Arkansas Association of Defense Counsel

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Permissive Appeals & Extraordinary Writs: Limited Remedies Available When a Motion for Protective Order is Denied

Protective orders specifying or restricting how information obtained in discovery may be used "are frequently obtained by agreement, particularly in document-intensive cases involving confidential information." David Newbern & John J. Watkins, *Ark. Civil Prac. & Proc.* § 21:12 (5th ed.). When parties cannot arrive at an agreement about how confidential information will be used, the party seeking protection of her information may be faced with significant challenges.

A litigant seeking to protect trade secrets and/or other confidential commercial information may file a motion for protective order under Rule 26(c) of the Arkansas Rules of Civil Procedure if she has conferred or attempted to confer in good faith with the opposing party to resolve the dispute. Rule 26(c) provides in pertinent part:

> [T]he court in which the action is pending 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.

Subsection (c)(7) of Rule 26 distinguishes trade secrets from "other confidential research, development, or commercial information." Ark. R. Civ. P. 26. While Arkansas's appellate courts have not addressed this distinction, a federal court in the Eastern District (interpreting the federal rule) has done so: "Because the protections of Rule 26(c)(1)(G) are not limited to information that qualifies as trade secrets, the Court does not find dispositive whether NYS and Skyline entered into an agreement to keep this information confidential." *J.D. Fields & Co., Inc. v. Nucor-Yamato Steel Co.*, No. 4:12-CV-00754-KGB, 2015 WL 12696208, at *6 (E.D. Ark. June 15, 2015) (citing *ConAgra, Inc. v. Tyson Foods, Inc.*, 342 Ark. 672, 30 S.W.3d 725 (Ark. 2000)). The distinction is important because it determines how an appeal must be taken in

the event a motion for protective order is denied.

Rule 507 of the Arkansas Rules of Evidence provides:

> A person has a privilege, which may be claimed by him or his agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by him, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. If disclosure is directed, the court shall take such protective measures as the interest of the holder of the privilege and of the parties and the interests of justice require.

Ark. R. Evid. 507. Because trade secrets are privileged, an appeal from an order denying a motion for a protective order for trade secrets information should be taken under Rule 2(f) of the Arkansas Rules of Appellate Procedure. Rule 2(f) provides in part:

> The Supreme Court may, **in its discretion**, permit an appeal from an order denying a motion for a protective order pursuant to Rule of Civil Procedure 26(c), an order pursuant to Rule of Civil Procedure 37 compelling production of discovery, or an order denying a motion to quash production of materials pursuant to Rule 45 **when the defense to production is any privilege recognized by Arkansas law** or the opinion-work-product protection.

Ark. R. App. P.—Civ. 2(f) (emphasis added).

Because "confidential commercial information" is not privileged, an appeal cannot be taken under Rule 2(f) when a court denies a motion for protective order sought to protect confidential commercial information. As such, the only available remedy is an extraordinary writ and the Arkansas Supreme Court has consistently held "a petition for writ of certiorari is not an appropriate remedy when a party seeks to reverse a discovery order." *Cooper Tire & Rubber Co. v. Phillips County Circuit Court*, 2011 Ark. 183, at 6, 381 S.W. 3d 67, 70. However, there is an exception "where the issue was not a 'mere' discovery issue but involved another area of law that would be impacted by the resolution of the discovery matter." *Id.* at 6, 71 (citing *Ark. Democrat–Gazette, Inc. v. Brantley,* 359 Ark. 75, 194 S.W.3d 748 (2004)). Thus, in order to even potentially succeed with an extraordinary writ, some other area of the law must be impacted by the circuit court's denial of a protective order.

In sum, if a protective order is denied, a litigant seeking to protect trade secrets and/or other confidential information is left with limited remedies—a permissive appeal pursuant to Rule 2(f) and/or an extraordinary writ. As such, it is in the best interest of the party seeking a protective order to come to an agreement with the opposing party without court intervention to the extent possible.

The thanks of the AADC go out to Maggie H. Benson of Kutak Rock for writing this article.

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