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Federal Courts Bring Renewed Scrutiny to Requests to Seal Documents

Litigation and Dispute Resolution

CHEAT SHEET

- ***Public interest.*** In *Shane Grp., Inc. v. Blue Cross Blue Shield*, the US Court of Appeals for the Sixth Circuit set a high bar for sealing documents around the world — mandating that such requests should be rejected if the public has a "strong interest in obtaining information contained in the court record."
- ***Keeping a secret.*** Trade secrets are one of the three categories of information that can be filed under seal. However, not all business information — including the most confidential information — rises to the level of a trade secret.
- ***Hide and seek.*** Perfunctory or boilerplate reasoning will not justify filing a document under seal. As early as possible, parties should identify documents that need to be sealed, and prepare specific justifications for doing so.
- ***Shifting tide.*** As recent rulings begin to suggest that courts will bring increased scrutiny to sealing requests, it's important that in-house counsel come to court prepared to argue the justification for the motion.

Corporate litigants often request to file data, documents, and even entire cases under seal. Some judges routinely acquiesce to these requests if the other side doesn't object, while other judges set a high bar for sealing a case, asserting a philosophy that the courts should be open to public view, absent a compelling reason to protect information. A 2009 study by the Federal Judicial Center found that district courts and individual judges were vastly inconsistent in granting requests for seals. Indeed, the law grants a great deal of discretion to judges in assessing requests to seal, allowing them to apply their own philosophical biases.

A recent decision from the United States Court of Appeals for the Sixth Circuit brings guidance to both litigants and judges and takes a conservative view of the need to seal cases. *Shane Grp., Inc. v. Blue Cross Blue Shield*, 825 F.3d 299 (Sixth Cir. 2016), sets a high bar for sealing documents. In addition, it suggests that corporate litigants, especially in class actions and consumer cases, must craft compelling arguments to win a court's approval for requests to seal. *Shane Group* highlights the practical challenges of effectively litigating a case while properly maintaining the confidentiality of sensitive financial data, trade secrets, and personal information. *Shane Group* raises important questions and offers guidance for all counsel who must protect sensitive information from unwanted public disclosure in court filings.

Recent court decisions — such as the Sixth Circuit's *Shane Group* opinion — and legal publications have a placed a renewed emphasis on the topic of filing under seal. This article continues that discussion by compiling the practical lessons of *Shane Group* and offering concrete guidance for corporate litigants who handle confidential or sensitive documents.

Class action appealed on grounds of unjustified sealing

A group of Michigan residents filed class actions against Blue Cross Blue Shield of Michigan, alleging that it had engaged in a price-fixing scheme with 22 major Michigan hospitals. The class actions were consolidated and, after discovery, class counsel filed a motion for class certification with 90 exhibits;

Blue Cross filed an opposition brief with 42 exhibits. Both briefs and their related exhibits were filed under seal. Class counsel also hired an antitrust expert who submitted a report estimating a total of US$118 million in damages to the class. Blue Cross filed a motion to exclude testimony that contained 34 exhibits. Again, the motion and all exhibits were filed under seal.

The parties then reached a tentative US$30 million settlement agreement. Just US$14 million of that amount was to be distributed to class members, with the rest going to expenses and attorneys' fees. Several class members objected to the proposed settlement, but were forced to formulate their objections without access to the numerous sealed filings. The district court approved the proposed settlement over these objections, and the objectors appealed, challenging the sealing of the documents and the fairness of the settlement agreement.

Sixth Circuit came down hard on sealing

The Sixth Circuit began its review of the district court's sealing orders by discussing in detail the standard for filing documents under seal. The court first noted the "stark difference between so-called 'protective orders' entered pursuant to the discovery provisions of Federal Rule of Civil Procedure 26, on the one hand, and orders to seal court records, on the other." Because "secrecy is fine" during discovery, Rule 26 protective orders are appropriate "upon a mere showing of good cause," the court said. However, the court also weighed the public interest in open courts, noting that the public has a "strong interest in obtaining information contained in the court record."

That interest gives rise to a "'strong presumption in favor of openness' as to court records," the court said, referring to a tobacco case, *Brown & Williamson*, 710 F.2d at 1179, in which the US Federal Trade Commission (FTC) sued Brown & Williamson, alleging deceptive advertising about the tar content of one of its cigarette brands. A party asking to seal court records bears a "heavy" burden and can "justify the non-disclosure of judicial records" only for "the most compelling reasons," the court said. The court emphasized that the burden is particularly heavy where the public has a strong interest in the subject matter of the litigation, such as in class actions, where members of the public are also class members.

