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Secret Evidence and Sealed Court Files: Illustrated in Insurance Cases Opened to the Sunshine

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In December, 2016 the Colorado Supreme Court made a decision that will introduce this article. The Colorado case is *Rumnock v. Anschutz*,[1] decided on December 5, 2016.

The *Rumnock* case was a split decision.[2] The point of departure between the five justices in the majority and the two justices in the dissent came over a part of the trial judge's ruling that had nothing to do with the focus either of the majority opinion or of this article, which is whether the burden of proof on a party that requests a protective order from a court requires evidence.

The particular claim to a protective order in this case came from an insurance company that was sued for breach of an uninsured motorist (UM) insurance contract and for bad faith and abuse of process. The UM carrier requested a protective order from the Colorado trial court on the ground that its "claim handling materials" were a trade secret. As a part of its requested protective order, the carrier also requested the trial court to limit any "use and disclosure" of this evidence to the current lawsuit.

The majority and the dissenters parted company on the second part of the carrier's request. The trial judge granted the limitation on use and disclosure in part, ruling that although the carrier could not offer sufficient evidence to prove that its UM claim handling "procedures, policies, and guidelines" were protected trade secrets, despite multiple opportunities to offer evidence and make a showing that these materials were trade secrets deserving of judicial protection, still the plaintiffs who received this discovery could not share it with the insurance company's competitors.

The trial court, however, did not put the evidence in a lockbox as the carrier effectively requested. In barring the plaintiffs' attorneys in this case from *directly* sharing the discovery of the defendant's UM claim handling in this case with the defendant's competitors, the trial court did not extend the ban on use and disclosure to other plaintiffs' attorneys in other cases. The other plaintiffs' attorneys would of course be free to share this discovery with anyone they might choose, including the defendant's competitors. This *indirect* route to potential use and disclosure by the defendant's competitors came about, to put it another way, because the trial court refused to ban the current plaintiffs' attorneys from sharing the discovery with other attorneys in other litigation or, in fact, from sharing the discovery with anyone other than the defendant's competitors.[3]

The majority opinion does not touch this part of the trial court's ruling. The majority's only focus was on what the majority saw as the defendant's failure to

1. Rumnock v. Anschutz, 384 P.3d 1261 (Colo. 2016). The author wishes to thank John K. DiMugno, Esq. for pointing this case out to him. This appellate court opinion provides valuable direction to trial courts concerning important secrecy issues.

2. Although the opinion does not list the names of the justices in the majority, we know that there were five justices in the majority because there were two justices identified as dissenting. Thus, the Colorado Supreme Court decided the *Rumnock* case by a vote of 5-to-2.

3. The trial court's ruling is summarized at the outset of the decision in *Rumnock v. Anschutz*, 384 P.3d 1262, ¶ 1, at p. 1263 (Colo. 2016), and again in ¶ 9, at p. 1264, for example.

show that the defendant's UM claim handling procedures were a trade secret deserving of judicial protection.

The two dissenters, in contrast, seemed to assume for the purposes of their argument that the defendant's UM claim handling procedures in this case were an established trade secret requiring the trial court's protection and, since the trial court should have been required to protect the defendant from discovery of those procedures, that the trial court should have been required to ban the disclosure of those procedures to anyone outside of the present case.[4]

At first, the difference between the majority and the dissent in the *Rumnock* case struck me as a distraction from the main focus of the decision. To say again, the main focus of the majority in that case is the same as the main focus of this article: Whether evidence is required of a party that requests a protective order? To put that question another way, who decides that good cause for a protective order has been established, a judge upon a record showing or a party upon a claim to entitlement?

I now see the difference between the majority and the dissent in *Rumnock* as central to the answer to that question, and anything but a distraction from it. The answer to that question in the *Rumnock* appeal serves as a point of departure for the remainder of this article which addresses how trial courts decide that question in the course of actual litigation.

Rumnock's Road to the Colorado Supreme Court

The Rumnock case began with Mr. Stephen Rumnock's claims to coverage against his UM carrier, American Family Mutual Insurance Company. After the UM carrier paid Mr. Rumnock the UM policy limits, Mr. Rumnock amended his complaint to include alleged claims of bad faith and abuse of process "alleging unreasonable litigation conduct."[5]

Rumnock then served American Family with a request for production of "documents showing, among other things, its procedures, policies, and guidelines for handling uninsured motorist claims."[6]

American Family did not respond for weeks. The defendant insurance company had opportunities to establish its later position of "trade secrets" since before its responses were due on September 10. After the due date for American Family's discovery responses, two hearings were set in the trial court.

The first of the two hearings was held on October 29. There was still no discovery response nor a request for a protective order before the hearing. In its order resulting from the October 29 hearing, the trial court ordered that the defendant should respond by the close of business on November 6 and that it had waived all of its objections because it had not responded at all to that point.[7]

The defendant responded "[a]t 5:06 p.m. on November 6th," as the Colorado Supreme Court pointed out without comment.[8] Two hours later, the defendant UM insurance company filed a motion for protective order. The carrier's motion asserted without showing that the materials requested by the plaintiff were "trade secrets" and "sought to limit their use and disclosure" to the current lawsuit.

