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OF THE  
JUDICIAL CONFERENCE OF THE UNITED STATES  
WASHINGTON, D.C. 20544

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June 28, 2010

Honorable Nancy Pelosi  
Speaker  
United States House of Representatives  
Washington, DC 20515

Dear Madam Speaker:

We write on behalf of the Judicial Conference Committee on the Rules of Practice and Procedure and the Advisory Committee on the Federal Rules of Civil Procedure to express our significant concerns about Section 6 of the proposed legislation relating to certain civil actions arising from maritime incidents, H.R. 5503. Section 6, entitled “Unenforceability of Certain Secrecy Agreements,” as amended by the Maritime Liability/Secrecy Agreement Revision, would cause severe problems and is inconsistent with, and unnecessary to, the purpose of the legislation. We urge you to remove this section. This letter outlines some of our most pressing concerns.

Section 6 would make court orders restricting the dissemination of broad categories of information void and unenforceable in any legal proceeding, with a very limited exception. The only exception is for court (or government agency) orders that the party seeking enforcement proves by clear and convincing evidence are necessary to protect public health or safety, if the judge makes factual findings and conclusions of law relating to that enforcement. These provisions in effect rewrite Rule 26(c) of the Federal Rules of Civil Procedure for the cases covered by the legislation. Rule 26(c) explicitly authorizes courts to issue orders in pretrial discovery to protect important rights and interests. Not only does Section 6 circumvent the process for amending the Federal Rules of Civil Procedure that Congress established in the Rules Enabling Act, 28 U.S.C. §§ 2072-2077, it threatens litigants’ rights and interests and creates an unworkable procedure for the cases covered by H.R. 5503.

The provisions in Section 6 would prohibit a court from enforcing a protective or confidentiality order that is necessary to protect vital privacy rights. For example, a court could not enforce an order limiting the dissemination of intimate health or other highly sensitive personal information about a plaintiff or any other person whose information is sought in discovery. Nor could a court enforce an order limiting the dissemination of highly sensitive trade secret information about proprietary technology or financial information about any party or other person or entity. Such a restriction is inconsistent with well-established case law in every circuit recognizing the importance of protective orders issued under Rule 26(c), based on a good-cause showing, to protect private and confidential information exchanged in pretrial discovery from being broadcast on the internet and otherwise made public. This section of H.R. 5503 is unnecessary to achieve the bill's purposes and has the potential to do great harm to those already struggling with the effects of the oil spill.

Section 6 of H.R. 5503 also provides an unworkable procedure that would delay and complicate discovery in the very cases that should be handled with expedition and efficiency to provide needed relief to those affected by the spill. The vital role protective orders play in enabling parties to exchange information in discovery efficiently, without the delay caused by requiring detailed involvement by a court, is well recognized. Section 6 would frustrate that role. Parties are usually unwilling to begin discovery unless there is an enforceable protective order in place. Under the provisions of H.R. 5503, a court could not enforce a protective order unless the proponent first proved by "clear and convincing evidence that such enforcement is permitted under subsection (c)," which in turn requires that the enforcement is necessary to public health or safety, and unless the court stated factual findings and conclusions of law relating to that enforcement on the record. Under this procedure, no discovery would occur until after the proponent of a protective order showed by clear and convincing evidence that the order was needed for the documents in question and the court made the findings and conclusions. This procedure would greatly delay discovery. It is also unworkable because it requires the court to rule on the adequacy of the showing and to make the findings and conclusions before the party seeking the documents has been able to obtain them. That means that the court is ruling without the benefit of informed input from all sides, which makes it more difficult for the court to rule efficiently and fairly, further complicating and delaying discovery and further delaying the litigation. Ordinarily, it is the party seeking the documents that is in the best position to inform the court whether the documents subject to the protective order are properly designated as subject to the order. Under Section 6, the court will not have that vital input.

In addition, this section of H.R. 5503 is unnecessary to prevent undue restrictions on documents and information that should be publicly available. Under Rule 26(c), federal courts enter a protective order for materials to be produced in pretrial discovery based on a good-cause showing. The case law makes it clear that courts consider a number of factors, including whether the information at issue is important to public health or safety, whether the litigation involves issues important to the public, the importance of a protective order to the fair and efficient conduct of discovery, and the confidentiality interests of the parties or nonparties. Once a protective order issues and discovery is able to proceed, there are recognized procedures for allowing parties, or third parties, to challenge the application of the protective order to particular documents or categories of documents, or to move to modify the order. In deciding such motions, courts consider whether the information at issue is important to public health or safety as well as other factors specific to each case. The procedure under Rule 26, with the case law in each circuit, allows discovery to be conducted subject to the court's oversight to ensure that protective orders do not improperly prevent the public from learning information that should be available to protect public health or safety. The protective order provisions in H.R. 5503 are unnecessary and would instead create severe problems.

The views in this letter are limited to the provisions in H.R. 5503 that affect the Federal Rules of Civil Procedure and do not address other parts of the legislation. We appreciate your consideration of these views and look forward to continuing to work with you on these vital matters.

Sincerely,



Lee H. Rosenthal  
United States District Judge  
Southern District of Texas  
Chair, Standing Committee on Rules  
of Practice and Procedure



Mark R. Kravitz  
United States District Judge  
District of Connecticut  
Chair, Advisory Committee on the  
Federal Rules of Civil Procedure

Identical letters sent to:      Honorable Steny Hoyer  
   Honorable John Boehner  
   Honorable John Conyers  
   Honorable Lamar Smith

cc:                                      Members of the House Judiciary Committee