

PRODUCT LIABILITY

JUNE 2015

IN THIS ISSUE

Attempts by the Plaintiffs' Bar to implement discovery sharing provisions in every protective order entered in litigation should be a call to arms for the Defense. While many courts seem to have an inclination to permit such provisions, there are strong arguments which have been successful in convincing courts to preclude such unfettered disclosure of confidential materials. Defendants need to take a strong stand against such efforts in order to protect their confidential information and to prevent plaintiffs from lowering the bar in litigation.

Protective Orders and Discovery Sharing: Beware of Plaintiffs Bearing Sharing Agreements

ABOUT THE AUTHORS



Joshua K. Leader is a partner in the New York City office of Leader & Berkon LLP. He handles a wide range of litigation in such areas as product liability, toxic tort, complex commercial, securities, entertainment and intellectual property actions in state and federal courts. Josh has over 15 years of experience in mass tort and complex product liability litigation, including defense of clients in nationwide semiconductor manufacturing litigation and in multiple groundwater contamination cases, defense of a major appliance manufacturer against mass subrogation claims brought to circumvent class action rules, and defense of an international chemical company in litigation alleging GMO contamination of the conventional food supply. He can be reached at jleader@leaderberkon.com.



Gloria Koo practices in Leader & Berkon LLP's New York City office in the areas of toxic tort, products liability, securities, and general commercial litigation in both state and federal courts. She represents individuals and corporations in a wide variety of matters. Gloria plays a major role with the firm's national asbestos defense practice, which includes performing National Coordinating Counsel duties for precision equipment manufacturers and managing the New York docket for industrial clients in the national asbestos litigation. She can be reached at gkoo@leaderberkon.com.

ABOUT THE COMMITTEE

The Product Liability Committee serves all members who defend manufacturers, product sellers and product designers. Committee members publish newsletters and *Journal* articles and present educational seminars for the IADC membership at large and mini-seminars for the committee membership. Opportunities for networking and business referral are plentiful. With one listserv message post, members can obtain information on experts from the entire Committee membership. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:



Jessalyn Zeigler
Vice Chair of Newsletter
Bass Berry & Sims PLC
jzeigler@bassberry.com

The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.

In what has become an all too frequent state of affairs, plaintiffs' attorneys, rather than fighting all aspects of confidentiality agreements and protective orders, put on a mask of cooperation, agree to a certain scope of confidentiality, but then insist upon a discovery sharing agreement, which essentially permits unfettered use of confidential materials obtained in one litigation in any other litigation, in any jurisdiction, by any plaintiff's counsel, without restriction or oversight. Beware! Such agreements pose significant risk to defendants on many fronts.

Sharing agreements generally allow plaintiffs to disseminate confidential discovery materials to other plaintiffs' attorneys outside of a particular case. Typically, there is no requirement in such agreements that the recipient of the discovery have live claims or claims that are in any way related or similar to the litigation from which the discovery was obtained, or any claim at all.¹ This practice is known as "discovery sharing."

While many commentators and courts are proponents of such sharing provisions, espousing the benefits of judicial economy and reduction of litigation costs as well as promoting the public interest and public health and safety, there is still a significant

difference of opinion on whether such provisions are appropriate or beneficial.² However, there can be no doubt that a certain segment of the Plaintiffs' Bar is not proposing sharing agreements out of a sense of concern for judicial economy, transparency in the judicial process, or anything so altruistic. Rather, they seek to lessen their burden in prosecuting claims, manufacture new litigation from confidential information, and lower the bar to maintaining their claims, even when those claims are weak. An approach which permits one attorney to pass along confidential materials gathered from a defendant in one litigation to another attorney in another jurisdiction with a wholly unrelated case or even no case at all, with no real control over the dissemination of such confidential materials, is highly prejudicial to that defendant, provides unfair leverage to the plaintiffs' counsel, whose clients may never have been entitled to see or obtain such materials in their individual cases, and drastically increases the risk of inadvertent and unauthorized disclosure of such confidential materials, often to the great detriment of defendants.

