Catastrophe Claims: Insurance Coverage for Natural and Man-Made Disasters

§ 2:19.50. The infliction of stipulations on litigation of facts and on settlements

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Stipulations have recently taken over much of litigation. Agreements are reached in lieu of discovery which keep the evidence secret. In some cases, secrecy stipulations even provide that documents and testimony in other cases will remain secret if filed in the current litigation.

The truthful cause of this situation has become public. At last, a Federal Judge has laid bare the catastrophe in the Federal Courts: Cases cannot be handled the way that they should be because there are not enough resources. For decades, Federal Courts have struggled with too few personnel and too little money to spend on administering what we euphemistically still call a system of justice.

This is the way that things are. Not only in Federal Courts, not only in State Courts, not only in one part of the country, but throughout the nation's judicial systems in every place, in every court.

Constitutional guarantees of access to courts are nothing but words without access to courts.

Statutes enacting new rights are hollow without the judges to declare what the statutes mean.

Procedural rules are worse than meaningless unless meaning is given to them by judicial conduct. They are misleading without judicial attention.

Judges cannot pay attention if they have so many things to do with so few capacities to do them that no judge can accomplish them in a single lifetime.

For a long time, individual judges have heroically tried to keep the judicial system performing, or on the whole at least give a convincing appearance of performing, even when a relatively small cohort of litigants game the system for advantage over the parties who oppose them.

That is where things stand in the 21st Century in the United States. It is the end of delusion. Now the veil of secrecy has been lifted, now the impossibility of administering justice using existing and even diminishing resources has been unveiled. Those who have eyes to see, let them see. And something more—seeing, let them do something to make the judicial system better even as the judicial system is about to crash.

This is what the Federal Judge had to say. This is what the Chief Judge of the Eastern District of California had to say. His words were written in an insurance case, but they apply to all cases:

> Lawrence J. O'Neill, UNITED STATES CHIEF DISTRICT JUDGE
>
> **I. PRELIMINARY STATEMENT TO PARTIES AND COUNSEL**
>
> Judges in the Eastern District of California carry the heaviest caseloads in the nation, and this Court is unable to devote inordinate time and resources to individual cases and matters. Given the shortage of district judges and staff, this Court addresses only the arguments, evidence, and

> matters necessary to reach the decision in this order. The parties and counsel are encouraged to contact the offices of United States Senators Feinstein and Harris to address this Court's inability to accommodate the parties and this action. The parties are required to reconsider consent to conduct all further proceedings before a Magistrate Judge, whose schedules are far more realistic and accommodating to parties than that of Chief U.S. District Judge Lawrence J. O'Neill, who must prioritize criminal and older civil cases.
>
> Civil trials set before Chief Judge O'Neill trail until he becomes available and [*sic*] are subject to suspension mid-trial to accommodate criminal matters. Civil trials are no longer reset to a later date if Chief Judge O'Neill is unavailable on the original date set for trial. Moreover, this Court's Fresno Division randomly and without advance notice reassigns civil actions to U.S. District Judges throughout the nation to serve as visiting judges. In the absence of Magistrate Judge consent, this action is subject to reassignment to a U.S. District Judge from inside or outside the Eastern District of California.[1]

How proposed orders have worked in the past. In all systems of justice in the United States, whether in the federal system or in any one of the State or other systems, judges have made rulings and lawyers have written proposed orders which are supposed to correctly reflect those rulings. The lawyers send their proposed orders to the judge, who reviews them to see if they accurately reflect her rulings. This historical model works when the ruling is already made by the judge and the proposed order is written to reflect the judge's ruling.

The long-standing judicial system of lawyers writing proposed orders and sending them to the judge to sign, has always worked efficiently only if the judge made an earlier ruling that the proposed order is supposed to reflect. The judge is then in a good position to review the proposed order and compare it to her earlier ruling.

A system in which parties and their lawyers propose orders tends to break down whenever the proposed orders do not reflect the judge's ruling but instead reflect what the parties and their lawyers want.

In the case of secrecy *stipulations* with proposed orders, judges are presented with a proposed order which turns their stipulation into a judge's ruling, as if by magic. Judges then often take a proposed secrecy order and sign it as it was written, just as in the case of *People of California v. Wells Fargo*. Sometimes, as happened with the February Order in this case, a judge merely crosses out the word, "proposed," before signing the secrecy order.[2]

That relatively new use of an old system of proposed orders written by lawyers and supposedly reviewed by judges now serves the goal of secrecy in court and agency proceedings alike. The public will generally not know what was actually done, or by whom. The public will know only that some uncertain number of people were hurt. It is unlikely that there will be an uproar or any public demands for change. And the evidence will be kept as secret as possible or perhaps not even offered. If no lawsuit is filed and no enforcement action is taken at all, then secret harmful conduct will be kept secret and will not stop.

