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overturned the contrary judgments of Florida courts in favor of the victim, BJF.

The Court engaged in a highly fact-specific, detailed explanation of exactly what happened in that case. One came to know the inner workings of the sheriff's office, the activities of the reporter in question, and how that story ultimately went to press.

Justice Thurgood Marshall, speaking for the Court, emphasized the contextual nature of each case. Throughout the opinion the Court treaded ever so lightly, stressing at each turn the sensitivity of this enterprise.

That case strongly suggests to me that the mood of the Court as a whole is very strongly pro privacy. Quite apart from the agonized tone of Justice Marshall's opinion, the nature of Justice Scalia's concurring opinion and the impassioned dissent by Justice White suggest as much.

We can also see this pro-privacy bent in the Reporters' Committee FOIA case, a case in which I was more than mildly interested because I had served on the panel of the court of appeals that adjudicated it. I joined the initial panel opinion that permitted CBS to obtain access under FOIA to FBI rap sheets on four individuals of a family in Pennsylvania.

Then, on re-hearing, I dissented from my colleagues' determination that we had been right in the first instance. The case went up to the Supreme Court, which then spoke with remarkable unanimity. The Court held that the rap sheet would not be made available to CBS under FOIA.

But the Court did not embrace the balancing test that I had tentatively -- and in a primitive fashion -- offered in my dissenting opinion at the court of appeals level. Rather, the Court said in this instance, unlike what it was destined to do in the *Florida Star* case, in effect as follows:

"We're not going to go on a case-by-case, highly contextual, highly fact-specific basis. We want a bright line. We are going to hold that a third party's -- Bob Shakne of CBS -- request for law enforcement records or information about a private citizen, not a public official, not a public figure, can reasonably, presumptively be expected to invade that individual's privacy."

And when the request seeks no official information about a government agency or the operations of the government itself, but information that the government is storing, then the invasion of privacy is -- in the Court's view -- unwarranted.

At the same time that we see this pro-privacy bent in the Court's jurisprudence, it would be wrong to assume that in this sensitive arena the Court is monolithically on a pro-privacy bent. The decision just a month ago in the Florida grand jury case makes that countervailing point rather nicely.

A reporter for a local newspaper in Florida, the *Charlotte Herald News*, wrote a series of articles about possible corruption in the sheriff's department and the state attorney's office. The reporter was then called, and in fact did testify, before a grand jury.

Once the grand jury's investigation came to an end, the reporter was interested in making public the information that he had shared with the grand jury. The Court, faced with a Florida statute that forbade precisely that, said that there really is no legitimate governmental interest, in the face of powerful First Amendment pro-disclosure values, to suppress the statements of witnesses who had once appeared before the grand jury in a now-completed investigation.

What all this portends, I believe, is that the Supreme Court is increasingly concerned about private citizens being caught up in the web of the information-rich, super-glasnost society and losing the ancient right – so valued in Western civilization – to be left alone.

Hon. Kenneth W. Starr,
U.S. Solicitor General

At the same time, the Court was unanimous not only in vindicating this First Amendment interest on the part of the press, but of paying homage to, in the Court's own words, "the tradition of secrecy surrounding grand jury proceedings." The Court did not go out of its way in this respect, but it also did not avoid saying very kind words about the tradition of secrecy.

In fact, the secrecy of the grand jury proceedings was viewed by all nine Justices as important to safeguarding a number of powerful interests that weighed heavily on the scales, including the interests of persons who have been accused of wrongdoing, but who are exonerated by the grand jury.

What all this portends, I believe, is that the Supreme Court is increasingly concerned about private citizens being caught up in the web of the information-rich, super-glasnost society and losing the ancient right -- so valued in Western civilization -- to be left alone.

In fact it was in the *Florida Star* case that the Court declined to accept the invitation to hold broadly that truthful publications may never be punished consistently with the First Amendment. The Court observed in rather elegant terms, in Justice Marshall's felicitous turn of phrase, that "the future may bring forth scenarios which prudence counsels not be resolved anticipatorily."

The Court cited, in so eschewing this broad, bright-line rule, the distinctly non-privacy case of *Near v. Minnesota* and the hypothetical in that ancient case of prohibiting the publication of the movement of

troops in time of war. In a nutshell, the Court is unanimously sensitive to privacy interests even when weighed in the First Amendment-balance context.

That should come as no surprise. The powerful conflicting interests at stake in the publication-rights versus privacy-interests arena leave little room for sweeping absolutes. At least in the confines of a courtroom and a conference room, where judges come together to discuss and to deliberate, broad generalities that may move individuals toward one point on the spectrum or another have a way of yielding to the complexity and the anguish of individual cases.

The Supreme Court's anguish in *Florida Star* about BJF and the horror that had befallen her can be seen in the very manner in which the Court saw fit to entitle the case -- *The Florida Star v. B.J.F.* Acting almost like the nation's schoolmaster, the Court pointedly noted, almost proudly, that it was using B.J.F.'s initials, rather than her name. It was a teaching gesture by the schoolmaster.

This is a Court where, after all, people like Roe, Doe, and, once upon a time, Poe, are frequent litigants.

It is noteworthy that such a landmark in the privacy field remains that much-discussed and, in many quarters (perhaps these), much-maligned article by Warren and Brandeis a hundred years ago on privacy, the ancient right in Western tradition to be left alone.

That article is far from being the definitive word on the subject and on legal doctrine. But it does, a hundred years after its publication, remain a touchstone for the Court's analysis. It was invoked by Justice Stevens for the unified Court in the *Reporters' Committee* case, and it found its way, through quoting from that unsettling case, *Time Inc. v. Hill*, into Justice White's dissent in the *Florida Star* case.

It may well be that serious re-thinking is and will continue to be underway in this challenging arena of First Amendment ferment. We remain committed to the *Times v. Sullivan* spirit of robust and uninhibited debate in an open society, and thus we are deeply suspicious -- both as a people and as a legal system -- of legal actions that sound in the nature of actions of seditious libel.

We remain deeply suspicious of anything that smacks of the Alien and Sedition laws. But at the same time, we remain, as a people and thus in our law, deeply concerned about basic human-dignity interests that undergird the entire edifice of our Constitution.

WITNESS TESTIMONY

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.

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.

)nly by opening this subject to ublic discussion would we be naking a contribution to safety, so hat other families will not lose heir children, or see them severely njured and permanently disabled, s we have.

James Miller, Father of Accident Victims

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.

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.

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.

Ed Keller, Accident Victim

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.

Fred Barbee
54 years old
Retired appliance repair company owner
Minong, Wisconsin

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 ten years after the first Shiley fracture, the Barbees were totally in the dark.

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 *anything* 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.

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.

Fred Barbee, Husband of Heart Valve Victim

Devra Lee Davis, Ph.D.
Toxicologist
Scholar in Residence,
National Academy of Sciences,
Washington, D.C.

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.

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.

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.

Dr. Devra Davis, Scientist and Victim

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.

Rule 76(a). Sealing Court Records

Adopted by the Supreme Court of Texas, April, 1990; Effective September 1, 1990

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 120(a).

5. Temporary Sealing Order. A temporary sealing order may issue upon motion and notice to any parties who have answered in the case pursuant to Rules 21 and 21(a), 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 166(b). 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 76(a) with respect to all court records subject to that rule.

Rule 120(a). 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.

Sunshine in Litigation Act

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 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.

PANELISTS AND SPEAKERS

Arthur Bryant
Trial Lawyers for Public Justice

Art Buchwald
Syndicated Columnist

Hon. Jim R. Carrigan
U.S. District Court, Colorado

Mary Cheh
Professor, George Washington University
National Law Center

Joan Claybrook
President, Public Citizen

Alfred W. Cortese
Kirkland & Ellis, Washington, D.C.

Dr. Devra Davis
Scholar in Residence,
National Academy of Sciences

Justice Lloyd Doggett
Texas Supreme Court

Michael Gartner
President, NBC News

Russ M. Herman
Herman, Herman, Katz and Cotlar, New Orleans, Louisiana

Harold Jacobson
Lord, Bissell & Brook, Chicago, Illinois

Alice Neff Lucan
Davis, Graham & Stubbs, Washington, D.C.

Michael C. Maher
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Paul K. McMasters
National Freedom of Information Chair,
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Bruce Sanford
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Hon. Kenneth W. Starr
Solicitor General,
United States Department of Justice

George Trubow
Center for Informatics Law

Elsa Walsh
Washington Post

Dianne Jay Weaver
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KEEPING SECRETS
Justice on Trial

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TORTS

By Michael Schneider

In February, 1991, the House Judiciary Committee, led by Representative Dave Donley, (D-Anchorage) introduced HB 171: "An Act Restricting Court Orders and Certain Private Agreements Relating to the Concealment of Public Hazards and Information on Public Hazards; and Amending Alaska Rules of Civil Procedure 24, 26(c), 26(f), 29, 30(d), and 37(a)(2)."

The notion is not novel. At least eight states will be considering similar legislation during the 1991 legislative session. Florida, North Carolina, and Virginia have passed secrecy/protective-order legislation in the last two years. California (San Diego Superior Court), New York, and Texas have amended their rules of court or their rules of civil procedure to prohibit secrecy/protective orders. A model "Sunshine in Litigation" act has been circulating around the country for the last couple of years and is being considered, at least as an alternative, by our legislature and the states mentioned above.

It's pretty obvious to attorneys why legislation of this type is being considered. The worse the defendant's conduct, the more widespread, the more it tends to affect (or potentially affect) a large class of people, the more it tends to be a "public hazard," and the greater the damages likely to flow from the hazard, the more likely it is that any offer of peace will be coupled with a demand for confidentiality.

The confidentiality provision typically addresses not only the fact of settlement, but the terms of the settlement and all the materials obtained in the course of the case. Orders are often issued in furtherance of these agreements (upon a stipulation of the parties) sealing the court record and/or requiring the return or disposal of documents obtained or disclosed during the case. While we are all forced to enter these agreements to promote our clients' interests, the public interest in being able to define and recognize dangerous products or dangerous practices and the interest of future litigants in being able to prove their case without "mining the same nugget" time after time after time suffers drastically as a result of this conspiracy of silence.

HB 171 is short and to the point. It imposes upon the court a duty to "examine the materials in camera" that are subject of a motion for an order prohibiting disclosure. If the materials or information have previously been disclosed, or concern "a public hazard," then the court is commanded not to enter the requested order. An "interested person" has standing to challenge a secrecy or protective order. An "interested person" is to be construed as that term is used in AS 44.62.300, and does not include a party to the litigation or to the agreement out of which the request for secrecy flows. While this definition is fairly broad, it could be a lot broader and does not clearly include classes such as the news media. Under HB 171, private agreements on materials concerning public hazards are void and may not be enforced. A public hazard is defined to be "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."

In my opinion HB 171 should be passed. Nevertheless, this bill could be a lot better than it is. The model "Sunshine in Litigation" Act of 1991 does a better job of addressing the legitimate concerns that are the subject of HB 171. Some examples follow:

1. Unlike the model act, HB 171 doesn't extend to settlement terms or the amount of a settlement.

2. The model act contains a legal presumption of openness. The burden is placed upon those demanding secrecy and confidentiality to prove the merit of their position. HB 171 does not do this.

3. The model act clearly specifies the types of information that may qualify for secret treatment. For instance, the model act recognizes that there is no interest in openness (secrecy is thus authorized) as to "private facts concerning a natural person or trade secrets or other confidential research, development, or commercially secret data."

4. "Interested person" is more broadly and less ambiguously defined than in the version of HB 171 that I reviewed.

5. The model act provides for automatic access to discovery generated in other litigation by parties with similar or identical claims.

6. The model act contains a public-notice provision. If litigants or any other "interested person" are going to fight over secrecy, the public is given notice of the battle and an opportunity to attend.

7. The model act provides for attorney's fees to public-interest litigants where a request for secrecy is successfully opposed.

8. Under the provisions of the model act, it is extremely difficult to hide relevant information about public hazards from governmental or regulatory agencies.

The legislature has already received vigorous opposition to HB 171 from such public-spirited folks as the American Insurance Association, the Motor Vehicle Manufacturers Association, the Pharmaceutical Manufacturers Association, and Lawyers for Civil Justice (and who do you suppose this outfit represents . . . ?).

If any of you really believe that promoting secrecy in litigation is good public policy for the state of Alaska, I would really appreciate it if you would take a moment to commit your thoughts to writing and send them to me. On the other hand, if you believe, as I do, that HB 171 (and better yet, the model act) is an idea whose time has come, I'd encourage you to get your views to the legislature immediately. As you know, this can be done with a telephone call to your local legislative information office and a request that your brief message be communicated to all members of the legislature.

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Protective and Secrecy Orders

Time for Change

Eugene I. Pavalon and Thomas G. Alvary

Protective orders and secrecy agreements in products liability actions continue to prevent public access to vital health and safety information, despite growing pressure to keep court files open. Court orders sealing information are of two basic types: protective orders controlling dissemination of materials that are or will be produced during discovery, and secrecy agreements that seal court files and records pursuant to settlements. Although protective orders are easily challenged, they continue to be entered by agreement. Defendants have successfully maintained secrecy by securing judicial cooperation in approving agreed-upon secrecy orders, buying the cooperation of plaintiffs to conduct discovery privately and seal court records following settlement.

The law has recognized the public's interest in access to materials produced in litigation and has long disfavored the sealing of court records. But the legal system has not yet adequately addressed the public policy implications of secrecy orders. Our adversarial system does not easily function as a clearinghouse for important information regarding public health and safety.

Manufacturers have successfully obtained protective orders denying public access to critical information by capitalizing on the plaintiffs' interests in settling or pursuing actions. Judges have not been free to ignore litigants' interest in favor of the broader interest of other plaintiffs and the public, who might suffer from court-imposed secrecy.

The law on protective and secrecy orders is relatively clear. Federal Rule of Civil Procedure 26(c) and similar provisions in court rules throughout the states presume that discovery materials are open to the public unless the party seeking protection can show good cause to close them.[1] In products liability actions, for example, a manufacturer must show the need to protect a trade secret or other proprietary information whose disclosure would cause the defendant economic harm.[2] Proof of good cause requires particularized, specific examples of the competitive harm disclosure would cause.[3]

Most reported cases deal with challenges to protec[illegible] orders entered either by agreement [illegible]e parties or without the careful jud[illegible] scrutiny of the good-cause requirement. Once an order is challenged, its existence carries no presumptive weight. The burden is on the party seeking the order to show good cause to avoid vacation or modification of the order.[4] The proper test is not merely to balance the right of access with contravening confidentiality interests; the party seeking protection must make a threshold showing of good cause to continue protection.[5] The procedural posture of the reported cases highlights the degree to which these orders are entered without judicial scrutiny of the clearly established substantive basis for protection.

Secrecy orders once entered are not inviolate. They remain subject to modification by the trial court. Protective orders are unlikely to be challenged by parties to the original action but may be challenged by an intervening party long after conclusion of the case.[6] Secrecy orders may also be challenged by interested third parties.[7]

Plaintiffs in other lawsuits who would be forced to duplicate discovery that is protected by order have well-established grounds for challenging and removing the protective order, since shared discovery falls squarely within the purposes of the federal rules.[8] Judicial economy resulting from saving both time and resources by discovery sharing is consistent with the truth-seeking process of our adversary system, and the practice is over-

Eugene I. Pavalon, a senior partner in Pavalon & Gifford, is a past president of ATLA and of the Roscoe Pound Foundation. Thomas G. Alvary is an associate in Pavalon & Gifford. *©Eugene I. Pavalon.*

whelmingly approved by the courts.[9]

Protective orders entered in the early stages of discovery typically result from a predictable initial course of discovery. A plaintiff seeks discovery of internal records on a product or hazard. The defendant's attorneys often reply that they have a variety of information, some of which could be trade secrets or proprietary business information protectable from competitors.

The plaintiff is then offered one of two options for continued discovery. Option one involves a line-by-line review by the defense of every document it is asked to produce for trade secrets and other privileged business information. This lengthy process is followed by motions to prevent disclosure of the allegedly protectable information, briefs, arguments, and a protracted judicial review of all the defendant's discovery in a struggle over all important information.

Option two is presented to the plaintiff as a good-faith effort to expedite the process by agreeing to a protective order covering all materials produced by the defendant. This is a subterfuge in which the defendant says that avoiding a lengthy and detailed review by the defendant's attorneys will help the plaintiff's attorney quickly and economically evaluate all the defendant's information. As presented to the plaintiff, option two will apparently save time and resources—especially when clear liability has yet to be established.

Consenting to such protective orders results in a serious tactical disadvantage for most plaintiffs. The plaintiffs' experts also must agree in advance to nondisclosure of the discovered information. This impairs their ability to discuss the material with representatives of similarly situated parties or other knowledgeable experts. It also alerts the defendant to the identity of the plaintiffs' consultants. Protective orders create an island of information within lawsuits, prohibiting the broader development of each case that could result from cooperation among similarly situated plaintiffs. Maintaining secrecy throughout discovery also prevents publicizing the case to the legal community and the general public. This may conceal from aggrieved parties the existence of claims arising from similar injuries and prevent procedures to eliminate a hazard.

Clients who understand the public harm that may result from protective orders and sealed settlements will be more likely to oppose them.

Despite the disadvantages of protective orders, plaintiffs' attorneys often agree to them. Mistakenly they believe that they will receive information to which they might not be entitled if the protection issue is litigated or that the defendant will more forthrightly answer discovery requests. Many are also intimidated by the threat of much valuable time lost to motion practice, briefs, and argument.

Another effect of successive protective orders in a series of cases involving the same product is the seeming de jure ennoblement of the defendant's claim of trade secrets, even though most protective orders do not provide a substantive basis for protection. Thus, a defendant who has obtained such agreed protective orders in litigation in other jurisdictions involving the same product will be able to refer to the entry of such orders as

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substantive basis, or lack thereof, for the entry of similar orders in other pending cases.

Orders sealing court records pursuant to settlement also allow defendants to limit public dissemination of information relating to consumer safety. Defendants rarely claim that protectable interests are involved; they simply buy the silence of plaintiffs and their attorneys by offering a generous settlement in return for secrecy.

In such cases, the full exercise of plaintiffs' legal rights is brought into conflict with the public's interest in full disclosure. Impecunious plaintiffs with substantial disability cannot be expected to defer to the public's need at their own expense and their family's expense. A plaintiff's consent to a sealed settlement agreement under circumstances like these is understandable.

