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COMMON LAW OR FIRST AMENDMENT RIGHT OF ACCESS TO SEALED SETTLEMENT AGREEMENTS

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THE RIGHT TO seal settlement agreements is a vital force in negotiations.¹ Parties may wish to avoid publicity and scandal and to protect their privacy.² In products liability cases or mass torts, such as airplane crashes, parties may want to prevent other potential plaintiffs from using information from one particular case in other cases.³ Parties feel this is justified because one claim may be clearly well-grounded or clearly invalid, and it may or may not be relevant to other potential plaintiffs' claims. Perhaps the particular lawyer handling one plaintiff's case was either very good or very poor at unearthing evidence before the settlement.⁴ Others may agree to sealing to obtain an increased settlement. For whatever reason, the

¹ See *infra* notes 204-220 and accompanying text for a discussion of the value of encouraging settlement and confidentiality in some cases.

² See, e.g., *Municipality Star & Tribune Co. v. Schumacher*, 392 N.W.2d 497 (Minn. 1986) (discussing the families' rights to keep their grief and financial affairs private by sealing plane crash settlement agreements). One article, *Sealed Lawsuits Shelter Wealthy, Influential*, lists several other reasons for sealing records: "The secret treatment of the lawsuits, according to plaintiffs lawyers, most frequently stems from attempts to avoid personal embarrassment or professional dispute, to discourage additional lawsuits, or to coerce large settlements from defendants in return for confidentiality." *Dallas Morning News*, Nov. 22, 1987, at 1A, col. 5.

³ See *infra* notes 81-98, 114-129, and accompanying text for example of cases dealing with access of sealed settlements in products liability or mass tort cases.

⁴ See *infra* notes 114-129, 204-250, and accompanying text for a discussion of some distinctions between settlements and court records, and the necessity of confidentiality in settlements.

right to seal settlement records is frequently crucial.⁵ Yet, the right to seal records is not absolute. In fact, the right may be largely illusory and uncertain, and is often the subject of abuse.⁶

Despite the value of sealing settlements, however, access is often desirable in certain situations. For example, in institutional reform litigation such as in civil rights or employment situations where absent parties are potentially affected by the outcome of a suit, sealing of consent decrees or settlements is arguably improper and full access should be accorded.⁷ Addressing the recent notoriety of the access issue to everything from settlements to sealed discovery documents, one article notes that "[f]or

⁵ See, e.g., *Palmieri v. New York*, 779 F.2d 861 (2d Cir. 1985) (without active court participation and promise of confidentiality, settlement would never have occurred). For a discussion of *Palmieri*, see *infra* notes 143-151.

⁶ See *infra* notes 49 and 191 and accompanying text for a discussion of potential problems in right of access cases. An investigation in Dallas, Texas, for example, revealed that courts had sealed eighty cases despite the fact there were no formal court orders authorizing the sealings. See *Dallas Morning News*, Nov. 22, 1987, at 21A, col. 3. The paper interviewed a state district court judge, Judge John Marshall, who stated that the abuse stemmed, in his opinion, from a "good ol' boy system" between judges and favored lawyers. *Id.* Further, as Judge Marshall stated, parties waive their privacy concerns when they bring their disputes into the judicial system. *Id.* "You are asking the government to come into your life. It's not like the government is coming in here as an unwelcome visitor." *Id.* at 25A, col. 4. As a means of controlling such abuse, Judge Marshall issued guidelines and form orders for all the district court judges to use in the future when parties request a sealing. *Id.* at 25A, col. 2. Several months later, Judge Marshall adopted a "good cause" standard for parties to meet if they desire to close records, based on the common law right of access. *Dallas Morning News*, Aug. 17, 1988, at 26A, col. 3-6.

⁷ See Thornburg, *Litigating the Zero Sum Game: The Effect of Institutional Reform Litigation on Absent Parties*, 66 *Or. L. Rev.* 201 (1987) (discussing institutional reform litigation and its effect on third parties). The article explains that "[i]nstitutional reform cases aim to restructure certain units of society. In so doing, these cases affect institutions and individuals that are not before the court. Courts, commentators, and politicians have therefore expressed concern that the rights of the absent parties and institutions not be ignored in the remedy-creation process." *Id.* at 251. Thus, one factor should be availability of full review to all potentially affected. Unfortunately, this has not always been the case. See, e.g., *EEOC v. Strayburger, Price, Kelton, Martin & Unis*, 626 F.2d 1272 (5th Cir. 1980); *Southern Methodist University Association of Women Law Students v. Wynn & Jaffe*, 593 F.2d 707 (5th Cir. 1979) (two related cases on discriminatory hiring practices which settled on the stipulation that all materials remain confidential for a specified time period).

a number of years nobody thought much about secrecy or about third parties who were not litigants Now we see more concern for the public interest and a recognition that some cases affect a lot of people and not just the parties."⁸ Another article cites not only abuses of sealing and protective orders but the emerging device for complete withdrawal of all the papers and documents of a case from the record "leaving no trace that the lawsuit ever existed" and giving the parties the ultimate protection sealing orders do not.⁹ Especially prevalent in products liability cases or mass accidents, such practices prevent "in the rush to secrecy . . . the early warning signals about defective products or questionable conduct [that] emerge during open court proceedings."¹⁰ Thus, the practice may prevent the public and state review boards from receiving notice of malpractice or unprofessional conduct cases with the result that a psychologist or doctor sued, perhaps repeatedly, continues in a thriving practice.¹¹

The Supreme Court has recently decided several cases dealing with the public's right of access to criminal trials

⁸ *Should a Court Keep Secrets*, *NAT'L L.J.*, Vol. 11 No. 6, 1, 22 (Oct. 7, 1988) (discussing recent access cases and problems they create) (quoting Cornish F. Hitchcock of the Public Citizen Litigation Group).

⁹ *Secrecy Rules Hide Dangers*, *Dallas Times Herald*, Oct. 23, 1988, at A-1, A 18. The article lists the following practices as reasons for the abuse which results in "secret" law: protective orders, negotiated settlements requiring secrecy in exchange for more money, sealing orders, and withdrawal orders. *Id.* at A-18, col. 2-3. Thus, each potential plaintiff not only has to repeat exact work done by past plaintiffs throughout the case, but may never relate an injury to an event or have adequate warning to prevent the harm from occurring. Arguably, this is not an efficient allocation of society's resources.

¹⁰ *Id.* at A 18, col. 3. As the article suggests:

In local and federal courthouses across the country, there are confidentiality orders in hundreds of cases that allege safety problems with widely used products and facilities. Every day, someone gets into a car, takes a drug, sees a doctor or wakes up near a toxic site that has been the subject of a lawsuit covered by a confidentiality order.

Id.

¹¹ *Id.* at A 18, col. 3-4. Some judges may be reluctant to grant sealing orders because of the significant public interests, one judge stating that "[w]hen parties litigate, they're using a public process." *Id.* at col. 5 (quoting Judge Leonard Braman of the Washington D.C. Superior Court).

and criminal records.¹² The source of the public's right of access to both the trial and records in civil cases, however, is uncertain.¹³ Presently, two bases exist for potential access to court records, including settlement agreements. Some courts find a public right of access in the first amendment, others under the common law right of access.¹⁴ Even among courts basing decisions solely on the common law right of access, however, differences of opinion exist as to the proper standard of review and the proper test for granting a request to seal or unseal materials.¹⁵

The focus of this comment is the public's right of access to sealed civil settlement agreements which were discussed in open court or filed with the court, thus formally

¹² See *Press-Enterprise Co. v. Superior Court*, 106 S. Ct. 2735 (1986) (access to criminal pretrial proceeding); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (allowing access to voir dire in criminal proceeding); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (access to criminal trial); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (public access to criminal trial under the first amendment); see also *infra* notes 20-31 and accompanying text for a discussion of *Richmond Newspapers*.

¹³ See *In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325 (D.C. Cir. 1985). *In re Reporters* discusses the differences between civil and criminal trials, pretrial and trial material, and access to courts and records. *Id.* at 1330-1341; see also *Minneapolis Star & Tribune*, 392 N.W.2d at 205-06 (discussing the many factors and uncertainties which come into play in right of access cases as they relate to access of settlement agreements). For a discussion of the differences between pretrial materials and trial records or evidence, see Marcus, *Myth and Reality in Protective Order Litigation*, 69 *Cornell L. Rev.* 1 (1983); see *infra* notes 230-250.

¹⁴ Compare *Palmieri*, 779 F.2d 861 (case resting on common law right of access and further separating original sealing from later unsealing) with *Wilson v. American Motors Corp.*, 759 F.2d 1568 (11th Cir. 1985) (adopting a first amendment standard to justify closure for products liability settlement sealing request). For a discussion of these and other related cases see *infra* notes 83-203. Another issue is the difference between pretrial, nonpublic and evidentiary materials, discussed at *infra* notes 120-125, 230-250 and accompanying text. Settlement agreements are similar to pretrial materials because they are "private" contracts reached with no court or public supervision in most cases. See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32-36 (1984); *In re Reporters*, 773 F.2d at 1331-37.

¹⁵ See *Bank of Am. Nat'l Trust v. Hotel Rittenhouse Assoc.*, 800 F.2d 339 (5d Cir. 1986) (disagreement between the majority and dissent as to the proper standard); *Times Herald Printing Co. v. Jones*, 717 S.W.2d 933 (Tex. Ct. App.), *re cited*, 730 S.W.2d 648 (Tex. 1986) (appellate decision split on rehearing *en banc*, subsequently vacated for lack of jurisdiction).

becoming part of the court's records.¹⁶ Access cases raise several issues under either a first amendment or common law basis, each apparently with no "clear" answer, such as the difference between access to court records versus access to the trial itself¹⁷ and the difference between granting the original seal and later attempts by a third party to unseal the agreement.¹⁸ Also, the issue of how much weight courts should give to the value of encouraging settlements in the various balancing tests used in determining a right of access arises.¹⁹ The comment addresses the first amendment right of access, followed by a discussion of the common law right and the value of encouraging settlements. Finally, the comment discusses potential solutions suggested by authorities for solving the access dilemma until a conclusive answer comes.

¹⁶ See *infra* notes 186-193, 230-250, and accompanying text for a discussion of the issue of whether filing an agreement with a court changes the nature of the material because a court may rely on the material in forming its judgment. Some commentators indicate that if a court does rely on material, the public's need for access increases so that the public can fully understand the judicial determination. See Marcus, *supra* note 13, at 49 (discussing a court's reliance on material as the proper basis for determining a right of access to material).

¹⁷ See *infra* notes 20-31 and accompanying text for a discussion of the differences; see also *In re Reporters*, 773 F.2d at 1331 (distinguishing between access to records and access to trials); Note, *The Common Law Right to Inspect and Copy Judicial Records: In Camera or On Camera*, 16 *Cal. L. Rev.* 659, 691-92 (1982) (noting the Supreme Court's distinction between a right of access to trials and records).

¹⁸ See *infra* notes 142-203 and accompanying text for a discussion of the cases discussing this issue. Courts apply several factors in the various balancing tests used for determining whether a right of access exists in a particular case. The factors arise, however, in criminal access cases. See, e.g., *Richmond Newspapers*, 448 U.S. at 555. Thus, an additional issue in right of access cases is whether these factors apply equally to civil proceedings. For a discussion of this issue, see *Gannett Co. v. DePascuale*, 443 U.S. 368, 386-87 n.15 (1979) (discussing the application of these factors to civil trials) and Fenner & Koley, *Access to Judicial Proceedings: To Richmond Newspapers and Beyond*, 16 *Harv. C.R.-C.L. L. Rev.* 415 (1981) (in-depth analysis of the factors presented in the *Richmond Newspapers* case and their application to civil trials).

¹⁹ See, e.g., *Times Herald*, 717 S.W.2d at 933 (demonstrating the various views vividly by contrasting the majority, concurring and dissenting opinions and discussing the value of encouraging settlement).

I. FIRST AMENDMENT RIGHT OF ACCESS TO CIVIL COURT RECORDS

The Supreme Court has not directly decided whether a first amendment right to attend a civil proceeding exists.²⁰ In *Richmond Newspapers, Inc. v. Virginia*,²¹ however, the Court held that the first amendment grants the public a right to attend criminal proceedings.²² Thus, in order to close a criminal case, a party must show "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."²³

The *Richmond Newspapers* Court adopted a two-prong historical/functional test, based on the historical openness and importance of criminal proceedings and the functional value of openness to a democratic government.²⁴ The Court listed several values advanced by

²⁰ See *Richmond Newspapers*, 418 U.S. at 580 n.17 (noting that the case did not answer the question for civil trials since the issue was not raised); *Fennel & Koley*, *supra* note 18, at 415 (discussing the extension of *Richmond Newspapers* to civil proceedings).

²¹ 418 U.S. 555 (1980) (plurality opinion). In *Richmond Newspapers*, the press sought to vacate an order closing a murder trial. *Id.* at 560. The trial court judge held that, because the trial was the fourth trial for the defendant, caution was necessary in order to prevent the jurors from hearing details outside the courtroom. *Id.* at 561.

²² *Id.* at 580. The Court stated that the "First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted." *Id.* at 576. Moreover, the first amendment implicitly requires access to assure the public's right to gather information. *Id.* at 575-76. The Court explained that "[t]he explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe the trial could, as it was here, be foreclosed arbitrarily." *Id.* at 576-77. Justice Rehnquist, however, in the dissent, expressly rejected a public right of access under the first or fourteenth amendments as long as the parties and the judge agree to closure. *Id.* at 604-06.

²³ See *Press-Enterprise Co.*, 464 U.S. at 510 (closing of criminal voir dire proceeding); *Globe Newspaper*, 457 U.S. at 606-607. The *Globe Newspaper* Court held that in a criminal case a party must show an important governmental interest and that no less restrictive means exists to protect that interest to justify closure of either the trial or records. 457 U.S. at 606-07.

²⁴ *Richmond Newspapers*, 418 U.S. at 564-78; see also *Publiker Indust. Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984) (discussing the factors and using the two prong test in a decision extending the first amendment right of access to civil proceed-

open trials.²⁵ These include: increasing the public's confidence in the judicial system; enhancing the quality of the system by subjecting proceedings to public view; increasing public information about important social issues; and educating the public about how the judicial system operates.²⁶ If these historical and functional values of openness outweigh the particular parties' benefits from closure, sealing is improper.²⁷

This first amendment balancing test, requiring a strong showing to prevent access, is in fact very similar to the common law right of access balancing test. Under the common law test, each case is similarly decided on a balancing of the cases's particular facts and circumstances, but with a lesser showing required to restrain access.²⁸ In fact, courts use the same reasons, such as increasing public confidence in the judiciary, as balancing factors under both tests.²⁹

After *Richmond Newspapers*, several courts extended the first amendment right of access to civil proceedings using the historical/functional test.³⁰ From this extension, some courts further held that a first amendment right of access to civil court records exists, including settlement agreements filed with a court under seal.³¹

ings). For a discussion of *Publiker Indust. Inc. v. Cohen* see *infra* notes 48-59 and accompanying text.

²⁵ *Richmond Newspapers*, 418 U.S. at 564-78.

²⁶ *Id.*

²⁷ *Id.*

²⁸ See *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978).

²⁹ See, e.g., *Nixon*, 435 U.S. at 602; *Minneapolis Star & Tribune*, 392 N.W.2d at 202-03 (discussing balance and value of factors under common law test).

³⁰ See *Wilson v. American Motors Corp.*, 759 F.2d 1568 (11th Cir. 1985). While *Wilson* did not expressly adopt a first amendment basis, the court did adopt the increased standard of proof necessary in first amendment cases to justify closure. Thus, the court required demonstration of an important interest as a strict prerequisite to restricted access to information. *Id.* at 1570; see also *Publiker Indust. Inc. v. Cohen*, 733 F.2d at 1070-71; *In re Continental Ill. Sec. Litig.*, 723 F.2d 1302 (7th Cir. 1984); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165 (6th Cir. 1983).

³¹ See *infra* notes 32-100 for some of the cases extending a right to civil records. The courts, however, did not discuss the differences between the right of access to trials and the right of access to records, which is a legitimate question potentially

A. *Extension of the Richmond Newspapers Test to Non-Settlement Materials*

One of the first cases to extend the first amendment right of access to civil records was *Brown & Williamson Tobacco Corp. v. FTC*.³² In *Brown & Williamson*, the Public Citizen Health Research Group, desiring to publish information in Federal Trade Commission (FTC) reports regarding tar levels in Brown & Williamson's cigarettes, intervened in a suit to modify an order sealing reports Brown & Williamson submitted to the FTC.³³ The citizen's group asserted three bases for its right of access: the Freedom of Information Act,³⁴ a common law right of access, and the first amendment.³⁵ The *Brown & Williamson* court, using the *Richmond Newspapers* historical/functional test, held that a first amendment right to the documents

affecting a determination of the access issue. See *In re Reporters*, 773 F.2d at 1331. The Tallahassee Democrat, Inc. v. Willis, 370 So. 2d 867, 871-72 (Fla. 1979) (pointing out the differences between closing a trial and closing records and finding no first amendment right allowing a court to unseal records which have been properly sealed); Note, *supra* note 17, at 691 (noting the difference and that public access is fulfilled solely by the right to attend a trial). *In re Reporters* stated that the first amendment does not create a right of access to civil trials, "much less to access to records in civil trials — or, for that matter, even records in criminal trials." 773 F.2d at 1331.

³² 710 F.2d at 1165.

³³ *Id.* at 1169. The group was a non-profit organization engaged in research and publication of health and safety information. *Id.* The plaintiff, Brown & Williamson, was a cigarette manufacturer whose tar levels were under investigation by the FTC after the FTC received complaints alleging that the FTC's testing methods produced erroneously low tar levels due to the special design of the plaintiff's cigarettes. *Id.* at 1168. Thus, public health was potentially adversely affected. *Id.* After determining the test results were incorrect, the FTC proposed to publish the information, at which point Brown & Williamson sought a preliminary injunction to stop the press release. *Id.*

³⁴ 5 U.S.C. § 552 (1982). The Freedom of Information Act allows any person to request from any federal governmental agency information ranging from agency opinions and records to statements of policy and staff manuals in order to prevent "secret" government. *Id.*

³⁵ *Brown & Williamson*, 710 F.2d at 1169. During the investigation, the FTC requested comments from five major cigarette companies, including Brown & Williamson. *Id.* The FTC also agreed to seal all the information from the administrative proceeding. *Id.* at 1176. The court dismissed the Freedom of Information claim because the statute expressly exempts courts from its application. See 5 U.S.C. §§ 551(1)(B), 552(j)(2) (1982).

existed.³⁶ Thus, Brown & Williamson failed to satisfy the increased burden of proof necessary to obtain closure.³⁷ Moreover, the court noted that in certain civil proceedings, such as those with government agency involvement, the public's interest and need for access are as high as in criminal proceedings.³⁸

Echoing the *Richmond Newspapers* Court, the *Brown & Williamson* court discussed the fact that widely publicized trials allow the public to see the government in action, permit expression of public concerns on important issues and venting of emotions, increase the quality of judicial proceedings by public scrutiny, and increase the public's confidence in the fairness of the judicial system.³⁹ Although the court noted that these factors arose in criminal access cases, it held that the factors apply with equal force to civil trials.⁴⁰ The court, however, did not discuss the differences between criminal and civil proceedings.⁴¹

Ultimately, the *Brown & Williamson* court held that there are only two categories of material exempt from public access, which are: matters related to keeping order in the courtroom and matters related to the content of the information.⁴² Under the first category, the court held that a

³⁶ *Brown & Williamson*, 710 F.2d at 1177-78.

³⁷ *Id.*

³⁸ *Id.* at 1178. For example, the court listed antitrust, government regulation actions, bankruptcy cases, and discrimination actions as instances in which public interest is very high. *Id.* Public interest increases because the outcome of the trial may affect citizens directly. *Id.*; see, e.g., *In re San Juan Star Co.*, 662 F.2d 108 (1st Cir. 1981) (allowing access to pretrial discovery material in a civil rights case on a restricted basis).

Other suits where public interest is high include physician malpractice or sexual misconduct, environmental contamination suits, and products liability cases. See Dallas Morning News, Nov. 22, 1987, at 1, col. 4. A major concern is that professionals escape review by state regulatory boards by sealing records, which means that physicians may have many instances of complaints against them yet no record for the public to check. *Id.* at 25A, col. 6.

³⁹ *Brown & Williamson*, 710 F.2d at 1177-78.

⁴⁰ *Id.*

⁴¹ *Id.*; see also Fenner & Koley, *supra* note 18, at 430-32 (discussing the factors and their application to civil proceedings).

⁴² *Brown & Williamson*, 710 F.2d at 1179. Under the second category, trade secrets, national security, and protecting the privacy of third parties justify closure. *Id.*; see also *In re Knoxville News-Sentinel Co.*, 723 F.2d 470, 476-77 (6th Cir.

party must demonstrate a compelling governmental interest to override the traditional presumption of access.⁴³ Under the second category, the court employed a balancing test weighing the parties' interests in closure against the public's interest in openness.⁴⁴ Additionally, the court stated that a company's desire to keep commercially harmful information from the public is not a factor for consideration in the balancing test.⁴⁵ In the court's opinion, the result of giving weight to the private parties' desires for secrecy would lead to abuses and a "norm" of closure rather than openness.⁴⁶

In 1984, the Third and Seventh Circuit Courts of Appeal also extended the first amendment right of access to civil court records.⁴⁷ In *Publicker Industries, Inc. v. Cohen*,⁴⁸ the issue was whether the first amendment protected the public's right of access to a confidential company report entered as evidence during a trial.⁴⁹ Only the portion of

1983) (allowing the sealing of FDIC records to preserve privacy because the material contained financial information of both parties and nonparties); *In re Estate of Hearst*, 67 Cal. App. 3d 777, 136 Cal. Rptr. 821 (1977) (closure, for a temporary period only, to prevent serious threats to the lives and property of trust beneficiaries). *But see* *United States v. Posner*, 594 F. Supp. 930 (S.D. Fla. 1984) (permitting access to defendant's tax returns which had been entered as evidence and discussed in open court, thereby becoming part of the open court record and waiving the right to privacy). The *In re Estate of Hearst* court clearly favored openness and stressed the fact the closure was purely temporary. 136 Cal. Rptr. at 821. *In re Estate of Hearst*, therefore, was arguably an early indication of the trend toward increased public access.

⁴³ *Brown & Williamson*, 710 F.2d at 1179.

⁴⁴ *Id.* The presumption in favor of disclosure tips the balance in favor of openness under this category. *Id.* This balancing test, "weighing in" the presumption of openness, is similar to the test used in determining the common law right of access. The major difference between the two balancing tests is that the first amendment test is weighted more heavily in favor of openness due to its constitutional basis. *See* *infra* notes 99-203 and accompanying text for a discussion of the common law test.

⁴⁵ *Brown & Williamson*, 710 F.2d at 1179.

⁴⁶ *Id.* For examples of present abuses of sealing, see Note, *Publicker Industries v. Cohen - Public Access to Civil Proceedings and a Corporation's Right to Privacy*, 80 Nw. U. L. Rev. 1319, 1324 n.36, 1350-51 (1987).

⁴⁷ *See Publicker Indus.*, 733 F.2d at 1061-70; *Continental*, 732 F.2d at 1302.

⁴⁸ 733 F.2d at 1061.

⁴⁹ *Id.* at 1061-65. The report concerned the company's use of an enzyme in the production of its Scottish whiskey. *Id.* Disclosure of this practice threatened ad-

the trial concerning the confidential report was closed to the public.⁵⁰ The court, finding that the common law right of access clearly applied, noted that a first amendment right of access is not yet explicitly recognized in civil cases.⁵¹

The court, however, extended the first amendment right of access to civil records and adopted the two-prong historical/functional test from *Richmond Newspapers*.⁵² *Publicker Industries* held that the balancing factors, although originating in criminal access cases, logically apply with equal force to civil cases. For example, the court stated that openness would increase the quality of trials and educate the public in civil as well as criminal trials. The court also noted that, historically, civil trials were as open to the public as criminal proceedings.⁵³ Further, in the court's opinion, openness in civil trials is just as necessary for the democratic process as it is in criminal trials.⁵⁴ Therefore, *Publicker Industries* held that a party must show a compelling governmental interest and the unavailability of a less restrictive method to protect that interest to justify closure.⁵⁵ Yet, while the court held that a first amendment right of access exists, it failed to critically analyze the distinctions between civil and criminal trials, or between access to a trial versus access to records.

verse economic consequences to the company, and the entire scotch industry as well, due to the widespread practice of blending different scotch whiskeys. *Id.*

⁵⁰ *Id.* The problem regarding the closure was that, by Publicker's own admission, at least one-third of the closed transcript did not contain truly confidential information. *Id.* Further, the sealing was not by mutual agreement but solely at the request of Publicker in order to protect its commercial reputation. *Id.*

⁵¹ *Id.* at 1066. Because the information was technically public at the time of the trial, the court first had to determine whether the issue of access was moot. *Id.* at 1065. The court held that because the question was one which was likely to occur again and which due to the short duration of trials could not normally be litigated before a trial ended, the court had jurisdiction to determine the issue. *Id.* The information was already "public" because the company released the material in the report to its stockholders during the pending appeal. *Id.*

⁵² *Id.* at 1067; *see also supra* notes 20-31 and accompanying text for a discussion of *Richmond Newspapers* and its test.

⁵³ *Publicker Indus.*, 733 F.2d at 1070.

⁵⁴ *Id.* at 1067-71.

⁵⁵ *Id.* at 1070-71.

Publicker Industries, however, did note that the right of access is not absolute under either the first amendment or the common law.⁵⁶ According to the court, the party seeking closure bears the burden of proving a "clearly defined and serious injury," such as that which occurs upon disclosure of a trade secret to close a record.⁵⁷ The reason for closing the *Publicker Industries* trial was proper because, if the public attended a confidentiality hearing, the material would necessarily not be confidential.⁵⁸ The problem, however, was that the district court abused its discretion by closing the entire record instead of narrowly tailoring the closure to fit the needs of the case.⁵⁹

Similarly, in *In re Continental Illinois Securities Litigation*,⁶⁰ the Seventh Circuit Court of Appeals extended the first amendment right of access not only to civil trials but also to civil records.⁶¹ In *Continental*, the press sought to obtain a special litigation committee report entered as evidence in open court during a motion to terminate shareholder derivative suits,⁶² basing its claim on the common law right of access.⁶³ The company responded

⁵⁶ *Id.* at 1070.

⁵⁷ *Id.* at 1070-71. *Publicker Industries* held that interests such as trade secrets, attorney-client privilege, or a binding contractual duty not to disclose information could justify closure. *Id.* at 1073. This raises the question of whether a binding agreement as part of a settlement justifies closure, an idea which some courts have rejected. See, e.g., *Wilson*, 759 F.2d at 1568 (allowing access to sealed settlement which was sealed by mutual agreement of all parties); *Times Herald*, 717 S.W.2d at 938 (holding that an agreement between the parties to deny access is not binding on a court).

⁵⁸ *Publicker Indus.*, 733 F.2d at 1063. Moreover, the court held that the injury must be specific in order to qualify for consideration. *Id.* at 1071. Thus, the company's desire to keep information pertaining to its poor management practices from the public did not qualify. *Id.* at 1074.

⁵⁹ *Id.* at 1072-73. Another problem was that the district court failed to make an adequate record for review. *Id.* at 1073. The *Publicker Industries* court also held that a district court should make specific findings on the record concerning access decisions in order to facilitate review. *Id.*

⁶⁰ 732 F.2d at 1302 (7th Cir. 1984).

⁶¹ *Id.* In *Continental*, shareholders were attempting to force the company to pursue certain legal claims. *Id.* at 1301. The company, in response, hired lawyers to investigate the merits of the claims. *Id.* The law firm then hired an accounting firm to investigate the company's auditors. *Id.*

⁶² *Id.* at 1304.

⁶³ *Id.* at 1308.

by asserting attorney-client privilege.⁶⁴ The court, however, began the opinion by stressing that a presumption of openness attaches once material is entered in the court records as evidence and relied on by the court in its decision.⁶⁵

While the *Continental* court did not expressly adopt a first amendment basis for the right of access, the court did adopt the more stringent first amendment standard requiring a compelling interest or extraordinary circumstances to justify closure.⁶⁶ *Continental* focused on the fact that if a judge relies on material, public access is necessary for the public to fully understand the judicial opinion.⁶⁷ The court also held that if parties discuss material in open court, the information becomes part of the open court record and subject to the presumption of openness.⁶⁸ Like the *Brown & Williamson* and *Publicker Industries* courts, however, the *Continental* court failed to discuss the distinctions between access to records and access to trials or the differences between civil and criminal proceedings.⁶⁹

Further, *Continental's* argument that other parties

⁶⁴ *Id.* at 1301-05. The company also asserted that the material was protected by work product immunity and that the protective order covering the report prevented disclosure. *Id.* at 1310. The court held, however, that once a party introduces material as evidence in open court, he waives these defenses. *Id.* at 1311-15. The court indicated that the report was an important determinant of whether it was proper to terminate the claims. *Id.* at 1307. In fact, the district court judge expressly indicated his reliance on the material. *Id.*; see also *F.D.R. Civ. P.* 26.

⁶⁵ *Continental*, 732 F.2d at 1308-09. The court listed factors such as improved public confidence and better quality of court proceedings arising from openness which weigh in favor of disclosure, along with court reliance. *Id.* Additionally, the court held that due to the nature of the suit, involving the securities market, public interest was high and thus weighed in favor of openness. *Id.* at 1308 n.9. Following the *Brown & Williamson* and *Publicker Industries* courts, the *Continental* court used a balancing test weighing the parties' interests in closure against the public's interests in openness. *Id.* at 1313.

⁶⁶ *Id.* at 1313. The balance must weigh clearly in favor of closure, thus a court resolves any doubts in favor of disclosure. *Id.* Additionally, the court advocated the use of specific findings on the record at the trial court level in order to avoid the necessity of remanding cases when proper review is impossible. *Id.*

⁶⁷ *Id.* at 1313.

⁶⁸ *Id.* at 1313-14.

⁶⁹ *Id.* at 1308-12; see also *supra* notes 32-59 and accompanying text for a discussion of the *Brown & Williamson* and *Publicker Industries* cases.

would use the material against it in other lawsuits did not persuade the *Continental* court to maintain closure.⁷⁰ The *Continental* court expressly rejected the contention that, absent a claim of clear and significant present danger to the party, potential future harm can prevent disclosure.⁷¹ Moreover, the court stated that heightened scrutiny is necessary in closure cases because less scrutiny could lead to abuses and a decrease of public confidence in the judiciary.⁷² The court did recognize, however, that allowing access to the report would hamper the free flow of information which makes special litigation committees effective.⁷³

Thus, based on *Continental* and similar cases, there is an apparent trend to extend the first amendment right of access to both civil trials and civil records, based largely on the historical/functional *Richmond Newspapers*' test.⁷⁴ When dealing with evidentiary materials, courts seem to apply the *Richmond Newspapers*' factors equally to civil and

⁷⁰ *Continental*, 732 F.2d at 1315.

⁷¹ *Id.* Further, the *Continental* court stated:

Continental also argues that confidentiality is required because otherwise the report will be used against it in other litigation. . . . We have some reason to doubt that the question whether third parties may use the report in litigation against *Continental* is, in strict contemplation, legally relevant to the decision whether the report should be disclosed. Whether the material is damaging is a consideration apart from attorney-client privilege or work product immunity. And there is no general privilege, analogous to the fifth amendment's protection against self-incrimination, that protects against disclosure of information that may lead to civil liability.

Id.

⁷² *Id.* at 1314. The court stated that "[w]hile sealing one document in one case may not have a measurable effect on confidence . . . the effect of a consistent practice of sealing documents could prove damaging." *Id.*

⁷³ *Id.* at 1314-15. The court, however, clearly refused to adopt a *per se* rule in favor of disclosure. *Id.* Rather, the court held that each case would turn on the balancing of its unique factors. *Id.* The dissent, however, noted that the report was submitted as evidence under seal and therefore was never really part of the open court record. *Id.* at 1320 (Poll, J., dissenting). Further, the dissent believed that the effects of the decision on special litigation committees deserved more weight than the majority attributed to the issue. *Id.* at 1316.

