ALASKA LEGISLATURE COMMITTEE FILES 1991-1992 8672
6936 HOUSE JUDICIARY

Texas: In 1990, Texas became the first state to address secrecy concerns through court rules which took effect on September 1, 1990,. The Texas Supreme Court chose to focus on the issue of sealed court records, and adopted amendments to the Texas Rules of Civil Procedure to establish standards and procedures for sealing. The court recognizes a "presumption of openness" of all court records, which could be overcome only after a showing that a specific, serious and substantial interest in sealing records outweighs any adverse effect on public health and safety, and that no less restrictive means than sealing would protect the interest. "Court records" includes all documents filed in a civil action, as well as unfiled discovery material and settlement agreements that are not filed but might have an adverse effect on public health and safety. The court detailed specific procedures (notice, public hearings, etc.) by which records could be sealed under the new rules, and provided that individuals and organizations not a party to the case could participate in hearings.

Virginia: HB 1582, the first legislation of its kind, was introduced in 1989 by ATLA Member Bernard Cohen, a member of the General Assembly. It passed and was signed by the Governor, and took effect on July 1, 1989. It allows attorneys to share information produced in discovery if they have permission of the court (given after a hearing), and if the attorneys who would receive the information agree to be bound by the terms of any protective order.

Washington: The Washington State Trial Lawyers Association is sponsoring bills in both House and Senate during the current legislative session. The bills, HB 1320 and S 5388, are very similar to the Florida Sunshine in Litigation Act.

Wisconsin: The Wisconsin Academy of Trial Lawyers plans to introduce a bill in the current legislative session. It is expected to be similar in operation and effect to the Texas court rule amendments.

March 1, 1991

Facts About Secrecy in Litigation

- **Secrecy in litigation,** the practice of keeping private what would otherwise be public information emerging from litigation, includes the following practices:

  Protective Orders that legally prohibit parties receiving information in a lawsuit from distributing this information to others (e.g. attorneys representing other plaintiffs).

  Confidentiality Agreements that require certain matters, once they are discussed or agreed to, to remain confidential except among the parties directly involved. Such matters might include the cause of injury and the contributing factors, the terms of settlement, and even the fact that a lawsuit was ever filed.

  Sealed Court Files that legally preclude access to any details of a case. The parties' names may even be withheld, leaving only a record titled "Sealed v. Sealed."

- **Secrecy has jumped steadily and significantly** in civil cases since at least the mid-1970's. Plaintiffs' attorneys indicate that demands for protective orders are now a routine occurrence in product liability cases.

- **The process of secrecy** is typically initiated by defendants. Plaintiffs can demand all information that the defendant has about the causes and circumstances of injuries, including the defendant's knowledge of any prior, similar incidents. Defense attorneys may object to the request on a variety of grounds, and may request a protective order limiting the information they have to produce. Through a protective order, they may also seek to prohibit the sharing of information with other attorneys. To expedite discovery, the parties directly involved in the case may agree to share information, but only among themselves. Judges tend to approve most agreements reached by both parties. Yet the public's right to know, especially about vital health and safety matters, can be sacrificed in the process.

- **First Amendment/Freedom of Information concerns** have also arisen in court secrecy practices. Journalists researching stories about health or safety hazards may find that confidentiality agreements bar attorneys from discussing information crucial to public safety with the media. Secrecy orders can also bar medical, scientific and other experts from discussing critical findings. They can also interfere with resolution of Freedom of Information Act disputes. The mandatory nature of the orders, the direct involvement of the judiciary in granting them, and the threat of contempt if they are violated, all raise questions about freedom of the press and free speech.

Examples of Secrecy:

ENVIRONMENTAL SAFETY: Secrecy orders can block attempts by scientists and health officials to monitor hazardous chemicals. In a confidential settlement, Xerox Corp. paid two families in Webster, New York nearly $5 million in 1988 in a case alleging that chemical leaks from a Xerox plant caused cancer and neurological damage to seven family members. Neighbors living on the same street could not obtain any information about the toxic hazards they may face. Until a 1989 court decision which released sealed records to state and local health authorities, medical experts who had analyzed the alleged connection between the children's illnesses were not even allowed to share their findings with the health officials.

MEDICAL MALPRACTICE: Some physicians have effectively avoided disciplinary charges by their peers because sealed court files remove all records of civil suits in which the facts would clearly warrant disciplinary action. In the District of Columbia, for example, records of a 1983 suit alleging that a doctor had sexually assaulted a patient during a gynecological examination were sealed after the doctor settled the case and admitted having a sexual relationship with his patient.

PRODUCT SAFETY:

- PFIZER HEART VALVE: A 1985 report on a defective heart valve withdrawn from further use in 1986, but still implanted in some 50,000 people, has been withheld from the medical community and the public because of protective orders obtained by Pfizer, Inc. Nearly 250 deaths have been caused by the defective valves, according to Pfizer's own statements. Pfizer has paid millions of dollars to settle many lawsuits in return for secrecy orders.

- BREAST IMPLANTS: In 1989, requests to the FDA by a public interest group seeking copies of safety studies of breast-implant material were denied on trade secret grounds. Expert witnesses who testified in lawsuits are under protective orders and cannot reveal what the manufacturer's records show about the hazards of materials in breast implants used by thousands of women. This is an example of how a protective order can be detrimental to public health and safety.

- AUTOMOBILE FUEL SYSTEMS: A series of suits against General Motors alleged that the fuel system used in GM cars built before the early 1980's presented avoidable risks of fuel-fed fires. GM systematically obtained protective orders that successfully kept from public scrutiny internal documents showing that financial considerations outweighed safety concerns in the design and manufacture of its automobiles.

Fred Barbee
Retired appliance repair co. owner
Minong, Wisconsin
54

Mr. Barbee's wife died on April 26, 1988, after her Bjork/Shiley artificial heart valve broke. The valve was originally implanted in May of 1982.

Pfizer has routinely sought protective orders in its heart valve cases, and has gone to court to try to maintain confidentiality of thousands of documents related to its heart valves.

Fred Barbee testified before the Dingell subcommittee. He and his wife were never advised by any doctors about the heart valve problem. They never read about it in the press. All of the company's settlements were kept confidential, so the media couldn't learn about litigation while it was underway. Nearly 10 years after the first Shiley fracture, the Barbees were totally in the dark.

STATEMENT OF FREDERICK BARBEE
Minong, Wisconsin

My name is Frederick Barbee, and I believe that secrecy, of the kind you're talking about in this conference today, killed my wife.

My wife, Carol, had a Bjork/Shiley artificial heart valve implanted in May 1982. About six years later, she collapsed after doing some yard work. She said she was having trouble breathing and that she thought she was having a heart attack, or that something might be wrong with her replacement valve. Until that time, we had never heard that Bjork/Shiley artificial heart valves would break.

I took Carol to the closest hospital where, despite emergency room care, she went into cardiac arrest. She was then rushed by ambulance to a hospital in Duluth, an hour away. She had open heart surgery in Duluth to replace the valve. By the end of that surgery, she had suffered so much oxygen deprivation that she slipped into clinical death. After all of the heroic efforts to save her life, she died about 48 hours after the first symptoms appeared.

I later discovered several things about her type of heart valve. I learned that dozens of other valves had fractured over a period of years before Carol's broke, including a number of them before hers was even implanted. I learned that Shiley, the company that made them, had not provided any information about the problem to patients who had the valves. I learned that the symptoms of a broken valve are like those for a heart attack, and that most of the people whose valves fractured died as a result.

I learned that many of their families had filed lawsuits against Shiley, Inc., the manufacturer, and its parent company, Pfizer, Inc. I 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 negotiated settlements in those cases that required the victims to keep their settlements confidential.

I read newspapers and watch television. If I had ever heard anything about this problem in the news I would have taken my wife back to the doctor to see what should be done about it. Even if she didn't have the defective valve replaced, and even if we couldn't prevent the strut fracture, having some advance information about the problem would have allowed us to plan for an emergency, and possibly save her life. If I had known what to expect, I would have made arrangements for Carol to be taken to Duluth, not to our local hospital, because I now know that only immediate open-heart surgery would have saved her life -- and our local hospital didn't have the capability to perform open heart surgery. If I had heard <u>anything</u> about valve fractures before April 24, 1988, we would have had time to reach Duluth, and Carol might be alive today.

But Shiley wanted this problem kept secret, and they got their way. I have learned that Shiley knew of problems with the valve as early as 1978, yet attorneys, victims' families, and the public are still struggling to get this information.

Devra Lee Davis, Ph.D.
Toxicologist, presently scholar-in-residence at the
National Academy of Sciences, Washington, D.C.
Professor at Mt. Sinai Medical Center, Dept. of Environmental and
Occupational Medicine, New York City

Dr. Davis suffered a near-fatal anaphylactic reaction to a prescription drug (Zomax) in 1983, two months before the drug was withdrawn from the market by its manufacturer, McNeil Pharmaceutical.

Dr. Davis believes that, as a result of secrecy provisions attached to settlements of lawsuits against McNeil, research on the effects of the chemical constituents of Zomax has been inhibited.

STATEMENT OF DEVRA LEE DAVIS, Ph.D.
Washington, D.C.

On January 4, 1983, I almost died. The drug I had taken early that morning for my broken foot, Zomax, had been billed as the best thing since morphine without narcotics. Within 20 minutes, it had nearly killed me.

I am a specialist in toxicology. When my heart began racing after taking Zomax, I pulled out my bedside copy of the Physicians' Desk Reference to learn what type of reaction I might be having. I was relieved to find no warning about a sometimes fatal allergic response called anaphylaxis. But my pulse soon soared to 140, and I began to experience that profound sensation of impending doom and deep dread characteristic of true anaphylaxis, along with breathing difficulties and gigantic hives all over my body.

I blacked out and tumbled down a flight of stairs. "Mommy! Mommy! Are you dead?" my six-year-old cried.

After I was treated at the hospital emergency room, I learned that a number of patients had experienced violent, allergic reactions to Zomax and that some had died. Later I met physicians who had survived other traumas with the same drug, as much as three years earlier. One drove his car off a super highway and was treated for a heart attack. Another suffered a punctured lung when his heart was restarted.

The Washington Post, on October 25, 1988, disclosed the background of the litigation and regulatory processes surrounding Zomax. This article by Weiser and Walsh detailed how the company that manufactures Zomax, McNeil Pharmaceutical, deliberately downplayed the severity of adverse reactions from the drug, in its reports to the Food and Drug Administration, in its aggressive marketing campaign, and in its letters to doctors.

Some of the victims of anaphylactic reactions to Zomax -- and some families of those who died -- sued McNeil. Two were physicians who spoke to me about their devastating reactions and told me that, as a condition of settling their cases, they were required never to disclose the details of their lawsuits or talk about what had happened again. They also agreed not to publish any reports of their reactions in medical journals, which are a key source of information for doctors to learn about such reactions. One of these reactions occurred three years before mine. If these warnings had been published, Zomax might well have been withdrawn from the market before my brush with death.

In order to settle cases, courts repeatedly sealed medical and scientific records, effectively shutting off access to vital technical information and preventing scientists from initiating research projects and from publishing results. In fact, Zomax is an unusual compound for research. It causes cancer in animals at doses about the same as those that could be taken by humans. It also produced severe renal disease, psychiatric disturbances and suicide in people with no previous history of such illness. Most interestingly, Zomax spawned powerful immunological reactions in people with no previous history of allergic response.

McNeil succeeded in having court-ordered secrecy maintained about such matters and suppressing the publication of information in medical journals, stifling the free flow of information so vital to scientific research.

Two former employees of McNeil, one a physician heavily involved in developing the product, recently filed suit against McNeil, claiming they were fired in retaliation for arguing for stronger warnings and earlier withdrawal of Zomax from the market. Throughout its years of litigation, McNeil shielded these officials from testifying or being deposed in lawsuits, alleging that information they had was protected under court-ordered secrecy of prior settlement agreements. After most of the allergic reaction deaths and other cases had been settled, they were terminated.

In their public pleadings, these former employees have disclosed crucial scientific information about the potential of this drug to kill or produce life-threatening reactions. They have attached large portions of the company's records on the Zomax problem to their complaint in court, to make it a part of the public record and protect it from the effect of later secrecy orders.

My interest in Zomax, and in the secrecy problem related to it, goes far beyond the personal level. There is much more work to be done on this fascinating compound. Zomax differs by one molecule from Tolectin-DS, which is now one of the most widely-prescribed pain medications in the U.S. We need to know the extent to which severe allergic reactions are also occurring with this drug.

The use of legally ordered secrecy to shield corporate mistakes is not unique to Zomax, but cuts across all product liability cases. When there is an allegation that a drug is causing injury, the manufacturer is not always forthcoming to researchers with what it knows about the problem. Moreover, attorneys are sometimes prohibited from disclosing company documents (including test records) which they receive during discovery. As a result, judicially sanctioned secrecy can compromise medical research.

A democracy rests on the informed consent of the governed. Science is an inherently democratic institution, fueled by shared, common information. The practice of secrecy in the courts can result in a failure to tell the public about proven hazards -- endangering lives, perverting science, and ultimately undermining democracy itself.

James Miller
44 years old
Printer
Carlsbad, California

Mr. Miller's twin sons were severely injured in a 1988 head-on collision while wearing rear seat lap belts in a Ford Escort. One died, the other is paraplegic.

The Millers were asked to keep the amount of their settlement with Ford confidential. They agreed to do so if Ford would alert its customers to the need for using rear seat shoulder harnesses, and provide the harnesses through dealers at a reasonable cost. Ford refused, so the $6 million settlement was not kept secret.

STATEMENT OF JAMES MILLER
Carlsbad, California

Our new 1986 Ford Escort was equipped with front-seat lap-belt/shoulder harness combination restraints, and rear seat lap belts when we purchased it. On November 13, 1988, we were struck head-on by a driver who had crossed the center-line of a road in our home town of Carlsbad, California. The front end of our car was virtually demolished. My wife and I suffered broken bones and bruises, but were saved from more serious injuries by our shoulder harnesses, even though we were in the front of the car, where most of the damage occurred. However, our 11-year-old twin sons, James and Richard, secured only by rear lap belts, both sustained broken spines, and James had a cervical injury. James died, and Richard was left a paraplegic.

We sued Ford for not providing shoulder harnesses for the rear seats. Ford offered to settle our case if we would agree to keep the amount of compensation a secret.

We told Ford that we would agree to such a request only if Ford would send a letter to every existing pre-1990 Ford Escort and Mercury Lynx owner, advising them of what Ford had known for 20 years: that properly installed 3-point shoulder harnesses clearly protect passengers better than lap belts alone. Our attorney obtained an internal Ford document which said that. We also asked Ford to make kits available to dealers to install shoulder belts, for a reasonable cost, in the anchor points which are already required by law in all post-1972 automobiles. We asked for that because we found that Ford dealers did not have the parts needed to install shoulder belts for rear seats. They cost an extra $12 per belt when installed at the factory. (European Escorts are required by law to have shoulder harnesses installed before sale.)

Ford refused to agree to those conditions. We felt then, and still do, that for us to agree to keep quiet would place us in complicity with Ford's own 20-year silence on this subject. Only by opening this subject to public discussion would we be making a contribution to safety, so that other families will not lose their children, or see them severely injured and permanently disabled, as we have.

Therefore, we refused to accept any secrecy and the case settled without it.

We are speaking out about this now because the public has to know two things:

1. The public should know that rear seat lap belts do not provide necessary protection in certain circumstances. Our family's present condition shows how devastating the injuries can be.

2. The public should know that, although Ford never admitted that its seat belt design was defective, it eventually treated our case as if a defect had been proved in court. Ford paid an amount of money that will support our handicapped son for the rest of his life.

The public would not know these things unless we spoke out.

Ed Keller
43 years old
Disabled former electrician
Hughesville, Maryland

Mr. Keller was left paraplegic after an incident in September, 1981, in which his Jeep CJ-5 vehicle rolled over when he swerved to avoid hitting a car in front of him.

Mr. Keller's case was settled by the vehicle manufacturer, with the amount not to be disclosed. Mr. Keller believes that this confidentiality camouflages just how serious injuries resulting from the Jeep CJ-5 rollover problem were, even from American Motors' perspective.

STATEMENT OF ED KELLER
Hughesville, Maryland

On September 11, 1981, I was driving my CJ-5 Jeep in a line of traffic, travelling at about 30 mph. A car directly ahead of me stopped short, and I swerved to avoid it. The maneuver I made is routine in traffic situations, and everybody does it from time to time. I also assumed that a Jeep could handle an easy maneuver like that. It wasn't until 1985 that I learned that American Motors had known, since at least July 1979, that its CJ-type vehicles would roll over more easily than regular cars.

My car did roll over, and I was thrown out of it. There was only about $1200 in damage to my car, but I suffered a spinal cord injury, and now need braces and crutches to walk. Only through long, painful rehabilitation was I able to avoid permanent confinement to a wheelchair. Before I was injured I worked as an electrician. Now I am completely unable to earn a living doing the only kind of work I am trained to do.

I sued American Motors in 1982. After about two years of investigation and discovery, American Motors offered to settle my case two weeks before trial, if I would agree to keep the amount of compensation secret.

Since 1988, I have been a volunteer at the National Rehabilitation Hospital. I volunteer one day a week in the occupational therapy department. I help the therapists with spinal cord injury victims like myself, encouraging patients not to give up hope and to try to get out of their wheelchairs.

To me, my case means I beat the giant that hurt me. Being involved in the case was extremely hard on my family and me. I really want to show, in public, what American Motors did wrong. For me not to talk about compensation means no one will know just how serious my case was, even from American Motors' perspective. I have a family to support, and that's why I agreed. There was also a lot of pressure from American Motors to agree to secrecy. I've done my best to put the incident behind me and move ahead with my life, but the secrecy part of it still grates on me.

As Amended

90 --

DGT6143

90 H-8522

STATE OF RHODE ISLAND

IN GENERAL ASSEMBLY

JANUARY SESSION, A.D. 1990

Passed by House 69-
(7-5-90)

Passed by Senate 41-0
(6-28-90)

Vetoed by Governor Edward D. DiPrete
(7-31-90 - after sessions ended)

Legislature reconvene Jan. 2, 1991

AN ACT

RELATING TO CAUSES OF ACTIONS

90-H 8522

Introduced by: Reps. Teitz, Boyle, Bramley, Gaschen and Friedemann
Date Introduced: February 7, 1990

Referred To: Committee on Judiciary

It is enacted by the General Assembly as follows:

SECTION 1. CHAPTER 9-1 OF THE GENERAL LAWS ENTITLED "CAUSES OF ACTION" IS HEREBY AMENDED BY ADDING THERETO THE FOLLOWING SECTION:

9-1-50. Availability of information in product liability actions. -- (a) No court may enter an order in a product liability action involving a product distributed in commerce that forbids any person from making any document or other information which is obtained in discovery and which is reasonably related to design specifications, performance standards, warranties, warnings and instructions or any other matter related to the safety of any product distributed in commerce available to:

(1) a federal, state or local regulatory agency, law enforcement agency or legislative or judicial body if the agency or body has regulatory, law enforcement, legislative or adjudicative responsibility with respect to the product and if the agency or body states in writing to such person before such document or information is made available that is has procedures in place to prevent the unauthorized disclosure to the public of trade secret information; or

(2) any person who the person reasonably believes:

(A) is an attorney duly licensed to practice law in a state or the District of Columbia; and

(B) is representing a person with a product liability claim which involves a product of the same type, brand or model involved in the product liability action of the person furnishing the document or information, for use in connection with a product liability claim.

If a document or information is made available under paragraph (1) to an agency or body, opposing counsel shall be notified of the fact not later than five (5) days after it is made available.

(b) In a product liability action involving a product distributed in commerce, no person may request as a condition to cooperating with discovery or to the settlement of the action that the claimant or the claimant's attorney agree:

(1) to return or destroy documents related in any way to the action if the claimant or the claimant's attorney has agreed in writing to be bound by an order entered with respect to the document and be bound by the jurisdiction of the court entering the order;

(2) in the case of an attorney, not to represent any other claimant in any action similar to the product liability action or any claimant in any other product liability action against any of the defendants in the product liability action; and

(3) to any terms that would violate the restrictions on court orders in subsection (a) of this subsection.

(c) No court may enter an order requiring any claimant or claimant's attorney to return or destroy any document related in any way to a product liability action involving a product distributed in commerce if such person has agreed in writing to continue to be bound by a valid confidentiality order.

SECTION ~~X~~3 This act shall take effect upon passage.

SECTION 2. No documents or other information provided pursuant to this section shall be sold, directly or indirectly, for profit.

DGT6143

90 H-8522

EXPLANATION

BY THE LEGISLATIVE COUNCIL

OF

AN ACT

RELATING TO CAUSES OF ACTIONS

***

This act would prohibit gag orders by courts on information relating to defective products discovered in civil litigation to government agencies or attorneys handling product liability cases involving a product of the same type.

The act would take effect upon passage.

*****

DGT6143

*****

Missouri

SECOND REGULAR SESSION

HOUSE BILL NO. 1139

85TH GENERAL ASSEMBLY

INTRODUCED BY REPRESENTATIVE GRAHAM.

Pre-filed December 27, 1989 and 1000 copies ordered printed.

DOUGLAS W. BURNETT, Chief Clerk

2524-1

AN ACT

Relating to the disclosure of discoverable materials.

Be it enacted by the General Assembly of the state of Missouri, as follows:

Section 1. A protective order issued to prevent disclosure of materials or information related to a personal injury action or action for wrongful death produced in discovery in any cause shall not prohibit an attorney from voluntarily sharing such information or materials with an attorney involved in a similar or related matter, with the permission of the court, after notice and an opportunity to be heard to any party or person protected by the protective order, and provided the attorney who receives the material or information agrees, in writing, to be bound by the terms of the protective order.

Section 2. An agreement between the parties of a lawsuit to keep the terms of any settlement confidential shall not be binding on the parties unless the court so orders. An order to keep the terms of a settlement confidential shall be issued only upon motion of either party and a finding by the court, based on clear and convincing evidence, that confidentiality is needed to protect one or more of the parties to the suit and the

public interest will not be harmed. An order issued pursuant to this section shall not bar an attorney or party to the cause from voluntarily sharing with another any materials and information gathered during discovery or otherwise during the preparation or investigation of the case provided such information or material does not disclose the terms of the settlement agreed to by the parties.

VIRGINIA

1989 RECONVENED SESSION

REENROLLED

VIRGINIA ACTS OF ASSEMBLY - CHAPTER

An Act to amend the Code of Virginia by adding a section numbered 8.01-420.01, relating to protective orders; disclosure of discoverable materials and information.

[H 1581]

Approved

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding a section numbered 8.01-420.01 as follows:

§ 8.01-420.01. Limiting further disclosure of discoverable materials and information; protective order.—A. A protective order issued to prevent disclosure of materials or information related to a personal injury action or action for wrongful death produced in discovery in any cause shall not prohibit an attorney from voluntarily sharing such materials or information with an attorney involved in a similar or related matter, with the permission of the court, after notice and an opportunity to be heard to any party or person protected by the protective order, and provided the attorney who receives the material or information agrees, in writing, to be bound by the terms of the protective order.

B. The provisions of this section shall apply only to protective orders issued on or after its effective date.

_____

President of the Senate

_____

Speaker of the House of Delegates

Approved:

_____

Governor

FLORIDA 1990

ENROLLED
SB 278

Second Engrossed

A bill to be entitled

An act relating to the concealment of public hazards; creating s. 69.081, F.S.; providing a definition; providing that a court may not enter a judgment which conceals a public hazard; providing that certain contracts or agreements are void; providing standing for certain persons; providing for an action for declaratory judgment; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 69.081, Florida Statutes, is created to read:

69.081 Sunshine in Litigation; Concealment of Public Hazards Prohibited.--

(1) This section may be cited as the "Sunshine in Litigation Act."

(2) As used in this section, "public hazard" means an instrumentality, including but not limited to any device, instrument, person, procedure, product, or a condition of a device, instrument, person, procedure or product, that has caused and is likely to cause injury.

(3) Except pursuant to this section, no court shall enter an order or judgment which has the purpose or effect of concealing a public hazard or any information concerning a public hazard, nor shall the court enter an order or judgment which has the purpose or effect of concealing any information which may be useful to members of the public in protecting

CODING: Words ~~stricken~~ are deletions; words <u>underlined</u> are additions

themselves from injury which may result from the public hazard.

(4) Any portion of an agreement or contract which has the purpose or effect of concealing a public hazard, any information concerning a public hazard, or any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard, is void, contrary to public policy and may not be enforced.

(5) Trade secrets as defined in s. 688.002 which are not pertinent to public hazards shall be protected pursuant to chapter 688.

(6) Any substantially affected person, including but not limited to representatives of news media, has standing to contest an order, judgment, agreement or contract that violates this section. A person may contest an order, judgment, agreement or contract that violates this section by motion in the court that entered the order or judgment, or by bringing a declaratory judgment action pursuant to chapter 86.

(7) Upon motion and good cause shown by a party attempting to prevent disclosure of information or materials which have not previously been disclosed, including but not limited to alleged trade secrets, the court shall examine the disputed information or materials in camera. If the court finds that the information or materials or portions thereof consist of information concerning a public hazard or information which may be useful to members of the public in protecting themselves from injury which may result from a public hazard, the court shall allow disclosure of the information or materials. If allowing disclosure, the court shall allow disclosure of only that portion of the information

or materials necessary or useful to the public regarding the public hazard.