Shane Group warns courts against the blanket sealing of filings. To carry its burden, "[t]he proponent of sealing therefore must 'analyze in detail, document by document, the propriety of secrecy, providing reasons and legal citations,'" the court said, quoting *Baxter Int'l, Inc. v. Abbott Labs.*, 297 F.3d 544, 548 (Seventh Cir. 2002). Valid reasons for sealing are few: "'[I]n civil litigation, only trade secrets, information covered by a recognized privilege (such as the attorney-client privilege), and information required by statute to be maintained in confidence (such as the name of a minor victim of a sexual assault),' is typically enough to overcome the presumption of access," the court said, again quoting the *Baxter* opinion.

Applying these stringent standards, the *Shane Group* court unsealed all of the documents that had been sealed by the district court. The court chastised the parties and the district court alike for "plainly conflat[ing] the standards for entering a protective order under Rule 26 with the vastly more demanding standards for sealing off judicial records from public view," rejecting the parties' arguments that the documents designated "confidential" in discovery could automatically be filed under seal. The court emphasized that such arguments "are protective-order justifications, not sealing-order ones," and criticized the parties for offering "one-sentence" justifications for sealing such documents at the trial-court level (and, in some instances, filing documents under seal without asking permission at all).

The court then considered whether any “confidential patient health information” or “competitively-sensitive financial and negotiating information” warranted sealing the documents. As there was “scarcely any” patient health information in the documents sealed, that justification failed. Likewise, the court refused to recognize the “negotiating information” as a valid trade secret, since the “negotiations” between Blue Cross and the Michigan hospitals were the very price-fixing scheme at issue in the class actions. On a related note, while typically the “privacy interests of innocent third parties” weigh “heavily” in favor of sealing, the third-party hospitals accused of price-fixing were not “innocent” third parties entitled to protection, the Sixth Circuit said.

To enable the class members to form “meaningful” objections to the proposed settlement — and especially so they could examine the fairness of a settlement fund that was small compared to the damages at issue — the court ordered all of the documents unsealed.

Lessons from *Shane Group*

Although *Shane Group* mostly reiterated and compiled existing precedent, district courts have heeded the Sixth Circuit’s call for close scrutiny of any request to file under seal. In the words of one district judge in the Sixth Circuit, “[t]he Court of Appeals has clearly directed that district judges must give more attention to the propriety of sealing documents.” *Alyn v. Southern Land Co., LLC,* No. 3:15–cv–596, 2016 WL 5126735, at *2 (M.D. Tenn. Sept. 20, 2016). The decisions of these district courts — along with the *Shane Group* opinion itself — provide useful guidance on what types of documents can be sealed and how parties can go about sealing them.

Confidentiality in discovery is not enough

The most important lesson from *Shane Group* is this: Documents designated “confidential” in discovery, even in accordance with a protective order, may not be filed under seal as a matter of course. Whether or not a document is treated as confidential in discovery has nothing to do with whether it can be filed under seal. In the months since *Shane Group* was decided, several district courts and the Sixth Circuit itself have reaffirmed and applied this principle, rejecting requests for seals that were based solely on the documents being confidential in discovery.

Trade secrets are protected — if they really are trade secrets

Trade secrets are one of the three categories of information that generally can be filed under seal. But not all business information — including confidential information — rises to the level of a trade secret. “Negotiating information” between hospitals and insurers is not a trade secret, for example. Since *Shane Group* was decided, courts have carefully scrutinized requests to file documents that purport to containing trade secrets under seal.

Harm to reputation is not persuasive

In *Rudd Equip. Co., Inc. v. John Deere Constr. & Forestry Co.*, 834 F.3d 589 (Sixth Cir. 2016), a construction equipment supplier threatened to terminate its agreement with a construction equipment dealer and servicer, and the dealer filed suit to prevent the supplier from doing so. At the time of filing, the dealer also requested that all documents in the case — including the fact that the case existed — be sealed from public view. According to the dealer, if the public learned of the supplier’s threat to terminate their agreement, the dealer would “suffer ‘devastating consequences,’” including the loss of customers, employees, and good will. Although the dealer’s motion to seal was granted,

the district court later unsealed the case, and the dealer appealed that order.

Applying the standards from *Shane Group*, the Sixth Circuit agreed with the trial court that the case should be unsealed. The court rejected any notion that the existence of the suit was somehow a protected trade secret. “Even taking Rudd at its word regarding the serious business consequences at stake should this case be unsealed, more is required,” the court’s opinion stated. “As we have explained, [simply] showing that the information would harm the company’s reputation is not sufficient to overcome the strong common-law presumption in favor of public access to court proceedings and records. That is especially true here, where the entity alleging harm from publicizing the mere existence of this case is the plaintiff — the party that chose to file suit.”

