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SUNSHINE IN LITIGATION ACT OF 2011

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Mr. LEAHY, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany S. 623]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to which was referred the bill (S. 623), 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, having considered the same, reports favorably thereon with an amendment and recommends that the bill, as amended, do pass.

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I. BACKGROUND AND PURPOSE OF THE SUNSHINE IN LITIGATION ACT OF 2011

The purpose of S. 623, the Sunshine in Litigation Act, is to protect the public from potential health or safety dangers that are too

often concealed by court orders restricting disclosure of information.

The bill requires judges, in cases pleading facts relevant to public health and safety, to consider the public's interest in disclosure of health and safety information before issuing a protective order or an order to seal court records or a settlement agreement. Under this bill, the proponent of such an order must demonstrate that the order would not restrict the disclosure of information relevant to protecting public health and safety. If the order would restrict such disclosure, the judge must find that the public interest in knowing about a potential health or safety hazard is outweighed by a specific and substantial interest in maintaining confidentiality before issuing the order.

The bill also prohibits a court from approving or enforcing any provision of an agreement between or among parties that restricts a party from disclosing public health or safety information that is relevant to the lawsuit to any Federal or state agency with authority to enforce laws regulating an activity related to such information. In addition, the bill prohibits a court from enforcing any provision of a settlement agreement that prohibits disclosure of public health or safety information unless it has made findings of fact that the public interest in disclosure of the potential health or safety hazards is outweighed by a specific and substantial interest in maintaining the confidentiality of the information.

A number of consumer advocacy and open government groups [1] support S. 623 because it will protect legitimate interests in confidentiality while ensuring that court-endorsed secrecy does not jeopardize public welfare by concealing information about potential public health or safety dangers from consumers and regulatory agencies. Despite the concerns expressed in the minority views, nothing in the Rules Enabling Act prevents congressional action to protect public health and safety. This legislation has arisen in part out of a concern that the courts have not adequately considered the importance of transparency.

This legislation is prospective and will take effect 30 days after the date of enactment and apply only to orders entered in civil actions or agreements entered into on or after such date. It does not provide a basis for reconsidering an order entered into before the effective date. The Sunshine in Litigation Act is not intended to preempt or displace current law, the Federal Rules of Civil Procedure, common law or First Amendment law unless that law provides greater openness and access to litigation documents, court records or proceedings. Furthermore, this legislation is not meant to preclude other interests the public may have in restricting disclosure information, such as in the case of financial fraud or environmental harms.

Court secrecy prevents the public from learning about public health and safety dangers. Over the past 20 years, we have learned about numerous cases where court-approved secrecy, in the form of protective orders and sealed settlements, has kept the public in the

[1] Letter to Senator Herb Kohl from Alliance for Justice, The Center for Justice and Democracy, Consumers Union, Consumer Federation of America, National Consumers League, US PIRG, and Public Citizen (April 14, 2011). The bill was also endorsed by The New York Times. Editorial, Need to Know, NY Times, March 12, 2008, *http://www.nytimes.com/2008/03/12/opinion/12wed3.html?scp=3&sq=%22need+to+know%22&st=nyt* (last accessed June 23, 2011).

dark about serious public health and safety dangers. At hearings in 1990 and 1994, the Judiciary Committee's Subcommittee on Courts and Administrative Practice heard testimony about some of the many examples of these cases such as those involving complications from silicone breast implants, adverse reactions to a prescription pain killer, "park to reverse" problems in pick-up trucks, and defective heart valves. Other examples include cases involving dangers from side-saddle gas tanks, playground equipment, IUD birth control devices, tires and portable cribs.

In December 2007, the Judiciary Committee's Subcommittee on Antitrust, Competition Policy and Consumer Rights received testimony about more recent examples, including phenylpropanolamine (PPA) in children's over-the-counter medicine, Cooper tires and the prescription drug Zyprexa.

This problem most often arises in product liability cases. Typically, an individual sues a manufacturer for an injury or death that has resulted from a defect in one of the manufacturer's products. In these cases, the victim generally faces a large corporation that can spend large sums of money defending the lawsuit and delaying its resolution. Facing a formidable opponent and mounting medical bills, plaintiffs are discouraged from continuing and often seek to settle the litigation. In exchange for monetary damages, the victim is often forced to agree to a provision that prohibits him or her from revealing information disclosed during the case. While the plaintiff gets a respectable award and the defendant is able to keep damaging information from being publicized, the public remains unaware of critical health and safety information that could potentially save lives.

In some of the examples cited, the civil complaint and other court records may have been available to the public. However, this publicity is minimal and not sufficient to notify the public and regulatory agencies or to prevent additional injuries.[2] In cases involving dangerous products, often it is the "smoking gun" documents, uncovered during discovery and sealed in settlement agreements, that will adequately inform the public and regulators about a health or safety danger. As a result, without access to that information, it takes the public and regulators much longer than it should to discover dangers to health and safety. Furthermore, in most cases, defendants continue to insist on secrecy even after some information has become public.[3]

A. EXAMPLES OF COURT SECRECY

1. Zomax

The popular painkiller Zomax, manufactured by McNeil Pharmaceuticals and linked to a dozen deaths and more than 400 severe allergic reactions, was taken off the market only after McNeil settled dozens of lawsuits with sealed settlements. In 1990, Devra Lee Davis testified before the Subcommittee on Courts and Administra-

[2] The Sunshine in Litigation Act: Does Court Secrecy Undermine Public Health and Safety: Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Comm. on the Judiciary, 110th Cong. (Dec. 11, 2007) [hereinafter 2007 Hearing] (testimony and responses to questions by Judge Anderson).

[3] According to Bruce Kaster, a lawyer who has represented clients in cases against Cooper Tire, Cooper still aggressively fights protective orders despite the fact that there is some publicity about the cases.

tive Practice that she nearly died from taking this legally prescribed drug. She later learned that the company had known the drug could kill some people and used judicially-sanctioned secrecy to keep that information from the public and from others injured by the drug.[4]

2. Zyprexa

In 2005, the drug company Eli Lilly settled 8,000 cases related to Zyprexa, a drug used to treat schizophrenia and bipolar disorder. These cases alleged that Eli Lilly did not disclose known harmful side effects of Zyprexa, such as inordinate weight gain and dangerously high blood sugar levels that sometimes resulted in diabetes. Eli Lilly was also accused of promoting off label use of the drug by urging doctors to prescribe it to elderly patients with dementia. All of the settlements required plaintiffs to agree "not to communicate, publish or cause to be published . . . any statement . . . concerning the specific events, facts or circumstances giving rise to [their] claims." The public did not learn about these settlements or Zyprexa's dangerous side effects until nearly two years later, in 2006, when The New York Times received and published leaked documents from a case that were subject to a protective order.[5]

