Litigation and Prevention of Insurer Bad Faith, Third Edition

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§ 3:107.75. Possible consequences of ignoring the public interest in disclosure in third-party bad faith claims*

Possible consequences of ignoring the public interest in disclosure in third-party bad faith claims include protecting settlement agreements by one insurer from disclosure to parties outside the litigation, as in *Bedivere Insurance Co. v. Blue Cross & Blue Shield of Kansas, Inc.*[1] A Magistrate Judge ultimately granted a motion to compel production of the settlement agreements to the requesting party in that case particularly given the context of that case, which included a counterclaim for insurance bad faith.[2]

The Magistrate rejected Blue Cross & Blue Shield's confidentiality argument against production of its settlement agreements. Its "confidentiality concerns are addressed by the agreed protective order entered in this case, *which prevents disclosure outside of this litigation*."[3] The Magistrate Judge did not discuss why that restriction on use of discovery was valid or why it was necessary to protect the settlement agreements from disclosure to parties outside the litigation, a universe of persons which clearly includes that company's life insurance policyholders who are not parties to that litigation.[4]

Policyholders who retain lawyers involved in previous litigation against the same insurance carrier as the one they are now suing for bad faith, may fare no better when the lawyers previously stipulated to a use restriction on information discovered from the insurance carrier in an earlier case. This was the situation that confronted a physician named Jalowsky who was represented in an insurance bad faith case by lawyers who had earlier received discovery from the current defendants, the Unum Group of insurance companies.

Dr. Jalowsky "intend[ed] to issue" a subpoena for the information from his own attorneys. However, the attorneys had received the information subject to a protective order, apparently a stipulated protective order, in the earlier litigation.

The order provided that the information could only be used in the earlier case. It is common for stipulated orders to have an "only-in-this-case" provision or "use restriction" on the use of evidence.

After discovery closed in the bad faith case, Dr. Jalowsky's lawyers asked Unum for permission to use the evidence in question in the bad faith case, a delay which was fatal in the eyes of the Magistrate Judge, as it turned out. We may never know what the result might have been if, as the Magistrate Judge suggested, the attorneys had carefully crafted a timely request for production of the same materials in the insurance bad faith case.

In any event, Unum refused Dr. Jalowsky's request to use the materials in question in his insurance bad faith case. Rather, Unum filed a motion to quash the subpoena and for a protective order. To say again, the Court revealed that Jalowsky "intends to issue a subpoena"—how and through whom, it is not clear from the opinion—against his own attorneys for documentation they had gotten ahold of in the earlier litigation.

The U.S. Magistrate Judge quashed the subpoena and granted Unum's motion for (another) protective order. The material in question was subject to an order in the earlier case which limited the use of that material to that particular case, meaning only the case in which the material was produced in the first place. There are no exceptions, said the Magistrate Judge, ordering that secrecy therefore had to be maintained and so refusing production of the information in the insurance bad faith case of *Jalowsky v. Provident Life & Accident Insurance Co.*[5]

Further, there were allegations of underlying bad faith failure to settle in the appeal in *Rebennack v. Westchester Fire Insurance Co.*[6] Kentucky's Court of Appeals kept any mention of settlement talks in the appellate briefs a secret, nonetheless.

Where these developments end up is anyone's guess, but they clearly signal the use of stipulated protective orders beyond their legitimate intended use. To the extent that SPOs are written to prevent competitors from gaining undue advantage by access to confidential information, they are consistent with the objectives of procedure[7] and they do not come

unnecessarily close to offending the Constitution. To the extent that SPOs are written to legitimize nondisclosure from the public, they may offend both procedure and the Constitution along the way.[8]

Footnotes

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1 Bedivere Ins. Co. v. Blue Cross & Blue Shield of Kansas, Inc., No. 18-2515-DDC, 2021 WL 843235 (D. Kan. March 5, 2021) (O'Hara, USMJ).

2 *Bedivere*, 2021 WL 843235, at *4.

3 *Bedivere*, 2021 WL 843235, at *3.

