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SUNSHINE IN LITIGATION ACT OF 2008

HEARING

BEFORE THE

SUBCOMMITTEE ON
COMMERCIAL AND ADMINISTRATIVE LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

ON

H.R. 5884

JULY 31, 2008

Serial No. 110–202

Printed for the use of the Committee on the Judiciary

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U.S. GOVERNMENT PRINTING OFFICE

43–831 PDF WASHINGTON : 2009

For sale by the Superintendent of Documents, U.S. Government Printing Office
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SUNSHINE IN LITIGATION ACT OF 2008

THURSDAY, JULY 31, 2008

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

The Subcommittee met, pursuant to notice, at 10:40 a.m., in room 2237, Rayburn House Office Building, the Honorable Linda Sánchez (Chairwoman of the Subcommittee) presiding.

Present: Representatives Sánchez, Cannon, and Jordan.

Staff present: Matthew Wiener, Majority Counsel; Daniel Flores, Minority Counsel; Andrés Jimenez, Majority Professional Staff Member; and Megan Crowley, Minority Clerk.

Ms. SÁNCHEZ. This hearing of the Committee on the Judiciary, Subcommittee on Commercial and Administrative Law will now come to order.

I will now recognize myself for a short statement.

Serious concerns have been raised as to whether court secrecy orders may endanger public safety and health. There are several examples of court secrecy orders that have concealed from the public and governmental regulatory agencies information about dangerous products and other potential harms.

None is more well known, perhaps, than the secrecy orders involving Firestone tires. Defective Firestone tires resulted in more than 250 deaths and many more serious injuries throughout the 1990's. Although Firestone knew of the defects by the early 1990's, it concealed the information from the public by settling numerous lawsuits under the cover of court secrecy orders. Those orders prohibited plaintiffs from sharing information with the public about the defects uncovered during litigation.

Not until 2000, when Firestone issued a recall, did the public finally learn of them. By then it was too late for those who were already victims and for their families. This is just one notable example. We expect to hear about others during this morning's testimony.

The fundamental question before us is whether Congress should leave the issue of court secrecy in the hands of Federal judges or, instead, address the issue itself. Should we choose the latter, we have H.R. 5884, the "Sunshine in Litigation Act of 2008." H.R. 5884 mirrors a bill pending before the Senate that has been favorably reported by a bipartisan majority of the Senate Committee on the Judiciary.

H.R. 5884 is modest in its scope. Its key provision would require courts to do what some Federal judges already do: consider the public's interest in health and safety before entering certain confidentiality orders that would conceal information from the public uncovered during discovery.

H.R. 5884 would not prohibit a court from ordering the confidentiality of discovery materials when confidentiality is due, such as when protecting a trade secret, other proprietary commercial information, or personal information of a private nature.

It would simply require a court, before entering a nondisclosure order, to find that the asserted interest in confidentiality outweighs the public interest in open access. And it would require that the nondisclosure order be no broader than necessary to protect the privacy interest that justifies its issuance.

To help us evaluate whether these and related restrictions on court secrecy orders should be legislatively mandated, we will hear from four witnesses. They are: Richard Meadow, a partner in the Lanier Law firm in New York; Professor John Freeman, Distinguished Professor Emeritus of Law at the University of South Carolina School of Law; the Honorable Mark Kravitz, a judge on the United States District Court for the District of Connecticut, who is testifying on behalf of the Judicial Conference of the United States; and the Honorable Joseph Anderson, Jr., a judge on the United States District Court for the District of South Carolina. Accordingly, I look forward to hearing today's testimony from our witnesses.

[The bill, H.R. 5884, follows:]

110TH CONGRESS
2D SESSION

H. R. 5884

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

IN THE HOUSE OF REPRESENTATIVES

APRIL 23, 2008

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

---

A BILL

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

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

SECTION 1. SHORT TITLE.

This Act may be cited as the "Sunshine in Litigation Act of 2008".

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5 "(c) Nothing in this section shall be construed to per-
6 mit, require, or authorize the disclosure of classified infor-
7 mation (as defined under section 1 of the Classified Infor-
8 mation Procedures Act (18 U.S.C. App.))."

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

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

13 **SEC. 3. EFFECTIVE DATE.**

14 The amendments made by this Act shall—

15 (1) take effect 30 days after the date of enact-
16 ment of this Act; and

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

○

Ms. SÁNCHEZ. And at this time, I would now recognize my colleague Mr. Cannon, the distinguished Ranking Member of the Subcommittee, for his opening remarks.

Mr. CANNON. Thank you, Madam Chair.

Just as a matter of curiosity, which I should probably frame as a parliamentary inquiry, I would think this normally would come under the jurisdiction of the Intellectual Property and Courts Subcommittee. Is there a reason why we are doing it here?

Ms. SÁNCHEZ. I would expect that, perhaps, for issues involving trade secrets that might be the case. But we are talking about issues of public health and welfare. So I believe the jurisdiction is properly in this Subcommittee.

Mr. CANNON. As the Chair knows, I am always anxious to expand the jurisdiction of this Committee. And so I think we should go forward. But my sense is that since we are dealing with the rules, or the way we make the rules, that this probably would fit—what we probably ought to do is get courts in this Committee, because IP has plenty of other things to do.

I want to thank the witnesses for their testimony today regarding H.R. 5884, the "Sunshine in Litigation Act of 2008." Oftentimes we hold hearings on legislation in this Subcommittee which is supported or opposed by partisan groups on opposite sides of the issue. That is not the case with the bill we are considering today.

Rather, the Sunshine in Litigation Act is opposed not just by what would generally be perceived as conservative or pro-business groups but by non-partisan groups such as the Judicial Conference of the United States and the American Bar Association. The bill is also opposed by the Department of Justice.

I ask unanimous consent that opposition letters from the Judicial Conference, the ABA and the Department of Justice be entered into the record.

Ms. SÁNCHEZ. Without objection, so ordered.

[The information referred to follows:]

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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May 22, 2008

Honorable Lamar Smith
Ranking Member
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Dear Representative Smith:

I write to advise you of the concerns of the Judicial Conference's Committee on Rules of Practice and Procedure about the "Sunshine in Litigation Act of 2008" (H.R. 5884), which was introduced on April 23, 2008, and has been referred to the House Judiciary Committee. The Committee on Rules of Practice and Procedure has carefully and thoroughly studied the bill's proposed requirements for issuing discovery protective orders under Rule 26(c) of the Federal Rules of Civil Procedure and for issuing orders approving settlements with confidentiality provisions. As a result of this work, the Rules Committee concluded that the legislation is not necessary to protect the public health and safety and that the discovery protective order provision would make it more difficult to protect important privacy interests and would make civil litigation more expensive, more burdensome, and less accessible.

Discovery Protective Orders

H.R. 5884 would require a judge presiding over a case, who is asked to enter a protective order governing discovery under Rule 26(c) of the Federal Rules of Civil Procedure, to make findings of fact that the information obtained through discovery is not relevant to the protection of public health or safety or, if it is relevant, that the public interest in the disclosure of potential health or safety hazards is outweighed by the public interest in maintaining the confidentiality of the information and that the protective order requested is no broader than necessary to protect the privacy interest asserted.

Bills that would regulate the issuance of protective orders in discovery under Rule 26(c), similar to H.R. 5884, have been introduced regularly since 1991. Under the Rules Enabling Act, 28 U.S.C. § 2071-2077, the Rules Committee studied Rule 26(c) to inform itself about the problems identified by these bills and to bring the strengths of the Rules Enabling Act process to bear on the problems that might be found. Under that process, the Rules Committee carefully examined and reexamined the issues, reviewed the pertinent case law and legal literature, held public hearings, and initiated and evaluated empirical research studies.

The Rules Committee consistently concluded that provisions affecting Rule 26(c), similar to those sought in H.R. 5884, were not warranted and would adversely affect the administration of justice. Based on lengthy and thorough examination of the issues, the Committee concluded that: (1) the empirical evidence showed that discovery protective orders did not create any significant problem of concealing information about safety or health hazards from the public; (2) protective orders are important to litigants' privacy and property interests; (3) discovery would become more burdensome and costly if parties cannot rely on protective orders; (4) administering a rule that added conditions before any discovery protective order could be entered would impose significant burdens on the court system; and (5) such a rule would have limited impact because much information gathered in discovery is not filed with the court and is not publicly available.

The Empirical Data Shows No Need for the Legislation

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

In 1994, the Rules Committee asked the Federal Judicial Center (FJC) to do an empirical study on whether discovery protective orders were operating to keep from the public information about public safety or health hazards. The FJC completed the study in April 1996. It examined 38,179 civil cases filed in the District of Columbia, Eastern District of Michigan, and Eastern District of Pennsylvania from 1990 to 1992. The FJC study showed that discovery protective orders are requested in only about 6% of civil

cases. Most of the requests are made by motion, which courts carefully review and deny or modify a substantial proportion; about one-quarter of the requests are made by party stipulations that courts usually accept.

The empirical study showed that discovery protective orders entered in most cases do not impact public safety or health. In its study, the FJC randomly selected 398 cases that had protective order activity. About half of the 398 cases involved a protective order governing the return or destruction of discovery materials or imposing a discovery stay pending some event or action. Only half of the 398 cases involved a protective order restricting disclosure of discovery materials. Of the cases in which a protective order was entered restricting access to discovery materials, a little more than 50% were civil rights and contract cases and about 9% were personal injury cases. In the cases in which a protective order is entered restricting parties from disclosing discovery material, most are not personal injury cases in which public health and safety issues are most likely to arise. The empirical data showed no evidence that protective orders create any significant problem of concealing information about public hazards.

Other Information Shows No Need for the Legislation

The Committee also studied the examples commonly cited as illustrations of the need for legislation such as H.R. 5884. In these cases, information sufficient to protect public health or safety was publicly available from other sources. The Committee examined the case law to understand what courts are in fact doing when parties file motions for protective orders in discovery. The case law showed that the courts review such motions carefully and often deny or modify them to grant only the protection needed, recognizing the importance of public access to court filings. The case law also shows that courts often reexamine protective orders if intervenors or third parties raise concerns about them.

The Committee also considered specific proposals to amend Rule 26(c), intended to address the problems identified in H.R. 5884's predecessor bills. The Committee published proposed amendments through the Rules Enabling Act process. Public comment led to significant revisions, republication, and extensive public comment. At the conclusion of this process, the Judicial Conference decided to return the proposals to the Committee for further study. That study included the work described above.

The Legislation Would Have Significant Negative Consequences

The Committee also carefully considered the impact of requiring findings of fact before any discovery protective order could be issued. As noted, the empirical data showed that about 50% of the cases in which discovery protective orders of the type addressed in H.R. 5884 are sought involve contract claims and civil rights claims, including employment discrimination. Many of these cases involve either protected confidential information, such as trade secrets, or highly sensitive personal information. In particular, civil rights and employment discrimination cases often involve personal information not only about the plaintiff but also about other individuals who are not parties, such as fellow employees. As a result, the parties in these categories of cases frequently seek orders protecting confidential information and personal information exchanged in discovery.

The risks to privacy are significantly greater today than when bills similar to H.R. 5884 were first introduced, because of the computer. The federal courts will soon all have electronic court filing systems, which permit public remote electronic access to court filings. Electronic filing is an inevitable development in this computer age and is providing beneficial increases in efficiency and in public access to court filings. But remote public access to court filings makes it more difficult to protect confidential information, such as competitors' trade secrets or individuals' sensitive private information. New rules implementing the E-Government Act do not reduce the need for protective orders to safeguard against dissemination of highly personal and sensitive information. If particularized fact findings are required before a discovery protective order can issue, parties in these cases will face a heavier litigation burden and some plaintiffs might abandon their claims rather than risk public disclosure of highly personal or confidential information.

Although few cases involve discovery into information relevant to public health or safety hazards, H.R. 5884 would apply to all civil cases. In many cases, protective orders are essential to effective discovery management. That importance has increased with the explosive growth in electronically stored information. Even relatively small cases often involve huge volumes of information. Requiring courts to review information – which can often amount to thousands or even millions of pages – to make such determinations will burden judges and further delay pretrial discovery. Parties often rely on the ability to obtain protective orders in voluntarily producing information without the need for extensive judicial supervision. If obtaining a protective order required item-by-item judicial consideration to determine whether the information was relevant to the protection of public health or safety, as contemplated under the bill, parties would be less likely to

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

The Legislation Would Primarily Affect Information that is Not Publicly Available Because it is Not Filed With the Court

Not only would the proposed legislation exact a heavy toll on litigants, lawyers, and judges, its potential benefit would be minimized by the general rule that what is produced in discovery is not public information. The Supreme Court recognized this limit when it noted in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984), that discovery materials, including "pretrial depositions and interrogatories are not public components of a civil trial. Such proceedings were not open to the public at common law, ... and, in general, they are conducted in private as a matter of modern practice." Information produced in discovery is not publicly available unless it is filed with the court. Information produced in discovery is not filed with the court unless it is part of or attached to a motion or other submission, such as a motion for summary judgment. Consequently, if discovery material is in the parties' possession but not filed, it is not publicly available. The absence of a protective order does not require that any party share the information with the public. The proposed legislation would have little effect on public access to discovery materials not filed with the court.

Conclusion

The Committee opposes the proposed legislation on discovery protective orders on the ground that it is inconsistent with the Rules Enabling Act. The Committee's substantive concerns with the proposed legislation result from the careful study conducted through the lengthy and transparent process of the Rules Enabling Act. That study, which spanned years and included research to gather and analyze empirical data, case law, academic studies, and practice, led to the conclusion that no change to the present protective-order practice is warranted and that the proposed legislation would make discovery more expensive, more burdensome, and more time-consuming, and would threaten important privacy interests.

Confidentiality Provisions in Settlement Agreements

The Empirical Data Shows No Need for the Legislation

H.R. 5884 would also require a judge asked to issue an order approving a settlement agreement to make findings of fact that such an order would not restrict the disclosure of information relevant to the protection of public health or safety or, if it is relevant, that the public interest in the disclosure of potential health or safety hazards is outweighed by the public interest in maintaining the confidentiality of the information and that the protective order requested is no broader than necessary to protect the privacy interest asserted. In 2002, the Committee on Rules of Practice and Procedure asked the Federal Judicial Center to collect and analyze data on the practice and frequency of "sealing orders" that limit disclosure of settlement agreements filed in the federal courts. The Committee asked for the study in response to proposed legislation that would regulate confidentiality provisions in settlement agreements. H.R. 5884 contains a similar provision. In April 2004, the FJC completed its comprehensive study surveying civil cases terminated in 52 district courts during the two-year period ending December 31, 2002. In those 52 districts, the FJC found a total of 1,270 cases out of 288,846 civil cases in which a sealed settlement agreement was filed, about one in 227 cases (0.44%).

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

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

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

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

The Legislation is Unlikely to be Effective

The FJC study shows that only a small fraction of the agreements that settle federal-court actions are filed in the court. Most settlement agreements remain private contracts between the parties. On the few occasions when parties do file a settlement agreement with the court, it is to make the settlement agreement part of the judgment to ensure continuing federal jurisdiction, not to secure court approval of the settlement. Such agreements would not be affected by prohibitions, like those in H.R. 5884, prohibiting a court from entering an order "approving a settlement agreement that would restrict disclosure" of its contents.

Conclusion

Based on the relatively small number of cases involving a sealed settlement agreement and the availability of other sources – including the complaint – to inform the public of potential hazards in cases involving a sealed settlement agreement, the Committee concluded that it was not necessary to enact a rule or a statute restricting confidentiality provisions in settlement agreements.

Summary

For these reasons, the Committee on Rules of Practice and Procedure has strong concerns about the discovery protective order and settlement order provisions of H.R. 5884 that you and the Judiciary Committee are urged to consider. I thank you for your consideration and look forward to continuing to work together to ensure that our civil justice system is just and fair.

Sincerely,

Lee H. Rosenthal
United States District Judge
Chair, Committee on Rules of Practice
and Procedure

cc: Members, House Committee on the Judiciary

Identical letter sent to: Honorable John Conyers, Jr.
Honorable Howard Berman
Honorable Howard Coble

Thomas M. Susman
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July 30, 2008

The Honorable Linda T. Sánchez
Chairwoman
Subcommittee on Commercial and Administrative Law
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20510

Dear Chairwoman Sanchez:

I am writing to you on behalf of the American Bar Association regarding the July 31, 2008, hearings before your subcommittee on H.R. 5884, the "Sunshine in Litigation Act of 2008."

The ABA, which has over 400,000 members throughout the country, has long opposed legislation that would make changes in the Federal Rules of Civil Procedure without going through the Rules Enabling Act process. The ABA opposes enactment of H.R. 5884 because it would circumvent the Rules Enabling Act and may unnecessarily restrict the authority of the federal courts under Rule 26(c).

Specifically, H.R. 5884 would limit a court's ability to enter an order: (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 of fact that such an 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.

We respectfully believe that the current version of Federal Rule of Civil Procedure 26(c) and the case law applying Rule 26(c) give federal judges more than enough latitude to determine when to enter a protective order and what provisions should or should not be in it, and to do so on a case-by-case basis in light of the particular facts and circumstances.

The ABA fully supports the Rules Enabling Act process, which is based on three fundamental concepts: (1) the essential and 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; and (3) provision for a congressional review period. We view the process of the proposed rules changes to the Federal Rules in H.R. 5884 as an unwise

retreat from the balanced and inclusive process established by Congress when it adopted the Rules Enabling Act.

In the Rules Enabling Act, 28 U.S.C. §§ 2071-77, Congress prescribed the appropriate procedure for the formulation and adoption of rules of evidence, practice and procedure for the federal courts. This well-settled, congressionally specified procedure contemplates that evidentiary and procedural rules will in the first instance be considered and drafted by committees of the United States Judicial Conference, will thereafter be subject to thorough public comment and reconsideration, and will then be submitted to the United States Supreme Court for consideration and promulgation. Finally, the proposed rules are transmitted to Congress, which retains the ultimate power to veto any rule before it takes effect.

This time-proven process proceeds from separation-of-powers concerns and is driven by the practical recognition that, among other things:

1. rules of evidence and procedure are inherently a matter of both intimate concern and intimate familiarity and expertise of the judiciary, which must apply them on a daily basis;

2. each rule forms just one part of a complicated, interlocking whole, rendering due deliberation and public comment essential to avoid unintended consequences; and

3. the Judicial Conference is in a unique position to draft rules with care in a setting isolated from pressures that may interfere with painstaking consideration and due deliberation.

H.R. 5884 would depart from this balanced and inclusive process established by Congress when it adopted the Rules Enabling Act. The ABA believes that congressional failure to follow the processes in the Rules Enabling Act would frustrate the purpose of the Act and potentially harm the effective functioning of the judicial system.

The ABA also has adopted policy regarding secrecy and coercive agreements but that policy is directed to the courts and not to the Congress. Regarding these agreements, the ABA recommends the following:

1. 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;

2. No protective order should contain any provision that requires an attorney for a plaintiff in a tort action to destroy information or records furnished pursuant to such order, including the attorney's notes and other work product, unless the attorney for a plaintiff refuses to agree to be bound by the order after the case has been concluded. An attorney for plaintiff should only be required to return copies of documents obtained from the defendant on condition that defendant agrees not to destroy any such documents so that they will be available, under appropriate circumstances, to government agencies or to other litigants in future cases; and

3. Any provision in a settlement or other agreement that prohibits an attorney from representing any other claimant in a similar action against the defendant should be void and of no effect. An attorney should not be permitted to sign such an agreement or request another attorney to do so.

Following adoption of this ABA policy, the Committee on Rules of Practice and Procedure and the Advisory Committee on Civil Rules of the Judicial Conference explored at length the need for changes in Rule 26(c) similar to the proposed changes in legislation such as H.R. 5884. These committees of the Judicial Conference concluded that such changes are not warranted. This would suggest that legislative action may be unnecessary and would undermine the federal courts' rules-development process.

We respectfully request that you include this letter in the record of your July 31 hearings.

Sincerely,

Thomas M. Susman

cc. The Honorable Chris Cannon, Ranking Member

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

February 26, 2008

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The Department of Justice (DOJ) has reviewed S. 2449, the "Sunshine in Litigation Act of 2007." As a threshold matter, the Department does not believe that legislation of this kind is necessary. District court judges and magistrate judges routinely handle requests for the entry of protective orders, and the Department is not aware of any serious or widespread problem in the exercise of the district courts' authority to apply Rule 26(c) or maintain oversight of protective orders. Confidentiality issues are necessarily case-specific, and the individual judge assigned to the case is best suited to determine the propriety of maintaining the confidentiality of information disclosed by or to the parties, the conditions of nondisclosure, and the duration of any such protections. Moreover, the bill is inconsistent with recent amendments to the Federal Rules of Civil Procedure for protecting privileged information during electronic discovery.

We have the following concerns with S. 2449, in its current form:

General Comments

1. S. 2449 does not recognize important traditional uses of protective orders and agreements such as for protecting settlement negotiation exchanges, trade secrets, sensitive and classified information concerning national security, and privileged material including material subject to the attorney-client, law enforcement and deliberative process privileges. See Rule 26(c) of Federal Rules of Civil Procedure ("good cause" provision for issuing protective orders); Pansy v. Borough of Stroudsburg, 23 F.3d 772 (3rd Cir. 1994) (adopting "good cause" requirement for issuing confidentiality orders); see also, testimony on Deputy Assistant Attorney General Carl J. Nichols, Senate Judiciary Committee, 13 February 2008 (concerning the use of protective orders in State Secrets cases). The bill would adversely affect DOJ's ability to resolve its cases as they commonly involve protection of public health or safety and some use protective or confidentiality orders for encouraging settlement negotiation exchanges and/or protecting trade secrets or national security. Rather than painting with a broad brush, Congress could amend its statutory language for existing federal causes of action to address any particular concerns in a more targeted fashion.

2. S. 2449 would displace the Federal Civil Rules of Procedure without amending them or undergoing the extensive legal review of the normal rules enabling process. By greatly limiting protective orders and agreements, the bill is out-of-sync with the 2006 electronic discovery amendments to the Federal Civil Rules of Procedure and proposed Rule 502 of Federal Rules of Evidence (see S. 2450). All these recent rule changes and proposals explicitly encourage confidentiality agreements and orders to guard against the real risks of inadvertent disclosure of privileged information during discovery in the computer age.

3. As currently drafted, section 2 of the bill would prohibit a court from entering a protective order for information obtained in civil discovery, unless the court found that the order would not restrict disclosure of "information relevant to the protection of public safety or health." Alternatively, the court could enter a protective order if it found that the public interest in disclosure of potential health and safety hazards is clearly outweighed by a specific and substantial interest in maintaining confidentiality and that the order is "no broader than necessary to protect the privacy interest asserted." In keeping with comments we raised when Congress debated similar legislation in the mid-1990s, we recommend amending this second "exception," so that it would explicitly recognize interests in protecting "privacy, *property, or other interests*."

Although we do not think the bill is unconstitutional, it could invite potential takings claims. The Supreme Court in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1002-04 (1984), recognized trade secrets as a species of property protected by the Fifth Amendment's Taking Clause. U.S. Const. amend. V. Because disclosure of vital business information or a trade secret may in some circumstances lead to a competitive disadvantage, litigants may claim that the disclosures contemplated by section 2 amount to court-approved takings of property for public use. *See* Note, *Trade Secrets in Discovery: From First Amendment Disclosure to Fifth Amendment Protection*, 104 Harv. L. Rev. 1330, 1336 (1991) (arguing that courts are widely considered state actors for purposes of constitutional analysis and that the Supreme Court has held that the taking clause prohibited the Illinois judiciary from awarding one dollar as compensation for a right that was clearly worth more, *Chicago, B. & Q.R.R. v. City of Chicago*, 166 U.S. 226, 233-35 (1897)), cited in Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 Harv. L. Rev. 427, 468 n.205 (1991); *Monsanto*, 467 at 1014-16 (conceivable public character constitutes public use; Congress determines mechanism). Accordingly, to guard against possible litigation risks, we suggest amending section 2 of the bill to make clear that courts may grant protective orders to protect proprietary interests.

4. A primary concern is that this bill calls for the district court to make specific factual findings both prior to entering a protective order and prior to continuing the protective order post-litigation. It thus infringes on judicial discretion and raises the likelihood of backlog and delay because of additional procedural requirements, without being based upon any finding that the courts are abusing their discretion to enter protective orders under the current system. Such

court management issues are preferably handled through the Federal Rules revisions process, rather than through legislation.

5. The bill provides that a confidentiality agreement cannot restrict disclosure of information to a Federal or state agency with law enforcement authority. There may be situations in which a Federal agency enters into such an agreement and legitimately may wish to preclude access to the information by a state agency. (However as a general rule, we typically include language in our confidentiality agreements that we have the right to share information with state or federal law enforcement authorities.)

6. The terms "public health or safety" and "potential health or safety hazards" used throughout the bill are not defined, which could lead to substantial uncertainty and litigation over the scope of the bill. Moreover, the two terms seem to be used interchangeably. If the same meaning is intended, then the same language should be used. If not, the difference in meanings should be explained in the bill.

7. Agencies of the Federal Government which are involved in civil litigation currently request "Privacy Act protective orders" on a regular basis to allow the agency to disclose in discovery information which is protected from disclosure under the Privacy Act.

In a 1992 views letter on an earlier version of S.2449, DOJ raised many of the above concerns and urged that the Government be excepted from the bill if it goes forward. This approach would be an improvement, particularly since the Government is already subject to the Freedom of Information Act and its settlements are generally public. However, there would still remain a risk of a compensable taking by the government such as for forced disclosure of a trade secret in private litigation (e.g., bill section 1660(a)(5)(A)). We note that a "Sunshine in Litigation" statute passed by the Florida legislature has a partial exemption for trade secrets. See section 69.081(5), F.S. (exemption for "trade secrets ... which are not pertinent to public hazards").

Technical Comments

1. Section 1660(a)(2) - These prohibitions would apply to all protective orders in all cases. As a result, courts in every case may be required to conduct a potentially time-consuming in camera review on all such requested orders, notwithstanding agreement by the parties. The requirement would add to the burden, length and time demands of litigation.

It is also unclear if this provision (and others in the bill) are intended to allow non-parties to argue that they have standing to intervene and challenge rulings. This could easily lead to increased litigation by potential intervenors over matters that are peripheral to the central dispute between the parties.

2. Section 1660(a)(2) - This provision on automatic termination of a protective order at the end of a case is confusing and would disrupt settled expectations of the conduct of cases including appeals. The finding to support continuation of the protective order would have to be included as a part of a final judgment or a post-judgment ruling. It would be unclear whether the protective order would remain in effect pending a request for a post-judgment ruling or appeal.

3. Section 1660(a)(5)(A) - see discussion above about takings risk of forced release of trade secret information.

4. Section 1660(a)(5)(B) - This provision barring a party from requesting a stipulated order would put a party in an impossible situation. A party would not know in advance whether its requested order would "violate this section," since the section allows the court to rule whether to issue the order. Would a ruling not to issue the order mean that the attorney is retroactively in violation of this bar? The attorney would have a Hobson's choice: request a stipulated order and risk someone arguing that the order is barred, or not request the order and risk violating ethical obligations to zealously represent the client.

5. Section 1660(c) -- The provision would seem to rewrite the law of contracts, which is a body of state law that usually allows parties to choose the terms of contract. Here, federal law would in effect require that at least certain forms of contracts - settlement agreements - be public. A party would not know whether a court would later find a confidentiality provision enforceable by a court after balancing under section 1660(c)(2). If the contract or settlement agreement did not allow for severability of the confidentiality provision, then the contract or agreement as a whole could be void or voidable. Moreover, for a party with trade secrets, presumably the party would later have to prove its basis for those trade secrets. It would be hard for such a party to plan whether the federal courts would be available to protect trade secrets. Finally, the definition of a "settlement agreement" is not clear, particularly as persons may settle potential claims as part of broader contract negotiations (not tied to any particular case). For all these reasons, federal courts might be seen as unavailable to resolve disputes.

6. Section 1660(c)(1)(A) - It is unclear whether the scope of this provision is limited to "matters related to public health or safety" (see 1660(c)(1)(B))?

7. Section 3 of S. 2449 states that the Act applies "only to orders entered in civil actions or agreements entered into on or after such date." Does this mean that the Act applies to all settlement agreements in all civil cases, even those not filed and entered in a court case? This seems somewhat inconsistent with section 1660(c)(1) which talks of cases between parties approved or enforced by a court.

Thank you for the consideration of our views. If we can be of further assistance on this legislation, please do not hesitate to contact this office. The Office of Management and Budget

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has advised us that there is no objection to this letter from the perspective of the Administration's program.

Sincerely,

Brian A. Benczkowski
Principal Deputy Assistant Attorney General

Attachment

cc: The Honorable Arlen Specter
Ranking Member

The Honorable Jeff Sessions

Department of Justice

STATEMENT

OF

CARL J. NICHOLS
DEPUTY ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION
DEPARTMENT OF JUSTICE

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

"EXAMINING THE STATE SECRETS PRIVILEGE:
PROTECTING NATIONAL SECURITY WHILE PRESERVING ACCOUNTABILITY"

PRESENTED ON
FEBRUARY 13, 2008

Statement of
Carl J. Nichols
Deputy Assistant Attorney General
Civil Division
Department of Justice

Before the
Committee on the Judiciary
United States Senate

Concerning
"Examining the State Secrets Privilege:
Protecting National Security While Preserving Accountability "

February 13, 2008

Chairman Leahy, Ranking Member Specter, Members of the Committee, thank you for the opportunity to appear before you to address the important subject of today's hearing, the state secrets privilege. Since March 2005, I have served as a Deputy Assistant Attorney General in the Civil Division in the Department of Justice. In that capacity I both have been involved in the decisionmaking process regarding whether and when the Executive Branch will assert the state secrets privilege in civil litigation, and have gained an appreciation for the important role that the privilege plays in preventing the disclosure of national security information.

I would like to address two separate but related points in my testimony.

First, the state secrets privilege serves a vital function by ensuring that private litigants cannot use litigation to force the disclosure of information that, if made public, would directly harm the national security of the United States. The privilege has a longstanding history and has been invoked, during periods of both conflict and peace, to protect such information. But the role of the state secrets privilege is particularly important when, as now, our Nation is engaged in a conflict with a terrorist enemy in which intelligence is absolutely vital to protecting the

homeland. The privilege is thus firmly rooted in the constitutional authorities and obligations assigned to the President under Article II to protect the national security of the United States.

Second, accountability is preserved by a number of procedural and substantive requirements that must be satisfied before a court may accept an assertion of the state secrets privilege. These protections ensure that the privilege is asserted by the Executive Branch, and accepted by the courts, only in the most appropriate cases.

I. The State Secrets Privilege Plays a Critical Role in Preventing the Disclosure of National Security Information.

Any discussion of the state secrets privilege must begin with the vital role it plays in protecting the national security. The state secrets privilege permits the United States to ensure that civil litigation does not result in the disclosure of information related to the national security that, if made public, would cause serious harm to the United States. As the Supreme Court held in *United States v. Reynolds*, 345 U.S. 1, 10 (1953), such information should be protected from disclosure when there is a "danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged." The Supreme Court recognized the imperative of protecting such information when it further held that even where a litigant has a strong need for that information, the privilege is absolute: "Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but *even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.*" *Id.* (emphasis added). As the Court of Appeals for the Fifth Circuit has noted, the "greater public good – ultimately the less harsh remedy – " is to protect the information from disclosure, even where the result might be dismissal of the lawsuit. *Bareford v. General Dynamics Corp.*, 973 F.2d 1138, 1144 (5th Cir. 1992).

The state secrets privilege thus plays a critical role, even in peacetime. But the privilege is particularly important during times, such as the present, when our Nation is engaged in a conflict with an enemy that seeks to attack the homeland. We remain locked in a struggle with al Qaeda, a terrorist enemy that does not acknowledge or comply with basic norms of warfare; that seeks to operate by stealth and secrecy, using the openness of our society against us; and that intends to inflict indiscriminate, mass casualties in the civilian population of the United States. In these circumstances, litigation may risk disclosing to al Qaeda or other adversaries details regarding our intelligence capabilities and operations, our sources and methods of foreign intelligence gathering, and other important and sensitive activities that we are presently undertaking in our conflict. The state secrets privilege ensures that critical national security efforts are not weakened or endangered through the forced disclosure of highly sensitive information.

The state secrets privilege is rooted in the constitutional authorities and obligations assigned to the President under Article II as Commander in Chief and representative of the Nation in the realm of foreign affairs. It is well established that the President is constitutionally charged with protecting information relating to the national security. As the Supreme Court has stated, "[t]he authority to protect such information falls on the President as head of the Executive Branch and as Commander in Chief." *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988).

The state secrets privilege is not, therefore, a mere "common law" privilege. Instead, as the courts have long recognized, the privilege has a firm foundation in the Constitution. Any doubt that the privilege is rooted in the Constitution was dispelled in *United States v. Nixon*, 418

U.S. 683 (1974), in which the Supreme Court explained that, to the extent a claim of privilege "relates to the effective discharge of the President's powers, it is constitutionally based." *Id.* at 711. The Court then went on to expressly recognize that a "claim of privilege on the ground that [information constitutes] military or diplomatic secrets" – that is, the state secrets privilege – necessarily involves "areas of Art. II duties" assigned to the President. *Id.* at 710. The lower courts have reaffirmed this conclusion. *See, e.g., El-Masri v. United States*, 479 F.3d 296, 303-04 (4th Cir.), *cert. denied*, 128 S.Ct. 373 (2007) (holding that the state secrets privilege "has a firm foundation in the Constitution"). As the D.C. Circuit has noted, the state secrets privilege "must head the list" of "the various privileges recognized in our courts." *Halkin v. Helms*, 598 F. 2d 1, 7 (D.C. Cir. 1978).

Before I turn to the second subject of my testimony, I would like to take an opportunity to discuss an issue arising out of *Reynolds* itself. Some have claimed that a review of declassified information in *Reynolds* demonstrates that the United States' assertion of the state secrets privilege in that case was somehow improper. Not only is that claim incorrect, but it has been rejected by two federal courts. In *Herring v. United States*, 2004 WL 2040272 (E.D. Pa. 2004), living heirs to those killed in the air crash at issue in *Reynolds* filed suit to set aside a settlement agreement, alleging that the United States' state secrets privilege assertion in *Reynolds* was fraudulent. After again reviewing the matter in 2004, Judge Davis held that the Air Force had not "misrepresent[ed] the truth or commit[ted] a fraud on the court" in *Reynolds*. *See Herring*, 2004 WL 2040272, at *5; *see also id.* at *6. Judge Davis reached this conclusion after analyzing precisely why disclosure of the information contained in an accident report of the crash would have caused harm to national security by revealing flaws in the B-29 aircraft. *See*

id. at 9. As Judge Davis found, "[d]etails of flight mechanics, B-29 glitches, and technical remedies in the hands of the wrong party could surely compromise national security," and thus "may have been of great moment to sophisticated intelligence analysts and Soviet engineers alike." *Id.* The Court of Appeals for the Third Circuit, reviewing the matter *de novo*, unanimously affirmed Judge Davis's decision. *See Herring v. United States*, 424 F.3d 384 (3rd Cir. 2005), *cert. denied*, 547 U.S. 1123 (2006).

II. Various Procedural and Substantive Requirements Ensure that the Privilege Is Invoked and Accepted Only in the Most Appropriate Cases.

Any discussion of the state secrets privilege should also recognize the significant procedural and substantive requirements for asserting the privilege. Several of these requirements are set forth in the Supreme Court's decision in *Reynolds*, and ensure that the privilege is invoked and accepted only in appropriate cases. This careful process ensures – and my experience confirms – that the privilege is not, in the words of the Supreme Court, "lightly invoked." 354 U.S. at 7.

Starting with the procedural protections, *Reynolds* enumerates three basic but important requirements. First, the privilege can be invoked only by the United States (that is, it cannot be invoked by a private litigant), and only through a "formal claim of privilege." *Reynolds*, 345 U.S. at 7-8. Second, the privilege cannot be invoked by a low-level government official, but instead must be "lodged by the head of the department which has control over the matter" – in other words, only an agency head may assert the privilege. *Id.* at 8. Third, that official must give "actual personal consideration" to the matter before asserting the privilege. *Id.* Separate from these important requirements, because the state secrets privilege is asserted in litigation, the Department of Justice, as the agency charged with conducting litigation involving the United

States, 28 U.S.C. §§ 516 & 519, must also agree that asserting the privilege in a particular situation is appropriate. Only if there is a "reasonable danger" that disclosure of the privilege will cause harm to the national security, *see Reynolds* at 10, will the privilege be asserted.

In practice, satisfying these requirements typically involves many layers of substantive review and protection. The agency with control over the information at issue reviews the information internally to determine if a privilege assertion is necessary and appropriate. That process typically involves considerable review by agency counsel and officials. Once that review is completed, the agency head – such as the Director of National Intelligence or the Attorney General – must personally satisfy himself or herself that the privilege should be asserted.

An important part of that process is the agency head's personal review of various materials, including the declaration (or declarations) that he or she must sign in order to assert the privilege. The point of such declarations is to formally invoke the privilege and to explain to the court the factual basis supporting the privilege. If the head of the department concludes that the privilege is warranted, the official formally invokes the privilege by signing the declarations, which are then made available to the court along with any supporting declarations. By signing the declarations, the department head and any supporting official attest, under penalty of perjury, to the truthfulness of their statements and to their personal attention to the matter.

Once the privilege is asserted, it is up to the court to decide whether, based on its review of the unclassified and classified materials that have been made available to it, the assertion should be upheld. It is well established that the court, in reviewing the privilege assertion, must accord the "utmost deference" to the privilege assertion and to the national security judgments of

the Executive Branch. *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998); *see also Al-Haramain Islamic Foundation, Inc. v. Bush*, 507 F.3d 1190, 1203 (9th Cir. 2007) (reaffirming "the need to defer to the Executive on matters of foreign policy and national security" and concluding that the court "surely cannot legitimately find [itself] second guessing the Executive in this arena"). Still, notwithstanding this deferential standard of review, "[t]he court itself must determine whether the circumstances are appropriate for the claim of privilege." *Reynolds*, 345 U.S. at 8. In other words, it is for the court to determine, after applying the appropriate level of deference, whether the Executive Branch has adequately demonstrated that there is a reasonable danger that disclosure of the information would harm the national security. This review serves as an important check in the state secrets process.

In making its determination, moreover, a court often reviews not just the public declarations of the Executive officials explaining the basis for the privilege, but also classified declarations providing further detail for the court's *in camera, ex parte* review. One misperception about the state secrets privilege is that the underlying classified information at issue is not shared with the courts, and that the courts instead are simply asked to dismiss cases based on trust and non-specific claims of national security. Instead, in every case of which I am aware, out of respect for the Judiciary's role the Executive Branch has made available to the courts both unclassified and classified declarations that justify, often in considerable detail, the bases for the privilege assertions. By way of example, the Court of Appeals for the Ninth Circuit recently noted in upholding the government's assertion of the state secrets privilege that the panel had:

> spent considerable time examining the government's declarations (both those publicly filed and filed under seal). *We are satisfied that the basis for the*

> *privilege is exceptionally well documented. Detailed statements [in the government's classified filings] underscore that disclosure of information concerning the Sealed Document and the means, sources and methods of intelligence gathering in the context of this case would undermine the government's intelligence capabilities and compromise national security.*

Al-Haramain Islamic Foundation, Inc. v. Bush, 507 F.3d 1190, 1204 (9th Cir. 2007) (emphasis added); *see also id.* ("We take very seriously our obligation to review the documents with a very careful, indeed a skeptical eye, and not to accept at face value the government's claim or justification of privilege. Simply saying 'military secret,' 'national security,' or 'terrorist threat' or invoking an ethereal fear that disclosure will threaten our nation is insufficient to support the privilege. Sufficient detail must be – *and has been* – provided for us to make a meaningful examination.") (emphasis added).

Finally, I should also address the common misperception that the Executive Branch always seeks dismissal in each case in which it has asserted the state secrets privilege, and that the courts must dismiss each case in which the privilege has been asserted. That is incorrect. Instead, once a court has concluded that the privilege has been properly asserted, the privileged information is removed from the case, and the court must then decide whether, and how, the case can proceed without that information. To be sure, the result is that some cases must be dismissed because there is no way to proceed without the information. But in other cases, the privileged information is peripheral and the case can proceed without it. By way of example, in *BCG v. Guerrieri, et al.*, No. 2004CV395 (Weld Cty., Colo. 19th Dist. Ct.), a real estate and contract dispute between private parties, the United States asserted the state secrets privilege over certain information and moved for a protective order precluding disclosure of that information, but did *not* seek dismissal of the action.

* * *

Thank you, Mr. Chairman, for the opportunity to address the Committee. I would be happy to address any questions that the Members may have.

Mr. CANNON. And why are these groups opposed to 5884?

First, they are opposed that the bill circumvents the regular order for promulgating changes to the Federal Rules of Civil Procedure established in the Rules Enabling Act. The Rules Enabling Act was passed by Congress so that before a Federal rule is adopted or modified, it is thoroughly vetted and studied by the Judicial Conference, the public, and the Supreme Court before being presented to Congress.

There is no reason to abandon that process for the rules changes proposed in H.R. 5884.

Second, they are opposed because the bill is not only unnecessary but would increase the burden and cost of litigation. This bill is unnecessary because discovery protective orders are rare. An extensive empirical study conducted by the Judicial Conference revealed that in the Federal judicial districts surveyed, protective orders were requested in only 6 percent of all civil cases.

This bill will increase the burden and cost of litigation because if confidentiality and privacy are not protected, litigants will be forced to oppose any document request that an opposing party makes for information which may be sensitive or confidential.

It will also force judges to make findings of fact every time a protective order is requested. As Judge Kravitz wrote in his testimony, requiring courts to review discovery information to make public health and safety determinations in every request for a protective order, no matter how irrelevant to public health or safety, will burden judges and further delay pretrial discovery—which already, by the way, takes way too long. I think we have a consensus on that.

For these reasons, the Judicial Conference has consistently concluded that provisions affecting Rule 26(c)—similar to those sought in H.R. 5884—were not warranted and would adversely affect the administration of justice.

In short, this bill is a bad idea, and it is a bad idea made worse by skipping the process that Congress set forth in the Rules Enabling Act. Hopefully, after this hearing we can lay this bill to rest.

Madam Chair, the size of this panel did not allow us to call some additional witnesses to testify in person. However, these witnesses have graciously provided us with their written views on the bill. I ask unanimous consent that written views of Professor Arthur Miller, a professor at New York University School of Law and one of the foremost experts on this area of the law, be entered into the record.

Ms. SÁNCHEZ. Without objection, so ordered.

[The information referred to follows:]

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Arthur R. Miller
University Professor

July 30, 2008

Via U.S. mail and email to: Daniel Flores (daniel.flores@mail.house.gov)
Zachary Somers (Zachary.somers@mail.house.gov)

The Honorable Chris Cannon
Member of Congress
2430 Rayburn Building
Washington DC 20515

Dear Congressman Cannon:

Re: Statement for Hearing on H.R. 5884, the "Sunshine in Litigation Act of 2008"

This is in response to your request for my views regarding the subject of a subcommittee hearing on Thursday, July 31, 2008 on H.R.5884, the so-called "Sunshine in Litigation Act of 2008."

I regret that I will be unable to appear in person at the hearing due to a prior engagement, but I am pleased to submit this statement. As you noted, I have had a great deal of experience in analyzing and evaluating a variety of proposals in this area. In fact, I have observed and commented on the court confidentiality debate for many years, including authoring a comprehensive law review article[1] and many shorter written commentaries.[2] I have

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

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

reviewed many state legislative proposals and court rule amendments, and have testified numerous times on this issue before the federal rulemakers as well as the United States Senate and House of Representatives. The first time I submitted a statement to the Senate on this subject was at a hearing of the Subcommittee on Courts of the Senate Judiciary Committee in 1990. [3]

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

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

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

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

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

Indeed, the more time that passes, the more secure I am in the knowledge that the use of protective and sealing orders and extra-judicial confidentiality agreements agreed to among the litigants is not prone to the serious abuses that the proponents of various forms of restrictive legislation suggest. At the same time, as a student of the courts and an active

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

practitioner for more than fifty years, I have no doubt that an assurance of confidentiality often is the essential ingredient that starts the information exchange flowing among the parties during discovery. That, in turn, facilitates the truth-seeking goals of the adversary process and the resolution of cases on their merits. Similarly, it ensures production of the materials that persuade parties to settle and comforts litigants that the price of peace was fair.

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

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

Thus, the federal courts are likely to become mired in a morass of motions that siphon precious judicial resources away from higher level duties, such as presiding over trials or writing opinions and that force judges to devote time to tedious, low-level tasks, such as document review and motions directed to the legitimacy of claims of, for example, "concealment of a public hazard." This drain on the federal system's limited judicial resources is particularly wasteful when we remember that discovery originally was designed to be self-executing. Thus, the parties generally are expected to be able to resolve discovery disputes themselves. Protective and sealing orders are devices that always have promoted that design.

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

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

It has long been my view that any public information purpose that public access serves is more appropriately accomplished by numerous other branches and agencies of government that are far better equipped to identify issues affecting public health or safety and to

disseminate relevant information to the public. Superimposing a public information function on the courts decreases their efficiency, delays justice, and distorts the sole purpose for which courts exist. The current federal law and rules appear to me to strike a fair, workable balance between confidentiality and public access. No change has been shown to be needed and none is warranted.

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

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

Litigants do not give up their rights to privacy merely because they have walked, voluntarily or involuntarily, through the courthouse door.[8] The rulemakers who created the broad discovery regime of modern civil procedure in order to promote the resolution of civil disputes on the merits, never intended that rights of privacy or confidentiality be destroyed in the process. They had no intention of using the compulsion of these procedures to undermine privacy in the name of public access or to warn the public of "public hazards."

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

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[4] Seattle Times v. Rhinehart, 467 U.S. 20 (1984)

[5] Id. at 34-36 (discovery process is subject to substantial abuse that could damage the litigants' interests).

[6] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

[7] Seattle Times, 467 U.S. at 35.

[8] U.S. Dep't of Justice v. Reporters Committee for Freedom of the Press. 109 S. Ct. 1468 (1989).

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

Two provisions were added to H.R.5884 in an unsuccessful attempt to ameliorate the bills adverse impact on privacy rights and national security. Subparagraph (c)(2)(d) creates "a rebuttable presumption that the interest in protecting personally identifiable information relating to financial, health, or other similar information of an individual outweighs the public interest in disclosure." And, subparagraph (c)(2)(e) provides that "Nothing in this section shall be construed to permit, require, or authorize the disclosure of classified information (as defined under section 1 of the Classified Information Procedures Act (18 U.S.C. App.))." Neither provision addresses the fundamental flaws of the bill that as a practical matter would prevent judges from effectively protecting private, proprietary, and constitutionally protected information from disclosure.

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

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

Numerous provisions of the federal and various state Constitutions are intended to protect personal property and the right to its exclusive use against government abuse or appropriation without compensation. Confidentiality is the sine qua non of preserving the modern property right in information that has become the backbone of the American economy and is so important to our competitiveness in the Global economy. This "property"

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

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

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

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

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

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

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

> My own research shows that information about dangers to the public is available even when confidentiality orders are in place. Most compelling are

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

> the findings of empirical research conducted by the Federal Judicial Center, the research arm of the federal courts, as well as extensive public comment submitted to the Judicial Conference's Committee on Rules of Practice and Procedure. Both failed to detect anything wrong with current protective order practice or the use of confidentiality agreements. * * * Ironically, the center's study found that protective orders most often were used to protect the privacy of plaintiffs in civil rights litigation. In light of the evidence, the federal rule makers quite correctly decided to make no changes to current rules of procedure.[15]

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

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

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

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

1999). Consequently, I strongly recommend against enactment of restrictive legislation in this area because of the many deleterious effects it is likely to have.

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

Sincerely,

Arthur R. Miller
University Professor

Mr. CANNON. As well as the written views of Stephen Morrison, a partner at Nelson Mullins, who has tried more than 240 cases to a jury verdict and has argued more than 60 appeals in the nation's highest courts, including the Supreme Court of the United States.

Ms. SÁNCHEZ. Also without objection, so ordered.

[The information referred to follows:]

TESTIMONY FOR HEARING ON
THE "SUNSHINE IN LITIGATION ACT OF 2008," H.R. 5884

BY
STEPHEN G. MORRISON

Committee on the Judiciary
United States House of Representatives
Subcommittee on Commercial and Administrative Law
July 31, 2008

Mr. Chairman and members of the subcommittee, my name is Steve Morrison. I am a trial lawyer who usually defends people who get sued. I have tried more than 240 cases to jury verdict and argued more than 60 appeals in the highest courts of the federal and state systems of this nation. It has been my privilege to be lead counsel in 27 states. I have represented large multi-nationals, Fortune 500 companies, and Main Street businesses. I have represented individuals and families. I am a past President of the Defense Research Institute representing over 21,000 defense lawyers nationwide. I am a past President of Lawyers for Civil Justice, a coalition of corporate and defense trial lawyers, major American corporations and defense bar associations. I am a past Chairman of the House of Delegates of the South Carolina Bar.

Last December, I testified before the Senate Judiciary Committee in opposition to Senator Kohl's Bill S.2449. That bill was nearly identical to the bill being discussed today, although certain provisions have been added to H.R. 5884 in a vain effort to cushion the bill's threat to privacy rights. Those provisions do not resolve the fundamental problems with the bill.

I have been involved on a first-hand basis with hundreds of cases that were successfully litigated or settled precisely because the parties involved in the litigation knew that the private information which they shared in discovery would remain confidential. The parties understood that if their private information was to be shared with the public, it would be shared in the context of judicial supervision and due process, with each party being allowed to comment and to explain the context of the data that is placed before the public. The current legislation contemplated, euphemistically designated the "Sunshine and Litigation Act," threatens the fundamental right of litigants to privacy and property. This legislation would increase the cost and burdens on the parties and decrease the efficiency of the court system. Certain parties would receive unfair tactical advantages at the expense of others. Importantly, the need for such legislation has not been demonstrated in the nearly two decades since it was first introduced. In my experience, legislation such as this would cripple the ability of the parties to reach a just determination of their disputes, without offering any offsetting benefits. The legislation currently contemplated also directly contravenes the views expressed by the Judicial Conference Committee on Rules of Practice and Procedure. Any attempt to restrict or eliminate the power of the courts to issue protective orders to maintain the confidentiality and privacy of personal or sensitive information would have clear negative consequences for our nation's legal system.

I would like to make it clear that I am not speaking on behalf of any client or on behalf of any organization that I have led or am a member of currently. I speak from personal experience with deep conviction and I speak for myself.

The right to privacy and the right to exclusive ownership of private property are fundamental rights protected by the United States Constitution. Yet, in our litigation

environment today, a ham sandwich can buy you the hog farm. For $100, a person can file a lawsuit saying a company's ham sandwich made that person sick, and that person can then invoke the incredible police power of the state to do discovery on the hog farm. In other words, the discovery allowable under our rules goes far beyond whether the ham sandwich was unreasonably dangerous and defective. If this bill passes, all of that information from the hog farm goes into the public domain, and there is a significant danger of abuse.

In my experience, hundreds of thousands and even millions of documents are released by parties to each other in individual cases throughout the country. Only a small fraction of these documents are relevant to any legal issue that is actually put before the court or placed in front of a jury in a trial. This means that massive amounts of private and confidential information are exchanged in the context of our civil justice system in order to resolve disputes peacefully and amicably. The massive amount of information generated in litigation often forces litigants to place their privacy and proprietary information at risk to vindicate their legal rights.

In our electronic age, if that kind of private information about either party is publicly available, it is subject to being used unfairly by a competitor, manipulated, taken out of context, or ridiculed on the internet. In my experience, most of the time when an individual is seeking to release private information into the public domain in the context of litigation, that person is motivated not by a desire to protect human health and public safety but rather by a desire to leverage information out of context to boost the value of a claim. If this bill passes, private information could be discovered and disclosed so as to create an "in terrorem" effect. It is simply a matter of economics.

This bill strikes at the heart of due process in its threat to privacy and property. In our system, information exchanged in litigation only becomes public when it's actually used in a courtroom. Why does it become public then? Because in the courtroom, due process of law applies under the oversight of a judge, where both sides have the opportunity over the course of days or weeks to explain the information and provide context. And, until the documents become evidence in a court proceeding, the dispute remains private and the discovery remains private. This system justifies the ability of litigants to use the awesome police power of the state to exchange private information and property to which they would otherwise not be entitled. The fact that this private confidential information is exchanged in our civil justice system does not mean that that information is of interest to, or necessary to be disclosed to, the public on a unilateral basis without court supervision, especially when the exchange of private information frequently does not lead to evidence that is admitted in any court of law.

Subparagraph (c)(2)(d) to H.R. 5884 does not ameliorate the danger to the privacy interests of litigants, and only serves to complicate the tasks that this bill proposes on our federal courts. Subparagraph (c)(2)(d) creates a "rebuttable presumption that the interest in protecting personally identifiable information relating to financial, health, or other similar information of an individual outweighs the public interest in disclosure." This section gets to the heart of what I call the outrageous presumption of evil. In a product liablity case for example, just because an individual person claims that a product caused them injury, does not make it so. Nor does that person become immune from impure motives by the simple filing of a suit. Both sides in any litigation have the same rights to privacy and deserve the same treatment of their own private and proprietary information. Additionally, companies are not faceless. They are also made up of individual people who may be asked to provide testimony,

including testimony about their personal lives. As a practical matter, this section of the bill would further burden the court with making particularized determinations to dissect each side's documents and testimony to determine the information to be made public and the information to be protected.

If confidentiality cannot be protected in the context of our civil justice system, litigants will be more inclined to oppose every document request or attempt to narrow the request for information by the opposing party in each and every case. This will cause an increased burden on our court system in the form of increased hearings, increased legal costs to both parties, and increased costs to the public. The legislation contemplated will impose new burdens on the courts by requiring them, at the earliest stages of litigation, to make preliminary determinations on an incomplete record regarding important questions such as whether protecting the confidentiality of any among thousands of documents requested would endanger the public health and safety. Overburdened courts are ill-equipped to assume such a role in modern trial practice, and lawyers are generally able to agree on a procedure that both protects the confidentiality of sensitive documents produced, and provides for the disclosure of those documents in an orderly process in open court when appropriate. In our current system, once a preliminary protective order is entered and the key documents have been identified, the parties can then litigate whether they should be disclosed to the public. That litigation takes place with total respect to the fundamental rights of the party who owns the private documents as well as the party who wishes to disclose them to the broader public for whatever purpose.

There is no compelling need to consider legislation that would undermine the current Federal Rules of Civil Procedure and restrict judges' discretion. As the statement and materials submitted by the Honorable Mark R. Kravitz demonstrate, recent research on this

issue concludes that the current system is working effectively and needs no change. Additionally, I share the view of Professor Arthur Miller, as the nation's foremost expert on privacy and procedure, that to impose any further restrictions on a judges' discretion to protect privacy and property rights or to "favor" or "disfavor" either privacy or openness in the exercise of that discretion by legislation or court rule, is not warranted by empirical evidence. The courts already have discretion to balance the competing goals of promoting openness and protecting legitimate interest in privacy when they issue protective orders or orders to seal, and there is no evidence that the courts have failed to properly apply this discretion.

Moreover, Congress has already established numerous agencies to regulate and oversee issues regarding public health and safety, including the Consumer Product Safety Commission, the National Highway Traffic Safety Administration, the Food and Drug Administration, Federal Aviation Administration, and many others. These agencies do not need courts to serve as freedom of information clearing houses. In fact, federal statutes already require regulated industries to self-report a massive amount of information to government agencies about the products they produce before they go to market, as well as after they are on the market. And, information about public hazards is already abundantly available to the public under exisiting law. Google any product. Countless blogs, chatrooms, and websites are immediately available, replete with facts, news, discussion, rumors, and parodies.

Professor Miller was correct in concluding, "the appropriate concern is not that there is too much 'secrecy'. Rather, it is that there is too little attention to privacy, the loss of confidentiality and to interference with the proper functioning of the judicial process."

Confidentiality serves several values in the civil justice system. The benefit of public access to certain litigation materials simply does not rise to, much less, transcend the essential rights of privacy. The present practice should be retained. We should continue to rely on our courts to use their discretion to issue confidentiality orders to protect the legitimate interest of the parties in private disputes. We should continue to allow the parties to retain their rights to negotiate confidentiality agreements voluntarily. Our current rules of practice and procedure allow judges to consider and act in the public interest when circumstances so indicate. There is simply no reason to believe that existing court rules of practice create any risks to public health and safety. I strongly recommend against enactment of restrictive legislation. The truth is, the courts rarely use their authority to seal information, especially in today's environment. When they do, there is compelling evidence that preserving confidentiality is of primary importance. Even if the courts have the resources to assume a public information function, they are not the appropriate institutions to do so. A multitude of executive, administrative and law enforcement agencies already exist for the sole purpose of protecting the public health and safety. This is not the role of the civil justice system or the role of individual private litigants no matter how much they aspire to that role. Courts are in the best position to make judgments in the full adversarial process, with the rules of evidence, cross examination procedures, and due process placing all information in context to determine whether or not information should remain confidential, or whether and how it should be disclosed to the public.

Thank you for the opportunity to present this information to the subcommittee. I hope it has been helpful.

Respectfully submitted,

Steve Morrison

Mr. CANNON. I thank you, Madam Chair. I yield back.

Ms. SÁNCHEZ. I thank the gentleman for his statement.

I would also ask unanimous consent to enter into the record a statement of Senator Kohl, who has introduced substantially this legislation in successive cycles. Without objection, his testimony will be entered into the record.

[The prepared statement of Senator Kohl follows:]

PREPARED STATEMENT OF THE HONORABLE HERB KOHL, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Thank you, Chairwpman Sánchez, for holding a hearing H.R. 5884, the Sunshine in Litigation Act of 2008, and the use of secrecy agreements and sealed settlements. I would also like to thank Congressman Wexler for introducing this legislation; legislation that I have been working on for many years and which recently passed the Senate Judiciary Committee with bipartisan support. I am pleased to see the bill advancing here in the House and I look forward to working with Congresswoman Sánchez and Congressman Wexler on this important issue.

Far too often, court approved secrecy agreements and sealed settlements hide vital public health and safety information from the American public—putting lives at stake. We are all familiar with well-known cases where protective orders and secret settlements prevented the public from learning about the dangers of silicone breast implants, IUDs, a prescription pain killer, side-saddle gas tanks, and defective heart valves and tires. This critical health and safety information did not deserve court endorsed protection.

The Sunshine in Litigation Act is a narrowly targeted measure that will make sure court-endorsed secrecy does not keep the public from learning about health and safety dangers. Under the bill, judges must consider public health and safety before granting a protective order or sealing court records and settlement agreements. They have the discretion to grant or deny the secrecy based on a balancing test that weighs the public's interest in a potential public health and safety hazard and legitimate interests in secrecy. The bill does not place an undue burden on our courts. It simply states that in a limited number of cases, judges must a closer look at requests for secrecy.

Last December, at a hearing in the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, we learned that while some judges may be more aware of the issue, this problem continues and we have examples to prove it. Johnny Bradley told us the chilling details of a car accident caused by tire tread separation that killed his wife and left him and his son severely injured. During his lawsuit against Cooper Tire, he learned that information about similar accidents had been kept secret for years through court orders and secret settlements. Today, details about this tire defect remain protected by court orders while Cooper Tire continues to aggressively fight attempts to make them public.

We also learned about the case of Zyprexa, a drug used to treat schizophrenia and bipolar disorder. In 2005, the drug company Eli Lilly settled 8,000 cases related to Zyprexa. The 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. Documents exchanged during discovery showed that Eli Lilly knew of the harmful side effects but did not inform prescribing doctors or the FDA. However, 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." As a result, the public did not learn about these settlements or Zyprexa's dangerous side effects until two years later when The New York Times leaked documents from the case that were covered by a protective order.

Finally, we heard from Judge Joe Anderson, a federal district court judge in South Carolina. We are pleased that the Subcommittee will hear from him today. Judge Anderson expressed his support for the Sunshine in Litigation Act as a balanced approach to address "a discernable and troubling trend" for litigants to ask for secrecy in cases where public health and safety might be adversely affected. He told us about a local rule in South Carolina, one that goes even further than our bill, and how it has been a great success. Despite concerns for the increased burden such a measure would put on South Carolina's federal courts, the number of trials has not increased and cases continue to settle even though secrecy is no longer an option.

In response to concerns about national security and personally identifiable information, we included language to ensure that this information is protected. We have

also heard concerns about protecting trade secrets. I would like to make it very clear that our bill protects trade secrets. We are confident that judges, as they are already required to do, will give ample consideration to them as part of the balancing test. However, we will not permit trade secrets that pose a threat to public health and safety—such a defective tire design—to justify secrecy.

We take great pride in our court system and its tradition of fairness for plaintiffs and defendants alike. However, the courts are public institutions meant to sometimes go beyond simply resolving cases between private parties; they also serve the greater goods of law, order and justice. We must not allow court endorsed secrecy to jeopardize public health and safety or undermine the public's confidence in our judicial system.

Again, I thank Chairwoman Sánchez and Congressman Wexler for their attention to this important issue and I look forward to working with them to enact the Sunshine in Litigation Act.

Ms. SÁNCHEZ. Without objection, the Chair will be authorized to declare a recess of the hearing at any point.

