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Protective Discovery Orders and the First Amendment: The Limits of Seattle Times and the Business Week Decision

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PROTECTIVE DISCOVERY ORDERS AND THE FIRST AMENDMENT: THE LIMITS OF *SEATTLE TIMES* AND THE *BUSINESS WEEK* DECISION

I. INTRODUCTION

There is a rising trend among corporate litigants to seek broad protective orders preventing disclosure of materials produced in discovery.[1] The response is a mounting criticism that the liberal granting of protective orders, sealing such pre-trial records, represents an unacceptable encroachment upon First Amendment principles and the right to an open judicial system.[2] Restrictions on public access to judicial proceedings routinely trigger a First Amendment inquiry.[3] In the realm of protective discovery orders, however, courts must

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[1] *See* Pansy v. Borough of Stroudsburg, 23 F.3d 772, 788-89 (3d Cir. 1994) (noting increasing use of confidentiality orders within "current trend of judicial secrecy"); Poliquin v. Garden Way, Inc., 989 F.2d 527, 535 (1st Cir. 1993) (commenting on the liberal use of protective orders on both pre-trial and post trial materials); Howes v. Ashland Oil Inc., No. 87-5939, 1991 WL 73251, at *3 (6th Cir. May 6, 1991) (acknowledging protective order prompted defendant to engage in a "nuclear war of discovery").

[2] *See, e.g.*, Sandor M. Polster, *Media's Right To Report is in Danger*, Bangor Daily News, Dec. 9, 1995 (warning against corporate secrecy through the use of protective orders); *Of Prior Restraint*, Indianapolis Star, Dec. 8, 1995, at A16 (describing protective orders as "judicial interference with the First Amendment"); *Casual Gag Orders, Constitutional Farce*, N.Y. Times, Oct. 7, 1995, §1, at 18 (criticizing the imposition of protective orders in litigation).

[3] The First Amendment states in pertinent part, "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. Const. amend I; *see* Seattle Times Co. v. Rhinehart, 467 U.S. 20, 37, 104 S. Ct. 2199, 2209-10 (1984) (concluding protective orders can survive First Amendment scrutiny); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575, 100 S. Ct. 2814, 2826 (1980) (establishing a qualified First Amendment right of access to criminal proceedings); *In re* Orion Pictures, 21 F.3d 24, 26 (2d Cir. 1994) (recognizing public access to the judicial system is based within the First Amendment); Anderson v. Cryovac, Inc., 805 F.2d 1, 5 (1st Cir. 1986) (acknowledging First Amendment is implicated in reviewing third party access to discovery materials); Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1119 (3d Cir. 1986) (reviewing protective orders does not involve a First Amendment analysis), *cert. denied*, 479 U.S. 1043, 107 S. Ct. 907 (1987); United States v. Anderson, 799 F.2d 1438, 1441 (11th Cir. 1986) (stating the First Amendment does not guarantee the public a right to view discovery documents); First Amendment Coalition v. Judicial Inquiry and Review Bd., 784 F.2d 467, 471-79 (3d Cir. 1986) (applying First Amendment scrutiny to restrictions on a judicial disciplinary board); Publicker Indus. v. Cohen, 733 F.2d 1059, 1067-71(3d Cir. 1984) (emphasizing importance of public access to hearings and transcripts in civil proceeding); Worrel

consider the privacy rights of litigants and realize that litigation between commercial entities may involve issues sensitive to public disclosure, such as detailed financial data, or industrial secrets.[4]

A recent, widely publicized example of the conflict between efficient discovery and judicial restraint arose in *Procter & Gamble Co. v. Bankers Trust Co.*[5] In a decision evoking a media outcry, a district court judge refused to lift an injunction preventing the magazine *Business Week* from publishing documents filed with the court as part of a motion.[6] The documents, shielded by a protective order, again raise the specter of First Amendment protection and access to the judicial forum.[7] On appeal, the Sixth Circuit Court of Appeals responded to the concern by labeling the injunction a prior restraint.[8] The opinion by the appellate court affords *Business Week* the heightened protections granted under the First Amendment, despite the finding of the trial judge that the magazine violated a court order when it obtained documents filed with the court

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Newspapers of Indiana, Inc. v. Westhafer, 739 F.2d 1219, 1224 (7th Cir. 1984) (holding broad statute restricting information on indictments violates First Amendment); United States v. Three Juveniles, 862 F. Supp. 651, 654 (D. Mass. 1994) (noting that statute governing juvenile records requires a constitutional examination). *But see* NBC v. Presser, 828 F.2d 340, 352 (6th Cir. 1987) (Ryan, J., dissenting) (noting public access to court records stems from common law, not the First Amendment).

[4] *See* Coca-Cola Bottling Co. v. Coca Cola Co., 107 F.R.D. 288, 300 (D. Del. 1985) (concluding that defendants must reveal secret formula for Coke during discovery); *see also* Note, *Trade Secrets in Discovery: From First Amendment Disclosure to Fifth Amendment Protection*, 104 HARV. L. REV. 1330, 1337 (1991) (equating trade secrets as a form of property entitled to protection under the fifth amendment).

[5] 78 F.3d 219 (6th Cir. 1996).

[6] Procter & Gamble Co. v. Bankers Trust Co., 900 F. Supp. 186, 193 (S.D. Ohio. 1995) [hereinafter *Bankers Trust*].

[7] *See* sources cited supra note 2; *see also* Saundra Torry, *Business Week Case Leaves Unresolved Issues*, Wash. Post, Oct. 30, 1995, at F7; Claudia Maclachlan, *Did Business Week Fold Too Easily?*, NAT'L L. J., Oct. 23, 1995, at A1; *Chilling Impact, 'Business Week' Wins and Loses in Court*, Columbus Dispatch, Oct. 10, 1995, at 8A; *Judges as Editors; Prior Restraint Decision Must Be Overturned*, Ashbury Park Press, Oct. 6, 1995, Sec. A, at 14.