⁷⁴ See *supra* notes 32-73 and accompanying text for a discussion of some cases which extended the right.

criminal cases.⁷⁵ In civil or criminal cases, a court's reliance on material in forming a judgment on the merits necessitates access so that the public may fully comprehend the judicial determination.⁷⁶ A major problem with the trend, however, is the fact that the cases do not provide an in-depth analysis of the distinctions between civil and criminal trials.⁷⁷ Further, some cases fail to discuss the differences between access to records and access to trials or between pretrial and evidentiary materials.⁷⁸

For example, the *Brown & Williamson* case demonstrates the difference between access to non-settlement evidentiary material and access to settlement agreements.⁷⁹ The case centered on an administrative agency and its actions⁸⁰ and dealt with significant public health issues.⁸¹ Thus, public interest in disclosure weighed heavily in the balance. By contrast, most settlement agreements normally concern only private individuals, do not relate to public issues, are not evidentiary, and occur in private with no rules regulating behavior or directing results.⁸²

⁷⁵ See *supra* notes 21-27, 65-68 and *infra* notes 230-242 and accompanying text for a discussion of factors which courts consider and the effect of court reliance on access.

⁷⁶ *Id.*

⁷⁷ See, e.g., *Publicker Indus.*, 733 F.2d at 1059; *Continental*, 732 F.2d at 1032; *Brown & Williamson*, 710 F.2d at 1165.

⁷⁸ See *Publicker Indus.*, 733 F.2d at 1059.

⁷⁹ See *supra* notes 114-129, 230-242, and accompanying text for a discussion of some of the differences.

⁸⁰ *Brown & Williamson*, 710 F.2d at 1180. One difference is that *Brown & Williamson*'s competitors had ready access to the information due to the previous administrative proceeding. *Id.* Thus, any threat of harm to *Brown & Williamson* rested solely on release to the general public. *Id.*

⁸¹ *Id.* at 1168. Because the FTC determined that the tar levels were erroneously low for *Brown & Williamson*'s cigarettes, public safety and health were expressly implicated. *Id.* Additionally, the court held that the FTC's promise of confidentiality did not bind a federal court in subsequent litigation. *Id.* at 1180; see also 5 U.S.C. § 576 2(d)(2) (1987) (stating that disclosure of material from confidential agency documents is governed by court rules or orders).

⁸² See *supra* notes 230-242 and accompanying text for a discussion of the differences between settlement agreements and evidentiary materials. Perhaps the largest difference concerns court reliance on evidentiary material to form a judgment, thus increasing the need for public access so that the public may fully understand judicial decisions, an issue discussed at *supra* notes 64-68 and accompanying text.

B. Extension of First Amendment Right of Access to Settlement Agreements

Thus far the cases adopting a first amendment standard for a right of access to civil trials and records have not dealt with settlement agreements, which are arguably similar to nonpublic pretrial materials.⁸³ The cases did, however, establish a foundation which later courts used to permit access to settlements. In *Wilson v. American Motors Corp.*⁸⁴ for example, the plaintiff sought to invoke non-mutual collateral estoppel⁸⁵ against American Motors and, therefore, wanted to unseal a previous settlement agreement between Wilson and American Motors.⁸⁶ After discussing the common law right of access, *Wilson* noted that the Supreme Court has not extended the first amendment right of access to civil trials or records.⁸⁷ The *Wilson* court also noted the varying standards and uncertainty among appellate courts regarding access to civil records.⁸⁸ Ultimately, after analyzing the cases, *Wilson* held that in view of the strong presumption of openness of courts and records, a party must show a "compelling governmental interest" in order to close either a trial or

⁸³ See *supra* notes 32-81 and accompanying text for a discussion of these cases.

⁸⁴ 759 F.2d 1568 (11th Cir. 1985).

⁸⁵ Nonmutual collateral estoppel compares to res judicata in that a litigant may rely on a previous determination of an issue if a party had a full and fair opportunity to litigate the issue in a previous suit. See LANDERS & MARTIN, CIVIL PROCEDURE 933-53 (1981).

⁸⁶ 759 F.2d at 1569. Both plaintiffs were injured by the same model jeep manufactured by American Motors. *Id.* The plaintiff asserted both a common law and a first amendment basis for the right of access. *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 1570. The court referred to the *Publicker Industries* and *Brown & Williamson* cases which extended the first amendment right to access to civil evidentiary materials. *Id.* The *Wilson* court further noted that the Fifth Circuit Court of Appeals held that there is no constitutional right of physical access to courtroom exhibits. *Id.* The Fifth Circuit ruling bound the *Wilson* court since the Eleventh Circuit adopted as precedent all Fifth Circuit decisions prior to October 1, 1981. *Id.* (referring to *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423 (5th Cir. 1981)). Therefore, the *Wilson* court separated the materials sought by the plaintiff into two groups: those related to the court records, such as pleadings, docket entries, and transcripts; and courtroom exhibits. *Id.*

records.⁸⁹ It thereby adopted the more stringent first amendment standard.⁹⁰ Thus, because the original party did not demonstrate "exceptional circumstances," the court held that the order granting the original seal was invalid.⁹¹ Additionally, *Wilson* held that a company cannot prevent disclosure merely by asserting that release will harm its commercial reputation.⁹²

Moreover, *Wilson* held that the need to encourage settlements cannot justify closure although recognizing that it is a valid concern.⁹³ While recognizing the existence of public and private interests in encouraging settlements, the court stated that "the payment of money to an injured party is simply not 'a compelling governmental interest'" The court's major concern was that if courts give weight to parties' desires for "secrecy" many parties would agree to close records, thus leading to abuses of the system.⁹⁴ *Wilson* raises questions, however, of fairness

⁸⁹ *Id.* at 1571.

⁹⁰ *Id.* Adopting the standard from criminal access cases, the *Wilson* court also held that closure must be narrowly tailored to suit the particular situation. *Id.* (referring to *Globe Newspaper*, 457 U.S. at 606-07). *Wilson* differs from some cases in that although the court sealed the entire record, the trial itself was open to the public. *Id.* at 1569. Thus, the plaintiff or anyone could have attended the trial. *Id.* Further, the *Wilson* parties settled only after the jury answered special interrogatories, as opposed to other cases which settle before the trial or at least before the case reaches the jury. *Id.*

⁹¹ *Id.* The court, however, failed to distinguish and discuss the differences between access to a trial and access to records, simply noting that the public could have attended the trial. *Id.* For a discussion of these distinctions, see *infra* notes 108-110 and accompanying text. *Wilson* listed as examples of "exceptional circumstances" protection of trade secrets, national security, and privacy of third parties. 759 F.2d at 1570. The court even indicated that if material is relevant to another case, access is desirable in order to save costs and time for both the court and the parties. *Id.* at 1571 n.3.

⁹² *Id.* at 1571-72. Further, the court stated that a "desire to prevent the use of [the] trial record in other proceedings is simply not an adequate justification for its sealing." *Id.*

⁹³ *Id.* In fact, the *Wilson* court noted that the district court judge actively participated in the settlement, and stated that "[t]here is no question that courts should encourage settlements." *Id.* at 1571-72 n.4.

⁹⁴ *Id.*

⁹⁵ *Id.* The court stated that:

[I]f the payment of money to an injured party is simply not 'a compelling governmental interest' legally recognizable or even entitled to consideration in deciding whether or not to seal a record. We feel

to the parties because settlements depend largely on the skills and efforts of counsel and the varying desires of the parties rather than upon established objective standards.⁹⁶ Thus problems arise from the *Wilson* court's failure not only to distinguish civil and criminal cases, but to separate settlement agreements from evidentiary court materials.⁹⁷ Yet, the *Wilson* decision follows the trend toward increased public access based on the first amendment and extends the right to include settlement agreements filed or discussed in a court during products liability cases.⁹⁸

II. THE COMMON LAW RIGHT OF ACCESS

The common law right of access test is essentially the same balancing test as the first amendment test except the balance is not tipped as greatly in favor of access. In fact, courts cite many of the same reasons for access in common law cases. For example, both civil and criminal trials have traditionally been open to the public with a corresponding presumption of openness attaching to the court records.⁹⁹

certain that many parties to lawsuits would be willing to bargain (with the adverse party and the court) for the sealing of records after listening to or observing damaging testimony and evidence. Such suppression of public records cannot be authorized. The situation here is further aggravated by the attempted suppression of a jury verdict because it might adversely affect American Motors in other judicial proceedings. Such action is contrary to the most basic principles of American jurisprudence.

Id.
⁹⁶ *Id.* at 1568. The danger lies in the fact that the factors relied on as supporting access arose in criminal actions. Moreover, a settlement is a private contract in contrast to evidence because evidence forms the basis of a court's judgment and is "public" information. See *supra* notes 20-31 for a discussion of *Richmond Newspapers* and *infra* notes 230-242 for a discussion of court reliance and its relationship to public access.

⁹⁷ *Wilson*, 759 F.2d at 1568-72.

⁹⁸ See *supra* notes 32-82 for a discussion of this trend and cases following it.
⁹⁹ See *Craig v. Harney*, 331 U.S. 367 (1947); *United States v. Edward*, 672 F.2d 1289, 1290 (7th Cir. 1981); Note, *supra* note 17; *Fenner & Koley*, *supra* note 18. Note, *supra* note 16. The *Cong.* court emphasized that a "trial is a public event", thus making what transpires in the courtroom public property. 331 U.S. at 368. Another court stated that "[o]nce the evidence has become known to the mem-

In *Nixon v. Warner Communications, Inc.*,¹⁰⁰ concerning the press's efforts to gain access to the actual Watergate tapes, the Supreme Court clearly acknowledged a common law right of access to court records.¹⁰¹ The Court stated that "the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents."¹⁰² Further, the Court held that a party does not need a proprietary or evidentiary interest in the material in order to enjoy this right.¹⁰³

Nixon also stated, however, that the common law right of access is not absolute and that courts retain supervisory powers over their records.¹⁰⁴ Thus, a court may deny access in order to prevent use of the material for "improper purposes" such as sensationalism or promoting public scandal.¹⁰⁵ Additionally, a court may deny access if the party seeking the information may use the material to

bers of the public . . . it would take the most extraordinary circumstances to justify restrictions on the opportunity of those not physically in attendance at the courtroom to see and hear the evidence . . ." *In re National Broadcasting Co. v. United States*, 635 F.2d 945, 952 (2d Cir. 1980) (criminal case concerning access to tapes played as evidence during open court). The *National Broadcasting* court noted, however, that if the evidence had been offered under a properly granted seal the case would have been entirely different because that portion of the trial would not have been open to the public. *Id.* at 952 n.4.

¹⁰⁰ 435 U.S. 589 (1978). The tapes were played as evidence in open court. *Id.* The public and the press, however, already had transcripts of the tapes. *Id.* Thus, as the Court noted, only physical access to the tapes themselves remained unavailable. *Id.* at 590.

¹⁰¹ *Id.* at 597. The Court held that the common law right exists although its exact historical origins are unclear and there are no cases directly on point delineating the exact scope of the right. *Id.*

¹⁰² *Id.* (footnote omitted).

¹⁰³ *Id.* For instance, *Nixon* stated that a citizen's desire to inspect the records merely to check on and observe the workings of the government justifies access. *Id.* at 598.

¹⁰⁴ *Id.* at 598.

¹⁰⁵ *Id.* The *Nixon* Court indicated that the proper test balances the factors favoring access, adding the presumption of openness, against the factors weighing against disclosure. *Id.* at 602. This test is very similar to the first amendment test yet without the increased burden of proof necessary to overcome the presumption of openness. See also *supra* notes 20-98 and accompanying text for a discussion of the first amendment standard and cases using it.

harm the commercial standing of a competitor.¹⁰⁶ Ultimately, the *Nixon* Court indicated that decisions regarding disclosure rest in the trial court's discretion and depend on the weight of the particular facts of each case.¹⁰⁷

Significantly, the *Nixon* decision further stated that neither the first nor the sixth amendments support a right of access to court records.¹⁰⁸ The Court, noting the differences between access to a trial and access to records, stated that "[t]he requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed."¹⁰⁹ Thus, the *Nixon* Court expressly rejected the

¹⁰⁶ *Nixon*, 435 U.S. at 598.

¹⁰⁷ *Id.* at 599. The Court suggested factors which trial courts should weigh in the balance, including: the value of allowing the public to view the judicial process; the value of informing the public about important events; the importance of the event in question; the parties' right to privacy; the need to protect privacy of third parties; and the use for which the material is sought. *Id.* at 600-02. The Court, however, decided the issue based on the Presidential Recordings Act, making the discussion of the common law right of access dictum. *Id.* at 603-07; see also Presidential Recordings Act of 1978, 44 U.S.C. §§ 101, 2107-2108, 2201-2207 (1982). Indeed, the fact the decision does not rest on the common law right of access causes uncertainties among courts and commentators regarding the proper standard of review and the strength of the presumption of openness. Uncertainty about the standard of review arises from the Court's statement, after discussing the balancing factors, that "[a]t this point, we normally would be faced with the task of weighing the interests advanced by the parties in light of the public interest and the duty of the courts." *Nixon*, 435 U.S. at 602. One view holds that a reviewing court should grant the lower court's decision a high degree of finality, using the normal abuse of discretion test. The other view states that a reviewing court should reweigh the factors, granting the lower court's decision only a slight degree of finality because of the *Nixon* Court's statement. See Note, *supra* note 17, at 683-85 (advocating the use of the slight degree of finality standard).

¹⁰⁸ *Nixon*, 435 U.S. at 608-10 (emphasis added). Some authorities argue that there is also an implicit right of access under the first amendment because the public cannot physically attend every trial. See, e.g., Note, *supra* note 17, at 691. The note states:

It is possible, however, that the right to attend criminal trials, as a practical matter, does not satisfy the public's right to freedom of information In order to guarantee the implicit constitutional right of [the] public and press to attend criminal trials to obtain information, the Supreme Court could recognize another implicit, indispensable right to inspect and copy evidentiary tapes

Id. The note, however, concludes that this implicit right does not exist and further, that the right of access is satisfied by the right to attend trials. *Id.* at 692.

¹⁰⁹ *Nixon*, 435 U.S. at 610. Some courts have noted the *Nixon* Court's failure to establish a first amendment right of access to civil records, as well as the uncer-

argument that the first amendment supports access to criminal court records, much less to civil records or settlement agreements.¹¹⁰

A. Application of the Common Law Right of Access to Settlement Agreements

Nixon firmly implanted the common law right of access to criminal judicial records in most cases.¹¹¹ Yet, *Nixon*

cauties concerning access. See *Belo Broadcasting*, 651 F.2d at 431 (criminal case dealing with access to audiotapes played as evidence). The *Belo Broadcasting* court, referring to access cases, stated:

In erecting such stout barriers against those opposing access and in limiting the exercise of the trial court's discretion, our fellow circuits have created standards more appropriate for protection of constitutional than of common law rights. With all due respect, we find such standards to be misreadings of the Supreme Court's directives, and we decline to apply them here.

Id.

¹¹⁰ *Nixon*, 435 U.S. at 608-10. The Court stated:

Respondents claim that [the first amendment] guarantees the press 'access' to — meaning the right to copy and publish — exhibits and materials displayed in open court.

This argument misconceives the holding in *Cox Broadcasting*. Our decision in that case merely affirmed the right of the press to publish accurately information contained in court records open to the public.

The First Amendment generally grants the press no right to information about a trial superior to that of the general public.

Id. at 608-09 (emphasis added) (referring to *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (dealing with the first amendment right of access to names of criminal victims)). Further, the Court stated:

Respondents contend that release of the tapes is required by the Sixth Amendment guarantee of a public trial. They acknowledge that the trial at which these tapes were played was one of the most publicized in history, but argue that public understanding of it remains incomplete in the absence of the ability to listen to the tapes.

The requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed.

Id. at 610; see also Hagenbach, *Scaled Judicial Records and Infant Doe: A Proposal to Protect the Public's Right of Access*, 16 IND. L. REV. 861, 882 (1983) (noting the uncertainty of a first amendment basis for a right of access to records and advocating adoption of clear guidelines to allow lower courts to more effectively use the common law right of access); Note, *supra* note 17, at 691 (distinguishing the right of access to trials from access to records and discussing the *Nixon* Court's apparent refusal to find a first amendment basis for a right of access to records).

¹¹¹ See *supra* notes 100-110 and accompanying text for a discussion of *Nixon*.

left unanswered several questions, such as the proper standard of review, the strength of the presumption in favor of openness, and how far the decision extends to civil trials or records.¹¹² Lower courts, however, have attempted to delineate the scope of the right and create standards for applying the balancing test to actual situations.¹¹³ For example, in *Minneapolis Star & Tribune v. Schumacher*,¹¹⁴ the issue was whether the court should unseal five settlement agreements arising from an airplane crash.¹¹⁵ The appellate court granted access to the documents, focusing on the fact the parties discussed the terms of the settlements in open court.¹¹⁶ Further, the appellate

¹¹² See *infra* notes 243-250 and *supra* notes 108-110 and accompanying text for discussion of these questions and possible answers. The uncertainties arise mainly from the fact that the case ultimately rested on grounds other than the common law right of access, as well as the Court's statements about the standard of review and presumption of openness. Regarding the presumption of openness, the Court stated that "[a]lso on respondents' side is the presumption — however gauged — in favor of public access to judicial records." *Nixon*, 435 U.S. at 602 (emphasis added).

¹¹³ See *infra* notes 111-203 and accompanying text for a discussion of some courts' attempts.

¹¹⁴ 392 N.W.2d 197 (Minn. 1986).

¹¹⁵ *Id.* at 200. Galaxy Airlines, Inc. operated the plane which crashed. *Id.* An additional factor in the case was that state law required the parties to file the agreements with the court because minor heirs were involved. *Id.* at 200 n.1 (referring to MINN. STAT. § 573.02 (1984)). Therefore, the case is different from the majority of settlements in which filing with the court is voluntary. *Id.* For another products liability case allowing access to settlement agreements, but under a first amendment right, see *supra* notes 81-98 and accompanying text.

¹¹⁶ *Minneapolis Star & Tribune Co. v. Schumacher*, 383 N.W.2d 323, 327 (Minn. Ct. App. 1986). The appellate court stated that once material becomes part of an open court record only "compelling governmental interests" can justify closure. *Id.* at 328. Thus, the appellate court adopted the heightened scrutiny standard normally used in first amendment cases. *Id.* The dissent, however, disagreed, stating that the first amendment standard applies only to criminal cases. *Id.* at 328 (Wozniak, J., dissenting). Further, the dissent stated that the majority's prior restraint analysis was not proper because the public never had the information and no one was prohibiting dissemination of public material. *Id.* at 329. Even though the hearings were open to the public, no one but the parties attended. *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 200. Moreover, the dissent noted that the only information that the press did not have was the amount and terms of the settlements. *Minneapolis Star & Tribune Co.*, 383 N.W.2d at 329-30. The dissent believed that publication of this information would not serve any of the traditional factors used to justify access, such as increasing the quality of the judicial proceedings by public scrutiny. *Id.* at 330.

court held that encouraging settlements, even in a mass tort situation, was not a "weighty" enough factor to overcome the presumption of openness because this factor is present in all litigation.¹¹⁷

The Minnesota Supreme Court, however, noted that while some courts have extended the first amendment right of access to include civil trials and records, most have not.¹¹⁸ Thus, the court chose to adopt a standard requiring a party to demonstrate "strong countervailing reasons" or "compelling reasons" for closure.¹¹⁹ Turning to the balancing test under the "compelling reasons" standard, the court stated that the majority of settlement agreements take place in private with the court exercising no control over the events.¹²⁰ Further, as the court observed, courts are not involved at all in typical settlements because the parties normally move for voluntary dismissal

¹¹⁷ *Id.* at 328. The dissent, however, pointed out that the majority did not analyze the distinctions between criminal and civil trials before adopting the first amendment standard, which arose from criminal cases. *Id.* In the dissent's opinion, settlement agreements are not public parts of any trial. *Id.* at 330. Additionally, the dissent noted that settlements take place in private without the participation of the court and emphasized the fact that filing in the present case was not voluntary. *Id.*

¹¹⁸ *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 203. The court also noted the absence of a decision by the Supreme Court on the issue and that most courts elect to base access on the common law right. *Id.*

¹¹⁹ *Id.* at 202. One of the problems in right of access cases is the varying standards among courts using the common law right of access, in addition to the confusion as to whether a first amendment claim also exists. The court expressly limited its decision, however, to apply only to settlement documents "or transcripts made part of a civil court file by statute," thus implicitly recognizing that different materials may need different tests and standards. *Id.* at 203.

¹²⁰ *Id.* at 201. The court stated:

Historically, the majority of settlements entered into between parties have been private. The parties agree to settle in private, outside of the courtroom and without the participation of the court. The court is only involved by accepting a stipulated agreement in which the parties inform the court that there has been a settlement and ask that the case be dismissed. The court, however, does not approve, or even inquire into, the terms of the settlement. The historic privacy of settlement agreements is borne out by the fact that settlements, offers to settle, and statements made during settlement negotiations are all inadmissible under the Rules of Evidence to prove liability.

Id. (referring to MINN. R. EVID. 408).

after reaching an agreement.¹²¹ Moreover, the court noted that the present filing was not voluntary.¹²² Finally, the value of encouraging settlements, especially in cases with several potential suits like this one, was a significant factor which the court weighed in the balance.¹²³ The court stated that release of the information would not only impede further settlements between Galaxy and potential plaintiffs, but could also "chill" future settlements in other unrelated cases.¹²⁴ This "chilling effect" on settlements would then increase the time and costs of litigation, both to the parties and the courts.¹²⁵

¹²¹ *Id.* Certain exceptions to this rule, such as class action suits, require courts to approve the settlement. See Fed. R. Civ. P. 23(e), 23.1 (class actions and shareholder derivative suits).

¹²² See *supra* note 115 and text for a discussion of the state's filing requirement.

¹²³ *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 205. Another factor noted by the court is the fact that parties cannot use settlement terms as evidence in trials. *Id.* at 201. In the court's opinion, this restriction demonstrates the private nature of settlements. *Id.*; see also Fed. R. Evid. 408. Further, *Minneapolis Star & Tribune Co.* noted that a major reason parties settle is to avoid publicity. *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 204-06. The court also held, however, that parties cannot escape access simply by agreeing among themselves to seal the settlement. *Id.* Rather, the decision rests with the court and depends on the particular balance of all the factors of each case. *Id.*

¹²⁴ *Id.* at 205. The court indicated that by adopting a standard permitting easy access to sealed settlements, future litigants would hesitate to settle if confidentiality was a key element because confidentiality could not be guaranteed. *Id.* The court stated:

The philosophical reasoning behind allowing private settlements also leads to the conclusion that such agreements should remain private. This court has often stated that it favors the settlement of disputed claims without litigation To allow public access to settlement documents filed with a court may circumvent this policy. One of the reasons parties agree to settle is that they do not wish to go to trial and expose their disputes to the public It would therefore be inconsistent with our public policy encouraging settlement to allow the settlement documents in this case to be made public. Such reasoning would tend to discourage settlements rather than encourage them.

Id. The court feared that allowing access would hamper negotiations between Galaxy and plaintiffs whose suits were still pending. *Id.*

¹²⁵ *Id.* at 201, 205. Other factors the court weighed included the privacy of the families, their right to grieve in private, and their right to have their financial affairs private. *Id.* at 206. Additionally, disclosure of the settlement amount could increase the likelihood of theft and vandalism. *Id.* As the dissent in the appellate decision stated:

[I]f the privacy interests of the grieving families in these cases is com-

Thus, contrasting the *Minneapolis Star & Tribune* appellate and supreme court opinions reveals the conflict and uncertainty over right of access cases and the proper basis for access.¹²⁶ Even though the court rejected a first amendment basis, it nonetheless confused the outcome by adopting a compelling need standard to justify closure. The value of the case, however, lies in its recognition and discussion of the importance of encouraging settlements.¹²⁷ For example, the supreme court recognized the increased value of encouraging settlement in situations like plane crashes where there are multiple plaintiffs.¹²⁸ Finally, the court recognized the distinction between settlement agreements and other court materials — a factor which courts should analyze but often neglect.¹²⁹

Yet another problem arises when, due to the identity of the parties or the nature of the lawsuit, significant public interest in disclosure exists.¹³⁰ For example, in *Miami Herald Publishing Co. v. Collazo*,¹³¹ the Miami Herald sought ac-

cess to a newspaper article which had been sealed by the court. The article described the tragic death of a young child. The court held that the newspaper had a right to be left alone. They have a right not to have their tragedy thrust into the public eye without their consent and with no redeeming public purpose except the satisfaction of the public's idle curiosity. They have a right not to have their personal financial affairs splashed across the pages of a newspaper. They have a right to be free from burglary, harassment, and intimidation, instances of which have already been documented in these cases.

Minneapolis Star & Tribune Co., 383 N.W.2d at 330 (Wozniak, J., dissenting).

¹²⁶ See *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 197; *Minneapolis Star & Tribune Co.*, 383 N.W.2d at 323.

¹²⁷ See *infra* notes 201-250 and accompanying text for a discussion of the value of encouraging settlements.

¹²⁸ *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 205.

¹²⁹ See *supra* notes 120-125 and accompanying text for a discussion of the distinctions between settlements and other trial materials, and *infra* notes 32-98 and accompanying text for a discussion of cases in which these distinctions were not recognized.

¹³⁰ See, e.g., *In re San Juan Star Co.*, 662 F.2d at 108 (allowing access to pretrial discovery materials in a civil rights case because of the high public interest); see also *supra* notes 38 and 65 and accompanying text for types of cases with great public interest. Another example of a topic of great public interest is Aids, a deadly viral infection recently sparking public controversy. One judge refused to seal court records in a suit involving a pediatrician alleged to have the Aids virus, in spite of the fact that the publicity could, and did, ruin the physician's practice. See *Dallas Morning News*, Nov. 22, 1987, at 24A, col. 1.

¹³¹ 329 So. 2d 333 (Fla. Dist. Ct. App.), cert. denied, 342 So. 2d 1100 (Fla. 1976).

cess to a sealed settlement between the city of Miami and Collazo, who was the victim of a police shooting.¹³² The trial, however, was open to the public except for the portion in which the parties discussed the settlement terms.¹³³ The trial court denied access to the sealed settlement, stating that "the amount of money involved was no one's business but those of the parties involved themselves."¹³⁴ The Miami Herald appealed, asserting a first amendment right of access to the settlement.¹³⁵

The appellate court, however, focused on the common law right of access rather than the first amendment.¹³⁶ One significant factor to the court was the involvement of a governmental unit as a party.¹³⁷ The court stated that the public had a substantial interest weighing in favor of disclosure because the suit involved city funds obtained from public taxes, which were used for the city's insurance, salaries and the cash settlement.¹³⁸ Balancing the

¹³² *Id.* at 334. The police shot and paralyzed Collazo during a burglary investigation. *Id.* Collazo's suit alleged that police misconduct and improper police training were the causes of the injury. *Id.*

¹³³ *Id.* The trial lasted only two days before the parties settled. *Id.*

¹³⁴ *Id.* at 335.

¹³⁵ *Id.* Collazo and the city defended by asserting a right to privacy and the right to reach a private agreement. *Id.*

¹³⁶ *Id.* at 336-38. The court stated that it was "unaware of any specific constitutional or statutory provision giving the press or the public a right to attend a judicial proceeding." *Id.* at 337. Further, the court enunciated that an open court is "an indispensable part of our system of government and our way of life" and that "what transpires in the courtroom is public property." *Id.*

¹³⁷ *Id.* at 338. The court stated that the value of open courts in a representative form of government is great and, therefore, with the city's involvement as a party the presumption in favor of openness increased. *Id.* at 336. Also, after reviewing criminal and civil cases, the court stated that the two justifications for closure are significant privacy concerns and the need to guarantee an impartial and fair trial. *Id.* Privacy concerns cited by the court included certain juvenile proceedings, adoption, and custody actions. *Id.*

¹³⁸ *Id.* at 338. The court stated:

Further, appellants' right to know the terms of the settlement agreement is particularly compelling here because of the nature of the issues being litigated, i.e., alleged police misconduct and improper police training involving a City of Miami police officer acting in his official capacity. These issues created a substantial monetary liability for the City and influenced its insurance rates for the future, which costs must be borne by the taxpayers. Moreover, the activities complained about are by their very nature newsworthy.

factors of the case, the court therefore held that the trial court abused its discretion by granting the request to seal the settlement.¹³⁹

Collazo provides a good example of how the common law balancing process can work to provide an acceptable answer if courts consider all the factors, including the nature of the suit and the identity of the parties.¹⁴⁰ Thus, the proper balancing of the factors should act to eliminate potential abuses of closure requests while adequately protecting both public and private interests because the balancing process takes in all relevant factors, ranging from privacy interests to potential decreases in court costs and time if settlements are encouraged by guaranteeing confidentiality.¹⁴¹ Because the court balances the factors, and not the parties, the potential for abuse is limited.

B. Distinguishing Between Sealing and Unsealing

While the balancing tests under the common law right of access works, albeit with some confusion, other factors besides the identity of the parties or nature of the suit come into play. Another factor which some courts recognize in right of access cases is that courts may need to apply a different standard when determining the appropriateness of later attempts by unrelated third parties to unseal settlements. This difference is important because the original parties may have relied on confidentiality in reaching the settlement agreement.¹⁴² In *Palmieri*

Id. The insurance company had already indicated that premiums would increase due to the city's claim experience. *Id.* at 336.

¹³⁹ *Id.* at 338-39. Further, the court declared that the city's fears that the information would affect pending litigation against the city was not a factor to weigh in the balance. *Id.* at 337. This reason did not rise to the level of being a "cogent reason for sealing" and the city failed to show "any immediate threat to the administration of justice" to justify the closure. *Id.*

¹⁴⁰ See *supra* notes 123, 130-139, for cases in which the balance arguably works well regardless of the circumstances.

¹⁴¹ See *supra* notes 46, 50, 95 and *infra* note 177 and accompanying text for examples of abuses.

¹⁴² See *infra* notes 147-203 and accompanying text for a discussion of the issues of parties' reliance and fairness.

v. New York,¹⁴³ for example, the court drew a distinction between the original sealing of the settlement and the later attempt to unseal it.¹⁴⁴ In *Palmieri*, the state of New York intervened in a private antitrust action between Palmieri and DIC Concrete Corp. to modify the order sealing the settlement so that the district attorney could use the information in grand jury proceedings against the parties.¹⁴⁵ After the district court granted the motion to unseal, Palmieri appealed to the Second Circuit Court of Appeals.¹⁴⁶

Recognizing the differences between sealing and unsealing, the Second Circuit adopted a standard requiring a party seeking disclosure to show "extraordinary circumstances or compelling need," the opposite of the test for sealing.¹⁴⁷ Thus, *Palmieri* held that when parties rely on a settlement's confidentiality, the party seeking access must satisfy the greater burden of proof.¹⁴⁸ Indeed, the court stated that a party's reliance "raises a presumption in favor of upholding [the sealing] orders."¹⁴⁹

In *Palmieri*, the court was faced with two competing in-

¹⁴³ 779 F.2d 861 (2d Cir. 1985).

¹⁴⁴ *Id.* at 865. The parties and the court acknowledged the great overlap between the state's antitrust action and the parties' case. *Id.* In fact, this is one reason the state sought to unseal the settlement agreement. *Id.* at 861-65.

¹⁴⁵ *Id.* at 864.

¹⁴⁶ *Id.* at 862. The parties' main argument was that they were deprived of legal rights because they had relied heavily on the sealing order in reaching the settlement. *Id.*

¹⁴⁷ *Id.* at 866. This standard is the exact opposite of the usual standard which requires the party seeking closure to demonstrate compelling need. See *supra* notes 99-125 and accompanying text for a discussion of the usual standard.

¹⁴⁸ *Palmieri*, 779 F.2d at 865. One factor the court noted was the magistrate's very active role in achieving the settlement due to the parties' concern that the Attorney General would obtain the information. *Id.* Thus, it would be unfair for the court to first encourage and actively assist in settlement only to then allow access to the material which the court promised would remain sealed. *Id.* The magistrate even stated that the settlement would have been extremely hard, if not impossible, without the promise to seal the agreement. *Id.* at 861. Earlier, the Attorney General used information from a sealed agreement against DIC Concrete Corp., which led to the parties' fears in *Palmieri*. *Id.* at 863.