4 The Magistrate Judge in Kansas is not alone in not discussing the use restriction in Stipulated Protective Orders. By agreeing to the use restriction, the parties in one case agree to restrict the use of discovery to persons connected with the parties to that case, and so far as they can, to exclude disclosure to anyone else, especially parties to other litigation and their lawyers.
The "use restriction" purpose permeates SPOs because it is the prime reason for them. One of the more chilling provisions that lawyers have written into their SPOs concerns what they call "SCOPE." The "SCOPE" provision is the provision in which they say how far they intend their order to reach. In that paragraph, the lawyers have all agreed that the Protective Order they are proposing will cover any "conversations" that they may have "that reveal Protected Material."
In some cases, such as Premier Valley Bank v. Nguyen, No. 1:20-CV-00900-NONE-EPG, 2021 WL 1164684 (E.D. Cal. March 26, 2021) in the Eastern District of California, the lawyers have agreed in their "SCOPE" provision that "Protected Material" is what they say it is; when they have written "CONFIDENTIAL—ATTORNEYS' EYES ONLY" on disclosure or discovery material, then it is protected from public view. *Premier Valley Bank*, 2021 WL 1164684, ¶ 2.11, at *2. In other cases, including in the Central District of California, recent "SCOPE" provisions have lowered the bar for recognizing "Protected Material" to material on which the lawyers have written, simply, "CONFIDENTIAL." *E.g.*, Diarian v. First Transit, Inc., No. 2:20-cv-02957-FMO (AFMx), 2021 WL 1163962, ¶ 2.13, at *3 (C.D. Cal. March 26, 2021); Ramos v. FCA US LLC, No. 2:20-cv-10440-DMG-AGR, 2021 WL 1163575, ¶ 2.14, at *2 (C.D. Cal. March 26, 2021); Orellana v. Target Corp., No. 2:20-cv-06665 SVW(KSx), 2021 WL 1163234, ¶ 2.14, at *3 (C.D. Cal. March 26, 2021). In all these cases as in most SPOs if not every SPO, the lawyers prevent material from being disclosed because they say it should not be disclosed.
This provision has echoes of the record in a recent Nondisclosure Agreement or NDA case in the Southern District of New York. The record in that case reflects that the political campaign that wrote the NDA in that case, also attempted to enforce it in an earlier proceeding **by alleging that a former campaign employee violated the NDA "*'when she and her attorneys made statements about her lawsuit ….'*"** Denson v. Donald J. Trump For President, Inc., No. 20 Civ. 4737 (PGG), 2021 WL 1198666, at *6 (S.D.N.Y. March 30, 2021) (emphasis added). In other words, the Campaign used this provision to attempt to restrict Denson's use of any and all information she had gained, i.e., the Campaign argued in an earlier proceeding that this provision stopped her from speaking, the Court pointed out. In the case at bar, the Court ruled that the threatened enforcement of this sort of contract restricts speech. *Denson*, 2021 WL 1198666, at *10. The Court went on to hold in that case that such a provision is invalid and unenforceable.
Further, the New York Federal Court ruled, "[w]hether the scope of the restrictions in the non-disclosure provision is reasonable must be considered in light of what the Campaign contends are the 'legitimate interests' protected by this provision." *Denson*, 2021 WL 1198666, at *15. "But even with respect to those categories the terms are not defined," and people purportedly bound by the secrecy provision are left with no idea how to comply with it.
The same might be said about similar provisions in SPOs, particularly when they are used in insurance bad faith cases.

5 Jalowsky v. Provident Life & Acc. Ins. Co. and Unum Grp., No. CV 18-279-TUC-CKJ (LAB), 2020 WL 8184343, at *1 (D. Ariz. June 19, 2020) (USMJ).

6 Rebennack v. Westchester Fire Ins. Co., _ S.W.3d _, Nos. 2018-CA-1494-MR & 2019-CA-0078-MR, 2020 WL 6811652, at *1-*2 (Ky. Ct. App. Nov. 20, 2020) (stated NOT FINAL).

7 *See, e.g.*, Fed. R. Civ. P. 26(c)(1)(G) (court may enter protective order "requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way"). *Cf.* Le v. Exeter Fin. Corp., 990 F.3d 410, 420 (5th Cir. 2021): "Party-agreed secrecy has its place—for example, honoring legitimate privacy interests and facilitating the efficient exchange of information."

[8] The same can safely be said about Nondisclsoure Agreements or NDAs. These cousins of the SPO or Stipulated Protective Order have also tended to run in channels beyond those they have cut before now:

> Companies have long used NDAs to prevent competitors from poaching confidential information and good ideas. But they appear to be used increasingly to prevent workers from speaking out about instances of harassment, discrimination or assault they may face on the job.

Ifeoma Ozoma, A Nondisclosure Agreement Didn't Silence Me, New York Times, Wed., April 14, 2021, at A27.