

Prepared Testimony of

Richard D. Meadow, Esq.
The Lanier Law Firm

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Introduction

Members of the Committee, it is my honor and privilege to present my views on the “Sunshine in Litigation Act of 2008” and confidentiality in litigation. Having been a practicing attorney for the past 24 years, I have had extensive experience in litigations involving protective orders and confidential settlements.

As a member of The Lanier Law Firm, we were at the forefront of the Vioxx litigation, having tried 3 of the 5 successful verdicts against Merck Pharmaceuticals. Our firm is also integrally involved in the Heparin, Avandia, Digitek, Trasylol, Bextra, Renu, Ortho Evra, and Zicam litigations. Additionally, we are involved in an action against Fannie Mae where the entire case is under seal. I present my testimony on behalf of myself and The Lanier Law Firm.

Secret settlement agreements that conceal a public hazard, or any information that would identify a public hazard, are both dangerous and unethical because they allow for the continuation of practices and circumstances that unnecessarily place members of the public at risk, usually to save a corporation from economic loss. They impair and frustrate civil justice, and throw a veil over the court system that is both corrosive and discrediting. While some may argue that secrecy agreements are sometimes necessary to encourage wrongdoers to settle with injured plaintiffs, it is bad public policy to allow those who are causing injury to hide their defective products and their dangerous practices from the public and government regulators.

How Secrecy Agreements Are Used

Secrecy agreements are used in a wide variety of civil actions for personal injury and wrongful death compensation. Among these are claims for compensation for injury resulting from defective consumer products, sexual abuse, toxic contamination, employment discrimination and medical malpractice.

Parties to a lawsuit can enter into a secrecy agreement at almost any point during the proceedings:

- During the pre-trial discovery phase, a judge may be asked to issue a protective order which forbids the plaintiff from sharing information disclosed during the case with anyone, even government regulators. Corporate defendants sometimes require such an order before they will disclose sensitive information that could be publicly embarrassing or expose the company to further lawsuits.
- At the conclusion of a trial, a defendant can request the plaintiff to agree to an order to seal all records in a case, including all exhibits and transcripts. Sealing orders can go so far as to remove all trace that a lawsuit even existed.
- After a trial, a defendant can ask for a confidentiality agreement that prohibits victims from saying or revealing anything publicly about the case. A confidentiality agreement

can prohibit a victim from cooperating with government safety regulators and even law enforcement agencies.

Secrecy agreements were not nearly as common three or four decades ago as they are today. A series of investigative articles on secrecy agreements in the Washington Post in 1988 found, “The broad use of confidentiality provisions has emerged only in the last 15 years...” and their use is “burgeoning.” It has now become the normal practice in cases alleging a defective product or improper conduct for the defense to ask plaintiffs to sign a secrecy agreement. In fact, many corporations refuse to settle a claim without the plaintiff signing such an agreement, even where a product is designed defectively or is hazardous and continues to be sold. Plaintiffs may put aside any misgivings they have about keeping dangers under wraps and agree to secrecy in order to avoid years of litigation or simply to remove doubt that they will be compensated for their injuries.

The Negative Effects of Secrecy Agreements on Public Safety

Litigation secrecy has kept information hidden from the public that could have prevented injuries and deaths to thousands of people. Tires, over-the-counter children’s cough syrup, Playskool Travel-Lite baby cribs – defects in these and innumerable other products were known yet kept killing and injuring people because secrecy agreements kept the public and regulators from learning about their dangers.