¹⁴⁹ *Id.* Additionally, the court stated:

As appellants have argued, here the very papers and information that the Attorney General seeks apparently would not even have existed but for the sealing orders and the magistrate's personal assur-

terests: (1) the state's interest in criminal investigation and obtaining evidence for grand jury proceedings; and (2) the interest in promoting settlement.¹⁵⁰ The court first noted that, in a previous decision, it held parties are entitled to rely on protective orders to prevent third party access even if the third party is a governmental unit.¹⁵¹ Also, the court stated that a state begins the battle against any private litigant with a distinct advantage due to its extensive investigative power.¹⁵² Thus, while a party's reliance would not automatically foreclose unsealing, the court held the decision whether to unseal a settlement agreement is best left to the trial court's discretion.¹⁵³ The court further stated that the trial court should decide based on the unique facts of each case with a view toward maintaining closure in cases where the parties relied on confidentiality.¹⁵⁴

*Times Herald Printing Co. v. Jones*¹⁵⁵ also demonstrates the uncertainty and conflicting views regarding the right of access to judicial records and settlement agreements and the value of encouraging settlements, although the case was later vacated for lack of jurisdiction.¹⁵⁶ The *Times Herald* attempted to unseal a settlement agreement, court orders, and non-discovery materials to publish the mate-

rials of confidentiality, upon which the appellants apparently relied in agreeing to enter closed-door settlement negotiations.

Id.

¹⁵⁰ *Id.* at 864.

¹⁵¹ *Id.* (referring to *Mattocelli v. International Tel & Tel Corp.*, 591 F.2d 291 (2d Cir. 1979)). Thus, by analogy a party should be entitled to rely on an order sealing settlement documents, as neither order deals with evidentiary materials. In *Mattocelli*, the court held that a party must show compelling need or extraordinary circumstances to overcome a protective order regardless of whether the party seeking access was a governmental unit. 591 F.2d at 296.

¹⁵² *Palmieri*, 779 F.2d at 866.

¹⁵³ *Id.* at 865.

¹⁵⁴ *Id.* (emphasis added). The court remanded the case to the district court after developing the new standard for unsealing. *Id.* The court also held that if the state could demonstrate a compelling need, such as the impossibility of obtaining the information by any other means after a good faith effort, disclosure would be proper. *Id.* at 865-66.

¹⁵⁵ 717 S.W.2d 933 (Tex. Ct. App., *reversed*), 730 S.W.2d 618 (Tex. 1986).

¹⁵⁶ *Id.* at 933-38.

rial arguing that the public needed the facts to evaluate a judge seeking re-election.¹⁵⁷ The trial court had sealed the record upon the requests of both parties after the parties settled before the actual trial began.¹⁵⁸ The *Times Herald* argued it had a right of access under the common law, first amendment, and the Texas Constitution.¹⁵⁹

After disposing of the other two claims, the *Times Herald* court accepted the existence of the common law right of access based on *Nixon*.¹⁶⁰ The court reiterated, however, that the right is not absolute¹⁶¹ and stressed the discretion of the trial court in the balancing test.¹⁶² Thus, the court held that closure is proper if the information sought contains a trade secret; pertains to national security; involves the privacy of third parties; or if there is a binding contractual duty not to disclose the information.¹⁶³ Significantly, the court analyzed the difference between unsealing, which raises questions of the parties' reliance on confidentiality, and sealing.¹⁶⁴ Thus, like the *Palmieri* court, the *Times Herald* court held that a party seeking to

¹⁵⁷ *Id.* at 934-35. The original suit involved physician misconduct. *Id.* at 935. The newspaper did not seek access to discovery materials, which both the parties and court stated were non-public parts of the trial process. *Id.* at 938 n.1. However, settlement agreements are also arguably non-public aspects of a trial. For a discussion of the special nature of settlement agreements, see *infra* notes 230-242 and *supra* notes 114-129 and accompanying text.

¹⁵⁸ *Times Herald*, 717 S.W.2d at 934. The fact the case never went to trial refutes some courts' fears concerning abuse. For example, one court stated that everyone would agree to settle after hearing damaging evidence and therefore closure would become the "norm". *Wilson*, 759 F.2d at 1571.

¹⁵⁹ *Times Herald*, 717 S.W.2d at 934. The court rejected the Texas constitutional claim, stating that the only case law pertained to criminal cases. *Id.* at 936. The court similarly rejected the first amendment claim after noting that it also only applied to criminal cases and that the Supreme Court had rejected a first amendment right of access to records in the *Nixon* decision. *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 939. The court also stated that private agreements alone, however, will not bind a court, a view similar to the *Wilson* and *Minneapolis Star & Tribune* courts. *Id.* at 938; see also *supra* notes 84-98, 114-129, for a discussion of the two cases.

¹⁶³ *Times Herald*, 717 S.W.2d at 938.

¹⁶⁴ *Id.* The court referred to *FDIC v. Ernst & Ernst*, 677 F.2d 230 (2d Cir. 1982), which supports the presumption of maintaining closure and distinguishes between unsealing and sealing. *Times Herald*, 717 S.W.2d at 938.

unseal documents must show "extraordinary circumstances" in order to gain access to previously sealed material.¹⁶⁵

Unlike some courts, however, *Times Herald* stated that the value of encouraging settlement is a significant factor which courts should consider in the balancing test in many cases.¹⁶⁶ The court indicated that a state has a great interest in encouraging settlements which weighs against the public's need to have access to settlement terms.¹⁶⁷ In the court's opinion, adopting a less stringent test would affect future settlements.¹⁶⁸ Impeding settlements would in turn increase the overload in trial courts because parties could not depend on lasting confidentiality when negotiating settlements.¹⁶⁹ Additionally, by allowing easy access to sealed material, a "chilling effect" on potential litigants could occur with the effect of nonlitigation of valid claims.¹⁷⁰ Finally, the *Times Herald* court noted that many of the common balancing factors which support public access do not apply to settlement agreements because of the private nature of the agreements.¹⁷¹ Thus,

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 938-40. The *Times Herald* court noted that the trial court's agreement to seal the settlement was a significant factor in the parties' attaining settlement. *Id.* at 940.

¹⁶⁷ *Id.* at 939.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* The court stated:

In our litigious society, for us to take the position that private litigants, who have settled their dispute before calling upon a court or jury to find, true the facts alleged in the pleadings, and who have settled in reliance upon the court's agreement to seal the record from public disclosure, have no right to expect the confidentiality to which they agreed and to which they were assured, would seriously impair the settlement process and would increase the trial overload which presently exists in our judicial system.

Id.

¹⁷⁰ *Id.* Denying confidentiality would deter people from pursuing valid legal claims because one reason people settle is to avoid publicity. *Id.* Moreover, the public, as well as the state, has an interest in encouraging settlement because of the increased time and costs of litigation compared to settling disputes. *Id.*

¹⁷¹ *Id.* at 940. The court noted that most settlement agreements occur in private with no court supervision and reflect the private desires of the particular parties. *Id.* Therefore, the argument that openness serves to increase judicial quality by public scrutiny does not apply to settlements. *Id.* at 939-40.

the majority held that the newspaper did not meet its burden of proof and denied access to the sealed settlement.¹⁷²

Yet, the *Times Herald* decision was strikingly far from unanimous.¹⁷³ The concurring opinion emphasized the value of encouraging settlements and stated that neither the press nor the public has a right to unlimited gathering of information.¹⁷⁴ The dissenting opinion, focusing on the Supreme Court cases establishing a first amendment right of access to criminal trials and the two-prong *Richmond Newspapers* test, however, believed a first amendment right of access exists for civil trials and records.¹⁷⁵ The dissent stated that many of the factors pertaining to the value of openness in criminal proceedings apply equally to civil trials, especially when the nature of the suit itself concerns the public directly or indirectly.¹⁷⁶ Finally, the dissent stated that the more significant concerns are the parties' rights to privacy rather than the value of encouraging set-

¹⁷² *Id.* The court stated that "the trial court's action in sealing the records was within his [sic] discretionary authority, that there was a substantial basis for the court's refusal to unseal the records, and no abuse of discretion is shown." *Id.*

¹⁷³ *Id.* at 940. The court, sitting *en banc* on rehearing, tallied seven members in the majority, one concurring opinion, and five in the dissent. *Id.*

¹⁷⁴ *Id.* at 941 (Whitham, J., concurring). Judge Whitham stated that "[t]he right to speak and publish does not carry with it the unrestrained right to gather information." *Id.* Further, Judge Whitham indicated that even if the first amendment supports access, the value of encouraging settlement is so significant that the balance would still tip in favor of nondisclosure. *Id.*

¹⁷⁵ *Id.* at 943-44 (Howell, J., dissenting). The dissent distinguished *Nixon* as a case of special access because the public already had written transcripts of the tapes and the press was seeking the actual tapes. *Id.* The dissent relied heavily on *Richmond Newspapers*, stating that "a new day dawned" with the decision. *Id.* Judge Howell interpreted the case as establishing constitutional protection for the acquisition of newsworthy material. *Id.* at 943; see *supra* notes 20-31 for a discussion of *Richmond Newspapers* and *supra* notes 108-110 for a discussion concerning the distinction between access to the trial and access to records, which indicates the dissent's reliance may have been misplaced.

¹⁷⁶ *Times Herald*, 717 S.W.2d at 944 (referring to factors such as increasing the quality of trials). Further, the dissent stated that the majority failed to critically analyze potential differences and/or similarities between criminal and civil cases before adopting the factors from criminal cases. *Id.* Judge Howell referred to environmental, products liability, and discrimination cases, which potentially can have a great impact on the public. *Id.* Thus, in these cases public interest in access would weigh heavily in the balance. *Id.*

tlements, and that even these rights might not tip the balance in favor of closure.¹⁷⁷

Other cases further demonstrate the uncertainties over access to sealed settlements. In *Bank of America National Trust v. Hotel Rittenhouse Association*,¹⁷⁸ FAB III, a concrete contractor, requested access to a sealed settlement agreement between the Bank of America and Hotel Rittenhouse (HRA).¹⁷⁹ The Bank and HRA settled the dispute before jury deliberations on the condition that the court seal the agreement.¹⁸⁰ FAB III, a creditor of HRA, alleged that the Bank and HRA had engaged in a conspiracy to prevent public access to "otherwise public proceedings."¹⁸¹ The district court denied the motion to unseal in a "one-paragraph order" stating that the private and public interests in settling disputes outweighed the public's interest in disclosure of the information.¹⁸²

On appeal, the Third Circuit Court of Appeals adopted

¹⁷⁷ *Id.* at 946-47. The dissent stated:

[T]he primary factor set forth in opposition of access is the parties' agreement to seal the records. This should be given little weight. The public has an independent interest in the record that the parties may not foreclose by mere agreement. If the matter were left entirely to the litigants and disclosure forbidden unless at least one party consented to public access, the vast majority of civil records would be screened from the public view. A drastic diminution of the stock of information available to those who pay for the creation and operation of the courts would inevitably result.

Id. at 946 (citations omitted). Further, the dissent pointed out that in the present case the court sealed the entire record instead of the legitimately confidential portions. *Id.* at 947. Thus, the closure exceeded the limit necessary to protect the privacy interests of the parties. *Id.* at 934, 947. The dissent also disagreed with the majority's valuation of encouraging settlement, ranking it as a very minor factor. *Id.* at 946.

¹⁷⁸ 800 F.2d 339 (3d Cir. 1986).

¹⁷⁹ *Id.* at 340-41. The Bank contracted with HRA to finance the construction of the hotel, a relationship which ended in a suit for foreclosure. *Id.* at 340.

¹⁸⁰ *Id.* The trial itself, however, was open to the public. *Id.* at 341. FAB III did not want evidence from the trial, only the settlement, even though the settlement itself was never "public information." *Id.*

¹⁸¹ *Id.* FAB III did not assert a first amendment right of access, thus the court did not address the issue. *Id.* at 343.

¹⁸² *Id.* For a discussion of the abuses of sealing records, see *supra* notes 46, 50, 95, and accompanying text. Other courts hold that the lower court must make a specific record for review to prevent waste of time and abuses. See *also supra* notes 59 and 66 and accompanying text for a discussion of the requirement of a record.

the common law balancing approach from *Nixon* and placed the burden of proof on the party seeking closure to overcome the presumption of openness.¹⁸³ According to the majority, the issue before the court was "whether the district court abused its discretion in holding that the judicial policy of promoting the settlement of litigation justifies the denial of public access to records and proceedings to enforce such settlements."¹⁸⁴ The Bank and HRA argued that settlement agreements are non-public aspects of trials.¹⁸⁵ The court, however, distinguished between a settlement which is not filed with a court and one like the settlement between the Bank and HRA.¹⁸⁶ According to the court, when the Bank and HRA filed their settlement with the court, the settlement technically became part of the judicial record.¹⁸⁷ Therefore, *Bank of America* held that once parties file an agreement with the court, the settlement takes on the same qualities as evidence or court rulings with a corresponding public

¹⁸³ *Bank of Am.*, 800 F.2d at 344. The court refused to apply the more stringent first amendment test. *Id.* The court also emphasized the fact that the common law right of access was not absolute. *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 343. The Bank and HRA relied on *Seattle Times*, a case concerning the press' right of access to names and addresses of donors and members of a religious organization. *Id.* (referring to *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984)). In *Seattle Times*, the press wanted to publish information obtained during discovery in a defamation suit between the newspaper and the organization. 467 U.S. at 23. The Supreme Court, in denying access to the information, discussed and emphasized the distinction of discovery as a non-public part of a trial. *Id.* at 32-33.

¹⁸⁶ *Bank of Am.*, 800 F.2d at 343-44. Moreover, the court stated that the parties could have avoided disclosure by not filing the agreement with the court and moving for voluntary dismissal. *Id.* at 344. The parties filed the agreement with the court anticipating future problems with compliance, thus hoping to avoid the need to initiate a new suit. *Id.*

¹⁸⁷ *Id.* at 343. The court stated:

Similarly, unlike the civil discovery materials at issue in *Seattle Times*, a motion or a settlement agreement filed with the court is a public component of a civil trial. As in the cases involving trial rulings or evidence admitted, the court's approval of a settlement or action on a motion are matters which the public has a right to know about and evaluate.

Id. at 343-44 (emphasis added).

right of access.¹⁸⁸

Yet, the *Bank of America* court, like the *Times Herald* court, recognized the value of encouraging settlements to both the public and the courts.¹⁸⁹ After balancing the factors of the particular case, however,¹⁹⁰ the *Bank of America* court determined that the district court abused its discretion in granting the motion to seal.¹⁹¹ The court, therefore, allowed access to the agreement and declared that such openness would promote an informed public; increase the public's confidence in the system and public understanding of the judicial process; act as a "check" on the system by subjecting the court to public view, thus promoting honesty and fairness within the courts; and prevent abuses of closure.¹⁹² Finally, the court noted that the case was a single claim between two parties rather than a multi-district, multi-party, complex case in which

¹⁸⁸ *Id.* at 344.

¹⁸⁹ *Id.* at 344, 346. The court stated that by adopting a policy of encouraging settlements the public and courts could save time and costs, and mentioned that settlement agreements generally may not be used as evidence to prove liability. *Id.* (referring to FED. R. EVID. 408).

¹⁹⁰ *Bank of Am.*, 800 F.2d at 342-46. The factors included: the presumption of openness of trials and records; court reliance on filed materials such as settlement agreements requiring access for complete public understanding of the opinion; the private nature of settlements contrasted with "public" evidence; the fact the case was simple rather than complex; and the effects of access on future settlements. *Id.*

¹⁹¹ *Id.* at 344, 346. In addition to the typical fears of abuse and secrecy related to access of court records, the court focused on the fact the parties filed the settlement with the court. *Id.* at 345. The majority stated:

In the name of encouraging settlements, [the dissent] would have us countenance what are essentially secret judicial proceedings. We cannot permit the expediency of the moment to overturn centuries of tradition of open access to court documents and orders.

Having undertaken to utilize the judicial process to interpret the settlement and to enforce it, the parties are no longer entitled to invoke the confidentiality ordinarily accorded settlement agreements. Once a settlement is filed in the district court, it becomes a judicial record, and subject to the access accorded such records.

Id.

¹⁹² *Id.* These benefits and factors are the same factors used in *Richmond Newspapers'* historical/functional balance for a first amendment right of access, discussed at *supra* notes 110-112. *Bank of America*, however, failed to distinguish between civil and criminal trials, or even between access to records and access to trials.

encouraging settlement becomes paramount.¹⁹³

By contrast, the *Bank of America* dissent, as did the *Palmieri* and *Times Herald* courts, separated the original sealing and later unsealing of settlements and advocated two separate standards.¹⁹⁴ To Judge Garth, the real issue was "whether a privately negotiated settlement agreement, agreed to and entered into a court record *only on condition that it remain secret*, should now be *unsealed* because of the district court's supposed abuse of discretion in permitting it to be filed under seal."¹⁹⁵ The dissent advocated adopting a standard requiring a third party to prove extraordinary circumstances or a compelling need in order to unseal a record.¹⁹⁶ Further, the dissent stated that the effect of the majority's opinion was to create a *per se* rule in which the public's right of access would always prevail over the interest in settling the case and privacy.¹⁹⁷ Therefore, Judge Garth asserted that the majority decision would "impair seriously the efficacy of judicial efforts to encourage [the] settlement of many cases"¹⁹⁸

In summary, therefore, there are two distinct situations which may arise in some jurisdictions in "unsealing" cases, varying with the parties' reliance.¹⁹⁹ If the parties

¹⁹³ *Bank of Am.*, 800 F.2d at 346. The dissent relied on *FDIC v. Ernst & Ernst*, to support its argument for the *unsealing* standard and necessity of encouraging settlement. *Id.* at 348 (referring to *FDIC v. Ernst & Ernst*, 677 F.2d 230 (2d Cir. 1982)).

¹⁹⁴ *Bank of Am.*, 800 F.2d at 346-47 (Garth, J., dissenting).

¹⁹⁵ *Id.* at 347. The dissent also noted that *both* parties requested the sealing, as distinguished from cases in which only one party seeks closure. *Id.* at 346.

¹⁹⁶ *Id.* at 348 (referring to *Ernst & Ernst*, 677 F.2d at 232). The dissent noted that the settlement was never public information to start with because it was entered under seal. *Id.* at 347. This fact, according to the dissent, gave "rise to a new and different factor: the reliance of the parties on the initial and continuing secrecy of the settlement agreement." *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* Further, Judge Garth stated that the majority decision "utterly ignores the importance of, and the practical realities surrounding, the process of settling lawsuits." *Id.*

¹⁹⁹ *Id.* at 348. As the dissent in *Bank of America* stated, "[a]lthough the common law right of access must be given due regard, a court cannot operate in a vacuum. To apply mechanically the same test no matter what the factual circumstances, is to risk doing injustice to parties before the court." *Id.*

have not relied on the confidentiality of the settlement agreement, the normal common law balancing test with the presumption in favor of openness applies.²⁰⁰ If, however, the parties have relied on the confidentiality, the burden of proof for the third party rises to a level requiring a showing of extraordinary circumstances or compelling need in order to unseal the settlement agreement.²⁰¹ Recognizing such a two-level standard could alleviate the fear that emphasis on the value of encouraging settlements would result in secret trials.²⁰² Courts avoid such abuses because it is the *court's* weighing of all relevant factors which controls the outcome rather than the private parties' agreement.²⁰³ Yet, in the already uncertain area of access, adopting another standard based on a factor such as reliance may create as many problems as it solves.

III. THE VALUE OF PROMOTING SETTLEMENT

Besides fairness and party reliance, which may support maintaining closure, the value of encouraging settlement may also support maintaining closure in some cases. There are several reasons why courts should give the value of encouraging settlements significant weight in the balancing tests — both from the public's and the courts' points of view.²⁰⁴ One reason is the litigation explosion of recent years. This phenomenon has forced courts to increasingly advocate alternative means of dispute resolution.²⁰⁵ To some courts and authorities, the increasing

²⁰⁰ *See, e.g., Times Herald*, 717 S.W.2d at 938. Normally, under the common law balance test the presumption of openness tips the balance in favor of disclosure, whereas here the balance shifts to favor maintaining closure if parties relied on confidentiality. *Bank of Am.*, 800 F.2d at 348.

²⁰¹ *See, e.g., Bank of Am.*, 800 F.2d at 348; *Palmieri*, 779 F.2d at 862.

²⁰² *See, e.g., Palmieri*, 779 F.2d at 865. In fact, the *Bank of America* dissent stated that "branding such an action [sealing the record] as a 'secret judicial proceeding,' with all that such a term may connote, and claiming that sealing practices will 'overturn centuries of tradition of open access' is not an adequate substitute for reasoned judicial analysis." *Bank of Am.*, 800 F.2d at 349 n.3.

²⁰³ *See, e.g., id.* at 348-49 n.3 (Garth, J., dissenting).

²⁰⁴ *Id.* at 349.

²⁰⁵ *Id.* Judge Garth noted that "[b]etween 1973 and 1983, new filings of civil cases in the federal district courts rose from 98,560 to 241,842, an increase of 145

use of alternative dispute resolution is evidence of the need to encourage settlements.²⁰⁶ Additionally, an express goal of Rule 16 of the Federal Rules of Civil Procedure is to encourage settlement.²⁰⁷ Other factors which support closure and the need to encourage settlement are: the avoidance of wasting courts' and parties' resources when settlement is successful; the fact that confidentiality is a key factor in many settlements; and the fact that settlement agreements may contain information which the parties legitimately desire to keep from the public but for which they cannot obtain a protective order.²⁰⁸

In re Franklin National Bank Securities Litigation,²⁰⁹ cited by several courts in their attempts to balance factors pertaining to the right of access,²¹⁰ exemplifies the significant value of settlement in certain cases.²¹¹ *Franklin* was a complex, multi-district case involving the insolvency of one of

percent." *Id.* (referring to Levin & Colliers, *Containing the Cost of Litigation*, 37 RUTGERS L.J. 219, 227-29 (1985)).

²⁰⁶ *Id.*; see also PROVINCE, SETTLEMENT STRATEGIES FOR FEDERAL JUDGES (1986). The increase has not only been in the number of suits, but also in the length and complexity of suits. *Bank of Am.*, 800 F.2d at 349. According to one authority, "[t]he federal courts held 213 trials lasting 20 days or more in 1973 [which] doubled to 426 by 1983." *Id.* (referring to Levin & Colliers, *supra* note 205). The judge stated that the majority of commentators and judges agree on "the value and necessity of a vigorous policy of encouraging fair and reasonable settlement of civil claims whenever possible," finding that "the literature . . . focuses not on whether settlement is desirable, but on how best to achieve it and how far a judge should go to encourage it." *Id.* at 350.

²⁰⁷ See FED. R. CIV. P. 16. Rule 16 states that one purpose of a pretrial conference is to "facilitat[e] the settlement of the case," and that the parties may discuss at the conference "the possibility of settlement or the use of extrajudicial procedures to resolve the dispute." *Id.* at 16(a)(5), (c)(7).

²⁰⁸ *Bank of Am.*, 800 F.2d at 350. Judge Garth pointed out in *Bank of America* that one study of ten federal courts showed that 88 percent of cases settle pretrial, with only nine percent actually reaching trial. *Id.* Thus, adoption of a policy which discourages settlement would increase the already existing overload without any new cases.

²⁰⁹ 92 F.R.D. 468 (E.D.N.Y.), *aff'd sub nom. FDIC v. Ernst & Ernst*, 677 F.2d 230 (2d Cir. 1982). This comment merely touches on the value of settlement as it may relate to the balancing tests in access cases.

²¹⁰ See *Bank of Am.*, 800 F.2d at 345, 348; *Palmieri*, 779 F.2d at 865; *Times Herald*, 717 S.W.2d at 938.

²¹¹ See *supra* notes 166-177, 191-193, and accompanying text for a discussion of this issue.

the nation's largest banks.²¹² Two years after some of the parties reached a settlement based on confidentiality, third parties sought to unseal the agreement.²¹³ The district court denied the motion, focusing on the parties' reliance on confidentiality in reaching the agreement and the enormous costs involved.²¹⁴ In fact, the court stated that the only reason the parties ever settled was due to their reliance on both protective orders and the sealing orders.²¹⁵ According to the court, without the settlement, the trial would have continued for at least six more months.²¹⁶ Continuing the trial would have forced an even greater investment by the parties and the court and consumed the balance of the insurance funds which protected both the defendants and their creditors.²¹⁷

Moreover, in mass torts where problems are also complex, the value of promoting settlements is also substantial. As one authority, Judge Williams, noted, in a society where parties file an ever increasing number of mass tort lawsuits, "it is not an overly pessimistic prediction that, absent some legislative or judicial solution, our attempt to try these virtually identical lawsuits, one-by-one, will bankrupt both the state and federal court systems."²¹⁸

²¹² *Franklin*, 92 F.R.D. at 472.

²¹³ *Ernst & Ernst*, 677 F.2d at 231.

²¹⁴ *Franklin*, 92 F.R.D. at 472. The court noted that the case lasted over five years, contained volumes of discovery materials and documents, and cost the parties millions of dollars in legal fees before the parties settled. *Id.* at 469. Further, the court stated that "[h]ad the trial continued, many millions of dollars more would have been expended in legal fees, a trial court would have been heavily engaged for a long period, more appeals were inevitable and jurors would have been inconvenienced." *Id.* at 470.

²¹⁵ *Id.* at 472. The court stated:

The settlement agreement resulted in the payment of substantial amounts of money and induced substantial changes of position by many parties in reliance on the condition of secrecy. For the court to induce such acts and then to decline to support the parties in their reliance would work in injustice on these litigants and make future settlements predicated upon confidentiality less likely.

Id.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ See S. Williams, *Mass Tort Class Actions: Going, Going, Gone?*, 98 F.R.D. 323, 324 (1983). Williams further noted that several current mass tort suits "[threaten] to

Williams separates mass tort cases into two categories.²¹⁹ He classifies the first category as mass products liability cases and the second as mass accident cases such as plane crashes.²²⁰ Williams advocates using the class action device to alleviate some of the problems with certain mass torts, such as products liability cases.²²¹ Nevertheless, Williams also recognizes that mass accident cases are not normally suitable for class actions and that many courts persist in opposing the use of class actions in such cases.²²² Finally, Williams notes that "the cost of retaining experts, collecting medical or technical data and collecting hundreds of depositions and affidavits preclude[s] the vigorous maintenance of a complex product liability suit by an individual plaintiff."²²³ Therefore, due to the high costs of suits and absence of alternatives such as class actions, settlement is possibly the most desirable and feasible alternative in mass accident cases.²²⁴ Any actions hindering settlement, therefore, could be extremely costly.²²⁵

last well into the next century." *Id.* He noted that according to the 1981 Annual Report of the Administrative Office of the United States Court, over 9,000 new products liability suits were filed in district courts, representing a 17 percent increase over the 1980 figures and following a trend which began in 1974. *Id.* at 324 n.2.

²¹⁹ *Id.* at 324 n.1.

²²⁰ *Id.*

²²¹ *Id.* at 325.

²²² *Id.* at 329.

²²³ *Id.* at 329 n.19.

²²⁴ See *supra* note 222 and accompanying text for a discussion of the absence of alternatives.

²²⁵ See *Franklin*, 92 F.R.D. at 472 and *supra* notes 209-217 and accompanying text for a discussion of mass torts, options and costs. One court stated:

Voluntary settlement of civil controversies is in high judicial favor. Judges and lawyers alike strive assiduously to promote amicable adjustment of matters in dispute, as for the most wholesome of reasons they certainly should. When the effort is successful, the parties avoid the expense and delay incidental to litigation of the issues; the court is spared the burdens of a trial and the preparation and proceedings that must forerun it.

Pennwalt Corp. v. Plough, Inc., 676 F.2d 77, 80 (3d Cir. 1982) (quoting *Aultra v. Robinson*, 419 F.2d 1197, 1199 (D.C. Cir. 1969)); see also *Times Herald*, 717 S.W.2d at 941-42. The *Times Herald* concurring opinion indicated that even if the court used the heightened scrutiny test from a first amendment basis for access that the

Additionally, in mass tort lawsuits, encouraging settlement takes on an even greater value since the defendant cannot look solely at an isolated agreement but rather must consider the potential of many suits by many parties.²²⁶ This requires the defendant to anticipate the effect of a single settlement agreement on all the possible suits.²²⁷ Moreover, if settlement is the most desirable alternative in these cases court supervision and approval of settlements may protect the plaintiffs by "evening out the odds" between defendant corporations and individual plaintiffs.²²⁸ Yet, ironically, court involvement also de-

substantial value of encouraging settlement to a state alone could tip the balance in favor of closure. *Id.* The concurring opinion further stated that the value of settlement is a "compelling governmental interest" and a trial court's order sealing an agreement is "no greater than [is] necessary or essential to the protection of the State's interest in encouraging and facilitating the settlement of lawsuits pending in its courts." *Id.* at 941.

²²⁶ See *Minneapolis Star & Tribune*, 392 N.W.2d at 205 (access to settlement in plane crash case with pending suits).

²²⁷ *Bank of Am.*, 800 F.2d at 351 (Garth, J., dissenting). The dissent stated that because the defendant has to look to the effect of any agreement on many cases, the defendant will be less likely to settle favorably with a party in the absence of confidentiality. *Id.* The dissent stated:

Moreover, it is precisely in the context of mass torts with multiple plaintiffs such matters as air disasters, toxic injuries, and products liability claims — that the interest in settlement is particularly strong. Such cases are characteristically long, complex, and costly to try, and the savings in public and private resources achieved by settling them are immense. As one judge familiar with the trial of mass tort cases noted: 'Even saving one week of judicial time per case would, as most trial judges know, be substantial. For example, in the Dalkon shield litigation, the record disclosed that, if the usual percentage (90) of the 1000 member statewide class settled their case, the savings of judicial resources in the trial of the remaining 100 would amount to 100 weeks, or, roughly, eight years of trial time. In addition, there would be an estimated savings of \$26 million in litigation expense to the parties and \$7 million of court expenses.'

Id. at 352 (quoting Williams, *supra* note 218, at 323, 328).

²²⁸ See *supra* note 225 for a discussion of why courts may need to supervise settlements because of party inequality; see also *The Dallas Morning News*, Nov. 22, 1987, at 8A, col. 2. The article, *Sealed Lawsuits Deal with Poisonings, Sex, Surgery*, stated that court supervision and approval of settlements is necessary in some cases, as well as non-disclosure of the parties' names, if the parties are mentally retarded or children who may fall victim to frauds. *Id.* The article cited one case involving lead poisoning of mainly young children which resulted in a \$20 million sealed settlement. *Id.* The plaintiffs' attorney agreed to seal the records to prevent exploitation of the children by "aluminum-siding people." *Id.*

stroys any opportunity for confidentiality in some jurisdictions.²²⁹

IV. POSSIBLE SOLUTIONS AMID THE UNCERTAINTY

Besides giving weight to the value of encouraging settlement, there are solutions and other considerations which could alleviate some of the confusion regarding access to settlement agreements. One consideration in settlement access cases, for example, should be the distinctions between pretrial versus trial proceedings or records, distinctions which are related to the "court reliance" factor.²³⁰ In *In re Reporters Committee for Freedom of the Press*,²³¹ the court separated pretrial materials and trial records, stating that pretrial information is not part of the open court record upon which a court relies to form a judgment on the merits.²³² The court further stated that

²²⁹ See *supra* notes 64-68, 186-191, and accompanying text for a discussion of the view that filing any material with a court makes the material part of the official court record and therefore subject to access.

²³⁰ See, e.g., *In re Reporters*, 773 F.2d at 1335. This case concerns third party attempts to obtain sealed discovery documents used to support a motion for summary judgment in a civil defamation case. *Id.* Other authorities, however, have the opinion that any material, even settlements, become public property once the parties file a lawsuit regardless of whether a court relies on the material. See *Dallas Morning News*, Nov. 22, 1987, at 24A, col. 6. The article quotes David Anderson, professor of law at the University of Texas, as stating:

[The parties have] invoked the public processes, and we pay for the court, we pay the judge's salary and we pay for that courtroom. It is not then their option to decide that having availed [themselves] of all these public resources [they can] now decide to make this a purely private matter.

Id.

