Litigation and Prevention of Insurer Bad Faith, Third Edition

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§ 3:107.50. Stipulated Protective Orders: How and why, and possible use in concealing third-party bad faith claims*

> When it comes to protecting the right of access, the judge is the public interest's principal champion. And when the parties are mutually interested in secrecy, the judge is its *only* champion.[1]

Stipulated protective orders challenge the requirements of procedural and Constitutional law. Specifically, SPOs or stipulated protective orders proposed by lawyers for judges to sign, tend to dispense with requirements of showing "good cause" as is required by procedural law. In addition, SPOs are designed to restrict the presumption of public access to court records, sometimes to the point of eliminating public access entirely.

Protective orders written and proposed by lawyers have actual and extended, potential ramifications for insurance bad faith cases.

Lawyers tend to write broadly when they write stipulations for protective orders. They give themselves powers to designate evidence "Confidential" and "Highly Confidential—Outside Attorneys' Eyes Only." This is what they did in their stipulated protective order in the case of *Edwards Vacuum, LLC v. Hoffman Instrumentation Supply, Inc.*[2]

Except that in that case the lawyers' powers were challenged. More precisely, some of the powers exercised by some of the lawyers were challenged.

The plaintiff's attorneys designated a lot of deposition testimony either as "Confidential" or as "Highly Confidential." The defendants challenged these designations with a "Motion to Compel De-Designation of Certain Deposition Testimony." The defendants' motion was granted in part and denied in part, but the lesson that this case holds lies much more in the way in which the Court reached its decision, than in the decision in this particular case.

"Four legal principles are particularly relevant to Defendants' motion to de-designate, or redesignate, the confidentiality restrictions under the Protective Order of certain deposition testimony of Plaintiff's witnesses."[3]

Transcribed into a numbered list, here are the four legal principles which this Court applied when one set of lawyers requested relabeling the "Confidential" and "Highly Confidential" designations that another set of lawyers had placed on deposition testimony:

1. The first legal principle, said the Court, was "'well-established,'" which it is at least in the Ninth Circuit, where this District Court sits. That is the legal principle that discovery is "'presumptively public'" unless and until a Court has ordered otherwise.[4]
2. "Second, a party's confidentiality designations must be reasonably and narrowly tailored to protect the confidential information the party seeks to shield from further disclosure. In other words, an 'across-the-board' designation is improper, even if some confidential information may be found within the broader designation. As several district courts have explained, a party misuses a protective order when it over-designates discovery materials in that way."[5]
3. "Third," the parties' stipulation for a protective order was written by the lawyers and not by the judge. A stipulated protective order is not dispositive of the outcome even when a stipulation written by the lawyers is accepted by the Court for an order. In other words, "the fact that the parties may have stipulated to a protective order is not itself a basis for sealing or otherwise restricting access to any specific discovery material."[6]
4. "Finally," said the Court, numerous decisions have established that "'mere embarrassment'" is not enough. Good cause for a protective order requires much more. If embarrassment is involved, then the embarrassment must "'be particularly serious or substantial'" in order to demonstrate good cause for a judge to enter a protective order.[7]

The District Judge in this case applied these four legal principles to the deposition testimony which had been designated "Confidential" or "Highly Confidential" by one set of attorneys in the case. The judge took unusual pains to review and report his rulings on what must have been several hundreds of pages of testimony from four witnesses.[8]

The extraordinary effort by the District Judge in this case is worthy of attention and, more than that, worthy of high praise. But the lesson of this case is not in the decision itself, as was said earlier.

The lesson of this case is in the Court's summary of four mandates, four "legal principles," required by the case law of any stipulated protective order submitted by the lawyers in any case.

"The common law right of access to judicial records is not absolute, but it is not easily overcome, either. Neither MASA nor Ricoh has carried the heavy burden necessary to prevent the public from accessing the judicial records on which they rely to mount their claims and defenses. Thus, the Court cannot seal these documents from public view and will deny both Parties' motions."[9]

In this ruling, the Court was recognizing the distinction followed by many courts and concisely summarized by the Sixth Circuit in the National Prescription Opiate Litigation MDL appeal.[10] The distinction recognized by many Courts, including in the *National Prescription Opiate Litigation*, is "between secrecy in the context of ***discovery***," which is subject to a "good cause" showing, "and secrecy in the context of ***adjudication***, which is generally impermissible due to the 'strong presumption of openness' of court records."[11]

The line of demarcation between discovery and adjudication is crossed when the material in question is put in the court file. At that point, the public presumptively has access to it.[12]

This "strong presumption in favor of openness" can be overcome and documents can be sealed from public view when, first, the party seeking to seal the information shows a compelling reason to seal them and, second, the seal is "'narrowly tailored to serve that reason.'"[13]

The *National Prescription Opiate Litigation* MDL appeal concerned not only public access to a database maintained by a government agency, the Drug Enforcement Administration (DEA), but also sealing or redacting "pleadings, briefs, or other documents that the parties have filed with the court, as well as any reports or exhibits that accompanied those filings[.]"

