SUNSHINE IN LITIGATION ACT OF 2009

HEARING

BEFORE THE

SUBCOMMITTEE ON
COMMERCIAL AND ADMINISTRATIVE LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

ON

H.R. 1508

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Enclosures to Bruce R. Kaster's responses to the Questions for the Record from the Honorable Steve Cohen have been retained in the official Committee hearing record.

Enclosures to Bruce R. Kaster's responses to the Questions for the Record from the Honorable Trent Franks have been retained in the official Committee hearing record.

Letter from Bruce R. Kaster to the Honorable Mark R. Kravitz has been retained in the official Committee hearing record.

Enclosure to the testimony of the Honorable Mark R. Kravitz, "Sealed Settlement Agreements in Federal District Court," has been retained in the official Committee hearing record.

Enclosures to the Honorable Mark R. Kravitz's responses to the Questions for the Record from the Honorable Steve Cohen have been retained in the official Committee hearing record.

Letters from Cooper Tire and Rubber Company to the Honorable Steve Cohen have been retained in the official Committee hearing record.

SUNSHINE IN LITIGATION ACT OF 2009

THURSDAY, JUNE 4, 2009

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCIAL
AND ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 11:05 a.m., in room 2237, Rayburn House Office Building, the Honorable Steve Cohen (Chairman of the Subcommittee) presiding.

Present: Representatives Cohen, Conyers, Maffei, Franks, Jordan, and Coble.

Staff present: (Majority) Matthew Wiener, Counsel; Adam Russell, Professional Staff; and (Minority) Blaine Merritt, Counsel.

Mr. COHEN. Thank you for your indulgence. We will have to break in a few minutes for votes. But this hearing of the Committee of the Judiciary Subcommittee on Commercial and Administrative Law will now come to order.

Without objection, the Chair will be authorized to declare a recess of the hearing and will do so in a few minutes. I will now recognize myself for a short statement.

Serious concerns have been raised that too many confidentiality orders have been entered in Federal civil cases and they have concealed from the public information about dangerous or harmful products, environmental conditions and business practices that the public has a desire or duty to—a need to know.

H.R. 1508, the "Sunshine in Litigation Act of 2009" responds to these concerns eliminating the circumstances under which a Federal court may restrict disclosure of information uncovered during discovery, during trial or other court proceedings which is relevant "to the protection of public health or safety."

This hearing will give the Subcommittee an opportunity to consider this bill. Legislation introduced by Representative Wexler has key provisions that require Federal judges to do, as some of them already do which is consider the public interest before entering a confidentiality order that would conceal information "relevant to protection of public health and safety" uncovered during civil litigation.

H.R. 1508 would not prohibit a court from entering a confidentiality order when confidentiality is due. It would simply require a court before entering such an order to find that the asserted interest and confidentiality outweighs the public's interest in disclosure

and that order is no broader than necessary to protect that interest's balancing acts.

H.R. 1508 raises two principle questions. First is whether if confidentiality orders entered in Federal civil cases too often conceal from the public important information about dangerous products, environmental conditions and business practices.

And second, whether we should leave this issue of courtroom secrecy in the hands of the Judicial conference and we hope that they can help us with this or whether as Chief Judge Abner Mikva said in his testimony before the Judiciary Committee some time ago in the Senate, that the issue is a basic policy issue too important to leave to the unelected rule changers.

So with that spoken and not being the words of the House, I look forward to receiving today's testimony.

And I now recognize my distinguished colleague from Arizona, Mr. Franks, Ranking Member of the Subcommittee, for his opening remarks.

[The bill, H.R. 1508, follows:]

I

111TH CONGRESS
1ST SESSION

H. R. 1508

To amend chapter 111 of title 28, United States Code, relating to protective orders, sealing of cases, disclosures of discovery information in civil actions, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MARCH 12, 2009

Mr. WEXLER (for himself and Mr. NADLER of New York) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To amend chapter 111 of title 28, United States Code, relating to protective orders, sealing of cases, disclosures of discovery information in civil actions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Sunshine in Litigation Act of 2009".

SEC. 2. RESTRICTIONS ON PROTECTIVE ORDERS AND SEALING OF CASES AND SETTLEMENTS.

(a) IN GENERAL.—Chapter 111 of title 28, United States Code, is amended by adding at the end the following:

"§ 1660. Restrictions on protective orders and sealing of cases and settlements

"(a)(1) A court shall not enter an order under rule 26(c) of the Federal Rules of Civil Procedure restricting the disclosure of information obtained through discovery, an order approving a settlement agreement that would restrict the disclosure of such information, or an order restricting access to court records in a civil case unless the court has made findings of fact that—

"(A) such order would not restrict the disclosure of information which is relevant to the protection of public health or safety; or

"(B)(i) the public interest in the disclosure of potential health or safety hazards is outweighed by a specific and substantial interest in maintaining the confidentiality of the information or records in question; and

"(ii) the requested protective order is no broader than necessary to protect the privacy interest asserted.

"(2) No order entered in accordance with paragraph (1), other than an order approving a settlement agreement, shall continue in effect after the entry of final judgment, unless at the time of, or after, such entry the court makes a separate finding of fact that the requirements of paragraph (1) have been met.

"(3) The party who is the proponent for the entry of an order, as provided under this section, shall have the burden of proof in obtaining such an order.

"(4) This section shall apply even if an order under paragraph (1) is requested—

"(A) by motion pursuant to rule 26(c) of the Federal Rules of Civil Procedure; or

"(B) by application pursuant to the stipulation of the parties.

"(5)(A) The provisions of this section shall not constitute grounds for the withholding of information in discovery that is otherwise discoverable under rule 26 of the Federal Rules of Civil Procedure.

"(B) No party shall request, as a condition for the production of discovery, that another party stipulate to an order that would violate this section.

"(b)(1) A court shall not approve or enforce any provision of an agreement between or among parties to a civil action, or approve or enforce an order subject to sub-

section (a)(1), that prohibits or otherwise restricts a party from disclosing any information relevant to such civil action to any Federal or State agency with authority to enforce laws regulating an activity relating to such information.

"(2) Any such information disclosed to a Federal or State agency shall be confidential to the extent provided by law.

"(c)(1) Subject to paragraph (2), a court shall not enforce any provision of a settlement agreement described under subsection (a)(1) between or among parties that prohibits 1 or more parties from—

"(A) disclosing that a settlement was reached or the terms of such settlement, other than the amount of money paid; or

"(B) discussing a case, or evidence produced in the case, that involves matters related to public health or safety.

"(2) Paragraph (1) does not apply if the court has made findings of fact that the public interest in the disclosure of potential health or safety hazards is outweighed by a specific and substantial interest in maintaining the confidentiality of the information.

"(d) When weighing the interest in maintaining confidentiality under this section, there shall be a rebuttable

presumption that the interest in protecting personally identifiable information relating to financial, health or other similar information of an individual outweighs the public interest in disclosure.

"(e) Nothing in this section shall be construed to permit, require, or authorize the disclosure of classified information (as defined under section 1 of the Classified Information Procedures Act (18 U.S.C. App.))."

(b) TECHNICAL AND CONFORMING AMENDMENT.—The table of sections for chapter 111 of title 28, United States Code, is amended by adding after the item relating to section 1659 the following:

"1660. Restrictions on protective orders and sealing of cases and settlements.".

SEC. 3. EFFECTIVE DATE.

The amendments made by this Act shall—

(1) take effect 30 days after the date of enactment of this Act; and

(2) apply only to orders entered in civil actions or agreements entered into on or after such date.

○

Mr. FRANKS. Well, thank you, Mr. Chairman. Thank you, Mr. Chairman.

And thank all of you for being here.

Mr. Chairman, I first want to thank the witnesses for their testimony today regarding H.R. 1508, the Sunshine in Litigation Act. Under Rule 26(c) of the Federal Rules of Civil Procedure, during discovery, a trial judge may exercise great discretion in issuing an order of which "justice requires to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense."

The judge may order that no disclosure or discovery may be had in certain areas or only on certain terms and conditions. The judge may also deny a protective order altogether.

H.R. 1508 is the latest legislative proposal to change Rule 26(c). In general, the bill greatly limits the discretion that a judge may exercise in granting a protective order by forcing the court to determine whether each piece of discoverable information is relevant to the protection of public health or safety.

As a practical matter, Mr. Chairman, H.R. 1508 essentially compels each trial court to become a documents clearinghouse that will undoubtedly compromise the property and privacy interests of litigants.

This legislation is opposed not only by the business community but by the Federal Judiciary and the American Bar Association as well. Now, while we get to hear from Department of Justice this year, the Bush Administration's Department of Justice also opposed the bill.

Mr. Chairman, at this time I would ask unanimous consent that opposition letters from the American Bar Association, Professor Arthur Miller of the New York University School of Law, and the Coalition to Protect Privacy, Property, Confidentiality and Efficiency in the Courts be entered into the record.

Mr. COHEN. Without objection, that will be done.

[The information referred to follows:]

Defending Liberty
Pursuing Justice

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June 2, 2009

The Honorable Steve Cohen
Chairman
Subcommittee on Commercial and Administrative Law
Committee on the Judiciary
United States House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

I am writing on behalf of the American Bar Association regarding the June 4, 2009 Subcommittee hearing on H.R. 1508, the "Sunshine in Litigation Act of 2009."

The ABA strongly opposes enactment of H.R. 1508. The Act would change Federal Rule of Civil Procedure 26(c) by limiting a court's ability to enter an order in a civil case (1) restricting disclosure of information obtained through discovery; (2) approving a settlement agreement restricting the disclosure of such information; or (3) restricting access to court records in civil cases – unless the court makes certain findings that the order would not restrict the disclosure of information relevant to the protection of public health or safety, or that the public interest in disclosure of such information is outweighed by a specific interest in maintaining the confidentiality of the information and that the protective order is no broader than necessary to protect the privacy interest asserted.

The ABA opposes H.R. 1508 for two reasons. First, the bill would circumvent the Rules Enabling Act, the procedure established by Congress for revising rules in the federal courts. Second, the bill would impose additional, unnecessary requirements on, and restrict the discretion of, federal courts in ways that will only increase the burdens of litigation in both time and expense. The existing provisions of Rule 26 are currently operating to protect the public interest against unnecessary restrictions on information bearing on public health and safety, and protective orders are important to facilitate the prompt flow of discovery in litigation without imposing the additional burdens contemplated in the bill.

Rules Enabling Act Issues

H.R. 1508 is an unwise retreat from the balanced and inclusive process established by Congress in the Rules Enabling Act. The Rules Enabling Act process is based on three fundamental concepts: (1) the essential, central role of the judiciary in initiating and formulating judicial rulemaking; (2) the use of procedures that permit full public participation, including participation

by members of the legal profession, in considering changes to the rules; and (3) congressional review before changes are adopted.

H.R. 1508 would depart from this balanced and inclusive process. The failure to follow the processes in the Rules Enabling Act would frustrate the purpose of the Act and could do harm to the effective functioning of the judicial system.

Substantive Issues

The current version of Rule 26(c) and the case law applying it give judges appropriate authority to determine when to enter a protective order and what provisions should or should not be in it in light of the particular facts and circumstances of each case. There are three substantive flaws in the proposed legislation:

First, there is no demonstrable deficiency in the current version of Rule 26(c) that requires a change. In a May 22, 2008 letter, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (the "Rules Committee") reported to the House Judiciary Committee that empirical studies since 1991 show "no evidence that protective orders create any significant problem of concealing information about public hazards."

Second, requiring particularized findings of fact before any protective order could be issued in *any* case would impose an enormous burden on both the courts and litigants. Only a small fraction of civil cases involve issues that implicate the public health and safety. Yet, the bill would impose a broad rule that would apply to every civil case. Even in cases that arguably may bear on public health and safety issues, requiring a court to make detailed findings at the beginning of a case, possibly on a document-by-document basis, will impose an impossible burden on the court and the litigants. Protective orders facilitate the timely production of documents and permit challenges to particular documents after the parties have had a chance to review them and the case has evolved to the point when the parties and the court can understand their significance and context.

The Rules Committee correctly noted in its letter to the House Judiciary Committee that the proposed legislation "would make discovery more expensive, more burdensome, and more time-consuming, and would threaten important privacy interests."

Third, the requirement that judges entering an order approving a sealed settlement agreement must make the same particularized findings of fact necessary for discovery protective orders is also unnecessary. Only a small number of cases involve a sealed settlement agreement and only a portion of those cases involve a potential public health or safety hazard. In those cases that do, the complaints and other documents that are a matter of public record typically contain sufficient details about the alleged hazard or harm to apprise the public of the risk, the source of the risk, and the harm it allegedly causes. Sealing a settlement agreement in these cases would have no material impact on the public's ability to be informed of potential health or safety hazards.

The ABA has adopted policy regarding secrecy and coercive agreements on this very issue:

> Where information obtained under secrecy agreements (a) indicates risk of hazards to other persons, or (b) reveals evidence relevant to claims based on such hazards, courts should ordinarily permit disclosure of such information, after hearing, to other plaintiffs or to government agencies who agree to be bound by appropriate agreements or court orders to protect the confidentiality of trade secrets and sensitive proprietary information; . . . .

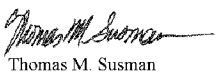
Following adoption of this ABA policy, the Rules Committee and the Advisory Committee on Civil Rules of the Judicial Conference explored at length the need for changes in Rule 26(c) similar to the proposed changes in legislation such as H.R. 1508. Both committees concluded that these changes are not warranted. They are not warranted for one overriding reason: the federal courts are already addressing these concerns when they consider whether to enter a protective order.

Conclusion

The current version of Rule 26(c) is and has been an appropriate, effective mechanism to protect the rights of both litigants and the public, without overburdening the administration of justice in the federal courts. Any proposed amendment to its provisions should be addressed through the existing Rules Enabling Act procedure. H.R. 1508 would not serve the public interest.

We request that you include this letter in the record of your June 4 hearings. Thank you.

Sincerely,



Thomas M. Susman

cc: Members, House Subcommittee on Commercial and Administrative Law, Committee on the Judiciary

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June 3, 2009

The Honorable Trent Franks
Member of Congress
2435 Rayburn Building
Washington DC 20515

Dear Congressman Franks:

Re: Statement for Hearing on H.R. 1508, the "Sunshine in Litigation Act of 2009"

This is in response to your request for my views regarding the subject of a subcommittee hearing on Thursday, June 4, 2009 on H.R.1508, the so-called "Sunshine in Litigation Act of 2009".

I regret that I will be unable to appear in person at the hearing due to a prior engagement, but I am pleased to submit this statement. As you noted, I have had a great deal of experience in analyzing and evaluating a variety of proposals in this area. In fact, I have observed and commented on the court confidentiality debate for many years, including authoring a comprehensive law review article[1] and many shorter written commentaries.[2] I have reviewed many state legislative proposals and court rule amendments, and have testified numerous times on this issue before the federal rulemakers as well as the United States Senate and House of Representatives. The first time I submitted a statement to the Senate on this subject was at a hearing of the Subcommittee on Courts of the Senate Judiciary Committee in May, 1990.[3]

My views on the subject are even stronger today, reinforced by dramatic changes in the litigation landscape: I believe that the current system under the Rules of Civil Procedure that empowers the federal courts with balanced discretion to protect litigants' privacy, property, and confidentiality in appropriate cases works well and does not need to be changed. And, the massive expansion of discovery

[1] Arthur R. Miller, Confidentiality, Protective Orders, and Public Access To The Courts, 105 HARV. L. REV. 427 (1991).

[2] See, e.g., Arthur R. Miller, Traveling Courthouse Circuses, A.B.A. J. 100 (Feb. 1999); Arthur R. Miller, Protective Order Practice: No Need To Amend F.R.C.P. 26(c), Prod. Safety & Liab. Rptr. 438 (BNA) (Apr. 21, 1995); Arthur R. Miller, Private Lives or Public Access? A.B.A. J. 65 (August 1991); Arthur R. Miller, Renewed Tension Between Right To Privacy, Boston Globe, March 10, 1991, § A, pg. 31, col. 1.

[3] See Statement of Professor Arthur R. Miller, Before Subcommittee on Courts of the Senate Judiciary Committee, Privacy, Secrecy, and the Public Interest, May 17, 1990.

in today's electronic world magnifies the need for broad judicial discretion to protect all litigants' privacy and property rights.

The extreme restrictions on protective and sealing orders and the ability of the parties to assure confidentiality in civil litigation proposed in all prior bills on this subject are, in my view, unnecessary and ill advised. Indeed, as time has passed judges have become more knowledgeable and sensitive to the balancing of interests that protects the rights of both sides in this debate and any legislation mandating more restrictive procedures has become even less advisable.

As I wrote in the Harvard Law Review article cited in footnote 1, such restrictive legislation is "ill advised" because:

> (1) such "restrictions run counter to important procedural trends designed to enhance judicial power to control discovery, improve efficiency, and promote settlement in the hope of reducing cost and delay"; (2) "proponents of the reforms have not demonstrated any clear need for constricting judicial discretion"; and (3) "constricting discretion would impair the fairness and efficiency of the existing system and would unduly impinge upon litigants' rights to maintain their privacy, to protect valuable property interests, and to resolve their legal disputes freely with minimal intrusion from outside forces." 105 Harv. L. Rev. at 432.

These are some of the reasons why over forty state legislatures and rulemaking bodies, the Congress, and the Judicial Conference of the United States have refused to enact such extreme restrictions on the discretion of judges to protect confidentiality in the courts.

Indeed, the more time that passes, the more secure I am in the knowledge that the use of protective and sealing orders and extra-judicial confidentiality agreements agreed to among the litigants is not prone to the serious abuses that the proponents of various forms of restrictive legislation suggest. At the same time, as a student of the courts and an active practitioner for over fifty years, I have no doubt that an assurance of confidentiality often is the essential ingredient that starts the information exchange flowing among the parties during discovery. That, in turn, facilitates the truth-seeking goals of the adversary process and the resolution of cases on their merits. Similarly, it ensures production of the materials that persuade parties to settle and comforts litigants that the price of peace was fair.

Confidentiality Is Necessary To the Efficient Functioning of the Civil Justice System.

Take away or restrict the ability to protect confidentiality and the civil justice system will suffer, particularly in this age of electronic discovery. If the parties are prevented from agreeing to confidentiality or a protective order among themselves the process is adversely impacted. Not only will proceedings be slower and more contentious, but in some instances proceedings will come to a complete halt while the court attempts to sort out what often are unreasonable and burdensome procedures contemplated.

Thus, the federal courts are likely to become mired in a morass of motions that siphon precious judicial resources away from higher level duties, such as presiding over trials or writing opinions and that force judges to devote time to tedious, low-level tasks, such as document review and motions directed to the legitimacy of claims of, for example, "concealment of a public hazard." This drain on the federal system's limited judicial resources is particularly wasteful when we remember that discovery was

designed to be self-executing. Thus, the parties generally are expected to be able to resolve discovery disputes themselves. Protective and sealing orders are devices that always have promoted that design.

Confidentiality serves several values in the civil justice system. A brief analysis of these demonstrates that they are fundamental and often of constitutional dimension, such as rights to privacy and property. The benefit of public access to certain litigation materials simply does not rise to, much less transcend, these essential rights. The Committee also must consider the effects that a decrease in the availability of confidentiality would have on the litigation process as a whole.

Confidentiality is of paramount importance during discovery because the willingness of the parties to produce information voluntarily often hinges on a guarantee that it will be preserved. Remove this guarantee and discovery will become more contentious, requiring frequent court intervention. Less information will be produced, making it more difficult to ascertain the facts underlying the dispute. Without all the facts, rendering a fair, just resolution of the dispute becomes less likely and reaching a truly informed settlement becomes more difficult. Consequently, any changes regarding confidentiality inevitably will produce a chain reaction affecting the litigation process.

It has long been my view that any public information purpose that public access serves is more appropriately accomplished by numerous other branches and agencies of government that are far better equipped to identify issues affecting public health or safety and to disseminate relevant information to the public. Superimposing a public information function on the courts decreases their efficiency, delays justice, and distorts the primary purpose for which courts exist. The current federal law and rules appear to me to strike a fair, workable balance between confidentiality and public access. No change has been shown to be needed and none is warranted.

Further Restricting Judicial Discretion to Protect Confidential Information Would Deprive The Public of Constitutionally Protected Privacy Rights.

Due to the invasive nature of the litigation process in this e-discovery age, parties often place substantive rights unrelated to the underlying legal issues at risk. One of the substantive rights that only confidentiality can protect is the right to privacy. The Supreme Court has indicated that litigants have privacy rights in the information produced during the discovery process, and that courts should protect those rights by ensuring confidentiality when good cause is shown. [4] Restricting the discretion of courts to keep sensitive information confidential would be a costly mistake for several substantive reasons.[5] There is a strong, symbiotic inter-relationship between rules of procedure and substantive rights. Procedure exists to give effect to substantive rights. For example, procedural rules governing service of process protect certain substantive rights under the Due Process clause.[6] By protecting confidential information to make certain that it is used solely to resolve disputes, courts also protect the substantive rights of the parties -- rights that may be placed in jeopardy quite unintentionally during the disclosure process by a desire to make the litigation process efficient and fair.[7]

Litigants do not give up their rights to privacy merely because they have walked, voluntarily or involuntarily, through the courthouse door.[8] The rulemakers who created the broad discovery regime of

[4] Seattle Times v. Rhinehart, 467 U.S. 20 (1984)
[5] Id. at 34-36 (discovery process is subject to substantial abuse that could damage the litigants' interests).

[6] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).
[7] Seattle Times, 467 U.S. at 35.
[8] U.S. Dep't of Justice v. Reporters Committee for Freedom of the Press. 109 S. Ct. 1468 (1989).

modern civil procedure in order to promote the resolution of civil disputes on the merits, never intended that rights of privacy or confidentiality be destroyed in the process. They had no intention of using the compulsion of these procedures to undermine privacy in the name of public access or to warn the public of "public hazards."

Because of my belief in the importance of the right to privacy in our computerized world, about which I have written extensively,[9] I am strongly opposed to any proposal that would restrict or eliminate the discretion of the courts to protect the privacy rights of litigants.[10]

Two provisions have been added to H.R.1508 in an unsuccessful attempt to ameliorate the bills adverse impact on privacy rights and national security. Section 1660(d) creates "a rebuttable presumption that the interest in protecting personally identifiable information relating to financial, health, or other similar information of an individual outweighs the public interest in disclosure." And, Section 1660(e) provides that "Nothing in this section shall be construed to permit, require, or authorize the disclosure of classified information (as defined under section 1 of the Classified Information Procedures Act (18 U.S.C. App.))." Although of value, neither provision addresses the fundamental flaws of the bill that as a practical matter would prevent judges from protecting private, proprietary, and constitutionally protected information from disclosure. There is no sibstitute for the exercise of discretion by an informed and experienced federal judge in the context of a particular case.

Restrictive Legislation Would Put the Intellectual Property and Confidential Information of all Litigants at Risk

Another substantive right that litigants often are compelled to place at risk in order to resolve a dispute is the right to the exclusive use of private property. Information is often very valuable -- so valuable that it can be bought and sold for great sums of money. It is not surprising then, that our legal system considers information to be property.[11] To expedite resolution of a lawsuit, rules of procedure can compel all litigants to reveal information in which a property right exists, such as a trade secret, that is costly to develop and that has enormous value to competitors and others who may or may not be involved in the lawsuit.[12] Protective and sealing orders, limiting access to and use of proprietary information, are the most effective means of protecting the commercial value of this type of information while still making it available for use in the litigation at hand. The only alternative might be denying disclosure altogether.[13]

Numerous provisions of the federal and various state Constitutions are intended to protect personal property and the right to its exclusive use against government abuse or appropriation without compensation. Confidentiality is the sine qua non of preserving the modern property right in information

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[9] See, e.g., A. Miller, The Assault on Privacy: Computers, Data Banks, and Dossiers (1971); A. Miller, Press Versus Privacy,
16 Gonzaga L. Rev. 843 (1981).

[10] Cf. In re Halkin, 598 F.2d 176,195 (D.C. Cir. 1979) ("Only in the context of particular discovery material and a particular trial setting can a court determine whether the threat to substantial public interests is sufficiently direct and certain.").

[11] Carpenter v. United States, 108 S. Ct. 316, 320 (1987); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1000-01 (1984); see also 8 C. Wright, A. Miller, & R. Marcus, Federal Practice and Procedure: Civil 2d § 2043 (1994); Warren & Brandeis, The Right To Privacy, 4 Harv. L. Rev. 193, 193 (1890).

[12] Hoenig, Protective Confidentiality Orders, New York Law Journal, Mar. 5, 1990, at 6-7; "FBI Stings Parts Counterfeiters," "Holograms Battle Counterfeit GM Parts," Automotive News, Jan. 22, 1990, at 19 and 20.

[13] In re Halkin, 598 F.2d 176, 195 (D.C. Cir. 1979) (only alternative to use of protective order might be denial of discovery).

that has become the backbone of the American economy. This "property" is exceptionally fragile, for once its confidentiality is lost, the value that comes from confidentiality -- exclusive ownership and possession of the information -- is irretrievably lost and can never be restored. Although our Nation's founders never contemplated a world of semiconductors, television, the internet, and e-discovery they foresaw the need to protect property rights in industrial and artistic creativity and embedded it in the United States Constitution, Art. I, § 8, cl. 8. The states have embellished that basic theme and recognize that the courts have an obligation to protect litigants' property rights when compelled to produce informational property in discovery in civil litigation in order to promote the just resolution of civil disputes.

Protective orders, sealing orders, and confidentiality agreements are the primary means of protecting constitutionally recognized intellectual property rights in litigation. Many of the rejected "Sunshine in Litigation" bills I have reviewed, ask us to accept as gospel that a handful of documents possibly taken out of context in highly complex litigation are evidence of widespread wrong-doing, or that the allegations set forth in a complaint are invariably true. As a consequence of these assumptions, these legislative proposals could compel the litigants to reveal personal or corporate documents, regardless of how proprietary, how valuable, how irrelevant, how embarrassing, or how confidential they might be.

The report from the National Academy of Sciences[14] about the breast implant litigation has shown us that we cannot always place our faith solely in excerpts from a few documents, or the unproven allegations in a lawsuit, regardless of how well pled, how many other similar lawsuits have been filed, or how many other plaintiffs are lined up making the same claims. The breast implant litigation, we recall, was an early poster child for a previous wave of unsuccessful "Sunshine in Litigation" bills. Then, we had the Ford–Firestone litigation which proponents of earlier bills citeed, in highly inflammatory terms, as justification for such legislation. When we take complex, confidential, untested information out of context during the pretrial process as "evidence" or "proof" of wrong-doing, I fear it is an invitation to go down the same road that we went down with breast implants and a number of other false alarms. With respect to Ford – Firestone, I understand that: a) the National Highway Traffic Safety Administration was alerted to a potential problem by early claim data compiled and submitted by the manufacturers and insurers; b) the companies voluntarily produced millions of pages of documents in a document depository which some plaintiff lawyers refused to share with other claimants; and c) the few settlements that were confidential, were sealed at the claimants' request, not the manufacturers'. As I said in a 1999 article:

> My own research shows that information about dangers to the public is available even when confidentiality orders are in place. Most compelling are the findings of empirical research conducted by the Federal Judicial Center, the research arm of the federal courts, as well as extensive public comment submitted to the Judicial Conference's Committee on Rules of Practice and Procedure. Both failed to detect anything wrong with current protective order practice or the use of confidentiality agreements. * * * Ironically, the center's study found that protective orders most often were used to protect the privacy of

[14] See, e.g., Stuart Bondurant, Virginia Ernster & Roger Herdman, eds., INSTITUTE OF MEDICINE, NATIONAL ACADEMY OF SCIENCES, THE SAFETY OF SILICONE BREAST IMPLANTS (Nat'l Academy Press 1999) (finding no scientific cause and effect relationship between silicone gel implants and the serious injuries alleged in thousands of highly publicized lawsuits).

plaintiffs in civil rights litigation. In light of the evidence, the federal rule makers quite correctly decided to make no changes to current rules of procedure.[15]

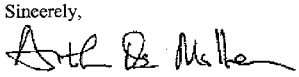
It is much more rational to allow the whole truth-finding process to run its course before we require judges to make judgments about whether or not particular bits of information produced to an adversary solely for purposes of litigation demonstrate the existence of a "public hazard" or other presumed effects on "public health and safety." It is the full adversarial process, with its rules of evidence and cross-examination procedures, that acts as the crucible from which the truth will emerge. And it is the informed and experienced judgment of Article III judges who are in the best position to make judgments of this character. If we by-pass that process and do not allow it to operate, or require the premature resolution of such difficult and important issues and the disclosure of untested information produced in the civil litigation discovery process, we will not be serving the truth.

In actuality, courts rarely use their authority to seal information, especially in today's transparency environment. When they do, there is compelling evidence that preserving confidentiality is of primary importance. Even if the courts had the resources to assume a public information function, they are not the appropriate institutions for doing so. Indeed, a multitude of executive, administrative, and law enforcement agencies exist for the purpose of protecting the public's health and safety. If efforts by these agencies are claimed to be inadequate, it does not follow that their responsibilities should be shifted to the courts.

The present practice should be retained -- relying on our courts to use their balanced discretion to issue confidentiality orders to protect the legitimate interests of the parties -- and allowing parties to retain their rights to negotiate confidentiality agreements voluntarily. Current rules of practice and procedure allow judges to consider and act in the public interest when circumstances so indicate. There is simply no reason to believe that existing court rules and practice create any risks to public health and safety. All indications are that the current system works quite well. The public, including the news media, already has plentiful access to the courts and court records; information affecting significant public interests is available to all. As I have said before: "The appropriate concern is not that there is too much 'secrecy.' Rather, it is that there is too little attention to privacy, to the loss of confidentiality and to interference with the proper functioning of the judicial process." A.B.A.J. at 100 (Feb. 1999). Consequently, I strongly recommend against enactment of constricting legislation in this area because of the many deleterious effects it is likely to have.

I hope you find these comments helpful. I am always available to be of service to the Committee.

Sincerely,



Arthur R. Miller
University Professor

[15] Arthur R. Miller, Traveling Courthouse Circuses, ABA Journal "Perspective" 100 (Feb. 1999).

April 24, 2009

The Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

The Honorable Lamar Smith
Ranking Member
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Conyers and Ranking Member Smith:

The undersigned members of the Coalition to Protect Privacy, Property, Confidentiality, and Efficiency in the Courts strongly oppose H.R. 1508, the "Sunshine in Litigation Act of 2009."

In addition to the signatories listed below, a wide array of academics, judges, litigants, trial lawyers and organizations such as the American Bar Association and the U.S. Judicial Conference Committee on Rules of Practice and Procedure oppose this legislation. Our collective opposition stems from the fact that the bill would severely restrict existing judicial discretion to protect the privacy, property, and confidentiality of all litigants by requiring federal judges to make premature decisions about the masses of information produced in modern civil litigation. Ultimately, H.R. 1508 would increase the costs and burdens associated with civil litigation while stifling the federal court system. Finally, the bill would confer unfair tactical advantages on certain litigants at the expense of others.

Protective and sealing orders are invaluable litigation tools which allow litigants to respond to extraordinarily broad discovery requests. These orders help ensure the confidentiality of valuable information produced in discovery. Severe restrictions on their availability would have a chilling effect not only on discovery and settlements but also on the commencement and defense of claims.

Although H.R. 1508 purports to benefit the public interest and protect public health and safety, it is unnecessary and would be harmful to litigants' rights and the U.S. judicial system. According to studies conducted and analyzed by the U.S. Judicial Conference Rules Committee, there is no need to make it more difficult to issue discovery protective or sealing orders. This is because there is no evidence that protective orders create any significant problem of inappropriately concealing information about public hazards or in impeding the efficient sharing of discovery information. Current law provides judges with the discretion to issue or deny protective and sealing orders, but does not impose upon them the mandatory, time consuming, and burdensome oversight role envisioned by H.R. 1508. As a result, efforts to enact such legislation in the past have repeatedly failed.

The Coalition strongly believes that the "Sunshine in Litigation Act" would undermine the privacy and property rights of all litigants. The legislation would also have a profoundly damaging impact on the United States civil justice system while burdening and delaying the just

disposition of litigation. Accordingly the undersigned organizations urge you to oppose H.R. 1508.

Sincerely,

ACE Group
American Insurance Association
American Tort Reform Association
Association of Corporate Counsel
Beckman Coulter
Boehringer Ingelheim USA Corporation
Caterpillar Inc.
Civil Justice Association of California
DRI
Eli Lilly and Company
Federation of Defense & Corporate Counsel
International Association of Defense Counsel
Lawyers for Civil Justice
LyondellBasell Industries, Inc.
Mazda North American Operations
National Association of Manufacturers
National Association of Mutual Insurance Companies
Nationwide Mutual Insurance Company
PhRMA
Property Casualty Insurers Association of America
The Chubb Corporation
The Travelers Companies, Inc.
U.S. Chamber Institute for Legal Reform
U.S. Chamber of Commerce

Cc: Committee on the Judiciary

Mr. FRANKS. Thank you, Mr. Chairman. Mr. Chairman, these groups oppose this bill, first, because it circumvents the regular order for promulgating changes to the Federal rules of civil procedures prescribed by the Rules Enabling Act.

The Rules Enabling Act has worked well through the years because it is premised on the logical presumption that the courts are

the institutional experts when it comes to understanding how rules of procedure are best developed and implemented.

I currently see no reason to abandon that process for the dramatic changes contemplated by H.R. 1508. This bill would also increase the burden in costs of litigation.

If confidentiality and privacy are not protected, litigants will be forced to oppose any document request that an opposing party makes for information which may be sensitive or confidential. It also forces judges to make findings of fact every time a protective order is requested.

As Judge Kravitz wrote in his testimony from a previous hearing, "Requiring courts to review discovery information to make public health and safety determinations in every request for a protective order no matter how irrelevant to the public health or safety, will burden judges and further delay pre-trial discovery." Well spoken.

Mr. Chairman, I believe that this is a bad bill, and that there exists no empirical evidence demonstrating its necessity. It compromises the legitimate property and privacy interests of plaintiffs and defendants in our Federal court system while generating unnecessary expense and delay.

And, again, I want to thank the witnesses for their participation today.

And I thank the Chairman. And yield back the balance of my time.

Mr. COHEN. Thank you, Mr. Franks.

I am now pleased to introduce the first witness, and we will hear testimony from all the witnesses. But I introduce witnesses before—as they speak. I want to thank each person for participating.

And without objection, your written statement will be placed in the record. And we would ask you to limit your remarks to 5 minutes. We have a lighting system; when it is green, you are on and you have got 4 minutes, more or less, to proceed. And yellow, you are in your last minute. And red, your time is finished, and you should quickly terminate your remarks.

After each witness has presented his or her testimony, the Subcommittee Members will be allowed to ask questions. But we wait until all of the witnesses have done that then and go forth.

Our first witness is Ms. Leslie Bailey. Ms. Bailey is a staff attorney at Public Justice, a national public interest law firm based here in Washington. Her practice focuses primarily on consumer rights and civil rights.

She has been counsel in several successful challenges to abusive class action bans and Federal preemption defenses before state supreme courts and Federal courts of appeal as well as two successful challenges to abusive secrecy orders: *Jesse v. Farmer's Insurance Exchange* in the Colorado Supreme Court, and *Davis v. Honda* in California Superior Court.

Thank you, Ms. Bailey, and we now take your 5-minute testimony.

TESTIMONY OF LESLIE A. BAILEY, PUBLIC JUSTICE

Ms. BAILEY. Mr. Chairman.

Members of the Subcommittee, thank you very much for inviting me to testify today on the problem of court secrecy.

Public Justice is a national public interest law firm based here in Washington. We are not a lobbying group but we do have a special project dedicated to fighting unwarranted secrecy in the courts. And, in particular, we intervene in cases on behalf of members of the public and the press to object to overbroad secrecy orders.

It is undisputed that much of the civil litigation in today's court is taking place in secret. The public courts are being used to keep smoking gun evidence of wrongdoing from the public eye.

Court secrecy is at least as common today as it was in the 1990's when the Firestone Tire scandal came to life. A recent Seattle Times series uncovered more than 400 cases in a single court that have been wrongly sealed, many involving cases of public safety.

Just a couple of years ago, we learned that Allstate Insurance Company had implemented a program where it was intentionally underpaying its policyholders on legitimate claims in order to increase shareholder profits.

It worked. The program resulted in record operating income during a time marked by some of the worst natural disasters in recent history, including Hurricane Katrina.

The documents about this program were produced in litigation but were kept secret from the public pursuant to a protective order. And it wasn't until a lawyer who had seen them published his notes that the contents of the documents became known.

The reason this happens, this reason the system is not working is that each party is pursuing her own narrow interests and no one in the process, in most cases, is looking out for the interests of the public.

Defendants want secrecy for the most part because information about hazardous products and fraudulent business practices is bad P.R. and, in the short term, could lead to more lawsuits. Plus, it is cheaper to pay off individual victims, as long as you can keep evidence secret, than it would be to fix the product or change the practice.

And plaintiffs, for their part, may well go into a case with the goal of making sure that what happened to them doesn't happen to anyone else. But then they are offered a settlement that can pay their medical bills or rebuild their homes if only they will agree to keep it quiet.

Judges are overburdened, and as long as the parties agree, it is easy for a judge to sign off on secrecy in a lot of cases without considering the public interest. Meanwhile, we continue to drive unsafe cars, drink unsafe water, take dangerous drugs and put our money and our trust into institutions that are defrauding and deceiving us.

That is the first and most obvious effect of secrecy. But there are other costs. Secrecy makes discovering the truth much more difficult and more costly.

If a defendant can keep its wrongdoing secret, it won't have to pay as much to the next person who is injured. As long as it is cheaper to pay damages, there is no incentive to make the product safer. And cases that would easily be resolved if the truth came out, take years.

Public Justice has fought several secrecy orders in recent years. And in some cases, though certainly not all, we have succeeded in

making documents public that never should have been concealed in the first place.

I want to briefly mention one case that I worked on. This was a case brought against Honda by Sarah Davis, a 17-year-old girl who was paralyzed in a crash.