Section 2. This act shall take effect July 1, 1990, and shall apply to causes of action accruing on or after the effective date.

CODING: Words stricken are deletions; words underlined are addition

SENATE BILL NO. 278

THIS ACT originated in the Senate; it was passed by the Senate on May 30, 1990, and has been examined and found to be correctly enrolled.

PRESIDENT OF THE SENATE

SECRETARY OF THE SENATE AND
ENROLLING CLERK

PASSED the House of Representatives on May 28, 1990

SPEAKER OF THE HOUSE OF REPRESENTATIVES

CLERK, HOUSE OF REPRESENTATIVES AND
EX-OFFICIO ENROLLING CLERK

APPROVED this 1st day of June, 1990

GOVERNOR

FILED in Office of the Secretary of State on

JIM SMITH
SECRETARY OF STATE

By

FLORIDA 1990

ENROLLED
SB 278

Second Engrossed

A bill to be entitled

An act relating to the concealment of public hazards; creating s. 69.081, F.S.; providing a definition; providing that a court may not enter a judgment which conceals a public hazard; providing that certain contracts or agreements are void; providing standing for certain persons; providing for an action for declaratory judgment; providing an effective date.

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(3) Except pursuant to this section, no court shall enter an order or judgment which has the purpose or effect of concealing a public hazard or any information concerning a public hazard, nor shall the court enter an order or judgment which has the purpose or effect of concealing any information which may be useful to members of the public in protecting

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(5) Trade secrets as defined in s. 688.002 which are not pertinent to public hazards shall be protected pursuant to chapter 688.

(6) Any substantially affected person, including but not limited to representatives of news media, has standing to contest an order, judgment, agreement or contract that violates this section. A person may contest an order, judgment, agreement or contract that violates this section by motion in the court that entered the order or judgment, or by bringing a declaratory judgment action pursuant to chapter 86.

(7) Upon motion and good cause shown by a party attempting to prevent disclosure of information or materials which have not previously been disclosed, including but not limited to alleged trade secrets, the court shall examine the disputed information or materials in camera. If the court finds that the information or materials or portions thereof consist of information concerning a public hazard or information which may be useful to members of the public in protecting themselves from injury which may result from a public hazard, the court shall allow disclosure of the information or materials. If allowing disclosure, the court shall allow disclosure of only that portion of the information

or materials necessary or useful to the public regarding the public hazard.

Section 2. This act shall take effect July 1, 1990, and shall apply to causes of action accruing on or after the effective date.

CODING: Words ~~stricken~~ are deletions; words <u>underlined</u> are additions

Final: Enacted

TEXAS RULES OF CIVIL PROCEDURE

Adopted by the Supreme Court of Texas, April, 1990;

Effective September 1, 1990

Rule 76a. Sealing Court Records

1. **Standard for Sealing Court Records.** Court records may not be removed from court files except as permitted by statute or rule. No court order or opinion issued in the adjudication of a case may be sealed. Other court records, as defined in this rule, are presumed to be open to the general public and may be sealed only upon a showing of all of the following:

(a) a specific, serious and substantial interest which clearly outweighs:

(1) this presumption of openness;

(2) any probable adverse effect that sealing will have upon general public health or safety;

(b) no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted.

2. **Court Records.** For purposes of this rule, court records means:

(a) all documents of any nature filed in connection with any matter before any civil court, except:

(1) documents filed with a court in camera, solely for the purpose of obtaining a ruling on the discoverability of such documents;

(2) documents in court files to which access is

otherwise restricted by law;

(3) documents filed in an action originally arising under the Family Code.

(b) settlement agreements, not filed of record, excluding all reference to any monetary consideration, that seek to restrict disclosure of information concerning matters that have a probable adverse effect upon general public health or safety, or the administration of public office, or the operation of government;

(c) discovery, not filed of record, concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government, except discovery in cases originally initiated to preserve bona fide trade secrets or other intangible property rights.

3. **Notice.** Court records may be sealed only upon a party's written motion, which shall be open to public inspection. The movant shall post a public notice at the place where notices for meetings of county governmental bodies are required to be posted, stating: that a hearing will be held in open court on a motion to seal court records in the specific case; that any person may intervene and be heard concerning the sealing of court records; the specific time and place of the hearing; the style and number of the case; a brief but specific description of both the nature of the case and the court records which are sought to be sealed; and the identity of the movant. Immediately after posting such notice, the

movant shall file a verified copy of the posted notice with the clerk of the court in which the case is pending and with the Clerk of the Supreme Court of Texas.

4. **Hearing.** A hearing, open to the public, on a motion to seal court records shall be held in open court as soon as practicable, but not less than fourteen days after the motion is filed and notice is posted. Any party may participate in the hearing. Non-parties may intervene as a matter of right for the limited purpose of participating in the proceedings, upon payment of the fee required for filing a plea in intervention. The court may inspect records in camera when necessary. The court may determine a motion relating to sealing or unsealing court records in accordance with the procedures prescribed by Rule 120a.

5. **Temporary Sealing Order.** A temporary sealing order may issue upon motion and notice to any party who have answered in the case pursuant to Rules 21 and 21a, upon a showing of compelling need from specific facts shown by affidavit or by verified petition that immediate and irreparable injury will result to a specific interest of the applicant before notice can be posted and a hearing held as otherwise provided herein. A temporary sealing order shall set the time for the hearing required by paragraph 4 and shall direct that the movant immediately give the public notice required by paragraph 3. The court may modify or withdraw any temporary order upon motion by any party or intervenor, notice to all parties, and hearing conducted as soon as practicable. Issuance of a temporary order shall not reduce in any way the burden of proof

of a party requesting sealing at the hearing required by paragraph 4.

6. Order on Motion to Seal Court Records. A motion relating to sealing or unsealing court records shall be decided by written order, open to the public, which shall state: the style and number of the case; the specific reasons for finding and concluding whether the showing required by paragraph 1 has been made; the specific portions of court records which are to be sealed; and the time period for which the sealed portions of the court records are to be sealed. The order shall not be included in any judgment or other order but shall be a separate document in the case; however, the failure to comply with this requirement shall not affect its appealability.

7. Continuing Jurisdiction. Any person may intervene as a matter of right at any time before or after judgment to seal or unseal court records. A court that issues a sealing order retains continuing jurisdiction to enforce, alter, or vacate that order. An order sealing or unsealing court records shall not be reconsidered on motion of any party or intervenor, who had actual notice of the hearing preceding issuance of the order, without first showing changed circumstances materially affecting the order. Such circumstances need not be related to the case in which the order was issued. However, the burden of making the showing required by paragraph 1 shall always be on the party seeking to seal records.

8. Appeal. Any order (or portion of an order or judgment)

relating to sealing or unsealing court records shall be deemed to be severed from the case and a final judgment which may be appealed by any party or intervenor who participated in the hearing preceding issuance of such order. The appellate court may abate the appeal and order the trial court to direct that further public notice be given, or to hold further hearings, or to make additional findings.

9. **Application.** Access to documents in court files not defined as court records by this rule remains governed by existing law. This rule does not apply to any court records sealed in an action in which a final judgment has been entered before its effective date. This rule applies to cases already pending on its effective date only with regard to:

(a) all court records filed or exchanged after the effective date;

(b) any motion to alter or vacate an order restricting access to court records, issued before the effective date.

*****

APPLICABLE PORTIONS OF RELATED RULES

Rule 166b **Forms and Scope of Discovery; Protective Orders; Supplementation of Responses**

5. **Protective Orders.** On motion specifying the grounds and made by any person against or from whom discovery is sought under these rules, the court may make any order in the interest of justice necessary to protect the movant from undue burden, unnecessary expense, harassment or annoyance, or invasion of personal, constitutional, or property rights. Motions or responses made under this rule may have exhibits attached including affidavits, discovery pleadings, or any other documents.

Specifically, the court's authority as to such orders extends to, although it is not necessarily limited by, any of the following:

a. ordering that requested discovery not be sought in whole or in part, or that the extent or subject matter of discovery be limited, or that it not be undertaken at the time or place specified.

b. ordering that the discovery be undertaken only by such method or upon such terms and conditions or at the time and place directed by the court.

c. ordering that for good cause shown results of discovery be sealed or otherwise adequately protected, that its distribution be limited, or that its disclosure be restricted. Any order under this subparagraph 5(c) shall be made in accordance with the provisions of Rule 76a with respect to all court records subject to that rule.

Rule 120a. Special Appearance

3. The court shall determine the special appearance on the basis of the pleadings, any stipulations made by and between the parties, such affidavits and attachments as may be filed by the parties, the results of discovery processes, and any oral testimony. The affidavits, if any, shall be served at least seven days before the hearing, shall be made on personal knowledge, shall set forth specific facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify.

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or make such other order as is just.

Should it appear to the satisfaction of the court at any time that any of such affidavits are presented in violation of Rule 13, the court shall impose sanctions in accordance with that rule.

*****

For further information contact: Justice Lloyd Doggett
Supreme Court of Texas
P. O. Box 12248
Austin, TX 78711
512/463-1344
Adm. Asst: Virginia Smith

ANCHORAGE SCHOOL DISTRICT, Appellant,

v.

ANCHORAGE DAILY NEWS, Appellee.

No. S-3148.

Supreme Court of Alaska.

Sept. 1, 1989.

Newspaper brought action against school district seeking declaratory and injunctive relief granting access to settlement documents to which school district was a party. The Superior Court, Third Judicial District, J. Justin Ripley, J., ordered district to disclose terms of settlement agreement. School district appealed. The Supreme Court, Burke, J., held that settlement provision prohibiting disclosure of terms of settlement was unenforceable as violating public records disclosure statutes.

Affirmed and remanded with instructions.

1. Records ⇐54

Public records disclosure statutes apply to records maintained by municipalities. AS 09.25.110, 09.25.120.

2. Records ⇐64

Question of whether municipality must disclose particular document under public records disclosure statutes is resolved by balancing fundamental public interest in disclosure against municipal interest in confidentiality, and trial court may also consider interest of third party in preventing disclosure. AS 09.25.110, 09.25.120.

3. Records ⇐65

In recognition of fundamental nature of public right to know, municipality seeking to prevent disclosure of records has burden of proving that records should not be disclosed.

4. Records ⇐53

Exceptions to statutory public record disclosure requirements are narrowly construed and doubtful cases are resolved by permitting public inspection. AS 09.25.110, 09.25.120.

5. Records ⇐53

Public agency may not circumvent statutory public record disclosure requirements by agreeing to keep terms of settlement agreement confidential. AS 09.25.110, 09.25.120.

6. Records ⇐53

Settlement provision prohibiting disclosure of terms of settlement involving school district was unenforceable as violating public records disclosure statutes. AS 09.25.110.

7. Courts ⇐493(2)

Superior court had jurisdiction over newspaper's action against school district for injunctive and declaratory relief granting access to settlement documents, even though federal court had entered a protective order; newspaper was not a party to federal litigation, and federal court had not addressed confidentiality issue when superior court entered its judgment.

Kermit E. Barker, Jr., Lane, Powell & Barker, Anchorage, for appellant.

D. John McKay, Middleton, Timme & McKay, Anchorage, for appellee.

Before MATTHEWS, C.J., and RABINOWITZ, BURKE, COMPTON, and MOORE, JJ.

OPINION

BURKE, Justice.

This appeal presents two questions. The first is whether Alaska's public records disclosure statutes, AS 09.25.110–09.25.120, require a municipal school district to produce for public inspection documents settling a school district lawsuit, despite the district's agreement to keep the settlement terms confidential. The second question is whether the plaintiff below may obtain the relief it seeks while there remains outstanding a United States District Court order prohibiting disclosure of the settlement

terms, obtained after entry of the superior court judgment which is the subject of this appeal.

I. FACTS AND PROCEEDINGS BELOW

In 1985, the Anchorage School District sued W.R. Grace & Co. for damages equal to the cost of removing and replacing fireproofing installed in an Anchorage high school. Although the action was filed in superior court, Grace removed the case to the United States District Court for the District of Alaska, based on diversity of citizenship.

In December 1988, a reporter for the Anchorage Daily News learned that the parties had agreed to settle. School district officials, however, refused to provide the reporter with copies of the settlement documents, because the settlement agreement contained a confidentiality provision. The Daily News sued the school district in superior court, seeking declaratory and injunctive relief granting access to the settlement documents.[1] On December 13, 1988, the superior court ordered the district to disclose the terms of the settlement agreement. Following entry of final judgment, the school district filed this appeal. The superior court stayed enforcement of its production order pending the announcement of our decision.

While the appeal was pending, Grace filed a motion in the United States District Court for an order sealing the settlement documents. Grace did not disclose to the federal court the existence of the state court judgment, or the fact that there was an appeal pending in this court. On January 20, 1989, United States District Court Judge H. Russel Holland ordered that the terms of the settlement not be disclosed.[2]

This court and the Daily News first learned of the federal protective order when the school district appended a copy of the order to its reply brief. We permitted the Daily News and the school district, thereafter, to submit supplemental briefs on the effect of the federal court's order.

On February 16, 1989, following oral argument, we issued an order affirming the decision of the superior court. We instructed the court, however, not to enforce its judgment unless and until the United States District Court vacates or modifies its protective order.

II. THE PUBLIC RECORDS DISCLOSURE STATUTES

The school district argues that it should not be required to produce the settlement documents because the confidentiality agreement was material to the settlement. According to the district, public interest in promoting settlements, coupled with the need for efficiency in conducting government business, outweighs the public interest in disclosure.

[1–4] Alaska's public records disclosure statutes[3] apply to records maintained by municipalities. *City of Kenai v. Kenai Peninsula Newspapers*, 642 P.2d 1316, 1318–23 (Alaska 1982). In general, they provide broad public access to municipal

1. Grace accepted the school district's tender of defense of the public records act claim.

2. The school district did not oppose Grace's motion.

3. AS 09.25.110 provides:

> Unless specifically provided otherwise the books, records, papers, files, accounts, writings, and transactions of all agencies and departments are public records and are open to inspection by the public under reasonable rules during regular office hours. The public officer having the custody of public records shall give on request and payment of costs a certified copy of the public record.

AS 09.25.120 provides in part:

> Every person has a right to inspect a public writing or record in the state, including public writings and records in recorders' offices except (1) records of vital statistics and adoption proceedings which shall be treated in the manner required by AS 18.50; (2) records pertaining to juveniles; (3) medical and related public health records; (4) records required to be kept confidential by a federal law or regulation or by state law. Every public officer having the custody of records not included in the exceptions shall permit the inspection, and give on demand and on payment of the legal fees therefor a certified copy of the writing or record, and the copy shall in all cases be evidence of the original.

books, records, papers, files, accounts, writings, and transactions." AS 09.25.110. The question whether a municipality must disclose a particular document is resolved by balancing the fundamental public interest in disclosure against the municipal interest in confidentiality.[4] *City of Kenai*, 642 P.2d at 1323. In recognition of the fundamental nature of the public right to know, the municipality has the burden of proving that the record should not be disclosed. *Id.* Exceptions to the statutory disclosure requirements are narrowly construed. *Doe*, 721 P.2d at 622. Doubtful cases are resolved by permitting public inspection. *City of Kenai*, 642 P.2d at 1323.

[5, 6] We recognize the important public policy served by those measures which encourage settlement. *See, e.g., Alaska Airlines v. Sweat*, 568 P.2d 916, 930 (Alaska 1977); *Interior Credit Bureau v. Bussing*, 559 P.2d 104, 106 (Alaska 1977). We recognize also that some litigants are unwilling to settle unless the terms of settlement remain confidential, and that a municipality's inability to assure confidentiality may, therefore, adversely affect its ability to negotiate a settlement. Nevertheless, the specific statutory provisions upon which the Daily News relies reflect a policy determination favoring disclosure of public records over the general policy of encouraging settlement. *The people of this state, through their elected representatives, have stated in the clearest of terms that it is more important that they have access to this type of information than that it remain confidential.* Thus, we hold that a public agency may not circumvent the statutory disclosure requirements by agreeing to keep the terms of a settlement agreement confidential. Under Alaska law, a confidentiality provision such as the one in the case at bar is unenforceable because it violates the public records disclosure statutes.[5]

III. THE FEDERAL PROTECTIVE ORDER

The school district argues that the federal court's protective order deprives us of jurisdiction over the Daily News' public records act claim. The Daily News contends that we may affirm the decision of the superior court in its entirety, notwithstanding the conflicting federal order. Neither argument is entirely correct.

Federal and state courts often have concurrent jurisdiction and, as a general rule, try not to interfere with each other's proceedings. *Donovan v. Dallas*, 377 U.S. 408, 413, 84 S.Ct. 1579, 1582, 12 L.Ed.2d 409 (1964). Instead,

> [e]ach court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court. Whenever a judgment is rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by the application of the principles of res judicata by the court in which the action is still pending in the orderly exercise of its jurisdiction, as it would determine any other question of fact or law arising in the progress of the case.

Kline v. Burke Constr. Co., 260 U.S. 226, 230, 43 S.Ct. 79, 81, 67 L.Ed. 226 (1922);

4. The court may also consider the interest of a third party in preventing disclosure. *Compare City of Kenai*, 642 P.2d at 1323–24 (privacy and reputation interests of persons whose employment applications were subject to the disclosure order entitled them to withdraw applications) *with Doe v. Alaska Superior Court*, 721 P.2d 617, 624 (Alaska 1986) (limiting executive privilege doctrine to exclude unsolicited public comments).

5. The school district also argues that the public meetings act, AS 44.62.310–44.62.312, authorizes confidential settlement agreements because it permits a public body to discuss in executive session matters "which would clearly have an adverse effect upon the finances of the government unit," AS 44.62.310(c)(1). The purpose of the open meetings act is to assure that government units transact business openly. The people have not delegated to their representatives the power to decide what the public may or may not know. AS 44.62.312(a)(2), (4). Assuming that the district may discuss a proposed settlement in closed session, the act specifically prohibits taking any action during executive session. AS 44.62.310(b); *see also City of Kenai*, 642 P.2d at 1326 n. 29. The open meetings requirement is intended to further the same purpose as the public records disclosure statutes, not to decimate it.

see also Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 296, 90 S.Ct. 1739, 1798, 26 L.Ed.2d 234 (1970) ("lower federal courts possess no power whatever to sit in direct review of state court decisions").

In certain instances, however, a state court must refrain from exercising its jurisdiction. In *Anchorage Daily News v. Anchorage Times Publishing Co.*, 631 P.2d 500 (Alaska 1981), we held that the superior court erred when it enjoined an arbitration proceeding scheduled by the United States District Court. Although the superior court had jurisdiction, under state law, to determine whether the parties had an arbitration agreement, it erred when it granted injunctive relief which interfered with the defendant's effort to obtain arbitration in a federal forum. *Id.* at 503–05. We viewed as "dispositive of t'.e jurisdictional issue" the following statement by the United States Supreme Court:

> [A state court] is without power under the United States Constitution to interfere with efforts by [a litigant] to obtain arbitration in federal forums on the ground that [the litigant] is not entitled to arbitration or for any other reason whatsoever. [Such litigant] has an absolute right to present its claims to federal forums.

Id. at 504 (quoting *General Atomic Co. v. Felter*, 436 U.S. 493, 497, 98 S.Ct. 1939, 1941, 56 L.Ed.2d 480 (1978)).

[7] In the case at bar, the Daily News sought a declaratory judgment that the settlement documents which ended the litigation in federal court were open to public inspection under state law.[6] The Daily News was not a party to the federal litigation and the federal court had not addressed the confidentiality issue when the superior court entered its judgment. Thus, we hold that the superior court had personal and subject matter jurisdiction. The court did not abuse its discretion in exercising its jurisdiction to determine that the Daily News had the right under state law to inspect the settlement documents. The court's declaratory judgment was, therefore, valid.[7]

Had Grace or the school district informed Judge Holland of the state court's judgment, he could have decided whether the substantive law of Alaska precluded him from ordering the settlement documents sealed.[8] Grace and the school district, however, induced Judge Holland to enter his order while still ignorant of the judgment.[9] We believe, nevertheless, that the principles discussed in *Anchorage Daily News v. Anchorage Times Publishing Co.*, dictate that the superior court not attempt to enforce that part of its judgment requiring production of the settlement documents, unless and until the federal protective order is vacated or modified.

The Daily News has moved to intervene in the federal case, asking Judge Holland to reconsider his decision. Accordingly, the federal court is now aware of the proceeding in state court. No doubt, it will be made aware of our decision as well. We are confident that Judge Holland will evaluate the Daily News' motions in light of all

6. AS 22.10.020(g) provides:

> In case of an actual controversy in the state, the superior court, upon the filing of an appropriate pleading, may declare the rights and legal relations of an interested party seeking the declaration, whether or not further relief is or could be sought. The declaration has the force and effect of a final judgment or decree and is reviewable as such. Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against an adverse party whose rights have been determined by the judgment.

7. A Civil Rule 54(b) judgment is final for purposes of res judicata. *Vertecs Corp. v. Reichhold Chemicals*, 671 P.2d 1273, 1275–76 (Alaska 1983); Alaska R.Civ.P. 54(b).

8. Federal jurisdiction in the litigation between Grace and the school district was based on diversity of citizenship. Therefore, Alaska law governed the substantive legal issues even though the case was removed to federal court. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78–80, 58 S.Ct. 817, 822–823, 82 L.Ed. 1188 (1938).

9. *See* DR 7-106(B)(1) (lawyer shall disclose "[l]egal authority in the controlling jurisdiction known to him to be directly adverse to the position of his client and which is not disclosed by opposing counsel").

applicable principles of law.[10]

The superior court's judgment is AFFIRMED, and the case is REMANDED with instructions to the superior court not to enforce its judgment requiring production, unless and until the federal protective order is vacated or modified.

Nancy R. CARTER, Appellant,

v.

David A. NOVOTNY, Appellee.

Nos. S–2645, S–3049.

Supreme Court of Alaska.

Sept. 8, 1989.

Rehearing Granted Oct. 9, 1989.

Minor child's maternal aunt appealed from two orders of the Superior Court, Third Judicial District, Anchorage, David C. Stewart, J. pro tem., which first awarded shared legal custody of child to both aunt and child's father, with physical custody in father, and second, ordered physical custody transferred from father to aunt with joint legal custody retained. The Supreme Court, Compton, J., held that: (1) Superior Court had jurisdiction to make such award, and (2) award was not abuse of discretion.

Second order affirmed.

1. Divorce ⇐312.6(1)

Father failed to file cross appeal from order modifying custody and, thus, father's insufficiency of evidence claim was not properly before Supreme Court.

2. Parent and Child ⇐2(12)

Parent is entitled to custodial preference over nonparent unless there is clear evidence that parent is either unfit or welfare of child requires that child be placed in custody of nonparent.

3. Parent and Child ⇐2(18)

Burden of proving that parent's custody of child would be clearly detrimental to child is on nonparent seeking to modify custody.

4. Parent and Child ⇐2(17)

Superior court had jurisdiction to award shared custody of minor to both parent and nonparent. AS 25.20.060.

5. Parent and Child ⇐2(17)

Superior court did not abuse its discretion in awarding parent and nonparent shared custody of minor child with physical custody in nonparent, even though court had determined that it would be detrimental to child to continue physical placement with father, insofar as such award was in best interest of child. AS 25.20.060, 25.24.150.

Charles Hagans, Hagans, Brown, Gibbs and Moran, Anchorage, for appellant.

William T. Ford, Anchorage, for appellee.

Ame Ivanov, Anchorage, Guardian Ad Litem.

Before MATTHEWS, C.J., and RABINOWITZ, BURKE, COMPTON and MOORE, JJ.

OPINION

COMPTON, Justice.

The principal issue presented in this appeal is whether the superior court erred in awarding shared custody of Heidi Novotny to David A. Novotny, her father, and Nancy R. Carter, her maternal aunt, after having determined that it would be detrimental

10. After we issued the order affirming the decision below, Judge Holland permitted the Daily News to intervene in the federal case and vacated the June 20 protective order. Grace appealed to the United States Court of Appeal, Ninth Circuit, but dismissed the appeal when the circuit court refused to grant a stay pending appeal. The settlement documents were released for public inspection.

Johnson & Johnson

ONE JOHNSON & JOHNSON PLAZA
NEW BRUNSWICK, N.J. 08933-

April 10, 1992

Federal Express - Saturday Delivery

Honorable Dave Donley
Chairman, House Judiciary Committee
Alaska House of Representatives
State Capitol, Room 120
Juneau, AK 99801-1182

Dear Mr. Donley:

RE: HB 171 - PROTECTIVE ORDER LEGISLATION - OPPOSE

Johnson & Johnson is opposed to House Bill 171 which would sharply curtail the discretion of judges to issue protective orders in certain civil cases. We urge its defeat in your committee.

Under current Alaska judicial policy and the Alaska Rules of Civil Procedure, a judge is authorized to weigh the public's right-to-know against a civil defendant's right-to-privacy and protection from the release of proprietary or embarrassing information. A judge, when the circumstances merit, may issue a protective order barring the release of settlement, judgment, or pre-trial discovery information. This sound judicial policy provides civil litigants assurance that they may litigate and settle a case but still protect personal, privileged or proprietary information by obtaining a protective order.

