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“Sunshine” Should Not Trump Privacy in Civil Litigation

Andrew M. Grossman

The phrase “secret settlement” has a shady ring to it, even though it denotes nothing more than a contract between two or more parties that is not released to the public—just like nearly all contracts. But the trial bar understands the value of branding—witness its leading advocacy group’s transformation from the “American Trial Lawyers Association” to the “American Association for Justice”—and so has dubbed its proposal to make public nearly all settlement agreements and evidence in personal-injury cases the Sunshine in Litigation Act (S. 2449).

Rather than “restore public accountability in the judicial system by restricting court secrecy on matters that affect public health and safety,” as proponents claim, the legislation would cause complex litigation to grind to a halt and actually make it more difficult for personal-injury plaintiffs to obtain favorable settlements. The real beneficiary of the bill is not the public or tort victims, but the trial bar, which would have an easier time harassing companies with strike suits, fishing for evidence to use in unrelated cases, and filing “follow-on” lawsuits en masse. Sunshine is a proper disinfectant for public institutions, but it is not appropriate for all private matters.

The Sunshine in Litigation Act (SLA) is designed to overturn the presumption that parties to civil litigation should be free to decide among themselves whether and how information obtained during a civil lawsuit may be disclosed—as they would continue to be free to do in contracts struck up to the moment a lawsuit is filed. The legislation, devised and long championed

Talking Points

- Confidentiality agreements and orders in civil litigation protect litigants’ privacy rights while greatly reducing disagreement and delay during discovery. Current law gives judges the discretion to reject confidentiality when it is not appropriate, while recognizing that parties have an inherent interest in the privacy of their trade secrets, personal information, and other private materials.
- The Sunshine in Litigation Act would limit judges’ discretion to approve and enforce litigants’ confidentiality agreements. In many cases, discovery would grind to a halt as parties, unable to rely on broad protective orders, would be forced to challenge far more requests for evidence.
- Plaintiffs especially would lose out. Without the ability to offer confidentiality, they could expect to see smaller settlements, higher litigation costs, and even the disclosure of their own personal information.
- The big winner, however, would be the plaintiffs’ bar. This legislation would empower trial lawyers to abuse private litigation and establish lawsuit factories, reaping large fees by bringing numerous follow-on lawsuits.

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by the trial lawyer bar,¹ contains three components. First, it would prevent federal courts from entering non-disclosure protective orders during discovery without making specific findings of fact about the privacy interest in preventing public disclosure and the information's relevancy to public health or safety. It would also ban parties to a case from reaching such non-disclosure agreements among themselves, without the court's involvement. Second, it would deny courts the ability to enforce orders among parties that prevent the disclosure of information obtained during a case to a federal or state agency. And third, it would deny courts the ability to enforce confidentiality agreements in settlements without, again, making specific findings about those disclosures. Each of these provisions stands to dramatically change the face of civil litigation by further increasing the cost and delay of going to court and stretching judicial resources.

Protective Orders

In the federal court system, protective orders are governed by Rule 26(c) of the Federal Rules of Civil Procedure. The rule allows parties to seek, and judges to grant, orders that forbid the disclosure of evidence obtained in discovery when disclosure would cause a party "annoyance, embarrassment, oppression, or undue burden or expense." Protective orders restricting such disclosure are rarely contested, because parties usually agree on the contours of the discovery process and are able to negotiate the terms of their agreements themselves. When a party objects to a proposed restriction, however, the court must consider and weigh the asserted need for the order and its requested scope. The court may then decide whether to grant the order at all and, if so, how broadly it should apply—to all evidence or just some.

Civil suits are, generally, disputes between private parties that, outside of court, would present

no basis to root around in one another's private files and disclose the findings to the world. For most litigants, bringing a private dispute into court does not alter this presumption of privacy and non-disclosure. As one prominent treatise of federal procedural law explains, "Discovery is essentially a private affair."²