During trial, Honda's expert witness went to examine the evidence. This witness was observed intentionally wiping away marks on the seatbelt that would have proved that Sarah Davis was wearing her seatbelt during the crash.

When the trial judge found out he issued a scathing 36-page sanctions decision, detailing his findings, and he awarded liability against Honda. A few days later, the parties reached a settlement. And as a condition of that settlement, the judge was asked to sign off on an order vacating and sealing his sanctions decision.

Once that court record was sealed, this same expert witness was used all over the country by other car companies sued by other people who had been hurt in car crashes, and no one was allowed to ask him about what he had done.

We challenged that sealing order, and we got it reversed. But for every success story, there are hundreds of equally harmful secrecy orders that remain in force. It shouldn't take intervention by a public interest group to make sure unnecessary secrecy is avoided.

Hundreds of thousands of cases are handled by the courts each year and it is not possible for a small number of non-profits with a handful of lawyers to intervene in more than a tiny fraction of those cases, especially since challenges to secrecy orders offer no possibility of recovering attorneys' fees.

We need another solution. Convenience is not a good enough reason for concealing information from the public. If Federal judges were required by law to weigh the public interest before entering a secrecy order, facts would come out, people's lives would be saved and the courts would be fulfilling their proper role as open, public government institutions.

I want to thank the Subcommittee for focusing on this very important issue today.

[The prepared statement of Ms. Bailey follows:]

PREPARED STATEMENT OF LESLIE A. BAILEY

Prepared Testimony of
Leslie A. Bailey
Staff Attorney, Public Justice

for the hearing on
H.R. 1508: The "Sunshine in Litigation Act of 2009"

before the
Subcommittee on Commercial and Administrative Law
Committee on the Judiciary
U.S. House of Representatives

June 4, 2009

Introduction

Mr. Chairman and Members of the Subcommittee:

Thank you for inviting me to testify today on the Sunshine in Litigation Act of 2009. I am a Staff Attorney at Public Justice, a national public interest law firm based in Washington, D.C. and supported by the non-profit Public Justice Foundation. My testimony is based on Public Justice's work fighting unnecessary secrecy in the courts.

Public Justice (www.publicjustice.net) specializes in precedent-setting and socially significant litigation. For two decades, through a special project called "Project Access," Public Justice has opposed unnecessary court secrecy as a threat to public health and safety, the fair and efficient administration of justice, and our democratic system of government. As part of this project, we intervene in cases to fight for the public's right of access to information. In addition, through our approximately 3,000 member attorneys, the members of the Public Justice Foundation Board of Directors, and numerous inquiries from attorneys seeking our assistance, we have developed a great deal of institutional expertise about court secrecy and its effects.

Public Justice does not lobby and generally does not endorse or oppose specific legislation. We do, however, respond to informational requests from legislators and have occasionally testified before legislative and administrative bodies. In keeping with that practice, I am grateful for the opportunity to discuss our experience fighting court secrecy with the Subcommittee today.

There is no question that much of the civil litigation in this country is taking place in secret. Corporate defendants, especially in product defect, automobile design, toxic tort, environmental, and pharmaceutical cases, often refuse to produce documents in pretrial discovery without a protective order barring the plaintiff from sharing them with others. Gag orders prevent countless injury victims from publicly discussing the cause of their injuries as a condition of settling the case. Courts seal entire case files, making it impossible for the public or press to find out what happened. In short, through protective orders, secret settlements, and sealed court records, the public courts are being used by private parties to hide smoking-gun evidence of wrongdoing. All the while, Americans unsuspectingly continue to drive unsafe cars, take dangerous drugs, drink unsafe water, entrust our financial well-being to institutions that engage in fraud and deception, and seek treatment from incompetent doctors. In addition, secrecy subverts our system of open government and undermines trust in the court system.

Court-sanctioned secrecy is pervasive because defendants want it and because plaintiffs and judges do not do enough to oppose it. While Public Justice and other public interest groups have successfully challenged abusive sealing orders and protective orders by intervening in litigation, secrecy orders go unchallenged in the vast majority of cases. A law requiring federal judges to consider the public interest before entering a secrecy order would provide a substantial counterweight to the factors that allow secrecy to flourish.

How Court Secrecy Harms the Public's Health and Safety

Famous examples abound of damaging information revealed in litigation but kept secret from the public for long periods of time: defective Bic lighters, children's car seats, all-terrain vehicles, asbestos, and breast implants were all subject to protective orders while countless consumers continued to be at risk from using them.[1] Doctors continued unknowingly to implant defective heart valves into patients, even though documents disclosed in litigation brought by victims' families—but concealed from the public—revealed a high risk of fatal fracture.[2] Manufacturers of dangerous drugs have settled cases brought by injured patients on terms that forbade the patients' attorneys from notifying the FDA that the drug caused harm.

In 2000, the public learned that a safety defect in Firestone tires, when combined with the susceptibility of Ford Explorers to rolling over, had caused at least 250 injuries and 80 deaths in the United States. Firestone had known about the defect for a decade. But each time a victim or her survivors sued the tire manufacturer, the corporation settled the case on condition that the documents showing that the tires had safety defects be returned to the corporation and hidden from the public and the press. While a government investigation and television exposé ultimately forced the corporation to recall 14.4 million tires—6.5 million of which were still in use at the time—many of those injuries and deaths may not have occurred if Firestone had not successfully kept information about its defective

[1] *See* American Association for Justice, *Eight Deadly Secrets—How Court Secrecy Harms Families and Children*, at http://www.justice.org/cps/rde/xchg/justice/hs.xsl/3469.htm; Public Citizen, *The Hazards of Secrecy: 10 Cases Where Protective Orders Or Confidential Settlements Jeopardized Public Health And Safety*, at http://www.citizen.org/congress/civjus/archive/secrecy/articles.cfm?ID=571.

[2] *See* Public Citizen, *The Hazards of Secrecy*, *supra*.

product from reaching the public.[3] As of 2006, Firestone still had not notified all the owners of the dangerous tires that they had been recalled.[4]

Likewise, in several lawsuits against Cooper Tire, the families of victims killed or injured in accidents have uncovered documents allegedly showing that the accidents were caused by tread separation. But Cooper, in virtually every case, has fought to keep that evidence under seal, claiming that to release it would expose the corporation's trade secrets. In at least one case, Cooper sought and obtained a "draconian" protective order whereby the corporation was "effectively permitted to unilaterally designate any document it chose as confidential."[5] And a Mississippi court recently found that "Cooper Tires has engaged upon a course of conduct exhibiting an attitude that it does not have to provide documents or even the barest information about them unless and until plaintiffs have discovered from other sources that they exist."[6] The plaintiffs in a case in federal court in Utah cited five separate cases in which courts found that Cooper had willfully engaged in bad faith by failing to produce documents or respond to discovery.[7]

The costs of this court-sanctioned secrecy are all too clear to Johnny Bradley. In 2004, Mr. Bradley and his wife embarked on a cross-country drive from California to Mississippi to visit relatives on the way to new Navy recruiter assignments in Florida. Before the trip, Mr. Bradley decided to equip his Ford Explorer with new tires. Having heard recent publicity about the dangers of Firestone tires, he chose Cooper Tires. On a New Mexico highway, the tread on one of the rear tires separated, rolling the Explorer four times, putting Mr. Bradley into a coma for two weeks, and killing his wife instantly. Mr. Bradley believes his

[3] Memorandum of Law of *Amicus Curiae* Public Citizen in Support of Plaintiff's Motion to Compel and Opposition to Protective Order, *Trahan v. Ford Motor Co.*, No. 99-62989 (61st Dist. of Harris County, Tex. Sept. 18, 2000), *available at* http://www.citizen.org/litigation/briefs/OpenCourt/articles.cfm?ID=1070.

[4] *Bridgestone Firestone to Notify Owners of Recalled Tires*, U.S.A. Today, July 21, 2006, at http://usatoday.com/money/autos/2006-07-21-firestone-recall_x.htm.

[5] Fortunately, the order was subsequently reversed. *Mann v. Cooper Tire Co.*, 816 N.Y.S. 2d 45, 56 (App. Div. 2006).

[6] *Plaintiffs Fight Protective Order on Cooper Documents*, 26 No. 20 Andrews Automotive Litig. Rep. 14, Apr. 3, 2007 (discussing *McGill v. Ford Motor Co.*, No. 02-114 (Miss. Cir. Ct., July 30, 2002).

[7] *Id.*

wife would still be alive today if courts had not allowed Cooper to hide the evidence of the defect from the public.[8]

In another example, it recently came to light that Allstate Insurance Company had implemented a program designed to increase its shareholder profits by intentionally and significantly underpaying policyholders on legitimate claims.[9] The new program, which was conceived by McKinsey Consulting and documented in a series of PowerPoint slides now known as the "McKinsey documents," resulted in record operating income for Allstate during a period marked by several of the worst natural disasters in recent history, including Hurricane Katrina. The McKinsey documents showed how Allstate was forcing victims to litigate valid claims rather than settling them. The documents were produced in litigation, but were kept secret from the public pursuant to a protective order. Even after the protective order expired, Allstate refused to turn over the documents. Finally, a lawyer who had viewed the McKinsey documents published his notes and analysis, and the contents of the slides are now known to the public.[10]

More recently, the *New York Times* reported in December 2008 that documents produced in a lawsuit against Wyeth, the manufacturer of the hormone therapy drug Prempro, contain evidence that Wyeth paid a medical writing company to ghostwrite journal articles stating that there was no evidence linking the drug to breast cancer. One article was apparently published even after a federal study had linked Prempro to increased risk of breast cancer. Senator Charles Grassley is investigating these allegations, but most of the documents containing the evidence remain sealed pursuant to a court order. In the mean time, Prempro is still prescribed for treatment of severe menopausal symptoms, although its label now warns of the risk of cancer.[11]

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[8] The Sunshine in Litigation Act: Does Court Secrecy Undermine Public Health and Safety?: Hearing on S. 2449 Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Comm. on the Judiciary, 110th Cong. (Dec. 11, 2007), written testimony of Johnny Bradley, *available at* http://judiciary.senate.gov/hearings/testimony.cfm?id=3053&wit_id=6819.

[9] David J. Berardinelli, *An Insurer in the Grip of Greed*, TRIAL, July 7, 2007, at 32.

[10] *Id.*

[11] Duff Wilson, *Wyeth's Use of Medical Ghostwriters Questioned*, N.Y. Times, December 13, 2003, available at http://www.nytimes.com/2008/12/12/business/13wyeth.html?_r=1&scp=1&sq=Wyeth%20ghostwriters&st=cse ("The documents show company executives came up with ideas for medical journal articles, titled, them, drafted outlines, paid writers to draft the manuscripts,

These are not isolated instances. An award-winning *Seattle Times* investigative series in 2007 uncovered more than 400 cases in a single court that had been wrongly sealed in their entirety—many of them involving matters of public safety.[12]

How Unnecessary Court Secrecy Undermines the Civil Justice System

Whether or not unnecessary secrecy is acceptable in our nation's civil justice system depends on whether one views the publicly-funded courts as merely a means of resolving private disputes, or whether one believes that the public has a right of access to information about what happens in our court system.

No one would deny that there are some cases in which secrecy is appropriate. Coca-Cola certainly has a right to keep its competitors from knowing its secret formula. In such cases, judges can easily determine that no public interest would be harmed by confidentiality. But in cases where the information would alert the public to harmful corporate practices, the balance tips against secrecy.

This is not merely an question of ideals; it has serious practical ramifications. The first and most obvious effect of secrecy is that consumers remain unaware of risks to their safety and health and continue to use dangerous products. But there are other, more subtle costs as well.

Secrecy makes discovering the truth much more difficult and costly. When a defendant is able to keep its wrongdoing secret, it does not have to pay as much money to subsequent victims. In addition, it is harder for other victims to learn that they have legal claims. Others who know they have claims may be unable to sue because of the high cost of obtaining information that only the defendant possesses. Those who do sue will face protective orders at every corner, and the few who do prevail will likely be forced to agree to a secret settlement. Meanwhile, consumers can't make informed decisions about which companies to do business with, and the defendant continues to compete in the marketplace.

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recruited academic authors and identified publications to run the articles – all without disclosing the companies' roles to journal editors or readers.").

[12] Ken Armstrong, Justin Mayo, & Steve Miletich, *Your Courts, Their Secrets*, Seattle Times, March 5–15, 2007, series available at http://seattletimes.nwsource.com/html/yourcourtstheirsecrets/. The authors of the series were honored as finalists for the 2007 Pulitzer Prize in investigative journalism.

The cost to the judicial system—and to taxpayers—is enormous. Judges must decide the same discovery disputes over and over again. Cases that should be resolved easily if the truth were known take years to resolve or never reach resolution at all. Instead ensuring that the truth is discovered and justice is done, the public courtroom is being used all too often as a means of hiding the truth.

Examples of Public Justice's Work Fighting Unnecessary Court Secrecy

In the last several years, Public Justice has fought numerous overbroad protective orders and sealing orders. In some cases, though certainly not all, we have succeeded in making documents public that should never have been concealed in the first place. Although every court decision unsealing such documents is a victory, we cannot rely on this kind of litigation to make sure unnecessary secrecy is avoided. Literally hundreds of thousands of cases are handled each year by federal and state courts, and it is simply not possible for the handful of organizations dedicated to fighting court secrecy to intervene in more than a tiny fraction of them. Furthermore, challenges to secrecy orders offer no possibility of recovering any damages, and few lawyers can afford to undertake such cases on a *pro bono* basis. Thus, while the following examples demonstrate that it is possible, in some cases, to fight secrecy, it should also be remembered that for every success story, there are hundreds of equally harmful secrecy orders that remain in force.

***Davis v. Honda*: Unsealing of court record showing auto maker's expert witness intentionally destroyed evidence in a personal injury case (2005)**

Sarah Davis was seventeen years old when the Honda Civic in which she was riding crashed, leaving her paralyzed. She filed a lawsuit against Honda in a California state court, and a key issue of fact at trial was whether she was wearing a seat belt at the time of the accident. After Ms. Davis had presented her case to the jury and Honda had begun its defense, the court granted permission for Honda's expert, automotive engineer Robert Gratzinger, to examine the car at issue in the presence of all counsel. During the inspection, Mr. Gratzinger was observed using a rag to intentionally wipe off marks on the seat belt that would have provided evidence of Ms. Davis's seat-belt use. Honda's attorney then refused to allow Ms. Davis's counsel to preserve the rag as evidence of spoliation.

As a result of this incident, Ms. Davis moved for sanctions, and the court halted the trial in order to investigate. After hearing testimony about what had happened, the court issued a scathing 36-page sanctions decision, finding that Mr. Gratzinger had "wrongfully and intentionally altered the most significant physical

evidence in the case" and that Honda's attorney had knowingly prevented the rag from being preserved.[13] The court sanctioned Honda by entering a judgment of liability against the corporation, leaving only the question of the amount of damages for the jury.

Unsurprisingly, a settlement was announced within a few days. Apparently as a condition of the settlement, the parties stipulated to an order sealing the sanctions decision. In addition to vacating that decision, the extraordinary sealing order banned all publication and sharing of the decision, and prohibited anyone from even mentioning it in any legal proceeding. As a result, Mr. Gratzinger was shielded from questions about his actions in *Davis* and continued to serve as an expert witness for automakers in crash cases around the country.

Public Justice challenged the secrecy order on behalf of the Center for Auto Safety, a national consumer group that works to improve automobile safety, and attorneys representing car crash victims against defendants who had named Mr. Gratzinger as an expert witness in their cases. On October 26, 2005, the court that had entered the sealing order reversed itself, agreeing that the order violated California law and the First Amendment.

***Jessee v. Farmers Insurance Exchange*: Reversal of overbroad protective order designating documents showing insurer linked employee compensation to limited payouts as confidential (2006)**

After Ruth Jessee was injured in an automobile accident, she filed a lawsuit against Farmers Insurance for denying coverage of her insurance claim in bad faith. Before trial, Ms. Jessee's attorney, in addition to seeking discovery from Farmers, obtained a number of documents from an attorney representing an injury victim against Farmers in a different state. Among them were internal documents that show that Farmers linked its adjusters' compensation to the amount they saved the corporation on claims. Farmers then sought a protective order that would make this key evidence secret, even though it had been obtained not from Farmers in discovery, but from an attorney in another case against Farmers where it was not sealed—and thus was already public. The trial court granted the corporation's motion.

The unusually broad protective order in *Jessee*, which was issued without any showing of good cause for secrecy, required the plaintiff's counsel to identify all documents in his possession relating to the subject matter of the case—and

[13] The sanctions decision in *Davis* is available on the Public Justice web site at http://www.publicjustice.net/Repository/Files/Davis%20-%20Decision.pdf.

permitted the insurance company to label those documents "confidential" regardless of their source. It also required that any court records containing or referring to those documents be filed under seal. Finally, it obligated the crash victim and her attorney to return all "confidential" documents to the insurance company at the conclusion of the case.

Public Justice, representing the plaintiffs before the Colorado Supreme Court, argued that the order should be vacated because it violated Colorado law and the First Amendment.[14] On November 20, 2006, the court agreed, reversing the trial court's order and holding that the documents must remain public.[15]

***State Farm v. Foltz*: Unsealing of *court* records in consumer fraud case (2003)**

Debbie Foltz sued State Farm for conspiring with another company to conduct a phony medical review of her file in order to defraud her of medical coverage under her auto policy. After four years of litigation, the parties reached a secret settlement and asked the court to seal virtually the entire record. The court agreed to back-seal the record, and the entire case—including the docket sheet—was erased from the court's computer system. Following the settlement, the court also permitted State Farm to physically remove the case files from the courthouse. As a result, it was impossible for the public to determine that the case existed, much less view the record.

Public Justice intervened in 1999 on behalf of several public interest groups, and won a partial victory.[16] The court ordered the file returned to the courthouse and restored the docket sheet to the court's record-keeping system, but said it would continue to bar access to materials filed under seal pursuant to protective orders entered earlier in the case. These documents allegedly showed that State Farm was cheating its policyholders. Joined by other intervening litigants, Public Justice fought to have the remaining documents unsealed—but the district court denied further access to the evidence, holding that the parties' agreement to keep the documents secret justified the sealing orders.

On appeal, the U.S. Court of Appeals for the Ninth Circuit held that the discovery materials had been improperly sealed, because there had never been any

[14] Our brief is available at http://www.publicjustice.net/Repository/Files/jessee_reply_021506.pdf.

[15] *Jessee v. Farmers Ins. Exchange*, 147 P.3d 56 (Colo. 2006).

[16] The Public Justice briefs are available at http://www.publicjustice.net/Resources/Cases/Foltz-v-State-Farm.aspx?cpid=25&nid=4600.

showing of the "good cause" for secrecy required by Federal Rule of Civil Procedure 26(c).[17] The court also ruled that the court records in the case had been wrongly sealed; affirmed that the "strong presumption in favor of access to court records" can only be overcome by a showing of "compelling reasons" for secrecy; and made clear that reliance on an agreed-upon protective order did not constitute a compelling reason.[18]

* * *

While these cases are success stories, the vast majority of secrecy orders are never known to anyone except the parties and the court, let alone challenged by public interest groups. In our communications with numerous plaintiffs' attorneys, we have come to understand that secrecy orders are more widespread now than ever. In order to understand how to solve this problem, it is helpful to understand why secrecy is so pervasive.

Why Does Secrecy Flourish Under Current Law?

Secrecy continues to flourish because defendants want it and because plaintiffs and judges do not do enough to oppose it at any stage of the process. For corporate defendants, secrecy helps maximize profits. If evidence of wrongdoing is concealed, it will be much more difficult for future plaintiffs to sue the company, and the defendant will be able to avoid paying as much as it otherwise would in damages. In addition, secrecy enables defendants to avoid the negative public relations that would result from public knowledge of their wrongdoing—and the ensuing loss in profits.

Plaintiffs' lawyers often agree to secrecy out of perceived necessity. A plaintiff's lawyer may be so concerned with gaining access to the key documents she needs to present her client's case that she does not recognize an unlawful protective order or may decide it isn't worth slowing down the litigation to fight. And when faced with a settlement that will compensate their clients for their injuries—especially if the defendant is willing to pay a premium for secrecy—few attorneys balk at the condition that the case and the settlement be kept secret. To fight would be to delay justice for the client, or possibly to lose the chance to settle altogether, and many cannot afford that risk.

Judges, meanwhile, are frequently overburdened. If neither of the parties is arguing for the public's right of access to information, it is often possible, under

[17] *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1138 (9th Cir. 2003).

[18] *Id.* at 1135.

current law, to resolve disputes without considering the public interest at all. If the parties disagree about whether a protective order is proper, a busy judge may simply insist that they work it out. Few judges are likely to reject a proposed settlement that has a confidentiality clause if both parties agree to the term. The result is that as long as each participant in the legal process pursues her own narrow interest, no one in the process is protecting the *public* interest—and the public remains unaware of the underlying facts that prompted the desire for secrecy.

Although the public generally has a right of access to trials, this is insufficient to ensure public access to information about the vast majority of cases, given that most settle. A recent UCLA report found that the rate of resolution by trial of cases in federal court is less than a sixth of what it was in 1962.[19] Naturally, settlement is especially likely when facts revealed in discovery show that the defendant has put peoples' health or safety at risk, or has defrauded its customers. When such facts do come out, defendants who want to shield their actions from public scrutiny have the perfect solution: pay for a secret settlement.[20]

The Sunshine in Litigation Act

Federal legislation aimed at reducing unnecessary secrecy in the courts and ensuring the public's right to know is long overdue. The Sunshine in Litigation Act would restrict federal judges from entering a protective order, or sealing a case or settlement, without making specific factual findings that the secrecy order would not harm the public's interest in disclosure of information relevant to health or safety—or that the public's interest is outweighed by the need for secrecy in a particular case. It would also provide a record on which to base appeals of or challenges to secrecy orders. Equally importantly, the bill would prohibit courts from approving or enforcing settlements or issuing protective orders or sealing

[19] Henry Weinstein, *UCLA Law School Joins Others to Pry Into Judicial Secrecy*, L.A. Times, Nov. 3, 2007, at http://www.latimes.com/news/local/la-me-secrecy3nov03,1,1247556.story.

[20] One of the primary arguments advanced by secrecy proponents is that fewer cases will settle if the parties cannot stipulate to confidentiality, and that the resulting burden on the courts will be overwhelming. But the experience of the U.S. District Court for the District of South Carolina has proven differently. As U.S. District Court Judge Joseph F. Anderson has explained, in 2002 that court enacted a local rule barring all unnecessary court-sealed settlements. Despite warnings by the defense bar that the rule would mean hundreds more trials, the number of trials has actually decreased since the rule was adopted. *See* Joseph F. Anderson, Jr., *Secrecy in the Courts: At the Tipping Point?*, Villanova L.R. (forthcoming 2009) (manuscript at 8–9, on file with author).

orders that would restrict disclosure of information to regulatory agencies. Each of these provisions will go a long way to helping reduce unnecessary court secrecy.

However, if the intent of the legislation is to strengthen the standards that must be met before a court can enter a secrecy order, there are specific ways in which the bill's language may need to be modified. We therefore urge legislators to consider the following concerns.

1. **As currently drafted, H.R. 1508 does not encompass public interests other than health and safety.**

Several provisions of the bill are narrowly limited to ensuring public access to information "relevant to the protection of public health or safety." However, as explained above, secrecy orders are also commonly used to shield egregious misconduct that is not directly linked to health or safety, such as refusal by insurance companies to pay policyholders' legitimate claims after they have suffered severe injuries or lost their homes. The public has a broader interest in access to information concerning corporate wrongdoing, including fraud, discrimination, and insurance bad faith. Legislation would go much further towards eradicating the problem of court secrecy if it were not limited to information directly related to public health and safety.

2. **As currently drafted, H.R. 1508 could be interpreted as supplanting or weakening the existing Constitutional and common-law right of access to court records.**

As currently drafted, section (a)(1) imposes new requirements for the issuing of protective orders and orders sealing court records, but it does not make clear that these requirements must be satisfied in addition to any requirements that already exist under current law. In addition, it appears to impose a single standard for the issuing of any secrecy order, regardless of whether it is a protective order under Federal Rule of Civil Procedure 26(c) (which governs the sealing of materials produced in pretrial discovery but not court records or settlements) or an order restricting access to court records. Because of these ambiguities, the section, as currently drafted, could have the unintended effect of actually weakening existing protections against the sealing of court records.

Section (a)(1)(B), as written, provides that court records may be sealed as long as any public interest in information related to the protection of public health or safety is outweighed by a "specific and substantial interest" in confidentiality. However, under current law, court records are subject to an arguably much more

stringent test. Many courts have held that, under both the common law right of access and the First Amendment to the United States Constitution, court records are subject to a "strong presumption in favor of access" that can only be overcome upon a showing of "compelling reasons for secrecy"[21] or "exceptional circumstances."[22] While courts use varying language to describe the burden that must be satisfied before access to court records can be restricted, it is clear that this standard is different from—and higher than—the Rule 26(c) "good cause" standard for issuing protective orders. In keeping with this, numerous courts have held that the mere existence of a protective order is not enough to justify the sealing of court records.[23]

Because section (a)(1)(B) does not make clear how the provision relates to current legal standards—i.e., whether it is intended to supplement or to replace them—it could be interpreted as permitting a court to seal court records, despite a public interest, as long as an (arguably weaker) "specific and substantial interest" standard is satisfied. Thus, if the bill is intended strengthen existing standards, it should make clear that this provision does not replace the stronger standards currently applicable to court records with a weaker standard. This concern could be remedied, for example, by excluding reference to court records in the bill altogether. Alternatively, language could be added that clarifies that nothing in the bill should be interpreted as diminishing existing legal standards for the issuance of an order restricting access to court records in a civil case, and that the standards set forth in the bill are to be applied in addition to, not in lieu of, such existing legal standards.

3. As currently drafted, H.R. 1508 could be interpreted as weakening requirements for the sealing of discovery materials.

Section (a)(1)(B) could also be construed as weakening current requirements under Rule 26(c) for the issuing protective orders. Although the provision requiring a court to consider the public interest would strengthen the standard applied by courts in many jurisdictions, the other factor to be weighed in the

[21] *Foltz v. State Farm Mut. Auto Ins. Co.*, 331 F.3d 1122, 1122 (9th Cir. 2003).

[22] *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982).

[23] *See, e.g., Littlejohn v. BIC Corp.*, 851 F.2d 673, 680 (3d Cir. 1988) (rejecting argument that a stipulated protective order gave the defendant the power to unilaterally block public access to trial exhibits); *Bank of America Nat. Trust v. Hotel Rittenhouse*, 800 F.2d 339, 345 (3d Cir. 1986) (parties' private confidentiality agreement could not bar access to what had become judicial record).

balance—whether the proponent of secrecy can demonstrate a "specific and substantial interest" in confidentiality—is arguably a lesser standard in some contexts than that currently applied under Rule 26(c). For example, under existing law, a defendant's interest in avoiding embarrassment and possible loss of sales due to disclosure of its unethical practices would not be grounds for a protective order under Rule 26(c). But a defendant could argue that exactly that sort of interest is now cognizable under the new "specific and substantial interest" test.

Again, this concern could be remedied by adding language that makes clear that nothing in the bill should be interpreted as diminishing existing legal standards, and that the standards set forth in the bill are to be applied in addition to, not in lieu of, such existing legal standards.

4. As currently drafted, H.R. 1508 could be interpreted as permitting a court to enter a secrecy order as long as it finds that the information at issue does not relate to the public interest or that the public interest is outweighed, without complying with existing legal requirements.

As written, section (a)(1) could be interpreted as permitting a court to issue a protective order or sealing order simply upon finding either (A) that the material at issue does not relate to public health and safety, "or" (B) that the public interest is outweighed—without satisfying any other requirements. Because it is not clear that the existing standards still must be met, it is conceivable that a court could interpret this provision as obviating both the good cause standard of Rule 26(c) and the compelling interest standard applicable to court records, and permitting the secrecy order even if one of those additional requirements has not been met. This concern could also be addressed by making clear that the bill does not diminish existing standards.

Conclusion

While Public Justice has successfully unsealed court records and blocked overbroad protective orders in many cases, it is not possible for public interest organizations to discover and fight every instance of court secrecy that puts the public at risk. Without widespread change through legislation, corporate defendants will continue to invest their substantial resources into keeping evidence of wrongdoing from the public, and plaintiffs' attorneys will too often continue to have no choice but to agree to secrecy as a condition of achieving a fair outcome for their clients. Only judges have the power to protect the public's right to know. Federal legislation that gives judges a blueprint for determining whether secrecy is actually necessary and a legal basis for refusing to sanction secrecy—even if the

parties agree to it—is needed to protect the public's right to know. We cannot afford to continue to allow our historically rooted system of open government to be used as a tool for the powerful to hide the truth from the public.

I am grateful to the Subcommittee for bringing this very important issue to the attention of Congress, and I appreciate the opportunity to present this testimony.

Mr. COHEN. Thank you, Ms. Bailey. I appreciate your testimony. And you already told some of the smoking gun secrecy. The tobacco lobby and the NRA gotten together?

Our second witness is Bruce Kaster. Since graduation from the University of Florida College of Law in 1975, Mr. Kaster has practiced in Ocala, Florida, as a civil trial lawyer.

His practice is limited to cases involving defective products in state and Federal courts across the country, focused primarily on tire failure related cases. He has pursued personal injury litigation against major domestic and foreign corporations on behalf of clients injured or killed by defective products including cases against Firestone, Michelin, Uniroyal, Goodyear and others.

Mr. Kaster is nationally recognized for his expertise in tire-related vehicular accidents. He has been featured and quoted in the New York Times, the Wall Street Journal and numerous other papers and magazines across the country and across the seas.

His extensive experience and knowledge as a result of products liability litigation in state and Federal courts across the country gives him a unique perspective on the impact of secrecy in legal proceedings.

Mr. Kaster, we appreciate your coming to testify before us. And would you please begin your testimony?

TESTIMONY OF BRUCE R. KASTER, KASTER & LYNCH, P.A.

Mr. KASTER. Thank you, Mr. Chairman, and Members of the Committee for this opportunity to speak on this very important legislation that I think is critical to protect the public.

Having spent over 20 years in my career handling products liability cases, I have had the opportunity to see the human cost of secrecy in the courtroom. Literally, tens of thousands of Americans, if not hundreds of thousands, are killed or injured as a result of products that the manufacturer knows are defective but the public doesn't.

I have struggled against secrecy in legal proceedings for over 20 years in state and Federal courts across this country and for the most time, unsuccessfully. In our present legal system the way it works, in practicality, is every time I request a document the manufacturer gets a protective order.

I object and have never, ever had it denied. And then they place the documents under protection. Once they are placed under protection, I come back and ask that document protection be removed.

I have never prevailed. And that is over 20 years of these cases in Federal courts across the United States.

I appreciate Mr. Franks' comments on the burden on the courts and Judge Kravitz has made the same point. And I think it is a good point.

But you have got to weigh the burden on the court for the lives of American citizens, and their only protection is from the Congress to overcome secrecy that has resulted in so many unnecessary deaths and injuries.

I would say that one good example to help us understand how this system is abused are some documents that I have brought with me and they are in your packet. If you look at the document

on the left, the Firestone Wilderness tires, the reason I brought that is to put the next document into context.

We all are familiar with the Firestone recall and the fact that so many people were killed and injured as a result of the defective tires; biggest recall in the history of this country for tires.

One of the major reasons that those tires failed was that they reduced the size of the wedge, and you will see it circled on the diagram. They did that as a cost-cutting measure; they cut it in half. Tread separations skyrocketed. People started dying.

The document to the right is a redacted document that normally you wouldn't be able to see. But we tried a case in Mississippi and this document came into evidence. It came into evidence in the courtroom.

Now, the document was protected. You will see a confidentiality stamp on the lower left-hand corner. I had opposed protection of this document before I even saw it because I knew what it was.

I came back to the Federal judge and asked the Federal judge, "Remove protection. This is not a trade secret document. It is dirty laundry." My motion was denied.

The judge did rule that the defendant, Cooper Tire Company, could seal the courtroom. I thought that was unprecedented. Fortunately, they failed to do it. This document came into evidence in that redacted form.

And what it tells us is that this manufacturer not only has a reduced wedge, it is worse than that. They don't have any. They don't even have the product that Firestone reduced that resulted in all these deaths.

The public doesn't know this, and they wouldn't even know this document except for what I would say is a fluke. This is a type of document that is routinely protected, and I cannot get out from under protection that tells you the company did not put in this safety measure for cost considerations.

Now, if the public knew that, they wouldn't want to buy these tires. They wouldn't want their family riding in a vehicle that has tires that don't have a basic safety component. But the public doesn't know. And there are literally thousands of these documents that I can't show you from every tire manufacturer that show what is wrong with their tires.

Now, I concentrate on tires because that is mostly what I do. But I have seen the same type of documents from motor vehicle companies in litigation I have been involved in, lawnmower cases, you name the product. In every case I have ever been involved in, the manufacturer put every document they produced under protection even documents from other entities.

And I have never been able to overcome that. Judge Kravitz' position, and I respect it, is come back to the judge and show the judge. I have done that. It doesn't work.

In the real world, manufacturers use protective orders to hide the truth about the defects in their products, and it is unwarranted and unnecessary.

I would say, finally, that in my experience, protective orders kill people. You have got to weigh the value of that against the burden on the courts. If we remove protection from documents that shouldn't be protected in the first place, the public is aware of

which products are defective and which are not. They can make an informed decision. Right now they cannot do that.

I respectfully request that this legislation go forward as drafted. I have some experience in Florida with somewhat similar legislation that is not, quite frankly, as good as this, but it is a step in the right direction.

This is clearly an improvement and necessary. And I thank you.

[The prepared statement of Mr. Kaster follows:]

PREPARED STATEMENT OF BRUCE R. KASTER

STATEMENT BEFORE THE HOUSE JUDICIARY
SUBCOMMITTEE ON COMMERCIAL AND
ADMINISTRATIVE LAW

BY BRUCE R. KASTER

REGARDING H.R. 1508
"SUNSHINE IN LITIGATION ACT OF 2009"

ON JUNE 4, 2009 @ 11:00 A.M.

Having spent over twenty years of my career handling products liability cases across this country, I am very familiar with the human costs resulting from secrecy in litigation. Literally, tens of thousands of Americans, if not hundreds of thousands, have been killed or seriously injured by defective products that manufacturers are aware of, but the public is not. I have struggled against secrecy in legal proceedings in both state and federal courts for over two decades, for the most part unsuccessfully because of the way in which the legal system deals with manufacturers' internal documents that disclose a product's defect and when the manufacturer learned of the defect.

The root of the problem is as protective orders or confidentiality agreements demanded by manufacturers and required or approved by trial judges. Like many lawyers who specialize in products liability, I routinely oppose any protective order or confidentiality agreement because in my experience they are universally abused by manufacturers. When you sue a manufacturer and request records they insist on a protective order before they produce any internal documents that they assert are trade secret. This position makes sense on its face. It's not fair for, say Michelin Tire to disclose information about their manufacturing that would benefit Goodyear Tire or Firestone or some other competitor.

Unfortunately, in the real world, manufacturers use this protection to cover all documents, including documents that no other manufacturer would want, or need to use to a competitive advantage in producing a product. Nonetheless, in my experience federal judges, like state judges, routinely enter protective orders requested by the manufacturer over my objections.

I have heard it explained that some judges do this because they want to expedite the process and they don't have the time or the energy to review thousands of documents to determine what should be protected and what's not. So they enter a protective order to enable the plaintiffs' lawyers to obtain the documents expeditiously, and then put the burden on them to come back and challenge what should and should not be protected. The fallacy of this is, after I receive and review documents I have challenged protective orders across this country in federal courts and I have never won, despite the fact that many of the documents on their face are clearly not trade secret or provide any information to a competitor that would give them an advantage in the production of products.

For the most part, the documents merely show the defect in the product, the fact that the manufacturer knew about the defect, and often times that they refused to correct the defect because they did not want to spend the money.

I should note, it is not just the entry of the protective order that I find offensive and against the public interest. It is the fact that judges routinely accept protective orders drafted by the manufacturers which are onerous and unduly burdensome on their face. They almost never accept compromise portions that we suggest that would at least make the protective orders less burdensome.

To give you an example of the type of document I'm talking about. I have brought with me a document from a recent case in federal court, *Bradley v. Cooper Tire*, in which the court entered a protective order, refused our request to have documents taken out from under the order which we asserted should never have been protected in the first place. We proceeded to trial and several of these documents, although heavily redacted, were placed into evidence in open court.

After the trial, the tire manufacturer, Cooper Tire, tried to claw back the documents and have them sealed again. We argued vigorously that this would be against basic principles of American jurisprudence. Evidence that comes in in open court in this country is part of the public record and should not be suppressed or hidden. The judge agreed with us, so I have a portion of one of the documents with me, the type of document that I'm referring to.

As you can see, this document reflects that the tire manufacturer knew about a safety component for their tires and elected not to put it in because of cost considerations. The safety component they're talking about, the belt edge gum strip, is the same safety component that Firestone reduced in their tires on Explorers. This was one of the significant design defects that led to the biggest recall of tires in American history.

Firestone reduced the size of the wedge. This manufacturer doesn't even have a wedge, and they know that it reduces tread belt separations, but this document discloses they have elected not to put this safety component in for cost considerations.

Now, why should that be protected? The public should know that. The public should know that there is a tire manufacturer who doesn't put in a basic safety component in order to save money, and if you buy their tires you are at an increased risk. But that is hidden from the public, and the only reason this portion of this document is made available is because we used it in open court and the manufacturer failed to suppress it in the courtroom, even though it had been put under protection for several years prior to that. This document is still wrongfully under protection across the country in state and federal courts.

Let me mention briefly the redaction. Companies also will block out portions of documents so that you do not know what they contain, even after they get a protective order. Courts routinely allow this. Even though they have a protective order which protects their documents, they do not give you the basic information that you need in order to determine the components of the products.

Finally, I would note that I have extensive experience with Sunshine in Litigation because the State of Florida has a Sunshine in Litigation Act very similar to this proposal that is before the Congress. It works well and helps overcome the problem of inappropriate protective orders. Although it does not cure the problem, it is a small step in the right direction.