Thus, mere reputational harm, even when that harm may have “disastrous” business consequences, does not justify filing under seal.

Sealing standards in other US Circuit Courts of Appeals

At least in civil cases, all US Circuit Courts of Appeals recognize that there is a public interest in obtaining information from judicial records and a corresponding presumption of access to those records. When this public interest applies to a document, generally only “compelling reasons” like those discussed in *Shane Group* can overcome the presumption of access and justify sealing. The Circuits, however, diverge somewhat on the types of court records to which the presumption of access attaches.

WHEN DOES THE PUBLIC INTEREST IN ACCESS TO COURT RECORDS APPLY?

Applies to all documents filed with the court:

- Fourth Circuit — *Doe v. Public Citizen*, 749 F.3d 246, 265-66 (Fourth Cir. 2014) (“The common- law presumptive right of access extends to all judicial documents and records”).
- Sixth Circuit — *Shane Grp. Inc. v. Blue Cross Blue Shield of Mich.*, 825 F.3d 299, 305 (Sixth Cir. 2016) (strong presumption attaches “when the parties place material in the court record”).

Whether the presumption applies depends on the importance of the document to the court’s decision on the merits of the case, as opposed to its relevance to discovery or other similar issues:

- First Circuit — *US v. Kravetz*, 706 F.3d 47, 54 (First Cir. 2013) (public interest applies to “materials on which a court relies in determining the litigants’ substantive rights,” which specifically excludes discovery related motions).
- Second Circuit — *Bernstein v. Bernstein*, 814 F.3d 132, 142 (Second Cir. 2016) (stating that strong presumption applies to documents “presented to the court to invoke its powers or affect its decisions,” and noting that the trend is toward applying the strong presumption to all filed documents except discovery related motions).
- Third Circuit — *Leucadia, Inc. v. Applied Extrusion Technologies, Inc.*, 998 F.2d 157, 165 (Third Cir. 1993) (presumption applies to “all material filed in connection with nondiscovery pretrial motions, whether these motions are case dispositive or not, but no such right as to discovery motions and their supporting documents”).
- Fifth Circuit — *SEC v. Van Waeyenberghe*, 990 F.2d 845, 849 and n.4 (Fifth Cir. 1993) (recognizing “presumption in favor of the public’s common law right of access to court

records" that extended to "settlement agreements that are filed and submitted to the district court for approval" as well as a final order (here, an injunction) and transcript related to the settlement. The Fifth Circuit, however, has refused to assign a particular weight to the right of public access).

- Seventh Circuit — *Baxter Int'l, Inc. v. Abbott Labs.*, 297 F.3d 544, 545 (Seventh Cir. 2002) (documents that "influence or underpin the judicial decision are open to public inspection unless they meet the definition of trade secrets or other categories of bona fide long-term confidentiality").
- Eighth Circuit — *IDT Corp. v. eBay*, 709 F.3d 1220, 1223 (8th Cir. 2013) (noting the "modern trend in federal cases to treat pleadings in civil litigation (other than discovery motions and accompanying exhibits) as presumptively public, even when the case is pending before judgment").
- Ninth Circuit — *Center for Auto Safety v. Chrysler Group, LLC*, 809 F.3d 1092, 1101 (Ninth Cir. 2016) (whether strong public interest applies "turn[s] on whether the motion is more than tangentially related to the merits of a case," and specifically does not apply to materials filed with discovery motion which are unrelated to merits of case).
- 10th Circuit — *Colony Ins. Co. v. Burke*, 698 F.3d 1222, 1242 (10th Cir. 2012) ("Where documents are used to determine litigants' substantive legal rights, a strong presumption of access attaches").
- 11th Circuit — *Romero v. Drummond Co., Inc.*, 480 F.3d 1234, 1245 (11th Cir. 2007) (presumption applies to "material filed in connection with pretrial motions that require judicial resolution of the merits" but not documents "filed in connection with motions to compel discovery").
- DC Circuit — *SEC v. Am. Int'l Grp.*, 712 F.3d 1, 3-4 (DC Cir. 2013) (presumption applies only to record that "plays a role in the adjudicatory process," not to documents where the court "ma[kes] no decisions about them or that otherwise relie[s] on them").

