discussing Texas, Virginia, and Florida provisions and Congressional proposal); *see also* Lucas, *Weighing the Price of Court-Ordered Secrecy*, N.J.L.J., March 14, 1991, at 3 (noting Florida, Texas and New York rules and proposals before legislatures in New Jersey and Congress); Sullivan, *In Lawsuits, How Much Should the Courts Keep Secret*, N.Y. Times, March 3, 1991, § 6, at 4, col. 1 (noting proposals in New Jersey and Congress).

possible mechanisms are available for legislative modification of protective order policy.²³² Legislative restrictions on protective orders have generally taken three forms.²³³ The mechanism that each form employs is the distinguishing characteristic of each of the three forms of restriction. The first approach, exemplified by a rule adopted by the Texas Supreme Court, rejects the good cause standard in favor of a more stringent standard that requires a showing of a specific, serious, and substantial interest before a court can issue a protective order.²³⁴ A second approach, exemplified by a Virginia statute and a Congressional proposal, adopts information sharing as a legitimate and desirable use of discovery.²³⁵ Finally, the third approach, as crafted by the Florida legislature, issues a flat prohibition against protective orders when discovery implicates the public welfare.²³⁶ Although balancing similar considerations, each approach has different goals and different effects. Evaluating each approach in terms of the balance achieved between defendant, plaintiff, and public interests reveals that only the second approach, information sharing, properly protects every interested party.²³⁷

Texas Rule of Civil Procedure 76a (Rule 76a) is essentially a redefinition of the applicable standard and a clarification of the balancing test in protective order analysis.²³⁸ Texas Rule 166b(5) originally governed protective

232. See Thomas, *supra* note 2, at 369-75 (discussing mechanisms of balancing test, specific exceptions, modification of court discretion, and increased advocacy). An alternative mechanism for legislative changes to protective order policy to those discussed *infra* includes fashioning a rule modeled on the Freedom of Information Act, allowing nonparties to request access to discovery information held by the courts. *Id.* at 373. The alternative mechanism would require disclosure absent a specified exception. See Freedom of Information Reform Act of 1986, 5 U.S.C. § 552. Courts have generally rejected the application of the FOIA to the courts. See *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1177 (6th Cir. 1983) (rejecting FOIA), *cert. denied* 465 U.S. 110 (1984).

233. See *infra* notes 234-236 and accompanying text (discussing types of legislative restrictions on protective orders).

234. See *infra* notes 238-258 and accompanying text (discussing Texas Rule 76a). A proposal in the Illinois legislature in 1991, the Sunshine Litigation Bill, is similar to the Texas rule, in that both would require that sealing can only occur on a showing of a specific, serious and substantial interest that outweighs the probable effect on the public. See *Blum & Samborn, Tylenol Settlement Revives Secrecy War*, Nat'l L.J., May 27, 1991, at 3 (describing Illinois proposal).

235. See *infra* notes 259-283 and accompanying text (discussing Virginia provision and Congressional proposal).

236. See *infra* notes 284-288 and accompanying text (discussing Florida Sunshine in Litigation Act).

237. See *supra* notes 115-139 and accompanying text (adopting information sharing as most effective mechanism).

238. Texas Rule 76a provides in pertinent part:

1. Standard for Sealing Court Records. Court records may not be removed from court files except as permitted by statute or rule. No court order or opinion issued in the adjudication of a case may be sealed. Other court records, as defined in this rule, are presumed to be open to the general public and may be sealed only upon a showing of all of the following:

(a) a specific, serious and substantial interest which clearly outweighs:

orders, using the good cause standard.²³⁹ Rule 166b(5)(c) now requires that a protective order for discovery accord with Rule 76a.²⁴⁰ Rule 76a first formalizes a presumption of openness to the general public of all court records.²⁴¹ The balancing test then requires the party requesting the protective order to show a specific, serious, and substantial interest that clearly outweighs the presumption of openness and the risk of harm to public health or safety.²⁴² Once the party overcomes the presumption, however, Rule 76a still requires the moving party to show that the protective order is the least restrictive means of protection available.²⁴³ The standard—specific, serious, and substantial interest—is a more difficult standard to meet than the good cause standard that the federal rule and the majority of state rules embody.²⁴⁴ Moreover, no specific exception for trade secrets exists in the Texas rule; thus, the competitive harm of trade secret disclosure

(1) this presumption of openness;

(2) any probably adverse effect that sealing will have upon the general public health or safety;

(b) no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted.

