

Your Stipulated Protective Order May Not Provide As Much Protection As You Expect

In a growing number of courts, a negotiated protective order entered for discovery purposes will not protect litigants' confidential information from public disclosure.

Stipulated protective orders are commonly used tools in complex litigation. These orders allow parties to designate material produced in discovery as confidential. But certain courts, most recently the Court of Appeals for the Sixth Circuit, have found that protective orders cannot be used as the sole basis to file that material under seal. In those courts, failure to properly support a motion to seal documents and information can lead to wholesale reversal of the sealing orders, and in one case, resulted in the revocation of the court's approval of a class action settlement. Understanding the substantive and procedural sealing requirements in your court and strictly following the rules are critical to protecting confidential information.

Stipulated Protective Orders Often Purport to Protect Information from the Public Record

Federal Rule of Civil Procedure 26(c) permits parties to request from the court a "protective order" that limits the dissemination of confidential discovery produced in a case.¹ Parties in complex antitrust cases, including class actions and multi-district litigations (MDLs), frequently use this provision to pro-actively enter into stipulated agreements that govern the confidentiality and use of discovery. These orders, which are entered by the court, commonly allow the producing party to unilaterally designate material as "confidential," and place restrictions on the persons or entities that can view that material. In many cases, the orders also purport to limit, or even prohibit, parties from filing any material that has been designated confidential in public court documents. In those cases, parties either file the documents containing the information wholly "under seal," or publicly file only redacted versions of the case documents with the court.

Some Courts Require More Than Just a Protective Order to Justify Filing Under Seal

Parties that enter into these protective orders may feel a sense of comfort that the protective orders will protect their confidential information from the public. But, certain courts do not allow parties to seal court filings simply because a party designated relevant material as confidential under a protective order. For example:

- The Court of Appeals for the Seventh Circuit presumes that all documents filed in appeals are in the public record unless the requesting party proves "in detail, document by document, the propriety of

secrecy, providing reasons and legal citations.”² The Seventh Circuit has specifically held that “broad secrecy agreement[s]” between the parties cannot support a request for sealing.³

- The Local Rules for the Northern District of California explicitly state that “[r]eference to a stipulation or protective order that allows a party to designate certain documents as confidential is not sufficient to establish that a document, or portions thereof, are sealable.”⁴ Instead, the party that has designated the material confidential must submit a declaration establishing that the information is “privileged, protectable as a trade secret or otherwise entitled to protection under the law.”⁵
- In the Eastern District of Wisconsin, “[a] party seeking to file a paper under seal must follow the [sealing] procedure set forth in General L.R. 79(d). This includes the filing of information covered by a protective order.”⁶

The Sixth Circuit’s Stand Against Unwarranted Sealing

In a trio of decisions this summer, *Shane Group Inc. v. Blue Cross Blue Shield of Michigan*,⁷ *Beauchamp v. Federal Home Loan Mortgage*⁸ and *Rudd Equipment Co. v. John Deere Construction & Forestry Co.*,⁹ the U.S. Court of Appeals for the Sixth Circuit joined the ranks of federal courts requiring more than a unilateral confidentiality designation to limit public filing of court documents. In those decisions, the court forcefully reiterated its “strict” standard for sealing court records. And, in both *Shane Group* and *Beauchamp*, the panels expressly held that the existence of blanket protective orders standing alone does not meet the standard to justify sealing.

As the panel explained in *Shane Group*, “the public has a strong interest in obtaining the information contained in the court record.”¹⁰ In antitrust cases specifically, this interest focuses both on the result of the case and the actual conduct that gave rise to the case.¹¹ Accordingly, courts can only seal court filings when the requesting party has demonstrated “the most compelling reasons” to do so.¹² The request must be narrowly tailored and include detailed, document-by-document factual and legal analysis.¹³ Similarly, the district court’s order granting a sealing request must set forth specific factual findings and legal conclusions to justify the sealing, even when both parties agree to the request to seal.¹⁴

In both *Shane Group* and *Beauchamp*, the panels found that this standard is not met when the district court solely relies upon the existence of a stipulated protective order as the basis for sealing. In *Shane Group*, the panel explained that there is a “stark difference” between protective orders used in discovery and orders to seal court documents.¹⁵ Protective orders may allow the producing party to identify what information is confidential, and courts often limit the use of that material based only on a “good cause” showing.¹⁶ Although “secrecy” can be appropriate to protect the production of material that may or may not be actually relevant in the case, those blanket protections are not appropriate when deciding what information is shielded from public view.¹⁷