3. Phenylpropanolamine (PPA)

In 1996, a seven-year-old boy in Washington State suffered a sudden stroke and fell into a coma hours after taking an over-the-counter medicine to treat an ear infection. After three years in a coma, he died. The child's mother sued the manufacturer of the medicine alleging that the stroke was induced by PPA, an ingredient with deadly potential side effects, which has since been banned by the Food and Drug Administration (FDA). Unknown to the public, many similar lawsuits in state and Federal courts had previously been filed against the drug manufacturer, but were settled secretly, with the lawyers and plaintiffs subject to restrictive confidentiality orders. In 2005, the mother settled her case and agreed to keep the information she learned and terms of the settlement secret.[6]

4. Bjork-Shiley heart valve

Over the course of several years, Pfizer's Bjork-Shiley heart valves were linked to 248 deaths. Pfizer insisted on secrecy agreements when settling dozens of lawsuits, before the FDA finally removed the valves from the market. The Subcommittee on Courts and Administrative Practice heard testimony from Fredrick Barbee about how court-endorsed secrecy prevented him and his wife from learning about the potential heart valve malfunction and ulti-

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[4] Examining the Use of Secrecy and Confidentiality of Documents by Courts in Civil Case: Hearing Before the Subcomm. on Courts and Administrative Practice of the S. Comm. on the Judiciary, 101st Cong. (May 17, 1990) [hereinafter 1990 Hearing] (testimony of Devra Davis Lee); Davan Maharaj, Tire Recall Fuels Drive to Bar Secret Settlements, LA Times, September 10, 2000, at A1.

[5] Alex Berenson, Drug Files Show Maker Promoted Unapproved Use, NY Times, Dec. 18, 2006, *http://www.nytimes.com/2006/12/18/business/18drug.html?scp=10&sq=zyprexa&st=nyt* (last accessed June 23, 2011); Alex Berenson, Lilly Settles With 18,000 Over Zyprexa, NY Times, Jan. 5, 2007, *http://query.nytimes.com/gst/fullpage.html? res=9F00E5DB1430F936A35752C0A9619C8B63&sec=&spon=&pagewanted=print* (last accessed June 23, 2011).

[6] Second Amended Complaint, Estate of Matthew Walker v. Whitehall-Robins, No. 0105–05204 (filed Or. Cir. Ct., Oct. 26, 1999); Interview with Leslie O'Leary, attorney for the Estate of Matthew Walker.

mately prevented her from getting the appropriate and life-saving treatment she needed when her valve malfunctioned.[7]

5. Dalkon Shield

In 1974, the FDA suspended use of the Dalkon Shield, a popular intrauterine birth control device. The device was linked to 11 deaths and 209 cases of spontaneous abortion. Prior to the FDA's action, it was reported that the maker of the device, A.H. Robins, had settled numerous cases with strict confidentiality agreements. The manufacturer even attempted to include agreements with the plaintiffs' lawyers that would have prohibited them from taking another Dalkon Shield related case.[8]

6. Silicone breast implants

Information about the hazards of silicone breast implants was discovered during litigation as early as 1984, but because of a protective order that was issued when the case settled, the information remained hidden from the public and the FDA. It was not until several years and tens of thousands of victims later that the public learned of potentially grave risks posed by the implants. The Subcommittee on Administration and the Courts heard testimony from Sybil Niden Goldrich about her injuries allegedly caused by silicone breast implants and how the use of protective orders prevented the public from learning about the risks posed by breast implants.[9]

7. Ephedra

Ephedra is a supplement that was widely popular until it was banned by the FDA in 2004. The ban could have come earlier and lives may have been saved had it not been for court-endorsed secrecy through protective orders and confidential settlements. Deaths related to Ephedra occurred as early as 1994. The existence of 14,700 consumer complaints about Metabolife 356, and other documents relating to the safety risks of Ephedra, although turned over in lawsuits against the company, were concealed by protective orders and confidential settlements. In 2000, the FDA tried unsuccessfully to intervene in a consumer lawsuit to gain access to the complaints which were under seal in a protective order.[10] It took significant public attention and a congressional investigation for Metabolife to finally agree to provide the FDA and Congress the adverse event reports. The subsequent investigation revealed that prior to 1999, Metabolife had 138 reports of significant adverse events, including heart attacks, strokes, seizures, and psychosis.[11]

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[7] 1990 Hearing (testimony of Frederick R. Barbee); Davan Maharaj, supra note 4.

[8] Maharaj, supra note 4.

[9] S. 1404: Hearing Before the Subcomm. on Courts and Administrative Practice of the S. Comm. on the Judiciary, 101st Cong. (Apr. 20, 1994) [hereinafter 1994 Hearing] (testimony of Sybil Niden Goldrich).

[10] In Bloom vs. Metabolife, the FDA sought to intervene in order to challenge a protective order that concealed health and safety information. Penni Crabtree, Court orders often keep companies' darkest secrets hidden, San Diego Union Tribune, Sept. 8, 2002, H–1; Dr. Lester Crawford discusses the Justice Department and FDA investigation of Metabolife for its use of Ephedra in its diet supplement, National Public Radio (NPR) August 16, 2002.

[11] Adverse Event Reports from Metabolife, Minority Staff Report, Special Investigations Division, Committee on Government Reform, U.S. House of Representatives. Oct. 2002. *http://democrats.oversight.house.gov/images/stories/documents/20040827102309–56026.pdf* (last accessed June 23, 2011).

8. "Park-to-reverse" malfunction

For many years, Ford was aware of problems associated with a "park-to-reverse" malfunction in its pick-up trucks and quietly settled cases stemming from this alleged defect. It was not until several years later that Ford made a minimal effort to notify original owners by sending stickers alerting them that there was a problem. The stickers made no mention of the potential risks of serious injury or death. Unfortunately, 2.7 million of these truck owners did not receive the warning. One victim of the alleged defect was Tom Schmidt. His parents, Leonard and Arleen Schmidt testified before the Subcommittee on Courts and Administrative Practice. During their lawsuit they learned that Ford had known about the problem as early as 1970 and for many years, Ford had quietly settled cases with strict protective orders concealing information about the problem.[12]

9. Side-saddle gas tanks

Over the course of several years, General Motors quietly settled more than 200 cases brought by victims of fiery truck crashes involving the automaker's side-mounted gas tanks before the defect came to light. It was not until 1993, when General Motors sued Ralph Nader and the Center for Auto Safety for defamation, that lawyers discovered records showing that General Motors had been sued in approximately 245 individual gas tank pick-up truck cases. The earliest cases had been filed as far back as 1973. Almost all cases were settled and almost all of the settlements required the plaintiffs to keep the information they discovered secret.[13]

10. Bridgestone/Firestone tires

From 1992 to 2000, accidents caused by tread separations of Bridgestone and Firestone tires resulted in more than 250 deaths and 800 injuries. Over the course of several years, Firestone quietly settled lawsuits relating to the tread separation, most of which included secrecy agreements. It was not until 1999, when a Houston public television station broke the story, that the company acknowledged its wrongdoing and recalled 6.5 million tires.[14]