Secrecy in the courtroom has resulted in unnecessary deaths and injuries across this country. From my perspective, secrecy kills and it is time to move toward an end to secrecy in American legal proceedings.

ATTACHMENT 1

BACKGROUND

Anyone who has ever handled a products liability lawsuit is familiar with the onerous protective orders insisted on by manufacturers and routinely granted by state and federal courts across this country. Virtually every state affords statutory protection to manufacturers' trade secrets disclosed in litigation. It is appropriate that manufacturers' bona fide trade secrets produced in litigation not be disclosed to their competitors. The problem that has arisen over the past several decades is not the use of trade secret protection, but its widespread abuse by manufacturers.

Typically, in any products liability case prior to the production of any internal company documents, the manufacturer insists on draconian protective orders, the purpose of which is not to protect their trade secrets from competitors but to insure that courts and lawyers handling other similar cases do not learn of the defects in the product reflected in the manufacturers' records.

In order to intimidate me and to retaliate against me for sharing non-protected information about internal documents, manufacturers have resulted to some extreme measures. In one instance, a manufacturer wrongfully accused me of violation of a protective order in a case in which I was not even involved. They served a rule to show cause summons on me immediately before closing argument in another case against the company in an obvious attempt to distract me. When the hearing was finally held on the other side of the country, the court ruled in my favor. On another occasion, a different manufacturer accused me of violation of a protective order and attempted to have me held in contempt at a hearing in California two days before I started a trial against them in

Florida. I was required to fly across the country to defend myself just before the trial started. Again, the court ruled in my favor.

On five other occasions, manufacturers have wrongfully accused me of violating protective orders, requiring me to on some occasions retain counsel to represent me in the defense of spurious claims in state and federal courts. In every case, the courts have ruled in my favor and found absolutely no wrongdoing. At the request of a manufacturer, I was also placed under a gag order by a judge in New York prohibiting me from discussing a manufacturers' products, including products other than the one involved in that particular case.

I have been sued by a tire company for some hundreds of millions of dollars as a result of my having conducted discovery of a former employee who burned company documents that were ordered to be produced to me by the federal court. The tire company sued me falsely alleging a conspiracy to breach what I believe is an illegal contract requiring the employee not to disclose what she did at the company in exchange for an agreement not to criminally prosecute her. The trial court granted summary judgment in my favor twice but the case was reinstated by the appellate court in decisions that were contrary to the evidence and the law as explained to me by Mississippi lawyers. The decisions of the appellate court have been characterized to me as bizarre. Fortunately, a third appeal was not necessary as the case was resolved at commencement of trial and all counts against me were dismissed with prejudice.

All of this has resulted from me widely sharing non-protected information and fighting protective orders.

Unfortunately, most trial courts are inclined to enter protective orders suggested by manufacturers and then to allow them to place virtually anything under the protective order, regardless of whether it is a trade secret or merely admissions against interest. In a recent decision by the New York Supreme Court, a manufacturer's proposed protective order was severely criticized by the court for what has become a typical abuse. *Mann v. Mann*, 816 N.Y. S.2d 45. The court noted that the manufacturer wrongfully designated as confidential pleadings, bills of particular for similar litigation, customer complaints, records of returns involving similar defects, brand names of the products produced, sources of parts and materials, advertising materials, materials on their face that showed they had been published to the general public, and documents submitted to the government without request for confidential treatment. *Id.* at 10-11. All of these "wrongfully designated" documents have been and are continuing to be designated as confidential by the manufacturer, notwithstanding this opinion.

The court also addressed some of the draconian aspects of the proposed protective order in which the manufacturer included the threat of a ten-year jail sentence, prohibition of contacts with anyone having consulted with a competitor in the past two years, and preventing the plaintiffs from seeing the materials.

Recently, I had an opportunity to attend a Senate Judiciary Committee hearing chaired by Senator Herb Kohl from Wisconsin. Senator Kohl has been attempting for many years to introduce and pass a federal statute, precluding secrecy in federal courts. The State of Florida has passed such legislation, the "Sunshine in Litigation Act" at Florida Statutes § 69.081, which provides an avenue for attorneys, public advocacy groups, the

media, or private citizens to attack inappropriate protective orders in order to disclose hazardous products in the marketplace.

The Florida Act defines public hazard as "an instrumentality including, but not limited to any device, instrument, person, procedure, product or condition of a device, instrument, person, procedure, or product that has caused and is likely to cause injury." F.S. § 69.081(2). In my experience, this would apply to most defective products that result in litigation.

The statute goes on to provide that except pursuant to this section no court shall enter an order or judgment which has the purpose of concealing a public hazard or any information concerning a public hazard, nor shall the court enter an order or judgment which has the purpose or effect of concealing any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard. Any portion of an agreement or contract which has a purpose or effect of concealing public hazard, any information concerning a public hazard or any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard is void and contrary to public policy and may not be enforced. F.S. §69.081(4) and (5).

The Act further provides that any substantially affected person, including but not limited to representatives of the news media, has standing to contest an order, judgment or agreement or contract that violates this section and upon motion and good cause shown by a party attempting to prevent disclosure of information materials which have not been previously disclosed, including but not limited to alleged trade secret, the court shall examine the disputed information or materials *in camera*. If the court finds the information

or materials or portions thereof consist of information concerning a public hazard or information which may be useful to members of the public in protecting themselves from injury which may result in a public hazard, the court shall allow disclosure of the information or materials. F.S. §69.081(6) and (7).

Unfortunately, there are very few reported cases interpreting or applying the Act. One significant case is *Jones v. Goodyear* that went to the Florida Supreme Court twice before the district court's opinion applying the Sunshine in Litigation Act was finally affirmed. This process took approximately three years as the manufacturer went to extraordinary measures to delay disclosure of the documents.

Subsequently, several circuit courts in Florida have relied on the *Jones* decision to open documents to the public. One decision appealed to the District Court of Appeal and was affirmed per curiam. *Vaughan v. Dunlop Tire Corp.*, 5th Judicial Circuit, Marion County, Florida, Case No.: 01-2089-CA-B

During the Senate hearing, I was surprised to hear several witnesses criticize confidential settlements as the mechanism agreed to by plaintiffs' counsel to protect the secret wrong-doing of manufacturers. In over 30 years of practice, with over 20 years in products liability litigation, I am not aware of such confidential settlement agreement. Routinely, confidential settlement agreements protect the amount of the settlement, which benefits both the defendant and the plaintiff. The defendant is protected from media attention which focuses on any large verdict or settlement and the victim is protected from the "lottery syndrome" that can often result in unscrupulous relatives and others attempting to descend on the plaintiff in search for a handout.

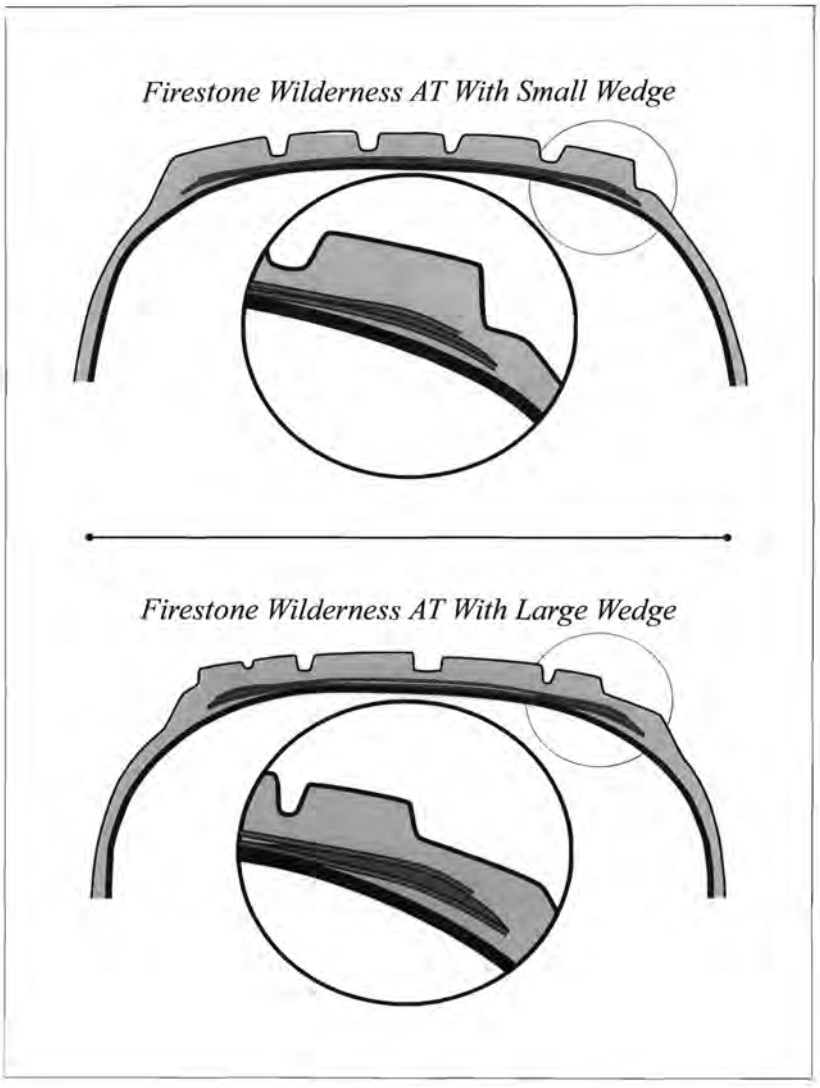
Settlement agreements should not affect the manufacturers' self-incriminating documents. These documents are already under the protective order entered before any documents are even provided to plaintiff and are not in any way affected by settlement agreements. Settlement agreements do not result in continuing deaths or injuries, protective orders do.

In my experience across the country, most judges are very reluctant to remove any document or deposition from protected status once so-designated by the defendant. Often, their rationale is something to the effect of, "You have all the information you need to represent your client. You are not here representing society at large."

I submit it is incumbent upon all lawyers to object vigorously to manufacturers' boilerplate protective orders, to insist on sharing with other lawyers across the country who have cases against the same manufacturer, and to vigorously protest inclusion of documents under a protective order that are no more than dirty laundry.

It has been my experience that clients strongly support these efforts as one of their prime motivations for litigation after a loved one has been severely injured or killed from a defective product is to prevent others from suffering the same fate. While our ethical obligation is to our client to proceed with their case without delay, this obligation often presents a conflict with efforts to vigorously fight protective orders which can substantially delay their lawsuit. In situations where they already have these protected documents it is not in their interest to delay their trial to fight protective orders and manufacturers are aware of this and take advantage of that fact. Nonetheless, lawyers also have a moral obligation to the society in which we live and prosper and whenever practical, with client approval, we should object to protective orders which hide product defects.

ATTACHMENT 2



Mr. COHEN. Thank you, Mr. Kaster.

Our next witness will be Mark R. Kravitz. Judge Kravitz was appointed in 2003 by President George W. Bush, U.S. District Court in the District of Connecticut.

Previously, he was a partner at the law firm of Wiggin and Dana where he worked for nearly 27 years, most recently as chair of the

firm's Appellate Practice Group. Before joining Wiggin and Dana, Judge Kravitz served as law clerk to Circuit Judge James Hunter, III of the U.S. Court of Appeals for the Third Circuit, and then to Justice William Rehnquist of the United States Supreme Court.

From 2001 to 2007, he served as a member of the Standing committee on the Rules of Practice and Procedure in the United States Courts, the body that oversees the rules of procedure in evidence that apply in all Federal courts. During that period, he also served as the liaison member of the Advisory committee on Criminal Rules.

June 2007, Chief Justice John Roberts, Jr. appointed Judge Kravitz to chair the Advisory committee on Civil Rules, the body that oversees the Federal rules of civil procedure.

Thank you, Judge Kravitz. You may proceed.

TESTIMONY OF THE HONORABLE MARK R. KRAVITZ, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT, ON BEHALF OF THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE AND THE ADVISORY COMMITTEE ON CIVIL RULES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

Judge KRAVITZ. Thank you, Mr. Chairman. And I appear today on behalf of both the Judicial Conferences committee on Rules of Practice and Procedure and the Advisory committee on Civil Rules, which I chair.

I should say at the outset, no one is opposed to the concept that information that is injurious to the public health and safety should get in the hands of people who can fix that. That is not the issue here.

This bill, therefore, has a good goal but its means are seriously flawed. And those means are likely to hurt rather than help.

The Rules committee have studied this for years and we oppose it for really three different reasons. And I have to ask this Committee, and I would ask the witnesses themselves to distinguish here between what we are talking about.

We have heard evidence of the Honda case. We have heard evidence of Seattle Times and 400 cases. Those are state court cases. What I want to hear is evidence of Federal courts abusing the process and not doing what the rule says it should do, which is only grant protective orders for good cause shown. And there is a huge body of case law.

We have not seen any empirical evidence of that and the Rules committees rely on empirical evidence. But if this Committee has evidence of Federal judges abusing the process repeatedly, I want to know about that, and we will do something about it.

Secondly, the burdens, again, I am not worried about me being burdened. Frankly, I have lots of things to do. But to the extent to which I spend my time looking document through document of truckloads of documents or electronic discovery, then other deserving litigants and critical issues are not going to get my attention. And, frankly, Mr. Kaster, whom I want to get those documents as quickly as possible is not going to get them in any time soon.

So I would ask this Committee also to distinguish between two things. First, documents that come into evidence at trial or are

filed with the court. Frankly, the courts have more severe rules than this legislation as Ms. Bailey points out that require those documents not to be sealed absent extraordinary circumstances.

So the law that exists there is actually more stringent than this legislation and it covers all cases not cases dealing with public health and safety. So what we are dealing with really is the exchange of information in discovery.

And I want to get that information to Mr. Kaster and his experts as quickly as possible so that they will tell me if the public health and safety is implicated because I am not going to be able to know that myself. The notion that there are smoking guns out there in roomful of documents and me not knowing anything about the case will stumble upon the smoking gun, I think, is naive to say the least.

So courts have a well-developed body of case law that allows parties to come in and get modifications to the document. I cited the Zyprexa case. That is the case where Judge Jack Weinstein of the Eastern District of New York had a protective order, allowed information to get to the plaintiffs and their experts, under the protective order.

And then a couple of years later after he knew more about the case and there had been motions, he then unsealed all that material that he had previously sealed and got it to the right people. And he did it under the existing law. And it happens all the time.

So I think the burdens here—this is just going to slow down Mr. Kaster getting any information. It is going to increase the cost of litigation at a time when the lawyers and the public are concerned about the cost of litigation.

And I don't think it is going to achieve the goal. And the reason I don't think it is going to achieve the goal is he is going to agree to a private agreement, not a protective order but a private agreement, that will have the same terms in it so he can get the information sooner.

And so the legislation at the end will not achieve what it is designed to achieve, which is a laudatory goal that we all support.

Thank you, Mr. Chairman.

[The prepared statement of Judge Kravitz follows:]

PREPARED STATEMENT OF THE HONORABLE MARK R. KRAVITZ

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
AND ITS
ADVISORY COMMITTEE ON CIVIL RULES
JUDICIAL CONFERENCE OF THE UNITED STATES

STATEMENT OF
THE HONORABLE MARK R. KRAVITZ

JUDGE, UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

FOR THE
SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

HEARING ON
THE "SUNSHINE IN LITIGATION ACT OF 2009," H.R. 1508

JUNE 4, 2009

Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Building, Washington, DC 20544

STATEMENT OF JUDGE MARK R. KRAVITZ
ON BEHALF OF THE RULES COMMITTEES OF
THE JUDICIAL CONFERENCE OF THE UNITED STATES

Mr. Chairman and members of the subcommittee, I am Judge Mark R. Kravitz of the United States District Court for the District of Connecticut, and I chair the Judicial Conference's Advisory Committee on Civil Rules. I am submitting this statement on behalf of the Conference's Committee on Rules of Practice and Procedure and its Advisory Committee on Civil Rules.

The Rules Committees oppose the "Sunshine in Litigation Act of 2009" (H.R. 1508), which was introduced on March 12, 2009, on the ground that it effectively amends the Federal Rules of Civil Procedure outside the rulemaking process, contrary to the Rules Enabling Act (28 U.S.C. §§ 2071-2077). Under the Rules Enabling Act, proposed amendments to federal court rules are subjected to extensive scrutiny by the public, bar, and bench through the advisory committee process, carefully considered by the Judicial Conference, and then presented after approval by the Supreme Court to Congress. It is an exacting, transparent, and deliberative process designed to provide exhaustive scrutiny to every proposed amendment of the rules, by many knowledgeable individuals and entities, so that lurking ambiguities can be unearthed, inconsistencies removed, problems identified, and improvements made. It is also a process that relies heavily upon empirical research, rather than anecdotal information, to identify problems and to ensure that any solution is workable, effective, and does not create unintended consequences. Direct amendment of the federal rules through legislation, even when the rulemaking process has been completed, circumvents the careful safeguards that Congress itself established in the Rules Enabling Act.

After years of careful and thorough study through the Rules Enabling Act process, the Judicial Conference Committee on Rules of Practice and Procedure and the Advisory Committee on Civil Rules did not recommend that the Judicial Conference approve a change to Rule 26(c) similar to that proposed in the Sunshine in Litigation Act and its predecessors. Because the Rules

Committees made no such recommendation, the Judicial Conference has not been asked nor has it taken a formal position on the specifics of the Act's provisions. The Rules Committees did not recommend such a change to Rule 26(c) for three principal reasons. First, the bill is unnecessary. Second, it would impose an intolerable burden on the federal courts. Third, it would have significant adverse consequences on civil litigation, including making litigation more expensive and making it more difficult to protect important privacy interests.

I am no stranger to these issues. In my former life as a private practitioner, I represented numerous media companies in their efforts to gain access to court proceedings and to information held by state and federal governments. As a judge, I have worked with litigants to craft responsible protective orders that safeguard the legitimate privacy interests of the parties while at the same time protecting the public's constitutionally grounded interest in open judicial proceedings.

Discovery Protective Orders

H.R. 1508 is intended to prevent parties from using the federal judicial process to conceal matters that harm the public health or safety by imposing requirements for issuing discovery protective orders under Rule 26(c) of the Federal Rules of Civil Procedure. The bill would require a judge presiding over a case, who is asked to enter a protective order governing discovery under Rule 26(c), to make findings of fact that the information obtained through discovery is not relevant to the protection of public health or safety or, if it is relevant, that the public interest in the disclosure of potential health or safety hazards is outweighed by the public interest in maintaining the confidentiality of the information and that the protective order requested is no broader than necessary to protect the privacy interest asserted.

Bills that would regulate the issuance of protective orders in discovery under Rule 26(c), similar to H.R. 1508, have been introduced regularly since 1991. Under the Rules Enabling Act, the Rules Committees studied Rule 26(c) to inform themselves about the problems identified by

these bills and to bring the strengths of the Rules Enabling Act process to bear on the problems that might be found. Under that process, the Rules Committees carefully examined and reexamined the issues, reviewed the pertinent case law and legal literature, held public hearings, and initiated and evaluated empirical research studies.

The Rules Committees also considered specific alternative proposals to amend Rule 26(c), intended to address the problems identified in H.R. 1508's predecessor bills, including an amendment to Rule 26(c) that expressly provided for modification or dissolution of a protective order on motion by a party or nonparty. The Rules Committees published the proposed amendments through the Rules Enabling Act process. Public comment led to significant revisions, republication, and further extensive public comment. At the conclusion of this process, the Judicial Conference decided to return the proposals to the Rules Committees for further study. That study included the work described above.

The Empirical Data Identify Scope of Protective Order Activity

In the early 1990's, the Rules Committees began studying pending bills, like H.R. 1508, requiring courts to make particularized findings of fact that a discovery protective order would not restrict the disclosure of information relevant to the protection of public health and safety. The study raised significant concerns about the potential for revealing, in the absence of a protective order, confidential information that could endanger privacy interests and generate increased litigation resulting from the parties' objections to, and refusal to voluntarily comply with, the broad discovery requests that are common in litigation. The Rules Committees concluded that the issues merited further consideration and that empirical information was necessary to understand whether there was a need to regulate the issuance of discovery protective orders by changing Rule 26(c).

In 1994, the Rules Committees asked the Federal Judicial Center (FJC) to do an empirical study on whether discovery protective orders were operating to keep information about public safety

or health hazards from the public. The FJC completed the study in April 1996. It examined 38,179 civil cases filed in the District of Columbia, Eastern District of Michigan, and Eastern District of Pennsylvania from 1990 to 1992. The FJC study showed that discovery protective orders were requested in only about 6% of the approximately 220,000 civil cases filed in federal courts in that time period. Most of the requests are made by motion. Courts carefully review these motions and deny or modify them in a substantial proportion. Less than one-quarter of the requests are made by party stipulations and the courts usually accept them.

In most civil cases in which discovery protective orders were entered, the empirical study showed that the orders did not impact public safety or health. In its study, the FJC randomly selected 398 cases that had protective order activity. A careful inspection of the data reveals that the protective orders targeted by H.R. 1508 represent only a small fraction of civil cases in federal courts. Only half of the 398 cases studied by the FJC involved a protective order restricting disclosure of discovery materials. The other half of the 398 cases involved a protective order governing the return or destruction of discovery materials or imposing a discovery stay pending some event or action. In addition, in those cases in which a protective order was entered, a little more than 50% were civil rights and contract cases and only about 9% were personal injury cases, in which public safety or heath issues might conceivably arise. The empirical data showed no evidence that protective orders create any significant problem of concealing information about public hazards. A copy of the study is attached to this statement.

Information Shows No Need for the Legislation

The Rules Committees studied the examples of cases in which information was hidden from the public commonly cited to justify legislation such as H.R. 1508. In these cases, the Rules Committees found that there was information available to the public sufficient to protect public health or safety. The pertinent information was found in court documents available to the public,

e.g., pleadings and motions, as well as in reported stories in the media. In particular, the complaints filed in these civil cases typically contained extensive information describing the alleged party's actions sufficient to inform the public of any health or safety issue. In product defect cases, for example, complaints typically, at a minimum, identify the allegedly defective product or alleged wrongdoer, identify the accident or event at issue, and describe the harm. Complaints are readily accessible to the public, the press and regulatory agencies. Indeed, remote access to court filings, now available in virtually all federal courts, makes it easier, more efficient, and inexpensive to find complaints with allegations that raise public health and safety issues.

The Rules Committees also examined the case law to determine whether the court rulings in cases in which parties file motions for protective orders in discovery justified legislation. The case law showed that federal courts review such motions carefully and often deny or modify them to grant only the protection needed, recognizing the importance of public access to court filings. The case law also showed that courts often reexamine protective orders if intervenors or third parties raise concerns. *See, e.g., In re Zyprexa Prods. Liab. Litig.*, 253 F.R.D. 69, 208-09 (E.D. N.Y. 2008). That conforms with my own personal experience as a lawyer in representing media companies. The FJC study corroborated the findings of the case law study and showed that judges denied or modified a substantial proportion of motions for protective orders.

The bill's limited practical effect further undermines its justification. The potential benefit of the proposed legislation would be minimized by the general rule that what is produced in discovery is not public information. The Supreme Court recognized this limit when it noted in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984), that discovery materials, including "pretrial depositions and interrogatories are not public components of a civil trial. Such proceedings were not open to the public at common law, ... and, in general, they are conducted in private as a matter of modern practice." Information produced in discovery is not publicly available unless it is filed

with the court. Information produced in discovery is not filed with the court unless it is part of or attached to a motion or other submission, such as a motion for summary judgment. Consequently, if discovery material is in the parties' possession but not filed, it is not publicly available. The absence of a protective order does not require that any party share the information with the public. The proposed legislation would have little effect on public access to discovery materials not filed with the court.

Even when a protective order is entered, it usually does not result in the sealing of all, or even many, documents or information submitted to the court. Case law shows that courts are rightly protective of the public's right to gain access to information and documents submitted to the courts. Thus, my court of appeals, the Second Circuit, has held that "[d]ocuments used by parties moving for, or opposing summary judgment should not remain under seal *absent the most compelling reasons*." *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 123 (2d Cir. 2006) (quoting *Joy v. North,* 692 F.2d 880, 893 (2d Cir. 1982)); *see Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 91 (2d Cir. 2004) (stating that judicial records enjoy a "presumption of openness," a presumption that is rebuttable only "upon demonstration that suppression is essential to preserve higher values and is narrowly tailored to serve that interest" (internal quotations omitted)). The Court of Appeals has instructed District Courts that "a judge must carefully and skeptically review sealing requests to insure that there really is an extraordinary circumstance or compelling need." *Video Software Dealers Assoc. v. Orion Pictures, Corp. (In re Orion Pictures Corp.)*, 21 F.3d 24, 27 (2d Cir. 1994) (citation omitted).

The Legislation Would Impose Intolerable Burdens on the Federal Civil Justice System

The scope of discovery has dramatically changed since legislation like H.R. 1508 was first introduced in 1991. Most discoverable information is now stored in computers and the growth in electronically stored information has exploded. Relatively "small" cases often involve huge

volumes of information. The discovery requests in cases filed in federal court typically involve gigabytes of electronically stored information or about 50,000 pages per gigabyte. Cases requiring intensive discovery can involve many gigabytes, and some cases are now producing terabytes of discoverable information, or about 50 million pages.

Requiring courts to review discovery information to make public health and safety determinations in every request for a protective order, no matter how irrelevant to public health or safety, will burden judges, further delay pretrial discovery and inevitably increase the cost of civil litigation in federal courts. It is important to recognize that most protective orders are requested *before* any documents are exchanged among the parties or submitted to the court and that it would be difficult, if not impossible, for the court to make the review the legislation requires. Furthermore, as a practical matter, "smoking guns" will be difficult, if not impossible, for the judge to recognize in the mountain of documents that must be reviewed, all without the assistance of the requesting party's counsel or expert. Indeed, the requirement to review all this information would make it infeasible for most federal judges even to consider undertaking the review.

Under current law, by contrast, motions for protective orders typically do not require the judge, who at that point has little information about the case, to examine all documents and information that may be produced in discovery to try to determine in advance whether any of it is relevant to protecting public health or safety. Instead, the parties generally request protective orders that seek confidentiality for categories of documents or information. The lawyers for each side can present arguments and the judge can evaluate whether particular categories of documents should be covered by a protective order and what the terms should be. If entered by the judge, protective orders provide the parties and the court with a procedural framework that allows the parties to produce documents and information much more quickly than would be the case if item-by-item judicial examination was required.

Moreover, protective orders also usually provide that after documents are produced in discovery, the receiving party may challenge whether particular documents or information should be kept confidential. Such challenges are often made at a time when the judge knows more about the case, and they typically involve a much smaller subset of the documents produced in discovery. In considering such requests, the judge also has the benefit of input from the lawyers after they have received the documents and know what they contain. Current law also allows federal courts to tailor protective orders to be sure that they are no broader than necessary. Finally, when documents are filed in court, the common law or constitutional interest of the public in open proceedings will apply.

The Legislation Would Have Significant Adverse Consequences

Since bills like H.R. 1508 were first introduced in 1991, obtaining information contained in court documents has become much easier. Court records no longer enjoy the practical obscurity they once had when the information was available only on a visit to the courthouse. The federal courts now have electronic court filing systems, which permit public remote electronic access to court filings. Electronic filing is an inevitable development in this computer age and is providing beneficial increases in efficiency and in public access to court filings. But remote public access to court filings makes it more difficult to protect confidential information, such as competitors' trade secrets or individuals' sensitive private information. If particularized fact findings are required before a discovery protective order can issue, parties in these cases will face a heavier litigation burden, and some plaintiffs might abandon their claims rather than risk public disclosure of highly personal or confidential information.

Parties rely on the ability to obtain protective orders in voluntarily producing information to each other without the need for extensive judicial supervision. They do this for many valid reasons, including saving costs that would otherwise be incurred in carefully screening every document produced in discovery. If obtaining a protective order required item-by-item judicial

consideration to determine whether the information was relevant to the protection of public health or safety, as contemplated under the bill, parties would be less likely to seek or rely on such orders and less willing to produce information voluntarily, leading to discovery disputes. Requiring parties to litigate and courts to resolve such discovery disputes would impose significant costs and burdens on the discovery process and cause further delay. Such satellite disputes would increase the cost of litigation, lead to orders refusing to permit discovery into some information now disclosed under protective orders, add to the pressures that encourage litigants to pursue nonpublic means of dispute resolution, and force some parties to abandon the litigation.

The burdensome requirements of H.R 1508 are especially objectionable because they would be imposed in cases having nothing to do with public health or safety, in which a protective order may be most needed and justified. As noted, the empirical data showed that about one-half of the cases in which discovery protective orders of the type addressed in H.R. 1508 are sought involve contract claims and civil rights claims, including employment discrimination. Many of these cases involve either protected confidential information, such as trade secrets, or highly sensitive personal information. In particular, civil rights and employment discrimination cases often involve personal information not only about the plaintiff but also about other individuals who are not parties, such as fellow employees. As a result, the parties in these categories of cases frequently seek orders protecting confidential information and personal information exchanged in discovery. H.R 1508 would make it more difficult to protect confidential and personal information in court records to the detriment of parties filing civil rights and employment discrimination cases.

Conclusion

The Rules Committees consistently have concluded that provisions affecting Rule 26(c), similar to those sought in H.R. 1508, are not warranted and would adversely affect the administration of justice. The Committees' substantive concerns about the proposed legislation

result from the careful study conducted through the lengthy and transparent process of the Rules Enabling Act. That study, which spanned years and included research to gather and analyze empirical data, case law, academic studies, and practice, led to the conclusion that no change to the present protective-order practice is warranted because: (1) the empirical evidence showed that discovery protective orders did not create any significant problem of concealing information about safety or health hazards from the public; (2) protective orders are important to litigants' privacy and property interests; (3) discovery would become more burdensome and costly if parties cannot rely on protective orders; (4) administering a rule that added conditions before any discovery protective order could be entered would impose significant burdens on the court system and costs on litigants; and (5) such a rule would have limited impact because much information gathered in discovery is not filed with the court and is not publicly available in any event.

If the Committee is aware of empirical information that suggests that protective orders have become a problem of some kind, the Rules Committees would be pleased to take a look at the empirical information and consider whether any rules changes are needed in response. To date, the Rules Committees have not been directed to any such empirical information. In the absence of demonstrated abuses, there seems no reason to burden litigants and courts with the requirements of H.R. 1508.

Confidentiality Provisions in Settlement Agreements

The Empirical Data Shows No Need for the Legislation

H.R. 1508 would also require a judge asked to issue an order approving a settlement agreement to make findings of fact that such an order would not restrict the disclosure of information relevant to the protection of public health or safety or, if it is relevant, that the public interest in the disclosure of potential health or safety hazards is outweighed by the public interest in maintaining the confidentiality of the information and that the protective order requested is no

broader than necessary to protect the privacy interest asserted. In 2002, the Rules Committees asked the Federal Judicial Center to collect and analyze data on the practice and frequency of "sealing orders" that limit disclosure of settlement agreements filed in the federal courts. The Committees asked for the study in response to proposed legislation that would regulate confidentiality provisions in settlement agreements. H.R. 1508 contains a similar provision. In April 2004, the FJC completed its comprehensive study surveying civil cases terminated in 52 district courts during the two-year period ending December 31, 2002. In those 52 districts, the FJC found a total of 1,270 cases out of 288,846 civil cases in which a sealed settlement agreement was filed, about one in 227 cases (0.44%). A copy of the study is attached to this statement.

The FJC study then analyzed the 1,270 sealed-settlement cases to determine how many involved public health or safety. The FJC coded the cases for the following characteristics, which might implicate public health or safety: (1) environmental; (2) product liability; (3) professional malpractice; (4) public-party defendant; (5) death or very serious injury; and (6) sexual abuse. A total of 503 cases (0.18% of all cases) had one or more of the public-interest characteristics. That number would be smaller still if the 177 cases that were part of two consolidated MDL (multidistrict litigation) proceedings were viewed as two cases because they were consolidated into two proceedings before two judges for centralized management.

After reviewing the information from the 52 districts, the FJC concluded that there were so few orders sealing settlement agreements because most settlement agreements are neither filed with the court nor require court approval. Instead, most settlement agreements are private contractual obligations.

The Rules Committees were nonetheless concerned that even though the number of cases in which courts sealed a settlement was small, those cases could involve significant public hazards. A follow-up study was conducted to determine whether in these cases, there was publicly available

information about potential hazards contained in other records that were not sealed. The follow-up study showed that in the few cases involving a potential public health or safety hazard and in which a settlement agreement was sealed, the complaint and other documents remained in the court's file, fully accessible to the public. In these cases, the complaints generally contained details about the basis for the suit, such as the defective nature of a harmful product, the dangerous characteristics of a person, or the lasting effects of a particular harmful event. Although the complaints varied in level of detail, all identified the three most critical pieces of information regarding possible public health or safety risks: (1) the risk itself; (2) the source of that risk; and (3) the harm that allegedly ensued. In many of the product-liability cases, for example, the complaints went further and identified a particular feature of the product that was defective, or described a particular way in which the product failed. In the cases alleging harm caused by a specific person, such as civil rights violations, sexual abuse, or negligence, the complaints consistently identified the alleged wrongdoer and described in detail the causes and extent of the alleged injury. These findings were consistent with the general conclusions of the FJC study that the complaints filed in lawsuits provided the public with "access to information about the alleged wrongdoers and wrongdoings." A copy of the follow-up study is attached to this statement.

The Legislation is Unlikely to be Effective

The FJC study shows that only a small fraction of the agreements that settle federal-court actions are filed in the court. Most settlement agreements remain private contracts between the parties. On the few occasions when parties do file a settlement agreement with the court, it is to make the settlement agreement part of the judgment to ensure continuing federal jurisdiction, not to secure court approval of the settlement. Such agreements would not be affected by prohibitions, like those in H.R. 1508, prohibiting a court from entering an order "approving a settlement agreement that would restrict disclosure" of its contents.

Conclusion

Based on the relatively small number of cases involving a sealed settlement agreement and the availability of other sources — including the complaint — to inform the public of potential hazards in cases involving a sealed settlement agreement, the Rules Committees concluded that it was not necessary to enact a rule or a statute restricting confidentiality provisions in settlement agreements. Once again, if the Committee is aware of empirical information that suggests that sealed settlements have become a larger problem, the Rules Committees would be pleased to take a look at the empirical information and consider whether any rules changes are needed in response.

I thank you for the opportunity to appear before you today.

ATTACHMENT 1

Protective Order Activity in Three Federal Judicial Districts
Report to the Advisory Committee on Civil Rules

Elizabeth C. Wiggins, Melissa J. Pecherski, and George Cort
Federal Judicial Center
April 1996

Introduction and Methods

This report summarizes work underway at the Federal Judicial Center concerning protective orders, confidential settlement agreements, and other sealed court records. The general purpose of our work is to provide the information necessary to evaluate the efficacy of Fed. R. Civ. P. 26(c) and to address the potential need for additional provisions in the rules relating to sealed court records and sealed settlement agreements.

This report focuses on the use of protective orders in three federal district courts. Our research approach entailed identifying cases that involved protective order activity in the three courts and then transcribing information from the docket sheets and case files of a sample of those cases.

Civil cases filed in 1990-1992 in the District of Columbia and those filed in 1991-92 in the Eastern District of Michigan and the Eastern District of Pennsylvania were included in the study. We identified cases involving protective order activity by electronically searching the computerized databases of civil case dockets for event and relief codes associated with this type of activity. We then obtained more detailed information about a random sample of cases that involved protective order activity from each district by recording information from docket sheets and case files.[1]

In this report, we present information about the following issues:

- the incidence of protective order activity;
- the extent to which protective order activity is initiated by stipulated agreement versus motion;
- the extent to which motions for protective orders are contested;
- the extent to which motions for protective orders are granted;
- the stated objectives of protective orders;

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[1]For the District of Columbia, we searched the electronic database during the fall of 1993 and collected the information from the docket sheets and case files during the spring and summer of 1994. In the Eastern District of Pennsylvania and the Eastern District of Michigan, we searched the electronic databases during the summer of 1994 and collected the information from the docket sheets and case files during that summer and fall.

- the types of cases in which protective orders are granted, including the nature of suit and the types of parties involved;
- the types of cases in which access to discovered material is restricted;
- the frequency with which protective orders are modified or dissolved; and
- the disposition of cases in which protective orders are granted.

Findings

The remainder of this report sets forth our findings. Each general finding is numbered and set forth in bold, followed by a fuller explanation and/or data tables.

1. In the Eastern District of Michigan and the Eastern District of Pennsylvania, protective order activity occurred in approximately 5% of civil cases filed in 1991 and 1992. In the District of Columbia, the incidence of protective order activity was higher; it occurred in approximately 10.0,% 9.8%, and 8.1% of the civil cases filed in 1990, 1991, and 1992, respectively.

Table 1 shows for each district the number of civil cases filed during the time period studied and the number of those cases in which protective order activity had occurred at the time we electronically searched the dockets. Because some of the cases filed during the study period were still pending at the time of our electronic search, the percentages shown in the third row likely underestimate the actual amount of protective order activity that will ultimately occur and should be interpreted as lower bounds. Table 2 on the next page shows the number of cases in each district that we examined in more detail, and the number of motions, stipulated agreements, and "sua sponte" protective orders occurring in those cases. By "sua sponte," we mean that the protective order was entered by a judge in the absence of a docketed motion or stipulated agreement. Most of the cases (between 69% and 74% across districts) involved only one motion for protective order, one stipulated agreement, or one "sua sponte" order, although some cases involved up to ten separate motions, agreements, or "sua sponte" orders.

Unless otherwise noted, the remainder of the findings that we present in this report are based on the cases that were examined in more detail.

Table 1
Comparison of Total Caseload with Protective Order Activity

	District of Columbia			Eastern Michigan		Eastern Pennsylvania	
	1990	1991	1992	1991	1992	1991	1992
Number of civil filings	3026	2958	2761	6317	6752	8317	8048
Number of cases involving protective order activity as of the time we examined the dockets	304	289	225	297	340	442	382
Percentage of cases reflecting protective order activity as of the time we examined the dockets	10.0%	9.8%	8.1%	4.7%	5.0%	5.3%	4.7%

Table 2
Description of Samples Examined in More Detail

	District of Columbia	Eastern Michigan	Eastern Pennsylvania
Number of cases examined in more detail	204	195	202
Number of motions, stipulated agreements, "sua sponte" orders in those cases	317	293	317

Note: By "sua sponte," we mean that the protective order was entered by a judge in the absence of a docketed motion or stipulated agreement.