TEX. R. CIV. P. 76a (1991). The Supreme Court drafted the new rule in response to a state legislative mandate. *See Doggett, Keeping Court Records in the Open*, TRIAL, July, 1990, at 62 (describing Rule 76a's background); TEX. CODE ANN. § 22.010 (1989) (directing Texas Supreme Court to consider problem of sealing court records).

239. *See* TEX. R. CIV. P. 166b(5)(c) (applying good cause standard to orders sealing discovery). The current form of the rule retains the good cause terminology, but adds the requirement that any protective order conform to Rule 76(a). *See infra* note 240 (quoting Rule 166b(5)).

240. TEX. R. CIV. P. 166b(5). Rule 166b(5) provides:

On motion specifying the grounds and made by any person against or from whom discovery is sought under these rules, the court may make any order in the interest of justice necessary to protect the movant from undue burden, unnecessary expense, harassment or annoyance, or invasion of personal, constitutional, or property rights. . . .

Specifically, the court's authority as to such orders extends to, although it is not necessarily limited by, any of the following:

a. ordering that requested discovery not be sought in whole or in part, or that the extent or subject matter of discovery be limited, or that it not be undertaken at the time or place specified.

b. ordering that the discovery be undertaken only by such method or upon such terms and conditions or at the time and place directed by the court.

c. ordering that for good cause shown results of discovery be sealed or otherwise adequately protected, that its distribution be limited, or that its disclosure be restricted. Any order under this subparagraph 5(c) shall be made in accordance with the provisions of Rule 76a with respect to all court records subject to that rule.

TEX. R. CIV. P. 166b(5) (1991).

241. *See supra* note 238 (quoting Rule 76a).

242. *Id.*

243. *Id.*

244. *See Doggett, supra* note 238, at 63 (describing standard embodied in Rule 76a). Justice Doggett, one of the proponents of Rule 76a, noted that instances in which records should be sealed should be rare. *Id.*

must be subjected to the balancing test of Rule 76a.²⁴⁵ The new rule manifests a concern in Texas that corporate abuse of the protective order provision was overshadowing the interest in public welfare.²⁴⁶ Because of Rule 76a's focus on additional procedures and a multi-step analysis, the Texas rule is the clearest articulation of the perceived imbalance in current protective order practice.²⁴⁷

Unfortunately, the fact that the Texas Supreme Court recognizes an imbalance does not necessarily mean that Rule 76a resolves the problem.²⁴⁸ The greatest concern with Rule 76a is with the procedures that the Rule provides.²⁴⁹ Rule 76a provides for public notice and a public hearing on any protective order motion.²⁵⁰ Further, anyone can intervene in the hearing.²⁵¹ Potentially, application of the rule will cause increased pretrial motions and hearings, as well as heightened expense as defendants resist discovery more aggressively.²⁵² Moreover, because the terms of 76a include settlement agreements, critics fear a chilling effect on the Texas public

245. See TEX. R. CIV. P. 76a (weighing risk to public, presumption of openness, and defendant's interest). The rule does contain an exception for discovery in cases initiated for trade-secret infringement. *Id.* The trade secret infringement exception is not available in products liability litigation. *Id.* See also Doggett, *supra* note 228, at 63 (noting exception for discovery in cases originally initiated for trade-secret infringement). The advisory committee that produced Rule 76a was composed of plaintiff's lawyers, who would be naturally adverse to the trade secret exception. See Tex. Law., Feb. 26, 1990, at 4 (quoting subcommittee co-chair Charles Herring as saying that plaintiff's lawyers view trade secret exceptions as used to seal files too frequently).

246. See Wash. Post, April 21, 1990, at A2 (quoting Texas Supreme Court Justice Doggett as concerned about abuse of protective orders to detriment of public welfare).

247. See Doggett, *supra* note 238, at 63 (characterizing Rule 76a as attempt to balance interests according to specified standards).

248. See *infra* notes 249-257 and accompanying text (discussing disadvantages of Texas Rule 76a); see also Doggett, *supra* note 238, at 64 (describing Rule 76a as an initial attempt to correct balance).