In other words, it was not merely the sealing of "pleadings and briefs" filed in the court file that was at issue in this case. Also at issue was the sealing of "any reports or exhibits" attached to them and therefore also "filed with the court[.]" These are all "the sort of records" subject to the presumption of public access and therefore subject to the compelling-reasons-and-narrowly-tailored standard before such records may be sealed away from public view.[14]

In this case, these documents also merited a further, stronger presumption "in favor of openness, … given the paramount importance of the litigation's subject matter."[15]

Following this reasoning tree to the end, a two-judge majority on the appellate panel held that "[t]he district court abused its discretion in permitting Defendants and the DEA to file their pleadings under seal."[16]

The "requisite good cause" for a protective order is not shown merely by an agreement or stipulation that material be kept secret from the public under the apparently universal rule that "good cause" for maintaining confidentiality must be shown in order to maintain confidentiality, at least when the materials in question are not "court records" because they have not been filed in the court file. Agreements or stipulations for protective orders do not supply the requisite good cause in and of themselves.[17]

The same standards for secrecy that apply to documents exchanged by the parties in discovery apply to "[d]ocuments produced by third parties," whether or not "the parties have designated third-party material as confidential pursuant to the protective order entered in this case[.]"[18] This has not stopped the parties in a life insurance coverage case from stipulating in a settlement agreement that Conseco Life and Wilton Re, two released entities, would not assert "confidentiality objections" under "any confidential order" to non-privileged documents produced by non-settling defendants in the case.[19]

It has been held, moreover, that "[a] party to a stipulated protective order seeking to modify the order must demonstrate a good cause for modification."[20]

The requirement of establishing "good cause" for secrecy was addressed in a recently written provision of a Stipulated Protective Order in an insurance case. The provision was written by an insurance carrier and the individual plaintiff suing it, in *Zehtab v. Principal Life Insurance Co*., in an obvious effort to rest determinations of "good cause" for secrecy on the good intentions of the parties and their lawyers (as well as to stretch the secrecy protection to things not ordinarily deemed worthy of protection). For ease of reference, I have highlighted the significant assertions in the "good cause" provision of this agreed secrecy order:[21]

> **B. <u>GOOD CAUSE STATEMENT</u>**
>
> The parties anticipate producing certain confidential documents or information in connection with discovery in this matter. Such confidential and proprietary materials and information consist of, among other things, confidential business information, information regarding confidential business practices, ***or other commercial information, information otherwise generally unavailable to the public***, or which may be privileged or otherwise protected from disclosure under state or federal statutes, court rules, case decisions, or common law. Accordingly, to expedite the flow of information, to facilitate the prompt resolution of disputes over confidentiality of discovery materials, to adequately protect information the parties are entitled to keep confidential, to ensure that the parties are permitted reasonable necessary uses of such material in preparation for and in the conduct of trial, to address their handling at the end of the litigation, and serve the ends of justice, a protective order for such information is justified in this matter***. It is the intent of the parties that*** information will not be designated as confidential for tactical reasons ***and that*** nothing be so designated without a good faith belief that it has been maintained in a confidential, non-public manner, ***and there is good cause why it should not be part of the public record of this case.***

Like many other stipulated protective orders, this one appears to have been entered by the Court without change from what the parties wrote.[22]

Further, at least one judge in the United States District Court for the District of Columbia of all places granted a motion for anonymity by companies under investigation by the Consumer Financial Protection Bureau. The companies sued the CFPB in what became a secret lawsuit[23] and remained so for an unknown period of time, until at least a part of the proceedings in that case were "unsealed" from and after October 1, 2015, according to a Court Order found on PACER, by which time it had been administratively closed although the case remains pending as of the last electronic docket entry in February 2016.

In addition to the lawsuit itself remaining a secret, as of this writing the identities of the plaintiffs remain unknown and anonymous. Each of the plaintiffs is a company which by the plaintiffs' own admission are under investigation by the Consumer Financial Protection Bureau.[24]

In *MSP Recovery Claims, Series LLC v. Ace American Insurance Co.*,[25] the Court was confronted with a plaintiff's motion effectively to redact and seal its own complaint. The plaintiff was the assignee of 67 of its clients. The plaintiff wanted the Court to hide the identity of its 67 clients in this case. "Plaintiff's clients are entities known as Medicare Advantage Organizations (MAOs) seeking to recover reimbursement for medical costs from other companies under the Medicare Act. Plaintiff's clients assigned their rights to recover payment to Plaintiff."[26]

The defendant insurance carrier was sued as an alleged "primary payer" of Medicare payments. In its complaint, the plaintiff enumerated the defendant's many alleged failures to reimburse the 67 assignees with publicly funded Medicare money. "Defendant opposes the Motion [DE 23] stating in part that the Plaintiff's client-assignors are government contractors and listed on a public website. Having reviewed the Motion and the Opposition, the Court finds that the Plaintiff has not met its burden for redacting the sixty-seven clients in its Complaint and denies Plaintiff's Motion."[27]

The question arises about what would have happened if the 67 contractor-clients-assignees had ***not*** been identified by Medicare on a public website, and whether the plaintiff would have met its burden for redacting and sealing its own complaint in that event.

The *MSP* decision was rejected by a U.S. Magistrate Judge who instead applied a "good faith" standard in order to seal documents, in *United States v. Lee Memorial Health System*.[28]

In *Roy v. County of Los Angeles*,[29] Immigration and Customs Enforcement ("ICE") and several of its officials are the

defendants in the Gonzalez Action, hence, the Court refers to them as the "Gonzalez Defendants" in its opinion. The Gonzalez Defendants filed a motion to strike the testimony of three of the plaintiff's experts.

Each of the three experts had been attorneys either with ICE or with the U.S. Citizenship and Immigration Services. They listed their previous employment among their qualifications to express opinions concerning immigration detainers issued by ICE and at issue in the case. Immigration detainers are "holds" placed by ICE on the release of persons held in the custody of law enforcement agencies, usually for 48 hours allowing ICE that time to come and get them.