Sealing orders pursuant to settlement agreements are often entered without the judge's considering the public interest in access to information. In a products liability action for personal injury, the public interest is not represented. Secrecy agreements are obviously in the defendant's interest of avoiding disclosure. The plaintiff's direct interest in the value of a settlement that is conditioned on silence and the court's interest in fair resolution of the action and judicial economy prevail over the public interest in the accessibility of the court documents. The plaintiff's attorney has a primary duty to promote the client's interest and is not free to impose a civic duty on the client at the client's expense.

Early Settlement Offers

Another emerging tactic of defendants is to offer settlement before responding to discovery requests. When a defendant is seeking a protective order in response to discovery requests seeking internal documents, safety reports, or corporate knowledge of product defects, the defendant may offer a substantial settlement to avoid disclosure. If the case is settled before discovery, the defendant is protected from the collateral attack of a secrecy order entered after compliance with discovery.

The lack of publicity about the pendency of litigation further protects the defendant from the adverse effects of wider public awareness that the product is defective and a public hazard. In such cases, courts, collateral litigants, and public interest groups have no opportunity to challenge the secrecy. By settling each case without even responding to discovery, a defendant-manufacturer allows statute of limitations periods to expire and prevents public disclosure of the hazard.

Premium for Silence

Combating the adverse effects of protective and secrecy orders requires considering the public interest within the context of an action between private parties. It also involves considering the degree to which plaintiffs' attorneys and judges may act in the public interest when doing so may damage plaintiffs' interests. When defendants are prepared to pay a premium for silence or when contests regarding protective orders will be protracted and burdensome to the plaintiff, the attorney's responsibility to the client may require consent to the order.

One technique counsel can use to avoid the effectiveness of a sealing order is to promptly disseminate all materials received during discovery to other attorneys representing plaintiffs in similar actions and to attorney information exchanges. Theoretically, this is an effective approach to preventing sealing of court documents at the conclusion of litigation, but practically, little sensitive information is likely to be produced because of the defendant's efforts to maintain secrecy.

An attorney has no specific ethical duty to disclose to the client intent to disseminate such information. There is, however, a question as to whether the general provisions of Canon 4 of the ABA Model Code of Professional Responsibility, Rule 1.6 of the ABA Model Rules of Professional Conduct, or similar state rules require the attorney to clear any such disclosure with the client before providing the information to other persons.

The most effective way for a plaintiff's attorney to avoid the onus of a protective or secrecy order is to inform the client about all issues concerning such orders, including settlement advantages and the public interest, and to secure the client's consent to oppose the entry of such orders. It is our experience that clients who understand the public harm that may result from protective orders and sealed settlements will be more likely to oppose them.

When agreeing to a protective or secrecy order, every effort should be made to limit the scope of its provisions. Plain-

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tiffs' counsel should avoid being prohibited from discussing anything but the designated protected materials with other attorneys, plaintiffs in similar situations, and the press.

Judicial involvement in these orders also raises serious questions about the proper role of courts in determining whether the public interest requires a judge to interfere with the interests of parties to the litigation. Although the public interest in access to court records is well-recognized, the judiciary has little guidance in deciding whether to thwart a settlement agreement that requires secrecy when the public interest may be affected.

Since agreed-to protective orders remain subject to collateral attack and further modification by the trial court, interested nonparties can always challenge such orders. In the absence of interested intervenors, however, a trial judge is at a disadvantage to determine the impact a protective order will have on the public interest.

Typically, settlements that include a secrecy provision are generous to the plaintiff and include a consideration for the plaintiff's agreement to seal court records and production documents. Under such circumstances, a court that is independent of specific guidelines is not likely to judge ad hoc that the public interest outweighs the parties' interest in settling for a fair amount—or the ever-present judicial interest in the economy and the expediency of the settlement process.

State Statutes

In response to this judicial guarding, two states have recently adopted guidelines for the sealing of court records. Texas Rule of Civil Procedure 76(a) provides a detailed standard for the sealing of court records, requiring that good cause be shown for every order. It requires the judge to consider the strong public policy interest long recognized in common law for granting general access to court records.[10]

The Texas rule essentially clarifies and requires active judicial participation in decisionmaking about protective and secrecy orders. But Florida's Sunshine in Litigation Act weighs more heavily on the side of disclosure, removing the protection of secrecy of "information or materials necessary or useful to the public regarding the public hazard," irrespective of the commercial value of such information.[11] Enacted in 1990, the Florida act prevents courts from entering orders concealing information concerning any public hazard regardless of whether the information constitutes a trade secret.[12]

The procedures of both states effectively protect the public and blunt the economic and practical leverage exerted by defendants for imposing protective and secrecy orders. Both reiterate the long established purpose of court secrecy as a device to protect competitive economic interests only, rather than to avoid liability for defective and hazardous conditions by perpetrating public ignorance of their danger. By clarifying the judicial responsibility for court secrecy and placing public safety and interest paramount, both the Texas and the Florida procedures provide sound and reasonable standards for sealing court records.

Rule 26(c) of the Federal Rules of Civil Procedure and corresponding state provisions should be similarly amended. Uniform recognition by court rules of the important interest of the public's access to information regarding defective products and hazards generated through discovery procedures will limit court-imposed secrecy to its originally intended purpose. □

Notes

1 In re Agent Orange Prod. Liab. Litig., 104 F.R.D. 559 (E.D. N.Y. 1985).
2 Brown & Williamson Tobacco Corp. v. F.T.C., 710 F.2d 1165, 1179-81, *reh'g denied*, 717 F.2d 963 (6th Cir. 1983).
3 Parsons v. General Motors Corp., 85 F.R.D. 724, 726 (N.D. Ga. 1980); Waelde v. Merck, Sharp and Dohme, 94 F.R.D. 27, 29 (E.D. Mich. 1981).
4 In re Upjohn Co. Antibiotic Cleocin Prod. Liab. Litig., 81 F.R.D. 482, 486 (E.D. Mich, 1979), *aff'd*, 664 F.2d 114 (6th Cir. 1981); American Tel. & Tel. v. Grady, 594 F.2d 594, 596 (7th Cir.), *cert. denied*, 440 U.S. 971 (1979).
5 Wilson v. AMC, 759 F.2d 1568, 1571 (11th Cir. 1985).
6 *See, e.g., id.*; Olympic Ref. Co. v. Carter, 332 F.2d 260, *cert. denied*, 379 U.S. 900 (1964).
7 Mokhiber v. Davis, 537 A.2d 1100 (D.C. Cir. 1988).
8 Williams v. Johnson & Johnson, 50 F.R.D. 31, 32 (S.D. N.Y. 1970); Patterson v. Ford Motor Co., 85 F.R.D. 152 (W.D. Tex. 1980).
9 Ward v. Ford Motor Co., 93 F.R.D. 579, 580 (D. Colo. 1982); Cipollone v. Liggett Group, Inc., 113 F.R.D. 86, 92-93 (D. N.J. 1986) *aff'd*, 822 F.2d 335 (3d Cir.), *cert. denied*, 484 U.S. 976 (1987); In re Halkin, 598 F.2d 176 (D.C. Cir. 1979), *aff'd*, Halkin v. Helms, 690 F.2d 977 (D.C. Cir. 1982).
10 TEX. R. CIV. P. 76 (a)(1). For a detailed discussion of Rule 76 (a), see Doggett, *Keeping Court Records in the Open—Texas Supreme Court Adopts New Rule*, TRIAL, July 1990, at 62.
11 FLA. STAT. §69.081 (7) (1990).
12 *Id.* at 69.081.

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January 27, 1992

Representative Dave Donley
Room 122, Capitol
P.O. Box V
Juneau, AK 99811

Re: HB 171

Dear Representative Donley:

This letter is to express my support for House Bill 171 introduced last session by the Alaska House Judiciary Committee.

I believe that a bill which prohibits sealing court records to conceal public hazards should be a high priority. The public has a right to know of the dangers of any defective products which could result in injury. Likewise, professionals should not be able to continue practicing without having to account to the public for providing substandard services.

In the past several years, I have been involved in two cases where the sealing of court records deprived the public of its right to know. In one instance, documents proving that State Farm Insurance Company takes advantage of its own insureds by routinely denying payments under medical pay provisions were returned and suppressed by stipulation because of the protection practice problem. In the second case, documents which proved that the Chrysler Volare was manufactured with defective headrests resulting in my client receiving a broken neck in a low speed collision, were also ordered returned and the amount of the settlement was suppressed.

Please give this matter your consideration and support.

Very truly yours,

MALONEY & HAGGART

P. Dennis Maloney

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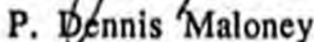

HB 171: SECRECY OF PUBLIC HAZARDS

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.

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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.

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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.

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Michael Schneider, Vice Chair

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Paul Cossman
Dan Hensley
James Pentlarge
Marcus Paine
Christine Schleuss
Richard Friedman
Joe Kalamarides

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

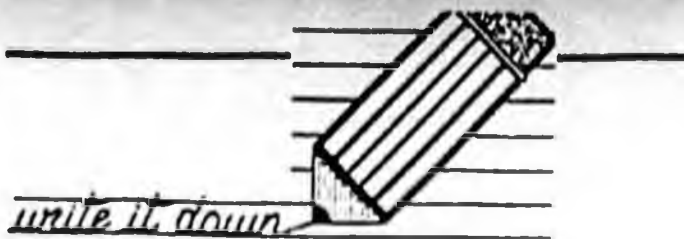
More Bills Introduced in the House. On October 8th and October 17th, 1991, similar bills to provide economic incentives to promote the development of alternative dispute resolution systems for medical malpractice claims were introduced in the House and Senate, respectively. The bills -- H.R. 3516 and 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**
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Dick Harren	**Vincent Vitale**
Jeff Jefferson	**Bob Wagstaff**
Kelly, Cossman & Associates	**Russ Winner**

THE ALASKA TRIAL LAWYER

Volume 7, Number 10 | Published by The Alaska Trial Lawyers | December 1991

PRESIDENT'S COLUMN

by Paul Cossman

I recently got a call from an editor at the Anchorage Times seeking information about tort reforms. Apparently, they will be publishing some opinion pieces about the 1987 initiative proposal to limit contingency fees. For those of you who may have forgotten, that part of the tort reform initiative was stricken by Lt. Governor Steve McAlpine as unconstitutional. The Citizens Coalition for Tort Reform filed a lawsuit in which we intervened. After prevailing through the Supreme Court, we were awarded attorney's fees against the Citizens Coalition for Tort Reform.

The Citizens Coalition for Tort Reform is now known as Alaskans for Liability Reform. Their acting Executive Director is Al Tamagni. Tamagni was one of the original founders of the Citizens Coalition back in 1985-86. I went to one of the board meetings of the Citizens Coalition back in '86 and found him to be one of their most rigid doctrinaires.

This would all be ancient history except for the fact that the tort reformers are again trying to sway public opinion through the media. Why are they bringing up such a dead issue?

The most likely scenario is that the tort reformers are gearing up for a major offensive in the event that redistricting presents us with a Republican majority in both houses of the Legislature. Our marching orders appear to be pretty clear. First, we must make sure that the House retains its Democratic majority. Second, we much once again ready ourselves for a public opinion fight on the issue of tort reform.

TRUST REPORT:

SUNSHINE IN LITIGATION: AN IDEA WHOSE TIME HAS COME

by Russ Winner, Chair

Trial Lawyers for Public Justice initiated a national campaign against secrecy in the courts in October of 1989 by seeking public access to documents under seal in a landmark $5.7 million all-terrain vehicle (ATV) case in Oregon. Announcing the establishment of "Project Access" to fight court secrecy nationwide, TLPJ challenged a protective order in Oberg v. Honda, Case No. A8709-05897 (Cir. Ct. Ore. February 21, 1990), the first case to award punitive damages against an ATV manufacturer. Project ACCESS has since helped injured consumers, their lawyers, the press and the public gain access to information about dangerous products, environmental hazards and other matters of public significance.

Here in Alaska, the House Judiciary Committee, chaired by Representative Dave Donley (D., Anchorage), introduced HB 171 last session, a bill restricting court orders and certain private agreements relating to the concealment of public hazards. The bill is currently before the House State of Affairs Committee. Representative Gene Kubina (D., Valdez) is chair of that committee. As would be expected, big business, industry and oil companies and civil defense lawyers have voiced opposition to this bill. Paul Cossman, a Trust steering committee member, and I met recently with Representative Kubina to discuss our reasons for supporting this bill.

In an opinion piece for the Anchorage Times this past May, Mary Nordale, representing the interests of the American Insurance Association, wrote that HB 171 would "destroy the courtroom as a place in which to settle disputes. It would lead to...blackmail against target defendants." She even went so far as to predict that passage of the bill would close "the local hardware store" and people would lose jobs. A little extreme? Read on.

Kathryn Kolkhorst, representing the Motor Vehicle Manufacturers Association and Lawyers for Civil Justice, testified before the House State Affairs Committee last session in opposition of the bill. Ms. Kolkhorst testified that passage of HB 171 would interfere with the state court system and tie the hands of judges and that the real reason behind this legislation was to allow plaintiff's lawyers to perpetuate the litigation explosion and generate additional contingency fees.

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THE ALASKA TRIAL LAWYER

Alaska Academy of Trial Lawyers

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EDITOR'S NOTE

Articles contributed to *The Alaska Trial Lawyer* are welcome at any time. Please submit to:

The Alaska Academy of Trial Lawyers
P.O. Box 102323
Anchorage, Alaska 99510.

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ACADEMY CONTRIBUTORS

The Alaska Academy of Trial Lawyers publishes its current contributors in *The Alaska Trial Lawyer* in recognition of their commitment to the goals of the Academy. To inquire about becoming a monthly contributor, contact Debra Gravo, Executive Director, at 258-4040.

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Dennis Mestas
W. Michael Moody

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Terry Aglietti
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Don Johnson

Do you know anyone who is a member of the Alaska Academy of Trial Lawyers, but not an ATLA member? If so, please encourage them to join ATLA. It is ATLA and its energized membership and consumer group allies that prevent the erosion of important legal and civil rights. For more information and an ATLA application, call Debra Gravo at 258-4040.

Got a complaint? A compliment? A clarification? A burning issue to discuss? Write us! Letters to the editor are encouraged and welcome. We reserve the right to edit for space considerations. Send your comments to: The Alaska Academy of Trial Lawyers, P.O. Box 102323, Anchorage, Alaska 99510.

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.

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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.

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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.

ALASKA ACTION TRUST STEERING COMMITTEE

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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

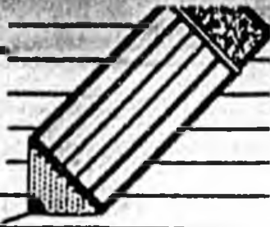
More Bills Introduced in the House. On October 8th and October 17th, 1991, similar bills to provide economic incentives to promote the development of alternative dispute resolution systems for medical malpractice claims were introduced in the House and Senate, respectively. The bills -- H.R. 3516 and 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

IF YOU SEE THESE MEMBERS, STOP THEM AND SAY "THANK YOU"

Preserving the jury system, promoting victims' rights and protecting our ability to practice personal injury law carries with it a big price tag. The Alaska Action Trust could not exist without the generous monthly contributions and commitment of the following members. To inquire about becoming a monthly contributor, contact Debra Gravo, Executive Director, at 258-4040.

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MOMENTUM GAINED FOR PRODUCT LIABILITY

Product liability reform has been upstaged by solvency, the single biggest insurance issue of the year.

Although lost in the midst of congressional and consumer calls for greater scrutiny of insurers, product liability reform nevertheless remains a perennial battle.

Reform proponents, including businesses and many of their insurers, call for passage of House and Senate bills that would pre-empt state product liability laws and establish federal rules.

Would-be reformers face an uphill march in the 12-year-old battle. Introduced often, reform, despite its formidable corporate backing, has never gained enough votes to pass because of overwhelming consumer opposition.

"Federalizing products law is not a good idea," said Roxanne Barton Conlin, president-elect of the Association of Trial Lawyers of America. "It's a bad law. It's just not going anywhere. No chance. The federal product liability bill is an effort on the part of manufacturers to get themselves exempted when they make defective products that hurt people."

For instance, Senate Bill 640, the Product Liability Fairness Act of 1991, calls for the victim to pay attorney fees and costs of the opposing party if the victim refuses a settlement offer that turns out to be greater than that awarded in a verdict. Furthermore, the bill increases the victim's burden of proof by requiring "clear and convincing" evidence that the defendant's conduct "manifested a conscious, flagrant indifference" to public safety.

The bill also establishes a defense against punitive damages for drugs and medical devices that have government approval, as long as there was no fraud in obtaining the approval and no bribery of government officials, according to a summary of the bill prepared by the Product Liability Alliance, a coalition of businesses.

WELCOME!!!

The Alaska Academy of Trial Lawyers welcomes Jeffrey Mayhook and David Weber as new sustaining members.

A BANK WITH LOTS OF INTEREST

Our Deposition Bank is an invaluable tool to the trial lawyers, but we need your help to keep us up to date.

Send us your latest briefs and most recent transcripts on experts — doctors, economists, engineers, etc.!!!

