

"It is a bitter sweet irony that Amway's rival, P&G, was disallowed the same thing Amway is now trying to do with the Blakey report"

Summary:

In a suit between P&G and Bankers Trust over money lost in financial derivatives, Business Week Magazine published a story containing confidential information under seal, which had been inadvertently given to Business Week by legal representatives of the parties. The District court issued injunctions against Business Week for violation of the protective order so that they would cease publishing the confidential material.

The injunctions were challenged and subsequently overturned by the Sixth Circuit Court of Appeals. The court cited the *prior restraints* doctrine, whereby free speech has priority in the situation where there is no significant national security threat.

Justice Blackmun recently summarized the state of *prior restraint* doctrine as follows:

Although the prohibition against prior restraints is by no means absolute, the gagging of publication has been considered acceptable only in "exceptional cases." Even where questions of allegedly urgent national security, or competing constitutional interests, are concerned, we have imposed this "most extraordinary remedy" only where the evil that would result from the reportage is both great and certain and cannot be mitigated by less intrusive measures.

Also noted by the appeals court was that courts couldn't abdicate their responsibility in the proper application of Rule 26(c) (materials which can be covered by Protective orders) so that long-established legal tradition of public access to court proceedings is persevered. The appeals court noted that Rule 26(c) was not properly applied in this case. The court noted an increasing trend in companies seeking protective orders to keep embarrassing items out of the public domain.

In January of 1995, Bankers and P&G agreed to a broad stipulated protective order as part of the discovery process. The order provided that parties and non-parties to the litigation -- *without court approval for "good cause" as required by Rule 26(e) of the Civil Rules* -- could, in their discretion, designate discovery material as "confidential" and could have such material filed under seal if the parties agreed that it reflected "trade secrets or other confidential research, development or commercial information . . . ." The parties and not the court would determine whether particular documents met the requirements of Rule 26. The protective order further provided that the parties could modify its terms without approval of the court. The protective order provided that the parties could modify its terms without approval of the court and allowed the parties to control public access to court papers.

Important excerpts.

MERRITT, Chief Judge. In a case of widespread interest to the press, the District Court issued an injunction prohibiting *Business Week* magazine from publishing an article disclosing the contents of documents placed under the seal of secrecy by the parties to a lawsuit. This appeal raises the issue of whether the bedrock First Amendment principle that the press shall not be subjected to *prior restraints* can be set aside when a federal court perceives a threat to the secrecy of material placed under seal by stipulation of the parties. We are guided by the holding of the First Circuit in *In the Matter of Providence Journal Company* that even a temporary restraint on pure speech is improper "absent the most compelling circumstances." 820 F.2d 1342, 1351, *modified on reh'g* by 820 F.2d 1354 (1st Cir. 1986), [**\*\*2**] *cert. granted and dismissed on other grounds*. Such circumstances are not present in the case at bar, and we therefore hold that the District Court erred in granting the orders challenged here.

Background:

On October 27, 1994, Procter & Gamble ("P&G") filed a complaint against Bankers Trust n1 ("Bankers") claiming a loss of over \$ 100 million due to alleged fraud by Bankers in the sale of derivatives to P&G. The case has received widespread coverage, especially in the business press.

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It appears that *Business Week* found out about the sealed material because of a P&G leak and got the documents through a leak from Banker's Trust.

The District Court entered two orders on October 3rd, three weeks after its initial order restraining publication. In one order, the District Court concluded that *Business Week* "knowingly violated the protective order" by obtaining the documents and was therefore prohibited and permanently enjoined from using "the confidential materials that it obtained unlawfully."

### ***The Protective Order***

Finally, the underlying protective order signed by Judge Rubin bears comment. While District Courts have the discretion to issue protective orders, that discretion is limited by the careful dictates of Fed. R. Civ. P. 26 and "is circumscribed by a long-established legal tradition" which values public access to court proceedings. *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1177 (6th Cir. 1983), *cert. denied*, 465 U.S. [\*\*22] 1100, 80 L. Ed. 2d 127, 104 S. Ct. 1595 (1984). Rule 26(c) allows the sealing of court papers only "for good cause shown" to the court that the particular documents justify court-imposed secrecy. In this case, the parties were allowed to adjudicate their own case based upon their own self-interest. This is a violation not only of Rule 26(c) but of the principles so painstakingly discussed in *Brown & Williamson*.

The District Court cannot abdicate its responsibility to oversee the discovery process and to determine whether filings should be made available to the public. It certainly should not turn this function over to the parties, as it did here, allowing them to modify the terms of a court order without even seeking the consent of the court. The protective order in this case allows the parties to control public access to court papers, and it should be vacated or substantially changed.

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