As a result, the court overturned the “patently inadequate” sealing orders, which granted the request to seal solely because a party or third party had designated the material confidential.¹⁸ The panel found that the district court erred by conflating the standards for designating discovery material confidential under a protective order and “the vastly more demanding standards” for sealing judicial records.¹⁹ The panel seemed particularly concerned that in one situation, a party did not even seek permission from the district court before filing materials under seal.²⁰

Similarly, in *Beauchamp*, the panel rejected the sealing orders because the district court relied entirely upon the terms of the parties’ protective order and made no findings at all to support withholding filings from the public record.²¹ Strikingly, the *Beauchamp* panel raised this issue “on [its] own motion,” even

though both parties agreed that the filings should be sealed and had not raised the issue in the appeal of the lower court's summary judgment decision.²² The panel vacated the sealing orders.²³

Failure to Comply with Sealing Requirements Can Have Additional Detrimental Effects in Class Actions

This line of cases makes abundantly clear that in the Sixth Circuit, parties should no longer rely only on their protective orders to justify the sealing of confidential information. But the stakes are even higher for class actions. As the court explained in *Shane Group*, the sealing standard must be applied "with particular strictness" in class actions because members of the public can be putative members of the asserted classes in the case.²⁴ These class members have an even greater interest in full access to the relevant case documents.²⁵

Thus in *Shane Group*, the court not only unsealed the court filings, but also overturned approval of the parties' settlement, finding that the sealing prevented absent class members from having enough information to determine whether the settlement was fair, reasonable and adequate.²⁶ This case demonstrates that class action litigants in the Sixth Circuit that wish to maintain the confidentiality of their information, as well as potentially the efficacy of their settlement agreements, should take the time to narrowly tailor and justify their requests to file materials under seal.

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Endnotes

¹ See Fed. R. Civ. P. 26(c)(1)(E)-(H).

² *Baxter Int'l Inc. v. Abbott Labs.*, 297 F.3d 544, 548 (7th Cir. 2002); 7th Circuit Operating Procedure 10.

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- ³ *Baxter*, 297 F.3d at 545-46 (“Agreements that were appropriate at the discovery stage are no longer appropriate for the few documents that determine the resolution of an appeal, so any claim of secrecy must be reviewed independently in this court.”).
- ⁴ N.D. Cal. Civ. R. 79-5(d)(1)(A).
- ⁵ *Id.* 79-5(b), (d)(1)(A).
- ⁶ E.D. Wis. Civ. R. 26(f); *see also* E.D. Wis. Civ. R. 26(f) committee cmt. (“The designation of a paper as confidential under the terms of a protective order is not sufficient to establish the basis for filing that document under seal. The party seeking to withhold the document from the public record must file a motion to seal in accordance with General L. R. 79(d).”).
- ⁷ 825 F.3d 299 (6th Cir. 2016).
- ⁸ No. 15-6067, 2016 WL 3671629 (6th Cir. July 11, 2016).
- ⁹ No. 16-5055, 2016 WL 4410575 (6th Cir. July 27, 2016).
- ¹⁰ 825 F.3d at 305 (quoting *Brown & Williamson Tobacco Co. v. FTC*, 701 F.2d 1165, 1180 (6th Cir. 1983)); *see also Rudd*, 2016 WL 4410575, at *3 (“[A] court’s discretion to seal its records is bounded by a long established legal tradition of the presumptive right of the public to inspect and copy judicial documents and files.”) (citation omitted).
- ¹¹ *Shane Grp.*, 825 F.3d at 305.
- ¹² *Id.* (citation omitted).
- ¹³ *Id.*; *see also Beauchamp*, 2016 WL 3671629 at *4 (quoting *Shane Grp.*, 825 F.3d at 305).
- ¹⁴ *Shane Grp.*, 825 F.3d at 306; *see also Beauchamp*, 2016 WL 3671629 at *4;
- ¹⁵ *Shane Grp.*, 825 F.3d at 305; *see also Rudd*, 2016 WL 4410575 at *4 (quoting *Shane Grp.*, 825 F.3d at 305).
- ¹⁶ *Shane Grp.*, 825 F.3d at 305; *see also Rudd*, 2016 WL 4410575 at *4 (quoting *Shane Grp.*, 825 F.3d at 305).
- ¹⁷ *Shane Grp.*, 825 F.3d at 305.
- ¹⁸ *Id.* at 306-07.
- ¹⁹ *Id.* at 307.
- ²⁰ *Id.*
- ²¹ 2016 WL 3671629, at *5.
- ²² *Id.* at *4-5.
- ²³ *Id.* at *5.
- ²⁴ *Shane Grp.*, 825 F.3d at 305 (citation omitted).
- ²⁵ *Id.*
- ²⁶ *Id.* at 309.