Court Secrecy: A Continuing National Disgrace

by Nicole Schulteis

For decades, exploding gas tanks, disintegrating tires, defective car seats, and other products have caused suffering and death. Lawyers for the injured victims sued and settled, gaining some measure of redress for their clients. Sometimes the settlements were sealed and the smoking gun documents destroyed or returned to their creators—until another person was injured by the same product. And then the cycle would repeat itself: more preventable injuries, more litigation, more sealed settlements.

At this very moment, over six million Firestone/Bridgestone tires are being recalled because of the grave danger they pose to the motor public. Before the government ordered that recall, however, dozens of preventable deaths and serious injuries took place for one simple reason: the truth about the tires’ tread separation dangers was hidden from the government and the public by protective orders entered in cases filed by crash victims who had already been injured.

So begins the intervenor’s brief in Frankl v. Goodyear Tire and Rubber Co., N.J. Sup. Ct. Law Div. No. MER-L-003052-99 (1999). It was submitted by the Washington, D.C.-based Trial Lawyers for Public Justice (TLPJ) and the New Jersey firm of Wilentz, Goldman & Spitzer, P.C., on behalf of Consumers for Auto Reliability and Safety (CARS), a national nonprofit public interest organization.

According to the CARS brief, Goodyear noted an alarming problem with the tires five years earlier and made a design change to strengthen them but did not recall the millions of tires already on the road. Since that time, the media have continued to report deaths and injuries related to the tires. Yet, asserts CARS, neither the public nor the government can determine the truth about these tires because key pleadings and discovery in Frankl remain sealed by a protective order.

Following complaints of tread separations, federal regulators opened an investigation into Goodyear’s light-truck tires three months after Bridgestone/Firestone launched its own tire recall. The government investigation into Goodyear tires came just as the company was reaping huge profits from the Firestone recall, capturing a significant share of the replacement business for the troubled Firestone product.

CARS is not alone in challenging secrecy in product liability litigation, nor is this battle a new one for TLPJ, which in 1989 founded Project ACCESS to combat court secrecy and has since won many victories. The Firestone tires debacle has renewed opposition to secrecy in cases that affect the public safety.

Lawyers have lined up on both sides of the court secrecy debate, and controversy abounds over how litigators should address claims of confidentiality in their cases. In 1987 the ABA House of Delegates adopted a policy that discouraged secrecy of discovery data indicating a risk of hazard to others or containing information relevant to other cases. It also discouraged destruction of information at the end of a case. The policy went beyond most ethical rules, which prevent counsel from agreeing not to represent other plaintiffs in the litigation. See Report No. 123, Action of the House of Delegates, Feb. 16-17, 1987. The ABA Section of Litigation later took a contrary position, suggesting that there should be a presumption of confidentiality and that discovery should be used solely for the case at hand and not shared with other litigants. Its written comments were included in a 1991 standing committee report on judicial improvement but were not approved by the ABA Board of Governors or House of Delegates.

Although many plaintiffs’ trial lawyers feel duty bound to publicize company secrets that pose a threat to public health and safety, they may not be in a position to withstand a confidential settlement offered to their clients. In such cases, trial lawyers still have the problem they have always had: Absent a court rule or a statute requiring them to do so, and in the absence of an ethical rule even permitting them to do so, they

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are in no position to tell an injured client who needs settlement money to feed a family and pay rent to turn down a decent settlement solely on the grounds that the requested confidentiality of the settlement would not benefit the public interest. If, however, a trial lawyer has the wherewithal to condition such secrecy on court approval, it could provide the key the public needs to challenge secrecy of the case under the First Amendment as well as the Federal Rules. Another method could be to ensure that trial lawyer colleagues know about the case before settlement negotiations get to the point where the topic of secrecy rears its ugly head.

With the Bridgestone/Firestone cases, the controversy over court secrecy as a cause of personal injury and death has reemerged. History repeats itself. Less than two decades ago, a firestorm of public opinion erupted when the media disclosed that the earliest litigation over the exploding Ford Pinto gas tank had been conducted under cover of confidentiality. In much the same manner, Procter & Gamble stumbled by attempting to keep secrets in the Rely tampon litigation. See Tom Riley & Mary K. Hoefer, "Protective Orders: Machiavelli Would Be Pleased," Prods. Liability 84.

Goodyear’s attorneys made a similar mistake. They relied on a series of umbrella confidentiality orders to prevent the public from hearing allegations of corporate misconduct, wrongly assuming that one case’s umbrella confidentiality order would be grafted onto all the others. For Goodyear and other manufacturers who made this assumption, the public relations ramifications have been devastating. Newspapers everywhere pummeled the company within days after CARS filed its brief, in an outcry heard even through the din of the infamous year 2000 presidential election.

