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Don't let them gag you!

Products liability: Use "share protective orders" to promote public safety

By Clifton Smoot

There comes a time in the life of every products-liability case when the defense comes asking for a protective order. Given that the plaintiff's attack on the defendant's careless product design or manufacture will involve the discovery of trade secrets, a protective order is a fair request. But the devil is in the details – too much secrecy thwarts justice.

This article focuses on one anti-secrecy provision that plaintiffs' attorneys of all stripes should pursue: disclosure of confidential information to similarly situated plaintiffs. It is not enough to obtain discovery for your client. The defendant has no right to keep relevant information secret from other plaintiffs' attorneys working on similar cases. Plaintiffs' attorneys, who fight for public safety and equal justice, must take this provision seriously.

The setup

A motion is often necessary to obtain a fair protective order. But that should not discourage anyone from attempting to negotiate a stipulated protective order in good faith.

The plaintiff's attorney should begin the negotiation. When serving the first round of written discovery, plaintiff's counsel's polite cover letter should state:

> In prelude to potential discovery disputes, the enclosed Proposed Stipulation is intended to resolve the methods for designating, using, accessing, and challenging the designation of confidential information, *including trade secrets*. I ask that we try to come to an agreement about this now, before defendant's discovery responses come due.

Enclosed with the letter is a proposed Stipulation and Protective Order. Plaintiff's counsel has now named their terms, and the clock is ticking. Defense must respond with reasonable revisions to the protective order or file a Motion for Protective Order. If defense responds to discovery with objections and no substantive information, plaintiff will file a Motion to Compel.

In any case, it is likely that plaintiff's counsel will end up negotiating every clause of the protective order. This may be done early and amicably. Or, the negotiations may follow a motion practice, when the Court orders the parties to meet and confer.

The "sharing" clause

When it comes to reviewing and circulating "confidential" information, who should be allowed to view it? For starters, disclosure is routinely allowed to: counsel (including employees, staff, and retained counsel), parties (individual parties or officers/employees of a party), consultants/expert witnesses, the Court, and witnesses. There may also be special provisions to address the sharing of information with defendant's competitors (e.g., where a competitor's staff is deposed, or where plaintiff's counsel retains an expert who works for the competitor). In some cases, individuals who receive confidential information will need to sign a "certification" promising not to use the information outside of litigation.

This brings us to the controversial "sharing" clause: "Confidential Information shall not be disclosed to any person other than . . . counsel actively handling a pending case against any Producing Party where it is alleged that a [product] was involved in an injury-producing incident due to an alleged defect in a [Defendant brand product/model/year]." In other words, a clause that permits plaintiff's counsel to share discovery with other plaintiffs' attorneys prosecuting a similar case. This is also known as "disclosure to collateral litigants."

Unfortunately, "share protective orders" are uncommon. This is likely because protective orders are often recycled (i.e., copied and pasted) from patent cases, employment cases, and other types of litigation that do *not* concern public safety. Compared to personal-injury cases that aim to uncover safety flaws in mass-produced consumer items, those cases have a comparably lower level of public interest, and a comparably lower need for the public to access that information. On this note, it is worth mentioning that the Santa Clara County Superior Court's "Model Confidentiality Order" states in preamble that the order is specifically *not* intended for cases involving "public health and safety concerns."

Case law supports "share protective orders"

The Ninth Circuit first approved protective orders allowing the exchange of confidential information for use in related cases in different courts in *Olympic Refining Company v. Carter* (1964) 332 F.2d 260. The best California authority is the *Raymond* case, a 1995 case of first impression in which the First District Court of Appeal upheld disclosure to collateral litigants in the context of a personal injury case caused by a vehicle design defect. (*Raymond Handling Concepts v. Super. Ct.* (1995) 39 Cal.App.4th 584.) *Raymond* was a tire defect case. The trial court issued a protective order which provided for disclosure to collateral litigants. Defense counsel then filed a writ. The appellate court found in favor of sharing, and discussed the benefits of "share protective orders," as well as the negative consequences of not having one.

