Unnecessary Court Secrecy in Product Liability Litigation Endangers Our Safety, and Undermines Fundamental Principles of Our Civil Justice System

by Brendan Faulkner, Esq. and Michael A. D'Amico, Esq.

Despite the presumption of open courts with public access that stems from the First Amendment and the common law, far too much civil litigation is taking place in secret. Unnecessary court secrecy is a threat to public health and safety, the fair and efficient administration of justice, and our democratic system of government. This problem is especially widespread and dangerous in product liability litigation.

The Presumption of Open Courts and the Problem of Product Liability Secrecy

The American public has a right to know what is done in its name. Because "[w]hat happens in the halls of government is presumptively public business," courts in this country "issue public decisions after public arguments based on public records." *Union Oil Co. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000). The presumption of public access is fundamental to the American system of justice. *See Rosado v. Bridgeport Catholic Diocesan Corp.*, 292 Conn. 1, 30 cert. denied sub. nom. *Bridgeport Roman Catholic Diocesan Corp. v. New York Times Co.*, 558 U.S. 991 (2009) (concluding that Practice Book § 11-20A codifies the common law presumption of public access to judicial documents; noting that public access to court documents traces its roots back centuries).

Limited secrecy may be appropriate in some circumstances (*i.e.* the protection of Colonel Sanders' secret recipe). A judge could easily determine that no public interest would be harmed by confidentiality there, but in a case where the information would make consumers aware of a defective product secrecy is not appropriate. Allowing public courts to be used by private parties to hide evidence of product defects fails to discourage the use of dangerous products as many examples through our recent history demonstrate. Defective lighters, car seats, tires, and asbestos were all subject to protective orders while consumers continued to be at risk from using these products.

Court secrecy also subverts our system of open government and undermines trust in the court system, and makes discovering the truth much more difficult and expensive.

Too often, the effect of this greatly increased cost is to effectively close the courthouse doors to people who have suffered serious injuries from defective products. In a complex design defect claim with damages in the range of a few hundred thousand dollars, most plaintiffs' attorneys would be reluctant to get involved because "blazing the trail" of discovery without the benefit of discovery from other cases tilts the cost-benefit analysis against taking the case. This burden is much less when a plaintiff is permitted to access information obtained in previous similar cases.

The cost of secrecy to the judicial system (and, by extension, to taxpayers) is enormous. Cases are unnecessarily prolonged and costly because plaintiff's counsel must essentially re-invent the wheel in each case, while judges have to decide the same discovery disputes repeatedly.

The Problem—Restrictive Protective Orders, Confidential Settlements, and Court Orders Sealing Documents

Corporate defendants, especially those in product liability cases, often refuse to produce information in discovery without a protective order prohibiting the plaintiff from sharing the information with others. Settlements conditioned on confidentiality prevent victims from discussing how a product caused their injuries. Courts on occasion seal entire case files, making it impossible for the public to know what happened.

So why are product liability and other cases involving large corporate defendants often shrouded in secrecy? Corporate defendants embrace secrecy because it maximizes profits and allows them to avoid negative publicity. Plaintiffs' lawyers frequently agree to secrecy because their role is to be zealous advocates for the particular clients they represent (not the public at large which might have different interests), and practical realities often dictate that the client's interests are best served by agreeing to secrecy. Overburdened judges may be unlikely to reject proposed secrecy where neither side is advocating for the public's right to know.

Restrictive Protective Orders

Pre-trial discovery proceedings are supposed to take place in the open unless compelling reasons exist for imposing confidentiality. Yet in nearly all product liability cases protective orders are entered, many of which are "restrictive" in that they prohibit plaintiffs counsel from sharing discovery with other lawyers.

The defendant typically asserts that the material sought by discovery involves a trade secret or other "proprietary information," or, if disclosed, would result in embarrassment or damage to reputation. These defendants are most interested in preventing plaintiffs and their lawyers from sharing information with other litigants. This contravenes the fundamental purpose of our civil justice system—to advance justice. Product liability actions are often fact-laden and discovery-intensive. Defense counsel often has the benefit of collaborating with defense counsel in similar claims, or has previously handled similar claims against the defendant. It is unfair to bar plaintiffs' counsel from meaningful collaboration, especially since product defendants already typically enjoy significant advantages in their knowledge of the technology, possession of all pertinent technical documents, access to experts, and greatly superior economic resources. *See United States v. Hooker Chemicals & Plastics Corp.*, 90 F.R.D. 421, 426 (W.D.N.Y. 1981) (wherein the court noted that information sharing is particularly appropriate "in lawsuits where the resources available to the parties are uneven").