The Academy currently has copies of depositions of the following individuals:

- John William Aker — manager of the Yakutat Fisherman's Cooperative
- Martha Andrew — rehabilitation consultant
- William Bell — family practice physician
- David Bickerstaff — Milliam & Robertson Inc.; casualty actuarial team
- Joe Blackard — road builder
- Richard Block — director, Division of Insurance, Department of Commerce & Economic Development for the State of Alaska
- Freda Marie Borchick — property owner in Juneau
- J.C. Borchick — property owner in Juneau
- George Brown — orthopedic surgeon
- Charles Chandler — d/b/a Chandler Sporting Goods & Hardware in Juneau
- Virginia Collins — certified rehabilitation nurse and certified rehabilitation counsellor
- Lawrence Dempsey — neurosurgeon
- William Maurice Dickson — biology, commerical fishing, guiding, flying, mostly land development (Stephan, et al. v. Nelson, et al.)
- Edward J. Dierick — State Department of Transportation & Public Facilities, superintendent of airport and highways in Yakutat
- J. Paul Dittrich — orthopedic surgeon
- Betty Eneboe — registered nurse
- Paul Eneboe — family practice physician
- Ken Fallon — social worker at the Langdon Clinic
- Terrance Gallagher — Magistrate for the State of Alaska at Yakutat, cook for the Yakutat School System, commercial fisherman
- George Gates — orthopedic surgeon
- Karl A. Hahn, Jr. — claims superintendent for State Farm
- Frank Harrison — Chancellor at UAA
- Christopher Horton — orthopedic surgeon
- Gregory Jerue — d/b/a Capital Decorators, contractor in Juneau
- Sidney Michael Johnston — controller for Stephan and Sons, Inc. (Stephan, et al. v. Nelson, et al.)
- Vincent Jolivet — financial and economic consultant (two volumes)
- William Judson King — accident reconstructionist and human factors expert
- David R. Knowles — consulting economist
- Donald Koch — Division of Insurance
- J.R. Langdon — psychiatrist
- William C. Lange (Vols. 1 and 2) — businessperson (Petro Marine Service v. Lange, et al.)
- Tina Long — works at the Airport Lodge
- Richard Maness — cashier at the Bank of Columbia Falls, Columbia Falls, Montana
- John McCarthy — dentist
- Polly March — claims representative for State Farm
- Lama Martin — firearms expert
- Ronald A. Martino — psychiatrist and neurologist
- Mary Moran — vocational counsellor for worker's comp claims
- Thomas Mungle — homeowner in Juneau (Paddock v Ulery)

- Bill Nelson — d/b/a Nelson and Associates (Stephan, et al. v. Nelson, et al.)
- Michael Newman — orthopedic surgeon
- T.O. Paddock — d/b/a T.O. Paddock, contractor in Juneau
- Thomas Parke — Chief of the Fisheries Tax Division, Department of Revenue for the State of Alaska
- Dr. David E. Peach — physician of internal medicine
- Lynn Ravsten — professor of psychology
- Donald R. Rogers, M.D. — pathologist
- Irvin A. Rothrock, M.D. — child and forensic psychiatrist
- William B. Ruger — President of the Sturm Ruger Company Inc, manufacturers of firearms
- David D. Sandberg — licensed psychological associate for Ohlson Psychological Services
- Joseph A. Shields, M.D. — orthopedic surgeon
- Gary D. Sloan, Ph.D. — human factors and ergonomics expert in Washington state
- Douglas Grant Smith, M.D. — orthopedic surgeon
- Reid H. Smith, — President of Norther Adjusters (court transcript, Vol. IV in Weiford v State Farm)
- David J. Sperbeck, Ph.D. — clinical and forensic psychologist
- Dennis Spurrier — police officer
- Craig Stewart — first grade teacher for the Yakutat City School
- John Talbott — forensic engineering expert (three volumes)
- Daniel R. Ulery — general contractor, in partnership with Greg Jerue
- Thomas P. Vasileff — orthopedic surgeon
- Edward M. Voke, M.D. — orthopedic surgeon
- Thomas R. Wickwire — attorney for the Attorney General's Office, Civil Section in Fairbanks

Other documents include:
Documents relating to roll-over protection.
Plaintiff & defendant exhibits in the Weiford case.
Jury instructions in the Weiford case.
McClellan: briefing on a motion to compel plaintiff to appear for a psychiatric exam in a personal injury case.
Dunaway: briefing on joint & several liability in Alaska and concurrent tortfeasors as indispensable parties; we also have an order from a case in southeast Alaska (Owens) which addresses the interpretation of the new several liability statute and comes to conclusions slightly different than those arrived at by Judge Fabe in this case.
Racine: briefing on punitive damages and lost profits in a tort claim for breach of a professional contract of employment.
Kulawik: Supreme Court briefs dealing with the question of (1) recovery of lost inheritance damages in wrongful death cases and who may recover those lost inheritance damages, and (2) the application of the income tax rules in Beaulieu to wrongful death cases.
Matlock: briefing on official immunity.
Vincent: application of Alaska's good Samaritan statute to a hospital emergency room.
Mellott: briefing on the statute of limitations discovery rule in medical negligence cases.
Davis: Superior Court brief on discretionary immunity for road design decisions involving crosswalk striping and warning signs.
Chi: briefing on an insurer's reservation of rights triggering the insured's right to independent counsel.
Shaw: briefing on a motion to compel plaintiff to submit to Rule 35 examination.
OK-Sun B. Preisinger: briefing in insurance bad faith case where defendant seeks unrestricted medical release from plaintiff.
George: defenses to liability under 42 U.S.C. section 1983 based on (1) the fact that state law affords an adequate remedy and (2) qualified immunity.
Baptiste v. Blumenshine: recent 1st Judicial District DWI case with various trial court rulings pertinent to personal injury cases, in particular, the automobile case; trial court decisions and orders re: punitive damages, comparative negligence, comparative negligence - punitive damages; discovery and discovery sanctions, evidence and hedonic damages.
Hughes v. Harrelson: briefings on statutory interpretation of A.S. 28.20.440 in conjunction with A.S. 2[illegible].89.020 and 28.22.010(d); the argument made is that the statutory language of these statutes compels payment of prejudgment interests in addition to the face amount of the policy.

LETTER TO THE EDITOR

Dear Editor:

Re: Pre-trial rulings in Baptiste v. Blumenshine

This recent First Judicial District DWI case was an opportunity to secure trial court rulings from Judges Carpeneti and Weeks on a number of issues common to personal injury cases, in particular, the automobile case. Some of the issues were unsettled in Alaska, others were more limited and unique to the facts.

The issues and holdings [are summarized below] . . .

Pleadings

1. Punitive Damages:

A defendant's conduct in driving while intoxicated is so reckless and wanton that plaintiff is entitled as a matter of law to plead and argue to the jury a claim for punitive damages.

2. Comparative Negligence:

Defendant's conduct in driving while intoxicated is not so reckless and wanton that he is prohibited from arguing plaintiff's comparative negligence. Plaintiff argued under McLemore v. Harris (a pre-Kaatz case) that pure comparative negligence was not applied when a defendant's conduct was wanton, reckless or intentional.

3. Comparative Negligence - Punitive Damages:

Even though one pure comparative negligence is applied in a DWI case and a defendant can argue plaintiff's negligence, if any, in the accident, the negligence of a plaintiff is not applied to reduce a punitive damages award.

4. Discovery:

Plaintiff was entitled to:

a. All insurance company records (except those pertaining to liability and settlement value of the case) before defense counsel advised plaintiff he was representing the defendant. The insurance company had on-going contacts with the attorneys in the defense firm for several months, but none of these attorneys, including the future defense attorney, advised plaintiff they were representing defendant or the insurer. All insurance company records generally (with the exception previously noted) therefore had to be produced, until the defense noticed its representation.

b. Plaintiff was entitled at deposition to inquire whether the defendant ever talked to another lawyer independent of his then attorney regarding an offer of judgment made by plaintiffs.

5. Discovery Sanctions:

Defendant's seat belt expert was struck as a witness for failure to release the expert's report until the day of the deposition. Plaintiff has been asking for the report for almost a year and defense counsel had expressly denied in pleadings and on the record at a deposition that no such report existed.

6. Evidence:

Defendant's history of driving while intoxicated was admissible on the issue of culpability when the jury considered whether to award punitive damages. However, defendant was entitled to introduce rehabilitation evidence after the collision to establish that an award of punitives was not appropriate.

7. Hedonic Damages:

Stan Smith, an economist and plaintiff's hedonic damages expert, was admitted over defense objection and allowed to testify to the value of a human life to assist the jury in addressing pain and suffering damagers (loss of enjoyment of life). Plaintiff's psychologist, however, was not permitted to testify on the degree (or percentage) to which plaintiff's loss of enjoyment had been impaired as a result of permanent injuries from the collision.

Very truly yours,

Loren Domke

The above materials are available at the Academy office.

WORKERS' COMPENSATION EXCLUSIVITY: IS IT HERE OR IS IT GONE?

by Vivian Senungetuk

"Workers' compensation claimants have sued compensation insurers in more than 30 states, alleging a panoply of torts, including willful failure to pay compensation, unreasonable delay designed to force an unfair settlement, intentional infliction of emotional distress, malice, deceit, misrepresentation, and outrageous conduct and conspiracy in the handling of claims.

Compensation insurers defend on the ground that the exclusive remedy provisions in the state workers' compensation statutes preclude these actions. They argue that all disputes between injured employees, employers and compensation insurers must be presented to the state board or commission that administers the workers' compensation system and makes the award. They contend that the penalty provisions of the statutes provide the remedy for both intentional and unintentional denial or delay in the payment of benefits.

Courts hold that mere delay in the payment of compensation benefits is indeed a matter to be addressed within the workers' compensation system. When, however, claimants allege malice and outrageous conduct that causes physical damage or emotional distress, the courts are in disagreement. In some jurisdictions, tort actions may lie against the workers' compensation insurance carrier. In others, suit against a carrier is barred, except when it commits an unlawful or egregious act, such as breaking into the claimant's home or dating the claimant to obtain personal information.

There does not appear to be a national trend, either toward permitting a common law action or toward barring one. Most of these cases have appeared in the last few years, although there is a relevant decision in New York as early as 1935. Suit is permitted in some jurisdictions when damage to the plaintiff appears minimal; in others, it is barred when damage is severe. In jurisdictions where suit is barred, the courts declare their intention to preserve the integrity of the workers' compensation system. In jurisdictions where suit is permitted, the courts simply allow an alternative forum for the aggrieved claimant."

The above paragraphs are taken from an article published in the October 1991 issue of the Defense Counsel Journal.

The 16 page article is a national survey which attempts to cite and describe every reported bad faith claim against a workers' compensation carrier, through 1990. It lists thirty-two states and two federal statutes. The case law covers such fascinating topics as:

- whether a bad faith claim can defeat subrogation of a recovery for a manufacturing defect (Alaska): it can.

- the reliability of motion picture evidence (California): pretty good.

- differences in the standard of care in first party v. third party claims against insurers (Colorado): significant.

- the exclusivity bar in asbestos cases (Delaware): allege collusion.

- a carrier's duty to raise available defense to a garnishment for child support (Georgia): deadbeats from hell.

- third party action under the Structural Work Act (Illinois): potential.

- Insurer's conspiracy with physicians (Arkansas, Florida, Indiana and New York): tell it to the Board.

The article concludes:

"Even in jurisdictions in which courts are attempting to uphold exclusivity provisions of the workers' compensation system, when employees present evidence of truly egregious conduct by workers' compensation insurers, bad faith claims are being recognized. What may strike one court as egregious may not impress another in the same way. In California, for instance, it's an investigator filming his date at Disneyland. In Arizona it's a carrier defying the order of an administrative law judge.

Within this decade of the 1990s, the exclusivity barrier may be broken in every jurisdiction. But the barrier is not falling like the Berlin Wall. An employee usually must present compelling evidence of bad faith before a first party claim against a compensation carrier will be recognized, and it still will be recognized as an extraordinary remedy."

Copies of Vivian Senungetuk's entire 16 page article can be obtained from the Academy office by calling 258-4040.

AMERICAN HEALTH CARE IN CRITICAL CONDITION

The cover story of the November 25th issue of gets to the heart of what troubles and costs Americans the most right now: health care.

The article recites several mind-boggling facts. For example, Americans spend $23,000 a second on medical care, more than $2 billion a day, $733 billion a year. Last year General Motors spent more on medical coverage than on steel. And the subject of health care has become a litmus test of American politics.

After a diagnosis of several troublesome areas, the article offers 10 solutions to 10 of the most important problems surrounding the American way of medical care.

In addition to pertinent problems like medicaid and medicare, fraud and abuse, disappearing doctors, the hospital glut, fairness and waste, two problems are particularly noteworthy. They are, physician compensation and unnecessary care.

The Problem: Physician Compensation

In the days when patients paid doctors from their own pockets, doctors were cautious about the amount of medical service prescribed and the charges levied. Doctors knew their decisions could devastate a family's finances. Besides, patients balked at unreasonable prices. However, over the past 40 years, as vast insurance pools were created through company benefits plans and the huge Medicaid and Medicare systems, cost concerns diminished.

Under such circumstances, insurance is like a blank check. Research shows that doctors paid in fee-for-service programs order 50% more electrocardiograms and 40% more X-rays than physicians in managed-care groups. Some doctors attend seminars on "creative billing," where they learn to describe medical treatment in terms that will yield the highest prices. When auto-repair shops or lawyers do that, it's called padding the bill. For doctors, it's known as "unbundling." Some maintain that physician "unbundling" is done in the spirit of Robin Hood, overcharging people with good insurance in order to charge less for the treatment of poorly covered patients. In any event, it seems the medical establishment is winning the accounting war.

The Solution: Cap Physician Fees (or Managed Care)

The authors contend that group insurance providers should insist that doctors treating their patients be paid salaries or flat fees. Such a system is already employed by many HMOs, which charge group-insurance plans an annual fee for treatment and produce dramatic savings. Treating over 40 million Americans last year, HMOs cost an average of 17% less than the cost of traditional indemnity plans.

The Problem: Unnecessary Care

The article contends that unnecessary care is fueled by "fear of malpractice lawsuits" which in turn drives doctors to perform many extra procedures to protect themselves against accusations of negligence. The A.M.A. estimates that defensive medicine adds $21 billion to the U.S. health-care bill every year. Others believe the cost is several times that. Some reformers insist that juries in malpractice cases share the blame by punishing doctors not only for shoddy practice but also for their human limitations.

On the other hand, many doctors and hospitals overtreat patients simply because they have a blank check to do so under many insurance programs. Some figures contend that 20% of all medical procedures and treatment is completely unnecessary. Many doctors challenge such findings, arguing that it is better to be safe than sorry.

The Solution: Cap Non-Economic Awards

The article advocates capping non-economic awards in malpractice cases. The authors cite California has having one of the lowest malpractice premiums in the U.S. because of placing a limit on such awards in 1975 ($250,000 cap on pain and suffering). No data is given to back up that claim however.

NEW STUDY SETS RECORD STRAIGHT ON PUNITIVE DAMAGES AWARDS

A landmark empirical study on punitive damages awards in products liability cases has confirmed that punitive damages rarely penalize corporations that take reasonable precautions.

The study, *Setting the Record Straight*, was conducted by Michael Rustad, professor of law at Suffolk University, and Thomas Koenig, professor of sociology at Northwestern University. The research was supported by a grant from the Roscoe Pound Foundation, which is publishing the results this year.

Rustad and Koenig tracked punitive damages verdicts in products liability litigation during the last 25 years. They analyzed the relationship between amounts awarded by a court and those actually received by a plaintiff. They found that few manufacturers were assessed punitive damages unless they had prior knowledge of a known risk that they failed to correct.

"The typical plaintiff was permanently disabled or killed by a product known by the manufacturer to be unnecessarily hazardous," note the authors.

A conclusion that can be drawn from the study is that the impact of punitive damages on competitiveness is minimal. According to the authors, the collected data show that "punitive damages are rarely awarded, even more rarely collected, and in the vast majority of cases, richly deserved."

The Academy hopes to have these findings available to interested members the beginning of the new year.

COULDN'T ATTEND DEFENSE CONFERENCE '91? THE COURSE MATERIALS CAN STILL BE YOURS!

Just because you couldn't make it to the Criminal Defense Conference this year doesn't mean the course materials are off limits. For $75 a complete copy of the materials are available to you. But hurry! We have already received many requests for copies, and more are sure to follow.

Each binder includes the following:

- "Opening Statements by a Defense Attorney in a Criminal Case" and "Cross Examination," by Terence F. MacCarthy.
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- "Client Preparation and Direct Testimony" and "Acting For Lawyers - Welcome to the Theater of the Absurd," by Dale T. Cobb.
- "Experts: Can You Use Them or Only Abuse Them?" by Bert Nieslanik.
- Class Materials for Lecture by Charles V. Morton (Forensic Scientist)
- Class Materials for Lecture by Dennis G. Fitzgerald (Lawyer, Investigator)

Call the Academy office at 258-4040 for your notebook today!

Invite a Friend to Join The Academy

THE ALASKA TRIAL LAWYER

MAKE A DIFFERENCE . . .

VOLUNTEER!

The second session of the 17th Legislature begins Monday, January 13th, 1992. During every legislative session the Academy office receives numerous inquiries from legislators and their staff, requesting input from trial lawyers on various pieces of draft legislation. Typical areas of concern are: civil liability issues, workers' compensation, auto insurance issues, insurance reform in general, secrecy orders, medical malpractice issues, criminal law issues and changes in rules of civil procedure. Oftentimes, the legislator wants to have a one-on-one conversation with a trial lawyer. Other times, written or verbal testimony regarding the bill and/or issue is needed. The Alaska Academy of Trial Lawyers and Alaska Action Trust are looking for volunteers within the two organizations to provide this invaluable input. If you are interested in making a difference in the legislative process, please call Debra at the Academy office, 258-4040, and sign up to be a volunteer.

Our January dinner speaker will be Dr. Paul Craig. Dr. Craig will talk about the mechanics of brain injuries, recognizing when a client has brain injuries, the treatment of brain injuries and presenting evidence of brain injuries. This should be an informative evening so plan now on attending.

Attorney challenging constitutionality of Alaska's new "Pot Law" wants to hear from others who have or plan to – for exchange of ideas and research. Contact Dan Wayne, 130 Seward Street, Juneau, Alaska, 99801. Telephone 907/586-2770.

FEAR McCARRAN REPEAL WILL JAR INSURANCE TRADE

According to a recent article in the *Journal of Commerce*, congressional scrutiny of the insurance industry's regulatory framework has prompted some industry groups to back off from their long standing opposition to changes in the McCarran-Ferguson Act.

However, the National Association of Independent Insurers, an industry group representing about 560 property/casualty insurance companies nationwide, will not follow suit. It refuses to accept any modifications in the act, the 46-year old legislation providing the industry with state regulation and a limited antitrust immunity.

Examination of the insurance industry's regulatory status began with the publication of a report issued in November 1989 by the General Accounting Office. The report seriously questioned whether the state regulatory system adequately safeguards consumers.

As evidence to support its case, the GAO cited an alarming escalation in insurance company insolvencies throughout the last decade.

A congressional research agency, the GAO issued two additional reports this past May that added momentum to the effort to re-regulate the industry. Both were harshly critical of state procedures to regulate insurers for solvency.

EXPERT WITNESS FILE NEEDS YOUR CONTRIBUTIONS!!!

The Alaska Academy of Trial Lawyers is in the process of updating our expert witness file. The file currently consists of several local and out of state experts.

We are asking members to submit names of experts they have used in litigation and/or know to be reliable. We are seeking experts in a wide variety of areas: medicine, economics, all areas of engineering, automotive and marine design, highway safety, aviation, product liability, etc.

If you know of expert witnesses who might like to be listed in our file, please submit the following form to:

The Alaska Academy of Trial Lawyers
P.O. Box 102323
Anchorage, AK 99510

Each expert will be contacted to ensure that s/he is willing to be included in the file before any referrals are given.

