



By Amanda Hartley

Protective Orders: *This is Not the Law*

Anyone who handles bad faith cases knows the real battle doesn't begin until the insurance company is asked to produce documents. In fact, bad faith cases are best characterized as two cases: the case about the facts and the case about the documents. Discovery is an exhausting, grueling and tedious process that will easily drain 90 percent of your time.

Inevitably, the process begins when the insurer refuses to produce anything without a protective order (except copies of documents you already have). When the request comes, it is rarely accompanied by any real argument. Usually, the carrier just makes some conclusory statement about "proprietary nature." Too often, parties and courts enter protective orders as a matter of course, without regard for the legal standards, and, we all know why. If you don't agree to the protective order, you'll have to wait months for the documents, write a brief, argue the issues, wait for a ruling, and repeat the same process each time you request another document. The expense (of both time and money) is a real deterrent. Companies know this; that's why they ask, and that's why we say yes. It is much easier (in the short run) to just sign the protective order. I have done it myself, but, in so doing, we sacrifice what is right for what is expedient. The legal standard plays little or no role in the decision, but there is a legal standard, and it exists for good reasons.

The standards governing protective orders are founded upon one of the overarching and sacred tenets of our justice system: it is open. Open courts continue to serve the purpose for which the principle was intended: enhancing the basic fairness of proceedings. In the bad faith context, one commentator noted:

The reason it [proliferation of secrecy orders] is such a terrible problem is several fold. First, the immediate effect that it has on the judicial system is that everybody who represents the plaintiffs has to reinvent the wheel. The defendants know this. That is why they ask for it. . . . But a far more egregious effect—talk about just, speedy and inexpensive determination of justice—is judges have to, over

and over and over again, resolve the same discovery disputes in courts throughout the country.¹

Protective orders prevent you from reusing documents and prevent sharing among plaintiffs. If we all start saying no, we'll steadily make the process easier for future plaintiffs and ourselves. So:

1. Before agreeing to any protective order, make the insurance company give you a real, legal reason!
2. Know the law.
3. Argue the law.

Here is what you need to know:

The insurance carrier will ask you to sign a "blanket" or "umbrella" protective order—covering everything—before the carrier even identifies what documents it may eventually produce. This is not the law.

The public has a strong interest in an open court system, and accordingly, a strict test governs a party's request to conceal information. The right of access to court records, like the openness of court proceedings, enhances the basic fairness of the proceedings and safeguards the integrity of the fact-finding process. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984). In *Meyer Goldberg, Inc. v. Fisher Foods, Inc.*, 823 F.2d 159 (6th Cir. 1987), the Sixth Circuit explained, "as a general proposition, *pretrial discovery must take place in the public unless compelling reasons exist for denying public access* to the proceedings . . . open records are fundamental to our system of law." Courts have long recognized a "strong presumption in favor of openness." *Rudd Equip. Co. v. John Deere Constr. & Forestry Co.*, 834 F.3d 589 (6th Cir. 2016). The reason is simple: "*secrecy serves only to insulate the participants, mask impropriety, obscure incompetence, and conceal corruption.*" *Id.* A party can only overcome the presumption

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of openness by demonstrating that failing to protect information will result in ‘clearly defined and very serious injury.’ *Shane Group, Inc. v. Blue Cross Blue Shield of Michigan*, 825 F.3d 299 (6th Cir. 2016).

A protective order is an extraordinary form of relief, and the burden is on the requesting party—the insurer—to assert and prove the necessity of it. *Shobe v. EPI*, 815 S.W.2d 395 (Ky. 1991). In Kentucky, CR 26.03 provides courts discretion to enter a protective order—“for good cause shown.” The movant must support “good cause” with a *particular, specific demonstration of fact, as distinguished from stereotyped and conclusory statements*. *Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 804, 817 (Ky. 2004). Broad allegations of harm, unsubstantiated by specific examples, are not “good cause.”

The insurer will argue a blanket or umbrella protective order is only temporary, and “good cause” is, therefore, a more “flexible” standard. This is not the law.

Nothing about making a protective order “temporary” eliminates the “good cause” requirement, and nothing in Kentucky law permits a “good cause” determination without identification of the documents that the carrier seeks to protect. In *Grange*, the Court held good cause was not demonstrated “when the petitioner has failed to provide access to the documents, themselves, or to *sufficient descriptions of their contents*.” *Id.* at 817. In formulating its opinion, the Court quoted the Court of Appeals findings that:

The record that has been provided to us does *not* sug-

gest that Grange sought to introduce *specific evidence for each document, or category of documents* for which it makes a claim of lack of relevance, confidentiality, or privilege, and it is not clear whether it submitted all the documents to the trial court for its review in camera. What is clear, however, is that the records were *neither submitted, nor sufficiently described* to us. *Id.* at 817.

As a description of the documents, Kentucky courts routinely approve use of a privilege log. *Collins v. Braden*, 384 S.W.3d 154 (Ky. 2012). Regardless of the method—in camera review, privilege log and/or proffer, the party seeking protection, “*must provide the court with sufficient information to show the existence of the elements of the privilege*.” *Id.* at 164-165.