2. Protective order activity was most commonly initiated by motion rather than by stipulated agreement. About half of the motions were opposed. In two districts, hearings were held on few of the motions; in the third district, hearings were held on over half of the motions, often in conjunction with hearings on other motions in the cases.

As shown in Table 3, most of the protective order activity in each district began with a motion by the plaintiff, defendant, another party, or non-party, although a significant amount of activity began with a stipulated agreement between opposing parties. Responses in opposition to about half of the motions were filed (see Table 4). About half of these responses were met with a reply in the District of Columbia and fewer than half of these responses were met with a reply in the other two districts, as shown in Table 5.

In the District of Columbia and the Eastern District of Pennsylvania, hearings were held on few of the motions. In the Eastern District of Michigan, however, hearings were held on over half of the motions (see Table 6). These hearings were often combined with hearings on other motions in the cases.

Table 3
Origin of Protective Order Activity

	District of Columbia		Eastern Michigan		Eastern Pennsylvania	
Motion by plaintiff	55	17%	63	22%	57	18%
Motion by defendant	184	58%	122	42%	153	48%
Motion by other party or non-party	12	4%	13	4%	25	8%
Stipulated agreement between opposing parties	53	17%	77	26%	77	24%
Judge's order in the absence of a docketed motion or stipulated agreement	13	4%	18	6%	5	2%
TOTAL NUMBER OF SEPARATE PROTECTIVE ORDER ACTIVITIES	317		293		317	

Table 4
Number of Motions to Which a Response was Filed

	District of Columbia		Eastern Michigan		Eastern Pennsylvania	
No response filed	78	31%	84	42%	111	47%
Response in opposition filed	143	57%	91	46%	107	46%
Response in concurrence filed	4	2%	1	<1%	3	1%
Response seeking an amendment to the motion	1	<1%	0	0%	0	0%
Response filed, but unknown if in opposition or concurrence	24	10%	21	11%	10	4%
Unable to ascertain whether a response was filed	1	<1%	1	<1%	4	2%
TOTAL NUMBER OF MOTIONS FOR PROTECTIVE ORDER	251		198		235	

Table 5
Number of Responses to which a Reply was Filed

	District of Columbia		Eastern Michigan		Eastern Pennsylvania	
No reply filed	92	53%	81	72%	100	83%
Reply filed	74	43%	30	27%	20	17%
Unable to ascertain whether a reply was filed	6	3%	2	2%	0	0%
TOTAL NUMBER OF RESPONSES	172		113		120	

Table 6
Number of Motions for which a Hearing was Held

	District of Columbia		Eastern Michigan		Eastern Pennsylvania	
Hearing held	27	11%	117	59%	5	2%
No hearing held	216	86%	76	38%	224	95%
Unable to determine if a hearing held	8	3%	5	3%	6	3%
TOTAL NUMBER OF MOTIONS FOR PROTECTIVE ORDER	251		198		235	

3. Approximately 40% of the motions for a protective order were granted either in whole or in part (see Table 7). Only two stipulated agreements were rejected by the court on the record.

Table 7
Disposition of motions for protective orders

	District of Columbia		Eastern Michigan		Eastern Pennsylvania	
1. Motion granted in whole	77	32%	53	27%	54	23%
2. Motion granted in part	24	10%	25	13%	29	12%
3. Motion denied (includes some motions denied as moot)	69	29%	58	30%	105	45%
4. Motion not ruled on although case closed (i.e., motion is moot)	70	29%	27	14%	40	17%
5. Motion withdrawn	2	1%	32	16%	6	3%
6. Motion pending	5		3		1	
7. Unknown	4		0		0	
NUMBER OF MOTIONS THAT WERE RESOLVED (categories 1, 2, 3, and 4 above)	240		195		234	

Note: Category 3: Motion Denied includes some motions that were denied as moot. We estimate that the reason for between 20 and 35% of the denials was mootness. The percentages were calculated excluding the categories (6) motion pending and (7) unknown. One stipulated agreement in the Eastern District of Pennsylvania and one stipulated agreement in the District of Columbia were rejected by the court; this is not reflected in the above figures.

Only two stipulated agreements for a protective order were rejected by the court on the record (one in the Eastern District of Pennsylvania and one in the District of Columbia). One explanation for the infrequency of this event is that parties discuss with the court whether a protective order is warranted and what provisions should be included before a formal agreement is presented, thus drastically reducing the number that are rejected. The alternate explanation is, of course, that judges are reluctant to reject an agreement between opposing parties, except in rare circumstances.

4. 166, 173, and 164 protective orders were entered in 127, 140, and 131 cases in the District of Columbia, the Eastern District of Michigan, and the Eastern District of Pennsylvania, respectively. Of the protective orders that were entered, between 45% and 61% were initiated by motion and between 31% and 46% were initiated by stipulated agreement between the parties (see Table 8). The objectives of these orders are summarized in Tables 9 and 10, and discussed below.

Table 8
Protective Orders Entered

	District of Columbia		Eastern Michigan		Eastern Pennsylvania	
Initiated by motion	101	61%	78	45%	83	51%
Initiated by agreement of parties	52	31%	77	45%	76	46%
Initiated sua sponte by court order	13	8%	18	10%	5	3%
TOTAL NUMBER OF PROTECTIVE ORDERS ENTERED	166		173		164	

Note: By "sua sponte", we mean the protective order was entered by a judge in the absence of a docketed motion or stipulated agreement.

Table 9 on the next page summarizes the objectives of these orders. The percentages in the tables are of the total number of protective orders. Because the objective of some orders was multi-faceted, the numbers within columns do not sum to the number of orders entered nor do the percentages sum to 100. Table 10 shows the nature of suit of the cases in which such a restriction was imposed.

Seventy-six, 89, and 82 orders in 62, 81, and 75 cases in the District of Columbia, the Eastern District of Michigan, and the Eastern District of Pennsylvania, respectively, restricted a party from disclosing materials to others. Many of the orders originated with a stipulated agreement (63% in the District of Columbia, 74% in the Eastern District of Michigan, and 88% in the Eastern District of Pennsylvania).

Almost all of the orders applied the restriction to anyone outside the litigation; many also set forth an inclusive list of those people who were allowed access. Many of the orders restricting access to discovered material set forth a set of procedures for handling confidential information. A typical order would describe the general type of material to held confidential (e.g., "party-designated confidential", medical records, trade secrets, business records, financial information, personnel or payroll records, depending on the type of case); describe how a party designates material as confidential and how that designation can be challenged; identify who is (is not) to have access to confidential information; allow documents marked as confidential to be filed under seal; and require the return or destruction of discovered materials.

Table 9
Objective of protective orders

	District of Columbia		Eastern Michigan		Eastern Pennsylvania	
That discovery not be had	19	12%	17	11%	19	13%
That discovery be had only by a method of discovery other than that selected by the party seeking discovery	0	0%	1	1%	4	3%
That certain matters not be inquired into or that scope of discovery be limited to certain matters	9	6%	12	8%	11	7%
Restrict party from disclosing materials to others	76	48%	89	59%	82	55%
Require return or destruction of discovered materials	56	36%	61	41%	47	32%
Stay discovery pending, for example, ruling on dispositive motion or until other party complies with discovery request	43	27%	26	17%	14	9%
Limit number of interrogatories	0	0%	1	1%	2	1%
Limit number or length of deposition	0	0%	2	1%	2	1%
Designate time and place of discovery	6	4%	1	1%	14	9%
Other provision	7	4%	7	5%	13	9%
Objective of Order Unknown	9		23		16	
TOTAL NUMBER OF PROTECTIVE ORDERS	166		173		164	

Note: Percentages were calculated using the number of protective orders for which the objective was known (District of Columbia: 157; Eastern District of Michigan: 150, and Eastern District of Pennsylvania: 148.)

Table 10
Nature of Suit for Cases in Which a Protective Order Restricting Access to Discovery Materials was Entered

NATURE OF SUIT	District of Columbia		Eastern Michigan		Eastern Pennsylvania	
Contract	**11**	**17.7%**	**22**	**27.2%**	**18**	**24%**
Insurance (110)	0	0%	3	3.7%	5	6.7%
Miller Act (130)	0	0%	0	0%	1	1.3%
Negotiable Instrument (140)	0	0%	1	1.2%	0	0%
Other Contract (190)	11	17.7%	17	21.0%	12	16.0%
Product Liability (195)	0	0%	1	1.2%	0	0%
Real Property	**1**	**1.6%**	**0**	**0%%**	**0**	**0%**
Rent, Lease and Ejectment (230)	1	1.6%	0	0%%	0	0%
Personal Injury	**7**	**11.3%**	**6**	**7.4%**	**6**	**8.0%**
Airplane Personal Injury (310)	0	0%	1	1.2%	0	0%
Personal Injury: Assault, Libel and Slander (320)	1	1.6%	0	0%	0	0%
Personal Injury: FELA (330)	1	1.6%	0	0%	0	0%
Personal Injury: Marine Personal Injury (340)	0	0%	0	0%	1	1.3%
Personal Injury: Motor Vehicle (350)	1	1.6%	0	0%	0	0%
Personal Injury: Other Personal Injury (360)	2	3.2%	0	0%	1	1.3%
Personal Injury: Medical Malpractice (362)	2	3.2%	0	0%	0	0%
Personal Injury: Personal Injury Product Liability (365)	0	0%	5	6.2%	4	5.3%
Personal Property	**0**	**0%**	**4**	**4.9%**	**5**	**6.7%**
Personal Property Damage: Other Fraud (370)	0	0%	4	4.9%	3	4.0%
Personal Property Damage: Other Personal Property Damage (380)	0	0%	0	0%	2	2.7%
Civil Rights	**22**	**35.5%**	**21**	**25.9%**	**19**	**25.3%**
Other (440)	0	0%	11	13.6%	3	4.0%
Employment (442)	21	33.9%	10	12.3%	16	21.3%
Accommodations (443)	1	1.6%	0	0%	0	0%
Prisoner Petitions (550)	**1**	**1.6%**	**0**	**0%**	**0**	**0%**
Labor	**3**	**4.8%**	**8**	**9.9%**	**5**	**6.6%**
Fair Labor Standards Act (710)	1	1.6%	1	1.2%	1	1.3%
Other Labor Litigation (790)	0	0%	2	2.5%	1	1.3%
ERISA (791)	2	3.2%	5	6.2%	3	4.0%
Property Rights	**6**	**9.7%**	**13**	**16.0%**	**9**	**12%**
Copyright (820)	2	3.2%	3	3.7%	2	2.7%
Patent (830)	2	3.2%	4	4.9%	5	6.7%
Trademark (840)	2	3.2%	6	7.4%	2	2.7%
Other Statutes	**11**	**17.7%**	**7**	**8.6%**	**13**	**17.3%**
Antitrust (410)	3	4.8%	2	2.5%	2	2.7%
Withdrawal (423)	0	0%	1	1.2%	1	1.3%
Banks and Banking (430)	1	1.6%	0	0%	2	2.7%
Racketeer Influenced and Corrupt Organizations (470)	1	1.6%	0	0%	0	0%
Securities, Commodities, and Exchange (850)	0	0%	2	2.5%	7	9.3%
Other Statutory Actions (890)	4	6.5%	2	2.5%	1	1.3%
Freedom of Information Act (895)	2	3.2%	0	0%	0	0%
TOTAL	62		81		75	

5. Across the three districts, few protective orders had been modified or dissolved at the time the case files were examined.

It was not uncommon for protective orders, particularly those restricting access to discovery materials, to contain a provision indicating that the order could be dissolved by agreement of the parties or by the court. These orders, however, typically did not elaborate on the specific factors the court would consider in modifying or dissolving the order.

As shown in Tables 11 and 12, few protective orders had been modified or dissolved at the time the case files were examined. Following the tables, we describe the ways in which the orders were modified or dissolved.

Table 11
Modification of Protective Orders by the Court or by Agreement of the Parties

	District of Columbia	Eastern Michigan	Eastern Pennsylvania
Number of protective orders modified by the court	2	6	3
Number of protective orders modified by agreement between the parties	4	0	3
Number of protective orders the court affirmatively refused to modify	1	1	0
Number of protective orders for which a motion to reconsider the protective order was pending	1	2	0

Table 12
Dissolution of Protective Orders by the Court or by Agreement of the Parties

	District of Columbia	Eastern Michigan	Eastern Pennsylvania
Number of protective orders dissolved by the court	2	0	4
Number of protective orders dissolved by agreement between the parties	0	0	1
Number of protective orders the court affirmatively refused to dissolve	0	2	0
Number of protective orders for which a motion to reconsider the protective order was pending	1	2	0

Protective orders modified by the court

A confidentiality order was modified to add: "Nothing in this order shall prevent disclosure of confidential materials under Commission Rule 4.11(b), 16 C.F.R. Section 4.11(b), in response to a request from a Congressional committee or subcommittee."

A confidentiality order was modified to bind an intervenor to its terms.

A deadline for taking a telephone deposition was extended - the original date was specified in a protective order.

A protective order limiting the scope of discovery was modified -- information previously protected from discovery during a deposition is discoverable, as long as discovering party keeps the information confidential and does not disclose it to any other parties.

A confidentiality order was amended to include performers and groups, whose merchandising rights plaintiff had recently acquired, in the scope of persons who should not have access to confidential information.

An order prohibiting the asking of certain questions during a deposition was modified in undetermined way.

A confidentiality order was expanded to cover other documents.

A confidentiality order was modified to allow plaintiff's counsel access to limited documents pertaining to jurisdiction.

A confidentiality order was modified to permit defendant to use non-privileged discovery matters in another pending case to which it is a party, provided the defendant abides by the original confidentiality agreement.

A sealed complaint was partially unsealed to facilitate discussion between the plaintiff and defendant.

After in camera review of certain documents, the court modified (strengthened) a protective order to require the plaintiff to keep the documents confidential and to return them to the defendant after trial.

Protective orders modified by agreement of the parties

Parties agreed that to the extent the provisions of two confidentiality orders contradicted a third, they were vacated. The third order was sealed.

A confidentiality order was modified twice to change the list of persons having access to confidential material.

A confidentiality order was modified to clarify that parties have access to discovered materials.

A confidentiality order was modified to clarify how counsel should designate documents/depositions confidential and challenge the confidential designation, and who may view/use confidential information.

An order restricting access to discovered materials was extended for a period of two years after entry of a stipulation of dismissal with prejudice.

A confidentiality order initially proposed by the plaintiff was vacated and a confidentiality order stipulated to by the parties was entered in its place.

Protective orders the court affirmatively declined to modify

A motion by an intervening plaintiff to modify a confidentiality order was denied.

A motion to modify a protective order staying discovery was denied.

Protective orders vacated by the court

Court vacated a temporary protective order that barred a deposition and denied the original motion as moot.

Court vacated an order staying discovery pending resolution of defendant's motion to dismiss.

Court ordered that all sealed documents in the case be unsealed immediately (three orders in one case, one order in a second case).

Protective orders dissolved by agreement of the parties

Documents sealed under the stipulated protective order are to be unsealed.

Protective orders the court affirmatively declined to vacate

Court declined to vacate an order staying discovery. (two orders in two cases)

7. In the District of Columbia and the Eastern District of Pennsylvania, the nature of suit for 85% and 81%, respectively, of the cases involving protective order activity fell into the nature of suit categories (1) contract, (2) personal injury, (3) civil rights, and (4) other statutes. The cases in which a protective order was actually entered also were concentrated in these four categories. In the Eastern District of Michigan, the nature of suit for 40% of the cases involving protective order activity fell into the nature of suit categories (1) contract and (2) civil rights; from 9% to 12% of the cases fell into each of the following other nature of suit categories: (1) personal injury, (2) prisoner petitions, (3) labor, (4) property rights, and (5) other statutes. The cases in which a protective order was actually entered were distributed across nature of suit categories in a similar fashion.

Table 13 shows the nature of suit for the cases involving any protective order activity. Table 14 presents the same information for cases in which a protective order was entered. More detailed tables are attached as Appendices A and B.

Table 13
Nature of Suit for Cases Involving Protective Order Activity

NATURE OF SUIT	District of Columbia		Eastern Michigan		Eastern Pennsylvania	
Contract	33	16%	38	19%	54	27%
Real Property	1	<1%	2	1%	4	2%
Personal Injury	35	17%	22	11%	38	19%
Personal Property	3	1%	5	3%	11	5%
Civil Rights	48	24%	40	21%	39	19%
Prisoner Petitions	9	4%	24	12%	2	1%
Forfeiture and Penalty	1	<1%	2	1%	2	1%
Labor	8	4%	18	9%	9	4%
Property Rights	8	4%	20	10%	11	5%
Other Statutes	58	28%	24	12%	32	16%
TOTAL NUMBER OF CASES INVOLVING PROTECTIVE ORDER ACTIVITY	204		195		202	

Table 14
Nature of Suit for Cases in which a Protective Order was Entered

NATURE OF SUIT	District of Columbia		Eastern Michigan		Eastern Pennsylvania	
Contract	19	15%	28	20%	29	22%
Real Property	1	1%	1	1%	3	2%
Personal Injury	20	16%	15	11%	25	19%
Personal Property	2	2%	5	4%	7	5%
Civil Rights	35	28%	32	23%	28	21%
Prisoner Petitions	4	3%	16	11%	1	1%
Forfeiture and Penalty	0	0%	1	1%	1	1%
Labor	4	3%	12	9%	6	5%
Property Rights	7	6%	18	13%	11	8%
Other Statutes	34	27%	12	9%	20	15%
TOTAL NUMBER OF CASES IN WHICH A PROTECTIVE ORDER WAS ENTERED	127		140		131	

8. In the District of Columbia and the Eastern District of Michigan, protective order activity occurred and protective orders were entered most frequently in cases in which the plaintiff was an individual and the defendant was either a business or governmental entity or in which both the plaintiff and defendant were businesses. In the Eastern District of Pennsylvania, protective order activity occurred and protective orders were entered most frequently in cases involving an individual or business as the plaintiff and a business as the defendant.

Tables 15 A-C shows the types of parties in the cases involving protective order activity. All percentages in the tables are of the total number of cases in the given district involving protective order activity. Table 16 A-C presents the same information for cases in which a protective order was entered. All percentages in the tables are of the total number of cases in the given district in which a protective order was entered.

Table 15
Types of Parties in Cases Involving Protective Order Activity

A. District of Columbia

		DEFENDANT											
		Individual		Government		Business		Private Organization		Other			
	Individual	18	9%	59	29%	48	24%	7	3%	0	0%	**132**	**65%**
PLAINTIFF	Government	0	0%	3	1%	5	2%	0	0%	0	0%	**8**	**4%**
	Business	5	2%	17	8%	30	15%	1	<1%	0	0%	**53**	**26%**
	Private Organization	1	<1%	9	4%	1	<1%	0	0%	0	0%	**11**	**5%**
		24	**12%**	**88**	**43%**	**84**	**41%**	**8**	**4%**	**0**	**0%**	**204**	

B. Eastern District of Michigan

		DEFENDANT											
		Individual		Government		Business		Private Organization		Other			
	Individual	10	5%	57	29%	63	32%	2	1%	0	0%	**132**	**68%**
PLAINTIFF	Government	1	<1%	1	<1%	2	1%	1	<1%	2	1%	**7**	**4%**
	Business	2	1%	2	1%	46	24%	0	0%	0	0%	**50**	**26%**
	Private Organization	0	0%	1	<1%	4	2%	1	<1%	0	0%	**6**	**3%**
		13	**7%**	**61**	**31%**	**115**	**59%**	**4**	**2%**	**2**	**1%**	**195**	

C. Eastern District of Pennsylvania

		DEFENDANT											
		Individual		Government		Business		Private Organization		Other			
	Individual	15	7%	18	9%	84	42%	6	3%	0	0%	**123**	**61%**
PLAINTIFF	Government	0	0%	1	<1%	8	4%	0	0%	2	1%	**11**	**5%**
	Business	19	9%	1	<1%	47	23%	0	0%	0	0%	**67**	**33%**
	Private Organization	0	0%	0	0%	1	<1%	0	0%	0	0%	**1**	**<1%**
		34	**17%**	**20**	**10%**	**140**	**69%**	**6**	**3%**	**2**	**1%**	**202**	

Table 16
Types of Parties in Cases in which a Protective Order was Entered

A. District of Columbia

		DEFENDANT											
		Individual		Government		Business		Private Organization		Other			
	Individual	10	8%	40	32%	32	25%	3	2%	0	0%	**85**	**67%**
PLAINTIFF	Government	0	0%	2	2%	2	2%	0	0%	0	0%	**4**	**3%**
	Business	4	3%	9	7%	21	17%	0	0%	0	0%	**34**	**27%**
	Private Organization	0	0%	4	3%	0	0%	0	0%	0	0%	**4**	**3%**
		14	**11%**	**55**	**43%**	**55**	**43%**	**3**	**2%**	**0**	**0%**	**127**	

B. Eastern District of Michigan

		DEFENDANT											
		Individual		Government		Business		Private Organization		Other			
	Individual	6	4%	42	30%	44	31%	0	0%	0	0%	**92**	**66%**
PLAINTIFF	Government	1	1%	1	1%	2	1%	0	0%	1	1%	**5**	**4%**
	Business	0	0%	1	1%	38	27%	0	0%	0	0%	**39**	**28%**
	Private Organization	0	0%	0	0%	3	2%	1	1%	0	0%	**4**	**3%**
		7	**5%**	**44**	**31%**	**87**	**62%**	**1**	**1%**	**1**	**1%**	**140**	

C. Eastern District of Pennsylvania

		DEFENDANT											
		Individual		Government		Business		Private Organization		Other			
	Individual	9	7%	10	8%	59	45%	5	4%	0	0%	**83**	**63%**
PLAINTIFF	Government	0	0%	0	0%	6	5%	0	0%	1	1%	**7**	**5%**
	Business	12	9%	1	1%	27	21%	0	0%	0	0%	**40**	**31%**
	Private Organization	0	0%	0	0%	1	1%	0	0%	0	0%	**1**	**1%**
		21	**16%**	**11**	**8%**	**93**	**71%**	**5**	**4%**	**1**	**1%**	**131**	

9. In the District of Columbia and the Eastern District of Michigan, cases in which protective activity occurred were most frequently resolved by a dismissal under Fed. R. Civ. P. 41(a)(1)(ii), with no explicit mention of settlement. In both districts, a substantial number of the cases were resolved by summary judgment or dispositive motion and in the District of Columbia, a substantial number were resolved by dismissal pursuant to Fed. R. Civ. P. 41(b). In the Eastern District of Pennsylvania, cases with protective order activity were most frequently reported as settled, although a substantial number were resolved by jury decision or by dismissal pursuant to Fed. R. Civ. P. 41(a)(1)(ii). A similar pattern of results was found for cases in which a protective order had been entered.

Table 17 shows the disposition of the cases involving protective order activity. Table 18 presents the same information for cases in which a protective order was entered.

Table 17
Disposition of Cases Involving Protective Order Activity

	District of Columbia		Eastern Michigan		Eastern Pennsylvania	
Summary Judgment	33	16%	41	21%	11	6%
Other dispositive motion	27	13%	18	9%	8	4%
Judicial decision after trial	12	6%	5	3%	13	7%
Jury decision	8	4%	8	4%	24	12%
Dismissal under Rule 41(a)(1)(i)	3	2%	0	0%	0	0%
Dismissal under Rule 41(a)(1)(ii) (with no explicit mention of settlement)	69	34%	62	32%	20	10%
Dismissal under Rule 41(a)(2)	5	3%	4	2%	4	2%
Dismissal under Rule 41(b)	5	3%	3	2%	3	2%
Settled/Consent Judgment	14	7%	32	16%	92	46%
Arbitration/Mediation	1	<1%	4	2%	5	2%
Transferred	9	4%	3	2%	4	2%
Remanded	3	1%	5	3%	3	1%
Other	2	1%	0	0%	7	3%
Case pending	12	6%	9	5%	7	4%
Disposition unknown	1	<1%	1	<1%	1	<1%
	204		195		202	

Table 18
Disposition of Cases in which a Protective Order was Entered

	District of Columbia		Eastern Michigan		Eastern Pennsylvania	
Summary Judgment	19	15%	31	22%	5	4%
Other dispositive motion	13	10%	13	9%	4	3%
Judicial decision after trial	10	8%	4	3%	9	7%
Jury decision	6	5%	6	4%	19	15%
Dismissal under Rule 41(a)(1)(i)	1	1%	0	0%	0	0%
Dismissal under Rule 41(a)(1)(ii) (with no explicit mention of settlement)	46	36%	46	33%	15	12%
Dismissal under Rule 41(a)(2)	2	2%	3	2%	3	2%
Dismissal under Rule 41(b)	2	2%	2	1%	2	2%
Settled	9	7%	23	16%	61	37%
Arbitration/Mediation	1	1%	3	2%	0	0%
Transferred	6	5%	1	1%	2	2%
Remanded	1	1%	1	1%	2	2%
Other	1	1%	0	0%	3	2%
Case pending	9	7%	6	4%	5	4%
Disposition unknown	1	1%	1	1%	1	<1%
	127		140		131	

Appendix A

Nature of Suit for Cases Involving Any Protective Order Activity

NATURE OF SUIT	District of Columbia		Eastern Michigan		Eastern Pennsylvania	
Contract						
Insurance (110)	2		7		16	
Marine (120)	0		0		1	
Miller Act (130)	0		0		1	
Negotiable Instrument (140)	1		1		1	
Other Contract (190)	29		29		33	
Product Liability (195)	0		1		2	
Recovery of overpayment of Medicare (151)	1		0		0	
	33	**16%**	**38**	**19%**	**54**	**27%**
Real Property						
Rent, Lease and Ejectment (230)	1		0		0	
Torts to Land (240)	0		0		3	
All Other Real Property (290)	0		2		1	
	1	**<1%**	**2**	**1%**	**4**	**2%**
Personal Injury						
Airplane Personal Injury (310)	0		1		0	
Personal Injury: Assault, Libel and Slander (320)	5		0		1	
Personal Injury: FELA (330)	1		1		4	
Personal Injury: Marine Personal Injury (340)	0		1		2	
Personal Injury: Motor Vehicle (350)	7		4		9	
Personal Injury: Other Personal Injury (360)	12		6		6	
Personal Injury: Medical Malpractice (362)	4		0		2	
Personal Injury: Personal Injury Product Liability (365)	5		9		14	
Asbestos personal injury product liability (368)	1		0		0	
	35	**17%**	**22**	**11%**	**38**	**19%**
Personal Property						
Personal Property Damage: Other Fraud (370)	2		5		6	
Personal Property Damage: Other Personal Property Damage (380)	1		0		3	
Personal Property Damage: Property Damage Product Liability (385)	0		0		2	
	3	**1%**	**5**	**3%**	**11**	**5%**
Civil Rights						
Other (440)	15		27		16	
Employment (442)	32		13		23	
Accommodations (443)	1		0		0	
	48	**24%**	**40**	**21%**	**39**	**19%**
Prisoner Petitions (550)	**9**	**4%**	**24**	**12%**	**2**	**1%**

NATURE OF SUIT	District of Columbia		Eastern Michigan		Eastern Pennsylvania	
Forfeiture and Penalty						
Food and Drug (620)	0		0		1	
Drug Forfeiture (625)	0		1		0	
Miscellaneous Forfeiture and Penalty (690)	1		1		1	
	1	**<1%**	**2**	**1%**	**2**	**1%**
Labor						
Fair Labor Standards Act (710)	1		1		1	
Labor Management Relations (720)	0		1		0	
Labor Management Reporting and Disclosure (730)	0		1		0	
Railway Labor Act (740)	1		0		0	
Other Labor Litigation (790)	2		3		1	
ERISA (791)	4		12		7	
	8	**4%**	**18**	**9%**	**9**	**4%**
Property Rights						
Copyright (820)	2		5		3	
Patent (830)	2		8		6	
Trademark (840)	4		7		2	
	8	**4%**	**20**	**10%**	**11**	**5%**
Other Statutes						
Antitrust (410)	5		4		4	
Withdrawal (423)	0		1		2	
Banks and Banking (430)	1		0		2	
Racketeer Influenced and Corrupt Organizations (470)	2		2		3	
Securities, Commodities, and Exchange (850)	3		7		12	
Social Security: SSID (864)	0		0		1	
Taxes (870)	0		1		0	
Other Statutory Actions (890)	26		9		8	
Environmental Matters (893)	4		0		0	
Freedom of Information Act (895)	17		0		0	
	58	**28%**	**24**	**12%**	**32**	**16%**
TOTAL	**204**		**195**		**202**	

Appendix B

Nature of Suit for Cases in which a Protective Order Was Entered

NATURE OF SUIT	District of Columbia		Eastern Michigan		Eastern Pennsylvania	
Contract						
Insurance (110)	0		6		8	
Marine (120)	0		0		0	
Miller Act (130)	0		0		1	
Negotiable Instrument (140)	0		1		1	
Other Contract (190)	19		20		18	
Product Liability (195)	0		1		1	
Recovery of overpayment of Medicare (151)	0		0		0	
	19	**15%**	**28**	**20%**	**29**	**22%**
Real Property						
Rent, Lease and Ejectment (230)	1		0		0	
Torts to Land (240)	0		0		3	
All Other Real Property (290)	0		1		0	
	1	**1%**	**1**	**1%**	**3**	**2%**
Personal Injury						
Airplane Personal Injury (310)	0		1		0	
Personal Injury: Assault, Libel and Slander (320)	1		0		1	
Personal Injury: FELA (330)	1		1		0	
Personal Injury: Marine Personal Injury (340)	0		0		2	
Personal Injury: Motor Vehicle (350)	4		1		6	
Personal Injury: Other Personal Injury (360)	9		5		4	
Personal Injury: Medical Malpractice (362)	2		0		2	
Personal Injury: Personal Injury Product Liability (365)	2		7		10	
Asbestos personal injury product liability (368)	1		0		0	
	20	**16%**	**15**	**11%**	**25**	**19%**
Personal Property						
Personal Property Damage: Other Fraud (370)	1		5		4	
Personal Property Damage: Other Personal Property Damage (380)	1		0		2	
Personal Property Damage: Property Damage Product Liability (385)	0		0		1	
	2	**2%**	**5**	**4%**	**7**	**5%**
Civil Rights						
Other (440)	6		19		8	
Employment (442)	28		13		20	
Accommodations (443)	1		0		0	
	35	**28%**	**32**	**23%**	**28**	**21%**
Prisoner Petitions (550)	**4**	**3%**	**16**	**11%**	**1**	**1%**

NATURE OF SUIT	District of Columbia		Eastern Michigan		Eastern Pennsylvania	
Forfeiture and Penalty						
Food and Drug (620)	0		0		1	
Drug Forfeiture (625)	0		0		0	
Miscellaneous Forfeiture and Penalty (690)	0		1		0	
	0	**0%**	**1**	**1%**	**1**	**1%**
Labor						
Fair Labor Standards Act (710)	1		1		1	
Labor Management Relations (720)	0		0		0	
Labor Management Reporting and Disclosure (730)	0		0		0	
Railway Labor Act (740)	0		0		0	
Other Labor Litigation (790)	1		3		1	
ERISA (791)	2		8		4	
	4	**3%**	**12**	**9%**	**6**	**5%**
Property Rights						
Copyright (820)	2		4		3	
Patent (830)	2		7		6	
Trademark (840)	3		7		2	
	7	**6%**	**18**	**13%**	**11**	**8%**
Other Statutes						
Antitrust (410)	3		4		2	
Withdrawal (423)	0		1		1	
Banks and Banking (430)	1		0		2	
Racketeer Influenced and Corrupt Organizations (470)	1		0		2	
Securities, Commodities, and Exchange (850)	2		3		9	
Social Security: SSID (864)	0		0		1	
Taxes (870)	0		0		0	
Other Statutory Actions (890)	13		4		4	
Environmental Matters (893)	2		0		0	
Freedom of Information Act (895)	12		0		0	
	34	**27%**	**12**	**9%**	**20**	**15%**
TOTAL	**127**		**140**		**131**	

ATTACHMENT 2

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MEMORANDUM TO THE ADVISORY COMMITTEE ON CIVIL RULES

Subject: **Health and Safety Information Available in the Complaints in Cases Involving Sealed Settlement Agreements**

From: **Steven S. Gensler**
Associate Professor, University of Oklahoma College of Law
Supreme Court Fellow, Administrative Office of the U.S. Courts (2003-04)

Date: **December 12, 2003**

Although no generally-applicable rule of procedure requires them to do so, litigants in federal court sometimes file their settlement agreements with the court. And in some of these cases, the court enters an order sealing the settlement agreement from public access. Under current practice, the decision whether to seal a settlement agreement is left to the judge's discretion. Critics argue that judges seal settlement agreements too freely and, in the process, endanger the public by needlessly restricting access to information that members of the public could use to protect themselves from health and safety hazards associated with those lawsuits.

This memorandum attempts to gauge the impact that sealed settlement agreements have on public access to health and safety information. Because the settlement agreements are sealed, we cannot know precisely what information they could have conveyed to the public were they unsealed. But we can approach the question from the other direction – by analyzing the public health and safety information available in court documents that are not sealed. Specifically, this memorandum examines *the complaints* in sealed settlement cases to see if the claims and allegations contained therein sufficiently serve to put the public on notice of the alleged health and safety hazards associated with those cases.

In all but two cases, the complaints provided significant notice to the public about the alleged health and safety risks. These complaints, *at a minimum*, specifically identified the allegedly defective product or alleged wrongdoer, identified the accident or event at issue, and described the harm (i.e., injuries) that ensued. In so doing, these complaints likely conveyed more health and safety information – and at a much earlier time – than the settlement agreements that terminated the litigation.

I. The Place of Sealed Settlements in the Settlement Secrecy Debate

Before considering what complaints might tell the public about health and safety risks, it is useful to locate that issue within the larger debate surrounding settlement secrecy. A robust criticism has emerged that links so-called "secret settlements" with the public's lack of timely information regarding ongoing health and safety hazards. Specifically, critics and media commentators often argue that defendants use secret settlements to keep the public "in the dark" about hazards associated with its products or actions. As discussed below, however, *sealed* settlements are a very small part of the "secret settlement" landscape. Moreover, much of what troubles people about private settlement agreements is neither a function of the court's sealing order nor readily redressable through the rule-making process.

A. *Media and Public Perceptions Regarding Settlement Secrecy*

The standard media account focuses on private (i.e., non-public) settlements generally, and condemns them as causing needless deaths and injuries by concealing hazards that the public could have avoided were they aware of them. A New York Times editorial, for example, asserts that the public is endangered when courts allow "secret" settlements because "[c]onsumers are deprived of information they need to protect themselves from unsafe products. Workers are kept in the dark about unsafe working conditions. And, as we now know, parishioners have been prevented from learning that their priest has been successfully sued for abuse." Editorial, *Ending Legal Secrecy*, N.Y. Times, Sept. 5, 2002, at A22. That charge is repeated by Robert A. Clifford, ABA Litigation Section Chair, who asserts that secret settlements "undermine public safety because they're used extensively in cases involving either defective products or bad doctors or other areas where the public is at risk for being victimized again by the wrongdoer who's settling the case." Martha Neil, *Confidential Settlements Scrutinized*, 88 ABA J. 20 (July 2002).

A recent National Public Radio segment on the "All Things Considered" program more concretely illustrates the arguments typically made against non-public settlements. NPR reporter Adam Hochberg interviewed Steve Terraszas, whose son died during a 2000 accident in which his Ford Explorer rolled over after the tread on its Firestone tire separated. He also spoke with advocates on both sides of the issue, including consumer advocate Gail Siegel. The following excerpt advances the suggestion that non-public settlements in the Ford/Firestone tire cases deprived the public of the information it needed to protect itself:

> HOCHBERG: That accident . . . was not the first involving Firestone tread separation. By that time, there already had been dozens around the country. But Terraszas had no idea there was a problem, in part, because the earlier accidents were not widely publicized. More than 50 times in the 1990s, Ford and Firestone were sued over the tire defect, and in almost every case, the suits were settled secretly, assuring that drivers like Steve Terraszas wouldn't find out about them.

> Mr. TERRASZAS: Kind of frustrating. Obviously, the secret settlement kept it out of the papers and kept everybody kind of in the dark as to what was happening. If these companies were forthcoming with the problem that they knew existed, there'd he a lot more people still alive, and certainly my son would still be here.
>
> * * *
>
> Ms. GAIL SIEGEL: If we don't know what dangers lurk in an operating room, in a vehicle, in a nursery, how can we protect ourselves? We can't know what we should be wary of if that kind of information is hidden away.

All Things Considered (NPR radio broadcast, Oct. 11, 2002) (*available at* 2002 WL 3498232).

B. *Three Major Misconceptions Regarding Settlement Secrecy*

The typical discussion of settlement secrecy tends to approach settlement secrecy as a single issue. In reality, the topic of settlement secrecy embraces several related but discrete issues. In this part, I identify three major misconceptions that often underlie the criticism of settlement secrecy. By doing so, I hope to show not just that the issues are in fact different, but that it is important to disentangle them because they yield different problems and have different potential solutions.

1. *Secret ≠ Sealed*

Perhaps the most obvious error that critics make is to conflate *non-public* settlement agreements with *sealed* settlement agreements. In most cases, the so-called "secret settlement agreement" is one which the parties agree to privately and do not file with the court at all. Except in certain areas (e.g., class actions, suits involving minors, Fair Lahor Standards Act cases), the federal courts have no role in approving or disapproving a settlement. Indeed, the court is not even needed to terminate the federal court proceedings, since the parties can stipulate to dismissal under Rule 41(a) and no court order is needed to effectuate it.

