Discovery Confidentiality At Risk After Columbia Pipeline

By **Arthur Bookout and Lilianna Townsend** (January 11, 2019, 4:35 PM EST)

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Recently, in In re Appraisal of Columbia Pipeline Group Inc.,[1] the Delaware Court of Chancery weighed in on two emerging practices in appraisal litigation: (i) wholesale challenges to confidential exhibits to court filings, and (ii) attaching confidential documents to court filings so that a party can subsequently challenge the documents' confidentiality designation and cause the documents to be unsealed and available for public viewing and use.

The court's decision, which was cited multiple times recently in Brookdale International Partners LP v. Nutraceutical International Corp.,[2] shines a sharp light on the use of confidentiality designations in discovery practice in Delaware, and how some parties' litigation tactics are changing the general discovery practice in the Court of Chancery. The treatment of confidential information in litigation, including the impact of the Columbia Pipeline decision, is one of the items to be watched closely in 2019.

In Columbia Pipeline, the respondent accused petitioners' lead counsel of attempting to unseal "every single filed exhibit in [the] case" and "the simple artifice of loading up its motions [in the litigation] with Discovery Material" so that counsel could then "lob[] in" a challenge to the confidential filing of the exhibits in order to unseal them, purportedly so counsel could use them in other litigation. Petitioners' counsel did not deny outright respondent's accusations, which petitioners' counsel characterized as nothing more than "counsel doing their job."

Instead, petitioners' counsel disputed that the exhibits they attached to the motions at issue were irrelevant to the subject matter of the motions, claimed that the exhibits did not contain confidential material under the Court of Chancery's confidentiality rule (Rule 5.1) and asserted that there was no "proper purpose" test under Rule 5.1. The petitioners also countered that respondents "gratuitously attach[ed] to its Motion volumes of Petitioners' confidential [documents]," and that the petitioners "only produced [those materials] without redactions in light of this Court's prior comments about not redacting materials on the ground of relevance."

The Court of Chancery denied respondent's motion to keep the filings confidential. The court noted that respondents did not "argue that the Challenged Materials were properly designated as confidential." As a result, any "use restriction" was never implicated, because there must be a predicate finding that the information is confidential. Analogizing

respondent's "improper purpose" argument to a Court of Chancery Rule 11 allegation, the court stated that "[a]ssuming for the sake of argument that attaching truly irrelevant material to a motion could give rise to this type of violation, [respondent] has not pointed to conduct that is either so extensive or so egregious as to support an inference that would warrant further investigation. …"

Recently, Columbia Pipeline and use restrictions resurfaced in Brookdale wherein the court relied on Columbia Pipeline in granting a use restriction in a confidentiality order, which allowed any information obtained in the pending litigation to be used in another litigation, so long as the other litigation is in the Court of Chancery and the filing is pursuant to Rule 5.1.

Although a short and straightforward decision, Columbia Pipeline has the potential for far-reaching consequences. This article (i) explains how confidentiality designations were historically treated in Court of Chancery litigation, (ii) summarizes how confidentiality is treated by the Court of Chancery under Rule 5.1, as spotlighted in Columbia Pipeline, and (iii) offers both private ordering and policy suggestions for limiting concerns regarding the perceived tactical use of Rule 5.1 identified in Columbia Pipeline.

Historical Treatment of Confidentiality Designations in Court of Chancery Litigation

While Columbia Pipeline involved an appraisal proceeding, its implications have the potential to extend to discovery practice as a whole in the Court of Chancery.

In Columbia Pipeline, the respondent noted that the company and third-party productions totaled over one million pages of documents. Although that total sounds hefty, one million pages is not an uncommon burden in appraisal litigation. Breach of fiduciary duty cases — another common cause of action litigated in the Court of Chancery — can yield similar volumes of documents. Absent an efficient way to produce large volumes of information, Columbia Pipeline could cause the cost and time to review and produce documents to increase (even further than increases in recent years).

Typically, after receiving a request for documents, discovery practice in the Court of Chancery generally begins with the parties stipulating to an order that prescribes the terms governing the confidential treatment of documents produced in litigation. The Court of Chancery website includes model forms of these confidentiality orders, which allow the parties to prevent public disclosure of documents and information produced in discovery by designating such material "confidential" or "highly confidential." Citing the protections of these confidentiality terms, the Court of Chancery has also cautioned against redacting documents on relevance grounds except in limited circumstances.

Other than copies of publicly available information, parties often produce all of their email communications and other documents with a "confidential" or "highly confidential" designation. Under the model agreements, a designation of "confidential" may be applied if the producing party "in good faith believes that such Discovery Material contains non-public, confidential, proprietary, or commercially sensitive information that requires the protections provided in this Stipulation and Order." A producing party may designate "discovery material" as "highly confidential" if it "in good faith believes that disclosure of the Discovery Material … is substantially likely to cause injury to the [p]roducing [p]arty."