At a second hearing on an unstated date, the defendant again "asserted" that the "claims-handling materials were proprietary" and requested the trial court to limit use or disclosure to the current lawsuit. Again, the defendant did not adduce any evidence in support of its assertion of "trade secrets." Parenthetically, the plaintiff did not introduce any evidence, either.[9]

As a result of this history, the issue was starkly presented in *Rumnock*: Is the burden of proof that is assumed by a party which requests a protective order, here on the basis of asserted "trade secrets," required to be supported by evidence, or is its naked assertion of an entitlement to protection a legally sufficient showing to support a court's protective order?

4. See Rumnock v. Anschutz, 384 P.3d 1262, ¶¶ 16-21, at pp. 1265-67 (Colo. 2016) (Coats, J., dissenting).
5. Rumnock v. Anschutz, 384 P.3d 1262, ¶ 4, at p. 1263 (Colo. 2016).
6. Rumnock v. Anschutz, 384 P.3d 1262, ¶ 5, at p. 1263 (Colo. 2016).
7. Rumnock v. Anschutz, 384 P.3d 1262, ¶¶ 5-6, at pp. 1263-64 (Colo. 2016).
8. Rumnock v. Anschutz, 384 P.3d 1262, ¶7, at p. 1264 (Colo. 2016).
9. Rumnock v. Anschutz, 384 P.3d 1262, ¶ 8, at p. 1264 (Colo. 2016).

The Colorado Supreme Court's Rumnock Holding and its Effect on Secrecy Orders and the Sealing of Evidence

The burden of proof is on the movant for a protective order. This "generally" means a showing of "good cause" by the party requesting a protective order, but not always. In this case, the party requesting a protective order from the trial court claimed that it was entitled to a protective order to protect "trade secrets." Therefore, the initial burden of proof in this case was to establish that "trade secrets" deserving of judicial protection were involved. In the eyes of the Colorado Supreme Court, only if and when this burden is met is the additional burden of showing good cause to be addressed.[10]

The Court recognized in *Rumnock* that simply repeating the mantra that the party that requests a protective order has the burden of proof, was not enough. The real question is whether the movant for a protective order has adduced *evidence* in support of its request. The Colorado Supreme Court answered that question three times in the course of the majority opinion requiring the movant for a protective order to adduce evidence. In this case, since the UM carrier requested protection on the basis of "trade secrets," it was required to show the trial judge by adducing evidence that the materials in question were "trade secrets" which deserved the trial court's protection.[11] The movant bore the burden of proof on each "particular piece of information[.]"[12]

The Supreme Court specifically mentioned at least two kinds of evidence that would satisfy this burden: "affidavits or testimony" or submitting "the alleged trade-secret documents [themselves,] under seal for in-camera review."[13] The evidence presented to the trial court will ordinarily involve a question of fact for the trial court to resolve, the Supreme Court observed, but if there is not a genuine dispute of fact then the courts may decide as a matter of law whether the burden of proof for a protective order has been met in a given case.[14]

In the *Rumnock* case itself, the UM carrier did not meet its burden of proof because "[u]nder any definition of trade secret, American Family's showing falls short."[15]

The point of departure between the majority and the dissenting justices in *Rumnock* serves as the point of departure between rulings by appellate courts upon reflection in protective order cases, and actions actually taken by trial judges and parties in protective order cases as revealed by publicly accessible original documents in electronic court files. The dissenters seemed to dispute the quality of protection afforded to the defendant's claim handling materials with respect to the defendant's competitors, but judging from the dissenting opinion's characterization of the contentions made by the amici that the materials should be broadly available, the dissenters' true point of contention seems to be whether the defendant carrier's claim-handling materials should be protected from disclosure to other plaintiffs' attorneys in other cases.[16]

In contrast, the Colorado Supreme Court majority in *Rumnock* focused on whether the movant for a protective order had to make a showing supported by evidence in support of its request and, if it did not adduce evidence, whether the movant's request should be denied for lack of evidence. The majority emphatically answered this question in the affirmative in this case, irrespective of whether the trial court acted in this particular case to sanction the defendant's "bad conduct" or not:

> We conclude that, even if the court had fully considered the merits of American Family's request, American Family could not have prevailed because it failed to present evidence that the documents allegedly in need of protection as trade secrets were, in fact, trade secrets or otherwise confidential commercial

10. Rumnock v. Anschutz, 384 P.3d 1262, ¶ 11, at p. 1264 (Colo. 2016).
11. Rumnock v. Anschutz, 384 P.3d 1262, ¶¶ 3, 10 & 13 at pp. 1263-65 (Colo. 2016).
12. Rumnock v. Anschutz, 384 P.3d 1262, ¶ 12, at p. 1264 (Colo. 2016).
13. Rumnock v. Anschutz, 384 P.3d 1262, ¶ 13, at p. 1265 (Colo. 2016).
14. Rumnock v. Anschutz, 384 P.3d 1262, ¶ 12, at pp. 1264-65 (Colo. 2016).
15. Rumnock v. Anschutz, 384 P.3d 1262, ¶ 13 n.3, at p. 1264 n. 3 (Colo. 2016).
16. Rumnock v. Anschutz, 384 P.3d 1262, ¶ 16, at pp. 1265-66 (Colo. 2016) (Coats, J., dissenting).

information.[17]

Whether and when a party seeking to conceal discovery or seal evidence faces any burden of proof in support of its concealment, including the further question of whether it must support its action with evidence, form the focus of the forensic investigations of actual trial court files which are at the heart of this article.[18]

The focus of this article is on the question of *who decides that good cause has been shown*: Is that a decision that can be left to the parties to make, or is it a decision which only judges should make? Is it a decision left to the parties' assertions, or is it a decision which judges make based upon evidence?

