# Confidentiality clauses: sunshine in litigation

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*Around the world we notice the increasing use by corporate defendants, of 'confidentiality agreements', ie: damages settlements including a clause preventing the plaintiff from revealing the settlement to anyone (usually) other than his immediate family and legal advisors. Is there a public interest case for prohibiting confidentiality clauses in agreements altogether and, if so, how might this be done?*

The public interest case for prohibition is based on the argument that the public has a fundamental right to know about anything which might be a public hazard. Regardless of the scope of any Freedom of Information scheme, publicity surrounding compensation claims for injury may be an important source of information for members of the public who wish to protect themselves from hazardous products; parents who may be concerned about dangerous toys, or patients who may be concerned about the side effects of a drug.

Confidentiality agreements usually arise in cases where a corporate defendant has some continuing commercial interest to protect - for example an airline wishing to prevent ongoing bad publicity following an air crash some years previously; or the manufacturer of a defective product seeking to discourage further potential claimants.

Whether prohibition of confidentiality agreements is in the public interest depends, on what exactly it is that the confidentiality agreement is seeking to conceal. Confidentiality agreements come in many different shapes and forms; they may be all embracing (ie. confidentiality about the fact of settlement, and the amount of damages, for all time) or they may be limited in various ways. We have entered into confidentiality agreements with defendants whereby the plaintiff has agreed not to reveal the fact of settlement, but for a limited period only. There have been others where confidentiality only relates to the amount of damages, or where the very fact that a settlement exists at all cannot be revealed. It is possible to argue a strong public interest case for prohibiting confidentiality agreements where the fact of the settlement itself is what is concealed because this is often the most important source of public information about the existence of the hazard.

Many routine product liability cases - for example involving unsafe toys or household equipment - fall into this category. In such cases it is often the publicity which attaches to a settlement of the damages claim which means that the wider public gets to learn of the hazard. The position may be different in the settlements of multi-party claims like high profile marine or aviation disasters: the fact of the disaster and quite probably its causes - will already be well known to the public, because of publicity surrounding the disaster and the public inquiries and inquests which follow. But even in these cases the negligent defendants benefit by insisting on secrecy regarding a settlement several years after the accident itself - it certainly puts a lid on the cases - but why should defendants be able to silence plaintiffs in this way?

### Is there a case for prohibiting confidentiality about the amount of damages?

At first glance the case for prohibition would appear to be weaker here since what is important is that the public knows of the existence of the hazard and of the manufacturer's acceptance of liability by payment of compensation. On this argument the amount of compensation is immaterial. Arguably, however, the amount of damages paid may be indicative, in broad terms, of the severity of the injury suffered and thus, arguably, the seriousness of the hazard - in which case there may be a public interest argument that the public should know of the amount of compensation as well. The argument is of course strong in a jurisdiction where punitive damages may be awarded.

### What of agreements where the confidentiality is time limited and will thus expire after a certain period?

An example from this firm's experience may illustrate the dilemmas which can arise. We have been acting for victims of a transport disaster which involved several deaths and injuries. Several companies were potentially responsible for the disaster and all were prosecuted by the Health & Safety Executive. However preparation of the prosecution case took a matter of years and in that period no definitive information on liability was publicly available. Because there were several defendants potentially involved it would have been difficult to win any contested interim payment hearing against any one of these defendants in the two years or so before the criminal prosecution. With the limited information publicly available we could not have satisfied a Judge that any one single defendant had definitive responsibility for the accident.

Without the confidentiality agreement (which was time limited and thus lapsed on completion of the criminal proceedings) the defendants probably would not have agreed to the interim payments which were urgently needed by the plaintiff. In fact, in this case, the public 'right to know' about the potential hazard was probably not prejudiced since both the original accident itself and the criminal trial verdict received a good deal of publicity. However this case illustrates that an outright, blanket ban on confidentiality agreements may not always be in the interest of injured plaintiffs and sometimes their greater needs as injured victims have to be balanced against the wider public right to know.

It should be clear, then, that the strength of the public interest argument for prohibiting the confidentiality agreement will vary from case to case and will depend precisely on what is concealed, and for how long.

**Can these dilemmas be addressed by legislation?**

An interesting solution is to be found in Florida's 'Sunshine in Litigation' statute which was eventually passed by the Florida legislature after several years lobbying by the Academy of Florida Trial Lawyers. This statute states that:

*'any portion of an agreement or contract which has the purpose or effect of concealing a public hazard, any information concerning a public hazard, or any information which may be useful for members of the public in protecting themselves from injury which may result from the public hazard, is void, contrary to public policy, and may not be enforced.'*

The statute also prohibits any court from entering an order or judgment 'which has the purpose or effect of concealing a public hazard or any information concerning a public hazard or 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'.

Trade secrets (defined) 'which are not pertinent to public hazards' are excluded from the provisions of the statute. The statute also allows 'any substantially affected person', including but not limited to representatives of news media to contest an order, judgment, agreement or contract that violates the statute.

The wording of this statute clearly enables a court to take a public interest view in each particular case, on whether the confidentiality agreement concerns important information about a public hazard coming into the public domain. But if information about a hazard itself is already widely known, a confidentiality agreement may survive this statute since by definition such an agreement cannot have 'the purpose or effect of concealing a public hazard' (since that hazard is already public knowledge).

There are considerable attractions to such an approach. It is better than a blanket 'ban' on all confidentiality agreements since there may be occasions (albeit rare) when such agreements are to the advantage of injured plaintiffs but do not materially affect public knowledge of a hazard.

Plainly the way such a statute would be enforced by judges approving consent orders and settlements will determine how useful it may be in allowing into the public domain information about settlements currently kept secret. Of course it is possible that a brave plaintiff may refuse to accept a settlement on the grounds that there is a confidentiality clause (even if all other aspects of the settlement are agreeable) - but most individuals cannot afford the luxury of such principles or the cost of determining the matter.

Under the present law the only way to alert the public to such hazards is to make a lot of noise with the aid of the media - especially before cases are issued and before the courts.

This is a topical issue. It seems from recent reports of the tobacco legislation that there are judges who will forbid those representing plaintiffs to discuss matters which are the subject of litigation, with the media while the case is ongoing. If any of these cases should succeed, these are exactly the types of cases where confidentiality clauses are likely to be enforced as part of any settlement agreement. It is precisely this sort of topical case which would benefit from the Sunshine in Litigation (Australia & UK) Act 1998! ■

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