²³¹ *In re Reporters*, 773 F.2d at 1334. The court reviewed the history of access to pretrial materials and the status of state and federal law regarding access to such materials. *Id.* The court held that as a general rule there is not a common law right of access to prejudgment records in civil cases. *Id.* Similarly, settlements are prejudgment, nonpublic parts of a trial.

²³² *Id.* Pretrial materials include pleadings and discovery materials — items not yet entered as evidence. *Id.* The court held that, since a court does not rely on pretrial materials for an ultimate judgment on the merits, public access will not serve to enlighten the public as to the rationale behind a decision. *Id.* at 1335. The court stated that:

The factor most obviously distinguishing the request for records in the present case from the requests at issue in the vast majority of reported cases — and the factor that obviously caused the District

pretrial materials are private efforts, occurring without court direction and with the content determined solely by the private individuals.²³³ Thus, public access to pretrial material may not serve any of the functions usually cited to support access.²³⁴ For example, access will not serve to increase the quality of judicial proceedings by placing the trial participants under public scrutiny.²³⁵ Further, *In re Reporters* noted that the factors which plaintiffs cite in support of a right to access arose in criminal cases.²³⁶ In the court's opinion, these factors do not apply equally to civil proceedings.²³⁷

Thus, to the extent settlement agreements are comparable to private, pretrial aspects of a trial upon which the

Court to deny access without the document-by-document examination that ordinarily accompanies Rule 26(c) protective orders — was the pendency of the litigation at the time the request was made. We must consider, therefore, whether the tradition of public access includes pre-judgment access '[A] record or transcript brought into this court on appeal, after judgment entered on the proceedings by the tribunal appealed from, do [sic] not stand upon the footing of original papers placed in the files of a court of original jurisdiction, and where there has been no trial had or judgment entered thereon.'

Id. at 1335 (quoting an earlier opinion, *Ex parte Drawbaugh*, 2 App. D.C. 401 (1894)).

²³³ *Id.* at 1335. The court drew an analogy to the fact that a party may not base a defamation suit on pretrial documents as pleadings because the material at this point is entirely private and the court has not heard nor acted upon the information. *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.* at 1336-37.

²³⁷ *Id.* The court stated:

Even assuming, as seems unlikely, that these functions are as important in the context of civil suits between private parties as they are in criminal prosecutions, they are not greatly enhanced by access to documents (which, unlike live proceedings, do not contain unrecordable subtleties) before judgment rather than after.

Id. at 1337 (emphasis added). The *In re Reporters* dissent, however, focused more on a court's reliance rather than on a private/public analysis of pretrial materials. *Id.* at 1342-43 (Wright, J., dissenting). The dissent stated that once a party files any material with a court, regardless of the stage of litigation, on which the court subsequently relies to make any judgment, the right of access attaches to the material. *Id.*; see also *In re Coordinated Pretrial Proceedings in Petroleum Prod. Antitrust Litig.*, 101 F.R.D. 31 (C.D. Cal. 1984) (holding that the right of access attaches when the documents are submitted in connection with any motion to the court).

court does not rely to form a judgment, the value of a right of access should decrease.²³⁸ Special problems arise, however, when a court must approve a settlement agreement.²³⁹ This is because the approval requires court assessment, which in turn may support access based on the court's reliance to form a judgment.²⁴⁰ One commentator noted this particular problem and advocated, as a solution to access problems, adopting an access test based on whether the material formed the basis of a decision on the merits.²⁴¹ In a case requiring court approval of a class action settlement, for example, one court dealt with the problem by holding that because the court opinion approving the settlement served to give the public enough indicia of the court's rationale, the court should deny access to the actual settlement.²⁴²

²³⁸ See *supra* notes 230-250 and accompanying text for a discussion of the qualities of pretrial materials and why access is not as vital. Further, settlement agreements depend largely upon the desires of the parties and their counsels' skills. For example, settlement may only reflect a desire to avoid publicity or the time and costs of litigation, rather than any belief in guilt or innocence. See *supra* notes 117, 120-125, 171, and accompanying text for a discussion of the distinctions of settlements; see also FED. R. EVID. 408 advisory committee's note.

²³⁹ See Marcus, *supra* note 13, at 49. Marcus discusses the right of access to pretrial materials and settlements and the distinctions of pretrial materials. *Id.* He stated that in pretrial situations, the court has not determined whether a "genuine dispute" exists. *Id.* Therefore, disclosure of the information would "provide little insight into the decision on the merits. . . . Moreover, a ruling that a party must disclose to the public all materials offered in connection with a motion for summary judgment that is ultimately denied could preclude later settlement conditioned on confidentiality." *Id.*

²⁴⁰ *Id.* at 49 n.206. Marcus noted:

Particularly difficult problems may result from a court's duty under rule 23(e) to approve any settlement of a class action. To do so, a court must conclude that the settlement is 'fair, reasonable and adequate', a process that requires some assessment of the evidence unearthed by the parties. If that material is covered by a protective order, the court's process of assessment may provide a basis for vacating the order. Yet, disclosure might preclude a settlement contingent on confidentiality.

Id. (citation omitted). Because Marcus feels that the critical issue justifying public access is the interest of the public in overseeing the judicial process, the text should focus on the court's reliance on the material occurring when the court enters a judgment on the merits. *Id.* at 49.

²⁴¹ *Id.*

²⁴² See *In re Corrugated Container Antitrust Litig.*, 659 F.2d 1322 (5th Cir. 1981).

Other commentators have also proposed solutions to some of the problems generated by third party access to sealed settlement agreements and other confidential materials.²⁴³ First, some suggest that courts should recognize the value of confidentiality in encouraging settlements and guarantee confidentiality in "good faith" cases.²⁴⁴ For example, courts could give greater weight to the value of encouraging settlements in the balancing tests.²⁴⁵ Alternatively, courts could determine if a court relied on the information in forming a judgment on the merits, thereby increasing the need for disclosure.²⁴⁶ Additionally, courts could develop clearer guidelines delineating the proper inquiry and standards for granting sealing requests, which could not only make better records, but prevent abuses as well.²⁴⁷

²⁴³ See *supra* notes 6, 59, 66, and accompanying text for a discussion of some problems and suggestions for reform.

²⁴⁴ See Annual Judicial Conference, Second Judicial Circuit of the United States, 101 F.R.D. 161, 233 (1983) (Dean Edward A. Dauer speaking on the topic of "How Lawyers and Judges Can Use Alternatives to Litigation").

²⁴⁵ See *id.* at 233. Dean Dauer stated:

There are legitimate, good faith reasons for the parties who are trying to work out a solution to something like [a] toxic tort case to want their discussion to be private, immune both from later admission and immune from discovery by other potential plaintiffs' lawyers later down the road, maybe even from competitors, and I think there are good faith reasons for wanting that privacy. That confidentiality is a very large advantage that will, if it can be guaranteed, make [alternate methods of dispute resolution] even more useful as adjuncts to the judicial process than they already are.

Id.

²⁴⁶ *Id.* Further, Dauer stated that "in the current state of the law in most jurisdictions, practically every place, we can't guarantee that degree of confidentiality that the parties would ideally like to have." *Id.* He concluded with the statement:

We need a little evolution, I think, and maybe a little clarification of what the applicable law of privilege or confidentiality might be. Judges, I am told, don't make law, but they do adapt it to changing circumstances, and I think the development of [alternative methods of dispute resolution] is a changing circumstance.

Id.; see also *supra* notes 63-68, 230-242, and accompanying text for a discussion of reliance as the test for disclosure.

²⁴⁷ See Note, *supra* note 46, at 1350-51. The author advocates clear guidelines in order to prevent "some of the harm from . . . hasty closures." See also *supra* notes 59 and 66, and accompanying text for a discussion of the related concern that lower courts fail to make an adequate record for review. Thus, one simple reform

Another authority suggests the adoption of the "clear and convincing" standard to justify closure. This standard avoids the uncertainties and inconsistencies until the Supreme Court rules on whether the first amendment supports access to civil trials or records and clarifies the standard which courts should use.²⁴⁸ In any case, courts need to ultimately resolve the questions concerning the nature of settlement agreements.²⁴⁹ If settlement agreements are non-public aspects of the trial process, courts must answer the question of whether voluntary filing, or discussion of the agreement in court, truly alters this private nature and justifies access.²⁵⁰

IV. CONCLUSION

The scope of the public's right of access to sealed settlement agreements is uncertain.²⁵¹ Yet, by adopting clearer guidelines and a uniform standard for all cases, courts could alleviate some of the uncertainties.²⁵² Most

is for lower courts to specify the exact factors and weight of each on the record to facilitate review.

²⁴⁸ See Hagenbach, *supra* note 110, at 882. Hagenbach advocates the use of the clear and convincing standard instead of the more stringent first amendment test, which requires a party to show "compelling governmental interests." *Id.*

²⁴⁹ See Marcus, *supra* note 13, at 29-41 (discussing the differences between pre-trial materials and protective orders in view of the non-public nature of the information). Marcus stated:

Many of the most troubling consequences of the public access approach result from the assumption that nonparties have some right to obtain discovery material. This attitude is likely not only to foster litigation over protective orders and preclude settlement, but also to sanction lawsuits designed to obtain information rather than judicial relief.

Id. at 29; see also *supra* notes 120-125, 230-242, and accompanying text for a discussion of the private nature of certain materials and records. Unless a suit actually goes to trial and the parties discuss the settlement in court, settlement is merely a private contract based on discovery materials.

²⁵⁰ See *supra* notes 68, 230-243, and accompanying text for the view that filing or discussion makes the settlement part of the record and subject to access the same as evidentiary materials.

²⁵¹ See *supra* notes 13-242 and accompanying text for a discussion of the differing views and tests, ranging from a first amendment basis to a common law basis with two variations.

²⁵² See *supra* notes 107, 232-250, and accompanying text for a discussion of possible reforms.

importantly, courts should address critical issues in-depth. These issues include the differences between access to trials and access to court records, as well as the differences between civil and criminal proceedings.²⁵³ Some courts, however, have not recognized these issues in the past.²⁵⁴ This situation in turn causes much of the uncertainty in right of access cases. Unfortunately, the problems cannot be completely eliminated until the Supreme Court decides whether a first amendment right of access applies to civil proceedings and records.²⁵⁵

Furthermore, some cases raise legitimate questions about reliance of parties on confidentiality.²⁵⁶ This should also be considered by the courts in an analysis of whether to grant public access to sealed settlement agreements.²⁵⁷ The difference between the original sealing of a settlement and later unsealing is a valid concern. Yet, the solution of adopting two different standards for closure and access adds to the confusion by introducing subjective questions of the parties' reliance.²⁵⁸ Reliance, in turn, raises additional questions such as how much reliance is necessary to justify continuing closure and how courts should measure reliance.²⁵⁹

²⁵³ See *supra* notes 41, 117, 176, 238, and accompanying text for a discussion of the failure to discuss distinctions between civil and criminal proceedings and records. The civil/criminal distinction is significant because the factors which courts cite to support first amendment access arose in criminal cases. Another issue some courts neglect is a party's reliance on confidentiality in agreeing to settle. Without the sealing order, the very materials that the third party seeks would never have existed. See *supra* notes 142-203 and accompanying text for a discussion of party reliance.

²⁵⁴ See *supra* notes 32-98 and accompanying text for a discussion of cases where courts failed to recognize or discuss issues such as the distinctions between access to trials and access to records, or between civil and criminal actions.

²⁵⁵ See *supra* notes 99-110 and accompanying text for a discussion of the Supreme Court decision in this area and the distinctions between access to records and access to trials.

²⁵⁶ See *supra* notes 142-203 and accompanying text for a discussion of cases discussing party reliance and later third party access. This is especially significant when the court actively encouraged settlement and guaranteed confidentiality.

²⁵⁷ *Id.*

²⁵⁸ See *supra* notes 142-203 and accompanying text for a discussion of the two tests.

²⁵⁹ *Id.*

Additionally, courts must address questions regarding the unique nature of settlement agreements.²⁶⁰ Courts recognize the private, non-public nature of pretrial discovery materials. Nevertheless, they sometimes fail to apply such distinctions to settlements which also occur in private and depend on many of the same factors. For example, if a public right of access rests in part on the public's need for access in order to understand the workings of the judiciary, courts should analyze whether release of settlements will really aid the public in its effort to understand court actions.²⁶¹ If courts do not rely on settlement agreements to form a judgment on the merits, the need for access should decrease because release will not facilitate public understanding of the judicial system.²⁶²

Also, the value of encouraging settlements is a factor which affects the balancing process.²⁶³ Courts should, therefore, recognize the value of encouraging settlements as a means to decrease court overloads and the costs of lawsuits.²⁶⁴ Yet, recognizing the value of encouraging settlements does not address the issue of *how much* weight courts should give the factor in the balancing tests.²⁶⁵ Moreover, concerns such as whether allowing access to sealed agreements will prevent some litigants from pursuing valid claims in order to avoid publicity may have no clear, quantitative answer to "balance" in the various tests.²⁶⁶ Another issue with no apparent conclusive an-

²⁶⁰ See *supra* notes 117, 120-125, 185, and accompanying text for a discussion of the private nature of settlements as opposed to evidentiary materials.

²⁶¹ See *supra* notes 63-68, 187-237, and accompanying text for a discussion of the "public understanding" issue and court reliance on material necessitating release.

²⁶² *Id.* Moreover, if the court balances the value of encouraging settlement with all the relevant factors, the common law balancing process should adequately protect the parties and prevent abuses.

²⁶³ See *supra* notes 114-129, 204-229, and accompanying text for a discussion of the need to encourage settlements, especially in mass tort cases.

²⁶⁴ *Id.*

²⁶⁵ *Id.* Other factors, such as party reliance, time, costs, and the number of potential suits, come into play. *Id.*

²⁶⁶ See *supra* notes 120-125, 166-174, 204-250, and accompanying text for a discussion of the possible chilling effect when parties cannot rely on confidentiality.

swer is whether a policy of permitting access will truly impede settlements.²⁶⁷ A possible effect could be to encourage faster settlement in order to avoid trial entirely. If the litigants could not rely on confidentiality of the settlement terms to shield them once a trial began or they filed the agreement with the court, they arguably might settle faster.²⁶⁸

Finally, courts should recognize the issues raised when they hold that voluntary filing of an agreement with the court determines accessibility.²⁶⁹ A party may, for example, anticipate compliance problems and wish to avoid filing a completely new suit in the future.²⁷⁰ Thus, the filing serves judicial efficiency and brings the settlement under the view of the court.²⁷¹ Filing could also act to even-out the odds when parties on opposite sides of a case are not equal in terms of power or resources.²⁷² Moreover, in mass tort cases, such as airplane disasters, the value of encouraging a settlement takes on a new dimension and may deserve more recognition and weight in the balancing tests.²⁷³

No easy or single solution appears, ultimately, to answer the issues raised by third party access to sealed settlement agreements.²⁷⁴ A more critical analysis recognizing such issues should be the goal of both the parties and the

Additionally, equitable concerns come into play if a court encouraged and actively participated in a settlement, agreeing to closure, while a later court overrules and permits access by third parties. Thus, not only party reliance but court participation may become a factor to weigh in the balance.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ See *supra* notes 42, 186-188, 230-242, and accompanying text for a discussion of cases holding that filing changes the nature of the material.

²⁷⁰ See, e.g., *Bank of Am.*, 800 F.2d at 344.

²⁷¹ *Id.*; see also *supra* notes 223 and 228 for a discussion of the "inequality" issue.

²⁷² Inequality between the parties may suggest that courts should approve settlements, without the danger that approval will later enable third parties to gain access based on a "court reliance" theory.

²⁷³ See *supra* notes 128 and 218-228 for a discussion of the value in mass torts. Yet, factors such as whether the case is a mass tort and how many potential plaintiffs exist also add to the complexity of the analysis.

²⁷⁴ See *supra* notes 32-98 and accompanying text for a discussion of cases in which the courts failed to analyze issues in access cases.

courts until the Supreme Court provides the conclusive answer. In the interim, lower courts could alleviate part of the problem and abuse by specifying the factors weighed and the weight given to each factor.²⁷⁵ Until a conclusive answer comes, however, litigants should be aware of potential access and the false security of sealing settlements.

²⁷⁵ See *supra* notes 59, 66, 182, and accompanying text for a discussion of this view and courts holding that a specific record is necessary.

THE REFORM OF JOINT AND SEVERAL LIABILITY THEORY: A SURVEY OF STATE APPROACHES

JAMES J. SCHESKE

I. INTRODUCTION

APPORTIONMENT OF DAMAGES between multiple tortfeasors has been the subject of much legal thought and, more significantly, recent legislative action. The most current popular movement in jurisprudence to sweep across the nation is commonly known as "tort reform."¹ Virtually each state's version of tort reform includes changes in apportioning or comparing joint tortfeasor responsibility.² This article attempts to characterize the various approaches, focusing on the responses affecting litigation involving the theory of joint and several liability. Moreover, this article includes recommendations for a model joint and several liability statute and concludes with discussions of alternatives to the current tort system.

¹ The primary purpose of this comment is not to present a discussion of the merits of tort reform or the evils of the insurance industry. This article includes numerous references to the scholarly thought on these important issues. See, e.g., *infra* notes 33-50 and accompanying text.

² See *infra* notes 63-175 for a discussion of state tort reform legislation; see also Talmadge and Petersen, *In Search of a Proper Balance*, 22 *CONZ. L. REV.* 259, 260 (1986) ("It will be no surprise when the 1986 tort reform legislation does not remedy the insurance crisis . . . The only certainty surrounding this issue is that it emanates from multiple factors.")

an individual consumer, was spurious at best. In truth the lack of legal accountability by manufacturers undoubtedly contributed to indifference toward safety issues and favored economic considerations which tended to promote the marketability rather than the safety of products. Safety simply was not a priority. It was from this environment that the doctrine of strict products liability emerged.

The similarity between the legal environment for manufactured products thirty years ago and that of the computer industry today is striking. As with its manufacturing precursor, the computer industry has enjoyed a period of protectionism in its infancy. This period of incubation for the computer industry was necessary and desirable. So too, as computers have moved from their infancy to the mainstream of society, accountability is a necessary and inevitable part of its right of passage into adulthood. As computer usage proliferates and the purely experimental stage for computers passes, there is little danger that potential liability for the industry will seriously inhibit expansion and development of computer technology. Potential liability will, however, encourage greater care in program design, testing, and production. At present insurance for software is apparently unavailable, but software providers are in a position to spread the cost of liability through product pricing.

Conclusion

In spite of the specialized nature of many computer-based medical systems and the high cost of procuring them, the role of computers in medicine is expanding. Computer programs for treatment and monitoring are the ones most likely to be responsible for patient injury. Programs for diagnosis and information processing are intended as aids in decision making and will be subject to interpretation and override by the physician.

The legal system can no longer condone the insulation of the software provider from liability. As discussed above, warranty and negligence theories of recovery may be inappropriate or unattainable. Computer software should be subject to strict liability where that software is responsible for personal injury. The computer industry has matured, and it is now time for the industry to accept its share of the inevitable liability which will be generated as computers become more pervasive in society.

Protective Orders and the Public Right of Access to Discovery

Richard P. Campbell

Introduction

Thirty years ago, it would have been unlikely to find a tort lawyer expounding on the United States Constitution. The tort lawyer of the fifties and sixties was busy with principles of negligence law and, of course, the rules of evidence. He left to his commercial litigation partner and the courts (typically in non-jury trials) the job of understanding and developing the law governing "trade secrets" and "confidential information." Similarly, when the American Bar Association initiated consideration of the uniform rules of civil procedure, it is likely that the distinguished panel of authorities convened for that purpose was dominated by legal scholars and corporate lawyers and included few, if any, personal injury trial lawyers. Certainly, it is highly improbable that any member of the Advisory Committee that drafted the rules of civil procedure (whether or not personal injury trial lawyers) envisioned the explosion of personal injury litigation that occurred in the last two or three decades.¹ And because "strict liability" and "second collision" (or "injury enhancement") liability was not really conceived until the mid sixties,² it is axiomatic that products liability (as corporate defendants now know it) played no part whatsoever in either the formation of the rules of civil procedure or the law "protecting" confidential information.³

It is not surprising, then, that application of the rules of civil procedure and the law regarding confidential information to products liability cases often produces results that are wholly unsatisfactory to the corporate defen-

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1. In 1985 alone, 160,660 civil lawsuits were brought by individuals in The United States District Courts. Of those, 29,152 cases were personal injury lawsuits based on diversity jurisdiction. WANT'S FEDERAL-STATE COURT DIRECTORY 135 (1987). Between 1975 and 1985, the number of product liability suits pending in The United States District Courts jumped from 2,768 to 22,111. STATISTICAL ABSTRACT OF THE UNITED STATES (107th ed. 1986).

2. *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 377 P.2d 897 (1963); *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968).

3. Indeed, it seems probable that any corporate trial attorney interested in the development of the rules of civil procedure or the law governing trade secrets or confidential information would approach the subject with a view toward their application in commercial litigation (e.g., anti-trust, trade secrets, and breach of contract cases).

dant. This is particularly true with respect to lawsuits over mass-marketed consumer goods, where industry now finds itself lined up against syndicates of contingency fee attorneys (e.g., American Trial Lawyers Association, Attorneys Information Exchange Group, etc.), self-proclaimed "public interest" groups (e.g., Trial Lawyers for Public Justice, Public Citizen Litigation Group, Center For Auto Safety, etc.), private industry lobby groups (e.g., Insurance Institute for Highway Safety), and the investigative press (e.g., 60 Minutes). A single lawsuit can place enormous amounts of proprietary information in the hands of an attorney whose sole mission in the litigation is to take as much money away from the corporate defendant as he possibly can. Obviously, it behooves that attorney to involve other attorneys, public interest groups, industry lobbyists, governmental agencies, and members of the press in review and republication of the proprietary information. In doing so, the plaintiff's attorney develops leads to other information, creates a network of potential referring attorneys, and exposes the corporate defendant to adverse publicity that may well taint the jury in his case.

Importantly, the same course of action results in dispersal of trade secrets and confidential information among an ill-defined and untraceable amalgam of adversaries. The privacy otherwise attendant to such information and documents is forever lost. Competitors and other antagonists have ready access to the internal decision-making and secrets of the company. And, in extraordinary cases, the viability of a product, a company, or even an industry is jeopardized. One need only consider the football helmet, the intra-uterine device, the all-terrain vehicle, and asbestos products in order to judge the ramifications of unfettered dissemination of proprietary information.

The proposition that protective orders should be obtained in every products liability case is certainly not a novel one. The content and breadth of the order, its timing and duration, and its form vary considerably among practitioners, however. More importantly for this discussion, the practical value of such orders in products liability suits in the face of vigorous assault on various fronts is certainly open to considerable doubt. The principal reasons for this doubt are the procedural framework for obtaining and enforcing protective orders and the willingness of many courts to find that members of the general public have statutory or Constitutional "rights" of access to discovery materials. This paper presents the procedural and Constitutional hurdles that corporate defendants in products liability cases confront in making their protective orders meaningful forms of protection.

A. The Applicable Rules of Civil Procedure

It seems reasonable to review the procedural rules that come into play when protective orders become an issue of heated litigation, although the applicable rules are probably obvious and the review possibly unnecessary.

Most lawyers would begin the discussion with Rule 26(c). On reflection, however, the more appropriate starting points are Rules 1 and 11, for they set the tone by which all other pertinent Rules are interpreted. Rule 1 instructs that the Rules of Civil Procedure ". . . shall be construed to secure the just, speedy, and inexpensive determination of every action." In Rule 11, the parties and their attorneys are admonished that their civil actions are not games or toys and that the United States District Courts are not their private sand boxes. Rule 11 mandates that:

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by [the] attorney of record in the attorney's individual name . . .

The Rule goes on to state:

The signature of an attorney . . . constitutes a certificate by the [attorney] that [he] has read the pleading, motion, or other paper; that to the best of [his] knowledge, information, and belief *formed after reasonable inquiry* it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. (Emphasis added).

Restated, the corporate defense attorney is obligated (under threat of personal sanction) by both Rule 11 and Rule 26(g) to undertake a reasonable inquiry of the law and the facts pertinent to any discovery request and certify that the response filed on behalf of his client is well grounded and not interposed for such improper purposes as delay. Indeed, if he is also obligated to abide by Rule 1 (as undoubtedly many federal judges would so find), then the defense attorney must proceed in a manner consistent with the "just, speedy, and inexpensive determination of [the] action." These Rules have a significant bearing on applications for protective orders and, if submitted, on any claims by non-parties of right of access to discovery materials or claims by parties of right of dissemination of discovery materials.

When responding to a discovery request, then, the defense attorney must first consider the breadth of discovery permitted by Rule 26(b). That Rule is intended to provide the plaintiff with a wide berth in searching out information in the possession of the defendant for use in proving his claim, opposing any defenses raised, and impeaching any witnesses. The Rule provides that objections regarding admissibility are not a proper basis for refusing discovery so long as "the information sought appears reasonably calculated to lead to the discovery of admissible evidence" and is not privileged. The defendant's responses in most cases, consequently, mix admissible information

(which the jury and the general public may have occasion to see or hear) with inadmissible information (which the jury and the general public will never see or hear). More importantly, the defendant often produces the inadmissible material knowing that it is unlikely to be taken as evidence at the trial, because the defendant is obligated to do so by the Rules of Civil Procedure even though that defendant would probably prefer to keep the material within its private files.

Rule 26(c) is, of course, the source for any protective order that may enter. It grants the trial court considerable discretion in limiting the nature and scope of discovery sought by the plaintiff or in prohibiting discovery altogether. The Rule provides in pertinent part:

Upon motion by a party . . . , and for good cause shown, the court . . . may make any order which justice requires to protect a party . . . from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

It is clear from the express language of the Rule that the discovery "rights" of the inquiring party may be terminated or substantially restricted by the court when "justice" requires. And justice may require the court's intervention when the responding party suffers "undue burden" or "oppression." Taken literally, the Rule permits the court to prohibit or terminate discovery even where the responding party suffers mere "annoyance" or "embarrassment." The plaintiff can be forced to proceed in a manner that is contrary to his preference (for example, he may be required to serve letters rogatory on a foreign defendant rather than taking a conventional deposition in the forum jurisdiction⁴). Similarly, the plaintiff may be instructed to avoid inquiry into a particular subject matter. The Rule explicitly sanctions the entry of a protective order to control disclosure of a "trade secret" or such lesser items as "confidential research" or "commercial information." It is equally clear that the Rule requires a showing of "good cause" before a protective order will

enter and the case law interpreting the Rule squarely places the burden on the moving party to prove that good cause exists.⁴

Under the rule, the moving party can show "good cause" for entry of an order if he demonstrates with sufficient factual data, that the material the party has requested through discovery is (1) a trade secret, or (2) confidential information. The fact that the opposing party will share the discovery with other attorneys in unrelated litigation is not in and of itself "good cause" for entry of a protective order.⁵ Nor is the financial burden of discovery "good cause" for entry of a protective order.⁶

The requirement of showing "good cause" requires more than conclusory allegations.⁷ "Broad allegations of harm unsubstantiated by specific examples or articulated reasoning" do not support entry of a protective order.⁸ The movant who seeks a protective order must set forth specific examples of the competitive harm he will suffer without the order.⁹ The motion must be accompanied by an affidavit that attests to particular and specific facts. The affidavit of counsel is never sufficient to establish good cause for entry of the protective order.¹⁰ Given the strictures of Rules 1 and 11, an affidavit of counsel would be appropriate, however, to document for the court attempts to resolve discovery disputes informally.¹¹ It is also wise to include in the body of the motion itself a statement that reasonable attempts to resolve discovery disputes were made.

1. Trade Secrets

A trade secret is information known only to the defendant that, if divulged, would put that defendant at a great competitive disadvantage. While the defendant who owns a trade secret has a property right in the secret,¹² that property right is destroyed if the secret is made public. Importantly, some courts have held that once a product incorporating the alleged trade secret enters the marketplace, the trade secret is, *a fortiori*, made public and, consequently, lost.¹³ An affidavit that seeks to establish that the requested

4. *Reliance Insurance Co. v. Barron's*, 428 F. Supp. 200 (S.D.N.Y. 1977).

5. *Parsons v. General Motors Corp.*, 85 F.R.D. 724 (N.D. Ga. 1980); *In re The Upjohn Company Antibiotic Cleocin Products Liability Litigation*, 81 F.R.D. 482 (E.D. Mich. 1979).

6. *Marshall v. S.K. William Co.*, 462 F. Supp. 722 (E.D. Wisc. 1978).

7. *United States v. Garrett*, 572 F.2d 1323 (5th Cir. 1978).

8. *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986).

9. *Parsons v. General Motors Corp.*, 85 F.R.D. 724 (N.D. Ga. 1980).

10. *Rosenblatt v. Northwest Airlines, Inc.*, 54 F.R.D. 21 (S.D.N.Y. 1971).

11. *Quaker Chair Corporation v. Litton Business Systems, Inc.*, 71 F.R.D. 517 (S.D.N.Y. 1976).

12. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984).

13. *Midline Ross Corp. v. Sunbeam Equip. Corp.*, 316 F. Supp. 171 (W.D. Pa. 1970), 435 F.2d 159 (3d Cir. 1970).

discovery material contains or constitutes trade secrets must set forth facts that will enable the court to consider the following:

- a. the extent to which those outside the business know the alleged "trade secret;"
- b. the number and positions of employees with knowledge of the "trade secret;"
- c. the defendant's rules and procedures designed to protect the secret;
- d. the value of the "trade secret" to the defendant or his competitors;
- e. the effort and cost of developing the "trade secret;"
- f. the ease or difficulty with which others could acquire or duplicate the "trade secret."

These criteria for determining whether information is a "trade secret" are set forth in Section 757 of the RESTATEMENT OF TORTS, and have been adopted by several courts.¹⁴

2. Confidential Information

The defendant can move for a protective order for information that may not rise to the level of a trade secret, but is nonetheless confidential. Confidential information is information that, if disclosed, will cause a "clearly defined and very serious injury to" the defendant's business.¹⁵

Some courts have held that outdated (or "stale") information does not deserve protection.¹⁶ Other courts have held that even "old business data may be extrapolated and interpreted to reveal a business' current strategy, strengths, and weaknesses" and is therefore worthy of confidentiality protection.¹⁷

"Confidential information" is not defined under the Rules and courts therefore use criteria substantially similar to those used for identifying trade secrets to test whether the information requested is confidential. The factors set forth in *Parsons v. General Motors Corp.*,¹⁸ are often cited as a standard for determining, *vel non*, the confidentiality of the information. In *Parsons*, the court concluded that the material General Motors sought to protect was not confidential by examining:

14. See *Waelder v. Merck, Sharp & Dohme*, 94 F.R.D. 27 (E.D. Mich. 1981); *Reliance Insurance Co. v. Barron's*, 428 F. Supp. 200 (S.D.N.Y. 1977); *United States v. International Business Mach. Corp.*, 67 F.R.D. 40 (S.D.N.Y. 1975). See also Uniform Trade Secrets Act, Section 1(4) (1979), which contains an expansive definition of the term.

15. *United States v. International Business Mach. Corp.*, 67 F.R.D. 40, 46 (S.D.N.Y. 1975); *Reliance Insurance Co., v. Barron's*, 428 F. Supp. 200 (S.D.N.Y. 1977).

16. *United States v. American Optical*, 39 F.R.D. 580 (N.D. Cal. 1966); *United States v. Lever Bros.*, 193 F. Supp. 254 (S.D.N.Y. 1961).

17. *Zenith Radio Corp. v. Matsushita Electric Industry Co.*, 529 F. Supp. 866, 891 (E.D. Pa. 1981).

18. 85 F.R.D. 724 (N.D. Ga. 1980).

- a. how many employees had knowledge of the information or worked on a confidential project;
- b. how the secrecy of the information was maintained by the defendant;
- c. how reproduction and circulation of the information is controlled or limited by the defendant;
- d. the age of the information;
- e. whether any of the information was required to be reported to the government.

It bears little note that in the typical products liability case, the defendant is often in the position that General Motors found itself in *Parsons*; i.e., trying to protect the confidentiality of information and data pertaining to a product that was prepared years before the product was finally assembled, years more before the product allegedly harmed the plaintiff, and even more years than that before the issue is presented to the court for resolution. Thus, it is no unusual for a defense attorney to find himself in the position of advocating the confidentiality of design drawings, design safety meeting minutes, and marketing data generated during the design and manufacturing process ten years before the suit was filed, seven years before the accident, and three or four years before the product was finally assembled.