Unfortunately for the success of the Gonzalez Defendants' motion to strike the experts' testimony, they could not and did not point to any specific thing that the experts included in their testimony that should be kept secret as privileged. Instead, the Gonzalez Defendants argued that the mere fact, standing alone, that the three experts were previously attorneys for ICE or for USCIS meant automatically that everything they could say in the case should be barred as privileged.

The District Court disagreed with that argument in this case. Instead, the Court ruled that the Gonzalez Defendants assumed the burden to show that the plaintiffs' experts' testimony should be barred because of some specific privilege, but that the Gonzalez Defendants failed to meet that burden here:

> In the Gonzalez Defendants' Motion to Strike, Defendants do not cite any particular statement from the expert witness declarations that are protected or privileged under any legal basis. (Mot. to Strike at 11–12.) ***Defendants argue that each of the expert witnesses had access to privileged information during their employment with DHS, and that DHS cannot tell whether their declarations include such information, and that therefore, the declarations should be stricken in their entirety.*** (Mot. to Strike at 11–12.) However, the fact that Defendants cannot determine whether the declarations include any privileged or protected information highlights that Defendants have not met their burden of establishing that the declarations contain privileged information.
>
> It is Defendants' burden "to demonstrate that the privilege applies to the information in question." [Citations omitted.] Defendants' failure to identify any information contained in the declarations that is privileged or subject to the work product doctrine, and their admission that they cannot point to specific information that is protected or privileged, warrants denial of Defendants' Motion to Strike on the basis of privilege or protection grounds.[30]

If this ruling is applied to an insurance case, the roles of the *Gonzalez* Defendants might be played by an insurance company and officials in its branch, regional, and home office claims departments. The plaintiff, *Gonzalez*, might be played by another plaintiff but in the role of a policyholder suing the insurance carrier. If in that case *Gonzalez* retained experts who used to be employed at or retained by the carrier, then any motion by the carrier to strike their testimony would, under this ruling, have to specifically identify what if any portion of their testimony was based on specific information that is protected or privileged, or have the motion denied as it was in this case.

Recently, an insurance company sued lawyers from a Washington class action who represented the plaintiffs, and their Expert Witness in the Washington case. The dispute arose over the use of documents in litigation. The insurance company apparently thought that the documents were or should be protected secrets. But the insurance company did not raise its grievances in the Washington case.

It filed its suit in Federal Court far away from the State of Washington, in Philadelphia, Pennsylvania. The insurance company, GEICO, alleged claims for allegedly misappropriating trade secrets and for unjust enrichment. The Federal Judge in Philadelphia was not having any of it, and the Judge wrote:

> GEICO weaves some clever arguments in an attempt to justify its acts of obstruction. However, practicality, legal analysis, and common sense all make clear GEICO is attempting to stalemate the Washington class actions by suing the plaintiffs' lawyers thousands of miles away from where those class actions are currently being litigated. The red herrings in this case are GEICO's alleged "claims" for trade secret misappropriation and unjust enrichment. Even if these "claims" were anything more than red herrings—which they are not—they fail as a matter of law.

…

> I will not tolerate the attempted manipulation of our judicial process in this case. The case is dismissed.[31]

The following language is typical. The following case is typical. That is not to say that either one is good or bad. It is to say that it is typical, meaning only that it is the way things are done more often than not:

> On July 2, 2018, the parties filed a stipulated protective order, which was entered by the court on July 11, 2018. [Docket Nos. 27 ("Protective Order"), 28.] The Protective Order permits the parties to designate certain materials produced during discovery as confidential in order to prevent their public disclosure. It states that a party "may challenge a designation of confidentiality at any time," by initiating a dispute resolution process and "providing written notice of each designation it is challenging and describing the basis for each challenge." Protective Order ¶¶ 6.1, 6.2. The Protective Order also states that if the parties cannot resolve a challenge through the meet and confer process, the designating party must file and serve a motion to retain confidentiality. *Id.* ¶ 6.3.[32]

After an exhaustive review of many factors that the Magistrate Judge wrote should be taken into account in any secrecy equation in the Ninth Circuit, the Magistrate Judge in this case granted the defendants' motion to retain confidentiality of certain documents. The defendants in the case had marked the documents confidential under the Stipulated Protective Order even as they were submitted as part of the reason for the defendants' motion for summary judgment.

In other words, the defendants submitted evidence which they argued was in favor of their summary judgment, and which they also marked "confidential" and so not available to the public to see.

Seven pages later in the Court's opinion, the Magistrate Judge announced a ruling to keep the materials under seal because the plaintiff did not follow the Stipulated Protective Order to challenge the defendants' confidentiality designations:

> As Economus did not properly challenge the confidentiality designation of these documents pursuant to the terms of the Protective Order, that issue is not presently before the court. Accordingly, the court declines to lift the confidentiality designations on those documents.
>
> **III. CONCLUSION**
>
> For the reasons stated above, the court grants Defendants' motion to retain confidentiality. The documents identified by Bates numbers CCSF_ECONOMUS 000837-841, 00117, and 002262-2267 shall remain confidential pursuant to the terms of the Protective Order entered in this case.[33]

In other words, the plaintiff Economus did not follow the Stipulated Protective Order in this case, the defendants did, and so the evidence marked "confidential" by the defendants and filed under seal had to remain under seal. And neither the constitutional nor the common law presumptions of public access were even considered in the process.

