STATEMENT BEFORE THE HOUSE JUDICIARY SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

BY BRUCE R. KASTER

REGARDING H.R. 1508
"SUNSHINE IN LITIGATION ACT OF 2009"

ON JUNE 4, 2009 @ 11:00 A.M.

Having spent over twenty years of my career handling products liability cases across this country, I am very familiar with the human costs resulting from secrecy in litigation. Literally, tens of thousands of Americans, if not hundreds of thousands, have been killed or seriously injured by defective products that manufacturers are aware of, but the public is not. I have struggled against secrecy in legal proceedings in both state and federal courts for over two decades, for the most part unsuccessfully because of the way in which the legal system deals with manufacturers' internal documents that disclose a product's defect and when the manufacturer learned of the defect.

The root of the problem is as protective orders or confidentiality agreements demanded by manufacturers and required or approved by trial judges. Like many lawyers who specialize in products liability, I routinely oppose any protective order or confidentiality agreement because in my experience they are universally abused by manufacturers. When you sue a manufacturer and request records they insist on a protective order before they produce any internal documents that they assert are trade secret. This position makes sense on its face. It's not fair for, say Michelin Tire to disclose information about their manufacturing that would benefit Goodyear Tire or Firestone or some other competitor.

Unfortunately, in the real world, manufacturers use this protection to cover all documents, including documents that no other manufacturer would want, or need to use to a competitive advantage in producing a product. Nonetheless, in my experience federal judges, like state judges, routinely enter protective orders requested by the manufacturer over my objections.

I have heard it explained that some judges do this because they want to expedite the process and they don't have the time or the energy to review thousands of documents to determine what should be protected and what's not. So they enter a protective order to enable the plaintiffs' lawyers to obtain the documents expeditiously, and then put the burden on them to come back and challenge what should and should not be protected. The fallacy of this is, after I receive and review documents I have challenged protective orders across this country in federal courts and I have never won, despite the fact that many of the documents on their face are clearly not trade secret or provide any information to a competitor that would give them an advantage in the production of products.

For the most part, the documents merely show the defect in the product, the fact that the manufacturer knew about the defect, and often times that they refused to correct the defect because they did not want to spend the money.

I should note, it is not just the entry of the protective order that I find offensive and against the public interest. It is the fact that judges routinely accept protective orders drafted by the manufacturers which are onerous and unduly burdensome on their face. They almost never accept compromise portions that we suggest that would at least make the protective orders less burdensome.

To give you an example of the type of document I'm talking about. I have brought with me a document from a recent case in federal court, *Bradley v. Cooper Tire*, in which the court entered a protective order, refused our request to have documents taken out from under the order which we asserted should never have been protected in the first place. We

proceeded to trial and several of these documents, although heavily redacted, were placed into evidence in open court.

After the trial, the tire manufacturer, Cooper Tire, tried to claw back the documents and have them sealed again. We argued vigorously that this would be against basic principles of American jurisprudence. Evidence that comes in in open court in this country is part of the public record and should not be suppressed or hidden. The judge agreed with us, so I have a portion of one of the documents with me, the type of document that I'm referring to.

As you can see, this document reflects that the tire manufacturer knew about a safety component for their tires and elected not to put it in because of cost considerations. The safety component they're talking about, the belt edge gum strip, is the same safety component that Firestone reduced in their tires on Explorers. This was one of the significant design defects that led to the biggest recall of tires in American history.

Firestone reduced the size of the wedge. This manufacturer doesn't even have a wedge, and they know that it reduces tread belt separations, but this document discloses they have elected not to put this safety component in for cost considerations.

Now, why should that be protected? The public should know that. The public should know that there is a tire manufacturer who doesn't put in a basic safety component in order to save money, and if you buy their tires you are at an increased risk. But that is hidden from the public, and the only reason this portion of this document is made available is because we used it in open court and the manufacturer

failed to suppress it in the courtroom, even though it had been put under protection for several years prior to that. This document is still wrongfully under protection across the country in state and federal courts.

Let me mention briefly the redaction. Companies also will block out portions of documents so that you do not know what they contain, even after they get a protective order. Courts routinely allow this. Even though they have a protective order which protects their documents, they do not give you the basic information that you need in order to determine the components of the products.

Finally, I would note that I have extensive experience with Sunshine in Litigation because the State of Florida has a Sunshine in Litigation Act very similar to this proposal that is before the Congress. It works well and helps overcome the problem of inappropriate protective orders. Although it does not cure the problem, it is a small step in the right direction.

Secrecy in the courtroom has resulted in unnecessary deaths and injuries across this country. From my perspective, secrecy kills and it is time to move toward an end to secrecy in American legal proceedings.