[8] *Procter & Gamble*, 78 F.3d 219 at 225. Under common law, the term "prior restraint" refers to "a system of unreviewable administrative censorship or licensing . . . [T]he Supreme Court has extended the meaning of prior restraint to include judicial orders having an impact analogous to administrative censorship." *In re* Halkin, 598 F.2d 176, 183 (U.S. App. D.C. 1979).

In a harsh criticism of the lower court's opinion, the Sixth Circuit in *Procter & Gamble* stated: "[A]t no time . . . did the District Court appear to realize that it was engaging in a practice that, under all but the most exceptional circumstances, violates the Constitution." 78 F.3d at 225.

under seal of a protective order.[9]

This article will examine the *Business Week* case within the broad concerns surrounding protective orders. It will illustrate the differing approaches federal courts have taken when applying First Amendment analysis to the issuance of protective orders in civil actions, particularly when such orders ensnare non-litigant third parties.[10] Further, it will highlight the range of issues that arise when considering the plight of Business Week and how, in light of the scant authority by the Supreme Court, a blinkered approach has provided anomalous results among the circuits.[11]

II. THE *BUSINESS WEEK* DECISION

In October 1994, Procter & Gamble filed suit in the United States District Court against Bankers Trust alleging fraud and securities violations in a derivatives contract between the two companies.[12] At the outset of the litigation, the District Court issued a protective order shielding all confidential materials produced in discovery.[13] On September 1, 1995, Procter & Gamble moved to

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[9] *Procter & Gamble*, 78 F.3d 219 at 225. In rejecting the tactics employed by the District Court in determining how and under what circumstances Business Week obtained the documents, the court stressed that "[w]hile these might be appropriate lines of inquiry for a contempt proceeding, they are not appropriate bases for issuing a prior restraint." *Id.*

[10] *Compare* Anderson v. Cryovac, Inc., 805 F.2d 1, 7 (1st Cir. 1986) (incorporating the First Amendment within the realm of protective orders) *with* Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1119 (3d Cir. 1986) (concluding protective orders fall outside the purview of the First Amendment), *cert. denied*, 479 U.S. 1043, 107 S. Ct. 907 (1987).

[11] *Compare In re* Halkin, 598 F.2d 176, 183 (U.S. App. D.C. 1979) (applying similar standard to protective orders as to prior restraint) *with In re* Alexander Grant & Co. Litig., 820 F.2d. 352, 355 (11th Cir. 1987) (holding protective orders issued upon a showing of good cause are not subject to heightened scrutiny) *and* Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1119 (3d Cir. 1986) (concluding that courts need not concern themselves with the First Amendment when issuing protective orders), *cert. denied*, 479 U.S. 1043, 107 S. Ct. 907 (1987) *and In re* San Juan Star Co., 662 F.2d 108, 115 (1st Cir. 1981) (recognizing that "[t]he products of discovery . . . embody significant but somewhat limited First Amendment interests").

[12] *Bankers Trust*, 900 F. Supp. at 187. Procter & Gamble's original claim included allegations of fraud and misrepresentation as well as violations of the Commodities Exchange Act. *In re* Bankers Trust Co., 61 F.3d 465, 467 (6th Cir. 1995). It sought nearly $200 million in damages. *Id.*

[13] *Bankers Trust*, 900 F. Supp. at 187. In a subsequent opinion the Sixth Circuit fiercely criticized the lower court's governing of the protective order for allowing the parties to dictate what discovery it deemed confidential. Procter & Gamble Co. v. Bankers Trust Co., 78 F.3d 219, 227 (6th Cir. 1996).

amend their complaint to include RICO[14] violations.[15] Subsequently, an associate lawyer working for Bankers Trust's counsel unaware of the protective order delivered a copy of the supporting documents attached to the motion into *Business Week's* hands.[16] In response, the parties to the lawsuit quickly obtained an ex parte temporary restraining order preventing *Business Week* from publishing the court protected records.[17]

The publishers of *Business Week*, McGraw-Hill, immediately appealed the injunction to the Sixth Circuit Court of Appeals.[18] Initially, however, the Sixth Circuit avoided ruling on the constitutionality of the temporary restraining order claiming it lacked jurisdiction to review the decision absent a final order.[19] McGraw-Hill then petitioned for certiorari to the Supreme Court of the United States.[20] In a terse opinion, Justice Stevens remanded the case to the District Court for final adjudication on the temporary restraining order, thus avoiding the need to address the conflict between the First Amendment and broad protective orders.[21]

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[14] Organized Crime Control Act of 1970, Title IX, 18 U.S.C. § 1961.

[15] Procter & Gamble Co. v. Bankers Trust Co., 900 F. Supp. 193, 194 (S.D. Ohio 1995). The stipulated protective order was originally approved by Judge Rubin in January 1995, approximately two months after Procter & Gamble filed suit. *Id.* at 195. With the death of Judge Rubin shortly thereafter, the case was reassigned to Judge Feikins. *Bankers Trust*, 900 F. Supp. at 187.

Procter & Gamble's decision to amend its complaint was prompted by the wealth of materials it received in discovery under the protective order. *Procter & Gamble*, 900 F. Supp. at 194. In deliberating on the motion to amend, Judge Feikins noted that "plaintiff received approximately 6500 tape recordings and 300,000 pages of other sensitive materials from the defendants." *Id.*

[16] *Bankers Trust*, 900 F. Supp. at 190.

