Made Secret by Stipulations with No Basis, Approved by Court Orders with No Authority: A Case Study in the Abuse of Protective Orders in Coverage Litigation

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Introduction

In *Braden v. Foremost Insurance Co.*, No. 4:15-cv-4114, 2016 WL 1417849 (W.D. Ark. April 8, 2016), a secrecy order was signed by a Federal Judge based only on an agreement written by the lawyers in the case "[t]o protect the confidentiality of materials which may contain confidential, proprietary, commercially sensitive, trade secret, or personal information of Foremost's insureds …."[1] Neither the stipulation submitted by the lawyers nor the Order signed by the Court reveal the nature of the *Braden* case.

Braden v. Foremost Insurance Co. is a first-party insurance coverage case. The author's research into the *Braden* Court File on PACER ("Public Access to [Federal] Court Electronic Records") shows that the lawsuit began not long ago with the filing of a Class Action Complaint containing allegations that in paying claims for covered repairs to dwellings and other structures, Foremost routinely depreciated labor in calculating the value of repairs.[2] There are no claims of insurer bad faith or fraud or the like. The only claims alleged in *Braden* are on behalf of a putative class for insurance coverage.

In *Braden*, the Judge approved a stipulated procedure for permitting materials to be declared "Confidential" or "Attorneys' Eyes Only," whether the materials in question might "be a document, information contained in a document," or deposition testimony, interrogatory answers "or otherwise."[3]

1. Braden v. Foremost Insurance Co., No. 4:15-cv-4114, 2016 WL 1417849, at *1 (W.D. Ark. April 8, 2016). The inclusion of "personal information of Foremost's insureds" in this stipulated order appears to have been surplusage. The Federal Judge entered a separate protective order on the same date which addresses the privacy protections required by the Court in this case with respect to personal information of Foremost's insureds.

2. Braden v. Foremost Insurance Co., Class Action Complaint, DE (Dkt. No.) 1, filed Dec. 10, 2015 (W.D. Ark. Case No. 4:15-cv-4114).

3. *See* Braden v. Foremost Insurance Co., No. 4:15-cv-4114, 2016 WL 1417849, at ¶ 2, p. *1 (W.D. Ark. April 8, 2016). The quoted stipulation reflects the Byzantine procedure for secrecy which it establishes. In keeping with a stated goal of secrecy, the stipulation itself is difficult to understand. It is to be doubted that there are a great many people beyond those who wrote it who know what is in it. In this respect, secrecy stipulations like the one in the *Braden* case are analogous to synthetic credit default obligations on Wall Street: Nobody really understands them and no-one is really supposed to.

For what it is worth, as has already been seen the *Braden* stipulation is typical in establishing at least two tiers of hidden information. One set is marked as "Confidential" by the lawyers, and a second set is marked for "Attorneys' Eyes Only." The second set means exactly what it implies, according to the stipulation. Evidence marked "Attorneys' Eyes Only" is for the attorneys' eyes only, as in a spy novel. The stipulation further provides what seems to be a momentary consolation: "Nothing shall be designated as Attorneys' Eyes Only except *information of the most sensitive nature*." Braden v. Foremost Insurance Co., No. 4:15-cv-4114, 2016 WL 1417849, at ¶ 2, p. *1 (W.D. Ark. April 8, 2016) (emphasis added). Unfortunately, the moment of consolation if any which this language affords, is necessarily brief. The drafters of this stipulation and the judge which approved it with the Court Order discussed in this Case Summary made no effort to define what is meant by "information of the most sensitive nature." A hint at what the people who wrote these words had in mind, at least, is offered by the ruling quoted in the note immediately following.

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This stipulated definition approved by the Court in *Braden* is the same in every important way as other secrecy stipulations which have been held to shield complaints from public view. It has thus been held that a blacked-out or redacted version of an amended complaint may be filed with judicial permission but only on the "public docket," while a complete version of the amended complaint is filed under seal for the eyes of the lawyers and the judge only.[4]

The secrecy stipulation which the judge approved in *Braden* seems to contemplate this result as well:

> 16. *In the event a party wishes to use Classified Information in* any affidavits, briefs, memoranda of law, or other *papers filed in Court in this litigation*, *such Classified Information shall be filed under seal* with the Court.[5]

The Order entered by the judge approving the stipulated secrecy procedure in this case is not a phenomenon unique to the Western District of Arkansas. Neither the order nor the secrecy stipulation in the *Braden* case is different in any material way from many other Court Orders approving secrecy stipulations in many other courts and cases, State or Federal. Since *Braden v. Foremost Insurance Co.* is a Federal case, the following analysis will refer to the Federal Rules of Civil Procedure. To be clear, similar stipulations and similar rules of procedure can be found in the courts and court files of many lawsuits in both State and Federal Courts in this country.