A carrier must give some description of the documents, give the plaintiff the ability to agree or disagree, and if there is a disagreement, show the court why the carrier thinks the documents are entitled to protection.

The insurer will argue a blanket protective order is expeditious. This is not the law.

In *Citizens First National Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943 (7th Cir. 1999), the Seventh Circuit acknowledged the school of thought viewing stipulated protective orders as “unproblematic aids” to the expeditious production of voluminous documents, but the court noted, “the weight of authority, however, is to the contrary. Most cases endorse a presumption of public access to discovery materials.” *Id.*, at 945-946. The court elaborated, “rule 26(c) would appear to

require no less” and “both the First and Third Circuits, which used to endorse broad umbrella orders, have moved away from that position.” *Id.* at 946.²

Not only do protective orders lack justification, they do not streamline discovery. For example, in *In re Air Crash at Lexington, Ky.* 2009 WL 1683629 (E.D. Ky. 2009), the court noted the defendant designated every document it produced as confidential. *Id.* at 6. The court explained that the defendant’s over-designation punished the plaintiff—by forcing the plaintiff to object to each and every document, and this was an unjustifiable burden. *Id.* The court described itself as “substantially burdened” by the number of sealed documents. *Id.*

Point being, if you agree to a blanket protective order, the insurer will stamp “confidential” on every, single document produced—from that point forward. You will have to evaluate thousands of pages—document by document - challenge improper designations—document by document—and ask for an opinion—document by document. This is an impermissible shift of the insurer’s burden.

On top of seeking a blanket protective order, the carrier will argue that specific documents—such as the claim manual—are entitled to protection. This is not the law.

The Kentucky Supreme Court determined a claim handling manual is not entitled to trade secret protection.

In *Grange*, the Kentucky Supreme Court examined the issuance of protective orders when considering a carrier’s “trade secret” designation. Therein, the plaintiff asked Grange to produce documents including training manuals, internally created manuals and policy and procedure manuals. *Grange*

Mut. Ins. Co. v. Trude, 151 S.W.3d at 817. Grange argued the documents were irrelevant and consisted of “trade secrets.” *Id.* at 807. The Kentucky Supreme Court disagreed and ordered Grange to produce the manuals—without a protective order. *Id.* at 819. The Court noted Grange’s petition contained “only broad descriptions of documents” followed by the “conclusory statement that these documents contain proprietary trade secrets.” *Id.* at 817. Grange’s petition which contained only broad descriptions of documents “followed by the conclusory statement that the documents contain proprietary trade secrets” was *clearly insufficient to support a finding of irreparable harm.* *Id.*

In most cases, the carrier provides a little more than the “trade secret” statement in *Grange*. Do not be fooled by this tactic. Carriers frequently

file affidavits which are substantively nothing more than a long, conclusory statement. Usually, the affidavits contain broad assertions of competitive disadvantage if the manual falls into a competitor’s hands. These statements are not “particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements.” More on this issue below.

What the carrier calls a “trade secret” is actually the carrier’s statutory compliance.

Claiming “proprietary” or “trade secret” protection implies that insurers develop claim manuals to gain some sort of competitive advantage. However, this undermines the spirit and purpose of the UCSPA and Kentucky public policy. Handling claims

shouldn’t be a profit-driven exercise. Claim manuals are nothing like the “Colonel’s secret recipe” or the formula for Coca-Cola. There is no statute requiring KFC to use the “secret recipe” or requiring Coca-Cola to make Coca-Cola. There is a statute requiring insurance companies to implement claim handling standards.

Carriers develop manuals because they are required to do so. The UCSPA, codified as KRS §304.12-230, states, “it is an unfair claims settlement practice for any person to commit or perform any of the following acts or omissions: (3) failing to *adopt and implement reasonable standards* for the prompt *investigation* of claims arising under insurance policies.” The manuals are *those standards*. Claim manuals cover

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the investigation, handling, evaluation, negotiation and settlement of claims – all activities directly governed by the UCSPA. Carriers cannot reasonably claim that the very standards—which the UCSPA requires—are trade secret.

Policies and procedures are not trade secrets.

KRS §365.880(4) defines a “trade secret” as information that:

- (a) 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
- (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

In *Mitchell v. Home Depot U.S.A.*, 2012 WL 2192279 (W.D. Ky. 2013), the plaintiff obtained Home Depot’s policies and procedures. Home Depot claimed the materials constituted “a memorialization of over 30 years of experience in the industry, the compilation of knowledge and expertise of the Company’s associates and the refinement of the Company’s best practices ... [which] are at the very core of Home Depot’s strategies in competitively conducting its business.” *Id.* at *4-5. Home Depot also claimed the materials were valuable to competitors—especially smaller retailers without the resources to develop their own practices. Despite Home Depot’s claims, the court found the policies and procedures were not confidential or “trade secrets.”