The answers given by judges and magistrate judges in actual cases are published here. Their answers were not generally available until the author investigated the actual documents accessible within electronic court files. None of the rulings or arguments or pleadings discussed in this article, which have been located through the author's forensic research into court files, has been previously published in any "official reporter" or in any paid subscription service such as Westlaw or Lexis-Nexis. This article rests in the end on research opportunities available in the 21st Century but not available to preceding generations of lawyers and their clients, or to many courts called upon to decide issues like those addressed here.

Before passing to the results obtained in the author's forensic investigation into electronic court files, it should be pointed out that the Federal Rules of Civil Procedure will be used as the point of departure in this article for discussing secrecy and sealing issues. Most jurisdictions base their own rules of civil procedure on the federal rules in any event. As noted, the feature of both rules which is most significant to this article is that they both require good cause.

Secrecy Orders[19] and Sealing Orders[20] in Actual Cases Revealed in Their Court Files

In writing this article I drew upon my 40 years of experience as a lawyer in trial courts, appeals, and administrative agency proceedings. I also drew upon the research techniques I learned in all those cases and during the writing of all or part of what is now a total of four books and many articles. Over time, I extended my research into forensic investigation of court files.

The latter research technique, too, informed this article. The court files I addressed for this article were all insurance cases. The issue of secrecy is global, however, and the insurance cases discussed here were chosen to illustrate a global issue.

Forensic investigation of court files requires access to the original documents filed in court files. Thankfully, court files in the 21st Century have increasingly become available electronically, minimizing the necessities and expenses of travel and making the expense and the time devoted to this research much more manageable.

In the case of this particular article, even more was involved. Secrecy, after all, was the subject of my forensic investigation of original documents on file in courts. These court files were intended to be kept secret, and so they required even greater efforts than

17. Rumnock v. Anschutz, 384 P.3d 1262, ¶ 10, at p. 1264 (Colo. 2016).

18. This discussion is based on original research by the author in a chapter article forthcoming in 2017 in New Appleman's on Insurance, "Attorneys Decide, Judges Sign Off: Protecting and Sealing Evidence Including in Insurance Coverage and Bad Faith Cases." The conclusions like the research are the author's and not necessarily those of Insurance Litigation Reporter or New Appleman's.

19. "Secrecy orders" is the term used in this article to describe a particular kind of protective order. It describes orders that are entered for the purpose of making unavailable to the outside world certain items or whole categories of discovery and evidence that may surface to the parties and their lawyers in any given case. Like any protective order, a secrecy order requires "good cause". E.g., Fed. R. Civ. P. 26(c)(1).

20. In contrast to "secrecy orders," "sealing orders" is a term used in this article to describe orders that are entered to seal all or parts of a court file from public view. Sealing orders, like secrecy orders, require "good cause". E.g., Fed. R. Civ. P. 5.2(e). Rule 5.2 is entitled, "Privacy Protection For Filings Made with the Court." "Good cause" is generally interpreted in the same way for both kinds of orders. *E.g.*, Hale v. State Farm Mut. Auto. Ins. Co., No. 1:14-cv-00036-TWP-MJD, 2014 U.S. Dist. LEXIS 178166, at *2, 2014 WL 7405761, at *1 (S.D. Ind. December 30, 2014) (Dinsmore, USMJ) (applying "good cause" requirement with respect to sealing); *see* Coker v. Hartford Life Grp. Ins. Co., No. CIV-06-0911-HE, 2007 U.S. Dist. LEXIS 97951, at *5-*6 (W.D. Okla. February 21, 2007) ("good cause" requirement under Rule 26[c]).

usual to track down the information that has been left available to strangers to the case, i.e., to members of the public at large. As a result, what follows is a representative sample of cases and court files in which secrecy issues were involved. There is enough information to come to a conclusion about what went on in these cases, and that information is presented here so as to understand the ever-developing tension between concealment and disclosure in judicial proceedings.

Parties regularly try to write their own laws of secrecy to serve their own interests in individual cases. They are not necessarily to be condemned for that. In their view, if they do not act to protect their own privacy, they are not certain who will. Judges and magistrates, on the other hand, are the only people who represent any public interest at work in these cases. If judges and magistrates fail or refuse to enforce the law, then the law does not exist; either they must change or the law will change. Nothing less than the judicial system's claim to public obedience is at stake. Authorizing secrecy is not the same thing as the public interest when the law demands disclosure instead.

The most frequent example of secrecy orders, one that will be seen repeatedly in the remainder of this article, is the so-called "Umbrella Order." These types of orders were proposed by one or more parties in the insurance cases that follow. To say again, however, the issue of secrecy is global in civil litigation. The issue of secrecy is not limited to the insurance cases which are addressed here to illustrate a global issue.

The Umbrella Order originates as an order usually written by one of the parties, but most often agreed to by all of the parties. It always relates to discovery disputes which have not happened. Frequently it encompasses disputes over the admissibility and sealing of evidence. It is proposed to a trial judge as a way to resolve potential disputes before there actually are any disputes. In particular, Umbrella Orders are used as a means to sidestep any requirement that good cause be shown to keep discovery secret or to seal evidence.