EXPERT WITNESS REFERRAL FORM

Name of Member Making Referral ______________________________

Name of Expert ______________________________

Type of Expert ______________________________

Expert's Phone Number ______________________________

Expert's Address ______________________________

City, State, Zip ______________________________

Area(s) of Expertise ______________________________

Comments ______________________________

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DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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FAX: (907) 463-5295

April 25, 1991

The Honorable Gene Kubina
House of Representatives
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Re: House Bill 171

Dear Representative Kubina:

You have requested the Department of Law to provide the House State Affairs Committee with comments on the legal effects of House Bill 171. We have reviewed the bill and are concerned that, as now drafted, it may create considerable legal difficulties for the state.

House Bill 171 attempts to limit courts' abilities to enter confidentiality orders as to "public hazards." It defines a "public hazard" broadly to mean "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 primary difficulty with the bill is with the first provision where it states broadly 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." This language, in conjunction with the definition of "public hazard," can have very broad ramifications. For example, in the environmental litigation area, it might have a chilling effect on the provision of information concerning the existence or effects of pollution by a confidential informant.

In the Exxon Valdez litigation, there is currently at issue a request to keep confidential the identities of respondents to a survey done of individuals affected by the oil spill. Although the state is not directly involved in this dispute, we support this request for confidentiality at the request of several of our client agencies. The survey at issue involves very personal information such as the use of alcohol and the presence of domestic friction in households. The agencies are concerned that if these

identities are made public, there will be a great reluctance on the part of the villagers to fully participate in state resource surveys in the future. Under the proposed bill, a court would be without authority to enter an order protecting that confidentiality.

With respect to the state's specific interest in environmental cases such as the Exxon Valdez litigation, we are concerned as to the potential impact of the bill on expert work-product. While part (b) of the proposed bill restricts itself to discoverable material, part (a) does not and could be misconstrued to require a court to order the production of attorney work product, such as expert reports. If so, it could put the state at a serious disadvantage in civil environmental prosecutions where the state bears the main brunt of the investigative work. In a worst case, it may inhibit the state or a private entity from fully investigating the effects of an oil spill or other environmental problem. The relationship of the proposed statute to Civil Rule 26(b) protections should be made more explicit.

Other problems may arise where this proposed statute conflicts with statutory or traditional notions of privacy. For example, it is unclear how the prohibition against entering an order which has the effect of concealing "information concerning a public hazard" would interact with a statutory requirement of confidentiality as to personnel records, child in need of aid proceedings, archaeological information, or exploration well data. In the Exxon Valdez litigation, the parties have filed discovery requests with the state which require disclosure of the location of archaeological sites affected by the oil spill. It is our intention to ask the court for a protective order based on federal law which restricts the public dissemination of that information. On their face both (a) and (b) of the proposed bill would prohibit the court from entering the requested order. Although such a result seems unlikely, the potential conflict could be easily avoided by the inclusion of language similar to that found in AS 09.26.120 which provides an exception to public records disclosure provisions for "records required to be kept confidential by a federal law or regulation or by state law."

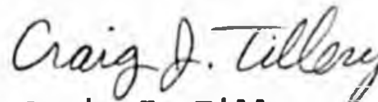
In other instances there may be information, such as trade secrets relating to the composition of a chemical compound, which technically concerns a "public hazard" but whose possible deleterious effect is so outweighed by the potential commercial damage done by disclosure that no reasonable person would view disclosure as prudent. In some instances, the publication of information which concerns a "public hazard" may interfere with an ongoing law enforcement investigation or disclose confidential techniques and procedures for law enforcement investigations or

prosecutions which a court, in its discretion, would choose to protect. The bill as drafted does not allow a court to make these judgments.

In general, there are likely to be many instances where information that falls within the literal ambit of this statute should be kept confidential but, under the proposed language, a court's discretion to do so would be restricted. This committee should give careful consideration as to the full extent of the legal impacts occasioned by this broad restriction on the exercise of discretion by the court.

Sincerely,

CHARLES E. COLE
ATTORNEY GENERAL

By: 
Craig J. Tillery
Assistant Attorney General

CJT: md

cc: The Honorable Dave Donley
The Honorable Rick Halford

USA TODAY 1/30/92

Release of information 'never tells full story'

Defense attorney James Morris wants to know: "How public do you consider your diary? Or your medical records? Or your sexual habits?"

He considers that information "highly personal" and thinks the same privacy should apply to some court records of corporations and individuals.

"There is absolutely no constitutional right in this country" to information such as trade secrets, psychiatric records, tax, credit and business records or other personal data that could provide additional facts in a lawsuit simply because individuals or corporations become involved in litigation, Morris says.

Morris

He points to the silicone gel breast-implant controversy as an example of why such information — called "discovery information" — "never tells the full story and seldom tells the truth."

"When you look at the thousands of documents that will eventually be revealed, just releasing information piecemeal without hearing the whole story creates a potential prejudice to the public.

"Many plastic surgeons are upset over this limited information being revealed about the implants when thousands of women are exercising their free choice," he says.

The Richmond, Va., lawyer adds that it is judges who make the decision to seal court records, and not corporations or individuals. Among the things judges consider, he says, is whether the information is a danger to the public.

Morris agrees that there is information the public has a right to know, and says federal agencies are already in place to gather this type of information. But he argues that its dissemination should not tie up the courts and interfere with justice.

"If we can't have protective orders in civil justice cases and have to argue every single document of tens of thousands rather than agreeing to make them confidential, nobody would get the cases tried."

— *Sharon Shahid*

When courts keep secrets

USA Today 1/30/92

INTERVIEW

Justice Lloyd Doggett says that when court records are closed, sometimes what you don't learn can hurt you.

Q: Courts often seal records of legal cases from view. Both parties like it. So how can it hurt the public?

A: A wide range of consumer products have a tendency to cause injury. Information that is hidden in one state may have consequences that literally result in people being killed and maimed in other states because you can't have accident avoidance and recognition of dangers if you never hear about the danger in the first place.

Q: That apparently happened recently with silicone gel breast implants. What other products are involved?

A: Motor vehicles — the recurring problems with certain kinds of deficiencies in motor vehicles. Toxic waste issues. It may not be an individual toxic waste problem, but recurring from dumps perhaps owned by the same company in different parts of the country.

Q: How extensive is secrecy of court records?

A: It has become quite commonplace to the extent that even when any benefit of secrecy is very minimal, secrecy has become so easy to get that litigants are encouraged to ask for it. The attitude becomes, why not get secrecy because there might be something in here someday that we would want to hide?

Q: Some defenders of court secrecy say it encourages settlements. Does that ease the docket for judges?

A: It's fair to say if a judge has presented to him or her an order that has been approved by both parties, the judge is likely to sign off on it. One party is told they could get the discovery [documents] they want if they'll agree not to share them with anyone else. Often, out of a desire to serve the individual client, the attorney may agree to the secrecy order, and the judge signs off.

Q: Do judges also consider public-safety concerns? Or is that not a factor?

A: Rarely is there ever any effort by the court to consider the public interest if both parties have signed off. In fact, the Third Circuit Court in the Cipollone tobacco case, now before the U.S. Supreme Court, suggested that the trial court would be in error under the federal rules if the judge in New Jersey had considered the public interest rather than just the interest advanced by the parties.

Q: You were instrumental in making it more difficult to seal records in Texas. And a bill calling for similar action is being considered this week in California.

A: We thought it was so important to put in this rule that the court does have to consider the public interest and not just what the litigants want.

Q: But are there reasons to keep records secret?

A: If someone comes forward and has a specific, substantial interest and he can show it — a legitimate trade secret he wants to protect from a competitor — it is likely to be the kind that would justify secrecy.

Q: What ... that have their files sealed?

A: There are companies that, if they get a report of a problem with their product, may take steps to correct it. Then there may be companies that aren't sufficiently sensitive to public-health dangers and because of the tremendous economic benefit of continuing to sell a product that's been costly to market, they may not place a high priority on the first few reports that come through.

Q: Isn't there a way to punish companies that insist on making products they know will cause harm?

A: In debates I've had with opponents of openness, they insist we need to rely on our governmental agencies. The view espoused by those of us who believe in openness is a strong belief in individual rights rather than a continuing reliance on governmental action. The belief is if people are informed from adequate access to information, they could make their own decision.

Q: Do you see a trend toward more people becoming more responsible about this?

A: The only way to alter it is by changing the rules and changing the laws to require specifically that judges do their job of balancing the interest between secrecy and the public's right to know. And it's definitely a balancing process. There's no guarantee that in every situation, including every breast-implant situation, the public has a right to know everything. But what's happening is the public is losing by default because judges aren't doing the job of balancing; they're just signing off on what the parties agree. And that's got to be changed.

Lloyd Doggett has been a justice of the Supreme Court of Texas since 1989. He was instrumental in the implementation of Texas Rule Procedure 76a, which discourages secrecy in the public interest and requires that most civil-court records be open to the public. He was interviewed by USA TODAY's Sharon Shahid.

Doggett

How information stays hidden

USA TODAY 1/20/92

Protective orders

A judge can issue an order that allows lawyers to receive internal documents — generally from the defendant — on the condition that they not be shared with anyone else, including the press, safety regulators and attorneys for other clients.

Confidentiality settlements

Both sides agree to keep aspects of a lawsuit confidential, or companies offer a large settlement to keep sensitive documents from becoming public. That could include alleged defects in products, alleged causes of injury, defendants' names in medical malpractice suits or an amount paid in a settlement. Often, no admission of fault is part of settlement.

AP

SIOUX CITY CRASH: As part of a settlement two weeks ago with United over the July 1989 crash, lawyers for plaintiffs are barred from divulging details of the agreement.

Sealed court records

Judges may order all files of a lawsuit sealed from public view, which prevents access by the press, safety regulators, citizens interested in the case or other lawyers. Sometimes, even the names of parties in a suit can be dropped.

Some recent court cases involving secrecy:

Silicone breast implants: The Dow Corning Corp., maker of silicone gel breast implants, agreed last week to a request from the Food and Drug Administration to make public approximately 90 scientific studies and internal memorandums concerning implant safety. Those documents had been sealed in earlier settlements.

All-terrain vehicles: As part of $5.7 million award to a man who suffered brain damage from an accident in 1981 in Oregon, a protective order required defense attorneys to return documents to Honda and not reveal what the documents showed.

Jeep CJ-5: Several owners sued and won settlements for claims that the Jeep CJ-5 had a high center of gravity and narrow wheel base and as a result was unstable. But that apparent safety hazard was sealed from the public by the settlements.

AP

ZOMAX: Settlements sealed in cases on allergic reactions to pain reliever in which some died.

Alaska State Legislature

need for

April 3

House of Representatives
House Judiciary Committee
Chairman Dave Donley

P. O. Box V
State Capitol
Juneau, Alaska 99811
(907) 465-4990
(907) 465-4712

M E M O R A N D U M

TO: Representative Gene Kubina, Chair
House State Affairs Committee

FROM: Representative Dave Donley, Chair
House Judiciary Committee

RE: Request for hearing on HB 171, prohibiting secrecy agreements in lawsuits.

DATE: March 1, 1991

I would greatly appreciate it if you would schedule HB 171 for a hearing at the earliest possible opportunity. This bill would prohibit courts from ordering non-disclosure of information concerning "public hazards" and would render unenforceable private non-disclosure agreements executed to settle civil litigation.

Thank you for your attention to this request.

DD/hk

Alaska State Legislature

REPRESENTATIVE
MARK BOYER

VICE-CHAIRMAN
HOUSE FINANCE COMMITTEE

House of Representatives

FAIRBANKS

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119 NORTH CUSHMAN STREET
FAIRBANKS, ALASKA 99701-2879
(907) 456-0473

JUNEAU

STATE CAPITOL
JUNEAU, ALASKA 99801-1182
(907) 465-3466

January 31, 1992

P. Dennis Maloney
Maloney & Haggart
405 West 36th Avenue, Suite 200
Anchorage, AK 99503

Dear Dennis,

Thank you for your recent letter regarding HB 171, prohibiting sealing of certain court records. I hope that everything is going well with you.

As you are aware, this is a controversial issue in the legal profession. The bill is still in the House State Affairs Committee, its first committee of referral. The committee heard testimony on HB 171 last year but has not yet scheduled it for additional hearings this session. In speaking with Representative Kubina, he does intend to bring it back before the committee in February.

This legislation will not be coming through the House Finance Committee, of which I am a member. So at this point I can't comment on the merits of the bill. However, from your letter it sounds to me like a fairly straight forward consumer right-to-know bill and ought to move. Dennis, I know that you've written to other members and hopefully interested others in moving the bill along. I'll do what I can to stimulate the debate.

Thanks again for sharing your opinion with me.

Sincerely,

Mark Boyer
Representative

cc: Representative Dave Donley
Representative Gene Kubina

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

Breaking the seal on product liability

The civil court system, publicly funded and operated, often participates in keeping secret details of out-of-court settlements that involve products and companies that present risks to the public safety.

Legislation to break the seal and bring such consumer-safety information into the light of public scrutiny is not only welcome but overdue.

Often, the victims of mistakes and products of the companies against whom they bring suit must risk the expense and stress of a trial and the prospect of winning nothing, or settling for at least something by agreeing to keep the details of the settlement secret.

If they do settle and the court seals the records of that settlement, what of the other people who have been or will be victims of the same mistakes and products?

Rep. Marlin Appelwick, D-Seattle, is sponsoring legislation that would allow Washington to lift the veil of secrecy from product liability settlements.

The legislation would essentially require the civil courts to shift from an assumption of secrecy to an assumption of openness. The assumption would be that no information would be sealed unless it passed two fundamental tests.

The first would be that the sealing would involve no issue of repeated risk to the public. The second would be that in a case that does involve such risk the information to be sealed is not relevant to the risk, thus protecting purely proprietary information from competitors.

The "public's right to know" may seem a tattered cliche, but surely the public has the right to product safety information garnered through its court system.

The Boston Sunday Globe, March 10, 1991, [A31:1]

Renewed tension between right to privacy and the public's right to know

ARTHUR R. MILLER

To the person on the street, the American legal system often seems bewildering and overused, but nonetheless distant and unrelated to daily life. Consequently, most people would be outraged to learn that for less than $50, the fee for filing a lawsuit, a neighbor has the legal right to compel them to turn over all of their bank statements, medical records, income tax returns, religious documents, school records and other private information, so long as the information is likely to lead to other information that may be related to the lawsuit.

The outrage might intensify upon learning that the neighbor could then give or sell this information to gossips, the press, con artists, or any other buyers, unless the court issues an order prohibiting public disclosure, commonly called a protective order.

Should the courts have the authority to issue protective orders to keep private information confidential? Of course. If the court has the power to compel broad intrusions into private matters to resolve a lawsuit, it must also have the power to protect this same private information from further public disclosure outside of the lawsuit.

Although the answer may seem obvious, it is the source of controversy within the legal community and the media. This controversy has also caused consternation among members of the business community, who frequently are involved in litigation and who rely upon the courts' power to protect confidential trade secrets and other commercial information in order to maintain their competitive livelihood.

Behind this controversy are members of the media, and lawyers who handle personal injury cases, who claim that courts are using their power to protect information about public health and safety that the public has a right to know. To prevent courts from keeping information secret, these groups are lobbying state and federal legislatures to change the law. They want to restrict or eliminate the power of courts to keep private information produced in a lawsuit confidential.

Although Florida and Texas have acted precipitately and done so, there simply is no need to change the current system. Such an effort is under way in Massachusetts.

As any poor soul slapped with a lawsuit will tell you, courts must have the power to protect privacy when necessary.

There is no reason to believe that they have used that power to the detriment of the public's right to know. Courts have fine-tuned the classic tension between the right to privacy and the public's right to know for centuries. In recent years, this fine-tuning has led to greater public access. A few anecdotal cases have been put forth in the media, and by personal injury lawyers, allegedly demonstrating that courts have hidden information affecting public health and safety. Upon investigation, none of these war stories actually establishes a link between information kept confidential in court records and subsequent harm to the public.

Instead, investigation reveals that both the media and personal injury lawyers have an insatiable thirst for information – it is an essential fuel to their professional and financial well-being.

Those advocating reduced confidentiality in the courts undervalue competing privacy and property interests.

Although the public interest may be served when court proceedings are open, at times confidentiality serves equally important public interests. Arguably, restrictions on court authority to guarantee confidentiality might discourage someone from reporting instances of government fraud or corruption out of fear that his identity will be revealed in subsequent litigation, making retaliation against him possible.

Confidential news sources might dry up for similar reasons. Fear that prior medical treatment or marital difficulties might be disclosed publicly could cause some people to forgo legitimate legal claims altogether. Society is not served when the price of seeking civil justice is the sacrifice of the right to be let alone. This is a right of increasing importance to human dignity in a computerized society that provides instant and universal access to information once it has been captured.

To businesses involved in litigation, confidentiality is often the only means to protect million-dollar investments in trade secrets, intellectual property, and other proprietary information. Preventing this type of information from falling into the hands of business rivals is central to maintaining a competitive edge. Indeed, trade secrets and the like are considered property, and the protection of private property rights is one of most fundamental obligations of our legal system.

Finally, confidentiality is an important judicial tool that facilitates the resolution of a lawsuit by encouraging litigants to exchange information among themselves freely without fear that it will be disclosed publicly. Society's interest in the prompt, inexpensive resolution of legal disputes is compromised when we take these tools away from our already overburdened judiciary.

As the proponents of restrictions on confidentiality argue, the courts are public institutions. But this concept has meant that the courts are open to the public in order to resolve legal disputes and to allow the public to observe the justice system in action. Until this recent controversy, this concept never stood for the proposition that the courts are like fishbowls through which the public can observe the most intimate affairs of the litigants suspended in the civil justice process.

Lawsuits already are highly invasive and impose inordinate costs in both time and money. Legislatures should not raise these costs by restricting the power of courts to assure privacy and confidentiality when necessary.

Arthur R. Miller is the Bruce Bromley Professor of Law at Harvard Law School.

Torts

By Michael Schneider

In February, 1991, the House Judiciary Committee, led by Representative Dave Donley, (D-Anchorage) introduced HB 171: "An Act Restricting Court Orders and Certain Private Agreements Relating to the Concealment of Public Hazards and Information on Public Hazards; and Amending Alaska Rules of Civil Procedure 24, 26(c), 26(f), 29, 30(d), and 37(a)(2)."