3. The Balancing Test

The trial court decides whether to enter a protective order by comparing the burden imposed on the moving party if an order is *not* granted with the burden imposed on the party who requested the discovery if the protective order *is* granted.¹⁹ The motion should recite, and the affidavit support, facts that show that the order will not particularly impede discovery and, moreover that the requesting party will not suffer undue prejudice by its entry.

The defendant should oppose entry of a protective order that would allow a plaintiff indiscriminately to disseminate protected information to third persons known only to the plaintiff on the representation that such persons will agree to be bound by the order. Not only does such an agreement depend on the diligent enforcement of the plaintiff's attorney, but third parties are likely to be beyond the jurisdiction of the court and, therefore, beyond the reach of its contempt powers.

Unfortunately, since many courts favor information sharing among plaintiffs in the interest of judicial economy, a trial court may be inclined to rely on self enforcement of a confidentiality order by the plaintiff and those with whom he shares the information.²⁰

19. *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 669 F.2d 620 (10th Cir. 1982).

20. *Garcia v. Peeples*, 734 S.W.2d 343 (Tex. 1987).

4. Summary

Returning to Rules 1 and 11, the defense attorney is obligated to do the following before he may properly move for a protective order:

1. Assemble the documents and information that are called for in the plaintiff's requests;
2. Review them with knowledgeable employees of the defendant with a view toward the nature and extent of any competitive harm that disclosure may cause;
3. Evaluate the efforts undertaken by the defendant to maintain the confidentiality of the information prior to the discovery request;
4. Determine which, if any, of the materials and information will be produced without the need of a protective order and, alternatively, which materials and information warrant the protection of the court;
5. Review the case law governing protection of these materials in the forum jurisdiction;
6. Produce the materials that are not subject to the claim of confidentiality;
7. Convene an informal discovery conference with the plaintiff's attorney in order to persuade him that the defendant is entitled to the order.

As discussed more fully below, the defendant and its attorney may be forced by the Rules to duplicate the same efforts *in the future* when and if the plaintiff, the plaintiff's attorney, the plaintiff's expert witnesses, other plaintiffs' attorneys, and such other persons as the press seek disclosure of the materials and information. With that unsettling possibility in mind, the defendant is well advised to maintain and periodically update its work product and continue in effect the internal and external controls governing the confidentiality of the materials that warranted the protective order in the first place.

The need for constant vigilance over the confidentiality of the otherwise discovered information is particularly acute in cases where the court has entered a blanket protective order as a means of avoiding the need for a document-by-document review of the materials and expediting trial preparation.²¹ The Manual for Complex Litigation encourages use of umbrella orders and even recommends a specific form of order.²² Other courts have held that blanket protective orders are overbroad and not permitted under the rule.²³

21. *Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.*, 529 F. Supp. 866, 889 (1981); *Cippolone v. Liggett Group, Inc.*, 785 F.2d 1108 (3d Cir. 1986).

22. See Manual for Complex Litigation, § 21.43, reprinted in 1 J. Moore, W. Taggart & J. Wicker, *MOORE'S FEDERAL PRACTICE* (pt. 2) P. 21.43, at 48-50 (1986).

23. *Wardle v. Merck, Sharp & Dohme*, 94 F.R.D. 27 (E.D. Mich. 1981); *Garcia v. Peoples*, 734 S.W.2d 343 (Tex. 1987).

B. The Plaintiff's "Right" of Access

1. The Constitutional "Right" of Access

Although courts sometimes confuse or combine the two, the public's purported right of access to discovery materials must be analyzed separately from the plaintiff's right to disseminate them. The first amendment to the Constitution of the United States provides as follows:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances.

The source of the public's right of access, if indeed one exists, is found in the first amendment's protection of communication about the functioning of government and empowers everyone to be a judicial watchdog. While not articulated in the words of the first amendment, courts that discerned such a right found it by implication because it was supposedly necessary to enjoy the other, articulated first amendment rights.²⁴

1. *Right of the Access to Discovery Prior to the Federal Rules.* Before enactment of the Federal Rules of Civil Procedure, little, if any, discovery preceded civil trials. State court rules marginally provided for depositions and written interrogatories, but both were used sparingly. Ambush and surprise were the marching orders of the day (much as burial by paper avalanche governs modern practice). In the federal courts, the Judiciary Act of 1789 provided for the taking of depositions, but only in cases where a deposition was necessary to preserve testimony (such as where the deponent was more than 100 miles from the court, about to leave the country, old or sick).²⁵ The Judiciary Act made no particular provisions regarding rights of access to discovery. Although the Act provided for depositions to be sealed prior to trial, that provision was not intended to protect confidentiality, but rather to insure that the transcript would not be altered before trial.²⁶ The only federal statute directly to address the question of public access to discovery materials prior to adoption of the Federal Rules was the Publicity in Taking Evidence Act of 1913. That statute specifically provided for public access to depositions in anti-trust actions. The fact that such a statute was required to make depositions public underscores the traditionally private nature of discovery.²⁷

24. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982).

25. J. Wright & A. Miller, *MODERN FEDERAL PRACTICE AND PROCEDURE*, § 2007 (1970).

26. *Louis Werner Slave Co. v. Marden, Orth & Hastings Co.*, 280 F. 601 (2d Cir. 1922).

27. Marcus, *Myth and Reality in Protective Order Litigation*, 69 *CORNELL L. REV.* 1, 38 (1983).

What little discovery existed prior to the enactment of the Federal Rules was not open to the public by custom either. Even without the benefit of a procedural device comparable to a Rule 26(c) protective order, a court sitting in equity could prevent public access to discovery through its equity powers. In fact, in 1912 a Massachusetts court sitting in equity barred the press and other members of the public from attending a deposition on the grounds that the deposition was not part of the formal trial and the testimony contained therein might not be admissible in evidence.²⁸

2. *Conflict in The Circuits Before Seattle Times.* *Seattle Times* was decided at a time when there was a great deal of confusion among the circuit courts of appeal on the public's right of access to information generated in the course of criminal and civil litigation. The press and public were unable to claim a right of access to criminal trials based on the sixth amendment's right to "public trials" because that right existed only for the benefit of the criminal defendant.²⁹ However, the Supreme Court ultimately recognized a first amendment right of public access to criminal trials.³⁰ And in the same year that it decided *Seattle Times*, the Court extended first amendment rights of access in criminal cases to pretrial, voir dire proceedings.³¹ Prior to *Seattle Times*, the Supreme Court had not ruled whether the public also had a right of access to civil trials, nor had the court decided whether pretrial documents produced in civil or criminal cases were subject to a Constitutional right of public access. The only Supreme Court case that had even addressed the impact of the first amendment on civil discovery had held that the first amendment prohibited the court from requiring disclosure of NAACP membership lists because such disclosure would have a negative impact on the members' first amendment freedom of association.³²

Prior to *Seattle Times*, lower courts disagreed on the question of whether a right of access to discovery documents existed in civil cases at all and, if it did exist, whether it was rooted in the Constitution or in the common law. For example, the Seventh Circuit found a right of access to discovery documents under the first amendment.³³ The First and Third Circuits, on the other hand, held that denial of access to discovered information did not implicate first amendment rights in any way.³⁴

28. *United States v. United Shoe Machinery Co.*, 198 F. 870 (D. Mass. 1912).

29. *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979).

30. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

31. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984).

32. *NAACP v. Alabama*, 357 U.S. 449 (1958).

33. *In re Continental Illinois Securities Litigation*, 732 F.2d 1302 (7th Cir. 1984).

34. *In re San Juan Star Co.*, 662 F.2d 108 (1st Cir. 1981); *United States v. Criden*, 648 F.2d 814, 819 (3d Cir. 1981).

3. *Seattle Times v. Rhinehart.* In *Seattle Times v. Rhinehart*, the Supreme Court held, in unequivocal terms, that a "litigant has no First Amendment right of access to information made available only for purposes of trying his suit."³⁵ The Court instructed that a litigant's power to compel another party to the suit to produce information was a product of legislative grace, not the Constitution, and consequently limitation or outright denial of that power did not impinge on Constitutional rights. Historically, this seems obvious. As set forth above, although the Constitution became law in 1787, there were no Federal Rules of Civil Procedure, and therefore no discovery procedures available, until 1938.

The protective order at issue in *Seattle Times* had been granted in favor of Keith Milton Rhinehart, the leader of a small religious group, who sued the *Seattle Times* for defamation and invasion of privacy. The *Seattle Times* had published a series of articles about Rhinehart, some of which focused on a six hour extravaganza he held at the Walla Walla State Penitentiary that included cash prizes and dancing girls.

During discovery, the trial court granted Rhinehart a protective order that prevented the *Seattle Times* from disseminating any discovered information pertaining to his financial affairs or to the identity of his followers or contributors. Since the *Seattle Times* was a media defendant, the protective order necessarily dealt with the rights (if any) of access to and dissemination of discovery materials and information of both a party to the litigation and such non-parties as the press.

On appeal, the Supreme Court of Washington held that the protective order did not violate the first amendment. Acknowledging the privacy interests of Rhinehart and his followers, the Washington court held that the trial court did not abuse its discretion when it entered a protective order. The holding of the Supreme Court of Washington was consistent with a then unambiguous ruling of the Second Circuit Court of Appeals that the first amendment did not inhibit a trial court's authority to restrict dissemination of discovery material.³⁶

However, the Washington Supreme Court's holding that the protective order did not infringe on the newspaper's first amendment rights conflicted with two leading opinions by other circuit courts. The Court of Appeals for the District of Columbia had previously held that protective orders that restrict dissemination of discovery material were prior restraints on speech and, as such, were permissible under the first amendment only when the

35. 467 U.S. 20 (1984).

36. *International Products Corp. v. Koons*, 325 F. 2d 403 (2d Cir. 1963); compare *In Re Agent Orange Product Liability Litigation*, 821 F.2d 139 (2d Cir. 1987), cert denied, 108 S.Ct. 289 (1987).

harm caused by the threatened dissemination was substantial and serious, the order was narrowly drawn and precise, and there were no less intrusive means of preventing the harm." Although it agreed substantially with the rule of law fashioned by the Second Circuit in *In Re Halkin*, the First Circuit Court of Appeals held that so long as the trial court displayed a "heightened sensitivity" to first amendment concerns when entertaining an application for a protective order in a civil discovery dispute, the more stringent standard usually applied to review the validity of a prior restraint was not required.³⁷

It is therefore apparent that the Supreme Court granted certiorari to resolve a conflict among the circuits as to the appropriate standard of review for protective orders. Although the *Seattle Times* court framed the issue before it as one involving a litigant's right to disseminate information learned in pre-trial discovery, it also resolved the conflict over any purported Constitutional right of access to discovery material. In noting that the right to gather information through discovery was not found in the Constitution, but only in legislation such as the federal rules of civil procedure and similar state counterparts, the Court explicitly rejected both the asserted first amendment rights of the party opponent and the press to otherwise private information uncovered by means of pre-trial discovery.

4. *The Aftermath of Seattle Times*. Despite the seeming clarity of the *Seattle Times* opinion, courts have continued to struggle with the issue of whether there exists a right of access to discovery materials. The lower courts concern over the issue probably reflects a deep seated belief that anything remotely connected with the administration of the judicial system should be open to public scrutiny. This concern is particularly acute in cases involving significant newsworthy events such as the Agent Orange class action. Perhaps the hesitancy of the lower courts to take the Supreme Court's words at face value is best exemplified by the First Circuit Court of Appeals which has read *Seattle Times* as foreclosing "any claim of any absolute public right to access to discovery materials,"³⁸ but regards the extent of the public's right to access to judicial proceedings as "still in the process of being defined."³⁹ That court went on to conclude that there was no right of access to pretrial discovery proceedings, based on their fundamental difference from other judicial proceedings to which a public right of access has been granted.⁴⁰

37. *In re Halkin*, 598 F.2d 176 (D.C. Cir. 1979).

38. *In re San Juan Star Co.*, 663 F.2d 108 (1st Cir. 1981).

39. *Anderson v. Cryovac, Inc.*, 805 F.2d at 6.

40. 805 F.2d at 10.

41. 805 F.2d at 13. See also, *In re Alexander Grant & Co. Litigation*, 802 F.2d 352, 355 (11th Cir. 1987) and *In re the Reporters Committee for Freedom of the Press*, 773 F.2d 1325, 1338 (D.C. Cir. 1985). The *Anderson* decision did find, however, that access to pretrial discovery could not be afforded selectively. 805 F.2d at 9.

Even the courts that previously found no first amendment right of access to materials obtained in discovery have suggested that such a right may attach at some later stage of the litigation, when the public interest in open court proceedings outweighs the need for the smooth functioning of the judicial process. Moreover, several courts have suggested that access should be granted to documents considered by a court in ruling on pretrial motions that are dispositive of the litigants' substantive rights.⁴¹

However, the First Circuit has characterized this position as being "at farthest reaches of the first amendment right to attend judicial proceedings,"⁴² and the District of Columbia Circuit has flatly rejected it as being inconsistent with *Seattle Times*'s reference to the admission of evidence as the "touchstone" of a first amendment right of access.⁴³

Similar concern is evident in the magistrate's opinion setting aside a blanket protective order after the parties reached a settlement, including an agreement to return all discovery materials to the defendants, in *In Re Agent Orange Product Liability Litigation*, an opinion which was affirmed by the district court (Weinstein, J.) and the Second Circuit Court of Appeals.⁴⁴ The United States Supreme Court denied defendant Dow Chemical's petition for cert on November 16, 1987. In discussing the "First Amendment Right of Access to Discovery Materials," Magistrate Scheindlin quickly concluded that in light of *Seattle Times* ". . . there can be no open question that the First Amendment does not require open access to discovery materials."⁴⁵ Later in the opinion, however, the magistrate substantially ignored her initial reading of *Seattle Times* and held the following:

The Court in *Seattle Times* approved a limitation on First Amendment rights upon a showing of good cause. In the absence of such a showing, continued protection would violate the First Amendment, particularly in this case, which is of great interest to the public and the media.⁴⁶

The Second Circuit Court of Appeals completely avoided any discussion of a purported Constitutional right of access to discovery materials and based

42. *In re Consumers Power Company Securities Litigation*, 109 F.R.D. 45, 55 (E.D. Mich. 1985). The court emphasized in denying the press access to the pretrial discovery materials that a much stricter test would apply for any exclusion of the public at later stages of the litigation. *Id.*

43. *In re Continental Illinois Securities Litigation*, 732 F.2d 1302, 1308-10 (7th Cir. 1984); *Joy v. North*, 692 F.2d 880 (2d Cir. 1982).

44. 805 F.2d at 8; *Cf.*, *Federal Trade Commission v. Standard Financial Management Corp.*, et al., 830 F.2d 404 (1st Cir. 1987).

45. 773 F.2d at 1338.

46. 104 F.R.D. 559 (E.D. N.Y. 1985), *aff'd*, 821 F.2d 139 (2nd Cir. 1987), *cert. denied*, 108 S.Ct. 289 (1987).

47. 104 F.R.D. at 566.

48. *Id.*, at 570.

its affirmance squarely on a right of public access arising (it concluded) by implication from Rule 26(c)'s requirement that a defendant make a showing of good cause before a protective order enter on its behalf.⁴⁹ The Court also opined in dicta that, because the blanket protective orders previously entered by the district court were improvidently granted (the defendants were never required to make a showing of good cause), it would have affirmed the modification of the orders in any event.⁵⁰ In its petition for certiorari, the defendants made this point:

. . . [T]he conflict between *Seattle Times* and the decision below goes beyond the issue of public access and centers on the very nature of the discovery process. The *Seattle Times* Court noted that discovery is permitted 'for the sole purpose of assisting in the preparation for trial.' . . . The decision below authorizes use of discovery materials by non-parties for purposes unrelated to any litigation. The *Seattle Times* Court described use of discovery to gather information for public release as an 'abuse of its [a court's] processes.' . . . The decision below suggests that such use of discovery material is presumptively permitted. . . . These fundamental disputes about the nature of the discovery process are so central to our civil litigation system that this Court must act to resolve the conflict.⁵¹

In Re Agent Orange Product Liability Litigation stands in frank conflict with the position the Florida Supreme Court recently expressed in two cases (one civil and the other criminal) where the press sought access to pre-trial discovery materials. In the criminal case, over the objection of the prosecutor and the defendant, the press sought to be present at depositions and to obtain copies of deposition transcripts that either were not transcribed or not filed with the court.⁵² Despite a long standing commitment to open judicial proceedings, and in reliance on *Seattle Times*, the court held that the press did not have a first amendment right to be present at discovery depositions or to obtain copies of deposition transcripts not filed with the court.⁵³ The Court went on to explain:

- There is no independent right outside the trial process to the information sought. Society in general, and the courts specifically, has a substantial interest in preventing abuse of judicially compelled discovery. Deposi-

49. 821 F.2d at 146.

50. *Id.*, at 148.

51. Petition For Writ Of Certiorari, *The Dow Chemical Company, et al. v. Ryan, et al.*, No. 87-224, filed August 7, 1987 (citations omitted); see, Section 3, *infra*.

52. *Palm Beach Newspapers, Inc. v. Burk*, 504 So.2d 378 (Fla. 1987).

53. *Id.*, at 382.

tion proceedings are not public components of a trial unless made so by the parties. Such proceedings were not open to the public at common law and, as a matter of modern practice, are normally conducted in private. Thus, restrictions on discovered information which has not been admitted at trial are not restrictions on a traditionally public source of information.⁵⁴

The court also advised that public access to pre-trial discovery materials presented "unacceptable hazards" to the Constitutional rights of the litigants (there the criminal defendant), at least in part because the discovery material often contains "irrelevant and inadmissible evidence" having a "substantial potential of hazarding the right to a fair trial [and] the privacy rights of both parties and non-parties. . . ."⁵⁵

The Florida civil case, *Miami Herald Publishing Co. v. Grindley*,⁵⁶ presents an interesting contrast to the *Agent Orange* case in that it involved a matter of rather obvious public interest equal to or greater than the public interest in personal injury claims arising out of the use of herbicides during the Vietnam conflict many years beforehand; to wit, the personal health and integrity of an incumbent United States Senator then engaged in an election campaign. In *Miami Herald*, newspapers wanted to gain access to deposition transcripts and answers to interrogatories in a personal injury action brought by Senator Paula Hawkins against the corporate owner of a television station where, according to the Senator, she slipped and fell and sustained injuries. Four years after her fall, and at a time when she was seeking re-election, she filed a complaint for damages in which she alleged that she suffered physical handicaps as a result of the fall that impaired her ability to work. The press claimed that the Senator's health was a central issue in the election and that, contrary to the allegations of her complaint, she publically averred that she was physically fit to hold office.

The press believed that the discovery materials sought would probably expose one or more of the Senator's claims as untrue, bearing directly on her integrity. While resting their argument principally upon a so-called "presumptive" right of access arising out of Florida's equivalent to Rule 26(c), the press nonetheless postulated that "[a]ll members of the public have a right to monitor civil litigation to see if justice is being done."⁵⁷ The press went on to make this additional argument:

54. *Id.*

55. *Id.*, at 383.

56. 510 So.2d 884 (Fla. 1987).

57. Brief For Petitioners *Miami Herald Publishing Company, Sentinel Communications Company, and Florida Publishing Company* at 32, *Miami Herald Publishing Co. v. Grindley*, 510 So.2d 884 (Fla. 1987).

Moreover, access to discovery process serves important public purposes. A large percentage of civil cases never go to trial because they are settled or dismissed. Discovery depositions are frequently left unfiled or even untranscribed. If parties are permitted to determine what discovery materials are available to the public by filing them selectively or not at all, the public will be denied any meaningful access to the judicial process. In this case, the proceedings involve claims of permanent impairment to a public official seeking re-election. The public's right to know should not be compromised in so important a matter merely because the parties or their attorneys choose not to file discovery materials with the court.⁵⁸

The Florida Supreme Court flatly rejected the press' claims on the basis of its ruling in *Burk*.

It seems reasonably clear that the Florida Supreme Court is correct and that the equivocal opinions of other court's are simply wrong. Civil litigation is by definition a process of dispute resolution between private parties and, in fact, the overwhelming number of such disputes are resolved without the intervention of the courts. The mere existence of court rules and processes for assisting the parties in resolving their differences cannot possibly invoke the Constitutional rights of strangers to the dispute or any undefinable "public right to know." The parties should maintain their right to privacy, as well as their right to a fair trial in the event that settlement is not achieved, irrespective of the curiosity or business concerns of non-parties. Nevertheless, it has been argued that some information may be "so significant to the process of self governance . . . that it would violate the [first] amendment to keep that knowledge from the press and public," and that [s]ome level of first amendment inquiry is necessary."⁶⁰ The problem with this suggestion is that it makes every piece of discovery open to judicial scrutiny, if for no reason other than the need to determine whether the information achieves the level of significance required to implicate self-government. The parties' legitimate interest in the privacy of their documents and information is then subject to the whim of individual judges in deciding what is important for our "self-governance." And certainly, corporate defendants engaged in product liability claims have experienced the difficulty of dealing with capricious judges who involve themselves unfairly and intimately in discovery matters properly left to the parties to the suit.

2. The Common Law Right of Access

As mentioned above, the Supreme Court of the United States, along with many lower state and federal courts, has recognized a common law right

58. *Id.*, at 41-42.

60. Note, *Access to Pretrial Documents Under the First Amendment*, 85 COLUM. L. REV. 1813, 1833 (1984).

of access to judicial records and documents based on a "citizen's desire to keep a watchful eye on the workings of public agencies."⁶¹ But as the cases involving proffered Constitutional rights of access show, the lines delineating "judicial" records and documents are vague.

There is general agreement that the common law presumption of access to judicial records (and court proceedings) does not extend to discovery materials.⁶² Pretrial proceedings and depositions were not public components of civil trials at common law.⁶³ In *Anderson v. Cryovac, Inc.*,⁶⁴ the Boston Globe newspaper sought access to discovery documents produced by the defendants in a highly publicized toxic waste case where the plaintiffs alleged that the leukemia illnesses or deaths suffered by them or their descendents resulted from improper discharge of pollutants into a small river running near their homes. One ground asserted by the Globe as justification for such access was a common law right to documents submitted to the court below for its ruling on discovery motions. The First Circuit Court of Appeals affirmed the denial of access on that ground. It offered these reasons:

The common law presumption that the public may inspect judicial records has been the foundation on which the courts have based the first amendment right of access to judicial proceedings. It is therefore not surprising that, like the constitutional right of access, the common law presumption does not encompass discovery materials. The courts have not extended it beyond materials on which a court relies in determining the litigant's substantive rights. See *In Re Reporters Committee for Freedom of the Press*, 773 F.2d at 1340, 1342 n. 3 (Scalia, J., writing for the District of Columbia Circuit, and Wright, J., dissenting, agree that the common law presumption does not go beyond evidentiary materials used in determining the litigant's substantive rights). And as we already have determined, discovery is fundamentally different from those proceedings for which a public right of access has been recognized. There is no tradition of public access to discovery, and requiring a trial court to scrutinize carefully public claims of access would be incongruous with the goals of the discovery process. In view of these conclusions, we decline to extend to materials used only in discovery the common law presumption that the public may inspect judicial records.⁶⁵

61. *Nixon v. Warner Communications*, 435 U.S. 589, 598 (1978).

62. *Cf. Seattle Times v. Rhinehart*, 467 U.S. at 20, 33; *Anderson v. Cryovac, Inc.*, 805 F.2d 1 (1st Cir. 1986).

63. *Seattle Times v. Rhinehart*, 467 U.S. at 20 (1984); *Palm Beach Newspapers, Inc. v. Burk*, 504 So.2d at 384.

64. 805 F.2d 1, 13 (1st Cir. 1986).

65. *Id.*, at 13; see also *Federal Trade Commission v. Standard Financial Management Corp. et al.*, 830 F.2d 404 (1st Cir. 1987).

3. Statutory Right of Access

In re Agent Orange Product Liability Litigation represents the best example of case law supporting the existence of a public right of access to discovery materials generated in the course of a private products liability lawsuit, where the right of access is found to arise out of a statute (Rule 26(c)) rather than the Constitution or the common law. *Agent Orange* was, of course, a class action suit brought by American veterans of the Vietnam war who claimed injury from contact with herbicides used to defoliate the jungles. It is important to keep in mind that, as a class action, the case may be unique and difficult to analogize to other products liability cases. After the class action was settled and during fairness hearings, a public interest group, the Vietnam Veterans of America, joined by several non-representative class members and one of the contingency fee attorneys for the plaintiffs, sought access to discovery produced by the Dow Chemical Company and other corporate defendants, manufacturers and distributors of the herbicide used by the government in Vietnam. An umbrella protective order previously entered by the district court during the early stages of the case prohibited dissemination of any discovery material to anyone other than the parties to the litigation. The order was found necessary (i.e., good cause was found to exist) because of the "complexity of this litigation, the emotionalism surrounding the issues, the number of documents yet to be reviewed and the desirability of moving discovery expeditiously in order to meet the [trial date]."⁶⁶

After concluding that neither the Constitution nor the common law provided the applicants with a sufficient basis for seeking access to the discovery materials (particularly because the principle movants were either non-parties or non-representative class members), the Magistrate focused on two rules of civil procedure: Rule 26(c) and Rule 5(d). First, the court looked at the Rule 26(c) requirement that a party seeking a protective order show with specific facts and articulated reasoning "good cause." The court reasoned that the procedural burden on the party seeking the closure order indicated a Congressional intent to make the materials and information generated by discovery open for public review and dissemination under normal circumstances.

Fed.R.Civ.P.26(c) presumes that discovery materials are open to the public. The Rule's requirement that the proponent of non-disclosure prove that good cause exists to limit public access to discovery material demonstrates that, in the absence of such proof, the discovery is open to the public.⁶⁷

66. *In re "Agent Orange" Product Liability Litigation*, 96 F.R.D. 582, 583 (E.D.N.Y. 1982).

67. *In re "Agent Orange."* 104 F.R.D. 567.

The magistrate explained away *Seattle Times* by claiming that the Supreme Court "tacitly affirmed the validity of the statutory presumption" because it approved the trial court's exercise of discretion in finding that good cause had been proven.

In fact, the Supreme Court made no mention of any statutory presumption of public access but, instead, concerned itself with the legitimacy of controls over the newspaper-defendant's extra-judicial use of the information. Restated, the Supreme Court in *Seattle Times* was ruling on first amendment issues pertaining to a party to the litigation who already had possession of the confidential material; and it did so only after it explicitly held that the same party had no Constitutional right of access to the materials. The magistrate's reliance on *Seattle Times* as a source of support for her opinion that Rule 26(c) creates a statutory right of access for members of the general public is simply misplaced.

At best, Rule 26(c) may implicitly permit a party opponent to disseminate information obtained through discovery unless the producing party moves for and secures a protective order. But even that "right" is subject to other rules and limitations (e.g., Rule 11 sanctions in the event that the information was obtained for improper purposes unconnected to the litigation or, perhaps, money damages for its illicit, tortious use). There is no language in Rule 26(c) that permits a *non-party* to engage in discovery and, indeed, the foundational rule, Rule 26(a), specifically limits its applicability to "parties." A person otherwise unconnected to the case (for example, not a person contemplating perpetuation of testimony under Rule 27) has no discovery rights whatsoever, unless he becomes a party; and he is permitted to do so, if at all, only under the strictures of Rule 24.

One need only consider the magistrate's suggestion in the light of day-to-day trial practice to see that it is impractical and lacking in the type of common sense that makes the rules of civil procedure work. Under the magistrate's rule, the general public would have the right to attend any deposition, participate in product inspections and testing, and compel production of documents (which can number in the thousands). Since it is a statutory "right" according to the magistrate, the non-party's access is reasonably assured against applications for protective orders (particularly since the cost of producing discovery materials is typically an insufficient basis for such an order) even though the end effect is additional cost, unnecessary delays, and frustration and intimidation of witnesses and attorneys. What corporate employees would be willing to appear as Rule 30(b)(6) deponents for their employer if the local or national investigative press is expected to be in attendance at the deposition? How is such a ruling possibly consistent with Rule 1's admonition that the rules are to be interpreted "to secure the just, speedy, and inexpensive determination of every action?"

The Magistrate cited Rule 5(d) as a second ground for her opinion that

the non-party applicants had the "right" of access to the discovery materials produced by the product liability defendants. This ground is even more insubstantial than the implied right under Rule 26(c). Rule 5(d) provides as follows:

All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter, but the court may on motion of a party or on its own initiative order that depositions on oral examination and interrogatories, requests for documents, requests for admission, and answers and responses thereto not be filed unless on order of the court or for use in the proceeding.

The problem with the court's reliance on Rule 5(d) as a basis for public access to discovery documents was that the materials produced in the *Agent Orange* litigation and subject to the non-parties' request for inspection were not filed with the court. Moreover, one reason that the materials were not filed, leaving aside the custom and practice of the trial bar to make the materials available for inspection and copying pursuant to the explicit language of Rule 34, was the existence of a local rule which was in force at the time and which mandated that discovery pleadings not be filed with the court.⁶⁸ The court found consolation and support for its position, despite the local rule and the fact that the materials in question were not filed, in the concluding phrase of the local rule that left open the possibility that the court could, in individual cases, order the parties to file discovery responses. The Second Circuit Court of Appeals approved this reading of Rule 5(d), relying in part on this comment by the Advisory Committee on Civil Rules: "[S]uch materials are sometimes of interest to those who may have no access to them except by a requirement of filing, such as members of a class, litigants similarly situated, or the public generally." Fed.R.Civ.P.5(d) Advisory Committee Note.

Unless the court's order dissolving the protective order is seen as an order modifying the local rule and compelling the product liability defendants to file the discovery materials, the fact is that the court never exercised its power of supervision under the local rule by requiring such a course of action. Further, use of the court's power of supervision solely for the purpose of granting the public at large access to private information that the public was otherwise not entitled to have is patently capricious and a form of judicial tyranny. As the defendants have persuasively pointed out in their Petition for Certiorari to the Supreme Court, the decision makes no sense either as a reasonable interpretation of Rule 5(d) or as a statement of the actual practice of law in the federal courts.

68. S.D.N.Y., E.D.N.Y. Civ. R. (18a) (1983).

Rule 5(d) states that all 'papers' that are 'required to be served' upon a party must be filed. There is a distinction between materials that are filed with a court and thus may be public and those that are not filed with a court are presumed to be private. . . . There is no question that documents produced pursuant to Rule 34 are neither 'papers' nor 'required to be served.'

Federal Rule of Civil Procedure 11 requires that every 'paper of a party represented by an attorney be signed by at least one attorney of record.' Because no one has ever suggested that documents produced in discovery must be signed pursuant to Rule 11, it is clear that they are not 'papers.' Moreover, Rule 7(b)(2) states that 'rules applicable to captions . . . apply to all motions and papers provided for by these rules.' Again, no one has ever suggested that all documents produced in discovery need a case caption. Indeed, the signing and captioning of all documents would serve no purpose and greatly increase discovery costs.

If the position of the Court of Appeals is allowed to stand, and all materials produced in discovery are 'papers' under Rule 5(d), all such materials would have to be signed, captioned, served upon the other party and filed in court. The fact that none of these procedures is followed demonstrates how far the court below has strayed from established judicial practice.⁶⁹

The Florida Supreme Court, on the other hand, has rejected the Second Circuit's finding of a statutory right of access to discovery material (founded on rules of procedure governing applications for protective orders and filing of "papers" with the court), just as it rejected finding a Constitutional right of access to discovery. In both *Palm Beach Newspapers, Inc. v. Burk* and *Miami Herald Publishing Co. v. Gridley*, the Florida Supreme Court was asked to recognize the general public's qualified right of access to discovery materials and information, subject to the parties' opportunity on a proper showing of good cause to obtain an appropriately structured protective order limiting or terminating that right. The proponents of this qualified right of access argued that the Florida equivalent to Rule 26(c) [Rule 1.280(c)] created a "presumptive public right of access" and, as well, that depositions and discovery documents were "judicial proceedings" and "judicial records."⁷⁰ The court reasoned as follows in rejecting the arguments:

69. Petition for Writ of Certiorari at 11-12, *The Dow Chemical Company, et al. v. Ryan, et al.*, No. 87-224 (filed August 7, 1987) (citations omitted).