The crucial feature of Umbrella Orders is to prevent disclosure without requiring a judicial determination of good cause shown for the nondisclosure. Under stipulated blanket secrecy orders, it is the parties and not the judges who decide whether and when good cause is shown for concealing discovery and other evidence. "These orders are often blanket in nature, and allow the parties to determine in the first instance whether particular materials fall within the order's protection."[21]

1. *Liberty Life Insurance Co. v. Onebeacon Insurance Co. (W.D. Mo. Case No. 4:08-CV-00955-REL).*

This is an insurance case that was removed from Missouri state court. The original complaint filed in state court, titled a "Petition," describes what the case was all about.[22]

The case involved a liability insurance dispute over coverage under a Commercial General Liability (CGL) policy. The defendant insurance carrier in this case, Onebeacon, issued a CGL policy when Onebeacon was known as Commercial Union. CU issued its CGL to "BMA" or Business Men's Assurance Company at the time, now known as Liberty Life Insurance Company, the plaintiff.

The coverage dispute did not involve any insurance policies issued by BMA or Liberty Life, but instead revolved around only the CGL issued to BMA in its capacity as the owner of a building in Kansas City. Liberty filed its claims for coverage. Liberty's complaint was originally in five (5) counts, three against Onebeacon and two against Onebeacon's co-defendant, its alleged "third-party claims adjuster," Resolute Management ("Resolute").

At different times during the coverage case, the magistrate judge entered both a protective order and a sealing order. The protective order has all the trademarks of a standard stipulated secrecy order.[23] The protective order expansively defines "Confiden-

21. Shane Grp., Inc. v. Blue Cross Blue Shield of Mich., 825 F.3d 299, 305 (6th Cir. 2016). *See generally* 8 Jay E. Grenig & Jeffrey S. Kinsler, Wis. Practice Civ. Discovery § 1:42 (2d ed., April 2016 Update); 8A Charles Alan Wright & Arthur R. Miller, et al., Fed. Practice & Proc. Civ. §§ 2035 "Procedure for Obtaining Protective Orders" & 2044.1 "Modification of Protective Orders" (3d ed. April 2016 Update).

22. Liberty Life Ins. Co. v. Onebeacon Ins. Co., Doc. 1-1, Exhibit "A" to Notice of Removal, Filed 12.12.08 (W.D. Mo. Case No. 4:08-DV-00955-REL).

tial Information" far beyond what the law and Rule 26(c) have usually authorized:

> "Confidential Information" shall mean those documents produced, given or filed that either party in this litigation reasonably, and in good faith, considers to be private, confidential, trade secret, commercially sensitive and/or proprietary in nature, including, but not limited to, processes and procedures, which, if disclosed to another, would be expected to reasonably result in injury or harm to a party's business or personal interests.[24]

In proposing this order, the parties and their lawyers presented many questionable provisions under the Rules governing secrecy vs. concealment, including these issues, among others:

> •The proposed order is obviously overbroad, rather than narrowly tailored to whatever legitimate secrecy concerns the parties and their lawyers may have had, concerns which they simply did not express here;
>
> •The proposed order confers upon the *lawyers* and their clients a kind of "carte blanche" to decide whether and when evidence has been kept secret from the general public for "good cause;" and
>
> •In the quoted "Confidential Information" definition and in other provisions, the proposed order contains an undefined "use restriction" purporting to prohibit disclosure "to another," without defining the 'other' to whom the information could not be given.

The stipulated blanket secrecy order in this case also puts deposition testimony in the holding pen of Confidential Information.[25] It is noteworthy that the stipulated proposed order does not mention any other form of testimony aside from deposition testimony, as many other proposed secrecy orders do.

Another element of Stipulated Protective Orders which is found in this order is an attempt to extend the order to materials filed with the court. The order purports to require that "[a]ll papers, documents and transcripts" with information in them which was designated as "confidential," can only be filed "in sealed envelopes."[26] The order does not contain any reference to Federal Rule of Civil Procedure 26(c) or Rule 5.2, or to any Local Rules governing the sealing of evidence or court files.

Parenthetically, Rule 5.2 of the Federal Rules of Civil Procedure which governs sealing documents filed in federal courts, was enacted in 2007. This order was signed in 2009.

In fact, this order does not refer to any Federal Rules of Civil Procedure or Local Rules at all. The rules developed in case law and written in Rules of Procedure regulating secrecy were not mentioned in this order. The clear intention of blanket secrecy orders, including this one, is for the parties or at least one of them, and their lawyers, to write their own law of secrecy in the given case. They simply work around the essential question of whether the information designated with the word, "Confidential," is recognized by the law as confidential.[27]

The parties and their lawyers in *Liberty Life v. Onebeacon* were not finished after this protective order was signed, however. There is a further "order" in the court file which contains a recital that once again all the parties consented to it. The additional order requires that the parties' pleadings and filed exhibits associated with adjudicating Onebeacon's motion for summary judgment "shall be filed as *sealed* documents using the CM/ECF system."[28]

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23. *Id.*, Doc. 24, "Protective Order," filed 05.15.09.

24. *Id.*, Doc. 24, ¶ 1.c, on unnumbered first page.

25. *Id.*, Doc. 24, ¶ 2.b, at page 2.

26. *Id.*, Doc. 24, ¶ 5, at page 4.

