

CENTER FOR JUSTICE
& DEMOCRACY
NEWS

Dear Reader,

We doubt anyone needs reminding of the work that lies ahead for those of us fighting to protect the civil justice system. But just in case, here's a choice little quote that Dubya delivered during the campaign:

"Once elected [Governor], we passed some of the strongest legal reforms in America. ... If I am fortunate enough to be your president, that will be my legacy."

At the Center for Justice & Democracy, we're committed to working full-time on behalf of our civil justice system. We produce groundbreaking research and studies, like our latest report *Lifesavers: CJ&D's Guide To Lawsuits That Protect Us All*.

We're expanding our outreach effort with organizations, journalists and policymakers around the country, and we're reaching audiences that have never been tapped before. Following publication of our White Paper *Not in My Backyard: The Hypocrites of "Tort Reform,"* we heard from the head of public relations at Rent-A-Wreck, underdog of the car rental industry, who said, "[O]ur thanks for your fine organization's attention and concern, and your continuing efforts on behalf of all consumers and 'little guys.'"

(continued on page 2)

IN THIS ISSUE: FOCUS ON SECRECY

Ford/Firestone and the Legacy of Secret Settlements

Sometimes it takes a national tragedy to change things for the better. So it may be true for the devastating crashes involving the Ford Explorer and Bridgestone/Firestone tires.

Lawmakers around the country are taking a second look at how, for years, these companies were able to keep critical safety information about tire crashes from reaching the public and government regulators. They are finding that demands for confidentiality by Ford and Firestone, through protective orders and confidential settle-

ments, are largely responsible.

In high-stakes product liability litigation, like Ford/Firestone cases, manufacturers routinely seek protective orders from courts so that documents stay hidden from the public, government regulators and other attorneys. Although there should be a strong presumption that documents filed with a court are public (some courts have even ruled that this is a constitutional requirement), discovery documents are often not filed with a court and judges often grant blanket protective orders on "trade secret" grounds, hop-

ing to avoid extended fights over which documents a defendant must disclose.

Once a case has ended, companies often ask judges to seal the case record. And if they settle, companies virtually always demand confidentiality from the injured consumer and his or her lawyer. This creates terrible pressure on victims, who may be in need of medical care, disabled or perhaps in pain and unable to work, to accept a monetary settlement on the company's terms. It is a dilemma perhaps best described by

(continued on page 3)

Fighting Back Against Secrecy

In November 1999, 79-year-old Mary Penturff was shopping at a California Home Depot store when a forklift operator knocked over some lumber and other merchandise stacked several feet above her. Mary was crushed to death in front of her daughter. When the family sued, they discovered that Home Depot knew of similar accidents, and that the company had settled numerous cases confidentially.

But Penturff's daughters refused a confidential deal.

According to the daughters' attorney, Stephen C. Rasak, "My clients wanted to ensure

that their mother's death was not some futile and senseless event, but rather that it might keep other families from having to go through this kind of horror. ... They were quite adamant about not agreeing to a confidential settlement or protective order." The company eventually settled for \$900,000 without a confidentiality agreement (43 *ATLA Law Reporter* 378, 409, December 2000).

Like Mary Penturff's daughters, some plaintiffs and lawyers are starting to fight back against confidentiality demands by corporate defen-

dants. The release of documents relating to Ford/Firestone accidents was made a key part of settlement negotiations between the companies and Donna Bailey, a Texas woman paralyzed after a Ford/Firestone crash. According to Bailey's lawyer, Tab Turner, the settlement was conditioned on the auto companies' release of "all materials submitted to the NHTSA regardless of whether they were submitted as 'confidential,' and all materials relating to their investigation of tires and

(continued on page 4)



Dear Reader (continued)

We at CJ&D are working round-the-clock to expose unscrupulous attacks by special interests on judges, juries, injured consumers and the attorneys who represent them.