In contrast, a sealed settlement only occurs where the parties actually file the settlement agreement with the court and the court then grants an order sealing it. This happens rarely; the FJC's September 8 progress report found evidence of it in only 0.3% of cases (3 out of 1000).[1]

---

[1]In an ongoing study titled "Sealed Settlement Agreements in Federal District Court," the FJC is reviewing case files from approximately half of the federal districts to identify cases that terminated in either 2001 or 2002 and include a sealed settlement agreement. The FJC presented a progress report, dated September 8, 2003, at the Advisory Committee's October meeting in Sacramento, covering the FJC's findings for the 29 districts that had been completed at that time. Out of a universe of 128,288 civil cases, the FJC identified only 379 as containing sealed settlement agreements.

Thus, sealed settlements are a very small aspect of the problems attributed to private, non-public settlements.

2. *Access to Settlement Agreements ≠ Access to Safety Information*

Criticisms of settlement secrecy also tend to imply (if not directly assert) that access to the contents of the settlement agreement will yield crucial information about health and safety dangers. Indeed, some of the media articles convey the impression that settlement agreements are bursting with admissions of guilt, references to smoking-gun documents, and damning details about product defects or personal malfeasance. My personal experience – albeit one seemingly shared by most involved with this project – is that settlement agreements simply do not contain information of this nature. To the contrary, the only direct reference to the merits in a typical settlement agreement is a non-admission clause. While I do not contend that safety information would never appear in a settlement agreement, any suggestion that the public routinely loses access to health and safety information by virtue of not being able to read private settlement agreements should be viewed with appropriate skepticism.

However, many settlement agreements will contain two items arguably related to health and safety information. First, the settlement agreement typically will identify the terms of the settlement. Sometimes, this will include a promise by the defendant to undertake certain conduct, or to stop certain activities. More commonly, it will consist of the dollar amount of the settlement payment.

These items are relevant in the sense that they might be viewed as a proxy for the merits. The fact that a defendant agrees to change its behavior might be viewed as a sign that the defendant recognized that the behavior in question was wrongful. And a large settlement payment might be viewed as a sign that the defendant expected to lose the case on the merits. To the extent these assumptions are true, they support the further implication that any health or safety risks associated with the merits are real. On the other hand, scholars of settlement agreements might argue that settlement terms evidence only the value that the respective parties placed on *not litigating* the case, and that many factors influence parties' relative preferences for pushing cases to trial. I do not attempt here, however, to resolve the debate surrounding the significance of settlement terms.

Second, settlement agreements often will contain a confidentiality provision by which the parties agree not to reveal information learned during discovery. The fact of the confidentiality agreement, of course, has no bearing on the merits, nor does it convey any information about public health and safety. Rather, the only thing that the public would learn from reading the confidentiality provision is confirmation that it exists.

Obviously, what settlement secrecy critics want to see is not the confidentiality provision itself but the information it protects. Secrecy critics view confidentiality provisions as defendants' primary tool for "burying" the information that litigants uncover through discovery.

Accordingly, critics of court secrecy frequently urge litigation reforms that would pierce contractual confidentiality provisions by limiting their enforcement.

There is merit to reforms that would prevent litigants from agreeing to keep silent about ongoing health and safety hazards, although the matter is not entirely without debate. We need not resolve that debate here, however, because even if it were normatively clear that parties should not be able to contract for or enforce promises of confidentiality, the law of contract formation and enforcement is generally a state substantive law issue. Thus, any effort to limit or otherwise reform the enforceability of private confidentiality contracts via the rules-making process would a face serious – if not crippling – challenge of locating authority for the reform under Rules Enabling Act.

3. *Secret Settlements ≠ Secret Cases*

Lastly, it is important to recognize that, even when a settlement is secret, the lawsuit itself is almost always public. I do not have statistics for unfiled private settlement agreements. But, according to the FJC progress report, of the 379 cases with sealed settlement agreements, the complaint was available in 375 of them. In only one of the "special public interest" cases was the complaint also sealed.

The fact that the lawsuits and the pleadings in them are public raises questions about the impact of sealed (or secret) settlements on the public's access to health and safety information associated with those cases. Many of the articles criticizing settlement secrecy seem to assume not just that settlement agreements contain crucial bits of health and safety information, but that they are *unique* sources of that information. The comments in the NPR story, for example, imply that the settlement agreements in the 50 prior Ford/Firestone suits comprised a unique well of information regarding rollover accidents and tire safety generally, and that the non-public nature of the settlement agreements left the public blind to this particular danger. But while the settlements were not public, the lawsuits that led to them were. As pointed out in the NPR story, at least 50 lawsuits had been filed *before* the Terraszas accident. The NPR story, however, does not discuss what notice the fact of those lawsuits gave to the public, nor does it discuss what dangers were mentioned in the complaints in those 50 cases.

C. <u>*Summary*</u>

Placing limits on sealed settlement agreements would likely have very little impact on settlement secrecy overall. Most "secret" settlements are secret not because the court seals them, but because the parties *never file* them with the court in the first place. When they are filed, settlement agreements likely contain no information about health and safety, although some view the settlement amount as an indicator of the merits. And finally, the sealing order typically covers only the settlement agreement and related papers, not the whole case. Thus, the public still has access to the complaint and other merits-related components of the case file.

What really seems to be driving the settlement secrecy movement is a belief that the public should have access to information obtained during the course of discovery. In other words, secrecy critics do not think that courts should allow or enforce contracts by which private litigants agree not to disclose what they learn during the course of a lawsuit. It is crucial to recognize, however, that the court's sealing order plays *no role whatsoever* in that process – the sealing order might conceal the fact of the confidentiality provision, but it does not supply the substantive basis for enforcing it. Stated otherwise, even if a filed settlement agreement is public, the fact of making it public does not pierce the confidentiality provision. While critics understandably might desire substantive reforms that make confidentiality contracts unenforceable, it is difficult to locate the power to enact those reforms in the rule-making power conferred under the Rules Enabling Act.

II. Analysis of Complaints in Cases with Sealed Settlement Agreements

The remainder of the memorandum follows up on a question raised above. Many are skeptical about the asserted link between sealed settlements and public awareness not just because of the view that settlements contain no health and safety information, but because of the view that there are other sources that adequately – if not better – convey that information. Specifically, many would contend that the typical complaint puts the public on alert of whatever health and safety issues might be associated with the suit.

To test that contention, I reviewed the complaints in 83 cases with sealed settlement agreements. My objective was to try to assess whether these complaints conveyed sufficient information about the nature of the health and safety risks involved to put the public on notice. As discussed below, my overall impression is that, with only two exceptions, the claims and allegations in the complaints were sufficiently clear and detailed to alert the public to whatever health and safety issues were associated with those cases.

A. *Methodology*

My analysis attempts to assess what information was available in the complaint. While other case documents would be expected to convey additional information, the complaint is a natural focal point for examining alternative sources of information about health and safety hazards.[2] As the initial document filed in the case, the complaint provides notice to the public at the *start* of the suit, rather than the end. In addition, the complaint is a paradigm source for information about a case because it sets forth the plaintiff's general claims and allegations. As such, it is a document that individuals ordinarily would be expected to look to for information about possible hazards.

[2]Practical issues also contributed to the decision to focus on complaints. The case files are located either with the originating court or in regional archives scattered throughout the country. Thus, reviewing the entire case file for each of the 83 cases would have resulted in prohibitive shipping or travel costs.

This study builds on the FJC progress report results. The FJC study listed six categories of "special public interest" cases: (1) environmental; (2) product liability; (3) professional malpractice; (4) public party defendant; (5) very serious injury; and (6) sexual abuse. As of the September 8 progress report, the FJC had identified 109 cases as having a sealed settlement agreement and being coded for one or more of these special public interest factors. For this study, I have excluded those cases in which "public party defendant" was the only special public interest factor. For each of the remaining 83 cases, I summarized the claims asserted and the plaintiff's allegations, paying particular attention to allegations that describe the underlying events. I then sorted those case summaries according to the primary nature of the suit as follows:

1. Product alleged to have caused personal injury (33 cases);

2. Civil rights violation alleged to have caused personal injury (including sexual abuse or harassment (9 cases);

3. Private defendant sexual abuse or harassment (3 cases);

4. Environmental damage (2 cases);

5. General tort alleged to have caused personal injury (30 cases); and

6. Cases that allege financial injury only (6 cases).

The case summaries are attached at the end of the memorandum as an Appendix.

B. *Content of Complaints*:

My overall impression is that the complaints contain sufficiently detailed allegations about the nature of the risk to put the public on notice of whatever health and safety issue might be involved. I couch my findings in terms of my "impression" rather than a "conclusion" simply because I have no external standard against which to measure the detail of complaints. Rule 8(a), of course, sets forth the minimum requirement – generally referred to as "notice pleading" – that complaints must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." But complaints vary dramatically in the degree to which they surpass notice pleading, and there is no scale that describes these varying levels of detail. Thus, the most one can offer is a gestalt impression of whether complaints communicate much about whether the defendant – through its actions or products – poses a health or safety risk generally.

Accepting this limitation, my review of the complaints in these cases leads me to believe that, on the whole, they substantially communicate health and safety risks to the public. First, they are very often quite detailed in their allegations. As discussed below, this is particularly true in the suits alleging a civil rights violation or death or serious physical injury. Second, even the least detailed complaints communicate what I consider to be the core pieces of information: they

describe the incident, they identify a source of the problem, and they describe the harm that resulted. This information supplies substantial notice to the public about potential health and safety risks.

1. *Products Liability*

The products liability complaints contain the greatest variation in how specifically they identify and detail potential health and safety risks. All of them, however, put the public on notice of the hazard posed by the product at issue.

At one end of the spectrum, some products liability complaints do little more than describe an accident, identify a product that was involved, and accuse the product as being defective (and the cause of the accident). In Chilbeck v. Deere & Co., for example, the complaint states that Mr. Chilbeck was operating his Deere compact utility tractor, that it tipped over, and that he was killed when he became trapped between its rollover cage and the ground. The complaint alleges that the tractor had a design defect and that Deere failed to properly warn or instruct consumers. The complaint, however, does not identify what that defect was, nor does the complaint say what Deere was supposed to warn or instruct about. Similarly, in Hemphill v. Helmtech, the complaint states that Mr. Hemphill was wearing a helmet made by the defendant while riding his motorcycle, that he was involved in an accident, and that he sustained head injuries because the helmet failed. The complaint alleges that the helmet failed because it was defectively designed and manufactured, but does not specify what that design or manufacturing flaw was.

At the other end of the spectrum, some products liability complaints specify a particular flaw in the product and how that flaw caused or contributed to the accident. Many complaints identify a specific product defect. In Haider v. American Honda, for example, the complaint identified a specific risk – that the car would split if hit from the side – and the defect responsible for the risk – the use of a spot-welded two-piece floor panel instead of a single-piece floor panel. And in Lamney v. Ford Motor Co., the complaint attributed a car accident involving a Lincoln Town Car to a defective gear box design that allows the gear shift to slip out of the "park" position. In the drug context, the complaint in Wilson v. Eli Lilly Co., a suit arising out of a suicide, recited a lengthy and detailed narrative about the history of Prozac and scientific literature that demonstrated a connection between Prozac and suicidal ideation.[3]

Between these two extremes lies a middle level of detail, as illustrated by Rzepka v. DaimlerChrysler Corp.. The complaint in Rzepka alleges that Mr. Lindeman was driving his

[3]Wilson may also exemplify products liability areas in which prior events, usually but not always prior lawsuits, have thoroughly exposed and document the risk. For example, twelve of the thirty-three products liability cases in our sample are asbestos suits brought on behalf of exposed workers. See Asbestos MDL Cases (VA-E). Few if any would suggest, however, that the sealed settlements in those twelve cases had any impact on public awareness of the health hazards associated with asbestos.

1996 Dodge Caravan with his wife in the front passenger seat, that they were wearing their seat belts, that they were involved in an accident which caused the minivan to rollover, and that Ms. Lindeman was fully ejected from the minivan while Mr. Lindeman was partially ejected. The complaint asserts that the minivan was defectively designed because it was incapable of maintaining structural integrity and restraining passengers during a predictable event like a rollover accident. The complaint specifies that the nature of the defect was that the roof and windows were not strong enough to maintain their integrity during a rollover accident, and that the seatbelts failed to keep them from ejecting, although it does not identify any particular weakness in the roof, windows, or seatbelts. The complaint in White v. DaimlerChrysler Corp., a rollover suit involving a 1996 Jeep Grand Cherokee, is very similar in its allegations regarding roof, window, and seatbelt defects in a rollover accident in which passengers were ejected.

Certainly, the second and third categories of complaints provide more notice than the first category. The Lamney complaint, for example, alerts owners of Lincoln Town Cars of a very specific risk – that their cars might slip out of "park." Similarly, the Haider complaint alerts Honda Accord owners that their cars might split in half if hit from the side because Honda used a less sturdy floor panel to shave costs. There is no question that cases like these that so precisely identify a defect put the public on notice of how these products might cause them injury. But I think the same can be said for the complaints in Rzepka and White, which alert the owners of 1996 Dodge Caravans or 1996 Grand Cherokees that their vehicles might not protect them in a rollover accident because their roofs, windows, and seatbelts might not hold. It is true that these complaints do not tell the owners of these vehicles *why* their seatbelts don't hold or *how* the roof should have been designed. But they do communicate the far more relevant and important general concern – that the product might not be as safe as it appears to be.

The question, then, is whether the least-detailed complaints – those that do little more than identify the product and associate it with an accident – give the public sufficient notice of health and safety issues. Here too, I think they do. The most crucial factor is that even the barest product defect complaints specifically identify the product at issue and describe how the plaintiff got hurt. While these complaints may not alert the public to *why* the products failed, they do alert the public that the products did fail and the injuries that ensued. Anyone owning the model of Deere tractor involved in Chilbeck or the motorcycle helmet involved in Helmtech would know, at least, that someone else had become hurt while using that product.

In assessing how well complaints notify the public of health and safety concerns associated with product liability cases, it is crucial to recall that, in our context, the analysis is a comparative one. Specifically, the question is not whether complaints give perfect notice, but whether something in a sealed settlement agreement would have given better notice than the complaint. As discussed above, there is little reason to think that settlement agreements say *anything* about the merits of the suit, let alone contain detailed findings about the precise ways in which the product at issue is defective. Rather, the available evidence suggests that even the least detailed product liability complaints give the public far more notice or information about

health and safety risks associated with that product than anything covered in the settlement agreement.

2. *Other Categories of Health and Safety Cases*

For the other categories of health and safety cases, the complaints appear to consistently communicate the most valuable details impacting on public health and safety.[4]

In the civil rights suits and sexual assault suits, for example, a wide range or wrongdoing is alleged, ranging from fatal police shootings to sexual abuse by school employees or contractors. The complaints in some of these cases describe the alleged wrongdoing and resulting injury almost too fully. In both Doe v. Florence School District #1 and Doe v. City of Memphis Board of Education, for example, the complaints describe incidents of mental and physical abuse in lengthy and graphic detail. Other complaints, of course, are more general; Shrader v. Fletcher Mallard, for example, alleges that three city employees forced her to perform oral sex on them while she was being detained in the city jail, but does not graphically detail the incident. Crucially, however, the complaint in every one of these cases specifically named the alleged wrongdoer, described what that person was alleged to have done, and identified the harm that resulted. Anyone reading these complaints would have notice of the threat that this person might pose to them or others.[5]

Similarly, the complaints consistently communicate the most valuable details in suits alleging malpractice or other tort leading to serious harm. Here too, the types of incidents varied greatly, from medical malpractice to automobile accidents to attempted suicides at residential care facilities. In all of these cases, however, the complaint identified the person alleged to have been negligent (or reckless), what they did (or failed to do), and the harm that resulted. In most of these cases, the "story" behind the case was simple. In Washington v. Kindred Nursing Centers, for example, a patient died when a nurse put a feeding tube down the patient's airway instead of his esophagus. In Cole v. PGT Trucking, Inc., a driver and passenger died when a truck crossed the center line and hit their car. To the extent that the public has an interest in learning about incidents of this nature, the filing of the suit and the core details contained in the complaint appear to satisfy it.

Many if not most of the complaints in the serious injury cases, however, go beyond general allegations. In Harper v. Gordon, for example, the complaint contained the additional detail that the driver of a school van that crashed had an arrest record for controlled substances.

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[4]Six of the 83 cases did not involve a health and safety risk. While they were included in the study because they were coded as satisfying one of the health and safety factors (e.g., professional malpractice), the only redress sought was for financial loss.

[5] Indeed, in two of the suits – Doe v. Holcomb and Martin v. Davenport AME Zion – prior criminal convictions for the conduct giving rise to the civil suit would also have supplied notice of the wrongdoing to the public.

In Reed v.Corrections Corp. of America, a suit arising out of an attempted suicide at a juvenile detention center, the complaint chronicles the "warning signals" that the center's employees should have recognized as signs that the patient might attempt suicide. And in In re Amtrak, a consolidated action arising out of a passenger train crash, the complaint contains detailed allegations regarding the safety and equipment problems that were alleged to have led to the accident.

Lastly, the complaints in the two cases alleging environmental damages also notify the public of the health risk at issue. Both complaints specifically identify the hazardous pollutants at issue and the property that is polluted or at risk.

3. *Two Cases Where the Complaint Does Not Adequately Communicate the Health and Safety Issue*

I did identify two cases where the public could not reasonably have learned of any public health or safety issue associated with the case by reading the complaint. First, the complaint in Farr v. Newell Rubbermaid was sealed by the court along with the rest of the pleadings. Thus, it obviously cannot serve as an alternate public resource to the settlement agreement. Second, the complaint in Hays v. Martinengo does not educate the public about any safety issues. The complaint in that case is an admiralty petition that seeks to exonerate the petitioner from liability. The only allegations in the complaint regarding the maritime accident at issue are that the petitioners were driving their boat safely. The complaint/petition contains no allegations from the respondents that would identify any reason why the petitioners might be a safety hazard to other boaters in the future.

Case Profiles
(By Nature of Claim)

1. Product Alleged to Have Caused Personal Injury: (33 cases total)

Farr v. Newell Rubbermaid, Inc. et al., 00-CV-997 (AL-N)
The court has sealed the pleadings in this case. Available documents indicate that the suit is a product liability action involving a minor, but they do not identify the product or describe the minor's claims or injuries.

Jordan v. API Outdoors, Inc., 00-CV-2059 (AL-N)
This suit arises out a climbing accident. In his complaint, the plaintiff alleges that he was climbing a tree when his climbing belt failed, causing him to fall and sustain serious injuries. He asserts claims for product liability, warranty, and negligence. He alleges that the climbing belt was defective, lacked necessary safety features, and lacked suitable warnings. The complaint does not specify the nature of the alleged defect other than to allege that the belt contained substandard and unsuitable components.

Cieslinski v. Taurus Int'l Mfg., Inc., 00-CV-712 (AZ)
This product liability suit arises out of an alleged accidental firearm discharge. The complaint alleges that the plaintiff was shot in the stomach when his gun discharged. The complaint asserts claims against the company that manufactured the pistol and a related company that performed service on it. The complaint alleges that the pistol had unspecified design and manufacturing defects that caused it to accidentally discharge even though it "was being carried properly and in the safety position."

Hemphill v. Helmtech, Inc., 6:00-CV-67 (FL-M)
This product liability suit arises out of a motorcycle accident. The complaint asserts that the plaintiff was wearing a helmet manufactured by the defendant when he was involved in an accident with a car. The complaint asserts that the helmet "failed or otherwise malfunctioned" due to unspecified design defects, leading the plaintiff to sustain severe head injuries.

Russell v. Baxter Healthcare Corp., 95-CV-1220 (FL-S)
This is a blood products suit asserting claims for negligence, product liability, and breach of warranty. The complaint alleges that the defendant's blood product was contaminated with hepatitis. It alleges that the defendant accepted blood donations from unsafe donors, failed to screen for hepatitis, and failed to warn the users of its products. The complaint specifically cites to a Center for Disease Control report warning about hepatitis viral infection associated with this particular blood product.

Rzepka et al. v. DaimlerChrysler et al., 5:00-CV-23 (FL-N)
This suit arises out of a minivan rollover. The driver and passenger were ejected and killed. The complaint asserts claims against DaimlerChrysler and certain component manufacturers for

product liability and negligence. The complaint alleges that the roof, windows, and seatbelts were insufficient to keep passengers from being ejected during a rollover accident. The complaint alleges that the plastic roof collapsed, that the windows burst, and that the seatbelts gave, but does not identify any specific defect that led to those events.

Rando v. Slingsby Aviation Ltd., 98-CV-2224 (FL-S)
This suit arises out of an Air Force training plane crash when the engine stalled. The complaint asserts various product liability and negligence claims against the manufacturer of the plane and/or its components. The complaint specifically identifies over a dozen problems with the plane that potentially contributed to the crash, most of which dealt with the fuel system (i.e., engine and fuel system were incompatible; fuel lines ran too close to warm areas of the engigne, causing vapor lock)

Regalado v. Airmark Engines, Inc. et al., 99-CV-7579 (FL-S)
This suit arises out of a crash of an airplane owned by the Dominican Republic. The complaint alleges that the defendants performed faulty repair work on the airplane's engine and fuel system, primarily by installing the wrong fuel pump. The complaint asserts claims for negligence and product liability (i.e., pumps should not be same size and should be better labeled).

Acevedo v. Airmark Engines, Inc. et al., 99-CV-7580 (FL-S)
This suit raises the same claims and allegations as the Regalado suit directly above.

Shinskie v. McDonnell Douglas Corp., CIV00-280-S (ID)
This product liability suit arises out of a helicopter crash. The complaint alleges that the helicopter was being used to string fiber optic cable along power lines when the engine suddenly lost power. The helicopter crashed, killing the plaintiff. The complaint asserts claims for product liability, tort, and warranty against the manufacturer of the helicopter, the manufacturer of the engine, and the operator of the helicopter. The complaint alleges that the helicopter was defective in that it failed to produce sufficient power for flight. In particular, the complaint alleges that the fittings and/or connections to the fuel system vibrated loose, permitting air into the fuel lines that caused the engine to fail. The complaint specifically alleges that the engine manufacturer knew that the fittings were insufficient and that its engines were susceptible to developing air in the fuel system.

Parks v. Alteon, Inc. et al., 1:00-CV-00657 (NC-M)
This is a negligence, breach of warranty, and fraud case that arises out of a diabetes clinical drug study at the University of North Carolina. The plaintiff was a participant in a controlled clinical trial for the diabetes drug "Pimagedine." His health deteriorated during the course of the clinical trial. In this suit, he alleges that the defendant-manufacturers put the drug into clinical trial without adequate pre-testing, that the clinical trial was negligently structured and monitored, that the drug was not fit for its intended purpose, and that the defendants lied about the safety of the drug both before and during the clinical trial. The complaint contains detailed allegations

regarding the effect of the drug on the plaintiff's body chemistry and the resulting side effects, including eventual kidney failure.

Wilson v. Eli Lilly & Co., 02-CV-10 (NC-W)
This suit arises out of a suicide by a woman taking the drug Prozac. The complaint alleges that the Prozac caused the woman to become suicidal and asserts claims for product liability and negligence. The complaint contains a lengthy and detailed narrative about the history of Prozac, including several paragraphs describing how, in 1990, "the issue of Prozac-induced suicidal ideation hit the scientific literature."

Williams v. Ford Motor Co., 2:00-CV-3398 (SC)
This suit arises out of a rollover accident. The complaint alleges that the plaintiffs were driving/riding in a 1993 Ford Aerostar van when there was a "pop" and the van veered. The driver took "emergency corrective steering action" to straighten the vehicle, which then caused the van to flip over and roll. The driver and one passenger were killed. Another passenger was hurt. The complaint asserts claims for product liability, negligence, and breach of warranty. It alleges that the van's design was defective because it allowed for too much yaw motion when the van was fully loaded with passengers. It further alleges that the roof support pillars and the restraint system were insufficient either to keep passengers from being thrown in a rollover accident or to keep the roof from collapsing and crushing any passengers who remained in the van.

White et al. v. DaimlerChrysler Corp., 2:00-CV-3803 (SC)
This suit arises out of a rollover accident. The complaint alleges that the plaintiffs were driving/riding in a Jeep Grand Cherokee when it was struck by another vehicle, causing it to rollover. Three of the passengers were ejected from the vehicle and died. Two others were seriously injured. The complaint asserts claims for product liability, negligence, and breach of warranty, generally alleging that the Jeep had a propensity to rollover and that the roof structure and restraint devices were insufficient to keep passengers from being ejected during a rollover.

Lammey v. Ford Motor Co., 99-2156-D (TN-W)
This is a product liability and breach of warranty action arising out of an accident involving a Lincoln Town Car. The complaint alleges that the car began moving even though the engine was off and the gear shift was in the "park" position. When it did so, the car ran over the owner's small child. The complaint asserts both that the car was defective when designed and manufactured and that Ford knew about the danger because this gear box design had a history of slippage and similar accidents. Specifically, the complaint alleges that Lincoln Town Cars "have a documented history" of failing to adequately and reasonably maintain and hold the vehicle in a "park" position.

Bui v. DaimlerChrysler Corp., 2:02-CV-612 (VA-E)
This suit arises out of a church van accident. The complaint alleges that the accident occurred because the rim of the left rear wheel on the Dodge van separated from the wheel hub. This

caused the tire to come off, causing the van to overturn and killing at least one of the passengers. The complaint identifies the wheel and tire by model number, but does not specify the model of the Dodge van. The complaint asserts various state law claims for products liability, negligence, and breach of warranty.

Haider v. American Honda Motor Co., 1:00-CV-2079 (VA-E)
This suit arises out of an automobile accident. The complaint alleges that the plaintiff was driving his 1985 Honda Accord Sedan LX when it was struck in a "T-bone" fashion. The complaint alleges that the vehicle split in half. His wife and son were thrown from the car and died. The complaint asserts claims for product liability and negligence. It alleges that the car was defectively designed; specifically, it alleges that Honda used a spot-welded two-piece floor panel – instead of a single sheet floor panel – to save money, even though it knew that the welded two-piece floor panel would be much weaker and more likely to split in an accident.

Cousino v. Sunbeam et al., 2:00-CV-876 (VA-E)
This suit arises out of an electric blanket fire. It seeks various compensatory and punitive damages, although it does not appear that anyone was seriously hurt. The complaint is very specific about the alleged design defects of the electric blanket. It specifically identifies (1) the wiring failure that initially causes the fire, and (2) the reason why the existing safety circuits were insufficient to redress that problem. The complaint asserts claims for product liability, negligence, and breach of warranty.

ASBESTOS MDL CASES: 2:00-CV-3931; 2:00-CV-3981; 2:01-CV-4223; 2:01-CV-4291; 2:01-CV-4343; 2:01-CV-4451; 2:01-CV-4787; 2:01-CV-4977; 2:01-CV-5007; 2:01-CV-5427; 2:01-CV-5431; 2:01-CV-5511 (VA-E)
These 12 cases all assert product liability and negligence claims on behalf of persons with asbestosis or other asbestos related diseases who allege to have been exposed to asbestos at the workplace. The complaints all adopt by reference various counts from the Aug. 20, 1986 Master Long Form Complaint in the E.D. Pa.

Green v. Ford Motor Co. & U-Haul Co., 3:00-CV-49 (VA-W)
This suit arises out of a rental truck accident. The complaint alleges that the plaintiff had rented a Ford truck from U-Haul. The truck ran off the road and turned on its side, at some point bursting into flames. The driver and one passenger died; one other passenger survived but was burned. The complaint asserts claims for breach of warranty, alleging that the truck's design dangerously placed a vent pipe and brake line connection too close to the fuel tank, such that during the accident the vent pipe punctured the fuel tank. (Ford cross-claimed against U-Haul for negligence and spoliation, alleging that U-Haul destroyed the truck without giving Ford a chance to inspect it.)

Carey v. Ford Motor Co. & U-Haul Co., 3:00-CV-50 (VA-W)
This complaint arises out of the accident described in Green v. Ford above on behalf of the passenger who died. The complaint contains essentially the same claims and allegations, although it does add claims for negligence and breach of duty to warn.

Chilbeck v. Deere & Co., C01-5287 (WA-W)
This product liability suit arises out of a tractor accident. The plaintiff's husband was killed when his tractor tipped over and pinned the driver to the ground. The complaint generally alleges that the tractor was defectively designed and lacked adequate warnings and instructions, but does not offer any specific detail about why the tractor posed a rollover danger.

2. Civil Rights Violation Alleged to Have Caused Personal Injury (including Sexual Abuse or Harassment): (9 cases total)

Shrader v. Fletcher Mallard, City of Attalla, et al., CV-00-1050 (AL-N)
This suit arises out of an alleged incident of sexual abuse at a city jail. In her complaint, the plaintiff alleges that, while being held in the city jail, three agents/employees of the city forced her to perform oral sex on them. She asserts various federal civil rights claims, and appears to assert state claims as well. The jail and individual defendants are identified by name.

Livingston v. City of Attalla, Fletcher Mallard et al., CV-00-1989 (AL-N)
This suit arises out of an alleged incident of sexual abuse at a city jail. In her complaint, the plaintiff alleges that, while being held in the city jail, several agents/employees of the city sexually abused her. She asserts various civil rights and tort claims under federal and state law. The jail and two of the individuals are identified by name.

Runnels v. City of Miami et al., 00-CV-2930 (FL-S)
This is a § 1983 suit. The complaint alleges that a police officer shot the decedent during a situation in which the police (including hostage negotiators) had been called to a house to address a possible suicide attempt. The complaint asserts that the shooting was unnecessary because the decedent had not committed any crime and was not a threat to anyone but himself. The complaint asserts a range of civil rights claims including excessive force, deliberate indifference, and municipal liability under policy or custom.

Solomon v. City of Sterling Heights, 98-7390 (MI-S)
This civil rights action arises out of conspiracy between a newspaper and the local police. The complaint alleged that the plaintiff was part of a picket line in support of striking newspaper workers. It further alleged that a group of local police officers had entered into a conspiracy with the newspaper to intimidate the strikers and discourage picketing. In the particular incident in question, the police officers assaulted the plaintiff by beating him up, using tear gas, and spraying pepper spray directly into his eyes.

Note: This case went to trial. The jury found for the plaintiff on all counts and awarded $2.5 million in compensatory and punitive damages. The parties later settled privately.

Smith v. City of Detroit et al., 00-40273 (MI-E)
This case arises out of a fatal police shooting. The complaint asserts that the plaintiff was shot five times – once in the back of the heard, once in the back, twice in the back of the left arm, and once in the front of the left ankle – during an attempt to arrest him. The complaint alleges that the plaintiff was shot despite the fact that he did not pose a threat of harm and was complying with the attempt to arrest him. The complaint identifies the arresting officers by name and badge number. The complaint asserts various federal and state civil rights and tort claims.

Doe v. Florence Sch. Dist. #1, C/A 4:00-1007-24 (S.C.)
This case arises out of the alleged rape of a mentally handicapped student by two school security officers working for a contractor retained by the school district. The complaint asserts a wide range of federal and state law claims. The complaint is quite detailed, both in its description of the rape, its allegations regarding negligent oversight of the student population generally, and regarding what the school district knew about the rape and what the school district knew or should have known about the danger these security officers posed based on prior events at the school and prior sexual misconduct at other schools.

Doe v. City of Memphis Bd. of Educ. et al., 99-CV-3075 (TN-W)
The suit involves allegations of mental and physical abuse at an elementary school. The complaint alleges that the school placed the plaintiff in a special education classroom where she was emotionally and physically abused by her teachers. The original and amended complaints include over twenty paragraphs setting forth details of the alleged harassment. The allegations also include charges of sexual touching. The complaint asserts various state law claims (primarily negligence and battery) and civil rights claims arising out of the alleged harassment and the school's failure to prevent or remedy it.

C.W. v. City of Memphis Bd. of Educ. et al., 99-3076 (TN-W)
The allegations and claims in this suit substantially track those from 99-CV-3075.

Doe v. Holcomb and Suffolk City School Board, 2:00-CV-597 (VA-E)
This is a molestation suit. The complaint alleges that a school bus driver sexually molested a Head Start student. The complaint asserts federal civil rights claims and various state law tort claims. The complaint indicates that the bus driver pleaded guilty to criminal charges of assault and battery.

3. Private Defendant Sexual Abuse or Harassment: (3 cases total)

Martin v. Davenport AME Zion et al., CV-99-PT-1908 (AL-N)
This tort suit involves claims that a pastor sexually abused a minor. The complaint alleges that the pastor fondled the minor while she was staying at the pastor's house. The complaint asserts tort claims against the pastor and against the church for negligent entrustment.

This civil action followed a criminal action against the pastor. A copy of the criminal indictment and his criminal disposition (guilty plea) are attached to the complaint. The indictment discloses additional details regarding the nature of the molestation.

Hale-delaGarza v. Spartan Travel, Inc., 1:01-CV-557 (MI-W)
This is a sexual harassment suit. The complaint contains a long and detailed recitation of harassing incidents of unwelcome advances, unwelcome touching, and inappropriate comments. The complaint asserts federal and state law discrimination claims and state law claims for emotional distress and battery.

Steen v. United States of America, 4:00-CV-40 (ND)
This is a sexual harassment suit. The complaint alleges – but does not describe in detail – that a civilian contractor made unwelcome sexual advances and sexually assaulted the plaintiff on the Minot Air Force Base. The complaint asserts state law claims for intentional infliction of emotional distress, assault and battery, and negligence.

4. Environmental Damage: (2 cases total)

Lambert Corp. v. Water Bonnet Mfg., Inc., 6:00-CV-10 (FL-M)
This suit arises out of a hazardous waste clean-up on private property. The current owner discovered pollutants (napthalene, xylene, benzene, and toluene) on its property. This CERCLA actions seeks to transfer the cleanup costs to the prior owners.

Weber et al. v. Rivanna Solid Waste Auth., 98-CV-0109 (VA-W)
This is an environmental clean-up suit brought by persons who live next to the Ivy Landfill in Albemarle County, Virginia against the local waste authority, the City of Charlottesville, and Albemarle County. The complaint alleges that the landfill is an open dump that is discharging hazardous pollutants into surface water, streams, and groundwater. The complaint specifically identifies the various pollutants and the means by which they are contaminating the water and environment generally. The complaint (and amended complaints) asserts claims under CERCLA, RCRA, and state law for nuisance, negligence, trespass, breach of contract, and violation of state water laws.

The case file includes a copy of a lengthy settlement agreement between the majority of the plaintiffs and the defendants. It addresses restrictions on continuing operations, monitoring,

remedial measures, and some minor compensatory claims. The plaintiffs that are not parties to this agreement appear to have entered into separate compensatory settlements.

5. General Tort Alleged to Have Caused Personal Injury: (30 cases total)

Desanto v. Howard et al., CV-00-171 (AL-N)
This tort suit arises out of an incident on a Northwest Airlines flight involving an intoxicated adult and a child traveling alone. The complaint alleges that Jessica DeSanto, age 7, was traveling alone and originally seated in the rear cabin. The flight attendants moved her to an empty seat in first class in front of defendant Howard, whom the complaint alleges was visibly drunk. The complaint alleges that Howard grabbed and touched DeSanto's arms, legs and hair in an uninvited and unwarranted manner, ultimately leading the flight attendants to move her back to coach (where Howard allegedly walked back to harass her later). The complaint asserts claims for negligence against Howard, Howard's employer, and Northwest Airlines.

Cole v. PGT Trucking, Inc., CV-01-498 (AL-N)
This suit arises out of a car-truck accident. In their complaint, the plaintiffs allege that the defendants' truck crossed the center line and hit their car. The car's driver and one passenger died; another passenger lived but was badly hurt. The complaint asserts claims for negligence and negligent supervision and training.

In re Amtrak Sunset Train Crash, 1:94-CV-5000; 1-94-CV-5015; 1:94-5017 (AL-S)
These three cases are part of an MDL proceeding arising out of an Amtrak passenger train crash near Mobile, AL. The Joint Statement of Facts submitted by Liaison Counsel alleges that a barge struck the railroad bridge, causing a girder to fall onto the railroad tracks. The Amtrak train hit the girder and was derailed. Forty-seven people died in the accident, and many more were injured.

The complaints filed by the individual plaintiffs generally assert three types of claims. First, they allege that the barge was operated negligently and without proper equipment and staffing. Second, they allege that the railroad/bridge owner failed to maintain and equip the bridge with safety warnings and devices and failed to warn Amtrak of the alleged safety hazards. Third, they allege that Amtrak was negligent by operating the train in ways and on tracks that they knew or should have known were hazardous. The barge, railroad, and train defendants assert various claims against each other as well.

Jabs v. Manatee Mem. Hosp., 8:00-CV-420 (FL-M)
This suit arises out of an emergency room delivery. The delivery and post-delivery care were complicated and the baby suffered brain damage. The child is now profoundly disabled. The complaint describes the care given and the procedures performed both during and after delivery in considerable detail.

Sosa v. American Airlines, Inc., 97-CV-3863 (FL-S)
This suit arises out of a plane crash in the Andes mountain range in Colombia. The complaint generally alleges negligence, but specifically alleges that American Airlines knew or should have known that approach conditions and insufficient ground navigational aids created unique hazards, and that the defendants failed to take appropriate flight, training, and other precautionary measures accordingly.

Hays v. Martinengo, 99-CV-3000 (FL-S)
This admiralty jurisdiction suit arises out of a boating accident. The petitioners seek a declaration that they are not liable and/or limiting their liability to the post-accident value of their boat. The petition asserts that the Hays' boat collided with the Rodriguez's boat, killing Rodriguez and his wife and daughter. Because the petition is to limit liability, however, it alleges that Hays was operating safely. Nothing in the petition attempts to set forth any theory of how Hays might have been operating unsafely.

Strout v. Paisley et al., CV-00-107 (ME)
This tort suit arises out of an automobile accident. The complaint asserts claims against a trucking company and its driver for negligence. The complaint alleges that the truck driver caused the accident through an unsafe lane change. The complaint also alleges that the driver falsified his log book, operated under a suspended registration, and exceeded driving time limits.

Pasque v. Frederick & Yellow Freights System, Inc., 99-CV-75113 (MI-E)
This case arises out of an accident in which a truck ran over a bicyclist while the truck driver was making a right-hand turn. The complaint generally alleges that the driver was negligent and that the trucking company negligently entrusted its vehicle to a person it knew or should have known had a history of (unspecified) unsafe driving practices.