27. *See id.*, Doc. 24, ¶ 7, at page 5, restricting appeals and contests of designated "confidentiality" strictly to circumstances calling into question whether "the information so designated is, in fact, appropriately designated as confidential."

28. *Id.*, Doc. 39, Order, Filed 08.14.09 (emphasis added).

There is no mention of any law or Rule, including but not limited to Rule 5.2 of the Federal Rules of Civil Procedure, which as noted above is the Federal Rule on sealing documents.

The sealing order contains a provision which may be the only one of its kind. At least, I have not seen anything like it before or since. The sealing order in this case contained a ruling that the magistrate judge would circulate his "written opinion with respect to the Defendants' Motion for Summary Judgment" to the attorneys in the case "prior to public disclosure." The order recited that this would give the attorneys an opportunity to request redactions.[29]

Since the sealing order was entered, every substantive pleading of any kind which followed—whether a motion, a memorandum, or a notice of filing or their equivalents—was filed under seal and is unavailable to public view, even though the sealing order did not require it.

To summarize the above protective order and sealing order disclosed by the *Liberty Life Insurance Co. v. Onebeacon Insurance Co*. court file, the protective order contains all the elements of the universal blanket or umbrella secrecy order. The sealing order reinforces it by ignoring any public interest in disclosure even of pleadings and documents consulted by a judge to reach a decision on any issue in the case and, in this case, the issue at hand was a significant one: whether Onebeacon would receive a judgment in its favor from the judge.[30]

I would like to raise at this point, what I earlier thought was a rhetorical question: What can possibly deserve judicial protection from disclosure in a dispute over Commercial General Liability (CGL) insurance coverage? A possible reason behind both of these two orders in the coverage case, and a potential explanation for the sealing of the first amended complaint in that case, may be provided by the allegations of Liberty Life in two paragraphs of its publicly available original complaint removed from state court. This is one of the few documents which the public can access in this court file. It is attached to the notice of removal on file in the federal court file in this case.

These are only allegations, of course, but they may shed a little light on some of the motivations behind seeking secrecy in this case:

> 36. Resolute [Onebeacon's codefendant and its alleged "third-party claims adjuster"] stated that the settlement amounts being discussed were not in line with the value it had placed against other companies in other jurisdictions, and that it was concerned the settlement amounts being discussed for Gregory, Taylor, and Lute [the plaintiffs in the underlying asbestos cases against Liberty] would negatively impact other claims it was handling for its clients.
>
> 37. Resolute and OneBeacon refused to authorize settlement solely to protect themselves against claims asserted against other CGL insurance policies issued to other companies, and without regard for their duties to Liberty on the OneBeacon Policies at issue in this lawsuit.[31]

2. Ford Motor Co. v. National Indemnity Co. (E.D. Va. No. 3:12-cv-839).

"Retroactive reinsurance" cases involving Berkshire Hathaway are now somewhat infamous. This case is one of them. In brief, these cases are based on claims that Berkshire Hathaway allegedly profited from nonpayment of insurance claims by one of its subsidiaries, after the subsidiary contracted with insurance carriers to handle claims on their policies.

In this case, an "Agreed Protective Order" was filed in the usual stipulated format in these cases.[32] Unlike many other such cases, however, the court made an edit to the proposed stipulated blanket protective order. The one edit in this case was to add the words

29. *Id*.

30. This case was resolved by a Stipulation of Dismissal with Prejudice filed by the plaintiff, Liberty Life Insurance Company. *Id.*, Doc. 62, Stipulation of Dismissal With Prejudice, filed 01.05.10. The protective order and the sealing order were never challenged or appealed, so far as is shown by the clerk's online docket.

31. *Id*., ¶¶ 36 & 37, at p. 6, of Doc. 1-1, Exhibit "A" to Notice of Removal, "Petition" filed by Liberty Life in Missouri Circuit Court on or about 10.31.08, filed in the federal court file on 12.12.08.

in parentheses, "(excepting exhibits filed with the Court)" to the standard "return and destroy" provision by which any party receiving discovery would either return it to the disclosing party, or simply destroy the evidence.[33]

Even after the stipulated blanket protective order was entered with the one edit, the defendant, National Indemnity Company (NICO), filed a motion for protective order with the announced objective to "preclude discovery by Plaintiff Ford Motor Company" of NICO's "loss reserve information," of NICO's "highly proprietary and confidential method of evaluating" certain reserves, and finally of certain "reinsurance information."[34]

All of the materials filed in the court file after the stipulated blanket protective order was signed, were filed under seal, as has happened in so many other cases. According to my calculations, approximately 291 of the 366 docket entries appearing on the docket after that order, were either filed under seal or concerned the sealing of documents in the case.[35]

Ford and NICO stipulated to dismissal of this case before any of their disputes were resolved by the court, as there are no such orders listed on the clerk's public docket.[36] It seems ironic that for a case with so many docket entries, the docket in this case does not identify any court order either approving the parties' stipulation or dismissing the case.

The court file of this case does not contain any published rulings, yet the file reveals at least three things about blanket secrecy orders. First, it is a fact that blanket secrecy orders authorizing parties and their lawyers to mark things "confidential" and thus protect those things from disclosure, tend to generate secrecy in all things that come after them in the case.