This should be a call to arms for the Defense Bar and for our clients.

¹ Plaintiffs' attorneys can and do utilize confidential information gleaned from discovery sharing to learn of and develop grounds upon which to base new lawsuits.

² See *Byrd v. U.S. Xpress, Inc.*, 2014-Ohio-5733, 26 N.E.3d 858, 864 (1st Dist. 2014) (denying a sharing provision but acknowledging that in certain narrow circumstances "sharing of discovery may reduce litigation costs and, in some cases, promote the public

interest. It may make little sense to force litigants in different lawsuits to "reinvent the wheel" with their discovery efforts. [citation omitted]. Sharing reduces the "wasteful" and "unnecessary" duplication of discovery. *Jepson*, 30 F.3d at 861. Further, sharing may promote public health and safety as, for example, when attorneys share information about a harmful product or commercial practice").

Additionally, discovery sharing has evolved from the mere exchange of materials from one attorney to another to the practice today of selling confidential discovery information for a profit,³ and the rise of plaintiffs' litigation support groups creating databases of confidential discovery materials for open and ready dissemination to their paying or otherwise supporting members.⁴

Defendants should vigorously oppose plaintiffs' efforts to implement sharing agreements wherever and however possible. While many courts generally seem inclined to favor sharing agreements in the first instance, there are also many courts that share defendants' concerns about the dangers of such agreements. As discussed below, numerous courts have analyzed the legitimate interests set forth by both proponents and opponents of discovery sharing, and there are valid and strong arguments adopted by many courts in opposition to the entry of orders permitting sharing. The defense should continue to assert those arguments to oppose sharing on any level, and at the very least, where courts seem intent on permitting some measure of sharing, defendants should seek to tailor such sharing as narrowly as possible.

There is No Constitutional or Common Law Right to Discovery Materials

Contrary to arguments often set forth by plaintiffs, discovery sharing is not constitutionally protected under the First Amendment. *Reinhart v. Seattle Times Co.*, 98 Wash.2d 226, 236 (1982), *aff'd*, 467 U.S. 20 (1984). In the seminal case on this issue, upon striking a constitutional challenge to the entry of a protective order, the Supreme Court of Washington stated that "the effective administration of justice does not require dissemination beyond that which is needed for litigation of the case. It was the needs of the litigation and only those needs for which the courts adopted [Rule 26]...." *Id.* The United States Supreme Court affirmed this ruling. Thus, under *Reinhart*, the public has no absolute first amendment right of access to materials exchanged in pretrial discovery. *Id.*; *Cordis v. O'Shea*, 988 So.2d 1163, 1168 (Fla. Dist. Ct. App. 2008); *Steede v. General Motors, LLC*, No. 11-2351-STA-dkv, 2012 WL 2089761, *4 (W.D. Tenn. Jun. 8, 2012) (documents produced during discovery are not 'presumptively public'" [citation omitted]). Moreover, there is general agreement amongst the jurisdictions that there is no common law right of access to pretrial discovery materials. See Campbell, *supra*, at 804 [citations omitted].

³ Richard P. Campbell, *The Protective Order In Products Liability Litigation: Safeguard or Misnomer?* 31 B.C. L. Rev. 771, 822 (1990).

⁴ For example, there are plaintiffs' attorney groups whose sole focus is to amass an information and document database from discovery obtained in litigation to be utilized by their members in prosecuting claims. Members can only gain access to the database

on a pay-for-play basis where they have to provide information or documents in order to receive them. See, e.g., Lana A. Olson and Nikaa B. Jordan, *Attorney Information Exchange Group ("AIEG"): What It Is, What It Does, and How to Mitigate Its Effect*, DRI, Toxic Torts and Environmental Law Conference, March 2015, 269-275.