Sales figures may not be trade secrets

A company's sales figures are not necessarily protected as a trade secret. For example, in *Graiser v. Visionworks of Am., Inc.*, No. 1:15-CV-2306, 2016 WL 3597718 (N.D. Ohio July 5, 2016), a consumer class action challenging the legality of the defendant's "buy-one-get-one" promotions, the defendant filed a summary judgment brief with certain sales figures redacted. The district court ordered these documents unsealed, saying that the defendant's claim that its "competitors may be able to use [its] sales data in an attempt to seize [the defendant's] market share" did not justify the redactions. Nor did the sales figures qualify as a trade secret.

Other courts have rejected similar vague assertions that "confidential," "competitive," or "strategic" business information may be filed under seal, especially if the parties don't provide a reasonable legal explanation of how disclosure of the information will be harmful. The courts have been clear that if a party wants to file trade secrets under seal, it must present specific legal authority showing that the information at issue is in fact a trade secret."

Innocent third parties and statute-required confidences

Where statutory or other law requires a party to maintain certain information in confidence, that party

may typically file the information under seal. For instance, if a party needs to file documents containing patient health information protected by the Health Insurance Portability and Accountability Act (HIPAA), it should be able to seal or redact those filings.

On a related note, courts recognize that, “the privacy interests of innocent third parties should weigh heavily” in favor of sealing documents. But not all information about third parties can be sealed. The *Shane Group* court rejected the “innocent third-party” justification as to third-party hospitals that allegedly schemed to fix insurance prices because they were not “innocent.” Other courts have relied on this distinction when considering requests to seal third-party information not otherwise required by law to be maintained in confidence.

Seal settlement amounts but not the agreements

Parties routinely designate that settlement agreements should be confidential, and may even agree to contractual penalties in the event that a party to a settlement agreement discloses its contents. As for filing such agreements under seal, courts recognize that settlement amounts can sometimes be sealed. (See In re *Black Diamond Mining Co., LLC*, No. 15-96-ART, 2016 WL 4433356, at *2(E.D. Ky. Aug. 18, 2016)).

But courts do not universally follow this rule, especially if the case involves public policy. A Tennessee district denied a request to seal a settlement agreement in a Fair Labor Standards Act case even though publication of the settlement amount might impact settlements in other cases. It noted that “the fear of copycat lawsuits or embarrassing inquiries [do not] suffice to defeat the presumption [of public access].”

While courts are likely to look favorably in most cases to sealing references to settlement amounts, settlement agreements are treated like any other document designated confidential in discovery — something more is required to justify sealing. *Shane Group* illustrates that the legal standard for filing documents under seal is demanding. The actual process of filing for seal is also somewhat complex. Here are some of the practical considerations relevant to filing under seal.

Identify confidential information early in a case

One lesson of *Shane Group* is that perfunctory or boilerplate reasoning will not justify filing a document under seal. As early as possible in the litigation process, parties should identify documents that may need to be filed under seal, and prepare specific justifications for doing so.

Parties should identify the steps required for filing under seal in the relevant jurisdiction. In federal district courts, the local civil rules and electronic case filing guidelines typically designate a procedure for filing under seal. Don’t neglect inquiring about standing orders of individual judges.

Broadly, these rules outline two approaches. Some courts, including most district courts in the Sixth Circuit, require a party to file a motion seeking permission to file under seal and in some instances, obtain a court order. Other more lenient courts allow a party to provisionally file a document under seal and then await a ruling as to whether the document can remain sealed.

This second approach may be barred by *Shane Group* because it permits a party to seal documents — even temporarily — without any justification. Applying Shane Group, one court rejected a proposed protective order that allowed for provisional filings under seal. (*Wasau Underwriters Ins. Co. v.*

Reliable Transp. Specialists, Inc., No. 15-12954, 2016 WL 6638698, at *2 (E.D. Mich. July 13, 2016)). In the Sixth Circuit, at least, parties should hesitate before provisionally filing any document under seal without a prior court order.

Offer specific justifications

As discussed, only a handful of compelling justifications warrant filing under seal. Thus, when requesting leave to file under seal, parties should specify the precise documents or parts of documents that should be sealed, and then match each document with an appropriate legal justification for sealing. Blanket and vague justifications for sealing documents are not likely to be approved.

What happens if a motion to seal is denied?

In jurisdictions where parties must obtain a court order ahead of time, parties generally must submit a redacted or sealed version of the document they want sealed as part of a substantive filing. This raises the question: If a motion to seal is denied, does that motion itself (including any attached documents proposed to be sealed) become part of the public court record? Fortunately, the answer appears to be no. Instead, the document will remain sealed, and the district court simply will not consider the document substantively unless it is refiled as a public document. Many sets of local rules, however, do not directly address this issue. When in doubt, it is best to consult the clerk or court before seeking a sealing order.