The *Braden* Order

Without proof and only a stipulation in the record, the Court in *Braden* approved the stipulation put before it. Many stipulations have been presented to many courts in many cases, and this certainly is only a representative example. However, the lawyers and the Court in this case effectively rewrote Federal Rule of Civil Procedure 26 or, perhaps more accurately, suspended it from playing any role in disputes over the secrecy permitted by the stipulation and now, by the Court Order approving that stipulation.

A preliminary question before addressing why the Court approved the secrecy stipulation: Why was Court approval of a secrecy stipulation requested in the first place? It appears that the judge in this case, like most judges in most of these cases, may have never asked herself why lawyers needed Court approval. The lawyers had clearly already bound themselves and the parties to a secrecy stipulation. They did not need a Court Order to keep secret things which they had already stipulated to keep secret. They clearly did not need a Court Order for that because they already had their stipulation.

There are several likely reasons why lawyers would ask a Court's approval of their secrecy stipulation. One reason to ask for a Court Order is to attempt to bind other people who are not lawyers or parties or Court personnel involved in the given case. In short, lawyers may submit their secrecy stipulations for Court approval in order to keep materials *secret from everyone else*, i.e., from the public. That is certainly the principal effect of Court Orders that bless such secrecy stipulations with judicial approval.

Another probable reason clearly appears as to why lawyers submit their stipulations for a judge's approval and a Court Order when they have already stipulated to certain procedures for keeping things secret. As in the *Braden* case example, the lawyers may well substitute a different procedure for confidentiality which they think will be easier to meet than the regime which might otherwise be applied by

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4. Such is the case in *Xi Chen Lauren v. PNC Bank, N.A.,* No. 2:14–cv–0230, 2014 WL 1884321, at *4 (S.D. Ohio May 12, 2014) (Kemp, U.S.M.J.):

> For the foregoing reasons, the motion for leave to amend (Dos. 78 (redacted) and 80 (filed under seal) is granted. Plaintiff may file a copy of the First Amended Complaint identical to the one attached to the motion for leave to amend. *To the extent that Plaintiff believes redactions to be required under the Stipulated Protective Order*, Plaintiff is granted permission to *file* a *redacted* copy on the *public* docket and an unredacted copy under seal.

(Emphasis added.) Presumably, this is one definition of "information of the most sensitive nature" discussed in the immediately preceding note. Many defendants and their lawyers find facts and allegations in complaints and amended complaints to be terribly offensive and thus "of the most sensitive nature," as was apparently the situation in the quoted case from Ohio.

5. Braden v. Foremost Insurance Co., No. 4:15-cv-4114, 2016 WL 1417849, at ¶ 16, p. *4 (W.D. Ark. April 8, 2016) (emphasis added).

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the judge such as that established by Federal Rule of Civil Procedure 26. In particular, if contemporary secrecy stipulations submitted to judges for approval are any indication, people who draft and proffer these stipulations covet a procedure which does not require a showing of good cause for secrecy.

Federal Rule of Civil Procedure 26

Protective Orders are authorized in Federal Courts by Rule 26(c). They are authorized when it is necessary for a court to protect "a party or person." They are fashioned to protect against "annoyance, embarrassment, oppression, or undue burden or expense."[6]

The Rule's authorization for protection of a "trade secret or other confidential research, development, or commercial information" is one of the better known provisions of Rule 26.[7] The only commentary offered on this provision and its reason for adoption in the Federal Rules of Civil Procedure makes clear that it was written in order to codify the existing practice of Federal Courts to weigh claims to "privacy" against a "need for disclosure." It follows that a protective order is not issued automatically nor is it necessarily "complete" in the sense that it may not require absolute secrecy but is instead tailored to the needs of each particular case even when the Court grants protection to particular materials.[8]

In every case, Rule 26 requires a showing that materials should be made confidential "for good cause."[9] The Rule does not authorize the entry of a blanket order in advance of any showing or proof, but instead depends on a more particularized showing of good cause for the confidentiality of discrete items or groups of items. This leads to an examination of the markers of potential problems, or the "red flags" that secrecy stipulations present to judges and their staffs.