And at this point, I am now pleased to introduce the witnesses for our hearing. Our first witness is Richard Meadow. Mr. Meadow has successfully tried over 25 cases to verdict. Since joining the Lanier Law Firm, Mr. Meadow was part of the trial team that obtained plaintiff verdicts in the Vioxx litigation in excess of $300 million. An active participant in New York and national bar associations, Mr. Meadow currently serves on the board of directors of the New York State Trial Lawyers Association. Mr. Meadow has lectured at numerous legal conferences and has been appointed to many committees that explore issues germane to the medical and legal communities. I want to welcome you to today's panel.

Our second witness is John Freeman. Professor Freeman joined the University of South Carolina Law Faculty in 1973. Prior to that, Professor Freeman started law practice in 1970 with the Jones Day law firm and subsequently worked for the Securities and Exchange Commission, where he served as special counsel analyzing mutual fund issues. He has taught corporate and securities law and legal ethics for over 30 years, and has testified as an expert witness or served as trial counsel in various legal malpractice lawsuits, ethics proceedings, and investment-related cases.

Professor Freeman has written and lectured extensively on ethics, malpractice and business-related matters, and writes a regular column on professionalism topics for the South Carolina Lawyer. Most recently, Professor Freeman has been addressing as a writer and commentator certain problems with the way mutual fund sponsors conduct their businesses. Professor Freeman retired from the faculty in 2008. He has received various service awards and serves as one of the four public members on South Carolina's Judicial Merit Selection Commission. We want to welcome you to today's panel.

Our third witness is Mark Kravitz. Judge Kravitz was appointed in 2003 by President George W. Bush to the U.S. District Court for the District of Connecticut. Previously, Judge Kravitz was a partner at the law firm of Wiggin & Dana, LLP, where he worked for nearly 27 years, most recently as the chair of the firm's Appellate Practice Group. Before joining Wiggin & Dana, Judge Kravitz served as a law clerk to Circuit Judge James Hunter, III, of the U.S. Court of Appeals for the Third Circuit, and then to Justice William H. Rehnquist of the United States Supreme Court.

From 2001 to 2007, Judge Kravitz served as a member of the Standing Committee on the Rules of Practice and Procedure in the United States Courts, the body that oversees the rules of procedure and evidence that apply in all Federal courts. During that period, he also served as liaison member of the Advisory Committee on Criminal Rules. In June of 2007, Chief Justice John Roberts, Jr., appointed Judge Kravitz to chair the Advisory Committee on Civil Rules, the body that oversees the Federal Rules of Civil Procedure.

From 1999-2003, Judge Kravitz was a regular columnist and commentator for the National Law Journal on appellate law. He has also authored numerous articles on a variety of topics. Judge Kravitz served as an adjunct professor at the University of Connecticut School of Law from January 1995 to 2001 and a lecturer in law at the Yale University Law School in 2000. Welcome to today's panel.

Our final witness is Joseph Anderson, Jr. After clerking for the Fourth Circuit's chief judge, Clement Haynsworth, Judge Anderson entered private practice with his family law firm. In 1980, he was elected to the South Carolina House of Representatives, where he served until his appointment to the Federal bench. Judge Anderson was also active in political campaigns other than his own, twice serving as county chair for Senator Strom Thurmond's reelection efforts and once for Congressman William Jennings Bryan Dorn's bid for governor.

Judge Anderson has been very active in the community as a member, board member and president of various organizations, including the Lions Club, United Way and the Boy Scouts. As a practicing lawyer and judge, he has published a variety of articles on substantive topics in trial advocacy.

I want to thank you all for your willingness to participate in today's hearing.

Without objection, your written statements that you have provided will be placed into the record in their entirety.

And we are going to ask that you please limit your oral testimony to 5 minutes. We do have a lighting system that we sometimes remember to employ here. You will get a green light when your time begins. When the light switches from green to yellow, that is a warning that you have about a minute to conclude your testimony. And then when you receive the red light, that will let you know that your time has expired. Of course, if you are mid-sentence or mid-thought when you get the red light, we will allow you to complete your final thought before moving on to the next witness.

With that, at the conclusion of your testimony, we will then allow Members to ask questions subject to the 5-minute limit.

If everybody understands the rules and everybody is ready to proceed, I would invite Mr. Meadow to please begin his testimony.

TESTIMONY OF RICHARD D. MEADOW, THE LANIER LAW FIRM, PLLC

Mr. MEADOW. [Off mike.]

Ms. SÁNCHEZ. Rarely do we have a witness that keeps it to less than 5 minutes.

Mr. MEADOW. I am pleased to appear before the Committee today to testify on behalf of myself and my law firm in support of the Sunshine in Litigation Act.

My name is Rick Meadow. I am the managing attorney of the Lanier Law Firm in New York City. We are a Houston-based law firm with offices in Los Angeles and Palo Alto, Houston and New York. We are involved in pharmaceutical litigation, asbestos litigation, toxic tort, and a number of other litigations. Led by Mr. Lanier, we took the forefront in the Vioxx litigation as lead counsel. As you previously stated, we achieved three of the successful verdicts in the Vioxx litigation against Merck Pharmaceuticals.

Because of the nature of our particular practice, we are subject to numerous confidentiality orders and numerous confidentiality settlements. It is for that reason that we appear here today on behalf of and in favor of the Sunshine in Litigation Act.

I would like to discuss the effect of these confidentiality settlements and confidentiality protective orders on numerous litigations.

The first I would like to discuss is the public health and safety of the Zyprexa litigation, but because of the confidentiality order I can't address that.

I would also like to discuss the public health and safety that is in effect because of the Bextra litigation, but because of the confidentiality order in effect I cannot do that either.

I would like to discuss the Ortho Evra litigation that we are involved in, but I can't do that as well.

Nor can I discuss those litigations involving Kugel Mesh, Vioxx—which continues—Avandia and many of the other litigations that we are involved in.

Because of the nature of today's practice, where the majority of our litigations end up in the Federal court because of the multi-district litigation process, I am not at liberty to discuss the public health and safety and welfare of a number of products that this act would take care of and allow us to talk about it.

I would also like to talk about how some corporate executives, based on internal emails, sell stock unbeknownst to an unknowing public, but I can't discuss that as well.

I could also, would love to, discuss how some corporations pollute surrounding neighborhoods with cancer-causing toxic agents, but because of the confidentiality agreement and orders I am not allowed to discuss that as well.

And there is one other litigation I would like to discuss where a major automobile manufacturer redesigned their product in midstream after a couple of rollover deaths, but I can't discuss that as well. But because of——

Ms. SÁNCHEZ. I can now see why you were so confident your testimony would be less than 5 minutes.

Mr. MEADOW. Well, yes, these are—and you lead me to my next line—these are just a few of the many examples where the public safety and welfare have taken a backseat to the interests of corporate defendants as well as settling defendants that are injured by hazardous products and practices.

At a time when the nation faces the looming possibility of Federal preemption, the lack of the disinfectant of the Sunshine Law

would free corporations to operate under the cloak of darkness with full immunity on an unsuspecting and unprotected public. This is a concept which must concern you, the Members of Congress who are entrusted with the significant responsibility to represent and protect the public welfare.

These same interests are behind many meritless arguments that the Sunshine Act would chill settlements and overburden the court system. I beg to differ. Not only is there no proof of this assertion, it impugns the integrity of the bar on both sides of any civil dispute.

I have addressed these issues in my written statement, but this morning I would like to focus on the potential deterrent aspects of the Sunshine Act.

Today, those who choose profits over people, and thus risk litigation if they are caught, take comfort in their proven ability to demand confidentiality in exchange for providing unfettered discovery and in exchange for ultimately settling with some claimants, who are often only a tiny fraction of the victims of a hazardous product.

If the Sunshine Act were in place, these same interests would have good reason to think twice before rushing a product to market because their actions would be unveiled for all the public to see.

The need for the Sunshine Act has recently become more urgent. The American public increasingly has nowhere to turn. The FDA, Consumer Product Safety Commission, EPA, and other governmental agencies are overworked, underfunded, and in some cases unmotivated to protect the public welfare. The last line of defense may rest with Congress beginning with the Sunshine in Litigation Act.

Thank you.

[The prepared statement of Mr. Meadow follows:]

PREPARED STATEMENT OF RICHARD D. MEADOW

Prepared Testimony of

Richard D. Meadow, Esq.
The Lanier Law Firm

for the hearing entitled

"The Sunshine in Litigation Act of 2008"

before the

Subcommittee on Commercial and Administrative Law

Committee on the Judiciary

United States House

Thursday, July 31, 2008

Introduction

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

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

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

How Secrecy Agreements Are Used

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

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

- During the pre-trial discovery phase, a judge may be asked to issue a protective order which forbids the plaintiff from sharing information disclosed during the case with anyone, even government regulators. Corporate defendants sometimes require such an order before they will disclose sensitive information that could be publicly embarrassing or expose the company to further lawsuits.

- At the conclusion of a trial, a defendant can request the plaintiff to agree to an order to seal all records in a case, including all exhibits and transcripts. Sealing orders can go so far as to remove all trace that a lawsuit even existed.

- After a trial, a defendant can ask for a confidentiality agreement that prohibits victims from saying or revealing anything publicly about the case. A confidentiality agreement

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

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

The Negative Effects of Secrecy Agreements on Public Safety

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

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

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

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

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

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

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

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

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

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

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

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

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

The Need for the Sunshine in Litigation Act

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

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

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

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

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

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

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

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

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

False Claims Made by Opponents of the Sunshine in Litigation Act

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

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

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

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

- There is no anecdotal evidence to support the claim that the Act will have a chilling effect on parties who might otherwise wish to settle. Parties will continue to settle because it saves money and resources and makes economic sense to do so. Judge Anderson notes that when South Carolina banned secret settlements, the District Court of South Carolina experienced neither an increase in trials, nor a decrease in settlements.

- The Act would not result in an influx of cases into an already overburdened judicial system, as opponents predict. States that have enacted similar measures have not experienced a surge in litigation. For example, there was no apparent increase or decrease in the number of cases disposed of when secrecy restrictions were introduced in Florida and Texas courts.[4] In fact, Judge Anderson of the U.S. District Court for the District of South Carolina has noted that his court actually "tried fewer cases in the five years after the rule's enactment that the five years before it was adopted."[5] On the contrary, secrecy agreements make repeated lawsuits involving the same dangerous product unnecessary.

- The Sunshine in Litigation Act would not allow sensitive trade secrets to be revealed to competitors, thereby hurting businesses and the business climate. Even if the Act did not exempt trade secrets, it is unlikely that any business would be harmed since trade secrets are usually not a part of the product that makes it a public hazard. In the rare instance that a trade secret could seriously threaten public health and safety, the court would apply the balancing test. Judges are already trained to make these types of decisions anyway, and would be in the best position to accurately make this call.

- The argument that secrecy agreements are private matters ignores the American tradition of open courts, the legal presumption of judicial system openness, and the public's overriding right to know. The taxpayer pays for the judicial system, and litigants who avail themselves of it should not be permitted to tell the public that information about a hazard that comes to light in a legal action is none of their business.

Other States Are Ending the Misuse of Secrecy Agreements

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

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

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

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

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

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

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

The Need to Return Secrecy Agreements to Their Intended Purpose

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

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

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

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

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

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

Ms. SÁNCHEZ. Thank you, Mr. Meadow. We appreciate your testimony.

At this time, I would invite Professor Freeman to give his testimony.

TESTIMONY OF JOHN P. FREEMAN, DISTINGUISHED PROFESSOR EMERITUS, UNIVERSITY OF SOUTH CAROLINA LAW SCHOOL

Mr. FREEMAN. Thank you, Madam Chairwoman.

I am delighted to be here. As my written statement reflects, I have taught various courses, including White Collar Crime, Securities, and Professional Responsibility, over the years, over 35 years, before my retirement. From time to time I also assisted either as a lawyer, a consultant or an expert witness in certain big-case litigation, including Big Tobacco—which to a considerable extent was driven out of South Carolina by some of our top lawyers, asbestos cases the same—but also other cases that affect the public interest, such as Dalkon Shield litigation, sexual predators and Catholic priests, defective car seats, Benlate fungicide, which cut a wide swath among farmers, and so forth.

From my experience in big complex cases, protective orders are very, very common and very overbroad. As my written statement reflects, decades ago judges were complaining about the issuance of protective orders, and one judge saying on the record he was unaware of any case in the past half-dozen years—and this is 1981—of even a modicum of complexity where an umbrella protective order was not agreed to.

I included in my written statement a recent, to update, within the last 2 months, order from the Seventh Circuit, a District Court order, where you have a magistrate judge complaining about lawyers in that circuit—which has taken the lead in trying to clamp down on protective orders—just not doing it, lawyers not following, not getting the message. And somebody needs to send a strong message. It hasn't been sent over decades.

The secrecy selling is of keen interest to me. As you know, we have dealt with that in South Carolina. And I would just raise a hypothetical, two actually, with you.

One: Assume that you have a witness to a vicious criminal assault who is a sole witness and the only person whose testimony could really convict the wrongdoer. And assume that the perpetrator's lawyer goes to that witness and says, "Here is $25,000. I want you to take this money. I don't want you to report to the police. I don't want you to cooperate with the authorities. It didn't happen." It is just: Wipe it off the map, and here is the money. Go spend it. Enjoy it. And assume that that transaction is struck.

And nobody would have a problem condemning that transaction for witness tampering, obstruction of justice, conspiracy, bribery, all kinds of heinous things.

Well, suppose it is a design defect in an automobile. And there, after tremendous discovery and a lot of effort, finally the plaintiff has figured it out and has come up with the killer documents—the key documents, the smoking gun documents.

And the company, realizing that it is going to get stung and that all this is going to come out, goes to the plaintiff and goes to the

plaintiff's lawyer and says, "Here is a million. Here is $3 million. We want your file. It didn't happen. You can't talk to anybody about it. We will—you will owe us liquidated damages if you—you are not cooperating with a soul."

And you might say, "Well, so what?" The deal goes down. The settlement is agreed to. The money is exchanged. And you can say, "Well, that happens every day. Nothing wrong with that. And it is a free country."

But what has happened in the hypothetical number two is the same thing that happened in hypothetical number one: You have a victim of serious wrongdoing or a witness to serious wrongdoing taking money in exchange for a promise not to cooperate with anybody. And we forget that victims of torts involving health and safety are often witnesses. And for them to take money and have their testimony and their ability to cooperate bought off, I say is heinous. It is heinous in the criminal case. I say it is heinous in the civil case. It is not what we talk about in our ethics courses. It is not proper.

As for some of the complaints, you know, there are theories that it is going to take too much time away; it is going to tie up our courts in knots. I don't believe that for a second. I mentioned that there is a group, the Lawyers for Civil Justice—Mr. Morrison was a—didn't represent them, but was a former president of that group—and they declare it is imperative that this legislation be killed; it is bad legislation, and if you pass it other people are going to emulate it at the state level.

Well, if it is bad legislation and it is going to tie our courts in knots, there is no risk that anybody is going to follow it. What I suggest people are really afraid of is that this starts momentum going in favor of truth in our courts. I want to see that.

Thank you.

[The prepared statement of Mr. Freeman follows:]

PREPARED STATEMENT OF JOHN P. FREEMAN

Testimony of Professor John P. Freeman

Before the Subcommittee on Commercial and Administrative Law of the United States House Committee on the Judiciary

July 31, 2008

My name is John Freeman. For 35 years I was a law professor at the University of South Carolina School of Law, where I taught courses in Professional Responsibility, Corporations, Securities Regulation, White Collar Crime, and other business related subjects. My post-retirement academic titles are: John T. Campbell Professor Emeritus of Business and Professional Ethics, and Distinguished Professor Emeritus of Law. I am a member of the Ohio and South Carolina Bars and am admitted to practice before various federal courts.

Over the years, while working as a scholar, lawyer, consultant, or expert witness I have gained first-hand insights into ethical, practical, and legal issues relating to many major business litigation matters with public policy overtones. I have been personally involved, in one way or another, in some of the most significant tort cases of the last several decades. These include lawsuits against Big Tobacco and the asbestos companies, as well as litigation over KPMG and other firms' tax shelters, toxic chemical dumping, DuPont's Benlate fungicide, the Dalkon Shield Intrauterine Device, sexual predation by Catholic priests, and defective child car seats.

Like many in the legal profession who have worked on or around big cases, I have encountered numerous instances where the truth could have come out long before it was finally exposed. Instead, the truth was shielded—at great cost to the public—by overly expansive protective orders and secret settlements, the two mechanisms H.R. 5884 seeks to curb. I come before you to speak in support of H.R. 5884. I am delighted that Congress has taken an interest in studying these abusive and pervasive practices.

I will start by briefly addressing the issue of overly expansive protective orders. I will then turn to the matter of secrecy selling, the practice by which civil litigants accept money in exchange for promising not to disclose information relevant to the civil action thus concluded.

Protective Orders

Our federal judicial system is a great natural resource. It functions as a truth screening and validating mechanism in much the same way that peer review operates for scholarly literature. In a sense, our judicial system operates as a huge information-sifting machine, generating findings about every facet of American life. With these findings, we learn about which goods are safe and which goods are dangerous, which employers share our

values of non-discrimination and which employers retain discriminatory policies, which institutions deserve our trust, and which institutions deserve our scorn.

Our civil justice system can only function, however, if parties can learn, through discovery, the relevant information needed to effectively present their side of the case. Discovery pursuant to Fed. R. Civ. P. 26 is the avenue by which the truth typically comes out in federal courts, especially since only a tiny (and declining) fraction of civil cases ever make it to trial. Yet, in my experience, Rule 26 rarely operates as the Rule drafters envisioned.

Lawyers face a double-whammy when seeking to gain access to the documents and testimony necessary to show misconduct by big companies that have abused the public. First, in my experience, in big-case litigation it is very, very hard to make the defendant produce the evidence (typically documents) needed to get the case to the jury. Delay is standard and objections are common. Motions to compel are usually needed in order to force the defendant to comply with even clear discovery obligations. Second, even if the evidence is provided to the plaintiff, it is routinely provided pursuant to a powerful protective order, granted too frequently on flimsy or illusory grounds.

Overuse of protective orders has long been a problem in federal courts. *See, e.g.*, *Ericson v. Ford Motor Co.*, 107 F.R.D. 92, 94 (E.D. Ark. 1985) ("District courts are today being bombarded by an ever increasing number of requests for protective orders."). Indeed, in a 1981 opinion, Judge Edward Becker 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." *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 889 (E.D. Pa. 1981). Once a protective order is granted, documents and testimony are routinely designated as confidential and thus off limits to the public. For example, according to the brief for the United States in opposition to the petition for certiorari in *AT&T v. MCI Comm. Corp.*, AT&T not only treated all documents produced as confidential but also designated every page of every deposition as confidential, often before the deposition had commenced. *See* Brief for the United States In Opposition to Petition for Certiorari at 4, *AT&T v. MCI Communications Corp.*, 695 F.2d 594 (7th Cir. 1978), *cert. denied*, 440 U.S. 971 (1979).

The problem has not diminished over the years. There is no sign that the frequency of protective orders has dropped off, and the overbreadth problems they pose are serious. A federal court recently observed:

> Motions to approve overbroad and otherwise improper protective orders seeking to shield purportedly confidential information from the public record continue to vex this and other courts. . . . The filing of motions for protective orders seeking to keep purportedly confidential information out of the public eye has seemingly become a reflexive part of federal court practice in this district, and presumably in other districts as well.

Brown v. Automotive Components Holdings, LLC, 2008 WL 2477588 (S.D. Ind. June 17, 2008).

In my opinion, the system is broken and, unfortunately, judges cannot be counted on to fix it. As a federal district court judge who is a leading sunlight proponent has explained, "courts too often rubber-stamp confidentiality orders presented to them." Joseph F. Anderson, Jr., *Hidden from the Public by Order of the Court: The Case against Government-Enforced Secrecy*, 55 S.C. L. REV. 711, 715 (2004). *See also Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 785 (3d Cir. 1994) ("Disturbingly, some courts routinely sign orders which contain confidentiality clauses without considering the propriety of such orders, or the countervailing public interests which are sacrificed by the orders."). The eagerness of judges to sign consensual protective orders is illustrated by a judge quoted in Judge Anderson's article who stated, "I would sign an order that stipulated that the moon was made out of cheese if the lawyers came in and asked me to sign it." Anderson, *supra* at 729.

In big, complex cases, secrecy typically advantages the defense. Keeping claimants isolated and ignorant has long been a useful defense tactic. *See, e.g.*, Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 STANFORD L. REV. 853, 860 (1992) (noting "the tobacco company lawyers simply wore down the opposition through reliance on protective orders (isolating the plaintiffs from opportunities to collaborate or realize economies of work-product)"). As the Rabin article reveals, an ideal source of helpful information in big cases tends to be other lawyers with similar claims. When lawyers all engaged in litigation against the same defendant cannot share information with one another, each must reinvent the wheel, which increases each plaintiff's litigation costs exponentially, while also consuming scarce judicial resources as judges are called upon to referee the same discovery battles over the same hidden evidence in jurisdictions across the country.

In my opinion, H.R. 5884(a) sets an appropriate standard for issuance of protective orders in order to safeguard public health or safety. I now discuss to the second big-case litigation problem targeted by H.R. 5884, secrecy selling.

Secrecy Selling

As with the ongoing attention being given to protective orders' scope and abuse, the debate over secrecy-selling in litigated cases is a discussion about how we view courthouses, judges, and lawyers, what we demand out of them, and what they may demand of themselves.

"A secret settlement allows the plaintiff to receive money and the defendant to retain secrecy, at the cost of perpetuating avertable public hazards." David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2654 (1995). Many Americans would be alarmed to know that incriminating evidence of serious public health and safety hazards is for sale and is being sold as an accepted part of our judicial process. It is these types of secret settlements that H.R. 5884 commendably targets.

In my view, secrecy selling for too long has bred sleazy, anti-social joint ventures between wrongdoers, victims, and lawyers, with each profiting handsomely. A disturbing corollary to the secrecy-selling reality is that the dollar value of the secrecy sold rises in relation to the amount of harm that the payor would suffer if the public knew the truth. In other words, the bigger and more dangerous the problem the defendant has created, the more money the defendant is likely willing to pay to suppress facts concerning that problem. Those able to profit off public ignorance and unholy alliances where cash is paid for suppression of evidence have no incentive to halt secrecy selling. Furthermore, even the plaintiff's lawyer who *wants* to decline a secret settlement offer to expose the defendant's wrongdoing is hamstrung. As an experienced legal ethics professor, I can testify that the lawyer's duty of loyalty is owed to the client first and foremost—not to society at large. Thus, even plaintiffs' attorneys who would prefer to decline a financial offer larded with secrecy demands in order to expose the truth have reason to fear violating their duty of loyalty to their client if they subordinate their client's pecuniary advantage for the common good. The reality is, no party to the secrecy-selling transaction is looking out for the public interest.

Legislation aimed at curbing antisocial truth hiding by litigants reflects a public policy commitment that is both correct and entirely consistent with the ethical exhortations that guide lawyers' and judges' behavior. The legal profession's ethics codes for lawyers and judges speak in lofty terms about integrity and honor. Judges, we are told, have a duty to "enhance . . . confidence in our legal system." Model Code of Judicial Conduct, Preamble. Lawyers, it has been decreed, owe "a solemn duty to uphold the integrity and honor of [the] profession; to encourage respect for the law and for the courts . . . [and] to conduct [themselves] so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of . . . the public." Model Code of Professional Responsibility, Ethical Consideration 9-6 (1980). There is nothing in secrecy selling that is consistent with honor or conducive to building trust in lawyers, judges, or our legal system.

Consider these two hypothetical fact patterns.

#1 The sole witness to a criminal act is tracked down by the perpetrator's lawyer who arranges a $15,000 payment to the witness to "forget it ever happened." The money is exchanged with the understanding the witness will not cooperate with law enforcement or in any way assist in the perpetrator's prosecution.

#2 After expensive and arduous civil litigation, the personal injury victim of a serious automotive design defect involving a safety hazard has finally assembled the evidence needed to establish the manufacturer's culpability. Realizing this, the manufacturer negotiates a settlement with a very large payoff to the victim and her lawyer. Part of the settlement package is a confidentiality agreement barring the victim and her lawyer from disclosing to anyone the settlement's terms or any of the disturbing facts that were unearthed during the course of discovery.

Anyone can see that hypothetical #1 violates public policy in multiple directions while implicating several criminal prohibitions, including witness tampering, obstruction of justice, conspiracy, and bribery.

But what about hypothetical #2? Is not something seriously wrong there, too? After all, like the payoff recipient in hypothetical #1, the tort victim in hypothetical #2 is a witness of wrongdoing well able to testify about the defendant's misbehavior. Did not the wrongdoer purchase the tort victim witness' silence? Does not society lose as much in the unholy civil lawsuit bargain as in the criminal transaction outlined in #1? How can the lawyers' complicity in both of these hypothethicals not be viewed as conduct "prejudicial to the administration of justice" and hence unethical under Model Rule of Professional Conduct 8.4? Yet the outcome of hypothetical #2, with minor variations, is daily grist for the mill in our nation's court systems, state and federal.

A case can also be made that allowing companies to hide material facts about their products or behavior is contrary to the efficient operation of our market economy. A useful insight into the wisdom of secrecy selling was offered in a recent law review article arguing that one of the purposes of tort litigation is to assist consumer choice by publicizing which products are harmful. *See* Scott Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867, 907-08 (2007). As Moss points out: "[W]hen a market flaw inhibits efficient decision-making, mandatory information disclosure can be a useful and quite moderate effort to remedy that flaw." *Id.* at 909. Moss's argument is that our courthouses churn out useful information that will help guide consumer choice if it is disseminated: which brand of auto tire is unsafe, which employers discriminate, which companies pollute our rivers. Confidentiality agreements reflecting payments for silence about product problems gum up the capitalistic system because they suppress material, valuable data consumers could benefit from knowing. For example, the mother of an infant could very well consider it important that a certain baby car seat manufacturer had paid many millions of dollars around the country to settle tort lawsuits involving design defect claims.

As Moss postulates, mandatory disclosure of the limited sort found in H.R. 5884 is a "useful and quite moderate effort" to remedy the consumer information shortfall caused by secret settlements. It is interesting and, I believe, more than a coincidence that two of our nation's leading federal judges who are experts in the field of economics and firm proponents of free markets, Judges Posner and Easterbrook, were on the panel in *Citizens First National Bank v. Cincinnati Ins. Co.*, 178 F. 3d 943 (7th Cir. 1999), the leading Seventh Circuit case that limited suppression of evidence through overbroad confidentiality orders.

Comments on Critics' Complaints

Opponents of "Sunshine in Litigation" offer various complaints about changing the status quo. For one, we are told that the legislation will increase the cost and burdens on the parties, decrease the efficiency of the court system, and create a litigation explosion. I reject this contention. I am unaware of any proof this has happened in Florida. As the

Subcommittee members know, for over a decade Florida has featured a sunshine in litigation regime at the state level, with no noticeable drawbacks. *See* Fla. Stat. Ann. § 69.081; *see also* Diana Digger, *Confidential Settlements Under Fire in 13 States*, 2 Ann. 2001 ATLA-CLE 2769 (concluding that per capita litigation rates fell in Florida following enactment of a state statute restricting secret settlements). The idea that passage of H.R. 5884 will leave the federal courts clogged and litigants financially damaged is nonsense.

I note that the pro-business, pro-defense group "Lawyers for Civil Justice" has declared that it is "imperative" that H.R. 5884 be killed. The group has expressed alarm on their web site that passage of H.R. 5884 "could . . . propel similar legislation in state legislatures." *See* Lawyers for Civil Justice Website, http://www.lfcj.com/hotcases2.cfm?hotCasesID=137.

This expression of concern seems to undercut the logic of the group's opposition. To me, the group's kill-it-before-it-multiplies fretting confirms the legislation is workable and will be sufficiently successful to deserve emulation by state legislatures. After all, if passage of the Bill really promised to tie the federal judiciary in knots, then why would anyone worry that the federal experience would "propel similar legislation" elsewhere? Why on earth would any state want to pass legislation repeating a federally-enacted logistical nightmare? Plainly, the defense advocacy group's worry is not that the legislation will not work, it is that the legislation will help mend a broken system that currently happens to benefit the group's supporters.

Another argument I have heard in favor of secrecy-selling is that it promotes settlements. I agree that promoting the settlement of cases is generally a good thing, but it is not a good thing when it involves hiding evidence from federal or state authorities or hiding evidence that "involves matters related to public health or safety." I do not understand how a settlement agreement falling within the narrow and limited antisocial scope targeted by H.R. 5884 can be viewed as a good thing, much less desirable, by any sensible American. Even though it is narrowly drawn, the statute has some teeth. If nothing else, H.R. 5884's limits on evidence hiding and settlement secrecy should have the *in terrorem* effect of discouraging litigants and their lawyers from entering into antisocial stipulations and agreements.

In any event, the claim that H.R. 5884 will chill settlements is dubious. The Florida experience supports my appraisal. *See* James E. Rooks, Jr., *Settlements and Secrets: Is the Sunshine Chilly?*, 55 S.C. L. REV. 859, 867-68 (2004) (finding no evidence that Florida's "Sunshine in Litigation Act" worked to chill settlements); Richard A. Zitrin, *Legal Ethics: The Case Against Secret Settlements (Or, What You Don't Know Can Hurt You)*, 2 J. INST. STUD. LEGAL ETHICS 115, 118 (1999) (noting that following enactment of restrictions on secret settlements in some states, there was "no indication of a resulting court logjam, or even that settlement rates have gone down").

One of the more humorous arguments advanced in opposition to allowing more sunlight into federal court proceedings is this one from a Sunlight legislation opponent:

"[R]egulatory agencies already have the power to obtain information from companies about matters affecting 'public health and safety.' These agencies do not need courts to serve as freedom of information clearing houses." *See* Hearing Of The Subcommittee On Antitrust, Competition Policy And Consumer Rights Of The Senate Judiciary Committee on the Sunshine In Litigation Act, Dec. 11, 2007) (filed testimony of Stephen G. Morrison), *available at* http://judiciary.senate.gov/testimony.cfm?id=3053&wit_id=6823.

If "regulatory agencies" are so proficient at protecting the public interest, then why did we witness Big Tobacco for decades selling an addictive, carcinogenic product while refusing to concede the product was either addictive or harmed health? Why aren't cigarettes regulated by the FDA today? What brought Big Tobacco to heel were lawyers and lawsuits, not regulatory agencies. The same is true for asbestos, numerous harmful drugs, Benlate, exploding tires, faulty child car seats, and so on down the line. To a considerable extent, big-case litigation centers on matters that escaped regulatory attention. When someone speaking for corporate America tells you the best way to get a job done is to rely on government regulators, you know something is awry.

Summary

Protective orders and sealed settlements have hidden the defects of products that have caused tremendous harm to the public, including Dow Corning' silicone gel breast implants, pickup trucks made by Ford and General Motors, Upjohn's sleeping pill Halcion, Pfizer's Bjork-Shiley heart valves, McNeil Pharmaceutical's painkiller, Zomax, and cigarettes. Luban, *supra* at 2650; Rabin, *supra* at 860 Countless lives have been lost because the dangers of these products were obscured. H.R. 5884 represents the right remedy arriving at the right time to address a glaring weakness in our judicial system.

Thank you for the opportunity to present my views on this important matter.

Ms. SÁNCHEZ. Thank you, Professor Freeman. We appreciate your testimony.

At this time, I would invite Judge Kravitz to please begin his testimony.

TESTIMONY OF THE HONORABLE MARK R. KRAVITZ, JUDGE, U.S. DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

Judge KRAVITZ. Thank you, Madam Chairperson. I am pleased to be here on behalf of the Judicial Conference Standing Committee and the Civil Rules Committee.

I just want to give you a little bit about my background, as the others have, so you will understand where I am coming from on this issue. I practiced for 27 years, and during that period of time I worked with protective orders for both plaintiffs and defendants. And a large portion of my practice was devoted to representing media companies who were trying to intervene in cases and open government. And I am proud to say that I have received two awards in Connecticut for my efforts at open government and efforts against secrecy in government. And I say that not to be boastful but rather so that you know that I do not have a personal history of secrecy in government at all.

Yet, the Rules Committee is opposed to this legislation for, I think, three very good reasons.

First, there is no empirical evidence to suggest that protective orders or sealed settlements are substantially used in the Federal courts or that there is any abuse. My friend Professor Freeman talked about every case having a protective order. We have actually dug into the data, and 6 percent of Federal cases have protective orders, and sealed settlements are in one half of 1 percent of all cases that are solved.

The Rules Committee actually devotes itself to using empirical information, not anecdotal information, and information about the Federal courts, not the state courts, to inform the rules process. And I would just say, if the committee has empirical information that suggests there is a problem to get it to the Rules Committee so that it can use that in the context of the rules process.

Secondly, this is not, with all due respect, Madam Chairperson, at least insofar as the protective orders are concerned, a modest proposal. What this proposal suggests is that at the start of a case, before the judge knows anything about the case, the judge is going to have to review the documents, sometimes millions of pages of documents that the defendant is going to have to turn over, and before those documents have been given to the plaintiff is going to have to make a determination as to whether those documents are "relevant to public health and safety."

We are not talking about documents being filed in court. Once documents are filed in court, the protective order provisions aren't what govern. It is the Constitution and the substantial body of case law that protects open judicial proceedings that govern. So we are talking about the exchange of information between parties outside of court to get the plaintiff up to speed as to what the facts are.

And in my experience, both as a judge and a lawyer, the entry of a protective order allows litigants to exchange more documents

at an earlier point in the litigation than would be possible without them.

This legislation will require—the burdens of it really cannot be overstated. I am going to have to—I cannot make a determination that documents are relevant to public health and safety unless I review those documents. I am going to have to review them without the plaintiff having them because this is all before the plaintiff gets them. And then I am going to have to make a judgment with no help from experts or anything whether they implicate or are relevant to the public health and safety.

First of all, I don't think I have the time to do that. And second of all, I don't think I have the knowledge to do that on any reasoned basis. And what we are going to result in is satellite litigation which is going to bog down the discovery. We should be in the business of getting Mr. Lanier the documents as quickly as possible, not as slowly as possible and not as expensively as possible. And Rule 1 of the Federal Rules says the goal here should be a just, speedy and inexpensive determination of the cases. And I believe that this provision on protective orders will disserve that interest.

And finally, even though it sounds good, these provisions, they are unlikely to produce any benefits because the agreements that Professor Freeman talked about, they are going to be entered into anyway, and they just won't get filed with courts. Settlements are secret not because judges are sealing them. It happens in only .5 percent of all cases. Settlements are secret because the parties themselves are agreeing to secrecy orders. So the benefits that this act is designed to achieve, I am afraid, and the Rules Committee is afraid, won't be achieved.

Thank you, Madam Chairperson.

[The prepared statement of Judge Kravitz follows:]

PREPARED STATEMENT OF THE HONORABLE MARK R. KRAVITZ*

JUDICIAL CONFERENCE OF THE UNITED STATES

STATEMENT OF
THE HONORABLE MARK R. KRAVITZ

JUDGE, UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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

HEARING ON
THE "SUNSHINE IN LITIGATION ACT OF 2008," H.R. 5884

JULY 31, 2008

Administrative Office of the U.S. Courts, Office of Legislative Affairs
Thurgood Marshall Federal Judiciary Building, Washington, DC 20544, 202-502-1700.

*See Appendix for attachments to the prepared statement of this witness.

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

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

The Judicial Conference opposes the "Sunshine in Litigation Act of 2008" (H.R. 5884), which was introduced on April 23, 2008, on the ground that it effectively amends the Federal Rules of Civil Procedure outside the rulemaking process, contrary to the Rules Enabling Act (28 U.S.C. §§ 2071-2077). Under the Rules Enabling Act, proposed amendments to federal court rules are subjected to extensive scrutiny by the public, bar, and bench through the advisory committee process, carefully considered by the Judicial Conference, and then presented after approval by the Supreme Court to Congress. It is an exacting, transparent, and deliberative process designed to provide exacting and exhaustive scrutiny to every proposed amendment of the rules, by many knowledgeable individuals and entities, so that lurking ambiguities can be unearthed, inconsistencies removed, problems identified, and improvements made. It is also a process that relies heavily upon empirical research, rather than anecdotal information, to identify problems and to ensure that any solution is workable, effective, and does not create unintended consequences. Direct amendment of the federal rules through legislation, even when the rulemaking process has been completed, circumvents the careful safeguards that Congress itself established.

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

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

I am no stranger to these issues. In my former life as a private practitioner I represented numerous media companies in their efforts to gain access to court proceedings and to information held by state and federal governments. I practiced law in Connecticut for 27 years. During those years, I represented both plaintiffs and defendants in litigation in the federal courts and utilized protective orders. I also spent a good deal of my time representing numerous media companies in their efforts to obtain access to courts and to government documents. And I am proud to say that during that time I received the Bice Clemow Award for my "support of open and accountable government" and the Dean Avery Award "for advancing the cause of freedom of information and speech in Connecticut." I say this so you will understand that I do not have a personal history of supporting secrecy in Government. I also have a deep appreciation of the Rules Enabling Act process having served on the Judicial Conference's Standing Committee on Rules of Practice and Procedure before becoming Chair of the Advisory Committee on Civil Rules about a year ago. As a judge I have worked with litigants to craft responsible protective orders that safeguard the legitimate privacy interests of the parties while at the same time protecting the public's constitutionally-grounded interest in open judicial proceedings.

Discovery Protective Orders

H.R. 5884 is intended to prevent parties from using the federal judicial process to conceal matters that harm the public health or safety by imposing requirements for issuing discovery

protective orders under Rule 26(c) of the Federal Rules of Civil Procedure. The bill would require a judge presiding over a case, who is asked to enter a protective order governing discovery under Rule 26(c), to make findings of fact that the information obtained through discovery is not relevant to the protection of public health or safety or, if it is relevant, that the public interest in the disclosure of potential health or safety hazards is outweighed by the public interest in maintaining the confidentiality of the information and that the protective order requested is no broader than necessary to protect the privacy interest asserted.

Bills that would regulate the issuance of protective orders in discovery under Rule 26(c), similar to H.R. 5884, have been introduced regularly since 1991. Under the Rules Enabling Act, the Rules Committees studied Rule 26(c) to inform itself about the problems identified by these bills and to bring the strengths of the Rules Enabling Act process to bear on the problems that might be found. Under that process, the Rules Committees carefully examined and reexamined the issues, reviewed the pertinent case law and legal literature, held public hearings, and initiated and evaluated empirical research studies.

The Rules Committees also considered specific alternative proposals to amend Rule 26(c), intended to address the problems identified in H.R. 5884's predecessor bills, including an amendment to Rule 26(c) that expressly provided for modification or dissolution of a protective order on motion by a party or nonparty. The Rules Committees published the proposed amendments through the Rules Enabling Act process. Public comment led to significant revisions, republication, and extensive public comment. At the conclusion of this process, the Judicial Conference decided to return the proposals to the Rules Committees for further study. That study included the work described above.

The Empirical Data Identifies Scope of Protective Order Activity

In the early 1990's, the Rules Committees began studying pending bills, like H.R. 5884, requiring courts to make particularized findings of fact that a discovery protective order would not restrict the disclosure of information relevant to the protection of public health and safety. The study raised significant concerns about the potential for revealing, in the absence of a protective order, confidential information that could endanger privacy interests and generate increased litigation resulting from the parties' objections to, and refusal to voluntarily comply with, the broad discovery requests that are common in litigation. The Rules Committees concluded that the issues merited further consideration and that empirical information was necessary to understand whether there was a need to regulate the issuance of discovery protective orders by changing Rule 26(c).

In 1994, the Rules Committees asked the Federal Judicial Center (FJC) to do an empirical study on whether discovery protective orders were operating to keep information about public safety or health hazards from the public. The FJC completed the study in April 1996. It examined 38,179 civil cases filed in the District of Columbia, Eastern District of Michigan, and Eastern District of Pennsylvania from 1990 to 1992. The FJC study showed that discovery protective orders are requested in only about 6% of civil cases. Most of the requests are made by motion, which courts carefully review and deny or modify a substantial proportion; less than one-quarter of the requests are made by party stipulations and the courts usually accept them.

In most of the 6% of civil cases in which discovery protective orders were entered, the empirical study showed that the orders did not impact public safety or health. In its study, the FJC randomly selected 398 cases that had protective order activity. A careful inspection of the data reveals that the problematic protective orders targeted by H.R. 5884 represent only a small fraction of civil cases, which would nonetheless all be subjected to the bill's requirements. Only half of the 398 cases studied by the FJC involved a protective order restricting disclosure of discovery materials.

The other half of the 398 cases involved a protective order governing the return or destruction of discovery materials or imposing a discovery stay pending some event or action. Of the cases in which a protective order was entered restricting access to discovery materials, a little more than 50% were civil rights and contract cases and about 9% were personal injury cases. The empirical data showed no evidence that protective orders create any significant problem of concealing information about public hazards. A copy of the study is attached to this statement.

Information Shows No Need for the Legislation

The Rules Committees studied the examples of cases in which information was hidden from the public commonly cited to justify legislation such as H.R. 5884. In these cases, the Rules Committees found that there was information available to the public sufficient to protect public health or safety. The pertinent information was found in court documents available to the public, e.g., pleadings and motions, as well as in reported stories in the media. In particular, the complaints filed in these civil cases typically contained extensive information describing the alleged party's actions sufficient to inform the public of any health or safety issue.

The Rules Committees also examined the case law to determine whether the court rulings in cases in which parties file motions for protective orders in discovery justified legislation. The case law showed that the courts review such motions carefully and often deny or modify them to grant only the protection needed, recognizing the importance of public access to court filings. The case law also showed that courts often reexamine protective orders if intervenors or third parties raise concerns about them. That conforms with my own personal experience as a lawyer in representing media companies. The FJC study corroborated the findings of the case law study and showed that judges denied or modified a substantial proportion of motions for protective orders.

The bill's limited practical effect further undermines its justification. The potential benefit of the proposed legislation would be minimized by the general rule that what is produced in

discovery is not public information. The Supreme Court recognized this limit when it noted in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984), that discovery materials, including "pretrial depositions and interrogatories are not public components of a civil trial. Such proceedings were not open to the public at common law, ... and, in general, they are conducted in private as a matter of modern practice." Information produced in discovery is not publicly available unless it is filed with the court. Information produced in discovery is not filed with the court unless it is part of or attached to a motion or other submission, such as a motion for summary judgment. Consequently, if discovery material is in the parties' possession but not filed, it is not publicly available. The absence of a protective order does not require that any party share the information with the public. The proposed legislation would have little effect on public access to discovery materials not filed with the court.

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

compelling need." *Video Software Dealers Assoc. v. Orion Pictures, Corp. (In re Orion Pictures Corp.)*, 21 F.3d 24, 27 (2d Cir. 1994) (citation omitted).

The Legislation Would Impose Intolerable Burdens on Federal Courts

The scope of discovery has dramatically changed since legislation like H.R. 5884 was first introduced in 1991. Most discoverable information is now stored in computers and the growth in electronically stored information has exploded. Relatively "small" cases often involve huge volumes of information. The discovery requests in cases filed in federal court typically involve gigabytes of electronically stored information or about 50,000 pages per gigabyte. Cases requiring intensive discovery can involve many gigabytes, and some cases are now producing terrabytes of discoverable information, or about 50 million pages.

Requiring courts to review discovery information to make public health and safety determinations in every request for a protective order, no matter how irrelevant to public health or safety, will burden judges and further delay pretrial discovery. Indeed, the requirement to review all this information would make it infeasible for most federal judges to even consider undertaking the review. It is important to recognize that most protective orders are requested *before* any documents are exchanged among the parties or submitted to the court, and that therefore, it would be difficult, if not impossible, for the court to make the review the legislation requires. Inevitably, a request for a protective order would be routinely denied, including requests that are entirely justified.

The Legislation Would Have Significant Adverse Consequences

Since bills like H.R. 5884 were first introduced in 1991, obtaining information contained in court documents has become much easier. Court records no longer enjoy the practical obscurity they once had when the information was available only on a visit to the courthouse. The federal courts now have electronic court filing systems, which permit public remote electronic access to court

filings. Electronic filing is an inevitable development in this computer age and is providing beneficial increases in efficiency and in public access to court filings. But remote public access to court filings makes it more difficult to protect confidential information, such as competitors' trade secrets or individuals' sensitive private information. If particularized fact findings are required before a discovery protective order can issue, parties in these cases will face a heavier litigation burden and some plaintiffs might abandon their claims rather than risk public disclosure of highly personal or confidential information.

Parties often rely on the ability to obtain protective orders in voluntarily producing information to each other without the need for extensive judicial supervision. They do this for many valid reasons, including saving costs that would otherwise be incurred in carefully screening every document produced in discovery. If obtaining a protective order required item-by-item judicial consideration to determine whether the information was relevant to the protection of public health or safety, as contemplated under the bill, parties would be less likely to seek or rely on such orders and less willing to produce information voluntarily, leading to discovery disputes. Requiring parties to litigate and courts to resolve such discovery disputes would impose significant costs and burdens on the discovery process and cause further delay. Such satellite disputes would increase the cost of litigation, lead to orders refusing to permit discovery into some information now disclosed under protective orders, add to the pressures that encourage litigants to pursue nonpublic means of dispute resolution, and force some parties to abandon the litigation.

In many cases, protective orders are essential to effective discovery management. The burdensome requirements of H.R 5884 are especially objectionable because they would be imposed in cases having nothing to do with public health or safety, in which a protective order may be most needed and justified. As noted, the empirical data showed that about one-half of the cases in which discovery protective orders of the type addressed in H.R. 5884 are sought involve contract claims

and civil rights claims, including employment discrimination. Many of these cases involve either protected confidential information, such as trade secrets, or highly sensitive personal information. In particular, civil rights and employment discrimination cases often involve personal information not only about the plaintiff but also about other individuals who are not parties, such as fellow employees. As a result, the parties in these categories of cases frequently seek orders protecting confidential information and personal information exchanged in discovery. H.R 5884 would make it more difficult to protect confidential and personal information in court records to the detriment of parties filing civil rights and employment discrimination cases.

Conclusion

The Rules Committees consistently have concluded that provisions affecting Rule 26(c), similar to those sought in H.R. 5884, are not warranted and would adversely affect the administration of justice. The Committees' substantive concerns about the proposed legislation result from the careful study conducted through the lengthy and transparent process of the Rules Enabling Act. That study, which spanned years and included research to gather and analyze empirical data, case law, academic studies, and practice, led to the conclusion that no change to the present protective-order practice is warranted and that the proposed legislation would make discovery more expensive, more burdensome, and more time-consuming, and would threaten important privacy interests.

Based on lengthy and thorough examination of the issues, the Rules Committees concluded that: (1) the empirical evidence showed that discovery protective orders did not create any significant problem of concealing information about safety or health hazards from the public; (2) protective orders are important to litigants' privacy and property interests; (3) discovery would become more burdensome and costly if parties cannot rely on protective orders; (4) administering a rule that added conditions before any discovery protective order could be entered would impose significant burdens

on the court system; and (5) such a rule would have limited impact because much information gathered in discovery is not filed with the court and is not publicly available.

If the Committee is aware of empirical information that suggests that protective orders have become a problem of some kind, the Rules Committee would be pleased to take a look at the empirical information and consider whether any rules changes are needed in response. To date the Rules Committee has not been directed to any such empirical information. In the absence of demonstrated abuses, however, there seems no reason to burden litigants and courts with the requirements of H.R. 5884.

Confidentiality Provisions in Settlement Agreements

The Empirical Data Shows No Need for the Legislation

H.R. 5884 would also require a judge asked to issue an order approving a settlement agreement to make findings of fact that such an order would not restrict the disclosure of information relevant to the protection of public health or safety or, if it is relevant, that the public interest in the disclosure of potential health or safety hazards is outweighed by the public interest in maintaining the confidentiality of the information and that the protective order requested is no broader than necessary to protect the privacy interest asserted. In 2002, the Rules Committees asked the Federal Judicial Center to collect and analyze data on the practice and frequency of "sealing orders" that limit disclosure of settlement agreements filed in the federal courts. The Committees asked for the study in response to proposed legislation that would regulate confidentiality provisions in settlement agreements. H.R. 5884 contains a similar provision. In April 2004, the FJC completed its comprehensive study surveying civil cases terminated in 52 district courts during the two-year period ending December 31, 2002. In those 52 districts, the FJC found a total of 1,270 cases out of 288,846 civil cases in which a sealed settlement agreement was filed, about one in 227 cases (0.44%). A copy of the study is attached to this statement.

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

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

The Rules Committees were nonetheless concerned that even though the number of cases in which courts sealed a settlement was small, those cases could involve significant public hazards. A follow-up study was conducted to determine whether in these cases, there was publicly available information about potential hazards contained in other records that were not sealed. The follow-up study showed that in the few cases involving a potential public health or safety hazard and in which a settlement agreement was sealed, the complaint and other documents remained in the court's file, fully accessible to the public. In these cases, the complaints generally contained details about the basis for the suit, such as the defective nature of a harmful product, the dangerous characteristics of a person, or the lasting effects of a particular harmful event. Although the complaints varied in level of detail, all identified the three most critical pieces of information regarding possible public health or safety risks: (1) the risk itself; (2) the source of that risk; and (3) the harm that allegedly ensued. The product-liability suit complaints, for example, specifically identified the product at issue,

described the accident or event, and described the harm or injury alleged to have resulted. In many cases, the complaints went further and identified a particular feature of the product that was defective, or described a particular way in which the product failed. In the cases alleging harm caused by a specific person, such as civil rights violations, sexual abuse, or negligence, the complaints consistently identified the alleged wrongdoer and described in detail the causes and extent of the alleged injury. These findings were consistent with the general conclusions of the FJC study that the complaints filed in lawsuits provided the public with "access to information about the alleged wrongdoers and wrongdoings." A copy of the follow-up study is attached to this statement.

The Legislation is Unlikely to be Effective

The FJC study shows that only a small fraction of the agreements that settle federal-court actions are filed in the court. Most settlement agreements remain private contracts between the parties. On the few occasions when parties do file a settlement agreement with the court, it is to make the settlement agreement part of the judgment to ensure continuing federal jurisdiction, not to secure court approval of the settlement. Such agreements would not be affected by prohibitions, like those in H.R. 5884, prohibiting a court from entering an order "approving a settlement agreement that would restrict disclosure" of its contents.

Conclusion

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

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

Ms. SÁNCHEZ. Thank you. I appreciate your testimony, Judge Kravitz.

And at this time, I would invite Judge Anderson to please present his testimony.

TESTIMONY OF THE HONORABLE JOSEPH F. ANDERSON, JR., JUDGE, U.S. DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

Judge ANDERSON. Thank you, Chairwoman Sánchez, Ranking Member Cannon, and Members of the Subcommittee. Thank you for inviting me to appear before you to discuss the Sunshine in Litigation subject, of particular importance to me as a trial judge with 22 years experience.

I should say at the outset that I am not here representing the Judicial Conference or any other organization. I am here simply to convey my thoughts on the need for the awareness of the adverse consequences of what I prefer to call "court-ordered secrecy."

As civil litigation has mushroomed in the United States courts in the past two decades, litigants have frequently requested that judges "approve" a settlement, often in cases where court approval is not legally required. And as part of the approval process, judges are sometimes asked to enter orders restricting public access to information about the case and its procedural history.

In these instances, litigants are not content to simply agree between themselves to remain silent as to the settlement terms. Instead, their preference is to involve the trial court in a "take it or leave it" consent order that brings to bear the contempt sanctions of the court to anyone who breaches the court-ordered confidentiality.

Unfortunately, trial judges often struggle under the crush of burgeoning case loads. 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 in the demands for court-ordered secrecy.

In late 2002, the judges on the District Court of South Carolina voted unanimously to adopt a local rule for our court which places some modest restrictions on court-ordered secrecy associated with settlements in civil cases. We were then, and we remain, the only Federal district court in the country with such a rule.

In the brief time allotted to me, I would like to relate several events which prompted me to propose this rule to our court and say just a word about our court's 6-year experience in operating under the rule.

In 1986 when I was a 36-year-old baby judge, I was assigned a case that had been pending on another judge's docket for several years. The case was ready for trial, and the lawyers predicted a grueling 6-month trial. It was brought by 350 plaintiffs who lived around a large 56,000-acre freshwater lake in upstate South Carolina. The plaintiffs contended that the defendant had knowingly deposited excessive amounts of PCBs into the lake, and that they had experienced severe health problems associated with being exposed to this toxic substance.

Much to my relief, shortly before the trial was to begin, the parties announced that they had reached an amicable settlement. The

defendant would pay three-and-a-half million dollars into a fund to be set up to provide primary medical monitoring and care for the 350 plaintiffs, and then there was a small amount of a per capita distribution to each of the plaintiffs to settle the case.

There was one catch, however: The settlement was absolutely contingent upon my entry of a gag order prohibiting the parties from ever discussing the case with anyone and also requiring the return of all allegedly "smoking gun" documents. I was advised by counsel for both sides that if I did not go along with their request, the carefully constructed compromise settlement would disintegrate, and the case would proceed to the 6-month trial.

As a judge with less than a year's experience on the court and other complex cases stacking up on my docket, and believing it was the fairest and best thing do in the case, I agreed to the request for court-ordered secrecy. When I signed the order, everyone was content: The plaintiffs had a handsome settlement; the lawyers for both sides were paid; the defendant received its court-ordered secrecy; there were no objections to my order; and I had one less case to try.

In the ensuing years, I began to question my decision to enter a protective order in that particular case. Other people lived around that lake and were exposed to the same substance. I saw lawyers request the court order secrecy both at settlement and in connection with the exchange of documents during discovery.

Just to take another example, I knew of a case on our docket of another judge who restricted information to case information about a go-cart which was allegedly defective and which was settled for one-and-a-half million dollars. Again, a court ordered gag order secrecy; the plaintiff's lawyer was restricted from discussing the case or even representing another litigant involving that same go-cart, which I later learned was still being marketed to the public.

These are just two instances, nothing anecdotal about them—people live around the lake; children ride those go-carts—where the judge had lit the lightning match through the appellate court system through an order restricting information about those hazards.

Responding to this series of events, I proposed to our court that we adopt a local rule prohibiting, in most civil cases, court-sanctioned secret settlements. When we proposed our rule for comment, we received heated objections from around the country. There were dire predictions that our court would be overwhelmed with the number of cases that went to trial as a result of our rule restricting court-ordered secrecy.

Well, after 6 years, the dire predictions have appeared to be wrong. Our case has actually tried fewer cases in the 6 years following the enactment of our local rule than it did in the 6 years preceding the enactment of our rule.

Of the national furor that was created when our rule was proposed at least brought this attention to the forefront. I think judges are now more aware of the adverse consequences of court-ordered secrecy. This legislation has served to further that interest and raise the consciousness of judges on this very important topic.

Thank you very much.

[The prepared statement of Judge Anderson follows:]

PREPARED STATEMENT OF THE HONORABLE JOSEPH F. ANDERSON, JR.

Prepared Testimony of

United States District Judge Joseph F. Anderson, Jr.

for the hearing entitled

"The Sunshine in Litigation Act of 2008"

before the

Subcommittee on Commercial and Administrative Law

Committee on the Judiciary

United States House of Representatives

Thursday, July 31, 2008

Chairman Conyers, Ranking Member Cannon, and Members of the Subcommittee, thank you for inviting me to appear before you to discuss "Sunshine in Litigation"—a subject of particular interest to me as a trial judge with 22 years on the federal bench.

I should say at the outset that I am not here representing the Judicial Conference or any other organization. I am here simply to convey my thoughts on the need for awareness of the adverse consequences of what I prefer to call "court-ordered secrecy."

As civil litigation has mushroomed in the United States courts in the past two decades, litigants have frequently requested that judges "approve" settlements, often when court approval is not even required by law. As part of this "approval" process, judges are sometimes asked to enter orders restricting public access to the settlement information and perhaps the case history. In these instances, litigants are not content to simply agree between themselves to remain silent as to the settlement terms. Instead, the preference is to involve the trial judge in a "take it or leave it" consent order that would bring to bear contempt sanctions on anyone who breaches the court-ordered secrecy.

Unfortunately, trial judges often struggle under the crush of burgeoning case loads. 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.

In late 2002, the judges of my district court in South Carolina voted unanimously to adopt a local rule for our court which restricts court-ordered secrecy associated with settlements in civil cases. We were then, and we remain, the only federal district court in the country with such a rule. In the brief time

allotted to me, I would like to relate several events which prompted me to propose the rule to our court, and also say just a word about our court's experience operating under this rule.

In 1986 when I was a 36-year-old newly-appointed federal trial judge, I was assigned a case that had been pending on another judge's docket for several years. The case was ready for trial which the lawyers predicted would take a grueling six months. The case was brought by 350 plaintiffs who lived around a large 56,000 acre freshwater lake in upstate South Carolina. The plaintiffs contended that the defendant in the case had knowingly deposited excessive amounts of PCBs into the lake, and that they had experienced severe health problems from being exposed to this toxic substance.

Much to my relief, shortly before the trial was to begin, the parties announced that they had reached an amicable settlement. The defendant would pay $3.5 million into a fund to be used to set up a medical monitoring and primary care program for all 350 plaintiff-residents and a small amount of the settlement money would be used for a per capita distribution to each plaintiff. There was one catch: The settlement was contingent upon my entry of a gag order prohibiting the parties from ever discussing the case with anyone and also requiring a return of all allegedly "smoking gun" documents. I was advised by counsel that if I did not go along with their request, the carefully crafted settlement package would disintegrate and the case would proceed to a contentious six-month trial.

As a judge with less than a year's experience on the bench, other complex cases stacking up on my docket, and believing it was in the fairest and best interest of all parties, I agreed to the request for court-ordered secrecy. When

I signed the order, everyone was content: The plaintiffs recovered a handsome sum; the lawyers for both sides were paid; the defendant received its court-ordered secrecy; there were no objections to the order; and the judge had one less case to try.

In the ensuing years, I questioned my decision to enter a secrecy order in that particular case. I also became troubled by what I viewed as a discernable trend in civil litigation: Lawyers were sometimes requesting court-ordered secrecy both at settlement and in connection with the exchange of documents during discovery. I was aware of instances in both the state and federal courts in South Carolina where judges had agreed to requests for court-ordered secrecy in cases where one could reasonably argue that public interest and public safety should have required openness.

For example, I knew of a judge who restricted access to case information where a child died while riding an allegedly defective go-cart. The settlement was $1.4 million, and the judge imposed a strict obligation of secrecy on the parties. I later learned that the model go-cart which the child had been riding was still being sold and marketed. I also learned of judges in the South Carolina state courts who entered confidentiality orders in medical malpractice cases where even the identities of the physicians who were named as defendants were shielded from public view.

Responding to this series of events, I proposed to our court that we adopt a local rule prohibiting, in most civil cases, court-sanctioned secret settlements. When our rule was released for public comment, we received heated objections from around the nation. Virtually every opponent of our rule suggested that an inevitable byproduct of such a local rule restricting court-ordered secrecy would

be the substantial increase in the number of cases going to trial which would, in turn, overwhelm our court.

The rule was adopted, nevertheless, and we now have a six-year operating perspective. The dire predictions of those who suggested that the rule would cause settlements to disappear proved to be wrong. In fact, according to statistics provided by the Clerk of Court, our court tried *fewer* cases in the six years *after* the rule's enactment than in the six years before it was adopted.

In short, our rule has worked well and our court has not been "overwhelmed" as a result. Trade secrets, proprietary information, sensitive personal identifiers, national security data, and the like remain protected. New business investments in South Carolina continue to go up. However, in those rare cases where the public interest or safety could be adversely affected by court-ordered secrecy, judges on our court have not hesitated to enforce the rule and keep the docket transparent.

The national furor created when our rule was proposed for public comment, coupled with Senator Kohl's long-standing commitment to improve transparency in the federal courts, began a vigorous debate and much-needed review of the adverse consequences associated with court-ordered secrecy.

Last December, I testified before the Senate Judiciary Committee in favor of Senator Kohl's Bill S2449, which was bipartisan and cosponsored by Senators Leahy and Graham. That Bill is virtually identical to the one now before the House subcommittee. I am confident that both Bills will assuage privacy concerns and provide further guidance to the judiciary for conducting a balancing test between confidentiality, public interest, and classified information.

While the issues have not been entirely resolved, I am of the opinion that the secrecy trend seems to be waning. More importantly, I believe that both state and federal judges have become more sensitive and enlightened to the need for "Sunshine in Litigation."

Thank you for allowing me to share my sentiments with you and I will be happy to answer any questions you may have.

Ms. SÁNCHEZ. Thank you, Judge Anderson. We appreciate your testimony.

We will now begin the first round of questioning. And I will begin by recognizing myself.

Mr. Meadow, I would like to start with you. Some critics of the Sunshine in Litigation Act say that there is no empirical evidence establishing that court secrecy orders endanger public health and safety, that proponents of this act are simply relying on anecdotal evidence alone. How would you respond to that criticism?

Mr. MEADOW. Based on my experience, the litigations that we are involved in are mass torts affecting—each drug we are involved in is affecting thousands and thousands of people. So if they come up and say it is only 6 percent, that one—maybe 1 percent of that can involve tens of thousands of people. So any time we discover a dirty document or something like that, it is going to affect thousands and thousands of people.