Second, without exception cases involving blanket secrecy orders always include at least one party who has sufficient assets to fund the writing of such secrecy orders and the continuing designation of information as "confidential." In this particular case, the plaintiff and the defendant both meet this description.[37]

Third, this case highlights the additional fact that secrecy in judicial proceedings succeeds when two things come together: (1) if the litigants arrange the secrecy, without public involvement or even awareness, and (2) if the litigants are willing to bear the burden of keeping a constant lookout to conceal everything irrespective of the time or expense that it may take.

3. Two cases taken together: Nationwide Mutual Fire Insurance Co. v. D.R. Horton, Inc.-Birmingham (S.D. Ala. No. CV-15-351-CG-N), and Pennsylvania Lumbermens Mutual Insurance Co. v. D.R. Horton, Inc.-Birmingham (S.D. Ala. No. 1:15-cv-00071-WS-B).

a. The Protective Order in Nationwide Mutual Fire Insurance Co. v. D.R. Horton, Inc.-Birmingham (S.D. Ala. No. CV-15-351-CG-N): Doc. No. 48, filed 05.12.16.

These were both insurance coverage cases. Pennsylvania Lumbermens filed its lawsuit before Nationwide did. Both cases revolved around similar issues of whether coverage was available under either of the CGL policies which they respectively issued to

32. Ford Mtr. Co. v. National Indem. Co., Doc. 49, Agreed Protective Order, filed 03.26.13 (E.D. Va. No. 3:12-cv-839). The copy in the court file reflects a second file-stamp from the clerk's office, reflecting that the document was filed one day earlier, on March 25, 2013. Apparently the proposed order was filed on March 25 and the signed order was filed on March 26.

33. *Id.*, Doc. 49, handwritten insert into ¶ 11, at p. 5.

34. Doc. 55, Defendant National Indemnity Company's Motion for Protective Order, filed 04.04.13 in *id*.

35. I began a count of how many documents were filed under seal or were concerned with sealing documents, after the Agreed Protective Order was filed in this case, but there were too many to count so after a while I stopped counting. After I identified 52 documents out of the next 79 documents on the clerk's docket as filed under seal or related to sealing documents, I extrapolated these numbers arithmetically to a total of 242 documents, more or less, filed under seal or relating to sealing, out of the 366 total documents that the parties in this case filed after the Agreed Protective Order.

36. Doc. 492, stipulation for dismissal by Ford Motor and NICO, filed on 10.08.13, in *id*.

37. In less than eleven (11) months between the date on which this case was filed (November 15, 2012), and the date on which this case was terminated (October 8, 2013), the attorneys who made appearances as lawyers in the case could have scrimmaged with the exact equivalent of two football teams. There are 22 lawyers who appeared in this case and who are listed on the clerk's docket accessible on PACER.

a common insured, D.R. Horton, Inc.-Birmingham. Taking Nationwide's case first, a protective order was filed in that case on May 12, 2016.[38] It shows all the signs of being written by a party opposing disclosure.

The secrecy order came about because of Horton's response to production requested by Nationwide of "any settlement agreement(s) and release(s) to which Horton is a party" in the earlier *Pennsylvania Lumbermens v. D.R. Horton* lawsuit. Horton opposed disclosure on the ground that "said agreement(s) impose upon Horton a confidentiality restriction."[39]

The secrecy order in that case stated many of the common elements of a standard stipulated protective order, including:

> 1."Confidential documents" would be those stamped with that word by Horton;[40]
>
> 2.No option to "destroy" evidence at the conclusion of the case was given here, but instead evidence was required to be "returned" to Horton's counsel. The provision was not limited to documents stamped "confidential," but was written to require that all documents "other than those filed with the Court shall be returned to Horton's counsel."[41] Similarly, all Deposition Testimony yet to be given[42] would have to be "returned" to Horton's counsel;[43] and
>
> 3.The parties would have to "seal" any "confidential document" which was "produce[d] ... in support of any pleading filed with the Court ...."[44] Similarly, with respect to Deposition Testimony, the subject order provides that if such testimony is "produce[d] or cite[d]" to support "any pleading filed with the Court or oral argument," then such deposition testimony would have to be filed under seal. The last part of this requirement purported to explain the reason for it: "Thus, protecting the confidentiality of the proprietary/trade secret information,"[45] although the order was not limited to "proprietary/trade secret information" in the first place.

Rule 5.2 which governs sealing orders, like Rule 26(c) which regulates protective orders, requires a showing of good cause. The stipulated protective order under discussion does not require a showing of good cause. In this order, good cause is not even mentioned.

b. The "Joint Proposed Protective Order" signed by another U.S. Magistrate Judge, Doc. 31, filed 05.07.15 in Pennsylvania Lumbermens Mutual Insurance Co. v. D.R. Horton, Inc.-Birmingham (S.D. Ala. No. 1:15-cv-00071-WS-B).

The parties' Joint Proposed Protective Order was filed by the plaintiff, Pennsylvania Lumbermens Mutual Insurance Company. It is docket entry number 30. When the Joint Proposed Protective Order was signed by the magistrate judge in the case, the joint proposed order became docket entry number 31. There was no change. Even the word, "Proposed," was untouched. It was left as is. So the court order is the proposed order, and the proposed order is the court order, as was intended all along.