[17] *Id.* at 187. After learning that Business Week intended to publish the material that evening, Judge Feikins granted a restraining order on September 13, 1995. *Id.* at 188.

[18] *See* McGraw-Hill Companies v. Procter & Gamble Co., _ U.S. _, 116 S. Ct. 6, 6 (1995) (reviewing the procedural history of Business Week's appeals).

[19] *Id.*; *see also* Claudia Maclachlan, *Did Business Week Fold Too Easily?*, NAT'L L. J., Oct. 23, 1995, at A1 (discussing the tactics of Business Week in appealing the decision of the lower court).

[20] *McGraw-Hill* at _, 116 S. Ct. at 6.

[21] *McGraw-Hill* at _, 116 S. Ct. at 7. Although noting the procedural failings in the original injunction, Justice Stevens declined to address the merits of Business Week's application to stay the restraining order. *Id.* In rejecting the propriety of the Supreme Court to review Feikins order, the opinion admonishes Business Week for creating the impression that it was unaware of the presence of the original protective order when it obtained the materials in controversy. *Id.* Justice Stevens is clearly uncomfortable with the procedural, as well as the constitutional, boundaries of his decision, but admits that "the manner in

On remand, district court judge Feikins, unsealed the amended complaint but refused to vacate the original injunction.[22] Echoing Justice Steven's concern over the method of procurement, Judge Feikins conducted a two day hearing to determine if *Business Week* was aware of the protective order when it obtained the Procter & Gamble filings.[23] Finding such awareness on the part of *Business Week*, the decision counters the argument that to bar publication is a violation of the First Amendment, by placing heavy reliance on the need for preserving efficient discovery and the refusal to let *Business Week* "snub its nose at court orders."[24]

In a succinct, if not unduly harsh, opinion the Sixth Circuit ultimately reversed the injunction against *Business Week*, admonishing Judge Feikins for ignoring the unconstitutionality of what it deemed a prior restraint upon the press.[25] The appeals court concluded that the trial judge had failed to distinguish between the rights of a party to disseminate those materials it receives in discovery, and what it considered a gag order on a third party.[26] It also criticized the district court for failing to manage what it considered to be a poorly executed protective order.[27]

III. THE PROTECTIVE ORDER CONTROVERSY

The Federal Rules of Civil Procedure emphasize the importance of

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which [Business Week] came into possession of the information it seeks to publish may have a bearing on its right to do so." *Id.* He acknowledges, however, that the District Court's order appeared to be unsupported by the factual inquiries required by Rule 65(b) of the Federal Rules of Civil Procedure. *Id.* at_, 116 S. Ct. at 6.

[22] Procter & Gamble Co. v. Bankers Trust Co., 900 F. Supp. 186, 193 (S.D. Ohio 1995).

[23] *Id.* at 189-91. In his decision, United States District Judge Feikens is quick to highlight the dubious nature of Business Week's journalistic inquiry into the original suit. *Id.* at 188. Upholding the injunction he concluded that the original protective order satisfied a "substantial governmental interest" in protecting the efficiency of the discovery process. *Id.* at 193. The decision subsequently received heavy criticism for focussing on the tactics employed by Business Week in obtaining the disputed materials rather than addressing the validity of the original injunction. *See Judges as Editors; Prior Restraint Decision Must Be Overturned*, Ashbury Park Press, Oct. 6, 1995, Sec. A, at 14 (commenting on the underlying issue of prior restraint).

[24] *Bankers Trust*, 900 F. Supp. at 192-93.

[25] Procter & Gamble Co. v. Bankers Trust Co., 78 F.3d 219, 225 (6th Cir. 1996).

[26] *Id.*

[27] *Id.* at 227.

timeliness and efficiency in the federal court system.[28] Rule 1 liberally vests courts with the power to interpret the rules in a manner that ensures the administration of all civil actions in a prompt and productive manner.[29] Prompted by these considerations, litigants routinely seek, and trial courts often award, protective orders.[30] These orders range from a specific limitation on access to certain discovery materials to "blanket" or "umbrella" protective orders which restrict the dissemination of all materials produced by the parties before trial.[31] The rationale is that by placing materials under a protective order parties are less likely to withhold information from each other, thus reducing the need for evidentiary hearings and burdensome judicial monitoring of the discovery process.[32]

The threshold for obtaining such a permit is low.[33] Rule 26(c) dictates that a protective order is awarded upon a showing of "good cause" only.[34] The inherent weakness within the rule is that many courts find "good cause" simply in the desire to foster an efficient court proceeding, ignoring the underlying issues surrounding the balance between confidentiality and public access.[35] The argument thus becomes somewhat circular. Validity of a protective order depends upon a showing of good cause. A showing of good cause is established by the likely effect of the protective order, namely efficient discovery.

The most commonly used method of mounting a direct attack on protective

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[28] FED. R. CIV. P. 1. Rule 1 states in pertinent part, "These rules . . . shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." *Id.*

[29] *Id.*

[30] *See* cases cited *supra* note 1.

[31] *See* Poliquin v. Garden Way, Inc., 989 F.2d 527, 532 (1st Cir. 1993) (noting the scope and structure of protective orders).

[32] *See In re* Alexander Grant & Co. Litig., 820 F.2d. 352, 357 (11th Cir. 1987) (emphasizing the desire to maximize the participation and efficiency of the discovery process).

[33] FED. R. CIV. P. 26(c). Rule 26(c) provides in pertinent part "Upon motion . . . and for good cause shown, the court . . . may make an order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . ." *Id.*

[34] FED. R. CIV. P. 26(c).