So I think the overall public policy speaks to a favorable climate for this act vs. the small—I haven't seen the empirical data. But in my personal experience from the litigations I am involved in, you are talking about tens of thousands of people who are affected by one protective order.

Ms. SÁNCHEZ. Thank you.

Professor Freeman, why do you believe, as you state in your prepared statement, that judges can't be counted on to address the problem of court secrecy?

Mr. FREEMAN. Because it is ubiquitous and because nothing seems to be happening. I didn't say that all Federal cases have protective orders. I said in——

Ms. SÁNCHEZ. Many.

Mr. FREEMAN [continuing]. Quoting a judge, cases with complexity are what we are talking about here. And there the protective orders are very, very common, and secrecy agreements are very common. And as I read the legislation, it deals not just with the approval of secret settlements, essentially to cover up evidence, but also the enforcement of secret settlements, which to me is important.

But, you know, I would refer you to this order that was issued by the magistrate within the last 60 days in a circuit where the judges led by Judge Posner and Judge Easterbrook have really sought to crack down on overbroad protective orders. And that was a 1999 decision that led the way with follow-up decisions—1999, we know, now is—what?—9 years ago. And this is within the last 60 days the judge saying, "You know, I—in this case, the magistrate judge entered a directive to the lawyers in the case saying, "Don't you come to me and ask for a protective order unless it meets the following standards, one through whatever." And then he didn't get that. And that is why he wrote that order.

And, you know, people have been talking a long time, but where is the beef? Where is the actual output that protects—that promises to protect—the public on matters of limited nature, health and safety in particular? It is time to do something because it just hasn't happened yet.

Ms. SÁNCHEZ. Thank you.

We know that plaintiffs sometimes, and maybe oftentimes, agree to these various types of confidentiality orders covered by the Sunshine in Litigation Act. And one example of that would be a protective order prohibiting the disclosure of discovery materials or an order sealing a settlement agreement.

Why do lawyers who represent plaintiffs agree to such orders even though they may be contrary to the public interest?

Mr. FREEMAN. For the money—for themselves and for their clients. This is about selling secrecy, and secrecy is a very, very valuable commodity it turns out, particularly when there is something very wrong that needs to be covered up.

A company that has tremendous exposure, say running to the billions, can be very happy to pay the plaintiff and the lawyer who have figured out—gotten the smoking gun documents under a protective order, can't disclose them to anybody—got them, and now the company is faced with the possibility of the truth coming out, and being picked up on the Internet, being picked up on the news. It becomes a very simple transaction to buy that evidence and pay these people off.

And the lawyer, you can say, "Well, that is crooked on the part of the lawyer." But the problem is for the lawyer, the lawyer's job is to protect the client and do the very best for the client. The lawyer doesn't see himself or herself as representing society as a whole. So that skews the transaction.

Legislation that came in and inserted the public interest into the calculation would be excellent.

Ms. SÁNCHEZ. Thank you.

Judge Anderson, you noted in your prepared statement that the local rule adopted by the district in which you sit as a judge has not inhibited settlement or increased the judges' workload. That rule, as I understand it, addresses only sealed, court-filed settlement agreements.

The Sunshine in Litigation Act goes a little bit further than that. It also covers, among other things, protective orders. And I am wondering if you believe that the provisions of the act would, as some critics have claimed, inhibit settlement or significantly increase the workload of our courts, if that.

Judge ANDERSON. I don't think it would inhibit settlement. It would increase the workload of the district judge. I do think we could count on the litigants to point out to us what is confidential, or what is arguably confidential. So it would increase our workload to some extent, but we could handle it.

Ms. SÁNCHEZ. Thank you.

My time has expired. So at this time I would recognize the Ranking Member for his 5 minutes to question.

Mr. CANNON. Thank you, Madam Chair. Do you intend to do a second round? I personally don't see a need, but.

Ms. SÁNCHEZ. I do have probably another question or two that I would like to ask. And given that there are not many of us here, I don't think that it would be overburdensome to go through a second round of questions.

Mr. CANNON. I don't think it would be overburdensome at all. I don't know how we move this issue forward, though, because it is not going to be in our jurisdiction, it appears to me.

But Mr. Kravitz, you seem to have had a response to what Mr. Anderson said about the parties. I suspect you are thinking in terms of the parties, plural, because——

Judge KRAVITZ. Well, we won't have parties. I mean, the idea is this is all before Mr. Lanier and Mr. Meadow have the documents. So I am going to have to review them presumably under seal with no expertise at all with the defendants trying to convince me that it doesn't involve the public health and safety.

We are far better served by getting Mr. Meadow the documents and then having him tell me where the smoking guns are, and having him tell me that public health and safety is implicated. And so, no, we are not going to have the parties, because he won't have the documents before I decide what the confidential agreement is, and whether the statute is met.

And I will say in this regard, I am unsure. I—you know, we have heard it is only a problem in complex cases. But this statute applies to all cases. So in every single case—so if I have a case that involves a person, an employment case where a person was allegedly fired for having child pornography at work. Is that a case that has relevance to public health and safety? I mean, I am going to have to go through these questions on each one of my cases, not just the complex drug cases.

Mr. CANNON. I—what you say, since we have a couple of judges here, that I am astonished at how hard it is to be a judge, and I appreciate your work. And I don't see much reason to make it more difficult.

Judge Anderson, can I just follow up on this and add, ask this question: You said that your district has done a modest rule. In fact, under the current rules, no judge ever has to sign one of these agreements. You have talked about the pressure that he is under with his docket.

But aren't we—why do we have to have this rule, taken out of order, passed by Congress instead of going through the normal rule enabling process, to do something that judges already pretty much have discretion and are able to do?

Judge ANDERSON. And that is the best question that could be asked on this subject. We judges have life tenure, and why do we need some rule to hide behind on protective orders?

My answer is: We judges have to work very hard to stay current. We, in my district, we are assigned between five and six hundred cases per year. But we have to close out between two and three cases each working day to stay current.

So when the parties walk in with a settlement that they have worked out together and it provides for some payment of money, it is awfully difficult for the judge to say, "Well, I am going to stand in the way of that settlement. I am not going to approve it. We are going to trial." And the plaintiffs might lose at trial, and then the judge has impaired a compromise settlement that was worked out legitimately just in the court.

Mr. CANNON. Right. And that is a great answer. And part of the reason I am so anxious to give honor to the judiciary—you guys do a great job. These are very hard things. But isn't the answer to that to step back as a society and say we need more judges, or address the issue in some other way?

Because you didn't deal with the issue of: Do you have discretion? Clearly your court, your district, has taken upon itself an additional set of guidelines. And while they are modest compared to this bill, each individual judge has a great deal of latitude.

Shouldn't we be looking—and this is why it is inappropriate for this Subcommittee, because we are not the Subcommittee that deals with courts. And I have been on that—in fact I am on the other Subcommittee. We deal with this issue all the time. Isn't that the place where we say, "How do we want to administer justice in America? Do we need more judges? What is taking time? What are our judges not doing?"

And if our judges are not doing their—the job that you would like them to do based on your testimony, which is to be looking more carefully at these kinds of cases because someone may be impaired in the future, that the plaintiff may be impaired because he doesn't get his settlement, or otherwise. Shouldn't we be looking, then, at some other solution rather than a rule that we legislate instead of taking through the rules process?

Judge ANDERSON. Well, I am a big fan of the rules making process. And I will say we judges work very hard. But I join the bandwagon for more judges. I take a briefcase home every weekend to read for the next week.

Mr. CANNON. I will say that—and I know many, many Federal judges and state judges—that they work amazingly hard. And I don't want to make it more difficult by going out of order—regular order of the rules, regular order on our Committee—and do something that I just don't see a compelling reason for doing, especially when you have got judges like in your district, Judge Anderson, and who generally, who don't—without the support of your rule, judges around the country have, I think, have the same kind of discretion that this allows. They do have, I grant you, the kind of pressures. And maybe we ought to look at that.

And, the light—I see the time is running out.

Ms. SÁNCHEZ. The gentleman's time has expired.

And I would just also remind the Members of the Committee that the full Committee has jurisdiction over such issues, and they referred it to this Subcommittee. So it is proper for us to consider it here today.

I am going to just go into a second round of questions. I have a few last questions, and hopefully we will conclude the hearing fairly soon so that you gentlemen can get back to what you do in your normal, everyday lives.

I want to start with Judge Kravitz. In your prepared statement, you say that the Sunshine in Litigation Act would, and I am quoting from your testimony, "effectively amend the Federal Rules of Civil Procedure outside the rulemaking process, contrary to the Rules Enabling Act." And you add that "direct amendment of the Federal Rules through legislation circumvents the careful safeguards Congress itself has established."

But isn't it true that the act wouldn't actually amend the Federal Rules, but instead it would amend Title 28 of the United States Code?

Judge KRAVITZ. Well, technically it does. But it says that a court shall not enter an order under Rule 26(c) of the Federal Rules of Civil Procedure. That is what the act says.

So what it is doing is, in effect, amending the Rules of Civil Procedure and saying that a court cannot enter the order that is otherwise provided unless they make these findings.

And the Rules Enabling Act process is an exacting and thorough process, as I know Judge Anderson understands. There are—it is also transparent, completely transparent. We publish these rules for comment; we have—and for these rules, we had three hearings nationwide——

Ms. SÁNCHEZ. I understand that.

Judge KRAVITZ [continuing]. People testify.

Ms. SÁNCHEZ. I understand that. But I am just trying to get at the authority issue here because I want to make it clear for the record. It isn't the position of the Judicial Conference, is it, that Congress lacks the authority to legislate with respect to matters covered by the Sunshine in Litigation Act?

Judge KRAVITZ. No, no. No, no.

Ms. SÁNCHEZ. Okay.

Judge KRAVITZ. No. The idea is that there is a Rules Enabling Act process that Congress put together. It has worked extremely well. And the rules that come out of that process are very, very good, and they are based on empirical data, not stories from my courtroom. And——

Ms. SÁNCHEZ. I want to draw your attention to——

Judge KRAVITZ [continuing]. It is the——

Ms. SÁNCHEZ [continuing]. Something that Judge Abner Mikva has said, that the Sunshine in Litigation legislation involves, and I am quoting from him, "policy issues that should be decided by policymakers in Congress, not by judges."

And my question is: Why should Congress defer to the Judicial Conference if the Judicial Conference has, by its inaction, acted inconsistently with what Congress believes to be a fundamental mandate of good public policy, which is trying to protect the health and welfare of other potential victims who will never have this information come to light because of these secrecy orders?

Judge KRAVITZ. Well, listen, the Congress obviously has the power to pass legislation—it is not that. It is just that Congress established a very orderly and sensible process for coming up with rules of civil procedure and criminal procedure. That process has worked extremely well for the last 70 years on a variety of topics, many of which have policy implications to them.

And this is a way of short-circuiting that process—not getting the empirical information, not having input from a wide spectrum of professors and others. And so that is why I think the Judicial Conference is so adamant about the fact that this process has just worked so extremely well that——

Ms. SÁNCHEZ. I understand that. But we also do have processes in Congress by which receive testimony; we get experts to send testimony; we get to question witnesses, much like what is happening today. And, you know, there are—legitimately, if there is a perceived lack of movement in an area in which Congress has a fundamental policy interest in looking after——

Judge KRAVITZ. I can't disagree with you. All I can say, though, is I would like to see the empirical information about how often protective orders that have been entered in connection with discovery. I am not talking about sealed settlements that have actually ended up, in Federal court, ended up with a health and safety issue. We have looked at that issue carefully, and it is not there.

Ms. SÁNCHEZ. Let me ask you this, Judge Kravitz. Although it is perhaps that the number of them is not huge, or gross of the overall docket, would you agree with Mr. Meadow, though, that the potential people that are affected by just one could be in the tens of thousands if not hundreds of thousands?

Judge KRAVITZ. I would like to hear that information. We found that protective——

Ms. SÁNCHEZ. But what about the fact that Mr. Meadow can't provide it because there are all these secrecy agreements that hide the number of people that have been impacted?

Judge KRAVITZ. I will say that that was very dramatic. But I gather that—I would venture to say that Mr. Meadow actually filed pleadings in court. And those pleadings in court are subject to the constitutional right of public access. And Mr. Meadow, I am sure, makes very strong arguments in court in those public documents about the health and safety in the conduct of defendants. So—and you, the Congress and other people, can get copies of those pleadings.

I talked to Mr. Meadow—his Vioxx cases were in state court; they weren't in Federal court. We are talking about the Federal rules. And I just think we need to look carefully at what has actually happened in Federal court, not in state court, and see if there is a problem. And if it is a problem, we will deal with it.

Ms. SÁNCHEZ. I understand.

But the question, more specifically, was—leaving aside state cases—was to talk about Federal cases in which there is an interest in potential effects to other plaintiffs. Do you or do you not agree that a plaintiff who has been injured, or even killed, because of the negligence or the fault of another, keeping that information secret does have the potential to impact tens of thousands of people?

Judge KRAVITZ. It does. But I think we have to distinguish between during the course of discovery before trial or settlement and at the end of the case. And what I am saying is, the provisions here about the course of discovery are going to slow down things and not get Mr. Meadow the information he needs.

Now, if at the end of the case he believes that—well, first of all, if it is tried, it is all open to the public. If it is settled, and not he but somebody else wants access to that information, they have an ability to come to the courts.

And courts do modify orders; courts do vacate orders. In the Wyeth case dealing with the vaccines, the court vacated the order and allowed that information to go to public authority. But that is the end of the case, after we have gotten Mr. Meadow the information that he wants. And I thinks that is the real—but that this order requires it during the discovery process.

Ms. SÁNCHEZ. I understand that distinction that you are making.

Mr. Meadow, would you care to respond to that? Or I also have another question I would like to ask.

Mr. MEADOW. No, absolutely. The judge is right that when we file a complaint, it is public; it is a public document; you can go down to the courthouse and read it. But these complaints are mere allegations of what we think a company has done wrong. We don't have any specific information. It is not until we get the actual documents.

And, normally, after we file a complaint, it could be months before we get any documents because we spent the first 6 months negotiating for a protective order and for confidentiality. And when we finally get the confidentiality order, and we start getting the documents, those documents are redacted. And we have to fight yet again. The defendants who are going over these documents, and they are normally multi-billion-dollar corporations, usually turn on six to seven law firms to review the documents. So they have already been gone through.

And this legislation places the burden of whoever seeks the protective order on that who is seeking the order. So the defendants know what documents are affected by the protective order.

So the complaint, I don't think—I think it is a red herring in this because it is bare-bones, and nobody goes down and reads our complaints. You know, the press may pick it up, and then the company denies all allegations and says they are all false anyway. So until we get a protective order in place, we can't see the documents. And then we have a second go-around with those documents.

Ms. SÁNCHEZ. Thank you, Mr. Meadow.

My time has expired. I would now recognize Mr. Cannon for 5 minutes.

Mr. CANNON. Thank you, Mr. Kravitz. Did you want to respond to Mr. Meadow's comments?

Judge KRAVITZ. Well, I just—can I just give you—I have talked about anecdotal information, so I shouldn't do it. But here is a case I just tried about a year ago: The plaintiff alleged that the brakes on the truck were defective. The defendant alleged that the driver was drunk and asleep at the time of the truck accident, which killed two people.

Truckloads of information was given to the plaintiff under the form of a protective order, during the course of which we got the plaintiff's new information; there were experts on both sides. It was tried to a jury. The jury found that the driver was asleep and drunk and that the brakes were fine.

Now, that is—we know that at the end of the case. Now, tell me, at the beginning of this case, when the requests for information about the brakes were coming, is that a case that is relevant to public health and safety or not? I just don't know how I am going to decide that information in those cases. And you can go on and on about the scenarios.

So all I am saying is I think that there is—judges have the ability to modify orders, and they do. Judges have the ability at the end of the case to allow information that has been subject to a confidentiality agreement to get out to the public, so that if the brakes were found to be defective by the jury, and somebody else wanted

this information, they could get it. Of course, this all came out at a public trial of that case.

So I just think we—I would urge the Committee to just kind of look at the sealed settlement provisions differently from the discovery proceedings. And we do not need to impose further burdens and costs on litigants in the course of discovery; there is already plenty of them. And I do believe that this would impose significant costs, and it will result in Mr. Meadow not getting his documents any time soon.

Mr. CANNON. Thank you.

You know, these are complicated issues. And sitting on both this Committee and the Committee on Intellectual Property and the Courts, it is—let me just give you one little experience. I sat on that Committee for 6 years with Barney Frank. Now, Barney Frank and I are on the opposite sides of the political spectrum. But after 6 years, he left the Committee to be, I think, the Ranking Member on Financial Services. But we had a little chat, and it occurred to us—or to me, at least—that we had sat on that Committee and disagreed on many things but had never once disagreed about judicial oversight and economy.

And we have in place here a system that allows for the development of rules in an open and public fashion where all thoughts can be weighed. And that system was—actually I agree with you, Mr. Kravitz—that has worked for a long time. In fact, I was just thinking how long I have been involved as a lawyer, and it tracks back quite a ways. And it has worked well, and I have followed it closely.

On the other hand, we in Congress have some pretty dramatic authority. We, for instance, can get from you, outside of your agreement system that is, the content of the information that you can't disclose to us because we are Congress, and we are not constrained by those agreements. There are some limitations, and we have to work through those. But we have great powers.

And those great powers, I think, we need to use very thoughtfully, very carefully, especially when society is changing as rapidly as it is right now. We need to maintain, in some ways, continuity. And so in the regular order of developing a rule, things happen that make sense. And in the regular order of this Congress, things happen we hope that make sense.

And going out of regular order, it is true that the full Committee can't actually mark this bill up now. But this Subcommittee, I don't believe, can mark this bill up, and I am not—I don't believe that this testimony is even going to be relevant when we get to a full Committee markup if it goes that far.

There is a good reason for having these kinds of regular order. And it just seems to me that there is nothing that has been said here at this hearing that compels anything, any activity, by this Committee or by the full Committee.

I am very impressed with Judge Anderson's comments about what they have done and what he has done in his—the other judges in his district have done. That makes enormous sense.

I think that there is agreement by the panel that judges have a lot of latitude, and I don't think anyone would disagree with Judge Kravitz that orders can be changed. I don't think anybody would

disagree with Judge Kravitz that after a trial has happened that that is a different environment and that this rule would create burdens before you can get to that open a trial.

And, in fact, I believe that the greatest benefit that most plaintiffs really ultimately have is the threat of the trial that the defendants will have to defend. And going through that process may mean that the brakes are determined not to be defective. And, therefore, there are classes of people that could emerge to sue won't be empowered. But on the other hand, it means that you have gotten a decision in a public, open fashion, and that leaves a very small number of cases where you might have a settlement agreement.

And I think we have heard great insight on that process. I don't think that insight leads us to change the ordinary course and create by legislation a new rule. I think it makes it, gives a basis for thinking about how these things should go. And I think it creates a basis for other districts to look at what your district has done, Judge Anderson, and say, "Do we want to do the same kind of thing?"

I think that these are very powerful ideas, but they are not ideas that should motivate this Congress or any other to do a bill that would change by legislative fiat rules that have grown in an organic, open and public fashion.

And so, Madam Chair, my time is——

Ms. SÁNCHEZ. Would the gentleman yield?

Mr. CANNON. Certainly.

Ms. SÁNCHEZ. Just because Judge Kravitz seems to be so interested in empirical information, I would ask—and we will submit written questions as well, which I will go over shortly—but I would be interested to know just how many times judicial orders are actually changed regarding these confidentiality agreements. So if you have that information, we will allow you to submit that.

Judge KRAVITZ. It actually is, if you read the study on protective orders that is part of attached to my testimony, there are statistics—I don't have them at my hand——

Ms. SÁNCHEZ. Okay.

Judge KRAVITZ [continuing]. On modifications and which orders come through stipulations——

Ms. SÁNCHEZ. Because I would suspect—and this is just speculation on my part, of course, until I receive the information—that it is probably not very often that that occurs.

Judge KRAVITZ. I don't know that you are right about that.

But let me just say, too, I said in 6 percent of all cases where a protective order, in only 9 percent of that 6 percent involves personal injury. I mean, the vast number involves things that have nothing to do with personal injury.

So we could look at the—but I, my recollection was that there was information on there. And, actually, only 50 percent—50 percent—of those protective orders were actually stipulated. Most of them were litigated, and then there was a decision by a judge about them as to whether or not to have them.

Mr. CANNON. In reclaiming my time, let me just point out that you would expect a very small number of these orders would be reviewed, but they get reviewed when there is a serious issue. And

a judge, he gets paid—not enough, by the way; although we did increase that, and I——

Ms. SÁNCHEZ. We have attempted, have attempted—— [Laughter.]

Mr. CANNON. We ought to grab it on anything that will go.

At least we have done our work on our side, I believe. And hopefully the Senate can actually do something before they are out.

But the whole point here is that Federal judges are in a position of stature—and not adequately paid, but hopefully better paid in the future—to make these kinds of decisions about what is important and what kind of rules and what kind of rulings that they have issued should be changed.

And so I am not sure that the number is so important as compared to the fact that it is done by men of judgment and women of judgment when it is reasonably required. And I think that you are going to find that the bench is competent. And, therefore, the orders, the changes on those rulings are going to be appropriate, and not that the number is significant but the action by judges, I think, that you will find to be appropriate.

Thank you, Madam Chair.

Ms. SÁNCHEZ. That remains to be seen.

We want to thank all of the witnesses for their testimony today.

Without objection, Members will have 5 legislative days to submit any additional written questions—I told you I would tell you about that—which we will forward to the witnesses and ask that you answer as promptly as you can so that they can be made a part of the record.

Without objection, the record will remain open for 5 legislative days for the submission of any additional materials as well.

Again, I want to thank everyone for their patience. And I wish everyone a safe and productive August work period.

And this hearing of the Subcommittee of Commercial and Administrative Law is now adjourned.

[Whereupon, at 11:45 a.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

ATTACHMENTS TO THE PREPARED STATEMENT OF THE HONORABLE MARK R. KRAVITZ, JUDGE, U.S. DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

ATTACHMENT 1

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

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

Introduction and Methods

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

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

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

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

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

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

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

Findings

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

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

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

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

Table 1
Comparison of Total Caseload with Protective Order Activity

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

Table 2
Description of Samples Examined in More Detail

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

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

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

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

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

Table 3
Origin of Protective Order Activity

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

Table 4
Number of Motions to Which a Response was Filed

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

Table 5
Number of Responses to which a Reply was Filed

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

Table 6
Number of Motions for which a Hearing was Held

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

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

Table 7
Disposition of motions for protective orders

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

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

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

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

Table 8
Protective Orders Entered

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

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

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

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

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

Table 9
Objective of protective orders

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

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

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

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

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

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

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

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

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

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

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

Protective orders modified by the court

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

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

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

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

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

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

A confidentiality order was expanded to cover other documents.

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

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

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

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

Protective orders modified by agreement of the parties

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

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

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

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

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

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

Protective orders the court affirmatively declined to modify

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

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

Protective orders vacated by the court

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

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

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

Protective orders dissolved by agreement of the parties

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

Protective orders the court affirmatively declined to vacate

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

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

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

Table 13
Nature of Suit for Cases Involving Protective Order Activity

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

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

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

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

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

Table 15
Types of Parties in Cases Involving Protective Order Activity

A. District of Columbia

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

B. Eastern District of Michigan

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

C. Eastern District of Pennsylvania

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

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

A. District of Columbia

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

B. Eastern District of Michigan

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

C. Eastern District of Pennsylvania

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

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

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

Table 17
Disposition of Cases Involving Protective Order Activity

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

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

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

Appendix A

Nature of Suit for Cases Involving Any Protective Order Activity

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

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

Appendix B

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

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

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

ATTACHMENT 2

Sealed Settlement Agreements in Federal District Court

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Federal Judicial Center
2004

This Federal Judicial Center publication was undertaken in furtherance of the Center's statutory mission to develop and conduct education programs for the judicial branch. The views expressed are those of the authors and not necessarily those of the Federal Judicial Center.

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Appendix C. Descriptions of Cases with Sealed Settlement Agreements C-1

Acknowledgments

We are grateful to our colleagues Pat Lombard, Angelia Levy, David Guth, Donna Pitts-Taylor, Vashty Gobinpersad, and Estelita Huidobro for their assistance with this project. We are grateful to Ed Cooper, Rick Marcus, Russell Wheeler, Jim Eaglin, Syl Sobel, Tom Willging, Molly Treadway Johnson, Ken Withers, Martha Kendall, and Geoff Erwin for advice on this report. We are especially grateful to the clerks of court, other court staff, and archive personnel who provided us with information and helped us acquire access to court files.

The Report

The Judicial Conference of the United States' Advisory Committee on Civil Rules asked the Federal Judicial Center to conduct research on sealed settlement agreements filed in federal district court. Although the practice of *confidential* settlement agreements is common, the question is how often and under what circumstances such agreements are *filed* under seal.

Many civil cases settle before trial, and defendants commonly seek confidentiality agreements concerning the terms of settlement. Usually such agreements are not filed. A high proportion of civil cases settle,[1] but a sealed settlement agreement is filed in less than one-half of one percent of civil cases. In 97% of these cases, the complaint is not sealed.

The Law of Sealing

"It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." *Nixon v. Warner Communications Inc.*, 435 U.S. 589, 597 (1978) (footnotes omitted). "It is uncontested, however, that the right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes." *Id.* at 598.

Accountability is a principal reason for public access. *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982) ("An adjudication is a formal act of government, the basis of which should, absent exceptional circumstances, be subject to public scrutiny."); *Jessup v. Luther*, 277 F.3d 926, 928 (7th Cir. 2002) ("the public cannot monitor judicial performance adequately if the records of judicial proceedings are secret"); *id.* at 929 ("The public has an interest in knowing what terms of settlement a federal judge would approve and perhaps therefore nudge the parties to agree to."); *Union Oil Co. of California v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000) ("The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat, which requires compelling justification.").

Courts of appeals have determined that the common law presumption of access applies to documents filed with the court, although it does not apply to documents exchanged in discovery, *Federal Trade Commission v. Standard Financial Management Corp.*, 830 F.2d 404, 408 (1st Cir. 1987); *United States v. Amodeo*, 71 F.3d 1044, 1050 (2d Cir. 1995), or to settlement agreements not filed, *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 781–83 (3d Cir. 1994). Also, the presumption of public access is stronger for documents filed in conjunction with substantive action by the court than for documents filed as part of discovery disputes. *Anderson*

1. An analysis of disposition codes for civil terminations from 1997 through 2001 showed that 22% were dismissed as settled and 2% were terminated on consent judgment. Another 10% were voluntary dismissals, and some of these probably were settled. An additional 20% are coded as "other" dismissals.

v. Cyrovac Inc., 805 F.2d 1, 11 (1st Cir. 1986); *Leucadia Inc. v. Applied Extrusion Technologies Inc.*, 998 F.2d 157, 165 (3d Cir. 1993); *Foltz v. State Farm Mutual Automobile Insurance Co.*, 331 F.3d 1122, 1135–36 (9th Cir. 2003); *Chicago Tribune Co. v. Bridgestone/Firestone Inc.*, 263 F.3d 1304, 1312 (11th Cir. 2001).

Some court opinions have explicit statements that if a settlement agreement is filed with the court for the court's approval or interpretation, then denying the public access to the agreement requires special circumstances. *Bank of America National Trust & Savings Association*, 800 F.2d 339, 345 (3d Cir. 1986) ("Once a settlement is filed in the district court, it becomes a judicial record, and subject to the access accorded such records."); *Herrmreiter v. Chicago Housing Authority*, 281 F.3d 634, 637 (7th Cir. 2002) ("[Defendant's] desire to keep the amount of its payment quiet (perhaps to avoid looking like an easy mark, and thus drawing more suits) is not nearly on a par with national security and trade secret information. Now that the agreement itself has become a subject of litigation, it must be opened to the public just like other information (such as wages paid to an employee, or the price for an architect's services) that becomes the subject of litigation."); *Brown v. Advantage Engineering Inc.*, 960 F.2d 1013, 1016 (11th Cir. 1992) ("It is immaterial whether the sealing of the record is an integral part of a negotiated settlement between the parties, even if the settlement comes with the court's active encouragement. Once a matter is brought before a court for resolution, it is no longer solely the parties' case, but also the public's case. Absent a showing of extraordinary circumstances . . . , the court file must remain accessible to the public.").

Many appellate opinions have stressed the importance of the court's stating specific reasons for sealing a filed document. *In re Cendant Corp.*, 260 F.3d 183, 194 (3d Cir. 2001) ("Broad allegations of harm, bereft of specific examples or articulated reasoning, are insufficient."); *Stone v. University of Maryland Medical System Corp.*, 855 F.2d 178, 182 (4th Cir. 1988) ("the district court must provide a clear statement, supported by specific findings, of its reasons for sealing any records or documents, as well as its reasons for rejecting measures less drastic than sealing them"); *Hagestad v. Tragesser*, 49 F.3d 1430, 1435 (9th Cir. 1995) ("because the district court failed to articulate any reason in support of its sealing order, meaningful appellate review is impossible").

Only two federal district courts have local rules pertaining specifically to sealed settlement agreements. The District of South Carolina proscribes them, D.S.C. L.R. 5.03(C), and the Eastern District of Michigan limits how long they may remain sealed, E.D. Mich. L.R. 5.4. Forty-nine districts (52%) have local rules pertaining to sealed documents generally. Fourteen districts (15%) have rules covering only administrative mechanics (e.g., how sealed documents are marked),[2] thirty-two districts (34%) have rules covering how long a document may remain sealed (after which it is returned to the parties, destroyed, or un-

2. California Central, California Eastern, Colorado, Delaware, District of Columbia, Georgia Southern, Indiana Southern, Montana, New Hampshire, New York Northern, Oklahoma Western, Rhode Island, Vermont, Wisconsin Eastern.

sealed),[3] and twelve districts (13%) have good-cause rules.[4] These rules are compiled in Appendix B.[5]

Findings

We examined 288,846 civil cases that were filed in a sample of 52 districts. We found 1,270 cases with sealed settlement agreements (0.44%). That is one in approximately 227 cases.

The sealed settlement rate for individual districts ranges from considerably less than the national rate to considerably more than that rate. Figure 1 shows sealed settlement rates for individual districts. Three districts (6%) had no sealed settlement agreements—Indiana Northern, Iowa Southern, and South Dakota. Three districts (6%) had sealed settlement rates more than twice the national rate—Pennsylvania Eastern (0.94%), Hawaii (2.2%), and Puerto Rico (3.3%).[6]

We studied all eleven districts whose local rules require good cause to seal a document. The rate of sealed settlement agreements in those districts was 0.37%. The rate of sealed settlement agreements in the other districts was somewhat higher—0.45%—but the difference was not statistically significant.[7]

Sealed settlement agreements appear in cases of many different types. Table 1 shows nature-of-suit frequencies. More than half of the cases with sealed settlement agreements are either personal injury cases (30%) or employment cases (27%). Another fifth are either contract cases (11%) or civil rights cases (10%). Intellectual property cases account for 11% of civil cases with sealed settlement agreements, but the rate of sealed settlement agreements in such cases is relatively high (1.5%). Cases identified as Fair Labor Standards Act cases have an even higher rate of sealed settlement agreements (2.6%), almost six times the overall average. Because the court must approve settlement agreements in such cases, they are frequently filed.

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3. Arizona, California Northern, California Southern, Connecticut, Florida Southern, Idaho, Illinois Northern, Iowa Northern and Southern, Kansas, Maryland, Michigan Eastern, Michigan Western, Minnesota, Mississippi Northern and Southern, Missouri Eastern, New York Eastern, North Carolina Eastern, North Carolina Middle, North Carolina Western, North Dakota, Ohio Northern, Ohio Southern, Oregon, Pennsylvania Middle, Tennessee Eastern, Texas Eastern, Texas Northern, Utah, Virginia Western, Washington Western.

4. California Northern, Illinois Northern, Maryland, Michigan Western, Mississippi Northern and Southern, Missouri Eastern, New York Western, Oklahoma Northern, Tennessee Eastern, Utah, Washington Western. Note that the good-cause rule for the Western District of New York is new (May 1, 2003).

5. In May 2003 we presented to the Advisory Committee on Civil Rules a compilation of both federal and state rules on sealed trial court documents, at the committee's request. This compilation is available in our unpublished report, "Sealed Settlement Agreements in Federal District Court—May 2003 Progress Report," which, like this report, is available at www.fjc.gov.

6. The high rate for Pennsylvania Eastern is due largely to a single multidistrict litigation case; 79% of the cases with sealed settlement agreements that we found in that district were in this multidistrict litigation. The sealed settlement agreement rate in Hawaii is relatively high in part because sealing the record of successful settlement conferences is a relatively frequent practice there; approximately two-thirds of the cases we identified as containing sealed settlement agreements in Hawaii were so identified for this reason. The high rate of sealed settlement agreements in Puerto Rico appears to reflect a relatively more common practice of filing and sealing such agreements there.

7. $p = 0.63$.

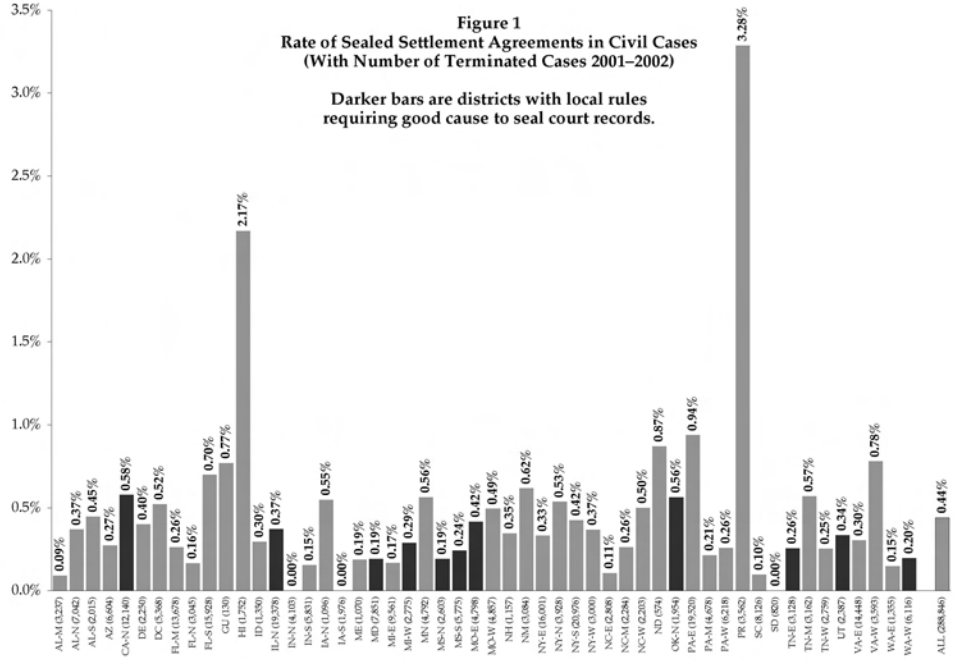
Figure 1
Rate of Sealed Settlement Agreements in Civil Cases
(With Number of Terminated Cases 2001–2002)
Darker bars are districts with local rules
requiring good cause to seal court records.
3.5%
3.0%
2.5%
2.0%
1.5%
1.0%
0.5%
0.0%
0.09%
0.37%
0.45%
0.27%
0.58%
0.40%
0.52%
0.26%
0.16%
0.70%
0.77%
2.17%
0.30%
0.37%
0.00%
0.15%
0.55%
0.00%
0.19%
0.19%
0.17%
0.29%
0.56%
0.19%
0.24%
0.42%
0.49%
0.35%
0.62%
0.33%
0.53%
0.42%
0.37%
0.11%
0.26%
0.50%
0.87%
0.56%
0.94%
0.21%
0.26%
3.28%
0.10%
0.00%
0.26%
0.57%
0.25%
0.34%
0.30%
0.78%
0.15%
0.20%
0.44%
AL-M (3,237)
AL-N (7,042)
AL-S (2,015)
AZ (6,604)
CA-N (12,140)
DE (2,250)
DC (5,368)
FL-M (13,678)
FL-N (3,045)
FL-S (15,928)
GU (130)
HI (1,752)
ID (1,350)
IL-N (19,378)
IN-N (4,103)
IN-S (5,831)
IA-N (1,096)
IA-S (1,576)
ME (1,070)
MD (7,851)
MI-E (9,561)
MI-W (2,775)
MN (4,792)
MS-N (2,603)
MS-S (5,773)
MO-E (4,798)
MO-W (4,867)
NH (1,157)
NM (3,084)
NY-E (16,901)
NY-N (3,928)
NY-S (20,976)
NY-W (3,000)
NC-E (2,808)
NC-M (2,284)
NC-W (2,203)
ND (574)
OK-N (1,954)
PA-E (19,520)
PA-M (4,678)
PA-W (6,218)
PR (3,562)
SC (8,126)
SD (820)
TN-E (3,128)
TN-M (3,162)
TN-W (2,759)
UT (2,387)
VA-E (14,448)
VA-W (3,593)
WA-E (1,355)
WA-W (6,116)
ALL (258,846)

Table 1. Types of Cases with Sealed Settlement Agreements

Nature of Suit	Number of Cases	Proportion Among Cases with Sealed Settlement Agreements[1]	Sealed Settlement Rate
Personal Injury	378	30%	0.82%
Personal Property	28	2%	0.64%
Real Property	7	1%	0.07%
ERISA	26	2%	0.19%
Fair Labor Standards Act	88	7%	2.58%
Other Employment/Labor	223	18%	0.75%
Other Civil Rights	124	10%	0.55%
RICO	9	1%	1.06%
Securities	10	1%	0.73%
Antitrust	10	1%	0.59%
Trademark	48	4%	1.19%
Patent	62	5%	2.17%
Copyright	29	2%	1.35%
Contract	145	11%	0.33%
Other	83	7%	0.08%
Total	**1,270**	**100%**	**0.44%**

1. Entries in the table sum to more than 100% because of rounding.

Sealed settlement agreements appear to be filed typically to facilitate their enforcement. If they are filed with the court, the same judge who heard the case can enforce the agreement without a new action being filed, and the court can enforce the agreement with contempt powers. Often the agreement is filed so that the court can approve it. Among cases with sealed settlement agreements, almost one-quarter (22%) were actions typically requiring court approval of settlement agreements. This includes cases involving minors or other persons requiring special protection (13%), actions under the Fair Labor Standards Act (7%), and class actions (6%).[8]

8. The three individual percentages add up to more than the overall percentage because some cases had more than one reason for court approval of settlements. A few cases with Fair Labor Standards Act claims had other nature-of-suit codes.

Sometimes the settlement agreement is not filed until one party believes it has been breached, and then it is filed as a sealed exhibit in a motion to enforce it. In approximately 11% of the cases with sealed settlement agreements, this was how the agreement came to be filed. In a few additional cases, there was a motion to enforce after the agreement was filed.

Occasionally the settlement agreement is not a sealed document filed with the court, but a part of a sealed or partially sealed proceeding or transcript. This was true for 13% of the cases we found with sealed settlement agreements.

In 97% of the cases with sealed settlement agreements, the *complaint* is not sealed. Almost the only time we encountered a sealed complaint was in cases in which the entire record is sealed. (Sometimes the docket sheet is sealed;[9] sometimes although the case file is sealed, the docket sheet is not.[10]) In one additional

9. We encountered 23 cases with sealed docket sheets: Cahaba Pressure-Treated Forest Products v. OM Group (AL-N 7:97-cv-01917 filed 07/25/1997) (fraud action dismissed as settled); Thomasson Lumber Co. v. Cahaba Pressure-Treated Forest Products (AL-N 7:98-cv-00043 filed 01/08/1998) (contract action dismissed as settled); Pennsylvania National Mutual Casualty Insurance Co. v. Cahaba Pressure-Treated Forest Products (AL-N 2:98-cv-01261 filed 05/19/1998) (insurance action dismissed as settled); Sealed Plaintiff v. Sealed Defendant (CA-N 4:00-cv-02945 filed 08/14/2000) (statutory action dismissed as settled); Sealed Plaintiff v. Sealed Defendant (CA-N 3:01-cv-01156 filed 03/21/2001) (statutory action dismissed as settled); Sealed Plaintiff v. Sealed Defendant (CA-N 3:01-cv-02928 filed 07/27/2001) (contract action dismissed as settled); Nick Chorak Mowing v. United States (DC 1:99-cv-00587 filed 03/08/1999) (contract action dismissed as settled); Engel v. Equifax Inc. (DC 1:01-cv-00882 filed 04/17/2001) (statutory action dismissed as settled); United States v. Board of Regents (FL-N 4:93-cv-40226 filed 06/25/1993) (statutory action dismissed as settled); Sealed Plaintiff v. Sealed Defendant (FL-S 0:01-cv-01845 filed 05/04/2001) (commerce action resolved by consent judgment); Casimiro v. Allstate (HI 1:99-cv-00527 filed 07/22/1999) (insurance action dismissed as settled); Kessler v. American Postal (MD 8:98-cv-03547 filed 10/21/1998) (statutory action dismissed as settled); United States v. Frederick Memorial (MD 1:01-cv-02923 filed 10/02/2001) (statutory action dismissed as settled); Compaq Computer Corp. v. SGII Inc. (MI-W 1:02-cv-00028 filed 01/16/2002) (trademark action dismissed as settled); Sealed Plaintiff v. Sealed Defendant (MN 0:98-cv-02428 filed 11/10/1998) (fraud action dismissed as settled); Sealed Plaintiff v. Sealed Defendant (MN 0:99-cv-00292 filed 02/18/1999) (fraud action dismissed as settled); Sealed Plaintiff v. Sealed Defendant (MN 0:02-cv-00369 filed 02/12/2002) (fraud action dismissed as settled); Sealed Plaintiff v. Sealed Defendant (MN 0:02-cv-04270 filed 11/07/2002) (contract action dismissed as settled); Sealed Plaintiff v. Sealed Defendant (MS-S 1:95-cv-00161 filed 03/23/1995) (statutory action dismissed as settled); Compass Marine v. Lambert Fenchurch (MS-S 1:99-cv-00252 filed 04/05/1999) (fraud action dismissed as settled); Arviso v. Mission Manor Health (NM 6:02-cv-01072 filed 08/27/2002) (statutory action dismissed as settled); United States v. Genesee Valley Card (NY-W 6:97-cv-06502 filed 11/12/1997) (statutory action dismissed as settled); United States v. 2986 Tallman Road (NY-W 6:01-cv-06155 filed 03/23/2001) (drug-related seizure of property case resolved by consent judgment).

10. We encountered 15 cases with sealed case files but unsealed docket sheets: a product liability action brought by a minor, Farr v. Newell Rubbermaid Inc. (AL-N 5:00-cv-00997 filed 04/18/2000); an employment action against the University of Michigan in which private medical information was an issue, Baker v. Bollinger (MI-E 4:00-cv-40239 filed 06/26/2000); a civil rights action by a minor against a county, M.K. v. Pinnacle Programs Inc. (MN 0:98-cv-02440 filed 11/13/1998); a wrongful death action against a city and a railroad, Schlicht v. Dakota Minnesota & Eastern Railroad Corp. (MN 0:98-cv-02059 filed 12/28/1999); a job discrimination action brought on behalf of children, Rowe v. Boys and Girls Club of America (MN 0:01-cv-202269 filed 12/10/2001); two consolidated foreclosure actions pertaining to gambling boat mortgages, Credit Suisse First Boston Mortgage Capital LLC v. Doris (MS-N 4:99-cv-00283 filed 11/22/1999), consolidated with Credit Suisse First Boston Mortgage Capital Inc. v. Bayou Caddy's Jubilee Casino (MS-N 4:99-cv-00284 filed 11/22/1999); a *qui tam* action under the False Claims Act against a hospital, United States *ex rel.* Padda v. Jefferson Memorial Hospital (MO-E 4:00-cv-00177 filed 02/03/2000); a RICO action by one unnamed plaintiff against three unnamed defendants, Sealed Plaintiff v. Sealed Defendant (NY-E 9:00-cv-04693 filed 08/11/2000); another product liability case with a mi-

case, all documents in the case file are sealed, including the complaint and the settlement conference report, except for the agreed judgment, which specifies the terms of settlement.[11]

We did not evaluate whether the sealing of documents complied with circuit law and local rules, but we did observe that the public record almost never included specific findings justifying sealing.

Some of the cases with sealed settlement agreements are likely to be of greater public interest than others. Table 2 lists some types of cases that might be of special public interest. The table shows how many cases of each type had sealed settlement agreements and the proportion of sealed settlement agreements that are in cases of each type. Approximately two-fifths of the cases with sealed settlement agreements have at least one of the features in Table 2 that might make them of special public interest. Appendix C contains case descriptions showing what the public record reveals about each of the 1,270 cases with sealed settlement agreements. Because the complaints are almost never sealed, the public record almost always identifies the defendants and reveals what the defendants are alleged to have done.

We had access to important terms of settlement in 18% of the cases with sealed settlement agreements. Occasionally this was because we had access to sealed documents. Sometimes sealed documents became unsealed. Sometimes documents that are not sealed disclose some or all terms of the settlement agreement. Analysis of information available in this way confirms that settlement agreements, sealed or otherwise, generally contain four essential elements: (1) a denial of liability, (2) a release of liability, (3) the amount of settlement, and (4) a requirement of confidentiality. In unfair competition cases, especially cases involving patents, the terms of settlement typically bind the parties to certain actions in addition to or instead of the payment of a settlement amount. In general, however, the only thing kept secret by the sealing of a settlement agreement is the amount of settlement.

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nor plaintiff, Keyes v. Deere & Co. (PA-E 2:98-cv-00602 filed 02/06/1998); an insurance case involving a workers' compensation claim, Slater v. Liberty Mutual Insurance Co. (PA-E 2:98-cv-01711 filed 03/31/1998); a copyright case, Valitek Inc. v. Hewlett-Packard Co. (PA-E 2:99-cv-03024 filed 06/15/1999); an insurance case against a church, Travelers Casualty & Surety Co. v. Church of the Lord Jesus Christ of the Apostolic Faith (PA-E 2:00-cv-03320 filed 06/29/2000); a patent case, Graham Packaging Co. v. Mooney (PA-M 1:00-cv-02027 filed 11/20/2000); and a third product liability case with a minor plaintiff, Angelo v. General Motors Corp. (PA-W 2:00-cv-00871 filed 05/04/2000).

11. This was a civil rights action for failure to prevent disclosure of the plaintiff's medical condition, Doe v. City of Tulsa (OK-N 4:00-cv-00896 filed 10/18/2000). We counted this as a case with a sealed settlement agreement, because although the agreed judgment was not sealed, other documents containing terms of settlement were sealed.

Table 2. Types of Cases That Might Be of Special Public Interest

Type of Case	Number of Cases	Proportion Among Cases with Sealed Settlement Agreements
Environmental	10	1%
Product Liability (includes cases with other nature-of-suit codes)[1]	258	20%
Professional Malpractice	40	3%
Public Party Defendant	152	12%
Very Serious Injury (death or serious permanent disability)[2]	334	26%
Sexual Abuse	31	2%
Any of These Reasons[3]	**503**	**40%**
None of These Reasons	**767**	**60%**

1. More than half of these cases arose from a 1998 airplane crash near Peggy's Cove, Nova Scotia (144 cases in the Eastern District of Pennsylvania). The 1996 crash of TWA Flight 800 taking off from Kennedy Airport also accounted for a substantial fraction of these cases (31 cases in the Southern District of New York).

2. More than half of these cases arose from the Peggy's Cove and TWA 800 airplane crashes (144 cases in the Eastern District of Pennsylvania and 33 cases in the Southern District of New York).

3. Some cases might be of special public interest for more than one reason. Over a third of these cases arose from the Peggy's Cove and TWA 800 airplane crashes.

Conclusion

Sealed settlement agreements are rare in federal court. They occur in less than one-half of one percent of civil cases. In 97% of these cases, the complaint is not sealed, so the public has access to information about the alleged wrongdoers and wrongdoings. Although the public record seldom contains specific findings justifying the sealing of settlement agreements, generally the only thing kept secret by the sealing is the amount of settlement.

Appendix A. Method

Districts

We looked for sealed settlement agreements in all 11 districts with local rules requiring good cause to seal a document and in a 50% random sample of the other districts.[12]

We originally designed our method so that we might include all districts in the study, but we studied the districts in a modified random order so that if we concluded the research without studying all districts, we would have studied a random sample. Because state court practices might influence federal practice, we decided to study districts in the same state together, and we decided that the same researcher should study all districts in the same state. So we listed the states (plus the District of Columbia, Guam, Puerto Rico, and the Virgin Islands) in random order and began studying the districts in that order.[13]

We modified random selection in the following ways. We began our research with districts in North Carolina, which is home to the overseeing subcommittee's chair (the Honorable Brent McKnight, U.S. District Judge for the Western District of North Carolina), so that his additional knowledge about cases in his district would serve as a check on our work. We also put at the top of the list states with districts that have local rules specifically concerning sealed settlement agreements. The Eastern District of Michigan has a rule calling for the unsealing of settlement agreements after two years. E.D. Mich. L.R. 6.4. The District of South Carolina has a new rule proscribing the sealing of settlement agreements. D.S.C. L.R. 5.03(C). We also put Florida at the top of the list, because of the state's groundbreaking "Sunshine in Litigation" law, Fla. Stat. § 69.081.

We decided that the first 47 districts in the list would provide a sample of sufficient size, taking into account an estimate that it would take approximately a year and a half to study that many districts. We determined that our time frame would permit us to supplement the random sample with the five otherwise unselected districts with local rules requiring good cause to seal a document. Our study would then include all 11 districts with good-cause rules,[14] permitting a rough comparison between those districts and a sample of other districts, especially with respect to sealed settlement rates.[15]

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12. The Western District of New York adopted a good-cause rule after the cases in this study were terminated.

13. The District of the Northern Mariana Islands is not included, because its docket sheets are not available electronically.

14. California Northern, N.D. Cal. Civ. L.R. 79-5; Illinois Northern, N.D. Ill. L.R. 26.2; Maryland, D. Md. L.R. 105.11; Michigan Western, W.D. Mich. L. Civ. R. 10.6; Mississippi Northern and Southern, N. & S. D. Miss. L.R. 83.6; Missouri Eastern, E.D. Mo. L.R. 83-13.05(A); Oklahoma Northern, N.D. Okla. L.R. 79.1(D); Tennessee Eastern, E.D. Tenn. L.R. 26.2; Utah, D. Utah L. Civ. R. 5-2; and Washington Western, W.D. Wash. L. Civ. R. 5. The Western District of New York adopted a good-cause rule after the cases in this study were terminated, *see* W.D.N.Y. L.R. 5.4(a) (adopted May 1, 2003).

15. Three of these additional districts—California Northern, Illinois Northern, and Oklahoma Northern—are in multidistrict states. We did not study the other districts in those states.

To test whether results from our modified random sample are likely to be different from an unmodified random sample, we computed the overall rate of sealed settlement agreements using a procedure somewhat different from just dividing the number of sealed settlements we found by the number of cases we examined. Nine districts were selected before we started selecting districts at random—districts in Florida, Michigan, North Carolina, and South Carolina. We computed an average by weighting each of these districts as 1. There are 85 other districts. Not considering the five districts that were selected only because they have good-cause rules (California Northern, Illinois Northern, Maryland, Oklahoma Northern, and Utah), we selected 38 at random. So we weighted these districts 85/38 = 2.24 in computing an average. Using this weighting scheme, we computed a sealed settlement rate of 0.46%, which is almost identical to the unweighted rate of 0.44%. We decided, therefore, to analyze our data as if our sample were truly random.

Termination Cohort

We decided to look at cases terminated over a two-year period—calendar years 2001 and 2002. Because we include all calendar months, there are unlikely to be any hidden seasonal biases. Looking at two years of terminations ensures that our data will not be based only on an idiosyncratic year.

Finding Sealed Settlement Agreements

Our search for sealed settlement agreements was a process of step-by-step elimination—upon closer and closer review—of cases that do not have sealed settlement agreements.

We rejected the idea of looking only at cases with disposition codes of "settled" or "consent judgment" in data reported to the Administrative Office because that would have eliminated 37% of the cases we ultimately found.[16] Even if we also looked at cases with disposition codes of "voluntary dismissal" and "other dismissal," we would have eliminated 20% of the cases we ultimately found.[17]

We attempted to download all 288,846 docket sheets for cases terminated in 2001 or 2002 in the study districts. We found 138 of the docket sheets (0.05%) to be sealed. We searched each unsealed docket sheet for the word "seal."[18] This search found "seal," "sealed," "unseal," etc., including "Seal," "Seale," etc., in a party name. Docket *entries* (and headers) with the word "seal" in them were extracted and assembled into a text file. If a docket *sheet* had the word "seal" in it, then we also searched for the word "settle" (which found "settle," "settled," "settlement," etc.), extracted docket *entries* with the word "settle" in them, and

16. Sixty percent of the cases we found were coded 13 = "dismissed: settled" and 4% were coded 5 = "judgment on consent."

17. Eight percent of the cases we found were coded 12 = "dismissed: voluntarily" and 9% were coded 14 = "dismissed: other."

18. Because the Northern District of Illinois has a procedure for restricting public access to documents without actually sealing them (although they may also be sealed), for that district we also searched for the word "restrict."

assembled them into the same text file as the docket entries with the word "seal" in them. Naturally, some docket entries had both the word "seal" and the word "settle" in them.

We considered, but rejected, looking only at cases in which a docket entry with the word "seal" had a date within two weeks, for example, of either the termination date or a docket entry with the word "settle." Had we done this, we would have missed 6% of the cases we ultimately found.[19]

The docket entries compiled using this method came from 15,043 cases. If "seal" and "settle" docket entries from the same case suggested that the case might or did have a sealed settlement agreement, then we read the entire docket sheet for that case. Sometimes, for example, a docket entry merely says "sealed document," and review of other docket entries is necessary to determine what the sealed document might be.[20]

This review of 2,262 docket sheets eliminated cases with sealed documents filed only at the beginning of *qui tam* actions or attached only to discovery motions, motions for summary judgment, or motions in limine.

When we reviewed a complete docket sheet, we determined two things. First, we determined whether the case might or did include a sealed settlement agreement. If so, then we identified which documents in the case file to review to learn what the case is about and to learn as much as possible about the sealed settlement agreement. We reviewed actual documents filed in 1,410 cases. Generally we reviewed complaints, cross-claims and counterclaims, court opinions, and documents pertaining, or possibly pertaining, to the settlement.

We were not able to determine with very good precision whether cases with sealed docket sheets contained sealed settlement agreements, so we regarded cases with sealed docket sheets that were terminated by consent judgment or settlement as containing sealed settlement agreements and cases terminated otherwise as not containing sealed settlement agreements.[21]

In this way we identified 1,270 cases among cases terminated over a two-year period in 52 districts that appear to have sealed settlement agreements.[22] Table A summarizes the number of cases reviewed in each district. Descriptions of these cases are presented in Appendix C.

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19. In one case the word "seal" is 627 days from both termination and the word "settle" (Franco v. Saks & Co., NY-S 1:00-cv-05522 filed 07/26/2000).

20. For this project, researchers who examined docket sheets and court documents all have law degrees—either a J.D. or an M.L.S. (master of legal studies, which typically requires approximately one year of law school). Tim Reagan reviewed documents from districts in California, Guam, Iowa, Michigan, Missouri, New Hampshire, North Carolina, Puerto Rico, South Carolina, and Virginia; Shannon Wheatman reviewed documents from districts in Florida, Hawaii, Indiana, Maine, Maryland, North Dakota, Pennsylvania, Puerto Rico, Virginia, and Washington; Marie Leary reviewed documents from districts in Alabama, Arizona, Delaware, Idaho, New York, and South Dakota; Natacha Blain reviewed documents from districts in Illinois, Minnesota, Mississippi, New Mexico, Oklahoma, Tennessee, and Utah; Steve Gensler reviewed documents from the District of Columbia.

21. We were given access to 17 of these sealed docket sheets, and our decision as to the presence of a sealed settlement agreement was based on a review of the docket sheets rather than the less precise rule of thumb.

22. This includes 23 cases (2%) with sealed docket sheets terminated either by consent judgment or settlement, according to data reported to the Administrative Office.

Table A. Number of Cases Examined in Each District

District	Cases Terminated in 2001 or 2002	Sealed Docket Sheets	Docket Sheets with Entries Examined	Docket Sheets Read	Case Files Examined	Cases with Sealed Settlement Agreements
Alabama Middle	3,237	0	80	4	3	3
Alabama Northern	7,042	3	745	26	24	26
Alabama Southern	2,015	1	78	22	9	9
Arizona	6,604	18	347	32	21	18
California Northern[1]	12,140	11	635	146	82	70
Delaware	2,250	0	213	13	9	9
District of Columbia	5,368	5	469	39	35	28
Florida Middle	13,678	17	529	103	43	36
Florida Northern	3,045	2	160	11	5	5
Florida Southern	15,928	16	669	260	128	111
Guam	130	0	7	3	1	1
Hawaii	1,752	2	458	42	40	38
Idaho	1,350	6	440	10	5	4
Illinois Northern[1]	19,378	0	649	99	80	72
Indiana Northern	4,103	1	216	11	0	0
Indiana Southern	5,831	0	200	60	13	9
Iowa Northern	1,096	0	42	15	6	6
Iowa Southern	1,976	0	69	9	0	0
Maine	1,070	0	141	10	2	2
Maryland[1]	7,851	8	232	20	15	15
Michigan Eastern	9,561	0	351	52	19	16
Michigan Western[2]	2,775	2	181	13	7	8
Minnesota	4,792	13	300	31	27	27
Mississippi Northern[2]	2,603	0	54	22	5	5
Mississippi Southern[2]	5,775	11	211	38	18	14
Missouri Eastern[2]	4,798	0	342	53	22	20
Missouri Western	4,857	0	167	35	27	24
New Hampshire	1,157	2	83	10	4	4
New Mexico	3,084	3	86	23	19	19
New York Eastern	16,001	0	495	88	59	53
New York Northern	3,928	0	192	27	22	21

Table A. Number of Cases Examined in Each District (continued)

District	Cases Terminated in 2001 or 2002	Sealed Docket Sheets	Docket Sheets with Entries Examined	Docket Sheets Read	Case Files Examined	Cases with Sealed Settlement Agreements
New York Southern	20,976	0	948	130	95	89
New York Western	3,000	12	106	20	12	11
North Carolina Eastern	2,808	0	143	12	4	3
North Carolina Middle	2,284	0	63	10	7	6
North Carolina Western	2,203	2	101	27	14	11
North Dakota	574	0	126	8	6	5
Oklahoma Northern[1]	1,954	0	176	35	15	11
Pennsylvania Eastern	19,520	0	655	208	192	183
Pennsylvania Middle	4,678	0	520	25	12	10
Pennsylvania Western	6,218	0	306	44	20	16
Puerto Rico	3,562	0	223	159	120	117
South Carolina	8,126	0	311	25	8	8
South Dakota	820	0	40	6	0	0
Tennessee Eastern[2]	3,128	0	249	15	11	8
Tennessee Middle	3,162	0	581	39	24	18
Tennessee Western	2,759	0	222	37	16	7
Utah[1]	2,387	3	179	11	8	8
Virginia Eastern	14,448	0	330	57	47	44
Virginia Western	3,593	0	112	41	31	28
Washington Eastern	1,355	0	70	3	2	2
Washington Western[2]	6,116	0	741	23	16	12
Total Number of Cases	**288,846**	**138**	**15,043**	**2,262**	**1,410**	**1,270**

1. District with a local rule requiring good cause for sealing and *not* part of the 50% random sample.
2. District with a local rule requiring good cause for sealing and part of the 50% random sample.

Appendix B
Federal District Court Local Rules on Sealed Records

This appendix is a compilation of federal district court local rules on sealed documents as of January 2004.[23]

Middle District of Alabama

No relevant local rule.

Northern District of Alabama

No relevant local rule.

Southern District of Alabama

No relevant local rule.

District of Alaska

No relevant local rule.

District of Arizona

Analysis: No restriction on the court's authority to seal a document. A sealed document may not remain under seal indefinitely. A document filed under seal in an action for which no trial commenced will be unsealed and eligible for destruction twenty-three years from the date final judgment or final disposition was entered. A document filed under seal in an action for which a trial commenced or an action was consolidated pursuant to Fed. R. Civ. P. 65(a) will be unsealed twenty-three years from the date final judgment or final disposition was entered and will remain stored as a permanent record. This rule does not apply to a document placed under seal in a case in which final judgment or final disposition occurred prior to 1990. Nor does it apply to sexual abuse cases filed pursuant to 18 U.S.C. § 3509 and juvenile cases, unless the record has been expunged.

District of Arizona Local Rule 1.3. Custody and Disposition of Exhibits and Sealed Documents.

(d) *Sealed Documents—Generally.* Unless otherwise ordered by the Court, any sealed document, paper, case file or thing in any action where final judgment or final disposition occurred in 1990 or thereafter, will be subject to the custody and disposition processes according to (e) or (f), below, as applicable.

(e) *Sealed Documents—Actions in Which No Trial Commenced.* Unless otherwise ordered by the Court, any document, paper, case file or thing filed under seal in any action for which no trial commenced shall be eligible for destruction no less than 23 years from the date of entry of final judgment or final disposition. The seal will be vacated without further action by the Court at the time of destruction.