11. Cooper tires

In 2002, Johnny Bradley's wife was killed, and he and his son were injured, in a Ford Explorer rollover accident. The accident was allegedly caused by tread separation in the SUV's Cooper Tires. While litigating the case, Mr. Bradley's attorney uncovered Cooper Tire documents that showed Cooper tires were prone to tread separation because of design defects. These documents had been kept secret through protective orders in numerous cases prior to the Bradleys' car accident. In Bradley's case against Ford and Cooper Tire, the jury found that Ford was not liable for the accident. Before the trial proceeded to the claims against Cooper, the claims were dropped and the parties involved agreed to settle with almost all litigation documents remaining confidential under a broad protective order. Mr. Bradley and his lawyer, familiar with

[12] 1994 Hearing (testimony of Leonard and Arleen Schmidt); Maharaj, supra note 4.
[13] 2007 Hearing (testimony of Richard Zitrin); Maharaj, supra note 4.
[14] Richard Zitrin, The Judicial Function: Justice Between the Parties, Or a Broader Legal Interest?, 32 Hofstra L. Rev. 1573, 1567 (2004); Maharaj, supra note 4.

the documents and unable to speak about the details due to protective orders, believe that if the documents were made public Cooper Tire would be forced to fix the tread separation problem.[15]

12. All-terrain vehicles (ATVs)

While the Consumer Product Safety Commission (CPSC) has long publicized information about ATV safety and maintained a reporting system for collecting data about injuries and deaths, it has not taken action on many alleged design and manufacturing defects. There continue to be cases filed in state and Federal courts about manufacturing and product design defects in ATVs. The defendants routinely obtain protective orders to keep information secret and plaintiffs often settle before trial. In a case filed in the Central District of Illinois, K.V. v. Kawasaki, the plaintiffs objected to the protective order sought by the defendants. In this case, a young boy was injured when his ATV flipped over in a corn field. The corn stalks protected him from being crushed, but the oil vent lacked a simple mechanism to prevent boiling hot oil from leaking out and severely burning 25 percent of the boy's body.[16]

Opposing the protective order, the plaintiff argued that the defendant did not substantiate its claim that trade secrets satisfied the "good cause" showing, required under Rule 26(c) of the Federal Rules of Civil Procedure. The plaintiff also claimed that the health and safety risks of ATVs, well documented by the CPSC and the American Association of Pediatrics, justified rejecting the protective order because it would conceal information about the alleged defect. According to the plaintiff's attorney, the judge simply issued the protective order without opinion or written findings in response to the plaintiff's arguments. The case settled shortly thereafter. If this information were in the public domain, the boy's attorney believes that the information he uncovered during the lawsuit would either increase pressure on ATV manufacturers to make their products safer or pressure the CPSC to investigate and take action in response to the defects.

13. Playground equipment

Miracle Recreation Company manufactured and sold a piece of playground equipment called Bounce Around the World. Dozens of lawsuits were brought against the company alleging that it was dangerous and caused serious injuries to young children, including severed limbs and crushed bones. For 13 years, the public and regulatory agencies remained in the dark about the potentially crippling equipment because the company insisted on settling lawsuits conditioned by confidentiality agreements. Approximately 80 children between the ages of four and five were seriously injured before the CPSC learned about the magnitude of the danger and the company recalled the merry-go-rounds. Following the recall, the Department of Justice (DOJ) charged Miracle Recreation in a civil suit with failing to reveal reports of injuries to dozens of children.[17]

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[15] 2007 Hearing (testimony of Johnny Bradley, Jr.)

[16] 200 U.S. Dist. Ct. Motions 615230; 2006 U.S. Dist. Cot. Motions LEXIS 45118; Interview with Daniel Pope, Phebus & Koester, Oct. 22, 2007.

[17] Barry Meier, Legal Merry-Go-Round; Case Highlights Lack of Data Sharing, Newsday, June 5, 1998 at 3.

14. Portable cribs

In May 1998, 16-month-old Danny Keysar was strangled to death at his licensed childcare facility when a Playskool "Travel-Lite" portable crib collapsed, trapping his neck in the "V" of its folded rails. Danny's parents sued the crib manufacturers, Kolcraft. During discovery, they learned that three prior lawsuits involving the same product defect had been settled secretly. Kolcraft offered Danny's parents a settlement, but only on the condition that they agreed to a secrecy provision. The parents would not accept a settlement that mandated their silence. Despite intense pressure to agree to a secret settlement, on the eve of trial, the parties reached a non-secret $3 million settlement agreement.[18]

15. Seroquel

In Florida, plaintiffs' lawyers and Bloomberg News sued to force AstraZeneca to make public clinical studies about the harmful side effects of an antipsychotic drug, Seroquel, which were discovered in lawsuits that were subsequently dismissed. In 2009, the court unsealed some of the documents in question, but denied requests to release AstraZeneca's submissions to foreign regulators and sales representatives' notes about doctors' meetings. Despite a recent $68.5 million settlement, continued efforts to unseal crucial documents proved unsuccessful.

16. British Petroleum Gulf oil spill

In April 2010, the Gulf Coast was devastated by a massive oil spill in the Gulf of Mexico. Numerous lawsuits were filed against British Petroleum. As the parties fight over crucial documents in those lawsuits, injured parties continue to accept secret settlements. These settlements may keep hidden documents that could shed light on potential future public health and safety risks.

17. Unintended acceleration problems

Recently, the world's largest automaker, Toyota, has faced a barrage of litigation relating to its recall of over 8 million cars due to sudden unintended acceleration problems, which may have caused more than 80 deaths. After years of lawsuits, congressional oversight hearings, and Toyota's efforts to keep settlements and product information secret, a California Federal judge finally made public thousands of previously sealed documents, noting that "the business of this litigation should be in the public domain." Had a judge been required to weigh the public's interest in health and safety, as this legislation would require, perhaps the public would have known more about the risks sooner, and some of those lives could have been saved.

B. CIVIL SUITS UNCOVER EARLY DANGERS

Civil lawsuits are often a critical first source of information about dangerous products.[19] For example, in a class action case

[18] Jonathan Eig, How Danny Died, Chicago, Nov. 1998, *http://www.kidsindanger.org/docs/news/news_detail/1998_chicmag.pdf* (last accessed June 23, 2011); Danny's story on the Kids in Danger website at *http://www.kidsindanger.org/family-voices/danny/* (last accessed June 23, 2011).

[19] Catherine T. Struve, The FDA and the Tort System: Postmarketing Surveillance, Compensation, and the Role of Litigation, 5 Yale J. Health Pol'y L. & Ethics 587, 664 (2005); Wendy

against Eli Lilly related to harmful side-effects of their drug Zyprexa, lawyers uncovered documents that showed Eli Lilly knew of Zyprexa's side effects and did not adequately warn doctors or consumers. This lawsuit uncovered information that the FDA did not have access to and did not know about until information was leaked to The New York Times.[20] Had this information been available to the public sooner, consumers would have been able to make an informed decision about the benefits and risks of taking Zyprexa.