[35] *See Poliquin*, 989 F.2d at 532 (emphasizing the deference awarded to trial judges in fashioning broad protective orders); Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1123 (3d Cir. 1986) (advocating the usefulness of umbrella orders); *see generally* MANUAL FOR COMPLEX LITIGATION § 21.432 (3rd ed. 1995) (stating, "an umbrella order will expedite production, reduce costs, and avoid the burden on the court of document-by-document adjudication").

orders is the First Amendment. This weapon, however, is blunted somewhat by the United States Supreme Court in the seminal case of *Seattle Times Co. v. Rhinehart*.[36] In *Seattle Times*, the Court declared that a protective order does not warrant traditional strict scrutiny under the First Amendment if the order is supported by a showing of good cause, limited to materials obtained only in pre-trial discovery and does not prevent the dissemination of information gleaned from other sources.[37] The decision gathers several components of the trial process together to distinguish the use of protective orders against the traditionally imposing presence of First Amendment strict scrutiny.[38] The Court considers the differences between public testimony versus private discovery through depositions or interrogatories, as well as the right to disseminate information under a protective order versus prior restraint on information gathered elsewhere.[39] In recognizing "[t]he unique position that such orders occupy in relation to the First Amendment," the Court frames the "good cause" balancing test within the language of intermediate scrutiny, granting protective orders merely upon a showing of an important governmental interest.[40] One example of such an important governmental interest is the need for a timely and

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[36] 467 U.S. 20, 104 S. Ct. 2199 (1984).

[37] *Id.* at 37, 104 S. Ct. at 2209-10. The Court granted certiori to resolve the conflict between the circuits as to what standard of review was appropriate when considering First Amendment concerns within the civil discovery process. *Compare In re* Halkin, 598 F.2d 176, 191 (D.C. Cir. 1979) (classifying the issuance of protective orders as that of a prior restraint implicating First Amendment considerations) *with In re* San Juan Star Co., 662 F.2d 108, 116 (1st Cir. 1981) (recognizing only a "heightened sensitivity" to "limited" First Amendment interests).

[38] *Seattle Times*, 467 U.S. at 30-36, 104 S. Ct. at 2206-09.

[39] *Id.*; *see also* Howes v. Ashland Oil, No. 87-5939, 1991 WL 73251, at *7 (6th Cir. May 6, 1991) (noting privacy interests of litigants involved in discovery); Butterworth v. Smith, 494 U.S. 624, 631-32, 110 S. Ct. 1376, 1381 (1990) (distinguishing the right to divulge information obtained before, rather than during, a judicial proceeding).

[40] Seattle Times Co. v. Rhinehart, 467 U.S. 20, 34, 104 S. Ct. 2199, 2207 (1984). In fashioning the test the Supreme Court states that a trial judge must consider if the "practice in question" furthers "an important or substantial governmental interest unrelated to the suppression of expression" and whether "the limitation of First Amendment freedoms" is "no greater than is necessary or essential to the protection of the particular governmental interest involved." *Id.* at 32 (quoting Procunier v. Martinez, 416 U.S. 396, 413, 94 S. Ct. 1800, 1811 (1974)); *see also* Gentile v. State Bar of Nevada, 501 U.S. 1030, 1052, 111 S. Ct. 2720, 2733 (1991) (distinguishing those situations in which traditional balancing tests do not apply); Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 28, 106 S. Ct. 2735, 2751 (1986) (Stevens, J., dissenting) (criticizing reliance on compelling governmental interest standard for question on access to criminal proceeding); Federal Election Comm'n v. International Funding Inst., 969 F.2d 1110, 1114 (D.C. Cir. 1992) (subjecting ban on private use of contributor lists to intermediate scrutiny).

efficient discovery process.[41]

Since *Seattle Times*, debate has focused on whether the Court has encouraged the growth of blanket protective orders by vesting too much discretion in the trial court to conduct good cause reviews within a liberal interpretation of Rule 26.[42] The prevalence of protective orders has led to the criticism that there is too little guidance on establishing the outer boundaries of such orders.[43] Courts continue to disagree on how the First Amendment applies to the issue of over broad protective orders with the increased number of corporate litigants requesting confidentiality of discovery materials.[44] The Third Circuit ruled that the First Amendment has little relevance, if any, to the analysis.[45] In contrast, the First Circuit is unwilling to reject the First

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[41] *Seattle Times Co.*, 467 U.S. at 34-36, 104 S. Ct. at 2208-09. The Court rejects the additional burdens that would be imposed by the strict scrutiny of traditional First Amendment investigation stating, "[t]he trial court is in the best position to weigh fairly the competing needs and interests of the parties affected by discovery. The unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders." *Id*; *see also In re* Alexander Grant & Co. Litig., 820 F.2d. 352, 356 (11th Cir. 1987) (emphasizing the procedural benefits produced by "umbrella" protective orders).

[42] *Compare* Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 471-73 (1991) (defending use of protective orders against reforms aimed at opening up discovery process) *with* Patrick M. Livingston, Note, *Seattle Times v. Rhinehart: Making "Good Cause" a Good Standard for Limits on Dissemination of Discovered Information*, 47 U. PITT. L. REV. 547, 558 (1986) (criticizing *Seattle Times* for undermining First Amendment principles).

[43] *See* Dianne L. Bratvold, Note, *Protective Orders and the Use of Discovery Materials Following Seattle Times*, 71 MINN. L. REV. 171, 192 (1986) (advocating a balancing of interests in the granting of protective orders).