(f) *Sealed Documents—Actions in Which the Case Was Terminated During or After Trial.* Unless otherwise ordered by the Court, any document, paper, case file or thing filed under seal in any action for which a trial commenced shall be unsealed without further action by the Court 23 years from the date of entry of final judgment or final disposition, and will remain stored as a permanent record. This rule further applies to all cases consolidated pursuant to Rule 65 (a), Federal Rules of Civil Procedure.

The following types of cases will be exempt from this practice:

- Sexual abuse cases filed pursuant to 18 U.S.C. § 3509.
- Juvenile cases, unless the record has been expunged.

Eastern and Western Districts of Arkansas

No relevant local rule.

Central District of California

Analysis: No restriction on the court's authority to seal a document. A sealed document may remain sealed indefinitely; no durational limitations are imposed by this rule. Disclosure can only occur upon written order of the court.

23. Marie Leary took the lead in compiling and analyzing these rules.

Central District of California Local Rule 79-5. Confidential Court Records.

79-5.1. Filing Under Seal—Procedures. No case or document shall be filed under seal without prior approval by the Court. Where approval is required, a written application and a proposed order shall be presented to the judge along with the document submitted for filing under seal. The proposed order shall address both the sealing of the application and order itself, if appropriate. The original and judge's copy of the document shall be sealed in separate envelopes with a copy of the title page attached to the front of each envelope. Conformed copies need not be placed in sealed envelopes. Where under-seal filings are authorized by statute or rule, the authority therefor shall appear on the title page of the proposed filing.

79-5.2. Confidential Court Records—Disclosure. No sealed or confidential record of the Court maintained by the Clerk shall be disclosed except upon written order of the Court.

79-5.3. Procedure for Disclosure of Confidential Court Records. An application for disclosure of sealed or confidential court records shall be made to the Court in writing and filed by the person seeking disclosure. The application shall set forth with particularity the need for specific information in such records. The procedures of L.R. 7-3 *et seq.* shall govern the hearing of any such application.

Eastern District of California

Analysis: No restriction on the court's authority to seal a document. A sealed document may remain sealed indefinitely; no durational limitations are imposed by this rule. Unsealing of a document must be made by court order.

Eastern District of California General Local Rule 39-138(b). Sealing of Documents.

Except as otherwise provided by statute or rule, documents may be sealed only upon written order of a Judge or Magistrate Judge. Court orders sealing documents are filed and maintained in the public case file and should not reveal the sealed information. A duplicate order is attached to the envelope containing the sealed documents. The case file shall reflect the date a document is ordered unsealed and by whom, and, if a document is resealed, the date and by whom.

Northern District of California

Analysis: The court must find that good cause to seal has been established before ordering a document or portions thereof to be placed under seal. A sealed document may not remain under seal indefinitely. Unless the court orders otherwise upon a showing of good cause at the conclusion of the case by a party that submitted the document that the court placed under seal, the document will be automatically unsealed and open to public inspection ten years from the date the case was transmitted to the National Archives and Records Administration or other court-designated depository.

Northern District of California Civil Local Rule 79-5. Sealed or Confidential Documents.

(a) *Applicability.* When a statute, a federal or local rule or a Court order permits documents or things to be filed under seal, i.e., not open to inspection by the public, the procedures set forth in this local rule apply.

(b) *Lodging Matter with Request to File Under Seal.* A party authorized by statute, rule or Court order to file a document under seal must lodge the document with the Clerk in accordance with this rule. The Clerk shall refer the matter to the assigned Judge pursuant to Civil L.R. 79-5(d). No document shall be filed under seal except pursuant to a Court order that authorizes the sealing of the particular document or portion thereof and is narrowly tailored to seal only that material for which good cause to seal has been established. Any order sealing any documents shall direct the sealing of only those documents, pages or, if practicable, those portions of documents or pages, which contain the information requiring confidentiality. All other portions of such documents shall be included in the public file.

Commentary: As a public forum, the Court will only entertain requests to seal that establish good cause and are narrowly tailored to seal only the particular information that is genuinely privileged or protectable as a trade secret or otherwise has a compelling need for confidentiality. Documents may not be filed under seal pursuant to blanket protective orders covering multiple documents. Counsel should not attempt to seal entire pleadings or memoranda required to be filed pursuant to the Federal Rules of Civil Procedure or these Local Rules.

(c) *Format*. The lodged document must be contained in an 8½ inch by 11 inch sealed envelope or other suitable container. The party must affix a cover sheet to the document and to its envelope or container, which must:

(1) Set out the information required by Civil L.R. 3-4(a) and (b);

(2) Set forth the name, address and telephone number of the submitting party;

(3) If filed pursuant to a previous Court order, state the date and name of the Judge ordering the matter filed under seal and attach a copy of the order; if filed pursuant to statute or rule, state the authorizing statute or rule and good cause for filing the submitted matter under seal;

(4) Prominently display the notation: "DOCUMENT FILED UNDER SEAL." When permitted by the Court order, the notation may also include: "NOT TO APPEAR ON THE PUBLIC DOCKET."

(d) *Motion to File Under Seal*. Counsel seeking to file a document or thing under seal, which is not authorized by statute or rule to be so filed, may file a motion under Civil L.R. 7-10 and lodge the document or thing with the Clerk in a manner which conforms with Civil L.R. 79-5(c). If pursuant to referral by the Clerk or motion of a party, the Court orders that a lodged document be filed under seal, the Clerk shall file the lodged document under seal. Otherwise, the lodged document shall be returned to the submitting party and the document shall not be placed in the file.

Commentary. Upon receipt of an order to file a lodged document under seal, the Clerk shall file-stamp the sealed envelope or container containing the document. Following receipt and away from public view, the clerk shall remove the item from the envelope, place a dated filed-stamp on the original document, enter it on the docket in a manner that ensures confidentiality consistent with this local rule, and place the document in a sealed folder which shall be maintained in a secure location at the courthouse of the assigned Judge or at the national Archives and Records Administration or other Court-designated depository.

(e) *Effect of Seal*. Unless otherwise ordered by the Court, any document, paper or thing filed under seal shall be kept from public inspection, including inspection by attorneys and parties to the action during the pendency of the case. Once a case is closed, any document, paper or thing filed under seal in a case shall be open to public inspection without further action by the Court 10 years from the date the case is transmitted to the National Archives and Records Administration or other Court-designated depository. However, a party that submitted documents, papers or other things which the Court placed under seal in a case may, upon showing good cause at the conclusion of the case, seek an order which would continue the seal until a specific date beyond the 10 years provided by this rule. Nothing in this rule is intended to affect the normal records destruction policy of the United States Courts.

Southern District of California

Analysis: No restriction on the court's authority to seal a document. A sealed document may not remain sealed indefinitely. Unless otherwise ordered by the court, a sealed document will be returned to the party that submitted it upon entry of the final judgment or termination of the appeal, if any.

Southern District of California Local Civil Rule 79.2. Books and Records of the Clerk.

b. *Sealed Documents*. Documents filed under seal in civil actions will be returned to the party submitting them upon entry of the final judgment or termination of the appeal, if any, unless otherwise ordered by the court.

c. *Sealing Orders*. Documents that are to be filed under seal must be accompanied by an order sealing them. If the order is also to be filed under seal, it shall so state.

District of Colorado

Analysis: No restriction on the court's authority to seal a document. A sealed document may remain sealed indefinitely; no durational limitations are imposed by this rule.

District of Colorado Local Civil Rule 7.2. Motions to Seal; Motions to Close Court Proceedings.

A. *Scope*. Upon motion and a showing of compelling reasons, a judicial officer may order that:

1. All or a portion of papers and documents filed in a case shall be sealed; or

2. All or a portion of court proceedings shall be closed to the public.

B. *Motion Open to Public Inspection*. A motion to seal or close court proceedings will be placed in the case file and open to public inspection.

C. *Proposed Filing.* A proposed filing of papers or documents will be submitted under seal until the motion to seal is decided by a judicial officer.

D. *Public Notice; Objections.* On the business day after the filing of a motion to seal or motion to close court proceedings, a public notice will be posted in the clerk's office and on the court's web site. The public notice will advise of such motion and state that any person or entity may file objections to the motion on or before the date set forth in such public notice. The date will be not less than three business days after the public notice is posted.

E. *Order.* No order to seal or close court proceedings will be entered before the date set forth in the public notice for filing objections, except in emergency circumstances shown or referred to in the motion.

District of Colorado Local Civil Rule 7.3. Procedures for Filing Papers and Documents Under Seal.

A. *Manner of Filing.* The following papers or documents must be placed unfolded in a sealed envelope with a copy of a cover page (see section B. of this rule) affixed to the outside of the envelope:

1. papers or documents ordered sealed by the court;

2. proposed filings of papers or documents submitted under seal with a motion requesting that the documents be sealed; and

3. documents required to be sealed by law.

B. *Cover Page.* The cover page affixed to the outside of the sealed envelope must include:

1. the case caption;

2. the title of the paper or document;

3. the name, address, and telephone number of the attorney or pro se party filing the paper or document;

4. a notation that the paper or document is filed under seal;

5. the title and date of the court order pursuant to which the paper or document is sealed, if applicable; or

6. the citation of the statute or other authority pursuant to which the paper or document is sealed, if applicable.

C. *Copies.* Copies of the papers or documents in sealed envelopes shall be filed in accordance with D.C. Colo. L. Civ. R. 10.1.L.

District of Connecticut

Analysis: No restriction on the court's authority to seal a document. A sealed document may not remain sealed indefinitely. If counsel did not file a motion for return of the sealed document, ninety days after final determination of the action the clerk may destroy the sealed document or send it with other parts of the file to the Federal Records Center, whereupon the document will be automatically unsealed without notice to counsel.

District of Connecticut Local Civil Rule 5(d). Serving and Filing Pleadings and Other Papers. Sealed Documents.

1. Counsel seeking to file a document under seal shall file a motion to seal and shall attach to the motion the document to be sealed. The document shall be submitted in an unsealed envelope, bearing the caption of the case, the case number, and the caption of the document to be sealed. The Clerk of the Court shall file-stamp the motion to seal and the document to be sealed, shall docket the motion and document and shall forward the motion to seal and the document to be sealed to the Court for consideration. If ordered sealed by the Court, the Clerk shall seal the document in the envelope provided by counsel, shall note the date of the sealing order on the envelope and docket sheet. Until such document is ordered sealed, the document shall be treated as a public document subject to public inspection. In the alternative, counsel can seek advance permission of the Court to file a document under seal without submitting the document to be sealed.

2. Counsel filing documents which are, or may be claimed to be, subject to any protective or impounding order previously entered shall file with the documents, and serve on all parties, a notice that the documents are, or are claimed to be, subject to such order or orders, identifying the particular order or orders by date, and shall submit such documents to the Clerk under seal.

3. Any file or document ordered sealed by the Court upon motion of the parties, by stipulation or by the Court, sua sponte, shall remain sealed pending further order of this Court, or any Court sitting in review. Upon final determination of the action, as defined in Rule 14 of the Local Rules of Civil Procedure, counsel shall have ninety (90) days to file a motion pursuant to Rule 14 for the return of the sealed documents. Any sealed document thereafter remaining may be destroyed by the Clerk pursuant to Rule 14 or retired by the Clerk with other parts of the file to the Federal

Records Center, whereupon they shall be automatically unsealed without notice to counsel.

District of Delaware

Analysis: No restriction on the court's authority to seal a document. A sealed document may remain sealed indefinitely; no durational limitations are imposed by this rule.

District of Delaware Local Rule 5.3. Number of Copies.

The original and one copy of pleadings, stipulations, motions, responses to motions, briefs, memoranda of points and authorities, appendices and any papers filed under seal shall be filed with the Clerk of Court. Any party filing papers under seal shall distinguish the original on the cover of the paper. The original of all other papers required to be filed shall be filed with the Clerk. Two copies of each paper filed with the Court shall be served on local counsel for each of the other parties. Whenever papers are captioned in more than one action, sufficient copies shall be furnished to permit the Clerk to file one copy in each action.

District of the District of Columbia

Analysis: No restriction on the court's authority to seal a document. A sealed document may remain sealed indefinitely; no durational limitations are imposed by this rule.

District of Columbia Federal District Court Local Civil Rule 5.1(j). Form and Filing of Pleadings and Other Papers. Sealed or Confidential Documents.

(1) Absent statutory authority, no cases or documents may be sealed without an order from the Court. Any pleading filed with the intention of being sealed shall be accompanied by a motion to seal. The document will be treated as sealed, pending the outcome of the ruling on the motion. Failure to file a motion to seal will result in the pleading being placed in the public record.

(2) Unless otherwise ordered or otherwise specifically provided in these Local Rules, all documents submitted for a confidential in camera inspection by the Court, which are the subject of a Protective Order, which are subject to an existing order that they be sealed, or which are the subject of a motion for such orders, shall be submitted to the Clerk securely sealed in an envelope/box needed to accommodate the documents. The envelope/box containing such documents shall contain a conspicuous notation that carries "DOCUMENT UNDER SEAL" or "DOCUMENTS SUBJECT TO PROTECTIVE ORDER," or the equivalent.

(3) The face of the envelope/box shall also contain the case number, the title of the Court, a descriptive title of the document and the case caption unless such information is to be, or has been, included among the information ordered sealed. The face of the envelope/box shall also contain the date of any order, or the reference to any statute permitting the item sealed.

(4) Filings of sealed materials must be made in the Clerk's Office during the business hours of 9:00 a.m. and 4:00 p.m. daily except Saturdays, Sundays and legal holidays. Filings at the security desk are prohibited because the Security Officers are not authorized to accept this material.

Middle District of Florida

No relevant local rule.

Northern District of Florida

No relevant local rule.

Southern District of Florida

Analysis: No specific restriction on the court's authority to seal a document; the party seeking to file a document under seal must set forth a reasonable basis for departing from the court's general policy of public filings. A sealed document may not remain sealed indefinitely unless the court's sealing order specifically provides for permanent sealing of the matter. A sealed document will be unsealed, destroyed, or returned to the filing party upon expiration of the time specified in the court's sealing order, which may not exceed five years from the date of filing absent extraordinary circumstances.

Southern District of Florida General Local Rule 5.4. Filings Under Seal; Disposal of Sealed Materials.

A. *General Policy.* Unless otherwise provided by law, Court rule or Court order, proceedings in the United States District Court are public and Court filings are matters of public record. Where not so provided, a party seeking to file matters under seal shall follow the procedures prescribed by this rule.

B. *Procedure for Filings Under Seal.* A party seeking to make a filing under seal shall:

1. Deliver to the Clerk's Office an original and one copy of the proposed filing, each contained in a separate plain envelope clearly marked as "sealed document" with the case number and style of the action noted on the outside. The Clerk's Office shall note on each envelope the date of filing and docket entry number.

2. File an original and a copy of the motion to seal with self-addressed postage-paid envelopes, setting forth a reasonable basis for departing from the general policy of a public filing, and generally describing the matter contained in the envelope. The motion shall specifically state the period of time that the party seeks to have the matter maintained under seal by the Clerk's Office. Unless permanent sealing is sought, the motion shall set forth how the matter is to be handled upon expiration of the time specified in the Court's sealing order. Absent extraordinary circumstances, no matter sealed pursuant to this rule may remain sealed for longer than five (5) years from the date of filing.

3. File an "ORDER RE: SEALED FILING" in the form set forth at the end of this rule. The form is available at the Clerk's Office. The bottom portion should be left blank for the Judge's ruling.

C. *Court Ruling.* If the Court grants the motion to seal, the Clerk's Office shall maintain the matter under seal as specified in the court order. If the Court denies the motion to seal, the original and copy of the proposed filing shall be returned to the party in its original envelope.

D. *Disposition of Sealed Matter.* Unless the Court's sealing order permits the matter to remain sealed permanently, the Clerk will dispose of the sealed matter upon expiration of the time specified in the Court's sealing order by unsealing, destroying, or returning the matter to the filing party.

Comment (2001): The current amendments are intended to reflect more accurately existing procedures, and to assist the court in the maintenance and ultimate disposition of sealed records by creating a form order which specifies how long the matter is to be kept under seal and how it is to be disposed of after the expiration of that time. By its terms, this rule does not apply to materials covered by specific statutes, rules or court orders authorizing, prescribing or requiring secrecy. However, litigants are required to complete an "Order Re: Sealed Filing" in the form set forth at the end of this rule for materials being filed under seal after the entry of, and pursuant to, a protective order governing the use of and disclosure of confidential information.

Middle District of Georgia

No relevant local rule.

Northern District of Georgia

No relevant local rule.

Southern District of Georgia

Analysis: No restriction on the court's authority to seal a document. A sealed document may remain sealed indefinitely; no durational limitations are imposed by this rule.

Southern District of Georgia Local Rule 79.7. Records and Documents. Sealed Documents.

(a) Papers submitted for filing with the Clerk may be placed under seal only where required by operation of law, these rules, or order of a judicial officer.

(b) Any person desiring to have any matter placed under seal shall present a motion stating grounds why a document filed with the Clerk should not be available for public inspection. The Clerk shall: (i) docket the motion as a Motion to Seal; (ii) refrain from labeling the filing as "sealed" or identifying the person seeking the sealing order unless the person consents; (iii) designate any accompanying papers as "sealed matter"; and (iv) maintain the motion and accompanying papers in a secure file pending a ruling on the Motion to Seal.

(c) If the Motion to Seal is denied, any papers which the person sought to have sealed, and which were submitted to the Clerk with the motion, shall be returned to the person, who shall then have the option of filing the papers in the normal course.

(d) Motions to Seal may extend to three layers of information: (1) the name of the movant; (2) the title of the filing sought to be sealed; and (3) the contents of the filing itself. In most cases, only the contents of the filing itself (e.g., proprietary data embodied within an in limine motion) will warrant sealing, not the title of the filing (e.g., Motion in Limine) or the identity of the movant (e.g., XYZ Tire Company). Therefore, unless the Court specified otherwise, the Clerk shall construe all sealing orders to extend only to the contents of the un-

derlying filing. The burden rests upon the moving party to justify all three sealing levels.

Southern District of Georgia Local Rule 83.28. Attorneys, Court Facilities, and Business. Release of Information by Courthouse Personnel.

All courthouse supporting personnel, including but not limited to the United States Marshal and his deputies, the Clerk and his deputies, the Probation Officer and probation clerks, bailiffs, court reporters, and any employees or subcontractors retained by the official court reporters, are prohibited from disclosing to any person, without authorization from the Court, any information relating to a pending grand jury proceeding, criminal case, or civil case that is not part of the public record of the Court. The public record of each case shall be those materials which are contained in the court's official file as maintained by the Clerk except such parts thereto as may be sealed, secret, impounded or specially set aside for in camera inspection. . . .

District of Guam

No relevant local rule.

District of Hawaii

No relevant local rule.

District of Idaho

Analysis: No restriction on the court's authority to seal a document. A sealed document may not remain sealed indefinitely. Unless the court orders otherwise, after the case is closed and the appeal time has expired, or if the case is appealed, after the conclusion of all appeals, the sealed document will be returned to the submitting party.

District of Idaho Local Rule 5.3. Sealed Documents and Public Access.

(a) *Motion to File Under Seal.* Counsel seeking to file a document under seal shall file an ex parte motion to seal, along with supporting memorandum and proposed order, and lodge the document with the Clerk of Court. Said motion must contain "MOTION TO SEAL" in bold letters in the caption of the pleading.

(b) *Motion to Seal Existing Documents.* Counsel seeking to place a pending case or filed document under seal shall file an ex parte motion to seal, along with supporting memorandum and a proposed order with the court. Said motion must contain "MOTION TO SEAL" in bold letters in the caption of the pleading. Portions of a document cannot be placed under seal. Instead, the entire document must be placed under seal in order to protect confidential information.

(c) *Public Information.* The Clerk of Court shall file and docket the motion to seal in the public record of the court. All lodged documents under seal will not be docketed, scanned or available for public inspection unless otherwise ordered by the court.

(d) *Format of Lodged Documents Under Seal.* Counsel lodging the material to be sealed shall submit the material in an UNSEALED 8½ x 11 inch manila envelope. The envelope shall contain the title of the court, the case caption, and case number.

(e) *Procedures.* The Clerk of Court will forward the lodged documents to the assigned judge for consideration. The assigned judge will direct the clerk to:

(1) File the documents under seal with any further specific instructions; or

(2) Return the documents to the offering party with appropriate instructions; or

(3) File the documents or materials in the public record.

(f) *Return of Sealed Documents to Public Record.* Because the Federal Records Center prohibits the storage of sealed records or documents, the clerk must unseal all documents and cases prior to shipment of any record to the Federal Records Center. Absent any other court order, the sealed documents will be returned to the submitting party after the case is closed and the appeal time has expired, or if appealed, after the conclusion of all appeals.

Central District of Illinois

No relevant local rule.

Northern District of Illinois

Analysis: The court must find that good cause has been shown before ordering a document to be filed as a restricted or sealed document. A restricted or sealed document may not remain restricted or under seal indefinitely. Except where the court, in response to a request of a party or on its own motion, orders otherwise, the clerk will place the restricted document in the public file sixty-three days following final disposition, including appeals of the case. If on written motion filed not more than sixty-three days following the

closing of the case period a party requests to have the restricted document turned over, the court may authorize the clerk to turn over the document to the party, destroy it, or retain the document as a restricted document no longer than twenty years and then destroy it.

Northern District of Illinois Local Rule 5.8. Filing Materials Under Seal.

Any document to be filed as a restricted or sealed document as defined by L.R. 26.2 must be accompanied by a cover sheet which shall include the following:

(A) the caption of the case, including the case number;

(B) the title "Restricted Document Pursuant to L.R. 26.2";

(C) a statement indicating that the document is filed as restricted in accordance with an order of court and the date of that order; and

(D) the signature of the attorney of record or unrepresented party filing the document.

Any document purporting to be a restricted or sealed document as defined in L.R. 26.2 that is presented for filing without the cover page or copy of the order shall not be treated as a restricted or sealed document, but shall be processed like any other document. In such instances the clerk is authorized to open the sealed envelope and remove the materials for processing.

Northern District of Illinois Local Rule 26.2. Protective Orders; Restricted Documents.

(a) *Definitions.* As used in this rule the term:

"Restricted document" means a document or an exhibit to which access has been restricted either by a written order or by a rule;

"Sealed document" means a restricted document which the court has directed be maintained within a sealed enclosure such that access to the document requires breaking the seal of the enclosure;

"Document awaiting expunction" means a document or an exhibit which the court has ordered held for possible expunction pursuant to 21 U.S.C. § 844(b)(2) but for which the period for holding prior to final destruction has yet to pass; and

"Protective order" means any protective order entered pursuant to Fed. R. Civ. P. 26(c), or any other order restricting access to one or more documents filed or to be filed with the court.

(b) *Restricting Order.* The court may on written motion and for good cause shown enter an order directing that one or more documents be restricted. The order shall also specify the persons, if any, who are to have access to the documents without further order of court. The minute order accompanying the order shall specify any qualifications as to access and disposition of the documents contained in the order.

(c) *Docket Entries.* The court may on written motion and for good cause shown enter an order directing that the docket entry for a restricted document show only that a restricted document was filed without any notation indicating its nature. Absent such an order a restricted document shall be docketed in the same manner as another document except that the entry will indicate that the document is restricted.

(d) *Inspection of Restricted Documents.* The clerk shall maintain a record in a manner provided for internal operating procedures approved by the Court of persons permitted access to restricted documents. Such procedures may require anyone seeking access to show identification and to sign a statement to the effect that they have been authorized to examine the restricted document.

(e) *Disposition of Restricted Documents.* When a case is closed in which an order was entered pursuant to section (b) of this rule, the clerk shall maintain the documents as restricted documents for a period of 63 days following the final disposition including appeals. Except where the court in response to a request of a party made pursuant to this section or on its own motion orders otherwise, at the end of the 63 day period the clerk shall place the restricted documents in the public file.

Any party may on written motion request that one or more of the restricted documents be turned over to that party. Such motions shall be filed not more than 63 days following the closing of the case period.

In ruling on a motion filed pursuant to this section or on its own motion, the court may authorize the clerk to do one of the following for any document covered by the order:

(1) turn over a document to a party; or

(2) destroy a document; or

(3) retain a document as a restricted document for a period not to exceed 20 years and thereafter destroy it.

Northern District of Illinois Internal Operating Procedure 30. Restricted Documents.

(a) *Separate Filing Area for Restricted Documents.* The clerk shall maintain restricted documents, sealed documents, and documents awaiting expunction as defined by L.R. 26.2(a) separately from the files of documents to which access has not been restricted. Any area used to store documents to which access has been restricted shall be secure from entry by any persons other than the clerk or those designated in writing by the clerk as authorized to have access. The clerk shall designate in writing deputies authorized to accept restricted documents either from chambers or for filing pursuant to protective orders. Materials accepted for filing as restricted shall be maintained in a secure area until collected by one of the designated deputies. Where the materials so accepted are being filed pursuant to a protective order, the deputy accepting them will stamp the cover of the document with a FILED stamp indicating the date of filing.

(b) *Handling Sealed Documents.* Where a document is ordered to be sealed, it is to be delivered for filing pursuant to L.R. 5.9 with the seal on the enclosure intact. If the document is sent from chambers or returned from an appellate court with the seal broken, one of the deputies authorized to handle restricted materials pursuant to section (a) will forthwith deliver the document to the courtroom deputy assigned to the judicial officer to whose calendar the proceedings to which the sealed document was filed is assigned. If that judicial officer is no longer sitting, the deputy will forthwith deliver the document to the courtroom deputy assigned to the emergency judge. The courtroom deputy will promptly bring the document to the attention of the judge. The judicial officer will either order that the document be resealed, or order that it continue to be handled as a restricted document, but not as a sealed document, or enter such other order as required to indicate the status of the document. Where the document is to be resealed, the judicial officer or courtroom deputy will reseal the document and transmit it to the appropriate deputy in the clerk's office. Where under the terms of a protective order a party is permitted to inspect a sealed document and that party appears in the clerk's office and requests the document, one of the deputies authorized to handle restricted materials pursuant to section (a) will obtain the document and provide an area where the person may inspect the document other than in the public area of the clerk's office. The deputy will complete a form showing the date, description of the document, the name of the person requesting access to the document, a statement indicating that the deputy has checked the protective order and it does indeed authorize the person to inspect the document, and a statement that the deputy requested of and was shown identification by the person requesting access to the document. Any person wishing to break the seal and inspect the document must sign the form completed by the deputy to indicate that they are authorized to inspect the document and have broken the seal. After the person has completed the inspection, the deputy will follow the procedures set out in the previous paragraph for handling the resealing of the document. . . .

Southern District of Illinois

No relevant local rule.

Northern District of Indiana

No relevant local rule.

Southern District of Indiana

Analysis: No restriction on the court's authority to seal a document. A sealed document may remain sealed indefinitely; no durational limitations are imposed by this rule.

Southern District of Indiana Local Rule 5.3. Filing of Documents Under Seal.

(a) *General Rule.* No document will be maintained under seal in the absence of an authorizing statute, Court rule, or Court order.

(b) *Filing of Cases Under Seal.* Any new case submitted for filing under seal must be accompanied by a motion to seal and proposed order. Any case presented in this manner will be assigned a new case number, District Judge and Magistrate Judge. The Clerk will maintain the case under seal until a ruling granting the motion to seal is entered by the assigned District Judge. If the motion to seal is denied, the case will be immediately unsealed with or without prior notice to the filing party.

(c) *Filing of Documents Under Seal.* Materials presented as sealed documents shall be inside an envelope which allows them to remain flat. Affixed to the exterior of the envelope shall be an 8½ x 11" cover sheet containing:

i. the case caption;

ii. the name of the document if it can be disclosed publicly, otherwise an appropriate title

by which the document may be identified on the public docket;

iii. the name, address and telephone number of the person filing the document; and

iv. in the event the motion requesting the document be filed under seal does not accompany the document, the cover sheet must set forth the citation of the statute or rule or the date of the Court order authorizing filing under seal.

(d) *Prohibition of Electronic Filing of Sealed Documents.* Sealed documents will not be filed electronically, but rather manually on paper. The party filing a sealed document shall file electronically a Notice of Manual Filing (see Form in Electronic Case Filing Administrative Policies and Procedures Manual for the Southern District of Indiana). The courtroom deputy to the District or Magistrate Judge should be contacted for instructions when filing certain ex parte documents which could not be disclosed by the electronic Notice of Manual Filing.

Northern and Southern Districts of Iowa

Analysis: No restriction on the court's authority to seal a document. A sealed document may not remain sealed indefinitely. Thirty days after a judgment has become final (sixty days if the United States is a party), or, if an appeal from the judgment is filed, thirty days after the issuance of the mandate by the circuit court, the clerk of court may unseal a document not claimed and withdrawn after (1) the clerk gives notice to the attorneys of record in the case and to any pro se parties of the clerk's intention to unseal the document; and (2) no response to the notice is filed within thirty days after the notice was sent. If a timely objection is filed, the document will be unsealed only upon an order of the court.

Northern and Southern Districts of Iowa Local Rule 1.1(k). General Provisions; Effective Date; Scope. Public Records.

All filings with the Clerk of Court's Office are public records and are available for public inspection unless otherwise ordered by the court or provided by a Local Rule or a statute of the United States. Materials may be filed under seal with the Clerk of Court, but only in accordance with the procedures prescribed in L.R. 5.1(e).

Northern and Southern Districts of Iowa Local Rule 5.1(e). Service, Filing of Papers, and Proof of Service. Sealed Documents and Exhibits.

A party seeking to file under seal a pleading, motion, document, or exhibit first must file a written request for leave to do so. The pleading, motion, document, or exhibit thereafter may be filed under seal only if the court so orders. If the court enters an order permitting or directing the parties to file certain designated materials under seal, the parties thereafter must file all such materials under seal without filing a further request to do so.

A request for leave to file materials under seal may be filed under seal ex parte and without prior court order. The request must be delivered by the Clerk of Court in a sealed envelope marked with the caption of the case and the notation, "FILED UNDER SEAL PURSUANT TO L.R. 5.1(e)."

Materials to be filed under seal must be filed in a sealed envelope marked with the caption of the case and the notation, "SEALED PURSUANT TO COURT ORDER ENTERED [DATE]."

All materials filed in response to or in connection with other materials filed under seal also must be filed in a sealed envelope marked with the caption of the case and the notation, "SEALED PURSUANT TO COURT ORDER ENTERED [DATE]."

Envelopes containing materials filed under seal may be opened only by the Clerk of Court, deputy clerks, federal judges, and their staff members.

Thirty days after a judgment has become final (60 days if the United States is a party), or, if an appeal from the judgment is filed, 30 days after the issuance of the mandate by the circuit court, sealed materials not claimed and withdrawn pursuant to L.R. 83.7(e) may be unsealed by the Clerk of Court after the following occurs:

1. The Clerk of Court gives notice to the attorneys of record in the case and to any pro se parties of the Clerk of Court's intention to unseal the materials; and

2. No response to the notice is filed within 30 days after the notice has been sent.

If a timely objection is filed, the document or exhibit will be unsealed only upon an order of the court.

A party intending to object to a notice of intention to unseal a document must, before filing the objection, confer with opposing counsel and any

pro se parties and attempt to reach an agreement on the disposition of the exhibit pursuant to L.R. 83.7(e) in lieu of the unsealing of the exhibit. An objection to a notice of intention to unseal must contain a statement describing the results of these efforts.

The procedures in this section do not apply to preindictment ex parte filings by the government in criminal cases or to cases where other procedures are required by statute.

District of Kansas

Analysis: No restriction on the court's authority to seal a document. A sealed document may not remain sealed indefinitely. A document placed under seal after October 22, 1998, will be unsealed ten years after a final judgment or dismissal was entered in the case, unless the court ordered otherwise at the time of entry of such judgment or dismissal. If a document placed under seal before October 22, 1998, is contained in a case that has been closed by entry of final judgment or order of dismissal for ten years or more, the clerk will lift the seal on the document after notifying the parties by written notice, unless a motion to extend the seal, served on all parties to the action, is filed within six months.

District of Kansas Local Rule 5.4.6. In re Procedural Rules for Electronic Case Filing. Sealed Documents.

Until the Electronic Filing System has adequate confidentiality procedures for sealed documents, documents ordered to be placed under seal must be filed conventionally and not electronically unless specifically authorized by the court. A motion to file documents under seal may be filed electronically unless prohibited by law. The order of the court authorizing the filing of documents under seal may be filed electronically unless prohibited by law. A paper copy of the order must be attached to the documents to be filed under seal and be delivered to the clerk.

District of Kansas Local Rule 79.4. Sealed Files and Documents in Civil Cases.

(a) *Documents/files sealed after the effective date of this rule.* Any file, pleading, motion, memorandum, order or other document placed under seal by order of this court in any civil action shall be unsealed by operation of this rule ten years after entry of a final judgment or dismissal unless otherwise ordered by the court at the time of entry of such judgment or dismissal. Any party, upon motion filed no more than six months before the seal is to be lifted, with notice to the remaining parties, may seek to renew the seal for an additional period of time not to exceed ten years. There shall be a rebuttable presumption that the seal shall not be renewed, and the burden shall be on the moving party to establish an appropriate basis for renewing the seal.

(b) *Documents/files under seal before the effective date of this rule.* On an ongoing basis, for a term of ten years from the effective date of the adoption of this rule, the clerk of the court will identify all civil files which have been sealed, or civil files in which sealed pleadings, motions, memoranda, orders or other documents are contained, and which files have been closed by entry of final judgment or order of dismissal, for a term of ten years or more, and at that time shall notify the parties, by written notice mailed to the last known address of counsel representing each party to the action, that:

(1) unless a motion to extend the seal, served on all parties to the action, is filed within six months, the seal will be lifted; and

(2) if a motion to extend the seal is filed, the burden shall be on the moving party to overcome a rebuttable presumption that the seal shall not be renewed and to establish an appropriate basis for renewing the seal.

In the event of a pro-se litigant all notices required by this rule shall be mailed to the last known mailing address of such litigant as reflected in the records of the Clerk of the District court in the file in issue.

(c) By its terms, this rule applies only to civil actions and does not apply to sealed files, documents, records, transcripts, or any other matter sealed in criminal cases.

Eastern and Western Districts of Kentucky

No relevant local rule.

Eastern District of Louisiana

No relevant local rule.

Middle District of Louisiana

No relevant local rule.

Western District of Louisiana

No relevant local rule.

District of Maine

No relevant local rule.

District of Maryland

Analysis: To file a document under seal, the court must consider the parties' joint motion to seal portions of the court record and any opposition thereto, refrain from ruling on the joint motion for at least fourteen days to permit interested parties to file objections, and consider any objections by interested parties. Then, the court must find and hold that alternatives to sealing would not provide sufficient protection and that sealing of the specified portion of the record would be appropriate. A sealed document may not remain under seal indefinitely. Upon final termination of an action, if any counsel fails to remove from the record the sealed document within thirty days of receiving notice from the clerk, the clerk may return the document to the parties, destroy it, or otherwise dispose of it.

District of Maryland Local Rule 105.11. Motions, Briefs and Memoranda. Sealing.

Any motion seeking the sealing of pleadings, motions, exhibits or other papers to be filed in the Court record shall include (a) proposed reasons supported by specific factual representations to justify the sealing and (b) an explanation why alternatives to sealing would not provide sufficient protection. The Court will not rule upon the motion until at least 14 days after it is entered on the public docket to permit the filing of objections by interested parties. Materials that are the subject of the motion shall remain temporarily sealed pending a ruling by the Court. If the motion is denied, the party making the filing will be given an opportunity to withdraw the materials.

Authors' Note: The district's form "Order Sealing Portions of the Court Record (Local Rule 105.11)" includes provisions not stated in Local Rule 105.11:

> 2. That the Sealed Record (as defined above) be, and hereby is, PLACED UNDER SEAL by the Clerk of the Court and that the Sealed Record shall be placed in an envelope or other container which is marked 'SEALED, SUBJECT TO ORDER OF COURT DATED _____.'
>
> 3. A copy of this Order shall be mailed to all counsel of record and to any other person entitled to notice hereof, and shall be docketed in the Court file.

District of Maryland Local Rule 113.2. Disposition of Exhibits. Upon Final Termination of Action.

Upon the final termination of an action, the Clerk shall send a notice to counsel advising them to remove from the record within thirty days of the notice all trial and hearing exhibits and all sealed materials which they presented at any time during the pendency of the action. If any counsel fails to do so, the clerk may return the materials to the parties, destroy the materials, or otherwise dispose of them.

District of Massachusetts

No relevant local rule.

Eastern District of Michigan

Analysis: No restriction on the court's authority to seal a document. A sealed document may not remain sealed indefinitely. Unless the court orders otherwise, a sealed settlement agreement will be unsealed and placed in the case file two years after the date on which it was sealed. The time limit for other sealed documents is sixty days from entry of final judgment and appellate mandate, if appealed.

Eastern District of Michigan Local Rule 5.3. Civil Discovery Material Sealed Under Protective Orders.

(a) *Filing.* Documents subject to a protective order must be filed pursuant to L.R. 5.1. In addition, each document subject to a protective order must be placed in a separate 9½ x 12 inch envelope and sealed closed. Each envelope must plainly state the full case caption, title of the document enclosed and the text, "FILED UNDER SEAL PUSUANT TO A PROTECTIVE ORDER" in bold, capital letters not less than one inch high.

(b) *Disposition.* Sixty days after the entry of a final judgment and an appellate mandate, if appealed, attorneys must present to the court a proposed order specifying whether the material sealed with protective order is (a) to be returned to the parties or (b) unsealed and placed in the case file. Failure to present the order will result in the court ordering the clerk to unseal the material and place it in the case file.

> *Comment:* L.R. 5.3 makes attorneys responsible for material sealed with a protective order. Upon receipt of sealed material, the Clerk's Office will provide copies of this Rule to the submitting party.

Attorneys are cautioned to seal only those documents specifically referenced in the protective order. If the sealed documents are exhibits to a motion, only the exhibits are to be filed under seal. Attorneys are instructed not to fasten, staple or bind sealed and public documents together.

Sealed settlement agreements or other material provided by statute, e.g., Qui Tam cases, are not covered by L.R. 5.3.

Eastern District of Michigan Local Rule 5.4. Sealed Settlement Agreements in Civil Cases.

Absent an order to the contrary, sealed settlement agreements will remain sealed for two years after the date of sealing, after which time they will be unsealed and placed in the case file.

Comment: L.R. 5.4 is an exception to L.R. 5.3. If a sealed settlement agreement is submitted to chambers for filing, the judge's courtroom deputy clerk will provide a copy of this Rule to the attorneys of record.

Western District of Michigan

Analysis: The court must find that there was good cause shown in order to seal a document. A sealed document may not remain sealed indefinitely. Unless the court orders otherwise, a sealed document will be unsealed thirty days after the case is terminated or any appeal is terminated, whichever is later.

Western District of Michigan Local Civil Rule 5.7(d)(ii). Service and Filing of Pleadings and Other Papers. Filing and Service by Electronic Means. Electronic Filing. Papers That May Not Be Filed Electronically.

The following documents may not be filed electronically, but must be submitted in paper form:

a. Documents filed under seal pursuant to W.D. Mich. L. Civ. R. 10.6;

. . . .

Western District of Michigan Local Civil Rule 10.6. Form of Pleadings and Other Papers; Filing Requirements. Filing Under Seal.

(a) *Request to Seal.* Requests to seal a document must be made by motion and will be granted only upon good cause shown. If the document accompanies the motion, it shall be clearly labeled "Proposed Sealed Document" and shall include an envelope suitable for sealing the document. The envelope shall have the caption of the case, case number, title of document, and the words "Contains Sealed Documents" prominently written on the outside. The document shall not be considered sealed until so ordered by the Court.

(b) *Documents Submitted Pursuant to Court Order.* A document submitted pursuant to a previous order by the Court authorizing the document to be filed under seal shall be clearly labeled "Sealed Document," shall be submitted in an envelope suitable for sealing the document, and identify the order or other authority allowing filing under seal. The caption of the case, case number, title of document, and the words "Contains Sealed Documents" shall be prominently written on the outside of the envelope.

(c) *Expiration of Seal.* Unless otherwise ordered by the Court, thirty days after the termination of a case or any appeal, whichever is later, sealed documents and cases will be unsealed by the Court.

District of Minnesota

Analysis: No restriction on the court's authority to seal a document. A sealed document may not remain sealed indefinitely. Four months after a case is closed, or if the case is appealed, thirty days after the filing and recording of the mandate of the appellate court disposing of the case, the parties must take away a sealed document in the clerk's custody, unless the court orders otherwise on its own motion or on the motion of any party or nonparty. If the document remains in the clerk's custody after the expiration of the time periods mentioned above, the clerk shall destroy the sealed document thirty days after the clerk notifies counsel in the case by mail, unless the court orders otherwise.

District of Minnesota Local Rule 79.1. Custody and Disposition of Records, Exhibits and Documents Under Seal.

(c) *Documents Subject to a Protective or Confidentiality Order.* Original documents filed subject to a protective or confidentiality order shall be separately stored and maintained by the Clerk and shall not be disclosed or otherwise made available to any person except as provided by the terms and conditions of the relevant order.

(d) *Removal of Models, Diagrams, Exhibits and Documents under Seal.* All models, diagrams, exhibits and documents subject to a protective or confidentiality order remaining in the custody of the Clerk shall be taken away by the parties

within four months after the case is finally decided unless an appeal is taken. In all cases in which an appeal is taken, they shall be taken away within 30 days after the filing and recording of the mandate of the Appellate Court finally disposing of the cause. On motion of any party, or on the request of any nonparty, or on the court's own initiative, the court may order that any model, diagram, exhibit or document shall be retained by the Clerk for such longer period of time as may be determined by the court, notwithstanding any of the foregoing requirements of this paragraph (d).

(e) *Other Disposition by the Clerk.* When models, diagrams, exhibits and documents subject to a protective or confidentiality order in the custody of the Clerk are not taken away within the time specified in the preceding paragraph of this rule, it shall be the duty of the Clerk to notify counsel in the case, by mail, of the requirements of this rule. Any articles, including documents subject to a protective or confidentiality order, which are not removed within 30 days after such notice is given shall be destroyed by the Clerk, unless otherwise ordered by the Court.

Northern and Southern Districts of Mississippi

Analysis: In order to seal a document the court must find good cause for placing the document under seal. A sealed document cannot remain sealed indefinitely. A sealed document will be unsealed and placed in the case file thirty days following final disposition (including direct appeal) of the action, unless the court (upon motion) orders otherwise. Any order permitting a document to be maintained under seal longer than thirty days must set a date for unsealing.

Northern and Southern Districts of Mississippi Local Rule 83.6. Sealing of Court Records.

(A) *Court Records Presumptively in Public Domain.* Except as otherwise provided by statute, rule, or order, all pleadings and other materials filed with the court ("court records") shall become a part of the public record of the court.

(B) *When and How Sealed; Redactions.* Court records or portions thereof shall not be placed under seal unless and except to the extent that the person seeking the sealing thereof shall have first obtained, for good cause shown, an order of the court specifying those court records, categories of court records, or portions thereof, which shall be placed under seal. The court may, in its discretion, receive and review any document in camera without public disclosure thereof and, in connection with any such review, determine whether good cause exists for the sealing of the document. Unless the court orders otherwise, the party seeking sealing shall file with the court redacted versions of court records when only a portion thereof is to be sealed.

(C) *Criminal Matters; Unsealing.* The Office of the United States Attorney shall present to the court a proposed order in connection with any indictment, complaint, or bill of information that the United States Attorney wishes to file under seal. Unless otherwise ordered by the Court, indictments, complaints, and bills of information filed under seal shall be unsealed after all defendants have made an appearance before the court.

(D) *Duration of Sealing.* Court records filed under seal in civil and criminal actions shall be maintained under seal for thirty days following final disposition (including direct appeal) of the action. After that time, all sealed court records shall be unsealed and placed in the case file unless the court, upon motion, orders that the court records be maintained under seal beyond the thirty-day period. All such orders shall set a date for unsealing of the court records.

Eastern District of Missouri

Analysis: The court must find that good cause exists before ordering a document to be placed under seal. A sealed document may not remain under seal indefinitely. Unless the court orders otherwise, a document filed under seal will be placed in the public file thirty days after a final order or other disposition has been issued in a civil action in the district court, or thirty days after the receipt of a mandate from the court of appeals in a case in which an appeal has been taken. Prior to the expiration of the thirty-day period following the termination of a case, a party may move for an order of the court either extending the seal for a specified additional time period or returning the sealed document to the filing party upon a showing of good cause.

Eastern District of Missouri Local Rule 83-13.05(A). Pleadings and Documents Filed Under Seal. Pleadings and Documents in Civil Cases.

(1) Upon a showing of good cause in a written motion of any party, the court may order that a

document or series of documents filed in a civil case be received and maintained by the clerk under seal. The clerk of court shall maintain such documents in a restricted area apart from the case file to which the public has access. Unless the docket reflects prior entry of an order to file under seal or the party offering a pleading or document presents the clerk with an order of the court authorizing a filing under seal or a motion for such order, all pleadings and documents received in the office of the clerk shall be filed in the public record of a civil case, except as otherwise required by law.

(2) Not less than thirty (30) days after a final order or other disposition has been issued in a civil action in the district court, or thirty (30) days after the receipt of a mandate from the court of appeals in a case in which an appeal has been taken, the clerk shall place in the public file all documents previously filed under seal, unless otherwise ordered by the court. Prior to the expiration of the thirty day period following the termination of a case, a party may move for an order of the court either extending the seal for a specified additional time period or returning sealed documents to the filing party upon a showing of good cause.

Western District of Missouri

No relevant local rule.

District of Montana

Analysis: No restriction on the court's authority to seal a document. A sealed document may remain sealed indefinitely; no durational limitations are imposed by this rule.

District of Montana Local Rule 77.6. Filing Under Seal.

Unless otherwise provided by statute or rule, no case or document shall be filed under seal without prior approval by the Court. If a filing under seal is requested, a written application and a proposed order shall be presented to the judge along with the document submitted for filing under seal. Unless otherwise ordered by the Court, the application and proposed order and document shall not be served on opposing parties. The original and judge's copy of the document shall be sealed in separate envelopes with a copy of the title page attached to the front of each envelope. Conformed copies need not be placed in sealed envelopes.

District of Nebraska

No relevant local rule.

District of Nevada

No relevant local rule.

District of New Hampshire

Analysis: No restriction on the court's authority to seal a document. A sealed document may remain sealed indefinitely; no durational limitations are imposed by this rule. The court may specify the duration of the sealing order in the court's order sealing the document.

District of New Hampshire Local Rule 83.11. Sealed Documents.

(a) *Filings, Orders, and Docket Entries.* All filings, orders, and docket entries shall be public unless:

(1) a filing, order, or docket entry must be sealed pursuant to state law, federal law, the Federal Rules of Criminal or Civil Procedure, or these rules;

(2) a filing, order, or docket entry has been sealed by order of another court or agency; or

(3) this court issues an order sealing a filing, order, or docket entry.

(b) *Levels of Sealed Filings, Orders, and Docket Entries.*

(1) Level I. Filings, orders, and docket entries sealed at Level I may be reviewed by any attorney appearing in the action without prior leave of court.

(2) Level II. Filings, orders, and docket entries sealed at Level II may be reviewed only by the filer or, in the case of an order, the person to whom the order is directed without prior leave of court.

(c) *Motions to Seal.* A motion to seal must be filed before the sealed material is submitted or, alternatively, the item to be sealed may be tendered with the motion and both will be accepted provisionally under seal, subject to the court's subsequent ruling on the motion. The motion must explain the basis for sealing, specify the proposed duration of the sealing order, and designate whether the material is to be sealed at Level I or Level II. Any motion to seal, upon specific request, may also be sealed if it contains a discussion of the confidential material. If the court denies the motion to seal, any materials tendered under provisional seal will be returned to the movant.

(d) *Filing Procedures.* All material submitted by a party either under seal or requesting sealed status, provisionally or otherwise, shall be placed in a sealed envelope with a copy of the document's cover page affixed to the outside of the envelope. The party shall designate the envelope with a conspicuous notation such as "DOCUMENTS UNDER SEAL," "DOCUMENTS SUBJECT TO PROTECTIVE ORDER," or the equivalent. If the basis for the document's sealed status is not apparent, an explanatory cover letter should also be attached to alert the clerk's staff of its special status.

Parties cannot seal otherwise public documents merely be agreement or by labeling them "sealed."

District of New Jersey

No relevant local rule.

District of New Mexico

No relevant local rule.

Eastern District of New York

Analysis: No restriction on the court's authority to seal a document. A sealed document may not remain sealed indefinitely. Following the issuance of an administrative order on February 21, 2001, all sealed records in civil and criminal cases that have been closed through calendar year 1995 were indexed and archived at the Federal Records Center, where they will remain sealed for twenty years, and then they will be destroyed after notice is given to the court. The court will periodically review sealed records in civil and criminal cases, and sealed records in cases that have been closed for at least five years also will be indexed and archived at the Federal Records Center.

Eastern District of New York Administrative Order 2001-02. In re Sealed Records (E.D.N.Y. February 21, 2001).

Whereas the Clerk of Court has within his possession in the Clerk's Office vault scores of boxes of sealed records in civil and criminal cases that have been closed for at least five (5) years;

it is ORDERED that all sealed records in civil and criminal cases that have been closed through calendar year 1995 be indexed and archived at the Federal Records Center, and remain sealed, with disposition within prescribed guidelines, after twenty years' time and upon prior notice to the Court,

and it is further ORDERED that records sealed in civil and criminal cases after the effective date of this Order be reviewed periodically and when closed for at least five (5) years, also shall be indexed and archived at the Federal Records Center.

SO ORDERED.

Northern District of New York

Analysis: No restriction on the court's authority to seal a document. A sealed document may remain sealed indefinitely; no durational requirements are imposed by this rule. A document sealed by court order will remain under seal until the court enters a subsequent order unsealing the document, either on its own motion or in response to a motion of a party.

Northern District of New York Local Rule 83.13. Sealed Matters.

Cases may be sealed in their entirety, or only as to certain parties or documents, when they are initiated, or at various stages of the proceedings. The court may on its own motion enter an order directing that a document, party or entire case be sealed. A party seeking to have a document, party or entire case sealed shall submit an application, under seal, setting forth the reason(s) why the document, party or entire case should be sealed, together with a proposed order for approval by the assigned judge. The proposed order shall include language in the "ORDERED" paragraph stating the referenced document(s) to be sealed and should include the phrase "including this sealing order." Upon approval of the sealing order by the assigned judge, the clerk shall seal the document(s) and the sealing order. A complaint presented for filing with a motion to seal and a proposed order shall be treated as a sealed case, pending approval of the order. Once a document or case is sealed by court order, it shall remain under seal until subsequent order, upon the court's own motion or in response to the motion of a party, is entered directing that the document or case be unsealed.

Southern District of New York

No relevant local rule.

Western District of New York

Analysis: A party must demonstrate a substantial showing for the court to place a document under seal. The party must submit an application under seal which sets forth the reasons for sealing the

document. A sealed document may remain sealed indefinitely unless the court orders otherwise. A party must obtain a court order in order to unseal the document.

Western District of New York Local Rule 5.4. Sealing of Complaints and Documents in Civil Cases.

(a) Except when otherwise required by statute or rule, there is a presumption that Court documents are accessible to the public and that a substantial showing is necessary to restrict access.

(b) Upon the proper showing, cases may be sealed in their entirety, or only as to certain parties or documents, when they are initiated, or at various stages of the proceedings. The Court may, on its own motion, enter an order directing that a document, party or entire case be sealed. A party seeking to have a document, party or entire case sealed shall submit an application, under seal, setting forth the reasons for sealing, together with a proposed order for approval by the assigned Judge. The proposed order shall include language in the "ORDERED" paragraph stating the referenced document(s) to be sealed. Upon approval of the sealing order by the assigned Judge, the Clerk shall seal the document(s). Upon denial of a sealing application, the Clerk shall notify the party of such decision. The party shall have five business days from the date of the notice to withdraw the document(s) submitted for sealing or appeal the decision denying the sealing request. If the party fails to withdraw the document(s) or otherwise appeal after the expiration of five business days, the document(s) shall be filed by the Clerk and made a part of the public record.

(c) When the sealing of a civil complaint is appropriate under either statute or this rule, the Clerk shall inscribe in the public records of the Court only the case number, the fact that a complaint was filed under seal, the name of the District Judge or Magistrate Judge who ordered the seal, and (after assignment of the case to a District Judge and a Magistrate Judge in the normal fashion) the names of the assigned District Judge and the assigned Magistrate Judge.

(d) A complaint presented for filing with a motion to seal and a proposed order shall be treated as a sealed case, pending approval of the order.

(e) Documents authorized to be filed under seal or pursuant to a protective order must be presented to the Clerk in envelopes bearing sufficient identification. The envelopes shall not be sealed until the documents inside have been filed and docketed by the Clerk's office.

(f) Unless an order of the court otherwise directs, all sealed documents will remain sealed after final disposition of the case. The party desiring that a sealed document be unsealed after disposition of the case must seek such relief by motion on notice.

Eastern District of North Carolina

Analysis: No restriction on the court's authority to seal a document. A sealed document may not remain sealed indefinitely. If counsel fails to retrieve the sealed document after the action concludes and all appeals are completed, within thirty days of final disposition the court may order the document to be unsealed upon ten days' notice by mail to counsel for all parties.

Eastern District of North Carolina Local Civil Rule 79.2. Sealed Documents.

(a) *Filing Sealed Documents.* Absent statutory authority, no cases or documents may be sealed without an order from the court. A party desiring to file material under seal must first file a motion seeking leave to file the information under seal, or have a court-approved protective order in place.

(b) *Proposed Sealed Documents.* All proposed, sealed material which accompanies a Motion to Seal shall be received by the clerk and temporarily sealed, pending a ruling on the motion to seal. The filing of a Motion to Seal documents will toll the time for filing the material. If the Motion to Seal is allowed, the sealed material shall be filed on the same date as the order allowing the filing under seal. If the motion to file the material under seal is denied, the movant will be given an option of retrieving the material or having it filed the same date as the order denying the filing under seal.

(c) *Docketing Sealed Documents.* When material is filed under seal, the docket will indicate generically the type of document filed under seal, but it will not contain a description that would disclose its identity.

(d) *Return of Sealed Materials.* After the action concludes and all appeals have been completed, counsel is charged with the responsibility of retrieving and maintaining all sealed documents. Upon 10 days notice by mail to counsel for all parties, and within 30 days after final disposition, the court may order the documents to be unsealed and they will thereafter be available for public inspection.

(e) *Form.* All under seal or potentially under seal documents shall be delivered to the clerk's office enclosed in a red envelope, marked with the case caption, case number, and a descriptive title of the document, unless such information is to be, or has been, among the information ordered sealed. Additionally, the following information will be prominently displayed:

SEALED PURSUANT TO THE
PROTECTIVE ORDER
ENTERED ON ___/___/98
or
PROPOSED SEALED MATERIAL:
SUBMITTED PURSUANT TO MOTION
TO SEAL FILED ON __/__/98

Middle District of North Carolina

Analysis: No restriction on the court's authority to seal a document. A sealed document may not remain sealed indefinitely. Within thirty days after the time for appeal has expired or thirty days after an appeal has been decided, the clerk may return a sealed document to the parties or destroy it. If the case file is transferred to the GSA for records holding, the court cannot ensure the confidentiality of a sealed document.

Middle District of North Carolina Local Rule 83.5(c). Custody and Disposition of Trial Exhibits, Sealed Documents, and Filed Depositions. Disposition of Exhibits, Sealed Documents, and Filed Depositions by Clerk.

Any exhibit, sealed document, disk, or filed deposition in the clerk's custody more than 30 days after the time for appeal, if any, has expired, or an appeal had been decided and mandate received, may be returned to the parties or destroyed by the clerk. Complaints, answers, motions, responses and replies, whether sealed or not, must be forwarded to the General Services Administration for permanent storage. The confidentiality of sealed documents cannot be assured after the case file is transferred to the General Services Administration for records holding.

Western District of North Carolina

Analysis: No restriction on the court's authority to seal a document. At final disposition of the case, a sealed document will be unsealed unless the court orders otherwise.

Western District of North Carolina Local Rule 5.1(D). Filing of Papers, Presenting Judgments, Orders, and Communications to Judge and Sealed Records. Sealed Matters.

(1) *New Civil Cases.* A civil complaint may be sealed at the time the case is filed if the complaint is accompanied by an ex parte motion of the plaintiff/petitioner accompanied by an order sealing the case. The case will be listed on the clerk's index as Sealed Plaintiff vs. Sealed Defendant.

(2) *Pending Cases.* A pending case may be sealed at any time upon motion of either party and execution by the court of a written order. Unless otherwise specified in the order, neither the clerk's case index nor the existing case docket will be modified.

(3) *Documents.* Documents ordered sealed by the court or otherwise required to be sealed by statute shall be marked as such within the document caption and submitted together with the judge's copy prepared in the same manner. If the document is sealed pursuant to a prior order of the court, the pleading caption shall include a notation that the document is being filed under court seal and include the order's entry date.

No document shall be designated by any party as "filed under seal" or "confidential" unless:

(a) it is accompanied by an order sealing the document;

(b) it is being filed in a case that the court has ordered sealed; or

(c) it contains material that is the subject of a protective order entered by the court.

(4) *Case Closing.* Unless otherwise ordered by a court, any case file or documents under court seal that have not previously been unsealed by the court order shall be unsealed at the time of final disposition of the case.

(5) *Access to Sealed Documents.* Unless otherwise ordered by the court, access to documents and cases under court seal shall be provided by the clerk only pursuant to court order. Unless otherwise ordered by the court, the clerk shall make no copies of sealed case files or documents.

District of North Dakota

Analysis: No restriction on the court's authority to seal a document. A sealed document in a civil action may not remain sealed indefinitely. Unless otherwise ordered by the court, the clerk must return a document filed under seal in a civil action

to the submitting party upon entry of a final judgment or termination of appeal, if any.

District of North Dakota Local Rule 5.1(F). Sealed Documents and Files.

(1) The clerk must return documents filed under seal in civil actions to the party submitting them, upon entry of a final judgment or termination of appeal, if any, unless otherwise ordered by the court.

(2) The clerk must retain custody of documents filed under seal in criminal cases, unless otherwise ordered by the court.

(3) The clerk must retain custody of entire files which are permanently sealed by statute or court order.

District Court for the Northern Mariana Islands

No relevant local rule.

Northern District of Ohio

Analysis: No restriction on the court's authority to seal a document. A sealed document may not remain sealed indefinitely. Unless the court orders to continue the seal for a specified period, the court will order the document to be unsealed thirty days after the termination of the case or any appeal, whichever is later.

Northern District of Ohio Local Civil Rule 5.2. Filing Documents Under Seal.

No document will be accepted for filing under seal unless a statute, court rule, or prior court order authorizes the filing of sealed documents. If no statute, rule, or prior order authorizes filing under seal, the document will not be filed under seal.

Materials presented as sealed documents shall be in an envelope which shows the citation of the statute or rule or the filing date of the court order authorizing the sealing, and the name, address, and telephone number of the person filing the documents.

If the sealing of the document purports to be authorized by court order, the person filing the documents shall include a copy of the order in the envelope. If the order does not authorize the filing under seal, or if no order is provided, the Clerk will unseal the documents before filing them. Before unsealing the documents, the Clerk will notify the person whose name and telephone number appears on the envelope in person (if he or she is present at the time of filing) or by telephone. The filer may withdraw the documents before 4:00 p.m. the day the Clerk notifies him or her of the defect. If not withdrawn, the documents will be unsealed and filed.

New cases submitted for filing without a signed sealing order will be assigned a new case number, District Judge and Magistrate Judge. The Clerk, without further processing, will send the file to the assigned District Judge for a sealing order. If a sealing order is signed, the Clerk will enter as much information as is permitted by the sealing order into the system to open and identify the case.

Thirty days after the termination of the case or any appeal, whichever is later, sealed documents and cases will be unsealed pursuant to court order, unless either a motion to continue the seal for a specified period of time or a motion to withdraw the document is filed and granted by the Court.

Southern District of Ohio

Analysis: No restriction on the court's authority to seal a document. A sealed document may not remain sealed indefinitely. Unless the court orders otherwise, counsel must withdraw the sealed document within six months after final termination of the action; if the document is not withdrawn by counsel, the clerk will dispose of it after the six-month withdrawal period has expired.

Southern District of Ohio Local Rule 79.2. Disposition of Exhibits, Models, Diagrams, Depositions, and Other Materials.

(a) *Withdrawal By Counsel.* All models, diagrams, depositions, photographs, x-rays and other exhibits and materials filed in an action or offered in evidence shall not be considered part of the pleadings in the action and, unless otherwise ordered by the Court, shall be withdrawn by counsel without further Order within six (6) months after final termination of the action.

(b) *Disposal By The Clerk.* All models, diagrams, depositions, x-rays and other exhibits and materials not withdrawn by counsel shall be disposed of by the Clerk as waste at the expiration of the withdrawal period.

Southern District of Ohio Local Rule 79.3. Sealed, or Confidential Documents.

(a) Unless otherwise ordered or otherwise specifically provided in these Rules, all documents submitted for a confidential in camera inspection

by the court, which are the subject of a Protective Order, which are subject to an existing order that they be sealed, or which are the subject of a motion for such orders, shall be submitted to the Clerk securely sealed in an envelope approximately 9" x 12" in size, or of such larger size as needed to accommodate the documents.