Johnson & Johnson, as the world's largest health care company, is also opposed to HB 171 for the following reasons:

1. House Bill 171 will have an adverse impact upon high technology business. HB 171 would alter this judicial policy by disallowing protective orders in lawsuits based on the mere allegation that such an order may conceal information concealing a "public hazard" or that the materials sought to be protected have "previously been disclosed to the public" in any jurisdiction. These restrictions could place any party to litigation at the risk of the disclosure of trade secret or other proprietary information to business competitors. Pre-trial discovery routinely produces proprietary information of great value to competitors, which is presently covered by protective orders by agreement of the parties. Such protection is increasingly important to maintain domestic and international competitiveness.

2. The bill also ignores many state and federal laws that exist primarily to inform the public of "public hazards," be they product, environmental, or financial. Several federal agencies, including the U.S. Food and Drug Administration, the Consumer Product Safety Commission, and OSHA, also regulate product and workplace safety. HB 171 is therefore totally unnecessary to protect the public from so-called "public hazards" that, in the case of pre-trial discovery, have not yet been judicially determined. The effect is to penalize litigants and non-party participants by eroding their right of privacy without any findings of liability or blame.

3. Restricting the use of protective orders by mutual agreement would discourage settlements, protract litigation and increase costs to litigants and the Alaska court system. The denial of protective orders will force more cases to trial by encouraging defendants to litigate rather than settle, thereby dramatically eroding judicial resources. Such a development would harm the business climate.

Thank you for allowing me to convey our thoughts on this bill. If you have any further questions, they may be directed to Johnson & Johnson's ICOM Government Affairs Manager, Mr. David Shestak, (916) 631-8114 or me at (908) 524-3070.

Sincerely,

Donald P. Sharkey
Director, State Relations

/jem

cc: Honorable Max Gruenberg
Vice Chairman, House Judiciary Committee

Mr. D. Shestak
Johnson & Johnson ICOM Development Group

Ms. D. Kapsa
Pharmaceutical Manufacturers Association
Sacramento, CA

Statement

Pharmaceutical Manufacturers Association

STATEMENT OF THE
PHARMACEUTICAL MANUFACTURERS ASSOCIATION

The Pharmaceutical Manufacturers Association (PMA) represents more than 100 companies that are responsible for the new prescription medicines discovered and developed in this country. We appreciate the opportunity to express our opposition to Alaska House Bill 171, which would restrict or eliminate the use of protective orders -- court orders ensuring the confidentiality of sensitive, private information, such as trade secrets or medical records. We believe confidentiality is essential to businesses and corporations engaged in litigation to ensure that valuable, confidential business information is not revealed to competitors or others who could harm the business or gain an unfair advantage if armed with the information.

Under traditional rules, courts have discretion to enter a protective order, ensuring confidentiality, when the litigant requesting the protective order has demonstrated a need for it. Alaska House Bill 171 simply would restrict or eliminate this discretion.

The advocates behind proposals of this type argue that courts are granting protective orders with increasing frequency to conceal information about dangerous consumer products or harmful corporate practices such as environmental pollution. According to these advocates, the public has a right to know this information. In reality, if someone has information about a harmful product or environmental hazard, that information should be reported to the appropriate governmental agency for action. Courts are meant to resolve legal disputes, not to act as public information clearinghouses. The real purpose behind these proposals is to allow plaintiffs' lawyers to share or sell information from litigation for use in other litigation, thus perpetuating the litigation explosion and generating additional contingency fees.

Any attempt to restrict or eliminate protective orders, and the confidentiality they ensure, will have numerous negative consequences:

1100 Fifteenth Street, N.W. Washington, D.C. 20005 (202) 835-3400

Increased Litigation Costs: If confidentiality cannot be protected, litigants will fight every document request that an opposing party makes for information that may be sensitive or confidential. This will cause increased hearings before the court, increased legal costs to both parties, as well as increased public costs for the additional court time.

Increased Court Congestion: Confidentiality promotes cooperation in discovery and private settlement of legal disputes outside of the courtroom. Without confidentiality, these components of litigation will end up back before the judge, requiring increased attention that could have been used to resolve other cases. Consequently, there will be increased court congestion. This is an unjustifiable result in light of the long delays litigants already face and the excessive burdens that confront courts due to over-crowded court dockets.

Loss of Fundamental Litigant Rights: The right to privacy and the right to exclusive ownership of private property are fundamental rights protected by the Constitution. Both of these rights are lost when private information becomes public, or a trade secret is revealed to a competitor. Without the authority to issue protective orders to guarantee confidentiality, courts cannot protect these fundamental rights of the litigants.

Unfair Treatment of Corporate Defendants: Generally, only corporate defendants possess trade secrets or other confidential business information that can be put at risk of unwarranted disclosure during litigation. Thus, if the use of confidentiality is restricted in litigation, corporate defendants frequently will have much more at stake and much more to lose than private individuals. Further, defendants have no choice about whether to participate in lawsuits. Unlike plaintiffs, defendants cannot consider whether to risk exposing highly confidential information before entering into the litigation. Consequently, corporate defendants would be unfairly disadvantaged by a change in court rules such as those proposed.

Perpetuation of the Litigation Explosion: Various segments of the plaintiffs' bar often package and sell information obtained from one lawsuit for use in other lawsuits. These aggressive sales and distribution of discovery and settlement materials stir up copy-cat lawsuits and generate adverse publicity against a "target" defendant. Without protective orders, the packaging and sale of litigation will grow phenomenally, perpetuating spurious lawsuits and creating additional burdens on already overcrowded courts. This will mean more money for lawyers and more lawsuits and legal expenses for everyone else.

In summary, PMA believes that protective orders, and the confidentiality they ensure, are a crucial device in several components of the litigation process. The rules governing discovery and settlement operate as a system of checks and balances designed to ensure that both plaintiffs and defendants are treated fairly. When the rules give parties free access to their opponents' most sensitive and confidential information, courts must have the authority to balance this intrusion with a guarantee of confidentiality. Although both plaintiffs and defendants have important rights at stake, defendants often have far more to lose when confidentiality cannot be guaranteed. Thus, restricting or eliminating the discretion of courts to protect confidential information will undermine the delicate system of checks and balances to the detriment of litigants, the courts, and the public. Therefore, we respectfully urge that you vote against House Bill 171.

HB 171: SECRECY OF PUBLIC HAZARDS

by Paul Cossman

House Bill 171 would prevent litigants and courts from keeping information secret concerning hazards to the public. Frequently, a defendant will only release information about public hazards to a plaintiff in a lawsuit if there is an agreement to keep the information secret. This bill would prevent that from occurring.

There are many examples of past cases where defendants have kept public dangers secret. Some examples include cases where people have been burned and killed when Bic lighters failed to extinguish properly or exploded, and cases where people have been burned and killed in GM vehicles with exploding gas tanks that could have been altered at a nominal cost. There have been cases which involve scout masters who sexually abuse their scouts. As lawsuits are brought and settled, these defendants insist on secrecy as a part of the settlement. This allows the scout masters to keep their positions and abuse other children. These hazards should not be hidden from the public.

Often a defendant will settle with a plaintiff and require that the dangers uncovered by the plaintiff be kept secret. When that is a condition of settlement, an impoverished and injured plaintiff is not in a position to require disclosure. House Bill 171 would prevent the defendant from requiring that the plaintiff keep the public danger secret.

The procedures of House Bill 171 are simple. If a defendant files a motion to keep secret materials produced in litigation discovery, the court must deny the motion if the materials have previously been disclosed or if the materials concern a public hazard. A court may not enter any order which has the effect of concealing information about a public hazard.

HB 171 would permit people who are not parties to the litigation to oppose a defendant's request to keep discovery materials secret if they contain information about public hazards. If a court enters an order which conceals public hazards, in violation of HB 171, then a person who was not a party to the litigation can file a motion to vacate the judgment and allow disclosure of the information concerning the public hazard.

In a situation where there is a private agreement between a plaintiff and a defendant to keep a public hazard secret, HB 171 would void that portion of the agreement and allow disclosure of the public hazard. Again, HB 171 would allow people who are not parties to the agreement to bring an action for a court order allowing disclosure of the public hazard.

The definition of public hazard in HB 171 includes any instrumentality that has caused injury to a person or property, including devices, instruments, persons, procedures, products and conditions of devices, instruments, persons, procedures, or products.

Legislation and court rules similar to HB 171 have already been enacted in Florida, North Carolina, Virginia, New York, Texas and part of California. Similar legislation and court rules are now pending in 14 other states besides Alaska. There is no valid public policy reason to allow public dangers to remain secret. To the contrary, this is an opportunity to promote public safety without adding any new burdens to any already-existing governmental agencies. It is an opportunity to prevent future injuries at no cost to the Alaskan public.

TRUST REPORT *continued from page 1*

In a recent Bar Rag (November-December 1991) letter to the editor, attorney Kenneth Gutsch expressed the opinion that passage of HB 171 would both increase costs of litigation and deter settlement.

We disagree. The public has the right to know of proven public hazards so that future injuries and deaths can be avoided. The prospect of public disclosure of these hazards will induce an elimination of these hazards, and an early settlement of suits brought against them. Litigation should be reduced, and early settlements increased.

As I indicated in my last report, the Alaska Action Trust strongly supports passage of HB 171. What follows is the Trust's position paper on HB 171, written by Paul Cossman, as well as a summary of state developments on the secrecy issue. Academy members are encouraged to contact Representative Kubina directly to let him know of their support of HB 171, and to ask him to pass the bill out of his committee. He can reached at 835-2111 during the interim and at 465-4853 during legislative session. If you wish to comment to us on this issue, please call or write Paul Cossman, Debra Gravo at the Trust office, or me.

SUMMARY OF DEVELOPMENTS ON SECRECY ISSUE

Enacted Legislation:

Florida: The Sunshine in Litigation Act, which took effect on July 1, 1990, was the first state legislation which identified a class of dangers to public health and safety and sought to limit the extent to which they could be concealed. The law forbids courts from entering orders which conceal a "public hazard" or information about a public hazard. A public hazard can be a "device, instrument, person, procedure, product, or a condition of a device, instrument, person, procedure, or product that caused and is likely to cause injury." The statute also makes any agreement or contract to conceal a public hazard unenforceable, and allows the public and the news media standing to contest court orders or contracts which would conceal public hazards. Courts are required to allow disclosure of information that is sought to be concealed if the information might be useful to members of the public to protect themselves from injury by a public hazard.

North Carolina: Legislation of confidential settlements of suits against the state government took effect on July 1, 1989. The statute prohibits government agencies, officials, or employees from entering into confidential settlements to resolve suits in connection with their official duties or responsibilities.

Virginia: House Bill 1582, the first legislation of its kind, was introduced in 1989 by ATLA Member Bernard Cohen, a member of the General Assembly. It passed and was signed by the Governor, and took effect on July 1, 1989. It allows attorneys to share information produced in discovery if they have permission of the court (given after a hearing), and if the attorneys who would receive the information agree to be bound by the terms of any protective order.

Adopted Court Rules:

California (San Diego County): By local rule, the San Diego County Superior Court adopted a policy on confidentiality agreements and protective orders, effective July 1, 1990. The rule states that such practices are disfavored and should only be allowed when it is shown that there is a recognized right to secrecy, that disclosure would cause harm, and that secrecy is in the public interest.

New York: On February 4, 1991, New York State's Administrative Board of the Courts adopted a new rule (22 NYCRR Part 216) on sealing of court records in civil actions in the trial courts. The rule took effect on March 1. The rule prohibits sealing of records without a specific finding of good cause. The rule directs the court to consider the interests of the public as well as the interests of the parties in determining whether good cause has been shown. "Court records" are defined as all documents and records of any kind that are filed with the clerk. Discovery material that is not filed with the clerk is unaffected.

Texas: In 1990, Texas became the first state to address secrecy concerns through court rules which took effect on September 1, 1990. The Texas Supreme Court chose to focus on the issue of sealed court records, and adopted amendments to the Texas Rules of Civil Procedure to establish standards and procedures for sealing. The court recognized a "presumption of openness" of all court records, which could be overcome only after a showing that a specific, serious and substantial interest in sealing records outweighs any adverse effect on public health and safety, and that no less restrictive means than sealing would protect the interest. "Court records" includes all documents filed in a civil action, as well as unfiled discovery material and settlement agreements that are not filed but might have an adverse effect on public health and safety. The court detailed specific procedures (notice, public hearings, etc.) by which records could be sealed under the new rules, and provided that individuals and organizations not a party to the case could participate in hearings.

Pending Legislation:

Alabama: The Alabama Trial Lawyers Association is supporting Senate Bill 328, which is identical to the Florida legislation. The bill is in the Senate Judiciary Committee.

Alaska: House Bill 171 was introduced on February 27, 1991 and is pending in the House State Affairs Committee. The bill utilizes the "public hazard" concept and several procedural points of the Florida legislation.

California: The Center for Public Interest Law, Sacramento, and the California Trial Lawyers Association are sponsoring Senate Bill 711. The bill would prohibit confidentiality agreements, protective orders and settlement agreements which would conceal a public hazard or threat of environmental damage, and would give any person standing to contest an order, agreement or contract which conceals such information. There are numerous additional sponsors. The bill is pending in the Senate Judiciary Committee.

Hawaii: The Hawaii Academy of Plaintiffs' Attorneys is supporting House Bill 2019. The bill utilizes the "public hazard" concept of the Florida Sunshine in Litigation Act. It also employs a standard to be met by those seeking protective

orders that is similar to that used by the Texas court rule amendments. The bill passed the House on March 12, but has since been deferred until next year.

Illinois: The Illinois Trial Lawyers Association is supporting two identical bills, House Bill 276 and Senate Bill 245. The bills are based on the Texas court rule amendments.

Louisiana: The Louisiana Trial Lawyers Association is actively supporting a bill (called the Sunshine in the Courtroom Bill) that would amend Article 1426 of the Louisiana Code of Civil Procedure by incorporating the elements of the Florida legislation.

Massachusetts: Two bills have been introduced. Senate Bill 778, similar to the Texas court rule amendments, was heard by the legislature's Joint Judiciary Committee on March 11. House Bill 3775 is similar to the Florida Sunshine in Litigation Act, but is broader in certain respects. It would apply to any dispute that has matured to the extent that one potential plaintiff and one potential defendant have notice of the possibility of litigation. It would establish a presumption in favor of disclosure of information regarding a public hazard, and require any party opposed to disclosure to prove beyond a reasonable doubt that the information would not help the public to protect itself from the hazard. The House bill was heard by the Joint Judiciary Committee on March 27. No further action has been taken on either bill as yet.

New Jersey: Assembly Bills 3794 and 4110 were introduced on October 29, 1990. They are essentially identical to the Florida legislation. Assembly Resolution No. 136, introduced May 24, 1990, urges New Jersey attorneys and judges not to enter into or approve secrecy agreements or orders in civil cases involving toy-related injury and death. Assembly Resolution No. 136 also urges the New Jersey Supreme Court to adopt rules to implement the resolution. All measures are still pending.

Oregon: The Oregon Trial Lawyers Association is supporting two bills that are pending in the Senate Judiciary Committee. Senate Bill 579 is similar to the Virginia legislation. It would amend the Oregon Rules of Civil Procedures to provide that protective orders in any civil litigation will not prevent an attorney from sharing information and materials covered by the protective order with an attorney handling a similar or related case. Disclosure may be made only by court order, and only to attorneys who agree to be bound by the protective order, but the court would be required to allow disclosure unless good cause is shown by the protective order's beneficiary. Senate Bill 580 would provide that confidential settlement agreements are not binding unless a court orders that they are, after findings that confidentiality is necessary to protect a party and that it will not harm the public interest. The bill would also provide that a confidential settlement order does not bar sharing of information between attorneys so long as the terms of the settlement are not disclosed.

Pennsylvania: Two bills are pending in the House. House Bill 751 is very similar to the Rhode Island bill, but is not limited to product liability litigation, and additionally bars requests for non-disclosure of the amount of settlements. House Bill 752 is a simplified version of the Florida legislation, but has additional provisions that (1) allow prevailing parties to recover attorney fees, and (2) make it a misdemeanor to conceal a public hazard intentionally, knowingly or recklessly. Senate Bill 656, similar to the Florida legislation, is pending in the Senate Judiciary Committee.

Rhode Island: House Bill 5987, introduced in February, has been passed by the House Judiciary Committee. It would prohibit courts from entering orders against disseminating product liability litigation documents (or information about product safety and design matters) to regulators or other attorneys. It would also prohibit discovery or settlement agreements which would require return or destruction of documents, as well as agreements not to represent other victims of similar product defects in the future. The bill is nearly identical to a secrecy bill that was passed overwhelmingly in 1990 but was vetoed by then Governor DiPrete after the legislative session had ended. Mr. DiPrete was defeated for reelection.

Wisconsin: The Wisconsin Academy of Trial Lawyers is supporting a bill similar in procedures and effects to the Texas court rule amendments.

Proposed Court Rule Amendments:

Michigan: The Michigan Trial Lawyers Associations has proposed amendments to the Michigan Court Rules which utilize the "public hazard" concept of the Florida Sunshine in Litigation Act but employ it in the court rule context. Amendments to Rules 2.302(c), 2.310 (b) and 2.310 (c) would add provisions prohibiting the entry of discovery orders that would conceal public hazards. Those rules govern protective orders in general and requests for production of documents, directed to both parties and non-parties.

New Jersey: A possible court rule amendment to prohibit some forms of secrecy in settlements is under consideration by a subcommittee of the Civil Practice Committee appointed by the New Jersey Supreme Court to review the rules of civil procedure. The next rule changes in New Jersey are scheduled for September 1992.

continued on page 6

from page 5

South Carolina: The South Carolina Trial Lawyers Association has submitted proposed rule changes to the South Carolina Supreme Court that are identical to Texas Rule 76a and a portion of a Texas rule on protective orders for discovery material.

Bills Not Passed, 1991 Legislative Sessions:

Arkansas: Senate Bill 698 died in committee. The bill utilized the "public hazard" concept of the Florida legislation, but would have applied only to settlement agreements and other agreements and contracts to conceal public hazards. The bill also had a section providing that it would not be construed to require disclosure of "private facts, concerning a natural person, that are not pertinent to public hazards."

Colorado: House Bill 91-1060, based on the Florida model, was defeated 6-5 in the House Judiciary Committee in February.

Connecticut: House Bill 7304, based on the Florida legislation, died in the House Judiciary Committee with no vote taken.

Hawaii: Senate Bill 1838, which was similar to the Texas court rule amendments but went well beyond any existing rules or legislation in several areas, died in committee. It included a finding on undesirable effects of secrecy. It would have presumed openness to the public of all court documents, discovery and settlement agreements, whether or not filed with the court; would have allowed the news media to file standing requests to receive notices of hearings on secrecy questions, and would have required maintenance of a public file of secrecy motions for the entire state; and it would have awarded attorney fees to any person who substantially prevailed in opposing a motion to limit public access.

Iowa: House Study Bill 294, based on the Texas court rule amendments, died in the House Judiciary Committee.

Kansas: Senate Bill 104 was defeated in the Senate Judiciary Committee. The bill substantially duplicated the Florida Sunshine in Litigation Act but also utilized procedural elements of the Texas court rule amendments as to notice and hearing requirements. The Kansas City Business Journal published an editorial in support of the bill.

Mississippi: House Bill 87 was defeated in the House Judiciary Committee. The bill incorporated elements of both the Florida Sunshine in Litigation Act (on "public hazards") and the Texas court rule amendments (establishing a presumption of openness and procedure for requests to seal court records.)

Montana: House Bill 473, essentially identical to the Florida Sunshine in Litigation Act, was passed by the House Judiciary Committee, but was defeated in the House.

Nevada: Senate Bill 373, similar to the Florida legislation, was defeated 9-8 by the Judiciary Committee on April 30. The bill would have given representatives of the news media, and the federal, state or local government standing to contest court orders that would conceal a public hazard. It would also have required hearings on contested orders to be "advanced as a matter of immediate public interest and concern."

New Hampshire: Senate Bill 91, identical to the Rhode Island legislation, was approved by the Senate on March 14, but was defeated in the House on May 3.

New Mexico: House Bill 865, similar to the Florida legislation, was heard by the House Judiciary Committee on March 7, but was tabled.

South Dakota: House Bill 1252, identical to the Florida Sunshine in Litigation Act, was reported out of the House Judiciary Committee, but was defeated in the House, 34-32.

Virginia: House Bill 1205 was introduced in January 1991 but was defeated in committee. The bill was similar to the Florida legislation. It was supported by the Virginia Trial Lawyers Association, but was strongly opposed by the Virginia Chamber of Commerce.

Washington: House Bill 1320, which was similar to the Florida Sunshine in Litigation Act, passed the House on March 18, but was not voted out of the Senate Law and Justice Committee before the legislative session ended.

TORT BRIEFS

MICHIGAN

Michigan has been facing a serious medical malpractice threat this year. The Senate Republicans have introduced a 28 bill health care package which would provide more expert witness restrictions, shorten the statute of limitations, adjust contingency fee sliding scales, cap non-economic damages at $225,000 and provide for an alternative fault-based adjudicatory process to the existing civil justice system.

OREGON

A secrecy bill passed the Oregon House by a 55-4 vote on May 31, the Senate with a 25-1 vote on June 15, and was then signed into law by the governor. The bill prohibits confidential settlements by state governmental agencies and employees without full and complete disclosure to the court of the settlement terms, and requires court authorization of any confidential settlements. The bill became effective October 1, 1991.

OHIO

Court Developments: The Ohio Supreme Court recently overturned the state's 1970's enactment of a $200,000 medical malpractice cap on non-economic damages in the case of Morris v. Savoy, No. 89-1807 (Ohio, Aug. 29, 1991) holding the damage limitation violated the Due Process Clause of the Ohio Constitution.

Morris was injured in an automobile accident, and subsequently treated by a neurosurgeon, Savoy. Following surgery performed by the defendant, Morris was left paralyzed from the neck down. During the federal court trial, Savoy admitted negligence, leaving damages as the only issue to be determined. The jury awarded $2.2 million which included an award of $845,000 for pain and suffering. The defendant moved to limit the award for pain and suffering to the $200,000 cap.

The Ohio Supreme Court determined that the cap violated the due process clause finding that no rational basis existed between the $200,000 damage cap and malpractice insurance rates. The Court further cited a 1987 Insurance Service Organization (ISO) claim study, the statistical arm of the insurance industry, which found that savings from various tort "reforms" were "marginal to nonexistent," including a $250,000 cap on non-economic damages.

This decision represents a significant step in that a court of ultimate jurisdiction has ruled in a way suggesting that there is no nexus between tort "reform" and lower insurance rates.

NEW YORK

In a progressive step, the New York legislature eliminated the requirement that medical negligence cases must first be considered by a medical malpractice screening panel prior to a jury trial during this year's session. The legislation became effective October 1, 1991.

FEDERAL LEVEL

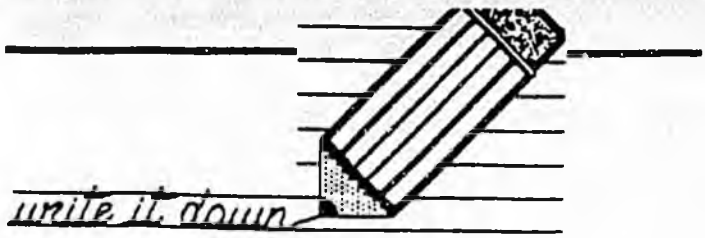
More Bills Introduced in the House. On October 8th and October 17th, 1991, similar bills to provide economic incentives to promote the development of alternative dispute resolution systems for medical malpractice claims were introduced in the House and Senate, respectively. The bills -- H.R. 3516 and S. 1836 -- also contain provisions that would preempt state tort law and enact uniform federal medical liability standards. Neither bill was introduced with any co-sponsorship by Democratic members. In the Senate, S. 1836 is the fourth comprehensive medical malpractice proposal introduced since the start of the First Session; in the House, H.R. 3516 is the third. There has been no significant action on any of these bills and none is presently scheduled.

THE NETWORK CORNER

Are you looking for information for a case? The Network Corner is here for the use of all Academy members, free of charge. It is a regular feature of *The Alaska Trial Lawyer*.

If you are seeking information, submit your inquiry to *The Alaska Trial Lawyer* by mail (P.O. Box 102323, Anchorage, Alaska 99510) or by phone at 258-4040).

- please limit your notice to 50 words or less
- include your name and phone number
- we will list your notice in the next issue



MARK YOUR CALENDAR

CONTINUING LEGAL EDUCATION HIGHLIGHTS

Products Liability/Wrongful Death Seminar
January 11, 1992
Chicago, Illinois
Sponsored by Illinois Trial Lawyers

ATLA Winter Convention
January 12-16, 1992
Boca Raton Resort
Boca Raton, Florida

Medical-Legal Update Seminar
February 12-16, 1991
Vail, Colorado
Sponsored by National College of Advocacy

UPCOMING ALASKAN EVENTS

First day of the second session, 17th Legislature

Roundtable Lunch
January 14, 1992
QuarterDeck, Twelve noon
$15.00 inclusive

Academy Dinner
January 23, 1992
QuarterDeck
6:00 p.m. no host cocktails 6:30 p.m. dinner
$30.00 inclusive
Speaker: Dr. Paul Craig speaking on the topic of brain injuries. Midnight Sun Court Reporting will be demonstrating "real-time" reporting (a process whereby a reporter's steno outline is immediately translated into the English word on a computer screen)

Mastering Jury Trials
A one-day seminar by Russ Herman, ATLA past president
May 29, 1992
Clarion Hotel
Anchorage, Alaska

WE APPLAUD THEIR COMMITMENT

The Alaska Academy of Trial Lawyers and Alaska Action Trust, both non-profit organizations, are financially dependent upon annual membership dues and monthly contributions. The Trust and Academy were facing a $40,000 deficit this fiscal year. Generous contributions from the lawyers listed below have made it possible to maintain both organizations at the levels it has taken years of hard work and money to attain.