Victims who suffer injuries related to a consumer product often promptly report their injuries to the CPSC or other relevant regulatory agencies. However, victims tend to learn specific information about a product defect later, during the course of a lawsuit. By this time, they are usually bound by protective orders that prohibit disclosure of everything they learn during the course of discovery. Because of extremely restrictive confidentiality agreements, reporting this information to a regulatory agency could mean violating a court order and jeopardizing their ability to recover their losses. Furthermore, when damaging information is revealed during discovery, the company quickly and quietly settles the case with a settlement that is almost always conditioned on total confidentiality. Thus, the public and the regulatory agencies are left in the dark about a dangerous product.

C. REFORM IS NEEDED TO PROTECT PUBLIC HEALTH AND SAFETY

Current practices do not adequately balance public interests with interests in confidentiality. Judges are not limited in the factors they may consider when deciding protective orders. However, in the many examples cited above, it is clear that judges do not always consider public health and safety.

Judge Joseph Anderson, District Court Judge for the District of South Carolina, testifying before the Subcommittee on Antitrust, Competition Policy and Consumer Rights, acknowledged that while some judges are mindful of the court secrecy problem, many judges, facing ever increasing case loads, are "eager to achieve speedy and concrete resolutions to their cases, and ever-mindful of the need for judicial economy, many judges all too often acquiesce to the demands for court-ordered secrecy." [21]

Leslie Bailey, a public interest lawyer with Public Justice who regularly represents clients who oppose protective orders that are against the public interest, testified that in her experience with requests for protective orders, judges, who are often managing heavy caseloads, are inclined to agree to whatever type of protection the parties agree on and easily find that to be enough good cause.[22]

Although plaintiffs may be concerned about notifying the public of a potential safety hazard, they often agree to secrecy out of perceived necessity. Leslie Bailey noted:

Wagner, When All Else Fails: Regulating Risky Products Through Tort Litigation, 95 GEO. L.J. 693, 695–696 (2007), ". . . the tort system plays an indispensable role in supplementing agency regulation of risky products and activities. In consumer and health protection, for example, the tort system provides both more tools and more rewards than the regulatory system for enterprising plaintiffs to uncover asymmetric information held by regulated parties regarding their products' risks."

[20] Berenson, supra note 4.

[21] 2007 Hearing (testimony of Judge Anderson)

[22] 2007 Hearing (testimony of Leslie Bailey)

> 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—especially if the defendant is willing to pay a premium for secrecy—few plaintiffs' 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 [clients] cannot afford that risk.[23]

As a result of the differing interests of judges, plaintiffs, defendants and the public, current litigation practices do not adequately protect the public from court-endorsed secrecy that conceals public health and safety hazards.

D. CURRENT PRACTICES

1. Protective orders

Under Rule 26(c) of the Federal Rules of Civil Procedure, a party or any person from whom discovery is sought may move for a protective order to keep the discovery materials confidential. The court may, for "good cause," issue an order to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense. Jurisdictions have extensive case law dictating what must be shown to establish "good cause." The "good cause" standard varies widely by jurisdiction from little more than a stipulation from both the parties that the order will expedite discovery to a more rigorous showing that there is a specific need to keep the information confidential.

2. Court records

Requests to seal court records or documents filed with the court are generally held to a higher standard than that required to obtain a protective order due to First Amendment protections.[24]

3. Settlement agreements

Under current law, there are no limitations on settlement agreements, reached privately or filed with the court, regarding the restriction of public health or safety information. As with protective orders, judges are free to consider public health and safety when reviewing other orders that restrict access to information, including settlement agreements, but no such consideration is required.

Parties in a civil action may choose to resolve pending litigation by agreeing to a settlement that contains a confidentiality provision sealing some or all of the discovery documents uncovered during litigation, the terms of the settlement, the fact that a settlement was reached and the fact that a case was ever filed.

Even when not required by statute, parties may choose to seek judicial approval of a confidential settlement and file the settlement with the court in order to create a court order of confiden-

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[23] Id.

[24] *Nixon* v. *Warner Communications, Inc.,* 435 U.S. 589 (1978); *Richmond Newspapers, Inc.* v. *Virginia,* 448 U.S. 555 (1980); *Globe Newspaper Co.* v. *Superior Court,* 457 U.S. 596 (1982); *Press Enterprise Co.* v. *Superior Court (Press Enterprise I),* 464 U.S. 501 (1984).

tiality. Once a court approves the confidential settlement, the settlement is sealed away and stored by the court. Since the court retains jurisdiction over the settlement, the court can issue a contempt order against a party that violates the confidentiality order. In this situation, filing a separate lawsuit is not necessary for the court to issue a contempt order.

Often, parties do not seek judicial approval of the confidential settlement, but instead agree to a private settlement that is not filed with the court. In these instances, the court docket only reveals that the action was dismissed by an agreement between the parties. These settlements are not accessible to the public. If a party to the settlement violates the settlement's confidentiality provision, a breach of contract action must be filed before the court may step in and enforce this provision.

E. EFFECT OF THE LEGISLATION

The Sunshine in Litigation Act of 2011 will not displace current practices under the Federal Rules of Civil Procedure or common law. Instead, it merely requires an additional step—consideration of public health and safety—before issuing protective orders, orders sealing court records, or settlement agreements in cases pleading facts relevant to public health and safety. By creating this additional requirement, S. 623 will ensure that court-endorsed confidentiality protection does not jeopardize the public's ability to learn about potential health or safety dangers. The additional requirement applies only to cases pleading facts relevant to public health and safety—a change made this Congress to clarify the reach of the bill.

A minority of Senators on this Committee have raised the concern that this legislation would lead to the filing of frivolous lawsuits, or change discovery rules during lawsuits. However, nothing in the purpose or content of this legislation would alter lawsuit filing standards, which were recently heightened by the Supreme Court. Further, nothing in this legislation alters time-honored discovery rules during litigation. Similar measures that have been in effect for more than 15 years in Texas and Florida go even further than this bill, and they have not resulted in increased trials or litigation over discovery, or a decrease in settlements.

The bill will not burden the Federal court system. It will affect only a small subset of Federal cases, those that plead facts relevant to public health and safety, and judges regularly weigh competing interests in balancing tests like the one required by this bill.[25] A minority of Senators on this Committee have raised the concern that this bill would burden courts by requiring judges to review all documents for relevance to public health and safety. However, that is untrue. The burden of proof rests on the proponent of the order to point the court directly to the information it wants sealed, and make the argument for such sealing.

1. Protective orders

Some judges already consider the public interest in disclosure of public health and safety information when reviewing protective orders. For those judges, the effect of this legislation will be minimal.

[25] 2007 Hearing (testimony of Judge Anderson)

For those who do not, S. 623 simply requires them to make such a consideration.