As was noted above, this was an insurance coverage case. In it, Pennsylvania Mutual sought declaratory relief as to whether its Commercial General Liability insurance policy provided coverage to D.R. Horton, Inc.-Birmingham. Nationwide was at

38. Nationwide Mut. Fire Ins. Co. v. D.R. Horton, Inc.-Birmingham, Doc. 48, Protective Order signed by U.S. Magistrate Judge, filed 05.12.16 (S.D. Ala. No. CV-15-351-CG-N).

39. *Id.*, in first paragraph on unnumbered first page.

40. *Id.*, at p. 2.

41. *Id.*, ¶ (3), at p. 2.

42. *Id.*, at p. 2: "In order to protect the confidentiality of the testimony to be given ...."

43. *Id.*, ¶¶ (4) & (5), at p. 3. Each paragraph refers to the "return" of "such Deposition Testimony" to Horton's counsel. The only "such Deposition Testimony" outlined in the order is as noted, "the testimony to be given" in the case.

44. *Id.*, ¶ (7), at p. 2.

45. *Id.*, ¶ (6), at p. 3.

first a defendant under Pennsylvania Mutual's amended complaint,[46] until Nationwide filed a motion to dismiss which was granted on December 1, 2015.[47] The Pennsylvania Mutual lawsuit ended in a settlement reached by the remaining parties followed by a court order dismissing the case with prejudice.[48]

Nationwide was no longer a party when the *Pennsylvania Lumbermens v. D.R. Horton, Inc.-Birmingham* case was settled. That puts perspective on why, in its own dec action, Nationwide later requested production of settlement agreements and releases between Pennsylvania Lumbermens and D.R. Horton, Inc.-Birmingham.

The *Pennsylvania Lumbermens* stipulated secrecy order revealed from its first sentence that it was a stipulation based only on speculation, and that it was not premised on Rule 26(c) nor on any showing of good cause. The Joint Proposed Protective Order simply repeated baseless speculation without even an attempt to provide any supporting evidence, that future discovery in the case "may" contain "confidential information," and that disclosure "might" cause injury to the plaintiff "and/or" the defendant.[49] These have rightly been called "fudge words" in the case law.

Moreover, this stipulated order was proposed before the fact, so to speak, meaning before there was any concrete dispute over particular discovery. (In almost all such cases, the discovery itself is not yet propounded, let alone that it has caused disputes which have not happened yet, but the proposed orders recite that there might be discovery disputes.) It has been held by a different court in a published opinion in another case that a *showing* is required in order to obtain a protective order, not merely use of fudge words like "merely" and "may":

> Furthermore, the proposed order makes no effort to specify why the purported protected materials are confidential and could be used by third parties to a party's detriment. "[M]erely asserting that a disclosure of the information 'could' harm a litigant's competitive position is insufficient; the motion must explain how."[50]

As is typical of such stipulated protective orders, the most desired provisions are often, but not always, located toward the beginning of Pennsylvania Lumbermens' order. Three provisions located at the beginning of the subject order will illustrate this.

First, the usual "confidential information" definition is written in the first numbered paragraph in this order as in most such orders. And, as with many such blanket secrecy orders proposed in litigation, this order purports to reach written responses to discovery requests.[51] In extending the reach of its proposed order, Pennsylvania Lumbermens signaled its true intention, namely, that it was not really very concerned with materials filed in a publicly accessible court file. As litigants and trial judges know well, discovery responses are not ordinarily filed under the Federal Rules of Civil Procedure anyway.

It is clear from this "confidential information" provision of the proposed protective order that Pennsylvania Lumbermens was broadly concerned with disclosure of information which it did not describe, even generically, rather than with the disclosure of information relating to the coverage issues in dispute.

The main thrust of the stipulation's restriction on "use" was similar in its scope: *The information must not be disclosed to other attorneys in other cases.* As it is written in this order:

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46. *See* Pennsylvania Lumbermens Mut. Ins. Co. v. D.R. Horton, Inc.-Birmingham, Doc. 45, Amended Complaint, filed 08.31.15 (S.D. Ala. No. 1:15-cv-00071-WS-B).

47. Doc. 121, Order, filed 12.01.15 in *id*.

48. Doc. 139, order of dismissal with prejudice due to settlement, filed 03.08.16 in *id*.

49. Doc. 31, Joint Proposed Protective Order signed by U.S. Magistrate Judge, filed 05.07.15 in *id*.

50. Grimes v. Hydro Sys's, LLC, No. 1:07-CV-241, 2008 U.S. Dist. LEXIS 3361, at *4, 2008 WL 155043, at *2 (N.D. Ind. January 14, 2008) (Cosbey, USMJ). Similarly, it has been held that a motion to seal would be denied where it was based on "speculative concern" rather than a showing of good cause. American Civ. Liberties U. v. Sebelius, No. 09-10038-RGS, 2011 U.S. Dist. LEXIS 115783, at *2-*3, 2011 WL 4744982, at *1 (D. Mass. October 6, 2011). "The First Amendment militates against overly broad confidentiality designations." American Civ. Liberties U. v. Sebelius, No. 09-10038-RGS, 2011 U.S. Dist. LEXIS 115783, at *2, 2011 WL 4744982, at *1 (D. Mass. October 6, 2011).

51. *Id*., ¶ 1, at p. 2.