Protective orders and agreements to keep evidence confidential are essential tools of litigation due to the nature of the discovery process. The scope of discovery is "extremely broad," allowing information to be obtained "regarding nearly any matter...that is relevant to the subject matter involved in the action, whether or not the information sought will be admissible at trial, just so long as it is reasonably calculated to lead to the discovery of admissible evidence."³ This is an extremely inclusive standard, because "relevance is interpreted very broadly."⁴ In a product liability lawsuit, for example, a plaintiff may be able to request and obtain detailed information about a corporate manufacturer's internal meetings and deliberations, design processes, personnel practices, finances, etc. Parties may challenge specific discovery inquiries, but doing so is expensive and time-consuming, as is carefully vetting every single document, out of tens of thousands or more handed over, for its relevance. Protective orders and analogous agreements thus serve to "facilitate the discovery process (thereby reducing the expense of litigation)."⁵ Their necessity and uncontroversial nature is underscored by the observation of one judge who stated that he was "unaware of any case in the past half-dozen years of even a modicum of complexity where an umbrella protective order...has not been agreed to by the parties and approved by the court."⁶

It should be noted that protective orders—especially broad ones—are not absolute. A party may still challenge the confidentiality of certain docu-

1. Richard Marcus, *The Discovery Confidentiality Controversy*, 1991 U. ILL. L. REV. 457, 464-45 (1991).

2. CHARLES WRIGHT & MARY KAY KANE, *LAW OF FEDERAL COURTS* § 83 (6th ed. 2002).

3. JACK FRIEDENTHAL, MARY KAY KANE, & ARTHUR MILLER, *CIVIL PROCEDURE* § 7.2 (1985).

4. *Id.*

5. CHRISTOPHER MUELLER & LAIRD KIRKPATRICK, *EVIDENCE* § 5.28 (3rd ed. 2003).

6. *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. SUPP. 866, 889 (E.D.Pa.1981).

ments, and then the opposing party bears the burden of proving that the documents qualify for continued protection.⁷ Protective orders and agreements, then, just establish default rules that may be overridden when appropriate.

The Supreme Court has recognized the great importance of protective orders in civil litigation. In a unanimous opinion, the Court explained that because the rules governing pre-trial discovery “do not differentiate between information that is private or intimate and that to which no privacy interests attach...the Rules often allow extensive intrusion into the affairs of both litigants and third parties” and have “a significant potential for abuse”⁸ Privacy, it concluded, had long been the norm; fruits of pre-trial discovery, it explained, “are not public components of a civil trial” and “were not open to the public at common law.”⁹ Thus it held that protective orders prohibiting public disclosure of information obtained in discovery stood up to even First Amendment challenge.¹⁰ And going a step further, the Court implied that denial of such protective orders may even violate constitutional rights in cases where “privacy interests” are implicated.¹¹

Without enforceable protective orders and agreements, the discovery process—already expensive, slow, and burdensome—would grind to a halt as more time-consuming and onerous efforts would be taken to prevent sensitive information from being released in discovery, and if so, from being subject to disclosure. Weakening this aspect of civil litigation is incompatible with the primary goal of securing the “just, speedy and inexpensive determination of every action.”¹²

“Secret” Settlements

Settlement is the conclusion of the overwhelming majority of lawsuits filed.¹³ If the purpose of the civil justice system is to lead to a determination of every action, then settlement is usually the least expensive, most amicable means toward reaching that goal. The Federal Rules of Evidence, as well as other rules of court, are carefully crafted to encourage settlement of claims throughout the litigation process.¹⁴ As discovery progresses, the parties are likely to have a better understanding of the factual basis of the case and the merits of the other side’s contentions, and so a better idea of what the case is “worth.” If the parties can reach an agreement on that point, then avoiding trial by means of settlement greatly reduces expense, delay, uncertainty, and frustration.

In most civil actions, settlements require no approval by the court: The plaintiff simply dismisses the action after reaching a deal, memorialized in a contract, with the defendant. This applies to sealed settlements, as well. Until a party seeks to enforce a settlement agreement, usually following an alleged breach of it, there is no requirement that it be filed with a court. This is the norm for nearly all contracts struck between private parties.

Settlement agreements, in general, are brief and fairly uniform in their contents. A typical agreement usually contains four elements: “(1) a denial of liability, (2) a release of liability, (3) the amount of settlement, and (4) a requirement of confidentiality.”¹⁵ This last element serves much the same purpose as a protective order during discovery that restricts a party from disclosing certain information.

7. See, e.g., Paul Barrett, *Protective Orders Come Under Attack*, Wall St. J., Aug. 31, 1988, p. 27.

8. *Seattle Times Co. v. Rhinehart*, 467 U.S. 29, 33 (1984).