The notion is not novel. At least eight states will be considering similar legislation during the 1991 legislative session. Florida, North Carolina, and Virginia have passed secrecy/protective-order legislation in the last two years. California (San Diego Superior Court), New York, and Texas have amended their rules of court or their rules of civil procedure to prohibit secrecy/protective orders. A model "Sunshine in Litigation" act has been circulating around the country for the last couple of years and is being considered, at least as an alternative, by our legislature and the states mentioned above.

It's pretty obvious to attorneys why legislation of this type is being considered. The worse the defendant's conduct, the more widespread, the more it tends to affect (or potentially affect) a large class of people, the more it tends to be a "public hazard," and the greater the damages likely to flow from the hazard, the more likely it is that any offer of peace will be coupled with a demand for confidentiality.

The confidentiality provision typically addresses not only the fact of settlement, but the terms of the settlement and all the materials obtained in the course of the case. Orders are often issued in furtherance of these agreements (upon a stipulation of the parties) sealing the court record and/or requiring the return or disposal of documents obtained or disclosed during the case. While we are all forced to enter these agreements to promote our clients' interests, the public interest in being able to define and recognize dangerous products or dangerous practices and the interest of future litigants in being able to prove their case without "mining the same nugget" time after time after time suffers drastically as a result of this conspiracy of silence.

HB 171 is short and to the point. It imposes upon the court a duty to "examine the materials in camera" that are subject of a motion for an order prohibiting disclosure. If the materials or information have previously been disclosed, or concern "a public hazard," then the court is commanded not to enter the requested order. An "interested person" has standing to challenge a secrecy or protective order. An "interested person" is to be construed as that term is used in AS 44.62.300, and does not include a party to the litigation or to the agreement out of which the request for secrecy flows. While this definition is fairly broad, it could be a lot broader and does not clearly include classes such as the news media. Under HB 171, private agreements on materials concerning public hazards are void and may not be enforced. A public hazard is defined to be "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."

In my opinion HB 171 should be passed. Nevertheless, this bill could be a lot better than it is. The model "Sunshine in Litigation" Act of 1991 does a better job of addressing the legitimate concerns that are the subject of HB 171. Some examples follow:

a. Unlike the model act, HB 171 doesn't extend to settlement terms or the amount of a settlement.

2. The model act contains a legal presumption of openness. The burden is placed upon those demanding secrecy and confidentiality to prove the merit of their position. HB 171 does not do this.

3. The model act clearly specifies the types of information that may qualify for secret treatment. For instance, the model act recognizes that there is no interest in openness (secrecy is thus authorized) as to "private facts concerning a natural person or trade secrets or other confidential research, development, or commercially secret data."

4. "Interested person" is more broadly and less ambiguously defined than in the version of HB 171 that I reviewed.

5. The model act provides for automatic access to discovery generated in other litigation by parties with similar or identical claims.

6. The model act contains a public-notice provision. If litigants or any other "interested person" are going to fight over secrecy, the public is given notice of the battle and an opportunity to attend.

7. The model act provides for attorney's fees to public-interest litigants where a request for secrecy is successfully opposed.

8. Under the provisions of the model act, it is extremely difficult to hide relevant information about public hazards from governmental or regulatory agencies.

The legislature has already received vigorous opposition to HB 171 from such public-spirited folks as the American Insurance Association, the Motor Vehicle Manufacturers Association, the Pharmaceutical Manufacturers Association, and Lawyers for Civil Justice (and who do you suppose this outfit represents . . . ?).

If any of you really believe that promoting secrecy in litigation is good public policy for the state of Alaska, I would really appreciate it if you would take a moment to commit your thoughts to writing and send them to me. On the other hand, if you believe, as I do, that HB 171 (and better yet, the model act) is an idea whose time has come, I'd encourage you to get your views to the legislature immediately. As you know, this can be done with a telephone call to your local legislative information office and a request that your brief message be communicated to all members of the legislature.

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NOTES

CIVIL PROCEDURE—ACCESS TO SEALED SETTLEMENT DOCUMENTS GRANTED BASED ON COMMON LAW RIGHT OF ACCESS TO JUDICIAL PROCEEDINGS—*Bank of America National Trust and Savings Association v. Hotel Rittenhouse Associates (Appeal of FAB III Concrete Corp.)*, 800 F.2d 339 (3d Cir. 1986).

INTRODUCTION

The common law right of public access to civil and criminal judicial proceedings includes the public's right to copy and inspect judicial records.[1] Although the United States Supreme Court has recognized that the right of access to judicial proceedings and records is not absolute, the Court has not articulated specific substantive and procedural guidelines by which to define this particular right.[2] Instead, the Court has adopted the position that the factors to be weighed in determining access should be left to the discretion of trial courts.[3]

Lacking clear direction from the Supreme Court, lower federal courts have looked to differing standards, procedures, and factors in granting or denying access to various civil documents.[4] Generally, courts have justified their decisions to restrict access based on the confidential, sensitive, or privileged nature of the documents at issue.[5]

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1. Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978) (American courts recognized common law right to copy and inspect judicial records and documents). *See also* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 n.17 (1980) (plurality opinion) (civil and criminal trials historically have been presumptively open to public); E. JENKS, THE BOOK OF ENGLISH LAW 73-74 (6th rev. ed. 1967) (all judicial trials open to public in England from time immemorial). *See generally* Comment, *All Courts Shall Be Open: The Public's Right to View Judicial Proceedings and Records*, 52 TEMP. L.Q. 311, 337-46 (1979) (discussion of historical development of common law right of access).

Courts have upheld the right of access because it permits the public to scrutinize the fairness and integrity of the judicial process and to participate in and serve as a check upon that process. *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1982) (public access promotes integrity of fact-finding and respect for and scrutiny of judicial processes); *see also* Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1068-70 (3d Cir. 1984) (comprehensive discussion of historical justifications and benefits of public access to civil proceedings).

2. *See Nixon*, 435 U.S. at 598-99 (quoting *In re* Caswell, 18 R.I. 835, 836, 29 A. 259, 259 (1893)) (because courts have supervisory power over their records, lower courts relying on case's particular facts and circumstances could deny access to records that might be harmful to others)).

3. *Nixon*, 435 U.S. at 599.

4. *See* Valley Broadcasting Co. v. United States Dist. Court, 798 F.2d 1289, 1293-94 (9th Cir. 1986), for a discussion of the various views of the nature and scope of the common law right of access to judicial records among the United States Courts of Appeals.

5. *See, e.g.*, Crystal Grower's Corp. v. Dobbins, 616 F.2d 458, 462 (10th Cir. 1980) (party's common law right of access to docketing statement, appellate briefs, and appendix filed with court in antitrust litigation outweighed by interest in preserving attorney-client privilege and work product

In *Bank of America National Trust and Savings Association v. Hotel Rittenhouse Associates (Appeal of FAB III Concrete Corp.)* ("*FAB III*"),[6] the United States Court of Appeals for the Third Circuit held that the district court erred in denying a third party's motion for access to a sealed settlement agreement and to the postsettlement documents filed wit[illegible] enforce the agreement.[7] The court found that a generalized interest in encouraging settlements, without a showing of additional supporting factors, was insufficient to outweigh the public's common law right of access.[8]

This note analyzes the policy considerations and balancing approach used by the Third Circuit to determine that the settlement agreement and postsettlement documents in *FAB III* should have been unsealed.[9] This note then examines the substantive interests and factors balanced by courts in denying or granting access to sealed civil documents.[10] Finally, this note proposes procedural guidelines for trial courts to apply when determining whether to allow sealing of settlement agreements and similar civil documents.[11] The proposed guidelines seek to protect both the public's interest in access to judicial proceedings and the parties' reliance interest on secrecy once a document has been sealed.

I. *Bank of America National Trust and Savings Association v. Hotel Rittenhouse Associates (Appeal of FAB III Concrete Corp.)*

The dispute in *FAB III*[12] arose out of litigation between the financier of a construction project and the project's developers.[13] In 1981, the Bank of America National Trust and Savings Association ("the Bank") entered into a contract with Hotel Rittenhouse Associates ("HRA") and other developers to finance the construction of a hotel in Philadelphia, Pennsylvania.[14] FAB III Concrete Corporation ("FAB III") was the concrete contractor for the pro-

immunity); *In re* Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig., 101 F.R.D. 34, 44 (C.D. Cal. 1984) (public's common law right of access may be limited where trade secrets are at stake); *In re* Application of KSTP Television, 504 F. Supp. 360, 362-63 n.2 (D. Minn. 1980) (media's common law right of access to video tape showing preliminary acts of rape victim and perpetrator outweighed by victim's privacy interests).

6. 800 F.2d 339 (3d Cir. 1986).

7. *Id.* at 346. The court, in reversing the district court's denial of the motion to unseal documents, did not cite a reported opinion on this matter by the district court. The district court, however, did publish an opinion when it partially granted the Bank's motion for summary judgment against HRA in its action to foreclose on the mortgage and recover on a promissory note. *See* Bank of Am. Nat'l Trust v. Hotel Rittenhouse, 595 F. Supp. 800 (E.D. Pa. 1984).

8. 800 F.2d at 346.

9. *See infra* notes 35-62 and accompanying text for a discussion of the balancing approach used by the *FAB III* court for determining whether to grant access to the sealed documents.

10. *See infra* notes 75-128 and accompanying text for a discussion of substantive factors and interests relied on by courts in determining the public's right of access to sealed civil documents.

11. *See infra* note 162 and accompanying text for a discussion of proposed procedural requirements for restricting access to settlement documents.

12. 800 F.2d 339 (3d Cir. 1986).

13. *Id.* at 340.

14. *Id.*

ject.[15] In June 1983, before the building was completed, the Bank filed suit against HRA in the United States District Court for the Eastern District of Pennsylvania to foreclose on the property and to collect on a construction loan.[16] The parties reached a settlement in January 1985, after the case went to trial but before it went to the jury.[17] The settlement agreement was then filed with the court and sealed at the parties' request, even though all prior proceedings had been open to the public.[18] Due to a disagreement about the settlement, the Bank and HRA later sought court assistance to enforce the agreement.[19] Accordingly, a series of motions and orders were filed and sealed by the trial court during March and April of 1985.[20]

FAB III initiated a number of legal actions in an effort to obtain the sealed settlement agreement itself and other documents filed to enforce the agreement.[21] Following a meeting with the district court in April 1985, in which FAB III and other creditors of HRA were denied access to the settlement documents, FAB III filed a motion two months later in district court to unseal the documents.[22] The district court again denied that motion on the basis that the

15. *Id.*

16. *Id.* HRA is a Pennsylvania limited partnership. *Id.* at 339. The suit was filed against HRA, its general partners, and other individuals, although the court referred to the defendants collectively as "HRA." *Id.* HRA counterclaimed on numerous state and federal law grounds. *Id.* These claims included violations of the Bank Holding Act, the federal securities laws, the Racketeer Influenced and Corrupt Organizations Act, and the Equal Credit Opportunity Act. *Id.* *See* Bank of Am. Nat'l Trust v. Hotel Rittenhouse, 595 F. Supp. 800, 801 (E.D. Pa. 1984) (discussion of basis of initial action filed by Bank against HRA).

17. 800 F.2d at 341.

18. *Id.*

19. *Id.* The court noted that the Bank and HRA filed their settlement agreement with the court expressly because they anticipated such a disagreement. *Id.* at 344.

20. *Id.* at 341. On March 11, 1985, HRA filed a motion to enforce the settlement agreement. *Id.* The Bank filed a similar motion on the following day. *Id.* The district court entered a judgment against HRA for over $38,000,000 on one count of the Bank's initial claim and dismissed all other counts and counterclaims. *Id.* The district court ordered the property in dispute to be sold and fixed the terms of the sale; the terms of payment for the sale were ordered and filed on April 12, 1985. *Id.* An entry on the district court's docket sheet for April 26, 1985 stated that the "Order of Court is Filed Under Seal and Not to be Opened Until Further Order." *Id.* Although the subject of this order was not explained, FAB III assumed that it related to another part of the district court's judgment. *Id.*

21. *Id.* Prior to commencing its action against the Bank and HRA to obtain the settlement documents, FAB III also began a separate action solely against the Bank to collect money allegedly owed to it by the Bank. *Id.* at 340-41. FAB III had filed suit in federal court against the Bank in April 1984, seeking over $800,000 for work performed on the HRA project. *Id.* at 340. The Bank allegedly agreed to pay FAB III directly for its work on the project. *Id.* at 340-41. The Bank's motion to dismiss FAB III's claim on the basis that HRA was an indispensable party to the action and that joinder would destroy diversity had not been decided at the time of the appeal to the Third Circuit. *Id.* at 341.

22. *Id.* When the court denied the initial informal request, FAB III filed a motion in federal court to submit its prior separate dispute against the Bank to the American Arbitration Association. *Id.* The district court stayed the federal proceedings initiated in April 1984 while arbitration proceeded. *Id.* At the time of the appeal, the arbitration was still pending. *Id.*

FAB III also filed a complaint in state court in July 1985 alleging that the Bank and HRA entered into a continuing conspiracy to withhold payment on the construction project. *Id.* As evi-

"public and private interests in settling disputes" outweighed both FAB III's private interests and the public's interest in access to judicial records.[23]

On appeal, the United States Court of Appeals for the Third Circuit considered the question whether the district court abused its discretion in denying FAB III's motion to unseal the settlement agreement and the postsettlement motions, documents, and orders related to the agreement.[24] In an opinion written by Judge Sloviter, the Third Circuit held that the district court had abused its discretion, and reversed the trial court's decision denying FAB III's motion to unseal the settlement documents.[25]

Because FAB III based its claim for access to the sealed documents on the common law right of access rather than on the first amendment, the court initially addressed the scope of the common law right.[26] The court first stated that the United States Supreme Court had held that there was a common law presumption in favor of access to judicial records and documents.[27] The court then noted that the Third Circuit had relied on the Supreme Court's reasoning in previous decisions when it held that the common law right of access applied to

dence of such a conspiracy, FAB III pointed to the agreement between the Bank and HRA to seal portions of the federal court proceedings that were otherwise public. *Id.* (citing Joint Appendix at 15a, *FAB III*, 800 F.2d 339 (3d Cir. 1986) (No. 85-1753)). Shortly after it filed the state complaint, FAB III filed the motion subject to this appeal. 800 F.2d at 341.

23. *Id.* (citing Joint Appendix, *supra* note 22, at 89a-90a).

24. *Id.* at 342. The Bank and HRA argued that an appeal of an order sealing portions of court records was improper. *Id.* at 341 n.2. The court noted that in the Third Circuit, orders granting or denying access to sealed records have been subject to appeal. *Id.* (citing United States v. Smith ("*Smith II*"), 787 F.2d 111, 113 (3d Cir. 1986) (order denying access to transcripts of sidebar and chambers conferences appealed); Publicker Indus., Inc. v. Cohen, 733 F.2d 1059 (3d Cir. 1984) (order closing hearing appealed); United States v. Criden ("*Criden I*"), 648 F.2d 814 (3d Cir. 1981) (order denying access to tapes introduced into evidence appealed)). The court pointed out that the order and notice of appeal were captioned in both the Bank-HRA suit and the FAB III-Bank suit. *Id.* Therefore, the court reasoned that because it had jurisdiction to hear the appeal in the Bank-HRA suit, it would dismiss the appeal in the pending FAB III-Bank action. *Id.* at 342 n.2.

The Bank and HRA also challenged FAB III's standing to appeal the order in the Bank-HRA suit because FAB III did not file a motion to intervene in that action. *Id.* The court assumed that FAB III did not intervene because it was already a party to one of the suits in which the motion to unseal was filed. *Id.* The court concluded that it was unnecessary for FAB III to file as an intervenor in the Bank-HRA case in order to appeal because the district court implicitly granted FAB III intervenor status when it denied its motion to unseal the records. *Id.* (citing United States v. Criden ("*Criden II*"), 675 F.2d 550, 552 n.2 (3d Cir. 1982) (district court implicitly grants intervenor status to movant by denying access to requested documents)).

25. 800 F.2d at 346. Chief Judge Aldisert joined the majority opinion while the third member of the panel, Judge Garth, wrote a dissenting opinion. Circuit Judges Adams, Becker, Weis, and Stapleton would have granted a rehearing en banc. *Id.* at 340.

26. *Id.* at 342-43. Because the court found that the common law right of access applied, it declined to decide whether the first amendment right of access applied to the settlement agreement and documents at issue. *Id.* at 343. Therefore, the court concluded that decisions denying access on first amendment grounds were inapposite. *Id.* (citing Capital Cities Media, Inc. v. Chester, 797 F.2d 1164, 1174-75 (3d Cir. 1986) (en banc) (first amendment right of access applies to investigative records of state environmental agency); First Amendment Coalition v. Judicial Inquiry and Review Bd., 784 F.2d 467, 472 (3d Cir. 1986) (en banc) (first amendment right of access applies to records of judicial inquiry board)).

27. *Id.* at 343 (quoting Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978)).

tapes played during a criminal trial, and to transcripts of sidebar and chambers conferences.[28] Relying on these prior decisions, the court concluded that the common law right of access encompassed the settlement agreement and the subsequent motions filed in the district court in the Bank-HRA litigation.[29]

In reaching this conclusion, the court rejected the defendants' argument that a settlement agreement is not a public aspect of litigation and may, therefore, be sealed from those who were not parties to the agreement.[30] The court noted that HRA and the Bank relied on *Seattle Times v. Rhinehart*,[31] in which the United States Supreme Court held that because pretrial discovery is ordinarily private in the federal system, products of that discovery were not accessible under the first amendment.[32] The *FAB III* court, however, distinguished *Seattle Times* from the instant case by concluding that a settlement agreement and motions filed with the court, unlike discovery materials, are public components of civil litigation.[33] The court also pointed out that the public has a right to know of and to scrutinize a trial judge's approval of a settlement or rulings on motions.[34]

Although the Third Circuit concluded that the common law right of access applied to the documents at issue, the court also emphasized that the right of access is not absolute, regardless of whether it is grounded on the common law or the first amendment.[35] According to the court, the district court may exer-

28. *Id.* at 343 (citing United States v. Smith ("*Smith II*"), 787 F.2d 111, 115 (3d Cir. 1986) (access right articulated in *Criden I* applies where evidentiary or substantive rulings are made at sidebar or in chambers); United States v. Martin, 746 F.2d 964, 968 (3d Cir. 1984) (factors establishing presumption of access in *Criden I* support granting access to transcripts of tapes introduced into evidence); Publicker Indus. Inc. v. Cohen, 733 F.2d 1059, 1066-71 (3d Cir. 1984) (both common law and first amendment grant public and press right of access to civil hearings and transcripts of proceedings); *Criden I*, 648 F.2d 814, 823 (3d Cir. 1981) ("strong presumption" of access exists with respect to materials introduced into evidence at criminal trial)).

