

The Hazards of Secrecy: Cases Where Protective Orders Or Confidential Settlements Jeopardized Public Health And Safety

Corporations sued in products liability actions very often insist that any material they turn over to injured consumers and their attorneys be kept completely confidential, even where the product is defectively designed or otherwise dangerous, and remains on the market. Often, corporations make confidentiality of information a condition for settling a case. Not only do such arrangements force every consumer injured by the same product to build their case against the corporation from scratch, they also prevent regulatory agencies, the media and the public from learning about dangerous or hazardous products. The following are examples of cases where corporations' insistence on such secrecy arrangements has endangered the public.

FORD/FIRESTONE

The horrible Ford/Firestone defect, involving scores of deaths and injuries, first came to light in litigation. Unfortunately, public revelation of the defect came nearly *ten years after* the first case was brought against Firestone. Documents that could have potentially saved over 200 lives and 700 injuries were, until October 2000, buried behind secrecy agreements and protective orders. The reason this information remained secret was that the defendants insisted on confidentiality as a condition of settlements. In October 2000, Ford and Firestone finally agreed to release numerous documents previously hidden, confirming their knowledge of defects and safety hazards relating to ATX and Wilderness tires on Ford Explorers. Information made public during the case of Trahan v. Elvin Hayes Firestone created public pressure for the recall of tens of millions of tires.

CAR SEATS

On March 12, 1989, 16 month-old Michael Wright suffered a broken neck in a car accident, causing him to be paralyzed from the waist down. Michael, who weighed 22 pounds, had been sitting in a booster-type car seat manufactured by Kolcraft Enterprises. The family sued Kolcraft, alleging the car seat should not have been advertised for use by children of Michael's weight. Other car seat manufacturers, and the National Highway Transportation Safety Administration, recommended that children under 30 pounds not use this type of car seat. The manufacturer agreed to settle the case for a sum of money that reportedly could reach eight figures, but the family and their lawyers had to sign a confidentiality agreement requiring, among other things, that the manufacturer never be named, and that any contacts by the media be immediately reported to the manufacturer's lawyers. The family's attorney, who in the past had publicly spoken out against companies' insistence on such confidentiality agreements, said, "In the end, I agreed, because my job is to secure proper care for my client. And I deemed it inappropriate for the confidentiality agreement to stand between my client and the settlement." (Dick Dahl, *Strictly Confidential*, Massachusetts Lawyers Weekly, January 11, 1993.)

ZOMAX

Zomax was an arthritis pain reliever, manufactured by McNeil Laboratories, that caused acute and sometimes fatal allergic reactions in many consumers in the early 1980s. In the numerous lawsuits filed against the manufacturer in 43 states, the company insisted on protective orders and confidential settlements, keeping information secret that could have alerted Zomax users of its dangers. By the time the FDA recalled the drug in 1985, the agency believed that Zomax was probably a factor in 14 deaths and 403 life-threatening allergic reactions. One lawyer representing several clients who settled confidentially, told *The Washington Post*, "What they are

trying to do is not be accountable to the vast majority of the public for what they've done ... They paid my clients a ton of money for me to shut up." Another said, "The problem is that they have a gun to our head..." Devra Davis, a toxicologist who nearly died from using Zomax, said she believes court secrecy impairs "free scientific inquiry and the right of the public to know specific information about drugs it consumes." (Eye to Eye with Connie Chung, CBS News, Oct. 10, 1994; Benjamin Weiser & Elsa Walsh, *Drug Firm's Strategy: Avoid Trial, Ask Secrecy*, Washington Post, Oct. 25, 1988. See also, Daniel C. Carson, 'Hired guns' aim to keep veil of secrecy on product dangers, San Diego Union-Tribune, May 4, 1991.)

WATER SLIDES

In 1991, Bill Evans broke his neck while sliding down a back yard toy called Slip 'N Slide. He is paralyzed from the neck down, confined to a wheelchair and needs round-the-clock care. Suspecting there was something defective about this product, Evans sued Kransco, the manufacturer. Evans' lawyer discovered that there had been at least seven other broken necks involving the Slip 'N Slide. He also discovered a videotape that was sealed as part of a confidential settlement in an earlier case, which showed that the manufacturer knew exactly how adults might be severely injured using the Slip 'N Slide. Evans and Kransco reached a confidential settlement, but Evans wanted to issue a press release alerting consumers about the hazards of the Slip 'N Slide. Kransco told Evans if he did this, their deal would be off and he would have to return the settlement money. Evans sued for the right to speak out, and the company eventually backed down. The manufacturer eventually stopped manufacturing the Slip 'N Slide. (Eye to Eye with Connie Chung, CBS News, Oct. 10, 1994.)