CJ&D's membership/subscription program is the most important way for you to support our vital work, and one of the most effective ways for you to be at the forefront of the fight to protect the civil justice system. It is also the only way to continue receiving our cutting-edge materials. So we hope you'll join us. (Information about joining this program can be found on page 4).

With your help, we know we can win this fight.

Sincerely,
Joanne Doroshow
Executive Director

In Pursuit of Justice... Maria S. Diamond

James Brown might be called the hardest working man in show business, but **Maria S. Diamond** just may hold the crown as the hardest working trial lawyer in Washington State.

Maria, who also happens to be an R&B aficionado, is one of the state's foremost experts in the areas of insurance and medical negligence litigation. She has been the lead attorney in landmark victories for consumers before the Washington State Supreme Court. She has represented injured victims in major cases involving defective medical products and dangerous pharmaceuticals. Her practice also emphasizes automobile and maritime insurance cases, and she is a frequent lecturer and prolific writer in the areas of personal injury and insurance.

As if that weren't enough, this year Maria holds the

demanding job of President of the Washington State Trial Lawyers Association (WSTLA). Colleagues say her contributions and dedication are consistently beyond the call of duty. At WSTLA, Maria has been a member of the Board of Governors since 1992. In 1994, she received the organization's prestigious President's Award.

Since her admission to the bar in 1983, Maria has practiced at the Seattle firm of **Levinson, Friedman, Vhugen, Duggan & Bland**, one of the oldest continuing law firms in Washington State. A *cum laude* graduate of the University of Washington and the University of Puget Sound School of Law, Maria also has served on the Washington State Bar Association's Office of Disciplinary Counsel and Continuing Legal Education Task Force. Most recently, she has served on the Washington State Jury Com-

mission.

With all the demands on her time, no one would expect Maria to have an extra ounce of energy for the Center for Justice & Democracy. Yet she has been one of our most consistently supportive fans. Maria frequently mentions CJ&D's work and cites our newest publications in the President's Column that she writes for *Trial News*, WSTLA's monthly publication. She says, "The Center for Justice & Democracy is doing groundbreaking research that is redefining the 'tort reform' debate. Outstanding issue papers and reports like *The CALA Files: The Secret Campaign by Big Tobacco and Other Major Industries to Take Away Your Rights* are gradually but profoundly changing the way that the media and public view civil justice issues."

We are tremendously honored to have her support.

Confidential Settlements and Protective Orders — State Actions

Arizona, Arkansas, California, Illinois, Massachusetts, Rhode Island and Texas are among a growing number of states considering new anti-secrecy legislation in response to the Ford/Firestone tragedy. Most bills would establish a strong presumption of openness for any health- and safety-related information, whether contained in court filings or settlement agreements. Some also cover discovery documents.

Some bills also allow injured plaintiffs to contact government regulators about hazards without fear of violating the terms of a confidentiality agreement.

Massachusetts and Rhode Island's bills go a step further by allowing third parties, such as representatives of federal, state and local regulatory or governmental bodies and media outlets, to challenge any final protective order. Illinois has a similar provision in two bills. As *Impact* went to press, both bills had passed in the Illinois House Judiciary Committee.

In Texas, a bill has been introduced that would, among other things, allow victims in products liability cases to recover damages from a company that hides or destroys documents, or enters into any agreement "not to reveal information regarding the risk, claim or incident or any act or omission" of the company. The bill would also impose damages on a company that fails to reveal a product defect to the public on a timely basis or fails to disclose information to a governmental agency, and makes it a criminal offense to conceal certain health and safety information.

On a related note, in response to the Ford/Firestone situation, Georgia lawmakers are considering legislation that compels every tire manufacturer, distributor, wholesaler, retailer or seller who does business in the state to publicly disclose the national adjustment rates of their tires.

Ford/Firestone and the Legacy of Secret Settlements continued...

lawyers in a case against manufacturers of the sometimes-fatal arthritis drug, Zomax, who were forced to sign confidential settlements in the 1980s. They told the *Washington Post*, "The problem is that they have a gun to our head ... They paid my clients a ton of money for me to shut up."