Parkhill v. Starwood Hotels & Resorts Worldwide, Inc., 00-CV-71877 (MI-E)
The plaintiff in this case was a guest at the Westin Brisas in Ixtapa, Mexico. He sustained a spinal cord injury while swimming near the hotel and is now quadriplegic. He asserts various tort and fraud claims, primarily alleging that the hotel knew or should have known of the dangerous conditions based on prior incidents and failed to protect guests or warn them of the dangers.

Williamson v. Odyssey House, Inc., C99-561-JM (N.H.)
This is a negligence suit arising out of an attempted suicide. The complaint alleges that the defendant care facility negligently failed to place a resident on suicide watch or to "suicide proof" the resident's room, despite various incidents – detailed in the complaint – that evidenced severe depression and suicidal ideation.

Armstrong v. Correctional Med. Svcs., Inc., 00-CV-532 (N.H.)
This suit arises out of the death of a county jail detainee. The complaint alleges that the detainee suffered head injuries while in custody, and that the defendant – a private company that

contracted to provide medical services – failed to provide medical assistance. Instead, the complaint alleges, the private company walked the detainee to the exit door and told his parents to take him to the hospital, where he died. The complaint alleges that the private company had a custom/pattern/practice of denying necessary medical care.

Note: the court ultimately refused to seal the settlement agreement. But instead of then putting the settlement agreement in the case file, it returned it to the parties.

Washington v. Kindred Nursing Centers East LLC, 1:02-CV-260 (NC-M)
This suit arises out of a nursing home death. The complaint alleges that a nurse put a nasogastric feeding tube down the patient's trachea (instead of down the esphagus). The patient died as a result. The complaint asserts various state law claims pertaining to the patient's care and monitoring.

Billy Mack Carr v. Louisiana-Pacific Corp., 5:99-CV-23 (NC-W)
Billy Matthew Carr v. Louisiana-Pacific Corp., 5:99-CV-24 (NC-W)
Charlotte Carr v. Louisiana-Pacific Corp., 5:99-CV-25 (NC-W)
Gary Phillips v. Louisiana-Pacific Corp., 5:99-CV-26 (NC-W)
Ronald Carr v. Louisiana-Pacific Corp., 5:99-CV-27 (NC-W)
This consolidated proceeding of five suits arises out of an accident involving a logging truck and a passenger vehicle. The complaint alleges that a logging truck ran the passenger vehicle off the road and then turned over, at which point the logs crushed the passenger vehicle. Five people died. (The court's summary judgment order indicates that the driver took his eyes off the road to adjust his cassette tape player.) The driver pleaded guilty to five counts of misdemeanor death by vehicle.

The complaints assert state law claims for negligence and respondeat superior against the driver and employing companies. The complaint generally asserts that the driver failed to exercise due care under dangerous driving conditions and that his employers knew or should have known that he was unfit for the job based on his substandard driving record.

Delaney v. Stephens, M.D. et al., 3:00-CV-138 (NC-W)
This suit arises out of a delivery in which the doctors used a vacuum assisted delivery device. The complaint alleges that the baby was injured as a result, and asserts claims for negligence, negligent supervision, and emotional distress against the doctor and hospital. The complaint specifically alleges that the vacuum assisted delivery technique is disfavored in the medical community and that the defendants failed to disclose the risks and hazards when obtaining the mother's consent.

Mall v. United States of America, 1:00-CV-29 (NC-W)
This suit arises out of the death of a Veterans Administration hospital patient. The complaint alleges that the VA doctor who performed an initial gallbladder surgery on the plaintiff

negligently transected her common bile duct during surgery. The complaint further asserts that the VA doctors negligently failed to timely identify or remedy this complication.

Johnson v. Prime, Inc. et al., 8:00-CV-1523 (SC)
This suit arises out of an accident involving a tractor-trailer and three passenger vehicles. The complaint alleges that the passenger vehicles were stopped at a road construction point. It then alleges that the tractor-trailer ran into the line of passenger vehicles from behind, causing a pile-up and fire that killed all of the occupants, including the plaintiff. The complaint asserts various tort claims against the driver and his employer for negligence and improper hiring/training/equipment/supervision.

Reed v. Corrections Corp. of Am. et al., 00-CV-2473 (TN-W)
This suit arises out of an attempted suicide at a juvenile detention center. The Complaint alleges that the plaintiff's son, a resident at the juvenile center, was physically and emotionally abused by the staff. The complaint further alleges that the resident told staff he was considering suicide and attempted suicide several times before this attempt, in which he tried to hang himself. The complaint alleges that staff allowed him to be in a room with sheets and other items despite his suicide threats, and that they did not respond timely or appropriately when he did try to hang himself. The resident suffered brain damage and now needs twenty-four hour care. The complaint asserts a range of claims under state tort law and federal civil rights law, generally asserting that the defendants should have known that the resident was suicidal and failed to take appropriate preventive measures.

Warner v. Owens, 01-CV-2250 (TN-W)
This suit arises out of an accident involving two passenger vehicles. The complaint alleges that the defendant crossed the median and hit the car in which she was a passenger, causing her substantial injuries. The complaint asserts claims for negligence.

Harper v. Gordon, 02-CV-2347 (TN-W)
This suit arises out of an accident involving a child care facility van. The complaint alleges that the driver of the van ran off the road and hit highway structures, killing the plaintiff's son. The complaint asserts claims against the child care facility for negligence, negligent entrustment, and negligent supervision. The complaint generally asserts that the driver failed to exercise due care, that the van was improperly maintained and equipped, and that the facility should not have hired the driver due to a prior arrest record. An amended complaint later added the State of Tennessee as a defendant based on its alleged breach of a duty to prevent child care facilities from hiring people with criminal records.

Price v. Foster, 99-CV-549 (VA-E)
This is a wrongful death suit. The complaint alleges that defendants were digging along a utility easement outside a hospital. When they dug too deep, they severed an oxygen pipeline that served the hospital. The plaintiff was a patient at the hospital who subsequently died, allegedly from oxygen deprivation.

Alegre v. United States of America, 4:00-CV-074 (VA-E)
This suit alleged medical malpractice at a Veteran's Administration hospital. The complaint alleges that the plaintiff slipped into a coma after undergoing exploratory surgery at the hospital. It generally asserts that the hospital was improperly supervised and staffed, and that the hospital rendered negligent medical care because it failed to realize or correct the fact that the plaintiff was not receiving an adequate oxygen supply during or immediately after his surgery.

Jappell v. American Assoc. of Blood Banks, 1:01-CV-2228 (VA-E)
This is an AIDS blood transfusion case. The complaint alleges that The AABB, through its member blood bank at Arlington Hospital, negligently failed to screen an AIDS infected blood donor. The complaint alleges that the hospital allowed a patient to give blood, even though he was bisexual, had recently traveled to Mexico and Haiti, and had been ill. The blood was transfused to an infant born at the hospital, who was later diagnosed with AIDS at the age of nine and died at the age of thirteen.

Lohr v. Komatsu Electronic Materials, 00-CV-0225 (WA-E)
This suit arises out of an industrial accident. Three workers were severely injured when a pressure line burst, allegedly engulfing the workers in a cloud of toxic chemicals. The complaint alleges that the defendant was negligent because it knew that the pressure line that carried these hazardous chemicals was old and dilapidated, but nevertheless took no action to prevent the foreseeable risk that the pipe would rupture.

In re Arctic Rose LLC, C01-1360 (WA-W)
This admiralty suit arises out of the sinking of a fishing boat off the Pacific coast. The complaint asserts that thirteen of the lost crew members had filed written claim notices against the defendant. It invokes admiralty law and jurisdiction seeking an order exonerating it from or limiting its liability. Although the petition is to limit liability, we are provided a theory of possible wrongdoing because one state law complaint, attached to this admiralty suit, alleged that if the seas were calm, then the fishing boat was unseaworthy, but that if the seas were treacherous, then the company was negligent for sailing in dangerous waters.

6. Cases Alleging Financial Injury Only: (6 cases total)

Williams v. Feder et al., CV-02-188 (AL-S)
This is a legal malpractice action. The complaint alleges that the plaintiff hired the defendant law firm to represent her in a products liability/personal injury action against a drug manufacturer. The complaint further alleges that the law firm misled her about the value of her case and obtained a grossly inadequate settlement. The plaintiff asserts claims for legal malpractice, fraud, and negligent misrepresentation. Although this dispute flows from an allegedly botched product liability suit, the suit seeks compensation for financial injury only.

Ritchie v. Yanchunis, CV-00-1533 (AZ)
This is a legal malpractice action. The complaint alleges that the plaintiff hired the defendant law firm to represent her in a wrongful termination suit against her former employer. The complaint further alleges that the law firm missed the statute of limitations. The plaintiff asserts claims for legal malpractice, breach of contract, negligent misrepresentation, breach of good faith, and breach of fiduciary duty.

Island Developers, Ltd. v. Marvin Lumber and Cedar Co., 99-CV-2969 (FL-S)
This suit arises out of alleged defects in wood windows. The plaintiff, IDL, is a developer that has been sued by various property owners claiming that the wood windows in their properties are defective. In this action, IDL has sued the manufacture for indemnity, contribution, and breach of warranty. While the suit does allege a defective product, it claims financial injury only.

FFI Corp. v. Powers Fastening, Inc., 00-CV-968 (IN-S)
This is a warranty action. The plaintiff, FFI, manufactures and installs commercial grain dryers. The complaint alleges that FFI used a procedure developed by the defendant to mount and secure numerous grain dryers. When one of these grain dryers collapsed, FFI incurred substantial testing, remediation, and insurance expenses for the remaining dryers. FFI seeks compensation from the defendant for these financial injuries through various tort and warranty claims.

Northfield Ins. Co. v. Gordon, 02-CV-2503 (TN-W)
This is a declaratory suit that grows out of the Harper v. Gordon action discussed above (general tort causing personal injury). Gordon's insurance company seeks a declaration that it is liable under the policy it issued to Gordon because Gordon allegedly misrepresented who the actual operator of the child care facility was and misrepresented that she would perform background checks on employees, when in fact she did not. The complaint alleges that had Gordon performed a background check as promised, she would have discovered that the driver had a criminal conviction for drug possession.

Costco Wholesale v. Commonwealth Ins. Co., 2:98-CV-1454 (WA-W)
This suit arises out of a commercial building that sustained damage due to settling. In the initial complaint, Costco sued its insurers to recover under its policy for damage to the building and remediation costs. The insurers impleaded the architects and engineers as third-party defendants. Costco, the original plaintiff, then appears to have asserted claims against the third-party defendants under Rule 14(a).

Mr. COHEN. Thank you, Judge Kravitz.

Our final witness is Sherman Cohn, without an "e," professor at the Georgetown Law Center since 1965. Professor Cohn specialized in the fields of civil procedure, professional responsibility and legal issues of a complimentary alternative and integrative medicine, of which he also lectures at Georgetown Medical Center.

Before joining the Law Center faculty, he served as a clerk for Judge Charles Fahy of the D.C. Circuit and in the Appellate section of the Civil Division of the Department of Justice. He serves as the Administrator of Preview of U.S. Supreme Court cases from 1976 to 1979 as director of Continuing Legal Education of the Law Center from 1977 to 1984.

Thank you, Professor Cohn. Will you proceed with your testimony? And turn on your microphone?

TESTIMONY OF SHERMAN L. COHN,
GEORGETOWN UNIVERSITY LAW CENTER

Mr. COHN. Thank you, Mr. Chairman. Thank you for the invitation and the opportunity.

I came here with the idea that I would disagree with Judge Kravitz from his earlier testimony as I understood it. What he is talking about today I agree with, that this from the standpoint of discovery matters that are not brought to the judge's attention that a judge should not have to go through the thousands and sometimes hundreds of thousands of pages in discovery.

That is what plaintiff's counsel should be there to bring to the judge's attention. And it is up to plaintiff's counsel, as Mr. Kaster pointed out, to bring that to the attention of the judge.

I am just looking at it once it is at the judge's attention. I am also looking at it from the standpoint of the end of the case. When there is a settlement entered and a settlement that is conditioned upon secrecy and they ask for the Federal judge to put his imprimatur, the power of the Federal court behind that secrecy agreement.

In that situation, it is the defendant who has interest to keep the matter a secret for reasons that this Committee and the Senate Committee have often heard. The defense counsel wants to keep his client. The plaintiff has a pot of gold that would not be as high or possibly would not be as high, that is what the plaintiff is told.

And plaintiff's counsel gets a contingency fee based on the size of the pot of gold. Now, it may be that plaintiff's counsel is like Mr. Kaster and will let that go and be interested in the public interest. That has not been what I have seen on the occasions that I have seen it.

That quite often plaintiff's counsel is torn between the plaintiff's counsel interest in his or her own welfare and the greater welfare of society. In law school, we try to say that while you have a loyalty to your client and, yes, you have to stay in business; you got to pay your rent, things like that. But you also have a loyalty to society.

Where that doesn't occur and where the judge knows that there are issues of safety and health involved, then to then enter into a secrecy agreement which the judge signed so that behind it is the power of a sovereign United States, I think is wrong.

Now, I want to address for just a moment the question of where this belongs. My view is that this issue belongs here in Congress. This is a question of social value. And it is not just a question of procedure.

I would like to suggest that this comes very close to or into the category of effecting substantive law. And under the Rules Enabling Act, the Rules committee, no matter how wise they are, do not have power in substantive law.

That belongs to Congress so that the issue however it is resolved and here I join Abner Mikva in his views, that this is an issue of balancing of social values. And balancing of social values is a legislative matter and Congress should however you come out, is the place where this ought to be resolved.

Thank you very much for listening and I hope this is helpful to your consideration.

[The prepared statement of Mr. Cohn follows:]

PREPARED STATEMENT OF SHERMAN L. COHN

GEORGETOWN UNIVERSITY LAW CENTER

Sherman L. Cohn
Professor of Law

Testimony on Sunshine in Litigation Act of 2009, H.R. 1508

House of Representatives Committee on the Judiciary
Subcommittee on Commercial and Administrative Law
June 4, 2009

Thank you very much for the opportunity to testify on the subject of transparency in federal litigation, focusing on H.R. 1508, the "Sunshine in Litigation Act of 2009." I am on the faculty of Georgetown University Law Center, where for many years I have taught courses relevant to this subject, Civil Procedure and Professional Responsibility. The subject of secrecy orders comes up in each of those courses. Moreover, in the Civil Procedure course, we discuss the rule making authority of the United States Judicial Conference and the Supreme Court, under the Rules Enabling Act, the origins of which go back to 1934. I have had the honor on a few occasions to appear before the United States Judicial Conference, in the 1980s, and to serve as a consultant to the Federal Judicial Center, so I have had some acquaintance with the operation of each.

At Georgetown, we bring our first year students in early for an orientation. As a part of that orientation, we give the students an introduction to the ethics of being a lawyer. We do this because we believe that legal ethics is so important that the student should realize from day one that it pervades all that he or she will learn and later practice as an attorney. I have taught that introductory lecture for many years. I have used as my text a video created and narrated by Professor Stephen Gillers of the New York

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University School of Law. Professor Gillers for more years than either of us would like to recall has been one of the leaders in the field of the ethics of lawyers. This video, titled "Amanda Kumar's Case," concerns an allegation that a young girl, Amanda, was injured by a drug that was dangerous for children to ingest. Ms. Kumar is represented by two young lawyers who had just opened their own office and smelled a very nice contingency fee. While there are many ethical issues in the presentation, toward the end the drug company makes a very significant dollar offer, conditioned upon everyone, particularly Ms. Kumar and her attorneys, agreeing to a secrecy order. While the attorneys, of course, left it up to Ms. Kumar to accept or reject the offer, it was clear from their advice that they were eager for her to accept the offer. The last scene has Ms. Kumar agonizing. The money would be enough for her and her daughter to live quite well compared to their meager existence at that time. Yet, Ms. Kumar declined the offer. She stated that she could not live with herself, even in comparative luxury, knowing that the drug company was still able to dispense this drug for children and cause untold numbers of children to be injured and not be able to say anything to warn others of the danger.

We then lead this class of neophyte lawyers in a discussion of the interests involved: the defendant drug company who would like to continue selling the product; the defense lawyers who are interested in keeping the drug company or its insurer as a client; the plaintiff who will benefit handsomely; and plaintiff's lawyers who will receive a significant fee based on a contingency agreement. There is no one to raise the social values of the public, including the children who will be given this drug in the future, and

their physicians who will not know that this drug is inappropriate for children. To me, that is what the present hearing is all about.

This issue has been before the Congress for close to two decades. There have been several hearings before this House and the Senate. You have received a great deal of material and have heard from many compelling witnesses. There are now a number of law review articles written on the subject and I am sure that staff has collected them all for their and your benefit. Thus, there is very little that I can add.

One issue that is raised over and over is that this matter should be dealt with by the United States Judicial Conference as a part of its rule making power. I join the esteemed former member of this House and former chief judge of the District of Columbia Circuit, Abner Mikva, now teaching at the University of Chicago, in urging that the responsibility belongs with the Congress. As you are well aware, the Rules Enabling Act 28 U.S.C. § 2072(a), prohibits the Judicial Conference and the Supreme Court from "abridg[ing], englarg[ing] or modify[ing]" any substantive right. I urge that the issue before the Congress in the proposed "Sunshine in Litigation Act of 2009" is really one of social values and a choice to be made among various values and that that is a substantive matter rather than a mere matter of procedure. It is a choice among values that Congress, the legislative arm of the federal government, is charged with making and in this case should make.

On the one side is a view that urges and permits secrecy, not just upon agreement of private parties, but with the imprimatur, approval and stamp of authority of a federal judge. A violation of that court order carries with it the threat of a contempt proceeding, with all of the sanctions of the sovereign United States available to punish the person

who dared disobey a judicial order. On the other side is a view that says that there should be as much transparency in government as possible, including in its judicial branch.

Moreover, in those cases – and this committee and its Senate equivalent have heard of many of those cases – there is a social value to be considered: when government, in this case a court, through its proceedings, learns of the adulterated or otherwise inappropriate drug, of the dangerous toy, of the tire waiting to separate and cause death, should it permit – indeed, by its order, should it participate – in keeping that information secret, so that others may be injured and killed? Should it be a party to keeping that information from the regulatory arms of government, the Food & Drug Administration, the Consumer Product Safety Commission, the Federal Trade Commission, the Securities and Exchange Commission, and similar bodies created by the Congress to do a job, but a job that can be done only when they have information. Thus, when information is withheld from such a regulatory body, its ability to do the job that the Congress delegated to it, to that extent is frustrated. When that information is withheld because of an order of a federal court, the court is complicit in that frustration.

One can make many arguments in favor of secrecy, and they have been made over and over again in these hearings. One can also make many arguments in favor of a level of transparency that will help to prevent future injury and death, and that will better permit the regulatory arms of government to carry out their responsibilities. Which should it be? I suggest that that is an issue of social values, one that is peculiarly within the ambit of Congress to resolve. And, I suggest, it is an issue that crosses the line from procedure to substance, which at least arguably takes it outside of the authority delegated

to the Judicial Conference and the Supreme Court to resolve through the rule-making power.

A second point concerning the United States Judicial Conference: As prior testimony has shown, the Judicial Conference has examined this issue for years, and, if I read the testimony correctly, it has concluded that it sees no problem that it needs to deal with. Indeed, it is concerned that, by resolving this social issue in favor of preventing further injuries, sickness, and death, it will create more work for judges. I found myself amazed at that argument. In my view, judges hold office to resolve questions brought to them. If it takes more time to make the findings that the "Sunshine in Litigation Act of 2009," so be it: in my mind that is or should be the responsibility of a federal judge even without the Act. Having great respect for federal judges – even those who have ruled against me in my court cases -- I assume that a careful federal judge in fact does think the matter through, rather than act as a rubber stamp. This Act would require the judge to articulate publicly the result of that thinking process, while protecting the various legitimate interests in privacy. And it would remind those judges who may be prone to skip the thinking process that that is in fact a part of their job that should not be skipped.

I hope that these thoughts may be helpful in your deliberations. Thank you for the honor of the invitation to appear before you and the opportunity to state these views.

Mr. COHEN. Thank you so much. Now that we have completed our testimony, and I appreciate each of the witnesses, we will pause for questions.

And I will first recognize Mr. Maffei and he will, if he would, and take the chair for a second. If Mr. Maffei would——

Mr. MAFFEI. We will take it here.

Mr. COHEN. Why don't you take it here? And he will take the chair, and he will have the first questions. So I yield——

Mr. MAFFEI. Thank you, Chairman Cohen. As a new Member of the Congress, I am actually very honored to even be the chair pro tem of a Committee.

First question I do want to ask Ms. Bailey. Judge Kravitz notes in his prepared statement that the empirical data on which the Judicial Conference relies in opposing H.R. 1508 showed no evidence that protective orders create any significant problems of concealing information about public hazards. What is your response to that?

Ms. BAILEY. Well, my understanding of that data is that it was being accumulated during the same period of time in which people were dying from defective Firestone Tires. So I don't think that it is possible to account for all of the cases of secrecy, it is part of the nature of secrecy, that a statistical analysis is not going to come up with every case in which someone may have been injured due to secret documents.

I think you actually need to look at real people and real cases.

Mr. MAFFEI. During his oral testimony, Judge Kravitz talked about how a lot of these things are going on in state courts, and I couldn't help but notice both you and Mr. Kaster scribbling. So I do want your response to that.

Is this really a problem more in the state courts than Federal courts?

Ms. BAILEY. Not to my knowledge. No. I like to talk about the Davis case because I worked on it, but in my written materials you will find examples of cases in Federal court where documents were improperly sealed or settlements were improperly sealed, including the Allstate case that I mentioned, which was in Federal District Court in Louisiana.

Mr. MAFFEI. Mr. Kaster, same question to you.

Mr. KASTER. Well, the case that I have used as an example today is just one of scores that I have been involved in in Federal court. I limited my comments today primarily to Federal court proceedings.

For example in Mississippi where I followed exactly what Judge Kravitz suggested, let me say that I hold him in great esteem. If I had Judge Kravitz all the time, I wouldn't have this problem.

But I don't have the same experiences as his empirical data tells you. I am in the real world. And in Federal courts, matter of fact you routinely get oppressive protective orders, and when I go back and challenge them with documents like this, they clearly shouldn't be protected. I have never won in 20 years. So that is part of the real world that I live in.

Mr. MAFFEI. Do you think the problem is that there is just no judicial scrutiny at all? How does——

Mr. KASTER. There is some——

Mr. MAFFEI. Describe how a judge approaches one of your motions.

Mr. KASTER. There is no judicial scrutiny. I have even asked judges to just look at sections of the documents. As a matter of fact as we sit here, in the Federal court in Georgia today, I believe, the court is entertaining the very question that we are here about.

I have gone back and pulled out just a sample of documents that I have asked the court to look at because they clearly are not trade secret or should be protected. That ruling may happen while I am sitting here today, which would be very ironic. If I were to win, it would be the first time in 20 years.

What happens is the Federal judges or the Federal magistrates do not look at the documents; they enter a protective order. I look at them; I come back and challenge the documents that should not be protected that would protect the public interest and I never win.

Mr. MAFFEI. But what is going on in their mind? Why would they never rule? I mean, obviously judges have all sorts of different backgrounds and stuff. But——

Mr. KASTER. As I understand it, the view is this. You represent one client and you have what you need for that client. You do not represent the public at large, counselor. And I have actually had judges say that to me.

I have a different view. This is actually against my own interest. If all of these documents become public, I happen to have a unique body of knowledge, and I know about documents that everybody else doesn't. One reason people hire me is that I have this unique knowledge.

If all of the knowledge were out there and any lawyer could get it, then that would diminish my practice. So it is against my interest to do this, but when I went to law school I was taught, you have a public interest as well.

And as I have put in my written statement, every client that I approach on this whose lost a child or family members or terribly injured, they allow me to pursue the public interest because they don't want the same thing to happen to someone else.

And I pursue the public interest with the permission of my client. If I didn't have that, I would be caught in the trap of not being able to push those documents to become public because my client has what they need.

And if I were selfish and decided to go that route, then Congress has to mandate to the courts, you have got to take on that burden if a lawyer won't do it.

Mr. MAFFEI. Do you agree with Professor Cohn's comments on the interest of various——

Mr. KASTER. We all agree that settlements should not hide the truth. That is, I think everyone here agrees to that. But that is not the problem. I have never had that as a problem.

Mr. MAFFEI. Thank you Mr. Kaster.

Judge Kravitz, I assume you have a different take on how a judge looks at a motion to open up these documents.

Judge KRAVITZ. Yes, I think this discussion has been interesting for a couple of different levels. I mean, if in fact Ms. Bailey and Mr. Kaster have all these decisions of judges routinely rejecting their motions to open up documents, then they have to exist. And,

in fact, Mr. Kaster said he is going to send me the Bradley decision, and I can take a look at it.

But there are lots of decisions of judges opening up cases. And the key point that I think Mr. Kaster made, what you need to keep in mind is this, he got the document, and then he came back to the Federal court, and he could explain to the judge as was true in the Zyprexa case.

But that is not what this legislation says. This legislation says before he even gets those documents, I have to do a document by document review without his assistance to try to figure out whether those documents are "relevant to public health and safety."

The truth is I am not going to be able to do that. I think as Professor Cohn said, we need to get the documents to Mr. Kaster, and then he needs to come back either under existing law or some changes in the rules that we would certainly be willing to entertain, to get the protective order lifted with respect to that.

But it can't be at the front end. That is the problem.

Mr. MAFFEI. Thank you, Judge Kravitz.

I now recognize the Ranking Member of the Subcommittee, Mr. Franks, for 5 minutes.

Mr. FRANKS. Well, thank you, Mr. Chairman. Mr. Chairman, I am observing some unprecedented common sense and dialogue between the witnesses here and it scares me to death. But it makes me think that perhaps there might be some middle ground here that perhaps, you know——

Mr. MAFFEI. Don't worry, that is the judicial branch. We would never fall into any of that.

Mr. FRANKS. You know, confidence like that is something one gets before they fully understand the situation, I suppose. But is it possible that the Rules committee or the entire Judicial Conference could craft a more narrow bill? That is the one suggestion that I would put forward.

But let me ask you, Judge Kravitz, I kind of had a little epiphany in your last comment. You are saying, just for clarity here——

Judge KRAVITZ. Right.

Mr. FRANKS [continuing]. That in Mr. Kaster's case, even though the judge ruled against making some of the documents public, and you never know whether that was justified or not, that indeed, he got the documents that he asked for——

Judge KRAVITZ. Absolutely.

Mr. FRANKS [continuing]. And that the difference that this bill would make is that before he ever got the documents he would have to go over them with a fine-toothed comb, as it were, before he ever got them.

Judge KRAVITZ. By myself. Without his assistance.

Mr. FRANKS. See, I find that a stunning crux of the discussion here. And again, maybe I am misunderstanding, but it sounds like Mr. Kaster's comments here, I mean, he has been very forthright, and you have said that yourself. And maybe he has had some narrow-minded judges that he has dealt with.

But isn't it true then, based on that, that if those same judges were forced to go through all of that data before Mr. Kaster had ever gotten it, that they would probably come to the same conclusion that it was, you know, if they—in other words, if I am a judge,

and I am looking at this data, and I am going to try to move through it as quickly as possible.

I am going to be much more deferential to a lawyer that comes in and says, "Judge, there is a problem here. This is a safety issue for the public. Please look at this." I am going to look at that much more carefully.

Judge KRAVITZ. Here is the thing, practically. In Mr. Kaster's example, it is the defendants who have the document. They are going to give them to me to look at presumably in camera so I can figure out whether they impact public health or safety.

Mr. Kaster doesn't even have the documents. His experts don't have the documents. And I am going to make up my mind. And who is the person who is going to be telling me whether the documents are a bear on public health and safety? It is the defendant, in his example.

So what we need to do is get the documents in his hands as rapidly as possible, get his expertise and then have him come back to the judge, if that is what he wants. And that is exactly what happened with Jack Weinstein in the Zyprexa litigation.

And I really urge the Committee to take a look at that decision, because Judge Weinstein in that case, after having gotten—had a protective order and gotten the information out says, public access is now advisable.

Now that he can figure out that—because the litigation involves issues of great public interest, the health of hundreds of thousands of people, fundamental questions about our system or approval and monitoring of pharmaceutical products and the funding of many health and insurance plans. Public and private agencies have a right to be informed.

And that information got out there. And that is under the existing rules. So I don't think we need necessarily any new rules.

But let me just say to Professor Cohn's point. There are things in this bill that are substantive, like the provision that a court can't approve an agreement that prevents people from going to a Federal agency with documents that bear on public health and safety.

But the provisions of this that deal with protective orders and the time at which judges agree to protective order, that is a procedural question and the factors that a court is going to consider. And the Rules Enabling Act has been in existence for 70 years and has worked extremely well for 70 years. It is going to be 70 years about next month, I think.

And as to procedure, the Congress has deferred to us, and I would ask them to continue to do so. To the extent there are substantive things that deal with social policy like getting information to relevant agencies or even the sealed settlements offers which I do not personally oppose at all. There shouldn't be sealed settlements, frankly. Those are appropriate for the Congress and appropriate to enact.

Mr. FRANKS. Well, thank you. Mr. Chairman, I am about out of time here. In fact, I am out of time as it looks like.

But let just suggest to the full Chairman of the Committee—the Chairman of the full Committee, I should say. There may be an opportunity for reason to get the best of us all here.

Where Mr. Kaster's comments were he has never won a situation like that may be where to focus our attention to where there is some type of appeals process or something that would overcome a recalcitrant or unreasonable judge that, you know, is simply not looking at the facts.

If he has never won, one of two things. Either he is a really rotten lawyer and that doesn't occur——

Mr. CONYERS. He is going to share with me those decisions.

Mr. FRANKS. He is going to explain that, but I just think that there may be an opportunity for some reasonable compromise here that would solve the problems of everyone on the—maybe I am wrong, again, I don't want to be too optimistic in an environment like this.

But thank you, Mr. Chairman.

Mr. MAFFEI. Thank you, Mr. Franks. Since the distinguished Member of the full Committee is here, am I right in understanding that you are not interested in asking questions, but you are here to observe and—you are interested in healing us.

Mr. CONYERS. My lips are sealed. [Laughter.]

Mr. MAFFEI. Well, thank you to the Chairman. Then I will recognize the distinguished gentleman from North Carolina, Mr. Coble, for 5 minutes hoping that he doesn't take the full 5 minutes, since we do have floor vote.

Mr. COBLE. Mr. Chairman, I will try to move it along.

Judge Kravitz, let me put a two-part question to you.

Judge KRAVITZ. Sure.

Mr. COBLE. If this bill were enacted, how would this impact the workload of the Federal Judiciary, A, and B, how would you determine what matters effect public health or safety? Is there case law or judicial doctrine from which judges might draw to determine that distinction?

Judge KRAVITZ. Okay. Two things. First, the average case load of an active Federal judge is about 550 cases. That is the average.

There are judges in California who have 1,000 cases. And the notion that they could then fish through document by document and get that information to Mr. Kaster in any time horizon that is reasonable, I think, is illusory.

So I think, again, I am not worried about my burden of doing this. I am worried about other litigants who deserve our time and attention.

Secondly, as to whether there is any existing case law, there is existing case law under the good cause standard of Rule 26 that requires judges to consider the public interest and, of course, public health and safety. But this statute says anything that is relevant to public health and safety.

And I said the last time, I mean, if I have an employment case and someone is accused of having child pornography on their computer, is that relevant to public health and safety? Maybe it is. I don't know.

Mr. COBLE. Thank you. I hate to cut you off but I am——

Judge KRAVITZ. No, that is fine. That is fine.

Mr. COBLE. One more question to Ms. Bailey. Ms. Bailey, what issues or matters do not affect public health or safety? Give me a couple of examples.

Ms. BAILEY. Well, I think that is a tough question. And fortunately, at this point in my career, I am not a judge. So I am not in a position to be put to that test.

But the examples that Judge Joe Anderson gave in his testimony on this same bill last year, made me believe that it is not that difficult to figure it out if you have the documents before you. I mean, obviously, a defective go-cart is something that is going to affect public safety.

You know, the formula for Coca-Cola, hopefully, will not be something that affects public safety. I realize there is a great deal of gray area but my understanding is that judges engage in this kind of balancing every day as part of their jobs. And I think this is a worthwhile use of that skill.

Mr. COBLE. Thank you. And I am on a short leash. So I will yield back, Mr. Chairman.

Mr. COHEN. Thank you. Thank you. We are all on short leashes. I want to ask one question, then we will be unleashed.

Judge Kravitz asked to the panel, do you know of any Federal judges that are abusing the process? Does anybody know any Federal judges abusing the process?

Mr. Kaster, quickly, because we have to vote.

Mr. KASTER. Mr. Chairman, I can give you a list of numerous judges that I believe are abusing the process because they——

Mr. COHEN. Federal judges?

Mr. KASTER. Federal judges.

Mr. COHEN. And, Ms. Bailey, do you——

Mr. KASTER. I only talked about Federal judges today.

Mr. COHEN. All right. Ms. Bailey, do you have any?

Judge KRAVITZ. And he is going to send me that list.

Mr. COHEN. All right. If you would give that list to Judge Kravitz and give it to us. And we need to go vote.

And I would like to thank all the witnesses for their testimony. The Members who attended, without objection, Members have 5 legislative days to submit any additional written questions which, as part of the witnesses, ask you to answer as promptly as possible to be made part of the record.

Without objection the record will remain open for 5 legislative days for submission of any additional material. Thank you for your time and patience. The Subcommittee is adjourned. Done.

[Whereupon, at 11:52 a.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

Questions for the Record
Subcommittee on Commercial and Administrative Law
Hearing on H.R. 1508, the "Sunshine in Litigation Act of 2009"
June 4, 2009

Leslie A. Bailey, Staff Attorney, Public Justice

Questions from the Honorable Steve Cohen, Chairman

1. **You contend in your prepared statement (at page 5) that the "public has a right of access to information about what happens in our court system." Does that right extend to litigation materials that are not filed with the court—in particular, discovery materials? Please explain your answer.**

It is true that the public right of access to litigation materials is especially strong as applied to documents filed with a court. *See, e.g.*, *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 487 (3d Cir. 1995) ("[T]he right of access to judicial records is beyond dispute."). However, under the Federal Rules of Civil Procedure, there is a presumptive right of public access to materials produced in discovery that may only be overcome by a particularized factual demonstration of good cause—even if those materials are not filed with the court. As the U.S. Court of Appeals for the Seventh Circuit has stated, Rule 26(c)'s good cause requirement means that, "[a]s a general proposition, pretrial discovery must take place in the public unless compelling reasons exist for denying the public access to the proceedings." *Am. Tel. & Tel. Co. v. Grady*, 594 F.2d 594, 596 (7th Cir. 1978), *cert. denied*, 440 U.S. 971 (1979); *see also Wilk v. Am. Med. Ass'n*, 635 F.2d 1295, 1299 (7th Cir. 1980); *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 101 F.R.D. 34, 38–41 (C.D. Cal. 1984); Note, *Nonparty Access to Discovery Materials in the Federal Courts*, 94 Harv. L. Rev. 1085, 1085–86 (1981).

Consistently with this, federal courts have held that when there is no showing of good cause, there is a presumed right of access. *See Public Citizen v. Liggett Group*, 858 F.2d 775, 790 (1st Cir. 1988), *cert. denied*, 488 U.S. 130 (1989) ("It is implicit in Rule 26(c)'s 'good cause' requirement that ordinarily (in the absence of good cause) a party receiving discovery materials might make them public."); *In re Agent Orange Product Liability Litig.*, 821 F.2d 139, 145–46 (2d Cir. 1987) ("[I]f good cause is not shown, the discovery materials in question should not receive judicial protection and therefore would be open to the public for

inspection. Any other conclusion effectively would negate the good cause requirement of rule 26(c): Unless the public has a presumptive right of access to discovery materials, the party seeking to protect the materials would have no need for a judicial order since the public would not be allowed to examine the materials in any event.") (internal citations omitted); *see also Leucadia, Inc. v. Applied Extrusion Technologies, Inc.*, 998 F.2d 157, 165 (3d Cir. 1993) (in context of declining to extend common law to apply to discovery motions, indicating that the Federal Rules would provide the relief sought).

In keeping with the public's right of access to discovery, the federal courts have routinely held that nonparties have the right to intervene in litigation in order to seek access to "confidential" discovery materials. *See, e.g., Liggett*, 858 F.2d at 783 (agreeing that "intervention is '*the* procedurally correct course' for third-party challenges to protective orders") (quoting *In re Beef Indust. Antitrust Litig.*, 589 F.2d 786, 789 (5th Cir. 1979)) (emphasis in original); *San Jose Mercury News, Inc. v. U.S. District Court*, 187 F.3d 1096, 1100 (9th Cir. 1999) ("Nonparties seeking access to a judicial record in a civil case may do so by seeking permissive intervention . . . ."); *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 472 (9th Cir. 1992) (noting the "ample support" for recognizing intervention "as a proper method to modify a protective order") (listing cases); *In re Guidant Corp. Implantable Defibrillators Products Liability Litig.*, 245 F.R.D. 632, 635 (D. Minn. 2007) (explaining that "majority view" among federal circuits is that the federal rules allow non-parties to challenge protective orders); *Jochims v. Isuzu Motors, Ltd.*, 148 F.R.D. 624, 627 (S.D. Iowa 1993) ("intervention is the proper method to modify a protective order") (internal quotation and citation omitted).

2. During his oral testimony, Judge Kravitz referred to an order in which Judge Weinstein of the U.S. District Court for the Eastern District of New York unsealed documents in the Zyprexa drug litigation as an example of why the Sunshine in Litigation Act is not necessary to ensure public access to health and safety information otherwise sealed by protective orders. Does the Zyprexa case demonstrate that the current system is working?

Public Justice was not involved in the *Zyprexa* litigation. However, based on my review of the record in that case, I believe that the *Zyprexa* example shows that the current system is ***not*** sufficient to protect the public's interest in obtaining information related to health and safety from documents produced in litigation.[1] I say this for two reasons.