And people who might be able to avoid harm if they knew the full story, cannot take action to protect themselves because they do not know the harm that may await them.

Often, the allegedly harmful conduct that was secret will remain secret even when a lawsuit is filed or an administrative agency action is brought. This was the case in the *People of California v. Wells Fargo* lawsuit filed by the City Attorney of Los Angeles. It is also the case in two *enforcement actions* brought by two federal agencies, the *Consumer Financial Protection Bureau* and the *Office of the Comptroller of the Currency*. All three of these proceedings—one lawsuit and two agency actions—ended with a settlement with Wells Fargo in which its allegedly bad secret conduct remained a secret anyway. Far more often than not, the *defendant* or *respondent* accused of secret harmful practices will settle and the evidence of its conduct will be kept secret. Generally, the most that the public knows in that event are just the accusations.

Secrecy Stipulations

"Blanket protective orders are routinely approved for use in civil cases[.]"[3] The "hazard" of these "stipulated protective orders" has been attributed to the provisions they routinely contain. "These orders often contain provisions that purport to put the entire litigation under lock and key without regard to the actual requirements of Rule 26(c)."[4]

One decision which illustrates the use and abuse of secrecy stipulations and by extension their use and abuse in

catastrophe claims litigation, including the catastrophe claims discussed below, came in the non-catastrophic claims case of *Cabrera v. Government Employees Insurance Co.*[5] That case involved an alleged class action against Government Employees Insurance Co. ("GEICO") and Bell, LLC ("Bell"). The substantive claims consisted of alleged violations of the Telephone Consumer Protection Act.

The defendant Bell objected to certain discovery with this trade secrets objection:

> Defendant's processes are proprietary processes that have independent commercial value and are not generally known. They are trade secrets.[6]

The Court overruled these "summary statements." These objections were held insufficient both to establish confidentiality and to demonstrate that disclosure would be harmful, which are the twin burdens of proof in successfully establishing a trade secrets objection.[7]

Even though this ruling is squarely in the mainstream of discovery law which requires trade secrets and other objections to be stated with particularity,[8] and when necessary to be established by proof such as the trade secrets objection, this is not the norm of legal rulings followed by courts in cases with secrecy stipulations filed by the parties.

Very often, judges and magistrate judges defer to the subjective decisions of the parties and their lawyers as to what constitutes "good cause" for secrecy. In at least some decisions, a "parties know best" approach appears to be at work.[9]

This set of cases is illustrated by the decision of a Federal Court in North Carolina in a case in which the Federal Deposit Insurance Corporation sued former executives of one Cooperative Bank for making bad loans. In that case, the Court sealed the evidence against the executives. This prompted much commentary on the Court's actions in that case, including this observation:

> The F.D.I.C. complaint made accusations that certainly sounded as if there were some bad faith. It said officers of the bank regularly ignored the bank's own lending rules and ignored repeated warnings from state and federal bank examiners. It said the board made no effort to force the bank officers to abide by the bank's own rules, let alone comply with the examiner's recommendations.
>
> So what facts indicated there was no bad faith? That is hard to tell. The judge sealed many documents, including the F.D.I.C.'s arguments against the summary judgment.[10]

The Court in this case based its secrecy order, first, on the fact that the several motions under consideration filed by the parties requesting that the records be sealed, were each and all unopposed in that case and, second, on "the May 21, 2013 Amended Stipulated Protective Order and Non-Waiver Agreement [DE 71]."[11] Remarkably, the order does not refer to Federal Rule of Civil Procedure 26 which governs requests for a protective order including requests to seal things on file from disclosure to non-parties.

Although the amended stipulation referenced in the order does refer to Rule 26,[12] the Rule contains no provision for parties to a lawsuit to alter its requirements. The record of this case reveals that the procedures of Rule 26 were simply not followed in this case when it came time to seal the evidence. The available record does not reflect "good cause" shown by any party "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."[13] Rule 26 does not provide that a party or person who might be annoyed, embarrassed, oppressed, or burdened by discovery or disclosure in Federal civil litigation is entitled to a protective order sealing the proceedings just because the party or person says so. They have to prove it.[14] That is their burden.[15]

Except in cases involving secrecy stipulations, it appears.