> It is specifically ordered that none of the documents and things submitted under this Protective Order will be disclosed to any attorney, paralegal or secretary except those who are employed by the attorneys now of record.[52]

Pennsylvania Lumbermens' proposed protective order even contains a restriction on the use of "notes" made while looking at documents or other materials, or, to quote the stipulated protective order, "notes ... relating to the documents or other materials," are forbidden to be disclosed "to anyone not authorized to examine said documents or materials."[53]

One final word about the subject protective order proposed by Pennsylvania Lumbermens in this case. The proposed order contains a very unusual provision. It purports to reach "any confidential information which may be entered into *evidence at the trial* of this cause. *Evidence produced during a trial herein and all such materials and information falling under the protection of this Order are deemed to be sealed by this Protective Order*."[54] In this regard, it is worth pointing out that, at least in my own experience, a federal district judge does not happily honor rulings of a magistrate judge that extend to the trial in a civil case, unless the magistrate judge, and not the district judge, is the one trying it.

In general terms, there is a difference of judicial opinion over whether the public has an interest that should ever be considered by a judge when passing on a *secrecy* order, and in contrast there is general agreement among the courts that a *sealing* order requires the public's right to know to be taken into account in the form of a rebuttable presumption to allow public access, before all or part of a court file may validly be sealed from public view.[55] Parenthetically, one expression of the public's interest is in recognition that the public at large pays for the courts, not the private litigants.[56]

Regardless of any split over secrecy in discovery, to the contrary most if not all courts agree that evidence produced at trial is presumptively available to public view. There is no dispute between any of the courts that a protective order controlling discovery does not control a trial judge's decision whether to seal trial evidence or not (and regardless of whether the trial is presided over by a district judge or a magistrate judge).

In summary of all the results presented here of forensic investigation into actual court files, it is clear that the prime motivation for a party or parties to propose such blanket secrecy orders is to exclude disclosure to other lawyers in other cases and, in order to accomplish that end or for its own value, to limit or bar public disclosure as well. This is the issue that divided the dissent from the majority in the Colorado Supreme Court case mentioned at the outset.[57]

Forensic investigation of the original documents in electronic court files also shows that too little attention is given by busy judges and magistrate judges to proposed secrecy orders—and that the parties proposing them know this fact all too well.

Conclusion

Parties who want to write their own secrecy rules, and who can afford to fund the effort, have often

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52. *Id*., ¶ 5, at pp. 3-4.

53. *Id.*, ¶ 12, at p. 7.

54. *Id*., ¶ 14, at p. 7 (emphasis added).

55. *Compare* Steede v. General Mtrs., LLC, No. 11-2351-STA-dkv, 2012 U.S. Dist. LEXIS 79465, at *13, 2012 WL 2089761, at *4 (W.D. Tenn. June 7, 2012) (in the Sixth Circuit, "documents produced during discovery are not 'presumptively public'") *with* Foster v. State Farm Fire & Cas. Co., No. 1:10-CV-20, 2011 U.S. Dist. LEXIS 61946, at *4, 2011 WL 2213805, at *2 (N.D. Ind. June 7, 2011) (Cosbey, USMJ; documents in question were a part of the court's basis for decision, and were therefore publicly accessible); *and with* Guideone Elite Ins. Co. v. Southern Nazarene Univ., No. CIV-08-727-D, 2008 U.S. Dist. LEXIS 95592, at *1 (W.D. Okla. November 24, 2008) (following view that sealing "materials filed or otherwise used in deciding a case should be permitted only if the litigants' legitimate privacy interests outweigh the substantial interest of the public in full disclosure of the basis of judicial decisions."). The majority view, it has been held, recognizes a public interest in disclosure even of discovery, so that the public interest in disclosure must accordingly be taken into account in deciding issues of secrecy even around discovery. Citizens First Nat'l Bank v. Cincinnati Ins. Co., 178 F.3d 943, 946 (7th Cir. 1999) (Posner, J.).

56. Citizens First Nat'l Bank v. Cincinnati Ins. Co., 178 F.3d 943, 945 (7th Cir. 1999). *Accord*, Segovia v. Rutledge, No. 1:15-cv-00288-TLS-SLC, 2015 U.S. Dist. LEXIS 137447, at *2 (N.D. Ind. October 8, 2015) (Collins, USMJ).

57. Rumnock v. Anschutz, 384 P.3d 1261 (Colo. 2016).

succeeded. Undoubtedly they and other similarly situated future litigants will also succeed in writing their own secrecy rules if we let them. However they have no right to call their rules good cause.

That said, the burdens on judges and magistrate judges deciding secrecy and sealing issues are great. Those burdens deserve our recognition, particularly if we want to understand the nature of the judicial system in which such issues are presented.

More than any other metrics, it seems, judges and magistrate judges are themselves judged by the number of cases they close and how long lawsuits take until they are resolved according to someone's measure. Reducing dockets is a favorite, constant murmur on the lips of those responsible for reducing judicial budgets.

Those working in and with the judicial system, state or federal, know that there are an insufficient number of assets in today's judicial system in order to handle the load on judges and magistrates without reducing dockets.

Without a doubt, these are heavy burdens and they must be made known.

That also being said, however, these burdens are not reasons to delegate either writing rules or making rulings to litigants or their lawyers.

Lawyers and litigants are not allowed to write their own law in any substantive areas. Parties and their lawyers are not authorized to write their own laws of products liability, or of malpractice, or of insurance bad faith for just a few examples.

Litigants and their lawyers have no right to write their own secrecy law to protect and seal their secrets either. Unless we let them.