The court began its analysis by considering the provisions of Kentucky’s Uniform Trade Secrets Act (KUTSA). *Id.* Home Depot argued it met the KUTSA standard because it spent considerable time and expense developing policies and procedures; it controlled their dissemination, and they were of significant value to competitors. *Id.* at *6-8. The court rejected these arguments. In so doing, the court noted it could “find *nothing unique or distinctive* about the safety procedures or methodologies.” *Id.* at *14-15.

The court cited decisions from across the country finding a company’s policies and procedures are simply not the type of information that is a confidential “trade secret.” Instead, courts routinely find assertions of competitive disadvantage pretextual, masking the primary goal—*limiting dissemination of the information to future litigants.* *Id.* at *10-11. It further recognized protective orders based on *generalized competitive claims* would “*eviscerate*” the general principle of open access to the courts. *Id.* at *11-12. If the harm associated with disclosure of policies and procedures is sufficient for trade secret status, “that *harm could apply to all businesses that develop policies and procedures.*” *Id.* Thus, the court determined, “that other competitors may adopt Home Depot’s safety policies without incurring the associated expenses does not constitute clearly defined and very serious injury.” *Id.* at *14-15.³

Courts around the country apply *Mitchell’s* reasoning in insurance cases. For example, in *McCallum v. Allstate Property and Casualty Ins. Co.*, 204 P.3d 944 (Wash. App. 2009), the court ordered Allstate to produce its claim manual without a protective order. Allstate claimed its manual contained trade secrets and submitted supporting affidavits. *Id.*

The court disagreed and found:

[The affidavits] consist of conclusory statements that should its competitors gain access to its national policies, the competitors will gain an unfair advantage. And similarly, the declarations provide only conclusory statements that Allstate devoted considerable time, manpower, and finances in developing the documents. *Id.* at 951.

Specifically, Allstate’s affidavits *did not state*: 1) *how much time, manpower, and/or financial resources* Allstate used in preparing the manual, 2) the *uniqueness* of Allstate’s processes, 3) *competitors actually wanted Allstate’s manual*, and/or 4) the *differences between the prior version of the manual and the current version of the manual.* *Id.* at 950. Allstate’s affidavits also “*failed to provide proof that rival companies would want the manuals . . . nor did the declarations quantify in any meaningful way what a hypothetical plagiarizer would enjoy.*” *Id.* at 951. In making the determination, the court elaborated, “just because the manuals set forth details and fine points of handling claims does not make them novel.” *Id.* at 951. In sum, Allstate *failed to demonstrate how its strategies or procedures for handling claims were materially different* from those of competitors. *Id.*⁴

Just like *McCallum*, Kentucky courts emphasize that a trade secret must derive independent economic value from not being known or generally ascertainable by others. *Insight Kentucky Partners v. Preferred Automotive Services*, 514 S.W.3d 537, 555 (2016). If the carrier produces an affidavit, it will likely fail to answer:

- What competitive edge does the carrier gain through its method of investigating, evaluating, negotiating and settling injury claims?
- How do the carrier’s claim proce-

- dures give it a competitive advantage?
- Are the carrier’s claim handling practices materially different from other insurers? If so, how?
 - Are there any specific facts supporting the carrier’s fear of lost investment?
 - Are other insurers trying to steal the carrier’s manual?
 - What is valuable about the carrier’s techniques, programs and practices?
 - Are the carrier’s claim handling practices unique? If so, how?
 - What percent of the market would the carrier lose if a competitor saw its claim handling manual?
 - What percent of the carrier’s market share is attributable to its claim handling manual?
 - Has a competitor ever actually stolen part of the carrier’s manual or a prior manual?

Insurance policies and procedures are not randomly created documents that each company generates from scratch. They are compiled based on specific requirements imposed by the various state and federal agencies,

legislatures, and regulatory bodies. There is very little room for deviation. Moreover, many manuals are already in the public realm. Chances are that whatever carrier you are dealing with already has some version of its manual in the public realm (seriously impairing any “trade secret” argument).

As the Sixth Circuit observed, “common sense would indicate that the greater a corporation’s motives for secrecy, the greater the public’s need to know.”⁵ When dealing with these issues, always remember that trying to conceal a document (or more accurately making access to the document a Sisyphean task) is not the same as legitimately maintaining a trade secret.

With the above arguments, we successfully fought entry of a protective order. Next time you are asked to sign one (without a legal reason), just email me at ahartley01@gmail.com. I will email you my brief.



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- 1 Arthur H. Bryant, *Proceedings of the Fifty-First Judicial Conference of the District of Columbia Circuit*, 134 F.R.D. 321, 389-90 (April 1991).
- 2 See *Proctor & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 227 (6th Cir. 1996) for the point that streamlining discovery is insufficient justification for a protective order.
- 3 See also *In re Air Crash at Lexington, Ky.* 2009 WL 1683629 (E.D. Ky. 2009), wherein the court explained policies and procedures are just that – policies and procedures, and “there is nothing legitimately secret about safety information.” Just like there is nothing legitimately secret about safety information – there is nothing legitimately secret about the standards for handling insurance claims.
- 4 See also *Borum v. Smith, M.D.*, 2017 WL 2588433 (W.D. Ky. 2017).
- 5 *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1180 (6th Cir. 1983).

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