SEYFARTH SHAW
MANAGEMENT ALERT

April 28, 2003

Pending Illinois Legislation Threatens Usefulness of Protective Orders

Illinois House Bill 1191, also commonly known as the "Sunshine in Litigation" legislation, is pending in the Illinois General Assembly. The bill proposes to amend the Illinois Code of Civil Procedure to prohibit judges from entering court orders or judgments that may conceal "public hazards." If passed, this bill would significantly limit a judge's discretion to issue protective orders in pending litigation. It would give almost any citizen or member of the media standing to challenge the validity of any protective order entered by the court on the basis that the order may conceal a public hazard. HB 1191 would significantly affect the manner in which litigation is conducted. It also would severely compromise a litigant's ability to protect its trade secrets, intellectual property and proprietary commercial information.

Although short in length, the bill has potentially wide sweeping ramifications. It would allow "[a]ny substantially affected person including but not limited to representatives of the news media" to challenge the validity of any protective order that allegedly conceals a public hazard. (Public hazard is broadly defined as any instrumentality including—but not limited to—a device, an instrument, a person, a procedure, a product, or the condition of a device, that has caused or is likely to cause injury.)

Arguably, the bill is inconsistent with prior judicial findings. For example, the U.S. Supreme Court previously rejected the notion that the public has a right to access discovery material exchanged between private litigants. The Court concluded that no right of access to such discovery existed at common law—nor could it be found in the Constitution. See *Seattle Times v. Rhinehart*, 467 U.S. 20, 31, 34-35 (1984). In fact, the Court has recognized that protective orders are appropriate in many situations. Moreover, the Civil Rules Advisory Committee reported to Congress that it opposed amending the *Federal Rules of Civil Procedure* to include a limitation on the issuance of protective orders. In its report to Congress, the committee recounted extensive studies which concluded that there was no need to make it more difficult to issue discovery protective orders because there was no evidence that such orders created any significant problem with concealment of public hazards.

Equally important, we should note that HB 1191 would likely raise the cost of litigation. Specifically, the bill would require parties seeking a protective order to show that the information sought to be withheld does not concern a public hazard or other information that may be useful to members of the public in protecting themselves from that hazard. Such a procedure would place the burden of reviewing hundreds, thousands, or even millions of documents on an already overburdened court system. Litigants would be forced to oppose more discovery requests—and additional time and money would be spent adjudicating discovery disputes instead of adjudicating the case on its own merits.

Proponents of the bill argue that litigants—behind the cloak of a protective order—are allowed to conceal information regarding potential public hazards. This argument, however, is not based upon sound reasoning. Neither a protective order issued during the course of discovery nor a confidential settlement agreement permits a defendant to conceal a public hazard, or a health and safety issue. Public safety is intensely regulated and monitored by various federal, state and local agencies. These regulatory agencies have the right to demand the production of any documents purportedly related to public health and/or safety issues. Moreover, the moment a lawsuit is commenced, all allegations of negligence contained in the complaint become public knowledge. Such allegations frequently are sensationalized by the plaintiffs' bar through the media.

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In summary, if passed, HB 1191 would undermine the traditional functioning of our civil justice system by making it practically impossible to protect personal and proprietary information, either by court order or private agreement. HB1191 won't do anything to protect the public from public hazards—but it *will* make litigation more contentious and expensive for the contending parties, as well as more burdensome and time-consuming for the courts. Furthermore, it will put the intellectual property and confidential commercial information of many businesses at risk.

If you'd like additional information about Illinois House Bill 1191— or other ideas on the best ways to protect your organization's confidential and proprietary information—feel free to contact Seyfarth Shaw.

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