For a further example, unspecified claims against Bayer and other defendants, presumably other pharmaceutical companies, were filed in the United States District Court for the Northern District of California. From there, the claims were put into Multi-District Litigation and assigned to the Southern District of Illinois, before they were sent back to the Northern District of California. The case is *Galinis v. Bayer Corp*.[16]

Now that the stage has been set, here's why the *Galinis* case is of interest here. The defendant Bayer filed two motions to exclude expert witness testimony that it had done something wrong, and a motion for summary judgment against a

claim that it had failed to warn about the alleged bad consequences of one of its pharmaceutical products, i.e., drugs. In opposition to these motions, the plaintiffs filed what the Federal Court in California calls "opposition documents (briefs and supporting declarations and exhibits) under seal."[17]

The defendant Bayer's motions and the plaintiffs' "opposition documents" were all filed when the case was pending in the Southern District of Illinois.

When this case was transferred back to the Northern District of California after that, the Federal Judge in California ruled that the parties would have to either unseal all the materials or file a motion to seal them that complies with the Local Rules of the Northern District of California. ***This is the first of two reasons why this case is of interest: Rules of Civil Procedure govern the determination of cases where they are pending, regardless of where they came from, whether from Multi-District Litigation or from Illinois.***

The plaintiffs then filed a motion to seal all or some of their "opposition documents." (Even the California Judge was not certain whether the plaintiffs were referring to all or some of these materials and, if they were referring only to some, which ones.) The plaintiffs based their motion to seal in part on a stipulated protective order that they had entered into with Bayer and the other defendants. The plaintiffs followed that stipulated protective order and marked some of their documents as "CONFIDENTIAL" and some as "HIGHLY CONFIDENTIAL." That is apparently all that the stipulated protective order required in order for the plaintiffs to try to file their materials under seal.

That brings us to a second reason that this case is of importance to us: The Court held that even when the parties agree to a stipulated protective order, that by itself is not enough to seal the record of Court proceedings. To put it another way, the parties may agree to seal a Court File but only the Court can actually seal a Court File.

The plaintiffs' motion to seal did not comply with Northern District of California Civil Local Rule 79-5, purely and simply, and so their motion to seal was denied.[18]

To summarize, there are at least two lessons to be learned from this case: (1) Rules of Civil Procedure govern the determination of cases in the places where they are pending, regardless of where they came from, whether from Multi-District Litigation which has its own made-up rules, or from a place like the Southern District of Illinois which also has its own rules, and (2) a stipulated protective order, which of course is contractually agreed to by the parties, is not alone enough to seal the record of Court proceedings.

Settlement Stipulations

In other cases, parties try to provide by agreement what they could not obtain by litigation. The most glaring example is in the recent attempts by defendants to write and propose settlement stipulations for class actions that attempt to dispense with the requirements of class actions, and which will stand as res judicata determinations of those requirements if the same allegations are raised in other cases against the defendants.

Class action settlement stipulations of this kind are often found, for example, in lender force-placed insurance cases. These are a class of catastrophic claims unto themselves, more or less, or so it appears to defendants confronted by these alleged class actions.

In one such case in 2014, the defendants in *Fladell, et al., Plaintiffs v. Wells Fargo Bank, N.A., et al., Defendants*[19] argued against class certification before they were in favor of it.

Within two months after the defendants filed their objections to class certification, the defendants settled the *Fladell* case. The defendants successfully urged the Federal Judge in that case to approve the settlement agreement and thereby approve, ostensibly for "settlement purposes" but in reality for res judicata purposes, more claims classes than the plaintiffs themselves asked the Court in that case to certify.

The fact of settlement negotiations was used in defense in other cases by the *Fladell* defendants before their settlement stipulation was executed and approved in that case. The defendants argued in these other cases that the plaintiffs in those other lender force-placed insurance cases should have to prove that their cases are not included in the settlement in Florida.

Apparently the parties in *Fladell* began talking about a national class action settlement as early as February, 2014.

"On February 3, 2014 the parties in *Fladell* reached a settlement in principle," anticipating a motion for preliminary approval of their class action settlement in March. A little over two weeks later, a Federal Court **stayed** an alleged LFPI class action involving California homeowners. The ground for the California Court's Order was that a settlement in Florida in *Fladell* might preclude the LFPI class action alleged in the complaint which was filed in California in October, 2013.[20]

To date, this is the third of three known cases involving a defense that lender force-placed insurance claims are precluded by a class action settlement of LFPI practices in Florida in *Fladell.* The proceedings in the *Ursomano* case in California paralleled the developments in both of these other cases. *Ursomano* contained both a request for a stay and, later, a dismissal.

The proceedings are instructive. First, as noted, the California Court granted the defendants' motion to stay because the Court was informed that the issues and allegations may be the same in *Ursomano* as in *Fladell.* (They arguably were not the same at all, but the Court was informed that they were. "It appears undisputed that the issues and putative classes are effectively the same in *Fladell* and *Ursomano."*[21])

Even though the Court was under the impression that the issues were the same in both cases, the Court nonetheless stated that it recognized its duty, if and when a settlement agreement was actually written in *Fladell,* to "determine whether the terms release Defendants from liability ***from claims asserted herein*** and whether ***Plaintiffs and the putative classes*** are covered by the *Fladell* class."[22]

That review does not appear to have happened.