(b) The envelope containing such documents shall contain a conspicuous notation that it carries "DOCUMENTS UNDER SEAL," "DOCUMENTS SUBJECT TO PROTECTIVE ORDER," or the equivalent.

(c) The face of the envelope shall also contain the case number, the title of the court, a descriptive title of the document and the case caption, unless such information is to be, or has been, included among the information ordered sealed. The face of the envelope shall also contain the date of any order, or the reference to any statute permitting the item to be sealed. The date of filing of an order formally sealing documents, submitted in anticipation of such an order, shall be added by the Clerk when determined.

(d) The Clerk's file stamp and appropriate related information or markings shall be made on the face of the envelope. Should the document be ordered opened and maintained in that manner in the case records, the actual date of filing will be noted on the face of the document by the Clerk and the envelope retained therewith.

(e) Sealed or confidential documents shall be disposed of in accordance with Rule 79.2.

Eastern District of Oklahoma

No relevant local rule.

Northern District of Oklahoma

Analysis: The court must find that good cause exists before ordering that a document be placed under seal. A sealed document may remain under seal indefinitely; no durational limitations are imposed by this rule. Only the court or a court order can unseal the document.

Northern District of Oklahoma Local Rule 79.1(D). Records Kept by the Court Clerk. Sealing of Records.

No pleading, document, or record shall be placed under seal without a prior, specific order of the court finding good cause to do so. No seal shall be lifted, except by the court, or by court order.

Western District of Oklahoma

Analysis: No restriction on the court's authority to seal a document. A sealed document may remain sealed indefinitely; no durational limitations are imposed by this rule.

Frequently Asked Questions (www.okwd.uscourts.gov/faq). Filing Documents.

What is the procedure for filing a motion/document under seal?

When filing a motion/document under seal, you should follow these steps:

- Place the motion/document to be sealed in an open, large manila envelope.
- Prepare a cover motion requesting permission to file your motion/document under seal.
- Attach the cover motion by stapling it outside the envelope containing the motion/document to be sealed.
- File the motion/document to be sealed at the intake counter. The intake clerk will stamp both the documents and will immediately give it to the Chief Deputy Clerk or the Operations Manager for docketing and delivery to the presiding judge or magistrate judge.
- Once the judge or magistrate judge has ruled upon the cover motion to seal, the sealed motion/document will be sealed and placed in the vault or, in the case of denial of the motion, will be placed in the case file.

District of Oregon

Analysis: No restriction on the court's authority to seal a document. A sealed document may not remain sealed indefinitely. Unless a party submits to the clerk a motion to return the sealed document within sixty days after a case is closed or sixty days after an appeal is concluded, the document will be unsealed before it is sent to the Federal Records Center.

District of Oregon Local Rule 3.8. Sealed Cases.

(a) *New Action.* At the time a complaint is presented for filing, any party seeking to file the case under seal, must either:

(1) File a motion and supporting memoranda requesting the court to seal the file. Pending the court's ruling on the motion to

seal, the case file and records will be withheld from the public record; or

(2) Provide a citation to the authorizing legislation (if any). Upon verification of the legislation, the case file and associated records will be sealed and withheld from the public record.

(b) *Pending Action.* A party seeking to place a pending case under seal must file an appropriate motion requesting the court to seal the file and all associated electronic records.

(c) *Court's Responsibility.* After reviewing the motion and supporting materials, the court will either:

(1) Grant the motion and direct the clerk to file the case and all subsequent papers and electronic records under seal, and to limit future access to the sealed case to those individuals included in the order; or

(2) Deny the motion and direct the clerk to file the case in the public records of the court.

(d) *Access to Sealed Cases.* Subsequent access to the sealed case will be regulated by controlling statute or court order.

District of Oregon Local Rule 3.9. Sealed Documents.

(a) *Sealed Documents Generally.* Portions of a document cannot be placed under seal. Instead, the entire document must be placed under seal in order to protect confidential information.

(b) *Filing a Document Sealed by Previous Court Order.* When a previous court order authorizes the filing of a document or other materials under seal, the filing party must present the clerk with a copy of the court order and submit the materials in an envelope provided by the clerk's office marked "SEALED MATERIALS". In addition, all documents authorized to be filed under seal must have the words "AUTHORIZED TO BE FILED UNDER SEAL" typed directly below the document title.

(c) *Motions to File a New Document Under Seal.* Motions to file a new document under seal—even those offered by stipulation of the parties—will be handled as in camera submissions pursuant to L.R. 3.10.

(d) *Motion to Seal Previously Filed Documents.* A party seeking to place under seal a document that is currently in the public record, must file and serve a motion and proposed order pursuant to L.R. 3.9(e). Unless requested, the motion will be treated as a discovery motion pursuant to L.R. 26.5.

(e) *Order to Seal Documents and/or Cases.* (*See* L.R. 79.2.) A proposed order to seal a document or case must include language that:

(1) Identifies the persons authorized to review, copy, photograph, and/or inspect the sealed materials; and

(2) Instructs the clerk whether the document should be excluded from the electronic docket as well as the public case file.

(f) *E-Government Act of 2002.* In accordance with this rule, and the E-Government Act of 2002, a party authorized to file a document under seal may file an unredacted document which will be retained by the court as part of the official record. At the court's direction, the filing party may also be required to file a redacted copy of the sealed document for inclusion in the public case file. (*See* L.R. 10.3).

District of Oregon Local Rule 3.10. In Camera Submissions.

(a) *During Court Proceedings.* Documents or other materials offered and accepted for in camera inspection during a court proceeding will be handled in accordance with L.R. 3.10(c).

(b) *Tendered to the Clerk's Office.* Documents tendered ex parte to the clerk's office for transmission to the court and subsequent in camera inspection, must be:

(1) Accompanied by a transmittal letter or motion to the assigned judge requesting that the materials be reviewed in camera; and

(2) Enclosed in a separate envelope provided by the clerk's office and marked:

SEALED MATERIALS
For in Camera Inspection

(c) *Court Responsibility.* After completing the in camera inspection, the court will direct the clerk's office to:

(1) File the documents or materials in the public record; or

(2) File the documents under seal with appropriate disclosure instructions to the clerk; or

(3) Direct that the documents should be returned to the offering party with appropriate instructions.

(d) *Order Regulating Subsequent Disclosure.* *See* L.R. 3.9(e).

District of Oregon Local Rule 3.11. Return of Sealed Documents to the Public Record.

(a) *Unsealing Documents and Cases.* Because the Federal Records Center prohibits storage of sealed records or documents, the clerk must unseal all documents and cases prior to shipment of any record to the Federal Records Center.

(b) *Application to Return Sealed Documents.* Therefore, not later than sixty (60) days after a case is closed, or within sixty (60) days after the conclusion of any appeal, any party may file and serve a motion to have the clerk return a sealed document.

(c) *Authorization to Unseal Documents or Cases.* Unless otherwise restricted by federal law, and absent an application pursuant to L.R. 3.11(b), the clerk is authorized to unseal all previously sealed civil documents and cases before a record is shipped to the Federal Records Center.

District of Oregon Local Rule 100.17(c). Public Access to Electronic Records. Sealed Documents.

(*See also* L.R. 3.9.) A motion to file documents under seal may be filed electronically unless prohibited by law or otherwise ordered by the court. The order of the court authorizing the filing of documents under seal may be filed electronically unless prohibited by law. Documents ordered to be placed under seal must be filed conventionally and not electronically. A paper copy of the order must be attached to the documents filed under seal and delivered to the clerk.

Eastern District of Pennsylvania

No relevant local rule.

Middle District of Pennsylvania

Analysis: No restriction on the court's authority to seal a document. A sealed document may not remain sealed indefinitely. Unless good cause is shown, for all documents that are still under seal after the case is terminated, the court will unseal them no later than two years after the final judgment or the exhaustion of all appeals.

Middle District of Pennsylvania Local Rule 79.5. Unsealing of Civil Cases/Documents.

Unless good cause is shown, all civil cases and/or documents in those cases which still remain under seal after the case is terminated will be unsealed by the court no later than two (2) years after the final judgment and/or the exhaustion of all appeals.

Western District of Pennsylvania

No relevant local rule.

District of Puerto Rico

No relevant local rule.

District of Rhode Island

Analysis: No restriction on the court's authority to seal a document. A sealed document may remain sealed indefinitely; no durational limitations are imposed by this rule. The document will remain under seal until the court vacates or amends the order to seal.

District of Rhode Island Amended General Order 2002-01 (January 31, 2003). Motions to Seal.

A motion to seal shall be accompanied by the document(s) sought to be sealed and a written memorandum not exceeding 5 pages which sets forth the basis for seeking an order to seal. Upon receipt of a motion to seal and the supporting memorandum, the clerk shall docket the items received and transmit them immediately to the chambers of the judge to whom the case has been assigned. Any opposition to the motion to seal likewise shall be docketed and transmitted to the judge to whom the case has been assigned.

If the Court grants the motion to seal, all documents sealed shall be placed in an envelope and a copy of the Court's order shall be affixed thereto. The sealed envelope and its contents shall be retained by the clerk in a secure location until such time as the Court vacates or amends the order to seal. If the Court denies the motion to seal, the document shall be placed in the Court file in accordance with this Order and the Local Rules.

District of South Carolina

Analysis: Local rules prohibit the sealing of a settlement agreement, but local rules can be suspended for good cause.

District of South Carolina Local Civil Rule 1.02. Suspension or Modification.

For good cause shown in a particular case, the Court may suspend or modify any Local Civil Rule.

District of South Carolina Local Civil Rule 5.03. Filing Documents Under Seal.

Absent a requirement to seal in the governing rule, statute, or order, any party seeking to file documents under seal shall follow the mandatory procedure described below. Failure to obtain prior approval as required by this Rule shall result in summary denial of any request or attempt to seal filed documents. Nothing in this Rule limits the ability of the parties, by agreement, to restrict access to documents which are not filed with the Court. See Local Civil Rule 26.08.

(A) A party seeking to file documents under seal shall file and serve a "Motion to Seal" accompanied by a memorandum. See Local Civil Rule 7.04. The memorandum shall:

(1) identify, with specificity, the documents or portions thereof for which sealing is requested;

(2) state the reasons why sealing is necessary;

(3) explain (for each document or group of documents) why less drastic alternatives to sealing will not afford adequate protection; and

(4) address the factors governing sealing of documents reflected in controlling case law. E.g., *Ashcraft v. Conoco, Inc.*, 218 F.3d 288 (4th Cir. 2000); and *In re Knight Publishing Co.*, 743 F.2d 231 (4th Cir. 1984). A non-confidential descriptive index of the documents at issue shall be attached to the motion. A separately sealed attachment labeled "Confidential Information to be Submitted to Court in Connection with Motion to Seal" shall be submitted with the motion. This attachment shall contain the documents at issue for the Court's in camera review and shall not be filed. The Court's docket shall reflect that the motion and memorandum were filed and were supported by a sealed attachment submitted for in camera review.

(B) The Clerk shall provide public notice of the Motion to Seal in the manner directed by the Court. Absent direction to the contrary, this may be accomplished by docketing the motion in a manner that discloses its nature as a motion to seal.

(C) No settlement agreement filed with the court shall be sealed pursuant to the terms of this Rule.

District of South Dakota

No relevant local rule.

Eastern District of Tennessee

Analysis: The court must find that good cause exists before ordering a document to be placed under seal. Unless the court, upon motion, orders otherwise, a document filed under seal will be unsealed and placed in the case file thirty days following final disposition (including direct appeal) of the action. If the court orders that a document is to be maintained under seal longer than thirty days, the court order must set a date for unsealing the document.

Eastern District of Tennessee Local Rule 26.2. Sealing of Court Records.

(a) *Public Record.* Except as otherwise provided by statute, rule or order, all pleadings and other papers of any nature filed with the Court ("Court Records") shall become a part of the public record of this court.

(b) *Procedure.* Court Records or portions thereof shall not be placed under seal unless and except to the extent that the person seeking the sealing thereof shall have first obtained, for good cause shown, an order of the Court specifying those Court Records, categories of Court Records, or portions thereof which shall be placed under seal. The Court may, in its discretion, receive and review any document in camera without public disclosure thereof and, in connection with any such review, determine whether good cause exists for the sealing of the document. Unless the Court orders otherwise, the parties shall file with the Court redacted versions of any Court Record where only a portion thereof is to be placed under seal.

(c) *Criminal Matters. . . .*

(d) *Expiration of Order.* Court Records filed under seal in civil and criminal actions shall be maintained under seal for thirty (30) days following final disposition (including direct appeal) of the action. After that time, all sealed court records shall be unsealed and placed in the case file unless the Court, upon motion, orders that the Court Records be maintained under seal beyond the thirty (30) days. All such orders shall set a date for the unsealing of the Court Records.

Middle District of Tennessee

No relevant local rule.

Western District of Tennessee

No relevant local rule.

Eastern District of Texas

Analysis: No restriction on the court's authority to seal a document. A sealed document may not remain sealed indefinitely. Thirty days after the civil action has been finally disposed of by the appellate courts or thirty days from the date the appeal time lapsed, the clerk may destroy the paper original of the document after scanning. The clerk will maintain the database and prevent unauthorized access to the scanned document for the foreseeable future.

Eastern District of Texas Local Rule CV-79(a). Books and Records Kept by the Clerk. Disposition of Exhibits and/or Sealed Documents by the Clerk.

Thirty days after a civil action has been finally disposed of by the appellate courts or from the date the appeal time lapsed, the clerk is authorized to take the following actions:

(1) *Exhibits. . . .*

(2) *Sealed documents.* Scan the original documents into electronic images that are stored on the court's computer system in lieu of maintaining the original paper copies. The clerk shall ensure that the database of scanned images is maintained for the foreseeable future, and that no unauthorized access of the stored images occurs. Once a document has been scanned, the paper original will be destroyed.

Northern District of Texas

Analysis: No restriction on the court's authority to seal a document. A sealed document may not remain sealed indefinitely. Unless the court orders otherwise, a sealed document will be unsealed sixty days after final disposition of the case.

Northern District of Texas Local Rule 79.3. Ex Parte and Sealed Documents.

(a) Unless exempted by subsection (b) of this rule—

(1) An ex parte document, or a document that a party desires to be filed under seal, shall not be filed by the clerk under seal absent an order of a judge of the court directing the clerk to file the document under seal. The term "document," as used in this rule, means any pleading, motion, other paper, or physical item that the Federal Rules of Civil Procedure permit or require to be filed.

(2) A party who desires to file a document under seal must at the time the document is presented to the clerk for filing either present a motion to file the document under seal or demonstrate that a judge has ordered that the document be filed under seal. If no judge has been assigned to a case in which a motion is filed, the clerk may direct the motion to the duty judge or to another judge of the court for consideration.

(3) The clerk of court shall defer filing an ex parte document, or document that a party desires to be filed under seal, until a judge of the court has ruled on the motion to file the document under seal.

(b) The clerk shall file under seal any document that a statute or rule requires or permits to be so filed.

Northern District of Texas Local Rule 79.4. Disposition of Sealed Documents.

Unless an order of the court otherwise directs, all sealed documents will be deemed unsealed 60 days after final disposition of a case. A party who desires that such a document remain sealed must move for this relief before the expiration of the 60-day period. The clerk may store, transfer, or otherwise dispose of unsealed documents according to the procedure that governs publicly available court records.

Southern District of Texas

No relevant local rule.

Western District of Texas

No relevant local rule.

District of Utah

Analysis: The court must find that good cause has been shown before ordering a document to be sealed. A sealed document may not remain under seal indefinitely. Unless otherwise ordered by the court, a sealed document will be unsealed upon final disposition of the case.

District of Utah Local Civil Rule 5–2. Filing Cases and Documents Under Court Seal.

(a) *General Rule.* On motion of one or more parties and a showing of good cause, the court or, upon referral, a magistrate judge may order all or a portion of the documents filed in a civil case to be sealed.

(b) *Sealing of New Cases.*

(1) *On Ex Parte Motion.* A case may be sealed at the time it is filed upon ex parte motion of the plaintiff or petitioner and execution by the court of a written order. The case will be listed on the clerk's case index as *Sealed Plaintiff vs. Sealed Defendant.*

(2) *Civil Actions for False Claims.* When an individual files a civil action on behalf of the individual and the government alleging a violation of 31 U.S.C. § 3729, the clerk will seal the complaint for a minimum of sixty (60) days. Extensions may be approved by the court on motion of the government.

(c) *Sealing of Pending Cases.* A pending case may be sealed at any time upon motion of either party and execution by the court of a written order. Unless the court otherwise orders, neither the clerk's automated case index nor the existing case docket will be modified.

(d) *Procedure for Filing Documents Under Seal.* Documents ordered sealed by the court or otherwise required to be sealed by statute must be placed unfolded in an envelope with a copy of the cover page of the document affixed to the outside of the envelope. The pleading caption on the cover page must include a notation that the document is being filed under court seal. The sealed document, together with a judge's copy prepared in the same manner, must be filed with the clerk. No document may be designated by any party as *Filed under Seal* or *Confidential* unless:

(1) it is accompanied by a court order sealing the document;

(2) it is being filed in a case that the court has ordered sealed; or

(3) it contains material that is the subject of a protective order entered by the court.

(e) *Access to Sealed Cases and Documents.* Unless otherwise ordered by the court, the clerk will provide access to cases and document under court seal only on court order. Unless otherwise ordered by the court, the clerk will make no copies of sealed case files or documents.

(f) *Disposition of Sealed Documents.* Unless otherwise ordered by the court, any case file or documents under court seal that have not previously been unsealed by court order will be unsealed at the time of final disposition of the case.

District of Vermont

Analysis: No restriction on the court's authority to seal a document. A sealed document may remain sealed indefinitely; no durational limitations are imposed by this rule.

District of Vermont Local Rule 83.8. Sealed Documents.

(a) *Order Required.* All official files in the possession of the court are considered to be public documents available for inspection unless otherwise ordered. Cases or documents cannot be sealed without an order from the court.

(b) *Filing Procedure.* To request that a filing be sealed, a separate Motion to Seal must accompany the specific item to be sealed.

(c) *Documents Filed Under Protective Order.* Any party filing a prospectively sealed document must place the document in a sealed envelope and affix a copy of the document's cover page (with confidential information deleted) to the outside of the envelope. The party must designate the envelope with a conspicuous notation such as "DOCUMENTS SUBJECT TO PROTECTIVE ORDER," or the equivalent.

District Court for the Virgin Islands

No relevant local rule.

Eastern District of Virginia

No relevant local rule.

Western District of Virginia

Analysis: No restriction on the court's authority to seal a document. A sealed document may not remain sealed indefinitely. Unless a district judge or magistrate judge expressly orders otherwise, a sealed document will be unsealed within thirty days of the date that it was ordered sealed.

Western District of Virginia Local Rules, Part XIII.A. Standing Order in re Unsealing of Documents Placed Under Seal with the Court.

This Standing Order governs the unsealing of documents, pleadings and files (except presentence reports, pretrial service reports, psychiatric and psychological reports and any other matter required by statute or rule of court to be sealed) placed under seal with the Court in criminal, civil or miscellaneous matters unless the provisions of this Order are expressly countermanded by a District Judge or Magistrate Judge in a matter pending before him or her. Nothing in this Standing Order shall be construed to prevent a District Judge or Magistrate Judge from expressly excepting a document, pleading or file pending before him or her from this Standing Order. This Standing Order is not retroactive.

Unless a District Judge or Magistrate Judge of this Court expressly orders to the contrary in a matter pending before him or her, it is hereby ORDERED as follows as to documents, pleadings and files that have been ordered sealed:

(1) search warrants are to be unsealed within twenty-four (24) hours of execution;

(2) arrest warrants are to be unsealed after execution;

(3) indictments are to be unsealed within thirty (30) days of return of the indictment or when all defendants are in custody or summoned, whichever is sooner;

(4) criminal complaints are to be unsealed within thirty (30) days of issuance or when all defendants are in custody or summoned, whichever is sooner;

(5) motions to seal shall be unsealed when the documents, pleadings or files to which they pertain are unsealed;

(6) all other documents, pleadings and files are to be unsealed within thirty (30) days from the date of the order to seal; and

(7) each defendant shall be provided an unredacted copy of the charges against him or her even if the matter is otherwise sealed.

Unless a District Judge or Magistrate Judge expressly orders to the contrary in a matter pending before him or her, the sealing of any document, pleading or file shall be considered only upon written motion.

It is further ORDERED that the Clerk of the Court shall maintain a list of sealed matters assigned to each District Judge and Magistrate Judge for that Judge's review.

The Clerk is directed to enter this order in the order books for each division of this Court and to send certified copies to the District Judges, Magistrate Judges and United States Attorney for this District.

ENTERED this 19th day of December 1997.

Eastern District of Washington

No relevant local rule.

Western District of Washington

Analysis: In order to seal a document, the court must find that the strong presumption in favor of public access to the court's files and records has been overcome by a compelling showing that the interests of the public and the parties in protecting the document from public review outweigh this presumption. A sealed document may not remain sealed indefinitely. If the court has ordered only the document in a civil action to be placed under seal, the court will return the sealed document to the submitting counsel or party after the case has terminated and the time for appeal has run. In civil actions in which the court ordered that the entire case file, including the document, be placed under seal, the court will destroy the sealed case file after the case has terminated, the time for appeal has run, and the parties have been given sixty days' notice.

Western District of Washington Local Civil Rule 5(g). Service and Filing of Pleadings and Other Papers. Sealing of Court Records.

(1) This rule sets forth a uniform procedure for sealing court files, cases, records, exhibits, specified documents, or materials in a court file or record. There is a strong presumption of public access to the court's files and records which may be overcome only on a compelling showing that the public's right of access is outweighed by the interests of the public and the parties in protecting files, records, or documents from public review. Nothing in this rule shall be construed to expand or restrict statutory provisions for the sealing of files, records, or documents.

(2) The court may order the sealing of any files and records on motion of any party, on stipulation and order, or on the court's own motion. If no defendant has appeared in the case, the motion to seal may be presented ex parte. The law requires, and the motion and the proposed order shall include, a clear statement of the facts justifying a seal and overcoming the strong presumption in favor of public access.

(3) Each document to be filed under seal must be submitted in a separate envelope, clearly identifying the enclosed document and stating that the document is "FILED UNDER SEAL." For example, if both the motion and the accompanying affidavit should be filed under seal, the two documents must be submitted in separate, clearly marked envelopes so that each may be entered on the docket. If only one exhibit or document needs to be filed under seal, only that exhibit or document should be submitted in an envelope.

(4) Sealed files and records, or any part thereof, shall remain sealed until the court orders unsealing on stipulation of the parties, motion by any party or intervenor, or the court's own motion. Any party opposing the unsealing must make a compelling showing that the interests of the parties in protecting files, records, or documents from

public review continue to outweigh the public's right of access.

(5) If the court orders the sealing of any files or documents pursuant to the above provisions, the clerk shall:

(A) file the order to seal;

(B) seal the file, record, or documents designated in the order to seal and secure it from public access;

(C) in civil actions in which only portions of the file have been placed under seal, return sealed documents to the submitting counsel or party after the case has concluded and the time for appeal has run;

(D) in civil actions in which the entire file has been placed under seal, destroy the sealed file after the case has concluded, the time for appeal has run, and the parties have been given sixty days' notice of the proposed destruction.

Northern District of West Virginia

No relevant local rule.

Southern District of West Virginia

No relevant local rule.

Eastern District of Wisconsin

Analysis: No restriction on the court's authority to seal a document. A sealed document may remain sealed indefinitely; no durational limitations are imposed by this rule.

Eastern District of Wisconsin General Local Rule 79.4. Confidential Matters.

(a) *Grand Jury Proceedings. . . .*

(b) All documents which a judge or magistrate judge has ordered to be treated as confidential must be filed in a sealed envelope conspicuously marked "SEALED".

(c) Subject to General L.R. 83.9(c) and Civil L.R. 26.4, the Court will consider all documents to have been filed publicly unless they are accompanied by a separate motion requesting that the documents, or portions thereof, be sealed by the Court.

(d) All documents which a party seeks to have treated as confidential, but as to which no sealing order has been entered, must be filed in a sealed envelope conspicuously marked "Request for Confidentiality Pending," together with a motion requesting an appropriate order. The separate motion for sealing must be publicly filed and must generally identify the documents contained in the sealed envelope. The documents must be transmitted by the Clerk of Court in a sealed envelope to the judge or magistrate judge, together with the moving papers. If the motion is denied, the documents must be filed by the Clerk of Court in an open file, unless otherwise ordered by the judge or magistrate judge assigned to the case.

Western District of Wisconsin

No relevant local rule.

District of Wyoming

No relevant local rule.

Appendix C
Descriptions of Cases with Sealed Settlement Agreements

An examination of 288,846 federal civil cases terminated in 2001 and 2002 in 52 districts revealed 1,270 cases with sealed settlement agreements, a rate of 0.44%. Descriptions of these cases follow.[24] For each district we briefly summarize local rules and practices and provide statistics on how many cases we searched to find sealed settlement agreements. Districts are presented in alphabetical order; cases are presented within a district in order of filing date. Consolidated and companion cases are counted separately, but described together.

Middle District of Alabama

No relevant local rule.

Statistics: 3,237 cases in termination cohort; 80 docket sheets (2.5%) have the word "seal" in them; 4 complete docket sheets (0.12%) were reviewed; actual documents were examined for 3 cases (0.09%); 3 cases (0.09%) appear to have sealed settlement agreements.

Cases with Sealed Settlement Agreements

Principal Financial Group v. Principal Equity Mortgage Inc. (AL-M 2:00-cv-00326 filed 03/16/2000).

Action seeking injunctive and monetary relief for trademark infringement, dilution, unfair competition, and counterfeiting. After the parties agreed to settle and submit a final judgment and permanent injunction by consent to the court, the court ordered the parties to submit a joint stipulation of dismissal. The plaintiffs requested more time to finalize the settlement terms and inadvertently attached exhibits containing draft settlement papers, which were filed with the court. Because the draft settlement papers contained confidential information, the plaintiffs moved to have them sealed. The court granted the motion, and the parties filed under seal the settlement documents and the final judgment and permanent injunction by consent. The court approved the judgment and permanent injunction, ordered the clerk to ensure that they remain sealed, and retained jurisdiction over the case as needed to enforce the settlement. The case was closed but remains on the court's administrative docket.

Robson v. Dale County Board of Education (AL-M 1:00-cv-01037 filed 08/02/2000).

Civil rights action by a substitute teacher for retaliation for exercising her First Amendment freedom of speech. The parties settled, and the court granted the parties' joint stipulation to dismiss with prejudice the individual defendants (the principal and the school superintendent). The settlement agreement with the remaining defendant school board apparently was filed under seal, because the docket sheet indicates that after the court granted the parties' sealed joint motion to seal, the case was closed pursuant to a sealed order and a document was filed under seal the same day.

Johnson v. Dothan Coca Cola Bottling Enterprises (AL-M 1:01-cv-00901 filed 07/20/2001).

Employment civil rights action by a black employee against a bottling company for race discrimination and retaliation. The parties settled, the court ordered costs to be taxed against the defendant, and the case was dismissed with prejudice. The defendant contested the bill of cost filed by the plaintiff and moved to file the parties' confidential settlement agreement under seal to show that the parties had an agreement with respect to the payment of costs. The court granted the motion, and the defendant filed a copy of the confidential settlement agreement for in camera review by the court. Prior to an evidentiary hearing, the parties agreed to split payment of the costs, and the court closed the case.

24. Each case description reflects the status of the case file at the time of review, some time in 2002–2004. Matters pending at the time of review (appeals, for example) may have been resolved between the time of review and the conclusion of the study.

Northern District of Alabama

No relevant local rule.

Statistics: 7,042 cases in termination cohort; 3 docket sheets are sealed (0.04%)—all of these cases' disposition codes suggest sealed settlement agreements;[25] 745 unsealed docket sheets (11%) have the word "seal" in them; 26 complete docket sheets (0.37%) were reviewed; actual documents were examined for 24 cases (0.34%); 26 cases (0.37%) appear to have sealed settlement agreements.

Cases with Sealed Settlement Agreements

Woodruff v. City of Birmingham (AL-N 2:96-cv-02196 filed 08/21/1996).

Employment civil rights action for sex discrimination and retaliation by a female buildings inspector employed by the city. Pursuant to a sealed court order, judgment was entered for the plaintiff and the defendant was ordered to comply with the terms contained in the sealed order. Because no motion preceded the order, the sealed order probably incorporated the terms of a settlement agreement reached by the parties. Four years later, the plaintiff brought a motion to enforce the court order still under seal and a motion for contempt against the defendant. The court denied the plaintiff's motions and the case was closed.

Robinson v. Boohaker Schillaci (AL-N 2:96-cv-03198 filed 12/09/1996).

Contract action by a former shareholder/director/employee for breach of several agreements made with the defendant accounting corporation, including a buy–sell agreement. The defendant filed a counterclaim alleging that the plaintiff's breach of a non-compete provision was the reason for its refusal to honor the terms of its agreement. After a jury trial had commenced, the parties settled. Settlement terms were stated on the record, and the transcript was sealed. The case was dismissed.

Cahaba Pressure-Treated Forest Products v. OM Group (AL-N 7:97-cv-01917 filed 07/25/1997).

Fraud action. The docket sheet is sealed. The case was dismissed as settled.

Thomasson Lumber Co. v. Cahaba Pressure-Treated Forest Products (AL-N 7:98-cv-00043 filed 01/08/1998).

Contract action. The docket sheet is sealed. The case was dismissed as settled.

Pennsylvania National Mutual Casualty Insurance Co. v. Cahaba Pressure-Treated Forest Products (AL-N 2:98-cv-01261 filed 05/19/1998).

Insurance action. The docket sheet is sealed. The case was dismissed as settled.

Jones v. Samford University (AL-N 2:98-cv-0253) filed 10/06/1998).

Employment civil rights class action by female faculty and staff members alleging sex discrimination by the defendant university in compensation, tenure, hiring, and promotion. The court denied certification of the case as a class action. The parties settled, and the court dismissed the case with prejudice. The court sealed the transcript of the settlement proceedings.

Faddis v. Roehuf Restaurants Inc. (AL-N 2:99-cv-01214 filed 05/13/1999).

Class action under the Fair Labor Standards Act alleging that the defendant restaurant discriminated against female employees regarding wages. In addition, allegations of race and age discrimination, retaliation, and failure to pay overtime wages were brought by named plaintiffs. The court denied class certification. A settlement apparently was reached, because two weeks after the court dismissed the case with prejudice, the defendant moved to enforce the settlement and for sanctions. The court denied the defendant's motions and ordered the clerk to place the defendant's motion to enforce the settlement under seal. The case was closed.

Martin v. Davenport AME Zion Church (AL-N 4:99-cv-01908 filed 07/23/1999).

Personal injury action by a minor and her mother for molestation of the minor by the defendant pastor. The parties settled, and the case was dismissed without prejudice. Less than a month later the parties moved to reopen the case to accept the parties' petition for *pro ami* settlement to effectuate the settlement that involves the minor. *Pro ami* proceedings were held. The court filed its order regarding the proposed settlement and final judgment under seal.

25. Three cases settled.

Smith v. Cohen (AL-N 5:99-cv-02907 filed 10/29/1999).

Employment civil rights action against the Department of Defense for sex and race discrimination against a black female employee and retaliation for participation in the EEO process. The parties reached a confidential settlement agreement, which was sealed. The case was dismissed without prejudice.

Hawkins v. Electronic Data Systems Corp. (AL-N 2:99-cv-03451 filed 12/30/1999).

Employment discrimination action by black employees. The plaintiffs also brought claims under the Fair Labor Standards Act for unpaid overtime compensation. The parties negotiated a settlement agreement at a mediation session. Two weeks later the defendant moved to enforce the settlement agreement. Attached exhibits that contained the terms of the settlement agreement were filed under seal. The court granted the defendant's motion and the parties' stipulation to dismiss the case with prejudice.

IMI International Medical Innovations Inc. v. MQS Inc. (AL-N 2:00-cv-00131 filed 01/14/2000).

Contract action for incomplete performance. The case settled, and the court granted the plaintiff's motion to place the confidential settlement agreement under seal. The court also sealed a consent judgment.

DeSanto v. Howard (AL-N 2:00-cv-00171 filed 01/20/2000).

Personal injury action on behalf of a minor for inappropriate contact by an intoxicated passenger during a flight on the defendant airline. The parties settled. The court granted the defendant's motion to allow the filing of all future pleadings under seal until a proposed settlement was approved by the court, because the claims were filed on behalf of a minor. In support of its motion, the defendant disclosed that confidentiality of the settlement amount was a material element upon which it relied. The plaintiff's motion to approve the proposed settlement and the report of the guardian ad litem were filed under seal. The court approved the *pro ami* settlement and dismissed the case.

McWhorter v. Lawson State Community College (AL-N 2:00-cv-00401 filed 02/17/2000).

Employment action by a female professor against the defendant university for sex discrimination and retaliation. The parties settled during court-ordered mediation, and the court dismissed the case without prejudice, retaining jurisdiction to enforce the parties' settlement agreement. The court ordered the mediation agreement, which was filed with the court, to be placed under seal.

Tarr v. Newell Rubbermaid Inc. (AL-N 5:00-cv-00997 filed 04/18/2000).

Product liability action by a minor. The specific allegations of this case are not known because, as the assigned judge's docket clerk confirmed, the entire case file is sealed. The docket sheet indicates that the parties settled and that the settlement agreement was sealed. In addition, following a *pro ami* hearing, the court filed under seal a confidential order and approval of the minor's settlement. The court ordered the contents of the file sealed to preserve confidentiality. The case was closed.

Shrader v. Mallard (AL-N 4:00-cv-01050 filed 04/21/2000).

Civil rights action for sexual abuse by city jail employees while the plaintiff was detained following arrest. The parties settled, and the case was dismissed without prejudice. Four months later the parties filed a joint motion to seal the settlement agreement to maintain its confidentiality for the benefit of the parties' reputations. The court granted the joint motion, and the settlement agreement was sealed, with the exception that it could be produced to plaintiff's counsel in a separate suit against the same defendant.

Livingston v. City of Attalla (AL-N 4:00-cv-01989 filed 07/18/2000).

Personal injury action for sexual abuse by city jail employees. The parties settled and the case was dismissed without prejudice. Four months later the parties filed a joint motion to seal the settlement agreement to maintain its confidentiality for the benefit of the parties' reputations. The court granted the joint motion and filed the settlement agreement under seal.

Bell v. Jacksonville City Board of Education (AL-N 1:00-cv-02035 filed 07/21/2000).

Employment action by a female teacher against the board of education for sex and age discrimination in repeatedly denying the plaintiff promotions. Prior to opening statements at a jury trial, the parties announced settlement of all pending claims and issues. The terms of settlement were

read into the record, and the settlement portion of the transcript was sealed. The case was dismissed, and the court reserved jurisdiction for thirty days for the filing of motions to enforce the settlement.

Jordan v. API Outdoors Inc. (AL-N 2:00-cv-02059 filed 07/24/2000).

Product liability action for serious injuries sustained in a fall when a climbing belt designed and manufactured by the defendant suddenly failed. The parties settled, and the court ordered the case dismissed without prejudice, retaining jurisdiction over the parties to enforce their settlement agreement. The court ordered that the parties' stipulation regarding the settlement agreement be filed under seal. The court granted the parties' stipulation to dismiss the case with prejudice.

EEOC v. Employers Mutual Casualty Co. (AL-N 2:00-cv-02605 filed 09/15/2000).

Employment action on behalf of a female employee of the defendant insurance company for failure to promote her because of her sex. The parties settled, and the defendant moved to allow the parties to file under seal the settlement agreement and the general release that was referenced in the proposed consent decree filed with the court. The court granted the defendant's motion. The court ordered the clerk to close the file, but the court retained jurisdiction either for the next four months to resolve any dispute that might arise out of administration of the consent decree, or until the defendant certified that the payment and training required under the consent decree were completed, whichever occurred first.

Brockway v. DaimlerChrysler Corp. (AL-N 5:00-cv-02970 filed 10/19/2000).

Employment action by a female employee for sex discrimination and sexual harassment. The defendant filed a motion to enforce a settlement agreement. Exhibits and a brief in support of the motion were filed under seal. The plaintiff's response to the motion also was filed under seal. The court denied the motion after an evidentiary hearing. All claims against the defendant were dismissed by summary judgment.

Reifenentsforgumsgesell Schaft mbH v. Oxy Tire Inc. (AL-N 2:00-cv-02977 filed 10/20/2000).

Contract action for breach of an agreement to make timely payments for tires and not to sell tires to certain countries. The parties settled, and the court granted their request to enter judgment against the defendant under seal and for the judgment to remain under seal until the defendant defaulted in payment. The case was dismissed with prejudice. Seven months later the court granted the plaintiff's motion to unseal the judgment because the defendant failed to make the second installment payment.

Hill v. CVS Rx Services Inc. (AL-N 2:00-cv-03355 filed 11/21/2000).

Class action under the Fair Labor Standards Act by CVS pharmacists for failure to pay overtime wages. The parties settled and filed their confidential settlement and release agreement under seal with the court. The court also sealed the transcript of the fairness hearing and settlement conference. The court approved the settlement of class claims and dismissed the case with prejudice.

Wilson v. Saks Inc. (AL-N 2:01-cv-00237 filed 01/24/2001).

Employment action by a black employee for race discrimination and retaliatory discharge. The parties agreed on a confidential settlement agreement. Six days later the defendant moved to enforce the settlement agreement with sealed exhibits attached (letters confirming the settlement). The court granted the motion and dismissed the case.

Estate of Westboro v. PGV Trucking Inc. (AL-N 5:01-cv-00498 filed 02/23/2001).

Motor vehicle action for the wrongful killing of a driver (father) and a passenger (daughter), and for severe injuries sustained by another minor passenger (another daughter) when a tractor-trailer collided head on with the plaintiffs' vehicle. The parties settled. The plaintiffs filed under seal a motion for an order approving the *pro ami* settlement pertaining to the minor plaintiff. The court approved the terms of the *pro ami* settlement and granted the parties' stipulation and order of dismissal with prejudice.

Holcombe v. Therapeutic Programs Inc. (AL-N 2:01-cv-00918 filed 04/13/2001).

Employment action for racial discrimination and wrongful termination by a black employee of a corporation providing foster care services to the state of Alabama. The parties apparently settled, because the defendant moved to enforce the settlement. The court sealed the transcript of the hearing on the motion to enforce the settlement

agreement. The court's order dismissing the case with prejudice also was sealed.

FMCO Building Products Inc. v. ARFS Corp. (AL-N 5:01-cv-01226 filed 05/14/2001).

Contract action for failure to pay a balance due for goods. After a jury trial had commenced, the case settled, and the settlement agreement as dictated into the court record was sealed. The court filed under seal a judgment by agreement of the parties terminating the case. The court granted the plaintiff's request to unseal the agreed order and judgment for the limited purpose of allowing it to be registered and recorded in another judicial district.

Southern District of Alabama

No relevant local rule.

Statistics: 2,015 cases in termination cohort; 1 docket sheet is sealed (0.05%)—this case's disposition code suggests no sealed settlement agreement;[26] 78 unsealed docket sheets (3.9%) have the word "seal" in them; 22 complete docket sheets (1.1%) were reviewed; actual documents were examined for 9 cases (0.45%); 9 cases (0.45%) appear to have sealed settlement agreements.

Cases with Sealed Settlement Agreements

In re Amtrak "Sunset Limited" Train Crash (AL-S 1:94-cv-05000, MDL 1003 filed 03/02/1994), multidistrict litigation including *Schmidt v. CSX Transportation Inc.* (AL-S 1:94-cv-05015 filed 03/02/1994) and *Procaccini v. CSX Transportation Co.* (AL-S 1:94-cv-05017 filed 03/03/1994).

Personal injury and wrongful death actions arising from the "Sunset Limited" passenger train derailment and crash into Big Bayou Canot on September 22, 1993. The train struck a bridge girder displaced by the collision of a towboat and barges with the railroad bridge over Big Bayou Canot in Alabama. Cases filed by or on behalf of injured or deceased passengers or crew members were transferred by the MDL panel to the Southern District of Alabama and consolidated for pretrial purposes. A master file was created for all pretrial proceedings and assigned docket numbers MDL 1003 and AL-S 94-05000.

The defendants were ordered to submit under seal lists of all settlements, and each settlement agreement was to be disclosed only if all parties to it agreed. In December 1998, a global settlement was reached in the remaining 42 wrongful death actions, but it was contingent upon all of the wrongful death plaintiffs' approving the settlement. Each plaintiff's attorney previously settling a wrongful death case with one of the defendants was ordered to complete a "confidential case settlement questionnaire" and file it under seal with the court, after which the plaintiff's attorney would receive the terms of the proposed confidential global settlement and other necessary settlement documents. After all plaintiffs executed the appropriate releases, and the defendants filed a notice of their receipt, the plaintiff steering committee filed under seal a request for disbursement of the settlement funds. All forty-two remaining wrongful death actions were dismissed in March 1999.

Case 94-05015 was brought by a minor, and case 94-05017 was brought by the minor's mother. One of the defendants filed a motion to enforce a settlement in these two cases, which was later placed under seal by the court; the court denied the motion, and a jury trial was held in these two cases. In both cases final judgment was entered for the plaintiffs against one defendant and in favor of another defendant who had been granted summary judgment. The court dismissed the remaining claims in both cases pursuant to a sealed settlement agreement.

Strong v. City of Selma (AL-S 2:98-cv-00191 filed 02/27/1998).

Civil rights class action for police brutality against black men. The court dismissed the case as settled. Three days later the case was reopened, and the court gave the parties twenty days to file under seal a jointly proposed consent order embodying the terms of the confidential settlement agreement. The case was closed upon entry of the sealed consent order.

O'Gwynn v. Foley Police Department (AL-S 1:00-cv-00273 filed 03/31/2000).

Action by a mentally ill plaintiff for civil rights violations during her detention at the city jail. After summary judgment for the city, the plaintiff and the police officer entered into a confidential settlement agreement. Because the plaintiff was committed and found to be incompetent, a *pro ami* hearing was required under state law to determine the fairness of the settlement. The court granted the guardian ad litem's request to seal the motion to approve the settlement agreement. The court approved the settlement agreement and dismissed the case.

26. One voluntary dismissal.

Huber v. Tillman (AL-S 1:01-cv-00019 filed 01/05/2001).

Employment action by a female police officer for sex discrimination and retaliation, including retaliation for a previous religious discrimination charge. After summary judgment for the defendant on the retaliation claim, the parties reached a confidential settlement agreement. The plaintiff filed a motion to enforce it. Because the terms of the settlement were confidential, the court ordered the plaintiff to file under seal a supplemental motion setting forth the terms of the settlement agreement and the basis for her claim. A notice of voluntary dismissal was filed before the court ruled on the motion to enforce the settlement agreement.

Curry v. Kimberly Clark Paper Co. (AL-S 1:01-cv-00445 filed 06/20/2001).

Action under the National Labor Relations Act and the Labor and Management Relations Act arising out of theft of property from the plaintiff's place of employment. The court dismissed the case as settled and gave the parties thirty days to perfect their agreement. The plaintiff moved to enforce the settlement agreement after refusing to sign the general release. The defendants moved to enforce the settlement agreement and the general release. The motions were filed under seal pursuant to a confidentiality provision of the proposed settlement agreement. The parties agreed that the court's resolution of the settlement dispute would end the case. The court denied both motions. Pursuant to inherent authority to enforce settlements, the court ordered the plaintiff to sign a release and the defendants to pay the undisputed settlement amount.

EEOC v. Wal-Mart Stores Inc. (AL-S 1:01-cv-00522 filed 07/19/2001).

Employment action on behalf of female Wal-Mart employees for sexual harassment and retaliation for reporting the harassment to supervisory employees. In July 2002, the parties notified the court that the action had settled, and the court dismissed the case with prejudice. The settlement agreement included a confidential release. The transcript of the settlement agreement apparently was sealed, because in January 2003, the court granted the defendant's motion to unseal it.

Williams v. Davis & Feder PA (AL-S 1:02-cv-00188 filed 03/21/2002).

Legal malpractice action concerning the plaintiff's claim for medical complications caused by a diet drug. The plaintiff alleged that the defendants' false representations induced her to accept an inadequate settlement that did not compensate her for an undiscovered serious heart condition. Following settlement and a voluntary dismissal, the defendants moved for relief from judgment and to submit evidence under seal. The court ordered sealed all documents related to the defendants' motion. The court granted the defendants' motion for relief from judgment and ordered the parties to conform to the terms of the settlement agreement and release. The parties agreed that the court should have continuing jurisdiction over any alleged breach of the settlement agreement or violation of its terms. The case was dismissed with prejudice.

District of Arizona

Documents may remain sealed for no more than 23 years. D. Ariz. L.R. 1.3(d)-(f).

Statistics: 6,604 cases in termination cohort; 18 docket sheets are sealed (0.27%)—all of these cases' disposition codes suggest no sealed settlement agreements;[27] 347 unsealed docket sheets (5.3%) have the word "seal" in them; 32 complete docket sheets (0.48%) were reviewed; actual documents were examined for 21 cases (0.32%); 18 cases (0.27%) appear to have sealed settlement agreements.

Cases with Sealed Settlement Agreements

Grimes v. Golden Eagle Distributors Inc. (AZ 4:96-cv-00689 filed 11/26/1996).

Employment discrimination action by current and former employees for age discrimination, wrongful termination, and retaliation in violation of the Age Discrimination in Employment Act. Three plaintiffs agreed to dismiss their claims with prejudice in consideration of a confidential settlement agreement reached by each plaintiff with the defendant. One of the three plaintiffs filed a motion to enforce the agreement. The court granted the defendant's unopposed request to file the plaintiff's motion under seal as well as any future pleadings or papers containing confidential

27. One case remanded to state court, 10 cases dismissed for want of prosecution, 5 cases with judgments on motions before trial, 1 multidistrict litigation transfer, 1 "other" judgment.

data regarding the settlement agreement and/or negotiations. The parties stipulated to withdraw all pending motions, except for motions for attorney fees filed on behalf of two of the plaintiffs.

Morton v. United Parcel Service Inc. (AZ 2:96-cv-02813 filed 12/23/1996).

Employment discrimination action under the Americans with Disabilities Act for refusal to consider the plaintiff for a driver position because of her hearing disability and for failure to accommodate her disability, which resulted in a constructive discharge. The parties settled eight months after the case was reopened following the court of appeals' reversal of summary judgment for the defendant. The court ordered the record of the telephonic settlement agreement sealed. The parties stipulated to a court order providing for confidentiality of the settlement agreement and for dismissal of the case with prejudice.

Unisys Corp. v. Varilease Technology Group (AZ 2:98-cv-02251 filed 12/17/1998).

Copyright and trade secret action concerning maintenance and product support materials and diagnostic software. All parties to the case reached a confidential settlement agreement. Because of delay by one of the defendants in signing the stipulation for dismissal, the plaintiff filed under seal a motion to enforce the settlement agreement. Before the motion was considered, the necessary signatures were obtained, and the case was dismissed upon the filing of the stipulation to enter a permanent injunction and dismiss the claims with prejudice.

Progressive Electronics Inc. v. Aines Manufacturing Corp. (AZ 2:99-cv-01184 filed 06/30/1999).

Patent infringement action concerning an inductive amplifier used in the telephone service industries. The parties settled and filed a proposed consent judgment under seal. The court approved the sealed consent judgment.

Ransom v. Arizona (AZ 2:99-cv-01962 filed 11/02/1999).

Employment action by an African-American security officer for race discrimination and for retaliation for filing an internal complaint alleging a racially biased internal affairs investigation of the plaintiff. The case settled, and the court ordered the record of the terms of the settlement to be sealed.

Southwest Gas Corp. v. ONEOK Inc. (AZ 2:00-cv-00119 filed 01/24/2000), consolidated with *Southwest Gas Corp. v. Southern Union Co.* (AZ 2:00-cv-00452 filed 03/13/2000).

This is a consolidation of three cases, two of which were identified by our search. The lead case was not included because it has not been terminated. The two cases listed above are contract actions also alleging fraud regarding a merger agreement and a confidentiality agreement. These two cases settled. The court sealed the transcript of the settlement hearing. The settlement agreement subsequently was unsealed by stipulation, except for attachments to an exhibit.

Borenstein v. Finova Group (AZ 2:00-cv-00619 filed 04/06/2000).

Securities class action alleging false financial statements. A court-approved settlement agreement was filed unsealed, but a "supplemental agreement" was filed under seal and the court sealed the portion of the transcript of a telephonic settlement hearing pertaining to the supplemental agreement.

M&I Heat Transfer Products Ltd. v. VAW Systems Ltd. (AZ 2:00-cv-00908 filed 05/15/2000).

Patent infringement action. The plaintiff accepted the defendant's offer of judgment, which the court ordered to be filed under seal.

Gregory v. Assisted Living Concepts Inc. (AZ 2:00-cv-01339 filed 07/13/2000).

Personal injury action for physical and mental injuries, including a stroke, because of negligent care by a nursing home. The court permitted the parties to file their "Joint Motion for Expedited Approval of Settlement and Stipulation to Dismiss with Prejudice" and all exhibits under seal; on the same day the court approved the parties' settlement agreement and dismissed the action with prejudice.

Ritchie v. Yanchunis (AZ 2:00-cv-01533 filed 08/09/2000).

Personal injury action for legal malpractice in allowing the statute of limitation on an action for wrongful termination to lapse. The parties agreed to a confidential settlement agreement, and the court ordered the transcript of the settlement agreement filed under seal.

Noriega v. City of Scottsdale (AZ 2:00-cv-01646 filed 08/28/2000).

Employment discrimination action by ten current or former Hispanic employees, alleging retaliation for filing complaints with the EEOC. The court sealed a joint notice regarding the status of settlement discussions reached by the parties. The court granted the parties' stipulation to dismiss the case with prejudice.

FTC v. RJB Telcom Inc. (AZ 2:00-cv-02017 filed 10/25/2000).

Action under the Federal Trade Commission Act for an injunction to halt defendants' unauthorized billing for access to sexually explicit Web pages and Web sites. The court filed under seal two appendices to the stipulated final injunction. These appendices apparently "contain details on the efforts that will be made to eliminate or at least minimize potential for fraud and would be damaging if made available to those wishing to perpetrate a fraud."

Cieslinski v. Taurus International Manufacturing Inc. (AZ 4:00-cv-00712 filed 12/18/2000).

Personal injury action against the manufacturer of an allegedly defective firearm for serious physical injury suffered by the plaintiff when the firearm misfired, striking the plaintiff in the abdomen. The court sealed the record of the settlement conference. The court retained jurisdiction to enforce any settlement.

Biesiada v. American Financial Resources Inc. (AZ 2:01-cv-00511 filed 03/19/2001).

Action under the Fair Labor Standards Act by two former bank employees for unpaid wages. The case was dismissed pursuant to a sealed settlement agreement.

Hannan v. Pacific Indemnity Co. (AZ 4:01-cv-00471 filed 09/14/2001).

Insurance contract action for bad faith in handling the plaintiff's claim for a fire that partially destroyed her home. Apparently the parties settled their claims, because five months after the case was filed the court found good cause to file under seal the defendant's motion to enforce the settlement agreement. The case was dismissed with prejudice shortly thereafter.

Stephens v. Arizona Association of Community Health Centers (AZ 2:01-cv-01936 filed 10/10/2001).

Action under the Fair Labor Standards Act by a former employee of the Arizona Association of Community Health Centers for unpaid overtime wages. The case settled, and the court ordered the terms of the settlement to be sealed.

Ishmail v. Honeywell Inc. (AZ 2:01-cv-02355 filed 12/03/2001).

Employment action involving a machinist of Macedonian descent suing his former employer for race and age discrimination and wrongful termination. The case settled, and the court ordered the settlement agreement to be sealed.

Northern District of California[28]

"No document shall be filed under seal except pursuant to a Court order that authorizes the sealing of the particular document or portion thereof and is narrowly tailored to seal only that material for which good cause to seal has been established." N.D. Cal. Civ. L.R. 79-5(b). "Documents may not be filed under seal pursuant to blanket protective orders covering multiple documents. Counsel should not attempt to seal entire pleadings or memoranda required to be filed pursuant to the Federal Rules of Civil Procedure or these Local Rules." *Id.* (commentary). Absent an order to the contrary, sealed documents are unsealed ten years after being sent to the records center. *Id.* R. 79-5(c).

Statistics: 12,140 cases in termination cohort; 11 docket sheets are sealed (0.09%)—the disposition codes for 8 of these cases suggest no sealed settlement agreements[29] and the disposition codes for 3 of these cases suggest sealed settlement agreements;[30] 635 unsealed docket sheets (5.2%) have the word "seal" in them; 146 complete docket sheets (1.2%) were reviewed; actual documents were examined for 82 cases (0.68%); 70 cases (0.58%) appear to have sealed settlement agreements.

28. This district is included in the study because of its good-cause rule.

29. One case transferred, 1 case dismissed for want of prosecution, 1 case dismissed for lack of jurisdiction, 1 judgment on motion before trial, 2 voluntary dismissals, 1 "other" dismissal, 1 "other" judgment.

30. Three cases settled.

Cases with Sealed Settlement Agreements

Selby v. National Railroad Passenger Corp. (CA-N 4:93-cv-04160 filed 11/23/1993).

Employment action by a female road foreman of engines for sex discrimination and sexual harassment. The jury returned a verdict for the defendant and the plaintiff appealed. The court of appeals found two errors in the judgment. The case ultimately settled. The settlement agreement was put on the record at a settlement conference, the transcript of which was filed under seal. An unsatisfied execution of judgment showed $20,765.98 due, but the case subsequently was dismissed.

Margetis v. Avant! Corp. (CA-N 5:96-cv-20132 filed 12/15/1995).

Securities class action by investors, alleging that defendants' software products were based on misappropriated computer code. The court approved a $35 million settlement and sealed a "supplemental agreement regarding requests for exclusion." The supplemental agreement, however, was filed unsealed.

Sun Microsystems Inc. v. Dataram Corp. (CA-N 4:02-cv-01010 filed 08/29/1996).

Patent action concerning single in-line memory modules. A settlement agreement was put on the record at a settlement conference before a magistrate judge. One month later, the defendant moved ex parte to preempt the plaintiff's planned motion before the district judge to enforce the settlement agreement, arguing that the district judge should be shielded from matters of settlement negotiations. The magistrate judge recused herself because she had become "too close to the parties and the issues in this case," and the motion to enforce was filed under seal and heard by a second magistrate judge. He denied the motion to enforce by sealed order. After three more months of litigation, the case was dismissed by stipulated sealed order. A year and a half later the defendant filed a sealed motion to enforce a settlement agreement. Six months later the case again was dismissed by stipulated order.

Taurus Impressions Inc. v. General Binding Corp. (CA-N 5:96-cv-21029 filed 12/10/1996).

Contract action for putting on hold a project to develop computer-controlled desktop hot stamping machines for personalizing folders, binders, etc. The case settled at a settlement conference. The court sealed a stipulation to dismiss and agreement to transfer intellectual property.

Media Financial Group v. W Publishing Group (CA-N 3:97-cv-02343 filed 06/23/1997).

Fraud action alleging business reorganization to avoid $1,251,883 in judgments from a New Jersey court for tortious interference with magazine accounts receivable. At a settlement conference, some defendants entered into a confidential settlement agreement with the plaintiffs and then moved for a determination of good-faith settlement. The motion was granted, and the action against the settling defendants was dismissed. The agreement was filed under seal. The court thereafter signed a stipulated judgment against the principal defendant for $839,633.89.

Adobe Systems Inc. v. Image & Business Solutions Inc. (CA-N 5:97-cv-20979 filed 10/30/1997).

Designated a copyright action, the complaint alleges various forms of unfair competition arising from possession and sale of unlicensed copies of the plaintiff's software. The case was dismissed pursuant to a consent decree that provided injunctive relief but did not specify any recovery of damages. The plaintiff filed an ex parte motion to reopen the case, alleging violations of the agreement. A declaration supporting the motion was sealed. The defendant's opposition also was sealed. The matter ultimately was resolved.

Xecom Inc. v. Xecom Corp. (CA-N 5:97-cv-21099 filed 11/24/1997).

Trademark action by a manufacturer of telecommunications equipment. The court awarded the plaintiff a default judgment and permanent injunction. The defendant's motion to set aside the judgment was denied. Before the plaintiff filed a motion for fees and damages, the case settled at a settlement conference, and the agreement was put on the record under seal. The following month the action was stayed by the defendant's bankruptcy. Three years later the court ordered the parties to show cause why the dormant case should not be dismissed and then dismissed it.

Lawrence v. Cessna Aircraft Co. (CA-N 3:98-cv-02837 filed 07/17/1998).

Airplane action alleging severe burns because the plaintiff was unable to escape from a crashed plane manufactured by the defendant. The case settled. The court sealed the minutes of the hearing on settlement approval.

Amersham Pharmacia Biotech Inc. v. Perkin-Elmer Corp. (CA-N 3:98-cv-04167 filed 09/08/1998); *Amersham Pharmacia Biotech Inc. v. Applera Corp.* (CA-N 3:00-cv-04707 filed 12/18/2000).

Patent actions concerning DNA sequencing techniques. The actions apparently were dismissed pursuant to sealed settlement agreements.

Berarducci v. General Electric Co. (CA-N 3:98-cv-03448 filed 09/09/1998).

Labor litigation for wrongful termination and age discrimination. The case settled pursuant to a settlement agreement, which was filed under seal.

EEOC v. C. & M. Packing Inc. (CA-N 5:98-cv-20975 filed 09/24/1998).

Employment action for sex discrimination and retaliation on behalf of two named employees and a class. The case settled pursuant to a consent decree. Two exhibits to the decree were filed under seal. One was a written reprimand for a named male employee. The second exhibit specified how much of the $90,000 settlement each of four women would get.

Affymetrix Inc. v. Synteni Inc. (CA-N 5:99-cv-21164 filed 11/24/1998).

Patent action concerning "high density array technology for gene expression monitoring." The case apparently settled, and the plaintiff was granted a motion to file under seal a motion for entry of final judgment.

Za-Za Inc. v. Eastman Chemical Co. (CA-N 3:98-cv-04886 filed 12/22/1998).

Antitrust consolidated class action alleging an international conspiracy to fix prices on food preservatives known as sorbates. (The consolidated action is titled *In re Sorbates Direct Purchaser Antitrust Litigation.*) The Justice Department pursued criminal actions separately. Over the course of litigation, all defendants settled; settlements totaled $96,478,000. The court sealed a "side letter to settlement agreement" with one defendant.

Marketel International Inc. v. Priceline.com (CA-N 3:99-cv-00161 filed 01/19/1999).

Designated a copyright action, this is an action for unfair competition and misappropriation of trade secrets in electronic travel auctions. The parties engaged in settlement negotiations. The plaintiff believed that an agreement was reached, but the defendant did not. The plaintiff sought permission to file under seal an amended complaint pleading existence of the agreement. The amended complaint was filed under seal, and the parties litigated under seal a restraining order on the defendant's issuing an initial public offering as a violation of the settlement agreement. The plaintiff subsequently withdrew its claim of settlement and filed an unsealed second amended complaint. A third amended complaint was filed later, and the court granted the defendant summary judgment on many of the claims. The plaintiff agreed to dismiss the remaining claims so that it could appeal the partial summary judgment. The court of appeals affirmed.

Sony Computer Entertainment Inc. v. Connectix Corp. (CA-N 3:99-cv-00390 filed 01/27/1999).

Copyright action by the makers of the PlayStation against the makers of the Virtual Game Station, which was designed to emulate the PlayStation on Apple computers. On the morning of trial the parties settled. "The parties submitted to the court a sealed Order of Intent which will be lodged with" the judge. The transcript of proceedings discloses that the plaintiff decided to buy certain intellectual property rights from the defendant. The minutes for a subsequent settlement conference state that the case did not settle. The defendant filed under seal a motion to enforce the settlement agreement. Opposition and reply papers also were filed under seal. The court granted the motion. The case was dismissed by stipulation.

Arlowo v. Novato Police Department (CA-N 3:99-cv-02272 filed 05/18/1999).

Designated a prison-conditions action, this is an action by a prisoner for an illegal arrest and beating by police officers prior to confinement. The case settled. The court granted the parties' request to file the settlement agreement under seal. The case was dismissed by stipulation.

Insituform Technologies Inc. v. Ultraliner Inc. (CA-N 5:01-cv-20599 filed 05/21/1999), consolidated with *Ultraliner Inc. v. Nupipe Inc.* (CA-N 5:01-cv-20601 filed 09/08/1999).

Patent actions concerning PVC pipe liners. The actions were resolved by consent judgment and permanent injunction, and a stipulation of facts and conclusions of law were filed under seal.

Provident Life and Accident Insurance Co. v. Khan (CA-N 3:99-cv-02479 filed 05/25/1999).

Insurance action for restitution of disability benefits paid upon discovery that the defendant was unable to work because of a suspended medical license, not because of disability. The case settled at a settlement conference, but the following month the plaintiff filed a sealed motion to enforce the settlement agreement. The court granted the motion and sanctioned the defendant $720. A magistrate judge's report and recommendation discloses that the settlement agreement essentially entailed a payment of $450,000 to the defendant in exchange for her surrendering the insurance policy.

Martin v. John F. Kennedy University (CA-N 3:99-cv-02902 filed 06/15/1999).