First, in the *Zyprexa* case, the manufacturer of a dangerous drug was permitted to designate "millions of documents" as confidential during the litigation[2] without demonstrating that there was "good cause" for secrecy as required by Federal Rule of Civil Procedure 26(c). Included were documents that revealed, among other things, that Eli Lilly executives purposefully concealed evidence that the drug Zyprexa caused significant weight gain and diabetes out of concern that disclosure might affect sales.[3] It was only after ***four years*** had passed that some of the documents were ultimately unsealed. During that time, doctors continued to prescribe the drug, and patients—including the plaintiffs in the case, who were not given access to the documents—continued to be at risk.

Second, the outcome in the *Zyprexa* case is by no means common or ordinary. Rather, the *Zyprexa* documents were made public only after a series of

[1] The plaintiffs in the *Zyprexa* case sued the drug's manufacturer, Eli Lilly, alleging that the drug, which was prescribed to treat schizophrenia and other psychotic disorders, caused excessive weight gain and diabetes. Insurance companies also sued Lilly, seeking to recover billions of dollars spent on the drug and alleging that the company hid the drug's harmful side effects from the public. *See* Mary Williams Walsh, *Judge to Unseal Documents on Eli Lilly Drug Zyprexa*, N.Y. Times, Sept. 6, 2008.

[2] *In re Zyprexa Prod. Liab. Litig.*, 253 F.R.D. 68, 93 (E.D.N.Y. 2008) ("Since the inception of the case, millions of documents produced by Lilly have been marked confidential.").

[3] Alex Berenson, *Eli Lilly Said to Play Down Risk of Top Pill*, N.Y. Times, Dec. 17, 2006. As explained below, the Times published a series of front-page articles disclosing some of the contents of the secret documents after they were leaked by a physician who believed that the public needed to know their contents.

extremely rare precipitating events, including multiple attempts by the plaintiffs to unseal the secret documents; Congressional inquiries; criminal investigations; intervention by third-party public interest groups; and national press about the contents of some of the secret documents. It would be extremely unlikely for any one of these factors to occur in a typical case.

The district court entered a protective order in August 2004 at the urging of Eli Lilly.[4] This blanket secrecy order,[5] which authorized the court to impose sanctions against any party that disclosed discovery materials, contains no findings that Eli Lilly had demonstrated good cause for secrecy with respect to specific documents as required by Rule 26(c).[6] Rather, the order permitted the defendant to designate anything and everything as confidential as long as it "believed in good faith" that secrecy is proper.[7] The order provided that the party disputing confidentiality of certain documents would bear the burden of challenging the order with respect to those documents.[8] The secrecy order did not even permit the attorneys representing the plaintiff patients to provide copies of the documents to the plaintiffs or their physicians.[9] Several additional protective orders were entered throughout the litigation.

According to the order issued by Judge Weinstein on September 5, 2008, the plaintiffs in the Zyprexa litigation attempted at least ***five times*** to unseal the protected documents, starting in 2005.[10] First, they moved to declassify documents cited in the complaint, arguing that they did not contain trade secrets or other commercial information properly subject to confidentiality under Rule 26(c). The court did not rule on their motion.

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[4] Case Management Order No. 3 (Protective Order), *In re Zyprexa Prod. Liab. Litig.*, Case 1:04-md-01596-JBW-RLM (E.D.N.Y. Aug. 9, 2004) (Docket No. 61).

[5] *Id.* at ¶ 1 ("This Order applies to all products of discovery . . . .").

[6] *Id.* at p. 1 (noting that the order was being entered "[t]o expedite the flow of discovery materials, facilitate the prompt resolution of disputes over confidentiality, adequately protect confidential materials, and ensure that protection is afforded only to materials so entitled").

[7] *Id.* at ¶ 3.

[8] *Id.* at ¶ 9.

[9] *Id.* at ¶ 6.

[10] *In re Zyprexa Prod. Liab. Litig.*, 253 F.R.D. at 93–94.

Then, in December 2006, the New York Times published a series of front-page articles reporting on internal Eli Lilly documents obtained from an attorney representing mentally-ill patients in an unrelated case. That attorney, James B. Gottstein, had obtained the secret documents from Dr. David Egilman, a physician and expert witness for the plaintiffs in the *Zyprexa* litigation.[11] The documents, which were partially described in the articles, showed that Lilly had boosted sales of Zyprexa by providing false data to prescribing doctors; hidden information about dangerous side effects; and encouraged doctors to prescribe Zyprexa to patients who did not have psychotic disorders.[12] Eli Lilly moved for an injunction to bar anyone in possession of the documents from distributing them, and threatened Dr. Egilman with criminal contempt sanctions.[13] At a hearing on Lilly's motion, attorney Richard Meadow testified that some of the plaintiffs in the litigation suffered from the same conditions revealed by the documents, but had been unable to avoid these side effects because they were barred from seeing the documents produced in the litigation.[14] Meadow also testified that Lilly had designated documents already in the public record as confidential without regard to whether the information contained in the documents constituted a trade secret or other protected information.[15] Meanwhile, the plaintiffs renewed their motion to unseal in January 2007, and third parties moved to intervene, but the court deferred ruling on these motions.[16] Rather, on February 13, 2007, the court issued an order finding that Dr. Egilman, James Gottstein, and the New York Times reporter had deliberately violated the confidentiality order. The court enjoined them from

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[11] *Doctor Who Leaked Documents Will Pay $100,000 to Lilly*, N.Y. Times, Sept. 8, 2007.

[12] Memorandum of Law in Support of Motion of Vera Sharav, Alliance for Human Research Protection, and David Cohen for an Order Modifying CMO-3 In Part, at 5–6, *In re Zyprexa Prod. Liab. Litig.*, Case 1:04-md-01596-JBW-RLM (E.D.N.Y. Aug. 27, 2008) (Docket No. 1859).

[13] Dr. Egilman has acknowledged that he leaked the documents, but stated that he believed his duty to protect public health superseded other agreements, "including those that prevent me from protecting public health by releasing information." David Egilman, *The Truth is Not Free*, Sept. 11, 2007, at http://thepumphandle.wordpress.com/2007/09/11/the-truth-is-not-free/. His actions came at substantial personal cost; threatened with criminal sanctions, he ultimately agreed to pay Eli Lilly $100,000. *Doctor Who Leaked Documents Will Pay $100,000 to Lilly*, *supra*.

[14] Memorandum of Law in Support of Motion of Vera Sharav et al., *supra*, at 8.

[15] *Id.*

[16] *In re Zyprexa Prod. Liab. Litig.*, 253 F.R.D. at 93; Order, *In re Zyprexa Prod. Liab. Litig.*, Case 1:04-md-01596-JBW-RLM (E.D.N.Y. Feb. 12, 2007) (Docket No. 1150); Amended Order, *In re Zyprexa Prod. Liab. Litig.*, Case 1:04-md-01596-JBW-RLM (E.D.N.Y. Feb. 12, 2007) (Docket No. 1152).

further disseminating the confidential Zyprexa documents and ordered all parties who had received copies of the documents to return them.[17] Meanwhile, the contents of the leaked documents sparked federal and state criminal investigations.[18]

In the Spring of 2007, the secret Zyprexa documents became the subject of multiple Congressional inquiries. Congressman Henry Waxman, Chairman of the House of Representatives Committee on Oversight and Government Reform, wrote to Eli Lilly in March 2007 seeking the documents related to the allegations that the corporation had misled physicians and promoted off-label uses of Zyprexa, as part of the Committee's oversight of the pharmaceutical industry.[19] These documents were previously provided to Waxman's office by attorney James Gottstein, but were returned after Judge Weinstein ordered all parties in possession of the secret documents to return them.[20] A month later, Senator Chuck Grassley, Ranking Member of the Senate Finance Committee, wrote to Lilly requesting that the documents subject to the protective order be provided to the Committee.[21] It is not clear from the court record whether any documents were ever provided by the manufacturer or the court in response to these inquiries.

In July 2007, the plaintiffs tried a third time to unseal the documents, this time challenging the confidentiality designations of the documents they had cited in their motions. The court did not rule. In April 2008, the plaintiffs once again

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[17] *In re Zyprexa Injunction*, 474 F. Supp. 2d 385 (E.D.N.Y. 2007).

[18] *See* Alex Berenson, *Lilly in Settlement Talks With U.S.*, N.Y. Times, Jan. 30, 2008, *at* http://select.nytimes.com/mem/tnt.html?_r=3&emc=tnt&tntget=2008/01/30/business/30cnd-drug.html&tntemail0=y&oref=slogin&oref=login. Earlier this year, Lilly agreed to pay $1.4 billion—the largest criminal fine ever imposed on a corporation—after a federal criminal investigation concluded that it had trained sales associates to market Zyprexa for uses not approved by the FDA, including to keep elderly nursing home patients quiet. Sharyl Attkisson, *Eli Lilly Owes $1.4B Over "Off Label" Use*, CBS News, Jan. 15, 2009, *at* http://www.cbsnews.com/stories/2009/01/15/cbsnews_investigates/main4725873.shtml.

[19] Letter from Rep. Henry Waxman to Sidney Taurel, Chairman and C.E.O., Eli Lilly & Co. (Mar. 1, 2007), *at* http://psychrights.org/Issues/ZPapers/3-1-07RepWaxmanLtr.pdf

[20] *Id. See also* Letter from Rep. Henry Waxman to Special Master Peter H. Woodin (Dec. 21, 2006), *In re Zyprexa Prod. Liab. Litig.*, Case 1:04-md-01596-JBW-RLM (E.D.N.Y.) (Docket No. 1006).

[21] *See* Letter from Sen. Chuck Grassley to Sidney Taurel, Chairman and C.E.O., Eli Lilly & Co. (Apr. 4, 2007), *at* http://grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=3917.

challenged the confidentiality order, this time limiting their request to 351 specific documents. Finally, in August 2008, the plaintiffs tried a ***fifth time***, seeking an order permitting the release of documents on which the parties had relied in making their dispositive motions.[22] Given that it is unusual for plaintiffs to fight protective orders at all, the fact that counsel for the *Zyprexa* plaintiffs made at least five attempts to unseal the documents sets the case apart from the vast majority of cases.

Even after these efforts by the plaintiffs—and the Congressional and criminal investigations—the court did not act until after at least three non-party organizations, including a news organization and human rights advocates, intervened.[23] In the end, the court unsealed only a small fraction of the confidential documents, and then only after it determined that "the documents are now so outdated that unsealing will not significantly harm Lilly."[24] This is yet another key difference between the *Zyprexa* litigation and most cases: in our experience, it is extremely rare for public interest groups and media organizations to intervene in support of unsealing documents. The vast majority of these secrecy orders are unchallenged by either the plaintiffs or third parties.

It is essential that the Subcommittee not have an incomplete impression of the *Zyprexa* case. Judge Kravitz cited the case as evidence that the current rules governing protective orders are working. But if the *Zyprexa* case proves anything, it is that documents containing evidence of significant threats to public health that were subject to an umbrella protective order were partially unsealed years after the fact, and then only under extremely unusual circumstances. I question whether this demonstrates that the system working is well.

[22] *In re Zyprexa Prod. Liab. Litig.*, 253 F.R.D. at 93–94.

[23] *Id.* at 94 (describing letters and motions submitted by Bloomberg News, the Alliance for Human Research Protection, and a group of health insurance companies).

[24] *Id.* at 208.

3. Please identify and provide a brief summary of each order (including any accompanying opinion), published and unpublished, of which you are aware in which a federal court denied a request to modify or vacate a protective order governing information uncovered during discovery that, in the language of H.R. 1508, "was relevant to the protection of public health or safety."

Public Justice has never attempted to develop a list of cases related to public health or safety in which modification or vacatur of a protective order was sought but not obtained, and it is not clear how we could do so. By definition, creation of such a list would require access to documents that are sealed from the public. I believe that this question illustrates a problem that the Sunshine in Litigation Act is designed to address: it is impossible for the legal community or the public to judge whether documents are relevant to health and safety if they are kept secret.

That being said, the question seems to assume that as long as judges grant requests to vacate or modify protective orders, there is no need for increased protections against court secrecy. I believe this assumption is flawed for two reasons.

First, there is no evidence that protective orders are ever challenged in any significant percentage of cases. Rather, based on our experience and discussions with plaintiffs' attorneys, we believe that in the vast majority of cases, neither a party nor an intervener ever seeks modification of the protective order. As I explained in my written testimony, in many cases the parties simply stipulate to secrecy, and the judge does not question that agreement. Moreover, public interest organizations such as Public Justice simply do not have the resources to intervene in more than a handful of cases in which protective orders have been entered; and private attorneys are unlikely to do so because there is no prospect of recovering attorneys' fees. Thus, any list of cases in which federal courts denied requests for modification or vacatur of a protective order would be dwarfed by the large number of cases in which protective orders remain in effect without challenge.

Second and more importantly, as the *Zyprexa* case discussed in response to Question 2 illustrates, even in cases where a judge ***does*** modify a protective order, this may not be sufficient to ensure that the public interest was sufficiently protected. Vacatur or modification may come years after the documents in question were sealed, and after countless additional people have suffered unknowing exposure to a dangerous product or practice.

I very much appreciate the opportunity to respond to these questions, and I hope that these responses are helpful to you.

RESPONSE TO POST-HEARING QUESTIONS FROM BRUCE R. KASTER, KASTER & LYNCH, P.A.

Questions for the Record
Subcommittee on Commercial and Administrative Law
Hearing on H.R. 1508, the "Sunshine in Litigation Act of 2009"
June 4, 2009

Bruce Kaster, Kaster & Lynch, PA

Questions from the Honorable Steve Cohen, Chairman

1. **Please identify and provide a brief summary of each order (including any accompanying opinion), published and unpublished, of which you are aware in which a federal court denied a request to modify or vacate a protective order governing information uncovered during discovery that, in the language of H.R. 1508, "was relevant to the protection of public health or safety."**

Questions from the Honorable Trent Franks, Ranking Member

1. **Were you counsel for plaintiff in the case of *Bradley v Cooper and Ford* in the United States District Court for the Southern District of Mississippi?**

2. **Is that the case that you refer to as *Bradley v. Cooper Tire* at pp 2-3 of your written statement?**

3. **Did plaintiff Bradley voluntarily dismiss the case against Cooper Tire after 7 days of trial?**

4. **Did Cooper Tire pay any money to plaintiff for the judgement of dismissal in that case?**

5. **Did the jury find a verdict for the remaining defendant Ford in that case?**

6. **Did not an independent expert determine that there was no defect in the tire that failed in the accident that led to the Bradley case?**

7. **You claim in your statement that "heavily redacted" Cooper Tire documents which you obtained in discovery and introduced into evidence at trial in the Bradley case should not "have been protected in the first place." Did not the U.S. Magistrate Judge for the federal District of Mississippi enter an order granting Copper Tire's proposed protective order and rejectiug the plaintiff's proposed order, finding that defendant's order was more reasonable?**

8. **You also claim in your statement that document "reflects that the tire manufacturer knew about a safety component for their tires and elected not to put it in because of cost considerations." Di you make that claim about the tire involved in the Bradley case?**

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July 2, 2009

Steve Cohen
Chairman, Subcommittee on
Commercial and Administrative
2138 Rayburn House Office Building
Washington, D.C. 20515-6216

Re: H.R. 1508 - Sunshine in Litigation Act of 2009

Dear Chairman Cohen:

In response to your inquiry, there are too many federal court orders to provide you with all of them. Instead, I am providing you with several examples that make the point.

The first one, *Kreiner v. Firestone* was a case filed in the Southern District of New York in 1998. This was a case in which we learned most of the manufacturing problems that subsequently came to light in reference to the ATX and Wilderness recall. However, the federal, Judge Alvin Hellerstein, not only kept all of the documents and testimony of plant workers under protection, but also gagged me, preventing me from telling the public what I knew about the Firestone problem. Eventually, the family decided to settle their case for very little money in order to get me out from under the gag order. If we had had House Bill 1508 or something similar, the tragedy that surrounded the ATX and Wilderness tires could have been made public much sooner. Excerpts from two hearings where Judge Hellerstein places me under his gag order are enclosed. (Enclosure 1)

A second more recent example is the case I mentioned at the hearing, *Bradley v. Cooper Tire and Ford*. I am providing you with a copy of the order from that case where the magistrate refused to allow us to remove documents from protection. His opinion was upheld by the trial judge, Judge Jordan. I cannot share with you the motion to unseal, nor our reply brief in support, as they were required to be filed under seal in accordance with the protective order in place in that matter. One of the documents in question is the redacted document I brought to the hearing with me. As is readily apparent, this is not a trade secret document. (Enclosure 2)

Another example is *Brownlee/Whitaker v. Cooper Tire*, U.S.D.C., Eastern District of Arkansas, Case No. 2:99CV00212 GH. This case involved an accident which resulted in the death of a man, his wife, and oldest son, and left his two youngest sons paralyzed.

There was also another gentleman killed in the accident. All of the company documents that they requested be placed under the protective order were done so, even though many of them would not have qualified to be placed under protection in accordance with House Bill 1508. The protective order entered in the state court case prior to voluntary dismissal and refiling in federal court is enclosed along with an order by the federal court denying Plaintiffs' attempt to modify the protective order. (Enclosure 3 at pages 2 and 3)

I would suggest that the federal multi-district litigation involving Ford and Firestone and the Firestone recalled tires contained at least hundreds of documents that would not have been protected under House Bill 1508 and would have alerted the public to the extent of the hazard of these tires, as well as the Ford Explorer. *In Re: Bridgestone/Firestone, Inc. ATX, ATX II and Wilderness Tires,* MDL No. 1373, Southern District of Indiana. Many of the Ford documents have come to light as a result of being used in evidence in litigation. However, most of the Firestone documents are still under protection to this day. The protective order from the MDL proceeding is attached. (Enclosure 4)

I'm enclosing an Order entered by the U.S.D.C., Middle District of Florida, in *Tiller v. Ford Motor Company*, (Enclosure 5) wherein the federal judge required production of documents in the federal case under the terms of a non-sharing protective order entered in a state court case, *Duncan v. Ford Motor Company*. I'm also enclosing as part of Enclosure 5, a copy of the *Duncan* protective order. As you can see, this protective order addressed Volvo documents regarding vehicle design which were contrary to assertions made by Ford, Volvo's parent corporation. Volvo engineers had designed a much safer SUV than the Explorer and Ford apparently did not want the public to know that their subsidiary was building a car up to safety standards they alleged were not necessary or feasible. If the public had become aware of the deficiencies in the Explorer and the superior design of its subsidiary's SUV vehicle, they could have made an informed decision regarding the purchase of the Explorer.

Another protective order entered by the U.S.D.C., Middle District of Florida in *Garcia v. Kelly-Springfield* is attached as an example of a manufacturer refusing to produce documents they deem to be trade secret unless an oppressive protective order is in place. (Enclosure 6)

The federal judge in *O'Hara v. General Motors*, U.S.D.C., Northern District of Texas, upon a motion by Defendant General Motors entered a second non-sharing protective order to cover production of certain of General Motors' documents where there was already in place a protective order with a sharing provision. Copies of the motions, responses, the original protective order and the second non-sharing protective order are attached. (Enclosure 7)

As I mentioned at the hearing, this issue is presently before the U.S.D.C, Southern District of Georgia in *Mascarenas v. Cooper Tire*. Unfortunately, I cannot provide you with our motions to unseal records as they had to be filed under seal. I am providing you with a

copy of the protective order that was entered by the court over our objections. (Enclosure 8) As soon as we have a decision we will forward you a copy of the order.

Finally, I am providing you with a copy of a decision I just received today wherein a Texas federal judge in *Ramirez v. Michelin* acknowledges that the information under protection has been widely distributed and even though it is not trade secret information, is keeping it under the protective order. Again, this would not be allowed under H.R. 1508. (Enclosure 9)

There are so many examples of this type that it would be extremely difficult to collect all of them. However, if you would like more examples of federal judges protecting documents or testimony that should not be protected, or requiring oppressive protective orders before any documents are produced, which are relevant to the protection of public health or safety, I can expand this list.

Very truly yours,

B. R. Kaster

BRK/ejm

Enclosures

cc: Hon. Mark R. Kravitz
Congressman Trent Franks
Leslie Bailey, Staff Attorney, Public Justice
Professor Sherman Cohn, Georgetown Law Center
James Parks, Sub-Committee Counsel
Christine Zinner, Public Affairs Policy Advocate, AAJ

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June 17, 2009

Congressman Trent Franks
2435 Rayburn Building
Washington, DC 20515

Re: H.R. 1508

Dear Congressman Franks:

Thank you for your June 11th inquiry. In response, I will respond to your questions in the order that you have posed them to me. I am attaching a copy of your letter for your convenience.

1. Yes, I was lead counsel.

2. Yes.

3. Yes, as part of a settlement negotiated by the Trial Judge. How does this relate to the Sunshine in Litigation Act?

4. I am not in a position to comment on that because of a Protective Order.

5. No, the jury found in Ford's favor. I recognize this and several of your other questions as Cooper's talking points from the *Bradley* case. I quite frankly do not see how this relates to the proposed Sunshine in Litigation Act. Perhaps you could enlighten me.

6. No. The alleged "independent expert" turned out not to be a tire expert, as he admitted in his deposition. Further, the court found he was not a qualified tire expert and disallowed his testimony. If you would like to see his testimony, we will send it to you. The Cooper expert that found that there was no defect in the tire was an expert routinely used by the tire industry who is a professional witness for them and is clearly biased. He, like you, has never seen Cooper's internal documents and so he does not know the truth. There is absolutely no question that Cooper tires lack a belt edge gum strip or wedge, they lack nylon overlays, that they have an inadequate inner liner, and that they have an improper antidegradant package. As the only one of the internal documents that you have seen indicates, they know

that the belt edge gum strip is effective in preventing tread belt separations, but they have elected not to use it. If you could see the rest of their internal documents, this question would be answered by their "protected documents." You will note we have enclosed several pages of Cooper's expert testimony from *Bradley* wherein he admits that in over 34 years of testifying on behalf of many tire companies, including his employer, he never found a tire that failed as a result of a design defect, including the Firestone recalled tires which were part of the biggest tire recall in the history of this country.

7. Yes, the Magistrate found, as they always do, that all of the documents Cooper claimed protected came under a Protective Order that they insisted on, and the Trial Judge affirmed this ruling. This is the point we were making at the hearing in response to Judge Kravitz's position that these types of documents should not be protected and to show that we followed the procedure he outlined which does not work in the real world. This is why the Sunshine in Litigation Bill is necessary.

8. It is not a claim, it is a fact.

If I can be of any further assistance, please do not hesitate to call on me.

Very truly yours,

B. R. Kaster

BRK/ejm

cc: Matthew Wiener, Sub-Committee Counsel
Leslie Bailey, Staff Attorney, Public Justice
Christine Zinner, Public Affairs Policy Advocate, AAJ

P.S. I thought you might be interested in the enclosed articles relating to an accident which occurred last Friday in Jacksonville that involved failure of a Cooper tire, resulting in the deaths of four teenagers. We are also including a partial list of Cooper detread deaths and injuries, and some of our letters to NHTSA after 2001 which relate to this problem.

RESPONSE TO POST-HEARING QUESTIONS FROM THE HONORABLE MARK R. KRAVITZ, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

Response of the Honorable Mark R. Kravitz
to
Questions for the Record
Subcommittee on Commercial and Administrative Law
Hearing on H.R. 1508, the "Sunshine in Litigation Act of 2009"

Questions from the Honorable Steve Cohen, Chairman

1. You note in your written statement (at 6) that H.R. 1508 would impose an "intolerable burden" on the federal judiciary. Please confirm that your contention is limited to H.R. 1508's regulation of protective orders and does not extend to its regulation of orders restricting public access to court records, approving settlement settlements, or enforcing settlement agreements.

1. The reference in my written statement to "intolerable burden" is a reference to H.R. 1508's requirement that a judge review all the information to be obtained through discovery before entering any protective order to determine whether any of that information is relevant to the protection of public health or safety. My reference to "burden" is not an objection to additional work for the judge. Instead, it is a concern that if a judge conducts this review, it will result in other deserving litigants and critical issues receiving less of the judge's time. Discovery intensive cases can contain thousands, and even millions of pages of documents, particularly if the cases involve electronically stored information, which is fast becoming routine. I frankly do not know how a judge could possibly do such a review effectively, much less how a judge could conduct such reviews in all cases in which protective orders are sought and attend to the other tasks judges must perform in those cases and in all the other cases on the docket.

   The "intolerable burden" reference was only directed to orders restricting information that is obtained in discovery but not filed with the court. The reference was not directed to orders restricting access to court-filed documents, approving settlements, or enforcing settlement agreements. The Federal Judicial Center conducted a comprehensive study of orders restricting disclosure of information in settlement agreements and found that the number of cases involving such orders was quite small. Based on the study's results, the duties imposed on a judge by the proposed legislation would have little impact on the federal judiciary's burden as a whole. But there is one point I would like to make on this part of the bill. As I mentioned in my oral testimony, the standard set forth in H.R. 1508 for restricting access to court-filed documents is far less demanding than the standard that

federal courts across the country now follow when sealing court documents. Therefore, as Ms. Bailey also points out in her written statement, H.R. 1508 will only confuse litigants as to the appropriate standard for sealing documents that are filed in court and appears to weaken the standard that exists under current law.

2. What amendments could be made to H.R. 1508's provision governing protective orders to render the burden on the judiciary "tolerable," while still ensuring that protective orders covering discovery materials "relevant to the protection of public health or safety" are not kept in place any longer than necessary to accommodate the needs of the discovery process, even if the parties to the case are unconcerned about the protection of public health or safety?

2. The Rules Committees believe that any provisions regarding protective orders should proceed through the Rules Enabling Act rulemaking process established by Congress, and should not be legislated directly by Congress. The Rules Committees would certainly be willing to consider a proposal to include specific provisions in Rule 26 on the standards for dissolving or modifying protective orders based on, among other factors, public health and safety. Under Rule 26 as it is currently worded, federal courts require good cause for protective orders and modify or dissolve protective orders at the request of parties and nonparties, including for reasons of public health and safety. In this regard, I would refer the Committee to my response to Question # 6 and the legal research I am providing the Committee in response to Question # 3.

3. Do existing legal doctrines governing protective orders require judges to consider whether, in the language of H.R. 1508, a requested protective order will cover information "relevant to the protection of public health or safety?"

3. There is an extensive body of case law on the good-cause standard in Rule 26 of the Federal Rules of Civil Procedure for issuing protective orders for materials to be produced in pretrial discovery. Attached is a detailed survey of governing law that the Rules Committees have compiled to demonstrate that existing law in the federal courts does not lead to protective orders preventing access to information relevant to the protection of public health or safety. In sum, under existing case law, federal courts frequently state in opinions and orders that the good cause for a protective order requires a clearly defined and serious need, which is not satisfied by generalized or conclusory allegations. The case law also shows that the public interest is considered under the standards used throughout the circuits for entering, modifying, or dissolving protective orders.

In evaluating whether good cause exists for a protective order, courts have considered many factors, including: the importance of a protective order to the fair and efficient conduct of discovery; the confidentiality interests of the parties or nonparties; whether the information is being sought for a legitimate or improper purpose; whether the information at issue is important to public health and safety; whether the party seeking confidentiality is a public entity or official; and whether the litigation involves issues important to the public. The case law stresses the importance of maintaining flexibility in evaluating requests for protective orders because each case involves different circumstances.

Unlike H.R. 1508, courts carefully distinguish between the standard for a protective order in the pretrial discovery stage for documents that are not filed with the court, and the more stringent standard applied to sealing documents filed with the court. Courts recognize that protective orders restricting dissemination of documents produced in discovery are often essential to the efficient and fair conduct of that discovery, and that the public usually does not have a right of access to such material. The extensive discovery that takes place in federal litigation frequently turns up huge amounts of material. Allowing public access to that discovery material may result in the dissemination of private, irrelevant, and even false information. As the Eleventh Circuit Court of Appeals noted: "The realities of today's world have shown that discovery and the exchange of information can become extremely difficult. . . . [An interim protective order] is designed to encourage and simplify the exchanging of large numbers of documents, volumes of records and extensive files without concern of improper disclosure. . . . History has confirmed the tremendous saving of time effected by such an approach. The objective is to speed up discovery." *In re Alexander Grant & Co. Litigation*, 820 F.2d 352, 356-357 (11th Cir. 1987). Electronic discovery has made these points even more important.

In contrast, courts require a much more exacting standard when parties seek to keep the public from obtaining documents filed with a court, emphasizing the presumption of public access to court records and requiring compelling reasons to seal such documents, even in cases that do not implicate public health and safety.

4. The Rules Committee's opposition to H.R. 1508 is based in large part on a 1996 empirical study conducted by the Federal Judicial Center. Is the Rules Committee's opposition to the bill grounded in any more recent empirical studies?

4. No. However, the Rules Committees are not aware of abuses in federal courts, and the Committees would become aware of such abuses since the Rules Committees regularly review case law regarding protective orders. Indeed, in connection with consideration of H.R. 1508, the Rules Committees conducted an exhaustive review of existing law, a copy of which I have attached to my answers, and that case law shows emphatically that there is no abuse occurring in the federal courts. The Rules Committees have a procedure for receiving requests, complaints, and statements of concern from lawyers, litigants, and judges. This "open line" is frequently used. But the Rules Committees have not received requests for an amendment to the rules regarding protective orders. The Rules Committees are also aware that bar organizations and legal policy research groups have studied protective orders in detail and found no evidence of abuses in the federal courts.

Furthermore, both last year and this year, I asked witnesses at the hearings to provide me with decisions by federal courts denying access to documents relevant to protecting public health and safety. Last year, no witness provided me with such a decision. On June 12 of this year, Mr. Kaster provided the Chairman and me with a decision from District Court Judge Daniel Jordan in *Bradley v. Cooper Tire & Rubber Co.* But that decision does not support Mr. Kaster's point. Judge Jordan reviewed orders entered by magistrate judges, including orders requiring the defendant to provide Mr. Kaster with certain documents containing trade secret information. Judge Jordan overruled an objection by Mr. Kaster to an order denying his request to unseal certain documents, noting that "by the time this objection was filed, the vast majority of the considerable number of motions in this case had already been filed, and the motion deadline has now passed." The Judge also noted that the objection was based primarily on Mr. Kaster's desire to use the documents in other cases he was handling against the same defendant. (Enclosure 2, Judge Jordan's Order, page 19). Judge Jordan's decision does not provide support for H.R. 1508.

On Monday, July 6, I received copies of additional protective orders and court records from Mr. Kaster offered to support the need for legislation. Of course, without more information about the cases, reliable conclusions are difficult. But a review of the materials submitted does not show that the courts are condoning abuses of protective orders or keeping information relevant to protecting public health and safety hidden. The materials provided by Mr. Kaster can be generally divided into two general groups. Neither group demonstrates any abuses or endangerment of public health and safety.

The first group includes sample protective orders. Such orders, as the case law makes clear, are important to allowing discovery to occur in cases involving proprietary or confidential business information, such as trade secrets, or involving sensitive personal information. All but one of the orders Mr. Kaster enclosed with his letter has a specific detailed provision for the party receiving the discovery to challenge the designation of

any document or information as confidential. (*See* Enclosure 3, Protective Order signed by Judge Whiteaker at ¶ 4; Enclosure 4 at ¶ 3; Enclosure 5, Stipulated Sharing Confidentiality Protective Order at ¶ 3; Enclosure 7, Protective Order dated February 23, 2005 at ¶ 5, Nonsharing Protective Order at ¶ 6; and Enclosure 8, at ¶ 6). Under well-established case law, a judge asked to decide a challenge to designating specific documents as confidential would consider public and private interests, including public health and safety. These protective orders provide counsel, such as Mr. Kaster, an efficient and effective way to have a judge conduct this review – after counsel has obtained the documents in discovery and can explain to the judge why specific documents should not be treated as confidential. These protective orders allow a much more efficient and effective way to have the type of judicial review that H.R. 1508 would require, without the grave difficulties for discovery that H.R. 1508 would create.

The second group of materials Mr. Kaster submitted are court orders and lawyers' briefs on motions to compel production of documents or motions relating to protective orders. This group includes some information about objections to protective orders. The main issue as to this group appears to be whether the protective order should permit sharing of confidential information with lawyers representing plaintiffs in other, similar cases, to achieve efficiency and economy, not for the purpose of protecting the public health or safety. It is clear from the materials that Mr. Kaster provided that the courts applied the law requiring good cause and balanced the need for keeping certain information produced in discovery confidential with the interest in broader disclosure.

Many of the orders Mr. Kaster cites have "sharing provisions" that expressly allow disclosure of information designated as confidential to lawyers representing plaintiffs in other, similar cases. Even in the absence of such a provision, under current law, as shown in the attached memorandum summarizing the case law around the country, courts often grant requests to allow information designated as confidential to be shared with counsel in other cases. Courts recognize that such sharing can make discovery more efficient and less expensive. In some cases, however, courts find that the efficiencies and economies such sharing can produce are outweighed by the need for a higher level of confidentiality for certain kinds of information, such as trade secrets.

The courts' rulings in each of the cases Mr. Kaster cites appear consistent with the case law that requires a court to weigh the parties' interests in protecting trade secrets or other confidential information exchanged in discovery with the interests supporting broader disclosure. There is no indication in the materials that the outcomes would have been different under H.R. 1508, except that the discovery process would have been much more difficult and time-consuming, and the court's rulings would have been based on much less information about what the documents contained and why they were important.

Let me make a few other specific points on the cases Mr. Kaster cites, in addition to the *Bradley v. Cooper Tire* case discussed above. Mr. Kaster cites *Kreiner v. Firestone*. The issue in that case did not appear to be whether specific information produced in discovery should be distributed because it was relevant to protecting public health or safety. So far

as we can tell from the excerpts provided, there was not an attempt to modify or dissolve the protective order on the basis of public health or safety.

Mr. Kaster cites *Browlee/Whitaker v. Cooper Tire*. But the material he enclosed shows that the federal court carefully considered the plaintiffs' and the defendant's arguments about whether to adopt the protective order that the parties had entered in the state court case before voluntarily dismissing that case and refiling in federal court. The court emphasized that the protective order "provides sufficient mechanism for plaintiffs to seek review of defendant's designations as they have not shown a reluctance to file discovery-related motions." The court also carefully considered a proposed sharing provision and concluded that given the nature of the documents and the disputes over what cases were "similar," such a provision would not adequately protect the need for confidentiality." (Enclosure 3, Order dated March 30, 2001, page 3). This case does not support the argument that the order was problematic or that H.R. 1508 would lead to a different result.

Mr. Kaster also cites *Bridgestone/Firestone, Inc.* and argues that the protective order in that case applied to "hundreds of documents" that would not have been protected under H.R. 1508. The protective order in that case does not support his argument. The protective order was consistent with the case law in stating: "Nothing in this Order is intended to prevent any party from raising with the Court any concern that the non-disclosure of certain Confidential Material may have a possible adverse effect upon the general public health or safety, or the administration or operation of government or public office." The order also allowed the use of information designated as confidential to be shared with "any attorney, expert, or consultant representing a party in other present or future cases" involving Bridgestone or Ford "arising out of the same or similar set of facts, transactions, or occurrences." (Enclosure 4, ¶ 7(f)).

Mr. Kaster cites *Tiller v. Ford Motor Company*. In that case, the court's order granted the plaintiffs' motion to compel production of information over the defendant's objection. The protective order at issue not only had a specific provision allowing the receiving party to challenge the confidentiality designation of any document, it also allowed the party to share the information designated as confidential with other attorneys involved in "active, ongoing litigation against Ford" involving "Ford Explorers and allegations of serious injury or death from roof crush, stability or handling issues, or from occupant restraint systems."). (Enclosure 5, Stipulated Sharing Confidentiality Protective Order, ¶ ¶ 3, 5(e)).

In *O'Hara v. General Motors*, Mr. Kaster cites a second, nonsharing protective order put into place after a protective order with a sharing provision had been entered. The first order specifically allowed the plaintiffs' counsel to share the documents with "other Plaintiffs' attorneys involved in the prosecution of product liability litigation against GM" involving similar claims. The other, "nonsharing" protective order was only entered after vigorous litigation over whether the limited group of documents at issue – trade secrets and other proprietary information about a specific type of laminated glass – were so confidential as to warrant the higher protection. The parties specifically briefed

the need for confidentiality and the interest in broader dissemination of the information. (Enclosure 7).

Mr. Kaster also cites a court order in *Ramirez v. Michelin*. In that order, the court granted the plaintiffs' motion to compel production of information the plaintiffs' lawyer had already obtained in previous litigation. The defendant objected on the ground that the documents were trade secrets. The court carefully considered the arguments and held that of the two categories of documents at issue, one was indeed a trade secret and one was not. The court ordered the defendant to produce both categories of documents. The court noted that the protective order was not limited to trade secrets. That is consistent with current law and with H.R. 1508, neither of which limits confidential information to trade secrets. The protective order entered in that case allowed the receiving party to challenge the propriety of a confidentiality designation at any time in the litigation. The protective order also followed current law by providing that the court could modify the order.

Finally, the Rules Committees would be willing to undertake another empirical study of the uses of protective orders and would be pleased to share the results of that study with Congress. You can be assured that the Rules Committees will be eager to consider remedies for any problems that might appear.

5. You note in your written statement (at page 4) that the 1996 study conducted by the Federal Judicial Center found that in "most civil cases" protective orders "did not impact public safety or health." Does that imply that there were some cases in which protective orders did impact public safety or health, and if so, why does the Rules Committee discount those cases?

5. The Rules Committees are not aware of federal court cases in which the public health and safety were adversely affected by protective orders, despite repeated requests for any such examples in federal courts. The point of the statement in my written testimony was not to discount any cases. Instead, the point was that using personal injury cases as a proxy for those that might conceivably affect public health and safety, the empirical data shows that those cases represent a very small percentage of the federal courts' docket. Furthermore, as to those cases, protective orders were entered in a relatively small percentage. When those orders were entered in a personal injury case, it was apparent from the judicial record precisely what the case was about; information about public health and safety was not kept secret from agencies or consumer groups that might have an interest.

