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Don't Sit Still: Businesses Must Act and Prove Their Commercial Secrets Are Exempt From Public Disclosure Under Pennsylvania's Right-to-Know Law

By Karl Myers and Bridget Giroud

A recent court decision has an implicit warning for businesses that share their trade secrets and confidential information with Pennsylvania government entities: if someone asks for that material under Pennsylvania's open records law, you must act quickly and prove your secrecy rights, or else you might lose them – and possibly suffer painful competitive harm as a result.

In *McKelvey v. Pennsylvania Department of Health,*[1] a reporter submitted a Right-to-Know Law (RTKL) request to the Commonwealth's health department for copies of permit applications filed by companies that wanted to participate in Pennsylvania's medical marijuana program. The applications included sensitive and confidential business information, including specific details of each applicant's business plans, financial and operational capabilities, site and facility plans, and planned business activities. As required by the RTKL, the department notified the applicants of the request so they could participate and try to protect their secret information. Ultimately, the department provided the reporter with redacted applications that obscured the applicants' claimed business secrets. The reporter challenged the redactions – first in the Office of Open Records, and then on appeal to the Commonwealth Court. Recently, the Pennsylvania Supreme Court offered its final say in the dispute.

In its decision, the Supreme Court reinforced that every business notified of an RTKL request has an independent burden to promptly submit evidence to the Office of Open Records proving that their trade secrets and confidential proprietary information are entitled to RTKL exemption. That lesson derives from the court's treatment of two applicants, who experienced very different outcomes.

One applicant, Harvest, submitted no evidence at all to support its secrecy claims. It instead asked the court to shield its application because the case's overall record supported broad inferences about intense competition between, and strict confidentiality within, competitors across the marijuana industry. While the court allowed lower courts to draw some limited industry-wide conclusions, it still faulted Harvest for "neglecting to submit its own evidence" and ruled against its exemption claims for that reason. The court also rejected Harvest's request to send the case back to the Commonwealth Court so Harvest could supplement the record, pointing out that allowing "a party to initially withhold evidence" but then submit it "at later stages of the proceedings" would cause improper delays and frustrate the RTKL's transparency goal.

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PA Right-to-Know Law

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Another applicant, Terrapin, pursued a different litigation strategy – and got a different result. Unlike Harvest, Terrapin submitted several detailed affidavits of knowledgeable management-level personnel to prove its entitlement to protection of its business secrets. In the proceedings below, the Commonwealth Court praised Terrapin's affidavits as the "model" for establishing protection – and the Supreme Court saw no reason to disagree. It favorably noted that Terrapin was the only applicant to submit additional evidence. The Supreme Court even held that Terrapin's affidavits could support an exemption for more of Terrapin's application than the Commonwealth Court found protected, and sent the case back for that court to reassess and assign greater significance to Terrapin's evidence.

The contrasting outcomes between Harvest and Terrapin are instructive. Many businesses submit trade secrets and other confidential information to the government for various reasons. That information is perpetually subject to the threat of RTKL disclosure. When it is requested, *McKelvey* emphasizes that businesses cannot afford to sit back and hope that generalized inferences or unsupported assertions will carry the day. These parties instead must put forward specific and detailed evidence – preferably in the form of affidavits or declarations from knowledgeable personnel – describing the factual support for a claimed exemption from disclosure. What's more, a business should provide that information promptly – preferably during the proceedings before the Office of Open Records, or at least before the Commonwealth Court. A business should not wait until its case is pending before the Supreme Court to ask for permission to submit evidence.

The Supreme Court's *McKelvey* decision also offers some limited guidance to agencies with RTKL responsibilities. As noted, the department provided the reporter with redacted applications.

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The applicants made the redactions without department review or input. The court criticized this process, faulting the department for what the court saw as an attempt to delegate departmental RTKL responsibilities and "blind deference" to the applicants.

It is unclear exactly how much input a government agency can – or should – have in this setting, however. As the department persuasively explained, agencies lack the needed capacity or interest to determine what constitutes a third party's intellectual property. To the court's credit, it understood the potential for conflict between an agency's disclosure duties and a third party's need to protect its intellectual property. The court also acknowledged that businesses have a right to notice of, and participate in, any RTKL proceeding seeking disclosure of their confidential materials. And the court admitted that "agencies are not permitted to waive a third party's interest in protecting the records." So it seems that while an agency is to have some input in this setting, its role in practice must remain quite limited – and in any event should be secondary to that of a business seeking to protect its intellectual property from damaging disclosure.

[1] 255 A.3d 385 (Pa. 2021)

Pennsylvania Supreme Court Opens the Door to Enterprise Liability in Veil-Piercing Cases

By Craig R. Blackman

The Pennsylvania Supreme Court recently considered a corporate veil-piercing liability doctrine adopted in other states, but not yet addressed by Pennsylvania's highest court: the so-called "enterprise liability" doctrine. See *Mortimer v. McCool*, 255 A.3d 261 (Pa. July 21, 2021).