Pro se civil rights action by a disabled black female law student against her law school, alleging various forms of mistreatment. The case was dismissed pursuant to a sealed settlement agreement.

Guy T. Atkinson Co. of California v. PriceWaterhouse-Coopers LLP (CA-N 3:99-cv-04334 filed 09/23/1999).

Bankruptcy withdrawal alleging negligence in financial management and monitoring. The plaintiffs settled with some defendants, and a motion for good-faith settlement was litigated under seal and apparently granted by sealed order. The following year the action against the remaining defendant was dismissed as settled.

Sanchez v. Safeway Inc. (CA-N 4:99-cv-05035 filed 11/22/1999).

Civil rights action by a customer against a supermarket for sexual assault by an employee. The plaintiff alleged that the employee grabbed her breast and buttock and asked her to feel his erection. The defendant claimed the employee, who had earlier refused the plaintiff's invitation for a date, merely engaged in verbal pleasantries and refused the plaintiff's hug. During discovery, the plaintiff revealed that her minor daughter may have claims against the defendants as well. The plaintiff was appointed guardian ad litem for her daughter, and the case was dismissed pursuant to a sealed settlement agreement.

United National Insurance Co. v. TIG Insurance Co. (CA-N 3:00-cv-00058 filed 01/06/2000).

Insurance action by one insurance company against another, alleging that the defendant was liable for two payments of $2 million instead of one. The terms of settlement were put on the record at a settlement conference, the transcript of which was filed under seal.

Foster v. Columbia Good Samaritan Health Systems (CA-N 5:00-cv-20116 filed 01/31/2000).

Employment action for failure to accommodate a back injury. The plaintiff alleged that she was injured while working for the defendant as a radiological technologist and was not hired for other hospital openings that would accommodate her injury. The terms of settlement were put on the record at a settlement conference, and the tape of the conference was ordered sealed.

Adobe Systems Inc. v. Dallas Computer Inc. (CA-N 5:00-cv-20236 filed 03/02/2000).

Copyright action for sale of unauthorized copies of software. The case was dismissed upon a stipulated permanent injunction and a judgment of $2,433,386.05 in favor of the plaintiff. The court granted the plaintiff's request to file the injunction and judgment under seal, but several unsealed copies are in the court's file and the docket sheet discloses the amount of judgment.

Evoke Software Corp. v. Evoke Communications Inc. (CA-N 3:00-cv-00965 filed 03/17/2000).

Trademark action over use of the name "Evoke." The defendant received permission to file under seal an amended answer with counterclaims and a motion to enforce a settlement agreement. Opposition and reply papers on the motion to enforce also were filed under seal. The motion was denied. The court subsequently granted the plaintiff a preliminary injunction, and the defendant appealed. The case settled while on appeal.

Adobe Systems Inc. v. Publitek Inc. (CA-N 5:00-cv-20375 filed 04/05/2000).

Copyright action for unauthorized distribution of the plaintiff's software. The action was dismissed pursuant to a sealed stipulated injunction. Correspondence in the file refers to settlement payments as well.

Sealed Settlement Agreements

American Motorists Insurance Co. v. Neighbor (CA-N 3:00-cv-01321 filed 04/14/2000).

Contract action by the issuer of a performance bond for indemnity of liability resulting from a developer's bankruptcy. The defendant filed a third-party complaint against the city. The case was dismissed pursuant to a confidential settlement agreement, which was filed under seal.

Hardy v. Alaska Air Group (CA-N 3:00-cv-01878 filed 05/24/2000); *Estate of Choate v. Alaska Airlines Inc.* (CA-N 3:00-cv-02737 filed 08/01/2000); *Estate of Lake v. Alaska Airlines Inc.* (CA-N 3:00-cv-03127 filed 08/29/2000); *Estate of Forshee v. Alaska Air Group* (CA-N 3:00-cv-03332 filed 09/14/2000).

Airplane wrongful death actions against the airline, the airplane's manufacturers, and manufacturers of the airplane's parts. The case was consolidated with others as part of a multidistrict litigation, *In re Air Crash Off Point Mugu* (MDL 1343). The cases were dismissed pursuant to sealed settlement agreements approved by the court.

Perkins v. Sortwell (CA-N 4:00-cv-01920 filed 05/26/2000).

Shareholders' derivative action alleging improper hiding of financial difficulties. The case was consolidated with *Steiner v. Aurora Foods Inc.* (CA-N 4:00-cv-00602 filed 02/22/2000), a class action on behalf of more than 3,000 shareholders. A filed stipulation of settlement specified changes in corporate governance, former officers' surrender of $12.6 to $15.0 million in shares, recovery of $26 million from their insurance policies, and $350,000 in fees and expenses for plaintiffs' attorneys. More specific details were spelled out in "definitive agreements" with individual defendants, which were filed under seal, because the defendants relied upon that level of confidentiality in reaching the agreements.

Penley v. Vales (CA-N 3:00-cv-02147 filed 06/16/2000).

Civil rights action for conspiracy to prevent the plaintiff's observation of protests against Neiman Marcus for selling clothes made from animals "killed through gassing, trapping, and anal electrocution." The case settled, and the settlement agreement was put on the record of a settlement conference. The transcript of the conference was filed under seal.

Marques v. North Beach Pizza Inc. (CA-N 3:00-cv-02200 filed 06/21/2000).

Action under the Fair Labor Standards Act by two pizza delivery drivers, alleging that their compensation by commission, although they were not responsible for sales, deprived them of overtime compensation. The case was consolidated with an action by a third driver, and the actions settled for $45,000. The plaintiffs were awarded $78,649 in fees and $1,538.02 in costs. A dispute arose over a payment plan, and a letter from the defendant was construed as a motion to enforce the settlement agreement, sealed, and denied. The court subsequently ordered a specific payment plan.

Bravo Corp. v. Concept Designs Inc. (CA-N 3:00-cv-02285 filed 06/28/2000).

Trademark action challenging the defendant's use of the plaintiff's Kryptonics trademark in marketing the defendant's wheel spinner. Kryptonics is a trademark for skateboard and in-line skate wheels. The action was dismissed pursuant to a sealed settlement agreement.

Moreno v. Dolores Heights Property Inc. (CA-N 3:00-cv-02308 filed 06/29/2000).

Action under the Fair Labor Standards Act for failure to pay an immigrant residential maintenance and renovation laborer minimum wage and overtime. A confidential settlement was reached at a settlement conference, and a conference exhibit—presumably the settlement agreement—was filed under seal. The transcript of the conference also was filed under seal.

Oracle Corp. v. Moellhoff (CA-N 3:00-cv-02789 filed 08/04/2000).

Statutory action for judicial determination of responsibilities under a long-term equity incentive plan for a terminated vice president. The case settled at a settlement conference, and the confidential terms were put on the record. Subsequently the plaintiff filed a sealed motion to resolve a settlement dispute, but the matter was resolved without court action and the case was dismissed.

Sealed Plaintiff v. Sealed Defendant (CA-N 4:00-cv-02945 filed 08/14/2000).

Statutory action. The docket sheet is sealed. The case was dismissed as settled.

Vallis v. CNF Transportation Inc. (CA-N 4:00-cv-04226 filed 11/14/2000).

Class action under the Fair Labor Standards Act on behalf of freight operations supervisors for unpaid overtime compensation. The class claims were dismissed by stipulation, and the individual claims were dismissed pursuant to a sealed settlement agreement.

Choi v. Doctor's Associates (CA-N 5:00-cv-21173 filed 11/17/2000); *Ounniyom v. Doctor's Associates* (CA-N 5:00-cv-21174 filed 11/17/2000).

Civil rights actions claiming barriers to persons with disabilities in Subway restaurants violated the Americans with Disabilities Act. The cases settled, and the settlement agreement, which specified changes to the defendants' restaurants, was filed. The amounts of recovery by twenty individuals were filed under seal.

Cerpas v. University of California, San Francisco (CA-N 3:00-cv-04505 filed 12/01/2000).

Employment action by a customer service representative claiming that her supervisor coerced her into accompanying him to a motel room for sex. The case settled at a settlement conference, and the confidential settlement agreement was placed on the record. The reporter's transcript was filed under seal.

Jones v. National Association of Letter Carriers (CA-N 3:00-cv-04637 filed 12/11/2000).

Civil rights action for failure to accommodate disabilities in union activities. The case was dismissed pursuant to a confidential settlement agreement. The court retained jurisdiction for ninety days to enforce the agreement. Nearly eight months after the dismissal, the plaintiff sent the court a letter asking for help in resolving settlement issues. The court filed the letter under seal and determined it no longer had jurisdiction over the case.

Hornes v. County of Alameda (CA-N 3:01-cv-00914 filed 03/05/2001); *Hornes v. City of Oakland* (CA-N 3:01-cv-01998 filed 05/22/2001).

Civil rights actions for wrongful killing by a police officer. One action was by the decedent's mother, and the other was by his wife and children. The actions were dismissed pursuant to a sealed minor's settlement agreement, approved by the court. An unsealed stipulation stated that the plaintiffs would recover nothing from the county.

Orsino v. Hartford Life and Accident Insurance Co. (CA-N 3:01-cv-01091 filed 03/16/2001).

ERISA action for denial of disability benefits because of a disagreement over whether the plaintiff suffered from depression or chronic fatigue syndrome. A settlement was placed on the record at a settlement conference, and the reporter's transcript was sealed.

Sealed Plaintiff v. Sealed Defendant (CA-N 3:01-cv-01156 filed 03/21/2001).

Statutory action. The docket sheet is sealed. The case was dismissed as settled.

RCN Telecom Services Inc. v. David (CA-N 3:01-cv-01181 filed 03/22/2001).

Rent, lease, and ejectment action involving a dispute as to whether commercial tenants were occupying more space than leased, especially on the roof. The parties filed a joint motion to approve a settlement agreement, which was filed under seal "so as to protect their privacy interests and trade secrets." The court approved the settlement, and the case was dismissed. Six months later it was reopened and the case continues.

Folkens v. Wyland (CA-N 3:01-cv-01241 filed 03/27/2001).

Copyright action by a pen-and-ink illustrator for misappropriation of his work. The parties filed a sealed settlement agreement, but the case continued and went to trial. It appears that the settlement agreement resolved some issues of liability, and the trial was over damages.

Food.com Inc. v. QuikOrder Inc. (CA-N 3:01-cv-01251 filed 03/27/2001).

Patent action concerning a method for ordering products on-line. The case was dismissed pursuant to a sealed settlement agreement.

Buffo v. Henkel Corp. (CA-N 3:01-cv-01442 filed 04/12/2001).

Employment action for insufficient payment of retirement benefits upon employment termination. A certification of early neutral evaluation was filed under seal, and an order dismissing the case was filed under seal the following day. Two months later an unsealed order dismissing the case was filed.

SanDisk Corp. v. Viking Components Inc. (CA-N 3:01-cv-01816 filed 05/01/2001).

Patent infringement action concerning electronic flash memory cards. The parties stipulated to an injunction preventing the defendant from selling flash memory cards that include any of enumerated models of flash memory controllers. The stipulated injunction states that the court will retain jurisdiction to enforce a settlement agreement to be filed under seal and incorporated by reference into the injunction. The day after the judge signed the stipulated injunction, a settlement agreement was filed under seal pursuant to an order granting permission to do so.

Fresh Express Inc. v. Bravo Packing Inc. (CA-N 5:01-cv-20743 filed 05/15/2001).

Patent action concerning a method for washing lettuce. The case was consolidated with *Fresh Express Inc. v. Elioco Produce Inc.* (CA-N 5:01-cv-20747). The original action was dismissed pursuant to "a confidential Settlement and License Agreement which contains information that is not generally known to the public and which Fresh Express and Bravo would, in the ordinary course of business, not disclose to competitors or other third parties. The confidentiality of the information contained in the Settlement and License Agreement cannot adequately be maintained so as to protect the interests of Fresh Express and Bravo in maintaining its confidentiality unless this information is kept from public disclosure." Thereafter the consolidated action similarly was dismissed, and the sealed settlement agreement was filed in the lead case's file.

Bruntjen v. Liberty Mutual Insurance Co. (CA-N 4:01-cv-01982 filed 05/21/2001).

RICO action for fraudulent solicitation of a $500,000 investment in a scheme to develop energy-related business interests in the Far East. All defendants except a law firm allegedly involved in the scheme were voluntarily dismissed pursuant to a confidential settlement agreement. Settling defendants sought a bar order protecting them from liability to the remaining law firm defendant. The law firm complained that the fairness of the settlement could not be evaluated unless presented to the court. Settling defendants' reply brief specified terms of settlement, which were redacted from the public file copy. A sealed, presumably unredacted, version of the brief also was filed. The court granted the bar order and dismissed the remaining claims against the law firm. Both plaintiffs and the law firm appealed. The case settled on appeal.

Caymus Vineyards v. Lisa Frank Inc. (CA-N 3:01-cv-02131 filed 05/31/2001).

Trademark infringement action. According to the complaint, the defendant liked the plaintiff's Caymus wine so much, she named her dog Caymus, and used her dog Caymus to market "Caymus" toys and related products for children. The case was dismissed pursuant to a sealed settlement agreement.

Pickern v. Best Western Inn at the Square (CA-N 4:01-cv-02202 filed 06/06/2001).

Civil rights action for failure to remove architectural barriers to persons with physical disabilities at the defendants' hotel. The case was dismissed pursuant to a sealed settlement agreement.

Bryant v. Rich (CA-N 3:01-cv-02613 filed 07/09/2001).

Personal injury action for unauthorized and untrue statements about the plaintiff in the defendants' advertising materials extolling the health benefits of their methylsulfonylmethane products. The parties reached a confidential settlement agreement during trial, and the agreement was filed under seal. The plaintiff paid jury costs of $2,403.11.

Lawton v. Prison Health Services (CA-N 4:01-cv-02761 filed 07/19/2001).

Designated a labor and management relations action, this is an employment action alleging race and age discrimination in failure to promote an African-American woman. An oral settlement was reached and the case was provisionally dismissed, but the plaintiff repudiated her oral settlement and the court agreed to vacate the dismissal. The case subsequently settled at a settlement conference, the minutes for which read, "Case settled. Court's Exhibit A received into evidence and is sealed. Settlement placed on the record and is confidential." Exhibit A was filed under seal the same day.

Sealed Plaintiff v. Sealed Defendant (CA-N 3:01-cv-02928 filed 07/27/2001).

Contract action. The docket sheet is sealed. The case was dismissed as settled.

Unobskey v. Taubman (CA-N 3:01-cv-03171 filed 08/17/2001).

Contract action for indemnification of tax liability. The complaint alleges that the indicted former chair of Sotheby's had participated in a real estate scheme a decade previously that the IRS now claims involved almost $1 billion in underreported income to a partnership. The complaint alleges that he agreed to indemnify the plaintiff partner for such circumstances, but now repudiates that agreement. The case settled. The plaintiff asked the court to sign a stipulated order directing the defendant not to dispose of property securing the agreement. Thereafter the court ordered that a letter from the plaintiff be construed as a motion to interpret the settlement agreement. The court ordered the letter sealed. Subsequent letters were construed as opposition and reply briefs, and they also were sealed. At a sealed telephonic hearing, the court denied the motion. A subsequent letter from the plaintiff asked for assistance in enforcing the settlement agreement. This letter was not sealed, and it includes a copy of the agreement. The letter states that the defendant agreed to post art worth $19.5 million to secure his indemnification responsibilities, but had so far designated art worth only $11.56 million.

Kent v. DaimlerChrysler Corp. (CA-N 3:01-cv-03293 filed 08/28/2001).

Class action under the Magnuson-Moss Warranty Act alleging that the Jeep's automatic transmission has "an unreasonably dangerous propensity to self shift from park into reverse." The action was dismissed pursuant to a sealed settlement agreement approved by the court.

Peninsula Creamery v. Fischer (CA-N 5:01-cv-20887 filed 09/20/2001).

Trademark action alleging that the defendant, Peninsula Fountain and Grill, which was licensed by the plaintiff to operate a downtown Palo Alto restaurant, opened up a similarly named Stanford Shopping Center restaurant without a license. The case settled, and the transcript for the successful settlement conference was filed under seal.

Christopher S. v. Orchard Union School District (CA-N 5:01-cv-21197 filed 09/20/2001).

Designated a statutory action for civil rights of a handicapped child, this is a suit for $39,416.30 in attorney fees and costs in an administrative action. (The parties settled the case for $28,000.) The case was dismissed pursuant to a sealed settlement agreement approved by the court.

Arrow Electronics Inc. v. Redback Networks Inc. (CA-N 5:01-cv-20918 filed 09/28/2001).

Contract action for amounts due on electronic components. The action was dismissed pursuant to a sealed joint stipulation.

EEOC v. Coastal Valley Management Inc. (CA-N 5:01-cv-21105 filed 11/28/2001).

Employment action on behalf of four women for sexual harassment, including unwanted sexual advances. The women intervened on behalf of a class. The case settled, and the court issued a consent decree stating the defendant's denial of the allegations but reciting the defendant's agreement to pay the plaintiffs $200,000. The court retained jurisdiction to enforce the decree for two years. The allocation of the settlement to the four women and their attorneys is stated in a sealed attachment. In addition, the sealed attachment states what other class members would receive.

Cooper v. UNUM Life Insurance Co. (CA-N 3:02-cv-01478 filed 03/26/2002).

Insurance action for denial of long-term disability benefits for Parkinson's disease. The case settled at a settlement conference. The settlement agreement was designated confidential, and the transcript of the conference was filed under seal.

Brooke v. Sydran Services Inc. (CA-N 3:02-cv-02151 filed 05/02/2002).

Action under the Fair Labor Standards Act by a Burger King assistant manager for unpaid overtime wages. The action was dismissed pursuant to a sealed consent decree.

Moore v. Yeast (CA-N 5:02-cv-02297 filed 05/13/2002).

Copyright action concerning ownership of computer software code. This case illustrates an interesting interplay among the parties and the court over what should be sealed and how to accomplish that.

Three months after the case was dismissed as settled, the plaintiffs filed a motion to enforce the settlement agreement, alleging that the defendants failed to properly notify a third party of the terms of the intellectual property agreement. The plaintiffs moved to attach a copy of the settlement agreement without seal, because "disclosure of the terms of the Settlement Agreement would not

release confidential trade secrets or compromise national security." The defendants responded that the plaintiffs' "attempt to file the Settlement Agreement without Seal is in violation of the confidentiality provision of the Settlement Agreement." The court ordered the defendants to "file a declaration from a competent witness setting forth the specific facts that justify protection under Federal Rules of Civil Procedure 26(c)," admonishing that "[b]road allegations of harm, however, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test" (quoting *Beckman Industries Inc. v. International Insurance Co.*, 966 F.2d 470, 476 (9th Cir. 1992)).

The court said that the plaintiffs should have lodged the settlement agreement with the court with a request to file it under seal pursuant to Local Rule 79-5, stating that the request was based solely on the opponents' claim of confidentiality. The docket sheet shows that five days later the court received a request to file the settlement agreement under seal and a notice of lodgment of the settlement agreement. The docket sheet entry states that the latter document was filed under seal, although there does not appear to be a document number for the filing.

The court denied the plaintiffs' motion to enforce the agreement on the merits and also on jurisdictional grounds. Because the original case was over and the court did not retain jurisdiction to enforce the agreement, and there did not appear to be independent jurisdiction over the enforcement action, the court lacked subject-matter jurisdiction over the motion.

District of Delaware

The court's local rule on sealing pertains only to administrative details. See D. Del. L.R. 5.3.

Statistics: 2,250 cases in termination cohort; 213 docket sheets (9.5%) have the word "seal" in them; 13 complete docket sheets (0.58%) were reviewed; actual documents were examined for 9 cases (0.40%); 9 cases (0.40%) appear to have sealed settlement agreements.

Cases with Sealed Settlement Agreements

Interactive Channel Technologies Inc. v. Worldgate Communications Inc. (DE 1:98-cv-00257 filed 05/11/1998).

Patent infringement action for selling a product that permits cable television providers to offer Internet access to their subscribers over existing cable infrastructure. The parties informed the court in September of a settlement, but between September and February the parties reached three different settlement agreements. In March the defendants filed a motion under seal to enforce one of these agreements. The court agreed to enforce the second settlement agreement. The parties filed the second settlement agreement under seal, and the court dismissed the action with prejudice in accordance with the terms of the stipulation of dismissal attached to this settlement agreement.

Advanced Energy Industries Inc. v. Astec America Inc. (DE 1:98-cv-00450 filed 07/31/1998).

Patent infringement action involving power conversion products for plasma-based thin film process technologies. After the parties settled, but before they filed a stipulation of dismissal, the court dismissed the case with leave to reopen. Prior to finalizing their settlement, the parties' requested reopening of the case. Two weeks later the parties signed a settlement agreement that included a provision requiring the parties to submit the settlement agreement and proposed consent judgment to the court under seal. The court approved the consent judgment and closed the case.

Flonex IP Holdings Ltd. v. MAG Technology Co. (DE 1:99-cv-00338 filed 05/28/1999).

One of several consolidated patent infringement actions concerning methods of reducing power consumption in computer systems and monitors. In this case, the parties agreed to a consent judgment in favor of the plaintiffs. The court closed the case but retained jurisdiction to enforce the settlement agreement. Four months later the plaintiffs filed a brief under seal in support of a motion to enforce the settlement agreement and hold the defendants in contempt. The court approved a supplemental consent judgment retained under seal by the court and dismissed the plaintiffs' motion to enforce the settlement as moot.

Barnes v. Town of Elsmere (DE 1:99-cv-00472 filed 07/23/1999).

Civil rights action against a fire company for indefinitely suspending the plaintiff firefighter for his membership in the Pagan Motorcycle Club. The parties settled and filed their settlement agreement and proposed order governing confidentiality with the court under seal. The court signed the order and dismissed the case with prejudice.

National Office Partners Ltd. Partnership v. Hyatt Corp. (DE 1:00-cv-00478 filed 05/12/2000).

Antitrust litigation concerning management of the plaintiffs' hotel. The plaintiffs alleged that the defendant received undisclosed kickbacks from vendors. The parties settled and submitted a consent order of dismissal to the court incorporating by reference the settlement agreement. The court sealed the settlement agreement, granted the consent order of dismissal, and closed the case, retaining jurisdiction to enforce the terms and provisions of the settlement agreement.

France Telecom v. Compaq Computer Corp. (DE 1:00-cv-00967 filed 11/16/2000).

Patent infringement action concerning MPEG-2 video compression. During a teleconference the parties informed the court that they reached a settlement in principle but wanted to stay the case instead of entering a stipulated dismissal. The court stayed the case, sealed the transcript of the teleconference, and ordered the parties to submit biweekly status reports of their settlement negotiations. These status reports on settlement negotiations were placed under seal when received by the court. Eight months later the court entered the parties' stipulation of dismissal with prejudice and ordered the case closed.

Housey Pharmaceuticals Inc. v. Boehringer-Ingelheim Pharmaceuticals Inc. (DE 1:00-cv-01002 filed 11/30/2000).

Patent infringement action concerning cell-based technology. The court granted the parties' stipulation of dismissal with prejudice and placed it under seal.

Jupiter Media Metrix Inc. v. NetRatings Inc. (DE 1:01-cv-00193 filed 03/27/2001).

Patent infringement action concerning a method for logging and reporting on-line activity of computer users in the United States. Five months after two of the defendants were dismissed without prejudice pursuant to a joint stipulation, the remaining parties settled and agreed to dismiss the case with prejudice. The parties filed a copy of the settlement agreement under seal and consented to allow the court to reserve jurisdiction over the case in order to enforce the terms of the settlement agreement. The case was closed.

Oratec Interventions Inc. v. Radionics Inc. (DE 1:01-cv-00558 filed 08/15/2001).

Patent infringement action concerning an apparatus for treating annular fissures of intervertebral disks. Seven months after one of the two defendants was voluntarily dismissed, the plaintiff informed the court that an oral settlement agreement had been reached with the remaining defendant. Pursuant to an order marked "confidential filed under seal," the court agreed to stay the case for sixty days to permit the parties to finalize negotiations. One month later the plaintiff filed a motion under seal to enforce the settlement agreement. Before the motion was decided, the court granted the parties' stipulation and dismissal with prejudice, and closed the case.

District of the District of Columbia

"Absent statutory authority, no cases or documents may be sealed without an order from the Court." D.D.C. L. Civ. R. 5.1(j)(1).

Statistics: 5,368 cases in termination cohort; 5 docket sheets are sealed (0.09%)—the disposition codes for 3 of these cases suggest no sealed settlement agreements[31] and the disposition codes for 2 of these cases suggest sealed settlement agreements;[32] 469 unsealed docket sheets (8.7%) have the word "seal" in them; 39 complete docket sheets (0.73%) were reviewed; actual documents were examined for 35 cases (0.65%); 28 cases (0.52%) appear to have sealed settlement agreements.

Cases with Sealed Settlement Agreements

Sharma v. Washington Metropolitan Area Transit Authority (DC 1:94-cv-00305 filed 02/16/1994).

Employment discrimination action for failure to promote, harassment, and retaliation. The parties submitted their settlement agreement with the court to be incorporated into a dismissal with prejudice, but asked that the agreement be sealed to preserve confidentiality. The court complied.

Kolstad v. American Dental Association (DC 1:94-cv-01578 filed 07/19/1994); *Kolstad v. American Dental Association* (DC 1:97-cv-00306 filed 02/14/1997).

Employment actions for sex discrimination. The first suit alleged a discriminatory failure to pro-

31. Two judgments on motions before trial, 1 "other" dismissal.

32. Two cases settled.

mote. The second suit alleged constructive termination in retaliation for the first suit. It appears that the parties reached a global settlement. Stipulated dismissals with unspecified attachments were filed under seal on the same day in both cases.

Sims v. Browner (DC 1:97-cv-00570 filed 03/21/1997).

Employment action against the Environmental Protection Agency for sex, age, and disability discrimination. The plaintiff filed a motion to enforce an alleged settlement agreement. A letter purporting to set forth the terms of settlement—which primarily provided for reassignment, work-at-home privileges, and retraction of discipline from her personnel file—was attached to the motion. Subsequently, the court granted motions to seal several related documents, including a brief in opposition to the motion to enforce and a motion for a protective order.

Scott v. District of Columbia (DC 1:98-cv-01645 filed 06/29/1998).

Civil rights action against the District of Columbia and its Department of Corrections for a prison murder brought by the decedent's estate and only child. The complaint alleged that the department knew or should have known that the victim was in danger from another inmate but failed to prevent his murder. The parties settled and submitted the settlement agreement under seal for the court's approval, specifically citing D.C. Code § 21-120(a), which requires court approval of settlements in suits brought on behalf of minors. The court approved it.

BMC – Benchmark Management Co. v. Meristar Hospitality Corp. (DC 1:98-cv-02394 filed 10/05/1998).

Contract, unjust enrichment, and fraud action arising out of a failed commercial relationship between a real estate holding company and a property management firm. The parties settled after a jury trial. The settlement agreement was filed under seal. A stipulation of dismissal was then filed under seal and "fiated" by the judge.

Lukas Nace Gutierrez & Sachs v. Havens (DC 1:99-cv-00395 filed 02/19/1999).

Contract action to recover unpaid legal fees. The plaintiff filed a motion to enforce a mediated settlement agreement and attached a handwritten agreement, signed by both parties, that called for a general release of all claims in exchange for an undisclosed cash payment. Later, the parties submitted their own draft settlement agreements intended to implement that earlier, less detailed agreement. Those draft settlement agreements were placed under seal.

William M. Mercer Inc. v. Mulder (DC 1:99-cv-00435 filed 02/24/1999).

Disability insurance fraud action against an insured employee and her alleged co-conspirator psychiatrist. The complaint alleges that the psychiatrist fabricated a diagnosis of "major depression" so that the patient would qualify for short-term disability. The parties apparently settled during a status conference on the eve of trial. The court sealed the record of that proceeding. Later, the court sealed a series of documents arising out of the defendant's motion to enforce that settlement agreement. Finally, the court, upon consent motion by the parties, ordered that the complaint and defendant Mulder's answer and counterclaim be sealed. (The complaint, however, remains in the open court file.)

Nick Chorak Moving v. United States (DC 1:99-cv-00587 filed 03/08/1999).

Contract action. The docket sheet is sealed. The action was dismissed as settled.

Lewis v. Booz-Allen & Hamilton Inc. (DC 1:99-cv-00713 filed 03/23/1999).

Employment action for race discrimination against a worldwide consulting firm by an African-American former technology consultant. A stipulation of voluntary dismissal, signed by all parties, and an order dismissing the case with prejudice were filed under seal on the same day shortly before trial.

L.L. v. Chimes District of Columbia Inc. (DC 1:99-cv-03277 filed 12/10/1999).

Pseudonymous personal injury action for the sexual assault of a mentally and physically disabled person. The defendant is a private company that employs mentally and physically disabled persons to provide building maintenance to third parties. The plaintiff, a mentally retarded 34-year-old woman, was raped by a nonimpaired co-worker who had a considerable criminal record and who was alleged to have been repeatedly violent and insubordinate during his employment with the defendant. The case concluded with a

stipulated order filed under seal shortly before trial.

Reddick v. Georgetown University Hospital (DC 1:99-cv-03377 filed 12/20/1999).

Medical malpractice action for the death of one twin in utero and severe mental and physical disabilities of the other twin born live. The parties settled and submitted the settlement agreement under seal for the court's approval. The court approved it.

Groenfeldt v. George Washington University (DC 1:99-cv-03470 filed 12/29/1999).

Medical malpractice wrongful death action for failure to diagnose a cancer while it was still treatable. The plaintiffs include two surviving children. The parties settled and submitted the settlement agreement under seal for the court's approval. The court approved it.

Komori Corp. v. Akiyama Printing Machine Manufacturing Co. (DC 1:00-cv-00432 filed 03/02/2000).

Designated a copyright action, this is really an action for declaration of noninfringement of the defendant's patent by the plaintiffs' offset printers that print multiple colors on both sides during a single pass through the press. The parties settled privately. Earlier in the suit, the plaintiffs had filed an apparent settlement agreement under seal as part of a motion to enforce it.

Jennings v. Family Management Services Inc. (DC 1:00-cv-00434 filed 03/02/2000).

Fraud action against a nursing company, a financial management company, and banks. The claims alleged various abusive financial dealings with an elderly woman. The suit resulted in a consent decree approving a private settlement agreement, which was filed under seal.

National Federation of the Blind v. Chevy Chase Bank (DC 1:00-cv-01167 filed 05/24/2000).

Civil rights action under the Americans with Disabilities Act to require installation of ATM machines accessible to the blind. The parties settled privately. Earlier in the suit, the plaintiffs filed a settlement agreement with the court under seal, although subsequent documents show that settlement negotiations continued thereafter.

Poindexter v. May Department Stores (DC 1:00-cv-01238 filed 05/31/2000).

Class action under the Fair Labor Standards Act on behalf of assistant buyers and media coordinators for overtime payments. The parties settled and sought approval of the settlement agreement from the court, attaching the agreement under seal. The court approved it.

Grant v. Riley (DC 1:00-cv-01595 filed 07/05/2000).

Employment discrimination class action against the Department of Education. The parties settled and submitted the settlement agreement to the court for approval. The court approved it. While the settlement agreement itself was public, the court sealed a list of the twenty-four individuals who would receive promotions as part of the settlement.

Washington-Baltimore Newspaper Guild v. Bureau of National Affairs (DC 1:00-cv-02045 filed 08/24/2000).

Labor and management relations action to compel arbitration. The employer had refused to proceed with arbitration based on a putative settlement of the underlying grievance. In seeking to compel arbitration, the union filed the alleged settlement materials with the court and then moved that they be sealed. The court sealed them. The parties subsequently settled the action pursuant to a settlement agreement, which was not filed.

Simmons v. Small Business Administration (DC 1:00-cv-02274 filed 09/22/2000).

Employment discrimination action against the Small Business Administration. The SBA asserted that it had settled these claims, moved to dismiss, and attached the settlement agreements under seal. The court granted the motion that they be kept under seal and granted the motion to dismiss.

Allen v. Soza and Co. (DC 1:00-cv-02726 filed 11/13/2000).

Employment discrimination action against a private employer and the Coast Guard. One party moved to enforce a settlement agreement with the plaintiff. By order of the court, this motion was filed under seal. Ultimately, the court granted the plaintiff's motion to voluntarily dismiss the case without prejudice, also explicitly preserving the right of the defendants to claim settlement in any subsequent action.

Conanan v. Tanoue (DC 1:00-cv-03091 filed 12/22/2000).

Employment class action against the Federal Deposit Insurance Corporation for race discrimination. The parties proposed to resolve the suit via consent decree, which was submitted to the court. The settlement called for the payment of $12 million in damages to class members and $2 million in attorney fees. What the court sealed was the number of persons who could opt out of the settlement pursuant to the consent decree. The court ultimately accepted the consent decree and approved final distribution of the settlement proceeds.

Groobert v. President and Directors of Georgetown College (DC 1:01-cv-00235 filed 01/30/2001).

Medical malpractice action for failure to diagnose and treat kidney failure. The husband of the deceased sued on behalf of the deceased, himself, and their minor child. The parties settled. The court sealed all materials related to the minor's settlement and "[a]ny and all other pleadings, records or correspondence relating to the parties' agreement to resolve and dismiss this case."

Engel v. Equifax Inc. (DC 1:01-cv-00882 filed 04/17/2001).

Statutory action. The docket sheet is sealed. The action was dismissed as settled.

United States v. 3d Systems Corp. (DC 1:01-cv-01237 filed 06/06/2001).

Antitrust action to prevent a leading technology company from acquiring its most significant competitor. The court approved a proposed final judgment that required divestment. The court sealed two appendices to the proposed judgment that related to pending patent applications.

Cooper v. Devereux Foundation (DC 1:01-cv-02325 filed 11/06/2001).

Assault action against a private residential treatment facility for coerced sexual intercourse with a minor resident by one of the staff members. The parties filed their settlement agreement under seal and sought approval for dismissal with prejudice. The court approved. While that particular settlement agreement was sealed, other settlement materials exist in the case file.

Kosen v. American Express Financial Advisors Inc. (DC 1:02-cv-00082 filed 01/17/2002).

Employment class action for systematic discrimination against women who applied for or obtained financial advisor positions. The suit was filed as a settlement class; the proposed settlement/consent decree was filed the day after the complaint was filed. The judge entered an order certifying the class and approving the consent decree, which provides for extensive injunctive relief and a compensation fund of more than $31 million. Subsequently several documents relating to disbursement of the monetary relief were filed under seal.

Cerveceria Modelo SA v. Hudnall (DC 1:02-cv-01586 filed 08/09/2002).

Trademark infringement action by the makers of Corona beer against a pornographic Web site that was using Corona marks and images, including images of sexual acts with Corona beer bottles. The parties settled and sought a stipulated judgment and permanent injunction. When the court asked to see the settlement agreement as part of its review of the stipulated judgment, the parties asked for it to be sealed. The court sealed it, and subsequently entered the stipulated judgment and injunction.

Middle District of Florida

No relevant local rule.

Statistics: 13,678 cases in termination cohort; 17 docket sheets are sealed (0.12%)—the disposition code for 1 of these cases suggests no sealed settlement agreement[33] and an examination of the other 16 docket sheets revealed no sealed settlement agreements;[34] 513 unsealed docket sheets (3.8%) have the word "seal" in them; 103 complete docket sheets (0.75%) were reviewed; actual documents were examined for 43 cases (0.31%); 36 cases (0.26%) appear to have sealed settlement agreements.

Cases with Sealed Settlement Agreements

Scarborough v. Medical Engineering Corp. (FL-M 8:97-cv-02266 filed 09/18/1997).

Personal injury case involving aluminum poisoning by breast implants. A settlement agreement was reached during mediation. The court denied the plaintiff's motion to set aside the me-

33. One statistical closing.
34. Two of these cases were settled.

diation agreement due to mediator bias. A sealed settlement agreement was filed with the defendants' motion to enforce a prior order requiring the plaintiff to sign a release. The case was dismissed with prejudice conditioned on immediate payment of the settlement and signing of the release by the plaintiff.

United States ex rel. Carroll v. Living Centers of America Inc. (FL-M 8:97-cv-02600 filed 10/23/1997).

Qui tam action under the False Claims Act for fraudulent Medicare billing against a provider of nursing homes. The government's notice to intervene reported a settlement agreement had been reached. The court ordered that all contents of the court's file remain under seal (except the complaint and the notice to intervene). A sealed settlement agreement apparently was filed.

Burnette v. Cooker Restaurant Corp. (FL-M 8:99-cv-00734 filed 03/29/1999).

Class action under the Fair Labor Standards Act by restaurant employees for failure to pay minimum wage and overtime wages. The case was dismissed pursuant to a sealed settlement agreement. Five weeks later the court granted the plaintiffs' motion to enforce the settlement agreement. The final document in the case reports that the defendant filed for bankruptcy.

United States ex rel. Williams v. NCS Healthcare Inc. (FL-M 8:99-cv-01556 filed 07/06/1999).

Qui tam action under the False Claims Act against a provider of pharmaceutical services for fraudulent Medicare billing. A sealed document was filed the same day that the case was dismissed. In the final order of dismissal the court ordered that all documents remain under seal (except the complaint and the notice of election to decline intervention). A sealed settlement agreement apparently was filed.

Lambert Corp. v. Water Bonnet Manufacturing Inc. (FL-M 6:00-cv-00010 filed 01/04/2000).

Action seeking declaratory judgment under CERCLA for causing pollution on the plaintiff's property. On the third day of a bench trial, a stipulated settlement agreement was made between the plaintiff and one of the defendants. A sealed settlement agreement was filed. The court also issued orders pertaining to final arguments regarding the remaining defendant, and the case was dismissed in the defendant's favor nearly eight months later.

Hemphill v. Helmtech Inc. (FL-M 5:00-cv-00045 filed 01/18/2000).

Product liability action in which the plaintiff suffered severe head injuries in a motorcycle accident while wearing a helmet manufactured by the defendant. A sealed settlement agreement was filed. The court denied the plaintiff's motion to enforce the settlement agreement and for sanctions, because payment of $2,320,542 had been received. The court retained jurisdiction for sixty days to enforce the terms of the settlement agreement.

United States ex rel. Gambrill v. Laboratory Corp. of America (FL-M 8:00-cv-00397 filed 02/25/2000).

Qui tam action under the False Claims Act against a provider of laboratory services for fraudulent Medicare billing. All documents in the case file (except the complaint) were filed under seal.

Jabs v. Manatee Memorial Hospital (FL-M 8:00-cv-00420 filed 03/01/2000).

Medical malpractice case involving the negligent care of a newborn with hypotension and respiratory problems, which caused permanent brain damage. The court placed under seal the plaintiff's motion for approval of the minor's settlement, the order granting the motion, the guardian ad litem report, and the release. The supplemental report of the guardian ad litem reports a settlement amount of $1,736,716.

Wheeler v. First Colony Life Insurance Co. (FL-M 8:00-cv-00695 filed 04/12/2000).

Contract class action alleging fraud and breach of common law duties in the sale and subsequent servicing of life insurance policies. The plaintiff never filed a motion to certify the class. The order dismissing the case approved a confidential settlement agreement. The same day the case was dismissed two sealed documents were filed under seal. A sealed settlement agreement apparently was filed.

Florida Conference Association of Seventh-Day Adventists v. Royal Venture Cruise Line Inc. (FL-M 6:00-cv-00895 filed 07/13/2000).

Admiralty action involving a deposit of $120,000 for a cruise, which the cruise company failed to return after it went out of business. A sealed settlement agreement was filed. The settlement amount of $300,000 was noted in the stipulated

final judgment. The court retained jurisdiction to enforce the terms of the settlement agreement.

Russell v. Baxter Healthcare Corp. (FL-M 6:00-cv-01134 filed 08/28/2000).

Product liability action involving a minor who contracted hepatitis C from the defendant's intravenous immunoglobulin product. The court granted the motion to approve the settlement and ordered the transcript and record of the settlement sealed.

TV/COM International Inc. v. MediaOne of Greater Florida Inc. (FL-M 3:00-cv-01045 filed 09/19/2000).

Patent infringement action concerning a "multilayer encryption system for broadcast of encrypted information." Two sealed settlement agreements were filed. The court retained jurisdiction to enforce the terms of the settlement agreements.

Woolbright v. Capris Furniture Industries Inc. (FL-M 5:00-cv-00315 filed 10/02/2000).

Employment action in which a furniture store employee sued her former employer for sexual harassment and retaliation. A sealed settlement agreement was filed by the defendant. The court retained jurisdiction to enforce the terms of the settlement agreement.

Brackett v. United Healthcare Insurance Co. (FL-M 8:00-cv-02112 filed 10/13/2000).

ERISA action for wrongful denial of coverage for speech therapy for the plaintiff's brain-injured child. A sealed settlement agreement was filed.

Artcraft Electric Ltd. v. Classic Lighting Corp. (FL-M 3:00-cv-01166 filed 10/18/2000).

Copyright action involving the production, distribution, and sale of glassware products that are direct copies of the plaintiff's glassware. A sealed settlement agreement was filed. The court retained jurisdiction to enforce the terms of the settlement agreement.

Anthony v. Community Hospice of Northeast Florida Inc. (FL-M 3:00-cv-01239 filed 11/08/2000).

Class action under the Fair Labor Standards Act by kitchen and nursing employees for failure to pay overtime wages. A sealed settlement agreement was filed. The court retained jurisdiction for thirty days to enforce the terms of the settlement agreement.

Morrow v. Town of Oakland (FL-M 6:00-cv-01514 filed 11/13/2000).

Employment action by a chief of police for age discrimination and wrongful termination. A sealed document was filed the day of the settlement conference. A sealed settlement agreement apparently was filed.

Thiruchelvam v. Humana Medical Plan Inc. (FL-M 6:00-cv-01542 filed 11/16/2000).

Employment action by eight doctors against a health insurance company, alleging that they were terminated from their primary care agreements because of their race. The plaintiffs filed a motion to enforce the oral settlement agreement reached during mediation. One week after the motion was filed, two sealed documents were filed. Two days later, a settlement conference was held. The case was dismissed as settled, and the court retained jurisdiction to enforce the settlement agreement.

Palermo v. United Parcel Service Inc. (FL-M 8:00-cv-02395 filed 11/22/2000).

Action under the Americans with Disabilities Act, Family Medical Leave Act, and Fair Labor Standards Act by a supervisor against his former employer for failure to pay overtime wages, discrimination, retaliation, and wrongful termination because of his stress disorder. A sealed settlement agreement was filed as an attachment to a joint motion for a protective order. The case was dismissed as settled.

Wallendy v. Kanji (FL-M 8:01-cv-00323 filed 02/13/2001).

Action under the Americans with Disabilities Act for an injunction requiring the defendant to remove from its commercial property architectural barriers to the physically disabled. A portion of the settlement agreement containing attorney fees and costs was filed under seal.

Delgado v. Hillsborough Community College (FL-M 8:01-cv-00514 filed 03/09/2001).

Employment action by a Hispanic security officer for race discrimination and retaliation for filing an EEOC complaint. A sealed settlement agreement was filed. Two months after the case was dismissed, the plaintiff filed a notice of the defendant's noncompliance. One month later, the plaintiff reported that the defendant had complied with the settlement agreement.

Hanshaw v. Princess U.S. Holdings Inc. (FL-M 8:01-cv-01045 filed 06/01/2001).

Personal injury action involving an injury sustained when the plaintiff's wheelchair was thrown backwards while entering the gangway of the defendant's passenger ship. After the court ordered mediation, the case was dismissed without prejudice and "subject to the right of the parties within 60 days to submit a stipulated form of final order or judgment." Six days after the case was dismissed, a sealed document was filed. Two months later, a final order granted the joint stipulation for dismissal with prejudice. A sealed settlement agreement apparently was filed.

Erway v. Mayport Wholesale Seafood Inc. (FL-M 3:01-cv-00733 filed 06/27/2001).

Employment action by a supervisor for sexual harassment and retaliation. The case was dismissed as settled. A sealed settlement agreement was filed as an attachment to the plaintiff's motion to enforce the settlement agreement. The court denied the motion.

Mishoe v. City of Bartow (FL-M 8:01-cv-01303 filed 07/10/2001).

Employment action for wrongful termination in retaliation for supporting a co-worker's sexual harassment claim. A sealed document was filed about a month after the case was dismissed without prejudice, and the parties were given sixty days to submit a stipulated form of final order or judgment.

Shuey v. Information and Display Systems Inc. (FL-M 3:01-cv-00797 filed 07/13/2001).

Action under the Fair Labor Standards Act by an inventory logistics coordinator for failure to pay overtime wages. A sealed settlement agreement was filed. The court retained jurisdiction to enforce the terms of the settlement agreement.

Hunter v. Albertson's Inc. (FL-M 6:01-cv-00866 filed 07/20/2001).

Class action under the Fair Labor Standards Act by grocery store employees for failure to pay overtime wages. A sealed settlement agreement was filed.

Konecranes Inc. v. Leach (FL-M 3:01-cv-00917 filed 08/09/2001).

Contract action involving breach of an employee noncompetition and confidentiality agreement. A sealed settlement agreement was filed. The court granted the plaintiff's motion for a permanent injunction against the use of client lists and trade secrets. The court retained jurisdiction to enforce the terms of the settlement agreement.

Access for America Inc. v. Hall (FL-M 8:01-cv-01734 filed 09/07/2001).

Action under the Americans with Disabilities Act for an injunction requiring the defendant to remove from its commercial property architectural barriers to the physically disabled. A sealed document was filed ten days after the motion to approve a consent decree. The court retained jurisdiction to enforce the consent decree.

Access for America Inc. v. World Continents Inc. (FL-M 8:01-cv-01736 filed 09/07/2001).

Action under the Americans with Disabilities Act for an injunction requiring the defendant to remove from its commercial property architectural barriers to the physically disabled. A sealed settlement agreement was filed. In the order of dismissal, the court awarded the plaintiff $2,500 to cover legal fees, expert fees, costs, and reinspection costs.

Hernandez v. Central Beef Industries LLC (FL-M 5:01-cv-00323 filed 09/27/2001).

Wrongful termination action under the Family Medical Leave Act seeking reinstatement and repayment of employment benefits. A sealed settlement agreement was filed by the defendant. The court retained jurisdiction to enforce the terms of the settlement agreement.

DirecTV Inc. v. Lamothe (FL-M 8:01-cv-01923 filed 10/09/2001).

Action under the Federal Communication Act seeking injunctive relief and compensation for unlawful sale of signal theft devices. Eighteen days before the case was dismissed a sealed document was filed. The court dismissed the case without prejudice, and held that the parties could "re-open the action within sixty (60) days upon good cause." The court also ordered a permanent injunction enjoining the defendant from manufacturing or selling signal theft devices.

Harwell v. Groover (FL-M 3:01-cv-01179 filed 10/12/2001).

Shareholder derivative action involving breach of fiduciary duty and usurpation of corporate op-

portunity. A sealed settlement agreement was filed.

Access for America Inc. v. G&G Properties LLC (FL-M 8:02-cv-00212 filed 02/05/2002).

Action under the Americans with Disabilities Act for an injunction requiring the defendant to remove from its shopping plaza architectural barriers to the physically disabled. In the consent decree the defendant agreed to modify its facilities to make them readily accessible to the disabled. In a stipulated agreement the court approved the fees and costs in camera under seal.

Tremaroli v. Information and Display Systems Inc. (FL-M 3:02-cv-00315 filed 04/01/2002).

Action under the Fair Labor Standards Act by an electronics technician for failure to pay overtime wages. A sealed settlement agreement was filed.

Violet v. Designers' Press Inc. (FL-M 6:02-cv-00658 filed 06/06/2002).

Employment action in which a woman sued her former employer for sexual harassment and retaliation. Settlement was reached during the settlement conference. The portion of the record containing the terms of the settlement was sealed.

Cummings v. Timberland Security Corp. (FL-M 8:02-cv-01227 filed 07/10/2002).

Class action under the Fair Labor Standards Act by a security officer for failure to pay overtime wages. A sealed settlement agreement was filed.

Northern District of Florida

No relevant local rule.

Statistics: 3,045 cases in termination cohort; 2 docket sheets are sealed (0.07%)—the disposition code for 1 of these cases suggests no sealed settlement agreement[35] and the disposition code for 1 of these cases suggests a sealed settlement agreement;[36] 160 unsealed docket sheets (5.3%) have the word "seal" in them; 11 complete docket sheets (0.36%) were reviewed; actual documents were examined for 5 cases (0.16%); 5 cases (0.16%) appear to have sealed settlement agreements.

35. One "other" dismissal.
36. One case settled.

Cases with Sealed Settlement Agreements

United States v. Board of Regents (FL-N 4:93-cv-40226 filed 06/25/1993).

Statutory action. The docket sheet is sealed. The case was dismissed as settled.

United States ex rel. Andres v. Florida Clinical Practice Associates (FL-N 1:96-cv-00116 filed 06/25/1996).

Qui tam action under the False Claims Act for fraudulent Medicare billing. Many filings in this case are under seal, including the settlement agreement, but not the complaint.

Rzepka v. DaimlerChrysler Corp. (FL-N 5:00-cv-00023 filed 02/01/2000).

Motor vehicle action against the manufacturer and distributor of the plaintiffs' Dodge Caravan and another driver for wrongful death in a rollover accident. Plaintiffs alleged that design defects caused the car's plastic roof to cave in, windows to burst, and restraint system to fail. A sealed settlement agreement was filed.

Thomas v. Florida Power Corp. (FL-N 4:00-cv-00231 filed 06/14/2000).

Employment discrimination case alleging a hostile work environment on the basis of race. The harassment included the hanging of two rope nooses in the workplace. A sealed settlement agreement was attached to the consent order of dismissal.

Blankenship v. Turner (FL-N 1:01-cv-00052 filed 05/16/2001).

Employment discrimination case involving sexual harassment by a former deputy sheriff. The plaintiff alleged that some employees of the Sheriff's Department made inappropriate and unwelcome sexual advances toward her and that after she reported the harassment she was made a target of ridicule and retaliation. At the pretrial conference a settlement agreement was reached, and the announcement and transcript of the settlement agreement were sealed.

Southern District of Florida

"Unless the Court's sealing order permits the matter to remain sealed permanently, the Clerk will dispose of the sealed matter upon expiration of the time specified in the Court's sealing order by unsealing, destroying, or returning the matter to the filing party." S.D. Fla. Gen. L.R. 5.4.D. "Absent extraordinary circumstances, no matter

sealed pursuant to this rule may remain sealed for longer than five (5) years from the date of filing." *Id.* R. 5.4.B.2.

Statistics: 15,928 cases in termination cohort; 16 docket sheets are sealed (0.10%)—the disposition codes for 15 of these cases suggest no sealed settlement agreements[37] and the disposition code for 1 of these cases suggests a sealed settlement agreement;[38] 669 docket sheets (4.2%) have the word "seal" in them; 260 complete docket sheets (1.6%) were reviewed; actual documents were examined for 128 cases (0.80%); 111 cases (0.70%) appear to have sealed settlement agreements.

Cases with Sealed Settlement Agreements

Brandt v. Deloitte & Touche LLP (FL-S 1:93-cv-01830 filed 09/21/1993).

Personal property damage action by a bankrupt bank against an accounting firm that allegedly failed to exercise reasonable care in performing accounting and auditing services. The final entry on the docket sheet notes that a sealed document was filed the same day the court reported that a settlement conference was canceled.

Arnold Palmer Enterprises v. Gotta Have It Golf Collectibles (FL-S 1:97-cv-00978 filed 04/14/1997).

Trademark infringement action involving sale of unlicensed photographs and false reproductions. A sealed document was filed a week before the case was dismissed. In the order of dismissal the court retained jurisdiction to enforce the settlement agreement. A sealed settlement agreement apparently was filed.

United States ex rel. Ayers v. Tenet Healthcare Corp. (FL-S 1:97-cv-02507 filed 08/05/1997).

Qui tam action under the False Claims Act for fraudulent Medicare billing. Many filings in this case are under seal, including the settlement agreement, but not the complaint.

Parris v. Miami Herald Publishing Co. (FL-S 1:97-cv-02524 filed 08/05/1997).

Wrongful termination action under the Family Medical Leave Act. Seventeen days after the settlement conference, a sealed document was filed and the case was dismissed. Four days after the case was dismissed, an amended order of dismissal was filed stating that the court would retain jurisdiction to enforce the terms of the settlement agreement. A sealed settlement agreement apparently was filed.

Estate of Sosa v. American Airlines Inc. (FL-S 1:97-cv-03863 filed 12/03/1997).

Airplane action for wrongful death of a passenger on a flight that crashed at the Cali, Colombia, airport, allegedly due to lack of ground navigational aids. The case settled for $1 million, and details of the settlement were provided in the guardian ad litem report. A sealed document was filed the same day the case was dismissed. A sealed settlement agreement apparently was filed.

United States ex rel. Aron v. University of Miami Inc. (FL-S 1:97-cv-04304 filed 12/19/1997).

Qui tam action under the False Claims Act for fraudulent Medicare billing. A sealed document was filed four days prior to an order dismissing the case. In the order for dismissal "all other presently existing contents of the Court's file" (except the complaint) were to remain sealed. A sealed settlement agreement apparently was filed.

United Parcel Service of America Inc. v. Lynn Strickland Tires Inc. (FL-S 1:98-cv-00992 filed 05/10/1998).

Contract action involving tire-related services. A sealed settlement agreement was filed. The court approved the settlement, retained jurisdiction to enforce the settlement agreement, and closed the case. One of the defendants filed a motion to reopen the case and unseal the settlement agreement because the defendant was not a party to the agreement and never received a copy of it. The court reopened the case, vacated the order approving the settlement, and unsealed the settlement agreement, but ordered that "the parties shall maintain the confidentiality of the document and use it only to promote further settlement." The defendant who had settled with the plaintiff was dismissed. The final judgment against the remaining defendant was in the amount of $18,712.

Rando v. Slingsby Aviation Ltd. (FL-S 1:98-cv-02224 filed 09/22/1998).

Wrongful death action alleging that a faulty fuel system caused the crash of a Firefly Aircraft, which killed an Air Force Academy cadet. The case was dismissed as to the distributor of the air-

37. One judgment on motion before trial, 4 voluntary dismissals, 4 "other" dismissals, 4 "other" judgments, 2 statistical closings.

38. One consent judgment.

plane. A joint stipulation of dismissal was ordered for the manufacturer of the fuel-injection system. A sealed document was filed two days prior to dismissal. A sealed settlement agreement apparently was filed. Two years later a settlement agreement was reached with the manufacturer of the airplane, but this agreement was not filed. In the order of dismissal the court retained jurisdiction to enforce the terms of the settlement agreement.

Casey v. Windmere-Durable Holdings Inc. (FL-S 1:98-cv-02273 filed 09/29/1998).

Securities class action for the fraudulent misrepresentation of financial condition, causing artificial inflation of the company's stock price. The settlement agreement provided $10.5 million to the class. A supplemental agreement was filed under seal.

United States ex rel. Christensen v. Preferred Healthcare Consultants Inc. (FL-S 1:98-cv-03021 filed 12/10/1998).

Qui tam action under the False Claims Act for fraudulent Medicare billing by health care providers. Two days before the case was dismissed a sealed document was filed. A sealed settlement agreement apparently was filed.

Martin v. Underwood Karcher & Karcher PA (FL-S 1:99-cv-01440 filed 05/19/1999).

Employment action for sexual harassment and for wrongful termination after the plaintiff reported the harassment. A sealed document was filed six days before the joint stipulation of dismissal. In the order of dismissal the court retained jurisdiction to enforce the terms of the settlement agreement. A sealed settlement agreement apparently was filed.

First Impressions Design and Management Inc. v. All That Style Interiors Inc. (FL-S 1:99-cv-02353 filed 08/26/1999).

Patent action alleging that the defendant marketed and sold a theater-style chair and falsely represented this product as identical to the plaintiff's "CineLounger." In the order of dismissal the court approved the settlement agreement. A sealed document was filed the same day the case was dismissed. A sealed settlement agreement apparently was filed.

Oviedo v. Crystal Art of Florida Inc. (FL-S 1:99-cv-02391 filed 08/31/1999).

Action under the Fair Labor Standards Act by a crystal art assembler for failure to pay overtime wages. A sealed settlement agreement was filed.

Martin v. Thermo Electron Corp. (FL-S 1:99-cv-02547 filed 09/22/1999).

Contract action for breach of a master distributor agreement. A sealed document was filed two weeks after the settlement conference and two weeks before the joint stipulation to dismiss. A sealed settlement agreement apparently was filed.

United States ex rel. Alford v. Bon-Bone Medical Imaging Inc. (FL-S 9:99-cv-08841 filed 10/08/1999).

Qui tam action under the False Claims Act for fraudulent Medicare billing. Sealed documents were filed the same day the case was dismissed.

Island Developers Ltd. v. Martin Lumber and Cedar Co. (FL-S 1:99-cv-02969 filed 11/03/1999).

Contract action involving breach of implied warranty when defective wood windows were installed. In the order of dismissal the court retained jurisdiction to enforce the terms of the settlement agreement. Two months after the case was dismissed, a sealed document was filed the same day the plaintiff filed a motion to expedite enforcement of the settlement agreement. A sealed settlement agreement apparently was filed. The court denied the motion for oral argument, and the plaintiff withdrew the motion to expedite enforcement, because the parties resolved the issue.

In re Hays v. Martinengo (FL-S 1:99-cv-03000 filed 11/08/1999).

Statutory action in admiralty by owners of a motorboat for exoneration from or limitation of liability for an accident that killed three people. A sealed document was filed four days after the order approving the settlement. A sealed settlement agreement apparently was filed.

Estate of Regalado v. Airmark Engines Inc. (FL-S 0:99-cv-07579 filed 11/29/1999); *Estate of Acevedo v. Airmark Engines Inc.* (FL-S 0:99-cv-07580 filed 11/29/1999).

Two airplane personal injury and product liability actions for wrongful death against the manufacturer and distributor of an aircraft for installing an incorrect fuel-pump system that caused the aircraft to crash, killing the pilot. The court ap-

pointed a guardian ad litem to approve the settlement agreement with the decedent's minor child. In the minutes of the motion to approve a settlement hearing, it was noted that the "parties will file settlement under seal." In the order dismissing the case, the court retained jurisdiction for sixty days to enforce the terms of the settlement agreement. A sealed document was filed one week after the case was dismissed. A sealed settlement agreement apparently was filed.

Hofstein v. Coastal Leasing Inc. (FL-S 0:99-cv-07620 filed 12/10/1999).

Employment action by a portfolio manager against her former employer for wrongful termination based on her pregnancy. The plaintiff's motion to enforce the settlement agreement was filed under seal. The court denied the motion and entered a final judgment in favor of the defendant.

Gornescu v. United Cable Communications Group (FL-S 0:99-cv-07637 filed 12/15/1999).

Action under the Fair Labor Standards Act by a cable company employee for failure to pay overtime wages. A sealed settlement agreement was filed.

DC Comics v. Burglar Alarm Technicians Inc. (FL-S 0:99-cv-07641 filed 12/16/1999).

Copyright action involving the "Batman" logo against a burglar alarm company. A sealed settlement agreement was filed as an attachment to the order of dismissal.

Zurich-American Insurance Co. v. Perez (FL-S 1:00-cv-00559 filed 02/10/2000).

Action for declaratory judgment regarding disputes over an insurance contract in which the distributor demanded a refund of the deposit on undelivered vehicles. A sealed document was filed three days before the case was dismissed. The order of dismissal refers to a "Confidential Settlement Agreement and Release." A sealed settlement agreement apparently was filed.

Guillen v. Northwest Airlines Inc. (FL-S 1:00-cv-01300 filed 04/06/2000).

Action for damages for personal injuries suffered by a three-year-old child when a flight attendant spilled hot coffee on her. In the guardian ad litem's report, the settlement amount of $145,000 was disclosed. The sealed settlement agreement was filed as an attachment to the guardian's report.

Jacobs v. Pine Crest Preparatory School Inc. (FL-S 0:00-cv-06564 filed 04/21/2000).

Employment action for wrongful termination of a teacher based on sex and age. A sealed settlement agreement was filed. In the order of dismissal the court retained jurisdiction to enforce the terms of the settlement agreement.

Williams v. Office Depot Inc. (FL-S 1:00-cv-01466 filed 04/24/2000).

Employment civil rights action in which a black plaintiff sued a former employer for race discrimination and wrongful termination. One day after the stipulation of dismissal was filed, a sealed document was filed. In the order of dismissal the court retained jurisdiction to enforce the terms of the settlement agreement. A sealed settlement agreement apparently was filed.

Johns v. Viking Life-Saving Equipment (America) Inc. (FL-S 1:00-cv-01998 filed 06/05/2000).

Class action under the Fair Labor Standards Act for failure to pay overtime wages. A sealed document was filed one week before the case was dismissed. The order of dismissal approved the settlement agreement. A sealed settlement agreement apparently was filed.

Mencia v. Crystal Art of Florida Inc. (FL-S 1:00-cv-02053 filed 06/08/2000).

Class action under the Fair Labor Standards Act by warehouse employees for failure to pay overtime wages. A sealed settlement agreement was filed.

Sakr v. University of Miami (FL-S 1:00-cv-02294 filed 06/28/2000).