Almost all materials produced in corporate litigation are nonpublic and considered, at a minimum, "commercially sensitive" by the producing parties. As a result, nearly all documents produced between parties and nonparties (through subpoena practice) in litigation contain either a "confidential" or "highly confidential" designation, though parties strive to reserve the "highly confidential" designation for highly sensitive personal or business data.

This allows for a more efficient review and production of a large volume of nonpublic documents. If a non-producing party disputes the confidentiality designation of a document, under the terms of the model confidentiality forms, it can file a motion and challenge the designation. The burden is on the producing party to prove that the material is "confidential" or "highly confidential" under the definitions described above.

In addition to the challenge mechanism in the model forms, which governs any discovery material produced by the parties in the litigation, any discovery material filed confidentially with the court is also subject to Court of Chancery Rule 5.1. While all court filings are presumptively public, Rule 5.1 permits confidential treatment of certain documents for "good cause."

Historically, parties have been able to agree to the production of large volumes of nonpublic, commercially sensitive documents and to limited "relevance" redactions for business documents that include discussions of multiple topics. This compromise was driven largely by the historical practice that challenges from opposing parties to confidentiality designations under the terms of the model forms and Rule 5.1 (or its predecessor, Rule 5(g)) are rare. Challenges to the confidentiality of exhibits to court filings were virtually nonexistent. After all, the parties can see the confidential filings, and thus do not need to "unseal" a court filing in order to see it in full.

Recent developments in practice have changed the thinking about the confidentiality of documents filed with the court, with Columbia Pipeline serving as a focal point.

Challenging Confidentiality Designations Under Rule 5.1

Part of the reassessment resulting from Columbia Pipeline stems from the framework of Rule 5.1 itself, and its interplay with the definitions of "confidential" and "highly confidential" in the model forms.

Rule 5.1 begins with the presumption that court filings are public, and, similar to the burden when challenging confidentiality under the terms of the model forms, "[t]he party or person seeking to obtain or maintain Confidential Treatment always bears the burden of establishing good cause for Confidential Treatment." Under Rule 5.1, "'good cause' for Confidential Treatment shall exist only if the public interest in access to Court proceedings is outweighed by the harm that public disclosure of sensitive, non-public information would cause."

Unlike the broad definition of "confidential" in the model forms governing the exchange of documents between the parties, Rule 5.1 is much more narrow. It requires materials to be both non-public and "sensitive," and for the harm of disclosure to outweigh the public's right of access to court filings. Moreover, cases interpreting Rule 5.1 have taken a narrow view of what is "sensitive."[3]

Under Rule 5.1, primary court filings like pleadings, briefs and motions must have public versions filed. These public versions contain any redactions proposed by any party or nonparty whose information is included in the document. Recognizing the more narrow universe of information deemed confidential by the court under Rule 5.1, redactions to the public versions of these documents tend to be minimal.

However, Rule 5.1(f)(2) provides that "[f]or administrative convenience, the filer need not file a public version of documentary exhibits or deposition transcripts." The reference to "administrative convenience" is an understated nod to the enormous burden that parties (typically defendants/respondents, who generally bear the overwhelming brunt of the discovery burden in M&A-related litigation) and the court would have to undertake if parties were required to file public versions of exhibits attached to every court filing.

For example, certain filings, like summary judgment, pretrial or post-trial filings, can include dozens (or even hundreds) of exhibits. These exhibits can range from a one-page email communication to large documents like deposition transcripts that cover numerous disparate topics over hundreds of pages.

However, it takes almost nothing for an opposing party (or any member of the public) to impose that enormous burden. Challenging the confidentiality of any exhibit under Rule 5.1 starts simply "by filing a notice." Frequently, these notices are nothing more than one-paragraph filings noting the document or documents being challenged without any additional explanation. The burden then falls on the party seeking confidential treatment to create and propose a "public version" of each of the challenged exhibits. If the parties still cannot reach an agreement on the scope of redactions to each of the exhibits, the challenger will file with the court a disputed "public version" containing the redactions it believes should be included.

Even after the burden to review and produce a public version has been undertaken, opposing parties (or any member of the public) can still seek the complete unsealing of any or all exhibits, simply by filing another one-page notice. The burden then falls on the party seeking confidential treatment of the redacted information in the public version to file a motion specifically articulating a basis for each of the confidentiality designations within five business days. The challenger then has five business days to file an opposition to the motion.

Respondent's reference in Columbia Pipeline to petitioners' ability to "lob[] in" a challenge presumably refers to the ability of any member of the public — but especially a party to the proceeding who can view the confidential filings — to impose the time and cost burden on respondent simply by filing a one-page notice, with no explanation about which redactions were being challenged or the reason for the challenge, especially when the challenging party filed the confidential discovery material with the court in the first instance.