The *Fladell* case was settled, but a close review of the *Ursomano* Court File on PACER ("Public Access to Court Electronic Records") does not show that anyone reviewed the terms of the Florida settlement agreement to see whether the terms release the same defendants from liability from claims asserted in California and whether the California plaintiffs and the *Ursomano* putative classes are covered by the *Fladell* case.

The District Judge who wrote the February opinion in *Ursomano* was reassigned and another District Judge took his place. The new Judge ordered all parties to notify him if and when the *Fladell* case was settled. On October 29, 2014—the same date on which the Florida Court gave its final approval to the *Fladell* settlement[23]—the parties in California filed their joint "Statement Regarding Settlement" informing the Federal Court in California that the parties in Florida "have drafted a settlement agreement" and were then having it signed.

The parties in *Ursomano* filed something other than a certification concerning the Florida settlement, however. Within two weeks, they filed their joint Stipulation of Voluntary Dismissal on November 12, 2014. They did not address whether the claims or classes alleged in California were the same or similar as those alleged in Florida. However, they did point out to the Federal Court that their alleged classes were never certified in *Ursomano.* The plaintiffs were careful to obtain the defendants' agreement that "the parties have reached a settlement of ***Plaintiffs' individual claims against Defendants in which the Plaintiffs' individual claims will be dismissed with prejudice*** and the members of any putative class will be dismissed ***without*** prejudice," and, moreover, that while all of the individual claims were settled and should be dismissed with prejudice, under this stipulation ***"[a]ll claims and allegations of any putative class members are hereby dismissed without prejudice.***" [Emphases added.][24]

The *Ursomano* Court approved this Stipulation in a text-only entry on November 13, 2014, available only on PACER:

> **Order by Hon. James Donato granting 74 Stipulation of Voluntary Dismissal. Pursuant to the parties' stipulation, the Court dismisses this action with prejudice as to Mr. Canonico, Ms. Canonico and Mr. Ursomano and without prejudice as to the putative class. The putative class members retain all claims and causes of action, if any, against defendants. (This is a text-only entry. There is no document associated with this entry.) (jdlc1S, COURT STAFF) (Filed on 11/13/2014) (Entered: 11/13/2014)**

In addition to the *Ursomano* case, there are as noted two other decisions which have been found to be on point at this time. In one of the two other available decisions which have been located on point in addition to *Ursomano,* a Federal Court in Oklahoma stayed an alleged lender force-placed insurance class action because the Court in Oklahoma was advised by the defendants that the defendants were negotiating settlement with the parties in the Florida case. On the strength of that representation alone, and without requiring any proof or a written order or even a briefing on the res judicata affirmative defense, the Federal Court in Oklahoma swiftly entered its order staying the proceedings in Utah unless the **plaintiffs** in Oklahoma could prove that their claims are not barred by the *Fladell* proceedings in Florida, proceedings to which the

Oklahoma plaintiffs are not parties. The Oklahoma Federal Court's decision is in the case of *Ali v. Wells Fargo Bank, N.A.*[25]

In the other case which has been located as being on point here, a Federal Court in the State of Washington conditionally enjoined a foreclosure proceeding and refused to immediately dismiss an alleged LFPI class action. However, the Federal Court in Washington State required the **plaintiffs** in that case, none of whom it seems are plaintiffs in the *Fladell* case in Florida, to prove that their claims are not barred by the settlement to which they are not parties. The Federal Court's decision in Washington State is in the case of *Keller v. Wells Fargo Bank, N.A.*[26]

Beyond the three cases which have just been discussed, each decision coming from a different Federal Court and a different jurisdiction, *Ursomano* from California, *Ali* from Oklahoma, and *Keller* from Washington State, there are many other lender force-placed insurance class action cases and many other types of cases which are pending and others which are likely to be filed in the future. Some of those class actions will involve the same defendants as in cases which have settled and in which a "class" has been "certified for settlement purposes," as in the *Fladell* case. Orders in those cases will be used in defense in other cases, whether or not they contain expressions of res judicata, preclusive effect as does the stipulated settlement order in *Fladell*.

Although the *Fladell* case was ultimately settled by a stipulated agreement which the Court approved in that case, it is interesting to note the several objections which the *Fladell* defendants raised to class certification when they were against it and before they were for it.