It is significant that the real issue in this case was not whether either party followed the Constitution, the common law, the Local Rules, or the Federal Rules of Civil Procedure and in particular Rule 26 in this typical case. Parties are now apparently well-advised to follow not only the actual Rules of Civil Procedure in most federal courts but also to follow the terms of any Stipulated Protective Order which they have filed in their particular case—just in case of a decision like this, wherever it is decided and it could be a decision from any federal district.

In *Lowrey v. Oregon Mutual Insurance Co.*,[34] a Stipulated Protective Order conceals discovery from the public. The Stipulated Protective Order says that it is not a disfavored blanket or umbrella protective order, protecting everything marked

"confidential." Further, "[t]he parties acknowledge that this agreement is consistent with" local rules of Civil Procedure. (Presumably, they meant to include the Federal Rules of Civil Procedure in that claim.)

It is not consistent with the Rules of Civil Procedure.

Whoever wrote the Stipulated Protective Order followed many earlier stipulated protective orders of the same ilk in many different kinds of cases. They wrote that whenever certain information is designated "confidential," it can be used in that lawsuit so no party has an incentive to seek judicial review.

Upon the conclusion of the case, under this stipulation the designated material must either be destroyed or "returned" to the party whose lawyers designated the information as "confidential."

The Rules of Civil Procedure require a showing of "good cause" to get a protective order in the first place. The Stipulated Protective Order in this case instead does not require a showing of anything for information to be secret and "confidential." In particular, whoever wrote the Stipulated Protective Order did not mention the requirement of showing good cause.[35]

To say again, the Stipulated Protective Order in this case is not unique. It follows many earlier stipulated protective orders filed in many different kinds of cases.[36]

But it does not follow the Rules of Civil Procedure. The Stipulated Protective Order is so secret that it does not even say what kind of case this is, or even what the parties have alleged.

Here is what the *Lowrey* case is about. Here is what the parties have alleged, so far. The Stipulated Protective Order intentionally or otherwise does not even hint at these things.

The plaintiff filed a complaint in the U.S. District Court for the Western District of Washington in May 2017. Her complaint was based on the defendant's refusal to hire her because she changed her gender from male to female.

The plaintiff alleged that she changed her gender after some 20 years of handling insurance claims including supervising others in the handling of insurance claims. She alleged that after she told the defendant's interviewers that she, the plaintiff, had changed her gender, the defendant essentially discriminated against her when the defendant interviewed her for an open claims-adjuster position but refused to hire her. Apparently, one of the defendant's stated reasons for refusing to hire her as a claims adjuster was that she did not have the experience that the defendant was looking for in a claims adjuster.

She alleged three claims in her complaint: sex discrimination, violation of a Washington statute protecting gender identification, and "retaliation" in connection with the violation of the Washington statute. She sought damages including lost wages and benefits, punitive damages, and attorney's fees.[37] Oregon Mutual Insurance Company filed its answer on June 30, 2017. It carefully denied most of the plaintiff's allegations by reference to each numbered paragraph of the complaint. It further listed 13 paragraphs of affirmative defenses also essentially denying the plaintiff's allegations.[38]

What a lot of things the Stipulated Protective Order does not mention. The case was set for Trial beginning on December 3, 2018. It was expected to last five days.[39] However, the case was settled long before. The parties announced that they had stipulated to dismissal with prejudice after their settlement, and the District Court dismissed the case with prejudice in August 2018.[40]

In another case, the Court applied the same legal principles that would be applied in most insurance coverage and insurance bad faith cases. In that non-insurance case, the following sealed documents were at issue. The District Judge identified the documents at issue in her decision in November 2017, and she explained in her opinion how and why the documents came to be sealed in the first place:

> As the Court of Appeals explained, (Mandate at 3), in 1983, a member of the demolition-workers union filed a class action against various parties involved in demolishing the Bonwit Teller building, which was torn down to build Trump Tower. The class members settled with the various defendants in 1998, and the Court sealed four documents connected to that settlement: (1) a transcript of an October 26, 1998 conference (ECF No. 409) (the "Settlement Transcript"); (2) a plaintiffs' brief filed on November 9, 1998, (ECF No. 410); (3) a district court order approving the settlement dated December 30, 1998, (ECF No. 411); and (4) an amended district court order approving the settlement dated February 9, 1999 (ECF No. 412). (*Id.* at 3–4).[41]

The District Judge held that the presumption of public access outweighs the asserted privacy interests here. As the District Judge wrote in this case: "For reasons explained below, the Court finds that the Trump Parties have failed to identify any interests that can overcome the common law and First Amendment presumptions of access to the four documents at issue."[42]

In a big, multi-district litigation (MDL) case where there are no binding rules, an MDL court actually flipped the presumption of public access to judicial proceedings, and put the burden of proving that things should ***not*** be blacked out ***on the parties opposing the blackout, i.e., on the parties opposing redaction***.

What's more, the MDL court apparently did this because so many lawyers agreed that this should be done, that the court not only went along with it, but actually approved it, in *In re: Automotive Parts Antitrust Litigation*:[43]

> None of the Objectors specify any particular redactions as problematic or inhibiting them from understanding the claims asserted in this litigation or any other information that might reflect on the fairness of the settlements. Since the *Shane Group* decision, the parties in *In re Auto Parts Antitrust Litigation* have developed, and the Court has approved, a protocol predicated on complying with the document-sealing standards laid out in *Shane Group*. *See* Stip. Order Regarding Sealed Filings, 12-md-2311, ECF No. 1690. Pursuant to the protocol, dozens of previously sealed documents are no longer sealed. The Objectors' sealing argument lacks merit.[44]

Pursuant to this decision, dozens of presumptively public documents are now sealed.