9. *Id.* at 32-33.

10. *Id.* at 36-37.

11. *Id.* at 34.

12. FED. R. CIV. P. 1.

13. Kevin McMunigal, *The Costs of Settlement: The Impact of Scarcity of Adjudication on Litigating Lawyers*, 37 UCLA L. REV. 833, 838.

14. See FED. R. EVID. 408.

15. ROBERT TIMOTHY REAGAN, SHANNON WHEATMAN, MARIE LEARY, NATACHA BLAIN, STEVEN GENSLE, GEORGE CORT, & DEAN MILETICH, FED. JUDICIAL CTR., *SEALED SETTLEMENT AGREEMENTS IN FEDERAL DISTRICT COURT 7* (2004), available at [http://www.fjc.gov/public/pdf.nsf/lookup/sealset3.pdf/\\$file/sealset3.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/sealset3.pdf/$file/sealset3.pdf).

Sealed agreements—so-called secret settlements—are actually rare in civil litigation. The Federal Judicial Center, a government agency that performs research for the federal courts, has conducted the only in-depth statistical analysis on the prevalence and use of sealed settlement agreements in federal civil litigation. Analyzing thousands of cases and tens of thousand of docket sheets, FJC researchers found that one in 227 civil filings (0.44 percent) result in sealed settlement agreements.¹⁶ If anything, this estimate is high because the study's sample included two unusual clusters of cases resulting in sealed settlements: 144 product liability cases arising from a 1998 airplane crash and 31 cases arising from a 1996 crash.¹⁷ Among all the cases resulting in sealed settlements, the initial complaint was sealed only 3 percent of the time, meaning that, in all but a very few cases (about 3 percent of 0.44 percent of cases), any allegations of wrongdoing remain a part of the public record.¹⁸

The study also examined the types of cases that result in sealed settlements. Less than a third of sealed settlements were in personal-injury cases. More significantly, less than one percent of personal-injury cases filed resulted in sealed settlements. Labor law, intellectual property, and civil rights cases accounted for significant numbers of sealed agreements—though, again, only a very small proportion of the cases filed in these areas actually result in sealed agreements.¹⁹

Expense, Delay, and Confusion

The most immediate collateral damage of removing the presumption of confidentiality in civil proceedings where the parties have agreed to it would be on judicial economy. The text of the SLA would prevent umbrella confidentiality agreements in almost all cases, whether or not there is even a conceivable relation to public health or safety, and require the parties to request narrow orders for each matter they might wish to keep confidential. That the parties may agree that confidentiality is

appropriate and even beneficial to both at the early discovery phase of litigation would be of no moment. The direct result would be a plethora of motions for protective orders, requiring filings and perhaps briefs for each and judicial review and determination.

Also inevitable would be a rise in the number of challenges during discovery. Discovery is, as described above, very liberal, and parties are willing to hew to the spirit of this liberality when they know that their sensitive materials can be protected from public disclosure. When that protection is uncertain or denied, parties will oppose more requests for document production, for fear that sensitive materials may be made public, and delay production as they carefully vet every document for information that may be lawfully withheld from the other party. Courts would be forced to do what they now dread: routinely make decisions and impose orders regarding minute details during the discovery process.

Further complicating matters, the legislation provides no specific standards that courts could use to determine whether to grant an order for nondisclosure. The potential bar on such orders would apply to all “information which is relevant to the protection of public health or safety,” and the balancing test weighs “public interest” against a party’s “specific and substantial interest” in confidentiality (in one provision) and “privacy interest” (in another). (This inconsistency of terms is, at least, a drafting error, and it may be an attempt to further narrow the grounds for confidentiality agreements.) These terms and concepts are extremely vague. The bill provides no guidance to a court that must decide whether a particular piece of evidence—say, a report from a manufacturer’s internal investigation of a production system incorporating its trade secrets that a single plaintiff asserts is “relevant” to public health or safety—actually meets that ambiguous definition. Although

16. *Id.* at 3.

17. *Id.* at 8.

18. *Id.* at 6.

19. *Id.* at 5.

the manufacturer in this case may contest the plaintiff's theories of defect and injury causation, the plaintiff's bare assertion in its complaint would be enough to force the manufacturer to make its case to the court and force the court to rule on what will, necessarily, be a bare factual record.