The Court never addressed any of the defendants' objections, and it did not adjudicate them, either. What follows is taken mainly from the defendants' own Response in Opposition to Plaintiff's' Motion for Class Certification in *Fladell*, which the defendants filed in December 2013.[27]

In the *Fladell* case, the defendants pointed out in their opposition that the plaintiffs were seeking limited certification. According to the *Fladell* defendants, the plaintiffs requested certification of a national class on three Federal claims but not of their Florida law claims, for which the plaintiffs requested certification "of a Florida-only class."[28] That statement obviously contradicts the position taken afterward by the same defendants in other legal proceedings, that the Fladell class settlement bars all lender force-placed insurance claims in all other cases in the nation.

In approving the *Fladell* parties' settlement agreement, the parties and the Federal Judge said that the Florida class action settlement complied with Federal Rules 23(a) and 23(b). Rule 23 requires among other things that the proposed class action procedure be a **superior** means of adjudicating the alleged claims and that the current named plaintiffs are **adequate** to represent the alleged classes in pursuing those claims.

When the defendants opposed the class certification motion, and before they were in favor of it, they objected that the proposed class action was an **inferior** means by which to adjudicate the plaintiffs' claims:

> Plaintiffs are not adequately representing borrowers in every state other than Florida, and this action is an inferior way for them to litigate.[29]

Of even greater significance here, however, the defendants objected to certification in *Fladell* because of the potential danger that other Courts might preclude the potential claims of other people in other lawsuits who did not participate in the *Fladell* settlement agreement:

> Plaintiffs seek national certification only on federal-law claims, which are, at best, highly dubious. If those claims are certified but fail on the merits, *res judicata* may prevent borrowers residing in 49 other states from bringing the more substantial state-law claims that Plaintiffs assert only for the proposed class of Florida borrowers. ***This is not a superior method of adjudication, nor adequate representation of those absent borrowers.***[30]

In this same vein, it bears repeating that, as the *Fladell* defendants pointed out, the *Fladell* plaintiffs requested certification "of a Florida-only class" of Florida claims, and those Florida claims were four in number: "contract, implied covenant, unjust enrichment, and fiduciary duty."[31] Yet, the defendants argue now, in other cases, that they tried to settle and the Federal Court purportedly approved their settlement in the *Fladell* case in Florida of **every** claim in **every** State in the nation involving **also** allegations of "alleged tortious interference," alleged compliance with "disclosure" laws, "the receipt or non-disclosure of any benefit," the making or failure to make any "communications" concerning LFPI insurance anywhere, and last but not least, "the regulatory approval or non-approval of any insurance policy, or the premium thereon, placed or

charged by the Wells Fargo Defendants."[32]

It is noteworthy but perhaps not entirely surprising that District Judges often make their secrecy decisions in unreported Orders. Being unreported, they are much harder to find than reported decisions. In one such secrecy Order, captioned "ORDER RE: ADMINISTRATIVE MOTIONS TO SEAL,"[33] a District Court ***treated a motion for class certification as a nondispositive motion*** even though disposition of the motion for class certification was at the heart of the plaintiffs' collective claims. The parties once again stipulated to secrecy, in this instance, to request that exhibits filed in connection with the motion for class certification should be kept secret. Applying an explicitly lesser standard for sealing documents and parts of documents when they are exhibits concerning "nondispositive" motions as opposed to dispositive motions, the District Court entered its Order granting the parties' stipulation to "file all documents sought to be sealed in redacted form consistent with their joint submission."[34] In other words, the holding that a motion to certify a class in a case in which the reason for the lawsuit's existence lies in class certification—and few if any putative class action lawsuits fit into any other category—drove the decision to keep documents secret which probably and almost certainly would support the plaintiffs' substantive claims in the case.

In the latest case against Microsoft, a United States Magistrate Judge signed the parties' First Amended Stipulated Protective Order obviously written for concealment. The case is *Uniloc 2017 LLC v. Microsoft Corp*.[35]

In this stipulated amended protective order, the parties stipulated and the Magistrate Judge agreed that:

> Discovery in this action is likely to involve confidential, proprietary, ***or private information requiring special protection from public disclosure and from use for any purpose other than this litigation***. Thus, the Court enters this Protective Order. This Order does not confer blanket protections on all disclosures or responses to discovery, and the protection it gives from public disclosure and use extends only to the specific material entitled to confidential treatment under the applicable legal principles.[36]

Never before has "from use for any purpose other than this litigation" been an accepted reason for a protective order. It simply has never appeared among the list of "the applicable legal principles." Until now.