249. See TEX. R. CIV. P. 76a (defining procedural aspects of protective order requests). The procedures required by 76a include notice of a motion to seal records and a hearing in open court in which any party may intervene and participate. *Id.* Additionally, the court retains continuing jurisdiction to modify or vacate the order, and any person who had no actual notice may challenge at any time. *Id.* The ruling on the protective order is an appealable judgment. *Id.*

250. *Id.*

251. *Id.*

252. See TEX. R. CIV. P. 76a, concurring and dissenting statement by Justice Gonzalez and Justice Hecht (stating concern that hearings will overburden courts and prevent final decisions from being entered); Chamberlain, *Proposed Rule 76a: An Elaborate, Time-Consuming, Cumbersome Procedure*, TEX. BAR J., April, 1990, at 349 (discussing possibility of additional court burdens); Peterson, *Proposed Rule 76a: A Radical Turning Point for Trade Secrets*, TEX. BAR J., April, 1990, at 345 (noting probability of delay and "mini-trials" in litigation). Both authors considered an older version of the proposed rule, which included a much stricter "compelling need" standard, as well as an addition to rule 166b(5) which would block protective orders which conceal public health information. See TEX. BAR J., April, 1990, at 338-39 (describing original compelling need standard). The procedures commented upon, however, are substantially unchanged. *Id.* See generally Texas Lawyer, May 21, 1990, at 24 (predicting higher litigation costs and strained dockets).

interest in settlement as the parties are forced to reveal settlement terms.²⁵³ Further, the new standard may be too vague to guide litigants and courts.²⁵⁴ Perhaps the most troubling aspect of the rule is the lack of any privilege for legitimate trade secrets or potentially damaging competitive information.²⁵⁵ The benefits of *Garcia*,²⁵⁶ protecting the defendant's information while allowing collaboration among plaintiffs, will be lost whenever the public welfare is implicated.²⁵⁷

While Texas concentrated on the public welfare interest, Virginia directed its efforts towards information sharing.²⁵⁸ In 1989, the Virginia legislature revised Virginia code section 8.01-420.01 to allow information sharing among plaintiffs attorneys involved in similar litigation.²⁵⁹ The

253. See Chamberlain, *supra* note 252, at 349 (discussing Rule 76a's chilling effect on settlements); *Plaintiffs' Counsel Win New Texas Supreme Court Rule*, DEFENSE COUNSEL J., July, 1990, at 280 (same).

254. See Tex. Law., May 21, 1990, at 24 (calling the standard a "non-standard" that fails to achieve its goals of compromise between interests).

The standard embodied in Rule 76a is in one sense a step backwards, as it is extremely similar to the standard described by the D.C. Circuit in the pre-*Seattle Times* case, *In re Halkin*, 598 F.2d 176 (D.C. Cir. 1979). In holding that the basis for a protective order was deficient, the court noted that a proper protective order must meet each of three criteria. *Id.* at 191. The harm posed by dissemination must be substantial and serious, the restraining order must be narrowly drawn and precise, and there must be no less restrictive alternative means of protecting the public interest. *Id.* In comparison, Texas Rule 76a requires a showing of a specific, serious and substantial interest which outweighs the presumption of openness and the effect on public safety. TEX. R. CIV. P. 76a(1)(a). Moreover, the Texas rule requires that courts find that no less restrictive means than the protective order will protect the interest involved. *Id.* The *Halkin* court's language concerning a narrow and precise order refers to the court's insistence on a particular and specific demonstration of fact. *Halkin*, 598 F.2d at 193. Thus, where *Halkin* requires a specific demonstration of serious and substantial harm, *id.* at 191, Rule 76a requires a demonstration of a specific, serious and substantial interest, TEX. R. CIV. P. 76a, and both require a least restrictive means analysis. TEX. R. CIV. P. 76a; *Halkin*, 598 F.2d at 195.

255. See *supra* note 245 and accompanying text (discussing exclusion of trade secret exception); Wash. Post, April 21, 1990, at A2 (noting concerns of industry groups that lack of trade secret exclusion will cause competitive disadvantage and protracted litigation).

256. See *supra* notes 124-135 and accompanying text (discussing *Garcia* and benefits of information sharing).

257. See TEX. R. CIV. P. 76a (specifically valuing risk to public); Wash. Post, April 21, 1990, at A2 (noting Texas Supreme Court's effort to prevent limited public access to product information); *supra* note 47-81 and accompanying text (discussing defendant's need for trade secret protection).