The underlying action involved an attempt to execute a liquor liability judgment related to serious injuries sustained by Ryan Mortimer when a drunk driver crashed into her car. The driver had been served alcohol by a restaurant owned by parties that had a contractual management agreement with the owner of the restaurant's liquor license, 340 Associates, LLC. The restaurant was housed in a mixed-use building owned by McCool Properties, LLC.

Mortimer filed a personal injury suit and the trial court later awarded her a combined judgment of $6.8 million against 340

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Enterprise Liability

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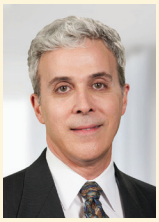
Associates and other defendants. Under the Pennsylvania Liquor Code, 340 Associates, as the licensee, was deemed jointly and severally liable to Mortimer. But 340 Associates lacked significant assets beyond the liquor license itself and did not – and, notably, was not obligated by law to – carry insurance for such liabilities.

Given 340 Associates' limited assets, Mortimer filed another lawsuit seeking to recover the balance of the judgment. This time, the defendants included 340 Associates and McCool Properties. Mortimer sought to pierce the corporate veil to hold McCool and the individuals associated with it liable based on the so-called "enterprise liability" doctrine, also known as the "single entity" or "horizontal liability" doctrine. Under this rule, "sibling" companies, companies with common ownership and companies engaged in a unitary commercial endeavor, may be held liable for one another's debts or judgments.

Mortimer's theory of liability was rooted in the fact that 340 Associates shared many (but not all) of the same owners and operators as McCool Properties. She argued they should be responsible for cross-entity debts and liabilities as a result.

While noting that piercing the corporate veil was among the most confusing doctrines in corporate law, the Pennsylvania Supreme Court noted that jurisdictions adopting the "enterprise liability" doctrine have explicitly preserved the threshold requirement of piercing-worthy conduct by the allegedly controlling actors or alter egos. The Court found "enterprise liability" not inconsistent with Pennsylvania law and equitable principles, but noted that the targeted individual or corporation still must have abused the corporate form either directly or through the sibling entity by treating the liability-free entity as independent during times of trouble, but using it for personal or parent company benefits during better times.



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In the context of the *Mortimer* dispute, the Court held that because McCool Properties had no material ownership in or administrative control over 340 Associates and the individuals behind the McCool entity had not engaged in blameworthy conduct, there was no basis to pierce the veil and apply enterprise liability to them.

With those factual and legal conclusions, the Court affirmed the lower courts' decisions rejecting the attempt to attach enterprise liability to the McCool defendants and declined to pierce the corporate veil. But the Court did not reject the "enterprise liability" doctrine itself. The Court noted that it remains for the lower courts to consider this doctrine in conjunction with existing case law requiring a balance between the interests of justice and protections offered by limited liability commercial structures.

Around the Office

Stradley recently achieved a successful result in a high-profile case before the Pennsylvania Supreme Court as part of the firm's pro bono efforts. Appellate Practice Group Chair Karl S. Myers and attorney Melissa L. Perry filed an *amicus curiae* brief representing a coalition of advocacy groups asking Pennsylvania's highest court to allow comfort dogs to accompany vulnerable testifying witnesses. The court agreed to do so, issuing an opinion broadly endorsing the use of comfort dogs. The case and Karl's and Melissa's advocacy received significant television, radio, and other media coverage.

Following this successful result, Karl and Melissa were honored to be invited by the Animal Legal Defense Fund and Association of Prosecuting Attorneys to serve as panelists for a Nov. 8 virtual seminar on how *amicus curiae* briefs can be used to bolster appellate advocacy in animal rights cases. Karl and Melissa shared their insights on how *amicus* briefs can enhance advocacy efforts in a variety of settings.

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Court News

In the Nov. 2 election, voters made their choices for the four vacancies on Pennsylvania's appellate courts:

- Commonwealth Court President **Judge Kevin Brobson** was elected to the one open Supreme Court seat;
- **Megan Sullivan** was chosen for the one open Superior Court seat and
- **Stacy Wallace** was selected for one of the two open Commonwealth Court seats, but the other seat's election is in question due to a close vote.

The judges-elect will officially assume or continue their judicial responsibilities when they are sworn into office in January 2022.

As for the U.S. Court of Appeals for the Third Circuit, **Judge Theodore McKee** notified the White House in July that he will assume senior status when the Senate confirms his successor. This gives President Biden his first opportunity to make an appointment to the Third Circuit. Judge McKee joined the court in 1994 and served as its chief judge from 2010 to 2016. Before joining the Third Circuit, Judge McKee served as a judge and in several governmental roles in the City of Philadelphia.

In September, Third Circuit **Chief Judge D. Brooks Smith** publicly disclosed that he will step down from his role as the court's chief judge later this year. Judge Smith joined the Third Circuit in 2002 and previously served as a federal district judge in Pittsburgh. **Judge Michael Chagares**, who joined the circuit court in 2006, is expected to become the next chief judge. Although Judge Smith is ceding the chief judge role, he is expected to remain a judge of the court.