One commentator opined:

What are we dealing with here, Goodyear? And why are you insisting on keeping secret the details from the several lawsuits you have already settled? ... This week, the Los Angeles Times reported that you are writing checks to customers who complain about the tires in question. This has been referred to as a "silent recall," and it has led safety advocates and plaintiffs' lawyers to claim that thousands of lives will continue to be at risk until there is a full recall. ... Your response is that greedy lawyers are just pursuing their own agendas. ... Maybe so ... But your openness is needed to convince people that you have the public interest first in mind. ... If this is not a Bridgestone/Firestone situation, then don’t behave as Bridgestone/Firestone did.

Diane Evans, "Holding back information didn’t work in Firestone case, and it won’t work now," Akron Beacon J., Nov. 8, 2000.

In 1988 and 1989, Elsa Walsh and Benjamin Weiser published an award-winning series of articles on secret court proceedings, in the Washington Post. The first of these dealt with the Ford Pinto gas tank cases and other automotive litigation and explored how public confidence in GM eroded as a result of various fuel system cases that were litigated in secret for years before the facts ultimately came to light. E. Walsh & B. Weiser, "Secret Courts, Secret Justice," Wash. Post, Oct. 23-26, 1988. What followed in the wake of the Walsh/Weiser articles and other writings, through and including the writings by legal ethics scholars such as Richard A. Zitrin, see, e.g., "The Case Against Secret Settlements, or What You Don’t Know Can Hurt You," Hofstra J. Inst. Stud. L. Ethics 115 (1999), was a steady stream of anti-secrecy rulings and even legislation. See D. Domino, "Proposal Will Make Sealing of Court Files More Difficult," San Francisco Daily J. (Oct. 23, 2000).

The legislative foray into the secrecy arena began with Florida’s Sunshine in Litigation Act, Fla. Stat. ch. 69.081 (1999), first adopted in 1990. Texas adopted an antisecrecy rule (Tex. R. Civ. Pro. 76(a)), a procedure for publicly challenging proposed orders that would serve to shield public haz-
ards from public scrutiny. Next came San Diego, California. See Abramson, "New Ruling Lifts Veil of Secrecy in Civil Cases," L.A. Times, Sept. 9, 1990. A few other jurisdictions followed, and some commentators and scholars, such as Zitlin, have also suggested changes to lawyers' ethical rules.

Until the Bridgeston/Firestone and Goodyear tire stories broke, the high point of the antitrust debate was Judge Sarokin's scathing attack on the tobacco industry in 1992 in Haines v. Liggett Group, Inc., 140 F.R.D. 681 (D.N.J.), rev'd, 975 F.2d 81 (3d Cir. 1992). His ruling made front-page news in the New York Times. Charles Strum, "Judge Cites Possible Fraud in Tobacco Research," N.Y. Times, Feb. 8, 1992, at A1. The article reported that Judge Sarokin released 40 years of secret research files after describing them as nothing more than a public relations ploy and quoted him saying, "the tobacco industry may be the king of concealment and disinformation." Judge Sarokin ultimately wound up getting himself removed from the case, but until that time came, he put up a good fight.

But the meater case law placing strict limits on court-imposed secrecy in product cases had been forged by the Third Circuit some years earlier in Cipollone v. Liggett Group, 785 F.2d 1108, 1122 (3d Cir. 1986), cert. denied, 484 U.S. 976 (1987). The court held that "broad allegations of harm, unsubstantiated by specific examples or unarticulated reasoning, do not satisfy the 'good cause' test set forth in F.R.C.P. 26(c)." To this day, this sentence is perhaps the most frequently quoted in decisions nationwide in cases where overly broad requests for protective orders under Rule 26 have been challenged by plaintiffs or by intervening third parties.

What is not so frequently recounted by veterans of the tobacco wars is the fact that after the original mandamus issued in the Cipollone case, Judge Sarokin went on to hold that the tobacco companies had failed to show good cause for the entry of a protective order where the information they sought to protect was their knowledge of smoking's hazards and what they did or failed to do about it. Cipollone v. Liggett Group, Inc., 113 F.R.D. 86 (D.N.J. 1986). On appeal again, the Third Circuit affirmed Judge Sarokin (and, at least for the time being, rebuffed the tobacco companies' efforts to remove him from the case). Cipollone v. Liggett Group, Inc., 822 F.2d 335 (3d Cir. 1987).

Finally, in 1998, the U.S. House Commerce Committee unsealed 39,000 documents. But to those most familiar with the litigation, it was Judge Sarokin who had first sounded the trumpet.