The vast majority of cases in the Federal court system do not plead facts relevant to public health and safety. In these cases, this law will not apply. Therefore, in most cases, judges will be able to issue a protective order without making a significant inquiry based on S. 623.

In the relatively small number of cases that do plead facts relevant to public health and safety, and where a judge finds that such an order would restrict disclosure of information relevant to protecting the public, the judge will have to weigh interests in disclosure with interests in confidentiality. According to S. 623, in these cases a judge may only issue the order after making findings of fact that the public interest in 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. Under this balancing test, judges will be required to make a more detailed inquiry.

This additional step required for obtaining a protective order will not overburden judges. First, the balancing test will only be required in a limited number of cases. Second, S. 623 places the burden of proof on the proponent of the order. It will be their responsibility to summarize and distill the information that would be subject to the protective order. As Judge Anderson told the Subcommittee on Antitrust, Competition Policy and Consumer Rights, judges regularly engage in balancing tests like the one required in S. 623.[26] Finally, judges can use magistrate judges and special masters to assist them in more complex cases.

The bill recognizes that there are appropriate uses for protective orders, such as protecting trade secrets. It makes sure that such information is protected by giving judges discretion to consider any confidentiality interests that are important to the proponent. Furthermore, the bill does not limit judges' existing obligations under current law and practice to protect information that truly deserves confidentiality.

The legislation strongly protects trade secrets and it is expected that judges, as they are already required to do, will give ample consideration to them as part of the balancing test. However, when a party claims that they need a protective order because of a trade secret, they must demonstrate that their interest in protecting the trade secret is not outweighed by the public interest in disclosure of a public health or safety hazard. In other words, this bill does not permit so-called trade secrets that pose a threat to public health and safety—such as a defective tire design—to justify court-endorsed secrecy.

A protective order entered as a result of the balancing test shall be no broader than necessary to protect the privacy interest asserted. For example, when a party or parties request a protective order for a trade secret, the judge should only protect the materials that refer to the actual trade secret. If the items sought to be protected contain information about a potential public health or safety hazard, then to the extent possible, the order shall only cover the trade secret and not other information about the potential hazard.

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[26] Id.

As a result, a blanket protective order over all materials exchanged during discovery cannot be justified by a claim that it deserves protection because of a trade secret or other interest in confidentiality.

2. Court records

The bill requires judges to take an additional step when considering the existing First Amendment law dictating when court records may be sealed. The bill does not purport to replace existing law interpreting the First Amendment. Instead, it creates an additional reason for openness when public health or safety is at issue.

3. Settlement agreements

The legislation requires judges to apply the provisions in subsection (a)(1) prior to approving or sealing a settlement agreement. As with protective orders, if the settlement agreement would restrict disclosure of information relevant to protecting public health or safety, such as requiring the destruction of documents or prohibiting a plaintiff from discussing potential public health or safety dangers related to his or her case, the judge must apply the balancing test in subsection (a)(1)(B) to determine if the public interest in disclosure is outweighed by a specific and substantial interest in confidentiality.

Under subsection (c), S. 623 will also impact settlements involving public health or safety, that otherwise would not be reviewed under subsection (a), when and if parties petition the court to enforce such settlements. For example, a case may settle privately, outside of court, before any requests for protective orders. In these cases, a settlement may be conditioned on confidentiality and as a result conceal a potential public health or safety hazard and prevent the plaintiff from disclosing any and all information about their case. A plaintiff may be prohibited from disclosing everything from the nature of their injury, to the evidence they obtained independent of the defendant, or even the very fact that they sued the defendant.

Subsection (c) prevents courts from facilitating defendants' efforts to conceal public health and safety information. It says that a court shall not enforce a settlement that restricts a party's ability to discuss a settlement that impacts public health or safety. This will protect plaintiffs, who were forced into out-of-court settlement agreements with restrictive gag orders, from being hauled into court by a defendant for speaking out about their settlements involving public health or safety hazards. Subsection (c), paragraph (2) makes it clear that the potential for nonenforcement of a settlement agreement will only apply in cases that restrict the disclosure of information relevant to the protection of public health or safety. Thus, in the vast majority of cases, S. 623 will not affect a party's ability to make or enforce confidentiality provisions in settlement agreements.

As we have seen with state and Federal court rules that limit the ability to seal settlement agreements, the bill is not likely to either increase the number of cases that proceed to trial or decrease the frequency of settlements. More than 15 years ago, Florida and Texas adopted a law and court rule, respectively, that limit the

ability to conceal public health and information in civil lawsuits.[27] Critics of these measures argued that the court system would be severely disrupted because parties would no longer have the same incentives to settle their cases, resulting in greater demands on trial judges. Opponents made similar claims when the Federal District Court for the District of South Carolina unanimously adopted Local Rule 5.03(c), which prohibits all sealed settlements.[28] To date, none of these dire predictions has come to fruition. In fact, South Carolina's district courts have actually experienced a decrease in trials and cases continue to settle.[29]

4. Personally identifiable information

When weighing the interest in maintaining confidentiality, it is intended that judges will use procedures they currently use to protect personally identifiable information and national security information. Should this information be at issue when a judge conducts the balancing test, subsection (d) establishes 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.

Although under the balancing test in subsection (a)(1), judges would be able to protect this information under current practices, this subsection is intended to clarify that S. 623 would not compromise an individual's personally identifiable information that, in all likelihood, has no bearing on protecting public health or safety. For example, a judge may find that the public has an interest in the disclosure of medical information that describes the harmful side effects of a drug because they pose a threat to public health and safety. However, the personally identifiable information connected to that medical information will remain confidential subject to the rebuttable presumption in subsection (d).

5. Classified information

Similarly, S. 623 specifically addresses national security information in subsection (e). A rule of construction states that when weighing the interest in maintaining confidentiality under Section (a), nothing in this section shall prohibit a court from entering an order that would restrict the disclosure of information, or an order restricting access to court records, if in either instance such order is necessary to protect from public disclosure information classified under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy. Further, nothing in this section shall be construed to permit, require or authorize the disclosure of information that is classified under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy. Again, judges have the ability to protect this information under current law and under the balancing test in subsection (a). However, this subsection is included to make clear that S. 623 does not alter a judge's existing obligations to issue protective orders, or orders sealing court records or settlements when classified information is at issue.

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[27] Fla. Stat. § 69.081 (2000); Tex. R. Civ. Pro. 76a.

[28] Joseph F. Anderson Jr., Secrecy in the Courts: At the Tipping Point?, presented Vil. L. Rev. Norman J. Shachoy Symposium: The Future of Judicial Transparency, Feb. 2, 2008.

[29] Id.