Confidential settlements and protective orders drive up the transaction costs of litigation by forcing consumers injured by the same product to build their case against a company from scratch.

They also cost lives. History is replete with examples, from the asbestos industry's insistence on confidentiality about asbestosis as far back as the 1930s, to more recent cover-ups by the pharmaceutical, auto, toy, health care and tobacco industries. Many examples are documented in reports from the Coalition for Consumer Rights and Public Citizen. See, e.g., <http://www.coalitionforconsumerrights.org/studies/secrets.htm>.

For example, information about Ford/Firestone stayed secret for years — until eventually some of it leaked. In time, the information found its way to a Houston television station, and the gradual public outcry, which followed this and other news stories, finally caused the National Highway Transportation and Safety Administration (NHTSA) to act. "The litigation is obviously what triggered the news story and the news story in turn triggered NHTSA," said plaintiffs' lawyer Tab Turner.

"The problem is that they have a gun to our head. ... They paid my clients a ton of money for me to shut up."

Turner's client, Donna Bailey, a Texas woman paralyzed from the waist down in a Ford/Firestone accident,

reached a multi-million-dollar out-of-court settlement with the companies in early January 2001. According to Turner, before the companies agreed to settle, he was able to release documents "in response to misstatements being made by Ford in the media [and] the media began to better understand the truth surrounding the entire situation. ... Had protective orders been in place, we never could have released the documents."

To date, sixteen states have enacted some legislation or court rules attempting to prevent abusive use of protective orders. But many rules are ineffective and easy for companies to overcome. Take New York's rules, for example, which establish a presumption of open access that can be overcome only for "good cause." Yet these rules are so weak that in February 2001, a New York judge was able to issue an extremely broad protective order in litigation against Warner Lam-

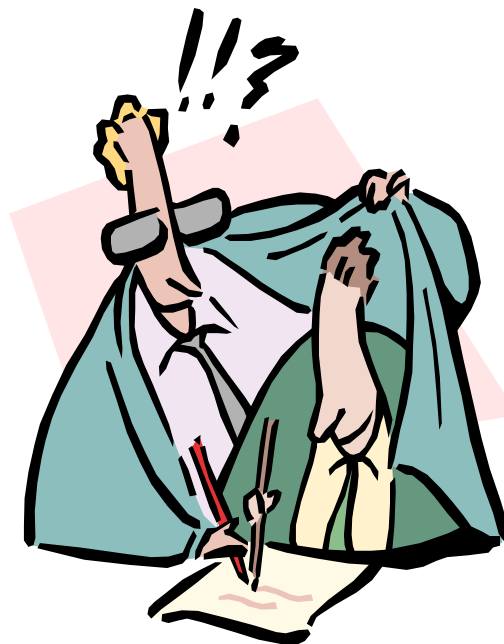
bert involving Rezulin, a diabetes drug associated with liver damage and death. The order gave the company wide discretion to apply a confidential designation to any document in the case.

Even in Florida, which has one of the strongest "Sunshine in Litigation" laws in the country, Firestone was able to obtain a protective order in September 1999 shielding documents it had disclosed during discovery. It took the state's Attorney General, Bob Butterworth, to step in and obtain a court order dissolving the protective order and releasing the documents.

New efforts are underway in a number of states to enact or strengthen laws, to make it far more difficult for companies to exact protective orders from courts or confidential settlements from consumers that keep health and safety information from reaching regulators or the public. Ironically, it may be Ford and Firestone's greatest legacy.

ANTI-SECRECY PACKETS

If you would like our **Anti-Secrecy** packet, containing model anti-secrecy legislation, news articles and additional background information on the secrecy issue, contact Emily Gottlieb by phone, 212.267.2801, e-mail, emily@centerjd.org, or regular mail, P.O. Box 3326, Church Street Station, New York, NY 10008-3326.