258. See *infra* notes 259-277 (discussing Virginia statute).

259. VA. CODE ANN. § 8.01-420.01 (1990). The statute provides in pertinent part:

A protective order issued to prevent disclosure of materials or information related to a personal injury action or action for wrongful death produced in discovery in any cause shall not prohibit an attorney from voluntarily sharing such materials or information with an attorney involved in a similar or related matter, with the permission of the court, after notice and an opportunity to be heard to any party or person protected by the protective order, and provided the attorney who receives the material or information agrees, in writing, to be bound by the terms of the protective order.

court's authority to grant protective orders is found in rule 4:1(c), which is identical to Federal Rule 26(c).²⁶⁰ A concern for public safety prompted a legislative response concerning protective orders.²⁶¹ Section 8.01-420.01 prohibits any protective order from blocking information sharing among attorneys involved in similar litigation, conditioned upon the parties involved in the collateral litigation agreeing to be bound by the order.²⁶² Procedurally, the Virginia statute requires permission of the court to share information with other attorneys, with notice and an opportunity to be heard for the protected party.²⁶³ Because the statute essentially limits the court's discretion under rule 4:1(c), Virginia continues to provide specifically for trade secret protection, with the proviso that the court must allow dissemination to similarly situated plaintiffs.²⁶⁴

The advantages of the Virginia statute include the verification, cost-cutting, and efficiency advantages of information sharing generally.²⁶⁵ However, the statute does not guarantee the expected benefits to public welfare, because the section makes no provision for information sharing with government regulators.²⁶⁶ Because the Virginia statute retains the Rule 26(c)-type protective order, courts may still consider public safety as a countervailing interest.²⁶⁷ As with other protective order provisions, supporters claim that the new rule will eliminate duplicitous discovery, substantially decreasing litigation costs.²⁶⁸ Conversely, manufacturers claim discovery costs would escalate due to more resistance in discovery, an argument that ignores the fact that protective orders are not designed as enforcement mechanisms for proper discovery practices.²⁶⁹ Additionally, information sharing would encourage voluntary compliance because plaintiffs will be able to recognize inconsistencies in discovery responses between different cases.

One difficulty with the Virginia approach is that a large amount of the shared information may be irrelevant to the other plaintiff's case, which

260. See VA. R. SUP. CT. 4:1(c) (adopting language identical to Rule 26(c)).

261. See Wash. Post, Feb. 22, 1989, at B5 (noting that although measure does not allow sharing information with public, revision would increase likelihood of safety information reaching regulators and public trial).

262. See *supra* note 259 (quoting language of § 8.01-420.01).

263. *Id.*

264. See *id.* (quoting language of § 8.01-420.01). Because the Virginia protective order rule, Rule 4:1(c), mirrors Rule 26(c), both rules have the same scope, including trade secret and confidential information exceptions. See VA. R. SUP. CT. 4:1(c) (giving protection to trade secrets and confidential information).

265. See *supra* notes 115-139 (discussing advantages of information sharing); see also Wash. Post, Feb. 6, 1989, at D3 (noting verification advantages).

266. See Wash. Post, Feb. 6, 1989, at D3 (noting that government safety regulators routinely do not see documents).

267. See *supra* note 180 and accompanying text (discussing possibility of public welfare as overriding interest).

268. See Wash. Post, Feb. 22, 1989, at B5 (discussing possible advantages of Virginia statute).

269. See *id.* (noting fears that Virginia statute will cause more aggressive discovery resistance); see also *supra* note 185-187 and accompanying text (noting illegitimacy of resistance to discovery).