Now, in this Microsoft case, it has. By stipulation. And by the official order of a magistrate judge. Whether this will actually stand as precedent or not, by the clear terms of this stipulated order, nobody outside of this Microsoft case can ever so much as see this stuff:

> A receiving party may use designated material only for this litigation.[37]

The public cannot see it. Other lawyers and other parties and in fact anyone outside of this Microsoft litigation cannot see it.

In general terms, this is apparently the approach taken by defendant mortgage lenders and servicers, and insurance companies. They act so as to limit the availability of information about what they do, to the parties that are actually suing them in any individual case, or to the regulators to whom they have a legal responsibility to report.[38]

All because of a new legal invention crafted by the stipulation in Microsoft's latest case, and signed by a magistrate judge into law: because "***private information***" is likely to be discovered and so must be protected "from use for ***any*** purpose other than this litigation." (Emphasis added.)

Baseless in law, perhaps, but as written that seems pretty absolute. It was intended to be.

In sum, stipulations have recently taken over much of litigation both in lieu of discovery which keep the evidence secret, and in settlement stipulations in which parties try to provide by agreement what they could not obtain by litigation. The most glaring example of the latter conduct is in the recent attempts by defendants to write and propose settlement stipulations for class actions that attempt to dispense with the requirements of class actions, and which will stand as res judicata determinations of those requirements if the same allegations are raised in other cases against the defendants. The effects of all of these stipulations remain to be worked out in each individual case, but until then, practitioners and their clients should be aware of the possibilities which they may face in presenting their catastrophic claims. In particular, these stipulations have not confronted the public policy sometimes embodied in statutes tending to prohibit public harm caused by secret agreements.[39]

Footnotes

[1] Houston Cas. Co. v. Charter Oak Fire Ins. Co., No. 1:16-cv-535-LJO-EPG, 2017 WL 35500 at *1 (E.D. Cal. January 3, 2017).

[2] Stipulation and Protective Order entered and filed on February 2, 2016 in *People v. Wells Fargo & Co.*, Case No. BC 580778 (Los Angeles County Superior Court). *See* generally DENNIS J. WALL, LENDER FORCE-PLACED INSURANCE PRACTICES § 3.1, "Secrecy First, and Then Settle" (American Bar Association Publishing 2015).

[3] Satmodo, LLC v. Whenever Communic's, LLC, No. 3:17-cv-192-AJB-NLS, 2018 WL 1071707, at *3 (S.D. Cal. February 27, 2018).

[4] Kamakana v. City and County of Honolulu, 447 F.3d 1172, 1183 (9th Cir. 2006).

[5] Cabrera v. Government Emp's Ins. Co., 2014 WL 2999206 (S.D. Fla. July 3, 2014) (Seltzer, Chief U.S.M.J.).

[6] Cabrera v. Government Emp's Ins. Co., 2014 WL 2999206 *9 (S.D. Fla. July 3, 2014) (Seltzer, Chief U.S.M.J.).

[7] *See* Cabrera v. Government Emp's Ins. Co., 2014 WL 2999206 *9 (S.D. Fla. July 3, 2014) (Seltzer, Chief U.S.M.J.).

[8] *See generally* Dennis J. Wall, "Conditional and Other 'Nonspecific' Objections to Discovery Are No Objections at All in an Insurance (or in Any Other Case)," 33 Ins. Litig. Rptr. 437 (2011).

[9] *See, e.g.*, Satmodo, LLC v. Whenever Communic's, LLC, NO. 3:17-cv-192-AJB-NLS, 2018 WL 1071707, at *4 (S.D. Cal. February 27, 2018) (district judge deferred to stipulated protective order's determination of "good cause," adding only that "the unrestricted disclosure of which [referring to documents withheld by the parties as confidential] could be potentially prejudicial to the business or operations of such party.").

[10] Floyd Norris, "High & Low Finance / Failed Bank's Broken Vows Mean Little" p. B1, col. 1 (New York Times Nat'l ed., "Business Day" Section, Friday, September 19, 2014). The order of the Federal Court in North Carolina can be found in FDIC v. Rippy, Order of September 10, 2014 granting defendants' summary judgment motion, Dkt. No. 124 (E.D.N.C. Case No. 7-11-cv-00165-BO).

[11] FDIC v. Rippy, Dkt. No. 124, Order of September 10, 2014 granting defendants' summary judgment motion, at p. 3 (E.D.N.C. Case No. 7-11-cv-00165-BO).

[12] FDIC v. Rippy, Dkt. No. 71, May 21, 2013 Amended Stipulated Protected Order and Non-Waiver Agreement, at p. 2 (E.D.N.C. Case No. 7-11-cv-00165-BO).

[13] Fed. R. Civ. P. 26. *See also* 18 U.S.C.A. § 1835, titled, *Orders to Preserve Confidentiality*, regarding Trade Secrets in particular.