Concealing evidence from a party corporation's general counsel may be going too far. At least without evidence to support an untimely request, the District Judge ruled in *TrueNorth Cos., LC v. TruNorth Warranty Plans of N. Am., LLC.*[45] The case involved substantive claims of trademark infringement, mark dilution, false designation of origin, mark infringement under Iowa law, false advertising, and unfair competition.[46] In *TrueNorth v. TruNorth*, the parties entered into a Stipulated Protective Order. We know very little about the stipulated protective order from the District Judge's opinion except that it "describes two levels of confidentiality—'confidential' and 'highly confidential,' which is limited to review by counsel, including in-house counsel."[47]

Although it was not otherwise summarized in the District Judge's opinion, a review of the court file on PACER shows that the stipulated protective order in this case is a pretty standard stipulated secrecy order.

As the District Court informed us in its opinion, the stipulated secrecy order already concealed information that was marked "confidential" and "highly confidential" by counsel in the case. The defendant belatedly filed a motion to amend the previously stipulated protective order to add **another** category of concealed information which it called "Highly Confidential ***Plus*** Material."[48]

This category would allow disclosure **only to litigating counsel** of evidence produced under this proposal and **prohibit disclosure** to the non-producing **party** and **in-house counsel** of the non-producing party. To put it differently, under the defendant's proposal to amend the secrecy order "certain information could be designated in such a manner as to prevent its disclosure to the receiving party's in-house counsel."[49]

This was a secrecy order gone too far, at least in the *TrueNorth v. TruNorth* case. The District Judge rejected this proposal and denied the defendant's motion to amend the stipulated protective order accordingly. The Court pointed out that the defendant's motion was untimely, but the fact that the defendant failed to support its request with evidence was more likely what determined the outcome in this case (i.e., that the defendant failed to support its request for further protection with a showing of good cause for its request, although the Court itself apparently never mentioned "good cause" or a lack of it in its decision denying the defendant's request in this case).[50]

Whether and to what degree this decision will influence the development of stipulated secrecy orders along the lines proposed by the defendant in this case, remains to be seen.

Frequently, discovery requests inquire into the policies and procedures of insurance companies, whether in the form of interrogatories, requests for production, or depositions.[51] The case of *Trevino v. Golden State FC LLC & Amazon.Com, Inc.*[52] has given up a decision which does not identify the causes of action or claims advanced by employees against Amazon and other corporations. The decision-in-the-dark, so to speak, continued with a holding that Amazon and the other defendants were entitled to seal certain documents that set out their corporate policies and procedures. Other than conclusions, the

decision apparently left out the Court's reasoning.

The documents to be sealed were filed in the Court File in opposition to the plaintiffs' motion to certify a class against Amazon and the other corporate defendants. The U.S. Magistrate Judge in this case held that Amazon's request to seal the corporate policies and procedures were subject to a showing of "compelling reasons" to seal them.[53] What the "compelling reasons" may be, do not show up in the opinion. However, the opinion does contain a conclusory statement that the records are "confidential" because they would hurt Amazon's "competitive" position. (***Amazon's*** competitive position?)

Further, the USMJ held that the showing Amazon and the other defendants made to her for sealing these documents was "particularized" as required,[54] although the decision does not contain a further description of the showing beyond saying that it was "particularized" concerning unspecified corporate policies and procedures that now are sealed from public view.

This decision puts a spotlight on showing the reasoning for judicial decisions particularly concerning what is and what is not "particularized." Declaring a showing to be "particularized" without necessarily disclosing why the showing is "particularized" is not enough disclosure to understand why the parties argued as they did or why a court acted as it did in any case.

Moreover, this decision may provide some guidance to Amazon and perhaps other corporations on sealing corporate policies and procedures, at least in other cases involving Amazon perhaps, as Amazon and its lawyers undoubtedly know what was involved in this case while the public simply does not know.

The current process of actively acquiring stipulated protective orders to protect secrets did not come from the experience that preceded it; it came from fear that secrets would not be protected and the accompanying desire to maximize the possibility that secrets would be protected. In 1972, a Ford Pinto exploded on a low-level impact with a bigger car. When the consolidated cases went to trial on damages, the jury awarded over $3 Million in damages to compensate the driver's estate and the horribly burned teenaged passenger. After the judge reduced the jury's punitive damage assessment to $3.5 Million, the judge denied Ford's motion for new trial and entered judgment for the $3+ Million in compensatory damages and $3.5 Million in punitive damages.[55]

The trial judge refused to admit a table prepared by Ford into evidence. Ford submitted the table to the National Highway Traffic Safety Administration (NHTSA) in opposition to a proposed NHTSA regulation related to rollovers. The Ford Pinto gas tank explosion did not involve a rollover, but the table Ford prepared was explosive.

The judge refused to admit the table into evidence.

The jury did not see it.

Here is a version of Ford's table which the jury did not see. The following version was prepared by FEMA for use in a course on handling burn injuries:

Source: Slide 8 of FEMA Burn Crisis and Continuity Management Powerpoint, Class Session 17, available online at https://training.fema.gov/hiedu/docs/bccm/bccm%20-%20session%2017%20-%20power%20point.ppt.