As I stated last year and this year, if the Congress is aware of empirical information showing that protective orders in federal courts are having an adverse effect on public health and safety, the Rules Committees would be anxious to examine that data. To date, the Rules Committees have not been provided with data that shows that protective orders are adversely impacting public health or safety. There is, in our judgment, no need for the protective-order provisions in H.R. 1508, and those provisions would have serious negative effects on pretrial litigation, which is already struggling with the high costs, burdens, and delays of discovery.

6. Are you at all concerned that some judges (perhaps many judges) give insufficient scrutiny to requests for protective orders governing discovery materials—especially stipulated requests, which you note on page 4 of your prepared statement courts "usually accept"?

6. Courts may not accept stipulated requests simply because counsel have agreed to the terms of a protective order. Rule 26 still requires the Court to make a determination of "good cause," a determination that the Court can make from the information in the pleadings about the issues in the case and the parties' representations about the types of information that they seek to place under a protective order, e.g., trade secrets in a patent infringement case; confidential salary and performance information about the plaintiff and fellow employees in an employment discrimination case; or medical information in a personal injury case.

In cases involving massive amounts of discovery material with thousands and sometimes millions of pages of documents or electronic information at issue, both parties can reap enormous benefits from an appropriately worded stipulated protective order. Absent a protective order, discovery in these cases would essentially grind to a halt with needless disputes constantly rising over the production of individual documents. The great savings in time and expense that can be gained from an appropriate protective order benefits not only the parties in the litigation but the administration of justice as a whole. It is not surprising, therefore, that when all parties agree that a case warrants a protective order, judges usually grant those requests to hasten the production of needed documents in discovery.

The Rules Committee are not concerned that stipulated requests abuse the process, for a number of reasons. The Federal Judicial Center research showed that stipulated orders represented only a fraction of all protective orders entered by federal courts. Furthermore, most, if not all, protective orders that are entered in federal court give the party receiving the document the right to challenge before the judge the producing party's designation of a document as confidential or needing protection. This allows the requesting party to get the documents, to review them, and to make a specific challenge to any restrictions on disclosure, and allows the court to decide disputes on an informed, effective, and efficient basis, which cannot be done before when no discovery has taken place.

Finally, case law recognizes that a protective order governing discovery that is entered into at the outset of a case may need to be modified or even vacated. It is routine, therefore, to allow the parties, or even third parties, including the press or intervenors, to challenge the application of the protective order to particular documents or categories of documents or to move to modify the order. When a party or intervenor challenges the good-cause determination as to specific documents, courts review the issue with care and courts of appeals have made it clear that the consent of the parties is not sufficient, in and of itself, to constitute "good cause." As the attached summary of case law shows, cases

throughout the circuits have developed standards for evaluating requests to modify protective orders. Among the factors that courts have considered are: whether the protected information is important to public health and safety; whether there is a continuing need for protection; whether those who produced discovery pursuant to a protective order reasonably relied on the order; whether alternative means exist for obtaining the information; and the relevance of protected materials to related litigation. The case law shows that courts do give scrutiny to the use of protective orders, even when the parties initially agree to their entry.

LETTERS FROM THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES SUBMITTED BY THE HONORABLE STEVE COHEN

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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ROBERT L. HINKLE
EVIDENCE RULES

May 22, 2008

Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

I write to advise you of the concerns of the Judicial Conference's Committee on Rules of Practice and Procedure about the "Sunshine in Litigation Act of 2008" (H.R. 5884), which was introduced on April 23, 2008, and has been referred to the House Judiciary Committee. The Committee on Rules of Practice and Procedure has carefully and thoroughly studied the bill's proposed requirements for issuing discovery protective orders under Rule 26(c) of the Federal Rules of Civil Procedure and for issuing orders approving settlements with confidentiality provisions. As a result of this work, the Rules Committee concluded that the legislation is not necessary to protect the public health and safety and that the discovery protective order provision would make it more difficult to protect important privacy interests and would make civil litigation more expensive, more burdensome, and less accessible.

Discovery Protective Orders

H.R. 5884 would require a judge presiding over a case, who is asked to enter a protective order governing discovery under Rule 26(c) of the Federal Rules of Civil Procedure, to make findings of fact that the information obtained through discovery is not relevant to the protection of public health or safety or, if it is relevant, that the public interest in the disclosure of potential health or safety hazards is outweighed by the public interest in maintaining the confidentiality of the information and that the protective order requested is no broader than necessary to protect the privacy interest asserted.

Bills that would regulate the issuance of protective orders in discovery under Rule 26(c), similar to H.R. 5884, have been introduced regularly since 1991. Under the Rules Enabling Act, 28 U.S.C. § 2071-2077, the Rules Committee studied Rule 26(c) to inform itself about the problems identified by these bills and to bring the strengths of the Rules Enabling Act process to bear on the problems that might be found. Under that process, the Rules Committee carefully examined and reexamined the issues, reviewed the pertinent case law and legal literature, held public hearings, and initiated and evaluated empirical research studies.

The Rules Committee consistently concluded that provisions affecting Rule 26(c), similar to those sought in H.R. 5884, were not warranted and would adversely affect the administration of justice. Based on lengthy and thorough examination of the issues, the Committee concluded that: (1) the empirical evidence showed that discovery protective orders did not create any significant problem of concealing information about safety or health hazards from the public; (2) protective orders are important to litigants' privacy and property interests; (3) discovery would become more burdensome and costly if parties cannot rely on protective orders; (4) administering a rule that added conditions before any discovery protective order could be entered would impose significant burdens on the court system; and (5) such a rule would have limited impact because much information gathered in discovery is not filed with the court and is not publicly available.

The Empirical Data Shows No Need for the Legislation

In the early 1990s, the Committee began studying pending bills requiring courts to make particularized findings of fact that a discovery protective order would not restrict the disclosure of information relevant to the protection of public health and safety. The study raised significant issues about the potential for revealing confidential information that could endanger privacy interests and increased litigation resulting from the parties' objections to, and refusal to voluntarily comply with, the broad discovery requests that are common in litigation. The Committee concluded that the issues merited further consideration and that empirical information was necessary to understand whether there was a need to regulate the issuance of discovery protective orders by changing Rule 26(c).

In 1994, the Rules Committee asked the Federal Judicial Center (FJC) to do an empirical study on whether discovery protective orders were operating to keep from the public information about public safety or health hazards. The FJC completed the study in April 1996. It examined 38,179 civil cases filed in the District of Columbia, Eastern District of Michigan, and Eastern District of Pennsylvania from 1990 to 1992. The FJC study showed that discovery protective orders are requested in only about 6% of civil

cases. Most of the requests are made by motion, which courts carefully review and deny or modify a substantial proportion; about one-quarter of the requests are made by party stipulations that courts usually accept.

The empirical study showed that discovery protective orders entered in most cases do not impact public safety or health. In its study, the FJC randomly selected 398 cases that had protective order activity. About half of the 398 cases involved a protective order governing the return or destruction of discovery materials or imposing a discovery stay pending some event or action. Only half of the 398 cases involved a protective order restricting disclosure of discovery materials. Of the cases in which a protective order was entered restricting access to discovery materials, a little more than 50% were civil rights and contract cases and about 9% were personal injury cases. In the cases in which a protective order is entered restricting parties from disclosing discovery material, most are not personal injury cases in which public health and safety issues are most likely to arise. The empirical data showed no evidence that protective orders create any significant problem of concealing information about public hazards.

Other Information Shows No Need for the Legislation

The Committee also studied the examples commonly cited as illustrations of the need for legislation such as H.R. 5884. In these cases, information sufficient to protect public health or safety was publicly available from other sources. The Committee examined the case law to understand what courts are in fact doing when parties file motions for protective orders in discovery. The case law showed that the courts review such motions carefully and often deny or modify them to grant only the protection needed, recognizing the importance of public access to court filings. The case law also shows that courts often reexamine protective orders if intervenors or third parties raise concerns about them.

The Committee also considered specific proposals to amend Rule 26(c), intended to address the problems identified in H.R. 5884's predecessor bills. The Committee published proposed amendments through the Rules Enabling Act process. Public comment led to significant revisions, republication, and extensive public comment. At the conclusion of this process, the Judicial Conference decided to return the proposals to the Committee for further study. That study included the work described above.

The Legislation Would Have Significant Negative Consequences

The Committee also carefully considered the impact of requiring findings of fact before any discovery protective order could be issued. As noted, the empirical data showed that about 50% of the cases in which discovery protective orders of the type addressed in H.R. 5884 are sought involve contract claims and civil rights claims, including employment discrimination. Many of these cases involve either protected confidential information, such as trade secrets, or highly sensitive personal information. In particular, civil rights and employment discrimination cases often involve personal information not only about the plaintiff but also about other individuals who are not parties, such as fellow employees. As a result, the parties in these categories of cases frequently seek orders protecting confidential information and personal information exchanged in discovery.

The risks to privacy are significantly greater today than when bills similar to H.R. 5884 were first introduced, because of the computer. The federal courts will soon all have electronic court filing systems, which permit public remote electronic access to court filings. Electronic filing is an inevitable development in this computer age and is providing beneficial increases in efficiency and in public access to court filings. But remote public access to court filings makes it more difficult to protect confidential information, such as competitors' trade secrets or individuals' sensitive private information. New rules implementing the E-Government Act do not reduce the need for protective orders to safeguard against dissemination of highly personal and sensitive information. If particularized fact findings are required before a discovery protective order can issue, parties in these cases will face a heavier litigation burden and some plaintiffs might abandon their claims rather than risk public disclosure of highly personal or confidential information.

Although few cases involve discovery into information relevant to public health or safety hazards, H.R. 5884 would apply to all civil cases. In many cases, protective orders are essential to effective discovery management. That importance has increased with the explosive growth in electronically stored information. Even relatively small cases often involve huge volumes of information. Requiring courts to review information – which can often amount to thousands or even millions of pages – to make such determinations will burden judges and further delay pretrial discovery. Parties often rely on the ability to obtain protective orders in voluntarily producing information without the need for extensive judicial supervision. If obtaining a protective order required item-by-item judicial consideration to determine whether the information was relevant to the protection of public health or safety, as contemplated under the bill, parties would be less likely to

seek or rely on such orders and less willing to produce information voluntarily, leading to discovery disputes. Requiring parties to litigate and courts to resolve such discovery disputes would impose significant costs and burdens on the discovery process and cause further delay. Such satellite disputes would increase the cost of litigation, lead to orders refusing to permit discovery into some information now disclosed under protective orders, add to the pressures that encourage litigants to pursue nonpublic means of dispute resolution, and force some parties to abandon the litigation.

The Legislation Would Primarily Affect Information that is Not Publicly Available Because it is Not Filed With the Court

Not only would the proposed legislation exact a heavy toll on litigants, lawyers, and judges, its potential benefit would be minimized by the general rule that what is produced in discovery is not public information. The Supreme Court recognized this limit when it noted in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984), that discovery materials, including "pretrial depositions and interrogatories are not public components of a civil trial. Such proceedings were not open to the public at common law, ... and, in general, they are conducted in private as a matter of modern practice." Information produced in discovery is not publicly available unless it is filed with the court. Information produced in discovery is not filed with the court unless it is part of or attached to a motion or other submission, such as a motion for summary judgment. Consequently, if discovery material is in the parties' possession but not filed, it is not publicly available. The absence of a protective order does not require that any party share the information with the public. The proposed legislation would have little effect on public access to discovery materials not filed with the court.

Conclusion

The Committee opposes the proposed legislation on discovery protective orders on the ground that it is inconsistent with the Rules Enabling Act. The Committee's substantive concerns with the proposed legislation result from the careful study conducted through the lengthy and transparent process of the Rules Enabling Act. That study, which spanned years and included research to gather and analyze empirical data, case law, academic studies, and practice, led to the conclusion that no change to the present protective-order practice is warranted and that the proposed legislation would make discovery more expensive, more burdensome, and more time-consuming, and would threaten important privacy interests.

Confidentiality Provisions in Settlement Agreements

The Empirical Data Shows No Need for the Legislation

H.R. 5884 would also require a judge asked to issue an order approving a settlement agreement to make findings of fact that such an order would not restrict the disclosure of information relevant to the protection of public health or safety or, if it is relevant, that the public interest in the disclosure of potential health or safety hazards is outweighed by the public interest in maintaining the confidentiality of the information and that the protective order requested is no broader than necessary to protect the privacy interest asserted. In 2002, the Committee on Rules of Practice and Procedure asked the Federal Judicial Center to collect and analyze data on the practice and frequency of "sealing orders" that limit disclosure of settlement agreements filed in the federal courts. The Committee asked for the study in response to proposed legislation that would regulate confidentiality provisions in settlement agreements. H.R. 5884 contains a similar provision. In April 2004, the FJC completed its comprehensive study surveying civil cases terminated in 52 district courts during the two-year period ending December 31, 2002. In those 52 districts, the FJC found a total of 1,270 cases out of 288,846 civil cases in which a sealed settlement agreement was filed, about one in 227 cases (0.44%).

The FJC study then analyzed the 1,270 sealed-settlement cases to determine how many involved public health or safety. The FJC coded the cases for the following characteristics, which might implicate public health or safety: (1) environmental; (2) product liability; (3) professional malpractice; (4) public-party defendant; (5) death or very serious injury; and (6) sexual abuse. A total of 503 cases (0.18% of all cases) had one or more of the public-interest characteristics. That number would be smaller still if the 177 cases that were part of two consolidated MDL (multidistrict litigation) proceedings were viewed as two cases because they were consolidated into two proceedings before two judges for centralized management.

After reviewing the information from the 52 districts, the FJC concluded that there were so few orders sealing settlement agreements because most settlement agreements are neither filed with the court nor require court approval. Instead, most settlement agreements are private contractual obligations.

The Committee was nonetheless concerned that even though the number of cases in which courts sealed a settlement was small, those cases could involve significant public hazards. A follow-up study was conducted to determine whether in these cases, there was publicly available information about potential hazards contained in other records that were

not sealed. The follow-up study showed that in the few cases involving a potential public health or safety hazard and in which a settlement agreement was sealed, the complaint and other documents remained in the court's file, fully accessible to the public. In these cases, the complaints generally contained details about the basis for the suit, such as the defective nature of a harmful product, the dangerous characteristics of a person, or the lasting effects of a particular harmful event. Although the complaints varied in level of detail, all identified the three most critical pieces of information regarding possible public health or safety risks: (1) the risk itself; (2) the source of that risk; and (3) the harm that allegedly ensued. The product-liability suit complaints, for example, specifically identified the product at issue, described the accident or event, and described the harm or injury alleged to have resulted. In many cases, the complaints went further and identified a particular feature of the product that was defective, or described a particular way in which the product failed. In the cases alleging harm caused by a specific person, such as civil rights violations, sexual abuse, or negligence, the complaints consistently identified the alleged wrongdoer and described in detail the causes and extent of the alleged injury. These findings were consistent with the general conclusions of the FJC study that the complaints filed in lawsuits provided the public with "access to information about the alleged wrongdoers and wrongdoings."

The Legislation is Unlikely to be Effective

The FJC study shows that only a small fraction of the agreements that settle federal-court actions are filed in the court. Most settlement agreements remain private contracts between the parties. On the few occasions when parties do file a settlement agreement with the court, it is to make the settlement agreement part of the judgment to ensure continuing federal jurisdiction, not to secure court approval of the settlement. Such agreements would not be affected by prohibitions, like those in H.R. 5884, prohibiting a court from entering an order "approving a settlement agreement that would restrict disclosure" of its contents.

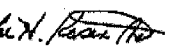
Conclusion

Based on the relatively small number of cases involving a sealed settlement agreement and the availability of other sources – including the complaint – to inform the public of potential hazards in cases involving a sealed settlement agreement, the Committee concluded that it was not necessary to enact a rule or a statute restricting confidentiality provisions in settlement agreements.

Summary

For these reasons, the Committee on Rules of Practice and Procedure has strong concerns about the discovery protective order and settlement order provisions of H.R. 5884 that you and the Judiciary Committee are urged to consider. I thank you for your consideration and look forward to continuing to work together to ensure that our civil justice system is just and fair.

Sincerely,



Lee H. Rosenthal
United States District Judge
Chair, Committee on Rules of Practice
and Procedure

cc: Members, House Committee on the Judiciary

Identical letter sent to: Honorable Lamar Smith
Honorable Howard Berman
Honorable Howard Coble

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

JUN 0 2 2009

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PETER G. McCABE
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CRIMINAL RULES

ROBERT L. HINKLE
EVIDENCE RULES

June 2, 2009

Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

I write to advise you that the Judicial Conference's Committee on Rules of Practice and Procedure and its Advisory Committee on Civil Rules oppose the "Sunshine in Litigation Act of 2009" (H.R. 1508), which was introduced on March 12, 2009. The Rules Committees have carefully and thoroughly studied the bill's proposed requirements for issuing discovery protective orders under Rule 26(c) of the Federal Rules of Civil Procedure and for issuing orders approving settlements with confidentiality provisions. As a result of this work, the Rules Committees concluded that the legislation is not necessary to protect the public health and safety and that the discovery protective order provision would make it more difficult to protect important privacy interests and would make civil litigation more expensive, more burdensome, and less accessible. The Committees also oppose the legislation because it is inconsistent with the Rules Enabling Act, 28 U.S.C. §§ 2071-2077. For many of the same reasons, the American Bar Association voted to approve a resolution opposing H.R. 1508, which is enclosed.

Discovery Protective Orders

H.R. 1508 would require a judge presiding over a case, who is asked to enter a protective order governing discovery under Rule 26(c) of the Federal Rules of Civil Procedure, to make findings of fact that the information obtained through discovery is not relevant to the protection of public health or safety or, if it is relevant, that the public interest in the disclosure of potential health or safety hazards is outweighed by the public interest in maintaining the confidentiality of the information and that the protective order requested is no broader than necessary to protect the privacy interest asserted.

Bills that would regulate the issuance of protective orders in discovery under Rule 26(c), similar to H.R. 1508, have been introduced regularly since 1991. Under the Rules Enabling Act, the Rules Committees studied Rule 26(c) to inform themselves about the problems identified by these bills and to bring the strengths of the Rules Enabling Act process to bear on the problems that might be found. Under that process, the Committees carefully examined and reexamined the issues, reviewed the pertinent case law and legal literature, held public hearings, and initiated and evaluated empirical research studies. They found that the criteria courts rely on when entering an order sealing documents filed with the court are properly more demanding than the criteria relied on when issuing a discovery protective order, which typically govern documents not filed with the court. Because discovery material does not affect the judicial function in determining the parties' substantive rights, the level of scrutiny for granting a protective order is not the same as for an order that seals filings. The difference explains why courts routinely require a separate showing of good cause when a party requests that documents subject to a protective order be sealed.

Based on lengthy and thorough examination of the issues, the Rules Committees concluded that provisions affecting Rule 26(c), similar to those sought in H.R. 1508, are not warranted and would adversely affect the administration of justice. They found that: (1) the empirical evidence showed that discovery protective orders did not create any significant problem of concealing information about safety or health hazards from the public; (2) protective orders are important to litigants' privacy and property interests; (3) discovery would become more burdensome and costly if parties cannot rely on protective orders; (4) administering a rule that added conditions before any discovery protective order could be entered would impose significant burdens on the court system; and (5) such a rule would have limited impact because much information gathered in discovery is not filed with the court and is not publicly available.

The Empirical Data Shows No Need for the Legislation

In the early 1990s, the Rules Committees began studying pending bills requiring courts to make findings of fact that a discovery protective order would not restrict the disclosure of information relevant to the protection of public health and safety. The study raised significant issues about the potential for revealing confidential information that could endanger privacy interests and increased litigation resulting from the parties' objections to, and refusal to voluntarily comply with, the broad discovery requests that are common in litigation. The Committees concluded that the issues merited further consideration and that empirical information was necessary to understand whether there was a need to regulate the issuance of discovery protective orders by changing Rule 26(c).

In 1994, the Rules Committees asked the Federal Judicial Center (FJC) to do an empirical study on whether discovery protective orders were operating to keep from the public information about public safety or health hazards. The FJC completed the study in April 1996. It examined 38,179 civil cases filed in the District of Columbia, Eastern District of Michigan, and Eastern District of Pennsylvania from 1990 to 1992. The FJC study showed that discovery protective orders are requested in only about 6% of civil cases. Most of the requests are made by motion, which are briefed by both parties and courts carefully review and deny or modify a substantial proportion; about one-quarter of the requests are made by party stipulations that courts usually accept.

The empirical study showed that discovery protective orders entered in most cases do not impact public safety or health. In its study, the FJC randomly selected 398 cases that had protective order activity. A little more than 50% were civil rights and contract cases and about 9% were personal injury cases. About half of the 398 cases involved a protective order governing the return or destruction of discovery materials or imposing a discovery stay pending some event or action. This half had nothing to do with restricting access to discovery material. In the other half of the 398 cases, a protective order was entered restricting access to discovery materials. Most of these cases are not personal injury cases in which public health and safety issues are most likely to arise. The empirical data showed no evidence that protective orders create any significant problem of concealing information about public hazards.

Other Information Shows No Need for the Legislation

The Rules Committees also studied the examples commonly cited as illustrations of the need for legislation such as H.R. 1508. In these cases, information sufficient to protect public health or safety was publicly available from other sources. The Committees examined the case law to understand what courts are in fact doing when parties file motions for protective orders in discovery. The case law showed that the courts review such motions carefully and often deny or modify them to grant only the protection needed, recognizing the importance of public access to court filings. The case law also shows that courts often reexamine protective orders if intervenors or third parties raise concerns about them.

The Rules Committees also considered specific proposals to amend Rule 26(c), intended to address the problems identified in H.R. 1508's predecessor bills. The Committees published proposed amendments through the Rules Enabling Act process. Public comment led to significant revisions, republication, and extensive public comment.

At the conclusion of this process, the Judicial Conference decided to return the proposals to the Committees for further study. That study included the work described above.

The Legislation Would Have Significant Negative Consequences

The Rules Committees also carefully considered the impact of requiring findings of fact before any discovery protective order could be issued. As noted, the empirical data showed that about 50% of the cases in which discovery protective orders of the type addressed in H.R. 1508 are sought involve contract claims and civil rights claims, including employment discrimination. Many of these cases involve either protected confidential information, such as trade secrets, or highly sensitive personal information. In particular, civil rights and employment discrimination cases often involve personal information not only about the plaintiff but also about other individuals who are not parties, such as fellow employees. As a result, the parties in these categories of cases frequently seek orders protecting confidential information and personal information exchanged in discovery.

The risks to privacy are significantly greater today than when bills similar to H.R. 1508 were first introduced, because of the computer. The federal courts all have electronic court filing systems, which permit public remote electronic access to court filings. Electronic filing is an inevitable development in this computer age and is providing beneficial increases in efficiency and in public access to court filings. But remote public access to court filings makes it more difficult to protect confidential information, such as competitors' trade secrets or individuals' sensitive private information. New rules implementing the E-Government Act do not reduce the need for protective orders to safeguard against dissemination of highly personal and sensitive information. If fact findings are required before a discovery protective order can issue, parties in these cases will face a heavier litigation burden and some plaintiffs might abandon their claims rather than risk public disclosure of highly personal or confidential information.

Although few cases involve discovery into information relevant to public health or safety hazards, H.R. 1508 would apply to all civil cases. In many cases, protective orders are essential to effective discovery management. That importance has increased with the explosive growth in electronically stored information. Even relatively small cases often involve massive amounts of information. Requiring courts to review information – which can often amount to thousands or even millions of pages – to make such determinations will burden judges and further delay pretrial discovery. The likely mechanics of a procedure implementing the bill underscore the significant delays it would add. As a

practical matter, a party requesting discovery would not receive discoverable material until the producing party completed its collection, processing, and review of discoverable material and transmitted it to the judge, which could take months. The case would then be put on hold until the judge reviewed the materials and made the necessary findings under the bill.

Parties often rely on the ability to obtain protective orders in voluntarily producing information without the need for extensive judicial supervision. If obtaining a protective order required item-by-item judicial consideration to determine whether the information was relevant to the protection of public health or safety, as contemplated under the bill, parties would be less likely to seek or rely on such orders and less willing to produce information voluntarily, leading to discovery disputes. Requiring parties to litigate and courts to resolve such discovery disputes would impose significant costs and burdens on the discovery process and cause further delay. Such satellite disputes would increase the cost of litigation, lead to orders refusing to permit discovery into some information now disclosed under protective orders, add to the pressures that encourage litigants to pursue nonpublic means of dispute resolution, and force some parties to abandon the litigation.

The Legislation Would Primarily Affect Information that is Not Publicly Available Because it is Not Filed With the Court

Not only would the proposed legislation exact a heavy toll on litigants, lawyers, and judges, its potential benefit would be minimized by the general rule that what is produced in discovery is not public information. The Supreme Court recognized this limit when it noted in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984), that discovery materials, including "pretrial depositions and interrogatories are not public components of a civil trial. Such proceedings were not open to the public at common law, ... and, in general, they are conducted in private as a matter of modern practice." Information produced in discovery is not publicly available unless it is filed with the court. Information produced in discovery is not filed with the court unless it is part of or attached to a motion or other submission, such as a motion for summary judgment. Consequently, if discovery material is in the parties' possession but not filed, it is not publicly available. The absence of a protective order does not require that any party share the information with the public. The proposed legislation would have little effect on public access to discovery materials not filed with the court.

Conclusion

The Rules Committees oppose the proposed legislation on discovery protective orders on the ground that it is inconsistent with the Rules Enabling Act. The Committees' substantive concerns with the proposed legislation result from the careful study conducted through the lengthy and transparent process of the Rules Enabling Act. That study, which spanned years and included research to gather and analyze empirical data, case law, academic studies, and practice, led to the conclusion that no change to the present protective-order practice is warranted and that the proposed legislation would make discovery more expensive, more burdensome, and more time-consuming, and would threaten important privacy interests.

Confidentiality Provisions in Settlement Agreements

The Empirical Data Shows No Need for the Legislation

H.R. 1508 would also require a judge asked to issue an order approving a settlement agreement to make findings of fact that such an order would not restrict the disclosure of information relevant to the protection of public health or safety or, if it is relevant, that the public interest in the disclosure of potential health or safety hazards is outweighed by the public interest in maintaining the confidentiality of the information and that the protective order requested is no broader than necessary to protect the privacy interest asserted. In 2002, the Rules Committees asked the Federal Judicial Center to collect and analyze data on the practice and frequency of "sealing orders" that limit disclosure of settlement agreements filed in the federal courts. The Committees asked for the study in response to proposed legislation that would regulate confidentiality provisions in settlement agreements. H.R. 1508 contains a similar provision. In April 2004 the FJC completed its comprehensive study, surveying civil cases terminated in 52 district courts during the two-year period ending December 31, 2002. In those 52 districts, the FJC found a total of 1,270 cases out of 288,846 civil cases in which a sealed settlement agreement was filed, about one in 227 cases (0.44%).

The FJC study then analyzed the 1,270 sealed-settlement cases to determine how many involved public health or safety. The FJC coded the cases for the following characteristics, which might implicate public health or safety: (1) environmental; (2) product liability; (3) professional malpractice; (4) public-party defendant; (5) death or very serious injury; and (6) sexual abuse. A total of 503 cases (0.18% of all cases) had one or more of the public-interest characteristics. That number would be smaller still if the 177 cases that were part of two consolidated MDL (multidistrict litigation) proceedings

were viewed as two cases because they were consolidated into two proceedings before two judges for centralized management.

After reviewing the information from the 52 districts, the FJC concluded that there were so few orders sealing settlement agreements because most settlement agreements are neither filed with the court nor require court approval. Instead, most settlement agreements are private contractual obligations.

The Rules Committees were nonetheless concerned that even though the number of cases in which courts sealed a settlement was small, those cases could involve significant public hazards. A follow-up study was conducted to determine whether in these cases, there was publicly available information about potential hazards contained in other records that were not sealed. The follow-up study showed that in the few cases involving a potential public health or safety hazard and in which a settlement agreement was sealed, the complaint and other documents remained in the court's file, fully accessible to the public. In these cases, the complaints generally contained details about the basis for the suit, such as the defective nature of a harmful product, the dangerous characteristics of a person, or the lasting effects of a particular harmful event. Although the complaints varied in level of detail, all identified the three most critical pieces of information regarding possible public health or safety risks: (1) the risk itself; (2) the source of that risk; and (3) the harm that allegedly ensued. The product-liability suit complaints, for example, specifically identified the product at issue, described the accident or event, and described the harm or injury alleged to have resulted. In many cases, the complaints went further and identified a particular feature of the product that was defective, or described a particular way in which the product failed. In the cases alleging harm caused by a specific person, such as civil rights violations, sexual abuse, or negligence, the complaints consistently identified the alleged wrongdoer and described in detail the causes and extent of the alleged injury. These findings were consistent with the general conclusions of the FJC study that the complaints filed in lawsuits provided the public with "access to information about the alleged wrongdoers and wrongdoings."

The Legislation is Unlikely to be Effective

The FJC study shows that only a small fraction of the agreements that settle federal-court actions are filed in the court. Most settlement agreements remain private contracts between the parties. On the few occasions when parties do file a settlement agreement with the court, it is to make the settlement agreement part of the judgment to ensure continuing federal jurisdiction, not to secure court approval of the settlement. Such agreements would not be affected by prohibitions, like those in H.R. 1508, prohibiting a

court from entering an order "approving a settlement agreement that would restrict disclosure" of its contents.

Conclusion

Based on the relatively small number of cases involving a sealed settlement agreement and the availability of other sources – including the complaint – to inform the public of potential hazards in cases involving a sealed settlement agreement, the Rules Committees concluded that it was not necessary to enact a rule or a statute restricting confidentiality provisions in settlement agreements.

Summary

For these reasons, the Committee on Rules of Practice and Procedure and the Advisory Committee on Civil Rules oppose the discovery protective order and settlement order provisions of H.R. 1508. I thank you for your consideration and look forward to continuing to work together to ensure that our civil justice system is just and fair.

Sincerely,

Lee H. Rosenthal
United States District Judge
Chair, Committee on Rules of Practice
and Procedure

Enclosure

cc: Members, House Committee on the Judiciary

Identical letter sent to: Honorable Lamar Smith

Thomas M. Susman
Director
Governmental Affairs Office

AMERICAN BAR ASSOCIATION
740 Fifteenth Street, NW
Washington, DC 20005-1022
(202) 662-1760
FAX: (202) 662-1762

April 13, 2009

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
433 Russell Senate Office Building
Washington, D.C. 20510

Dear Chairman Leahy:

I am writing on behalf of the American Bar Association to voice our strong opposition to S. 537, the "Sunshine in Litigation Act of 2009."

The Act would change Federal Rule of Civil Procedure 26(c) by limiting a court's ability to enter an order in a civil case (1) restricting disclosure of information obtained through discovery; (2) approving a settlement agreement restricting the disclosure of such information; or (3) restricting access to court records in civil cases – unless the court makes certain findings that the order would not restrict the disclosure of information relevant to the protection of public health or safety, or that the public interest in disclosure of such information is outweighed by a specific interest in maintaining the confidentiality of the information and that the protective order is no broader than necessary to protect the privacy interest asserted.

The ABA opposes S. 537 for two reasons. First, the bill would circumvent the Rules Enabling Act, the procedure established by Congress for revising rules in the federal courts. Second, the bill would impose additional, unnecessary requirements on, and restrict the discretion of, federal courts in ways that will only increase the burdens of litigation in both time and expense. The existing provisions of Rule 26 are currently operating to protect the public interest against unnecessary restrictions on information bearing on public health and safety, and protective orders are important to facilitate the prompt flow of discovery in litigation without imposing the additional burdens contemplated in the bill.

Rules Enabling Act Issues

S. 537 is an unwise retreat from the balanced and inclusive process established by Congress in the Rules Enabling Act. The Rules Enabling Act process is based on three fundamental concepts: (1) the essential, central role of the judiciary in initiating and formulating judicial rulemaking; (2) the use of procedures that permit full public participation, including participation by members

of the legal profession, in considering changes to the rules; and (3) congressional review before changes are adopted.

S. 537 would depart from this balanced and inclusive process. The failure to follow the processes in the Rules Enabling Act would frustrate the purpose of the Act and could do harm to the effective functioning of the judicial system.

Substantive Issues

The current version of Rule 26(c) and the case law applying it give judges appropriate authority to determine when to enter a protective order and what provisions should or should not be in it in light of the particular facts and circumstances of each case. There are three substantive flaws in the proposed legislation:

First, there is no demonstrable deficiency in the current version of Rule 26(c) that requires a change. The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (the "Rules Committee") reported to this Committee in 2008 that empirical studies since 1991 show "no evidence that protective orders create any significant problem of concealing information about public hazards." A copy of the Rules Committee's letter of March 4, 2008, is attached to this letter.

Second, requiring particularized findings of fact before any protective order could be issued in *any* case would impose an enormous burden on both the courts and litigants.

Only a small fraction of civil cases involve issues that implicate the public health and safety. Yet, the bill would impose a broad rule that would apply to every civil case. Even in cases that arguably may bear on public health and safety issues, requiring a court to make detailed findings at the beginning of a case, possibly on a document-by-document basis, will impose an impossible burden on the court and the litigants. Protective orders facilitate the timely production of documents and permit challenges to particular documents after the parties have had a chance to review them and the case has evolved to the point when the parties and the court can understand their significance and context.

The Rules Committee correctly noted in its letter to this Committee that the proposed legislation "would make discovery more expensive, more burdensome, and more time-consuming, and would threaten important privacy interests."

Third, the requirement that judges entering an order approving a sealed settlement agreement must make the same particularized findings of fact necessary for discovery protective orders is also unnecessary. Only a small number of cases involve a sealed settlement agreement and only a portion of those cases involve a potential public health or safety hazard. In those cases that do, the complaints and other documents that are a matter of public record typically contain sufficient details about the alleged hazard or harm to apprise the public of the risk, the source of the risk,

and the harm it allegedly causes. Sealing a settlement agreement in these cases would have no material impact on the public's ability to be informed of potential health or safety hazards.

The ABA has adopted policy regarding secrecy and coercive agreements on this very issue:

> Where information obtained under secrecy agreements (a) indicates risk of hazards to other persons, or (b) reveals evidence relevant to claims based on such hazards, courts should ordinarily permit disclosure of such information, after hearing, to other plaintiffs or to government agencies who agree to be bound by appropriate agreements or court orders to protect the confidentiality of trade secrets and sensitive proprietary information; . . . .

Following adoption of this ABA policy, the Rules Committee and the Advisory Committee on Civil Rules of the Judicial Conference explored at length the need for changes in Rule 26(c) similar to the proposed changes in legislation such as S. 537. Both committees concluded that these changes are not warranted. They are not warranted for one overriding reason: the federal courts are already addressing these concerns when they consider whether to enter a protective order.

Conclusion

The current version of Rule 26(c) is and has been an appropriate, effective mechanism to protect the rights of both litigants and the public, without overburdening the administration of justice in the federal courts. Any proposed amendment to its provisions should be addressed through the existing Rules Enabling Act procedure. S. 537 would not serve the public interest.

Sincerely,

Thomas M. Susman

cc: Members, Senate Committee on the Judiciary

10C

ADOPTED

AMERICAN BAR ASSOCIATION

OHIO STATE BAR ASSOCIATION
SECTION OF LITIGATION

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

RESOLVED, That the American Bar Association reaffirms its support for the Congressionally-enacted, judicial rulemaking process set forth in the Rules Enabling Act and opposes those portions of the Sunshine in Litigation Act of 2007 of the 110th Congress (S.2449) or other legislation that would circumvent that process.

FURTHER RESOLVED, That the American Bar Association opposes the Sunshine in Litigation Act of 2007 of the 110th Congress (S.2449) or other legislation that would impose similar requirements or burdens on the federal courts above and beyond the current (2008) provisions of Fed. R. Civ. P. 26(c) for entering or modifying protective orders or sealing settlements.

LETTER OF SUPPORT FOR THE BILL, H.R. 1508,
SUBMITTED BY THE HONORABLE STEVE COHEN

June 4, 2009

The Honorable Representative Stephen Cohen, Chairman
House Committee on the Judiciary
Subcommittee on Commercial and Administrative Law
Ford House Office Building
United States House of Representatives
Washington, DC 20515

Dear Chairman Cohen and Members of the Subcommittee:

We, the undersigned national consumer advocacy organizations, strongly support H.R. 1508, the "Sunshine in Litigation Act of 2009." This much needed legislation restricts court-ordered secrecy on matters that impact public health and safety and keeps corporations accountable for wrongdoing they would otherwise try to hide from the public. In the last decade alone, companies that settled product liability cases used secrecy to wrongfully and repeatedly conceal injuries and deaths associated with every day consumer products like automobile tires, magnetic toys, collapsing baby cribs, and prescription drugs. Secrecy also enabled clergy misconduct and sexual abuse to remain hidden from the public when victimized young children and their families could have benefited greatly from such information.

A major 2004 Federal Judicial Center study confirms that secrecy is, indeed, a significant problem. The study suggests that in 2001 and 2002, settlements alone may have been sealed in as many as 500 personal injury cases in federal courts. There will never be any way to determine the public health and safety significance of these sealed settlements, and each case could potentially be hiding another dangerous product or a pattern of negligent conduct. As Judge Abner Mikva has emphasized in the past, court secrecy clearly remains a public policy matter that must be addressed through Congress.

In addition to providing an enormous public benefit, secrecy restrictions adopted in various courts across the country have not burdened judicial systems or impacted the number of cases resolved in these courts. This could explain why the number of states that regulate secrecy agreements has at least quadrupled since the 1990s, and why court systems in 41 states and 50 out of 94 federal court districts have taken steps to limit court secrecy. The "Sunshine in Litigation Act" is a natural progression of these measures, and would ensure consistency in federal courts as well.

For these reasons, we urge Congress to enact H.R. 1508, the "Sunshine in Litigation Act" and we look forward to working with you and your staff to pass the strongest possible court secrecy reform law.

Sincerely,

Center for Justice and Democracy
Consumer Federation of America
Consumers Union
Kids in Danger
National Consumers League
National Association of Consumer Advocates
Public Citizen
US PIRG

○