Indeed, the legislation contains no mention of any specific reasons, even those long recognized in the use of protective orders, that litigants might wish to keep certain pieces of evidence confidential. These include information revealed in settlement negotiations, trade secrets, and classified or sensitive but unclassified information concerning national security. The legislation also makes no mention of information that is subject to a privilege—such as the attorney–client, law enforcement, deliberative process, doctor–patient, and spousal privileges—but may be incidentally revealed in discovery (a happenstance often preemptively addressed today by mutual agreement of the parties).

Bad for Plaintiffs

Proponents of the Sunshine in Litigation Act portray it as a measure to aid plaintiffs pushed into signing confidentiality agreements by powerful defendants, but the legislation would actually make plaintiffs worse off. The greatest risk is that plaintiffs would be denied the opportunity to strike a quick settlement of meritorious claims—an important thing for plaintiffs who have been injured or are out of work. The inability to protect confidentiality would make settlements less attractive to defendants, giving them a greater incentive to litigate claims rather than settle. Particularly when defendants have greater resources than plaintiffs (such as when an individual sues a corporation), this would put the plaintiff at a disadvantage as litigation drags on and expenses mount.²⁰

Similarly, forbidding confidentiality agreements would limit plaintiffs' bargaining positions and reduce the value of settlements to plaintiffs. Agreements between parties (whether contracts, settlements, or even informal ongoing relationships) are

polycentric—that is, the terms of the agreement do not stand alone but are interrelated. It is usually not possible to alter one term of an agreement without others being affected. For example, increasing the duration of a product warranty may raise the price of the product and also prompt the manufacturer to supply a hardier product. Similarly, altering one term of a settlement agreement will affect others. Today, nearly all parties to litigation are free to choose whether to accept or reject other parties' requests for confidentiality and may weigh the costs of doing so against the advantageous terms that may accompany confidentiality. But if a party is forbidden from offering confidentiality as part of a settlement agreement, it will receive less favorable terms elsewhere in the agreement, such as a lower cash award. The decision whether or not to make this tradeoff would be out of the plaintiff's hands.

Further, some plaintiffs would be reluctant to sue at all for fear that evidence obtained from them in discovery may be disclosed to the public against their wishes. This is particularly a risk in personal-injury actions, where the plaintiff "is often asked to expose his or her private life to intense scrutiny"²¹ and this scrutiny may result in evidence that is relevant to public health. Women, in particular, are likely to face this consequence due to their reproductive role. For example, a woman claiming that an intrauterine contraceptive device caused her infertility may have to disclose her sexual history, which may be a causative factor in infertility, in the same way that smoking greatly increases the risk of cancer among those who have been exposed to asbestos. The Sunshine in Litigation Act would create a presumption in favor of disclosure of this very personal information. In other cases, plaintiffs may wish to avoid publicity altogether. A strong presumption against confidentiality and the sealing of court records, even by mutual consent of the parties, could cause such plaintiffs to seek shelter from the sunshine of public disclosure and thus from the courtroom.

20. Though plaintiffs represented on a contingent-free basis may not feel the burden of legal expenses so acutely, they may have an even greater need for a quick settlement than other defendants.

21. Arthur Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 464 (1991).

Finally, the Sunshine in Litigation Act would create the real risk that courts may turn their back on the innovation of liberal discovery practices by limiting discovery in ways that would not be covered by the law. As Harvard Law School's Arthur Miller explains, "If courts could deny or restrict discovery more easily than they could issue protective orders, judges might choose to do the former on the assumption that denying discovery will curb abuse and prevented protracted pretrial litigation." This, he explains, would be antithetical to the purposes of discovery because it "would subordinate one litigant's interest in preparing her case to a hypothetical subsequent litigant's interest in ready access to the discovery material in the original case."²² In this way, the legislation is directly opposed to plaintiffs' interests.

Infringement of Constitutional Rights

While the SLA is almost certainly constitutional, it could, and likely would, be employed in ways that violate litigants' fundamental rights. First, as the Supreme Court observed in *Seattle Times*, discovery and disclosure "may seriously implicate privacy interests of litigants and third parties," and these interests may be so substantial as to give rise to a constitutional violation.²³ Though the Supreme Court's jurisprudence on privacy rights is controversial and, in the main, unsupported by persuasive textual or historical authority, it is the law of the land and certainly applicable to judicial proceedings, which may concern matters well within the bounds of personal autonomy protected by courts under constitutional privacy doctrines.