70. Initial Brief of Petitioners Miami Herald Publishing Company, Sentinel Communications Company, and Florida Publishing Company at 8-21 and 39, *Miami Herald Publishing Co. v. Gridley*, 510 So.2d 883 (Fla. 1987).

Petitioners further urge that, notwithstanding the success or failure of their constitutional argument, they have a qualified right under Florida criminal and civil rules of procedure to attend discovery depositions and to obtain copies of unfiled depositions. Largely for the same reasons as set forth above, we do not agree that the press has a qualified right under the rules of procedure to attend deposition proceedings.

. . . A deposition is nothing more than a statement of a witness taken under oath in accordance with the rules. As the Seattle Times Court said, "[l]iberal discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement of litigated disputes." . . . Open access would not serve this purpose. The discovery rules are aimed at protecting the rights of the parties involved in the judicial proceeding and of non-parties who are brought into the proceedings because of purported knowledge of the subject matter. Transforming the discovery rules into a major vehicle for obtaining information to be published by the press even though the information may be inadmissible, irrelevant, defamatory or prejudicial would subvert the purpose of discovery and result in the tail wagging the dog.⁷¹

Importantly, in the *Agent Orange* case, the magistrate, and the Second Circuit Court of Appeals in its affirming opinion, imposed a continuing burden on the protected party to prove good cause in order to keep the order in force. Acknowledging that protective orders are modifiable, the magistrate held that on a motion to modify a protective order, it is the party protected, *not* the party who seeks access, who bears the burden of showing that good cause continues to warrant the protective order.⁷²

Prior to the *Agent Orange* case the Second Circuit had required the movant seeking to modify a protective order to show that a "compelling need" or "extraordinary circumstances" warranted the modification.⁷³ Other circuits have not imposed the burden of proof on the protected party in motions for modification. In the Eighth Circuit, the party seeking dissolution of a protective order bears the burden of showing that intervening circumstances have removed the potential prejudice.⁷⁴

The burden imposed on a product liability defendant who has produced voluminous discovery documents by the court in the *Agent Orange* case is

71. *Palm Beach Newspapers, Inc. v. Burk*, 504 So.2d at 383-384.

72. See *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 101 F.R.D. 34 (C.D. Cal. 1984).

73. *Federal Deposit Ins. Corp. v. Ernst & Ernst*, 677 F.2d 230, 232 (2d Cir. 1982).

74. *Iowa Beef Processors, Inc. v. Bagley*, 601 F.2d 949 (8th Cir.), cert. denied sub nom *Iowa Beef Processors, Inc. v. Smith*, 441 U.S. 907 (1979).

problematic to say the least. Under the decision, every member of the public has a statutory right of access to discovery and is entitled to force the court to convene a hearing *at any time* and to compel the defendant to justify its continuing need for the protection of the order. This is no small matter, especially when the court is required to consider among other issues the extent to which the materials and information have become stale. It seems unlikely that corporate documents and information about the design, manufacture, and distribution of products placed in the stream of commerce many years before the discovery process began can withstand a non-party's challenge on staleness grounds made months or years after the litigation has terminated. In the *Agent Orange* case, the magistrate referred to the dated nature of the discovery material at issue (twenty to thirty years old) as an "important factor in determining whether disclosure will cause competitive harm."⁷⁵ In addition, if the requirements of Rule 26(c) and Rule 11 are applied literally, the corporate defendant (as the protected party) must wade through all the discovery, document by document, to show good cause why each individual document still warrants protection. Mindful of Rule 11 and the requirement of reasonable inquiry, such document by document investigation could impose hours or weeks of labor on the defendant, followed by considerable effort by the court, years after the litigation is resolved. That is precisely what the *Agent Orange* court required, holding that the defendants had to prove that serious harm would befall their business or other interests and that "the time consuming and costly nature" of doing so was not a valid reason for continuing the protective order in force.⁷⁶

It is simply incredible that any court would interpret Rule 26(c) so as to impose on parties to private disputes and the system itself a never ending responsibility to monitor discovery records and proceedings as if the materials and information were comparable to presidential papers and state secrets with significant historic value to our democracy. Such an interpretation clearly fails "to secure the just, speedy and inexpensive determination" of the action required by Rule 1 and runs afoul of the ever-pressing need in an age of shrinking budgets to manage the court's dockets in a way that produces reasonable access to the judicial system for all members of society.

The United States District Court for the District of Columbia, confronted with an application by the Washington Post and a non-party (The Reporters Committee for Freedom of the Press) for access to 3800 pages of deposition testimony and 425 pages of deposition exhibits generated during a libel action against the Post by the president of Mobil Corporation and his son, substantially refused to pursue a course of action like that adopted by the

75. *In Re Agent Orange Products Liability Litigation*, 104 F.R.D. at 575.

76. *In re "Agent Orange,"* 104 F.R.D. at 571.

Agent Orange court.⁷⁷ The documents in question involved Mobil's dealings in Saudi Arabia and its marine transport business and were all subject to a blanket protective order entered by the court in 1981. While Mobil conducted a renewed evaluation of the materials in light of the post-trial application to set aside the protective order and submitted an affidavit of counsel in support of its position that the order was still needed, the Post asserted that a document-by-document and line-by-line inspection of the materials and testimony was necessary to meet the burden imposed on Mobil by Rule 26(c). The Post also argued that the information was substantially in the public domain and, since it involved commercial events more than ten years old, was stale. The court agreed that the burden remained on Mobil to make a "present determination" of good cause but flatly rejected its claim that intense scrutiny of the materials was needed in a matter that was already tried to a conclusion.

Furthermore, the Court must construe Rule 26(c) so as 'to secure the just, speedy, and inexpensive determination of every action.' . . . If the Court were to adhere to the rigorous standard urged by the Post, and force Mobil to demonstrate the likelihood of serious injury for each and every page and exhibit, the Court would be required to undertake that which it has already stated it had no intention of undertaking: a time-consuming review of the 3800 pages and 425 exhibits. Where, as here, the defendant Post obtained the full benefit of the discovery materials for trial preparation, and the material is no longer needed for trial, such an undertaking would be a waste of the parties' and the Court's resources.⁷⁸

The court specifically ruled that the lawyer's affidavit, while not meeting "the standard of particularity required where a court is considering whether to enter a protective order initially," satisfied Mobil's burden of demonstrating good cause for maintaining a blanket protective order that had been in place for several years.⁷⁹

There is little doubt that the *Tavoulares* court approached the post-trial application to set aside the protective order in a far more practical manner than did the *Agent Orange* court. The latter court's willingness after a settlement or a trial to engage in costly and time consuming discovery matters is likely the result of the nature of the lawsuit, a highly publicized class action. In such a case, reasonable arguments for access to discovery material may be based upon the need of the court and members of the class to consider the material in an evaluation of the fairness of a proposed

77. *Tavoulares v. Washington Post*, 111 F.R.D. 653 (D. D.C. 1986).

78. *Id.*, at 659.

79. *Id.*, at 659-670.

settlement. However, in its zeal to find grounds for setting aside the blanket protective order, the court has fashioned a rule of procedure that makes no sense and could impose unwarranted costs and hardships on the parties and the system.

Conclusion

Protective orders should protect parties subject to extremely liberal discovery from the irreparable harm that can accompany the publication of confidential business information and trade secrets. That purpose has been defeated by courts that have allowed private dispute resolution to become a public media event and by a plaintiffs' bar that has made a business out of selling confidential information obtained through discovery. In spite of Supreme Court decisions that hold there is no Constitutional right of access to confidential information produced during discovery, defendants in product liability litigation continue to face successful Constitutional challenges to protective orders from many fronts.

The Second Circuit has recognized a statutory presumption of public access to every ounce of information produced during discovery in a private lawsuit. The impact of that decision, coming as it does from one of the most respected of the federal circuits, has already been felt in complex litigation across the country. In January, 1988 a federal judge in Boston lifted a protective order that had been entered in *Palmer v. Liggett Group, Inc.*, thereby granting the American Cancer Society and others access to documents produced by a defendant tobacco company pursuant to discovery. The case, a failure to warn claim against a tobacco company alleging that the plaintiff's decedent's death was caused by smoking, had been dismissed by the First Circuit Court of Appeals earlier.⁸⁰ In another case, also in January, a district court judge granted a plaintiff's motion to lift a protective order in a DTP vaccine case after a verdict had been entered for the plaintiff. Once the protective order was removed, the judge created a "Wyeth Laboratories DTP Vaccine Litigation Library" from the trial transcript, exhibits, pleadings, depositions and other discovery documents produced in the case for the benefit of other DTP plaintiffs, "researchers, academics, institutions, consumer groups, members of the medical profession or associations, private or governmental, legal associations such as the ATLA and/or Defense Research Institute, and even law students."⁸¹ The library is to be maintained by the court clerk.

80. *Palmer v. Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987) (on preemption grounds); No. 83-2445-MA (D. Mass. January 28, 1988) (order to modify protective order).

81. *Graham v. Wyeth Laboratories*, 118 F.R.D. 511 (D. Mo. 1988) (order to modify protective order).

The presumption of a public right of access to material produced during discovery will change the face of complex litigation. The umbrella protective order (a standard in multidistrict litigation), provided protection with relative ease of administration. Now the defendant must confront the document-specific protective order: a costly and time consuming way to obtain protection and one that is reviewable by motion of any member of the public at any time. The term "protective order" may be a misnomer.

The Effectiveness of Warning Labels

Mark R. Lehto and James M. Miller

Introduction

During the last twenty years the duty to warn has been heavily emphasized in litigation regarding products liability. In accordance with this doctrine, manufacturers of products lacking explicit warning labels may be liable for damages under the theories of negligence (Noel, 1969) or strict liability (Sales, 1982). It has been suggested that such litigation has proliferated because of the relative ease of initiating tort actions based upon inadequate warnings, the difficulty in defending against such actions, and the "apparently" low cost of placing warnings on products (Twerski, et al., 1976).

In response to this proliferation of litigation based upon the duty to warn, many manufacturers have both increased and made more explicit the warning labels they provide with their products, often with the conviction that the hazards being warned against are minor. While this response may have increased the safety of certain products, the dangers of the indiscriminate provision of warnings have been noted by several authors (Twerski, et al., 1976; Schwartz and Driver, 1983). The noted concern is that all warning labels may lose effectiveness, if they "cry wolf" too many times.

Few individuals would argue against the idea that warning labels should be applied only when they are likely to reduce the frequency and severity of classes of product-related injuries. This idea underlies the "risk balancing" theory applied by the courts which recognizes that the benefits of applying a warning label are to be compared to its costs (Schwartz and Driver, 1983; Weinstein, et al., 1978; McCarthy, et al., 1982). However, clear, academically-based criteria that would guide the courts in evaluating the costs and benefits of particular warning labels have not been made available to the legal community. As a consequence, warning-related legal decisions are frequently based upon intuitive rather than scientific grounds. Little consideration has been given to the true complexity of the problem (Kantowitz and Sorkin, 1983). The result has been decisions that may have long-term implications counterproductive to safety (Twerski, et al., 1976; Schwartz and Driver, 1983).

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PUBLIC COURTS, PRIVATE JUSTICE

First of Four Articles

Court Secrecy Masks Safety Issues

Key GM Fuel Tank Memos Kept Hidden in Auto Crash Suits

By Elsa Walsh and Benjamin Weiser

Washington Post Staff Writers

Over the last five years, in defending itself against scores of lawsuits filed by victims of fiery car crashes, General Motors Corp. has used court secrecy procedures throughout the nation to keep closely held and controversial documents about auto safety from becoming public.

GM's legal approach, which is becoming a favored way of preventing the disclosure of sensitive information in civil lawsuits, has helped avoid a public debate about whether the company placed financial considerations ahead of safety concerns in designing the fuel tanks used in most GM cars until the early 1980s. Fuel leaks are a key factor in starting fires, which can cause deaths in otherwise survivable accidents.

The documents that have been kept from public view show that company officials were told in 1970 that the gas tank was vulnerable to puncture during some high-speed crashes. In 1971, the company decided not to move the tank to a more protected location after top engineers concluded that the traditional design was adequate, and that the design change was too expensive and would reduce trunk space. GM's estimates for the cost of the change ranged from \$8.59 a car to \$11.59.

Two years later, when engineers were assigned to study the fuel tank location again, the question of cost arose once more, and a "Value Analysis" was prepared in a two-page memo dated June 29, 1973.

A GM engineer, Edward C. Ivey, assigned a \$200,000 value to each human life and assumed that a maximum of 500 people died annually in GM cars "where the bodies were burnt."

Then, in a two-stage calculation relating to new GM cars, Ivey determined what level of expenditure could be justified to try to avoid the fiery deaths in the 5 million cars GM was producing annually. This analysis indicates that for GM it would be worth approximately \$2.20 per new model auto to prevent a fuel fed fire in all accidents.

Ivey cautioned, however, that "it is really impossible to put a value on human life."

These documents, which were made available to The Washington Post as part of a lengthy examination of the burgeoning use of court secrecy procedures, have remained confidential

because of GM's legal strategy.

In case after case, GM has turned over documents to opposing lawyers only under court-imposed confidentiality orders that prohibit disclosure to anyone else. It has paid millions of dollars to settle cases before trial and, as part of those settle-

See COURTS, A22, Col. 1



CONFIDENTIAL
PROTECTED BY COURT-IMPOSED
PROTECTIVE ORDER

 COURTS, From A1

tion turned over to each other during the course of the case.

Such secrecy procedures—once used almost exclusively in cases involving business trade secrets, national security and personal privacy—are increasingly being used to prevent debate about critical problems of public safety and policy. Those who have sought to take advantage of secrecy procedures include corporations, hospitals, doctors, lawyers and law firms.

There is a striking lack of consistency and standards among the area's local and federal courts in the way they handle requests to seal cases. In an environment usually governed by formal rules, the process has become almost casual. Judges follow no set procedures, ask few probing questions, offer no notification to the public and often put nothing in the public court records to explain their reasoning in deciding to seal the files.

Judges here have approved secrecy orders in lawsuits involving allegations of misconduct by doctors and lawyers, safety hazards in public facilities and products, and race and sex discrimination. Considering themselves referees who monitor disputes between private parties, judges rarely reject a request to seal a case, according to lawyers and judges interviewed. If the two sides involved in a settlement want the file sealed from public access, most judges see no reason not to go along.

"There isn't any great objection to" it among the judges of the Montgomery County Circuit Court, said Chief Judge John J. Mitchell.

In Fairfax County Circuit Court, Chief Judge Lewis Griffith said, "Normally, the court honors the request."

This informal approach conflicts with the long-accepted American tradition that the public has a right to see basic records in a civil lawsuit, an expectation formally recognized by the U.S. Supreme Court. Although judges have broad discretion in handling cases, courts historically have adhered to the principle that records should be sealed in a selective way, and that open files should contain at least the original complaint, a list of the proceedings in the case and copies of any rulings made by the judge.

No local courthouse keeps a publicly available record of which lawsuits are sealed, and internal record-keeping is so haphazard that most of the courts could not provide reliable figures. At the request of *The Washington Post*, the clerk's office at D.C. Superior Court searched its records and initially came up with 43 cases. It declined to provide the names of those involved, listing only case numbers, the judge and the attorneys. Told of additional cases not on the list, the clerk's office provided a revised list of 53—which still did not include every sealed case found through other sources.

At the federal courthouse in the District, the clerk's office said it would be difficult to compile a list of all sealed cases; however, the court's files contain 23 references to sealed cases, including 12 referred to as "Sealed & Sealed". At least some appeared to have been sealed when they were filed—the earliest possible time. In U.S. District Court in Alexandria, 31 cases are under seal, according to a clerk.

In Fairfax County, a review of a court clerk's handwritten list suggests there have been 13 sealings in the last two years. There is no record of sealings that occurred before then. In Montgomery County, there were 69 cases sealed before 1984; a change in record-keeping procedures since then makes it difficult to obtain an accurate count. In Prince George's County, the clerk's office said it had no figures. In Arlington County, the clerk's office also said it does not keep specific figures, but one clerk estimated "no more than one a year."

Some judges said in interviews that they did not realize that sealing a case meant the entire file would be removed from public access. When D.C. Superior Court Judge Eugene Hamilton was told that he is listed as sealing the records in five cases, including two medical malpractice matters, he said: "Is that right? The whole suit? Including the names of the plaintiffs and so forth?"

Hamilton said he assumed that his secrecy orders only applied to the amounts of money paid out as part of the settlements, but said it was "never too clear" to him what else would be covered.

Judge Leonard Braman, one of 32 Superior Court judges who have sealed cases, attributed the proliferation of secrecy to busy judges looking for a way to resolve cases. "It was done as a matter of practice and the judges were driven by the desire to keep their calendars churning," said Braman. "It just seems to me that it doesn't necessarily follow that the court has to be a mindless and conscienceless tool that serves the selfish . . . ends of a litigant."

But Judge Stanley Sporkin of the federal court here said courts have only a limited role in civil lawsuits before trial. "Criminal law is the public business. Private lawsuits are usually private business," he said. "The courts don't have much say."

Stephen R. Steinberg, a senior lawyer at a New York firm who heads a committee on trial practice for the American Bar Association, said sealing records is an extraordinary step and that judges should weigh carefully the "public right to know and the constitutional protection of an open court system" against the privacy of those involved in the lawsuit.

"Public interest should be paramount," Steinberg said.

Safety Issues Kept Secret

More than 75 sealed cases and 100 confidential settlements were reviewed for this article. Information about these cases was pieced together from court files, documents provided by sources, and interviews with lawyers, judges and parties in the lawsuits, some of whom did not want to be identified.

Those interviewed drew a distinction between a judge's direct involvement in lawsuits—such as sealing and confidentiality orders—and settlements in which two sides privately agree to resolve the issues, sign a

contract not to discuss the matter and then ask the court to dismiss the lawsuit.

Settlements, which usually involve no admission of fault, serve a variety of purposes. Many cases are resolved, lawyers said, to avoid costly trials.

In nearly all the cases reviewed for this series, settlements had the effect of keeping issues of public concern from surfacing. In the Howard University Hospital case, for example, no outside investigative body learned of the nurse's alleged falsification of records. The settlement included an order, agreed to by both sides, not to discuss the case.

According to pretrial statements, which are confidential, the nurse added entries to a patient's chart to make it appear that the nursing staff had conscientiously monitored the patient as she complained of breathing problems and had summoned McKenna, the on-duty physician, several times.

The patient's chart stated that McKenna had examined the woman three times that day, May 7, 1983, but McKenna said he did not. "I knew that it was a falsification of what had happened and that I had not been notified, and I wanted to get the record straight right then and there," McKenna said at his deposition.

Another patient who was sharing the woman's room said in an affidavit that she tried to alert the nursing staff to the woman's breathing difficulties. "[She] was having problems breathing and kept taking the oxygen mask off and would start to gasp and I would buzz for the nurses. They wouldn't respond," the other patient said.

The woman stopped breathing that night, lost consciousness and died six days later, medical records show. The cause of death was listed as a heart attack brought on by a blood clot in her lung. Breathing difficulties are often a symptom of such blood clots.

When Barry Nace, the attorney for the woman's family, learned of the alleged falsification, he used it as a bargaining chip, according to sources. Unless the hospital agreed to settle immediately, Nace told Howard's attorneys, he planned to alert the media.

The \$1 million confidential settlement came a few weeks later.

The hospital's attorney, Francis Smith, declined to comment about the allegations or the settlement, except to say: "It is not the policy of the hospital ever to falsify records." Speaking generally, he said, "Sealing the record is an effort to protect people, from time to time, from illegitimate or . . . misleading implications."

Judge Webber said, "I believe it would be inappropriate for me to discuss the details of any sealed cases."

Nace defended the settlement. "Would I like to see confidentiality agreements prohib-

ited and outlawed? Yes . . . but until that happens, our obligation is to our client and not to the rest of the world," he said.

Discovery of allegedly altered records also played a major role in the settlements of two other local medical malpractice cases, according to Ronald Karp, the attorney who brought the lawsuits.

Karp, who is prohibited from discussing the specific details of the two cases, said each was settled for a "six-figure" sum. One involved a surgeon who allegedly had forged an informed-consent form to show that he had told a patient of the risks of surgery, when no such discussion had taken place, Karp said. The patient later suffered major complications in the surgery.

In the other case, Karp said, a doctor allegedly had failed to diagnose symptoms of cancer in a patient and falsified the records to show that he had detected the disease.

Karp said he did not notify medical licensing authorities of the allegations raised in the cases. "I presumed that if I did, it would be discussing the case, and that would be a breach of the settlement terms," he said.

Under a 1986 D.C. law, it is illegal to falsify medical records.

Investigation Roadblocks

Allegations against local doctors or hospitals account for a sizable percentage of the confidential settlements and sealed cases. In D.C. Superior Court, for example, 14 sealed cases involve lawsuits against doctors or hospitals.

In a 1983 case in the D.C. federal court, Judge Thomas Jackson removed from the public file all records of a civil lawsuit that alleged a physician had sexually assaulted a female patient during a gynecological examination, according to sources.

In a deposition during the lawsuit, the doctor denied assaulting the woman, but acknowledged having sexual relations with her during an exam, saying the act was consensual, according to one source familiar with the case. Consensual sexual relationships between doctor and patient can be grounds for disciplinary action, according to medical codes of ethics.

The case was settled for \$30,000, the source said. The doctor's partners severed their relationship with him, but the doctor—whose name could not be learned—remains in practice in this area, according to the source.

Even if a disciplinary body is told of possible misconduct, confidential settlements in a lawsuit can sometimes stymie an investigation. Eight years ago, D.C. medical authorities received a complaint alleging that Dr. Paul Weisberg, a prominent psychiatrist, had violated professional ethics by becoming sex-

ually involved with an emotionally-vulnerable female patient during therapy.

The woman had sued Weisberg and was engaged in negotiations to settle the case. A friend of the woman, Clarence Ditlow, said he wanted to alert authorities before the woman agreed to a confidential settlement that might keep her from discussing the matter in the future. Ditlow's fears proved true. When investigators sought to interview the woman, the woman's attorney told them that the terms of the settlement prohibited her client from cooperating, according to sources.

Weisberg, in a deposition taken during the lawsuit, said he began a friendship with the woman on the day that her therapy ended and that it later became a sexual relationship. Therefore, he said, it was not a violation of ethics.

Last year, when the ethics committee of the Washington Psychiatric Society received a complaint about Weisberg's practice, the eight-year-old settlement again caused problems. The ethics committee wanted to interview the woman and tried to negotiate a way around the confidentiality agreement. Before it could be worked out, the committee decided it had enough information to go to the American Psychiatric Association (APA), a committee member said. The committee subsequently had learned about a similar allegation from another patient.

The APA, which could revoke Weisberg's membership but has no authority over his license to practice, has made no decision yet. Weisberg, who has denied any misconduct with either patient, has closed his practice here and moved to California, according to his attorney, John Karr.

Some institutions routinely seek confidentiality agreements that include provisions barring opposing lawyers from discussing settled cases.

The general counsel for Children's Hospital, Lee Doty, said she viewed confidential settlements as agreements between private parties and, in the case of Children's, a way to protect the privacy of the children treated there. "It is the belief that it's nobody's business how we handle things out of court," she said.

She added, "Lawsuits are settled for reasons frequently that have absolutely nothing to do with whether we think [the hospital is] in error. Physicians' reputations may be on the line. The hospital's reputation may be on the line It may be really unfair to make it public."

Doty said she could not comment on the specifics of two settlements involving the hospital. In both cases, confidentiality agreements prohibit the attorneys and their clients from alerting anyone to the suits, even

though there are some documents in the public file that raise questions about safety.

One of the cases, a 1983 suit, alleged that the hospital's decision to delay the purchase of additional infant heart/respiratory monitors had been a factor in causing severe brain damage to a 6-week-old baby, who later died. The baby, who was found in cardiac arrest and not breathing, was being monitored by less sophisticated equipment that measured only respiration, according to court records.

The hospital's top medical staff—including the chairman of neonatology, Dr. Gordon B. Avery—had been requesting three more monitors for some time. In one memo to hospital officials, they said the sophisticated monitors were "urgently needed," according to hospital records turned over during the suit and placed in the public court file.

One memo said, "Not uncommonly, a monitor must be taken off one baby to be put on another." Another called it an "unacceptable situation" and said "nor is it consistent with our hospital philosophy of providing safe patient care."

Citing budgetary restraints, the hospital put off the purchase, the records show. In responding to the suit's allegation, the hospital blamed a defect in the less sophisticated monitor. If it had been designed properly, the hospital said, the incident might never have occurred. The hospital denied that its delay in purchasing new monitors was a factor in the child's death.

The case was settled in 1985 for \$1.9 million, with the hospital and the manufacturer of the monitor each contributing, court records show. A hospital spokesman, Lon Walls, said Children's since has built a state-of-the-art neonatal facility with "all the monitors needed."

The attorney who sued Children's, Jack Olender, said he could not comment on the case because of the confidentiality provisions in the settlement. Speaking generally, he said, "The public should know about poorly designed or defective medical equipment if we are ever to obtain improvements in the health care delivery system."

The second lawsuit alleged that one of the hospital's surgeons had connected the wrong blood vessel to a 9-month-old baby's heart, causing neurological damage before the mistake was corrected. In a statement filed with the court, the hospital acknowledged the surgeon's mistake and said the child had received treatment that was "not acceptable," but pointed out that the operation was technically difficult because of the child's size. The hospital questioned whether the mistake was solely the reason for the child's condition.

This case was settled in 1986 for \$2 million, according to one source.

Secrecy Is Bargaining Chip

In the back and forth of settlement negotiations, secrecy has become leverage.

For example, in a Montgomery County case filed last November, a Maryland physician agreed to settle a claim of sexual misconduct if the lawsuit was filed under seal so that his name would never appear on the public record, according to the attorney who brought the suit on behalf of a female patient. Under terms of the deal, the doctor paid an undisclosed sum to the woman and agreed to enter a rehabilitation program, the attorney said.

In a 1982 case, a judge's willingness to seal the case file became a critical element in the settlement. A group of local dentists sued Chesapeake & Potomac Telephone Co., complaining that the company was refusing to correct a phone number in an advertisement set to appear in 670,000 copies of the new D.C. Yellow Pages.

C&P said it was too late and too expensive to fix the error. D.C. Superior Court Judge David Norman temporarily blocked distribution of the books, which were about to be bound. The case was settled when C&P agreed to correct the phone number—which it called an unprecedented move and not legally required—as long as Norman agreed to seal the case.

C&P did not want other advertisers to know such a remedy was available, Ken Pitt, a C&P spokesman, said. "If every time we had a complaint we had to stop the presses, it would be an impossible situation," Pitt said. "We would never get the books out."

The Washington Post has asked judges in some business cases to impose protective orders on internal company documents relating to individual personnel records and marketing information, but has not sought sealing orders on information filed in court, according to newspaper vice president and counsel Boisfeuillet Jones Jr.

In libel cases, Jones said, The Post seeks to protect the identity of confidential sources, but otherwise turns over records detailing the editorial process without any protective order precluding public access.

Lawyers also have learned to use secrecy when they are sued personally. In D.C. Superior Court, nearly a fourth of the 53 sealed cases involve allegations of legal malpractice or disputes between lawyers. "It's judges and lawyers saying, 'We'll take care of our own,'" said lawyer John Karr.

In Prince George's County, Chief Judge Ernest A. Loveless said he sealed the records of a lawsuit filed in June against a Maryland lawyer because—in Loveless' words—he did not want "nosy" clerks to have access to the file. "You've got people handling that [court] jacket all day long who would know him," Loveless said.

In one case in D.C. Superior Court, attorneys agreed between themselves to seal certain records in a case against Howard University Hospital, only to run into stiff opposition from Judge Gladys Kessler—one of the few instances in which a judge refused to go along with such a request.

The hospital had agreed to pay \$275,000 to the family of a 36-year-old Washington man who died after the hospital staff allegedly misdiagnosed his pneumonia as malaria, an allegation that the hospital denied. When they presented the deal at a July 24, 1985, hearing, Kessler said, "Across the board, I believe that court documents are public documents and the world has a right to look at them," according to a transcript of the hearing.

The case later was settled for the same amount, and the file remained open.

Kessler was surprised when she was reminded during an interview that she, too,

COURTS, From A1

appeared on the list of Superior Court judges who have sealed cases. Told that the case involved a lawyer and a bank, she said she could not discuss her reasons for sealing it but acknowledged her action was "inconsistent" with her stated philosophy.

"It really is a good example of my feeling that sealing is often done on an arbitrary or ad hoc basis," she said. "Sealing is often granted to people who are economically and socially advantaged and are therefore able to hire lawyers who know how to ask for that remedy. I suspect that you will rarely see a case involving poor people which has been sealed."

But defense lawyers say secrecy is just another tool in the vigorous representation of a client. "I will have clients I know are guilty of some wrongdoing civilly and it's still my obligation to go in and defend them as best I can," said Joseph Montedonico, whose D.C. firm has obtained five sealing orders in Superior Court civil lawsuits.

Montedonico, whose firm represented Howard University Hospital in the case that Judge Webber sealed, said lawyers have no ethical responsibility to decide if a confidentiality order is contrary to the public interest. "I don't make the ultimate decision. That's up to the judge," he said.

In another twist on the kind of leverage that secrecy can offer, lawyer Jean D. O'Malley said one of her clients was offered a "substantial increase" in a settlement in return for agreeing to the other side's request to seal a case in D.C. Superior Court.

According to documents apparently left by mistake in the open file, the suit alleged that a 6-month-old child died after a D.C. doctor failed to diagnose and treat diarrhea, a charge the doctor denied.

O'Malley declined to comment on the case, citing the seal. She said she felt ambivalent about closing the records in the case because it involved questions about a doctor's performance. At the same time, she said, her client did not object to the secrecy as long as it meant a higher settlement.

As a general rule, O'Malley said, "secrecy is worth money. No seal, no bucks."

The doctor's attorney said he made no such offer and does not engage in such tactics. "The amount of the settlement was not affected at all by the agreement to seal," he said.

'Top Dollar' for Privacy

Some settlement negotiations have nearly collapsed over the issue of confidentiality. In 1984, Judge James C. Cacheris in Alexandria federal court sent attorneys back to the negotiating table when it was clear there was a difference of opinion over the effect of a proposed confidentiality agreement.

The suit alleged that a Falls Church resident, Michael A. Webber, had suffered a near-fatal rupture of the stomach after taking Arm & Hammer Baking Soda for indigestion, a usage suggested on the package. The baking soda manufacturer, Church & Dwight Co., disputed in court papers that its product had caused Webber's illness.

At a settlement conference with the judge, Church & Dwight Co.'s attorney, Richard H. Lewis, complained that a Washington Post reporter had inquired about the case. Lewis said the company would not go forward unless Webber and his attorneys agreed not to talk about the matter, according to a transcript of the July 25, 1984, hearing.

The company was paying "top dollar" to settle, Lewis said, "but part of that reasoning was . . . no one would discuss this matter with the press or anybody else, not only the dollars and cents, but the facts [of the case]."

Webber's attorneys were reluctant to go along. After a short recess, however, they gave in to the company's demand. Back in court, Cacheris asked Webber, his wife and one of his attorneys, Kenneth Trombly, whether they understood the secrecy provision, repeating his questions several times to make sure. Satisfied, he dismissed the case, saying, "I'm glad you all resolved it."

The strategy worked. No news article appeared about the case.

Staff researcher Melissa Mathis contributed to this report.

NEXT: One company's strategy

Secrecy Boosts Settlements

VIEWPOINTS



KESSLER

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—Stanley Sporkin, a federal court judge who believes that courts have only a limited role in civil lawsuits before trial

"... I believe that court documents are public documents, and the world has a right to look at them."

—Gladys Kessler, a D.C. Superior Court judge who has ordered one case sealed but who believes that such actions are often done on an arbitrary or ad hoc basis



SPORKIN



MONTEDONICO

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O'MALLEY

TUESDAY, OCTOBER 25, 1988

PUBLIC COURTS, PRIVATE JUSTICE

Third of Four Articles

Drug Firm's Strategy: Avoid Trial, Ask Secrecy

Records Reveal Story of Zomax Recall

By Benjamin Weiser
and Elsa Walsh
Washington Post Staff Writers

In mid-January 1985, an important memorandum began circulating to top officials at McNeil Pharmaceutical, a major subsidiary of the Johnson & Johnson company, the maker of Band-Aids and Tylenol.

