

CLIENT ALERT

NHTSA Identifies Best Practices Regarding Confidentiality Provisions in Settlement Agreements and Protective Orders

Jun.01.2016

On March 11, 2016, the National Highway Traffic Safety Administration (NHTSA) released a final enforcement bulletin that set forth “[Recommended Best Practices for Protective Orders and Settlement Agreements in Civil Litigation](#).” In the Agency’s view, restrictions imposed in protective orders and settlement agreements are limiting its access to “critical safety information.” Although federal law may require members of the industry to report this information, in NHTSA’s experience, they do not always do so, or do so timely. And according to the Agency, access to critical safety information identified or discovered in private litigation is essential to enable NHTSA to protect public safety. As a result, the guidance “communicates the Agency’s position that confidentiality provisions should not be used to prevent safety-related information from reaching NHTSA.”

To prevent impediments to NHTSA’s access to safety information, NHTSA recommends “that all parties seek to include a provision in any protective order or settlement agreement that—despite whatever other restrictions on confidentiality are imposed, and whether entered into by consent or judicial fiat—***specifically allows for disclosures of relevant motor vehicle safety information to NHTSA and other applicable government authorities.***” NHTSA declined to provide recommended boiler plate language, noting that parties in private litigation are best positioned to craft appropriate language based on their specific circumstances. In doing so, NHTSA asks the parties to remain mindful of the “global interest of protecting and promoting public safety.” NHTSA provides two examples of language that may be suitable. The first is a general provision: “*discovery material may only be disclosed to . . . governmental entities with an interest in public safety hazards involving [description of the product or vehicle].*” NHTSA also suggests that litigants may specifically identify its interest (*e.g.*, “The manufacturer may provide information and documents to NHTSA.”).

Although NHTSA’s Enforcement Bulletin is not itself binding, the House of Representatives has proposed legislation that would create a presumption against protective orders and against sealing documents in cases in which the pleadings state facts that are relevant to protecting public health and safety. This proposed legislation is consistent with certain state laws already in effect. For example, Florida does not permit courts to enter protective orders that may have the “purpose or effect of concealing a public hazard or any information concerning a public hazard.” Likewise, Texas establishes a presumption that court records “concerning matters that have a probable adverse effect upon the general public health or safety” are open to the public unless there is a showing of a specific, serious, and substantial interest in nondisclosure. Some states, such as Indiana, go even further by requiring an affirmative showing that the protective order will further the public interest and lifting the protective order when its basis no longer exists.

Other Articles in This Month's Edition:

- [NHTSA Addresses Hacking and Cybersecurity](#)

- [NHTSA Intends to Enforce MAP-21's Indexing Requirement](#)
- [FTC Targets "All Natural" Claims for Personal-Care Products](#)
- [The European Commission Is Not Bound by EFSA's Approval of Food Health Claims](#)
- [European Commission Releases 2015 RAPEX Report](#)
- [Advertisers in the Ring – A Roundup of This Month's Competitor Advertising Challenges: Best Brands, Hometown Brands, and Playing by NAD Rules](#)

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Daniel T. Campbell

Partner – Washington, D.C.
Phone: +1 202.624.2544
Email: dcampbell@crowell.com

Rebecca Baden Chaney

Partner – Washington, D.C.
Phone: +1 202.624.2772
Email: rchaney@crowell.com

Danielle Rowan

Associate – Washington, D.C.
Phone: +1 202.624.2681
Email: drowan@crowell.com