calls into doubt the efficiency of information sharing.²⁷⁰ At the very least, however, the plaintiff involved in collateral litigation avoids the time and expense of discovery for much of the information. Moreover, the second plaintiff can use the discovery to verify compliance with his own discovery requests.²⁷¹ A more serious concern is that, while subsequent attorneys could receive the discovery information, a protective order could block actual use of the shared materials in subsequent litigation.²⁷² In response, the plaintiff could either challenge the protective order²⁷³ or, more simply, make his own discovery request of the defendant. At the very least, information sharing would let the plaintiff know about the discovery material while the prior system made no such guarantee.²⁷⁴ The Virginia legislature, by adopting information sharing as a discovery mechanism, continues to protect trade secrets and confidential information as a proper balance requires.²⁷⁵ The Virginia statute has eliminated the shortcomings of the original rule 26(c)-type protective order policy by the use of a mechanism that gives a legitimate value to the goals of trade secret protection, judicial efficiency, and public safety.²⁷⁶ With the minor revision of allowing exchange with government regulators, the Virginia provision serves as a model for the proper balance of competing interests.²⁷⁷

Similar to the Virginia statute, Congressional bill H.R. 129 prohibits protective orders that would prevent information sharing among attorney involved in similar litigation.²⁷⁸ Like the Virginia statute, the Congressional

270. See Thomas, *supra* note 2, at 372 (noting that much information relevant to one case may have nothing to do with another).

271. See Wash. Post, Feb. 6, 1989, at D3 (noting verification advantages).

272. See Thomas, *supra* note 2, at 372 (noting that use of the information by similarly situated plaintiff still will be limited by protective order).

273. See *id.* (discussing difficulties involved with Virginia statute). As a non-party to the original litigation, a similarly-situated plaintiff in a jurisdiction with a Rule 26(c)-type protective order provision may not have standing to challenge the order. *Id.*

274. See *id.* (noting viability of statute as means to allow plaintiff to verify discovered information or for fashioning new discovery requests).

275. See Note, *A Proposal*, *supra* note 34, at 1149 (finding that information sharing would protect defendant's interest in trade secrets and confidential information).

276. See VA. CODE ANN. § 8.01-420.01 (1989) (applying information sharing mechanism).

277. Compare VA. CODE ANN. § 8.01-420.01 (1989) (allowing information sharing among attorneys) with H.R. 129 (1989) (prohibiting court from entering protective order which prevents information sharing among attorneys involved in similar litigation and regulatory agencies).

278. H.R. 129 states:

No court may enter an order in a product liability action involving a product distributed in commerce that forbids any person from making any document or other information which is obtained in discovery and which is reasonably related to design specification, performance standards, warranties, warnings and instructions, or any other matter related to the safety of any product distributed in commerce available to—

(1) a Federal, State, or local regulatory agency, law enforcement agency, or legislative or judicial body if the agency or body has regulatory, law enforcement, legislative, or adjudicative responsibility with respect to the product and if the agency or body states in writing to such person before such document or information is made

bill acts as an amendment to Rule 26(c). However, the Congressional version of information sharing also allows attorneys to make the information available to regulatory bodies.²⁷⁹ The provision allowing information sharing is triggered, however, only when the information is related to the safety of the product.²⁸⁰ Because of the limited scope, H.R. 129 loses much of the benefit of information sharing; plaintiffs still will need to duplicate discovery in similar cases except for discovery information relating to safety.²⁸¹ The one glaring shortcoming of the bill is that no provision is made to bind the other attorneys to the terms of the protective order.²⁸² Once one attorney discloses the information to another attorney, the protective order no longer controls dissemination.²⁸³ Thus, the bill succeeds in achieving the limited objective of information sharing, but fails either to protect the defendant's interest in the process or to recognize the substantial benefits of the mechanism employed.

The Florida Sunshine in Litigation Act (Sunshine Act), at the other extreme from the Congressional bill, takes an absolute approach towards public safety by prohibiting any court from entering an order which conceals a public hazard.²⁸⁴ The statute exempts trade secrets from disclosure only

available that it has procedures in place to prevent the unauthorized disclosure to the public of trade secret information, or

(2) any person who the person reasonably believes—

(A) is an attorney duly licensed to practice law in a State or the District of Columbia, and

(B) is representing a person with a product liability claim which involves a product of the same type, brand or model involved in the product liability action of the person furnishing the document or information, for use in connection with a product liability claim.

H.R. 129, 101st Cong., 1st Sess. (1989).

279. See H.R. 129 § 1(a)(1) (allowing dissemination of discovery material to federal, state or local regulatory agencies, law enforcement agencies, or legislative or judicial bodies with regulatory or law enforcement responsibility with respect to product).

280. See *id.* at § 1(a) (stating that courts may not enter protective orders in products liability actions dealing with safety of product).

