Responses of Leslie A. Bailey to Follow-up Questions on Sunshine In Litigation Act Hearing

January 7, 2008

1. In his testimony, Mr. Weiner argues that plaintiffs have the opportunity to raise objections to protective orders because of health and safety hazards. Can you address the burden this places on the plaintiff?

The notion that the public's interest in information relevant to health and safety is protected because plaintiffs have the opportunity to object to overly broad protective orders ignores the reality of litigation.

First, under the law, the party that wants to keep a document secret is supposed to bear the burden of showing why secrecy is necessary—not the other way around. Thus, even if plaintiffs were in a position to be responsible for protecting the public's interest—which they are not—making plaintiffs responsible for this would put the burden on the wrong party.

Second, as a practical matter, even though the proponent of secrecy is required to show why there is good cause for secrecy, what often happens is that the defendant refuses to produce a smoking gun document, or refuses to settle the case, unless the plaintiff agrees to secrecy. In our experiences, plaintiffs often do not want secrecy (indeed, many specifically say they want to make sure nothing like what happened to them happens to anyone else), but individual plaintiffs are often pressured to agree to secrecy orders to get the documents they need to go forward with their case without extensive delays, or to get settlements that are crucial to their ability to take care of her family. Thus, the mere fact that plaintiffs are technically not *prohibited* from raising objections to protective orders every time the protective order would bar disclosure of information relevant to the protection of health or safety does not mean that most individual plaintiffs are in a position to fight on principle. It makes more sense to have a legal system that automatically protects the public interest than to hope and expect that an injured individual plaintiff will be willing and able to put the public interest above her own needs and her family's needs and her right to be compensated for the harm she has suffered.

The fact is that under the current system, the parties often agree to secrecy—the defendant in order to keep evidence of wrongdoing from the public, and the plaintiff because of necessity. When the parties agree, the judge nearly always goes along. But if they were required to weigh the public's interest—separate and apart from the interests of either of the parties—judges would have the power and the duty to ensure that critical information is not kept secret.

2. Ms. Bailey, why do plaintiffs agree to confidentiality agreements? Why would the parent of a child who was injured or killed by a defective product, such as an over-the-counter medicine or toy, agree to a confidentiality agreement that puts other children at risk?

Certainly no parent of a child injured or killed by a defective product goes into a lawsuit intending to let the manufacturer of that product keep putting others at risk. Yet parents, and other plaintiffs, commonly do end up agreeing to confidentiality as a condition of settlement, even in cases involving severe injuries or death. The reason is simple: these individuals are forced to choose between a protracted and expensive fight, with the possibility that even after trial they may not recover any (or enough) damages from the corporation, and a monetary settlement that would help their family to recover from horrific loss or to care for a loved one who now needs long-term medical care. In situations like this, defendants have the leverage to extract secret settlements.

There is simply no good reason for our public courts to facilitate such secrecy agreements when the public interest is at stake. If judges have the duty to consider the public interest, plaintiffs will no longer be forced to choose between not getting the money they need and deserve and hiding the truth from others who may be at risk.