Many lives could have been saved in the late 1990s when information about the dangerous combination of Ford vehicles and Firestone tires uncovered during litigation were kept hidden from the public through secret settlements and overbroad protective orders. On March 9, 1997, 19-year-old scholarship student Daniel Van Etten was killed when the tread on his Firestone tire separated. Instead of addressing these problem tires and alerting the public immediately, Firestone chose to settle the Van Etten’s claim quietly, by requiring all the discovery documents to be kept confidential. Firestone did not recall the 6.5 million defective tires until three years later. By 2001, the National Highway Traffic Safety Administration (NHTSA) “determined that Firestone shredding tires had caused at least 271 fatalities, most of which involved cases settled secretly.”¹

16-month-old Danny Keysar was strangled to death when his Playskool Travel-Lite baby crib collapsed in 1998. Danny’s parents later learned that three prior lawsuits involving the same defect had already been settled secretly. The crib’s manufacturers, Kolcraft and Hasbro even offered them a settlement with a secrecy provision but – in a rare instance – Danny’s parents fought successfully to deny the manufacturer’s request for secrecy. A total of 16 children have been killed by these cribs.²

¹ Richard Zitrin, *The Judicial Function: Justice Between the Parties, Or a Broader Legal Interest?*, 32 HOFSTRA L. REV. 1573, 1567 (2004).

² Jonathan Eig, *How Danny Died*, CHICAGO, Nov. 1998, http://www.kidsindanger.org/news/news_detail/1998_chicmag.pdf (last accessed Oct. 24, 2007); Also see Danny’s story on the Kids in Danger website at http://www.kidsindanger.org/pressroom/releases/20011206_pr.pdf (last accessed October 24, 2007).

Hours after taking an over-the-counter children's cough syrup, Mrs. X's 7-year-old son experienced a hemorrhagic stroke, fell into a permanent coma, and died after being on life support for three years. The stroke was induced by phenylpropanolamine, an ingredient that was later banned by the FDA. Similar lawsuits had already been filed against the drug manufacturer, but these lawsuits were settled secretly. Since her son died in a jurisdiction that significantly capped damages, Mrs. X's limited financial position forced her to accept a secret settlement in 2005. The secrecy provision in her settlement is so broad that she cannot disclose any details related to her suit, including her identity.

More recently, in my home state of New York, Consolidated Edison admitted that it had secretly settled 11 legal claims involving stray voltage, a fact that came to light only after 30-year-old Jodie Lane was killed in the East Village in January, 2004 after she stepped on an electrified service box cover while walking her dogs. The tragedy of this incident and the corporate cynicism that allowed it to happen is further emphasized by the fact that it was only after Jodie's death that Con Ed announced a comprehensive investigation of its service boxes.

Secrecy agreements also have kept knowledge of environmental contamination, unfair business practices, professional malpractice and sexual abuse of minors by clergymen from the public and government safety regulators. And according to a four part series of investigative articles on secrecy agreements published in the Washington Post in 1988, secrecy agreements have caused a broader harm to society because they are "increasingly being used to prevent debate about critical problems of public safety and policy."

Secrecy agreements can also help a manufacturer of a defective drug, medical device, auto, or other consumer product to "hide" information from a federal regulator with the authority to ban or recall the product. Federal laws like the Food and Drug Act, Motor Vehicle Safety Act, and the Consumer Product Safety Act require a company to report to the relevant federal regulatory agency a known or suspected product hazard. In essence, secrecy agreements facilitate evasion of laws designed to protect consumers.

The *New York Times* reported that this is exactly what occurred when the U.S. Food and Drug Administration tried to find out about the dangers of the Bjork-Shiley Convexo-Concave prosthetic heart valve, which had a propensity to crack and has been linked to nearly 250 deaths. The Times reported:

Documents that reveal the dangers of a heart valve that is prone to sudden, deadly failure were kept from the public and the Food and Drug Administration, according to the agency and lawyers whose clients are suing the company... F.D.A. officials, consumer advocates and lawyers involved in the cases say the secrecy has hindered the agency in making safety judgments about the valve.

The *Times* also quoted Ronald Johnson, director of compliance and surveillance at the FDA. According to Johnson, the protective orders "did prevent us from knowing the facts of the matter as soon as we would like to" and "the delay resulted in 'physical and emotional harm' to patients."