"$11 Cost vs. A Burn Death

<u>Benefits and costs relating to fuel leakage associated with the static rollover test portion of FMVSS 208</u>

<u>Benefits</u>

Savings: 180 burn deaths, 180 serious burn injuries, 2,100 burned vehicles.

Unit Cost: $200,000 per death, $67,000 per injury, $700 per vehicle.

Total Benefit: 180 X ($200,000) + 180 X ($67,000) + 2,100 X ($700) = *$49.5 Million.*

<u>Costs</u>

Sales: 11 Million cars and 1.5 Million light trucks.

Unit Cost: $11 per car and $11 per light truck.

Total Cost: 12.5 Million X ($11) = *$137 Million.*

Ford Motor Company Internal Memorandum—'Fatalities Associated with Crash-Induced Fuel Leakage and Fires'[.]"

It was a long time ago, now. The jury trial that is.

There was no need for a blanket secrecy order. The jury did not see this table even without a Stipulated Protective Order in the case.

Ford was not prejudiced by this evidence. It was not admitted into evidence.

The judge refused to allow this table into evidence.

The jury system worked.

That should have actually inspired confidence in the justice system in the years since then.

But that is not the point. Not really. Stipulated Protective Orders are really about concealing the evidence, not about the integrity of the justice system.

But maybe, in the final analysis, it ***is*** all about the integrity of the justice system. Judges and juries are likely to do the right things in the long run—and often in the short run as well.

Footnotes

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[1] Le v. Exeter Fin. Corp., 990 F.3d 410, 421 (5th Cir. 2021) (emphasis in original).

[2] Edwards Vacuum, LLC v. Hoffman Instr. Supply, Inc. d/b/a His Innov's Grp., No. 3:20-cv-1681-AC, 2021 WL 186932 (D. Or. January 19, 2021).

[3] *Edwards Vacuum*, 2021 WL 186932, at *1.

[4] *Edwards Vacuum*, 2021 WL 186932, at *1.

[5] *Edwards Vacuum*, 2021 WL 186932, at *2.

[6] *Edwards Vacuum*, 2021 WL 186932, at *2.

[7] *Edwards Vacuum*, 2021 WL 186932, at *2.

[8] *See Edwards Vacuum*, 2021 WL 186932, at *4-6.

[9] Midwest Athletics & Sports Alliance LLC v. Ricoh USA, Inc., No. 2:19-cv-00514, 2021 WL 915721, at *3 (E.D. Pa. March 10, 2021).

[10] In re: Nat'l Prescrip. Opiate Litig. (HD Media Co. v. U.S. Dep't of Justice), 927 F.3d 919 (6th Cir. 2019).

[11] In re: Nat'l Prescrip. Opiate Litig. (HD Media Co. v. U.S. Dep't of Justice), 927 F.3d 919, 938-39 (6th Cir. 2019) (emphasis added). *Accord*, Le v. Exeter Fin. Corp., 990 F.3d 410 (5th Cir. 2021); Blackwell v. C.R. Bard, Inc., No. 2:19-CV-180-Z, 2021 WL 1088439, at *1 (N.D. Tex. March 22, 2021). The *Bard* decision on March 22, 2021, is an interesting case.

Bard involves at least two proceedings. the cited case from the Northern District of Texas is one. Another is a multi-district litigation (MDL) pending in the District of Arizona. *In re:* Bard IVC Filters Prod's Liab. Litig., (D. Ariz. MDL Case No. 15-02641-PHX-DGC). In Texas, the plaintiff argued that there was "good cause" to seal certain materials that had been filed in the court file, because "a previous stipulated protective order had been entered in the MDL court." *C.R. Bard, Inc*., 2021 WL 1088439, at *1. The District Judge in Texas noted that "good cause" is "the wrong standard to apply at this stage[.]" *C.R. Bard, Inc*., 2021 WL 1088439, at *1.

[12] *See* In re: Nat'l Prescrip. Opiate Litig., 927 F.3d at 939.

[13] *In re: Nat'l Prescrip. Opiate Litig.*, 927 F.3d at 939 (citations omitted).

[14] *See In re: Nat'l Prescrip. Opiate Litig.*, 927 F.3d at 939.

[15] *In re: Nat'l Prescrip. Opiate Litig.*, 927 F.3d at 939.

[16] *In re: Nat'l Prescrip. Opiate Litig.*, 927 F.3d at 939. Analogous developments which will certainly end up in some form of disclosure are underway in the regulation of "corporate climate transparency" on both federal and state levels. "The results could be transformative, potentially mandating that companies go beyond just revealing the emissions their products create to probing their supply chains, the pollution created when their products are discarded and possibly even the carbon footprint created by day-to-day business activities such as employee travel." Evan Halper, Corporate Secrecy Over Climate Change Targeted by Washington and California, Los Angeles Times online, Thursday, April 29, 2021, https://www.latimes.com/politics/story/2021-04-29/corporate-secrecy-over-climate-change-targeted-by-washington-and-california.

This inquiry in California, for example, is one result of Pacific Gas & Electric's "failure to upgrade its equipment to withstand extreme weather [that] led to the wildfires that wiped out communities and killed dozens," and that led as well to PG&E declaring bankruptcy. Halper, Corporate Secrecy, *supra*.

"California can play a leadership role in laying down a marker," said a former California Insurance Commissioner who is on the state advisory board considering the corporate climate disclosures issues. Halper, Corporate Secrecy, *supra, quoting* Mr. Dave Jones, former California Insurance Commissioner.