II. HISTORY OF THE BILL AND COMMITTEE CONSIDERATION

A. COMMITTEE CONSIDERATION—103RD THROUGH 111TH CONGRESSES

The Sunshine in Litigation Act was first introduced by Senator Kohl in the 103rd Congress as S. 1404. On April 20, 1994, the Judiciary Committee's Subcommittee on Courts and Administrative Practice held a hearing, "S. 1404, 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." On June 27, 1994, the Sunshine in Litigation Act, with some minor changes,[30] was offered as an amendment to S. 687, the Product Liability Fairness Act. On June 28, 1994, the Senate conducted a roll call vote on a motion to table the amendment.[31] The amendment was tabled by a vote of 51 to 49.

The Sunshine in Litigation Act was introduced again in the 104th through 109th Congresses. In each Congress it was referred to the Committee on the Judiciary and no further action was taken.

In the 110th Congress, Senator Kohl introduced S. 2449, the Sunshine in Litigation Act of 2007, on December 11, 2007. Senator Patrick Leahy (D–VT) was an original cosponsor. Also on December 11, 2007, the Senate Judiciary Committee's Subcommittee on Antitrust, Competition Policy and Consumer Rights held a hearing, "The Sunshine in Litigation Act: Does Court Secrecy Undermine Public Health and Safety?" Testimony was received from five witnesses including Johnny Bradley, Jr. and Judge Joseph Anderson, Jr., District Court Judge for the District of South Carolina.

Johnny Bradley, Jr. testified about his experience as a plaintiff in a case against Cooper Tire Company related to a serious car accident that killed his wife and injured him and his son. During discovery, Mr. Bradley learned that there had been dozens of cases involving Cooper Tire that ended with confidential settlements. He told the Subcommittee that during his case, his lawyer discovered documents showing that Cooper Tires posed a threat to public safety. Due to protective orders entered by the judge during the lawsuit, Mr. Bradley is unable to publicly speak about these documents.

Judge Joseph Anderson testified about his views concerning the adverse consequences of court-ordered secrecy. In his experience, litigants frequently request judges "approve" their settlements even when the law does not require judicial approval. Specifically, judges are often asked to enter orders restricting public access to settlement information and sometimes the case history. Litigants prefer to involve the trial judge in order to ensure the court's power to enforce the confidentiality of the agreement. Judge Anderson noted that some judges already do consider public health and safety when making these decisions. But, he recognized that many judges have very large caseloads and, as a result, they often agree

[30] The differences between the amendment and the bill that was reported out of Committee were: subsection (a)(1) stated, "A court shall enter an order under rule 26(c) of the Federal Rules of Civil Procedure restricting the disclosure of information obtained through discovery or an order restricting access to court records in a civil case only after making particularized findings of fact that—"; subsection (a)(1)(B)(i) stated, "the public interest in disclosure of potential health or safety hazards is clearly outweighed by a specific and substantial interest in maintaining the confidentiality of the information or records in question"; and the amendment did not include anything after subsection (b).

[31] Vote no. 168, 103rd Congress, 2nd Session (June 28, 1994).

to court-ordered secrecy with little more than consent of all parties. Judge Anderson testified about cases he was directly involved in and cases he was aware of where judges have agreed to requests for court-ordered secrecy where one could reasonably argue that public interest and public safety should have required openness.

Judge Anderson also testified about the success of a local rule, unanimously adopted in South Carolina's District Court in 2002, which bans secret settlements. Contrary to the claims of those who opposed the rule, data indicates it has not resulted in more trials and that cases continue to settle. In fact, the number of trials has actually decreased since adoption of the rule.

Judge Anderson has endorsed S. 623, noting:

> [it is] carefully-crafted legislation [that] proposes a nuanced approach that simply requires judges to employ a balancing test—weighing the need for secrecy compared to potential harm to the public—and then to make specific factual findings before entering confidentiality orders. This 'balancing test' would not be a new experience: weighing competing interests is what judges do on a daily basis.[32]

On January 28, 2008, Senator Lindsey Graham (R–SC) signed on as a cosponsor. On March 6, 2008, the Judiciary Committee met in executive session to consider the bill. Senator Kohl offered an amendment in the nature of a substitute that made four changes to the bill. Two changes were technical. One changed the bill title to the "Sunshine in Litigation Act of 2008." The other added to subsection (c) a reference to subsection (a)(1) to make clear that this provision only applies to cases involving public health and safety. The other two changes were rules of construction that make it clear that the bill does not compromise protections for classified information or personally identifiable information related to financial, health or other related information. The substitute amendment was accepted by unanimous consent.

The Committee then voted to report the Sunshine in Litigation Act of 2008, with an amendment in the nature of a substitute, favorably to the Senate. The Committee proceeded by roll call vote as follows:

Tally: 12 Yeas, 6 Nays, 1 Pass

Yeas (12): Leahy (D–VT), Kennedy (D–MA), Biden (D–DE), Kohl (D–WI), Feinstein (D–CA), Feingold (D–WI), Schumer (D–NY), Durbin (D–IL), Cardin (D–MD), Whitehouse (D–RI), Grassley (R–IA), Graham (R–SC)

Nays (6): Hatch (R–UT), Kyl (R–AZ), Sessions (R–AL), Cornyn (R–TX), Brownback (R–KS), Coburn (R–OK)

Pass (1): Specter (R–PA)

The bill was introduced again in the 111th Congress on March 5, 2009. The Sunshine in Litigation Act of 2009, S. 537, was introduced by Senator Kohl, with Senator Lindsey Graham (R–SC) joining as an original cosponsor. It was referred to the Committee on the Judiciary and no further action was taken.

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[32] Anderson, supra note 28.

B. INTRODUCTION OF THE BILL AND COMMITTEE CONSIDERATION—112TH CONGRESS

The Sunshine in Litigation Act of 2011, S. 623, was introduced by Senator Kohl on March 17, 2011. On March 28, 2011, Senator Lindsey Graham (R–SC) joined as a cosponsor. On April 8, Senator Patrick Leahy signed on as a cosponsor.

On May 19, 2011, the Judiciary Committee met in executive session to consider the bill. Senator Kohl offered an amendment in the nature of a substitute that made three changes to the bill. One restricted the application of the bill to cases in which the pleadings state facts that are relevant to public health and safety. The second incorporated the relevant language from the Classified Information Procedures Act (CIPA) into the provisions protecting national security information. The original bill referred to CIPA, and the substitute amendment incorporated the particular CIPA language, clarifying that those protections would remain in place. The final change made clear that the bill would not provide a basis for the granting of a motion to reconsider, modify, amend or vacate a protective order or settlement order entered into before the effective date, or a basis for the reversal on appeal of a protective order or settlement order entered into before the effective date. The substitute amendment was accepted by unanimous consent.

The Committee then voted to report the Sunshine in Litigation Act of 2011, with an amendment in the nature of a substitute, favorably to the Senate. The Committee proceeded by roll call vote as follows:

Tally: 12 Yeas, 6 Nays

Yeas (12): Leahy (D–VT), Kohl (D–WI), Feinstein (D–CA), Schumer (D–NY), Durbin (D–IL), Whitehouse (D–RI), Klobuchar (D–MN), Franken (D–MN), Coons (D–DE), Blumenthal (D–CT), Grassley (R–IA), Graham (R–SC)

Nays (6): Hatch (R–UT), Kyl (R–AZ), Sessions (R–AL), Cornyn (R–TX), Lee (R–UT), Coburn (R–OK)

Also on May 19, 2011, Senator Dianne Feinstein (D–CA) joined the bill as a cosponsor.

