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Crafting Motions To Seal After 3rd Circ. Avandia Decision

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In a recent precedential opinion, In re Avandia Marketing, Sales Practices & Products Liability Litigation,[1] the U.S. Court of Appeals for the Third Circuit clarified the standard for filing documents under seal — a nuts and bolts issue regularly confronted by litigators and trial court judges. This article analyzes that important decision and offers a few strategies for protecting your client's confidential information.

Background

The Avandia litigation began as a putative class action brought by two health benefit plans who alleged that GlaxoSmithKline LLC violated the Racketeer Influenced and Corrupt Organizations Act and certain state consumer protection laws in connection with its marketing of Avandia, a drug used to treat Type II diabetes. Ultimately, GSK moved for — and won — summary judgment.

During the appeal of the district court's summary judgment ruling, the parties sought to include in their joint appendix documents filed in connection with the summary judgment motion that GSK had designated confidential. GSK requested that the district court maintain the confidentiality of such documents. However, the plans argued that the common law right of access and the First Amendment right of public access required that those documents be unsealed.

In two orders, the district court ruled in favor of GSK on many of the documents, maintaining their confidentiality.[2] The plans then appealed those two orders.

The Third Circuit reversed. Chief Judge D. Brooks Smith, writing for the court, held that the district court misapplied the standard for maintaining the confidentiality of documents submitted in connection with a court filing. The court's analysis began by highlighting the "three distinct standards" for confidentiality applicable to different aspects of litigation:

Discovery Materials — The Standard for a Protective Order

Typically, a protective order maintains the confidentiality of documents that are exchanged in discovery but which are not filed with the court. A party seeking a protective order over discovery material must

demonstrate "good cause," which requires a balancing of the requesting party's needs against the injury caused by compelled disclosure.

In the context of a protective order, "good cause" means "that disclosure will work a clearly defined and serious injury to the party seeking closure. The injury must be shown with specificity." Accordingly, "broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not support a good cause showing."[3]

A trial court should articulate the findings supporting its decision to grant or deny a protective order.

Court Filings — The Standard for Filing Documents Under Seal

Once documents are filed with a court, "there is a presumptive right of public access to pretrial motions of a nondiscovery nature, whether preliminary or dispositive, and the material filed in connection therewith." This common law right is "not absolute," and the presumption of access may be rebutted by a showing that "the interest in secrecy outweighs the presumption," i.e., "that the material is the kind of information that courts will protect and that disclosure will work a clearly defined and serious injury to the party seeking closure."

The court must articulate "the compelling, countervailing interests to be protected," make "specific findings on the record concerning the effects of disclosure," and "provide an opportunity for interested third parties to be heard." "Broad allegations of harm, bereft of specific examples or articulated reasoning, are insufficient" to permit documents to remain under seal.[4]

Civil Trials — First Amendment Right of Access Standard

Lastly, the public and the press have a First Amendment right of access to civil trials that "is to be accorded the due process protection that other fundamental rights enjoy." Under this standard, "there is a presumption that the proceedings will be open to the public," which can be overcome by "an overriding interest in excluding the public based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."

The party seeking closure or sealing "bears the burden of showing that the material is the kind of information that courts will protect and that there is good cause for the order to issue." Good cause requires "that disclosure will work a clearly defined and serious injury to the party seeking closure;" and "[t]he injury must be shown with specificity."

The trial court "must both articulate the countervailing interest it seeks to protect and make findings specific enough that a reviewing court can determine whether the closure order was properly entered."[5] Traditionally, this right applied to trials, but, as discussed below, some courts have held that the right of access also extends to summary judgment proceedings.

The Third Circuit's Analysis

After summarizing the foregoing framework, the Third Circuit concluded that the district court applied only the first standard — that governing protective orders — to GSK's request to maintain confidentiality of the summary judgment documents. According to the Third Circuit, the district court erred by conflating the more liberal Pansy factors applicable to a protective order governing discovery with the "exacting" standard and "strong presumption of access" governing the common law right of

access to court filings.

Distinguishing the applicable standards, the Third Circuit observed that certain of the Pansy factors, such as whether disclosure would result in embarrassment to a party or whether the information sought was for a proper purpose, were incompatible with case law on the common law right of access to court filings and therefore inapplicable.

Further, the court noted several other issues with the underlying application for confidentiality, including GSK's reliance on an eight-year old affidavit that related to the sealing of other documents, which the court held insufficient under the common law right of access standard, which must be based on current evidence.