The Academy engages in many activities which serve as invaluable resources for plaintiff-oriented attorneys. The monthly newsletter, roundtable luncheons, and dinner meetings are exceptional venues for the exchange of views and information. The Academy is involved in various public service programs which cast a positive light on the legal profession, such as Community Law School and the Toy Safety Program. A professional staff combined with a dedicated membership has made the Academy a force to reckon with in Alaska's legal community.

The Trust, the political arm of the Academy, represents the interests of the general public and trial lawyers in Juneau. The Trust addresses and monitors many issues of importance, including workers' compensation, criminal law, auto insurance, insurance reform, family law, workplace safety, and works to defend the rights of the individual and to protect the civil justice system.

The success of both the Academy and Trust is due entirely to the hard work, perseverance and financial contributions of its members.

Thank you.

Winston Burbank	**Mestas & Schneider**
Grant Callow	**Jim Pentlarge**
Charles Coe	**Laurel Peterson**
George Dickson	**Rice, Volland & Gleason**
Pete Ehrhardt	**Eric Sanders**
Michael Flanigan	**Chris Schleuss**
Rick Friedman	**Clifford Smith**
Lewis Gordon	**Torrisi & Snyder**
Peter Gruenstein	**John Suddock**
Dick Harren	**Vincent Vitale**
Jeff Jefferson	**Bob Wagstaff**
Kelly, Cossman & Associates	**Russ Winner**

Legislation targets concealment in public hazard settlements

Unjust bill blackmails business

By Mary A. Nordale

A fundamental principle on which American courts operate is that each case is unique. Whether the parties in a case are at trial or in appeal, the courts must deal with their claims and circumstances alone.

The system is designed to be fair to both parties. House Bill 171, introduced by the House Judiciary Committee, would change that.

This bill provides that a court may not enter an order or judgment that has the effect of concealing a public hazard or information concerning a public hazard. It also allows someone who is not a party, a stranger to the case, to contest the order or judgment.

A public hazard is an instrumentality "that has caused injury to a person or property, and includes a device, instrument, person, procedure or product, and a condition of a device, instrument, person, procedure or product."

The courts have adopted discovery rules to assist litigants, before trial, in acquiring as much information about the case they are trying as they need in order to be successful.

These rules work for the advantage of both parties, so no surprises occur in the courtroom. And at trial, the judge has the advantage of knowing as much as possible about the facts and the issues so that he or she can apply the law fairly and correctly. Thus the decision can reflect the general rules of civil behavior our society endorses.

In the course of the discovery process a judge may be required to enter a number of orders either compelling a party to disclose information, or protecting a party from having to disclose information that is clearly not relevant to the issues. Often a court will order disclosure of information that is clearly not admissible in the case, but that may "lead to" admissible evidence.

By asserting that a public hazard is involved, any stranger to the case can contest the order and require either or both parties to turn over to the stranger all of the information covered by the order. A judge would be required to make a determination on what are called "ultimate facts" and means that the judge will have determined as the outcome of the trial before the parties ever get to a courtroom.

All of this means that an environmental litigation organization, an attorney interested in commencing a case, or even newspapers can intervene in a case in which a defendant — targeted by the environmental litigation organizations or the American Trial Lawyers, for example — may be involved to acquire information about the defendant and compel a judge to dictate the outcome of a case before it can be tried.

This bill would destroy the courtroom as a place in which to settle disputes. It would lead to a system of blackmail against target defendants, especially natural resource-based industries.

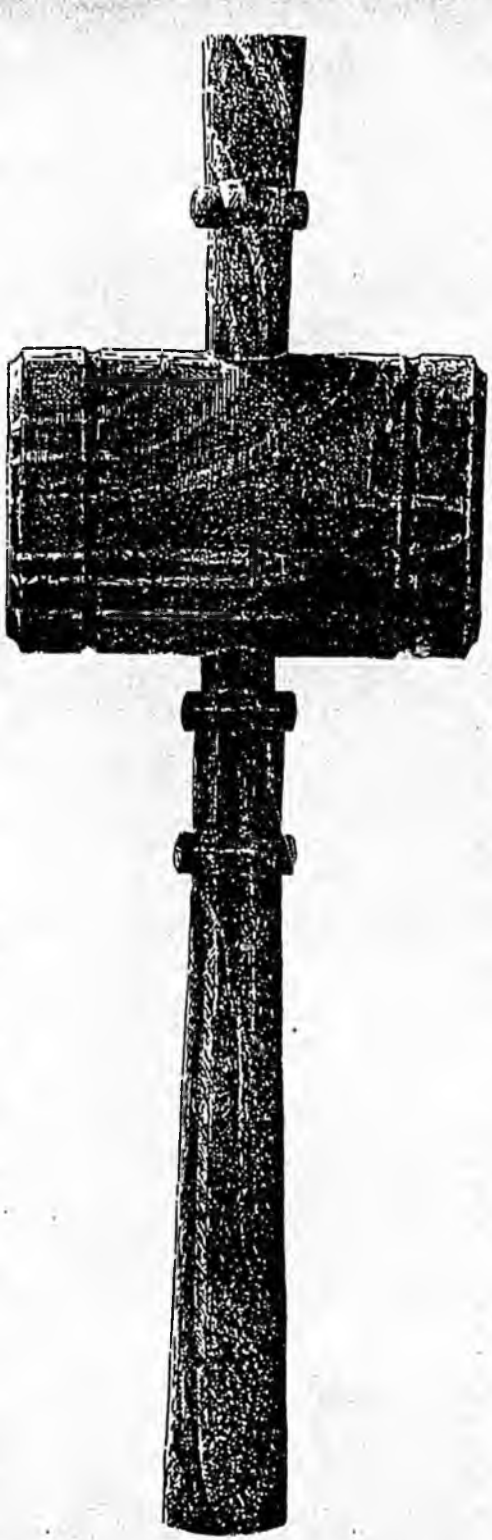
All a plaintiff would have to do is write a letter to his target defendant alleging injury because of a public hazard. The defendant would know that the choice is to settle out of court or defend against the plaintiff and any other person who wanted information about the defendant's business.

Because the costs of trying a case can be enormous, the target defendant may very well determine that peace with the plaintiff — even if the plaintiff does not have a good case and would not win — may be less expensive than a defense.

What business in its right mind would want to establish itself in Alaska knowing that it faces this kind of blackmail? What business in Alaska already established can survive? Chevron has shut down its refinery on the Kenai Peninsula, stating that one cause is the regulatory climate.

We have lost jobs and a significant part of Alaska's economy. Consider what would happen if HB171 passes. Even the local hardware store would have to reconsider the advantages of staying in business.

Mary A. Nordale is a lifelong Alaskan, former assistant U.S. Attorney and assistant district attorney in Fairbanks, and former Commissioner of Revenue, now in private practice in Juneau. Opinions expressed in Taking a Stand do not necessarily reflect the editorial position of The Anchorage Times.



Legislation exposes secrets

By Michael J. Schneider

It has been observed that American industry is motivated by little more than money. The "bottom line" is not the only line, but it's the only line that seems to get much attention. While this approach has provided us with industrial superiority, a high standard of living, and considerable hope for the future, it carries with it some tragic and avoidable consequences.

Schneider

If the cost to the particular business or industry of correcting a product defect or a dangerous design is greater than the benefit to that industry or business, then the problem goes unremedied. Corporate wrongdoers continue to reap the monetary benefits of their dangerous products, while people, their families and the public bear the burden. Few perceive this reality as keenly as those of us whose privilege it is to represent the maimed and the injured against the giants of American industry.

One of our greatest frustrations as plaintiffs' attorneys is that we are frequent and unwilling participants in the conspiracy of silence that surrounds litigation over public hazards.

The consuming public and government regulators are kept unaware of dangerous products, safety violations and predatory business practices because of the widespread practice of making settlements and facts, obtained in the course of litigation, secret from all but the parties to the case.

The conflict arises very simply. Our first duty is to our individual client's interests. When a corporate wrongdoer finally buys peace at the courthouse steps (or on appeal after a favorable verdict), silence is customarily demanded by the wrongdoer.

Plaintiff and plaintiff's counsel are compelled to promise that they will not disclose the nature or terms of the settlement reached, nor the facts obtained or disclosed during the course of the lawsuit. A maimed and injured plaintiff rarely declines a fair settlement offer to hold out for the "public's right to know."

Most of us in the same circumstances would make the same decision. Unfortunately, the consequence is that the most hideous and widespread misconduct and public danger remains secret, while the judicial system pays an outrageous price processing claims. This is because each new plaintiff must replow the same ground in order to obtain the facts and circumstances necessary to develop their case.

Many meritorious cases are not prosecuted because of the expense and difficulty involved. Corporate misconduct goes unpunished and consumers are left without the information they need to promote the safety of their families.

Fortunately for all of us, a move is afoot to end this conspiracy of silence. The House Judiciary Committee, under the leadership of Rep. Dave Donley, has introduced House Bill 171. That legislation is in the process of making its way through the House of Representatives and is currently before the House State Affairs Committee.

While this bill may be subject to criticism because it doesn't go far enough, it will alter Alaska's public policy in favor of the consumer and in favor of openness.

This bill needs our support to ensure that corporate wrongdoers will be unable to hide their misconduct behind a check at the courthouse steps.

Support for this legislation can be easily expressed. Your local legislative information office will be happy to send a short public opinion message to your legislators or to the entire legislature for free. Do it today. Opposition from the insurance industry, the automotive industry and the pharmaceutical industry is already being heard in Juneau. Now let them hear from us, the public consumer.

Michael J. Schneider is former chairman of Alaska Action Trust, a committee of trial lawyers opposing reductions in plaintiffs' rights and other changes in the civil justice system. Opinions expressed in Taking a Stand do not necessarily reflect the editorial position of The Anchorage Times.

ANCHORAGE TIMES, MAY 5, 1991

Sealed out-of-court settlements leave public in dark

By BARRY SIEGEL
Los Angeles Times

SEATTLE – There is a moment that recurs with disheartening regularity for Barbara Arbuckle.

It comes during her conversations with women who, like her, have survived faulty Pap smears and deadly cervical cancer.

Just as Arbuckle is nodding sympathetically in response to a companion's account of medical travail, just as she is thinking this lady's story is a film of my own life, the other woman invariably leans forward, eyes narrowing, with questions: So where were your Pap smears done? Do you know anything about my lab? How many tests did you have? How did they botch your case?

Arbuckle has talked in general terms on national television programs about problems with Pap smears. She has testified before a U.S. Senate subcommittee. She has campaigned tirelessly for what she calls "the public's right to know." But she is unable to answer these other women's specific questions.

I can't tell you, she responds, looking away. I just can't.

Such is the price Arbuckle paid in agreeing to a sizable out-of-court settlement of her lawsuit against two laboratories that she said misread her Pap smear results. In exchange for avoiding an expensive, drawn-out trial, Arbuckle agreed not to identify the labs publicly, or discuss details of her case, or disclose evidence that she and her lawyer had gathered about the labs' problems with other patients' Pap smears. In fact, she agreed to let most of the court records of her suit be sealed from public view.

"Today I regret that deal," Arbuckle, 27, told a state legislative hearing in Washington state last January. "There are things that you all should know. I can't say some things. And those things could save lots of lives. ... Lives would be saved if people knew."

With those words of public remorse, Arbuckle joined a mounting national backlash against sealed settlements and protective orders, which over the past 15 years have become a commonplace element of the civil-justice system.

A few individual judges have started preventing secret settlements or reversing their own confidentiality orders. A national trial lawyers association has launched an offensive called Project Access, which files legal challenges to confidentiality orders and mails out thick information packages full of key cases and sample briefs.

Citizens regularly drive cars, take drugs, operate equipment and live near toxic polluters that have been the subject of lawsuits covered by a confidentiality order. Does the public have an absolute right to know about these cases? Or should plaintiffs and companies be allowed to settle their private disputes as they see fit? Where to draw the line between private rights and public interest? These are the questions being raised by lawyers and lobbyists in a growing national debate.

> *'There are things that you all should know. I can't say some things. And those things could save lots of lives.'*
>
> **– Barbara Arbuckle,**
> **who settled a case involving faulty Pap smears**

Barbara Arbuckle takes part in this broad exchange, but also sees the matter in more personal and morally vexing terms. The legal system, after all, forced her to choose between her own interests and the public interest.

"My attorney's advice was to let go, move on, because she knew I was wore out," Arbuckle said. "I agreed." I'm not mad at my lawyer. She handled this to the best of her ability. I was a 23-year-old waitress, just scratching by with no one to help her. But the bottom line is, this hurt the public. It hurt lots of other people. So I have a question: Why should my attorney have to advise me about this in the first place?"

A look at Arbuckle's case and the debate in Washington offers more than one answer to this question.

Barbara Arbuckle was 21 when her troubles began – first discomfort and pain, then problems with menstruation. For two years she regularly visited her doctor, who took a series of Pap smears but could find nothing wrong.

Then, watching television late one night in October 1985, Arbuckle happened upon a show in which medical people were sitting around talking about cervical cancer. There was a listing of symptoms. This sounds just like me, Arbuckle thought.

Three weeks later she underwent a radical hysterectomy to remove advanced cervical cancer.

"I had all the goals in life," she recalled. I was going to have a little boy, a little girl. Then the doctor told me nope, you don't get it. This shouldn't have happened – it's not just bad fate. I'd been going to my doctor, telling him my symptoms for two years, taking the tests. So I called my attorney."

Eventually, her lawyer came to believe the fault was with two Seattle labs. The labs, attorney Mary Ann Ottinger claimed in a lawsuit, misread Arbuckle's Pap smears. Such misdiagnoses, it emerged, had been a growing problem across the country, and were not uncommon at the two labs in question. But the scope of the problem had been obscured by secret court settlements.

Soon Arbuckle was speaking out in public regularly, being careful not to dwell on the particulars of her own case, since there had been no judgment in court yet. Reporters called every week. Geraldo Rivera invited her on his talk show. So did Larry King.

"The response from all over since I started to talk was so much," Arbuckle said. "It's amazing – people do read, people watch TV, people learn. We were giving the public the knowledge. The only way I knew about Pap smears was that late night TV show. Without that show I'd be dead. If I can learn about my health watching TV, why not others?"

But while her public appearances multiplied, her legal battle dragged on without resolution. One trial date was postponed, then another, until the case was 2½ years old. Defense lawyers came back again and again to question Arbuckle.

"They asked hundreds of questions," she said. "When was the first time I saw a doctor? How often did I see him? What about my sex life? How often? For how long?"

Then, in early January 1988, the defending companies learned Arbuckle was scheduled to testify within days before a subcommittee of Congress that was investigating Pap smear misdiagnoses. "No way did the defendants want their names and the details spread over USA Today," said Ottinger, Arbuckle's attorney. "They did not want it in Congress and the papers."

So just as Arbuckle was packing for Washington, a generous settlement offer arrived. It had a condition, though: Arbuckle could not talk about the particular details of her case, and the file would be sealed.

Arbuckle bristled. "After 2½ years of legal fighting, I'm told I have to keep my mouth shut. And the whole record is to be sealed. My case doesn't exist. To what purpose?"

See p. 72 re FLORIDA LAW.

Dangers Insurance Companies Hide

'The Blood of Thy Neighbor'

Morton Mintz

Imagine a manufacturer who discovers that one of his products has a defect that is causing grave injuries to unsuspecting consumers. If he promptly warns them, halts production, and recalls the product, he will be obeying a moral obligation that is deeply rooted in our religious and ethical heritage. The obligation is expressed this way in Leviticus 19:16: "Neither shalt thou stand idly by the blood of thy neighbor."

Now imagine a house bordering an alley. From a second-floor window, X sees Y lay a nearly invisible wire across the alley and then run away. Moments later, X sees Z—an unsuspecting stranger to whom he has no special tie—walking toward the wire. X's moral obligation to warn Z is also his duty under the laws of a dozen foreign countries. In the United States since 1973, 27 states and the District of Columbia have enacted some version of the so-called "Good Samaritan" statute.

In a final scenario, our manufacturer neither warns of the defect nor recalls the product. Figuratively, he lays a nearly invisible trip wire and flees. Watching him do it from the window, and then sitting in silence as consumers are ambushed, is the manufacturer's products liability insurer. He is above it all. He sounds no warning. Unlike X, however, he claims that his conduct is morally right—even though, unlike X, he is not a "stranger" to Z since the insurer profits from the consumer, and even though, unlike X, he in essence enabled Y to lay the trip wire by underwriting the effort.

His conduct, he points out, is required by the courts. They have ruled that an insurer has no affirmative duty to warn the public or to facilitate a recall of a product it insures. "Indeed, under the laws of, I think, every state," Craig A. Berrington, general counsel of the American Insurance Association, told me, "the insurer has an absolute obligation to provide a defense for that policyholder against claims that arise, and the insurer can be sued when policyholders believe that insurers are not vigorous enough in providing that defense."

Lie-ability Insurance

"My primary concern," Berrington said, is that no standard be established under which

> insurers essentially become police officers or reporting officials—an arm of the government . . . or that insurers do the work of government and be blamed when government fails in its responsibility to make judgments as to what products ought not to be on the market. . . . A legal duty to disclose with regard to a product that the insurance company has covered would be contrary to the insurer's statutory and contractual obligations today and place the insurer in a terrible bind.

Berrington has a point about the role of government, but through him the insurance industry makes an argument for preserving the confidentiality of a commercial relationship no matter the cost in human life. It's an argument that government, which has no higher mis-

Morton Mintz, an award-winning investigative reporter for the Washington Post, *now retired, is the author of* At Any Cost: Corporate Greed, Women, and the Dalkon Shield *(Pantheon 1985).* *This article is reprinted with permission from* The Washington Monthly *(January/February 1991).*

sion than public safety, must not compel insurers to divulge information that would protect us from massive, continuing disease, injury, and death. It's an argument that would surely astound most Americans were they aware of it; but through a quiet accretion of court rulings, and without congressional debate, this privileged position asserted by products liability insurers has evolved into national policy. It's an argument that in essence is an excuse for the insurance industry to stand by the blood of its neighbors.

Meanwhile, the neighbors in the marketplace and the workplace have been shedding lots of blood. Consider the dreadful catastrophes caused by only two products: the Dalkon Shield, the defective intrauterine contraceptive device (IUD), and asbestos, the deadly mineral.

New Year's Eve Irresolution

The Dalkon Shield was sold in the United States from January 1971 to June 1974, when the manufacturer, pressed by a worried Food and Drug Administration (FDA), ended domestic sales (but continued foreign sales until at least April 1975). During those three-and-one-half years, physicians implanted an estimated 2.2 million of the devices in the United States and 800,000 in some 100 other countries. For at least a decade after the sales halt, according to recently available court documents, the liability insurer joined the manufacturer in suppressing knowledge of the IUD's hazardous defects.

The foreseeable and preventable result was that tens if not hundreds of thousands of women suffered life-threatening pelvic infections, which commonly impaired or destroyed their ability to bear children. In addition, hundreds of children were born with injuries inflicted by the Dalkon Shield while it was their companion in the womb, causing blindness, cerebral palsy, and mental retardation. Eighteen deaths have been reported, but the toll is certainly much higher, if only because in Third World countries no one was counting.

The insurer was Aetna Casualty & Surety Company. ACS is wholly owned by Aetna Life & Casualty Company, one of the world's largest providers of insurance and financial services. In its corporate publications, Aetna acclaims itself a "good corporate citizen." Notably, it was an ACS senior claims adjuster who, on New Year's Eve of 1981, writing in the margin of a complaint filed by a Dalkon Shield victim, raised the rarely asked question: *"What is duty of an insurer to the public when it has knowledge of serious product defects which are likely to cause injury?"* [Italics added.]

That William D. McGehee had asked the question did not become known for more than six years; whatever the answer, it isn't on the record. So I asked Aetna for an answer, and a spokesman assured me I'd get one. Several days later, Aetna backed out, giving an interesting reason: The information I was seeking concerned the industry as a whole, and therefore I should talk to Berrington, the insurance association counsel.

The courts equate an insurer of wounding and lethal products with a priest who hears the sacramental confession of a serial murderer.

About 21 million U.S. workers have been exposed to asbestos, and several hundred thousand of them are expected to die of asbestos-induced cancer over the next quarter-century. In *Outrageous Misconduct*, Paul Brodeur wrote: "By 1981, many of the nation's insurers had known for decades that asbestos workers were dying early, but had kept silent while their underwriters wrote policies for workmen's compensation and comprehensive general liability as fast as they could put pen to paper."

Proving to a fare-thee-well that they had known the truth from their own "actuarial tables, ratings schedules, physicians' reports, workmen's compensation claims, underwriting guidelines, and safety-and-engineering manuals," Brodeur wrote:

> If at some point along the way, Aetna, Travelers, Commercial Union, Liberty Mutual, INA, Hartford, Home, Lloyd's, or any of the other major insurers of the asbestos industry had gone public with their inside knowledge, they might well have been able to save tens of thousands of lives and untold suffering and pain.

Why did insurers conceal their knowledge and continue to provide coverage? Disclosure, Brodeur explained, would

> have encouraged claims and damage suits, and run counter to basic insurance-company practice, which is to write as much coverage as possible, and as cheaply as possible, in order to reap a rich harvest of premiums that, when invested, will return enough money to pay for future claims and make a profit for the company.

As Ralph Nader put it in a 1987 article in the *Suffolk Law Review*, insurance companies "have become predominantly cash flow financial institutions. . . . More and more attention is being paid to increasing investment income through premium volume."

Such a casino philosophy too often has led to industry indifference to loss prevention and advocacy for health and safety, which, as some insurers often brag, are historical objectives of insurance. Thus, Aetna's top officers piously stated in their 1989 annual report that "the best way to keep premiums down is to work with clients to prevent or minimize losses." Yet, while the Aetna Life and Casualty Company foundation made $6.8 million in grants in 1985, Nader wrote in 1987, "the only safety contribution was $5,000 to an Indianapolis, Indiana, Volunteer Fire Department, according to the annual report of the company and the foundation."

The downside of loss prevention for the industry was described in a 1971 study by Herbert S. Denenberg, the former insurance commissioner of Pennsylvania. Loss prevention, he wrote, "might encourage self-insurance and might otherwise lessen the need for insurance [and] lower premiums, and decrease . . . income and cash flow."

Robert Hunter, president of the National Insurance Consumer Organization (NICO), said in an interview, "It's a shocking thing that what the industry knows from its files could save lives [but] is never tapped." He cited an example: The National Highway Traffic Safety Agency (NHTSA) test-crashes cars equipped with dummies to find out how safe —or unsafe—they are, while insurers refuse to release the data on millions of cars that have crashed with real people in them.

"Even repeated litigation arising from well-known and identical hazardous product models or services has not prompted the insurance industry to insist on elimination of possible dangers," Nader wrote. "The insurance industry's indifference to loss prevention has been a significant contributor to the 'insurance crisis' of the 1980s, which hit consumers and businesses with skyrocketing premiums."

Was the conduct of insurers in the Dalkon Shield and asbestos cases an aberration? "It happens routinely," Denenberg told me. "They don't come forward and say, 'Hey, world, look out for this!'" Fortunately, some firms break the mold. In 1970, for example, Charles K. Cox, president of the Insurance Company of North America (INA), said that INA "will no longer insure the company that knowingly dumps its wastes."

Early in the Reagan administration, NHTSA voided an automobile safety standard that required air bags or other automatic restraints and would have saved thousands of lives annually. In what Nader hailed as a "luminous exception" to the industry norm, the huge State Farm Mutual Automobile Insurance Company fought NHTSA's action up to the Supreme Court and was vindicated in 1983 when the court held the action illegal.

However admirable, such exceptions provide no clue as to how many deaths and injuries insurers could have prevented through the years, or could prevent from now on, by dedicating themselves to loss prevention and by disclosing their knowledge of dangerous defects in products and needless workplace hazards. Brodeur found that insurers could have saved the lives of tens of thousands who fell victim to only one product, asbestos.

So it's a fair question: What did the insurers know and when did they know it about hazardous defects identified after marketing in, say, automobiles? Aircraft? Athletic gear? Building materials? Butane lighters? Drugs and vaccines? Food additives? Playground equipment and toys? Toxic chemicals? No one asks the insurers to reveal everything they know. And they shouldn't, says NICO's Hunter. "But in the case of a product that kills they have a duty to warn."

Robins's Hoods

Aetna became deeply involved in the Dalkon Shield episode 16 years ago in Wichita, Kansas, where the manufacturer, A.H. Robins Company, was the defendant in an early, seemingly routine personal injury trial. To that point Robins had sold more than 4.5 million Dalkon Shields, claiming that in preventing pregnancy the device had a stunningly low failure rate of 1.1 percent per year. All along, however, Robins—but not Aetna—had known that the claim was based on studies that were unreliable at best and fraudulent at worst: The true failure rate of the Dalkon Shield was later determined to be about 5.5 percent.

In February 1975, near the end of the trial, a leading plaintiffs' lawyer, Bradley Post, introduced a smoking-gun internal Robins memo. In the memo, which was written exactly four days before the company bought rights to the Dalkon Shield in June 1970, a Robins medical executive revealed that the developer of the device had admitted to him that he knew the pregnancy rate to be well over 1.1 percent. The memo erased any possible doubt at Aetna that the claim was false, devastated the defense, and led the jury to make the first award of punitive damages to a Dalkon Shield victim.

