CONFIDENTIALITY AGREEMENTS

LISTEN…DO YOU WANT TO KNOW A SECRET?

A typical confidentiality agreement in a personal injury case is a written contract between a plaintiff and a defendant and its insurer. In exchange for a monetary settlement, the plaintiff and her attorney agree to keep secret the facts of the case and the amount of the settlement.

It is the premise of this article that confidentiality agreements are against public policy and should be treated as such by the courts. The settlement terms of a court proceeding should be available to the public and to the press. What happens in the courts is the public's business. Confidentiality agreements should be prohibited absent a showing of specific harm after an evidentiary hearing. The court should require that personal injury cases settled prior to trial, at trial and/or after trail should not be the subject of secrecy agreements. If history has taught us anything it is that the best disinfectant for the ills of society is the light of day. Open meeting laws and "sunshine" statutes have been passed in the last twenty-five years to promote accountability and to provide a mechanism for society to learn from its mistakes. Confidentiality agreements run counter to this historical trend.

It is also important to preclude confidentiality agreements when a claim is settled prior to the commencement of litigation. It may be that plaintiff's counsel, due to his tenacity and meticulous investigation, can act as society's "canary in the mine" giving the public a initial warning about a product's defect or about a course of conduct that is systemically unlawful and/or tortuous. Secrecy agreements would mute this message.

Absent court or legislative action precluding these agreements, the pressure upon plaintiffs and their counsel to agree is enormous. The plaintiff's monetary compensation is made contingent upon keeping the secret. Money is used as a club to make a physically and emotionally traumatized plaintiff submit to the dictates of the defendant and its insurer. In most agreements, the defendant refuses to admit to any wrongdoing and specifically denies culpability.

The following are offered as specific reasons for Massachusetts' courts and its state legislature to preclude confidentiality agreements in personal injury cases:

1. Accountability: confidentiality agreements promote secrecy and secrecy obviates accountability;
2. Secrecy defeats the public's right to know;
3. Secrecy defeats the public's need to know. How can society correct its ills if it is unaware that they exist? For example, the Ford SUV and Firestone tire accidents were investigated overseas in hot climate countries. At the same time, these multinationals kept secret the results of their investigation and the settlement information. They deprived U.S. citizens, Federal and State regulators, the media and the courts from the information necessary to understand the magnitude of the problem and to fix the problem before more people died. In another example, the Catholic Church's sexual scandal in Massachusetts was allowed to fester and grow due, in part, to the secrecy surrounding the abuse of boys by priests over a long period of time. An unintended and unanticipated, yet inevitable outcome of the confidentiality agreements signed by the representatives of the Catholic Church was the breach of trust felt by its parishioners and by the abused victims as the systemic nature of the problem emerged years later;
4. Corporation lawyers like to like to settle cases one at a time. It allows them to divide and conquer. It allows them to control the flow of- and access to- information. Information is power. If a plaintiff's attorney can prove that his client's accident is part of a pattern, a systemic failure, or a design defect then his ability to meet his burden of proof is greatly enhanced. Prior knowledge of a product defect by the defendant is potent information. It is something juries clearly understand and will not tolerate. It is for this very reason defendants fight so hard to keep the information about prior lawsuits secret. In addition, if the public knew, the abuses would not be tolerated. The recalcitrant company would be punished in the marketplace.
5. Corporate secrecy hinders the timely analysis of failures and product defects and ensures unnecessary future injuries and deaths (e.g., the Ford Pinto gas tank explosion cases in the 1970s and the Ford SUV Explorer and Firestone Tire roll-over cases in the 1900s);
6. Secrecy undermines the ability of the political process to mandate change. It weakens our ability to learn from our collective mistakes and to right the wrongs as we come to know them;