A supplemental declaration provided by GSK was likewise insufficient because it contained only "broad, vague, and conclusory allegations of harm." The court also emphasized that none of the documents at issue disclosed purported trade secrets but rather the only harm to GSK was "mere embarrassment."

Lastly, the court declined to determine whether the First Amendment right of public access to civil trials applies to summary judgment proceedings, because the common law right was potentially sufficient to permit access and would resolve of the issue before the court. However, although the court declined to decide whether the First Amendment right applied at summary judgment, the Third Circuit directed the district court to apply the First Amendment standard on remand if it concluded that materials should remain sealed under the common law right of access standard.

In a concurring and dissenting opinion, Judge Felipe Restrepo stated that he would have gone further than the court by joining the U.S. Court of Appeals for the Second Circuit and the U.S. Court of Appeals for the Fourth Circuit in holding that summary judgment filings are subject to the First Amendment right of access standard.

The court remanded with instructions for the trial court to apply the applicable standard on a document-by-document basis.

Takeaways

The court emphasized that its opinion did not establish a new standard. However, the court's careful delineation of the three applicable confidentiality standards, its detailed instructions to the district court and its suggestion that a First Amendment right of access standard might apply to summary judgment filings, all emphasize the need for litigants and judges to be scrupulous of confidentiality issues going forward.

We think the following principles may be helpful in avoiding the sort of problems raised by Avandia:

Think ahead when negotiating a protective order.

Protective orders typically protect documents exchanged in discovery but do not require the parties to engage in any additional process before filing the opposing parties' confidential documents, provided that the filing party requests that such documents be maintained under seal in compliance with the court's rules.

However, in light of Avandia's emphasis on the more rigorous standard applicable to filings under seal,

parties should consider agreeing to meet and confer to before filing the opposing parties' confidential documents under seal.

Think about exactly what you are trying to keep confidential — and how.

The Third Circuit's criticisms of GSK's submission in support of its requests for sealing, including GSK's use of an outdated affidavit, offer lessons for other parties going forward.

Before filing any confidential materials under seal, make sure your application clearly describes the injury that disclosure of the confidential information would work. It may be worth a little more time with your client to determine the consequences of disclosure beyond the "mere embarrassment" the Avandia court held insufficient.

Manage client expectations.

The Third Circuit's ruling highlights the difficulty of predicting whether a document will be maintained under seal. Clients should be advised early in the process that, while they may have no choice but to produce confidential material in discovery, there is no guarantee that those documents will remain under seal if filed with the court.

This is especially true in light of suggestions in the court's opinion, and Judge Restrepo's clear statement in his concurring and dissenting opinion, that the Third Circuit may join those circuits that hold that summary judgment filings are subject to the First Amendment right of access standard.

Build in additional time before summary judgment and other filings involving confidential material.

The public access standard and document-by-document review required under Avandia confirm that the days of generic, last-minute motions for leave to file under seal are over, and that, at least in complex cases, motions for leave to file under seal need to be underway well before the summary judgment deadline. Courts and parties should bear this in mind when setting summary judgment deadlines.

If nothing else, Avandia makes clear that pro forma applications to seal are a thing of the past. By following the practical steps above, parties can avoid being surprised by the disclosure of confidential information.

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[1] In re: Avandia Marketing, Sales Practices & Products Liability Litigation, 924 F.3d 662 (3d Cir. May 15, 2019).

[2] See In re Avandia, No. 07-MD-1871, 2018 WL 3589439, at *1 (E.D. Pa. July 24, 2018), vacated and remanded, 924 F.3d 662.

[3] See Avandia, 924 F.3d at 671 (citing Fed. R. Civ. P. 26(c) and Pansy v. Borough of Stroudsburg, 23 F.3d 772 (3d Cir. 1994)). Pansy, a seminal Third Circuit decision, established certain non-exhaustive factors the court may consider when determining whether good cause exists for a protective order, which amount to a balancing of private interests against public interests. Those factors include: (a) whether disclosure will violate any privacy interests; (b) whether the information is being sought for a legitimate purpose or for an improper purpose; (c) whether disclosure of the information will cause a party embarrassment; (d) whether confidentiality is being sought over information important to public health and safety; (e) whether the sharing of information among litigants will promote fairness and efficiency; (f) whether a party benefiting from the order of confidentiality is a public entity or official; and (g) whether the case involves issues important to the public. 23 F.3d at 787-91.

[4] Avandia, 924 F.3d at 672-73.

[5] Id. at 674.