281. Compare H.R. 129 (limiting applicability to information related to safety of product) with VA. CODE ANN. § 8.01-420.01 (limiting applicability to information related to action). The Texas rule is even more expansive, limited only to court records, which the Texas rules define broadly. TEX. R. CIV. P. 76a.

282. Compare H.R. 129 (lacking requirement that protective order bind attorneys in collateral litigation) with VA. CODE ANN. § 8.01-420.01 (requiring that protective order bind attorney in collateral litigation).

283. See H.R. 129 (lacking requirement that protective order bind attorney in collateral litigation).

284. The Florida Sunshine in Litigation Act provides:

(3) Except pursuant to this section, no court shall enter an order or judgment which has the purpose or effect of concealing a public hazard or any information concerning a public hazard, nor shall the court enter an order or judgment which has the purpose or effect of concealing any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard.

(4) Any portion of an agreement or contract which has the purpose or effect of

if the information is not pertinent to public safety.²⁸⁵ Essentially, the Sunshine Act destroys the balancing test by making one concern, public safety, paramount and overriding.²⁸⁶ Once the court finds a public hazard, the court loses all discretion to fashion a protective order.²⁸⁷ Although the Sunshine Act implicitly allows information sharing,²⁸⁸ the mechanism is meaningless without the protection provided to manufacturers. Further, because the statute only applies to public hazards, protective orders presumably will continue to block information sharing for non-hazardous information that the manufacturer claims to be confidential. The Sunshine Act makes an effective mechanism ineffective by reducing the protection for legitimate defendant interests and not going far enough in attempting to aid subsequent litigants. Instead, the balance is skewed in favor of the public without regard to the interests of the parties to the litigation.

The shortcomings and strengths of each of the provisions are best illustrated by applying each provision to a hypothetical set of facts. As a hypothetical, the facts from *Garcia v. Peeples*²⁸⁹ are instructive. In *Garcia* the plaintiff's vehicle burst into flames when another car hit Garcia's from behind.²⁹⁰ The plaintiff claimed that a design defect in the fuel system caused a fire that was fed by fuel from the gas tank.²⁹¹ The manufacturer, General Motors Corporation, moved for a protective order for documents containing trade secrets relating to the fuel system design.²⁹² The application of Rule 26(c) mirrors the result reached by the lower court, which issued an umbrella order absolutely restricting dissemination.²⁹³

Viewed within the context of the hypothetical facts, the Texas rule would require that the harm resulting from the loss of trade secrets be

concealing a public hazard, any information concerning a public hazard, or any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard, is void, contrary to public policy and may not be enforced.

(5) Trade secrets as defined in § 688.002 which are not pertinent to public hazards shall be protected pursuant to chapter 688.

FLA. STAT. § 69.081 (1990).

285. *Id.*

286. *See* Business Ins., June 25, 1990, at 21 (stating that availability of information will protect public and improve compensation to victims).

287. *See* FLA. STAT. § 69.081 (making public safety paramount concern).

288. *See id.* (noting that information may be used in related proceedings).

289. 734 S.W.2d 343 (Tex. 1987). Facts similar to *Garcia* may be found in *Parsons v. General Motors Corp.*, 85 F.R.D. 724 (N.D. Ga. 1980) and *Ward v. Ford Motor Co.*, 93 F.R.D. 579 (D. Colo. 1982).

290. *Garcia v. Peeples*, 734 S.W.2d 343, 344 (Tex. 1987).

291. *Id.*

292. *Id.* In *Garcia*, the trial court entered an umbrella or blanket protective order to cover the documents relating to fuel system integrity. *Id.* The Supreme Court of Texas, on mandamus, held that although trade secrets were involved, the protective order was too broad, as it restricted information sharing among plaintiffs involved in similar suits. *Id.* at 348.