The oft-cited admonition of Justice Louis Brandeis, “Sunlight is the best of disinfectants,” surely should apply to litigation in which public hazards become known to the parties but are kept secret. Focusing sunlight on public hazards will make it possible to stop them from harming others and, with the benefit of public debate, to help lawmakers and government officials address any underlying statutory and regulatory deficiencies that allowed the hazards to occur in the first place.

The Need for the Sunshine in Litigation Act

The Sunshine in Litigation Act would enable journalists, lawyers and government investigators to learn promptly about public hazards that are revealed during litigation. Knowledge of such hazards could then be widely disseminated, possibly leading to government action that removes a defective product from the market. When hazards are reported in the media, the public can be warned not to use or purchase a defective product.

In 2002, South Carolina's U.S. District Court became the first federal court to eliminate secret settlement orders. Before the judges voted on the ban, Chief Judge Joseph F. Anderson wrote to his colleagues: “Here is a rare opportunity to do the right thing.... in a time when the Arthur Anderson/Enron/Catholic-priest controversies are undermining public confidence in our institutions and causing a growing suspicion of things that are kept secret by public bodies.” Congress should also “do the right thing” and help restore public trust in our institutions by enacting the Sunshine in Litigation Act.

Had the dangers of the products mentioned above been widely known, thousands of deaths and injuries and extraordinary economic costs could have been avoided. Hundreds of thousands of cases of asbestos-related disease and countless numbers of deaths would have been avoided, in addition to the tens of billions of dollars required to compensate asbestos victims.

The weakening of federal oversight and regulatory enforcement in key consumer and environmental areas in recent years – from the Consumer Product Safety Commission to the Environmental Protection Agency to the Food and Drug Administration – makes it even more critical for public hazards that are uncovered during litigation to come to public attention. The reality of our global marketplace and the recent influx of defective foreign-manufactured products means that regulatory agencies like the CPSC and FDA are also increasingly relying on information uncovered in litigation to find out about dangerous consumers goods.

The Sunshine in Litigation Act would provide many important benefits in addition to avoiding deaths and injuries. For one, it would help ensure that truthful and complete testimony is given in court. When secrecy agreements are in effect, corporations, manufacturers, and other defendants can offer testimony in one case that is entirely inconsistent with testimony in another case concerning the same defective product and no one is the wiser for it. The Act would make it more difficult for unscrupulous defendants to keep their inconsistent -- and possibly untrue -- statements secret.

The Sunshine in Litigation Act would also advance justice by making it possible for injured parties and their counsel to pool information and compare notes about a defective

product. Large corporations with virtually unlimited funds to spend on lawyers and experts already possess a significant advantage over a lone injured party seeking redress, particularly when the injured party is represented by a small law office or solo practitioner with limited resources. Pooling data from similar cases can help injured parties level a playing field that is now tilted in favor of corporate wrongdoers.

The Sunshine in Litigation Act would save taxpayers money. Bringing every case involving the same product in a vacuum wastes judicial system and claimants' resources on duplicative discovery and motion practice that could be avoided if the injured party simply had access to key materials and testimony from previous cases. These transactional costs benefit no one and unnecessarily run up huge expenses for plaintiffs, defendants, and insurers. The legislation would also help regulatory agencies save precious time and resources trying to overturn secrecy orders when vital health and safety information has been sealed.

Ultimately, the Sunshine in Litigation Act would restore some of the deterrent effect of civil lawsuits on corporate and individual wrongdoing that has been eroded through the increasing use of secrecy agreements. Fear of adverse publicity and legal liability can be a powerful motivator for manufacturers to design and test their products properly. Corporations that know that they can keep damaging information about a product's safety secret have less incentive to take all steps necessary to ensure that their products are safe in the future. It is not surprising that the Pharmaceutical Manufacturers Association opposes measures such as the Sunshine in Litigation Act that would enable the Food and Drug Administration to be guaranteed access to company data, even when it has been sealed by court order or settlement agreement.