The disclosure clause approved by the *Raymond* court was surprisingly broad. The *Raymond* disclosure provision read in pertinent part,

> That plaintiff[']s counsel may disclose said discovery so designated as confidential to counsel in other pending similar litigation. Said discovery shall not be disclosed or disseminated to the general public and in the event plaintiff[']s counsel elects to share discovery in this case with other counsel similarly situated in other similar pending litigation then counsel in such other litigation shall execute a stipulation agreeing to be bound by this protective order. Plaintiff[']s counsel shall maintain a list of counsel similarly situated to whom disclosure is made and shall notify defense counsel when such disclosure is made.

(*Id.* at 587.)

The phrase, "similarly situated in other similar pending litigation," is left undefined. As a practice pointer, this is an area ripe for negotiation. Plaintiff's counsel will propose broader definitions of "similarly situated," while defense counsel – after attempting to eliminate the clause entirely – will want to narrow the definition.

The *Raymond* court spelled out the public policies favoring this type of disclosure. Chiefly among them is "full disclosure and efficiency in the trial system." (*Id.* at 589.) The court specifically mentions:

- Fair play. "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." (*Ibid.* (quoting *Garcia v. Peeples* (Tex. 1987) 734 S.W.2d 343).)
- Saving plaintiff's attorneys from duplicating efforts. "Benefiting 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." (*Ibid.*)
- Common sense. Since plaintiff's attorney will be sharing this discovery only with counsel in other similar cases, it follows that the information would also be discovered in those similar cases. (*Id.* at 590.)

Raymond is part of a small line of national case law that recommends allowing collateral litigants discovery of confidential and trade secret materials.

One robust ruling comes from the Ninth Circuit in *Foltz v. State Farm Mutual Automobile Ins. Co.* (2003) 331 F.3d 1122. In *Foltz*, plaintiff brought a bad faith action, alleging that State Farm conspired to wrongfully deny personal injury coverage. Plaintiff sought to share certain confidential documents – which the *Court had placed under seal* – with other litigants engaged in similar cases against State Farm. The Ninth Circuit found that it was abuse of discretion

(to wit, the lower court "utterly fail[ed]" to apply legal principles) for the lower court to withhold confidential materials from collateral litigants. (See *Foltz* at parts 1b, "Discovery by Collateral Litigants," and 2, "Right of Access to Judicial Records.")

The *Foltz* court articulates the above list of public policy reasons to allow "collateral litigants" access to confidential documents:

- Judicial economy. "Allowing the fruits of one litigation to facilitate preparation in other cases advances the interests of judicial economy by avoiding the wasteful duplication of discovery." (*Id.*, at 1131.)
- Public access to judicial documents, especially with regard to dispositive motions. (*Id.* at 1134-36.)

In addition to the policies and case law cited by *Raymond* and *Foltz*, guidance from secondary sources may prove persuasive. (See e.g., *Manual for Complex Litigation* § 21.431, at 53 n. 61 and § 31.13, at 258 (2d 1985) ("Protective orders may, of course, authorize disclosure of confidential documents to counsel in other related cases … [because] discovery already completed should ordinarily be made available to litigants in the other cases.").)

Conclusion

California law disfavors secrecy in litigation, and encourages sharing provisions in circumstances where they improve efficiency and fairness. "[C]ollaboration among plaintiffs' attorneys would come squarely within the aims of the Federal Rules of Civil Procedure to secure the just, speedy, and inexpensive determination of every action." (*Patterson v. Ford Motor Co.* (W.D. Tex. 1980) 85 F.R.D. 152, 153-54.) Sharing protective orders should be the norm in personal injury cases, insurance bad faith actions, employment discrimination cases, and many others.

There are many resources to help plaintiff's counsel succeed in obtaining a "collateral litigants" clause. It is likely that the defendant in your case has previously negotiated and signed a protective order that permitted sharing – plaintiff's counsel should find it, and use it. Many local court rules address protective orders, disfavoring secrecy. Other sample orders abound. Many courts, including Santa Clara, San Mateo, Alameda, and the Northern District, have "model" protective orders posted on their websites. Public Justice has penned a fantastic model order. Finally, members of organizations like Attorneys Information Exchange Group (AIEG), CAOC, and SFTLA have written excellent articles, protective orders, and briefing on this issue. (In this regard, the writer owes a debt of gratitude to Andrew McDevitt.)

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