7. Secrecy undermines the political will to lobby for reform when a defect is identified as a systemic problem: for example, the tobacco litigation.
8. Traditionally, civil litigation was considered a private matter in which the parties were free to negotiate contractual agreements to resolve their differences. Counter-balancing these private interests is the public's need to know.
9. In the past, arguments espousing the right to freely enter into contracts have been used as an excuse to support confidentiality agreements. Yet, a lawsuit is also the public's business since it takes place in the public's courts. The judicial system has an interest in promoting the public good. The courts should not be unwittingly used to hide significant health and safety information from the public and their elected officials. Lawsuits by individuals against corporations typically involve unequal bargaining power due to a discrepancy in resources, power, political connections and the passage of time. Unless confidentiality agreements are deemed unlawful, an attorney's best advice for a particular client may be at odds with the public's need to know.
10. A private individual seeks compensation in a personal injury lawsuit. Frequently, she does not have the luxury to promote the public's right to know or its health and safety. An economic imperative is at work which severely constrains the client's options when presented with a fair offer to settle when the settlement is contingent upon a secrecy agreement;
11. An attorney may find himself at odds with his client about the need for her (and him) to sign a secrecy agreement as a condition-precedent to a negotiated settlement. In fact, an attorney may be presented with a conflict of interest between his professional judgment and the client's wishes or instructions. In that instance, the attorney must defer to the client's request. The corporation's attorneys understand the conflict of interest. They work to foster an atmosphere in which an economically vulnerable claimant must choose between her own individual interests and the public's right to know. More and more frequently, product defects and dangerous business practices are being kept secret. Ironically, the defendant corporation normally does not pay the monetary settlement. The insurer pays it. The incentive to change corporate behavior is therefore minimal
12. The only way in which to protect the private claimant and the public is to pass legislation that requires full disclosure absent some extraordinary circumstance. The default position should always be openness. In fact, such legislation has adopted the nickname "sunshine in litigation" and it is the law in fifteen states. The prohibition against secrecy agreements

should also extend to settlements negotiated prior to commencement of litigation;

13. The necessity for sunshine legislation is urgent with the pervasiveness of multinational corporations. Many of these corporations are more powerful and wealthier than the countries in which they do business. For example, Ford and Firestone tires were initially found to be defective in hot climate, poor countries near the equator. Yet, the defects were never reported to the host countries or to U.S. regulators. The financial resources of these multinational institutions are substantial. They often dwarf the resources of the individual states and sometimes even overwhelm the Federal government in terms of their ability to commit time and money to a particular project. This type of power can be coercive and corrosive. It can allow a multinational corporation to dictate regulatory terms to a poor country. It can tempt a corporation to refrain from reporting a product defect in one country to the regulators in the other countries in which it does business. This type of corporate misbehavior is facilitated by secrecy agreements. Often, a problem initially surfaces through widely dispersed individual claims. The only central repository of information concerning the product defect is the corporation that makes the product. If it can hide the information, it is able to buy-off the individual claimants, and assert while doing so that there is no problem with the product.

Business interests have argued that their intellectual property, patents and industrial secrets are put at risk if confidentiality agreements are prohibited. This is blatantly false and merely serves to obfuscate the issue. Clearly, if a defendant can convince a court, in a particular instance, that legitimate business interests or trade secrets are at risk, then it should have the right to make that argument to a court. Absent such a showing, a defendant and its insurer should be precluded from making a confidentiality agreement a condition precedent for settlement. The bias should always be for the free-flow of information.

The courts also have an institutional interest in full disclosure. Disclosure may reduce the number of individual lawsuits filed or permit the court to consolidate them for discovery purposes. The court can also save the parties time and money by fashioning a case management plan if it is aware of other lawsuits and/or settlements that involve the same defective product. It may also conserve judicial resources by minimizing the duplication of discovery and its resulting costs to the court and the parties.

There has been some renewed interest in this issue in the last couple of years as the financial abuses of the 1990s have come to light. On November 1, 2002 the judges of the United States District Court for the District of South Carolina enacted an amendment to their Local Civil Rule 5.03. Section C of the rule states the following: "No settlement agreement filed with the court shall be sealed pursuant to the terms of this Rule." It also provides for a hearing if one of the parties seeks an exception to the general rule of full disclosure and transparency.

This is an example of trial judges not waiting for the legislature to enact a statute or for the state appellate courts to issue an opinion. Modification of a local rule of court was sufficient. A similar amendment to the local rules by the Massachusetts Federal District Court judges is certainly within their discretion. An amendment to the local trial court rules by the judges of the Massachusetts Superior Court is probably within their discretion. Precluding confidentiality agreements in civil cases (without good cause shown) would be a fitting way to start the New Year as Massachusetts citizens grapple with solutions for their need to know; and as they increasingly look to the courts as the only institution available to vindicate their right to know.

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