A Congress that can compel disclosure by accountants can also compel disclosure by insurers who learn of avoidable hazards in products and the workplace.

The amount of the award was relatively small—$75,000. But the defeat and its implications infuriated Aetna and William A. (Skip) Forrest, Jr., general counsel of Robins. They blamed Roger L. Tuttle, the Robins in-house counsel in charge of Dalkon Shield products liability litigation. Soon afterward, Tuttle testified —and Forrest denied—that Forrest ordered him to arrange the destruction of hundreds of "troublesome" documents (some of which Tuttle secretly saved). In short order, Aetna forced Tuttle's dismissal from Dalkon Shield legal matters. Forrest replaced him with what is now McGuire, Woods, Battle & Boothe, Virginia's second-largest law firm, which would coordinate as many as 150 Dalkon Shield defense law firms around the country.

A development of supreme importance followed in a few weeks. According to hitherto unreported Aetna internal memos, by November 1974 ACS had, or was trying to take, "complete control" of Dalkon Shield litigation from Robins. Through McGuire, Woods, ACS in March 1975 clearly assumed complete control. From that day forward, McGuire, Woods was getting its marching orders from the insurer, not the manufacturer.

In the process, Aetna had to, and did, learn what Robins knew and what plaintiffs' attorneys would soon demonstrate with overwhelming scientific evidence: the longer a Dalkon Shield remained in the body, the greater the risk of pelvic infection or pelvic inflammatory disease (PID). As far back as 1956, articles in scientific literature had warned that nylon rotted upon long-term exposure to body fluids. Robins's IUD was the only one with a retrieval string that was not only made entirely of nylon, but also consisted of hundreds of tiny filaments encased in a sheath. As the nylon rotted, bacteria that penetrated the spaces between the filaments were wicked into the normally germ-free uterus, where they caused PID.

Robins did not test the Dalkon Shield for safety until after it began to sell the device worldwide. Aetna knew this. In October 1975, a meeting was held at Aetna to discuss "problems of defense" in Dalkon Shield lawsuits. One of the problems, claims adjuster Ronald Szeremeta said in a memo, was "lack of testing prior to marketing." In February 1976, an ACS internal memo acknowledged inadequate testing. But later in 1976, Aetna was still reassuring other companies providing coverage to Robins. Yes, an Aetna official told one of them, Aetna was "completely satisfied with Robins's testing and marketing program."

Incriminating Experiments

The first experiments incriminating the Dalkon Shield string were reported in 1974 by IUD expert Howard J. Tatum. Aetna then began to fund numerous string studies through McGuire, Woods, using the lawyer-client relationship to cloak the results. An early, ominous report came in December 1975, when the law firm told senior ACS attorney John A. Edgerly, Sr., that a British study was "showing greater bacteria buildup with DS [Dalkon Shield]." Aetna also paid for a comparative study by New York University's primate laboratory of IUDs in baboons (primates that, after chimpanzees, have a female reproductive system most closely resembling a human's).

Attorney Edgerly feared confirmation of Tatum's experiments. And so in June 1977, he wrote a classic head-in-the-sand directive to Harris W. Wagenseil, then a San Francisco lawyer who has been described as "a principal architect" of the defense of the Dalkon Shield, and who reported to Aetna mostly through McGuire, Woods. First, Edgerly instructed Wagenseil to classify information about the baboon study as a lawyer's confidential "work product" to prevent plaintiffs' counsel from seeing it. Then he

wrote: "There is one caveat, and that is, this test could verify the finding of Tatum—if the conclusion appears to be headed in this direction, the study will be aborted."

For whatever reason, the study continued long enough to go far toward confirming Tatum's experiments. In an analysis of the data in 1981, after the study was completed, Dr. William M. O'Leary, professor and chairman of microbiology at Cornell, concluded that there was "a striking association" between the multifilamented string and bacterial contamination of the womb. After I learned of the study in 1984, NYU refused for six months to reveal who had paid for it. Finally, Forrest admitted in court testimony that Aetna had picked up the entire bill.

Only a complete recall could protect Dalkon Shield wearers, all of whom were unaware that the string deteriorating in their bodies was exposing them to ever-increasing peril. The need for a recall of these IUDs became apparent in late May 1974, when Robins disclosed that four women who had become pregnant while wearing the Dalkon Shield had suffered rare fatal septic infected miscarriages. The toll of serious cases and fatalities increased almost daily.

FDA staff members urged Commissioner Alexander M. Schmidt to recall at least all unimplanted Dalkon Shields. But he settled for a "voluntary" suspension of sales—the weakest course of action besides doing nothing. It was also the course Robins had preferred because, a Robins lawyer advised, it minimized the company's legal liability. An Aetna memo quoted a revealing admission from an official identified as Bill Dumbauld: "Bill's caustic comment was 'those unsafe cars on the road aren't being recalled.'"

To force a recall, Aetna could have refused to renew the annual liability coverage that Robins needed to do business since, as Robins's own insurance broker warned, if ACS didn't insure the Dalkon Shield, no other carrier would. The possibility was considered. But Aetna resisted a true recall, and a reason emerged in a 1980 interoffice communication in which ACS official Douglas D. Carr discussed a meeting the previous day. Robins, he wrote, "was still contemplating a recall of the IUD which would 'precipitate an influx of claims.'"

Aetna renewed its coverage in 1976 and again in 1977. That it coveted the Robins account is suggested by an internal memo warning that "unless we do something to safeguard ourselves, profitability of account will disappear." Although Aetna's profits from 1974 to 1977 haven't been disclosed, its 1973 profit from Robins was relatively trivial —about $30,000, according to an internal memo.

Even supposing that Aetna subsequently jacked up its premiums, it seems strange that profits on this scale could account for the annual renewals after 1974, when Aetna had to know that big trouble lay ahead. But blindly following the "basic insurance-company practice" of seeking the maximum possible premium income in order to make investments had apparently led Aetna into a colossal blunder. "I can't see anything beyond stupidity," said NICO's Hunter, "I just can't."

Aetna finally cut off coverage effective February 28, 1978. The cut-off was a consequence of a megabucks battle with Robins, similar to one in the asbestos litigation, over the question of when the insurer's liability began: upon exposure to the product or upon diagnosis of disease. Negotiations failed to settle the dispute, so Robins sued Aetna.

In March 1977, while the case was pending in circuit court in Richmond,

the companies signed a secret armistice. Aetna, waiving traditional immunities from liability, consented to some cold-blooded provisions. It would pay all compensatory awards, even for "*intended* bodily injuries," and for injuries arising "on account of Robins's failure to disclose relevant information and the *supplying of false and misleading information* [to physicians and women]." [Italics added]. The quid for this quo was that Robins would pay all punitive awards. The lawsuit was settled in 1984, on the eve of trial.

The pact could have embarrassed Aetna and rocked the industry if it leaked into a court proceeding. ACS outside counsel Rufus Coldwell warned in a 1982 memo that a judge could construe it "in an unfavorable manner and place upon ACS some heretofore non-existent duty of disclosure to the public."

In February 1984, the then-chief U.S. district court judge for Minnesota, Miles W. Lord, excoriated E. Claiborne Robins, Jr., and two other top Robins executives for having refused to recall the Dalkon Shield. A multitude of women were still carrying "the deadly depth charge in their wombs, ready to explode at any time," Lord told the utterly unrepentant trio standing before him. "Face up to your misdeeds," he pleaded. "Please, gentlemen, give consideration to tracing down the victims and sparing them the agony that will surely be theirs." Finally in October, Robins asked all women who were wearing the Dalkon Shield to have it removed.

If Lord had seen the newly available court documents, he surely would have extended his wrath and his plea to complicit Aetna executives. Still, he had a few harsh words for Aetna:

> The policy of delay and obfuscation practiced by [Robins's] lawyers in courts throughout this country has made it possible for you and . . . Aetna Casualty and Surety Company to delay the payment of these claims for such a long period that the interest you earn in the interim covers the cost of these cases. You, in essence, pay nothing out of your pockets to settle these cases.

[redacted]

While the Dalkon Shield episode left Robins a shattered, humiliated company, Aetna almost completely escaped punishment.

[redacted]

But in keeping with the court rules—it's a no-no for a jury to be told whether a defendant is insured—the Aetna executives were, and remain to this day, all but invisible. Yet they have been complicit in a decade of delay of the recall, while the Dalkon Shield injured thousands more women than any serial rapist ever has.

Monkey Business

Aetna dodged my questions about the baboon study, the armistice with Robins, and other awkward subjects, citing "legal reasons," "advice of counsel," and the inviolability of insurer confidentiality: "We are prevented by law from publicly discussing or otherwise disclosing any information provided to us in confidence by our clients," a spokesman told me at the time.

"Confidentiality is not only paramount to an insurer's relationships with its clients; it is also our business and legal principle without which it might not be possible for insurance companies to pro-

vide . . . liability insurance in any form."

Unlike the insurance industry, the medical and legal professions do not say "never" to disclosure because they recognize that confidentiality treated as an absolute inevitably collides with higher responsibilities to the welfare or the community at large:

- The American Medical Association's ethical code allows a physician to "reveal the confidences entrusted to him in the course of medical attendance" if "required to do so by law or [if] it becomes necessary in order to protect the welfare of the individual or of the society."
- The American Psychiatric Association's "Guidelines on Confidentiality" warn that "psychiatrists today may be held responsible for protecting parties whom their patients seriously threaten, particularly when these other persons have been specifically identified."
- The American Bar Association's Model Rules of Professional Conduct say that information confided by a client may be revealed "to the extent the lawyer reasonably believes necessary . . . to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm."

Considering that a dangerous patient or client is usually only a threat to one person or a few people, and that just one needlessly hazardous product may injure tens of thousands of people, is it rational public policy to treat the insurer-customer relationship as sacrosanct?

And even in financial matters that aren't life-threatening, the government is likely to construe professional confidentiality as waivable. Accountants had no small role in the S&L disaster, a case in point being a major accounting firm's apparent cover-up of the shenanigans of Charles Keating, Jr. So late last year, the House of Representatives passed a bill requiring accountants to alert regulators to serious irregularities. The bill died in conference with the Senate, but Rep. Ron Wyden (D. Or.), who has been sponsoring the proposal for years, sees a good chance of enactment in the new session. A Congress that can compel disclosure by accountants can also compel disclosure by insurers who learn of avoidable hazards in products and the workplace.

But the way things stand, the courts equate an insurer of wounding and lethal products with a priest who hears the sacramental confession of a serial murderer. In *Ethics in the Sanctuary*, author Margaret P. Battin recalls the much-publicized West German case of Jurgen Bartsch, a 15-year-old butcher's apprentice who confessed to his priest that he had committed a murder:

> The priest attempted to persuade Bartsch to give himself up to the police. When he was unable to do so, the priest followed Roman Catholic church law requiring absolute confidentiality of the confessional and did not reveal information about the murder or Bartsch's intentions. Bartsch committed three more murders—all of them of 11-year-old boys, all of whom he subjected to sexual torture prior to killing them—before he was caught four years later [in 1966].

At least the priest did what he felt he could to avert further bloodshed. The insurers of asbestos and the Dalkon Shield did not.

More than two years after William McGehee had asked his incisive question about the insurer's duty, he was still groping for a satisfactory answer—while women in large numbers continued to be stricken with pelvic infections. He rephrased his concern in April 1984 in handwritten notes in which he spoke of the "dilemma of insurance company which knows that insured has danger of defective product."

Aetna's headquarters are less than 20 miles from a nuclear plant. If the "defective product" giving rise to the "dilemma" were about to cause a meltdown at the plant, would Aetna bend its iron rule of confidentiality?

The Columbus Dump

Thirteen days after the February 1975 verdict in Wichita, Forrest and other Robins officials met in Hartford with five Aetna executives and an official from Robins's insurance broker to discuss why the case had been lost and how to build better legal defenses against Dalkon Shield lawsuits. Toward the end of two pages of handwritten notes, Joseph E. Fazio, an ACS manager and claims attorney, made a startling reference to Forrest: "Purging files to be sure that for future they will not be as vulnerable." The meeting minutes also refer to a discussion of purging of documents.

In one way or another, thousands of documents sought by plaintiffs' lawyers vanished suspiciously after McGuire, Woods took over the Dalkon Shield litigation under Aetna's direction. An especially odd fate awaited about 20 boxes of documents, some concerning secret tests of the Dalkon Shield's string.

The papers had been in the possession of Harris Wagenseil, the San Francisco attorney retained by McGuire, Woods. He shipped the boxes to Columbus, Indiana, when he moved to a new home there. In what he described in testimony as a "spring cleaning," his wife had the boxes carted off to the city dump.

At the time, the papers relating to the string tests were under a court "nondestruct" order. In a February 1984 report to Judge Lord, two special masters said that plaintiffs' attorneys had established a strong prima facie case that there was "ongoing fraud" and that it had "involved the destruction or withholding of documents."

In June 1984, when Dalkon Shield litigation was reaching floodtide proportions, four ACS officials met to discuss the carrier's options. One sentence in notes of the meeting—handwritten by someone not publicly identified—leaps off the page: "If we propose alternative #1—re: giving greater detail about how to run their [Robins's] operations and they don't accept it and we walk, aren't we conspiring even more."

This teasing hint drew strength in 1985, when the U.S. Department of Justice began to investigate whether Robins had criminally obstructed justice. In four subpoenas, a federal grand jury in Wichita ordered Robins ("Company X" or "Company" in public court papers because of the secrecy of grand jury proceedings) and McGuire, Woods ("Law Firm Y" or "Law Firm") to produce specific records. Company and Law Firm, asserting the attorney-client and lawyer's work-product privileges, refused to produce substantial numbers of the subpoenaed documents.

In deciding whether to sustain the refusal, District Judge Patrick E. Kelly, who was supervising the grand jury, conducted an in camera examination of sealed grand jury testimony and exhibits. Kelly ruled that the privileges could not be invoked "as a result of the crime-fraud exception." The in camera submissions, he said,

> contain a strong prima facie showing that [Company] and its employees and officers participated in the commission of crimes and fraud during the promotion, marketing, and sale of [the Product], and used its attorneys to perpetuate and cover up these ongoing crimes and fraud during the ensuing product liability litigation through the commission of frauds on the courts, obstruction of justice, and perjury.

Significantly, Kelly noted that these alleged acts had occurred "during the period of representation by [Law Firm]" —that is, during the period Aetna controlled the law firm's representation of Robins.

An appeal by Company X failed. Upholding Kelly 3 to 0, the U.S. Court of Appeals for the Tenth Circuit said, "From 1975 to 1985, the law firm was responsible for the nationwide coordination of Company's defense." From 1975 to 1985, Aetna had "complete control" of this litigation.

'What is duty of an insurer to the public when it has knowledge of serious product defects which are likely to cause injury?'

Company X petitioned for Supreme Court review. In a vigorous reply brief in February 1989, the Justice Department listed the possible violations it was investigating: obstruction of justice, mail and wire fraud, false declarations before the grand jury, racketeering, and conspiracy.

The Supreme Court denied the Robins petition in June 1989—an obviously significant victory for the Justice Department. So it was astounding when in January 1990 the department dropped its five-year investigation. Had Company X been found to be not provably guilty of any crimes? Found wholly innocent of criminal activities? Had the "false declarations before the grand jury" suddenly been transformed into true declarations?

Runaround Suit

Flat-out allegations of conspiracy were made against (and denied by) Aetna in private lawsuits. Such allegations against an insurer are not a first. In cases dating back to 1977, for example, 80 former asbestos workers at a Johns-Manville plant in New Jersey accused Metropolitan Life Insurance Company of "negligence, fraudulent concealment, and conspiracy," and a federal judge ruled that the insurer "could be held as a defendant" on those accusations, Brodeur wrote in *Outrageous Misconduct*.

One allegation was that in a 1935 report on asbestos disease, Metropolitan had altered certain passages "to suit the insurance industry"; another was that it had withheld "vital information from asbestos workers." However, after long delays of a trial that might have determined Metropolitan's legal accountability, the parties settled.

While the Dalkon Shield episode left Robins a shattered, humiliated company, Aetna almost completely escaped punishment, thanks to a class-action lawsuit called *Breland*. Robins's bankruptcy filing in 1985 meant Aetna faced a nightmarish possibility: It could become the sole defendant in the hundreds or thousands of lawsuits latent in the approximately 195,000 claims that survived court screening. But Aetna itself could not have devised a more brilliant self-rescue than *Breland*.

It was a mockery of an adversarial lawsuit: Aetna instantly embraced it; the lead plaintiff's lawyer had never tried a civil suit; Aetna produced only the documents it cared to (summarized in a 99-page "index"); and no plaintiff's lawyer took a single deposition. The *Breland* plaintiffs' counsel crafted the class action as an unprecedented—and, for the ongoing asbestos litigation, precedent-setting—"mandatory non-opt-out class."

This extraordinary move meant that hundreds of thousands of Dalkon Shield victims who had never heard of their self-appointed putative benefactors—Glenda Breland, her co-plaintiffs, and their lawyers—would, without their knowledge or consent, forever lose their constitutional right to a jury trial against Aetna, to select their lawyers, and to have their cases heard in the jurisdictions where they live.

U.S. District Judge Robert R. Merhige, Jr., of Richmond, who supervised both the Robins bankruptcy and the *Breland* hearings, certified the class action, airily declaring in his April 1988 opinion that, "there have been no suggestions that Aetna had any relation with the alleged injuring device except as an insurer." He disregarded the allegations of conspiracy and other wrongs imputed to Aetna even in *Breland*, and he was at variance with uncontested facts. Aetna's "complete control" of the Dalkon Shield litigation had been a reality for nearly 13 years, for example. And contrary to Merhige's opinion, Aetna attorney Edgerly's order to abandon the baboon test if it was yielding undesired results was certainly more than a "suggestion."

Based on Merhige's ruling, *Breland* counsel and Aetna reached an amicable settlement, as no one had doubted they

would. The claimants—most of them exceedingly weary of waiting to be compensated for injuries suffered a decade or more earlier—could not easily refuse, though some plaintiff's lawyers claimed "collusion" contaminated the settlement.

Once all the agreement's misleading provisions are weighed, they indicate that for $43 million—little more than nuisance value—Aetna could walk away from the multibillion-dollar arena of Dalkon Shield liability immune from lawsuits for ever after. This from a company that in 1989 listed assets of $87.12 billion and a net income of $676 million. No wonder Aetna was so happy to pay *Breland*'s attorneys—including a former partner of the judge involved—fees of $8.2 million (an average of $407 an hour) plus expenses.

In a brief filed as part of an unsuccessful appeal to overturn the settlement by 500 of the Dalkon Shield victims involuntarily corralled by *Breland*, two plaintiffs' lawyers cut to the heart of the matter: "If one follows Aetna's arguments to their logical conclusion," they wrote, "an insurer such as Aetna cannot be held liable for fraud, obstruction of justice, negligence, or any other tortious activities as long as it is acting as insurer at the time of its tortious activities."

Sunshine on Policyholders

The first line of defense against defective and needlessly unsafe products resides not in those who manage the offices where they are insured, but in those who manage the factories where they are made. This deserves particular emphasis because in recent years *self-insurance* has become commonplace in a wide range of manufacturing industries, including automotive parts, chemicals, general aviation, medical devices, pharmaceuticals, sporting goods, and tobacco.

Since 1979, Reps. John Conyers, Jr., (D. Mich.) and George Miller (D. Cal.) have proposed a bill to strengthen the first line of defense. The bill says that "whoever is an appropriate manager with respect to a product or business practice," and who "discovers . . . a serious danger associated with such product (or a component of the product) or business practice," shall within 30 days "inform each appropriate federal agency in writing . . . and warn affected employees in writing." A manager convicted of a violation "shall be fined not less than $50,000 or imprisoned not less than two years, or both"; a convicted corporation shall be fined not less than $100,000.

The virtues of this approach are several: It would infuse personal accountability where there is now too little, offset pressures on managers to cover up, and be enforced by U.S. attorneys—no new bureaucracy would be needed. In an impressive example of local initiative, California enacted a close copy of Conyers-Miller in late November.

Florida has also blazed a trail toward corporate accountability. Its "Sunshine in Litigation Act," which took effect July 1, says that

> any portion of an agreement or contract with the purpose or effect of concealing a public hazard, any information concerning a public hazard, or any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard, is void, contrary to public policy and may not be enforced.

Why not a federal sunshine in litigation act?

In the 1972 law creating the Consumer Product Safety Commission, Congress put on distributors and retailers the same legal burden of disclosure it put on manufacturers: Each and every one who obtains information "which reasonably supports the conclusion that such product . . . contains a defect which could create a substantial product hazard" must inform the CPSC immediately. If he doesn't, the agency is empowered to compel him to do that which he had already been morally bound to do.

In 1975, former Sen. Frank E. Moss (D. Utah) and the late Sen. Warren G. Magnuson (D. Wash.) introduced a CPSC bill that would have extended the reporting requirement to products liability insurers (and to independent testing labs). For Congress, the bill was an apparently novel perception that protecting human life, safety, and health is too important to exempt insurers (and labs) from reporting serious hazards to regulators. The measure passed the Senate but died in squabbles with the House of Representatives over unrelated issues—and was never reintroduced.

Still, the public health and safety being so much at stake, we need new federal and state legislation that revives the implicit message of Magnuson and Moss: The "thou" in Leviticus 19:16—"Neither shalt thou stand idly by the blood of thy neighbor"—exempts none of us, including the insurer watching from the window. ☐

Keeping Court Records in the Open

Texas Supreme Court Adopts New Rule

Lloyd Doggett

When a private dispute is taken before a city council or a regulatory agency or enters the halls of Congress or a state legislature, it is no longer purely private. The public finances these institutions and thus has an interest in what is occurring in them.

The same can be said with regard to the public's interest in decisions made in the third branch of government—the judiciary. Although a particular dispute may be essentially private, judicial decisions often have far-reaching public-policy consequences.

In November 1987, the *Dallas Morning News* published a series of articles[1] about sealing civil court records in Dallas County. Its investigation disclosed that since 1980, sealing orders had been entered in over 200 non-child-related cases. In each instance, trial judges had sealed court records without any prior notice to the public to allow its interest to be considered.

Judges had sealed the records without hearings and without any showing that secrecy was proper. Many overly broad orders closed entire files rather than only those parts that could justifiably have been sealed. Orders explaining the reasons for sealing had often also been sealed. Many records had apparently been closed in perpetuity because the orders specified no expiration time. Since the *Dallas Morning News* survey did not analyze protective orders restricting access to unfiled discovery in otherwise unsealed files, it represents only a small segment of secrecy directives.

During 1988, the nationwide implications of such secrecy for the public were explored in incisive series of articles in the *Washington Post*[2] and *Newsday*.[3]

Need for Action

There is no reason to believe that the Dallas County experience was unique or even substantially different from that in other parts of the state. This situation clearly indicated the need for a comprehensive, uniform rule governing the sealing of civil court records.

Last year, legislation sponsored by Representative Orlando Garcia of San Antonio was enacted to mandate the Texas Supreme Court to adopt guidelines for judicial use in determining whether civil records should be sealed.

The court submitted the issue to a subcommittee of its standing rules advisory committee. Public hearings were held before the subcommittee, the advisory committee, and the supreme court itself. Participants included diverse representatives from the bar as well as public interest and citizen groups. After considerable debate, the advisory committee made a recommendation that was then revised substantially by the supreme court.

As finally approved, Texas Rule of Civil Procedure 76a is, therefore, a product of debate and compromise. It was adopted by the narrowest possible margin—a 5-4 vote—after the court was bombarded with communications suggesting that greater openness would produce the most dire economic consequences. The Product Liability Advisory Council, the Texas Association of Defense Counsel, and the American Tort Reform Association appear to have taken a lead in this opposition.

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Rule 76a begins by affirming the clear presumption that all civil court records are open to the public. It is up to the person who wants to seal records to shoulder the burden of proof in every case, whether in the original request for sealing or in any later attempt to modify or vacate a sealing order. This burden is not that of showing only "good cause." Rather, it is to show a specific, serious, and substantial interest. The judge must find that this interest outweighs any probable adverse effect on the public health and safety.

In the rare cases where records should be sealed, the court must first satisfy certain substantive and procedural due process requirements. Nor can the court seal any order or motion regarding sealing itself. Paragraph (1) of the rule defines the standard by which trial courts must be guided in considering sealing requests.

The movant always has the burden of proof to establish all of the following by a preponderance of the evidence:

> (a) a specific, serious and substantial interest which clearly outweighs:
> (1) this presumption of openness;
> (2) any probable adverse effect that sealing will have upon general public health or safety;
> (b) no less restrictive means that sealing records will adequately and effectively protect the specific interest asserted.[4]

The trial judge is thus called on to balance the needs of the public with the asserted interest of the party seeking secrecy. In this regard, Texas has taken a different approach from some federal courts that do not view the public interest as an appropriate factor to consider for entering a secrecy order.

The rule does not ensure that the public health and safety will always surmount the private interest. There may be circumstances where the public interest is minimal and the private interest is great. The rule further calls on judges to be sure that no sealing order is a blanket order but to specify precisely what is covered and to use the least restrictive means of sealing.

The new rule is not an absolute guarantee of openness, but it is a guarantee that for the first time a true balancing of interests will occur according to specified standards.