GM FUEL TANKS

Between 1973 and 1987, GM manufactured approximately 9.6 million C/K pickup trucks equipped with unsafe, 40-gallon "side saddle" fuel tanks. According to the Center for Auto Safety, from 1973 until today, there have been at least 750 fire deaths involving GM pickup crashes. The company knew it was endangering the public by using this fuel tank design, evidenced by a 1973 memorandum, authored by GM engineer Edward Ivey, which evaluated the cost to GM of these expected "burned deaths." When victims of fuel tank crashes first sued, GM disclosed documents to them only under confidentiality agreements, and settled these cases only on the condition that plaintiffs and their lawyers agreed to keep the information secret. In one such case, GM lawyers asked a judge to punish an injured consumers' lawyer, claiming he had violated the confidentiality agreement by telling other lawyers suing GM about the existence of the Ivey memo. In 1986, the lawyer had to pay an \$8,000 fine for the breach of confidentiality for disclosing this safety information. (J. Todd Foster, *Woman Without a Face Vows to Stay in GM's Face*, The Oregonian, August 3, 1997; Ralph Nader & Wesley Smith, *No Contest: Corporate Lawyers and the Perversion of Justice in America*, p. 72-73 (1996); Elsa Walsh & Benjamin Weiser, *Court Secrecy Masks Safety Issues*, Washington Post, Oct. 23, 1988.)

BJORK-SHILEY HEART VALVES

The Bjork-Shiley heart valve, put on the market in 1980, was prone to fracture. About two-thirds of all fractures were fatal, while many others led to serious injury. The valves were finally removed from the market by the FDA in 1986. But as of January 1990, the company had reported a total of 389 fractures and 248 deaths (numbers generally agreed to be greatly understated due to the limited number of autopsies taken). Because the company insisted on confidential settlements and protective orders during early litigation, the valve's defects stayed secret and more patients

were implanted with the valve. Among them was the wife of Fred Barbee, of Minong, WI who, according to the *Toxics Law Reporter*, said, "I learned that many [victims'] families had filed lawsuits against [the manufacturers and its parent company]. I also learned that documents and information obtained in those lawsuits were never made public because of agreements or court orders which kept the information secret. I learned that Shiley had settled every fracture case out of court and in each settlement required that the victims keep the settlements confidential." (Diane Jay Weaver, *Secrets that can kill have no place in our courts*, *Toxics Law Reporter*, June 19, 1991; Staff Report for the Use of the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce, U.S. House of Representatives, *The Bjork-Shiley Heart Valve: Earn as You Learn*, Feb. 1990, p. 2, 3.)

BIC LIGHTERS

In the 1980s, Bic Corporation quietly settled a number of lawsuits stemming from its allegedly defective butane cigarette lighters that would occasionally blow up and burn to death or maim the user. In exchange for paying out millions in settlements to injured consumers, it routinely demanded that they return all company documents provided during discovery. Not until 1987, when it was eventually reported in newspapers that 10 deaths had been linked to these lighters, did Congress begin investigating. They found that Bic and other popular brand lighters were so unsafe that they sometimes failed to meet the industry's own safety standards. (Barry Meier, "Deadly Secrets System Thwarts Sharing Data on Unsafe Products," *Newsday*, April 24, 1988. See also, Daniel C. Carson, *'Hired guns' aim to keep veil of secrecy on product dangers*, *San Diego Union-Tribune*, May 4, 1991.)

CHRYSLER FUEL TANKS

Shirley LoPrest sued Chrysler in a Los Angeles court after her husband burned to death when his 1971 Dodge Demon was hit and burst into flames. She alleged that because of the car's fuel tank design, there was a serious risk that fire would enter the passenger compartment on impact. In 1987, in response to LoPrest's discovery requests, Chrysler obtained a protective order from the judge that limited access to the company's documents to only the parties, their attorneys, consultants and expert witnesses. As a result, Chrysler's crash test results and other company safety documents were kept secret. The case settled confidentially and the Chrysler files are still secret. (Ralph Nader & Wesley Smith, *No Contest: Corporate Lawyers and the Perversion of Justice in America*, p. 73, 1996.)

XEROX

In 1988, two families settled their case against Xerox Corporation in which they alleged that exposure to toxic chemicals released from its plant in Rochester, New York had damaged their health. According to Richard Rifkin, counsel for the Attorney General of New York, Xerox paid the families several million dollars in exchange for a promise of confidentiality. The health departments of Monroe County and the State of New York sued to open the records, believing that other families in the area could be injured by exposure to these toxic chemicals. Upon gaining access to the file, the agencies discovered that no critical scientific data were contained in them. Said Rifkin, "The time and effort involved could have been avoided if the documents had been available to the state agencies from the outset." (Amy Dockser Marcus, *Firms' Secrets Are Increasingly Bared by Courts*, *Wall Street Journal*; See also, Daniel C. Carson, *'Hired guns' aim to keep veil of secrecy on product dangers*, *San Diego Union-Tribune*, May 4, 1991.)

ASBESTOS

In 1933, the Johns-Manville Company settled with an attorney for 11 former Manville employees, all asbestosis victims. The attorney received \$30,000 for the victims, in exchange for a written promise that he would not "directly or indirectly participate in the bringing of new actions against the Corporation." This fact did not come to light for more than 45 years. In the meantime, the company was able successfully to avoid damage suits. Had the public known about this settlement, it is likely that the hazards of asbestos would have come to light decades earlier. (Paul Brodeur, *Outrageous Misconduct; The Asbestos Industry on Trial*, Pantheon Books, p. 22; See also, Barry Meier, *Deadly Secrets System Thwarts Sharing Data on Unsafe Products Series*, *Newsday*, April 24, 1988.)

