STATEMENT BEFORE THE HOUSE JUDICIARY SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

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REGARDING H.R. 1508
“SUNSHINE IN LITIGATION ACT OF 2009"

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Having spent over twenty years of my career handling products liability cases across this country, I am very familiar with the human costs resulting from secrecy in litigation. Literally, tens of thousands of Americans, if not hundreds of thousands, have been killed or seriously injured by defective products that manufacturers are aware of, but the public is not. I have struggled against secrecy in legal proceedings in both state and federal courts for over two decades, for the most part unsuccessfully because of the way in which the legal system deals with manufacturers' internal documents that disclose a product's defect and when the manufacturer learned of the defect.

The root of the problem is as protective orders or confidentiality agreements demanded by manufacturers and required or approved by trial judges. Like many lawyers who specialize in products liability, I routinely oppose any protective order or confidentiality agreement because in my experience they are universally abused by manufacturers. When you sue a manufacturer and request records they insist on a protective order before they produce any internal documents that they assert are trade secret. This position makes sense on its face. It's not fair for, say Michelin Tire to disclose information about their manufacturing that would benefit Goodyear Tire or Firestone or some other competitor.

Unfortunately, in the real world, manufacturers use this protection to cover all documents, including documents that no other manufacturer would want, or need to use to a competitive advantage in producing a product. Nonetheless, in my experience federal judges, like state judges, routinely enter protective orders requested by the manufacturer over my objections.

I have heard it explained that some judges do this because they want to expedite the process and they don't have the time or the energy to review thousands of documents to determine what should be protected and what's not. So they enter a protective order to enable the plaintiffs' lawyers to obtain the documents expeditiously, and then put the burden on them to come back and challenge what should and should not be protected. The fallacy of this is, after I receive and review documents I have challenged protective orders across this country in federal courts and I have never won, despite the fact that many of the documents on their face are clearly not trade secret or provide any information to a competitor that would give them an advantage in the production of products.

For the most part, the documents merely show the defect in the product, the fact that the manufacturer knew about the defect, and often times that they refused to correct the defect because they did not want to spend the money.

I should note, it is not just the entry of the protective order that I find offensive and against the public interest. It is the fact that judges routinely accept protective orders drafted by the manufacturers which are onerous and unduly burdensome on their face. They almost never accept compromise portions that we suggest that would at least make the protective orders less burdensome.

To give you an example of the type of document I'm talking about. I have brought with me a document from a recent case in federal court, *Bradley v. Cooper Tire*, in which the court entered a protective order, refused our request to have documents taken out from under the order which we asserted should never have been protected in the first place. We proceeded to trial and several of these documents, although heavily redacted, were placed into evidence in open court.

After the trial, the tire manufacturer, Cooper Tire, tried to claw back the documents and have them sealed again. We argued vigorously that this would be against basic principles of American jurisprudence. Evidence that comes in in open court in this country is part of the public record and should not be suppressed or hidden. The judge agreed with us, so I have a portion of one of the documents with me, the type of document that I'm referring to.

As you can see, this document reflects that the tire manufacturer knew about a safety component for their tires and elected not to put it in because of cost considerations. The safety component they're talking about, the belt edge gum strip, is the same safety component that Firestone reduced in their tires on Explorers. This was one of the significant design defects that led to the biggest recall of tires in American history.

Firestone reduced the size of the wedge. This manufacturer doesn't even have a wedge, and they know that it reduces tread belt separations, but this document discloses they have elected not to put this safety component in for cost considerations.

Now, why should that be protected? The public should know that. The public should know that there is a tire manufacturer who doesn't put in a basic safety component in order to save money, and if you buy their tires you are at an increased risk. But that is hidden from the public, and the only reason this portion of this document is made available is because we used it in open court and the manufacturer failed to suppress it in the courtroom, even though it had been put under protection for several years prior to that. This document is still wrongfully under protection across the country in state and federal courts.

Let me mention briefly the redaction. Companies also will block out portions of documents so that you do not know what they contain, even after they get a protective order. Courts routinely allow this. Even though they have a protective order which protects their documents, they do not give you the basic information that you need in order to determine the components of the products.

Finally, I would note that I have extensive experience with Sunshine in Litigation because the State of Florida has a Sunshine in Litigation Act very similar to this proposal that is before the Congress. It works well and helps overcome the problem of inappropriate protective orders. Although it does not cure the problem, it is a small step in the right direction.

Secrecy in the courtroom has resulted in unnecessary deaths and injuries across this country. From my perspective, secrecy kills and it is time to move toward an end to secrecy in American legal proceedings.

BACKGROUND

Anyone who has ever handled a products liability lawsuit is familiar with the onerous protective orders insisted on by manufacturers and routinely granted by state and federal courts across this country. Virtually every state affords statutory protection to manufacturers' trade secrets disclosed in litigation. It is appropriate that manufacturers' bona fide trade secrets produced in litigation not be disclosed to their competitors. The problem that has arisen over the past several decades is not the use of trade secret protection, but its widespread abuse by manufacturers.