29. 800 F.2d at 343. As a preliminary matter, the court concluded that the district court's order denied both the unsealing of the settlement agreement as well as the unsealing of documents filed on record to enforce the agreement. *Id.* at 342.

30. *Id.* at 343 (quoting Brief for Appellees at 12, *FAB III*, 800 F.2d 339 (3d Cir. 1986) (No. 85-1753)).

31. 467 U.S. 20 (1984).

32. 800 F.2d at 343 (citing Seattle Times v. Rhinehart, 467 U.S. at 37 (first amendment right of access does not override protective order preventing publication of civil discovery information by party litigants)).

33. 800 F.2d at 343-44.

34. *Id.* at 344. The court distinguished other cases on which HRA and the Bank had relied to support a denial of access to the settlement documents because those cases involved discovery materials. *Id.* at 344 n.3 (citing Cipollone v. Liggett Group Inc., 785 F.2d 1108, 1118-20 (3d Cir. 1986) ("good cause" rather than first amendment standard applies to party seeking protective order of pretrial discovery information), *cert. denied*, 107 S. Ct. 907 (1987); New York v. United States Metals Ref. Co., 771 F.2d 796, 803 (3d Cir. 1985) (protective order restraining dissemination of pretrial information not violative of first amendment)).

35. 800 F.2d at 344. The court noted that Third Circuit opinions suggest that different standards are applied in determining the right of access depending on whether the constitutional or common law right of access is asserted. *Id.* (quoting *Publicker Indus., Inc.*, 733 F.2d at 1073). The court stated that the standard applied by the Third Circuit in common law cases requires the party seeking to restrict access to demonstrate that the interest in confidentiality outweighs the strong

cise discretion to weigh the factors for and against access by applying a balancing test.[36] Moreover, the court concluded that the issue of whether the district court abused its discretion in applying the balancing test was within its scope of review.[37]

The court pointed out that the district court denied access based on the judicial policy of encouraging settlements in civil litigation.[38] The court agreed that there is a strong public interest in promoting settlements and added that both the Federal Rules of Civil Procedure and Evidence encourage settlements by prohibiting the admission of settlement offers as evidence.[39] The court noted, however, that the method used by HRA and the Bank to settle their dispute did not serve the purpose of that policy.[40] The court explained that HRA and the Bank did not settle privately and then file a voluntary stipulation of dismissal of their suit, but instead chose to invoke the judicial process in anticipation of their reliance on the court's authority to enforce their agreement.[41] The court noted that the parties' use of the judicial process to interpret and enforce a settlement agreement abrogates the private nature ordinarily attributed to settlement agreements made outside the judicial process.[42] The court emphasized that in the instant case, motions and orders were filed in secrecy in direct violation of the common law protection of open access to judicial records.[43] In such circumstances, the court concluded, a settlement agreement filed with the court becomes a judicial record subject to the public's common law right of access.[44]

Having decided that the judicial process was utilized to settle the dispute between HRA and the Bank, the court articulated two policy interests that weigh in favor of access to records resulting from judicial proceedings.[45] First, the court stated that public access "promotes 'informed discussion of govern-

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presumption in favor of access. 800 F.2d at 344 (citing United States v. Criden ("*Criden III*"), 681 F.2d 919, 921 (3d Cir. 1982) (strong presumption favoring access is outweighed only by showing that information sought would inflict "intensified pain" on third parties); *Criden I*, 648 F.2d 814, 818 (3d Cir. 1981) ("strong presumption" of access must be balanced against factors weighing against access)).

36. 800 F.2d at 344 (citing Nixon v. Warner Communications, Inc., 435 U.S. 589, 599 (1978) (decision to grant access is best left to discretion of trial court to consider relevant facts and circumstances of each case)).

37. *Id.* at 344. Although discretionary decisions of the trial court are generally subject to a narrow scope of review, the court found that where first-hand observations are not at issue, a narrow standard of review is not required. *Id.* at 344 (citing *Criden I*, 648 F.2d at 818 (decision to release tapes was not dependent on first-hand observation of trial court and therefore was not accorded the ordinary narrow review of discretionary matters)).

38. *Id.* at 344.

39. *Id.* (citing FED. R. EVID. 408 and advisory committee note (offers to compromise are inadmissible evidence); FED. R. CIV. P. 68 (evidence of offer to settle inadmissible)).

40. *Id.* at 344.

41. *Id.* (citing FED. R. CIV. P. 41(a)(1) (plaintiff may dismiss action without prejudice by filing consent signed by all parties)). The court noted that had HRA and the Bank used this procedure, the documents would not have been subject to public access. 800 F.2d at 344.

42. *Id.* at 345.

43. *Id.*

44. *Id.*

45. *Id.*

mental affairs by providing the public with [a] more complete understanding of the judicial system.'"[46] Second, the court added that access promotes the "public perception of fairness" by allowing the public to observe the workings of the court system.[47] The court concluded that disclosing settlement documents allows the public to monitor the integrity of the judicial process.[48] These two interests were no less important, according to the court, merely because FAB III was a third party seeking to serve its private interests rather than those of the public.[49]

Finally, the court considered whether the district court had erred in relying on a decision in which the United States Court of Appeals for the Second Circuit denied access to sealed settlement documents.[50] In *Federal Deposit Insurance Corp. v. Ernst & Ernst*,[51] the court noted, the Second Circuit refused to set aside an order maintaining the confidentiality of a settlement agreement between a large bank and an accounting firm.[52] The court explained, however, that *Ernst & Ernst* was distinguishable from the instant case for several reasons.[53] The court stated that both the district court and the circuit court in *Ernst & Ernst* emphasized that settling the complex litigation served the interests of both the parties and the public because continued litigation would be costly, would engage the judicial process for a long time, and would inconvenience the jurors.[54] In addition, the court pointed out that the parties in that case stated unequivocally that settlement was contingent on confidentiality.[55] The court also emphasized that the action seeking to modify the confidentiality order was initiated two years after the settlement was filed; therefore, the *Ernst & Ernst* court made its decision not to unseal only after an additional showing of the need for continued secrecy was made by the parties opposing access.[56] Thus, the majority concluded that *Ernst & Ernst* was distinguishable, and that consequently the

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46. *Id.* (quoting *Smith II*, 787 F.2d 111, 114 (3d Cir. 1986) (citing *Criden II*, 675 F.2d 550, 557 (3d Cir. 1982) (societal interest favoring public access to trials articulated by Supreme Court are served by permitting first amendment access to criminal pretrial proceedings))).

47. 800 F.2d at 345 (quoting *Smith II*, 787 F.2d at 114 (citing *Criden II*, 675 F.2d at 557)).

48. *Id.* (citing *Smith II*, 787 F.2d at 114 (open access to court proceedings serves as a "check on corrupt practices by exposing the judicial process to public scrutiny"); Wilson v. American Motors Corp., 759 F.2d 1568, 1571 (11th Cir. 1985) (quoting Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1179 (6th Cir. 1983) (decision to grant access to civil judicial records must focus on public's right to scrutinize the integrity of system)).

49. 800 F.2d at 345.

50. *Id.*

51. 677 F.2d 230 (2d Cir. 1982) (per curiam).

52. 800 F.2d at 345.

53. *Id.* at 345-46. Judge Garth particularly relied on *Ernst & Ernst* as justifying the denial of access. *See infra* notes 63-74 for a discussion of Judge Garth's analysis of *Ernst & Ernst* and his rationale for applying its principles to *FAB III*.

54. *Id.* at 345-46 (citing *In re* Franklin Nat'l Bank Sec. Litig., 92 F.R.D. 468, 470 (E.D.N.Y. 1981) (factors showing protracted trial and litigation expenses and loss of insurance protection for defendant were sufficient to deny public access), *aff'd sub nom.* FDIC v. Ernst & Ernst, 677 F.2d 230 (2d Cir. 1982)).

55. 800 F.2d at 345-46.

56. *Id.* The court also noted that the appellants in *Ernst & Ernst* based their claim of access on the Federal Freedom of Information Act rather than on the common law right of access. *Id.* at 345.

district court had erroneously relied on the decision.[57]

The court further concluded that both the *Ernst & Ernst* district court and Second Circuit had weighed substantial and articulable factors against the presumption of access.[58] In *FAB III*, however, the court found that the district court had instead relied merely on a generalized interest in promoting settlements.[59] The court held that such a generalized interest alone was insufficient to overcome the common law presumption of access.[60] Therefore, the court considered it unnecessary to determine whether FAB III had sufficient particularized interests in the settlement documents to further tip the balance in its favor.[61] Because the court found that the district court had abused its discretion in denying FAB III's motion to unseal the settlement documents, the court reversed the district court's order and remanded the case.[62]

In a lengthy dissenting opinion, Circuit Judge Garth criticized the majority's opinion on several grounds.[63] First, Judge Garth noted that the majority did not acknowledge the difference between sealing and unsealing documents.[64] Judge Garth maintained that the cases relied on by the majority distinguished acts of sealing from acts of unsealing, and that those cases established different standards and burdens of proof which the majority had disregarded.[65] Second, Judge Garth stated that the majority failed to give proper weight to the public's interest in settling disputes and to the parties' subsequent reliance on secrecy.[66]

Relying on the Supreme Court's discussion of the common law right of public access in *Nixon v. Warner Communications Inc.*,[67] Judge Garth explained that where a document has been entered into the public record without the parties relying on it remaining secret, the interests of third parties seeking access to that document must be weighed in view of a presumption of openness.[68] Judge Garth pointed out, however, that where a third party seeks to

57. *Id.* at 346.

58. *Id.* at 345-46.

59. *Id.* at 346.

60. *Id.*

61. *Id.* at 346 n.4.

62. *Id.* at 346. The district court was ordered to enter an order consistent with the Third Circuit's opinion. *Id.* FAB III's appeal against the Bank was dismissed. *Id.*

63. 800 F.2d 339, 346 (Garth, J., dissenting).

64. *Id.* Judge Garth stated that the proper issue on appeal was whether the settlement agreement, negotiated in private and entered into contingent on the agreement remaining secret, should be unsealed because the district court allegedly erred in intially sealing it. *Id.* at 347. He maintained that the majority, although acknowleding this unsealing issue, addressed only the circumstances under which a document should be sealed in the first place. *Id.* Judge Garth believed the majority should not have considered this issue because the documents were already sealed. *Id.*

65. *Id.* at 348 & n.3.

66. *Id.* at 347. Judge Garth strongly criticized the majority for essentially imposing a *per se* rule that the interest in settling disputes can "never" be sufficient to overcome the presumption of access. *Id.* Furthermore, Judge Garth maintained that the majority's decision lends short shrift to the parties' reliance interest in the agreement remaining secret, particularly where a document is entered into the record solely because the court agreeds to grant a protective seal. *Id.* at 348.

67. 435 U.S. 589 (1978).

68. 800 F.2d at 348 & n.3. In *Nixon*, the Court articulated that trial courts must apply a balancing approach and weigh the relevant facts and circumstances in determining whether public

unseal documents filed solely because of a reliance on secrecy, the presumption and burden should shift to require that party to show a "compelling need" or "extraordinary circumstance" as articulated in the Second Circuit's opinion in *Ernst & Ernst*.[69] Applying the *Ernst & Ernst* standard, Judge Garth found that FAB III had not met its burden to establish a "compelling need" to unseal the documents and concluded that the interest in settling disputes was sufficient to outweigh that presumption of access.[70]

Judge Garth criticized the majority for not acknowledging the differences between sealing and unsealing in relation to the parties' reliance interest on secrecy, and for attempting to distinguish rather than to apply *Ernst & Ernst*.[71] In addition, Judge Garth pointed out that regardless of whether the *Ernst & Ernst* standard was applied, the decision to seal or unseal documents should be left to the discretion of the trial court.[72] Judge Garth concluded that the district court properly balanced the competing interests and exercised its discretion.[73] Therefore, he would have affirmed the district court's decision refusing to unseal the settlement documents.[74]

II. RESTRICTING THE COMMON LAW RIGHT OF ACCESS TO JUDICIAL DOCUMENTS

As early as 1894, courts have recognized the common law right of all citizens to examine judicial records regardless of the interest of the person seeking access.[75] Generally, the right of access is deemed to be inherent in our demo-

access to judicial records is appropriate. 435 U.S. at 599. Judge Garth pointed out that the *FAB III* district court applied the *Nixon* Court's balancing test and determined that the settlement agreement at issue should not be disclosed. 800 F.2d at 348-49 n.3.

69. *Id.* at 348 (citing FDIC v. Ernst & Ernst, 677 F.2d 230, 232 (2d Cir. 1982) (confidentiality order may be modified only after showing of "compelling need" or "extraordinary circumstance")).

70. 800 F.2d at 349. Although Judge Garth acknowledged that *Ernst & Ernst* was not controlling, he believed it was a well reasoned decision that should have been applied in *FAB III*. *Id.* at 348.

71. *Id.* at 348 & n.3. Judge Garth criticized the majority for characterizing the sealing of the documents as a "secret judicial proceeding" tending to "overturn centuries of tradition of open access." *Id.* at 348 n.3. He stated that this characterization "is not an adequate substitute for reasoned judicial analysis." *Id.* at 349 n.3.

72. *Id.* at 352-53.

73. *Id.* at 353. Judge Garth noted that there is a long-standing acceptance of a trial court's right to use its discretionary powers to encourage settlements in order to manage its docket effectively. *Id.* at 352. Additionally, he stated that the majority's decision removes the district court's discretion to accept a settlement agreement under seal either to promote expeditious case resolution or to protect the interests of the parties to the settlement. *Id.*

74. *Id.* at 353.

75. *See Ex parte* Drawbaugh, 2 App. D.C. 404 (1894) in which the court refused to grant a motion to seal the pleadings of an appeal of a patent determination, stating that "[a]ny attempt to maintain secrecy, as to records of this court, would seem to be inconsistent with the common understanding of what belongs to a public court of record, to which all persons have the right of access, and to its records . . . ." *Id.* at 407-08. *See also* Nixon v. Warner Communications, Inc., 435 U.S. 589, 597-99 (1978) (American decisions do not condition right of access to records on a proprietary interest in documents); *Ex parte* Uppercu, 239 U.S. 435, 440 (1915) (public has right to view judicial records regardless of its interest); *In re* Sackett, 136 F.2d 248, 249 (C.C.P.A. 1943) (court has no

cratic form of government[76] and serves the purpose of assuring public confidence in the fair and effective administration of justice.[77] Alternatively, courts have restricted access under certain circumstances to serve important purposes, such as the promotion of judicial economy, the protection of privacy interests of litigants and third parties, and the preservation of the doctrines of attorney-client privilege and work-product immunity.[78]

When sealed settlement agreements and other types of documents claimed to be confidential are the subject of access claims, courts face the difficult task of balancing the competing interests, because both sides claim harm will result from an unfavorable decision.[79] Moreover, courts must wrestle with the determination of an appropriate standard to apply in gauging these competing interests.[80]

A. Reliance Interests

In *Federal Deposit Insurance Corp. v. Ernst & Ernst*,[81] the United States Court of Appeals for the Second Circuit held that when parties enter into a settlement agreement and rely on its remaining secret, a motion to unseal should be denied absent a showing of compelling need or extraordinary circumstances.[82] As the *Ernst & Ernst* district court pointed out, the settlement agreement was contingent on confidentiality at the insistence of one of the defendants, Ernst & Ernst.[83] The district court stated that it would be unfair to the litigants, and future settlements conditioned on secrecy would be discouraged, if the court, after inducing reliance, refused to support the parties later when this

power to seal records of patent appeal); Comment, *supra* note 1, at 337-38 (common law right of access to judicial records necessarily extends from the right to open courts).

76. United States v. Mitchell, 551 F.2d 1252, 1258 (D.C. Cir. 1976), *rev'd on other grounds sub nom.* Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978) (access to judicial records is "fundamental" to democratic state).

77. *See Richmond Newspapers*, 448 U.S. at 592-97 (Brennan, J., concurring) (access serves as check on judicial abuse and assures fair adjudication). *See also supra* note 48 for federal court decisions reflecting policy considerations in support of access to judicial records.

78. *See, e.g.*, *Nixon*, 435 U.S. at 598 (citing *In re* Caswell, 18 R.I. 835, 836, 29 A. 259, 259 (1893) (access may be denied where records may be used to satisfy spite or promote scandel)); *In re* Iowa Freedom of Information Council, 724 F.2d 658, 661 (8th Cir. 1983) (substantial damage to property rights in trade secrets justified denial of access); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 529 F. Supp. 866, 907 (E.D. Pa. 1981) (sensitive commercial information sufficient to seal documents). *See also infra* notes 80-129 and accompanying text for discussion of other court decisions denying or granting access to records.

79. *See infra* notes 94-120 and accompanying text for a discussion of federal court decisions balancing claims of confidentiality against the public's right of access.

80. *See, e.g.*, Wilson v. American Motors Corp., 759 F.2d 1568, 1571 (11th Cir. 1985) (court required showing that denial of access served "compelling government interest"); Publicker Indus. Inc. v. Cohen, 733 F.2d 1059, 1073 (3d Cir. 1984) (court required showing of "countervailing interest" to deny access); FDIC v. Ernst & Ernst, 677 F.2d 230, 232 (2d Cir. 1982) (court required showing of "compelling need" or "extraordinary circumstances" to grant access).

81. 677 F.2d 230 (2d Cir. 1982).

82. *Id.* at 232.