The memo was both a warning and a reminder of a difficult period in McNeil's history. Nearly two years earlier, on March 4, 1983, McNeil had withdrawn its prescription painkiller Zomax after only 28 months on the market. The decision came after reports of hundreds of severe allergic reactions to the drug, a top seller. After the recall, the company faced nearly 600 lawsuits, many alleging that McNeil had failed to adequately warn the medical community about Zomax's risks—an allegation the company has strongly disputed in court.

The Jan. 14, 1985, memo, written by McNeil legal aide Herman Lutz, listed 18 lawsuits that "presented McNeil with the most exposure or had sensitive problems." Many of the cases involved patients who had taken Zomax during periods when the company had decided to issue stronger warnings, but had not yet done so. The memo, sent to company President Jack O'Brien, also noted other factors, including the potential testimony of

several witnesses that might prove worrisome.

To defend itself against these lawsuits and dozens of others that McNeil's lawyers regarded as serious, the company adopted a strategy that it has pursued vigorously during five years of Zomax litigation in 43 states.

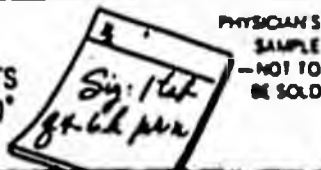
It has used court secrecy procedures—called protective orders—to prevent the disclosure of information that McNeil turned over during the course of the lawsuits. It has taken only three cases to trial, choosing instead to settle cases outside the courtroom without admitting any liability. As part of these settlements, it has obtained confidentiality agreements that prohibit opposing lawyers and their clients from revealing what they have learned about Zomax.

What McNeil's attorneys consistently have managed to keep out of the courtroom are documents and testimony that might have provoked a public debate about whether McNeil withheld information from the medical community about the risks of Zomax. The U.S. Food and Drug Administration concluded in 1985 that the drug was probably a factor in 14 deaths and 403 life-threatening allergic reactions. The material also did not reach congressional investigators who, a month after the recall, held two days of hearings

See COURTS, A12, Col. 1

4 Tablet Starter Package

ZOMAX TABLETS
(ZOMEPIRAC SODIUM) 100 mg



COURTS, From A1

that centered on the FDA's role in regulating Zomax, and not the company's internal procedures.

McNeil officials, pointing out that drugs are inherently unsafe, said in interviews that they promptly alerted doctors or the FDA whenever they had solid data about Zomax's risks. They sought broad secrecy orders, they said, to prevent disclosure of trade secrets that would be valuable to competitors and because some documents might be misinterpreted. "McNeil's only protection is secrecy," the company has said in court papers.

The Washington Post, as part of a lengthy examination of secrecy in the civil courts, has reviewed much of this still-confidential material. It provides an inside look at how McNeil tested and marketed Zomax, then struggled to understand why the drug—which was being taken safely by millions of people—also was causing unpredicted and life-threatening reactions in some patients.

According to the documents, there were indications during premarketing testing that Zomax might cause a severe allergic reaction known as anaphylaxis, which can lead to seizures and respiratory failure. McNeil said the results were not conclusive enough to include in Zomax's package insert—the primary way that a company warns prescribing doctors of harmful side effects.

A warning about anaphylaxis was first included nine months after the drug went on the market, following several reports of anaphylactic reactions, but one internal memorandum to McNeil's president criticized the company for not acting sooner. "We resisted too much and waited too long," wrote Patrick Seay, McNeil's longtime head of regulatory affairs in a Sept. 8, 1984, critique of the company's overall performance in marketing drugs.

Another internal document is a Feb. 26, 1982, memo sent to the company's sales force immediately after a case of anaphylactic shock was reported in the *Journal of the American Medical Association*. The memo said, "This information is being sent to you so you will be fully prepared to respond to a physician or pharmacist who initiates discussion on the article. You should not bring up the subject."

Six weeks later, other documents show, the company launched a high-pressure sales campaign shortly after McNeil had sent out a special warning letter to 200,000 physicians. As the letter was being drafted, a McNeil researcher gathered data that suggested Zomax might be riskier for some patients than previously believed.

Concerns within McNeil climaxed in a series of tense weekend meetings on Feb. 5 and 6, 1983, at the firm's headquarters in Spring House, Pa. Three of the company's four top doctors told McNeil's president they no longer had confidence in the drug's safety, according to one of the doctors, James A. Dale. The company considered various options, including a recall, before deciding instead to strengthen its package warning.

As the new warning was being prepared, two people died of anaphylactic reactions allegedly related to Zomax use, and the company took the drug off the market. "They were avoidable deaths," Dale, then McNeil's associate medical director and now in private practice, said in an interview.

"They were avoidable side effects . . . I felt guilty . . . We met and had the opportunity to take action . . . We could have done something sooner."

Dale has never testified in any Zomax lawsuit. In several instances where his testimony has been sought, McNeil has settled before he could appear for a deposition, sworn pre-trial testimony that is taken outside the courtroom. Information about the Feb. 5 and 6 meetings has never become public.

McNeil also moved quickly to settle two cases in which opposing lawyers had unexpectedly referred to sensitive McNeil documents in publicly filed legal briefs in Miami and Seattle. As part of those settlements, judges in both cases ordered that the entire file be sealed from public view.

During four hours of interviews and in 22 pages of written responses to questions submitted in advance, officials at McNeil and its parent company, Johnson & Johnson, strongly defended both their legal strategy and their handling of Zomax.

"The strategy was to dispose of the Zomax cases as expeditiously and as cheaply as possible," said Roger Fine, associate general counsel of Johnson & Johnson, which handles the legal work for all the company's subsidiaries.

According to Fine, secrecy orders were necessary to guard the company's chemical formulas and marketing methods, as well as to prevent others from using documents to suggest unfairly that McNeil did not care about the safety of its products. The company settled cases, he said, for a variety of reasons, not just concern over documents and testimony.

James E. Burke, chairman of Johnson & Johnson, said in an interview that he was proud of the company's handling of Zomax and rejected any suggestion that the company should have withdrawn the drug immediately after the Feb. 5 and 6 meetings. Once the company decided to recall the drug, he said, "I think we did a good thing—I don't see how you could do it any faster."

Dr. Patricia Stewart, McNeil's head of medical research, said her staff carefully monitored adverse reactions to Zomax for the entire time that it was on the market. McNeil officials said the company's decision to issue a stronger warning after the Feb. 6 meeting was a prudent course of action given what was known at the time.

Lawrence G. Foster, Johnson & Johnson's vice president for public relations, said, "As we demonstrated in response to the Tylenol poisonings and again in the way we managed Zomax, our first responsibility under our credo is to our customers. Anybody who manages a business for the long term, as we do, knows that putting the customer first is the only way to increase sales."

Foster said that nearly 15 million patients used Zomax without incident, and that the recall of Zomax was not an admission that the drug was unsafe for everyone. "Decisions regarding Zomax labeling had to be made based on fragmentary information about possible adverse reactions experienced by a small number of patients out of the millions who actually used the medication," he said. "This is hardly an exact science . . . And warning of every conjectural side effect, no matter how thin the evidence, results in a label so expansive and indiscriminate that it in effect warns of nothing . . ."

The company revised its warning labels whenever it had enough information to war-

rant it, he said. "This is the simple truth—and no amount of second-guessing of McNeil's and FDA's judgments . . . can negate it."

Responding to Seay's criticism that McNeil had not issued a warning about anaphylaxis soon enough, Foster said the company's decision was reasonable at the time.

The adequacy of McNeil's warnings is the central issue in the Zomax lawsuits. The courts have long recognized that prescription drugs are inherently unsafe, that what is enormously beneficial for some people may not be for others. Federal law has resolved that medical dilemma by requiring drug companies to assess a drug's risks, as well as its benefits, and issue full and accurate warnings about possible adverse side effects. If a company complies, the courts have ruled, it usually cannot be held liable for an adverse reaction.

Seay, in his 22-page internal critique written 18 months after Zomax was recalled, voiced his belief that the company had failed, at times, to meet its own high standards. "We can do little about the past," he wrote, "but we should perform now strictly according to the letter and spirit of the regulations and to ethical principles to preserve the good name of J&J [Johnson & Johnson]."

Conflicting Interests

The information in this article is drawn from internal McNeil records made available by sources, and from interviews with present and former McNeil employees, lawyers who have sued McNeil and officials at McNeil and Johnson & Johnson.

McNeil's attorneys agreed to discuss some aspects of their legal strategy and to comment on internal documents that The Post had obtained elsewhere. They declined to disclose settlement amounts or to release internal records.

A handful of plaintiffs' attorneys agreed to a limited discussion of their impressions of McNeil's legal strategy. A few other lawyers consented to interviews on the condition that they not be identified by name. Most plaintiffs' attorneys, however, declined to make any comment, saying they feared it might be construed as a violation of court-imposed protective orders or a breach of the confidentiality agreements they have signed with McNeil.

Some of the plaintiffs' attorneys, while acknowledging that they agreed to McNeil's requests for secrecy, took issue with the company's statements about its need for confidentiality.

Allan Kanner, a lawyer in Philadelphia who has represented several clients in Zomax settlements, said, "What they are trying to do is not be accountable to the vast majority of the public for what they've done They paid my clients a ton of money for me to shut up."

Maryland lawyer Steven Nemeroff, who settled a Zomax lawsuit in Baltimore, said generally of lawsuits involving drugs, "The problem is that they have a gun to your head. The client is concerned about being compensated in full. The lawyer must abide by the concerns and wishes of his client . . . not the fact that [information will remain secret or] other victims may be injured."

For some of Zomax's alleged victims and their families, the legal process left them ambivalent. They agreed to financial settlements—in which the company admitted

no fault—and found themselves with important unanswered questions.

Carol Sawyer, whose lawsuit alleged that her 42-year-old husband Michael died of anaphylaxis after taking Zomax, said she settled the case without knowing of the Feb. 6 meeting at which Dale said he and two other McNeil doctors had declared their lack of confidence in Zomax's safety.

Michael Sawyer was one of two people to die of anaphylactic reactions allegedly caused by Zomax in the four-week period between that meeting and Zomax's recall. "That's very upsetting to know, that [his death] might have been prevented," she said. "I just can't believe [McNeil] would take a chance and wait and see."

Devra L. Davis, a Washington toxicologist who settled with McNeil after suffering a near-fatal anaphylactic reaction, said she believes court secrecy impairs "free scientific inquiry and the right of the public to know specific information about drugs it consumes."

If independent scientists could make a thorough study of what happened with Zomax, Davis said, they might be able to learn lessons that would help others in the future.

McNeil's attorneys dispute these characterizations, saying that the civil courts are primarily intended to be a place to resolve private disputes—and, therefore, not the proper forum for a public debate on McNeil's performance. "We don't really have anything to hide in this thing," said David F. Dobbins, of Patterson, Belknap, Webb & Tyler, the New York law firm that has represented McNeil in court throughout the Zomax litigation.

Code Name: Operation 111

In large part, the information contained in McNeil's internal records and in still-confidential depositions shows a side of the drug industry that the public rarely sees: the inevitable tension between the medical staff and the marketing division, the sometimes flawed relationship between a drug company and its regulators at the FDA, and the high-pressure sales tactics used to promote a drug to doctors and hospitals.

When Zomax was approved for sale in October 1980, McNeil called the painkiller a breakthrough, as strong as a narcotic but not addictive. The drug was an immediate success, capturing 11 percent of the new prescription analgesic market within four months, according to McNeil records.

Zomax's initial package insert cautioned that doctors should not prescribe the drug for patients with allergies to aspirin or similar medication, but it made no mention of anaphylactic reactions.

The first reports of anaphylactic reactions—none of which had resulted in death—surfaced soon after Zomax was launched. In July 1981, the company revised its package insert to include a statement that "anaphylactoid reactions have been reported."

Seay, in his internal critique, suggested that the package insert should have been revised sooner. He faulted the company for allowing its marketing division to gain "a greater role in the content and changes of the package insert," an area traditionally left to the medical side.

Pointing out that several severe allergic reactions occurred in 1978 during the premarketing testing of Zomax, Seay said an argument could be made that the company should have interpreted them as anaphylactic—an argument the company rejects. Seay also cited reports of anaphylactic reactions to another McNeil drug, Tolectin. "We knew the

chemical relationship of Zomax to Tolectin and we knew that Tolectin produced anaphylactoid/anaphylactic reactions," he wrote.

McNeil's Foster said, "With hindsight, one can debate whether the label should have been changed a month or two earlier," but not earlier than that.

Another memo shows McNeil's growing concern as anaphylactic reactions escalated through 1981 and into 1982. "Zomax allergic reactions are continuing to be reported at a relatively high rate and need close surveillance," wrote Dr. Stewart, McNeil's medical research chief, on Feb. 18, 1982.

A month later, the company learned of the first fatal anaphylactic reaction in a patient who had taken Zomax. Because the patient was allergic to aspirin and should not have been given a prescription for Zomax, the company decided to issue a special "Dear Doctor" letter to the medical community to call attention to the aspirin warning already in the package insert.

As the Dear Doctor letter was being drafted with the aid of FDA officials, the company undertook a study of the 178 allergic and anaphylactic reactions that had been recorded since Zomax was introduced. The results surprised some members of McNeil's medical staff.

According to a March 31, 1982, internal memo from researcher Thomas Teal to McNeil president O'Brien, the study found a pattern of anaphylactic reactions in patients who took Zomax intermittently—starting, stopping, starting again. It made no conclusions about these statistics.

Intermittent users were Zomax's largest market, about 75 percent. They took Zomax like aspirin, whenever necessary. If they were at risk, that might require a broad warning.

A few days after Teal presented his study to McNeil management, documents show, an explicit paragraph-long warning was drafted for the proposed Dear Doctor letter, specifically citing risks for intermittent users who had no previous problems with Zomax. In the final draft, however, the word "intermittent" was dropped and the warning shortened to a single sentence: "Hypersensitivity upon re-exposure or extended use cannot be ruled out."

In recent interviews, McNeil and Johnson & Johnson officials stood by the letter's final wording. They said the Teal study, while worthy of consideration, was based on fragmentary information. At that point, they said, intermittent use was still an "unproven risk factor."

On April 9, the less explicit version was mailed to 200,000 prescribing doctors.

Seven days later, internal documents show, McNeil instructed its sales force to undertake a major new marketing campaign. An April 16 Mailgram said, "We're calling it 'Operation One-Eleven.' Now, if that sounds like war, well, in our world of selling that's what it is."

It was being called Operation 111, the Mailgram said, because McNeil hoped to garner \$111 million in annual sales for Zomax and its sister drug, Tolectin. To do so, the Mailgram instructed the sales force to concentrate exclusively for 10 weeks on those two drugs.

During the duration of the sales campaign, McNeil sent memo after memo to its sales force, all written in mock military language and styled as if they were military intelligence reports. At the top of each was the Operation 111 insignia: crossed rifles. The sales reps received new stationery,

Staff Doctors Voice Concern At Tense Weekend Meetings

COURTS, From A12

adorned with pictures of a tank, a cannon and a fighter plane.

An April 22 memo to the sales force, titled "Operation 111 War Bulletin," warned of a competing drug firm's plans to introduce its own painkiller. It began:

"Situation: Be advised, the invading forces of Pfizer are currently amassing on our borders. Intelligence reports that no aggressive actions have taken place thus far. Each day Pfizer delays gives us more time to make preemptive strikes.

"Mission: We will not only hold our ground but continue to increase our strength by aggressive pursuit of current competitors.

"Strategy: Immediate deployment to all territory representatives and hospital representatives for strengthening the Zomax . . . flanks has begun

"Tactical support: Our factories have been converted to increase production of samples, direct mail, literature, and journal ads."

Halfway through Operation 111, a memo went out reminding the sales force that "high volume prescribers" of Zomax should be called a minimum of four times before the campaign was over. Each sales representative had been sent a list of these physicians in their area.

At McNeil headquarters, some medical staffers were upset about the sales campaign, believing that it had probably increased sales to intermittent users, according to Dale.

McNeil officials said Operation 111 was a typical sales campaign that had been conceived to respond to the introduction of Pfizer's new drug. They stressed that the

sales force also had been sent copies of the Dear Doctor letter, which in their view contained the best warning statements that could be written at that time.

The Demise of Zomax

The internal documents also contain revealing insights into McNeil's dealings with the FDA and provide new details about the company's decision to recall the drug.

By law, drug companies are required to forward all reports of adverse reactions to the FDA. In 1982, documents show, Seay informed the FDA that McNeil had inaccurately reported the seriousness of several adverse reactions to Zomax. According to an April 21, 1982, internal memo by Seay, who was the company's liaison with the FDA, several cases described simply as allergic reactions "should have been designated" as the more serious anaphylactic.

It is clear from Seay's 1984 critique that he considered accurate reporting to the FDA to be of paramount importance. Not naming any specific drugs, he recounted one McNeil official's complaint that the company was "reporting too many adverse reactions on our drugs." Responded Seay, "We must report every adverse drug reaction that is received by us The requirements are clear."

Seay's critique also criticized other McNeil officials who paid visits to the FDA commissioner's office, which Seay said were seen by the FDA "as a form of pressure" to win favorable decisions. "We are having some difficulty in maintaining credible relations with FDA," he wrote.

Another internal memo criticized Dr. John Harter, the FDA official in charge of regulating Zomax. Robert Z. Gussin, McNeil's vice president for scientific af-

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fairs, described Harter as someone who "seems to have a different cause celebre every week, and we would go out-of-our-minds if we seriously followed up every one," according to his Jan. 25, 1982, memo to a McNeil colleague.

McNeil officials told The Post that Gussin's "colorful choice of words" does not reflect McNeil policies. They said the company took all FDA requests seriously.

By early 1983, with Johnson & Johnson still reeling from the highly publicized Tylenol poisonings in the fall of 1982, a task force was appointed at McNeil to study the deaths associated with Zomax use. At a meeting of McNeil officials, "It was pointed out . . . that this is a sensitive issue which can become the focus of immediate attention," according to minutes of the Jan. 21, 1983, meeting.

The issue came to a head at the Feb. 5 and 6 weekend meetings. At a Sunday session, McNeil president O'Brien heard for the first time that three of his four highest-

ranking medical staffers were sufficiently concerned that they would not prescribe the drug for a patient, according to Dale, one of those who participated. His account was confirmed by another McNeil employee who attended the meeting with O'Brien.

McNeil officials differ over what happened next. Dale said there was a consensus that the company should recall the drug and immediately publicize its concerns. Foster, of Johnson & Johnson, said, "The possibility of voluntarily withdrawing the drug from the market was considered, but it is incorrect to state that the medical personnel concluded that a recall should take place."

The company decided to strengthen its package insert again. As it was being prepared, McNeil learned of three cases in which patients with no known allergy to aspirin had died of anaphylactic shock. Then, on March 3, a Syracuse, N.Y., television station carried a report of several nonfatal anaphylactic reactions in that city, the first time the issue had surfaced in the general media.

The next day, Johnson & Johnson announced the nationwide recall.

Troubling Witnesses

From the filing of the first lawsuits, after the wide publicity about the recall, McNeil's lawyers divided the cases into two categories. Many cases were considered frivolous or involved mild reactions that caused no long-term injuries. These were typically settled for less than \$20,000, according to McNeil, and involved no extensive exchange of documents or secrecy orders.

The second category were cases deemed more difficult to defend for a variety of reasons, including the severity and timing of the injury, as well as the company's desire to prevent sensitive documents from emerging or certain witnesses from testifying.

One such witness was Jody Perez, a former McNeil sales representative in Texas who had resigned in 1982 because he believed the sales campaign downplayed Zomax's risks. Perez is listed as one factor in some cases on the list of 18 sensitive cases that circulated inside McNeil in January 1985.

McNeil's lawyers said Perez was only one factor in their decision to settle, and never the most important one. "We looked at the cases in the total spectrum . . . the injuries involved, the jurisdiction, all the things which go into evaluating a case, and attempted to negotiate a settlement," said Roger Christiansen, another Johnson & Johnson attorney.

McNeil was more concerned about anonymous notes that began mysteriously arriving in 1986 at the offices of attorneys suing McNeil. The notes urged that they "not be deflected" from taking depositions of three McNeil employees—Dale, Seay and Edward Lemanowicz, one of Seay's deputies.

The depositions never took place.

One note went to lawyer W. Thomas Smith. He was the attorney for Carol Sawyer and the children of Michael Sawyer, whose death had occurred in the four-week interval between the Feb. 6 meeting and the recall. The Sawyer lawsuit, filed in Boston federal court, was on McNeil's list of 18 sensitive cases.

Another note went to Florida attorney James Gray, who was representing Higinio Acosta, a 41-year-old construction worker who had a severe reaction on the same day as Sawyer.

Both cases were settled soon after Smith and Gray sought to take the depositions. Under the terms of the settlements, the attorneys said they could not discuss the cases. In the Acosta case, the entire file in the Miami federal court has been sealed "in accordance with certain confidential agreements," according to an Oct. 2, 1986, order by Judge Thomas E. Scott.

McNeil's attorneys said they settled these two cases for a variety of reasons and not because they feared the testimony of potential witnesses.

Referring to the three men, Fine said, "They were not the best spokespeople for the company. It was as simple as that."

Staff researcher Melissa Mathis contributed to this report.

NEXT: A sealed dispute

Settlements Kept Former Drug Salesman's Story Under Wraps

Jody Perez, a former sales representative for McNeil Pharmaceutical, went to his garage in June 1984, retrieved some documents stored there and took them to a law office in downtown Lubbock, Tex.

He was an important witness in several lawsuits against McNeil, which had been filed by alleged victims of Zomax, a prescription painkiller that McNeil pulled off the market in March 1983. Perez, 34, had quit the company in frustration and disgust in 1982, believing that the sales force had participated in a campaign that minimized Zomax's risks.

His audience at the law office was limited: attorneys suing McNeil, attorneys representing McNeil and a stenographer making a record of Perez's words. No judge or jury was present. This was a sworn deposition, pretrial questioning intended to help the lawyers prepare their case, the first of two depositions that Perez gave.

In all, the Perez transcripts total more than 900 pages. But no one, other than that small group of attorneys and their clients, has read them. Before Perez could tell his story in open court, the lawsuits were settled. As part of the settlements, the lawyers are prohibited from discussing the cases.

McNeil's attorneys said the company had many reasons for settling cases in which Perez was deposed, and that Perez was only a small factor. "What he had to say was not something that we were concerned about. We knew what he had said. We had taken his deposition and it wasn't anything extraordinary," said Steven Charen, a lawyer with the New York firm that has represented McNeil in Zomax cases.

McNeil officials, both in court and in recent interviews, rejected any suggestion that the company sales campaign had played down Zomax's risks. Safety concerns, they said, were the company's first consideration in its marketing of drugs, including Zomax. The drug was taken safely by millions and the company issued warnings about its risks whenever necessary, they said.

Perez's testimony and his documents were a casualty in the five-year legal battle over Zomax. In defending against the Zomax lawsuits, McNeil used an array of court-approved secrecy procedures to control the disclosure of documents and testimony.

The attorneys suing McNeil saw witnesses such as Perez as extra leverage. They knew how some juries might react to his testimony, and they used it in bargaining with McNeil.

Perez had no pharmaceutical background when he was hired at McNeil in June 1981 at an annual salary of \$19,500. A former teacher and football coach at Lubbock High School, he went through a weeklong orientation devoted in part to Zomax, which had gone on the market eight months before.

Very appreciative. They usually have to pry notepads from Lilly rep."

He treated doctors to college football games and boxing matches, delivered pizzas to their offices and took doughnuts to their surgical suites. He gave samples to medical students and medical residents for their headaches, hangovers and menstrual cramps. He flattered nurses and receptionists to gain access to their office supply closets, which he then filled with Zomax samples.

Before Halloween, he carried pumpkins filled with candy and Zomax samples into doctors' offices, announcing, "Doctor, medicine is very serious business and you don't want to trick your patients, so treat your patients [with] Zomax," according to his Oct. 30, 1981, field report.

By early 1982, Zomax had become a phenomenal success, ranking second among McNeil's prescription products behind Tylenol with Codeine. "No other company has ever come close to this record of productivity for a new product launch," according to a Dec. 17, 1981, memo to Perez and McNeil's national sales force. "Let's make the McNeil sales force and Zomax the 'talk of the industry' for the second year in a row."

That same month, Perez learned of four severe anaphylactic reactions associated with Zomax use at local hospitals. At Methodist Hospital, an emergency notice was posted and the staff was told not to prescribe Zomax pending further investigation.

Word quickly spread to doctors throughout Lubbock. Perez's weekly reports took on a worried tone.

Jan. 29: "They want to know the details about what is going on. But the big question is whether they will keep writing for Zomax???"

Feb. 12: "I got kicked out of Dr. Patrick Pappas's office. I just mentioned Zomax and he said, 'Get out if you don't want me to quit writing your other products.'"

Feb. 19: "I won some battles this week concerning Zomax, but I do not believe that the war will be easily won . . . The overall movement of Zomax in Lubbock is slowing down immensely."

Soon, six of the seven Lubbock hospitals stopped using Zomax. Pharmacists questioned doctors who prescribed the drug, according to one of Perez's reports. For Perez, months of hard work had come undone.

Perez spent much of his time on the road in western Texas, visiting doctors' offices and hospitals. The trunk of his company car was filled with boxes of Zomax samples, along with Zomax-imprinted golf tees, prescription pads and pens that he handed out on sales calls.

Hospital personnel welcomed his visits—and his gifts. "The staff was hungry for some good down-home conversation and service," Perez wrote in a weekly report one week after visiting hospitals in eastern New Mexico. At Guadalupe Hospital in Carlsbad, he noted, "McNeil is the only company where reps bring them donuts, notepads or anything

In early March, McNeil's head of medical research, Dr. Patricia Stewart, flew to Texas to investigate the reactions. She met with doctors and one of the people who had an anaphylactic reaction. On her return to McNeil headquarters in Spring House, Pa., she wrote a memo to her superiors, citing Perez for his "outstanding" performance in helping to reassure the Lubbock medical community. "Without his stabilizing influence the situation there would be much more problematic," she wrote.

In early April, Perez and the other sales people received a copy of a letter that McNeil was sending nationwide, reminding doctors that Zomax should not be prescribed for patients with sensitivity to aspirin and noting that "hypersensitivity"

was a possible side effect for occasional users. "The attached letter need not be the focus of a Zomax presentation," an April 8 memo said. "However, the issues it raises should be communicated as part of a balanced presentation to physicians and pharmacists . . . Zomax business is excellent. We are ahead of our sales forecast to date. Keep up the good work!"

A few days later, the company sent another announcement to its sales force, launching a major 10-week sales campaign for Zomax dubbed Operation 111. "Your role is vital" to Operation 111, said a Mailgram signed by Thomas Odiorne, then sales vice president and now McNeil's president. "Use your samples abundantly . . . Remember, business belongs to those who ask for it."

McNeil officials said in recent interviews that their sales tactics, including Operation 111, are typical of the industry. "The communications to the sales force that are designated 'Operation 111' represent nothing but an unexceptional effort to compete in the marketplace with a resourceful competitor," said Lawrence G. Foster, vice president for public relations at Johnson & Johnson.

As Perez made his rounds to carry out Operation 111, he found strong resistance. One doctor told him that McNeil had, in his view, lost "all credibility" because of Zomax, Perez noted in one report. Perez, too, began to have doubts. At home, he threw away the samples he kept in the medicine cabinet.

At work, he kept his feelings to himself. McNeil was pleased with his efforts to promote the drug. "The Lubbock Zomax situation creates a big challenge," J.W. Davis, one of Perez's supervisors, wrote in Perez's March 1982 performance evaluation. "The goal is to sell as much Zomax as possible . . . From all I see, you are the man for the challenge."

On May 21, Perez heard from his immediate supervisor, Chuck Marshall, McNeil's regional sales manager. "Wanted to express my appreciation for the outstanding way that you have handled the Zomax . . . situation in Lubbock," Marshall wrote. ". . . Suggest that you do not spend selling time initiating discussion on the Zomax side effects."

He recommended Perez concentrate his efforts on "other products" but then mentioned that he might want to continue offering Zomax samples to those doctors who "have expressed a desire to continue to prescribe the product." Marshall's note concluded: "Jody, most coaches never give up . . . Most coaches, when their team is down, fight even harder and I know that you are this type of person."

On June 16, Perez heard of another severe reaction, according to one of his reports. Two days later, another Operation 111 memo arrived. "Keep the momentum going," the memo said. "It's looks like we're winning the battle, but the war is far from over . . ."

A short time later, over breakfast, Perez said he voiced his growing concern with Marshall. "I said, 'What are we doing here? We're passing out stuff that's hurting people. People are dropping . . . People are near death.' I said, 'Pull the drug off the market.'"

According to Perez, Marshall replied that that couldn't be done, citing competition and "business reasons . . . money reasons."

Asked about Perez's account of his conversation with Marshall, McNeil officials said they spoke with Marshall and he said he had not made those comments. The officials also said the company has never placed financial considerations ahead of public safety.

On July 1, McNeil gave Perez a \$33-a-week raise, thanking him in a note for his help in "containing the Lubbock situation."

Eight days later, Perez quit.

Asked about Perez's account, McNeil said the cluster of Zomax reactions in Lubbock was an "isolated situation" and "aberrational." The company's attorneys said Perez had allowed his emotions to color his perspective about the highly competitive drug industry. "How drugs are marketed is common knowledge," said David Dobbins, another attorney who represents McNeil. "Jody Perez may think this is bad."

— Benjamin Welser and Elsa Walsh

Settlements Kept Former Drug Salesman's Story Under Wraps



McNEIL PHARMACEUTICAL

May 21, 1982

TO: Jody K. Perez

FROM: C. D. Marshall

SUBJECT: Field Work Section

Dear Jody:

Would so express my appreciation for the outstanding way that you have handled the ZOMAX[®] complaint problem situation in Lubbock. You have been the right person for us to have in that location at the right time. Mr. Stewart, Jack Vaughan, Dick Jackson, J. W. Davis, and myself all know that no one could have done a better job. You have kept us informed of the situation, have exactly who should be contacted, and have established the necessary rapport and understanding with your customers to accurately report the facts. We realize you are not responsible for this situation and are concerned over low sales figures in this particular product category may affect your outlook and opinion of McNeil. Let us assure you that you will not be held responsible for this situation.

Suggest that you do not spend selling time talking discussion on the ZOMAX side effects. We have a lot of other products to sell and I feel that you should be concentrating your efforts on this other items. I fully understand, however, if the physicians should be offered ZOMAX samples if they have expressed a desire to continue to promote the product.

Six weeks before he quit his sales job at McNeil, Jody Perez, above, received a letter from his immediate supervisor praising his handling of the Zomax "situation" in Lubbock, Tex., where there had been several reports of adverse reactions to the drug. The supervisor also suggested Perez not spend "selling time" by bringing up Zomax's side effects.

VIEWPOINTS



SAWYER

"That's very upsetting to know, that [her husband's death] might have been prevented."

— Carol Sawyer, who sued McNeil after her husband, Michael, 42, died of anaphylaxis after taking Zomax

Court secrecy impairs "free scientific inquiry and the right of the public to know specific information about drugs it consumes."

— Devra L. Davis, a Washington toxicologist who settled with McNeil after suffering a near-fatal anaphylactic reaction



DAVIS



KANNER

"What they are trying to do is not be accountable to the vast majority of the public for what they've done . . . they paid my clients a ton of money for me to shut up."

— Allan Kanner, a Philadelphia lawyer who has been involved in a number of Zomax settlements

"The strategy was to dispose of the Zomax cases as expeditiously and as cheaply as possible."

— Roger Fine, Johnson & Johnson associate counsel, who believes secrecy orders are needed to guard company formulas and marketing methods



FINE

Drug Label Warnings at Issue in Suits

October 25, 1988

THE CORPORATE PHILOSOPHY

4 Tablet Starter Package

ZOMAX TABLETS
ZOMEPIRAC SODIUM) 100mg

PHYSICIAN'S
SAMPLE
— NOT TO
BE SOLD

*Sig: 1 tab
q 4-6h prn*



physician's sample of Zomax, developed
McNeil Pharmaceutical



"I think we did a good thing
—I don't see how you could do it
any faster."