[17] *E.g.*, Ramos v. Continental Auto. Sys's, Inc., No. 18-1900-pp, 2020 WL 8617482, at *1 (E.D. Wis. Sept. 3, 2020); Ortiz v. City & County of S.F., No. 18-cv-07727-HSG, 2020 WL 2793615, at *9 (N.D. Cal. May 29, 2020). In Sweeney v. Nationwide Mut. Ins. Co., No. 2:20-cv-1569, 2020 WL 8265654 (S.D. Ohio Oct. 6, 2020), a United States Magistrate Judge applied settled Sixth Circuit case law and denied permission to file an Amended Class Action Complaint in secret and under seal.

The excuse offered by the parties in that case was that they had agreed to keep things a secret that showed up in the amended complaint. "The parties' agreement to maintain confidentiality, standing alone, does not constitute a compelling reason for filing under seal." *Sweeney*, 2020 WL 8265654, at *1.

A little over two weeks after this decision was reached, all defects were cured in the eyes of the Magistrate, apparently. At that time, some or all of the *defendants* asked the Magistrate to allow the *plaintiffs* to file an amended complaint under seal. The request to seal the amended complaint and its exhibits was granted because, "[b]ased on Defendants' representations, the Court concludes the Amended Class Action Complaint contains confidential information that should be shielded from public access." Ryan Sweeney v. Nationwide Mutual Insurance Co., DE 33, Order granting "Certain Defendants' Motion for Leave to Allow Plaintiffs to File Their Unredacted Amended Class Action Complaint Under Seal," filed October 21, 2020 (S.D. Ohio Case No. 2:20-cv-1569).

[18] Media Glow Digital, LLC v. Panasonic Corp. of N. Am., No. 16 Civ. 7907 (PGG) (SLC), 2021 WL 1400054, at *1 (S.D.N.Y. April 14, 2021).

[19] *See* "APPENDIX A, ARTICLE 8 RELEASE," ¶ 8.13.2, in Burnett v. Conseco Life Ins. Co., No. 1:18-cv-00200-JPH-DML, 2021 WL 119205, at *16 (S.D. Ind. Jan. 13, 2021).

[20] Allscripts Healthcare, LLC v. DR/Decision Res., LLC, 440 F. Supp. 3d 71, 78 (D. Mass. 2020).

[21] Zehtab v. Principal Life Ins. Co., No. 8:19-CV-01649-JLS-KES, 2020 WL 2079987, at *1 (C.D. Cal. April 30, 2020) (emphasis added).

[22] The Westlaw report ends with a California-required "Proof of Service" by one of the lawyers in the case. *Zehtab*, 2020 WL 2079987, at *8. There is not even a signature line for the Judge, although the parties' proposed Stipulated Protective Order does recite that "FOR GOOD CAUSE SHOWN, IT IS SO ORDERED." *Zehtab*, 2020 WL 2079987, at *7.

[23] John Doe Company v. Consumer Financial Protection Bureau (Case No. 1:15-cv-1177, D.D.C.), last accessed on PACER on Wednesday, March 23, 2016.

[24] That we know this much about this hidden lawsuit is thanks to Scott Michelman, Esquire who posted an article revealing the known history of the proceeding on PublicCitizen Consumer Law & Policy Blog on Wednesday, December 23, 2015, titled "John Doe Company v. CFPB." Mr. Michelman's blog post can be found at http://pubcit.typepad.com/clpblog/2015/12/john-doe-company-v-cfpb.html, last accessed on Wednesday, March 23, 2016. *See generally* Daniel Schwarcz, Transparently Opaque: Understanding the Lack of Transparency in Insurance Consumer Protection, 61 U.C.L.A. L. Rev. 394 (2014).

[25] MSP Recovery Claims, Series LLC v. Ace Am. Ins. Co., No. 17-23749-CIV-SEITZ, 2017 WL 6622648 (S.D. Fla. December 22, 2017).

[26] MSP Recovery Claims, Series LLC v. Ace American Ins. Co., No. 17-23749-CIV-SEITZ, 2017 WL 6622648 at *1 (S.D. Fla. December 22, 2017).

[27] MSP Recovery Claims, Series LLC v. Ace American Ins. Co., No. 17-23749-CIV-SEITZ, 2017 WL 6622648 at *1 (S.D. Fla. December 22, 2017).

[28] United States v. Lee Mem. Health Sys., No. 2:14-cv-437-FtM-38CM, 2018 WL 5014534, at *9 & n. 15 (M.D. Fla. Oct. 16, 2018) (Mirando, USMJ).

[29] Roy v. County of Los Angeles, No. CV 12-09012-AB (FFMx), 2018 WL 914773 (C.D. Cal. February 7, 2018).

[30] Roy v. County of Los Angeles, No. CV 12-09012-AB (FFMx), 2018 WL 914773 at *13 (C.D. Cal. February 7, 2018) (emphasis added).

[31] Government Emp's Ins. Co. v. Nealey, 262 F. Supp. 3d 153, 158 (E.D. Pa. 2017).

[32] Economus v. City and County of San Francisco, No. 18-cv-01071-HSG (DMR), 2019 WL 3842008, at *1 (N.D. Cal. August 15, 2019) (Ryu, USMJ).

[33] *Economus*, 2019 WL 3842008, at *8.

[34] Lowrey v. Oregon Mut. Ins. Co., No. 2:17-cv-00831-RSL, 2017 WL 3769424 (W.D. Wash. August 29, 2017).