Getting Access

There have been other trumpeters. Lloyd Doggett, formerly a Texas Supreme Court justice and now a member of Congress, published an article in 1991 with Michael J. Mucchetti entitled "Public Access to Public Courts: Discouraging Secrecy in the Public Interest," 69 Tex. L. Rev. 643. As a jurist, he drafted what became Texas Rule 76(a), referred to earlier, which was largely ignored. See Ballard, "Courts Defang Much-Feared Rule," Tex. L., Dec. 3, 1990, at 10-11.

Clerks' offices used to be, and perhaps still are, one of the traditional hangout joint for reporters. In the 1970s, a hand-lettered sign in the Baltimore courthouse said, "Please put two extras in the press box." Clerks' offices still serve as free how-to libraries for the nation's paralegals and law students. In the old days, even before the information technology explosion, they were an absolute gold mine for the lawyers looking for evidence of prior similar claims.

Despite all that we have learned about the dangers of secrecy over the past two decades, court clerks' offices, formerly such bastions of openness, may not be counted on blindly to fulfill this role in the 21st century. Why, in this information age, with national PACER data available for a few cents and a plunk of the Enter key, is discovering a company's past history of safety and design failings such a huge

One attorney advised an entire audience of risk managers to discard evidence of adverse events.
TLPI, the Association of Trial Lawyers of America (ATLA), and Public Citizen periodically gathered and shared with others their own research materials on the growing evidence of the dangers of secrecy. Public Citizen’s research is available online at www.citizen.org/litigation/open_court.html and TLPI’s at www.tlpi.org. The Society of Professional Journalists cosponsored a one-day conference on secrecy with ATLA that was broadcast on cable TV and put together a special publication on the subject, “Secret Justice,” in 1990.

But was anyone, apart from the vocal few, actually listening? A decade later the story broke about insurance companies that use dubious medical reviews to deny personal injury claims. Alas, the game was now tougher.

**Settlements Under Seal**

One lawsuit challenging the practice, *Foltz v. State Farm Mutual Automobile Insurance Co.*, was filed in federal district court in Eugene, Oregon, in 1994. According to the few documents available, Debbie Foltz accused State Farm, her automobile insurer, of hiring the California Institute of Medical Research and Technology, a medical paper utilization review company, to defraud her by conducting a sham review of her son’s need for treatment. Four years later, the parties entered into a confidential settlement. As part of the settlement, the court entered an order sealing more than 450 documents in the case file, wiping the docket sheet clean and erasing the case from the court’s computer system.

As a result, it became impossible for a member of the public to determine that the case existed, much less to view the court record. TLPI learned of Foltz when, in 1998, the Oregon Supreme Court issued a published opinion answering state law questions that had arisen in the federal case. When lawyers attempted to view the Foltz case file at the federal courthouse, however, the clerk found no case file in the computer system. Searching by case number also produced no results. A manual search turned up a few unsealed documents, but the remaining court records had been sealed and were unavailable for public view. It was later learned that, with the court’s permission, these court files had been physically removed from the courthouse by State Farm.

TLPI moved to intervene, to compel the return of the documents to the courthouse and to unseal the file on behalf of three consumer advocacy groups. The court ordered a portion of the file unsealed but refused to grant public access to the remainder. As of October 2001, resolution by the Ninth Circuit is pending.

Other important cases still languish quietly in the dark. For example, in *Holmes v. Century Products*, No. 90-24046 (4th Cir.), lawyers for a family that owned the same model car seat involved in the case sought to open a file that had been sealed by the court pursuant to the original parties’ settlement agreement. In an unpublished per curiam opinion, the Fourth Circuit eventually ordered removal of the sealing order—but what subsequently happened to that case or to the related litigation? No one knows: Despite what was occurring across the country in the 1990s, in the wake of antsecrecy rulings and legislation, the car seat cases were still being settled secretly and sealed.

The media, of course, are drawn to secrets as a matter of principle. Although H.L. Mencken was speaking of scientific investigators, what he said applies equally well to journalists and lawyers:

What actually urges him on is not some brummagem idea of Service, but a boundless, almost pathological thirst to penetrate the unknown, to uncover the secret, to find out what has not been found out before. His prototype is not the liberator releasing slaves, the good Samaritan lifting up the fallen, but a dog sniffing tremendously at an infinite series of rat-holes.