The Red Flags of Secrecy Stipulations

These are some of the markers of potential problems presented by secrecy stipulations in every case.

1. The stipulation does not mention the Rule that authorizes Confidentiality.

In Federal District Court cases specifically, this red flag means that the stipulation does not mention Rule 26. The only "authority" that appears on the face of many secrecy stipulations is a lawyer's signature, at least until the secrecy stipulation is submitted to the Court for an Order approving it. If a stipulation does not cite the authority that permits it, that is certainly a red flag for potential problems.

For example, the stipulation approved on April 8, 2016 in the *Braden v. Foremost Insurance* case runs for 20 paragraphs over the course of 5 printed pages in the Westlaw version. It does not mention the source of authority for secrecy—in this case, Rule 26—in any paragraph on any page.

2. The stipulation is submitted without any accompanying evidence.

Many secrecy stipulations do not even pretend to show "good cause" for the unnecessarily complicated secrecy procedures which they invent. In fact, in many secrecy stipulations, "cause" is not even mentioned, let alone "good cause" shown.

The stipulation which the judge approved in *Braden* is typical, once again. It provides only that in the event of a dispute "[t]he designating party shall then be required to move the Court [*sic*] for an order preserving the designation" of "Confidential" or "Attorneys' Eyes Only," but it says nothing about a standard by which such a motion ought to be judged.[10]

3. The stipulation attempts to conceal what may already have been made public in another lawsuit.

This red flag is made all the more glaring because judges rarely if ever require Court Hearings on stipulated matters. There may be no way for the judge presiding over a given case in which she or he has been presented with a secrecy stipulation that purports to shield from public view deposition testimony taken in another case, for example, to know

6. Fed. R. Civ. P. 26(c)(1).
7. Fed. R. Civ. P. 26(c)(1)(G).
8. *See* 1970 Committee Notes to Federal Rule of Civil Procedure 26.
9. Fed. R. Civ. P. 26(c)(1).
10. Braden v. Foremost Insurance Co., No. 4:15-cv-4114, 2016 WL 1417849, at ¶ 15, p. *3 (W.D. Ark. April 8, 2016).

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whether that testimony has been made public already or not.

The secrecy stipulation approved by the judge in the *Braden* case is yet again typical in this regard as well. It provides that certain deposition "transcripts and exhibits" in a totally different case shall be treated in *Braden* as though they were designated as "Classified Information" if the testimony and evidence "were *designated as Classified Information* in that [other] case …."[11] As the emphasized language displays, the stipulation depends only on whether the testimony and exhibits were "designated" as classified in the other case, *not* on whether the Court in that other case ruled that they were confidential under Rule 26 or its equivalent.[12]

If only the stipulation is considered, without a showing of any kind, then the Court may never know whether the testimony and other evidence taken in some other case, but stipulated to be "Confidential Information" in the case at bar, has been disclosed or even if it is already in the public domain.

Conclusion

More red flags exist. It is important to recall that red flags exist for more cases than the *Braden* case and for more courts than the Western District of Arkansas. Red flags of potential problems are raised by contemporary secrecy stipulations filed in all courts in all places in the United States. The red flags they raise are a product of the regular use of more or less standardized secrecy stipulations.

This Case Summary has brought to light several of the most flagrant indicators of possible problems with Court-approved secrecy stipulations that are simply not authorized by any governing Rules of Civil Procedure. There is an old saying which can be favorably adapted to the experience of secrecy stipulations that are submitted for Court approval: "If wishes were horses, then beggars would ride." Adapted to present cases, the saying aptly describes the inherent problem of secrecy stipulations: "If stipulations were orders, then lawyers would rule."

Thankfully, for the most part, lawyers do not rule. Judges do. But in the case of trial judges, they rule best when they exercise the powers of their office and do not rubber stamp every stipulation "approved" simply because it is not adversarial.

11. Braden v. Foremost Insurance Co., No. 4:15-cv-4114, 2016 WL 1417849, at ¶ 12, p. *3 (W.D. Ark. April 8, 2016) (emphasis added).

12. For that matter, the stipulation in *Braden* is typical of many other secrecy stipulations in another respect. It offers no explanation of why certain deposition testimony and no other testimony taken in another case should be marked "Confidential" in the *Braden* case, or why certain documentary evidence and not others taken from another case should also be marked "Confidential" in the *Braden* case.

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