GM CORVAIR

John Petry drove his 1961 Corvair more than 100 miles a day for work. The Corvair's heating system was of a design that other manufacturers had long rejected: air used to cool the engine was diverted into the passenger compartment to provide heat. This allowed deadly carbon monoxide fumes to enter the car. As a result, Petry developed permanent brain damage. He sued GM on the grounds that the heating system was defective. GM settled, but as part of the deal required Petry to sell the company not only his entire case file, but also the car itself. It also required him to change the basis of Petry's original 1962 complaint from design defect, which could implicate all similar Corvairs, to a manufacturing defect, which could cover only Petry's car. As a result, information about the defective design of the Corvair's heating system was kept confidential for nearly a decade. (Ralph Nader & Wesley Smith, *No Contest: Corporate Lawyers and the Perversion of Justice in America*, p. 88, 1996.)

THE MOSELEY V. GM "SIDE-SADDLE FUEL TANK" CASE

In February 1993, a suburban Atlanta jury ordered General Motors Corp. to pay \$101 million in punitive damages to the parents of 17-year-old Shannon Moseley, who died in a fiery crash in his 1985 GMC Sierra pickup truck in 1989. The boy's truck was struck on the side by a vehicle driven by a drunken driver who ran a red light.

The jury found that GM knew the trucks had a defective fuel-tank design but had failed to correct it. GM had placed the fuel tank outside the frame of the pickup, which safety critics said made it vulnerable to puncturing during a crash. At the time of the Moseley verdict, GM faced at least 130 other lawsuits involving the design of the fuel tank. The fuel tank design was used for trucks manufactured between 1973 and 1987. Beginning in 1988, GM moved the fuel tanks inside the truck frame, but denied that it did so for safety reasons. Some have likened the design to placing a human's heart outside the rib cage.

The jury had earlier awarded the boy's parents, Elaine and Thomas, \$4.2 million in compensatory damages. The Moseleys had refused GM's offers to settle the case.

The major issue in the trial was whether the fuel-tank placement and design were defective and caused Shannon to burn to death after his pickup was struck on the side by another vehicle. GM argued that Shannon was killed almost instantly upon impact and not from the fire that occurred shortly thereafter. GM sought to show that Shannon had not experienced pain and suffering, a prerequisite for a punitive damages award in Georgia. But the jury apparently believed the

plaintiffs' eyewitness testimony that Shannon had been conscious after the impact and during the resulting fire -- and that he undoubtedly experienced great pain and suffering.

The case also involved the defection of a former GM safety engineer, Ronald E. Elwell, who testified that the company had intentionally hidden its knowledge of a dangerous safety defect. Elwell, whose testimony GM tried to block, said the company had known for years that the design was defective but refused to fix it for fear of alerting the public. Ironically, Elwell had testified in more than 15 previous cases as an expert for GM and had stated that the design was safe.

In addition, videotapes of GM's own crash tests between 1981 and 1983 showed that when the pickup was struck on the side by another vehicle its fuel tank broke open.

According to juror John Dale, a vice president for a Georgia distribution company: "We felt there was wanton and willful disregard for common sense."

GM's Knowledge of Defect

The problems with the tanks soon became apparent to GM. Within the first year of introduction, GM conducted a special accident study of 1973 compared to pre-1973 pickups which showed "the 1973 trucks had more fuel leaks from the fuel tank than did the pre-1973 pick-ups." A 1978 study by George Garvil concluded that both the rear located and inside the frame fuel tanks were superior to the outside-the-frame tanks. Using GM's insurance company Motors Insurance Corp. data, Garvil found "Approximately 40 of 212 or 19%, of the side impacts were judged to have had high fuel tank leakage potential for outboard side-located tanks. Moving these side tanks inboard might eliminate most of these potential leakers."

After the fatal fire crashes begin mounting up in the mid-late 1970's, GM again studied alternative designs including moving the tanks inside the frame, installing a plastic liner or bladder, or using external shields to reduce the danger of tank rupture. Crash tests of 22 GM pickups in 1981-83 to develop protective designs revealed that the tanks "split like melons." GM did develop a protective steel fuel tank cage which it installed on its 1978-83 cab chassis models (pickups without the bed). If these cages were modified to fit the C/K pickups it could have significantly enhanced the overall fuel system integrity of the vehicle. GM Vice President Alex Mair sketched a simple shield costing only \$23 which was termed "a probable easy fix."

At the heart of GM's resistance to improving the safety of its fuel systems was a cost benefit analysis done by Edward Ivey which concluded that **it was not cost effective for GM to spend more than \$2.20 per vehicle to prevent a fire death. When deposed about his cost benefit analysis, Mr. Ivey was asked whether he could identify a more hazardous location for the fuel tank on a GM pickup than outside the frame. Mr. Ivey responded, "Well yes... You could put in on the front bumper."** GM was able to hide all this evidence and much more from the public until the early 1990's when leaks in GM's secrecy dam started and the Center for Auto Safety began to focus in on the defect.