That discovery might be useful in other litigation is actually a good thing of course, because it furthers one of the driving forces of our practice rules—the just, speedy and inexpensive determination of every action—by allowing the cost of repeating the discovery process to be avoided. *See Grange Mutual Ins. Co. v. Trude*, 151 S.W. 3d 803, 814 (2004) (noting "the public …has a right to every man's evidence" and that sharing information with other litigants is to be *encouraged*). "Each plaintiff should not have to undertake to discover anew the basic evidence that other plaintiffs have uncovered. To so

require would be tantamount to holding that each litigant who wishes to ride a taxi to court must undertake the expense of inventing the wheel." *Ward v. Ford Motor Co*. 93 F.R.D. 579, 580 (D. Colo. 1982).

As the Texas Supreme Court observed:

> Shared discovery is an effective means to insure full and fair disclosure. Parties subject to a number of suits concerning the same subject matter are forced to be consistent in their responses by the knowledge that their opponents can compare those responses. In addition to making discovery more truthful, shared discovery makes the system itself more efficient. The current discovery process forces similarly situated parties to go through the same discovery process time and time again, even though the issues involved are virtually identical. Benefitting from restrictions on discovery, one party facing a number of adversaries can require his opponents to duplicate another's discovery efforts, even though the opponents share similar discovery needs and will litigate similar issues. Discovery costs are no small part of the overall trial expense. A number of courts have recognized that allowing shared discovery is far more efficient than the repetitive system now employed.

Garcia v. Peeples, 734 S.W.2d 343, 347 (Texas 1987) (internal citations omitted).

The Federal Judicial Center's Manual for Complex Litigation also suggests sharing discovery in order to avoid duplicative efforts.

Confidential Settlements

Confidential settlements in product liability cases also pose a danger to public safety. A young boy strangled to death when his Playskool travel lit crib collapsed in 1998. His parents later learned that three prior lawsuits involving the same product defect had been secretly settled. (The manufacturers offered them a confidential settlement but the boy's parents successfully fought the secrecy request.)

Recently, some product defendants have even required that plaintiff's counsel agree not to sue the company again. This too is a troublesome trend, and highlights the tension between a lawyer's duty to his or her client and the public's right to know.

When it comes to settlements involving dangerous products secrecy should be the rare exception.

Motions to Seal

Motions to seal are another means by which large corporations seek to cloak product liability litigation in secrecy. Though the applicable standard on a motion to seal is much higher than even the particularized "good cause" showing required for a protective order, motions to seal involving defective products are nonetheless granted by some courts.

In a case currently pending before the United States Court of Appeals for the Fourth Circuit, a company was permitted to anonymously use the federal court to secretly

challenge a report filed about one its products on the Consumer Product Safety Commission web site. The company sued the CPSC to keep the report from being published in its database, and sought to litigate the case under seal and without revealing its true name.

When such a motion to seal is filed, the court is required to publish notification to the public that this type of relief is being sought in order to provide the public with an opportunity to be heard on the issue. Consumer groups objected, as did the CPSC, but the district court did not rule on the motion for nine months. The court conducted secret proceedings on the merits in the meantime. Then, without releasing its opinion to the public, the court granted summary judgment to "Company Doe," and granted the company's motions to seal and to proceed pseudonymously. Three months later that decision was made available to the public, but with all of the most important information redacted. The consumer and media groups appealed the rulings on the motions to seal and regarding a pseudonym. That is being considered by a three-judge panel of the Fourth Circuit. (The case caption is *Company Doe v. Public Citizen et al.*, No. 12-2209.) A decision is expected by early next year.

What Can Be Done: Plaintiffs' Lawyers Should Vigorously Oppose Restrictive Protective Orders; Judges Should Consider the Public's Interest Before Allowing Secrecy; and Legislative Solutions Should be Enacted.

There is much that can be done to combat this serious problem.

Plaintiffs' lawyers should oppose protective orders that are overbroad or that prohibit sharing with other litigants. Plaintiffs in products cases are in the vulnerable position of having to develop a substantial portion of their evidence from the defendants. If a protective order must be agreed to, the best mechanism is a protective order that protects the alleged proprietary interests, but keeps the documents available to other litigants. Likewise, plaintiffs counsel should be wary of agreeing to confidential settlements involving dangerous products.

Despite time constraints or even the agreement of the parties, judges should be vigilant in protecting the openness of our courts. They should consider the public's right to know not only when considering motions to seal (as they are required to), but also when endorsing protective orders and confidential settlements.

Still, the best remedies may be legislative. A law *requiring* a judge to consider the public's interest (the public's right to know) when deciding whether to sanction secrecy in the form of a proposed protective order or confidential settlement (even where the parties agree) would be a step in the right direction.

Another legislative solution is the Florida Sunshine in Litigation Act, which prohibits courts from restricting disclosure of information or materials "concerning a public hazard" or "useful to members of the public in protecting themselves from injury which may result from the public hazard . . . ." Additionally, that law gives standing to "any substantially affected person, including but not limited to representatives of the news media" to contest an order or agreement restricting dissemination.

Lawyers, judges, and legislators should strive to prevent powerful product liability defendants from co-opting our system of open government to be as a tool with which to hide the truth from the public. Otherwise, we are all in unnecessary danger.