Defining Court Records

The definition of "court records" in paragraph (2) includes "all documents of any nature" filed in any civil court. Exceptions are made for (1) "documents filed with a court in camera, solely for the purpose of obtaining a ruling on the discoverability of such documents"; (2) documents in adoption, mental health, and other cases "to which access is otherwise restricted by law"; and (3) documents filed in cases arising under the Texas family code. Also, the term "court records" is expanded to include settlement agreements not filed of

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record, which seek to circumvent the rule by including provisions restricting "disclosure of information concerning matters that have a probable adverse effect upon the general public health or safety or the administration of government or the operation of government."

The most controversial provision was the inclusion within the term "court records" of documents obtained during pre-trial discovery. A court record is more than just what has a file stamp on it from the local district clerk. All such discovery that is filed of record is, of course, accorded the same status as any other filed document.

Since interrogatory answers must now be filed under the newly amended Rule 168, they are always considered court records for the purposes of the rule. Unfiled discovery "concerning matters that have a probable adverse effect upon the general public health or safety or the administration of public office or the operation of government" are also included. There is an exception for discovery in cases originally initiated for trade-secret infringement or other similar action to protect "intangible property rights."

Texas Rule of Civil Procedure 166b(5)(c) continues to authorize the entry of protective orders to seal or otherwise limit disclosure of the results of discovery.[5] Any such order applicable to "court records" as defined in Rule 76a must, however, now be made in accordance with the procedures of that rule.[6] Even when the need for protection for public disclosure is established, the information will still be available to lawyers involved in similar litigation pursuant to *Garcia v. Peeples*.[7]

Notice and Hearing

The notice and hearing provisions in paragraphs (3) and (4) provide procedural safeguards to ensure that the public does not lose its right of access to court records. Most importantly, the rule guarantees to persons not otherwise a party to a lawsuit an absolute right to intervene to oppose secrecy.[8]

A party seeking sealing of records must file a written motion, obtain a hearing on the motion, and post notice of the requested sealing where notices for county meetings must be placed. The rule mandates a notice including a specific description of both the nature of the case and the records sought to be sealed.

The notice must be posted at least 14 days before the hearing on the motion to seal. A verified copy of the posted notice must also be forwarded to the clerk of the Texas Supreme Court so that both the capitol press and public interest groups based in Austin will be aware of the proposed sealing. This procedure will also provide a data base on the extent of secrecy requests throughout the state.

A hearing on the motion must be held in open court, at which time nonparties may intervene for the limited purpose of participating on the sealing issue. The court may conduct an *in camera* inspection of records as necessary. Pursuant to procedures utilized for jurisdictional special appearances under Texas Rule of Civil Procedure 120a, at the hearing the court may consider evidence including affidavits served at least seven days in advance to enable an opponent to issue subpoenas or conduct discovery. Affidavits may be used by both those supporting and opposing records closure.

Temporary Sealing Orders

Paragraph (5) provides for temporary sealing orders when a specific interest of the party seeking sealing will suffer immediate and irreparable injury before compliance with the notice and hearing provisions can be accomplished. Any temporary sealing order obtained must set the time for the public hearing and require the movant to post notice and

comply with the hearing provisions. A party, including an intervenor, may seek a prompt dissolution or modification of any temporary sealing order.

To be valid, a sealing order must conform to the requirements of paragraph (6). The order must include the specific findings of fact and conclusions of law regarding the standard for sealing set forth in paragraph (1). To avoid unjustified "blanket" orders, each trial court decision must reference the parts of the court records to be sealed and the length of time for which sealing is to occur. Such decisions should be incorporated in separate orders rather than as part of a judgment.

Continuing Jurisdiction

Paragraph (7) affirms the trial court's power to enforce, alter, or vacate its sealing orders. It further recognizes the public's right to intervene before or after a judgment in connection with such orders.[9]

This procedure assures that sealing orders will not exist in perpetuity without the possibility of intervention at some future date when the justification for sealing may no longer be valid. Only those who had actual notice of the original hearing regarding records closure are required to demonstrate a material change of circumstances in order to reopen the sealing issue.

Appeal Rights

Given the importance of appellate review of trial court sealing orders, paragraph (8) provides that such rulings shall be considered final, appealable judgments. In addition to the usual authority to reverse the trial court, appellate courts are specifically empowered to abate an appeal where necessary to guarantee strict compliance with the notice and hearing provisions or to require the trial court to make the specific findings mandated by the rule.

Opponents of the rule urged that trial judges be accorded maximum discretion. The rule recognizes that it is considerably more difficult for an appellate court to exercise genuine review when the only issue presented concerns whether the trial court abused its discretion on good cause. With clearer standards, it is hoped that the trial court will be provided guidance to exercise its discretion in a proper manner, while, at the same time, appellate courts will for the first time have a meaningful standard by which to review secrecy orders.

Paragraph (9) makes Rule 76a prospective except for cases that will be pending on September 1, 1990. Court records exchanged in those cases after that date are subject to the rule's provisions even if they are covered by a prior sealing or protective order. Moreover, any motions in a pending case to alter a sealing order that has been issued before September 1 are governed by the new rule.

Implementation

Texas is the first state to adopt such a comprehensive rule designed to ensure greater openness in judicial processes. Undoubtedly the implementation of the rule will involve some difficulties and will ultimately require further refinement of its provisions.

Rule 76a represents an initial attempt by the Texas Supreme Court to balance the limited interests of litigants in secrecy with the broad public policy favoring openness as well as the important objective that the general public health and safety not be adversely affected by closure in "private" litigation. Texas has adopted the philosophy expressed in *Atlanta Journal v. Long*,[10] during that

Court Secrecy Often Puts Public at Risk

Editor's Note: *This interview with Judge Jim Carrigan of the U.S. District Court in Colorado is reprinted with permission from* USA TODAY *(April 23, 1990).* ©1990 USA TODAY.


Berkley-Lainson

Is increasing secrecy in the courts harming people?

Carrigan: I think it has. I don't think public courts ought to be causing harm.

How are people being harmed?

Carrigan: In product liability cases, for instance. The law provides that if a product is dangerously defective, the user who is injured by it has a right to damages for whatever they've lost. An example is the Dalkon Shield, a contraceptive that transmitted bacteria into the woman's pelvic area and caused infections that caused septic abortions, and all kinds of other complications.

What happens in cases like that?

Carrigan: Let's say someone is burned in an automobile gas tank explosion case, and goes ahead and sues and finds out all the defects that caused that. Then the manufacturer will ask the judge to enter an order that this information isn't going to be disseminated to any other victim or attorney who might have a case.

So other people who may have been injured can't find out and won't sue. Why would a judge go along with that?

Carrigan: The defendant often says to the plaintiff's attorney, "Look, if you'll agree not to disseminate this information to anybody else, I'll give you without any hassle what you're probably going to be entitled to anyway but without the expense and delay of going to the court." Plaintiffs often find that very appealing because they don't have any money. Why should the judge have a dispute with it?

This may all be good for the people and companies involved in the suit. But what about the public? Who protects the rest of us so we know about dangerous products?

Carrigan: The judge has a rule that he has to follow. We call it 26C. And that requires that there be some legal ground for keeping it secret. But judges are very swarmed over with work, overwhelmed in many instances.

Can government agencies that protect consumers get the information?

Carrigan: Not usually. The agreements usually stipulate that the plaintiff's attorney not give this information to any federal or state regulatory agency that might have to do with safety. The Federal Aviation Administration, if they found a defect in an airplane, or the Consumer Product Safety Commission, or the Food and Drug Administration if it's a dangerous drug. Or, for example, these heart valves that have been found to be defective now. That involves the lives of people as well as just their safety.

Doesn't the public's right to be protected outweigh the rights of companies and plaintiffs to keep such things secret?

Carrigan: That's the question: Should this information be made generally available so that other people become aware that certain products are dangerous, such as the Dalkon Shield? Maybe people would have used a different kind of birth control method if that information had been made public a lot sooner. But because of protective orders and because the company didn't publish what it found out about its product in a very timely manner, it didn't become public sooner. So a lot of women got very badly injured and lost babies and so forth.

There's an economic factor, isn't there? If you don't accept this settlement, you've got to go to trial.

Carrigan: Right. It used to be even worse. Until about a year or so ago, there was also a condition frequently attached—the plaintiff's attorney would agree not only to turn all the materials back, but also not to accept any more cases of this type against this defendant. The powers that be have now ruled that it is unethical to even ask for that.

Does that mean the tide is turning against this secrecy?

Carrigan: Maybe. I think plaintiffs are going to be agreeing to them less and less now because they're becoming more aware. After all, the whole idea of litigation is to try to find out what the truth is. And then you say, "Well, let's hide the truth from everybody else who might have an interest in knowing the truth, and make them start all over again."

Is secrecy ever justified?

Carrigan: Obviously, if there is a legitimate trade secret, it ought to be protected so that a competitor can't just bring a lawsuit and get the other party's trade secret and make it public. That's not fair. Attorney-client privilege has some legitimate value to it, so that people can feel more free to disclose to their attorneys all the facts.

Won't companies stop selling products once they know they're dangerous, even if suits are not made public?

Carrigan: In the Dalkon Shield case, the company knew for many, many, many years from letters from their own doctors warning them that this product had very dangerous side effects, but kept on manufacturing them because it was very profitable.

What's the best way to break this cycle?

Carrigan: Perhaps the best way is just what you're doing right now. And there ought to be a presumption that information in court is open to anybody who wants to see it. The person who wants to keep it private has the burden of proof to show that there's some real, substantial reason why it ought to be kept private. There's been more or less a gentleman's agreement between the attorneys handling these matters that has overlooked their long-range impact in an effort to get a faster, cheaper resolution of their own lawsuit.

Is there any evidence that dangerous products have come off the market as a result of disclosure?

Carrigan: Why don't we have Dalkon Shields on the market anymore? Why did we get rid of those gas tanks that were burning up people? You can enumerate as many examples as you want to. There are thousands of them out there. □

court's review of a somewhat more narrow open records procedural rule."

> Public access protects litigants both present and future, because justice faces its gravest threat when courts dispense it secretly. Our system abhors star chamber proceedings with good reasons. Like a candle, court records hidden under a bushel make scant contribution to their purpose. □

Notes

1 McGonigle, *Secret Lawsuits Shelter Wealthy, Influential; Jurist Believes Sealing Records Is Undemocratic; Judge Says Privacy Can Help Settle Suits*; Dallas Morning News, Nov. 22, 1987, at A1, col. 1, and A25, col. 1; McGonigle, *Sealed Lawsuits Deal with Poisonings, Sex, Surgery*, Dallas Morning News, Nov. 23, 1987, at A1, col. 1.

2 Walsh and Weiser, *Public Courts, Private Justice*, Washington Post, Oct. 23-26, 1988; Mar. 13, 1989.

3 Meier, *System Thwarts Sharing Data on Unsafe Products*, Newsday, Apr. 24, 1988, at 24; *Legal Merry-Go-Round*, June 5, 1988, at 21.

4 *See, e.g.*, Cipollone v. Liggett Group, Inc., 822 F.2d 335, 340-41 (3d Cir. 1987); *In re* Alexander Grant & Co. Litigation, 820 F.2d 352, 358-59 (11th Cir. 1987).

5 For a comprehensive review of protective orders, *see* F. Hare, J. Gilbert & W. ReMine, CONFIDENTIALITY ORDERS (1988).

6 This is a change from the general attitude expressed in Houston Chronicle Pub. Co. v. Hardy, 678 S.W.2d 495, 499 (Tex. Ct. App. 1984, mandamus overruled), *cert. denied*, 470 U.S. 1052 (1984), that the trial court has exceedingly broad discretion in denying third parties "*their claimed* right to root through a tremendous pile of undigested documentary evidence assembled during pretrial discovery proceedings."

7 734 S.W.2d 343 (Tex. 1987).

8 It is not necessary for an intervening third party to satisfy a standing requirement by showing an actual or threatened injury as was required in Oklahoma Hosp. Assn. v. Oklahoma Publishing Co., 748 F.2d 1421, 1424 (10th Cir. 1984), *cert. denied*, 473 U.S. 905 (1985).

9 *See* Times Herald Printing Co. v. Jones, 730 S.W.2d 648 (Tex. 1987); Express-News Corp. v. Spears, 766 S.W.2d 885 (Tex. Ct. App. 1989, mandamus overruled).

10 369 S.E.2d 755, 757 (Ga. 1988).

11 Since becoming effective in July 1985, Georgia's Uniform Superior Court Rule 21 has provided a strong statement of a public policy supporting openness. However, it does not appear to encompass any pre-trial discovery not filed of record; nor does it enumerate the more complete procedural safeguards in Texas Rule 76a. Concern for unreasonable judicial restrictions on access to discovery materials obtained during personal injury litigation resulted in remedial legislation last year in Virginia (VA. CODE ANN. §§8.01-420.01 (1989)). Regarding legislative consideration of this and similar proposals in other states, *see* Walsh, *Rising Secrecy in Civil Cases Prompts Legislative Backlash*, Washington Post, Feb. 20, 1989. In May, the Florida legislature passed a "Sunshine in Litigation" Act to prevent judicial concealment of any "public hazard," S.B. 278, H.B. 839, 22d Fla. Leg., Gen. Sess. (1990), creating §69.081, Fla. Stat. The law was signed June 1, effective July 1.

SECRECY versus SAFETY

Restoring the Balance

COMMENTARY

BY BOB GIBBINS

In 1984, a San Francisco federal court case set the stage for a display of the potential of protective orders to delay government regulation and conceal threats to public health. It provides a potent look at the workings of secrecy in litigation—and clearly reflects why determined action is essential to restore balance to America's justice system. (For another view, see Arthur Miller's "Private Lives or Public Access," August 1991 *ABA Journal*, page 64.)

That case, *Stern v. Dow Corning Corp.* (U.S. Dist. Ct., N.D. Cal., No. C83-2348), involved silicone breast implants used in reconstructive surgery. The jury rendered a verdict for the plaintiff on her complaint that the manufacturer committed fraud and failed to warn of the potential for severe side effects. The case was settled while on appeal.

After *Stern* was concluded, a protective order demanded by the implant manufacturer remained in force. It prohibited the plaintiff's attorneys and expert witnesses from telling government regulators or anyone else what the discovery documents showed about safety tests of the product.

Even at a 1988 U.S. Food and Drug Administration hearing held to consider requiring implant manufacturers to demonstrate safety, a *Stern* attorney subject to that protective order was unable to disclose information about clinical or animal tests.

A medical school professor who examined more than a dozen breast implant litigation files has been similarly prohibited, by protective orders in every case, from sharing his knowledge of tests with FDA or congressional investigators. Here is an example of a publicly funded inquiry of a possibly dangerous product; yet a medical school professor is legally gagged through a process funded by taxpayers.

The protective-order strategy was used by several manufacturers, and it bought them time. Manufacturers produced and sold implants for at least six years after the *Stern* verdict, until the FDA took its first look at the companies' clinical data in 1991.

The agency concluded that no test results submitted by any manufacturer demonstrated the safety of implants, and one manufacturer has since recalled its entire line and announced its withdrawal from the breast implant market. But while the FDA vacillated and numerous product liability cases were settled with confidentiality "agreements" and protective orders, 150,000 new patients received implants each year.

Secrecy devices have been used increasingly in litigation during the past decade. A comprehensive new study of products liability litigation involving punitive damages awards revealed a marked increase in the use of confidential settlements after 1986. Conducted by professors Michael Rustad of Suffolk University Law School and Thomas Koenig of Northeastern University, the study examined a quarter-century of data.

Recent litigation involving the prescription sleeping medication Halcion further shows how secrecy, along with lax pharmaceutical regulation, multiplies consumer risks. In 1989 a blanket protective order was entered in *Grundberg v. The Upjohn Co.* (U.S. Dist. Ct., D. Utah, No. C89-274), a case that alleged severe, unpredictable mood changes caused by this drug now used by several million Americans. The *Grundberg* protective order effectively made all documents produced by the defendant confidential and required their return or destruction following the conclusion of the lawsuit. But shortly after *Grundberg* was settled, Halcion's manufacturer acknowledged that clinical data submitted to the FDA during the drug approval process were incomplete.

As it stands, the *Grundberg* protective order leaves an unknown number of patients and doctors wondering what caused side effects. Considering that the plaintiff in *Grundberg* had killed her own mother (although charges against her were dismissed because of involuntary intoxication with Halcion), access to complete information is crucial. A consumer organization is now asking the court to modify the protective order.

Other examples of the threat posed by secrecy are, unfortunately, not hard to come by:

▶ A patient with a Shiley artificial heart valve is unable to learn of the danger that the device's mechanism may fracture. She dies when the valve fails, and her husband later learns that the manufacturer secretly settled litigation brought by other victims years before.

In part through that practice, the company avoids the notoriety that could have led to earlier warning of patients and/or withdrawal of the valves from the market.

A congressional investigative report ("The Bjork-Shiley Heart Valve: Earn as You Learn," House Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, 2/90) cites "numerous instances" of deaths that might have been avoided had patients and doctors been aware of the danger earlier. *Barbee v. Shiley, Inc.* (claim was settled in 1989 without filing complaint).

▶ The widow of a police officer killed in the crash of a traffic-control

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ILLUSTRATION BY SAM WARD

plane is denied discovery of evidence of the airplane's design defect because of a confidential settlement "agreement" in another case. The aircraft type is still in use. *Turnberger v. Cessna Aircraft Co.*; Broward Cty., Fla., 17th Jud. Cir. Ct.; No. 83-12392.

▶ A scientist who herself suffered a potentially fatal allergic reaction to a painkiller—later withdrawn from the market—discovers that other victims were similarly affected several years earlier but were sworn to secrecy. She also discovers that some confidential settlement "agreements" even prohibited discussion of adverse reactions in scientific journals. *Davis v. McNeilab, Inc.*, U.S. Dist. Ct., D.C., No. 85-CV-3972 (case settled in 1986).

While private matters having no public impact and true trade secrets justify confidentiality, it is inconsistent with the impartial administration of justice for a publicly created and maintained legal system to help hide responsibility for misconduct.

Events that lead to litigation often have an impact well beyond the immediate parties, and that impact can be deadly. In today's age of mass manufacturing and distribution, a dispute brought before a court can involve a potentially life-threatening hazard that already may have affected thousands of citizens, and may affect even more in the future.

Confidentiality "agreements" in products liability cases can keep information about the dangers of defective products from coming to the attention of government regulators, the news media and others who could alert the public.

And in medical negligence cases, the doctors alleged to have caused an injury may well have other patients undergoing the same procedures. Secret settlements and sealed files can enable physicians to keep practicing without having to account for substandard care. The same concerns apply to injurious behavior in other professions.

In fact, in all types of tort litigation, both the deterrent and compensation functions of the civil justice system can be stifled by secrecy. Beyond leaving past victims ignorant of the cause of their injuries and future victims vulnerable, secrecy also can make it more difficult for victims to prepare and prove their cases.

Secrecy can make it more likely that critical evidence will be concealed or destroyed without ever being discovered.

A legal system that functions in this way is out of balance, which is why there is growing support for changes in court rules and procedures to eliminate unwarranted secrecy. Those who advocate such change seek a fairer balance between privacy and property rights

on one side, and public health and safety on the other. Restoring lost balance also could help to reduce injuries and resulting litigation.

The imbalance in the tort litigation system is rooted in abuses of otherwise legitimate rights. The litigation playing field was level when the Federal Rules of Civil Procedure and other similar reforms of litigation practice were inaugurated in the 1930s. The system at that time provided protection for truly personal information (the reasons why a divorce was sought, or why child custody was refused) and true trade secrets (chemical formulae, manufacturing methods, details of distribution networks).

Some segments of the legal community now attempt to protect classes of information that go well beyond the original plan. They are advised to misuse the "trade secret" and "privacy" labels, claiming special protection for information never intended to have confidential status under the rules of civil procedure, and claiming corporate privacy rights never recognized by American law.

From this attempt to expand the idea of protected information into new areas, there has developed a well-known arsenal of devices intended to protect wrongdoers:

▶ "Agreements" that prohibit disclosure of the compensation paid in a settlement, the names of the parties, and sometimes even the fact that litigation occurred;

▶ Sealed court files that can conceal the very existence of the lawsuit;

▶ Protective orders that require the return or destruction of discovery information after the termination of the litigation, and prohibit sharing discovery material with other attorneys handling similar cases or with government agencies; and

▶ Prohibitions against attorneys handling similar cases in the future.

New secrecy strategies are still emerging. In medical malpractice cases, for instance, negotiated dismissals of individual physicians have been used to keep the doctors' names out of the federal government's data bank of malpractice verdicts and settlements, thus thwarting an important public policy.

Secrecy proponents argue that confidentiality makes litigation go more smoothly and promotes early settlement, and indeed it may—when the advocates of secrecy get their way.

But secrecy also can delay the resolution of litigation, consume large amounts of lawyers' time, and strain the courts' capacity to move cases toward a conclusion—as shown by a recent federal court opinion in *Wauchop v. Domino's Pizza, Inc.* (U.S. Dist. Ct., S.D. Ind., No. S90-496). The plaintiffs in *Wauchop* sought information on the corporation's promise to deliver food by car in 30 minutes or less, arguing that the policy may have led to an auto collision.

The defendants demanded that much of the discovery material requested by the plaintiffs be protected against further disclosure. The court concluded that secrecy was not justified for most categories of the material, but the defendants' demand for a protective order forced the court to read motions, review and analyze numerous discovery requests, and render its conclusions in an opinion and order more than 30 pages long. The judge properly lamented that the federal rules on discovery "should be self-executing through the cooperation of counsel."

To stabilize this out-of-balance system and counteract the harm secrecy can cause, this country needs a strong presumption of openness for court proceedings and records.

We need adequate procedures to ensure that the trial judge will consider the public's interest in information that would be concealed under a proposed protective order. Advocates of secrecy argue that existing procedures already allow courts to consider the public interest as part of the exercise of judicial discretion, but widespread approval of protective orders and confidenti-

ality "agreements" suggests that the public interest has not been made a routine part of the courts' calculus.

The Association of Trial Lawyers of America acted in 1989 to focus attention on the multiple problems caused by secrecy. ATLA's Board of Governors passed a resolution encouraging:

- ▶ Courts to scrutinize requests for secrecy and grant them only when information sought to be protected is a true trade secret or can qualify for some other privilege;
- ▶ Courts to allow sharing of discovery material with attorneys handling similar cases, regulatory agencies and professional boards;
- ▶ Courts to liberally grant relief from pre-existing orders and "agreements" that unfairly impose secrecy; and
- ▶ Attorneys to resist secrecy demands that preclude sharing information with regulatory agencies and other lawyers, and discouraging them from agreeing to proposed secrecy orders.

By now eight states have joined the movement away from secrecy. Some of this initiative has come from judges themselves. In 1990, the Texas Supreme Court was the first court to amend its rules to recognize a presumption of openness for all court proceedings, and to establish procedures to be followed for any request to seal court files.

Court rules with a similar focus on openness have been adopted by the New York State Administrative Board of the Courts, the San Diego County Superior Court, and the Delaware Supreme Court and Chancery Court.

In 1990, a different approach was taken by Florida, which passed legislation that identified a class of dangers as "public hazards," and prohibited concealment of such hazards through judicial processes.

Narrower mechanisms have been adopted in several other states. These include specific procedures to be followed in disclosing discovery material to attorneys handling similar cases (adopted in Virginia in 1989), and standards for confidentiality regarding litigation by and against state government (adopted in North Carolina, Florida and Oregon).

Other bills and proposed court rules are under consideration in many states, most based on either the Texas or Florida models, and usually with the support of consumer, labor, environmental, senior citizen or media organizations.

The mechanics of the new measures aside, an obvious question is what the new rules and procedures change, and what they leave unchanged.

The new mechanisms give no one any new substantive rights of action. They cannot engender new cases. Nor, in any known case, do they expose strictly personal information or reveal genuine trade secrets to the public.

The changes do, obviously, give judges new duties of review in a number of situations. But once it becomes clear that requests for secrecy will be measured against the public interest, the number of secrecy demands should decrease, so that the net result is the same or better than what has been observed in the past.

The same effect should be noticeable in terms of the cost of litigation. Market forces can be expected to work against satellite litigation when clients realize that demands for unjustified secrecy will not succeed, and that they may be penalized.

Perhaps most importantly, the new measures do not infringe on judicial discretion. Indeed, they depend on judges to exercise discretion as much as the former rules ever did. They provide standards to be met by litigants, like many other written standards of proof, and prescribe what the result will be if the judge determines that the standards have not been met.

There is at least some evidence of improvement already. An ATLA member who practices in Minnesota, where no legislation has yet been passed on secrecy, recently observed a dramatic reversal of the Shiley heart valve manufacturer's previous use of secrecy demands, as well as judges' awareness of the issue of secrecy and the potential it has for harm.

These developments suggest that secrecy advocates' dire warnings about increased satellite litigation and diminished access to information are exaggerated. Their predictions imply that America's judges would allow the courts to slow to a crawl, and that members of the bar and the public would accept dramatic increases in litigation costs. Experienced judges and trial lawyers, however, will not tolerate such a result.

The goal here is to have a safer society. One way to attain that goal is to create mechanisms designed to help protect us all. ■

USA TODAY 1/15/92

Today's debate is on **PRODUCT LIABILITY**
and whether courts should allow case files to remain secret.

Open court files to protect public health and safety

OUR VIEW **Judges should make sure that vital data are not kept from consumers or government regulators.**

Two events this week should sound a call to arms for everyone who suspects some courts help some companies play fast and loose with our safety.

First, new concerns surfaced that Dow Corning Corp. rushed its silicone gel breast implants to market despite questionable test results.