Now back to the events of the day. As CARS points out in the *Franki* case, it was not merely that the parties stipulated to umbrella secrecy and their agreement was then unthinkingly rubberstamped by an ill-informed trial judge. Indeed, it was worse. As is stated in the CARS brief, it was the trial judge who twisted arms to get the parties to enter voluntarily into a broad protective order, apparently because some other trial judge had approved a similar arrangement via stipulation in prior litigation. CARS contends that this is an insufficient basis for the entry of such a sweeping secrecy order in *Franki*:

“[C]ourts should not provide a shield to potential claims by entering broad protective orders that prevent public disclosure of relevant information,” quoting *Glenmede Trust Co. v. Hutton*, 56 F.3d 476, 485 (3d Cir. 1995) (moreover, it is secrecy proponent’s burden to show it will sustain specific injury from public dissemination).

Whether it is this case or some other product case affecting the lives, health, and safety of both American citizens and our neighbors abroad, manufacturers, insurers, and their advocates continue to cry foul. Their argument boils down to this: Relevant information is turned over solely for the litigation at hand, and it is nobody else’s business. A settlement is private, and the parties need not share its terms with the public. Yet cases are litigated in public courts that are paid for with public money for the benefit of all. And the plain language of Federal Rules of Civil Procedure 1 and 5(d), not to mention Rule 26(c), creates a presumption of openness in civil proceedings and discovery.

**The Trojan Horse**

Many courts now have sample confidentiality orders reproduced online for free and local court rules and discovery guidelines that set forth clear limits on what parties may do to keep their cases secret. *See, e.g.*, D. Md. Local Rule 104.13, and the sample order reflected on page 98 of those rules, downloadable in various formats from www.mdd.uscourts.gov/Resources/LocalRules/default.htm. It is the wise litigator who consults such sources before insisting upon, or consenting to, an umbrella secrecy order.

Some dismiss as not based in reality the concern that secrecy permits bad products to remain on the market. But marketing people know that keeping the profits rolling in from a popular product is not child’s play; it is a war that needs constantly to be waged. And since at least the time of the Trojan Horse, it has been known that secrecy is one of the warrior’s best allies. What is unreal about that?

What is also real is that corporations and insurance companies are artificial entities. They are publicly answerable for their conduct. Their charters can be revoked. By the same token, as the U.S. Supreme Court recognized half a century ago, corporations have no right to privacy:

[N]either incorporated nor unincorporated associations can plead an unqualified right to conduct their affairs in
A.2d 859, 864 (Md. App. 1988), it was noted, "To close a court to public scrutiny of the proceedings is to shut off the light of the law." The Supreme Court of New Jersey, while specifically recognizing that third parties have a right to seek public access to sealed documents, reminds us that courts cannot blindly seal civil case proceedings: "Independent of the interests of the parties, there is a profound public interest when matters of health, safety and consumer fraud are involved." Hammock by Hammock v. Hoffmann-LaRoche, 142 N.J. 356, 379 (1995).

In the same vein, the Reference Manual on Scientific Evidence, 2d ed., states:

Issues frequently arise concerning third-party access to protected material. Information subject to a protective order in a case may be sought by parties in other litigation, by the media, or by other interested persons or organizations. Nonparties may request the terms of a confidential settlement. State and federal laws may also define rights of access to such information. Parties should therefore be aware that issuance of a protective order will not necessarily maintain the confidentiality of the information. Where a sweeping protective order has been entered, the process of segregating protected and nonprotected information when access to it is sought may be time-consuming and expensive. Filings submitted under seal with or without stipulation will not be protected from disclosure to third parties in the absence of a proper order. The parties may bind each other to limit disclosure of such materials, but the materials are not protected against subpoena.

Federal Judicial Center (2000), at 53.

The lesson for litigators? Make sure your motion for a protective order, and the protective order itself, are limited to those materials truly deserving of protection, such as trade secrets and other commercially valuable information. Do not stamp articles from medical journals, complaints obtained from third parties, published advertisements, instruction manuals, and other obviously nonsecret materials with the word "CONFIDENTIAL." If you represent the plaintiff, vigorously challenge such attempts by the defense. Do not seek to seal materials in the court's file concerning past injuries or health and safety data. If you represent the injured plaintiff, do not blithely sign an umbrella order, particularly one that shifts the burden of proving legitimate confidentiality away from the defendant, whose job it is to demonstrate with particularity what materials need to be covered by the confidentiality order. Make sure the order contains a mechanism by which you can challenge the claimed need for confidentiality and trigger a renewed obligation on the part of the defendant to establish the entitlement to the protection afforded under Rule 26(c).


In short, parties should never overstate their need for confidentiality, and they should never fail to be specific about why it is necessary, or it will come back to haunt them in the end. As an editorial in the New York Times, "Mayday! and May Day," May 1, 1986, on Soviet suppression of news regarding the nuclear accident at Chernobyl stated, "Those who live by secrecy can also perish by it."