[14] The federal courts have held that what is "good cause" for a protective order to keep a document or testimony from seeing the light of day is essentially the same amount of "good cause" needed to seal that evidence. The good cause must be shown by evidence in the record and not merely contended by assertions of counsel or their clients whether in litigation between businesses or in any other type of litigation. *See, e.g.*, Villery v. Beard, No. 1:15-cv-00987-DAD-BAM (PC), 2018 WL 6304410, at *4 (E.D. Cal. December 3, 2018) (in civil rights action filed by a state prisoner, McAuliffe, USMJ, recognized that "good cause" is the standard "which applies to [sealing] non-dispositive discovery type motions" and holding that good cause was shown regarding "confidential health information and confidential investigatory information obtained from witness interviews, and in the absence of any objection"); Contour IP Holdings, LLC v. GoPro, Inc., No. 17-cv-04738-WHO, 2018 WL 6574188, at *1 n.1 (N.D. Cal. December 12, 2018) (Orrick, USDJ, holding in a patent infringement action that good cause was not provided "to warrant preserving the secrecy of sealed discovery material attached to nondispositive motions.").

[15] In addition to the clear language of Rule 26, the Advisory Committee Notes to the present enactment of Rule 26(c) in 1970, provide:

> The new reference to trade secrets and other confidential commercial information reflects existing law. The courts have not given trade secrets automatic and complete immunity against disclosure, but have in each case weighed their claim to privacy

against the need for disclosure.

An alternative to secrecy stipulations pursued in the cases, is to settle the class action case and provide for secrecy in the settlement agreement which the Court is then requested to approve. This method of obtaining secrecy is at work in the class action lawsuit filed against the high-profile corporations of Silicon Valley who allegedly conspired to limit their workers' "mobility and incomes." David Streitfeld, "New Accord is Expected in Hiring Ban," p. B1, col. 5 (New York Times Nat'l ed., "Business Day" Section, Thursday, January 15, 2015). As explained in this Times report, a second settlement agreement was reached in the case and presented to the Court for approval "[t]o head off a trial and the exposure of reams of incriminating emails." The Federal District Judge already rejected one settlement because the amount was too low to be "'within the range of reasonableness,'" i.e., the original settlement amount presented for the Court's approval was unreasonably low. Although the second attempt at a settlement agreement contains more money, "[t]he settlement money is pocket change to the companies, which include some of the world's wealthiest. If they let the case go to trial, however, it might corrode their image as forward-thinking, worker-friendly benevolent empires." David Streitfeld, "New Accord is Expected in Hiring Ban," p. B1, col. 5 (New York Times Nat'l ed., "Business Day" Section, Thursday, January 15, 2015).

[16] Galinis v. Bayer Corp., No. 09-cv-04980-SI, 2019 WL 1024403 (N.D. Cal. March 4, 2019).

[17] *Galinis*, 2019 WL 1024403, at *1.

[18] *Galinis*, 2019 WL 1024403, at *2.

[19] Fladell, et al., Plaintiffs v. Wells Fargo Bank, N.A., et al., Defendants (S.D. Fla. Case No. 13-cv-60721), *app. dismissed (unreported)* (11th Cir. August 4, 2015).

[20] Ursomano v. Wells Fargo Bank, N.A., No. C-13-4381, 2014 WL 644340 *1-*2 (N.D. Cal. February 19, 2014).

[21] Ursomano v. Wells Fargo Bank, N.A., No. C-13-4381, 2014 WL 644340 *2 (N.D. Cal. February 19, 2014).

[22] Ursomano v. Wells Fargo Bank, N.A., No. C-13-4381, 2014 WL 644340 *2 (N.D. Cal. February 19, 2014). [Emphasis added.]

[23] Fladell v. Wells Fargo Bank, N.A., No. 13-cv-60721-FAM, 2014 WL 5488167 (S.D. Fla. October 29, 2014), *app. dismissed (unreported)* (11th Cir. August 4, 2015). The appeal to the Eleventh Circuit Court of Appeals was filed in *Fladell* after several plaintiffs objected to the attorney's fees award in that case of $19 Million "payable pursuant to the terms of the settlement agreement."
The *Fladell* settlement agreement and the District Court's approval of it has also been cited as authority in another Southern District of Florida case involving the same sets of attorneys on all sides, to the effect that "Class Counsel's fees were calculated in keeping with the Eleventh Circuit's approved methodology." Almanzar v. Select Portfolio Serv., Inc., No. 1:14-cv-22586-FAM, 2016 WL 1169198, at *4 (S.D. Fla. March 25, 2016).
The *Fladell* settlement in Florida was held to bar a defendant from raising a defense in a foreclosure action in New York. Wells Fargo Bank, N.A. v. Miller, 150 A.D.3d 1046, 1048, 55 N.Y.S.3d 309, 311 (N.Y. App. Div., 2d Dep't, 2017).