The firm denies that — but the Association of Trial Lawyers says secrecy ordered as part of court settlements likely kept test data from regulators for years. The group says one doctor alone — Marc Lappe of the University of Illinois — now is subject to 18 gag orders.

Secondly, the first suit from the 1989 Iowa crash of United Flight 232 was settled out of court. A trial might have resolved who was most to blame and helped other victims seek fair treatment — but the settlement was secret, so other victims are on their own.

Such cases are all too frequent: Companies entice plaintiffs with quick settlements. In return, they ask courts to shroud what went wrong. Many judges, facing clogged dockets, happily agree.

Who does that hurt? It can hurt you:

▶ Government regulators don't see data that could help protect consumers.

▶ Manufacturers have less incentive to change harmful products.

▶ Other victims are denied helpful evidence, and potential victims remain unaware.

Some firms say they need such secrecy to protect trade secrets or prevent nuisance suits. But the public suffers.

Johnson & Johnson got court records sealed in suits filed by people who had suffered harmful reactions to its painkiller Zomax.

Pfizer Inc. got courts to order secrecy in suits over its heart valve — recalled only in 1986, after 160 patients had died.

Consumers clearly need federal and state laws so judges will forbid secrecy if public safety or health is at stake.

Florida now has such a law; six states have court rules favoring openness.

Far too often, though, makers of harmful products still find it too easy to buy silence. That must stop.

▶ Dow Corning halts production, 1D

USA TODAY 1/15/92

Public is protected now

OPPOSING VIEW **Attorney Alfred Cortese says increased access to court records means less justice.**

Whoever said, "There are none so blind as those that will not see," could have been referring to today's editorial opposing court "secrecy." Anyone who sees the recent disclosure of court documents concerning the Dow Corning breast implant as proof that courts are concealing product safety information must have blinders on.

If this case proves anything, it's that the current system works. Courts understand the public's interest in the cases they consider. Current law allows courts to make information public when appropriate, even when the litigants want it kept confidential, so government agencies can do their jobs. The breast-implant case proves the point.

The fuss about court "secrecy" boils down to a nationwide campaign by personal-injury lawyers, fueled by the media, to use bald accusations to destroy beneficial products and privacy rights.

Increased access to court records means more sensationalized stories but less justice for all. Unproved accusations drove the only safe treatment for morning sickness, Bendectin, off the market. They did the same to the Audi 5000. The fact is, the allegations about court secrecy are equally untrue. They are based on innuendo and manipulated facts, not hard proof.

Litigant rights are important, too. A sexual harassment victim ought to be able to sue her harasser without a newspaper printing the intimate details of her sex life. If courts have no authority to protect her privacy, she may forego her legal rights. Also, courts must be able to protect trade secrets from falling into the hands of competitors. Under current law, they can. So far, over 30 states have wisely rejected attempts to turn their courts into information clearinghouses.

Courts balance the need for confidentiality against the need for access in each case. Their ability to maintain that balance should not be restricted.

Alfred W. Cortese Jr. is a partner in the Washington law firm of Kirkland & Ellis.

Privacy, Secrecy, and the Public Interest

by Arthur R. Miller

The following article is derived from a statement of Professor Miller to the Subcommittee on Courts of the Senate Judiciary Committee, made on May 17, 1990.

The public's right of access to information produced in litigation is a subject that raises a variety of issues that are both significant and subtle. Some of them I have studied and previously discussed at length, including the proper functioning of the rules of procedure that govern civil cases as they move through the federal courts, the role of the courts in today's society, and the tension between the right to privacy and the public's right to know.

I served as the reporter to the Advisory Committee on Civil Rules of the Judicial Conference of the United States when the 1980 and 1983 amendments were proposed and promulgated. Because of my involvement in drafting these amendments, I can say with some confidence that the amended rules, and the remaining rules of civil procedure, are the product of considerable thought, analysis, and discussion at the highest levels of the legal profession. They reflect what we judged to be an appropriate balance between the often conflicting needs of all those who are involved in the litigation process as well as the legal system as a whole.

I am somewhat disturbed, therefore, to discover that the proponents of public access to court documents have started referring to protective orders, authorized by Rule 26(c) of the Federal Rules of Civil Procedure, by the rather pejorative misnomer of "secrecy orders." This nasty epithet implies that they are designed for some fundamentally evil purpose. Further, it implies that those who request protective orders and those who authorize them are engaged in a conspiracy to bury truth. The illogical conclusion of this line of thought is that those of us involved in drafting the rules, and those in the judiciary and the Congress who shepherded them through to promulgation, have unleashed a procedural device capable of subverting truth and justice.

In fact, the opposite is true. A legal system that does not recognize the right to keep private matters private would be far more likely to lead to deleterious consequences—the evil of an Orwellian society where Big Brother knows all. See generally, Miller, *The Assault on Privacy* (Ann Arbor 1971). Although that might not be the result the proponents of public access have in mind, unfettered authority to collect and disseminate private information through the judicial process can, without doubt, lead to that end.

Recognition of a general right of public access to civil litigation documents would be at odds with the

parties' rights to privacy. Litigants do not give up their rights to privacy just because they have walked through the courthouse door. Because of my belief in the importance of the right to privacy in our computerized world, I find it very difficult to accept any proposal that would eliminate individual consideration of the privacy rights of litigants on a case-by-case basis in favor of a presumption of public access. As the District of Columbia Circuit noted in *In re Halkin*, 598 F.2d 176, 195 (D.C.Cir. 1979), "only in the context of particular discovery material and a particular trial setting can a court determine whether the threat to substantial public interests is sufficiently direct and certain."

Our legal system recognizes a limited public right of access to information used in the courts and justice system. That right most clearly exists at common law and under the First Amendment in criminal cases. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597-99 (1978); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (right to attend criminal trial); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (right to attend voir dire examination of jurors in criminal trial); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (right to attend preliminary hearings in criminal trial).

Nonetheless, the United States Supreme Court never has recognized a First Amendment right of access to information used in a civil trial, much less a right of access to information that is merely produced in the course of discovery. Prior to *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), courts were divided over whether non-litigants had First Amendment rights in information produced in litigation. *Seattle Times*, 467 U.S. at 25, n.6. Since *Seattle Times*, a few lower federal courts and some state courts appear to have misunderstood the Supreme Court's application of a First Amendment analysis in *Seattle Times* as implicit recognition that a request for access to information produced in litigation implicates the requestor's First Amendment rights. See e.g., *Palmer v. Liggett Group, Inc.*, No. 83-2445-MA (D.Mass. 1988) (order to modify protective order); *Graham v. Wyeth Laboratories*, 118 F.R.D. 511 (D.Kan. 1988) (order to modify protective orders).

According to the Supreme Court, the right of access exists to allow the public to monitor the functioning of our judicial system: access promotes participation in governmental processes and helps protect constitutional guarantees. *Nixon v. Warner Communications*, 435 U.S. at 598.

It does not follow, however, that this limited right extends to private information about the private individuals or organizations involved in civil litigation. Often information produced in discovery consists only of bits and pieces of information. It is difficult to imagine how this fragmented intrusion into the private affairs of private parties promotes any societal interest; or how it could result in any balanced or fair presentation of the disputed facts. Yet, that is precisely what the proponents of public access claim. They assert that because of some possible public interest in information produced in the course of litigation, there should be a presumptive right of access to that information, whether or not the information is used at trial, (see *In re CBS, Inc.*, 838 F.2d 958, 959 (2d Cir. 1987)), or merely produced in pretrial discovery, and regardless of whether the information is shown to be truthful. Very often, information produced in discovery will tell only one side of the story, raising obvious opportunities for injustice. In light of *Seattle Times*, the position the proponents of public access take clearly is not supported by the law.

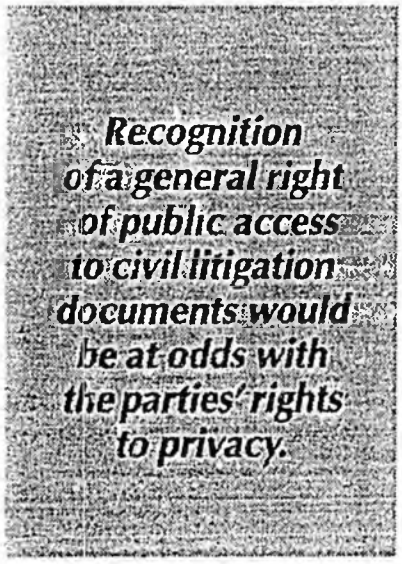
Notwithstanding the settled nature of the law on this issue, the proponents of public access strenuously argue that the public must have access to information produced by private parties at a minimum when that information affects public health and safety. Although this position initially seems to have merit, it fails to come to grips with the critical question: "*Who* decides that information produced in litigation affects public health and safety?"

Under current law, the presiding judge decides what information is relevant at trial and pretrial and whether any information generated in the process should be protected from public disclosure by a protective order. Before a protective order will issue, the party seeking the order must show "good cause," and also must make specific allegations of the harm that will occur if the protective order does not issue. See Wright & Miller, *Federal Practice & Procedure*, §2025. See, e.g., *General Dynamics Corp. v. Self Manufacturing Co.*, 481 F.2d 1204, 1212 (8th Cir. 1973); *Kamp Implement Co. v. J.I Case Co.*, 630 F.Supp. 218 (D.Mont. 1986); *United States v. International Business Machines Corp.*, 67 F.R.D. 40, 46 (S.D.N.Y. 1975).

Courts have developed considerable experience in balancing the needs of the adverse parties in the protection or disclosure of information. Further, federal judges are the only impartial participants in litigation, and they are in the best position to determine whether any information pertaining to public health and safety is being improperly withheld from the public under cover of a protective order. When that is shown, the judge can modify the protective order to take action to disclose the information to the appropriate government agency. Appellate review also generally is available to ensure the efficacy of the process.

Additional support for allowing the judge to determine whether information produced in a lawsuit raises issues of public health and safety that warrant public disclosure lies in the rules of evidence. If a court concludes that information concerning public health or safety is relevant to the issues in a lawsuit and the information is reliable, the court will admit it as evidence at trial. Evidence admitted at trial generally is available to the public through the traditional common law right of access to the courtroom. If the judge finds the information inadmissible at trial, it is because the court deems the information irrelevant or unreliable. If the information has no logical connection to a fact at issue, or if the information is not trustworthy or credible, it is difficult to understand how the public is served by public disclosure.

In fact, public disclosure of untrustworthy safety or health information could cause serious public harm. Under existing law, the trial court has the discretion to weigh all of these issues and act in the public's best interest. In the end, only the trial court is sufficiently objective to decide what is and what is not in the public interest.



Nonetheless, the proponents of public access seem to be saying that they should be the ones to decide whether information sought in litigation affects public health and safety. This is an untenable position for several reasons.

First, neither allegations of harm made in the pleadings of a lawsuit, nor information produced in bits and pieces in discovery, rises to the level of proof that some injury actually occurred or is even likely to occur. The Federal Rules of Civil Procedure provide easy access to the judicial system because they only require notice pleading. Discovery is designed only to reveal information which *may lead* to discovery of admissible evidence. See *Conley v. Gibson*, 355 U.S. 41, 46 n.6 (1957) (citing with approval *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944)). See also Miller, "The Adversary System: Dinosaur or Phoenix," 69 Minn.L.Rev. 1, 8-9 (1984).

Thus it is virtually impossible to stop a lawsuit at the courthouse door or during the pre-trial process, regardless of the actual merits of the case. Once inside the courthouse, motions to dismiss are not difficult to survive. Rule 15 of the Federal Rules of Civil Procedure sets forth liberal provisions for amendment of pleadings, and motions to dismiss under Rule 12(b)(6) for "failure to state a claim upon which relief can be granted" rarely are successful. "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. at 45. *See* 5 Wright & Miller, *Federal Practice and Procedure*, §1357.

Consequently, although the allegations made in a complaint may rise issues that appear to implicate matters affecting the public health and safety, and the bits and pieces of information produced in discovery may appear to confirm that, the truth of the allegations can be known only after they have been tested through the full litigation process. Release of information prior to trial is premature at best, and destructive of a litigant's reputation and his business at worst.

Second, it is not altogether unheard of for individuals to file completely unfounded lawsuits for a variety of purposes. A suit could be filed merely to compel the defendant to produce information that the plaintiff subsequently can sell to other similarly situated plaintiffs, for a percentage of the damages awarded in subsequent cases. If an individual determined on using the courts in this fashion is allowed to decide what and when information produced in litigation should be available to the public, it is not difficult to see that these individuals invariably will favor public disclosure. A presumption in favor of disclosure allows these individuals to use the courts solely as conduits for finding new clients and other money-making enterprises—an outrageous abuse of the system. The possibility of Rule 11 sanctions is inadequate once the damage has been done. I find it difficult to understand why the plaintiffs' bar would support this "presumption of access." In reality it means that the attorney who first uncovered the "public" information would own it. That attorney would become the gatekeeper, charging others for access to it at monopoly prices and denying access whenever it suited his personal predilections. I hardly think that many members of the bar would willingly support this considerable transfer of power from the courts to individual attorneys.

Third, I must return to an issue that has troubled me for many years—the great deference our legal system gives journalists, and perhaps now the advocates of public access, to decide what is in the public

interest. See Miller *The Assault on Privacy*, supra, at 196; Miller, "Press versus Privacy," 16 Gonzaga L.Rev. 843, 848-50 (1981). I do not quarrel with an expansive reading of the First Amendment or judicial decisions that allow publication of material of public significance despite the fact that it will embarrass those to whom the information pertains. Neither the First Amendment, nor these decisions, however, legitimate demands to publish any private information, no matter how sensitive, how personal, how ruinous, or how irrelevant to daily events it may be.

The position of the proponents of public access seems to be that only they, and not our nation's judges, are capable of protecting the public from the harms perpetrated on the public by secretive courts and defendants. These proponents apparently think that only they are capable of meeting the everpresent enemy and that they must continuously sally forth to slay the enemy. This strikes me as a distorted and egocentric view of the universe.

In reality, the proponents of access, whether they are the plaintiffs' bar or the press, are engaged in business and have their own agenda to serve, just like the defendants they pursue. The simple truth is that only the judges can be neutral gate-keepers. Thus, when information possibly implicating public health and safety surfaces in documents produced in litigation, the decision about whether it should be released to the public should rest where it always has — within the sound discretion of the court. Only the trial judge has no axe to grind and no pecuniary gain in sight. Existing rules and procedures are more than adequate to accomplish this end.

Courts have developed considerable experience in balancing the needs of the adverse parties in the protection or disclosure of information.

Fourth, my experience tells me that there are reasons to be very concerned about the effect universal public access would have on civil litigation in the federal courts. In the course of invoking the rhetoric of "secrecy" and "public health and safety," those who propose universal access to materials generated in the course of civil litigation ignore many important values that might well be compromised if present practice were to be dramatically altered. "A protective order pursuant to Rule 26(c) may be the least intrusive means of achieving the goals of protecting the fairness of the judicial process and preserving the discovery system.... The only plausible alternative to a protective order may be the denial of discovery altogether." *In re Halkin*, 598 F.2d 176, 195 (D.C.Cir. 1979).

The centerpiece of contemporary federal civil litigation is discovery. Indeed, one of the crowning achievements of the Federal Rules of Civil Procedure is the discovery regime, which seeks to provide the litigants with equal access to all relevant data in the hope of achieving the efficient resolution of cases on their merits rather than through artifice and surprise. The rules, in effect, have taken the position that it is justifiable to intrude on the private affairs of parties and non-parties through discovery in order to permit full preparation for trial.

But that does not make discovery a public process. Indeed, history and practice is to the contrary. It is a private process, with only occasional intervention by the court, and it is intended solely to assist in the process of dispute resolution. Parties are encouraged to reveal information, and occasionally are compelled to do so, under the assumption that discovery materials are being used solely for purposes of the particular litigation and that other uses are inappropriate. This assumption is reinforced by the availability of the protective order, to which the parties typically stipulate, to guard privacy and prevent misuse of discovered information.

The assumption that material produced in discovery is not available for use outside the litigation is critical to assuring widespread, voluntary compliance with the discovery regime, upon which we base our ability to resolve cases on their merits. This is particularly true in federal litigation because discovery is given the widest possible berth and tends to produce material that is not used—or even relevant to the case—and which can also be extraordinarily intrusive.

If we undermine the assumption that discovery is a private process, or degrade the reliability of protective orders, the discovery process would become infinitely more contentious, protracted, and expensive. See *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 12 (1st Cir. 1986). Litigants would be likely to pursue a full trial to bring out the complete story and vindicate their reputations. The time and money of litigants would be wasted; the energies of that most precious resource--our federal judges—would be dissipated. The federal courts' ability to handle major complex litigation and cases involving issues of enormous social importance would be compromised. The net effect might well be a constriction on the flow of information, rather than its expansion.

Cf., *In re Halkin*, 598 F.2d at 195 (denial of discovery to protect confidentiality benefits no one).

Discovery also enables litigants to appraise their cases and evaluate the risks of proceeding to trial. It often is the availability of discovery that leads parties to settle, thereby saving themselves and the court system enormous amounts of time and money. Without the guarantee of confidentiality, some litigants will have little or no incentive to produce as much information as possible during discovery, particularly if courts permit public access for reasons unrelated to the litigation. Because an essential precursor to settlement will have been removed, it would be much more difficult to resolve cases. Similarly, the settlement process would be impaired if the parties could not rely on the confidentiality assurances in the settlement agreement. In fact, there would be significantly greater incentive to litigate simply to postpone public access to confidential information. Our civil justice system simply could not function if the settlement rate were to drop or if settlements were delayed to any significant degree.

It always must be remembered that there are many legitimate reasons for litigants, both individual and corporate, to keep information confidential. In addition to concerns about individual and institutional privacy, today's commercial litigation often involves information that is critical to marketing, distribution, product development, and various elements of competition. Eliminating the possibility of maintaining confidentiality throughout the litigation process might well encourage the institution of lawsuits for ulterior purposes.

In short, changing the current protective order practices under Rule 26(c) could have dramatic and unfortunate consequences for civil litigation in our federal courts. Ironically, these consequences probably would be more of a hardship for plaintiffs as a group than defendants, because plaintiffs would have greater difficulty gaining access to data and there would be greater resistance to settlement. Unless litigants are able to rely on the assumption that materials produced in the context of a civil lawsuit will be used only for those purposes, absent a judicially declared supervening interest in public health or safety, many of the objectives of Rule 1 ("the just, speedy, and inexpensive determination of every action"), the discovery regime, the healthy developments in judicial management (as reflected in Rule 16 and in the *Manual on Complex Litigation*), and the ability to achieve settlements could be seriously undermined.

I have a final systemic concern about recognizing a wholesale right of public access to documents produced in litigation: the American judicial system is already unable to resolve civil disputes in an economical, timely fashion. Adding a clearinghouse —or Freedom of Information Act—function to the existing burdens on the courts, which is essentially what the proponents of access advocate, is unjustifiable for even the most compelling reasons because the courts simply cannot withstand the additional workload. As the court said in *Anderson v. Cryovac, Inc.*, 805 F.2d at 12:

> The public's interest is in seeing that the [discovery] process works and the parties are able to explore the issues fully without excessive waste or delay. But rather than facilitate an efficient and complete exploration of the facts and issues, a public right of access would unduly complicate the process. It would require the court to make extensive evidentiary findings whenever a request for access was made, and this in turn could lead to lengthy and expensive interlocutory appeals....

Discovery was designed to operate extra-judicially. But, because of the complexity and extent of modern litigation, federal judges are overwhelmed with management functions. They are barely able to perform these management duties for legitimate litigation purposes. It is unrealistic to ask them to manage a freedom of information system as well. The Supreme Court recently rejected a similar effort by the press to use an executive agency as a clearinghouse for information regarding private individuals. *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 109 S.Ct. 1468, 1475 (1989). There is every reason to believe that the Court would take the same view of the judiciary disseminating information as well.

The law regarding access to documents used in litigation has been settled for decades and it has worked very well. As Justice Holmes said long ago:

> It will be understood that if, in the opinion of the trial judge, it is or should become necessary to reveal the secrets to others, it will rest in the judge's discretion to determine whether, to whom, and under what precautions, the revelation should be made.

E.I. Du Pont de Nemours Powder Co. v. Masland, 244 U.S. 100, 103 (1917). These words were written regarding the right to protect trade secrets, just one type of information that would be endangered by a universal right of access. Holmes' position was well-founded in 1917 when the decision was rendered, and it is equally appropriate today, because once confidentiality has been destroyed, it can never again be restored.

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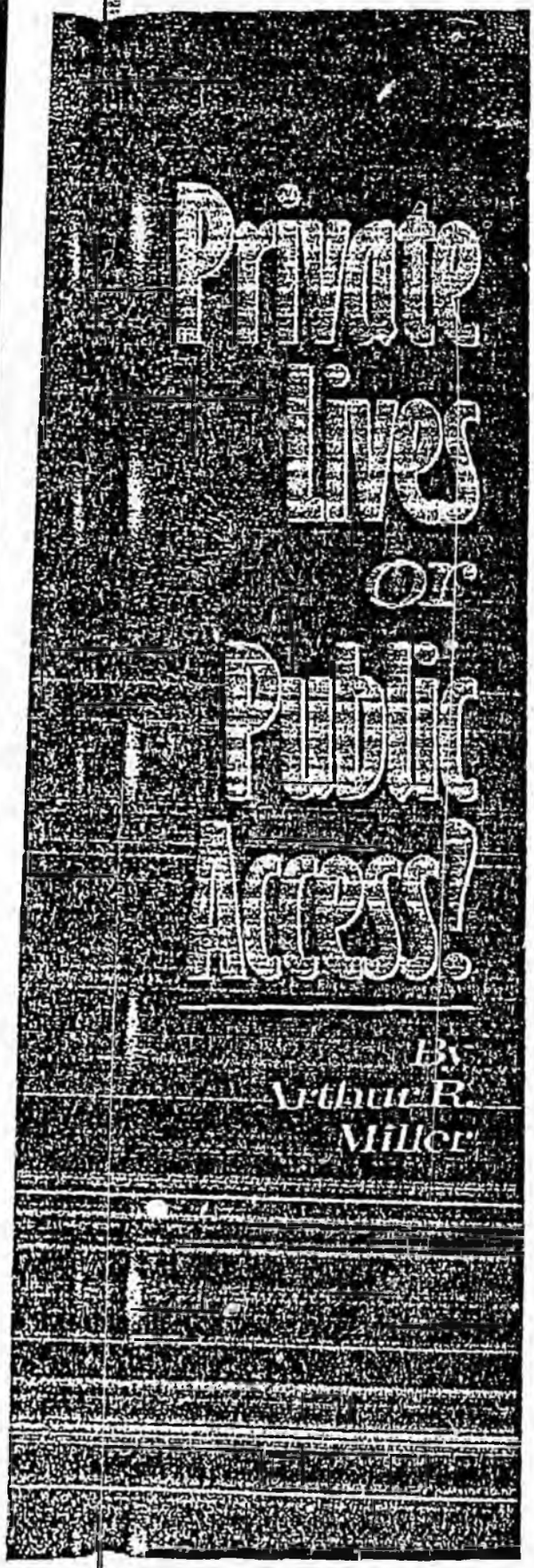

COMMENTARY

The Debate Over Courthouse Confidentiality

By tradition, the American public may view the daily activities of the courts through an expansive window that reveals our civil and criminal justice systems at their best and their worst. Through this window, sometimes garishly illuminated by television lights and press reports, the public has front row seats from which it may observe an endless panoply of lawsuits, litigants, judges and juries.

Like much of our system of justice, the right of public access to court proceedings descends from the English common-law tradition. The right exists to enhance public trust in the fairness of that system, to promote public participation in the processes of government, and to protect constitutional guarantees.

This right of access, however, is not absolute; it never has extended beyond the confines of court proceedings and documents themselves. As Justice Holmes said in *Du Pont de Nemours Powder Co. v. Masland*, 244 U.S. 100 (1917), the trial judge always has had great discretion "to determine whether, to whom, and under what precautions," public access should be permitted. Further, there never has been any right of public access to the activities, discussions and papers of the parties outside of the courtroom during discovery or settlement.

An intense, nationwide campaign is underway, calling for a "presumption of public access" to all information produced in litigation including discovery and settlement. This presumption is necessary, it is said, because courts have disregarded the public interest and as a result have kept important information affecting public health and safety confidential. Thus, the proponents of increased public access seek to transform the halls of justice into walls of glass, so that absolutely nothing is withheld from the public eye.

Such a transformation would be nothing short of a fundamental change in the role of the courts. From its inception, our legal system has recognized a variety of situations in which confidentiality is more than just appropriate, and, in fact, is essential to the even-handed administration of justice.

Discovery, grand jury proceedings, settlement negotiations and jury deliberations are conducted far from public view. Classified government information, intimate personal matters, confidential communications between attorney and client, the identity of confidential news sources or police informers, and proprietary information traditionally have been treated as confidential and public access to such information generally is not permitted.

In each of these instances, confidentiality is essential to accomplish fundamental goals of the justice system and of society in general, goals of greater importance to us than providing the public with insight into the details of a particular case.

The traditional model of civil adjudication in this country envisions private parties bringing a private dispute to a dispassionate arbiter—the judge—for resolution based on neutral principles of law. The judge and, sometimes, a jury consider only the evidence and arguments presented by the parties, apply the law to the facts, and do not inject their personal views.