— James E. Burke, chairman of
Johnson & Johnson, rejecting any
suggestion that the company should have
withdrawn Zomax sooner

OPERATION ONE-ELEVEN



Operation III
ZOMAX Product Resources 11 April

Initial Strategy: ZOMAX, "the office aspirin analgesic," should be promoted to capture the following strengths beyond the range of aspirin:

Non-steroidal Anti-inflammatory Pain Relievers Surgical Pain	Painful Spines Post-Operative Posture Pain Painful Erections
--	--

Situation: Three positions are currently held by Merck and Burroughs-Wellcome. Focusing on Wellcome won't help us meet our objective and may in fact help Merck reach theirs.

Medical Support: Samples
An initial operation is underway to provide additional samples by May 1. A second effort will occur by June 1.

Literature:
Two objectives are on route. By May 15 additional slide cards and the New York Symposium Highlights brochure will be available to support your effort.

Mail:
Several questions will drop mailings to colleagues and non-unionized physicians around the firm to support consulting and promotional efforts.

Journal Advertising:
Developers are currently in buy strategic offphase locations. They will continue to fund the physician network tolerating the ZOMAX "office aspirin" position.

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McNEIL
PHARMACEUTICAL



"... Our first responsibility
under our credo is to our
customers."

—Lawrence G. Foster, Johnson &
Johnson vice president for public
relations, who said that nearly 15 million
patients used Zomax without incident

A portion of the corporate philosophy of
Johnson & Johnson's founder, below

Johnson & Johnson

"The evidence on this point is clear . . . institutions, both public and private, exist because the people want them, believe in them, or at least are willing to tolerate them. The day has passed when business was a private matter — if it ever really was. In a business society, every act of business has social consequences and may arouse public interest. Every time business hires, builds, sells, or buys, it is acting for the . . . people as well as for itself, and it must be prepared to accept full responsibility for its acts . . ."

Excerpt from "On Faithful Freedom" by General Robert Wood Johnson, 1947

McNeil marketing strategy memo, left, has a military motif. The paper, sealed as part of a lawsuit, bears a "confidential" stamp.

WEDNESDAY, OCTOBER 26, 1988

PUBLIC COURTS, PRIVATE JUSTICE

Last of Four Articles

**Secret Filing, Settlement
Hide Surgeon's Record***Questions Raised Over Patients' Deaths*By Benjamin Weiser
and Elsa Walsh

Washington Post Staff Writers

On Aug. 25, 1982, heart surgeon Richard N. Scott sued Washington Hospital Center, alleging that the hospital's internal review of the deaths of three of Scott's patients was unfair and improper. He said he learned of the confidential review only when the hospital suspended him from performing open heart surgery pending further inquiry.

Usually, such lawsuits are filed publicly. But Scott's attorneys asked a D.C. Superior Court judge to seal the suit, arguing that a public proceeding would damage Scott's reputation when he may be a victim of the hospital's procedures.

The hospital agreed to the sealing and Judge Frank Schwelb ordered the records closed to the public. To this day, the only available record of the case is a file number in Superior Court.

Scott's suspension came after hospital reviews concluded that his performance had been a fac-

tor in two of the three deaths, and criticized his technical skill in the third case, according to hospital records made available to The Washington Post. A year earlier, another review had concluded that his performance had been a factor in two other deaths. Scott denied fault in the five cases; the hospital defended its review process as fair.

Three months after Scott filed suit and before the hospital proceedings were resolved, the two sides reached a confidential settlement. Scott agreed to give up his surgical privileges at the hospital and drop his lawsuit; the hospital agreed to remove selected documents from Scott's personnel file and not to release details of Scott's suspension.

Schwelb's order to seal the court records and the subsequent settling of the case allowed Scott and the hospital to avoid the normal consequence of going to court—that a private dispute becomes public and may result in debate, controversy and

See COURTS, A16, Col. 1

■ Church pays secret six-figure out-of-court settlement. Page B1

 COURTS, From A1

detailed examination of the issues involved.

Today, Scott, 47, runs his own cardiovascular clinic in the District and has privileges at Montgomery General Hospital in Olney, where he has performed vascular surgery since March 1978. Open heart surgery is not performed at Montgomery General.

When Montgomery General conducted a routine review of Scott's credentials in 1983 and asked Washington Hospital Center about Scott, it was told that Scott had been suspended and had resigned for "personal reasons." It was not given access to the review committees' files.

The internal documents, reviewed by The Post as part of a lengthy examination of court secrecy in civil lawsuits, provide a revealing glimpse into the peer-review system that hospitals use to police themselves and their doctors, a process that is confidential.

Peer reviews often address highly technical and sophisticated medical judgments, about which the doctors involved may disagree. Committees look at medical records, and may seek independent opinions or interview those who handled the case. The committees act as fact-finders and report their conclusions to hospital authorities, who then make final decisions.

The internal records show Scott's colleagues candidly debated and assessed Scott's performance. "Entire case was mismanaged by surgeons," one committee reported in 1981 after reviewing a case in which a 69-year-old patient died after Scott's surgical team allegedly failed to maintain an adequate blood supply to the patient during a heart bypass. Scott has denied mismanaging any cases.

That case was examined as part of a routine audit of all heart surgery deaths at the hospital during a six-month period in 1980. The Feb. 12, 1981, audit report concluded that 12 of 26 deaths occurred because of surgeons' alleged mistakes, including judgmental and technical errors, or failure to maintain appropriate life support systems. Scott was singled out for criticism in two cases.

Later, a committee concluded in a Sept. 14, 1982, memorandum to the head of the medical staff: "Dr. Scott's pattern of practice does not comply with the guidelines for open heart surgery of the Washington Hospital Center. His practice of cardio-vascular surgery has shown at times questionable performance and judgment."

Scott and his attorneys declined to be interviewed for this article. After his privileges were suspended in August 1982, he appeared before two committees asked to investigate the matter. He submitted a 24-page statement, in which he offered a rebuttal to the conclusions that led to his suspension and strongly objected to the review process.

Scott criticized the hospital for not examining the performance of other medical staff members, saying their mistakes had contributed to the death of one of his patients. Responding to questions about why he decided to operate in some of the cases, he agreed that the surgery was risky but said he felt the patients would benefit and that the risks were known to the patients and their families.

He alleged that the hospital's investigation violated his rights as well as hospital procedures. He said he had no choice but to file suit, "a regrettable and distasteful process . . . nonetheless the only available alternative."

Scott also outlined his views briefly during a 1984 deposition in an unrelated court case. Asked to explain why his privileges had been suspended, he said, "The reason was due to a difference of opinion on the management of two cardiac cases, and during the hearing that resulted from that suspension it was apparent to me that the medical reasons were not valid for the suspension and that the hearings had escalated to a personal level, and during the hearings I voluntarily resigned my privileges."

Dr. Harold H. Hawfield, vice president for medical affairs at Washington Hospital Center, declined to comment specifically on the hospital's proceedings, citing the confidential settlement with Scott and the court's sealing order.

Referring to Scott's allegations about the fairness of the process, he said Scott "had ample opportunity to respond, ample notice of the meetings and of his rights in the matter" during the investigation that followed the suspension in August 1982.

Hawfield said some doctors who had reviewed Scott's performance were unhappy with the settlement because it "allowed him to leave the hospital" without stronger corrective action, enabling him to continue practicing elsewhere.

Edward J. Krill, Washington Hospital Center's legal counsel, said of the secrecy involved in both the court and the hospital's review, "There's been a balancing of the public's right to know . . . and the privacy of the process . . . The benefit that is seen is that physicians will come forward, and forthrightly and confidentially evaluate each other in a very vigorous way."

Dr. John J. Lynch, a former president of the D.C. Medical Society and a current member of the D.C. Board of Medicine, which licenses doctors, said he was troubled by the concept of sealing court cases that raise questions about a doctor's performance. "I would worry," said Lynch, who is on the staff at Washington Hospital Center. "What is the gravity of a case that is sealed? Is it something that ought to be looked at in renewing somebody's license? . . . There's no way of knowing, if it's sealed."

'Profound Concern' Surfaces

The dispute between Scott and the hospital has its origins in the February 1981 audit of 26 heart surgery deaths at the hospital, the first time the records show that questions were raised about Scott's performance. The study, conducted by three departments at the hospital, concluded that doctors' errors were "a predominating factor" in 12 deaths and recommended that the hospital more closely monitor the mortality rates of patients under treatment by its heart surgeons.

Two of the 12 cases were Scott's and involved questions about whether the patients had received an adequate flow of blood during heart bypass surgery. The report cited "profound concern" about Scott's handling of the cases.

One patient was Helen Taliaferro, 69, who died Aug. 20, 1980. "Dr. Scott was informed of the situation during entire case," the report said. "Entire case was mismanaged by surgeons."

The second patient was Willard Jackson, 78, who died Aug. 26, 1980. In this case, a major artery near the heart was punctured during a bypass. "Bleeding was not adequately stopped," the report concluded. Scott was assisted in this operation by another doctor. "Between the two of them, case was very mismanaged," the report said.

The records do not reflect Scott's specific response to the allegations against him in these two cases.

Then, in May 1981, came complaints from medical staff members that Scott had prepared a patient for surgery, ordered her placed under anesthesia, then had her awakened 45 minutes later without operating so that he could perform emergency surgery on another patient. Other doctors were available to handle the emergency, according to minutes of a June 18, 1981, meeting of an ad hoc committee reviewing the incident.

Anesthesia contains life-threatening risks for a patient that are separate from the surgery itself. One doctor at the meeting commented that "in all of his years of practice he had never seen a surgeon leave a patient during anesthesia, and he brought up the question of possible abandonment of the patient," according to the minutes. Had such abandonment occurred, it would have been a violation of medical ethics.

Scott appeared before the committee on June 24. He said he did not order the anesthesia and discovered it had been administered only when he came to the operating room to check on the patient. He said the emergency patient was in more critical condition and that he had saved the man's life.

On July 17, Scott was reprimanded about this case by Dr. William J. Fouty, the head of the department of surgery. Adopting the language of the committee's recommen-

dation, Fouty wrote Scott of "the profound concern of the Department of General Surgery with regard to the serious nature of errors in professional judgment and infractions of prevailing standards of medical practice and operating room policy."

Then, in 1982, came the reviews that eventually led to Scott's suspension of privileges in open heart surgery and his lawsuit. The reviews were conducted without Scott's knowledge, which is the hospital's

The first review began in April, when Fouty asked the chief of cardiac surgery, Dr. Jorge Garcia, to investigate the deaths of two of Scott's patients after heart operations.

Garcia convened a five-member committee. It first looked into the April 7 death of Charles Kidd, 64. Committee members debated whether the operation should have been done, given Kidd's severe heart disease and a six-month life expectancy. A routine pathology report said Kidd died from bleeding in a major artery, which apparently began after the surgery.

Scott's technique also became a subject of the committee's deliberations. Scott used an artificial heart valve that was too large and then implanted it "at a strikingly abnormal angle," according to the pathology report by Dr. William C. Roberts, a top pathologist at the National Heart, Lung and Blood Institute, one of the National Institutes of Health in Bethesda.

Scott, in his 24-page statement, said the bleeding that caused Kidd's death was the result of mistakes by other medical staff members. He said he implanted the correct heart valve and had positioned it properly. He described the operation as "extremely high risk" because of Kidd's deteriorating heart condition, but said Kidd and his family were fully aware of the risks.

On April 22, Richard Fortkiewicz, 60, died of complications after Scott performed a bypass operation. Garcia's committee concluded on May 20 that Fortkiewicz was a good candidate for surgery but that the operation had taken too long. The committee also questioned why Scott had completed only two of the three grafts needed to bypass blockages. The report said, "In all probability the death was related to the procedure."

Scott, in his statement, suggested that other surgical staff members were at fault in the death for their inept handling of a catheter, causing complications during surgery. He also cited their "inappropriate" use of certain drugs and "belated" resuscitative efforts.

As Garcia's committee was reviewing these two cases, a third patient of Scott's died after surgery. Fouty asked the head of vascular surgery, Dr. Nicholas P.D. Smyth, to examine the matter.

Smyth reported that Walter H. Fields, 77, died of a stroke after Scott conducted two operations to improve the blood flow in Fields' partially obstructed carotid arteries, the major vessels that supply blood to the brain.

Fields had cancer, and Smyth questioned whether the surgery was necessary or safe, suggesting that the stroke may have been caused by the operations. A surgical resident, Dr. Frederick Finelli, had objected to the surgery and had refused to "scrub" for the first operation, according to Smyth's report.

When the stroke occurred, another doctor telephoned Scott and urged him to operate immediately to reverse the stroke's effects. Scott, who was outside the hospital, said such an operation was ill-advised so soon after the stroke. He did not come to the hospital to examine the patient. Fields went into a coma and died three days later.

Smyth said in his report that he believed Fields' treatment was "inadequate" from the outset, including "the pre-operative work-up, the indications for the surgery, the timing of the surgery, and the management of the post-operative complications."

Scott said in his statement that the operations were necessary and that the stroke was caused by other factors. The patient knew the risks of the surgery and had agreed, Scott said.

Members of three of the five patients' families, contacted recently, said they were not told of the 1981 audit or the subsequent reviews, which are normally conducted in confidence.

On Aug. 18, 1982, the hospital notified Scott that it was suspending his privileges to perform open heart surgery. A letter to Scott said the decision was based on a "preliminary review" of the Fields, Kidd and Fortkiewicz cases. The next day, the hospital appointed a fact-finding committee of the Department of Surgery to conduct a full-scale investigation.

Acting to Ensure Privacy

On Aug. 25, Scott went to Superior Court in hopes of stopping the investigation. One of Scott's attorneys, Jacob Stein, met with the hospital's attorney at the time, George Hart, and Hart said the two sides agreed to ask for the case to be sealed. "Obviously both parties agreed that they were both well served by having it under seal," said Hart, who now lives in Buffalo.

At a closed hearing, Judge Schwelb rejected Scott's request for immediate action on the hospital's review, ruling that the investigation could continue while the lawsuit was progressing, Hart said.

Schwelb did agree, however, to seal the records in the case. "He listened very carefully and posed a number of questions," Hart said. "He was concerned about the public's right to know."

Schwelb, who is now on the D.C. Court of Appeals, declined to comment. It could not be learned how much Schwelb knew about the dispute between Scott and the hospital when he sealed the records.

Two weeks later, the ad hoc committee interviewed Scott and his partner in several of the operations and received the 24-page statement, which rebuked the hospital for failing to notify Scott of the reviews of the Kidd, Fields and Fortkiewicz cases before suspending him.

On Sept. 14, the committee reported that it had examined the records in the three deaths—as well as the Taliaferro and Jackson cases—and had looked at the mortality rate of Scott's 49 open-heart surgery patients from 1970 to 1982. Six of Scott's patients had died, or a rate of 12 percent. Hospital guidelines called for open-heart surgeons to have a rate of less than 7 percent.

The committee criticized Scott's judgment and performance in a letter to Dr. Neville K. Connolly, head of the medical and dental staffs. The matter was then referred to one of the hospital's highest-ranking committees, the Standards of Professional Conduct Committee, headed by Dr. David Morowitz.

On Oct. 25, after another interview with Scott, the committee said Scott, while technically capable, was "not equipped to make preoperative and intraoperative decisions relative to performing" heart surgery without "the strictest" supervision.

After the hospital took the matter to its highest committee, the Appellate Review Board, Scott's attorneys and the hospital's attorneys reached a confidential settlement of the pending lawsuit and the hospital's investigation. On Nov. 12, 1982, the two sides asked the court to dismiss the case. In a routine action, Judge Frederick Weisberg signed the order. The seal remained intact.

In 1983, when Montgomery General Hospital began a routine review of Scott's privileges to conduct vascular surgery there, it sent a letter to Washington Hospital Center.

"It has come to [our] attention that there was some question regarding Dr. Richard N. Scott at your institution," said the April 11, 1983, letter. "It would be most helpful in our deliberations if you could shed some light on this issue."

Hawfield replied in a two-paragraph letter that Scott had been reprimanded in a July 1981 case and that his privileges had been suspended in August 1982. His April 19 letter also said, "During the hearing procedures [that followed the] suspension, Dr. Scott resigned from the Medical and Dental Staff of the Washington Hospital Center for personal reasons."

Montgomery General was told that it could not have access to the records of the review committees, according to Dr. John N. Delahay, Montgomery General's chairman of surgery. "All I know is [we] were told that only some material would be available for review. All matters would not be," Delahay said. After obtaining Scott's permission, Delahay said, several doctors from Montgomery General examined medical charts of some of Scott's patients.

Based on this limited review, Montgomery General renewed Scott's privileges.

Staff writer Susan Olin and staff researcher Melissa Mathis contributed to this report.

PUBLIC COURTS, PRIVATE JUSTICE

Case Number Only Trace of Suit Involving Surgeon's Performance

THE DISPUTE OVER DR. SCOTT



LYNCH

"What is the gravity of a case that is sealed? . . . There's no way of knowing. If it's sealed."

— Dr. John J. Lynch, a member of the D.C. Board of Medicine that licenses doctors, who says he is troubled by the concept of sealing court cases that raise questions about a doctor's performance



HAWFIELD

Scott "had ample opportunity to respond, ample notice of . . . his rights in the matter . . ."

— Dr. Harold H. Hawfield, vice president for medical affairs, Washington Hospital Center, referring to Scott's allegations about fairness of the disciplinary process



Helen Tallaferra, 69, died in 1980 after heart bypass surgery. A hospital report cited "profound concern" about Scott's performance and said that the "entire case was mismanaged by surgeons." Records do not reflect Scott's specific response to the allegations, but he has denied mismanaging any cases.



Willard Jackson, 78, also died after bypass surgery in 1980. A hospital report called the case "very mismanaged." The records do not reflect Scott's specific response to the allegations in this case either, but in a 24-page statement, he objected strongly to the conclusions of hospital review committees.



Walter H. Fields, 77, died of a stroke after Scott conducted two operations to improve blood flow in arteries that supply the brain. Questions were raised as to whether the surgery was necessary or safe. Scott's statement said the operations were necessary and the risks of the surgery were known to the patients and their families.



CONFIDENTIAL
PROTECTED BY COURT-IMPOSED
PROTECTIVE ORDER

About This Series

On Sunday, The Washington Post began a series of articles examining the burgeoning use of court secrecy in civil lawsuits; the first article reported how General Motors Corp. has used these procedures and avoided a public debate about the safety of its automobile fuel tanks.

Monday's article looked at secrecy procedures in Washington area courts and how judges often ask few questions in sealing cases. More than 200 lawsuits have been sealed from public view, many of which deal with questions of public policy or safety. Hundreds of other lawsuits have been settled with confidential agreements that prevent discussion of what was learned in the case.

Yesterday's story examined how McNeil Pharmaceutical, a major subsidiary of Johnson & Johnson, used court secrecy and avoided a public debate about whether the company withheld critical information from the medical community before it recalled its pain-killing drug Zomax.



The State Factor

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LEGISLATION TO LIMIT PROTECTIVE ORDERS: AN INVASION OF PRIVACY

by
The Civil Justice Task Force
of the
American Legislative Exchange Council

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LEGISLATION TO LIMIT PROTECTIVE ORDERS: AN INVASION OF PRIVACY

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

— Justice Oliver Wendell Holmes (1917)/1

INTRODUCTION

Lawyers who represent plaintiffs in civil lawsuits are actively pursuing an agenda to restrict or even eliminate the ability of judges in this country to issue protective orders. Protective orders are issued by courts to protect confidential or proprietary information, or to protect parties from undue burden or embarrassment. Protective orders often cover documents and information exchanged during the initial stages of a lawsuit to help each party investigate the case, but may not necessarily pertain to documents or information presented at trial. Plaintiffs' lawyers allege that courts are issuing protective orders with increasing frequency in order to keep secret vital information concerning dangerous products and practices, thus endangering the public. This allegation has helped the plaintiffs' bar find strong allies on this issue from consumerists and the media. Replacing the legal term "protective orders" with the emotionally volatile and misleading moniker "secrecy agreements," these allies have worked together to introduce legislation and propose rule changes to bar "secrecy agreements" from the courts.

But protective orders — the so-called "secrecy agreements" — are what help make the current U.S. civil justice system work. The civil justice system is often criticized for being too cumbersome and for taking too long to resolve disputes. It would be far worse without protective orders.

THE DISCOVERY PROCESS

Most state courts have modeled their rules of civil procedure after the Federal Rules of Civil Procedure used by the federal court system. Under these rules, the complaint which initiates the lawsuit may be drafted so broadly that neither party knows the precise grounds for the lawsuit, or indeed whether grounds for a lawsuit actually exist. The parties learn the facts of the case, and narrow the focus of the lawsuit, through the discovery process.

Because the purpose for discovery is to gather information, the discovery process can have a very wide scope. Rule 26(b) of the Federal Rules of Civil Procedure provides that the litigants may obtain from parties and nonparties alike, not only information relevant to the lawsuit, but also information which "appears reasonably calculated to lead to the discovery of admissible evidence." Rule 26(b) allows a party to ask for almost any type of information based on the argument that the requested information may help the party discover something that would be admissible at trial. Under this rule, any person,² even one completely uninvolved with the lawsuit, may be required to turn over a broad range of material, including private or proprietary information. For example, in a lawsuit arising out of an accident, a court ruled that a newspaper must give a plaintiff copies of the paper's unpublished photographs of an accident scene.³

The design of the current United States civil justice system requires that parties be given wide latitude in the discovery process. The wide scope of this discovery process is tempered by the discretion of the judge to issue protective orders. Rule 26(c) of the Federal Rules of Civil Procedure grants the judge authority to issue protective orders at the request of the person asked to provide information, to protect him or her from "annoyance, embarrassment, oppression, or undue burden or expense."

Without protective orders, people with private or proprietary information to protect would fight vigorously through every available avenue against every discovery request. The protracted satellite litigation that would result would have a devastating impact upon the already overburdened judicial system.

Protective orders exist to encourage people, from whom documents and information are requested, to provide documents that they, because of privacy or proprietary reasons, would otherwise be reluctant to give up. In fact, to ensure the free exchange of information during discovery, parties will often agree that sensitive information shall be subject to a protective order. Without protective orders, people with private or proprietary information to protect would fight vigorously through every available avenue against every discovery request. The protracted satellite litigation that would result would have a devastating impact upon the already overburdened judicial system.

Courts have been issuing protective orders at least since the Federal Rules of Civil Procedure expanded the parties' right to obtain, or "discover," information in preparation for trial of a lawsuit. For more than forty years courts have consistently required the person asking for a protective order to prove that there is a good reason for the protective order.

Rule 26(c) does not permit the judge to issue protective orders on a whim. Rule 26(c) requires

the person requesting a protective order to show that "good cause" exists for the issuance of such an order. Thus, Rule 26(c) creates a proper and proven balance between the competing interests of the litigants to gain access to sensitive but important information in their opponents' possession, and the interest of the person holding the information to protect private or proprietary information from unauthorized disclosure and dissemination.⁴

Courts throughout the country have addressed the types of information which parties can force others to provide. The Federal Food and Drug Administration has established a system in which drug manufacturers receive reports from doctors about potential patient reactions to drugs, to enable drug manufacturers to identify rare or unanticipated reactions. To encourage doctors to report, FDA maintains that the individual reports are confidential and may not be disclosed. A court has been asked to decide whether the names of reporting doctors, as well as information about their patients, should be provided to individuals suing the drug manufacturer and thereby made available to any other plaintiff's attorney.⁵

In the ground-breaking case involving court-ordered limits on release of information provided during discovery, the U.S. Supreme Court ruled that a religious group's membership and contribution lists, provided to a newspaper in the course of a civil suit, were not public information that the newspaper could publish.⁶ In many lawsuits, the plaintiff's medical records, and even the medical records of members of the plaintiff's immediate family, are provided to the defendants.⁷ This information may be of interest to the public and the media if the plaintiff is a well-known individual, such as a professional athlete, movie star, or politician, which leads the plaintiff to ask for a protective order limiting its distribution.

Another type of circumstance would be criminal investigations. For example, a court refused to allow a person convicted of tampering with over-the-counter drugs to receive reports of state and federal investigations of tampering incidents.⁸

ATLA'S PROTECTIVE ORDERS CAMPAIGN

ATLA's Purpose

At its annual meeting in 1989, the Association of Trial Lawyers of America (ATLA) launched a national campaign to severely limit the use of protective orders.⁹ ATLA's artful campaign is depicted as a battle between good and evil. The plaintiffs' bar, consumer groups and the media have cast themselves as the "good guys," looking after the hapless public whom the evil corporations are victimizing by purposefully hiding "public hazards" from the public eye. Although this is an attractive representation, and one that captures wide sympathy, it is not true.

It is not the responsibility of the plaintiffs' bar to police the community to ensure public health and safety. That is the function of government agencies. If ATLA was truly concerned for the public welfare, it would report information it believes indicates a public hazard to the appropriate government agency for regulatory action, rather than attacking the product or practice on a case-by-case basis.

Since it is in the plaintiffs' counsel's best interest to obtain as many judgments as he can in the least amount of time, and since the discovery process is the most time-consuming aspect of litigation, the ATLA-sponsored legislation would be a financial boon to the plaintiff's lawyer.

The truth underlying ATLA's campaign is that legislation restricting the use of protective orders would financially benefit ATLA's members. The plaintiffs' bar works almost exclusively on contingency fees, where the plaintiff's lawyer receives a percentage of his client's award. Since it is in the plaintiffs' counsel's best interest to obtain as many judgments as he can in the least amount of time, and since the discovery process is the most time-consuming aspect of litigation, the ATLA-

sponsored legislation would be a financial boon to the plaintiff's lawyer. This is one of the reasons plaintiffs' attorneys spend money to advertise for clients suffering from the same alleged injury or to contact people injured in a mass disaster, such as an airplane crash. The race to the courthouse to represent large numbers of clients is illustrated in the upsurge of filings alleging injury from L-tryptophan, and the battle over whether silicone gel breast implant cases will be tried as individual cases or as class actions, and which attorneys will control the litigation. The legislation proposed by ATLA would remove the obstacle that impedes lawyers from using the information obtained through discovery in one case in subsequent similar cases.

In addition, the ATLA-sponsored legislation would assist its members in another area of their practice: sales of litigation kits. ATLA advertises "The ATLA Exchange" where, for a fee, ATLA will find attorneys with similar cases against the same or similar defendants.¹⁰ An attorney who has packaged the information and documents obtained in a case can receive a large fee as an "advisor" to attorneys involved in similar lawsuits nationwide. The protective order legislation would remove the obstacles that limit the sale of litigation kits. It would also encourage a proliferation of copycat lawsuits throughout the country.

The National Campaign

In Spring 1989, Virginia became the first state to enact protective order legislation.¹¹ The Virginia statute allows access to documents covered by a previous protective order if the party requesting access agrees to be bound by the terms of the order. Soon after the enactment of the Virginia bill, identical bills began appearing in other states. ATLA's motivations were easily discernible from these subsequent bills, and the bills were easily defeated. The ATLA campaign then underwent a metamorphosis.

In Spring 1990, Florida enacted a bill that went into effect on July 1, 1991.¹² The Florida statute

prohibits protective orders that have the purpose or effect of concealing 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 Florida legislation proved to be a brilliant strategy. ATLA gained allies from the consumer groups and the media. Protective orders were dubbed "secrecy agreements." In 1991, protective order legislation, mostly "public hazard" bills similar to Florida's, was introduced in twenty-seven states. All were defeated, but some only after hard-fought legislative battles, and one after a governor's veto. A similar battle is underway during the 1992 legislative session.

THE DELETERIOUS EFFECT OF LEGISLATION TO LIMIT PROTECTIVE ORDERS

Noted Harvard University Law Professor Arthur Miller highlighted an important aspect of legislation limiting protective orders when he stated before the United States Congress:

A legal system that does not recognize the right to keep private matters private would be...likely to lead to deleterious consequences—the evil of an Orwellian society where big brother knows all. Although that might not be the result the proponents of public access have in mind, unfettered authority to collect and disseminate private information through the judicial process can, without doubt, lead to that end.13

Professor Miller went on to explain that the U.S. legal system recognizes a limited public right of access to information used in the courts to allow the public to monitor the functioning of our judicial system, but this limited right does not extend to access to private information about private individuals or organizations involved in civil litigation. Professor Miller's statement goes to the heart of the protective order controversy.

Discovery proceedings are distinct from trials, but protective order legislation, particularly "public hazard" bills, fails to recognize this distinction. "Public hazard" bills would prohibit the court from issuing protective orders to prevent public access to any information relating to a "public hazard." This prohibition would apply to all documents, including documents given to either party during the investigative phase of the law suit and settlement agreements, as well as court records.

Often information exchanged during discovery is fragmentary, and, taken out of context, can be misleading. Evidence admitted at trial is governed by strict rules that require the evidence to be both relevant and reliable. If a judge refuses to admit evidence at trial, it is because the court finds the information irrelevant to the issue in dispute, unreliable, or repetitive of information already presented. Much of the information exchanged during discovery fits into the "unreliable" category. Yet, this is precisely the information that the proponents of "public hazard" bills want disseminated to the public.

Further, in these bills the term "public hazard" is so broadly defined that the mere allegation that a product has caused injury would be sufficient to bring the product within the definition. In criminal law, this would be the equivalent of holding the accused guilty until proven innocent. Nevertheless, proponents of "public hazard" bills would have the public believe that allegations of harm, coupled with the fragmentary pieces of information exchanged during discovery, provide sufficient proof that a public hazard exists.

Proponents of "public hazard" bills portray themselves as the defenders of public health and safety. They are wrong. It is the function of the government agencies to prevent products and practices from harming the public. Further, proponents of "public hazard" bills believe they should be the ones to decide what information exchanged during litigation should be disseminated to the public. However, society has given judges the duty to make that decision.

The judge is the only impartial participant in the litigation, and he or she is in the best position to determine whether information relating to public health and safety is being hidden under the guise of a protective order. If the judge subsequently learns that the information subject to a protective order indicates that a danger to the public exists, the judge can modify the protective order and release the information to the public. As Justice Holmes stated earlier in this century,

...the judge who tries this case will know the secrets, and if in his opinion and discretion it should be advisable and necessary to take in others, nothing shall prevent his doing so./14

Over the years that it has taken to develop our current civil justice system, courts have learned to balance the competing interests of adverse parties in litigation. Under current law, the judge has the discretion to weigh all the competing factors and to act in the public's best interest. It is a system that works, and it is a system that should be retained.



This edition of The State Factor was written under the auspices of the ALEC Civil Justice Task Force, and edited by Matthew Bordonaro, Legislative Director of the Civil Justice Task Force. For further information, call (202) 547-4646.

END NOTES

1. E.I. Du Pont de Nemours Powder Co. v. Masland, 244 U.S. 100, 103 (1917).
2. Consistent with general statutory construction, the term "person" includes both individuals and business entities, such as corporations.
3. Stickels v. General Rental Co. (D.C. E.Va., No.90-00263-R, November 9, 1990) reported in 18 Product Safety & Liability Reporter 1356 (1992).
4. Lawyers for Civil Justice, *Court-approved Confidentiality Orders: Why They are Needed*, 57 DEF.COUNS.J. 89, 90 (January 1990).
5. Bittle v. Eli Lilly & Co. (Texas Dist. Ct., No. 91-02496-A, January 14, 1992), reported in 20 Product Safety & Liability Reporter 117 (1992).
6. Seattle Times Co. v. Rinehart, 467 U.S. 20 (1984).
7. See, for example, Cantor v. Toyota Motor Sales USA, Inc. (Fla. Ct. App. No. 89-339, July 13, 1989), reported in 17 Product Safety & Liability Reporter 738 (1989).
8. Bowen v. U.S. Food and Drug Administration (9th Cir., No. 90-15065, February 21, 1991) reported in 19 Product Safety & Liability Reporter 291 (1991).
9. ATLA News, *Trial Lawyers Decry Secrecy in Courts: "Secrets That Can Kill" Hidden from the Public*, (July 17, 1989).
10. Lawyers for Civil Justice, *supra* at 90.
11. V.A. Code Section 801-42.01.
12. Fla. Stat. Section 69.081.
13. A. Miller, testimony before the Subcommittee on Courts of the U.S. Senate Judiciary Committee (May 17, 1990).
14. Du Pont de Nemours, 244 U.S. at 103.

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