III. SECTION-BY-SECTION SUMMARY OF THE BILL

Section 1. Short title

This section provides that the legislation may be cited as the "Sunshine in Litigation Act of 2011."

Section 2. Restrictions on protective orders and sealing of cases and settlements

Section 2 (a) amends Chapter 111 of title 28 of the United States Code, by adding section 1660 to the end of Chapter 111. Title 28 of the U.S. Code governs the Federal judiciary and Federal judicial procedure. Under current law, Federal courts may enter protective orders under Rule 26(c) of the Federal Rules of Civil Procedure simply by a showing that "good cause" for the protective order exists. The new section 1660 augments this "good cause" showing by requiring a court to make additional findings of fact for certain protective orders under Rule 26(c) of the Federal Rules of Civil Procedure. In the case of court records and sealed settlement agreements, the new section augments existing laws, including common

law and First Amendment law, dictating the standard for sealing such items.

Subsection (a), paragraph (1) requires that before entering a discovery protective order, an order restricting access to documents filed with the court, an order sealing a settlement agreement that would restrict the disclosure of such information, or an order restricting access to court records in a civil case in which the pleadings state facts that are relevant to the protection of public health or safety, the court must make certain findings regarding public health and safety.

Subparagraph (A) states that a judge may enter an order referenced in (a)(1) when such order would not restrict the disclosure of information which is relevant to the protection of public health and safety.

Subparagraph (B), clause (i) states that in the event that a judge finds that such an order would restrict disclosure of information relevant to protecting public health and safety, the judge may only issue the order after making findings of fact that the public interest in 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.

Clause (ii) states that the protective order entered as a result of the balancing test in clause (i) shall be no broader than necessary to protect the privacy interest asserted.

Paragraph (2) states that 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, the court makes a separate finding of fact that the requirements of paragraph (1) have been met.

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

Paragraph (4) states that section 2 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 stipulation of the parties.

Paragraph (5), subparagraph (A) states that the provisions of this section shall not constitute grounds for withholding information in discovery that is otherwise discoverable under Rule 26 of the Federal Rules of Civil Procedure.

Paragraph (5), subparagraph (B) states that no party shall request, as a condition for the production of discovery, that another party stipulate to an order that would violate this section.

Subsection (b), paragraph (1) states that a court shall not approve or enforce any provision of an agreement between or among parties to a civil action in which the pleadings state facts that are relevant to the protection of public health or safety, or approve or enforce an order subject to subsection (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.

Subsection (b), paragraph (2) states that any such information disclosed to a Federal or State agency shall be confidential to the extent provided by law.

Subsection (c), paragraph (1) states that, 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 one or more parties from—(A) disclosing that settlement was reached or the terms of such a 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. Paragraph (2) states that paragraph (c)(1) does not apply if the court has made findings of fact that the public interest in the disclosure of potential public health or safety hazards is outweighed by a specific and substantial interest in maintaining the confidentiality of the information.

Subsection (d) is a rule of construction which says that when weighing the interest in maintaining confidentiality under Section (a), there is 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.

Subsection (e) is a rule of construction which says that when weighing the interest in maintaining confidentiality under Section (a), nothing in this section shall prohibit a court from entering an order that would restrict the disclosure of information, or an order restricting access to court records, if in either instance such order is necessary to protect from public disclosure—(A) information classified under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy; or (B) intelligence sources and methods. Further, nothing in this section shall be construed to permit, require, or authorize the disclosure of information that—(A) is classified under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy; or (B) reveals intelligence sources and methods.

Section 2 (b) amends the table of sections of chapter 111 of title 28 of the United States Code by adding after the item relating to section 1659—"1660. Restrictions on protective orders and sealing of cases and settlements."

Section 3. Effective date and application

This section states that the effective date of the amendments made by this Act shall take effect 30 days after the date of enactment of this Act; and apply only to orders entered in civil actions or agreements entered into on or after such date; and not provide a basis for the granting of a motion to reconsider, modify, amend or vacate a protective order or settlement order entered into before the effective date, or a basis for the reversal on appeal of a protective order or settlement order entered into before the effective date.

IV. Congressional Budget Office Cost Estimate

The Committee sets forth, with respect to the bill, S. 623, the following estimate and comparison prepared by the director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

MAY 25, 2011.

Hon. PATRICK J. LEAHY,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 623, the Sunshine in Litigation Act of 2011.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Martin von Gnechten.

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

S. 623—Sunshine in Litigation Act of 2011

S. 623 would, under certain conditions, prevent federal judges from issuing protective orders restricting the use of litigation records that could influence public health or safety. The bill would take effect 30 days after enactment and would apply to protective orders in civil actions or arrangements entered on or after that date.

CBO estimates that enacting S. 623 would have no significant impact on the federal budget. The bill could alter and possibly increase the workloads of federal attorneys, court staff, and judges. However, CBO estimates that any resulting increase in spending would be small and subject to the availability of appropriated funds. Enacting S. 623 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

S. 623 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

The CBO staff contact for this estimate is Martin von Gnechten. The estimate was approved by Theresa Gullo.

V. REGULATORY IMPACT EVALUATION

In compliance with rule XXVI of the Standing Rules of the Senate, the Committee finds that no significant regulatory impact will result from the enactment of S. 623.

VI. CONCLUSION

The Sunshine in Litigation Act of 2011, S. 623, is a straightforward and narrowly targeted measure that will ensure that court-endorsed secrecy will not jeopardize public health and safety by concealing information about potential health or safety dangers from consumers and regulatory agencies.

VII. MINORITY VIEWS

MINORITY VIEWS FROM SENATORS KYL, HATCH, SESSIONS, CORNYN, COBURN, AND LEE

The "Sunshine in Litigation Act" has been proposed numerous times since 1991, most recently as S. 623. Each time, the bill has been vehemently opposed by industry, lawyers, and judges. The Act purportedly would prevent judges in civil cases from issuing protective orders that would keep information confidential if it is relevant to the protection of public health or safety. In reality, however, this bill would simply provide a tool to trial lawyers to conduct fishing expeditions and file frivolous lawsuits with impunity.

THE BILL IS UNNECESSARY

Proponents of the legislation cite anecdotal evidence of defendants covering up public health and safety problems via protective orders granted during litigation. However, as Judge Mark Kravitz has noted, the cited cases have all occurred in state courts.[33] Judge Kravitz further emphasized that there is no evidence that such problems have occurred in the federal court system the only system that this legislation would affect.[34] This Act is directed at a problem that does not exist.