[44] *See, e.g.*, The Courier-Journal v. Marshall, 828 F.2d 361, 367 (6th Cir. 1987) (upholding defendant's association rights under First Amendment over media's right of access to depositions); Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1119 (3d Cir. 1986) (supporting the use of umbrella orders free from the imposition of First Amendment analysis), *cert. denied*, 484 U.S. 976, 108 S. Ct. 487 (1987); Anderson v. Cryovac, Inc., 805 F.2d 1, 7 (1st Cir. 1986) (advocating a retention of First Amendment considerations).

[45] *Cipollone*, 785 F.2d at 1119. The *Cipollone* court identified the ambiguity in the Supreme Court decision thus:

> [I]t was unclear whether Seattle Times mandated a Rule 26(c) analysis without regard to the First Amendment or whether it required an analysis that included a least restrictive means test. This ambiguity may be significant because the good cause analysis, although by no means toothless . . . is significantly less stringent than the least restrictive means test.

Id. at 1118-19.

Amendment's involvement entirely.[46] Prior to *Seattle Times*, the First Circuit dictated that the good cause standard requires a heightened sensitivity to First Amendment considerations.[47] In its first post *Seattle Times* decision, the First Circuit, in *Anderson v. Cryovac,*[48] appears to avoid a conflict by couching its pre *Seattle Times*, "heightened sensitivity" within the rubric of the Supreme Court decision.[49] By structuring an analysis within the good cause framework, however, the court fails to fully distinguish the situation in *Seattle Times*, in which a party to the suit wished to disseminate information, with the issue presented of a third party wishing to intervene and publish the discovered materials.[50] In a subsequent First Circuit opinion the court suggests that traditional First Amendment strict scrutiny is only brought to the fore when good cause is absent from the granting of a protective order.[51]

Similarly, the argument is raised that the broad discretionary powers conferred upon judges to grant protective orders has been unfairly expanded to include those materials introduced at trial, filed in court under seal of a protective order, or produced in discovery, but otherwise available as a public record.[52] Although Federal courts have generally raised the standard of review to a

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[46] *See* Anderson v. Cryovac, Inc., 805 F.2d 1, 7 (1st Cir. 1986) (rejecting *Cipollone* by stressing that the First Amendment does retain a presence within protective orders); *In re* San Juan Star Co., 662 F.2d 108, 116 (1st Cir. 1981) (noting "good cause" standard must incorporate a "heightened sensitivity" to First Amendment).

[47] *In re San Juan Star Co.*, 662 F.2d at 115.

[48] 805 F.2d 1 (1st Cir. 1986).

[49] *Id.* at 7. The *Anderson* court states: "[w]e read the [*Seattle Times*] opinion as applying the heightened scrutiny test of [*Procunier v. Martinez*] to the practice of restraining a litigant's right to disseminate discovery information, not to any particular application of Rule 26(c)." *Id.* at 7 n.2.

[50] *Id.* at 9; *see also* B. Deidre Brennan, Comment, *Rule 26(c) Protective Orders: First Amendment Scrutiny and the Good Cause Standard*, 21 SUFFOLK U. L. REV. 909, 915 (1987) (noting the distinction between those parties seeking disclosure).

[51] Public Citizen v. Liggett Group, Inc. 858 F.2d 775, 789 (1st Cir. 1988).

[52] *See* Poliquin v. Garden Way, Inc., 989 F.2d 527, 532-35 (1st Cir. 1993) (reviewing post trial disclosure of various materials brought within control of protective order); *In re* Perry, 859 F.2d 1043, 1049 (1st Cir. 1988) (criticizing extension of protective order within administrative hearing to cover information distributed by employee's union). The court in *Perry* noted that, contrary to the administrative judge's opinion, a vague and broad protective order written simply to prevent "abuse" of the proceeding reduced its capacity to survive constitutional muster. *In re Perry*, 859 F.2d at 1050; *see also In re* "Agent Orange" Prod. Liab. Litig., 821 F.2d. 139, 148 (2d Cir. 1987) (declaring that absent good cause a lifting of the protective order was provident); Bank of America Nat'l Trust & Sav. Ass'n. v. Hotel Rittenhouse Assocs., 800 F.2d 339, 343 (3d Cir. 1986) (distinguishing unsealing of court filed settlement agreement from facts in *Seattle Times*).

showing of "compelling government interest" when restricting evidence introduced into the trial record, they have not always extended such heightened scrutiny to court filings produced under the umbrella of the original "good cause" protective order.[53]

In general, unlike discovery materials, a settlement or motion filed with the court is a public component of a civil trial.[54] Such filings, as a public record, are thus presumptively open for inspection.[55] *Seattle Times* confirmed the belief, however, that no such public right of access extends to those materials generated by pre-trial discovery.[56] The problem arises, therefore, when a court imposes a restriction on the dissemination of material that is first produced under a protective order but later introduced into evidence or attached to pre-trial pleadings.[57] The district court in *Procter & Gamble*, declared that such restrictions are within the bounds of the protective order, and as such, are afforded review under the less stringent balancing test of "good cause."[58] Other courts, however, reject such a practice and favor a rule that any restriction on a document filed with the court under a protective order is subject to a separate and more deliberate review which must establish a compelling reason before withholding the information.[59]

Third parties, such as media outlets who are adversely affected by protective orders, criticize courts for curtailing the right to disseminate under the guise of maintaining an efficient court process.[60] Although *Seattle Times*

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[53] *Poliquin*, 989 F.2d at 534 (1st Cir. 1993) (retaining Rule 26 standard for other complaints filed against defendant but produced in discovery under protective order).

[54] *See* United States *ex rel.* Stinson v. Prudential Ins. Co., 944 F.2d 1149, 1158 (3d Cir. 1991) (stressing, absent protective order, all material produced in discovery is potentially accessible to public); *In re* Rafferty, 864 F.2d 151, 155 (D.C. Cir. 1988) (emphasizing that protective order cannot be used retroactively to restrict information gathered outside discovery). *But see Poliquin*, 989 F.2d at 534 (preventing post trial dissemination of public records generated under protective order).