Nor does the trier consider interests or matters outside the facts of the case. Public access to information produced in litigation always has been a secondary benefit, or side effect, of the primary undertaking of the courts. Allowing public access or public interest in litigation to assume an importance greater than the interests of the private litigants skews the traditional balance, transforming the courts into something other than dispute resolution agencies.

Some public law theorists have suggested that this traditional role of the courts is too narrow, saying that the courts also should involve themselves aggressively in promot-

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All indications are that the current system including the media, has plentiful

ing broad social goals within the context of private litigation.

But a number of states that have considered legislation to restrict the use of confidentiality in litigation have decided that, in light of the broad public access rights already extant, the outcry for a presumption of access is nothing but noise.

So far this year efforts to change the law on court confidentiality in Arkansas, Colorado, Hawaii, Idaho, Iowa, Kansas, Mississippi, Montana, New Mexico, South Dakota and Virginia have failed. These states rejected the kind of confidentiality limitations imposed earlier in Florida and Texas.

New York has adopted a rule to require a showing of good cause prior to sealing court records, which is essentially a codification of existing practice. The New York rule does not, however, affect discovery or the rule regarding protective orders. Legislatures and rule-making bodies in other states are raising serious questions about the need to change the rules on confidentiality, based on their understanding of the important role that confidentiality plays in the justice system.

Confidentiality is an integral part of the civil litigation process, and plays an essential role in fostering the resolution of disputes from start to finish. Keeping communications between client and attorney confidential fosters the candid exchange of information that is vital to the attorney's efforts to serve the client's interests most effectively. The protection of attorney work product prevents unfair intrusion into the mental processes of the lawyer preparing for litigation in an adversary system.

Preventing public disclosure of trade secrets through litigation preserves the valuable investment of the trade-secret owner. Information of an intensely personal nature is withheld from the public to prevent unwarranted invasion of personal privacy.

The rules giving courts discretion to issue confidentiality orders are central to the litigation process. An expectation of confidentiality can be vitally important in overcoming inhibitions in differing stages of litigation: bringing a lawsuit to enforce one's rights; engaging in complete disclosure during the pretrial process; fully airing all issues at pretrial hearings and during trial; and being willing to negotiate a settlement and doing so candidly. Consequently, compromising the court's discretion to protect confidentiality undoubtedly will affect the civil justice process as a whole.

The current movement to restrict judicial discretion in the name of public access does not present an across-the-board challenge to confidentiality. Instead, the movement focuses on protective orders during discovery and court seals or confidentiality agreements during settlement, claiming that these devices are being used to hide important information from the public.

Although these protective orders and court seals are the exception, not the rule, their availability to provide confidentiality during discovery and settlement serves objectives of the justice system as important as the attorney-client privilege, work product doctrine, or the protection of trade secrets and privacy rights.

Wide-angle discovery is central to contemporary civil litigation, and provides the litigants with equal access to all relevant data. But that does not make discovery a public process; indeed, history and practice are to the contrary. It is a private and voluntary process, with only occasional intervention by the court, intended solely to assist in the resolution of disputes. These assumptions are reinforced by the availability of the protective order, to which the parties typically stipulate, to guard privacy and prevent misuse of discovered information.

The assumption that material produced in discovery will not always be made available for use outside the litigation assures widespread voluntary compliance with the discovery regime, upon which we base our ability to resolve cases on their merits. This is true because modern discovery has the widest possible berth. It therefore tends to produce large quantities of material that are not used—or are not even directly relevant to the case—but that can be extraordinarily intrusive or extremely damaging if disclosed.

If we undermine the principle that discovery is a private process, or degrade the reliability of protective orders, the discovery process would become infinitely more contentious, protracted and expensive.

Litigants would be motivated to contest discovery requests with increasing frequency to prevent disclosure. More litigants would choose a full litigation strategy, rather than pursuing a settlement, simply to vindicate their reputations by bringing out the complete story concerning information produced in discovery and disclosed out of context. Further, the litigants' time and money would be wasted; the energies of that most precious resource—our judges—would be dissipated. The net effect might well be a constriction on the flow of information, rather than its expansion.

Broad discovery also enables litigants to appraise their cases and evaluate the risks of proceeding to trial. It often is the availability of discovery that leads parties to settle, saving themselves and the court system enormous time and money. Without the guarantee of confidentiality, some litigants would have little or no incentive to produce information during discovery, particularly if courts permit public access for reasons unrelated to the lawsuit.

Similarly, the settlement process would be impaired if the parties could not rely on the assurances of confidentiality reached voluntarily in the settlement agreement. In fact, the greater incentive to litigate, simply to postpone or avoid public access to confidential information, would work to the disadvantage of poorer litigants.

Our civil justice system simply could not bear the increased burden if the settlement rate were to decline, or if settlements were delayed to any significant degree, or if the dissemination of settlement details encouraged the bringing of suits that otherwise would not have been brought.

Nonetheless, it is alarming to think that protective orders, court seals and confidentiality agreements are being used to conceal information regarding hazardous consumer products, toxic waste dumps, or other potentially harmful activities. The allegations that courts are concealing such information apparently stems from

works rather well. The public, access to the courts and court records.

news media reports about a handful of cases. According to these reports, were it not for protective orders and court seals keeping this information confidential, the public would have learned about these potential threats to their health and welfare.

These reports, however, do not withstand scrutiny. For example, it was alleged that Xerox had hidden vital information about hazardous-waste contamination of a neighborhood near a New York plant in a sealed court settlement. However, no information of this type was found in the sealed files, which only contained medical records.

In another example, it was claimed that a drug manufacturer hid information about a potentially fatal side effect of a new drug in sealed court records. The facts, however, show that the manufacturer promptly notified the government of the potential problem, published warnings about the potential side effect in the prescription drug manual, and also sent a warning letter to over 100,000 physicians.

Neither of these examples reveals a cause and effect relationship between protective orders, sealed court records, and harm to public health or safety.

Nonetheless, it is argued that once allegations of harm are made, the public should be permitted access to all information subsequently produced in discovery. But that approach inadequately balances the tension between the public's right to know and the important purposes served by confidentiality.

Most jurisdictions have extremely liberal pleading requirements. Thus, it rarely is possible to determine in advance of trial whether allegations of harm in the pleadings of a lawsuit, or information produced in bits and pieces in discovery, rise to the level of proof that some injury actually occurred or is even likely to occur.

Today's rules of civil procedure are intended to make access to the judicial system easy, and to achieve that end, they only require notice pleading.

Discovery is designed only to reveal information that may lead to discovery of admissible evidence. This makes it virtually impossible to stop a lawsuit at the courthouse door or during the pretrial process, regardless of the merits of the case.

Once inside the courthouse, motions to dismiss are not difficult to survive. Consequently, although the allegations made in a complaint may raise issues that appear to implicate matters affecting public health and safety, and information produced in discovery may appear to confirm that, the truth of the allegations can be known only after they have been tested through the full litigation process. Release of information prior to trial is premature at best, and destructive to a litigant's reputation or business at worst.

A prime example of precisely this result is the treatment of the Audi 5000, which was claimed to have killed and injured numerous people due to a sudden acceleration defect. Even though no sudden acceleration defect was noted in identical cars sold in other countries, the national media, such as the CBS program "60 Minutes," tried and convicted the vehicle.

American consumers stopped buying it, only to find, after many trials and a National Highway Transportation Safety Administration investigation, that driver error and not a defect in the car itself caused the sudden acceleration. Yet, the car is off the market, and Audi is still struggling to re-establish its former reputation for producing high-quality cars.

Despite the financial tragedy the media and over-eager plaintiffs' bar caused in this instance and others, both the media and the plaintiffs' bar stridently proclaim their "right" to decide what information is of import to the public, to be given unfettered access to that information, and to use it in whatever manner they see fit.

I do not quarrel with an expansive reading of the First Amendment or judicial decisions that allow publication of material of public significance despite the fact that it will embarrass, or even damage, those to whom the information pertains. Neither the First Amendment, nor these decisions, however, legitimate demands to publish any private information, no matter how sensitive, how personal, how ruinous, or how irrelevant to daily events it may be.

We must remember that the proponents of increased public access, whether they are the plaintiffs' bar or the press, engage in business and have their own agendas to serve; they are just like the defendants they pursue who support confidentiality. Given the self-interest of the contending forces, the simple truth is that only the judges can be neutral gatekeepers.

When information possibly implicating public health and safety surfaces in documents produced in litigation, the decision about whether it should be released to the public should rest where it always has—within the sound discretion of the court. Only the trial judge has no axe to grind and no prospect of pecuniary gain. Existing rules and procedures are more than adequate to accomplish this end.

Additional support for allowing the judge to determine whether information produced in a lawsuit raises issues of public health and safety that warrant public disclosure lies in the rules of evidence.

Evidence admitted at trial generally is available to the public through the traditional common-law right of access to the courtroom. If the judge finds the information inadmissible at trial, it is because the court deems the information irrelevant or unreliable. If the information has no logical connection to a fact at issue, or if the information is not trustworthy or credible, it is difficult to understand how the public is served by public disclosure. In fact, public disclosure of untrustworthy safety or health information could cause serious public anxiety and harm.

Also, in today's litigious society it is not altogether unheard of for individuals to institute completely unfounded lawsuits for a variety of purposes. A suit could be filed merely to compel the defendant to produce information that the plaintiff subsequently can sell to others, perhaps for a percentage of the damages awarded in subsequent cases—an impermissible abuse of the system. The possibility of Rule 11 sanctions is inadequate once the damage has been done.

In all of the fanfare and expressions of concern about the rights of the public, insufficient attention has been given to the rights of the actual litigants, who are in court to resolve very real legal disputes of

Information affecting compelling public interests is available to the public.

great import to themselves.

Due to the invasive nature of the litigation process, parties often place substantive rights unrelated to the underlying legal issues at risk. One of the substantive rights that only confidentiality can protect is the right to privacy. In *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), the Supreme Court indicated that litigants have privacy rights in the information produced during the discovery process, and that courts should protect those rights by ensuring confidentiality when good cause is shown.

Unfettered authority to collect and disseminate private information through the judicial process raises images of an Orwellian society where Big Brother knows all. Litigants do not give up their rights to privacy just because they have walked through the courthouse door.

Those who drafted the broad discovery procedures in rules of civil procedure did so to improve the dispute resolution system. They had no intention of using the compulsion of these procedures to undermine privacy in the name of public access. Because of the importance of the right to privacy, it would be imprudent to endorse any proposal that would restrict or eliminate the discretion of the courts to protect the privacy rights of litigants on a case-by-case basis.

Another substantive right that litigants often are compelled to place at risk to resolve a legal dispute is the right to the exclusive use of private property. Information is often very valuable in today's society—so valuable that it can be bought and sold for great sums of money. Unlike tangible property, which can change hands without diminishing its value to the current owner, once information has been disclosed, its original owner never again can obtain exclusive possession of it.

To expedite resolution of a lawsuit, rules of procedure can compel both the plaintiff and defendant to reveal information, such as a trade secret, that is costly to develop and that has enormous value to competitors and others who may not be involved in the lawsuit, in which a property right exists.

Courts traditionally have issued protective orders to protect property rights in information and to prevent outsiders from gaining gratuitous access to proprietary information to the detriment of a litigant. These protective orders are the most effective means of safeguarding the commercial value of this type of information while still making it available for use in the litigation. The only alternative might be denying discovery of this type of information altogether.

The rights to privacy and property ownership are among the most fundamental rights that we have as

citizens of this country. Any type of governmental intrusion into these rights is costly to society as a whole, and should not be permitted except for the most compelling reasons. A presumptive right of public access to information, the physical embodiment of these rights, would work a wholesale invasion of them—not for some demonstrated compelling reason, but in most instances for no legitimate reason at all.

There is a final systemic concern about recognizing a wholesale right of public access to materials produced in litigation: The American judicial system already is unable to resolve civil disputes in an economical, timely fashion.

To breed "satellite litigation" concerning access to discovery or material settlement information is especially onerous because it undermines a fundamental principle behind these two components of litigation—they both were designed to operate extra-judicially.

Our judges simply cannot assume the additional burdens that satellite litigation over access would create. Adding a clearinghouse—or Freedom of Information Act—function to the existing judicial workload, which essentially is what the proponents of increased access advocate, is unjustifiable for even the most compelling reasons.

It is unrealistic to believe that our judges can examine the masses of discovery generated in today's litigation to determine questions of public access. In *Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), the Supreme Court rejected similar efforts by the press to use an executive agency as a clearinghouse for information about private individuals. There is every reason to believe that the Court would take the same view of the judiciary acting as an information agency.

The truth is that even if the courts had the resources to assume this function, they are not the appropriate institutions for doing so. Judges generally lack the scientific or medical expertise needed to evaluate properly the complex data and theories routinely implicated when health and safety are at issue.

Indeed, a multitude of expert executive and administrative agencies at the local, state and federal levels already exist for this purpose. If efforts by these agencies are inadequate, it does not follow that their responsibilities should be shifted to the courts.

The balance clearly favors retaining the present practice—relying on our courts to use their discretion to issue confidentiality orders to protect the legitimate interests of the parties, and allowing parties to retain their rights to negotiate confidentiality agreements voluntarily. Rules of civil procedure, as currently written, allow judges to consider and act in the public interest when circumstances so indicate.

There is simply no reason to believe that current court rules and practices create any risks to public health or safety. Indeed, all indications are that the current system works rather well. The public, including the media, already has plentiful access to the courts and court records; information affecting compelling public interests is available to them. No change to the practice of providing confidentiality when appropriate is needed. ■

BARRON'S
April 2, 1990

Legal Heartbreak?

Pfizer Faces Huge Liability If It Loses a Key Lawsuit

By MAGGIE MAHAR

ATTENTION:
PROFESSOR VIKING BJORK

REF: YOUR TELEX DATED DEC 17 1980

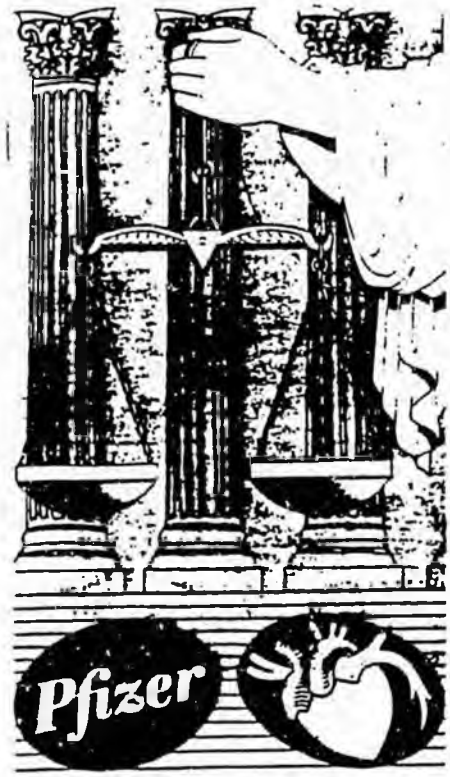
WE WOULD PREFER THAT YOU DID NOT PUBLISH THE DATA RELATIVE TO STRUT FRACTURES. WE EXPECT A FEW MORE AND UNTIL THE PROBLEM HAS BEEN CORRECTED. WE DO NOT FEEL COMFORTABLE. WE WOULD LIKE TO DISCUSS THE STRATEGY WITH YOU DURING YOUR JANUARY 81 VISIT. .

THE telex was signed "Merry Christmas, Paul Morris." Morris was chief product engineer at Shiley Inc., a Pfizer Inc. subsidiary best known as a maker of mechanical heart valves, and he was was sending season's greetings to Dr. Viking Bjork, a Swedish heart surgeon who was then lead investigator on Pfizer's newest model, the Bjork-Shiley convexo-concave valve.

The new mechanical heart valve had won Food and Drug Administration approval a year earlier, and by Christmas of 1980, nearly 23,000 of the devices had been shipped. The company was stepping up production. There was just one hitch. By the end of 1980, six valves had fractured within months of being implanted. In each case, an uncontrolled flow of blood flooded the heart, and the patient died.

But in 1980, the Pfizer subsidiary didn't want Dr. Bjork to publish any data on fractures just yet. As Morris indicated in his communication to Bjork, the company "expected a few more, and didn't feel comfortable" making the problem public until it figured out what was causing the trouble and had "corrected" it. According to the FDA, the problem was never corrected.

In November 1986, six years after Morris sent his Christmas telex to Dr. Bjork, just as the FDA was moving to suspend approval, Pfizer withdrew the convexo-concave valve from the market. By then, 86,000 valves had been implanted, 281 had fractured and 188 patients had died. The company said it was pulling the product only because of "negative publicity," which was dampening its marketing effort.



Disputing the FDA statement that the problem was never solved, Pfizer later claimed that it corrected the fatal flaw, pointing out that valves produced after April 1984 were not fracturing. The company does not claim, however, that it ever found the cause of the problem. In rebuttal, the FDA says that it's too soon to tell whether fractures will take place in valves manufactured after April 1984, pointing out that only about 8,000 of the 86,000 valves implanted were manufactured after that date. In any case, breakage is occurring in the other 78,000 valves, sometimes years after being sutured to a human heart.

No one knows how many of the convexo-concave valves will ultimately fracture. Some 56,000 individuals now wearing the valve can only listen to the quietly reassuring "clicking" sound that the valve makes as it opens and closes. If that sound suddenly stops—they know they're in trouble.

At the beginning of this year, Pfizer reported that 389 valves had fractured, 248 patients had died, and it has been hit with about 200 claims for damages. Pfizer has settled each lawsuit out of court, for amounts reportedly as high as $1 million. Meanwhile, seven shareholders have launched legal action, in seven separate class-action suits, charging that the company failed to disclose information about problems with the faulty valve.

The total number of deaths resulting from fractures is generally agreed to be much higher than the 248 known cases. For when a valve breaks, the symptoms mirror the symptoms of a heart attack, and since the victim typically has had a chronic history of heart disease, autopsies are not routinely performed. Estimates of actual fractures reportedly range from 50% more than the number reported up to 10 times the number. "There is a published report that has alleged the 50% figure; there are 3 published reports that claim 10 times," says William Vodra, an attorney at the law firm Arnold & Porter representing Pfizer. Now some survivors of deceased implant recipients are having bodies exhumed and autopsies performed.

Two months ago, the story took a new, potentially devastating turn for Pfizer. On Jan. 30, a California appellate court ruled that Judy Khan, a 39-year-old implant recipient from Roanoke, Va., can sue for anxiety—even if her valve doesn't break. To win, the court said, Khan must prove "fraud" or "deceit"—i.e., that the company withheld significant information about problems with the valve. The ruling opens the door for the roughly 56,000 implant recipients currently wearing the Pfizer convexo-concave valve.

Pfizer has assured investors that the company's insurance and reserves are adequate to protect it against valve lawsuits. But the company will not disclose the extent of its insurance coverage, or whether it would be covered in the case of fraud. "We have multiple insurance policies from different companies covering different periods of time and different risks," explains Vodra. "We don't have a breakout of our total coverage for potential heart-valve problems. And, as a matter of security, given the shareholder suits, the company would be reluctant to publish such a breakout if they had it."

Pfizer also is asking the California Supreme Court to review the appellate court ruling. But the Supreme Court is not bound to take the case; a decision should be announced later this spring. And, even if the Khan action fails, her attorneys have 161 other plaintiffs ready to bring anxiety suits.

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In the worst case, the company could be liable for hundreds of millions of dollars of "anxiety" claims. Concern over liability caused Pfizer's stock to drop to below $60 at the end of February from $72 at the beginning of the year. Currently, it's trading slightly above that level. Many analysts have decided that all the bad news has been discounted by the earlier decline in the stock. After all, noted one recent report, "to establish fraud, the plaintiff must prove ... 1) that the company deliberately created misinformation and 2) that the information was created with the intent to injure."

But, in fact, that's not all that counts as fraud in California, the state where the valves were manufactured and where Pfizer's fate will most likely be decided. In California, the law on fraud is very broad, says Bruce Finzen, the attorney representing Judy Khan, and extends beyond willful deceit with intent to injure to include sins of omission or "the suppression of a fact by one who is bound to disclose it, or gives information of other facts which are likely to mislead for want of communication of that fact."

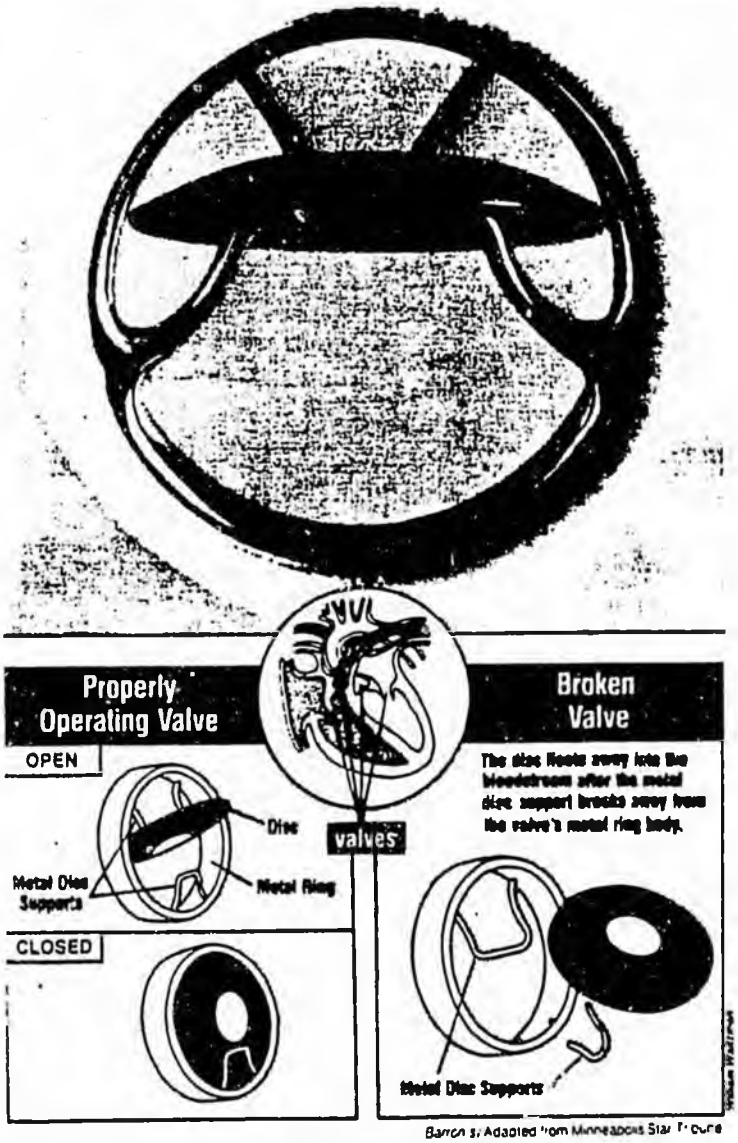
Moreover, according to Finzen, false assurances, or "assertion of a fact that is not true by one who has no reasonable ground for believing it to be true" counts as fraud, too. In other words, as Finzen interprets the state's law: "Maybe I thought it was true, believed it was true, hoped it was true, but I had no specific basis for knowing whether it was true or not. In California, that's fraud."

Pfizer's attorneys strongly disagree. "He's quoting the law on misrepresentation. Misrepresentation is not fraud," says David Klingsberg of Kaye Scholer, Feirman, Hays & Handler, the firm that represents Pfizer.

"The attorney for Pfizer is splitting hairs," observes Jeffrey White, the associate general counsel of the Association of Trial Lawyers of Americ. "If Finzen can show misrepresentation—and that the surgeons relied on it—that's fraud. And, from the evidence we've seen so far, in congressional hearings that took place before the House Subcommittee on Oversight and Investigations at the end of February, there's enough evidence to bring a case to trial. Pfizer will have to make its case before a jury."

Finzen's Minneapolis law firm of Robins, Kaplan, Miller & Ciresi was active in the Copper 7 cases against G.D. Searle, represented the government of India in the Bhopal disaster, and won the Dalkon Shield case after showing misconduct by its manufacturer, A.H. Robins.

As problems with the Bjork-Shiley heart valve surfaced, Shiley tried out various manufacturing changes while continuing full-scale production.



Barron's; Adapted from Minneapolis Star Tribune

Currently, Finzen represents some 179 plaintiffs in litigation against Shiley and Pfizer, and he is hoping to break new ground with the Khan "anxiety" suit. He compares the heart-valve case to the Dalkon Shield action in that both are "mass tort" cases. Some securities analysts have assumed Pfizer's exposure is limited because plaintiffs can't bring a class action for fraud, but White explains: "There are several ways to settle a mass tort. You can take all of your cases and put them in one court for the purpose of discovery, for instance. Sometimes you try one issue, then each plaintiff takes it back to his or her court."

In the Dalkon Shield case, settlements of roughly $370 million paid to 9,230 plaintiffs, plus legal fees of about $100 million, drove A.H. Robins, maker of the Dalkon Shield, into Chapter 11 in August of 1985.

But to win his first anxiety case, Finzen must prove deceit. To do so, he says he intends "to discover what the company knew, when they knew it, and what they did about it."

Those were precisely the questions raised by a subcommittee of the House Committee on Energy and Commerce, chaired by Democrat John Dingell of Michigan, in an open hearing Feb. 26, just a month after the California ruling opened the door to anxiety suits. For over a year, the staff of the Subcommittee on Oversight and Investigations had been probing what went wrong with the convexo-concave valve, and the result of its investigation was a 127-page staff report with exhibits that included internal memos from Pfizer and the FDA.