Further, at least one federal court, in response to an argument that sharing was necessary so that all parties litigating against a particular defendant “would receive ‘the appropriate and complete data in similarly situated cases[,]’” has held that there “was no need for the sharing provision” because “the Federal Rules already provide ‘that anything that is relevant must be turned over to counsel and to all the parties.’” *Haeger v. Goodyear Tire and Rubber Co.*, 906 F.Supp.2d 938, 943 (D. Ariz. 2012).

Sharing Provisions Do Not Promote Judicial Efficiency

“The primary rationale set forth in favor of allowing sharing is to increase litigation efficiency by allowing the sharing of information between participants in lawsuits involving the same facts and avoiding costly and time-consuming discovery.” *Byrd, supra*, at 865. Yet, proponents of this claimed benefit of discovery sharing often seek such sharing where there is no limitation to similar claims, known litigants, or even actual claims, making duplicative discovery all the more unlikely. Rather, they seek unfettered discretion to share the information, which creates more inefficiencies and side litigation than it eliminates. *See generally, Byrd; McKellips v. Kumho Tire Co., Inc.*, No. 13-cv-2393-JTM-TJJ, 2014 WL 3541726 (D. Kan. Jul. 17, 2014). In addition, if there is no provision for the return of confidential documents at the end of a litigation (and such a provision is clearly inconsistent with a sharing provision), “the court ostensibly retains jurisdiction to act

if someone violates the terms of the order[,]” which “calls for the court’s involvement in perpetuity.” *Byrd* at 867.

Sharing provisions “invoke several important interests. First, of course, is the producing party’s desire to keep its confidential information secret.” *Byrd* at 864. This is of paramount importance where trade secrets or other commercially sensitive information is involved, which is “an interest which must not be lightly disregarded.” *Id.* Indeed, courts and commentators have recognized the irreparable harm public dissemination of confidential information will cause to a corporate defendant and that “the more widely confidential documents are disseminated, it becomes both more likely that those documents will be released, and more difficult for the Court to enforce the terms of its protective order.” *Williams v. Taser Int’l, Inc.*, No. 1:06-CV-0051-RWS, 2006 WL 1835437 at *2 (N.D.Ga. Jun. 30, 2006); *see generally*, Dustin B. Benham, *Proportionality, Pretrial Confidentiality, and Discovery Sharing*, 71 Wash. & Lee L. Rev. 2181 (2014) at 2204 (proponent of sharing acknowledging that the potential for sensitive information reaching a defendant’s direct competitor increases with each individual disclosure).

Thus, instead of increasing efficiency, discovery sharing actually wastes time and judicial resources because defendants will most aggressively resist disclosure in discovery for fear of uncontrolled dissemination of their confidential information; thus opening the door to a “glut

of protective order litigation” in the courts. Campbell, *supra*, at 823.

Sharing Provisions Unfairly Benefit Plaintiffs

Courts have been loath to grant protective orders with “preemptive” sharing provisions where they allow plaintiffs to share information without narrowly limiting disclosure only to substantially similar cases,⁵ without requiring the requesting party to “identify any collateral proceedings,”⁶ or without any real judicial oversight. *Byrd* at 866-867; *see also Gil v. Ford Motor Co.*, No. 1:06CV122, 2007 WL 2580792, *4-6 (N.D.W.Va. Sept. 4, 2007). In rejecting a proposed “preemptive” sharing provision, one court described its significant concerns with such a provision as follows:

It would essentially allow discovery of Defendants’ designated confidential information by as-yet unnamed plaintiffs or potential plaintiffs in collateral litigation without any court supervision and without any opportunity for Defendants to object to the disclosure. Plaintiffs’ proposed sharing provision would give Plaintiffs’ counsel the sole discretion to decide which attorneys met the criteria for disclosure of Defendants’ confidential information. It does not require any advance notice be given to Defendants

of those being provided confidential information, or any opportunity for Defendants to object in advance of the disclosure.⁷

Courts furthermore have been concerned that a lack of judicial oversight where sharing provisions are concerned creates a situation where “the traditional protections for producing parties in the discovery process are eviscerated.” *Byrd* at 866. For example, in ordinary discovery proceedings, defendants may move to dismiss frivolous claims before discovery commences,⁸ or may object and seek protective orders where discovery “is so far afield” or irrelevant to the issues in the collateral suit.⁹ Yet, in circumstances where sharing provisions are sought, no such opportunity exists for a defendant even to attempt to protect widespread dissemination of its confidential information.