False Claims Made by Opponents of the Sunshine in Litigation Act

Opponents of the Act have incorrectly argued that the legislation is unnecessary because secret settlements are rare; that the legislation will deter parties from settling; that the legislation will cause more cases to be filed; that trade secrets will be disclosed; and that litigants have a privacy interest in their settlements. As set forth below, these arguments, asserted by insurance companies, drug manufacturers, and other opponents, do not stand up to scrutiny:

- Findings from the 2004 Federal Judicial Center study suggests that in 2001 and 2002 alone, settlements may have been sealed in as many as 500 personal injury cases in federal courts.³ More than 100 cases with sealed settlements were product liability cases that involved products like children's products, cars, toys, and motorcycle helmets. Each case could be hiding another dangerous product or pattern of negligent conduct that, in turn, impacts hundreds of thousands of unsuspecting consumers. The FJC study also found instances where the entire case file was sealed, which leaves the public completely in the dark about potentially hazardous products.

³ Robert Timothy Reagan et al, *Sealed Settlement Agreements in Federal District Court* (Fed. Jud. Ctr. 2004); See James E. Rooks Jr., *The Assault Upon the Citadel*, TRIAL, Dec. 2007 at 28, 30. Rooks notes, "A rough extrapolation from the 1,270 sealed settlement agreements found [by Federal Judicial Center researchers] suggests that throughout all 94 federal districts...there might have been as many as 400 more sealed settlements, with a rough total perhaps close to 1,700. With personal injury cases representing 30 percent of the FJC's sealed settlements, there might have been as many as 500 personal injury cases among the 1,700 total."

Furthermore, it appears that the FJC study did not cover protective orders that also conceal public health and safety information.

- There is no anecdotal evidence to support the claim that the Act will have a chilling effect on parties who might otherwise wish to settle. Parties will continue to settle because it saves money and resources and makes economic sense to do so. Judge Anderson notes that when South Carolina banned secret settlements, the District Court of South Carolina experienced neither an increase in trials, nor a decrease in settlements.
- The Act would not result in an influx of cases into an already overburdened judicial system, as opponents predict. States that have enacted similar measures have not experienced a surge in litigation. For example, there was no apparent increase or decrease in the number of cases disposed of when secrecy restrictions were introduced in Florida and Texas courts.⁴ In fact, Judge Anderson of the U.S. District Court for the District of South Carolina has noted that his court actually “tried fewer cases in the five years after the rule’s enactment than the five years before it was adopted.”⁵ On the contrary, secrecy agreements make repeated lawsuits involving the same dangerous product unnecessary.
- The Sunshine in Litigation Act would not allow sensitive trade secrets to be revealed to competitors, thereby hurting businesses and the business climate. Even if the Act did not exempt trade secrets, it is unlikely that any business would be harmed since trade secrets are usually not a part of the product that makes it a public hazard. In the rare instance that a trade secret could seriously threaten public health and safety, the court would apply the balancing test. Judges are already trained to make these types of decisions anyway, and would be in the best position to accurately make this call.
- The argument that secrecy agreements are private matters ignores the American tradition of open courts, the legal presumption of judicial system openness, and the public’s overriding right to know. The taxpayer pays for the judicial system, and litigants who avail themselves of it should not be permitted to tell the public that information about a hazard that comes to light in a legal action is none of their business.

Other States Are Ending the Misuse of Secrecy Agreements

The enormous public benefit of secrecy restrictions is evident in the number of states and courts that have adopted such restrictions. Since the 1990s, the number of states that have adopted court secrecy restrictions has quadrupled in number. Currently, court systems in 41

⁴ James E. Rooks Jr., *The Assault Upon the Citadel*, TRIAL, Dec. 2007 at 28, 31.