Action under the Americans with Disabilities Act alleging that the defendant dismissed the plaintiff from a doctoral program on account of his disability. The plaintiff's counsel filed an emergency motion to enforce the settlement agreement, alleging that the plaintiff had agreed to accept the settlement reached at the settlement conference but later refused to sign the agreement. The defendant filed an emergency motion to seal the settlement agreement and filed a sealed copy of the agreement. The motion to enforce the settlement agreement was denied. Subsequently, the court granted the defendant's motion for summary judgment. The plaintiff filed an appeal one

month after the case was dismissed, and the appeal currently is pending.

Tessier v. J.C. Penney Inc. (FL-S 0:00-cv-07080 filed 07/31/2000).

Employment discrimination action by an Italian man alleging a hostile work environment. The plaintiff alleged that he was harassed after he complained about hazardous working conditions. The defendant filed a sealed motion to enforce the settlement agreement. The court denied the motion to enforce because the plaintiff never signed the settlement agreement. Four months later the case was dismissed as settled.

Dolan v. Ancicare PPO Inc. (FL-S 0:00-cv-07099 filed 08/03/2000).

Employment discrimination case based on sexual harassment and retaliation. The joint stipulation for dismissal asked the court to retain jurisdiction to enforce the settlement agreement. One month after the case was dismissed, a sealed document was filed. A sealed settlement agreement apparently was filed.

Estate of Runnels v. City of Miami (FL-S 1:00-cv-02930 filed 08/10/2000).

Civil rights action for wrongful death that occurred when a police officer killed a man threatening to commit suicide. The decedent was alone in his house when the police officer shot him through a window. A sealed document was filed one week before the notice of settlement. A sealed settlement agreement apparently was filed.

Association for Disabled Americans v. Beekman Towers Inc. (FL-S 1:00-cv-02951 filed 08/14/2000).

Civil rights action under the Americans with Disabilities Act for an injunction requiring the defendant to remove from its hotel architectural barriers to the physically disabled. A sealed settlement agreement was filed. The court retained jurisdiction to enforce the terms of the settlement agreement.

Rivera v. Lentine Marine Inc. (FL-S 2:00-cv-14266 filed 08/30/2000).

Action under the Fair Labor Standards Act by a mechanic for failure to pay minimum wage and overtime wages. A sealed settlement agreement was filed.

American Disability Association v. Mavis Development Corp. (FL-S 0:00-cv-07278 filed 09/05/2000).

Civil rights action under the Americans with Disabilities Act for an injunction requiring the defendant to remove from its commercial property architectural barriers to the physically disabled. A sealed document was filed two days before the case was dismissed. In the order dismissing the case the court retained jurisdiction to enforce the stipulation for settlement. A sealed settlement agreement apparently was filed.

Genao v. Joe Allen Miami Beach LLC (FL-S 1:00-cv-03689 filed 10/02/2000).

Class action under the Fair Labor Standards Act by kitchen workers for failure to pay minimum wage and overtime wages. A sealed settlement agreement was filed.

Singh-Chaitan v. Nova Southeastern University Inc. (FL-S 1:00-cv-04553 filed 11/30/2000).

Employment action by a black office manager against a former employer for race discrimination. In the order of dismissal the court retained jurisdiction to enforce the settlement agreement. A sealed settlement agreement was filed as an attachment to the plaintiff's motion to enforce it. The parties were unable to agree on a separate agreement that was to be the final settlement agreement, so the plaintiff wanted to enforce the original settlement agreement. The defendant filed a motion to compel a settlement agreement with a revised confidentiality provision. The court granted the plaintiff's motion to enforce the original settlement agreement and denied the defendant's motion to compel a revised settlement agreement. The defendant filed a revised sealed settlement agreement as an attachment to a renewed motion to compel a settlement agreement. The defendant objected to the court order enforcing the original settlement agreement, and the court heard oral argument on this issue. After oral argument the parties amicably resolved the dispute involving the confidentiality clause. The court retained jurisdiction to enforce the terms of the settlement agreement.

Ballantini v. Royal Caribbean Cruises Ltd. (FL-S 1:00-cv-04755 filed 12/14/2000).

Admiralty action for personal injury that occurred when the plaintiff fell down some stairs while a passenger on the defendant's cruise ship. A settlement for $110,000 was noted in the minutes of

the settlement conference. The transcript of the settlement conference was sealed. The court retained jurisdiction for thirty days to enforce the settlement agreement.

Darch v. Café Iguana Inc. (FL-S 1:00-cv-04813 filed 12/18/2000).
Class action under the Fair Labor Standards Act by restaurant workers for failure to pay minimum wage and overtime wages. A sealed document was filed two weeks after the notice of settlement was filed by the plaintiffs. A sealed settlement agreement apparently was filed.

United States v. Kantor (FL-S 0:00-cv-07851 filed 12/19/2000).
Action under the False Claims Act for fraudulent Medicare billing. A sealed document was filed three days before the case was dismissed. A sealed settlement agreement apparently was filed.

Barnuevo v. BNP Paribas (FL-S 1:01-cv-00005 filed 01/02/2001).
Action under the Fair Labor Standards Act by a bank employee for failure to pay overtime wages. A sealed document was filed the same day the case was dismissed. In the order of dismissal the court retained jurisdiction to enforce the terms of the settlement agreement. A sealed settlement agreement apparently was filed.

Egli v. Martino Tire Co. of Royal Palm Beach (FL-S 9:01-cv-08013 filed 01/04/2001).
Action under the Fair Labor Standards Act by an automobile repair shop employee for failure to pay overtime wages. A sealed settlement agreement was filed. The order of dismissal stated that "the documents filed under seal shall remain under seal until the closing of this case, at which time they shall be destroyed."

Weiss v. Russell J. Ferraro Jr. and Associates (FL-S 2:01-cv-14025 filed 01/22/2001).
Action under the Fair Labor Standards Act by a legal assistant for failure to pay overtime wages. A sealed settlement agreement was filed.

Rodriguez v. Fresh King Inc. (FL-S 1:01-cv-00304 filed 01/23/2001).
Class action under the Fair Labor Standards Act by warehouse employees for failure to pay overtime wages. A sealed document was filed the same day the case was dismissed. A sealed settlement agreement apparently was filed.

Artcom Technologies Corp. v. Mastec Inc. (FL-S 1:01-cv-00351 filed 01/29/2001).
RICO action involving a management buyout with allegations of conversion, fraud, and breach of fiduciary duty. A sealed settlement agreement was filed. In the order of dismissal the court retained jurisdiction to enforce the terms of the settlement agreement.

Biosample Inc. v. Biosamplex Inc. (FL-S 9:01-cv-08107 filed 02/06/2001).
Trademark action concerning the sale of "biological products." The court ordered a permanent injunction against the defendant's use of the trademark Biosamplex. A sealed settlement agreement was filed. In the order of dismissal the court retained jurisdiction to enforce the injunction and settlement agreement.

Stortini v. MDC General Contracting Inc. (FL-S 1:01-cv-00531 filed 02/09/2001).
Action under the Fair Labor Standards Act by a construction worker for failure to pay overtime wages. A sealed settlement agreement was filed. In the order of dismissal the court retained jurisdiction to enforce the terms of the settlement agreement.

Flores v. Albertson's Inc. (FL-S 1:01-cv-00534 filed 02/09/2001).
Class action under the Fair Labor Standards Act by grocery store employees for failure to pay overtime wages. A sealed document was filed two days before the case was dismissed. In the order of dismissal the court approved the settlement agreement. A sealed settlement agreement apparently was filed.

Doe v. Metropolitan Dade County Public Health Trust (FL-S 1:01-cv-00546 filed 02/12/2001).
Civil rights action arising from refusal to disclose a minor's AIDS diagnosis to the minor. A sealed document was filed the same day the case was dismissed. In the order of dismissal the court retained jurisdiction to enforce the terms of the settlement agreement. A sealed settlement agreement apparently was filed.

Access Now Inc. v. Winn-Dixie Stores Inc. (FL-S 1:01-cv-00764 filed 02/21/2001).

Civil rights action under the Americans with Disabilities Act for an injunction requiring the defendant to remove from its grocery stores architectural barriers to the physically disabled. A sealed document was filed one day before the case was dismissed. In the order of dismissal the settlement was approved and the court ordered that the settlement agreement be returned to the parties rather than be permanently under seal.

Pierre-Louis v. Archon Residential Management LP (FL-S 1:01-cv-00794 filed 02/22/2001).

Employment action by a black maintenance worker against his former employer for race discrimination and wrongful termination. A sealed document was filed five days before the case was dismissed. In the order of dismissal the court approved the settlement agreement and retained jurisdiction to enforce the settlement agreement. A sealed settlement agreement apparently was filed.

Jones v. Air Compressor Works Inc. (FL-S 9:01-cv-08164 filed 02/23/2001).

Action under the Fair Labor Standards Act by an office manager for failure to pay overtime wages. A sealed document was filed on the same day the case was dismissed. The order dismissing the case approved the settlement agreement. A sealed settlement agreement apparently was filed.

Taks v. Martinique 2-Owners' Association (FL-S 9:01-cv-08199 filed 03/05/2001).

Employment action by a general manager alleging a hostile work environment as a result of sexual harassment and alleging wrongful termination on the basis of age and disability. In the order of dismissal the court approved the settlement agreement and granted a motion to file it under seal.

Thomas v. Johnny Rockets Group (FL-S 1:01-cv-01067 filed 03/19/2001).

Class action under the Fair Labor Standards Act by restaurant employees for failure to pay minimum wage. The case was dismissed as settled, and the court retained jurisdiction to enforce the settlement agreement. Six months after the case was dismissed the plaintiff filed a motion to enforce the settlement agreement. A sealed document, presumably the settlement agreement, was filed the same day.

Planet Solutions v. European Cosmetics and Research Lab Inc. (FL-S 0:01-cv-06448 filed 03/21/2001).

Trademark action under the Uniform Trade Secrets Act involving trade secrets for cleaning products. The complaint also included Florida statutory and common law claims. In August 2002, seventeen days after the order granting a stay pending arbitration, the court granted the joint stipulation of dismissal and permanent injunction. In March 2003, the defendant filed a motion to seal the settlement agreement so that the court could rule upon the motion to vacate the permanent injunction on grounds that the plaintiff breached the terms of the confidential settlement agreement. A sealed settlement agreement was filed along with the motion to vacate. No other documents were filed in the case.

Vigo v. American Sales and Management Organization Corp. (FL-S 1:01-cv-01245 filed 03/26/2001).

Action under the Fair Labor Standards Act by a security guard for failure to pay overtime wages. A sealed settlement agreement was filed. In the amended order of dismissal the court retained jurisdiction to enforce the terms of the settlement agreement.

Lil' Joe Records Inc. v. Worldwide Pants Inc. (FL-S 1:01-cv-01377 filed 04/05/2001).

Copyright action involving the use of a sound recording on "The Late Late Show with Craig Kilborn." A sealed document was filed five days before the notice of settlement was filed. The court retained jurisdiction for sixty days to enforce the settlement agreement. A sealed settlement agreement apparently was filed.

Aguilera v. Quail Investments Inc. (FL-S 1:01-cv-01384 filed 04/06/2001).

Class action under the Fair Labor Standards Act by restaurant employees for failure to pay overtime wages. A sealed document was filed the same day the case was dismissed. A sealed settlement agreement apparently was filed.

Brito v. Shoma Development Corp. (FL-S 1:01-cv-01421 filed 04/10/2001).

Class action under the Fair Labor Standards Act for failure to pay overtime wages. A sealed settlement agreement was filed as an attachment to the notice of stipulation for voluntary dismissal. In the order approving settlement, the court or-

dered that the settlement agreement remain under seal until the case was dismissed.

Carlucci v. Thermo Electron Corp. (FL-S 1:01-cv-01680 filed 04/24/2001).

Personal injury action against the manufacturer and owner of an X-ray unit the plaintiff serviced. The plaintiff's wrist was broken when the scissor arm casting broke, causing the arm and tube head to fall. A sealed settlement agreement was attached to the defendants' motion to enforce the settlement agreement. The case was dismissed as settled before the court ruled on the motion to enforce.

Signal Communications LLC v. Motorola Inc. (FL-S 0:01-cv-06676 filed 04/25/2001).

Contract action involving breach of a noncompetition covenant in an agreement to purchase assets of a two-way radio service division. The joint stipulation of dismissal notes that the parties entered into a separate settlement agreement. A sealed document was filed three days before the case was dismissed. In the order of dismissal the court retained jurisdiction to enforce the settlement agreement. A sealed settlement agreement apparently was filed.

Seiko Kabushiki Kaisha v. Swiss Watch International Inc. (FL-S 0:01-cv-06732 filed 05/02/2001).

Infringement action for use of the trademarks "Seiko" and "Pulsar." A sealed settlement agreement was filed.

Sealed Plaintiff v. Sealed Defendant (FL-S 0:01-cv-01845 filed 05/04/2001).

Commerce action. The docket sheet is sealed. The case was resolved by consent judgment.

Taylor v. Arrowpac Inc. (FL-S 1:01-cv-01948 filed 05/11/2001).

Employment civil rights action by a black plaintiff for race discrimination. A sealed settlement agreement was filed, and the plaintiff asked for the enforcement of the settlement agreement eleven days later. The day after the motion to enforce the settlement agreement was filed, the motion was withdrawn. In the final order of dismissal the court retained jurisdiction for ninety days to enforce the terms of the settlement agreement.

Harrington v. Twin City Fire Insurance Co. (FL-S 9:01-cv-08442 filed 05/16/2001).

Insurance action for bad faith in not offering policy limits to resolve an automobile negligence claim. The court approved a settlement and sealed the settlement agreement. The court retained jurisdiction to enforce the settlement agreement.

Velazquez v. SoftNetGaming Inc. (FL-S 1:01-cv-02011 filed 05/17/2001).

Action under the Fair Labor Standards Act for failure to pay overtime wages. The case was dismissed as settled, and the court retained jurisdiction to enforce the settlement agreement. Two months after the case was dismissed, the plaintiff filed a motion to enforce the settlement agreement under seal. Another sealed document, presumably the settlement agreement, was filed the same day.

Medley Industria Farmaceutica SA v. Da Matta (FL-S 1:01-cv-02132 filed 05/24/2001).

Action for breach of contract involving repayment for sponsorship and support of the defendant's career as a race car driver. A sealed document was filed one day before the joint stipulation of dismissal was filed. In the order of dismissal the court retained jurisdiction to enforce the terms of the settlement agreement. A sealed settlement agreement apparently was filed.

Israel v. Mayrsohn International Trading Co. (FL-S 1:01-cv-02172 filed 05/25/2001).

Employment action under the Americans with Disabilities Act by a disabled employee alleging wrongful termination. A sealed document was filed on the same day the case was dismissed. In the order of dismissal the court retained jurisdiction only to enforce the terms of the settlement agreement. A sealed settlement agreement apparently was filed. Three months after the case was dismissed, the final judgment ordered that the defendant pay $15,876 to the plaintiff.

Morkos Group v. Amoco Oil Co. (FL-S 0:01-cv-06911 filed 05/29/2001).

Contract action for breach of "Right of First Option to Purchase when Available for Sale" by an independent contractor for a gasoline station. The sealed settlement agreement was filed as an exhibit to the notice regarding settlement. In the order dismissing the case, the court retained jurisdiction to enforce the terms of the settlement agreement. On the same day the case was dis-

missed the court granted the defendant's motion to enforce the settlement agreement. The plaintiff filed an appeal five months after the case was dismissed, and the appeal currently is pending.

Fort Lauderdale Auto Leasing Corp. v. Sunshine Auto Rentals Inc. (FL-S 1:01-cv-02682 filed 06/25/2001).

Trademark action concerning the use of the service mark "Sunshine" by a rental car company. The court granted the parties' joint motion for a stipulated permanent injunction. A sealed settlement agreement was filed.

Dede v. City Furniture Inc. (FL-S 1:01-cv-02696 filed 06/25/2001).

Class action under the Fair Labor Standards Act by furniture store employees for failure to pay overtime wages. A sealed settlement agreement was filed.

Vargas v. Shoma Development Corp. (FL-S 1:01-cv-02738 filed 06/27/2001).

Action under the Fair Labor Standards Act by a construction worker for failure to pay minimum wage and overtime wages. A sealed settlement agreement was filed.

Heurimond v. United Enterprises of Southeast Florida Inc. (FL-S 1:01-cv-02938 filed 07/06/2001).

Class action under the Fair Labor Standards Act by construction workers for failure to pay overtime wages. The confidential settlement agreement was filed under seal with a motion to enforce the settlement agreement. The court denied the motion to enforce on the grounds that the defendant had satisfied its obligations. The parties' request that the settlement agreement be returned was granted. The court ordered that the motion to file the settlement agreement under seal be unsealed and that the docket entry referring to a "sealed document" also be unsealed to reflect that the sealed document was a settlement agreement.

National Installers Inc. v. Harris (FL-S 1:01-cv-02964 filed 07/06/2001).

Action for declaratory judgment under the Fair Labor Standards Act for failure to pay overtime wages. A joint stipulation of settlement ordered that the "Settlement Agreement is to remain permanently under seal."

Tapia v. Extendicare Homes Inc. (FL-S 1:01-cv-03104 filed 07/17/2001).

Class action under the Fair Labor Standards Act for failure to pay overtime wages. A sealed document was filed on the same day the case was dismissed. A sealed settlement agreement apparently was filed.

Eugene v. Pep Boys – Manny Moe & Jack Inc. (FL-S 1:01-cv-03171 filed 07/19/2001).

Civil rights employment action by a black assistant store manager against his former employer for race discrimination. The parties settled the case during mediation. The plaintiff filed a motion to enforce the settlement agreement. The defendants filed under seal a response to the plaintiff's motion, because it contained information on the confidential terms of the settlement. The court dismissed the case pursuant to a joint stipulation and retained jurisdiction to enforce the settlement agreement.

Tyson v. Martino Tire Co. of Royal Palm Beach (FL-S 9:01-cv-08661 filed 07/19/2001).

Class action under the Fair Labor Standards Act by service managers of an auto repair shop for failure to pay overtime wages. A sealed settlement agreement was filed. In the order of dismissal the court retained jurisdiction to enforce the terms of the settlement agreement.

Giraldo v. One World Inc. (FL-S 1:01-cv-03172 filed 07/20/2001).

Action under the Fair Labor Standards Act for failure to pay overtime wages and for retaliatory discharge after the plaintiff complained of nonpayment. A sealed settlement agreement was attached to the motion for fees and costs.

Washington v. School Board of Miami-Dade County (FL-S 1:01-cv-03343 filed 07/30/2001).

Employment action by a substitute teacher against a school district and a high school principal for sexual harassment. Two sealed documents were filed eight days before the parties filed a joint notice of status of settlement documents. The notice stated that the parties had agreed on the terms of the settlement and were in the process of executing the agreements. The case was dismissed as settled, and the court retained jurisdiction for sixty days to enforce the settlement agreement.

Palco Labs Inc. v. Vitalcare Group (FL-S 1:01-cv-03480 filed 08/10/2001).

Patent infringement case involving an adjustable tip for a blood lancet device. The court granted the plaintiff's motion for permanent injunction. A sealed settlement agreement was filed, and the order of dismissal noted that the settlement agreement will be unsealed on June 4, 2006.

McConnell v. Capri Miami Beach Condo Hotel Inc. (FL-S 1:01-cv-03572 filed 08/20/2001).

Civil rights action under the Pregnancy Discrimination Act for wrongful termination. The case was dismissed in April 2002, and the court retained jurisdiction to enforce the terms of the settlement agreement. In May 2002, a sealed settlement agreement was attached to the first motion to enforce an agreement to pay the plaintiff $89,500. The court placed a lien on a property of the defendant's sister company as security. In July 2002, there was a renewed motion to enforce the settlement agreement, claiming $57,000 still due. In December 2002, a third motion to enforce the settlement agreement sought sanctions for an unpaid outstanding judgment of $51,000. The last document on the docket sheet, filed in February 2003, is a plaintiff's memorandum concerning the effect on the outstanding judgment of the defendant's sister company's bankruptcy.

Mastercard International Inc. v. T&T Sports Marketing Ltd. (FL-S 1:01-cv-03632 filed 08/24/2001).

Contract action involving fraudulent misrepresentations and breaches of material provisions in a written contract for media promotional rights to a sporting event. A sealed settlement agreement was filed.

Stubbs v. Art Express 30 Minute Custom Framing Inc. (FL-S 1:01-cv-03760 filed 09/05/2001).

Action under the Fair Labor Standards Act by an employee of a custom art framing business for failure to pay overtime wages. A sealed document was filed two days before the case was dismissed. The order of dismissal approved the settlement agreement. A sealed settlement agreement apparently was filed.

Sanchez v. Drusco Inc. (FL-S 1:01-cv-03796 filed 09/07/2001).

Class action under the Fair Labor Standards Act by employees of an export company for failure to pay overtime wages. Three weeks after the case was dismissed, the court granted a motion to extend time to sign settlement papers. A sealed document was filed one day after the order to extend time. A sealed settlement agreement apparently was filed.

BestNet Communications Corp. v. Infinity Financial Group (FL-S 0:01-cv-07483 filed 09/17/2001).

Securities case involving false representation in connection with the purchase of 100,000 shares of common stock. The plaintiff filed a sealed motion to enforce the settlement agreement. The court retained jurisdiction for sixty days to enforce the terms of settlement.

Rivera v. KB Toy of Florida Inc. (FL-S 0:01-cv-07607 filed 10/17/2001).

Class action under the Fair Labor Standards Act by assistant store managers for failure to pay overtime wages. A sealed document was filed two days before the case was dismissed. In the final order of dismissal, the court stated it considered the settlement agreement before dismissing the case. A sealed settlement agreement apparently was filed.

Yeung v. Far & Wide Travel Corp. (FL-S 1:01-cv-04373 filed 10/24/2001).

Contract action for breach of a restrictive covenant that included a noncompetition clause. The parties filed a joint motion to seal a settlement agreement. The sealed settlement agreement was filed. The court denied the motion to seal and returned the settlement agreement to the parties. The court approved the $2,936,550 settlement.

Alvarez v. Professional Aviation Management Inc. (FL-S 1:01-cv-04444 filed 10/30/2001).

Action under the Fair Labor Standards Act by a flight dispatcher for failure to pay overtime wages. A sealed settlement agreement was filed. In the order of dismissal, the court retained jurisdiction to enforce the terms of the settlement agreement.

Siegel v. Office Depot Inc. (FL-S 1:01-cv-04566 filed 11/06/2001).

Civil rights employment action by a copy center manager alleging demotion because of age. A settlement agreement was reached during mediation. The case was dismissed as settled. A sealed document was filed the same day the case was dismissed. A sealed settlement agreement apparently was filed.

Sarabia v. PeopLease Corp. (FL-S 1:01-cv-04870 filed 11/30/2001).

Class action under the Fair Labor Standards Act for failure to pay overtime wages. A sealed settlement agreement was filed. The court retained jurisdiction to enforce the settlement agreement.

Baumgarten v. Children's Psychiatric Center Inc. (FL-S 1:01-cv-05040 filed 12/17/2001).

Action under the Fair Labor Standards Act by a psychiatric aide for failure to pay minimum and overtime wages. A sealed settlement agreement was filed.

Fishman v. American Media Inc. (FL-S 9:02-cv-80042 filed 01/16/2002).

Class action under the Fair Labor Standards Act by newspaper employees for failure to pay overtime wages. A sealed settlement agreement was filed. The court ordered that the settlement agreement remain sealed for five years, at which time it will be returned to the defendant.

Marinaro v. Miller & Becherl PA (FL-S 0:02-cv-60089 filed 1/22/2002).

Class action under the Fair Labor Standards Act for failure to pay overtime wages. A sealed settlement agreement was filed as an attachment to the motion to seal the settlement agreement. Parties asked the court to destroy the motion to seal, the motion to approve the sealed settlement agreement, and the settlement agreement when the court entered the order to dismiss. In the order dismissing the case, the court retained jurisdiction to enforce the terms of the settlement agreement for sixty days, but did not mention destroying any documents.

White v. Cowcat Enterprises Inc. (FL-S 9:02-cv-80075 filed 01/31/2002).

Class action under the Fair Labor Standards Act by employees of an addiction treatment program for failure to pay overtime wages. Two sealed documents were filed one day before the court approved the settlement and retained jurisdiction to enforce the settlement agreement. A sealed settlement agreement apparently was filed.

Nuñez v. Acosta Tractors Inc. (FL-S 1:02-cv-20417 filed 02/06/2002).

Action under the Fair Labor Standards Act by a dirt digger operator for failure to pay overtime wages. In the order of dismissal the court retained jurisdiction to enforce the terms of the settlement agreement for sixty days. Sealed documents were filed four and eleven days after the case was dismissed. A sealed settlement agreement apparently was filed.

Wilson v. Señor Frogs Inc. (FL-S 1:02-cv-20516 filed 02/15/2002).

Class action under the Fair Labor Standards Act by restaurant workers for failure to pay minimum and overtime wages. A sealed settlement agreement was filed with the motion to approve it. The court approved the settlement but denied the motion to seal the settlement agreement.

Puig v. Florida Sol Systems Inc. (FL-S 1:02-cv-20663 filed 03/04/2002).

Class action under the Fair Labor Standards Act for failure to pay overtime wages. A sealed settlement agreement was filed. The court approved the settlement and said it would destroy the settlement agreement.

Webster v. Urbieta (FL-S 1:02-cv-20838 filed 03/18/2002).

Civil rights action against the owner of a gas station for denial of service to the black plaintiff and his two minor children because of their race. Three sealed documents were filed within two weeks of the case's close. A sealed settlement agreement apparently was filed.

Navigators Insurance Co. v. Seaboard Marine Ltd. (FL-S 1:02-cv-20867 filed 03/20/2002).

Contract action in admiralty for loss resulting from defendant's failure to properly load and stow cargo. Five months after the case was dismissed as settled, a sealed document was filed.

VARIG SA v. Nijankin (FL-S 1:02-cv-20960 filed 03/28/2002).

RICO action for breach of fiduciary duty to recover damages for the defendant's receipt of commissions, bribes, and kickbacks from the plaintiff's contractors. A sealed document was filed one day before the case was dismissed. The court retained jurisdiction to enforce the settlement agreement.

Hernandez v. Children's Psychiatric Center Inc. (FL-S 1:02-cv-20961 filed 03/28/2002).

Action under the Fair Labor Standards Act for failure to pay minimum and overtime wages. A

sealed settlement agreement was filed as an attachment to the defendant's motion to approve and seal it. Six days later the court denied the motion to seal. The settlement agreement was returned to the defendant. The defendant filed a motion for reconsideration of the motion to seal or in the alternative to review the settlement in camera. The court granted an in camera review. The court approved the settlement and dismissed the case.

Reyes Cigars SA v. Adworks of Boca Raton Inc. (FL-S 9:02-cv-80290 filed 04/30/2002).

Contract action against an advertising company for intentionally shutting down the plaintiff's e-commerce Web site in breach of an agreement that the plaintiff would own the rights to the site. The plaintiff's request for injunctive relief to reinstate the Web site was denied. A sealed document was filed four days before the case was dismissed. A sealed settlement agreement apparently was filed.

Fernandez v. G.M.B. Enterprises LLC (FL-S 1:02-cv-21563 filed 05/24/2002).

Class action under the Fair Labor Standards Act for failure to pay overtime wages. A sealed settlement agreement was filed. The court approved the settlement and dismissed the case.

Steinberg v. Michaud Buschmann Mittlemark Millian Blitz & Warren PA (FL-S 9:02-cv-80523 filed 06/06/2002).

Class action under the Fair Labor Standards Act for failure to pay overtime wages. The case settled during mediation. The case was dismissed without prejudice, and the court retained jurisdiction for sixty days to enter judgment or final order of dismissal. One month later a sealed document was filed. The court has yet to enter an order of dismissal.

Plasencia v. Hanjin Shipping Co. (FL-S 1:02-cv-21968 filed 07/03/2002).

Class action under the Fair Labor Standards Act for failure to pay overtime wages. A sealed settlement agreement was filed as an attachment to the defendant's motion to file it under seal. The case was dismissed as settled.

Abascal v. Univision Network LP (FL-S 1:02-cv-22092 filed 07/17/2002).

Class action under the Fair Labor Standards Act by sales employees for failure to pay overtime wages. A sealed settlement agreement was filed. The court approved the settlement and ordered that the settlement agreement be unsealed December 5, 2007.

Charmant v. J. & M Fisheries Inc. (FL-S 0:02-cv-61141 filed 08/15/2002).

Class action under the Fair Labor Standards Act for failure to pay overtime wages. A sealed settlement agreement was filed. The parties filed a joint stipulation of dismissal and asked the court to retain jurisdiction to enforce the settlement agreement. The case was closed, but no order of dismissal was filed. Five sealed documents were filed the same day the case was closed. A sealed settlement agreement apparently was filed.

Wool v. Tokyo Bowl Inc. (FL-S 1:02-cv-22442 filed 08/19/2002).

Class action under the Fair Labor Standards Act by restaurant employees for failure to pay overtime wages. A sealed settlement agreement was filed as an attachment to a joint motion to seal it. Eight days later the court denied the motion to seal and returned the settlement agreement to counsel. The case has not been closed, and no order of dismissal has been filed.

Shred-it USA Inc. v. Tejo (FL-S 1:02-cv-22494 filed 08/22/2002).

Contract action for breach of a confidentiality and noncompetition agreement. A sealed settlement agreement was attached to the defendant's motion to enforce it. The court granted the motion.

Chong v. D&L Building Maintenance Inc. (FL-S 1:02-cv-22534 filed 08/27/2002).

Action under the Fair Labor Standards Act by a maintenance worker for failure to pay overtime wages. A sealed settlement agreement was filed. The court approved the settlement and dismissed the case.

Pizza Hut Inc. v. Grossman (FL-S 1:02-cv-23192 filed 10/29/2002).

Trademark infringement action by Pizza Hut against the owner of the domain name "pizahut.com." A sealed settlement agreement was filed. A consent judgment ordered a permanent injunction against the defendant's use of the domain name. The court retained jurisdiction for sixty days to enforce the settlement agreement.

District of Guam

No relevant local rule.

Statistics: 130 cases in termination cohort; 7 docket sheets (5.4%) have the word "seal" in them; 3 complete docket sheets (2.3%) were reviewed; actual documents were examined for 1 case (0.77%); 1 case (0.77%) appears to have a sealed settlement agreement.

Case with a Sealed Settlement Agreement

Blaz v. van der Pyl (GU 1:00-cv-00014 filed 03/31/2000).

ERISA action by a former dental employee for failure to provide pension documents, for wrongful termination in retaliation for a request to examine pension documents, and for wrongfully attempting to withhold pension funds in satisfaction of the plaintiff's personal debt to her employer. The defendants countersued for conversion of patients' bill payments to the plaintiff's personal use. The case settled at a court-mediated settlement conference, and a sealed document was filed that day. Two days later, the court dismissed the action pursuant to the settlement agreement, which was incorporated by reference into the notice of dismissal.

District of Hawaii

No relevant local rule.

Statistics: 1,752 cases in termination cohort; 2 docket sheets are sealed (0.11%)—the disposition code for 1 of these cases suggests no sealed settlement agreement[39] and the disposition code for 1 of these cases suggests a sealed settlement agreement;[40] 458 unsealed docket sheets (26%) have the word "seal" in them; 42 complete docket sheets (2.4%) were reviewed; actual documents were examined for 40 cases (2.3%); 38 cases (2.2%) appear to have sealed settlement agreements.

Cases with Sealed Settlement Agreements

Kon v. Goto (HI 1:96-cv-00340 filed 04/09/1996).

ERISA class action by retired employees for breach of fiduciary duty. A sealed settlement agreement was filed. Two months after final approval of the settlement, the plaintiff filed a motion to enforce the settlement agreement. The court granted the motion and ordered the defendant to pay $453,802. Subsequently, the defendant was held in civil contempt and jailed twice for not truthfully disclosing his financial records. The defendant filed for bankruptcy, but the bankruptcy case was dismissed. One year later, the final judgment was ordered against the defendant. The court retained jurisdiction over this judgment for one year.

Tanaka v. First Hawaiian Bank (HI 1:96-cv-00734 filed 09/04/1996).

RICO action for breach of fiduciary duty involving the estate of the plaintiff's deceased father. On the eleventh day of a jury trial a sealed settlement agreement was filed. A default judgment was ordered against one of the defendants for $2,613,906.

R&R of Hawaii Inc. v. Union Oil Co. of California (HI 1:97-cv-00248 filed 03/14/1997).

Real property case alleging soil contamination by storage tanks left by the defendant, who was the previous owner. The settlement was placed on the record under seal during a settlement conference.

Arrington v. Wong (HI 1:98-cv-00357 filed 05/04/1998), consolidated with *Arrington v. Wong* (HI 1:99-cv-00782 filed 11/09/1999).

The first case is designated a statutory action, and the second, a medical malpractice case. These cases were brought by the estate and relatives of a man (including his minor grandchild) who died of respiratory failure allegedly because he was refused care by the defendants at their medical care facility, which was the closest. The settlement was placed on the record under seal during a settlement conference.

Cyanotech Corp. v. Aquasearch Inc. (HI 1:98-cv-00600 filed 07/13/1998).

Patent noninfringement case concerning a method to control a microorganism growth process. The defendant's motion to enforce the settlement agreement was sealed and denied by the court.

Lesane v. Hawaiian Airlines (HI 1:98-cv-00735 filed 09/01/1998); *Lesane v. Hawaiian Airlines* (HI 1:01-cv-00024 filed 01/03/2001).

Employment action by a black mechanic for race discrimination. The hearing on the defendant's motion to enforce the settlement agreement was sealed. The court granted the motion to enforce the settlement agreement.

39. One "other" dismissal.

40. One case settled.

Castle & Cooke Properties Inc. v. BHP Hawaii Inc. (HI 1:98-cv-00923 filed 11/17/1998).

Environmental case in which hazardous chemicals and petroleum products allegedly migrated from the defendant's property to the plaintiff's property, causing contamination of groundwater and soil. An unexecuted sealed settlement agreement was filed.

Casimiro v. Allstate (HI 1:99-cv-00527 filed 07/22/1999).

Insurance action. The docket sheet is sealed. The case was dismissed as settled.

EEOC v. Safeway Inc. (HI 1:99-cv-00593 filed 08/25/1999).

Employment action on behalf of a man alleging sexual harassment and wrongful termination. The settlement agreement was placed on the record under seal during a settlement conference. The case was terminated by a consent decree that was in effect until February 26, 2003.

Silva v. Scott (HI 1:99-cv-00636 filed 09/16/1999).

Civil rights action by an undergraduate student against her professor and adviser and his employer for sexual harassment. On the sixth day of jury deliberation, a settlement was reached. The settlement was placed on the record under seal during a settlement conference.

Turner v. GTE Corp. (HI 1:99-cv-00652 filed 09/22/1999).

Civil rights action by a secretary for sexual harassment and wrongful termination. The settlement was placed on the record under seal during a settlement conference.

City & County of Honolulu v. Estate of Campbell (HI 1:99-cv-00670 filed 09/30/1999).

Environmental case under CERCLA, seeking compensation for the cleanup of the plaintiff's property, which allegedly was contaminated by hazardous chemicals during the defendant's ownership of the property. The settlement was placed on the record under seal during a settlement conference.

King v. Gannett Co. (HI 1:99-cv-00686 filed 10/06/1999), consolidated with *Hawaii v. Gannett Pacific Corp.* (HI 1:99-cv-00687 filed 10/06/1999).

Antitrust action by a group of newspaper subscribers and the state of Hawaii to prevent the defendant from closing down one of the two daily newspapers in general circulation in Honolulu. A sealed settlement agreement was filed.

Taylor v. Kaneshiro (HI 1:99-cv-00909 filed 12/13/1999).

Prisoner civil rights action by the mother of a man who allegedly died because prison officials did not seek immediate emergency medical treatment for his self-inflicted wounds. The settlement was placed on the record under seal during a settlement conference. Eight months after settlement, the court ordered the defendant to pay the amount of settlement. The minutes of a status conference regarding dismissal notes a settlement amount of $200,000.

Giobbi v. Lahaina Divers Inc. (HI 1:00-cv-00005 filed 01/04/2000).

Personal injury action by a woman who was injured by a boat propeller while swimming. The settlement was placed on the record under seal during a settlement conference.

Hilo Fish Co. v. Kowalski (HI 1:00-cv-00185 filed 03/06/2000).

Patent case involving a process for freezing seafood. A partial settlement agreement was filed under seal as an attachment to the minutes of a settlement conference. Six months later the settlement was placed on the record during another settlement conference. The court ordered a consent judgment and permanent injunction in favor of the defendants.

Redmond v. Ackerson (HI 1:00-cv-00444 filed 06/27/2000).

Civil rights action by a disabled black man alleging harassment by his homeowner's association after he complained about a revoked parking permit for his handicap-equipped van. A sealed settlement agreement was filed.

Hermes International v. High-Class Hawaii LLC (HI 1:00-cv-00518 filed 07/26/2000).

Trademark infringement case involving fraudulent reproductions of the plaintiff's "Kelly bag" designs. The case was dismissed, and a permanent injunction was granted in a confidential order filed under seal.

Quitog v. Piney (HI 1:00-cv-00629 filed 09/26/2000).

Housing case under the Americans with Disabilities Act and the Fair Housing Act by a disabled woman against her landlord for threatening to evict her for having too many caregivers staying overnight in her apartment. The settlement was placed on the record under seal during a settlement conference.

Wolken-Vierra v. Allstate Insurance Co. (HI 1:00-cv-00721 filed 11/03/2000).

Insurance action for bad faith involving an insured who caused the death of the plaintiff's husband in a motor vehicle accident. The defendant failed to secure a release of claims of settlement in the plaintiff's earlier case against it. The insured was forced to continue as a defendant in that case and later assigned rights to the plaintiff to sue for the $480,000 judgment (which included $350,000 for the decedent's minor child). The defendant's motion for approval of settlement was filed under seal and granted by the court.

Arnott v. United Airlines Inc. (HI 1:00-cv-00731 filed 11/09/2000).

Railway Labor Act action by a female flight attendant against her employer for violating the terms of the collective bargaining agreement by not processing her workers' compensation benefits. The settlement was placed on the record under seal during a settlement conference.

Noice v. Ameriquest Mortgage Co. (HI 1:01-cv-00036 filed 01/11/2001).

Truth-in-Lending Act case involving a consumer transaction in which the defendant allegedly misrepresented the financial terms and conditions of a loan. The settlement was placed on the record under seal during a settlement conference.

Beach v. See's Candies Inc. (HI 1:01-cv-00047 filed 01/17/2001).

Employment action by a female store manager for discrimination and wrongful termination. The settlement was placed on the record under seal during a settlement conference.

Berluccio v. Longs Drug Stores California Inc. (HI 1:01-cv-00052 filed 01/18/2001).

Personal injury case alleging that the plaintiff suffered a knee injury when he slipped and fell in the defendant's store. The settlement was placed on the record under seal during a settlement conference.

Richardson v. Longs Drug Stores California Inc. (HI 1:01-cv-00101 filed 02/08/2001).

Personal injury case alleging that the plaintiff suffered a back injury when hit by a hand truck in the defendant's store. The settlement was placed on the record under seal during a settlement conference.

Fuchs v. Tokyu Corp. (HI 1:01-cv-00165 filed 03/09/2001).

Real property case for breach of a purchase and sale agreement for a parcel of land. A sealed settlement agreement was filed.

Pachuta v. UnumProvident Corp. (HI 1:01-cv-00199 filed 03/28/2001).

Insurance action by a physician with Alzheimer's disease for breach of a disability insurance policy. All documents pertaining to the plaintiff's motion to enforce the settlement agreement were sealed. A new settlement agreement was reached, and the plaintiff withdrew the motion.

Continental Casualty Co. v. CPA Consulting Group (HI 1:01-cv-00200 filed 03/28/2001).

Insurance interpleader action concerning disputed funds of an insurance policy. The settlement was placed on the record under seal during a settlement conference.

Rowe v. Cutter Ford Inc. (HI 1:01-cv-00209 filed 03/30/2001).

Contract case alleging that the defendant failed to properly deliver all disclosures about a used car. The settlement was placed on the record under seal during a settlement conference.

Newinsky v. Maui Radiology Consultants LLP (HI 1:01-cv-00223 filed 04/05/2001).

Labor action under the Americans with Disabilities Act, Family Medical Leave Act, and ERISA, by an MRI technician who became disabled while on the job. The defendant allegedly failed to accommodate his disability, failed to notify him of FMLA applicability, and denied him retirement benefits. The settlement was placed on the record under seal during a settlement conference.

Jaress & Leong v. Continental Casualty Co. (HI 1:01-cv-00266 filed 04/24/2001).

Contract action claiming that the defendant settled claims of fraud, misrepresentation, and malpractice against the plaintiff without his consent. The defendant's motion for approval of settlement was filed under seal. The defendant's motion to oppose the plaintiff's motion to enforce the settlement agreement was filed under seal. The court denied the plaintiff's motion to enforce the settlement agreement.

State Farm Fire & Casualty Co. v. Eilers (HI 1:01-cv-00306 filed 05/11/2001).

Insurance action seeking a binding declaration by the court that the plaintiff is not obligated under the insurance policies of the defendant's employer to defend or indemnify it against a claim of defamation and discrimination. The settlement was placed on the record under seal during a settlement conference.

Herrmann v. Kaiser Permanente (HI 1:01-cv-00767 filed 11/15/2001), consolidated with *Herrmann v. Kaiser Permanente* (HI 1:01-cv-00813 filed 12/07/2001).

Employment and civil rights actions by a doctor for wrongful termination of hospital privileges. The settlement was placed on the record under seal during a settlement conference.

Hogue v. Emmis Television License Corp. of Honolulu (HI 1:02-cv-00046 filed 01/18/2002).

Employment action by a white sportscaster for age and race discrimination and wrongful termination. The settlement was placed on the record under seal during a settlement conference.

District of Idaho

Absent a court order to the contrary, sealed documents are returned to the submitting party at the end of the case. D. Idaho L.R. 5.3(f). Court staff members have observed that after they started making electronic images of court files available in 1998, parties have more often requested that settlement agreements be filed under seal.

Statistics: 1,350 cases in termination cohort; 6 docket sheets are sealed (0.44%)—all of these cases' disposition codes suggest no sealed settlement agreements;[41] 440 unsealed docket sheets (33%) have the word "seal" in them; 10 complete docket sheets (0.74%) were reviewed; actual documents were examined for 5 cases (0.37%); 4 cases (0.30%) appear to have sealed settlement agreements.

Cases with Sealed Settlement Agreements

Bursch v. Residential Funding Corp. (ID 3:99-cv-00385 filed 09/03/1999).

Class action under the Truth in Lending Act by plaintiffs who entered into loan transactions pursuant to a home sales program under which the defendants allegedly "marked up" the cost of construction materials. Following mediation the parties agreed to a confidential settlement agreement, and pursuant to Local Civil Rule 5.3, the court sealed the agreement.

EEOC v. J.R. Simplot Co. (ID 1:99-cv-00439 filed 09/30/1999).

Employment discrimination case challenging an English language reading skills test as having an adverse impact on Hispanic and Asian-American employees and applicants. The court approved a consent decree, which was not sealed. Provisions of the consent decree required the EEOC to file with the court as a separate exhibit the specific amount of lost wages and interest each claimant was entitled to and a list of claimants who timely returned the claim form. One year later the court agreed to seal the exhibit and incorporate it as part of the consent decree.

Estate of Shinski v. McDonnell-Douglas Corp. (ID 1:00-cv-00280 filed 05/23/2000).

Product liability action against the manufacturer of a helicopter for wrongful death in a crash resulting from the engine's failing suddenly. The court approved and sealed the settlement agreement.

McKee v. Young (ID 1:00-cv-00713 filed 12/08/2000).

Motor vehicle action against a truck driver and the truck's owner for injuries sustained when the semi-truck and trailer rear-ended the plaintiff's vehicle. A stipulation of compromise and settlement was filed and sealed.

41. One judgment on motion before trial, 2 judgments on jury verdicts, 1 multidistrict litigation transfer, 2 voluntary dismissals.

Northern District of Illinois[42]

The Northern District of Illinois distinguishes "restricted" documents, to which access has been restricted, from "sealed" documents, which are actually in sealed enclosures so that access requires the breaking of a seal. N.D. Ill. L.R. 26.2(a). A document may be restricted upon a showing of good cause. *Id.* R. 26.2(b). With good cause the document's docket entry may "show only that a restricted document was filed without any notation indicating its nature." *Id.* R. 26.2(c). Absent an order to the contrary, document restrictions are lifted sixty-three days after the case is over. *Id.* R. 26.2(e). Restricted documents may be returned to the parties or destroyed, but they may not remain restricted for more than twenty years. *Id.*

Statistics: 19,378 cases in termination cohort; 649 docket sheets (3.3%) have the word "seal" in them; 99 complete docket sheets (0.51%) were reviewed; actual documents were examined for 80 cases (0.41%); 72 cases (0.37%) appear to have sealed settlement agreements.

Cases with Sealed Settlement Agreements

Poole v. Alpha Therapeutic Corp. (IL-N 1:86-cv-07623 filed 10/08/1986).

Product liability action by a hemophiliac against manufacturers of blood products for failure to screen and test for the AIDS virus, which resulted in his contracting the virus. He died during the course of the trial, and his wife and children continued the case. Two defendants settled, and the settlement agreement was approved by the court and filed under seal. Three other defendants ultimately settled, but the agreements were not filed with the court. The remaining defendant also settled. This agreement, including the specific amounts to be distributed to the children, was not sealed.

Wilson v. Wilson (IL-N 1:89-cv-09620 filed 12/29/1989).

Personal property damage action concerning family trusts. One family member was dismissed pursuant to a sealed settlement agreement approved by the court. The plaintiff reached an apparent settlement agreement with the remaining defendants in open court for $1.2 million. A dispute over this agreement arose. Both the district court and the court of appeals ruled for the plaintiff in his motion to enforce the agreement. The plaintiff obtained substitute counsel, and his former attorneys moved to enforce a later settlement agreement. The court granted the motion, releasing $175,000 to the attorneys. The case finally terminated by stipulated dismissal.

Pivot Point International Inc. v. Charlene Products Inc. (IL-N 1:90-cv-06933 filed 11/29/1990).

Copyright action for the unauthorized marketing of exact reproductions of the plaintiff's "Mara Sculpture," "an artistically sculpted mannequin head which is unlike any other to the extent that this artist's sculpture is extremely lifelike and pleasing in appearance." The plaintiff filed a motion to enforce an oral settlement agreement, with one exhibit filed under seal. Another document was filed under seal on the day the defendants' response was due. The plaintiff's reply brief was filed unsealed, and it lays out terms of the alleged settlement agreement, along with proposed changes to satisfy the defendants' objections. The agreement required that the defendants cease their copyright infringement, but permitted them to sell current inventory, and it made no mention of monetary terms. An exhibit to the plaintiff's brief was filed under seal. The court held the copyright invalid and dismissed the complaint. The plaintiff appealed, and the matter remains before the court of appeals.

Geneva Assurance Syndicate v. Medical Emergency Services Associates (IL-N 1:92-cv-01652 filed 03/06/1992).

Insurance action by six plaintiffs against 120 defendants concerning medical malpractice insurance pooling. During the course of litigation a sealed document was filed the same day as a motion to dismiss one of the defendants. The motion was granted that day by minute order. Later in the litigation the plaintiffs filed a motion to enforce a settlement agreement with other defendants. The memorandum was filed under seal. The case ultimately was resolved by settlement with all parties.

DeKalb Genetics Corp. v. Pioneer Hi-Bred International Inc. (IL-N 3:96-cv-50112 filed 04/30/1996), consolidated with *DeKalb Genetics Corp. v. Pioneer Hi-Bred International Inc.* (IL-N 3:96-cv-50239 filed 07/23/1996), *DeKalb Genetics Corp. v. Pioneer Hi-Bred International Inc.* (IL-N 3:98-cv-50186 filed 06/19/1998), *DeKalb Genetics Corp. v. Pioneer Hi-Bred International Inc.* (IL-N 3:99-cv-50212 filed 07/01/1999), and *DeKalb*

42. This district is included in the study because of its good-cause rule.

Genetics Corp. v. Pioneer Hi-Bred International Inc. (IL-N 3:99-cv-50385 filed 11/23/1999); *Pioneer Hi-Bred International Inc. v. DeKalb Genetics Corp.* (IL-N 3:00-cv-050201 filed 06/07/2000), consolidated with *Pioneer Hi-Bred International Inc. v. Monsanto Co.* (IL-N 3:01-cv-050219 filed 07/10/2001).

Patent infringement actions between a producer and seller of corn seed and its competitors. The cases settled. The court granted the defendants' sealed motion to enforce the settlement agreement.

Jensen v. Oliver (IL-N 1:97-cv-01018 filed 02/13/1997).

Fraud action by an investor against a corporation's managing shareholder for using corporate money to pay for unauthorized personal expenses and converting all the corporation's assets and transferring them to a competing company he owned. The case settled. The settlement terms were stated on the record, and the transcript of the proceedings was filed under seal.

College Inn Partners v. Deby Inc. (IL-N 1:97-cv-02989 filed 04/25/1997).

Environmental action concerning the continuing contamination of the plaintiffs' land by the defendants' dry cleaning establishment and their underground petroleum storage tanks. The parties entered into a confidential settlement agreement. The defendants filed a motion to enforce it. The memorandum in support of their motion was restricted.

Santelli v. Electro-Motive (IL-N 1:97-cv-05702 filed 08/12/1997).

Designated a civil rights action, this is a Title VII employment discrimination action by a female welder against an automobile manufacturer, alleging that she was repeatedly denied equal opportunity in training, pay, and promotion because of her sex. The case settled. The defendant's brief in support of its motion to enforce the settlement agreement and the plaintiff's response were placed under seal for a period of two years. The defendant's motion reveals that the plaintiff rejected a $7,000 check tendered by the defendant. The court granted the defendant's motion to enforce the settlement agreement and directed the plaintiff to accept the check.

Scott v. Steingold (IL-N 1:97-cv-07871 filed 11/12/1997).

RICO action alleging nationwide schemes to sell unregistered securities in wireless cable and specialized mobile radio systems. Some of the defendants settled, and the court granted them leave to file the settlement agreement under seal. The remaining defendant also settled. The court-approved settlement was stricken from the docket and court record.

Bavuro v. Grand Victoria Casino (IL-N 1:97-cv-07921 filed 11/13/1997).

Marine action against a riverboat casino by an employee for failure to provide a safe work environment, which caused her to injure herself on a stairway. She alleged that she was fired in anticipation of a lawsuit. The case settled. The court order regarding the settlement was restricted.

Nystrom v. Associated Plastic Fabricators Inc. (IL-N 1:98-cv-00134 filed 01/09/1998), consolidated with *Malachowski v. Associated Plastic Fabrications Inc.* (IL-N 1:98-cv-04282 filed 07/13/1998) and *Herman v. Peper* (IL-N 1:99-cv-04275 filed 06/28/1999).

ERISA actions concerning a company's failure to transfer former employees' vested benefits into their designated IRAs. Some of the parties settled, and the court granted the plaintiffs' oral motion to seal the settlement document and agreement; however, some of the terms of the settlement agreement, including the agreed amount of $850,000, are stated in the court order recognizing the oral settlement. The plaintiffs' motion to enforce the settlement agreement was withdrawn after one defendant filed for bankruptcy. The remaining defendants ultimately settled.

Coilcraft Inc. v. Instructor Warehouse (IL-N 1:98-cv-00140 filed 01/09/1998).

Trademark infringement action by a manufacturer of electronic components against an unauthorized distributor. The case was dismissed as settled. The court's consent judgment order was restricted.

EEOC v. Foster Wheeler (IL-N 1:98-cv-01601 filed 03/17/1998).

Employment class action alleging race and sex discrimination. According to the docket sheet, the case settled as to the lead individual plaintiff, and a motion for entry of a protective order covering confidential settlement terms was filed under seal. But a minute order states that "payment amounts

to individuals identified on Exhibits B & C" would be $11,666.65 per individual. The final judgment states that the lead individual plaintiff will receive $25,000, each of seven other named plaintiffs will receive either $10,000 or $15,000, and a union defendant will pay punitive damages of $50,000, with $20,000 going to the lead plaintiff and $30,000 to be divided among the other class members. Both the EEOC and the lead plaintiff were awarded fees.

Soros Associates v. Trafalgar House Construction India Ltd. (IL-N 1:98-cv-01807 filed 03/24/1998).

Breach of contract action by a construction engineer seeking payment for additional work. The case was dismissed as settled. The terms of the settlement agreement were filed under seal.

L.R. Oliver & Co. v. B&J Manufacturing Co. (IL-N 1:98-cv-04268 filed 06/10/1998).

Breach of contract action by a manufacturer of grit coatings against a rival for failure to pay royalties pursuant to an oral agreement. The case was dismissed as settled. The transcript of the proceedings containing the terms of the agreement was filed under seal.

Midwest Community Health Service Inc. v. American United Life Insurance Co. (IL-N 1:98-cv-06128 filed 09/30/1998).

ERISA action alleging breach of fiduciary duty for failure to disclose the impact on the plaintiff's plans of an asset transfer. The case was dismissed as settled. The plaintiffs filed the confidential settlement agreement under seal.

Erickson v. Baxter Healthcare Inc. (IL-N 1:99-cv-00426 filed 01/26/1999).

Product liability action on behalf of a hemophiliac against manufacturers of blood products for failure to screen and test for the AIDS virus and Hepatitis C, which resulted in his contracting the viruses and dying. The parties entered into a confidential settlement agreement. The court granted the plaintiff's motion to submit the statement of settlement under seal. The court approved the settlement and the distribution of proceeds to a minor survivor.

Tracy v. Jewel Food Stores Inc. (IL-N 1:99-cv-02736 filed 04/26/1999).

Patent infringement action concerning disposable diapers. One of the defendants settled and filed a restricted memorandum in support of the motion to enforce the oral settlement agreement. In a sealed order, the court granted the defendant's motion. The order later was unsealed and made part of the public record. The case ultimately was dismissed as settled.

Wise v. McNeil Pharmaceutical (IL-N 1:99-cv-03852 filed 06/10/1999).

Product liability action on behalf of a minor with cystic fibrosis against drug manufacturers for failing to detect the toxic effects of drugs that resulted in fibrosing colonopathy disease. The case settled. The court order approving the settlement and the distribution of proceeds from the minor's settlement was restricted. However, documents reveal that $200,000 from the gross amount of the settlement proceeds was paid to the minor's parents for family purposes.

CoolSavings.com Inc. v. Brightstreet.com Inc. (IL-N 1:99-cv-05499 filed 08/23/1999).

Patent infringement action concerning targeted electronic certificates such as coupons. The case settled. The terms of the settlement were stated on the record at a settlement conference and placed under seal. The court temporarily unsealed the transcript so that the parties could order copies of it. The transcript then was resealed. The parties were unable to reduce the terms of the settlement to writing. The court examined several competing documents claimed to accurately reflect the settlement agreement, some of which were unsealed and contained parts of the settlement transcript. The court ultimately agreed with the plaintiff's version of the settlement agreement. The defendants appealed, and the court of appeals affirmed the court's decision.

Fitzpatrick v. Daewoo Motor America Inc. (IL-N 1:99-cv-05557 filed 08/25/1999).

Employment action against a Korean automobile company alleging pervasive racial harassment, including the use of especially vile racial epithets. The case settled. The court granted the parties' oral motion to place the settlement terms under seal.

Pappas v. Hartford Life Insurance Co. (IL-N 1:99-cv-05612 filed 08/27/1999).

Insurance action concerning the defendants' sales practices in marketing and selling whole life and universal life policies. The case settled. The settlement transcripts were sealed.

March v. Greater Rockford Airport Authority (IL-N 3:99-cv-50297 filed 09/10/1999).

Designated a civil rights action, this is an employment action by an African-American female security officer for race and sex discrimination in accommodating her pregnancy. The plaintiff filed a motion to clarify the settlement agreement, and the defendant filed a motion to enforce it. The controversy apparently involved the scope of liability release. At the hearing, the parties put the settlement agreement on the record, and the court sealed the tape of the hearing.

Motor Coach Industries Ltd. v. SMC Corp. (IL-N 1:99-cv-06578 filed 10/06/1999).

Patent action concerning a "stairway for a motor coach." The action was dismissed pursuant to a settlement agreement filed under seal.

Rucker v. Streetwise Inc. (IL-N 1:99-cv-07195 filed 11/04/1999).

Action under the Fair Labor Standards Act by an office assistant alleging that the newspaper publisher who employed her failed to pay her overtime wages. The case settled. The settlement was restricted. The case was appealed and ultimately dismissed as settled.

Recycling Sciences International Inc. v. Soil Restoration and Recycling LLC (IL-N 1:00-cv-00311 filed 01/18/2000).

Patent infringement action concerning soil remediation processes. The case was dismissed as settled. The settlement was filed under seal and redacted as to settlement amount.

Hightower v. Commonwealth Edison Co. (IL-N 1:00-cv-00689 filed 02/03/2000).

Title VII employment action by an African-American radiation protection manager alleging that the electric company intentionally subjected him to unequal and discriminatory treatment because of his race and color. The case settled. The settlement agreement was stated on the record. The settlement agreement and the audiotape of the settlement proceedings were sealed.

Nelson v. Sotheby's Inc. (IL-N 1:00-cv-01590 filed 03/16/2000).

Personal property damage action concerning the conversion of a painting. The case was dismissed as settled. The court ordered that the cassette tape of the settlement conference and any transcript prepared from the cassette tape be placed under seal.

Heel-O-Matic Inc. v. GP Manufacturing LLC (IL-N 1:00-cv-01818 filed 03/24/2000).

Patent infringement action concerning an apparatus for rope training. The case settled. The defendants filed a motion to reinstate the action for breach of the settlement agreement. The defendants' supplemental memorandum and exhibits in support of their motion are restricted.

Bagnall v. Freeman Decorating (IL-N 1:00-cv-01922 filed 03/30/2000).

Employment action alleging violation of the Americans with Disabilities Act for terminating and refusing to rehire the plaintiff based on his perceived disability. The case settled. The plaintiff later filed a sealed motion to enforce the settlement agreement.

Godinez v. Eagle Insurance Agency (IL-N 1:00-cv-01987 filed 03/31/2000); consolidated on appeal with *Jones v. American Ambassador Casualty Co.* (IL-N 1:00-cv-05973 filed 09/28/2000).

Section 1981 actions by and on behalf of minority customers of an insurance company alleging that they paid money for substandard insurance coverage and were not compensated for automobile losses ordinarily covered by standard automobile insurance policies. The court held that the plaintiffs' civil rights claims were barred by the McCarran–Ferguson Act, which forbids federal courts from intervening in the regulation of insurance by states. The plaintiffs appealed. The case settled. The case was remanded to the district court to certify approval of the settlement. The settlement agreement was filed under seal.

Denison Hydraulics Inc. v. Veljan Hydrair Ltd. (IL-N 1:00-cv-02022 filed 04/04/2000).

Trademark infringement action by a manufacturer of hydraulic pumps. The case settled. The court ordered that the confidential settlement agreement remain under seal for twenty years and thereafter be destroyed.

Devlieg Bullard II Inc. v. Ivan Doverspike Co. (IL-N 1:00-cv-05260 filed 08/25/2000).

Patent infringement action by a manufacturer of multiple spindle machines. The case settled. The court sealed the transcript of the proceedings that memorialized the confidential settlement agreement.

Leadership Council for Metropolitan Open Communities Inc. v. Buczek (IL-N 1:00-cv-05851 filed 09/22/2000).

Housing discrimination action on behalf of an African-American family, alleging that the defendant refused to rent to them because of their three minor children. The case settled. The audiotape of the settlement proceedings outlining the terms of the agreement was placed under seal. The consent decree also was sealed. The court later granted the plaintiffs' motion to lift the seal restricting publication of the consent decree.

Royal Source Inc. v. Puri-Clean Enterprises Inc. (IL-N 1:00-cv-06603 filed 10/24/2000).

Trademark infringement action by a manufacturer of nutritional and dietary supplements against competitors. The case settled. The court granted the plaintiff's motion to file under seal exhibits to its motion to enforce the settlement agreement. The defendants requested that the court order be vacated, because they never agreed to the plaintiff's version of the settlement terms. The court denied the defendants' motion. The case ultimately was dismissed as settled.

Pressner v. Target Corp. (IL-N 1:00-cv-06636 filed 10/25/2000).

Title VII employment action alleging sex discrimination and retaliation for supporting a co-worker's lawsuit against the retail store defendant. The case settled. The tape of the settlement proceedings was sealed.

Collier v. Greater Rockford Airport Authority (IL-N 3:00-cv-50416 filed 11/21/2000).

Action under the Fair Labor Standards Act concerning an airport's failure to pay employees overtime wages. The case was dismissed as settled with respect to all plaintiffs except one. That plaintiff ultimately settled for $11,000, and the settlement agreement was filed under seal as an exhibit.

Viravakin v. Sara Lee Branded Foods (IL-N 1:00-cv-07677 filed 12/07/2000).

Title VII employment action by an Asian accounts payable clerk independent contractor alleging that over the span of four years she was overlooked for several employment opportunities because of her race and national origin. The case settled. The transcript and tape of the settlement proceedings were sealed.