Continued skepticism of courts likely

Many corporate litigants have grown accustomed to the routine or easy sealing of documents in some jurisdictions. *Shane Group* and other recent rulings suggest that most courts will bring renewed scrutiny to such requests. This won't result in a wholesale disclosure of sensitive information in court cases, but it does suggest that parties should come to court prepared to argue the justification for sealing documents. Courts are likely to continue to protect genuine trade secrets and sensitive business information, but counsel should take nothing for granted.

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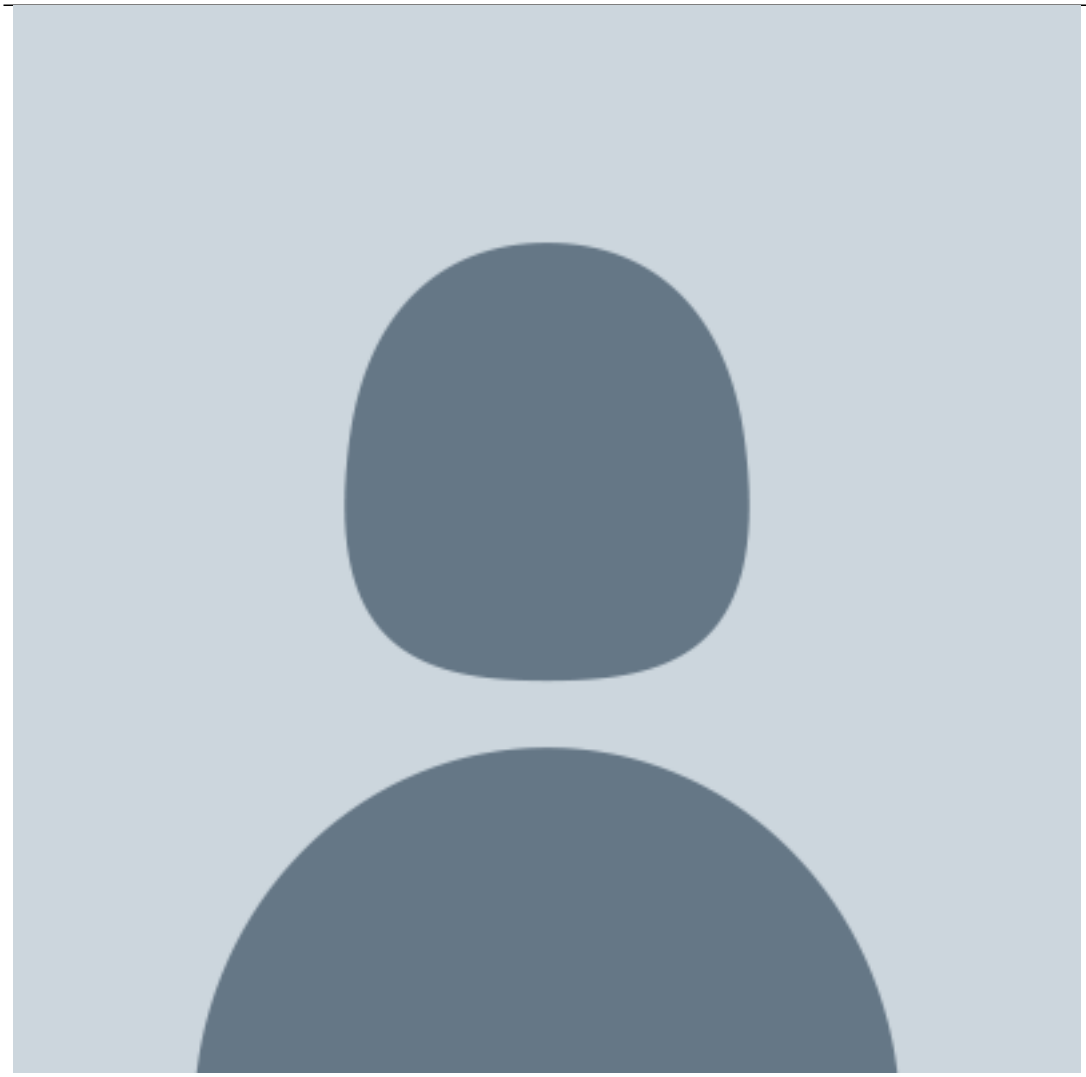

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