293. *Id.* at 344-45. The Texas Supreme Court reached a different result than the lower courts only because the supreme court began to mandate information sharing in protective orders. *See id.* (mandating information sharing as part of protective order procedure).

greater than both the presumption of openness and the interest in public health or safety.²⁹⁴ Although a court could, in its discretion, find that the competitive harm would overcome the presumption of openness, the adverse effect to the general public welfare of not disclosing the defects of the fuel integrity system probably would tip the balance in favor of denying the motion for protective order.²⁹⁵ A possible compromise could occur if the court estimated that the risk of public harm was slight in comparison to the risk of competitive harm to the company, in which case the court could allow the protective order.²⁹⁶ The least restrictive means policy embodied in the new rule would suggest that the protective order would have to allow information sharing among plaintiffs.²⁹⁷ However, *Garcia* directs Texas courts to allow information sharing for any protective order, obviating the need for a similar interpretation of Rule 76a.²⁹⁸ Given the stricter standard and the clear intent behind Rule 76a to limit use of protective orders if public safety is concerned,²⁹⁹ the most probable outcome is denial of the protective order.³⁰⁰ In this instance, the Texas rule protects the public interest, but the effect on the defendant's interest could be devastating competitively. The existence of *Garcia* as a mandate for information sharing makes the need for the Texas rule with stricter standards tenuous in light of the possible damage to defendants.

Both the Virginia statute and the Congressional bill would impose essentially the same order that the appeals court in *Garcia* imposed.³⁰¹ Thus, attorneys would be able to exchange information, creating an expanded class of persons subject to the order.³⁰² The information sharing mechanism would reduce litigation costs and delay. Moreover, public awareness of the defect could come by virtue of a public trial, without requiring public disclosure of trade secrets or confidential information. Where the advantages of the Texas rule stem from the pre-existing mechanism of information sharing, Virginia has adopted information sharing as the primary mechanism.³⁰³ With the minor revision to the Virginia bill of allowing disclosure

294. See *supra* notes 240-245 and accompanying text (discussing Texas procedure pursuant to Rule 76a).

295. See Doggett, *supra* note 238, at 63 (noting Texas rule's perspective that public interest is important factor in protective order analysis). Doggett notes that the public interest may be overcome when the possibility of harm to the public is minimal and the private interest is great. *Id.*

296. See *id.* (discussing possibility of private order if public interest is minimal).

297. See TEX. R. CIV. P. 76a(1)(b) (enunciating least restrictive means policy).

298. See Doggett, *supra* note 238, at 63 (stating that even when need for protection is established, information sharing will be required).

299. See *id.* (discussing public welfare interest in Rule 76a analysis).

300. See *id.* (noting that instances in which sealing will be required should be rare).

301. See *supra* notes 124-134 and accompanying text (discussing *Garcia v. Peeples*).

302. *Id.*

303. See VA. STAT. § 8.01-420.01 (allowing information sharing). Under the precedent of *Garcia v. Peeples*, Texas courts are generally required to allow information sharing under the restrictions of any protective order. See *American Honda Motor Co., Inc. v. Dibrell*, 736

to government agents and requiring compliance with the protective order for all plaintiffs to whom information is disseminated, the Virginia statute serves as a model provision which protects all relevant interests. The ability to disseminate information to other plaintiffs would protect plaintiff interests by decreasing overall litigation costs. Defendant interests continue to be preserved by a protective order which limits dissemination. Finally, the public is protected from hazards by operation of information sharing with government regulators and by the exchange of information among plaintiffs' attorneys.

The Florida rule goes to the opposite extreme, preventing a court from entering a protective order to conceal the trade secrets or to allow information sharing alone, as the *Garcia* court did.³⁰⁴ Although a legitimate trade secret existed, because the documents contained information pertinent to a public hazard the court would be required to allow full access to discovery. Because most products cases involve potential public hazards, protective orders should become extremely rare in Florida product liability litigation. The competitive value of the defendant's information will become meaningless if disclosure to the public is required in every case.

Given the legitimate needs of each of the three interests involved in products litigation, only information sharing provides a stable balance. As a mechanism, information sharing avoids duplicitous discovery while maintaining the secrecy required for the defendant's competitive interests. Additionally, information sharing protects the public by allowing a limited right to disseminate information that is relevant to public welfare. In striking the correct balance, the principles embodied in *Garcia* and the policy behind the Virginia statute achieve a mutually advantageous and equitable measure of competing interests.

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S.W.2d 257 (Tx. Ct. App. 1987) (holding that *Garcia* requires trial court to allow information sharing); Doggett, *supra* note 238, at 63 (noting requirement that Texas courts follow precedent of *Garcia*).

304. See *supra* notes 124-134 and accompanying text (discussing *Garcia v. Peebles*).