83. *In re* Franklin Nat'l Bank Sec. Litig., 92 F.R.D. 468, 472 (E.D.N.Y. 1981) (memorandum opinion), *aff'd sub nom.* FDIC v. Ernst & Ernst, 677 F.2d 230 (2d Cir. 1982) (per curiam opinion)

secrecy was challenged.[84] In denying the motion to modify the sealing order, the district court considered the parties reliance on confidentiality along with other factors, including notification to the press and the public of the imminency of settlement and the parties' intent to seal the terms of any settlement reached prior to the actual sealing order.[85]

In a more recent decision, the Second Circuit again weighed the parties' reliance interests against the general policy of granting access. In *Palmieri v. New York*,[86] the litigants in a private civil antitrust action agreed to enter into settlement negotiations and a subsequent agreement only after a federal magistrate had agreed to grant a protective order to facilitate settlement.[87] When the state sought the settlement records for its own use in an ongoing criminal investigation of antitrust law violations, the defendants objected on the basis that the information sought would not have existed without the magistrate's assurance of secrecy.[88] The state asserted on appeal that entering into a settlement agreement following a grant of a protective order in a private civil antitrust matter was an act which would ultimately further criminal activity.[89] In response, the court stated that if the magistrate should have known that his sealing order would aid criminal violations of the antitrust laws, his action would be improvident.[90] As a result, the court concluded that where a sealing order is granted "improvidently," no amount of judicial encouragement to enter into a confidential settlement agreement or subsequent reliance by the parties would "substantiate an unquestioning adherence" to the order.[91] Consequently, the *Palmieri*

84. *Id.* Additionally, the district court noted that the agreement resulted in substantial monetary payments and induced significant changes in positions of many of the parties relying on the secrecy. *Id.*

85. *Id.* The district court pointed out that this litigation involved a multitude of parties, protracted litigation, jury inconvenience, and large legal fees. *Id.* In addition, defendants' insurance coverage would be exhausted without settlement, leaving the injured party without an enforceable monetary judgment. *Id.*

86. 779 F.2d 861 (2d Cir. 1985).

87. *Id.* at 866. In 1982, Palmieri, a concrete contractor, initiated a private antitrust suit against several individuals and corporations involved in the ready-mix concrete industry in New York, alleging antitrust violations. *Id.* at 862-63. The matter was assigned by the district court to a federal magistrate to supervise pretrial discovery. *Id.* at 863. The magistrate subsequently participated in settlement negotiations with all parties. *Id.* Because the alleged violations were also the subject of an ongoing state criminal antitrust investigation, the defendants in the private action moved for a protective order of all discovery matter. *Id.* In December 1983, the magistrate granted this motion and specifically ordered the nondisclosure of discovery to any government agency. *Id.* Moreover, the magistrate included in the order that the defendants intended to provide information only in reliance upon the protective order. *Id.* Discovery proceeded and a settlement was reached with additional sealing orders entered throughout the process. *Id.* at 893-94.

In October 1985, after the settlement was reached, the State Attorney General filed a motion to intervene to modify the sealing orders to permit disclosure and testimony to the grand jury. *Id.* at 864. After a series of court actions, the district court granted the motion, subject to a stay pending appeal to the Second Circuit. *Id.*

88. *Id.* at 865.

89. *Id.*

90. *Id.*

91. *Id.* The court noted that even though the parties' reliance on the sealing order established a heavy burden for the state and raised a presumption in favor of maintaining the seal, the order could

court reversed and remanded the case to the district court to determine whether the state met its burden to prove a compelling need or improvidence to justify modification of the sealing order.[92]

Thus, in *Ernst & Ernst*, the Second Circuit required proof of a "compelling need" before permitting access to sealed documents when the parties had relied on the documents remaining confidential. Moreover, in *Palmieri*, the Second Circuit also recognized that if the lower court acted improvidently, the reliance interests of the parties may not be sufficient to justify restricting public access.[93]

B. Privileges

Litigants have also asserted that the attorney-client privilege and work-product immunity outweigh the presumption of access to judicial records. In *Joy v. North*,[94] the Second Circuit held that a special litigation committee report submitted for use in adjudicating a motion to dismiss the suit could not remain under seal as a private document.[95] The court reasoned that adjudication was a government act subject to public scrutiny.[96] The defendant corporation in *Joy*, opposing the lifting of the sealing order, asserted reputational harm, work-product immunity, and the attorney-client privilege as factors outweighing the common law right of access.[97] The Second Circuit concluded that submission of the report for the court's consideration on a motion for a judgment waived the attorney-client privilege.[98] The court also dismissed the claim that access would produce reputational harm, concluding that it was an insufficient basis on which to restrict public access to court documents.[99] The court reasoned that confidence in the administration of justice would be weakened if the public was not permitted to scrutinize material relied on for adjudication in derivative actions.[100]

These same privileges were addressed by the Tenth Circuit in *Crystal Grower's Corp. v. Dobbins*.[101] In *Crystal Grower's*, the plaintiff-appellant sought to maintain a seal on discovery documents and documents produced in the litigation of its suit involving a merger dispute.[102] Unlike the Second Circuit, the *Crystal Grower's* court held that the interest in preserving the doctrines of attorney-client privilege and work-product immunity outweighed the public interest in scrutinizing the judicial process.[103] The *Crystal Grower's* court qualified its holding, however, stating that the asserted doctrines justified retaining the documents under seal only for a limited time.[104] Moreover, the court reasoned that this result would not harm the public's interest in overseeing the integrity and fairness of the judicial process because oral arguments on the motion were public.[105] Furthermore, the court concluded that a contrary decision would threaten open communication between lawyers and clients and would ultimately impair the ability of attorneys to adequately prepare clients' cases.[106]

The *Joy* and *Crystal Grower's* courts viewed the documents claimed to be protected by the privileges in relation to the judicial proceedings themselves. Thus, in circumstances where the documents at issue are material to the judicial resolution of the disputes, the public's right to scrutinize the judicial decision-making process may outweigh the privileges.[107]

C. Reputational Harm and Third Party Privacy Interests

When weighing a party's interest in the protection of its business reputation against a claim of access to commercial information, courts have had to consider two competing interests as well: whether consumers would be harmed by being denied the information, and whether disclosure of the business information

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be modified if it could be shown that the magistrate should have recognized that the settlement would further criminal activity. *Id.* at 864-66.

92. *Id.* at 866.

93. *Id.* at 865. *See supra* notes 86-92 and accompanying text for a discussion of reliance interests in *Palmieri*.

94. 692 F.2d 880 (2d Cir. 1982), *cert. denied*, 460 U.S. 1051 (1983).

95. *Id.* at 894.

96. *Id.* at 893-94. The court noted that the report was used in the adjudication of the case and although it revealed corporate misconduct, the report did not reveal trade secrets that, under certain circumstances, would justify sealing. *Id.* The *Joy* court concluded that, absent exceptional circumstances requiring confidentiality, special litigation committee reports utilized in the adjudicative stages of derivative suits should be subject to public scrutiny. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 894. The court reasoned that since a claim of reputational harm would become stronger as corporate mismanagement increased, protection for such an interest would lead to absurd results. *Id.*

100. Id. at 893.

101. 616 F.2d 458 (10th Cir. 1980).

102. *Id.* at 459-60. Following a merger with a company involved in antitrust violations, Crystal Grower's Corporation brought suit against the new corporation's former directors and the law firm participating in the merger. *Id.* at 459. The trial court directed the plaintiff, Crystal Grower's, to produce discovery documents, including premerger communications between itself and its attorneys. *Id.* Although the district court recognized that the documents might have been subject to the attorney-client privilege and work-product immunity, it reasoned that Crystal Grower's put these documents in issue when it filed suit, and had, therefore, waived its right to assert those privileges. *Id.* at 460. The trial court subsequently entered summary judgment in favor of defendants. *Id.*

On appeal of the merits of the summary judgment of the securities law violations, the circuit court granted plaintiff's request to seal the amended docketing statement, joint appendix, and appellate briefs. *Id.* After the parties reached a settlement, the appeal was dismissed and the sealed trial record was returned to the district court. *Id.* The appellate documents that were filed, which contained reference to privileged communication, were to be unsealed twenty (20) days following dismissal. *Id.* at 460-61. Crystal Grower's filed a motion to reconsider the timing of the unsealing. *Id.* at 461.

103. *Id.* at 461-62.

104. *Id.* at 462. The court ordered that the sealed documents allegedly subject to the attorney-client privilege and work-product immunity were to remain sealed for an additional five years. *Id.* The court reasoned that, because the appeal was dismissed without determining whether the documents were immune from disclosure, lifting the seal immediately would essentially decide that issue *sub silentio*. *Id.* Therefore, the court delayed the unsealing of the appellate documents for five years to allow the pending litigation to proceed without the disclosure of the sealed documents. *Id.*

105. *Id.*

106. *Id.* at 461-62.

107. *See supra* notes 94-106 and accompanying text for a discussion of attorney-client privilege and work-product immunity claims that outweigh the public's right of access.

would violate a third party's privacy interest.[108] In *Brown & Williamson Tobacco Corp. v. FTC*,[109] for example, the Sixth Circuit vacated a district court's order sealing FTC records despite the fact that the agency made an agreement with Brown & Williamson to keep certain information in their investigatory records confidential.[110] The court rejected Brown & Williamson's claim that the information would harm the company's reputation if it was disclosed.[111] The court explained that interests implicating certain privacy rights, trade secrets, or national security are the only recognized exceptions to the common law right of access,[112] and concluded that protecting the company from reputational harm was not a recognized exception.[113] In contrast to these interests, the court pointed out that the public had a strong interest in obtaining the health information contained in the agency's records.[114] Moreover, the court also recognized that the stronger the desire for the company to hide its operations from the public to prevent disclosure of prejudicial information, the greater the public's need to know.[115]

The protection of third party privacy interests was also addressed by the Sixth Circuit in *In re Knoxville News-Sentinel Co.*[116] In *Knoxville*, the court held that the privacy interests of a bank's borrowers in avoiding public disclosure of their financial affairs, outweighed the right of the public and press to have access to two financial exhibits filed in a civil action between the bank and the FDIC.[117] The court explained that sealing trial exhibits from the press was not intended to protect the business reputation of the bank, but rather, that the action was to protect the privacy of the depositors who were not responsible for

108. *See infra* notes 109-20 and accompanying text for a discussion of Sixth Circuit cases addressing reputational harm and third party privacy interests.

109. 710 F.2d 1165 (6th Cir.), *cert. denied*, 465 U.S. 1100 (1983).

110. *Id.* at 1179-80. Brown & Williamson Corporation brought an action to enjoin the FTC from publishing statements disclaiming, among other things, the accuracy of the "tar" and nicotine yields of Brown & Williamson's Barclay cigarettes. *Id.* at 1167-69. Previously, the FTC solicited information from Brown & Williamson and four other tobacco manufacturers with the agreement that the information would be confidential. *Id.* at 1180. The district court sealed the agency records and documents pending decisions on several issues. *Id.* at 1168-69. On appeal, jurisdictional and substantive issues were resolved and the agency's records were ordered to be released to the public. *Id.* at 1169.

111. *Id.* at 1179-80.

112. *Id.* at 1179.

113. *Id.* at 1179-80.

114. *Id.* at 1180.

115. *Id.* The court stated that in order not to undermine the tradition of accessible court records should be sealed only in those circumstances where trade secrets are involved. *Id.*

116. 723 F.2d 470 (6th Cir. 1983).

117. *Id.* at 477-78. Tennessee Newspapers intervened in a lawsuit between a bank and the FDIC in an effort to obtain access to records that the bank was permitted to remove from the court's files. *Id.* at 471. The newspaper argued that the litigation between the bank and the FDIC was of public interest, and, therefore that the media should have access to the exhibits placed under seal. *Id.* at 472. The lawsuit between the FDIC and the bank was subsequently dismissed and the protective order lifted except as to the two exhibits that were returned to the bank. *Id.* The exhibits in question contained a list of questionable loans made to bank customers and the bank's defenses to those loans. *Id.*

initiating the litigation.[118] Recognizing the importance of the rights involved, the court stated that both the public and the press must be given a reasonable opportunity to voice their objections to a protective order before a court may deny the presumptive right of access.[119]

Thus, at least in the Sixth Circuit, claims of commercial reputational harm are insufficient to outweigh the public's right of access, especially where innocent third parties' privacy interests are implicated. The *Brown & Williamson* and *Knoxville* decisions reflect the strong interest in protecting the public's right to beneficial consumer information, as well as the interest in protecting third parties' privacy from the public.[120]

D. Judicial Economy

In order to promote judicial economy, facilitating settlement agreements between litigants may justify restricting public access to the agreements. Confronting this issue in *Wilson v. American Motors Corp.*,[121] the Eleventh Circuit held that the district court abused its discretion in sealing all trial records to facilitate settlement in a public proceeding.[122] In reaching this result, the *Wilson* court evaluated the district court's emphasis on promoting settlement agreements.[123] In order to deny access, the *Wilson* court required a showing that denial of access was "necessitated by a compelling governmental interest" and "narrowly tailored" to meet that interest.[124] The court found that although encouraging settlements is an important judicial function, settlements only result in payment of money to an injured party which is not a compelling interest entitled to consideration in determining whether to seal public records.[125] The *Wilson* court also concluded that the promotion of judicial economy in encouraging settlement was not served in this case because the jury had already considered some evidence when the settlement was reached.[126]

The common denominator of federal court decisions granting access to

118. *Id.* at 477. The court reasoned that bank customers had an expectation of privacy that warranted protection by the court. *Id.*

119. *Id.* at 475. The court suggested that a reasonable approach to protect the right to be heard is to require sealing motions to be docketed with the clerk of the district court. *Id.* at 475-76. The court ultimately concluded that the district court properly exercised its discretion in removing the two exhibits from public access. *Id.* at 477.

120. *See supra* notes 109-20 and accompanying text for a discussion of the public's right of access to public interest information and the public's right to be heard prior to restricting access.

121. 759 F.2d 1568, 1571 (11th Cir. 1985).

122. *Id.* at 1569.

123. *Id.*

124. *Id.* at 1571 (citing Newman v. Graddick, 696 F.2d 796, 802 (11th Cir. 1983) (quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606-07 (1982) (first amendment right of access to criminal trials may be denied by necessity of compelling governmental interest narrowly tailored to meet interest))). The *Wilson* court relied on the common law right of access in reversing the district court's sealing order. 759 F.2d at 1570. The court, however, proceeded to analyze the issues by applying the first amendment standard cited in *Globe Newspaper* and relying on authorities that applied first amendment rather than common law analysis. *Id.* at 1570-71.

125. *Id.* at 1571 n.4.

126. *Id.* at 1571.

sealed documents is an emphasis on a single primary policy consideration: maintaining the integrity of judicial proceedings by protecting the public's access interest.[127] Alternatively, courts denying public access have done so by emphasizing the litigants' and third parties' privacy and reliance interests.[128] In order to overcome the public's right of access, however, courts have generally required parties to make a specific showing of the rights and interests at stake.[129] This requirement ultimately becomes the foundation on which courts justify their decisions.

III. A Procedural Analysis

In *Bank of America National Savings & Trust v. Hotel Rittenhouse Associates (Appeal of FAB III)*,[130] the United States Court of Appeals for the Third Circuit held that a generalized interest in encouraging settlements was insufficient to outweigh the common law presumption of access to a judicially sealed settlement agreement, as well as posttrial motions and orders filed to enforce the settlement agreement.[131] A review of cases addressing similar access claims supports the majority's decision that, at least in this case, neither the interest in settling disputes and promoting judicial economy, nor the reliance on secrecy by the settling parties justified denying access to the agreement.[132]

A. Promoting Judicial Economy—A Timely Request

The majority in *FAB III* acknowledged the public interest served by encouraging settlements of private litigation.[133] As the court pointed out, settlements reduce litigation costs and conserve judicial resources.[134] Nevertheless, the majority rejected the judicial economy argument by the parties in this case.[135] Instead, the majority focused on the fact that the *FAB III* litigation proceeded to a full jury trial, was settled only before the jury had an opportunity to render a verdict, and, finally, was returned to court on motions by the settling parties to enforce the agreement, thereby negating any argument that judicial economy and the interest in settling disputes were served by sealing the agreement.[136] Under these circumstances, the *FAB III* court properly concluded that

127. *See, e.g., Smith II*, 787 F.2d 111, 114 (3d Cir.) (public access serves as check on corrupt practices by permitting public scrutiny of court process), *cert. denied*, — U.S. —, 107 S. Ct. [illegible] (1986); *Brown & Williamson*, 710 F.2d 1165, 1178 (6th Cir.) (public access provides accountability thereby minimizing judicial errors and misconduct), *cert. denied*, 465 U.S. 1100 (1984).

128. *See, e.g., Ernst & Ernst*, 677 F.2d 230, 232 (2d Cir. 1982) (public access may be restricted absent extraordinary circumstances once sealing order is entered and relied on).

129. *See supra* notes 75-126 for a discussion of the courts' requirement that the parties' interests be specifically demonstrated.

130. 800 F.2d 339 (3d Cir. 1986).

131. *Id.* at 346.

132. *See supra* notes 51-126 and accompanying text for a discussion of these competing interests.

133. 800 F.2d at 344.

134. *Id.*

135. *Id.* at 345.

136. The Bank and HRA wanted the best of both worlds: each wanted the benefit of the force and authority of the court process, but at the same time each desired the privacy usually afforded only to litigants who settle their disputes before incurring the public expense in using the resources of the judicial system. *See supra* notes 38-62 and accompanying text for the *FAB III* court's discussion of these issues.

the interest in promoting judicial economy by settling disputes was insufficient to outweigh the public's right of access.

Judge Garth criticized the majority for adopting what he describes as a "*per se* rule that the interest in settling cases [by assuring secrecy] can never outweigh the public's right of access."[137] Rather than create a per se rule, however, the majority instead distinguished a point in time at which restricting access no longer serves the public's interest in judicial economy and therefore is not justified.[138] Acknowledging that the Federal Rules of Civil Procedure promote a generalized interest in settling disputes, the majority pointed out that the particular provisions expressly relate to pretrial conferences and discovery,[139] thus providing additional support for the majority's time-framed distinction. Accordingly, in order to justify denying access to promote settlement agreements on the basis that the public's interest in judicial economy is served, settlement needs to be reached before incurring the time and expense of judicial proceedings.

B. Distinguishing Between Sealing Documents and Sealing Proceedings

The *FAB III* court focused on the documents at issue and their relationship to the court proceedings involving those documents in its determination whether to grant access. For example, the court emphasized that in the instant case, "*motions* filed and *orders* entered . . . were kept secret."[140] The court stated that denying access under these circumstances would essentially sanction "secret judicial proceedings."[141] This suggests that the court viewed the documents under seal as an integral part of the proceedings themselves. It may be that access was granted not upon consideration of the specific nature of the documents, but rather on the basis that the documents evidenced judicial action *per se*, which is more clearly subject to public access.[142]

A similar reasoning was applied by the Eleventh Circuit in *Wilson v. Ameri-*

137. 800 F.2d at 347.

138. *Id.* at 344. The majority pointed out that had the Bank and HRA settled and chosen to file a voluntary dismissal provided for in the Federal Rules of Civil Procedure, it was likely that they would have prevented FAB III and the public from gaining access to their documents. *Id.*

Fed. R. Civ. P. 41(a)(1) provides in pertinent part:

> [A]n action may be dismissed by the plaintiff without order of court . . . (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action.