Federal Rule of Civil Procedure (FRCP) 26 already allows judges to weigh the need for protective orders against public or private concerns when such an order is challenged. The FRCP were created, and are normally amended, through the Rules Enabling Act (REA), which allows the Judicial Conference to create carefully crafted rules that are presented by the Supreme Court to Congress for approval. Changes are made in this manner to ensure that the rules governing federal courts are consistent with the needs of courts, lawyers, and all parties to litigation. Not only would this legislation superfluously modify the FRCP, it does so in a manner contrary to the REA.

The Judicial Conference has repeatedly strongly criticized this bill and has conducted studies showing that the legislation serves no purpose. The Conference found that only about six percent of civil cases see requests for protective orders.[35] In the majority of these cases, the order had no impact on public health or safety. And of the cases where it did, "the empirical data showed no evidence that protective orders create any significant problem of con-

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[33] Sunshine in Litigation Act of 2009: Hearing before the Subcomm. on Com. and Admin. Law of the House Comm. on the Judiciary, 111th Cong., 1st Sess. (June 4, 2009) at 52 (statement of Mark Kravitz) [hereinafter "Hearing of June 4, 2009"].

[34] Hearing of June 4, 2009 at 52 (statement of Mark Kravitz).

[35] Hearing of June 4, 2009 at 58 (written testimony of Mark Kravitz).

cealing information about public hazards."[36] Additionally, the study found that in cases that raised public health or safety concerns, there was sufficient information to inform citizens of the health risks contained in publicly available court documents.[37] Last, the study concluded that judges usually will only grant protection orders for information that needs to be protected, and judges tend to recognize the importance of allowing access to data concerning public health risks.[38]

THE BILL'S ADVERSE EFFECTS ON CIVIL LITIGATION

This act will drive up the costs of litigation in a number of ways. Without the certainty that a protective order will be upheld, litigants will raise significantly more objections to litigation discovery in order to protect confidential information. Parties will be less willing to submit to discovery if they believe information will be disclosed to the public. This will inevitably result in expensive court battles, putting a greater burden on courts as well as the parties themselves. This is an unacceptable cost, especially when weighed against the limited beneficial effects that the bill would have.

Courts would be further burdened by this legislation because they will be required to ensure that all pre-discovery documents do not contain any information concerning public health or safety hazards. In *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20, 33 (1984), the Supreme Court held that pre-discovery materials are private matters and are not meant for the public. This bill, however, would require judges to scour these documents, which can be in the millions of pages, for any information that might concern a public health or safety hazard. Currently, to reduce the costs of litigation and speed up the discovery process, parties will frequently conduct discovery without judicial supervision. Passing this legislation will make this money-saving option impossible. Burdening these pre-discovery and discovery solutions would only delay discovery and put added strain on judges, who frequently already have heavy case loads.

Chilling discovery in this manner would further increase the costs of litigation by disincentivizing parties to settle. By forcing documents to be disclosed regardless of the outcome of a suit, this bill removes a bargaining chip for litigants to settle outside of court once discovery begins.

This bill would also encourage lawyers to go on fishing expeditions seeking information in discovery that would otherwise be protected. This would potentially allow frivolous lawsuits to be filed with impunity. While most of these lawsuits would be thrown out due to trial court discretion, some of them would inevitably go to trial and be a drain on court resources. And of course, even frivolous lawsuits that are disposed of before trial needlessly consume valuable public and private resources.

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[36] Hearing of June 4, 2009 at 58 (written testimony of Mark Kravitz).
[37] Hearing of June 4, 2009 at 58 (written testimony of Mark Kravitz).
[38] Hearing of June 4, 2009 at 60 (written testimony of Mark Kravitz).

CONCLUSION

We stand in opposition to the "Sunshine in Litigation Act of 2011" for the same reasons similar legislation has been rejected by congress since 1991. There is no benefit to enacting S. 623 into law—there is no evidence that protection orders are abused in federal courts. The only effect of this bill would be to increase litigation costs and burdens on federal judges.

JON KYL.
ORRIN G. HATCH.
JEFF SESSIONS.
JOHN CORNYN.
TOM COBURN.
MIKE LEE.

VIII. CHANGES TO EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 623, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

28 U.S.C. CHAPTER 111

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

(a)(1) Except as provided under subsection (e), in any civil action in which the pleadings state facts that are relevant to the protection of public health or safety, a court shall not enter, by stipulation or otherwise, an order otherwise authorized 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 unless in connection with such order the court has first made independent 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 past, present, or 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 order is no broader than necessary to protect the confidentiality interest asserted.

(2) No order entered as a result of the operation of paragraph (1), other than an order approving a settlement agreement, may 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) continue to be 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) A court shall not approve any party's stipulation or request to stipulate to an order that would violate this section.

(b)(1) In any civil action in which the pleadings state facts that are relevant to the protection of public health or safety, a court shall not approve or enforce any provision of an agreement between or among parties, or approve or enforce an order entered as a result of the operation of subsection (a)(1), to the extent that such provision or such order 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 the fact that such settlement was reached or the terms of such settlement, other than the amount of money paid; or

(B) discussing a civil action, or evidence produced in the civil action, that involves matters relevant to the protection of public health or safety.

(2) Paragraph (1) applies unless the court has made independent findings of fact that—

(A) the public interest in the disclosure of past, present, or 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

(B) the requested order is no broader than necessary to protect the confidentiality interest asserted.

(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—

(1) Shall prohibit a court from entering an order that would restrict the disclosure of information, or an order restricting access to court records, if in either instance such order is necessary to protect from public disclosure—

(A) information classified under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy; or

(B) intelligence sources and methods; or

(2) shall be construed to permit, require, or authorize the disclosure of information that—

(A) is classified under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy; or

(B) reveals intelligence sources and methods.

APPENDIX FOR MINORITY VIEWS

AMERICAN BAR ASSOCIATION,
Washington, DC, April 13, 2009.

Hon. PATRICK J. LEAHY,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

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,
Director,
Governmental Affairs Office.

MAY 3, 2011.

Hon. PATRICK J. LEAHY,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

Hon. CHARLES GRASSLEY,
Ranking Member, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR CHAIRMAN LEAHY AND RANKING MEMBER GRASSLEY: The undersigned members of the Coalition to Protect Privacy, Property, Confidentiality, and Efficiency in the Courts strongly oppose S. 623, the "Sunshine in Litigation Act of 2011."

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, S. 623 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. 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 S. 623 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 information about public hazards being inappropriately concealed or otherwise impede the efficient and appropriate sharing of discovery information. Current law provides judges with ample 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 S. 623. As a result, efforts to enact similar 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. S. 623 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 S. 623.

Sincerely,

Alliance of Automobile Manufacturers,

American Tort Reform Association,
American Insurance Association,
Civil Justice Association of California,
Lawyers for Civil Justice,
National Association of Manufacturers,
PhRMA,
U.S. Chamber Institute for Legal Reform,
U.S. Chamber of Commerce.

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