[24] Ursomano v. Wells Fargo Bank, N.A., No. C-13-4381, Dkt. No. 74 filed on Nov. 12, 2014 (N.D. Cal. Case No. C-13-4381).

[25] Ali v. Wells Fargo Bank, N.A., No. CIV-13-876-D, 2014 WL 819385, at *2 (W.D. Okla. March 3, 2014) (granting defendants' motion to stay lender force-placed insurance claims of plaintiffs who were not parties in the Florida case, unless those plaintiffs could prove that their claims were not settled in *Fladell).* The *Ali* case was distinguished when the same issue was raised, with a different result, in the case of Valdez v. Saxon Mort. Serv's, Inc., No. 2:14-cv-03595-CAS(MANx), 2015 WL 93387, at *2 (C.D. Cal. January 6, 2015): "Here, in contrast, the *Lee* settlement [the asserted fact of which was relied on in *Ali*] will not resolve all of plaintiffs' claims; rather, as moving defendants argue, the *Lee* settlement 'if approved, will resolve claims against Ocwen [ ] and Deutsche Bank [ ] ….' Mot. Stay at 1."]

[26] *See, e.g.,* Keller v. Wells Fargo Bank, N.A., No. C14-422, 2014 WL 6684895 *2-*3 (W.D. Wash. November 25, 2014) ("limited injunction" ultimately granted against defendants foreclosing on plaintiffs' home so as to allow the plaintiffs to prove that their case is not included in the *Fladell* settlement).

[27] Fladell v. Wells Fargo Bank, N.A., No. 13-cv-60721-FAM, Dkt. No. 108 [hereinafter "DE 108"], filed December, 2013 (S.D. Fla. Case No. 13-cv-60721-FAM), *app. dismissed (unreported)* (11th Cir. August 4, 2015).

[28] DE 108 at page 1.

[29] DE 108 at page 19.

[30] DE 108 at pages 2-3. [Emphasis added.]

[31] DE 108 at page 1.

[32] Fladell v. Wells Fargo Bank, N.A., 2014 WL 5488167 *7 (S.D. Fla. Oct. 29, 2014), *app. dismissed (unreported)* (11th Cir. August 4, 2015).

[33] Stitt v. Citibank, N.A., ORDER RE: ADMINISTRATIVE MOTIONS TO SEAL, Dkt. No. 152 Filed December 17, 2015 (N.D. Cal. No. 4:12-cv-032892-YGR).

[34] Stitt v. Citibank, N.A., ORDER RE: ADMINISTRATIVE MOTIONS TO SEAL, Dkt. No. 152, at p.2, Filed December 17, 2015 (N.D. Cal. No. 4:12-cv-032892-YGR).

[35] Uniloc 2017 LLC v. Microsoft Corp., NO. 8:18-CV-02053-AG (JDEx), 2019 WL 451345 (C.D. Cal. February 5, 2019) (USMJ). The ruling in this case was apparently stayed by the District Judge, as one of six particular consolidated patent cases filed against Microsoft, in NO. 8:18-CV-02053-AG (JDEx), 2019 WL 6974354, at *1-*2 (C.D. Cal. August 9, 2019).

[36] *Uniloc*, 2019 WL 451345, at *1 (emphasis added).

[37] *Uniloc*, 2019 WL 451345, ¶ 4.1, at p. *2.

[38] *See, e.g.*, Blankenship v. Citimortgage, Inc., No. 2:14-cv-2309 WBS AC, 2015 WL 5009079, at *5 (E.D. Cal. August 20, 2015) ("If, as it appears, the documents sought are relevant, then defendant's confidentiality concerns can be addressed with a protective order that permits disclosure to plaintiffs while preventing disclosure to anyone else."); Ron Hurtibese, Insurers Using 'Trade Secret' Stamp to Keep Data Hidden, Orlando Sentinel, Sunday, June 28, 2020, at C4.

[39] *See, e.g.*, 1 Dennis J. Wall, Litigation and Prevention of Insurer Bad Faith § 3:107, "Settlement of third-party bad faith claims: Confidentiality (protected) or concealment (void)" (3d Edition and current Supplements, Thomson Reuters West); 2 Dennis J. Wall, Litigation and Prevention of Insurer Bad Faith § 9:28, "Settlement of first party bad faith claims: Confidentiality (protected) or concealment (void)" (3d Edition and current Supplements, Thomson Reuters West), examining among other things, Florida Statute Section 69.081.