[35] One of the reasons that a Stipulated Protective Order submitted in one case looks like Stipulated Protective Orders submitted in many other cases is that in many of these cases in which Stipulated Protective Orders are written by counsel and submitted to Courts for approval, the lawyers involved travel all over the United States representing the same clients and submitting similar orders in multiple cases. *See, e.g.*, Bedivere Ins. Co. v. Blue Cross & Blue Shield of Kansas, Inc., No. 18-cv-02515-DDC, 2020 WL 1140394 (D. Kan. March 9, 2020).
A couple of things to point out about the Stipulated Protective Order signed by the Magistrate Judge in this case.
One possibly unexpected development is that the attorneys of record in this civil case pending in Kansas travelled from Miami and Tampa, Florida; San Diego and Costa Mesa, California; and Chicago, in addition to locales one would perhaps more readily expect such as, in this case, Kansas City, Missouri. It is worth noting in this regard that the appearances of counsel in this case do not reflect counsel from Kansas where this case is pending.
The other thing of note is that the Stipulated Protective Order entered in this case on March 9, 2020, contains the same exact language leading into its provisions as many other Stipulated Protective Orders entered on this date in different federal courts around the country. Obviously, it is not necessarily required that the same lawyers write the same Stipulated Protective Orders when the same language that will be approved by federal courts across the nation is known to many, if not to all.
This takes nothing away from the quality of the representation provided by the lawyers in any of these cases. The point is rather that writing Stipulated Protective Orders is an art with many followers.

[36] *See* Dennis J. Wall, Post-claims handling practices issues—The presumption of public access vs. stipulated secrecy orders, § 2:19 in Catastrophe Claims: Insurance Coverage for Natural and Man-Made Disasters (Thomson Reuters forthcoming May 2021 Ed.).

[37] *See* Janet Lowrey v. Oregon Mut. Ins. Co., DE 1, Complaint, Filed May 26, 2017 (W.D. Wash. No. 2:17-cv-00831-RSL).

[38] Janet Lowrey v. Oregon Mut. Ins. Co., DE 7, Answer of Oregon Mutual Insurance Co., Filed June 30, 2017.

[39] Janet Lowrey v. Oregon Mut. Ins. Co., DE 10, Order Entered July 18, 2017.

[40] Janet Lowrey v. Oregon Mut. Ins. Co., DE 19, Stipulation and Order of Dismissal entered August 22, 2018 (W.D. Wash. Case No. 2:17-cv-00831-RSL).

[41] Hardy v. Kaszycki & Sons, No. 83-cv-6346 (LAP), 2017 WL 6805707 at *1 (S.D.N.Y. November 21, 2017).

[42] Hardy v. Kaszycki & Sons, No. 83-cv-6346 (LAP), 2017 WL 6805707 at *1 (S.D.N.Y. November 21, 2017).

[43] In re: Automotive Parts Antitrust Lit., MDL No. 12-md-02311, 2017 WL 3499291 (E.D. Mich. July 10, 2017), appeal dismissed for want of prosecution, No. 17-1967, 2017 WL 5664917 (6th Cir. Sept. 15, 2017).

[44] In re: Automotive Parts Antitrust Lit., MDL No. 12-md-02311, 2017 WL 3499291 at *8 (E.D. Mich. July 10, 2017), appeal dismissed for want of prosecution, No. 17-1967, 2017 WL 5664917 (6th Cir. Sept. 15, 2017).

[45] TrueNorth Cos., LC v. TruNorth Warranty Plans of N. Am., LLC, 353 F. Supp. 3d 788 (N.D. Iowa 2018) (Strand, Chief USDJ).

[46] TrueNorth Cos., LC v. TruNorth Warranty Plans of N. Am., LLC, 353 F. Supp. 3d 788, 791 (N.D. Iowa 2018).

[47] TrueNorth Cos., LC v. TruNorth Warranty Plans of N. Am., LLC, 353 F. Supp. 3d 788, 805 n.9 (N.D. Iowa 2018).

[48] TrueNorth Cos., LC v. TruNorth Warranty Plans of N. Am., LLC, 353 F. Supp. 3d 788, 797 (N.D. Iowa 2018) (emphasis added).

[49] TrueNorth Cos., LC v. TruNorth Warranty Plans of N. Am., LLC, 353 F. Supp. 3d 788, 806 (N.D. Iowa 2018).

[50] *See* TrueNorth Cos., LC v. TruNorth Warranty Plans of N. Am., LLC, 353 F. Supp. 3d 788, 810 (N.D. Iowa 2018) ("Instead, TN Warranty engaged in extra-judicial self-help, taking it upon itself to decide what information to disclose while holding other evidence hostage in an effort to force TrueNorth to agree to its terms.").

[51] *See* §§ 8:5 to 8:6, 8:8, 8:10, 12:5 to 12:6, and 12:10, *infra*.

[52] Trevino v. Golden State FC LLC& Amazon.Com, Inc., et al, No. 1:18-cv-00120-DAD-BAM, 2020 WL 550702 (E.D. Cal. 02.04.20) (McAuliffe, USMJ).

[53] *Trevino*, 2020 WL 550702, at *2.

[54] *Trevino*, 2020 WL 550702, at *2.

[55] Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal. Rptr. 348, 359–60 (Cal. 4th DCA 1981), *disapproved on other grounds in* Kim v. Toyota Motor Corp., 6 Cal. 5th 21, 31–36, 424 P.3d 290, 296–300, 237 Cal. Rptr. 3d 205, 213–17 (Cal. 2018) (disapproving categorical rejection of "industry standards" evidence in a strict liability case).