[55] *See* Nixon v. Warner Communications, Inc., 435 U.S. 589, 597, 98 S. Ct. 1306, 1312 (1978) (acknowledging public accessibility of judicial records).

[56] Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33, 104 S. Ct. 2199, 2208 (1984).

[57] *See* Poliquin v. Garden Way, Inc., 989 F.2d 527, 534 (1st Cir. 1993) (holding court filings introduced through discovery remained sealed under a protective order).

[58] Procter & Gamble Co. v. Bankers Trust Co., 900 F. Supp. 186, 192 (S.D. Ohio 1995).

[59] *See* Anderson v. Cryovac, Inc., 805 F.2d 1, 9 (1st Cir. 1986) (criticizing trial court's selective relaxation of protective orders upon third parties).

[60] *See In re* Perry, 859 F.2d 1043, 1048-49 (1st Cir. 1988) (criticizing extension of protective order to cover information distributed by union of party employee); The Courier-Journal v. Marshall, 828 F.2d 361, 367 (6th Cir. 1987) (denying newspapers right

recognizes that the right of litigants to publish information produced through discovery is weaker than those parties who are otherwise subject to judicial censorship through prior restraint, it is unclear whether this assumption extends to the rights of non-parties seeking to pierce the order's veil of protection.[61] To this end, the stifling effect of protective orders is often challenged when the underlying action involves a matter of widespread public concern, such as those cases involving products liability or health issues.[62] For example, in a widely publicized case involving the claims by Vietnam veterans against the manufacturers of Agent Orange, the Second Circuit lifted a protective order preventing disclosure of the materials generated during discovery.[63] The court stated that "[a]ny inconvenience to which the appellants are subjected certainly is outweighed by the enormous public interest in the Agent Orange litigation and the compelling need for class members and non-class members alike to evaluate fully the efficacy of settling this litigation."[64]

As noted above, *Seattle Times* concerned the right of a defendant to disseminate materials it received during discovery.[65] The court did not directly consider a restriction on a third party wishing to gain information filed with the

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to gain access to fruits of discovery). The court in *Perry* noted that, contrary to the administrative judge's opinion, a vague and broad protective order written simply to prevent "abuse" of the proceeding, reduced its capacity to survive constitutional muster. *Perry*, 859 F.2d at 1050.

[61] *Compare* Pansy v. Borough of Stroudsburg, 23 F.3d 772, 788 (3d Cir. 1994) (noting court must consider whether issue is important to public before entering confidentiality orders) *and In re* Alexander Grant & Co. Litig., 820 F.2d. 352, 357 (11th Cir. 1987) (Clark, J., dissenting) (stating interests of public are part of balancing process when granting protective orders) *with* The Courier-Journal v. Marshall, 828 F.2d 361, 367 (6th Cir. 1987) (rejecting importance of issue to public as supporting press access to discovery).

[62] *See* Public Citizen v. Liggett Group, Inc., 858 F.2d 775, 787 (1st Cir. 1988) (noting strong public interest in discovery concerning important public health issue); Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1111-12 (3d Cir. 1986) (reviewing an umbrella order issued in a tobacco products liability suit), *cert. denied*, 484 U.S. 976, 108 S. Ct. 487 (1987); Anderson v. Cryovac, Inc., 805 F.2d 1, 3 (1st Cir. 1986) (discussing media's right of access to proceedings involving environmental pollution); New York v. United States Metals Ref. Co., 771 F.2d 796, 802 (3d Cir. 1985) (rejecting party's right to publish report on air pollution from discovery materials); Sanders v. Shell Oil Co., 678 F.2d 614, 618-19 (5th Cir. 1982) (upholding protective order furnished in civil rights claim).

[63] *In re* "Agent Orange" Prod. Liab. Litig., 821 F.2d. 139, 148 (2d Cir. 1987).

[64] *Id.*

[65] Seattle Times Co. v. Rhinehart, 467 U.S. 20, 22-29, 104 S. Ct. 2199, 2202-05 (1984).

court in a judicial proceeding.[66] First Amendment advocates point out that such a restriction constitutes a prior restraint outside the "good cause" review of protective orders.[67] This distinction is important for several reasons. First, there is a well established principle that "prior restraints upon speech and publication are the most serious and least tolerable infringement on First Amendment rights."[68] Relying on the belief that the preferred remedy for publication of injurious information lies in subsequent criminal or civil action, as opposed to court imposed restraints, such gag orders are held to the strictest scrutiny.[69]

Furthermore, a prior restraint issued upon an absent party carries with it an even higher presumption of invalidity, making the threshold of constitutionality virtually insurmountable.[70] The Supreme Court has previously set aside an ex parte, temporary restraining order on the ground that it was issued without showing that reasonable efforts were made to contact the absent third party.[71] In *In re Providence Journal Co.*[72] the First Circuit went further ruling that where an order is on its face unconstitutional a party has the right to publish in violation of the order.[73]

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[66] *See In re* Reporters Comm. for Freedom of the Press, 773 F.2d 1325, 1331 (D.C. Cir. 1985) (separating *Seattle Times* holding from discussion on right of access to civil proceeding); Tavoulareas v. Washington Post Co., 724 F.2d 1010, 1017 n.13 (D.C. Cir. 1984) (emphasizing First Amendment rights of disclosure separate from those concerning access to discovery).

[67] *See* sources cited *supra* note 2.

[68] Nebraska Press Ass'n. v. Stuart, 427 U.S. 539, 559, 96 S. Ct. 2791, 2803 (1976).