Second is the risk that the SLA could infringe on property rights. Information can be property, and is frequently more valuable than tangible property. Trade secrets, for example, encompass a wide variety of businesses' intellectual capital, from customer lists to proprietary methods of manufacturing to secret flavoring agents, and exposing most of these secrets to the public and competitors would destroy their value. Mandated disclosure of trade secrets could result, then, in the

taking of private property in violation of the Fifth Amendment. This is no hypothetical fear but a reality in modern business practice, where companies go to great lengths to prevent computer intrusions by competitors, industrial espionage, and improper disclosures by employees.

A Boon to Trial Lawyers

While the Sunshine in Litigation Act would disadvantage many plaintiffs, it would help the trial attorneys representing them in three important ways. First, limiting protective orders and agreements—and essentially banning "umbrella" protective orders—would make "fishing expeditions" far more lucrative. Getting into court in the United States is easy; a plaintiff need merely file a complaint sufficient to put a defendant on notice of the allegations against him. With that single filing, perhaps just a few pages long, and a small fee, an attorney is entitled to discovery. As described above, discovery is extremely liberal and can be easily abused to dredge for facts to support flimsy allegations or to conduct broad sweeps for information which might be useful in some future case. Protective orders and the good discretion of trial judges serve today to limit this kind of litigation abuse, but bars on protective orders would make it much harder for courts to prevent fishing expeditions intended to find needle-in-a-haystack wrongdoing.

Second, failing that, a trial attorney may use discovery to harass and coerce the defendant into an easy settlement. This threat would be greatly amplified without enforceable protective orders and agreements, leading more corporate defendants to settle early, before discovery, for relatively small sums. While such "strike suits" can be lucrative for lawyers, who may bring them by the dozen and gain a modest fee for each, they benefit plaintiffs little—each receives just the residue of his suit's small settlement after lawyers' fees have been extracted.

Third, the legislation would make it easier for trial lawyers to bring "follow-on" litigation. While this is not necessarily a bad thing in itself, it does create a conflict of interest for trial lawyers: They

22. *Id.* at 484.

23. *Seattle Times Co.*, 467 U.S. at 35.

will have a larger incentive to treat each case as part of a larger litigation strategy rather than an opportunity to reach the best result for their client. For example, a client may wish to settle early in litigation, but her lawyer may wish to push on through discovery to see if he finds anything that will be useful in subsequent cases. In other cases, a lawyer who is prepared for “follow-on” cases may be less than zealous in seeking an award for a plaintiff who has been injured more greatly than other plaintiffs in this type of litigation.

Conclusion

The Sunshine in Litigation Act is unnecessary. A wide variety of expert agencies already investigate threats to public health and safety and mandate the public disclosure of relevant materials. These experienced agencies are better placed than courts to determine whether the public has a legitimate interest in otherwise private information and have a wide variety of tools at their disposal, from administrative enforcement to criminal prosecution, to ensure that businesses do not escape their obligations to be forthcoming. Because these agencies can make determinations with greater accuracy and precision than the courts, they are also less likely to mandate the disclosure of information in which the public has no legitimate interest. Narrow, relevant disclosures avoid confusing the

public with misleading reports and burdening businesses and individuals with violation of their privacy and other rights.

The tort-lawyer lobby has been pushing the Sunshine in Litigation Act for 14 years, taking advantage of every opportunity to point out cases in which confidentiality agreements have kept valuable information from the public. The record, however, is sparse of such cases. Much more common, though, and well documented is harassing and vexatious litigation that saps American competitiveness and winds up costing businesses millions in legal fees.

Confidentiality plays a vital role in civil litigation and is usually the result of deals freely made between parties to a lawsuit. This is because confidentiality benefits plaintiffs and defendants alike, reducing the cost and delay of litigation and easing the settlement process. Where confidentiality is not appropriate, parties today have the power to block or contest it. Lawsuits are, in most cases, private disagreements between private parties. Asking a court to adjudicate a dispute should not rob parties of their right to keep private matters private.

—Andrew M. Grossman is Senior Legal Policy Analyst in the Center for Legal and Judicial Studies at The Heritage Foundation.