⁵ *The Sunshine in Litigation Act: Does Court Secrecy Undermine Public Health and Safety? Before the Senate Comm. on the Judiciary, Subcomm. on Antitrust, Competition, and Consumer Rights*, 110th Cong. 3 (2007)(statement of the Honorable Joseph F. Anderson, Jr., Chief Judge of the U.S. District Court for the District of South Carolina).

states and 50 out of 94 federal districts have taken steps to limit court secrecy. Arkansas, Florida, Louisiana and Washington have enacted laws that void agreements that conceal public hazards. Other states that have enacted anti-secrecy laws or where courts have promulgated regulations that substantially restrict the use of secrecy agreements include Delaware, Georgia, Virginia, North Carolina, Oregon, Idaho, Michigan, and Virginia.

In California, the sealing of court-filed documents is discouraged unless there is an overriding interest that outweighs the public right to access. In 1990, the Texas Supreme Court promulgated what is perhaps the most far-reaching court-written anti-secrecy regulation in the nation, Sec. 76a of the Texas Rules of Civil Procedure. This rule creates a “presumption of openness” applying to public access to all court records. Court records include pretrial discovery documents.

In November 2002, South Carolina's U.S. District Court judges implemented a broad secrecy agreement limitation, the first federal court to do so. The new rule provides, “No settlement agreement filed with the court shall be sealed pursuant to the terms of this rule.”

The Sunshine in Litigation Act simply capitalizes on the existing framework of state and district court rules and further helps ensure that all federal courts consider public health and safety considerations before approving court secrecy.

The Need to Return Secrecy Agreements to Their Intended Purpose

A 2006 investigation on court secrecy by the Seattle Times revealed that since “litigation has become a system of secrecy...one result is that patterns – with products and with people – can get obscured.” When the use of secrecy agreements expands beyond cases involving business trade secrets, national security, or personally identifiable information, the public loses out. The Sunshine in Litigation Act would return secrecy agreements to their originally intended function of protecting trade secrets, highly personal information and national security.

If the Act becomes law, secrecy agreements could no longer be used to prevent people from learning about products that could harm and kill them, about professionals who should no longer be licensed to practice their professions, about instances of sexual harassment and abuse in the workplace, and about instances of toxic contamination of their communities. Corporations would no longer be able to pay victims what amounts to “hush money” as an alternative to removing a dangerous product from the market and losing sales.

Lawyers who represent victims would welcome enactment of the Sunshine in Litigation Act not only because it would save lives and prevent injuries, but because they would finally be relieved of the sometimes wrenching dilemma of choosing between the needs of an individual client and the good of the many. According to the legal profession's Code of Ethics, lawyers must do what is in the best interest of their clients. A lawyer who is asked by the defense as a settlement condition to keep information about a public hazard secret is put in a quandary between agreeing and obtaining a good settlement for their client and saying no and living with the knowledge that more people could die or be injured.

In an article on the use of secrecy agreements to settle claims against McNeil Pharmaceuticals for injuries linked to its painkiller Zomax, the Washington Post quoted an attorney for one of the patients candidly summing up the dilemma lawyers confront: “The problem is that they have a gun to your head. The client is concerned about being compensated in full. The lawyer must abide by the concerns and wishes of his client....not the fact that [information will remain secret or] other victims may be injured.” Another attorney told the Post, “What they [McNeil Pharmaceuticals] are trying to do is not be accountable to the vast majority of the public for what they've done.... They paid my clients a ton of money for me to shut up.”

Confidentiality in litigation has its place. But ultimately, the public interest must prevail. The Sunshine in Litigation Act would set the right balance between the defense's legitimate interest in keeping some matters secret and the public's right to know about imminent hazards. What could possibly be the overriding public benefit in protecting clergymen who molest children? In protecting incompetent physicians who repeatedly commit serious treatment and procedure errors?

In a broader sense, the Act would facilitate public oversight of the judicial system and ensure that private-sector wrongdoers can be held publicly accountable. Stephen Gillers, Vice-Dean and Professor of Legal Ethics at New York University Law School, summed up what may be the most important reason for enacting the Sunshine in Litigation Act when he wrote, “A judge should not suppress information that enables the public to evaluate the performance of the courts, government officials, the electoral process and powerful private organizations.”