[69] *See In re* Providence Journal Co., 820 F.2d 1342, 1348 (1st Cir. 1986) (stating "[a]ny prior restraint on expression comes to this Court with a heavy presumption against its constitutional validity" (quoting Org. for a Better Austin v. Keefe, 402 U.S. 415, 419, 91 S. Ct. 1575 (1971))), *modified on reh'g*, 820 F.2d 1354 (1987), *cert. granted and dismissed on other grounds*, 485 U.S. 693, 108 S. Ct. 1502 (1988).

[70] *See* Carrol v. President and Comm'rs of Princess Anne, 393 U.S. 175, 183, 89 S. Ct. 347, 353 (1968) (warning no participation in formulation of prior restraint orders negates First Amendment safeguards); *In re Providence Journal Co.*, 820 F.2d at 1351 (emphasizing that First Amendment demands a full hearing on orders constituting a prior restraint).

[71] *See Carrol*, 393 U.S. at 181, 89 S. Ct. at 352 (overturning issuance of restraining order since petitioner received no notice).

[72] 820 F.2d 1342 (1st Cir. 1986), *modified on reh'g*, 820 F.2d 1354 (1987), *cert. granted and dismissed on other grounds*, 485 U.S. 693, 108 S. Ct. 1502 (1988).

[73] *See id.* at 1347 (stating that "transparently invalid" court orders are not subject to collateral bar rule).

IV. THE ISSUES IN *PROCTER & GAMBLE*

The decision by the Sixth Circuit in *Procter & Gamble* is notable both for its stinging criticism of the trial court's analysis and its firm stance on the issue of protective orders. The District Court justifies the constitutionality of its restraining order by placing heavy reliance on *Seattle Times*.[74] In contrast, the Sixth Circuit unequivocally distances its holding from that of *Seattle Times* characterizing its investigation as "the classic case of prior restraint."[75] The court firmly rejected the inquisition into *Business Week's* journalistic methods conducted by the trial judge characterizing such an inquiry as better suited to a contempt proceeding as opposed to a third party injunction.[76] The Sixth Circuit completed this shift in analysis by identifying the factual distinction between the two cases.[77] In *Seattle Times* the plaintiff asserted a right to disseminate and in *Procter & Gamble* a third party challenged the protective order.[78] Having embraced a First Amendment inquiry the Sixth Circuit sought guidance within a prior restraint analysis by reverting to the First Circuit's opinion in *Providence Journal*.[79]

Such a wholesale abandonment of the Supreme Court opinion, however, is misplaced. Although *Seattle Times* did not purport to state that a third party may never gain access to pre-trial proceedings, it did stress that dissemination of such materials by party litigants falls outside traditional First Amendment scrutiny.[80] The court based it's decision on the presumption that pre-trial discovery is not open to the public. In *Procter & Gamble* the court appears to rely on such a presumption.[81] Despite a movement in modern legislation to the contrary, there remains no right of access, in either common or constitutional law, to all discovery produced by civil litigants.[82] The decision in *Procter & Gamble*, though not unequivocal, may be read in support of such a right.

After framing its analysis within prior restraint, the Sixth Circuit

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[74] Procter & Gamble Co. v. Bankers Trust Co., 900 F. Supp. 186, 192 (S.D. Ohio 1995).

[75] Procter & Gamble Co. v. Bankers Trust Co., 78 F.3d 219, 225 (6th Cir. 1996).

[76] *Id.* at 225; *see also In re* Rafferty, 864 F.2d 151, 155 (D.C. Cir. 1988) (emphasizing protective order cannot be used retroactively to restrict information gathered outside discovery).

[77] *Procter & Gamble Co.*, 78 F.3d at 225.

[78] *Id.*

[79] *Id.* at 226.

[80] Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33, 104 S. Ct. 2199, 2208 (1984).

[81] Procter & Gamble Co. v. Bankers Trust Co., 78 F.3d 219, 227 (6th Cir. 1996).

[82] *Seattle Times Co.*, 467 U.S. at 33, 104 S. Ct. at 2208.

emphasized that commercial confidences will not justify such a restraining order as that imposed upon *Business Week*.[83] In doing so, however, the court ignores the finding by the trial judge that *Business Week* was aware that the documents were under seal of a court order when it decided to publish.[84] It does so by relying on the language of *Providence Journal*, which held that a party may have a right to defy a "transparently invalid prior restraint on pure speech."[85] Such an exception to the general rule, that a party may not violate an order and raise the issue of its unconstitutionality collaterally as a defense in a criminal contempt proceeding, is fraught with problems. The dangers of encouraging parties to ignore court orders is obvious and this concern is prevalent throughout the lower court's decision.[86]

The majority opinion ends by identifying the underlying deficiencies in the original protective order.[87] It suggests that a mere deferral to the original protective order without a more exacting analysis of its underlying validity is misplaced, particularly where it jeopardizes the right to an open judicial system.[88] The court admonished the District Court for allowing the litigants to unilaterally decide what is confidential and therefore protected by the order.[89] By issuing such an order, the Sixth Circuit points out, the district court abdicated its responsibility as an impartial arbitrator protecting the interests of the public.[90]

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[83] *Procter & Gamble Co.*, 78 F.3d at 225.

[84] Procter & Gamble Co. v. Bankers Trust Co., 900 F. Supp. 186, 188 (S.D. Ohio 1995). District Court Judge Feikins concludes his criticism by stating, "*Business Week* actively sought to obtain documents while it knew of the protective order." *Id.* at 191. In contrast the Sixth Circuit describes *Business Week's* methods as "standard journalistic protocol." *Procter & Gamble Co.*, 98 F.3d at 224.