The perceived inequity can be especially acute in proceedings like appraisal actions, where there are typically no initial procedural hurdles (such as a motion to dismiss) to clear before discovery proceeds. While historical practice did not involve these types of "lob[] in" challenges or accusations of parties "larding" filings with exhibits just to make those exhibits part of the public record, new tactics may be changing the customary practice. In addition, if Columbia Pipeline serves as precedent, the court has set a very high bar for finding that challenging parties are abusing Rule 5.1 by likening it to a Rule 11 sanctionable conduct standard.

Suggestions to Protect Confidential Information in Discovery

If parties increasingly challenge the confidentiality of redactions or exhibits filed with the court, that has profound implications for discovery practice. How can parties limit the exposure of their nonpublic information? Answers are not readily apparent, but some potential strategies and policy suggestions are offered here.

Private Ordering

The simplest and most cost-effective change would be to remove parties' ability to challenge (or to solicit, aid, encourage or otherwise facilitate a challenge to) redactions made to public versions of filings or the confidentiality of exhibits. Parties can see the unredacted confidential versions of filed documents, and their experts are likewise "in the bubble" under the court's model confidentiality forms. If a member of the "public" desires to file a challenge to redacted information and confidentially filed exhibits, they have the ability. Challenges from the public are relatively rare, and tend, so far, to be narrowly

focused.

Even less drastic limitations, such as limiting a party's ability to challenge the confidentiality of exhibits or eliminating a party's ability to challenge the confidentiality of information it affirmatively made part of the court record, could help address the burgeoning issue of tactically employing the provisions of Rule 5.1. The rationale for this limitation is straightforward: parties can see the confidential versions of all court filings. Thus, there is no prejudice to either party from removing the ability of the parties to challenge the confidential filing of documents and information.

Moreover, if a party believes that the designation of "confidential" or "highly confidential" under the model forms is improper and prejudicial, it has the ability under the model forms to challenge that designation by filing a motion (not simply a notice as in the case of challenges under Rule 5.1).

Reintroduce Relevance Redactions

Another option is for parties to resume making relevance redactions. This approach, however, would likely not be preferred by the parties or the court.

For the producing party, it greatly increases the time, effort and cost to review and produce documents. It is also an under-inclusive solution because it does not address a sizeable swath of discovery — the bucket of information in court filings that contains relevant but confidential information.

For the court, the inevitable challenges to relevance redactions could dwarf the existing challenges to privilege redactions and further tax the docket. While relevance redactions have generally been disfavored in the court, there is currently no distinction between relevant and nonrelevant information when determining whether to remove a redaction or unseal an exhibit in response to a "notice." Without removing nonrelevant information from the document in the first instance, it is unclear how parties can protect against its exposure.

Consider Revisions to Rule 5.1

While both of the prior suggestions would require court acceptance before they would become mainstream, this suggestion goes one step further and advocates for small revisions to Rule 5.1 itself. The court is laudably committed to public access. However, it is worth considering whether, given the unique nature of the Court of Chancery, some revisions to Rule 5.1 (and how it is interpreted) are warranted.

Some practitioners would argue that Rule 5.1 is read too narrowly, and that the court should expand what it is willing to keep confidential until documents are automatically unsealed after three years. This could be achieved by broadening the interpretation of "sensitive" information, including adding a broader list of illustrative categories to the rule.

In addition (or in conjunction), the court could consider revising Rule 5.1 so that a party cannot simply "lob[] in" a challenge to dozens of documents absent any substantive explanation. While it might be tempting to conform Rule 5.1's definition of confidential information to the definition of "confidential" in the model forms, it is important to remember that the model form definition and Rule 5.1 govern two very different, though related, scenarios. One involves the exchange of documents between parties and the other involves the public right of access to court filings. Thus, a more limited definition under Rule 5.1 is appropriate — but it is important to contemplate where the boundary should lie.

Columbia Pipeline has raised interesting issues and questions about how parties should

view the discovery process and the confidentiality of their own documents produced in litigation. It also reinforces that strategic decisions in litigation, such as choosing to argue that the "deal price" is at or above a company's going concern value in an appraisal litigation, can lead not only to increased discovery, but to increased risk that a broader range of documents produced in discovery could be made public.

Only time will tell whether parties will continue the alleged practice of attaching exhibits for the purpose of seeking to unseal the documents, but the risk is now a factor to be considered when engaging in discovery. The above suggestions represent potential avenues to mitigate the risk, but it remains to be seen which, if any, approaches gain traction or acceptance — and whether they will be effective in combating the extraordinary tactical use of Rule 5.1 identified in Columbia Pipeline.

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[1] In re Appraisal of Columbia Pipeline Group Inc., Consolidated Civil Action Number 12736-VCL.

[2] Brookdale International Partners LP v. Nutraceutical International Corp., C.A. No. 2017-0901-TMR; NTD: Oct. 22, 2018, transcript decision on motion related to confidentiality order.

[3] Rule 5.1 includes an illustrative list of the types of information that would qualify as "sensitive," identifying "trade secrets; sensitive proprietary information; sensitive financial, business, or personnel information; sensitive personal information such as medical records; and personally identifying information."