Typically, in any products liability case prior to the production of any internal company documents, the manufacturer insists on draconian protective orders, the purpose of which is not to protect their trade secrets from competitors but to insure that courts and lawyers handling other similar cases do not learn of the defects in the product reflected in the manufacturers' records.

In order to intimidate me and to retaliate against me for sharing non-protected information about internal documents, manufacturers have resulted to some extreme measures. In one instance, a manufacturer wrongfully accused me of violation of a protective order in a case in which I was not even involved. They served a rule to show cause summons on me immediately before closing argument in another case against the company in an obvious attempt to distract me. When the hearing was finally held on the other side of the country, the court ruled in my favor. On another occasion, a different manufacturer accused me of violation of a protective order and attempted to have me held in contempt at a hearing in California two days before I started a trial against them in

Florida. I was required to fly across the country to defend myself just before the trial started. Again, the court ruled in my favor.

On five other occasions, manufacturers have wrongfully accused me of violating protective orders, requiring me to on some occasions retain counsel to represent me in the defense of spurious claims in state and federal courts. In every case, the courts have ruled in my favor and found absolutely no wrongdoing. At the request of a manufacturer, I was also placed under a gag order by a judge in New York prohibiting me from discussing a manufacturers' products, including products other than the one involved in that particular case.

I have been sued by a tire company for some hundreds of millions of dollars as a result of my having conducted discovery of a former employee who burned company documents that were ordered to be produced to me by the federal court. The tire company sued me falsely alleging a conspiracy to breach what I believe is an illegal contract requiring the employee not to disclose what she did at the company in exchange for an agreement not to criminally prosecute her. The trial court granted summary judgment in my favor twice but the case was reinstated by the appellate court in decisions that were contrary to the evidence and the law as explained to me by Mississippi lawyers. The decisions of the appellate court have been characterized to me as bizarre. Fortunately, a third appeal was not necessary as the case was resolved at commencement of trial and all counts against me were dismissed with prejudice.

All of this has resulted from me widely sharing non-protected information and fighting protective orders.

Unfortunately, most trial courts are inclined to enter protective orders suggested by manufacturers and then to allow them to place virtually anything under the protective order, regardless of whether it is a trade secret or merely admissions against interest. In a recent decision by the New York Supreme Court, a manufacturer's proposed protective order was severely criticized by the court for what has become a typical abuse. *Mann v. Mann*, 816 N.Y. S.2d 45. The court noted that the manufacturer wrongfully designated as confidential pleadings, bills of particular for similar litigation, customer complaints, records of returns involving similar defects, brand names of the products produced, sources of parts and materials, advertising materials, materials on their face that showed they had been published to the general public, and documents submitted to the government without request for confidential treatment. *Id.* at 10-11. All of these "wrongfully designated" documents have been and are continuing to be designated as confidential by the manufacturer, notwithstanding this opinion.

The court also addressed some of the draconian aspects of the proposed protective order in which the manufacturer included the threat of a ten-year jail sentence, prohibition of contacts with anyone having consulted with a competitor in the past two years, and preventing the plaintiffs from seeing the materials.

Recently, I had an opportunity to attend a Senate Judiciary Committee hearing chaired by Senator Herb Kohl from Wisconsin. Senator Kohl has been attempting for many years to introduce and pass a federal statute, precluding secrecy in federal courts. The State of Florida has passed such legislation, the "Sunshine in Litigation Act" at Florida Statutes § 69.081, which provides an avenue for attorneys, public advocacy groups, the

media, or private citizens to attack inappropriate protective orders in order to disclose hazardous products in the marketplace.

The Florida Act defines public hazard as "an instrumentality including, but not limited to any device, instrument, person, procedure, product or condition of a device, instrument, person, procedure, or product that has caused and is likely to cause injury." F.S. § 69.081(2). In my experience, this would apply to most defective products that result in litigation.

The statute goes on to provide that except pursuant to this section no court shall enter an order or judgment which has the purpose of concealing a public hazard or any information concerning a public hazard, nor shall the court enter an order or judgment which has the purpose or effect of concealing any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard. Any portion of an agreement or contract which has a purpose or effect of concealing public hazard, any information concerning a public hazard or any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard is void and contrary to public policy and may not be enforced. F.S. §69.081(4) and (5).

The Act further provides that any substantially affected person, including but not limited to representatives of the news media, has standing to contest an order, judgment or agreement or contract that violates this section and upon motion and good cause shown by a party attempting to prevent disclosure of information materials which have not been previously disclosed, including but not limited to alleged trade secret, the court shall examine the disputed information or materials *in camera*. If the court finds the information

or materials or portions thereof consist of information concerning a public hazard or information which may be useful to members of the public in protecting themselves from injury which may result in a public hazard, the court shall allow disclosure of the information or materials. F.S. §69.081(6) and (7).

Unfortunately, there are very few reported cases interpreting or applying the Act. One significant case is *Jones v. Goodyear* that went to the Florida Supreme Court twice before the district court's opinion applying the Sunshine in Litigation Act was finally affirmed. This process took approximately three years as the manufacturer went to extraordinary measures to delay disclosure of the documents.