In addition, “[a]llowing this degree of sharing of confidential information may provide a mechanism for attorneys in states with narrower discovery laws to evade their state law discovery limitations by obtaining confidential information from” attorneys and courts with broader discovery provisions. *Cordis* at 1167. “While other states may preclude admission of that discovery later, the fact remains that counsel would have obtained what he or she could not otherwise obtain by using ... [a certain state’s] discovery

⁵ *See Byrd* at 865; *Gunson v. BMO Harris Bank, N.A.*, 300 F.R.D. 581, 584 (S.D. Fla. 2014).

⁶ *Byrd* at 865.

⁷ *McKellips* at *1.

⁸ *Byrd* at 866; *Bertetto v. Eon Labs, Inc.*, No. 06-1136 JCH/ACT, 2008 WL 2522571, * 2 (D. N. M. May 29,

2008); *see also Gunson* at 584 (“The Court will not permit the instant proceeding to be used as a back door to obtain discovery for use in other proceedings in which discovery has been stayed”).

⁹ *Byrd* at 866; *Bertetto* at *2.

law. The federal courts have recognized that: “federal discovery may not be used merely to subvert limitations on discovery in another proceeding.” *Id.* [citations omitted].

Thus, sharing provisions clearly provide unfair advantages to plaintiffs such as the opportunity for a head start in litigation based upon the work of others. Gary L. Wilson, *Seattle Times: What Effect on Discovery Sharing?* 1985 Wis. L. Rev. 1055, 1056-1059 (1985) (citing Arthurs, *Defendants Fight Back on Data Sharing*, *Legal Times*, July 16, 1984 at 1, col. 2.) Sharing provisions also provide plaintiffs’ lawyers the opportunity to use confidential information they would not otherwise be entitled to – for the purpose of fishing for ways to propagate litigation, perhaps of different varieties, against defendants. *Id.* (citing *Ward v. Ford*, 93 F.R.D. 579, 580 (D. Colo. 1982)) (discovery sharing was challenged upon the ground that it benefitted the plaintiffs’ bar – seminars given to the public on ways to sue defendant were based on information learned through discovery sharing).

Financial motivation from the sale or bartering of discovery materials also, unfortunately, presents the potential for attorneys, with the intent to learn as much sellable information as possible, to willingly cast a wider net in discovery than is necessary for the representation of their current clients. The United States Supreme Court has unequivocally stated that discovery requests purposed to gather information for use in proceedings other than the case at bar should be denied. *Oppenheimer Fund, Inc. v.*

Sanders, 437 U.S. 340, 352-53, n. 17 (1978). Furthermore, this practice potentially creates a conflict of interest between the plaintiff’s attorney’s own pecuniary interests and those of his or her existing clients, implicating the ethical considerations inherent when an attorney’s financial motivations are injected into the discovery process. See Campbell, *supra*, at n. 261 (“Although the A.B.A. Code of Professional Responsibility does not directly address the sale of discovery materials, the sale of such materials may raise doubts about a lawyer’s ability to exercise independent professional judgment as is required under Canon 5”).