139. 800 F.2d at 344 (citing *Fed. R. Civ. P.* 68 (settlement offer not accepted is inadmissible evidence at trial)).

140. *Id.* at 345.

141. *Id.*

142. *See* Joy v. North, 692 F.2d 880, 893 (2d Cir. 1982) (public access may not be denied where document is used for adjudication which is formal act of government subject to public scrutiny), *cert. denied*, City Trust v. Joy, 460 U.S. 1051 (1983).

can Motors Corp.,[143] in which the court stated that the interest in promoting settlement is not sufficient to justify denying access to trial records when the parties, prior to reaching their settlement agreement, proceeded to the point in the trial where the jury at least partially considered the evidence.[144] The court emphasized that suppression of public records under such circumstances can not be sanctioned because of the importance of access to the judicial process itself.[145] The Second Circuit reached a similar result in *Joy v. North*.[146] There the court concluded that adjudication was a proceeding in the judicial system that was clearly subject to access, and therefore that materials used to aid the decision-making process could not be sealed from public scrutiny without weakening the public's confidence in the administration of justice.[147]

The *FAB III* decision, as well as the *Wilson* and *Joy* decisions, emphasize the importance of the public's right to scrutinize the judicial process for the purpose of maintaining a check on the integrity of the court system.[148] The nature of the document at issue is not the critical factor in granting or denying access. Instead, it is the impact of the documents on the judicial proceeding itself that implicates the tradition of open courtrooms. Consequently, when sealing documents essentially denies the public an opportunity to scrutinize the judicial decision-making process, courts have required parties seeking access to meet a considerable burden to justify restricting access.[149]

C. Reliance Interests—Establishing a Right to Rely

The majority in *FAB III* was sharply criticized by the dissent for giving short shrift to the parties' reliance interests.[150] Judge Garth emphasized that the litigants entered into the settlement agreement with the understanding that it would remain secret, and that only a showing of a compelling need or extraordi-

143. 759 F.2d 1568 (11th Cir. 1985) (common law right of access applicable to trial record sealed by court to facilitate subsequent settlement).

144. *Id.* at 1571. The *Wilson* court reasoned that many litigants would be receptive to negotiations for the sealing of records after hearing damaging testimony during trial. *Id.* at 1571 n.4. Although the court recognized that courts should encourage settlements, it emphasized that monetary compensation for an injured party is not an element entitled to consideration in deciding whether to seal a record. *Id.*

145. *Id.* at 1571.

146. 692 F.2d 880, 893 (2d Cir. 1982) (consideration must be given to the importance of documents to adjudication before granting sealing order). The *Joy* court lifted a sealing order on a special litigation report in a derivative suit despite privacy interests to the contrary, because the document was used to decide the matter at hand. *Id.* at 893-94.

147. *Id.* at 893.

148. The *FAB III* majority properly left open the question whether a sealed settlement agreement, entered into by the litigants under different circumstances, such as before a case proceeds to trial, may be unsealed by another party at a later date. *See supra* notes 38-44 and accompanying text for the *FAB III* court's discussion of the relationship between the sealed documents and the judicial proceedings.

149. *See supra* note 80 for standards applied to the circumstances asserted to outweigh the public's right of access.

150. 800 F.2d at 347-48.

nary circumstances as prescribed in *Ernst & Ernst* justified granting access.[151] Because Judge Garth concluded that both *FAB III* and *Ernst & Ernst* turned on the litigants' reliance interest, he would have applied the *Ernst & Ernst* standard in *FAB III* and protected the parties' reliance interests.[152]

When the *Ernst & Ernst* district court and court of appeals denied access based in part on the parties' reliance interests, however, the courts were confronted with a significantly different factual and procedural situation than that of *FAB III*.[153] For example, the *Ernst & Ernst* district court, in granting the sealing order, found that the public's interest, as well as that of the litigants, was served by secrecy.[154] Moreover, the *Ernst & Ernst* district court pointed out that the proposed settlement received significant publicity in the media.[155] Not only did the press report the imminency of the settlement, but the press also reported that the settlement would be sealed.[156] Consequently, the public was given actual notice and an opportunity to object before the court sealed the agreement.[157] Under these circumstances, the litigants had a right to rely on the secrecy of the agreement to the extent that any later motions to unseal would be granted only where extraordinary circumstances existed.[158]

In contrast to the *Ernst & Ernst* litigation, the record contained no evidence to explain the Bank and HRA's request for secrecy.[159] Essentially, the litigants in *FAB III* entered into a secret settlement agreement by which they agreed to contract away both the public and FAB III's right of access to judicial proceedings. Courts should not permit private litigants to exercise such power solely to further their own interests.[160] Moreover, because FAB III and the public had no notice of the agreement's proposed confidentiality, or an opportunity to be heard, the Bank and HRA had no right to rely on the documents' continued secrecy in the future if an interested third party, who was not aware of the initial

151. *Id.* at 349 (citing *Ernst & Ernst*, 677 F.2d 230, 232 (2d Cir. 1982)). Judge Garth objected to the majority's approach in distinguishing *Ernst & Ernst* on the basis that the effort to unseal the *Ernst & Ernst* records occurred two years after the agreement was sealed, whereas FAB III waited only five months. *Id.* at 348 n.3.

152. *Id.*

153. *See supra* notes 50-62 & 68-74 and accompanying text for a factual comparison between *FAB III* and *Ernst & Ernst*.

154. *See In re* Franklin Nat'l Bank Sec. Litig., 92 F.R.D. 468, 472 (E.D.N.Y. 1981) (consideration given to public's interest in expeditious disposition of litigation), *aff'd sub nom.* FDIC v. Ernst & Ernst, 677 F.2d 230 (2d Cir. 1982). The court pointed out that had an agreement not been reached, a great deal of expenditures would fall on the litigants and judiciary. *Id.* Thus, the sealing order was essentially based on the interests in judicial economy and in minimizing the expense to the public. *Id.*

155. *Id.* at 472.

156. *Id.*

157. *Id.*

158. *Id.* *See supra* notes 81-85 and accompanying text for a discussion of the district and circuit courts' decisions in *Ernst & Ernst*.

159. *See FAB III*, 800 F.2d 339, 346 (3d Cir. 1986) (record void of articulable factors outweighing presumption of openness comparable to *Ernst & Ernst*).

160. *See Wilson*, 759 F.2d 1568, 1571 (11th Cir. 1985) (litigants do not have right to seal public records).

sealing motion, asserted a right of access. Under these circumstances, any reliance of the settling litigants in *FAB III* was not warranted. Thus, the weight allocated to reliance interests by the *FAB III* majority was justifiably different from the weight properly allocated to reliance interests in *Ernst & Ernst*. Although the majority did not articulate these factual differences between *FAB III* and *Ernst & Ernst*, it implicitly recognized the differences.[161]

D. Procedural Safeguards to Protect Competing Interests

In order to protect the right of the public and third parties to scrutinize the judicial process and also to protect the interests of the settling parties in maintaining secrecy once a motion to seal is made, certain procedural safeguards at the trial court level have developed from prior access cases and should be adopted in all circuits.[162] First, the court should give the public notice and an opportunity to be heard regarding the sealing of the documents, particularly where interested third parties can be readily identified at the time the motion to seal is considered. Second, the court should state specific, articulable facts which justify sealing. Third, the court, in balancing the public and private interests at stake, should consider whether the sealing of documents indirectly closes the proceedings as well by preventing the public from examining the judicial decision-making process.

Providing the public with an opportunity to object to sealing documents tends to serve the same policy considerations as maintaining access—it permits the public to scrutinize the integrity and fairness of the judicial process. Additionally, the litigants establish a right to rely, which warrants protection, only after there has been an opportunity for the public and interested third parties to object to a sealing motion.

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161. *See supra* notes 50-62 and accompanying text for a discussion of the factual differences between *Ernst & Ernst* and *FAB III* noted by the *FAB III* majority.

162. *See, e.g., In re Knoxville News-Sentinel Company*, 723 F.2d 470, 473-74 (6th Cir. 1983) (public's right to be heard requires sealing order to be docketed with clerk of district court). *See supra* notes 116-20 and accompanying text for the Sixth Circuit's discussion of the procedural requirements necessary for sealing records.

In Publicker Indus. Inc. v. Cohen, 733 F.2d 1059 (3d Cir. 1984), which involved the media's constitutional claim of access to a civil hearing and transcripts of an in camera proceeding, the Third Circuit set forth formal procedures for restricting access. *Id.* at 1071-72. The *Publicker* court only required that the trial court articulate countervailing interest to access, and after considering alternatives to closure, make specific findings for a need to close the proceedings. *Id. See also* Note, *Procedural and Substantive Prerequisites to Restricting the First Amendment Right of Access to Civil Hearings and Transcripts—Publicker Industries, Inc. v. Cohen*, 58 TEMP. L.Q. 159, 184-92 (1985) (discussion of procedural requirements beyond those articulated by circuit court).

Procedures for docketing sealing motions in criminal proceedings have been developed in the Third Circuit. *See, e.g.*, United States v. Raffoul, No. 86-3605, slip op. at 2 (3d Cir. Aug. 14, 1987) (procedures articulated in *Criden II* apply to motions for closure during criminal trials); *Criden II*, 675 F.2d 550, 560 (3d Cir. 1982) (motions for closure of pretrial hearings must be docketed, alternatives considered, and statement of reason for closure put on record).

CONCLUSION

In *Bank of America National Trust and Savings Association v. Hotel Rittenhouse Associates (Appeal of FAB III Concrete Corp.)*,[163] the United States Court of Appeals for the Third Circuit held that a district court abused its discretion in denying a third party's motion to unseal both a settlement agreement and post-settlement motions and orders filed with the court.[164] The *FAB III* court found that a generalized interest in encouraging settlements, without a showing of additional factors, was insufficient to outweigh the public's common law right of access.[165] In reaching this conclusion, the court emphasized that the litigants relied on the judicial process not only to reach the settlement, but also to enforce the agreement.[166] Because the documents under seal included motions and orders evidencing judicial proceedings, the court refused to deny access.[167] Courts considering sealing orders should not deny the public's right of access without providing a reasonable opportunity for the public to oppose sealing or without determining that sealing documents do not indirectly seal judicial proceedings.[168] To do otherwise leaves the public without a remedy to a well defined and recognized presumptive common law right of access to judicial proceedings.

Susan G. Maurer

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163. 800 F.2d 339 (3d Cir. 1986).

164. *Id.* at 346.

165. *Id.*

166. *Id.* at 345.

167. *Id.*

168. *See supra* notes 133-60 and accompanying text for a discussion of the procedural factors relied on by courts in determining whether to restrict public access to documents.

The Boston Sunday Globe, March 10, 1991, [A31:1]

Renewed tension between right to privacy and the public's right to know

ARTHUR R. MILLER

To the person on the street, the American legal system often seems bewildering and overused, but nonetheless distant and unrelated to daily life. Consequently, most people would be outraged to learn that for less than $50, the fee for filing a lawsuit, a neighbor has the legal right to compel them to turn over all of their bank statements, medical records, income tax returns, religious documents, school records and other private information, so long as the information is likely to lead to other information that may be related to the lawsuit.

The outrage might intensify upon learning that the neighbor could then give or sell this information to gossips, the press, con artists, or any other buyers, unless the court issues an order prohibiting public disclosure, commonly called a protective order.

Should the courts have the authority to issue protective orders to keep private information confidential? Of course. If the court has the power to compel broad intrusions into private matters to resolve a lawsuit, it must also have the power to protect this same private information from further public disclosure outside of the lawsuit.

Although the answer may seem obvious, it is the source of controversy within the legal community and the media. This controversy has also caused consternation among members of the business community, who frequently are involved in litigation and who rely upon the courts' power to protect confidential trade secrets and other commercial information in order to maintain their competitive livelihood.

Behind this controversy are members of the media, and lawyers who handle personal injury cases, who claim that courts are using their power to protect information about public health and safety that the public has a right to know. To prevent courts from keeping information secret, these groups are lobbying state and federal legislatures to change the law. They want to restrict or eliminate the power of courts to keep private information produced in a lawsuit confidential.

Although Florida and Texas have acted precipitately and done so, there simply is no need to change the current system. Such an effort is under way in Massachusetts.

As any poor soul slapped with a lawsuit will tell you, courts must have the power to protect privacy when necessary.

There is no reason to believe that they have used that power to the detriment of the public's right to know. Courts have fine-tuned the classic tension between the right to privacy and the public's right to know for centuries. In recent years, this fine-tuning has led to greater public access. A few anecdotal cases have been put forth in the media, and by personal injury lawyers, allegedly demonstrating that courts have hidden information affecting public health and safety. Upon investigation, none of these war stories actually establishes a link between information kept confidential in court records and subsequent harm to the public.

Instead, investigation reveals that both the media and personal injury lawyers have an insatiable thirst for information – it is an essential fuel to their professional and financial well-being.

Those advocating reduced confidentiality in the courts undervalue competing privacy and property interests.

Although the public interest may be served when court proceedings are open, at times confidentiality serves equally important public interests. Arguably, restrictions on court authority to guarantee confidentiality might discourage someone from reporting instances of government fraud or corruption out of fear that his identity will be revealed in subsequent litigation, making retaliation against him possible.

Confidential news sources might dry up for similar reasons. Fear that prior medical treatment or marital difficulties might be disclosed publicly could cause some people to forgo legitimate legal claims altogether. Society is not served when the price of seeking civil justice is the sacrifice of the right to be let alone. This is a right of increasing importance to human dignity in a computerized society that provides instant and universal access to information once it has been captured.

To businesses involved in litigation, confidentiality is often the only means to protect million-dollar investments in trade secrets, intellectual property, and other proprietary information. Preventing this type of information from falling into the hands of business rivals is central to maintaining a competitive edge. Indeed, trade secrets and the like are considered property, and the protection of private property rights is one of most fundamental obligations of our legal system.

Finally, confidentiality is an important judicial tool that facilitates the resolution of a lawsuit by encouraging litigants to exchange information among themselves freely without fear that it will be disclosed publicly. Society's interest in the prompt, inexpensive resolution of legal disputes is compromised when we take these tools away from our already overburdened judiciary.

As the proponents of restrictions on confidentiality argue, the courts are public institutions. But this concept has meant that the courts are open to the public in order to resolve legal disputes and to allow the public to observe the justice system in action. Until this recent controversy, this concept never stood for the proposition that the courts are like fishbowls through which the public can observe the most intimate affairs of the litigants suspended in the civil justice process.

Lawsuits already are highly invasive and impose inordinate costs in both time and money. Legislatures should not raise these costs by restricting the power of courts to assure privacy and confidentiality when necessary.

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President's Page

Demolishing the Wall of Secrecy

During a question-and-answer session at the ATLA secrecy conference last spring, a gentleman in the audience stepped up to the microphone and told the sad story of his wife's premature death in 1988. Her doctors thought she was suffering from an irregular heartbeat. Actually, the artificial valve that was implanted in her heart years before had failed. She died in spite of open-heart surgery to replace the valve once the true cause of her condition was known.

Her husband was angry. He and his wife had had no idea that the Bjork-Shiley convexo-concave heart valve could fracture and fail. They had never been warned by their doctors or by Shiley, the valve's manufacturer, although problems with the valves first appeared in 1978. Last summer Shiley finally announced an effort to contact about 20,000 North Americans who had been given the valve and warn them of the potential problem.

For years, Shiley had hidden this important safety information from the public behind protective orders and confidential settlements. Other manufacturers and their insurers, notably in Dalkon Shield and all-terrain vehicle litigation, have done the same. As a result, consumers have paid a tragic human cost. These victims are why ATLA has mounted a vigorous campaign against secrecy in the courts.

Right to Know

The people's right to know about matters of public concern is the foundation of our constitutional house. Without the free exchange of ideas and information, the structure would surely crumble. Recognizing this, the founders enshrined freedom of speech, assembly, and the press in the first amendment. These freedoms ensure the public's right to have access to information that vitally affects their health and safety.

Secrecy orders fly in the face of these principles. When a defendant in a case insists that a plaintiff keep mum about critical safety matters in exchange for settlement, it chips away at the ideal of an informed public.

Judges, of course, must approve or deny corporate requests for secrecy. In May 1989, the ATLA Board of Governors adopted a resolution urging judges to demand clear proof of a legitimate need for secrecy before they lock up information of life-and-death importance and throw away the key.

Fortunately, a few states have taken the lead in ending the irresponsible use of protective orders. Virginia passed the first law promoting openness in the judicial process in 1989. Florida's "Sunshine in Litigation" Act, which went into effect last July, prohibits judges from concealing any "public hazard." The Rhode Island legislature passed a similar measure, but the governor vetoed it.

Change can also come from within the judiciary. Last year, the Texas courts adopted a new rule of civil procedure (Rule 76a) that says that all civil court records are presumed to be open. Anyone wishing to seal records must prove that secrecy is necessary and that the need outweighs the public's interest in the information. [*See* Doggett, "Keeping Court Records in the Open," TRIAL, July 1990, at 62.]

Scare Tactics

Not surprisingly, our courtroom adversaries are resisting the movement toward openness. Corporate defendants claim that giving the public greater access to court records threatens economic competitiveness by revealing trade secrets. And they cynically raise the specter of Big Brother peering into the private lives of any individual who becomes involved in litigation. These are nothing more than scare tactics—straw men designed to divert attention from the central issues in the debate.

Trade Secrets

We have no objection to the courts protecting legitimate trade secrets. But defendants frequently resort to the trade-secret umbrella to shelter information that evidences negligence or product defects and impacts on the health and safety of many others. Attempts by defendants to wrap incriminating information in the cloak of trade secrets must be strenuously resisted.

The alleged threat to personal privacy is an even redder herring. We're not talking here about the private details of the parties' personal lives. *We do not challenge individual privacy in juvenile justice, sexual abuse cases, domestic relations, or other legitimately private matters.* However, courts have never recognized a comparable right to privacy for corporations. It is particularly outrageous for a corporation to claim a right to privacy when its product or behavior imperils the health and safety of the public.

The bottom line is that secrecy almost always protects the wrongdoer and almost never serves the public. Every secrecy agreement lays another brick on the wall that separates the public from vital health and safety information. The taller that wall becomes, the longer the shadow it casts on a judicial system that was intended to be a public institution, with disputes resolved in the bright light of day.

And as that shadow lengthens, it will overtake more people like the widower at the conference who watched, confused and helpless, as his wife's life was snuffed out by a corporate mistake that should have been made public knowledge long before.

Michael Maher

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?"