Subsequently, several circuit courts in Florida have relied on the *Jones* decision to open documents to the public. One decision appealed to the District Court of Appeal and was affirmed per curiam. *Vaughan v. Dunlop Tire Corp.*, 5th Judicial Circuit, Marion County, Florida, Case No.: 01-2089-CA-B

During the Senate hearing, I was surprised to hear several witnesses criticize confidential settlements as the mechanism agreed to by plaintiffs' counsel to protect the secret wrong-doing of manufacturers. In over 30 years of practice, with over 20 years in products liability litigation, I am not aware of such confidential settlement agreement. Routinely, confidential settlement agreements protect the amount of the settlement, which benefits both the defendant and the plaintiff. The defendant is protected from media attention which focuses on any large verdict or settlement and the victim is protected from the "lottery syndrome" that can often result in unscrupulous relatives and others attempting to descend on the plaintiff in search for a handout.

Settlement agreements should not affect the manufacturers' self-incriminating documents. These documents are already under the protective order entered before any documents are even provided to plaintiff and are not in any way affected by settlement agreements. Settlement agreements do not result in continuing deaths or injuries, protective orders do.

In my experience across the country, most judges are very reluctant to remove any document or deposition from protected status once so-designated by the defendant. Often, their rationale is something to the effect of, "You have all the information you need to represent your client. You are not here representing society at large."

I submit it is incumbent upon all lawyers to object vigorously to manufacturers' boilerplate protective orders, to insist on sharing with other lawyers across the country who have cases against the same manufacturer, and to vigorously protest inclusion of documents under a protective order that are no more than dirty laundry.

It has been my experience that clients strongly support these efforts as one of their prime motivations for litigation after a loved one has been severely injured or killed from a defective product is to prevent others from suffering the same fate. While our ethical obligation is to our client to proceed with their case without delay, this obligation often presents a conflict with efforts to vigorously fight protective orders which can substantially delay their lawsuit. In situations where they already have these protected documents it is not in their interest to delay their trial to fight protective orders and manufacturers are aware of this and take advantage of that fact. Nonetheless, lawyers also have a moral obligation to the society in which we live and prosper and whenever practical, with client approval, we should object to protective orders which hide product defects.

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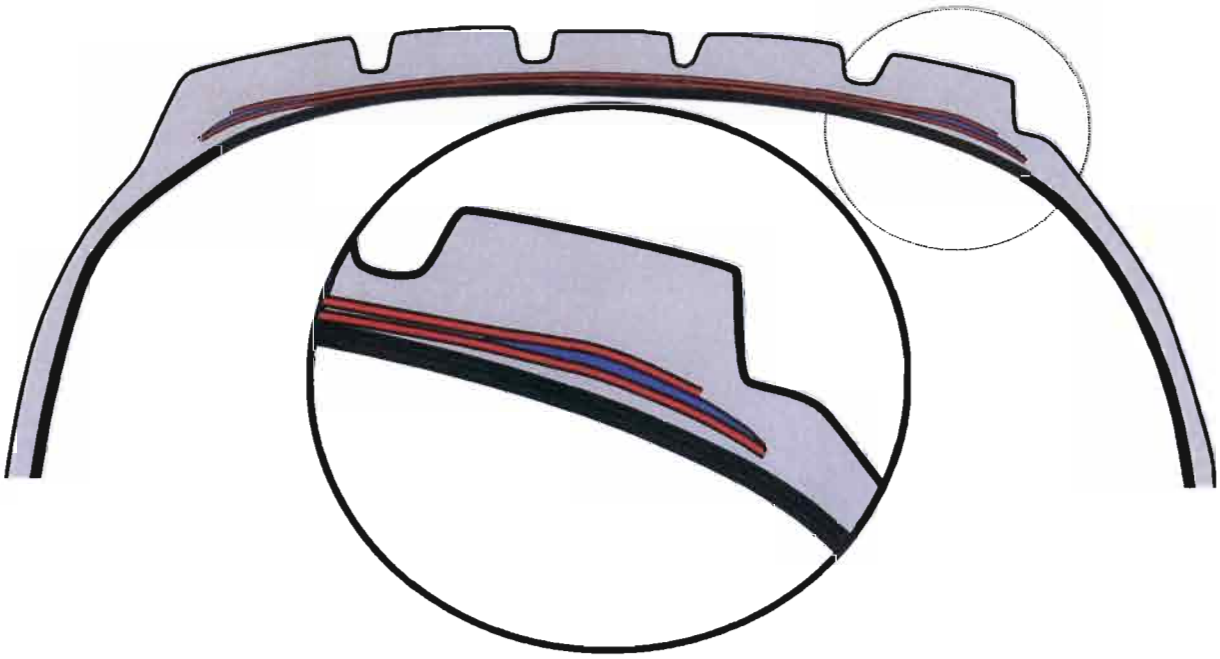

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