Protective Order Modification – A Practical Alternative

As an alternative to sharing provisions with no procedural protections or judicial oversight, rather, where a non-party would be otherwise entitled to the protected discovery in a different case, that non-party has the option to seek a court-ordered modification of the protective order from the court presiding over the litigation from which the discovery originated. Robert Timothy Regan, Federal Judicial Center, *Confidential Discovery: A Pocket Guide on Protective Orders* (2012) at 12-13, citing *Foltz v. State Farm Mut. Auto Ins. Co.*, 331 F.3d 1122, 1130 (9th Cir. 2003); *Griffith v. Univ. Hosp., L.L.C.*, 249 F.3d 658, 661 (7th Cir. 2001); *Beckman Indus., Inc. v. Int’l Ins. Co.*, 966 F.2d 470, 472 (9th Cir. 1992). As such, many courts have held that “sharing should be determined on ‘an as-needed or case-by-case basis during the course of the litigation.”” *Byrd* at 866 (quoting *McKellips* at *2). In its

decision to allow the modification, the court considers the original parties' reliance interests on the protections accorded therein¹⁰ and must weigh that against the potential for litigation efficiency. As the *Foltz* court noted, "the collateral litigant must demonstrate the relevance of the protected discovery to the collateral proceedings and its general discoverability therein.... Such relevance hinges 'on the degree of overlap in facts, parties, and issues between the suit covered by the protective order and the collateral proceedings.'" *Foltz* at 1132 [citations omitted].

As illustrated above, the defense bar should fight the use of sharing provisions to the greatest extent possible to protect the privacy and pecuniary interests of our clients. Sharing provisions promote judicial inefficiency, do not protect the legitimate privacy interests of defendants, and disproportionately favor the interests of the Plaintiffs' Bar. Should the practice of wide, unmonitored discovery sharing continue, the overall result will be a proliferation of damaging publicity and

lawsuits unjustly based upon confidential information plaintiffs should not have gained or had access to in the first place. The scope of potential damage to defendants is immeasurable, and unjustly outweighed by the unfair advantages reaped by plaintiffs. Rather than permitting preemptive sharing, defendants should push for the requirement that collateral litigants, instead, seek modifications to protective orders as discussed above. However, to the extent sharing provisions must exist, defense attorneys should absolutely insure that the provisions are as narrowly tailored as possible requiring at a minimum: similarity in claims and parties; identifiable litigants; notice to defendants; and a reasonable opportunity to object to the disclosure.

¹⁰ *Byrd* at 866; *Regan*, at 13.

Past Committee Newsletters

Visit the Committee's newsletter archive online at www.iadclaw.org to read other articles published by the Committee. Prior articles include:

MAY 2015

Satellite Witnesses: Can Corporate Witnesses be Required to Testify Live From Across the Country?
Sherry Knutson and Michelle Ramirez

Self-Driving Technology and Autonomous Vehicles: A Whole New World for Potential Product Liability Discussion
Roy Alan Cohen

APRIL 2015

Watts v. Medicis Pharmaceutical Corporation – Trend or Outlier? Why This Case Should Remain on the Outskirts
Tonya Newman and Valerie Raedy

Alabama Supreme Court Upholds Landmark Ruling that Brand-Name Drug Manufacturers Can be Held Liable for Injuries Caused by Generic Drugs
Carol P. Michel and Brannon J. Arnold

MARCH 2015

Comcast v. Berhrend: Was the Optimism Warranted?
Kelly Anne Luther

FEBRUARY 2015

Legal Issues for the Product Liability Blogger
Jeffrey R. Lilly and Bradley B. Bush

A Primer on Product Recalls
Scott Kozak and Casey Housley

DECEMBER 2014

Alternative Approaches to Alternative Design: Understanding the Reasonable Alternative Design Requirement and Its Different Applications
Alex Purvis and Simon Bailey

NOVEMBER 2014

Expert Testimony that Contradicts Plaintiff's Testimony is Admissible in the Sixth Circuit
Jim Doran and Jackie Garfield

OCTOBER 2014

The Application of CAFA's Mass Action Provision to Multi-Plaintiff Products Liability Cases
Tamar B. Kelber and Daniel A. Spira

SEPTEMBER 2014

A Twist on Component Supplier Liability in Medical Device Cases
Sarah Grider Cronan and Jessie Zeigler

An Overview of the Legal Standard Regarding Product Liability Design Defect Claims and a Fifty State Survey on the Applicable Law in Each Jurisdiction
Mike McWilliams and Margaret Smith