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By BETHANY KRAJELIS

A pair of environmental groups on Monday submitted a brief to the 7th Circuit Court of Appeals in an ongoing fight to unseal documents in the now-settled class action suit over atrazine.

The Environmental Law & Policy Center (ELPC) and Prairie Rivers Network (PRN) in March appealed U.S. District Judge J. Phil Gilbert's order that directed the plaintiffs in the suit to unseal several documents included in their response to the defendants' motion to dismiss.

The suit against Syngenta AG and Syngenta Crop Protection LLC, the manufacturers and distributors of the agricultural herbicide, settled in October 2012 for \$105 million.

Represented by attorneys at Korein Tillery in St. Louis and Barron & Budd in Dallas, the plaintiffs –municipalities and water providers in six states including Illinois– claimed that atrazine entered their water supplies and forced them to incur costs associated with testing, monitoring and filtering their water.

ELPC and PRN intervened in the case in March 2011 “for the sole purpose of enforcing the public’s presumptive right of access to documents in the judicial record,” the groups state in their recently-filed brief.

After they filed their first motion to unseal in 2011, Gilbert divided most of the sealed documents at issue into three categories: 1) documents that should be unsealed because they shouldn’t have been designated as “Confidential Information,” 2) documents that should be stricken because they were duplicates or not cited, and 3) documents that should remain under seal.

While he ordered some documents to be unsealed, Gilbert held that the documents not directly cited in the plaintiff’s briefs should remain under seal, a ruling the two groups’ unsuccessfully asked him to reconsider.

The two groups then appealed to the 7th Circuit Court of Appeals, which in 2012 dismissed their appeal for lack of jurisdiction.

In December 2012, Magistrate Judge Philip Frazier, who handled some preliminary matters for Gilbert in the case, ordered several dozen more documents to be unsealed.

The Syngenta defendants then appealed Frazier’s order in regards to eight of the 86 documents he ordered to be unsealed by April 19, claiming that they should remain under seal because they contained “confidential business information” regarding business decisions, financial information and planning strategies.

Gilbert in March affirmed Frazier’s order, ruling that the Syngenta defendants “repeatedly failed to satisfy ... the burden of demonstrating that maintaining the documents under seal is warranted.”

Even though Gilbert’s order leaned largely in favor of the two groups, the two groups in March appealed to the 7th Circuit Court of Appeals again in an attempt to unseal the second category of sealed documents, the ones that were not cited in the plaintiffs’ brief.

“The District Court erroneously held that the long-recognized common law presumption of public access to documents filed in the judicial record only attaches to a document if a judge specifically relies on that document in making a decision on the merits,” the groups assert in their brief.



Learner

They add, “Based on that flawed subjective legal standard, the District Court ruled that the presumption of public access did not apply to hundreds of exhibits filed with Plaintiffs’ response brief in opposition to the Defendants’ motion to dismiss.”

The two groups claim that Gilbert’s holding is not only contrary to the standard adopted in *Bond v. Ulterias*, but it “is also bad policy.”

The *Bond* court, the groups state in their brief, “makes clear that the presumptive right of public access attaches to documents filed in the judicial record” and did not limit this right “based upon whether a judge relies on the documents.”

“Whereas the *Bond* rule is objective, straightforward and furthers the underlying purposes of the presumption of public access, the District Court’s new standard is subjective, inherently murky and difficult to consistently apply, and wholly inconsistent with the fundamental purposes of the presumption of public access,” the groups argue.

They contend that because the documents they seek to get unsealed were filed in connection with a dispositive motion, “the presumption of public access clearly attaches to them.”

In addition, the groups further argue that the documents “should be unsealed without delay” because the Syngenta defendants’ failed to show sufficient reasons to overcome that presumption.

Saying that Gilbert’s ruling adopts “an objective, bright-line rule distinguishing between documents filed with the court, which are judicial records, and unfiled discovery, which is not,” the groups contend that such a standard “would put appellate courts in the challenging position of needing to read the District Court judge’s mind.”

“Further,” the groups assert, “it would undermine the fundamental purposes and policies advanced by the right of public access to encourage transparency of the judicial system and public confidence in its fairness and legitimacy.”

In their brief, the two groups contend that oral argument over the issue “is appropriate and necessary to fully address the important public interest issues presented in this appeal.”

The Syngenta defendants have until June 5 to file their brief.

Howard Learner, ELPC’s president and executive director, and his colleague, Jennifer Cassel, submitted the brief on behalf of ELPC and PRN.

The Syngenta defendants are represented by McDermott, Will & Emery attorneys Michael A. Pope, Christopher M. Murphy and Brian A. Fogerty.

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