CENTER FOR JUSTICE & DEMOCRACY

P.O. Box 3326
Church Street Station
New York, NY 10008-3326
Phone: 212.267.2801
Fax: 212.764.4298
E-mail: centerjd@centerjd.org
Web: centerjd.org

IMPACT

Editor: Liz Carey
Contributors:
Joanne Doroshov
Emily Gottlieb

© Copyright 2001 Center for Justice & Democracy. All rights reserved.

Fighting Back Against Secrecy continued...

vehicles involved in these incidents.”

For years, consumer groups and the media have fought secrecy agreements and protective orders that have hidden critical safety information. Both Public Citizen and Trial Lawyers for Public Justice (TLPJ) frequently challenge secrecy orders. Twelve years ago, TLPJ developed Project Access, its campaign against what it calls “unnecessary secrecy in the courts.” In one of the group’s latest projects, TLPJ, along with Consumers for Auto Reliability, is seeking public access to documents and testimony relating to unsafe Goodyear light truck tires, which are under seal in a New

Jersey case.

The media has become particularly active in several Ford/Firestone cases. The *Washington Post*, *Los Angeles Times*, *Chicago Tribune* and other media outlets have recently won some important court rulings dealing with the unsealing of Ford/Firestone records. In September 2000, a Georgia federal district court ordered the release of Bridgestone/Firestone documents sealed during a 1997 suit against the tire company. The case is on appeal before the 11th Circuit. Media outlets also won a favorable intervention ruling from the Indiana federal district court that now has more than 200 consolidated

Ford/Firestone cases. Among other things, the press argued that Firestone was denying reporters access to Firestone’s warehouse of discovery materials, commonly known at the “reading room.”

In addition to case intervention, the Newspaper Association of America and numerous major media outlets recently filed comments with the Judicial Conference of the United States on a case management proposal being developed to provide public access to electronic files through the Internet. The media groups expressed strong opposition to several proposed policy options that would limit public access to records, including creating limited

“public” court files that would be different from the complete court record.

Consumer groups and the media have certainly made important strides in the fight to uncover critical health and safety information from companies that use protective orders and confidential settlements to conceal information. For injured plaintiffs, fighting court secrecy can take enormous courage and determination. Ultimately, stronger “Sunshine in Litigation” laws are needed to eliminate the obstacles that hinder government agencies, lawyers and the public from learning about hazardous products and practices that have been the subject of major litigation.

MEMBERSHIPS / SUBSCRIPTIONS

JOIN CJ&D

CJ&D’s materials are up-to-the-minute, thoroughly researched and topical. There is nothing like them anywhere. But starting this Spring, only paying subscribers or members will have access to them. With the civil justice system under attack, you can’t afford to be left out. Become a CJ&D member/subscriber and stay at the forefront of the fight against “tort reform.”

MYTHBUSTERS!
GROUNDBREAKING

RESEARCH PAPERS
NEWSLETTERS
CRUCIAL

WHITE PAPERS ALERTS

Membership/Subscription Levels

Subscriber—\$100+**

FREE quarterly newsletter, IMPACT, breakthrough fact sheets, MYTHBUSTERS and topical e-mail or faxed alerts.

Associate—\$1,000+

Group Subscriber—\$1,000+

Subscriber benefits plus FREE groundbreaking bi-monthly White Papers and unlimited access to CJ&D’s library, available through an exclusive password-protected area of the Web site.

Fellow—\$5,000+

All Associate benefits plus exclusive personal correspondence from CJ&D with inside information and analyses.

Lifetime Member

The most valuable commitment you can make. Contact CJ&D’s Executive Director at 212.267.2801 for more information.

Membership is renewable annually.

**Students and select others may qualify for Subscriber Special \$25 rate. Contact CJ&D for details.

MEMBERSHIP CONTACT INFORMATION

To join CJ&D or for membership inquiries, call Liz Carey toll free 1.888.450.5545. Visit our Web site at centerjd.org or contact us by e-mail at liz@centerjd.org.