[85] *In re* Providence Journal Co., 820 F.2d 1342, 1352-53 (1st Cir. 1986), *modified on reh'g*, 820 F.2d 1354 (1st Cir. 1987), *cert. granted and dismissed on other grounds*, 485 U.S. 693, 108 S. Ct. 1502 (1988).

[86] Procter & Gamble Co. v. Bankers Trust Co., 900 F. Supp. 186, 192-93 (S.D. Ohio 1995).

[87] Procter & Gamble Co. v. Bankers Trust Co., 78 F.3d 219, 227 (6th Cir. 1986).

[88] *Id.; see also* Carrol v. President and Comm'rs of Princess Anne, 393 U.S. 175, 183, 89 S. Ct. 347, 353 (1968) (emphasizing the First Amendment requires a narrower court order); Pansy v. Borough of Stroudsburg, 23 F.3d 772, 775 (3rd Cir. 1994) (criticizing the use of confidentiality orders without due consideration to the interest of the public in obtaining protected information); In Re "Agent Orange" Prod. Liab. Litig., 821 F.2d. 139, 148 (2nd Cir. 1987) (stressing a lack of good cause will warrant a lifting or modification of a protective order); Anderson v. Cryovac, Inc., 805 F.2d 1, 8-13 (1st Cir. 1986) (considering the media's First Amendment rights of access to discovery materials).

[89] *Procter & Gamble Co.*, 78 F.3d at 227.

[90] *Id.*

The court then advocates for a more stringent balancing test before courts furnish parties with a blanket protective order.[91]

While it is true that the decision in *Procter & Gamble* may have swung the pendulum against poorly designed protective orders, the benefits provided by Rule 26(c) cannot easily be ignored. Discovery is not a public forum for information gathering, and therefore the right to restrict the dissemination of those materials produced under the liberal parameters of the Federal Rules must be maintained.[92] As opponents of such freedoms as that sort by *Business Week* stress, the rights of privacy among litigants are not surrendered at the courthouse door.[93]

Protective orders do serve a useful purpose in protecting commercial entities from abuses of the discovery process. As commentators have pointed out, pre-trial protective discovery orders prevent parties from engaging in unnecessary "fishing expeditions" and thus frustrate attempts to promote future litigation or provide leverage in seeking favorable settlements.[94] A strengthening of a third party's right to pierce such an order may therefore discourage open and efficient discovery between litigants. By framing such a right under a prior restraint analysis the Sixth Circuit may have undermined the goals set forth in

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[91] Pansy v. Borough of Stroudsburg, 23 F.3d 772, 787 (3rd Cir. 1994) (weighing interests of parties in maintaining confidentiality order over settlement agreement). The *Pansy* court considered the rights of a newspaper who intervened in a civil action to gain access to a settlement agreement reached by the original litigants. *Id.* at 787-90. The opinion draws upon several factors in balancing the validity of the confidentiality order including whether the information is sought for a legitimate purpose, whether the parties or issues in dispute of a public or private nature, the presence of the order in facilitating a settlement and where, modification of an order is sought, the parties' reliance on the original order. *Id.; see also* Leucadia, Inc. v. Applied Extrusion Technologies, Inc., 998 F.2d 157, 166-67 (3rd Cir. 1993); Public Citizen v. Liggett Group, Inc., 858 F.2d 775, 790 (1st Cir. 1988) (stressing broad protective orders are too over inclusive without modification for individual documents); Anderson v. Cryovac, Inc., 805 F.2d 1, 7 (1st Cir. 1986) (requiring a "particular factual demonstration of potential harm" as opposed to "conclusory statements"); *In re* Continental Illinois Sec. Litig., 732 F.2d 1302, 1311 (7th Cir. 1984) (rejecting implication that protective order, if properly entered, would foreclose any subsequent unsealing of documents); *In re* San Juan Star Co., 662 F.2d 108, 117 (1st Cir. 1981) (advising courts to conduct more explicit investigation when prohibiting disclosure of depositions).

[92] *See* Poliquin v. Garden Way, Inc., 989 F.2d 527, 532 (1st Cir. 1993) (stressing that Federal Rules reflect broad judicial discretion in fashioning protective orders); *see generally* MILLER, *supra* note 42, at 510-02 (defending the attack on protective orders).

[93] Seattle Times Co. v. Rhinehart, 467 U.S. 20, 34-36, 104 S. Ct. 2199, 2208-09 (1984).

[94] *Id.*; *see also* MANUAL FOR COMPLEX LITIGATION § 21.432 (3rd ed. 1995) (listing various considerations in request for release of information under seal of protective order).

Rule 26(c) and weakened the shield of protective orders created under *Seattle Times*.

V. CONCLUSION

The popularity of protective orders can be seen as an abuse of the liberal rules of discovery to the detriment of the First Amendment protections, or a useful tool which encourages expedient and faithful discovery. To protect constitutional freedoms, it appears necessary that the courts limit the growth of protective orders. Alternatively, a blind leap to the defense of the First Amendment without a careful inspection of the competing interests, at best ignores the prerequisite to the Federal Rules of Civil Procedure and, at worst, encourages the deliberate violation of court orders. A strengthening of the *Seattle Times* holding is required to check the unbridled censorship of all materials produced in discovery. *Seattle Times* ruled that protective orders are not violative of the First Amendment. It did not however, as many courts have interpreted, sanction the broad use of protective orders within the liberal parameters of the Federal Rules of Civil Procedure. A more thorough investigation of the interests of the parties in dispute, as well as the collateral effects on third parties brought within the scope of protective orders, must be accomplished if courts wish to encourage efficient litigation within accepted constitutional boundaries.

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