188 LLC v. Trinity Industries Inc. (IL-N 1:00-cv-07993 filed 12/21/2000).

Breach of contract action concerning the negligent repair of railroad cars. The case settled. Both parties filed restricted motions to enforce the settlement agreement. The plaintiff filed for bankruptcy and motions were deemed moot.

Johnstone v. Wabick (IL-N 1:01-cv-00577 filed 01/29/2001).

Civil rights action by shareholders against trust managers concerning fraudulent transfers that resulted in a $7 million loss for shareholders. The case settled. The court granted the plaintiffs' request to file the stipulated judgment against the defendants under seal. The judgment later was unsealed, revealing that the defendant had to pay plaintiffs $1,050,000.

Poly-Plating Inc. v. Hi-Grade Welding and Manufacturing Inc. (IL-N 1:00-cv-00772 filed 02/05/2001).

Trademark infringement action by a manufacturer of surface coating metals. The case settled. The court placed the transcript and tape of the settlement proceedings under seal.

Anderson Medical Supply Inc. v. Chevron Phillips Chemical Co. (IL-N 1:01-cv-01388 filed 02/27/2001).

Trademark infringement action concerning a breathing mask for children requiring asthma aerosol medication. The case settled. The tape of the settlement proceedings was placed under seal.

Robert Half International Inc v. Wong (IL-N 1:01-cv-01489 filed 03/02/2001).

Breach of contract action alleging misappropriation of trade secrets by former employees of a recruitment company. The case settled. The court sealed the defendants' motion to enter judgment based on the settlement agreement. The case was dismissed as settled.

Juno Lighting Inc. v. Bartco Lighting (IL-N 1:01-cv-01498 filed 03/02/2001).

Patent infringement action by a lighting manufacturer. The case settled. The settlement agreement was filed under seal.

Leherer Flaherty & Canavan P.C. v. Mesirow Financial Inc. (IL-N 1:01-cv-01643 filed 03/08/2001).

ERISA action alleging that the defendant failed to diversify and tend to the corporation's retirement and pension plan, which resulted in severe losses. The case settled. The terms of the settlement agreement were stated on the record and placed under seal.

Lawson Products Inc. v. Chromate Industrial Corp. (IL-N 1:01-cv-01793 filed 03/14/2001).

Contract action by manufacturers of industrial fasteners seeking to enjoin their competitor from soliciting their employees and encouraging them to breach their employment agreements by misappropriating trade secrets. The case settled. The settlement agreement was filed under seal.

Hegy v. Community Counseling Center of Fox Valley (IL-N 1:01-cv-02288 filed 04/02/2001).

Civil rights action by the defendant's former executive director alleging that she was locked out of her office by the board of directors because of age discrimination. The case settled. The transcript of the settlement conference was sealed.

Fruit of the Loom Inc. v. Gildan Activewear Inc. (IL-N 1:01-cv-02315 filed 04/04/2001).

Contract action to enjoin the misappropriation of the plaintiff's trade secrets. The case settled. The final settlement agreement was subject to the bankruptcy court's approval. The consent order was filed under seal.

Hibo v. Kehoe Palmer Djordjevic Service Center P.C. (IL-N 1:01-cv-02475 filed 04/09/2001).

Title VII employment discrimination action by a Filipino lab technician against an internal medicine and ambulatory patient consulting corporation, alleging wrongful discharge based on national origin. The case settled. The transcript tape of the settlement conference was sealed.

Hellman v. Econovo Ltd. & Trade Trust Ltd. (IL-N 1:01-cv-02613 filed 04/13/2001).

Breach of contract action by a chief development officer alleging that he was not properly compensated after being terminated without cause. The case settled. The terms of the settlement were stated on the record and placed under seal.

Nu-Wool Co. v. Certainteed Corp. (IL-N 1:01-cv-03691 filed 05/18/2001).

Statutory action by a manufacturer of cellulose insulation products against a manufacturer of fiberglass insulation products, alleging that the defendant, in an attempt to thwart competition, produced and distributed false advertisements about the dangers of cellulose insulation. The case settled. The settlement and release agreement is restricted.

Johnson v. Board of Trustees of the University of Illinois (IL-N 1:01-cv-03774 filed 05/22/2001).

Employment action alleging that the defendant breached the sealed settlement agreement, entered into in a previous action, by changing the plaintiff's job description and requiring him to report to workers he previously supervised. The court ordered that the settlement agreement remain under seal. The case was ultimately dismissed as settled.

Evanston Materials Consulting Corp. v. Dancor Inc. (IL-N 1:01-cv-06077 filed 08/08/2001).

Patent action by a material coatings research company against a consulting corporation, alleging that the defendants had no claim to the work performed under a grant. The parties entered into an "interim settlement agreement," which was sealed and approved by the court. The case ultimately was dismissed as settled.

Mitchell v. American Express TBS (IL-N 1:01-cv-06225 filed 08/14/2001).

Title VII employment action alleging sexual harassment, retaliatory conduct, and constructive discharge. The case settled. The terms of the settlement were stated on the record, and the tape was placed under seal.

Tibor v. Connaissance Consulting LLC (IL-N 1:01-cv-07207 filed 09/18/2001).

Contract action by an account executive and salesman against a technology consulting company for failure to provide him with written notice of its intent to terminate him and for refusing to pay him commissions owed. The case settled. The settlement agreement was filed under seal.

AOC LLC v. Applied Composites Corp. (IL-N 1:01-cv-07689 filed 10/04/2001).

Breach of contract action by a polyester and resins manufacturer against a customer for nonpayment.

The case settled. The court granted the defendant's oral motion to seal the settlement agreement.

Fox v. Yellow Freight System Inc. (IL-N 1:01-cv-07827 filed 10/10/2001).

Wrongful termination action alleging race and age discrimination. The case settled. The terms of the settlement were stated on the record and placed under seal.

Nolden v. FCI of Illinois Inc. (IL-N 1:01-cv-09335 filed 12/06/2001).

Employment action alleging wrongful discrimination because of the plaintiff's disability. The parties reached a settlement and placed the terms of the settlement on the record and under seal.

V & S Vin & Spirit Aktiebolag v. Cracovia Brands Inc. (IL-N 1:01-cv-09923 filed 12/27/2001).

Trademark infringement action by a vodka manufacturer against a competitor. The case settled. Although the confidential settlement agreement was filed under seal, it can be found attached to the plaintiff's notice of filing.

Career Holdings Inc. v. Finnigan (IL-N 1:02-cv-02746 filed 04/16/2002).

Fraud action seeking an injunction preventing a senior employee from going to work for a competitor until his knowledge of the recruitment solutions company's trade secrets is significantly less current. The case settled. The agreed order dismissing the case was sealed.

Corporate Express Office Products Inc. v. Schoepke (IL-N 1:02-cv-05076 filed 07/18/2002).

Contract action seeking to enjoin employees from working for a competitor of office supplies and using trade secrets. The case settled. The plaintiff filed a motion to enforce the settlement agreement. The motion contains terms of the settlement agreement, including an injunction against contacting the plaintiff's customers for a period of nine months. Two days later, the court granted the plaintiff's oral motion to file exhibits under seal.

Martinez v. City of Chicago (IL-N 1:02-cv-05093 filed 07/18/2002).

Employment action by a mailroom assistant alleging sexual harassment. The case settled. The transcript of the settlement conference was filed under seal.

Shen Wei (USA) Inc. v. Kimberly-Clark Corp. (IL-N 1:02-cv-05196 filed 07/23/2002).

Patent infringement action by manufacturers of moisturizing therapeutic gloves against a competitor. The case settled. The plaintiffs filed a restricted motion to enforce the settlement agreement.

Northern District of Indiana

No relevant local rule. According to the clerk, the court considered adopting a rule like the District of South Carolina's, proscribing sealed settlement agreements, but decided such a rule was unnecessary, because the district does not have sealed settlement agreements.

Statistics: 4,103 cases in termination cohort; 1 docket sheet is sealed (0.02%)—this case's disposition code suggests no sealed settlement agreement;[43] 216 docket sheets (5.3%) have the word "seal" in them; 11 complete docket sheets (0.27%) were reviewed; actual documents were examined for 0 cases; no case appears to have a sealed settlement agreement.

Southern District of Indiana

"No document will be maintained under seal in the absence of an authorizing statute, Court rule, or Court order." S.D. Ind. L.R. 5.3(a).

Statistics: 5,831 cases in termination cohort; 200 docket sheets (3.4%) have the word "seal" in them; 60 complete docket sheets (1.0%) were reviewed; actual documents were examined for 13 cases (0.22%); 9 cases (0.15%) appear to have sealed settlement agreements.

Cases with Sealed Settlement Agreements

United States ex rel. Urefai v. Charter Medical Corp. (IN-S 1:96-cv-01759 filed 12/04/1996).

Qui tam action under the False Claims Act for fraudulent Medicare billing by psychiatric hospitals. The case was dismissed as settled, and the complaint, notice of intervention, stipulation of dismissal, and dismissal were unsealed. A sealed settlement agreement apparently was filed.

43. One judgment on motion before trial.

Stanback v. DaimlerChrysler Corp. (IN-S 1:99-cv-00043 filed 01/15/1999).

Civil rights employment action for wrongful termination after the plaintiff complained that he was sexually harassed. A jury awarded the plaintiff $2.8 million. To prevent an appeal, the plaintiff reached an agreement with the defendant. A sealed settlement agreement was filed with the motion to enforce it.

Indianapolis Motor Speedway Corp. v. Transworld Diversified Services Inc. (IN-S 1:99-cv-01073 filed 07/12/1999).

Contract action involving breach of a sponsorship agreement. A sealed settlement agreement was filed as an attachment to the joint notification of settlement.

Bokelman v. Allied Telecommunications Inc. (IN-S 1:99-cv-01452 filed 09/16/1999).

Contract action for breach of an employment agreement involving failure to pay the plaintiff a sales commission. The defendant filed a sealed settlement agreement. The court dismissed the case and returned the settlement agreement to the defendant.

Cook Vascular Inc. v. Reiser (IN-S 1:99-cv-01598 filed 10/15/1999).

Patent infringement action involving a specialized catheter used to remove problem pacemakers. A sealed settlement agreement was filed pursuant to a protective order. The court retained jurisdiction to enforce the settlement agreement.

Glendale Centre LLC v. Houlihan's Restaurants Inc. (IN-S 1:00-cv-00671 filed 04/21/2000).

Real property action involving breach of a lease agreement. A consent judgment was reached, and a sealed settlement agreement was filed. The order of dismissal discloses that the amount of judgment was $800,000.

Locke v. Lawrence Township Fire Department (IN-S 1:00-cv-00942 filed 06/07/2000).

Civil rights employment action by a firefighter against her employer for sexual discrimination and retaliation. The plaintiff filed a motion to enforce the settlement agreement. The court sealed the motion because it contained settlement terms.

FFI Corp. v. Powers Fastening Inc. (IN-S 1:00-cv-00968 filed 06/13/2000).

Contract product liability action claming that the plaintiff installed grain dryers using the defendant's faulty anchoring system, which caused one grain dryer to collapse and required the plaintiff to test all of the anchors it installed. The plaintiff filed a motion to enforce a settlement agreement. Two months after the motion was filed, the court ordered the motion sealed because it contained settlement terms.

Bailey v. United National Bank (IN-S 1:00-cv-01175 filed 07/21/2000).

ERISA action by retired employees for breach of fiduciary and contractual duty in not properly monitoring and protecting assets. At the pretrial conference the record of settlement was sealed. The case was dismissed and referred to the bankruptcy court because the ERISA claims related to matters that were contested in the debtor's bankruptcy case.

Northern District of Iowa

A document may be filed under seal only by court order. N. & S. D. Iowa L.R. 5.1(e). Thirty days after the case is over (sixty days if the United States is a party), the clerk may notify parties that documents will be unsealed unless there is a timely objection. *Id.* (Note that the Northern and Southern Districts of Iowa have the same local rules.)

Statistics: 1,096 cases in termination cohort; 42 docket sheets (3.8%) have the word "seal" in them; 15 complete docket sheets (1.4%) were reviewed; actual documents were examined for 6 cases (0.55%); 6 cases (0.55%) appear to have sealed settlement agreements.

Cases with Sealed Settlement Agreements

Mineral Area Osteopathic Hospital Inc. v. Keane Inc. (IA-N 1:99-cv-00050 filed 03/31/1999).

Contract action by three hospitals against a provider of health care information software for damages arising from the Y2K bug. The defendant sought a protective order. Papers and proceedings pertaining to the plaintiffs' motion to certify a class were sealed, and the motion was denied. The parties settled (as did three additional hospital plaintiffs in independent actions) at a settlement conference before a magistrate judge. The parties asked the court to approve a confidential settlement agreement, which was filed under seal. One term of the agreement was plaintiffs' not appeal-

ing the denial of class certification. The court approved the settlement agreement.

Jaweed v. Covenant Medical Center Inc. (IA-N 6:00-cv-02007 filed 01/13/2000).

Employment sex discrimination action by a surgeon alleging a hostile work environment for women, more favorable treatment of male surgeons, and termination of her employment contract for complaining about the discrimination. The court scheduled a settlement conference before the chief magistrate judge, and nearly two months later the plaintiff filed a sealed motion to enforce a settlement agreement. The defendants filed a sealed opposition. Four months later the case was dismissed as settled.

Weems v. Federated Mutual Insurance Co. (IA-N 6:00-cv-02013 filed 02/08/2000).

Designated a civil rights action, this is really an employment discrimination action by an African-American employee alleging wrongful termination on the basis of race. The complaint included state-law counts for assault and intentional infliction of emotional distress. The defendant filed a counterclaim for $549.32 in excess salary paid and the return of property belonging to the defendant. In advance of a settlement conference, the defendant filed a "confidential settlement statement" under seal. Subsequently the case was dismissed as settled.

EEOC v. American Home Products Corp. (IA-N 3:00-cv-03079 filed 09/29/2000).

Employment discrimination action on behalf of female employees for a hostile work environment created by a manager. The complaint alleged that the manager was promoted rather than disciplined and that employees who investigated the harassment were fired. A consent decree mandated payment of $478,500 to employees. The list of employees and their shares was filed under seal.

Liu v. Life Investors Insurance Co. of America (IA-N 1:01-cv-00141 filed 09/28/2001).

Action alleging employment discrimination on the basis of race and national origin in failing to promote the plaintiff. The action was dismissed as settled, and the plaintiff filed a sealed "motion to extend time to finalize settlement" three weeks later. Over a month later the defendant filed a sealed motion to enforce a settlement agreement. An unsealed brief in support of this motion stated that the agreement had not been executed because (1) the plaintiff sought to amend his agreement not to seek employment with the defendant or related companies with a limitation to companies within the United States, (2) the plaintiff objected to terms concerning his return of the defendant's property and to the defendant's not admitting liability, and (3) the plaintiff's wife had not signed the agreement. Ruling on the motion, the court ordered specific terms and that a signed settlement agreement be filed by a specific date. The agreement was filed under seal.

EEOC v. DeCoster (IA-N 3:02-cv-03077 filed 09/26/2002).

Employment sex discrimination action on behalf of female employees who complained of sexual harassment and assault. The case was terminated by consent decree. The defendant denied the allegations, but agreed to promulgation of an anti-harassment policy, training, recordkeeping, and payment of $1,525,000 in monetary relief. The list of who received how much was sealed, but each of approximately a dozen individuals received approximately $125,000.

Southern District of Iowa

A document may be filed under seal only by court order. N. & S. D. Iowa L.R. 5.1(c). Thirty days after the case is over (sixty days if the United States is a party), the clerk may notify parties that documents will be unsealed unless there is a timely objection. *Id.* (Note that the Northern and Southern Districts of Iowa have the same local rules.)

Statistics: 1,976 cases in termination cohort; 69 docket sheets (3.5%) have the word "seal" in them; 9 complete docket sheets (0.46%) were reviewed; actual documents were examined for 0 cases; no case appears to have a sealed settlement agreement.

District of Maine

No relevant local rule.

Statistics: 1,070 cases in termination cohort; 141 docket sheets (13%) have the word "seal" in them; 10 complete docket sheets (0.93%) were reviewed; actual documents were examined for 2 cases (0.19%); 2 cases (0.19%) appear to have sealed settlement agreements.

Cases with Sealed Settlement Agreements

Strout v. Paisley (ME 1:00-cv-00107 filed 05/24/2000).

Wrongful death and personal injury action against a truck driver and his employer for causing a motor vehicle accident that killed the plaintiff's wife and caused him bodily injury. The plaintiff's motion for approval of the couple's minor son's settlement was sealed. An unsealed order approving the minor's settlement reported that the minor received $125,341 of the $450,000 settlement.

Carrier v. JPB Enterprises (ME 2:01-cv-00187 filed 07/20/2001).

ERISA class action against plaintiffs' former employer for failure to provide advance notice of mass layoffs, failure to pay severance and vacation pay, and failure to contribute to a 401(k) plan. The parties filed a sealed joint motion to approve the settlement. An unsealed order approving the settlement reported that the class representatives each received a total of $10,000. The order approving the plaintiffs' motion for attorney fees reported that the attorneys were awarded $150,000.

District of Maryland[44]

"Any motion seeking the sealing of pleadings, motions, exhibits or other papers to be filed in the Court record shall include (a) proposed reasons supported by specific factual representations to justify the sealing and (b) an explanation why alternatives to sealing would not provide sufficient protection. The Court will not rule upon the motion until at least 14 days after it is entered on the public docket to permit the filing of objections by interested parties." D. Md. L.R. 105.11. At the end of the case, sealed documents are returned to the parties or destroyed. *Id.* R. 113.2.

Statistics: 7,851 cases in termination cohort; 8 docket sheets are sealed (0.10%)—the disposition codes for 6 of these cases suggest no sealed settlement agreements[45] and the disposition codes for 2 of these cases suggest sealed settlement agreements;[46] 232 unsealed docket sheets (3.0%) have the word "seal" in them; 20 complete docket sheets (0.25%) were reviewed; actual documents were examined for 15 cases (0.19%); 15 cases (0.19%) appear to have sealed settlement agreements.

Cases with Sealed Settlement Agreements

Grandison v. Lanham (MD 1:94-cv-00204 filed 01/27/1994).

Prisoner civil rights action by a Muslim prisoner who alleged he was prevented from practicing his religion while incarcerated. The parties settled. A tape recording of the settlement conference was sealed.

United States ex rel. Ackley v. International Business Machines Corp. (MD 8:97-cv-03189 filed 09/18/1997).

Qui tam case filed under the False Claims Act for fraudulent billing by a computer company working on NASA's space shuttle project. A sealed settlement agreement was filed.

Quillen v. CSX Transportation Inc. (MD 8:97-cv-03219 filed 09/22/1997).

Federal employers' liability action by the wife and minor son of an assistant conductor who died when the passenger train he was riding on crashed into a commuter train. A petition for approval of the settlement was sealed. The court denied the request to approve the settlement.

Robinson v. New Line Cinema Corp. (MD 1:97-cv-03859 filed 11/14/1997).

Copyright case claiming that the defendant passed off as its own a screenplay by the plaintiff, which the plaintiff called "Sister Sara" and the defendant called "Set It Off." The court granted the defendant summary judgment, and the plaintiff appealed. The court of appeals reversed. Eleven months after the case was reopened, the plaintiff filed a sealed motion to enforce a settlement agreement. The case was dismissed as settled.

Wilklow v. Johns Hopkins Hospital (MD 1:98-cv-02178 filed 07/08/1998).

Medical malpractice action by the parents of a minor who suffered neurological and permanent physical damage because her hydrocephalus was not treated promptly. A sealed order granted the plaintiffs' motion to approve the settlement.

44. This district is included in the study because of its good-cause rule.

45. Two judgments on motions before trial, 3 "other" dismissals, 1 "other" judgment.

46. Two cases settled.

Kessler v. American Postal (MD 8:98-cv-03547 filed 10/21/1998).

Statutory action. The docket sheet is sealed. The case was dismissed as settled.

Superior Federal Bank FSB v. Tandem National Mortgage Inc. (MD 1:99-cv-02360 filed 08/04/1999).

Contract case involving breach of a purchase agreement. Settlement documents were filed under seal. The defendants' second application to approve the settlement agreement included a copy of the settlement agreement that did not mention the amount being paid. A default judgment was ordered against one of the defendants for $71,041.

Teague v. O&K Escalators Inc. (MD 8:00-cv-00292 filed 01/31/2000).

Personal injury action by the estate of a man who was killed when an escalator he was installing in the Washington Metro system collapsed. The plaintiff alleged that the fastener system was defective. There were counterclaims, cross-claims, and third-party claims among Metro, the contractor, the escalator manufacturer, and parts manufacturers. A sealed settlement agreement was filed.

Harmon v. Tyson Foods Inc. (MD 1:00-cv-01997 filed 06/29/2000).

Class action under the Fair Labor Standards Act by chicken catchers for failure to pay overtime wages. A joint memorandum for approval of the settlement agreement was sealed and approved by the court.

Charles River Associates v. Hale Trans Inc. (MD 1:00-cv-02760 filed 09/14/2000).

Contract case involving failure to pay for services rendered to assist the defendant in an antitrust lawsuit. The defendant filed a third-party complaint for legal malpractice against its former attorneys. After a settlement conference the court dismissed the case. The plaintiff filed a motion to revoke the dismissal and reopen the case, because the primary defendant did not pay the settlement. This motion included a letter from the magistrate judge that revealed the settlement amount of $162,000. The third-party defendant filed a sealed settlement agreement as an exhibit to a motion to enforce it.

Clean Harbors Environmental Services Inc. v. Isom (MD 1:01-cv-00657 filed 03/05/2001).

Contract case involving breach of a confidentiality and noncompetition agreement. A sealed consent order was filed.

Robinson v. Allen Family Foods Inc. (MD 1:01-cv-00838 filed 03/20/2001).

Class action under the Fair Labor Standards Act by chicken catchers for failure to pay overtime wages. A sealed settlement agreement was filed.

Warehouse Employees Local Union Number 730 v. Great Atlantic & Pacific Tea Co. (MD 1:01-cv-01528 filed 05/25/2001).

Case filed under the Labor and Management Relations Act involving dismissal of a union worker in violation of a collective bargaining agreement. A sealed settlement agreement was filed.

Chamberlain v. Fairbanks Capital Corp. (MD 8:01-cv-01779 filed 06/19/2001).

Statutory action involving violation of the Fair Debt Collection Act in connection with the plaintiffs' home mortgage. A sealed settlement agreement was filed.

United States v. Frederick Memorial (MD 1:01-cv-02923 filed 10/02/2001).

Statutory action. The docket sheet is sealed. The case was dismissed as settled.

Eastern District of Michigan

Sealed settlement agreements should be unsealed two years after the date of sealing, absent an order to the contrary. E.D. Mich. L.R. 5.4. Court staff members say that the rule is difficult to implement, because no rule specifies that sealed settlement agreements be designated as anything other than a sealed document, so it is difficult to know what documents are covered by the rule. Sealed *discovery* documents are returned or unsealed sixty days after the case is over. *Id.* R. 5.3(b).

Statistics: 9,561 cases in termination cohort; 351 docket sheets (3.7%) have the word "seal" in them (but 155 of these merely have "seal" in a party name, including 141 cases with Crown Cork and Seal Company as a party); 52 complete docket sheets (0.54%) were reviewed; actual documents were examined for 19 cases (0.20%); 16 cases (0.17%) appear to have sealed settlement agreements.

Cases with Sealed Settlement Agreements

Herman Miller Inc. v. Palazzetti Imports & Exports Inc. (MI-E 2:96-cv-75833 filed 06/25/1996).

Trademark and trade dress action concerning high-quality reproductions of Eames chairs and ottomans. There was a jury trial, a judgment, an appeal, and a remand. On the eve of the second trial, the case settled pursuant to a sealed settlement agreement "to remain under seal for a period of ten (10) years" (until January 3, 2013).

Smith v. Chrysler Financial Corp. (MI-E 2:97-cv-76338 filed 12/03/1997).

Employment action by a paralegal alleging retaliation against her for complaining of the general counsel's pursuing a sexual relationship with another paralegal through unwelcome sexual advances. The action was partially dismissed pursuant to a sealed settlement agreement, and an award of attorney fees was to be determined. In addition, the plaintiff was ordered to keep confidential the terms of the defendants' settlement agreement with the other paralegal in her separate action. Attorney fees of $184,371.25 and costs of $13,240.98 were awarded by sealed order, which both the plaintiff and the defendants appealed. The case settled on appeal.

Relume Corp. v. Dialight Corp. (MI-E 2:98-cv-72360 filed 06/09/1998).

Patent infringement case concerning LED displays in traffic signals. The court granted summary judgment to the defendants. Documents filed in the case indicate that the plaintiff tried to negotiate a settlement with the defendants that would relieve it of the preclusive effect of the summary judgment in future actions against other manufacturers of LED traffic signals. Apparently some defendants were amenable to this and some were not. The amenable defendants agreed to a settlement agreement filed under seal. The plaintiff thereafter lost an appeal of the summary judgment. The case was finally dismissed as settled pursuant to an apparently unfiled settlement agreement.

Solomon v. City of Sterling Heights (MI-E 2:98-cv-73900 filed 09/04/1998).

Civil rights case against a newspaper, a city, and its police department for injuries resulting from the police's use of tear gas, pepper spray, and physical violence to disrupt a picket line. The plaintiff further alleged denial of medical treatment while in confinement and permanent disability. Judgment on a jury verdict awarded the plaintiff $500,000 in compensatory damages against all defendants and $1 million in punitive damages against the newspaper. Litigation over prejudgment interest and attorney fees continued, and a sealed settlement agreement with the city defendants was filed. The newspaper appealed the judgment against it, and the matter is still on appeal.

Pasque v. Frederick (MI-E 2:99-cv-75113 filed 10/20/1999).

Motor vehicle action for wrongful killing of a bicyclist by a truck driver. A sealed document was filed the same day as a "settlement on the record," and the case was dismissed on an approved settlement the following month. Five days before the settlement on the record, the plaintiff filed a petition to determine settlement specifying a $2 million settlement.

Wagner v. Ford Motor Co. (MI-E 2:99-cv-75567 filed 11/17/1999).

Employment discrimination case, which was dismissed without prejudice in November. The court retained jurisdiction for two months in the event that the settlement was not consummated. Two months later the court agreed to retain jurisdiction for an additional month. One month later—in early March—the court dismissed the case with prejudice. A sealed document was filed by the judge nearly two months later; this may be a sealed settlement agreement.

Fitch v. Sensormatic Electronics Corp. (MI-E 2:00-cv-71603 filed 04/03/2000).

Complaint under the Fair Labor Standards Act for wrongfully requiring field technicians to deduct one hour from each workday. A stipulated order for dismissal states that the court facilitated a settlement conference, which resulted in a confidential settlement agreement that the court will hold under seal. The docket sheet, however, does not show the filing of such an agreement.

Intra Corp. v. Air Cage Co. (MI-E 5:00-cv-60234 filed 04/19/2000).

Patent case concerning an "apparatus for inspecting an engine valve seat." The case was dismissed, and the court retained jurisdiction to enforce a sealed settlement agreement.

Parkhill v. Starwood Hotels & Resorts Worldwide Inc. (MI-E 2:00-cv-71877 filed 04/24/2000).

Personal injury action for quadriplegic spinal cord injuries sustained by the plaintiff while swimming in the ocean at the defendant's hotel. The case settled, and approximately three months after the filing of the stipulated order of dismissal—on the statistical date of termination—a sealed document was filed; this may be a settlement agreement.

Hoy v. Pet Greetings (MI-E 2:00-cv-72308 filed 05/19/2000).

Patent case concerning edible pet greeting cards. A sealed document was filed on the day of termination. The unsealed judgment contains several terms of a settlement agreement, but states that some terms are sealed.

Madison/OHI Liquidity Investors LLC v. Omega Healthcare Investors Inc. (MI-E 2:00-cv-72793 filed 06/21/2000).

Contract case for failure to provide a security investment firm with an agreed-upon line of credit. A settlement agreement was reached during a bench trial, and a transcript of the agreement was filed under seal.

Baker v. Bollinger (MI-E 4:00-cv-40239 filed 06/26/2000).

Employment case against the University of Michigan and some of its employees. The case file includes a protective order concerning confidential health information. The court granted the parties' joint motion for a stipulated permanent injunction and sealing of the record.

Smith v. City of Detroit (MI-E 4:00-cv-40273 filed 07/21/2000).

Civil rights action against the city of Detroit for a wrongful killing by a police officer. A sealed document was filed by the judge six days before the case was dismissed as settled. The case was dismissed without prejudice to give plaintiffs sixty days to move to enforce the settlement agreement if it was not consummated.

Allegiance Telecom Inc. v. Hopkins (MI-E 2:01-cv-74310 filed 11/09/2001).

Designated a trademark case, this is an unfair competition case against former employees for siphoning business, with the seventh of eleven claims arising under the Lanham Act. A sealed document was filed nine days before the case was closed. The stipulated order of dismissal specifies the terms of settlement, but also refers to an "accompanying Confidential Settlement and Mutual General Release Agreement" and represents that an attached exhibit contains true information and is filed under seal.

Saleh v. U.S. Health & Life Insurance Co. (MI-E 2:01-cv-74981 filed 12/21/2001).

Designated an insurance action, the complaint alleges ERISA violations in wrongfully denying an employee's wife $21,256.80 in health insurance benefits because the employer wrongfully ceased paying the premium. The record of a settlement conference was sealed, the case was referred to mediation, and the case was dismissed as settled.

Moses v. MSP Industries Corp. (MI-E 5:02-cv-60076 filed 04/12/2002).

Action under the Fair Labor Standards Act by a student engineer for failure to pay for overtime work. The case was dismissed pursuant to a sealed settlement agreement.

Western District of Michigan[47]

Documents may be filed under seal only with prior permission from the court, W.D. Mich. L. Civ. R. 10.6(a)-(b), and will be unsealed thirty days after termination of the case, absent an order to the contrary, *id.* R. 10.6(c).

Statistics: 2,775 cases in termination cohort; 2 docket sheets are sealed (0.07%)—the disposition code for 1 of these cases suggests no sealed settlement agreement[48] and the disposition code for 1 of these cases suggests a sealed settlement agreement;[49] 181 unsealed docket sheets (6.5%) have the word "seal" in them (but 79 of these include only docket entries made under the identification "seal" because the docket clerk had been accessing sealed documents in other cases, or only notation of whether a sealed mediation award was accepted or rejected); 13 complete docket sheets (0.47%) were reviewed; actual documents were examined for 7 cases (0.25%); 8 cases (0.29%) appear to have sealed settlement agreements.

47. This district was selected for the study as part of a modified random sample, and it has a good-cause rule.

48. One voluntary dismissal.

49. One case settled.

Cases with Sealed Settlement Agreements

Tompkins v. Anderson (MI-W 4:99-cv-00124 filed 09/10/1999).

Fraud action concerning ownership and operation of a radio station. The case settled at a settlement conference, and the proceedings were sealed. Eight months after the case was dismissed, the plaintiffs moved to enforce the confidential settlement agreement. The plaintiffs attached the settlement agreement, which called for twenty-three monthly payments of $500 from each defendant. The plaintiffs' motion was denied on the ground that the court had not retained jurisdiction to enforce the settlement agreement.

C.S. Engineered Castings Inc. v. deMco Technologies Inc. (MI-W 4:01-cv-00024 filed 02/20/2001).

Negotiable instrument action for nonpayment of loans, with counterclaims for fraud and related injuries. The amount in controversy allegedly was $75,000 in principal and $2,445.45 in interest. The case settled. The plaintiff moved to enforce the confidential settlement agreement, claiming $72,800 still owed. The motion stated that a copy of the confidential agreement would not be attached, but would "be delivered to the court for consideration with this motion." The motion was unopposed and granted. It appears that the court subsequently filed the confidential settlement agreement under seal.

Stryker Corp. v. NeoDyme Technologies Corp. (MI-W 4:01-cv-00031 filed 02/26/2001).

Contract action for failure to pay $91,500 in invoices for hospital goods and services. The court agreed to file a confidential settlement agreement under seal so that the court could retain jurisdiction to enforce it. The order to seal stated "that within 30 days after termination of the case, the Court will return the Settlement Agreement to either of the attorneys." The motion to seal the settlement agreement was filed two days after the case was dismissed, and the order was granted the following month. The docket sheet shows that the sealed settlement agreement was filed the same day as the order to seal and does not show a return of the sealed document. Less than two months later, the defendant filed a notice for bankruptcy protection.

Fewless v. Board of Education (MI-W 1:01-cv-00271 filed 05/01/2001).

Civil rights action for a warrantless strip search of a disabled 14-year-old student on a false tip from another student that the boy was concealing contraband drugs in his buttocks. The parties filed a "confidentiality agreement and stipulated protective order" to keep confidential "the name or other personally identifying information about a minor witness or minor party." A magistrate judge presided over a settlement conference, which was sealed "in furtherance of justice and the protection of a minor child." Subsequent to a stipulated dismissal, the plaintiff filed a motion to recover $53,034.10 in fees and costs. The defendants argued against this figure by noting that the settlement amount was "significantly lower than [the] initial demand" of $750,000 stated in the plaintiffs' Rule 26(a)(1) disclosures. The court's resolution of this motion was sealed.

Hale-DeLaCarza v. Spartan Travel Inc. (MI-W 1:01-cv-00557 filed 08/28/2001).

Employment action alleging persistent unwanted physical sexual advances. A minute docket entry states that a settlement was placed on the record under seal. A stipulated order dismissing the case gives no additional information.

Mikulak v. ChoiceOne Financial Services Inc. (MI-W 1:01-cv-00721 filed 11/07/2001).

Pro se employment action by an insurance agent who was a recovering alcoholic for wrongful termination and disability discrimination. The court sealed a tape recording of a settlement conference at which the case settled.

Compaq Computer Corp. v. SGH Inc. (MI-W 1:02-cv-00028 filed 01/16/2002).

Trademark action. The docket sheet is sealed. The case was dismissed as settled.

Rapid Design Service Inc. v. Cambridge Integrated Service Group (MI-W 1:02-cv-00179 filed 03/18/2002).

Contract action by a self-insured employer against a company hired by the employer to provide administrative services on insurance claims. An employee was severely burned when mixing explosives in his home, and the defendant authorized an insurance payment of $236,983.32 to the employee. But the employer's "excess insurance" provider refused to cover the payment because the injury arose from criminal activity, so the employer sued the defendant for wrongful authorization. The case settled pursuant to a confidential settlement agreement, which was inadvertently filed with the court and subsequently sealed.

District of Minnesota

Absent an order to the contrary, sealed documents should be reclaimed by the parties four months after the case is over if there is no appeal and thirty days after the case is over if there is an appeal. D. Minn. L.R. 79.1(d). The court will destroy documents not retrieved within thirty days of notice to retrieve them. *Id.* R. 79.1(e).

Statistics: 4,792 cases in termination cohort; 13 docket sheets are sealed (0.27%)—the disposition codes for 9 of these cases suggest no sealed settlement agreements[50] and the disposition codes for 4 of these cases suggest sealed settlement agreements;[51] 300 unsealed docket sheets (6.3%) have the word "seal" in them; 31 complete docket sheets (0.65%) were reviewed; actual documents were examined for 27 cases (0.56%); 27 cases (0.56%) appear to have sealed settlement agreements.

Cases with Sealed Settlement Agreements

Sealed Plaintiff v. Sealed Defendant (MN 0:98-cv-02428 filed 11/10/1998).

Fraud action. The docket sheet is sealed. The case was dismissed as settled.

M.K. v. Pinnacle Programs Inc. (MN 0:98-cv-02440 filed 11/13/1998).

Section 1983 civil rights action by a minor plaintiff against an individual, a corporation, and a county and its board of supervisors. The case was dismissed as settled. The entire case file is sealed.

Sealed Plaintiff v. Sealed Defendant (MN 0:99-cv-00292 filed 02/18/1999).

Fraud action. The docket sheet is sealed. The case was dismissed as settled.

W.F. v. Hennepin County (MN 0:99-cv-00585 filed 04/13/1999).

Section 1983 civil rights action by minor plaintiffs against the Hennepin County Children and Family Services Department and two of its representatives for repeatedly ignoring signs of neglect and both physical and sexual abuse while the children were in their mother's care. In a sealed order, the court approved the settlement agreement and dismissed the case.

Stockberger v. Physicians Mutual Insurance Co. (MN 0:99-cv-00805 filed 05/24/1999).

Contract action by a division manager for wrongful termination. The employer filed a counterclaim alleging misappropriation of trade secrets, intentional interference with contractual relations, and unfair competition. The case was settled and dismissed. The settlement transcript was sealed.

Dimensional Arts Inc. v. Holographic Label Converting Inc. (MN 0:99-cv-00958 filed 06/23/1999).

Patent infringement action concerning a holographic product. A sealed settlement agreement was filed. The court enjoined the defendants from infringing on the plaintiff's patent and using its trade secrets.

Heidi Ott A.G v. Target Stores Inc. (MN 0:99-cv-01170 filed 07/29/1999).

Trademark action concerning Swiss dolls. The case was dismissed pursuant to a sealed settlement agreement. Two months later the plaintiff filed a motion to enforce the settlement agreement. The court granted the motion and provided the parties with a settlement payment schedule.

Von Ruden v. Arvig Enterprises Inc. (MN 0:99-cv-01260 filed 08/11/1999).

Employment action for wrongful termination just days before the birth of the plaintiff's second child. The parties entered into a confidential settlement agreement that was sealed by the court.

Schlicht v. Dakota Minnesota & Eastern Railroad Corp. (MN 0:99-cv-02059 filed 12/28/1999).

Wrongful death federal employers' liability action on behalf of the widow and children of the deceased plaintiff against a city and a railroad corporation. The case was dismissed as settled. The entire case file is sealed.

Keystone Retaining Wall Systems Inc. v. Rockwood Retaining Walls Inc. (MN 0:00-cv-00496 filed 03/03/2000).

Patent infringement action concerning retaining wall blocks. The case was dismissed pursuant to a sealed settlement agreement.

50. One dismissal for want of prosecution; 3 judgments on motions before trial, 1 voluntary dismissal, 3 "other" dismissals, 1 case affirmed by the appeal division.

51. Four cases settled.

Binkerd v. Mayo Foundation (MN 0:00-cv-00985 filed 04/17/2000).

Medical malpractice action for the wrongful death of a child. The case settled. All documents relating to the settlement are marked confidential under a protective order and may only be viewed upon written order issued by the court.

Hutchinson v. Nutro Products Inc. (MN 0:00-cv-01929 filed 08/14/2000).

Trademark infringement action concerning pet food. This case and a related case, *Hutchinson v. Petsmart* (MN 0:00-cv-02119 filed 9/13/2000), were settled. The defendants filed a motion to enforce the settlement agreement. The court's order on the defendant's motion is sealed. The case ultimately was dismissed.

Kaufman v. University Travel Services Inc. (MN 0:00-cv-02226 filed 09/29/2000).

Action under the Fair Labor Standards Act for failure to pay an employee overtime wages pursuant to an agreement the defendant entered into with the Department of Labor. The case was dismissed pursuant to a sealed settlement agreement.

Robinson v. Preferred Management Services Inc. (MN 0:00-cv-02419 filed 10/30/2000).

Action under the Fair Housing Act alleging race discrimination and refusal to accommodate the plaintiffs' asthma disability. The court approved and sealed a minor's settlement.

Young v. Conroy (MN 0:01-cv-00354 filed 02/27/2001).

Marine action on behalf of a minor child for injuries from the defendant's motorboat. The parties entered into a confidential settlement agreement, which the court placed under seal.

Jones v. Messerli & Kramer PA (MN 0:01-cv-00748 filed 04/30/2001).

Fraud action under the Fair Debt Collection Act for trying to collect a debt with notice of the plaintiff's Chapter 7 bankruptcy case. The case was dismissed pursuant to a sealed settlement agreement.

Vertical Real Estate Inc. v. AirBand Communications Inc. (MN 0:01-cv-00804 filed 05/09/2001).

Fraud action by a real estate corporation against a seller of broadband wireless communication services for breach of contract. The plaintiff alleged that the defendant used proprietary information to circumvent the plaintiff and enter into contracts with the plaintiff's subcontractors directly. The case settled, and the court ordered the transcript of the settlement sealed.

Alexander v. Minnesota Viking Food Services LLC (MN 0:01-cv-01514 filed 08/20/2001).

Employment discrimination action by an Egyptian employee against a food service corporation. The case settled, and the court sealed the transcript of the settlement agreement.

Percarina v. Tokai Corp. (MN 0:01-cv-01655 filed 09/07/2001).

Product liability action arising from the negligent manufacture of a butane lighter that was not child-resistant and caused catastrophic burns to two minor children. The defendants filed a counterclaim of contributory negligence and indemnity. The case was dismissed as settled. The court order approving the minors' settlement and distribution of the proceeds was sealed.

Work Connection Inc. v. SAFECO Insurance Cos. (MN 0:01-cv-01670 filed 09/11/2001).

Insurance action alleging failure to return the plaintiff's premium overpayments. The defendants filed a counterclaim alleging that the plaintiff failed to pay for the coverage afforded. The case was dismissed as settled. The confidential transcript of the settlement conference was sealed.

Winmark Corp. v. MNO Inc. (MN 0:01-cv-01805 filed 10/02/2001).

Originally filed as a trademark infringement action, the complaint was amended to allege breach of an anticompetition covenant instead. The case settled, and the court ordered the defendants to keep the terms of the settlement agreement confidential. The transcript of the settlement agreement was sealed. However, a subsequent stipulation order reveals that the defendants agreed to rename three of their stores and, with respect to each store, enter into new franchise agreements with the plaintiffs.

Independent School District No. 112 v. A.S. (MN 0:01-cv-01859 filed 10/10/2001).

Civil rights action against a seven-year-old special education student by a school district appealing the decision by a district hearing officer that the school district needs to provide one-to-one nurs-

ing care pursuant to the Individuals with Disabilities Education Act. The case settled, and the transcript of the settlement conference was sealed.

Universal Hospital Services Inc. v. Hennessy (MN 0:01-cv-02072 filed 11/13/2001).

Breach of contract action by a supplier of moveable medical equipment alleging that its former district manager used confidential trade information to solicit the plaintiff's customers on behalf of a competitor and in violation of a noncompetition agreement. The defendant filed a counterclaim alleging that he signed the agreement after he had already begun employment and received no consideration for signing it. The case settled. The settlement agreement was sealed.

Rowe v. Boys and Girls Club of America (MN 0:01-cv-02269 filed 12/10/2001).

Civil rights action by several parents on behalf of their minor children for race discrimination. The case was dismissed as settled. The court approved and sealed the minors' settlement agreements. The entire case file is under seal.

Sealed Plaintiff v. Sealed Defendant (MN 0:02-cv-00369 filed 02/12/2002).

Fraud action. The docket sheet is sealed. The case was dismissed as settled.

Wright Medical Technology Inc. v. Strand (MN 0:02-cv-01769 filed 07/17/2002).

Breach of contract action by a seller of medical implant devices against a former distributor, alleging violation of the covenants not to compete. The defendant filed a counterclaim alleging that the plaintiff failed to pay a commission for services rendered. The case settled. The settlement agreement was sealed. Some of the settlement terms appear to be detailed in the consent order.

Sealed Plaintiff v. Sealed Defendant (MN 0:02-cv-04270 filed 11/07/2002).

Contract action. The docket sheet is sealed. The case was dismissed as settled.

Northern District of Mississippi[52]

Court records may be sealed only upon a showing of good cause. N. & S. D. Miss. L.R. 83.6(B). Absent an order to the contrary, sealed documents are unsealed thirty days after the case is over. *Id.* R. 83.6(D). If a court orders a document sealed beyond that time period, the order "shall set a date for unsealing." *Id.* (Note that the Northern and Southern Districts of Mississippi have the same local rules.)

Statistics: 2,603 cases in termination cohort; 54 docket sheets (2.1%) have the word "seal" in them; 22 complete docket sheets (0.85%) were reviewed; actual documents were examined for 5 cases (0.19%); 5 cases (0.19%) appear to have sealed settlement agreements.

Cases with Sealed Settlement Agreements

Smith v. Salvation Army (MS-N 1:99-cv-00148 filed 04/03/1999).

Contract action by a bookkeeper for wrongful termination. The case was dismissed as settled, and the parties agreed to keep terms of the settlement confidential. Two months later the plaintiff filed a sealed motion to enforce the settlement agreement. The court denied the motion.

Credit Suisse First Boston Mortgage Capital LLC v. Doris (MS-N 4:99-cv-00283 filed 11/22/1999), consolidated with *Credit Suisse First Boston Mortgage Capital Inc. v. Bayou Caddy's Jubilee Casino* (MS-N 4:99-cv-00284 filed 11/22/1999).

Foreclosure actions concerning preferred ship mortgages pertaining to riverboat gambling. The parties filed a stipulation of dismissal. Over three months later the court granted a joint motion to seal the record.

Banks v. CCA of Tennessee Inc. (MS-N 4:01-cv-00150 filed 06/20/2001); *Hale v. CCA of Tennessee Inc.* (MS-N 2:01-cv-00145 filed 06/21/2001).

Actions under the Fair Labor Standards Act for failure to pay employees overtime for meetings the plaintiffs attended as part of their employment but beyond their scheduled shift. The plaintiffs filed under seal a motion to enforce a settlement agreement. The court ordered the defendants to pay approximately $2,075,000 to 346 plaintiffs, with notice to a handful of named plaintiffs whose claims were determined not to be valid.

52. This district was selected at random for the study, and it has a good-cause rule.

Southern District of Mississippi[53]

Court records may be sealed only upon a showing of good cause. N. & S. D. Miss. L.R. 83.6(B). Absent an order to the contrary, sealed documents are unsealed thirty days after the case is over. *Id.* R. 83.6(D). If a court orders a document sealed beyond that time period, the order "shall set a date for unsealing." *Id.* (Note that the Northern and Southern Districts of Mississippi have the same local rules.)

Statistics: 5,775 cases in termination cohort; 11 docket sheets are sealed (0.19%)—the disposition codes for 9 of these cases suggest no sealed settlement agreements[54] and the disposition codes for 2 of these cases suggest sealed settlement agreements;[55] 211 unsealed docket sheets (3.7%) have the word "seal" in them; 38 complete docket sheets (0.66%) were reviewed; actual documents were examined for 18 cases (0.31%); 14 cases (0.24%) appear to have sealed settlement agreements.

Cases with Sealed Settlement Agreements

Sealed Plaintiff v. Sealed Defendant (MS-S 1:95-cv-00161 filed 03/23/1995).

Statutory action. The docket sheet is sealed. The case was dismissed as settled.

Sistrunk v. Forest Oil Corp. (MS-S 2:97-cv-00070 filed 02/18/1997).

Product liability action by the mother of three minors for a fatal drilling rig accident that resulted in the wrongful death of their father. The court granted one defendant summary judgment. The plaintiffs settled with another defendant for $49,000. The case against the remaining defendants was then dismissed as settled. The court ordered the transcript of the settlement conference sealed.

Compass Marine v. Lambert Fenchurch (MS-S 1:99-cv-00252 filed 04/05/1999).

Fraud action. The docket sheet is sealed. The case was dismissed as settled.

Donnell v. BellSouth Telecommunications Inc. (MS-S 3:00-cv-00202 filed 03/14/2000).

Employment discrimination action by an African-American technician. The case settled. The defendants filed a motion to enforce the settlement agreement. The plaintiff opposed the motion and moved to seal the settlement agreement that was attached as an exhibit. The court granted the plaintiff's motion to enforce. The case is on appeal.

Calvert Co. v. Conte Glancz Industries Inc. (MS-S 3:00-cv-00704 filed 09/20/2000).

Breach of contract action by a manufacturer of high voltage electrical bus systems for nonpayment. The case was dismissed pursuant to a sealed settlement agreement.

Boyd v. G & K Services Inc. (MS-S 2:00-cv-00327 filed 12/29/2000).

Employment action by a sales representative for unjust discipline, suspension, and demotion after he reported sexual harassment of himself and others by management. The case settled. The court ordered the transcript of the settlement conference sealed.

Forestry Suppliers Inc. v. General Supply Corp. (MS-S 3:01-cv-00014 filed 01/09/2001).

Copyright infringement action concerning forestry catalogues. The case was dismissed pursuant to a sealed settlement agreement.

Hufstetler v. Hudson Salvage Inc. (MS-S 1:01-cv-00156 filed 04/18/2001).

Action under the Fair Labor Standards Act for failure to pay overtime wages. The case was settled and dismissed. According to the joint stipulation of dismissal, "the settlement agreement contains payment for all claims for back pay, overtime, liquidated damages, attorneys fees, costs, interest, breach of contract damages, and back benefits which have been or could have been raised by plaintiff." The court later granted the defendant's oral motion to seal the agreement.

Shepherd v. Corrections Corp. of America (MS-S 5:01-cv-00179 filed 06/07/2001).

Action under the Fair Labor Standards Act for failure to pay employees overtime wages for meetings held outside employees' scheduled shifts. The case was dismissed as settled. The file

53. This district was selected at random for the study, and it has a good-cause rule.

54. Two judgments on motions before trial, 6 voluntary dismissals, 1 "other" dismissal.

55. Two cases settled.

contains a sealed document that appears to be the settlement agreement.

Pasha Hawaii Transport Lines LLC v. Travelers Casualty and Surety Co. (MS-S 1:01-cv-00279 filed 07/10/2001).

Breach of contract action against a surety company concerning performance and payment in the construction of a car-and-truck carrier vessel. The case settled, and the court sealed the record of the settlement hearing.

Mabry v. Cooper Tire and Rubber Co. (MS-S 3:01-cv-00810 filed 10/18/2001).

Product liability action concerning automobile tires. The case was dismissed as settled. The court sealed all documents related to the settlement agreement on behalf of the minor plaintiff. However, a subsequent court order releasing the minor's claims against Ford Motor Company for the sum of $5,000 is unsealed.

Huffmaster v. Harlin (MS-S 2:02-cv-00001 filed 01/03/2002).

Section 1983 civil rights action concerning the warrantless illegal search of the plaintiff's bedroom. The plaintiff was jailed and refused bond. The case settled. The defendants subsequently filed a motion to compel settlement and for an award of attorney fees and costs. The court granted the plaintiff's request to seal the defendants' motion, because it contained terms of the confidential settlement agreement. The settlement was renegotiated, and some documents were ordered sealed by the court.

Barlow v. Equifax Information Services Inc. (MS-S 2:02-cv-00088 filed 04/05/2002).

Personal injury action under the Fair Credit Reporting Act for inaccurate information posted to the plaintiff's credit file. The case settled. The transcript of the settlement conference was sealed.

Tillery Dental Clinic PLLC v. BellSouth Credit and Collections Management Inc. (MS-S 2:02-cv-00796 filed 10/01/2002).

Breach of contract action by dental clinics for negligence in managing the plaintiffs' advertising. The defendants filed a counterclaim seeking complete payment for the advertisements. The parties settled, and the court sealed the transcript of the settlement conference.

Eastern District of Missouri[56]

A document may be filed under seal only by court order upon a showing of good cause. E.D. Mo. L.R. 83-13.05(A)(1). Absent an order to the contrary, sealed documents may be unsealed and placed in the public file thirty days after the case is over. *Id.* R. 83-13.05(A)(2).

Statistics: 4,798 cases in termination cohort; 342 docket sheets (7.1%) have the word "seal" in them (but 98 of these merely have the word "seal" in place of docket entry clerk initials); 53 complete docket sheets (1.1%) were reviewed; actual documents were examined for 22 cases (0.46%); 20 cases (0.42%) appear to have sealed settlement agreements.

Cases with Sealed Settlement Agreements

McCrary v. Delo (MO-E 4:93-cv-00384 filed 02/12/1993).

Civil rights prisoner petition in which the plaintiff alleged that prison guards permitted a race-based attack on him, nearly resulting in the severing of his ear. The plaintiff further alleged inadequate medical treatment and retaliation for seeking legal redress. After a trial, the jury found in favor of the plaintiff on some claims and in favor of some defendants on others, awarding the plaintiff $50,000 in compensatory damages and $80,000 in punitive damages. Other claims previously dismissed on summary judgment were reopened when it was discovered that the defendants withheld court-ordered discovery. The case subsequently was referred to mediation, where it was settled. According to a later-filed unsealed court opinion, the terms of settlement included payment to the plaintiff of $200,000 and confidentiality.

The plaintiff subsequently filed under seal a "motion for order vacating order re dismissal, vacating trial setting, reopening discovery and assessing sanctions." This motion most likely was filed under seal because it disclosed terms of the confidential settlement agreement. Apparently, after the defense counsel agreed to the settlement, the Missouri Attorney General's Office determined it had to notify victims of the plaintiff's crimes of the settlement, contrary to the settlement agreement, and the plaintiff was concerned that the victims would seek to block payment. The defense counsel was sanctioned, and the case ultimately was dismissed as resolved.

56. This district was selected at random for the study, and it has a good-cause rule.

Perez v. Ford Motor Co. (MO-E 4:98-cv-01973 filed 11/25/1998).

Motor vehicle product liability action by a wife and two children for their injuries and for the husband's wrongful death in an automobile accident. The plaintiffs and decedent were passengers in an Aerostar minivan, which was driven by the defendant driver, rented from the defendant rental agency, and manufactured by the defendant auto maker. Apparently, the van hit a patch of ice, rolled down an embankment, and lost its side door, causing the decedent to be thrown from the van and killed when his seatbelt, manufactured by the defendant seatbelt manufacturer, failed. The court approved a settlement with the defendant driver in which the wife received $51,000 for her injuries, each child received $2,500 for the child's own injuries and $7,000 for the wrongful death of the child's father, and the plaintiffs' attorneys received $30,000.

Over one year later, the court approved a settlement with the defendant seatbelt manufacturer in which each child received $12,000, the decedent's mother received $6,000, and the plaintiffs' attorneys received $20,000. Approximately one year after that, the case against the remaining defendants was dismissed pursuant to a sealed settlement agreement. An unsealed order approving the structure of the minors' settlement discloses that the auto maker agreed to future payments to the children equivalent to approximately $100,000 total in present value.

Meier v. Ortho-Clinical Diagnostics Inc. (MO-E 4:99-cv-01172 filed 07/22/1999).

Product liability action for a defective blood product. During the plaintiff wife's first pregnancy, she was given RhoGAM to protect subsequent pregnancies from Rh incompatibility. The plaintiffs husband, wife, and baby sued for injuries sustained during delivery following the second pregnancy, allegedly arising from insufficient RhoGAM dosage during the first delivery. (Filed papers suggest the defective dosage subsequently was recalled.) At court-ordered ADR, the case settled. The plaintiffs filed a motion to approve the settlement on behalf of the minor, stating that Rh incompatibility did not appear to result in permanent injury to the minor, and attaching a sealed copy of the confidential settlement agreement. The court approved the settlement and dismissed the case.

Rademeyer v. Farris (MO-E 4:99-cv-01770 filed 11/12/1999).

Personal property fraud action alleging that the defendant wrongfully netted $602,000 by simultaneously negotiating the sale of a medical technology corporation in which he was 51% owner and the purchase of the remaining 49% for substantially less than the sale price. The district court granted the defendant summary judgment, but the court of appeals reversed. On remand, the case settled and the court accepted a copy of the settlement agreement under seal.

Ray v. de Castro (MO-E 4:00-cv-00118 filed 01/25/2000).

Medical malpractice action by the husband and children of a woman who died from breast cancer for failure to diagnose and treat the cancer early enough to save her. After a settlement hearing before the court, a settlement agreement was approved by sealed court order. Upon satisfaction of judgment, the case was dismissed.

United States ex rel. Padda v. Jefferson Memorial Hospital P.H.O. (MO-E 4:00-cv-00177 filed 02/03/2000).

Qui tam action under the False Claims Act. The docket sheet shows only documents 1, 17, 18, and 19. The last document is a "sealed stipulation for dismissal of case," and all four documents, including the complaint, are sealed.

Black v. AutoZone Inc. (MO-E 4:00-cv-00488 filed 03/23/2000).

Motor vehicle personal injury action against a truck driver and a truck company by parents of a boy killed in a traffic accident with the truck. The court approved a settlement agreement by an order the court ordered sealed for fifteen years.

Cummings v. Mallinckrodt Inc. (MO-E 4:00-cv-00660 filed 04/20/2000).

Designated a civil rights action, this is an employment action for wrongful termination in retaliation for previously pursuing an employment discrimination lawsuit against the defendant that ultimately was settled. The defendant filed a sealed "motion to enforce settlement agreement reached during the Court ordered mediation," and the plaintiff opposed the motion by sealed brief. The case was resolved without a hearing on the motion.

Orthodontic Centers of Missouri Inc. v. Bhatia (MO-E 4:00-cv-00765 filed 05/09/2000).

Contract action by a provider of business and office management to orthodontic practices against an orthodontist for failure to make monthly payments. The plaintiff filed a motion to enforce a settlement agreement, and a copy of the agreement was filed under seal. The matter ultimately was resolved without a hearing on the motion to enforce.

Berliner v. LoBue Associates (MO-E 4:00-cv-00824 filed 05/17/2000).

Contract action by a departing corporate CEO against the corporation for three years' salary as severance pay. After the court twice denied the defendants' motions for summary judgment, the parties settled and the court sealed the transcript of the settlement hearing. The case was dismissed, and the court retained jurisdiction to enforce the agreement.

Schuppert v. Orthodontic Centers of America (MO-E 4:00-cv-01034 filed 06/23/2000).

Contract action by a dentist against his business and office management provider. The defendants filed a sealed motion to enforce a confidential settlement agreement. Before the motion was heard, the disagreement apparently was resolved and the case dismissed pursuant to a consent judgment disclosing no settlement terms beyond the validity of the contract.

Newman v. Sikeston Department of Public Safety (MO-E 1:00-cv-00074 filed 07/07/2000).

Civil rights action for wrongful death of a fetus and injuries to the mother and her child when the mother and child were arrested after the child accidentally hit a police officer's private car with a tar-paper shingle he was throwing into the air to see fly. The plaintiffs, who are African-American, also alleged race discrimination. The court granted the plaintiffs' motion to approve a $400,000 settlement agreement calling for payment of $70,360 to the mother now and $10,000 per year thereafter, $25,000 to the child on his eighteenth birthday, and $173,455 to the plaintiffs' attorneys. Subsequent to the court's granting this motion by "ruled document," the court filed an "order approving settlement" under seal. Two days later a newspaper article reported the city's settlement payment, prompting the defendants to request a gag order on the plaintiffs, which the court denied.

Estate of Dobbins v. City of Pagedale (MO-E 4:00-cv-01104 filed 07/07/2000).

Civil rights action for wrongful killing by a police officer. The case was dismissed pursuant to a confidential settlement agreement, which the court approved by sealed order. Filed correspondence suggests that the decedent's minor son would obtain his interest in the settlement upon reaching the age of eighteen.

McDermott v. 7-Eleven Inc. (MO-E 4:00-cv-01495 filed 09/15/2000).

Designated an employment action, the complaint alleges sexual harassment, including unwanted sexual touching, of a female employee and her minor daughter. The case was consolidated with two other cases for discovery purposes (*McCroy v. 7-Eleven Inc.*, MO-E 4:00-cv-01495, and *Castrogiovanni v. 7-Eleven Inc.*, MO-E 4:00-cv-01974). The case settled, and the plaintiffs filed a sealed motion to approve the minor's settlement, which the court granted. Two months after the case's conclusion, the clerk notified counsel that sealed documents would be unsealed absent an order to the contrary. The court granted the defendant's motion to return the sealed documents to the defendant.

Tipler v. Delta Area Economic Opportunity Corp. (MO-E 1:00-cv-00152 filed 12/13/2000).

Employment action in which thirteen African-American plaintiffs alleged forty-one causes of action pertaining to a racially discriminatory hostile work environment and wrongful termination. After some claims were dismissed on summary judgment, the case went to trial. During a break, the case settled. The settlement agreement was put on the record, settlement proceedings were sealed, and the case was dismissed.

Nottingham v. Women's Health Specialists PC (MO-E 1:01-cv-00005 filed 01/10/2001).

Medical malpractice action for brain injury to a baby resulting from negligent pregnancy care and delivery. The case was dismissed pursuant to a sealed judgment of settlement. An unsealed satisfaction of judgment showed that the plaintiffs received $100,000 in settlement.

Bowler v. Southwestern Bell Telephone LP (MO-E 4:01-cv-00131 filed 01/26/2001).

Employment action by a plaintiff with psoriasis for wrongful termination and disability discrimination. The case settled at court-ordered ADR, but

two weeks later the plaintiff's counsel requested to withdraw as counsel on the ground that his client dismissed him; the plaintiff apparently developed second thoughts. Approximately one month later the defendant filed a sealed motion to enforce the settlement agreement. Approximately one week later, the plaintiff's attorney filed a sealed motion to enforce the settlement agreement. The plaintiff's attorney's motion to recover his fees from the plaintiff discloses that the case was settled for $7,500. The attorney recovered from the plaintiff $5,700 in fees and $2,210.85 in costs.

Earth City Technologies Inc. v. Dentsply International Inc. (MO-E 4:01-cv-00173 filed 02/02/2001).

Trademark infringement action concerning ultrasonic endodontic tips. The parties filed a partial settlement agreement under seal. The case continues. (It is not clear why the statistical database shows the case to have been terminated in 2001.)

Stelbrink v. Manyx (MO-E 4:01-cv-00411 filed 03/20/2001).

Motor vehicle action in which a fourteen-year-old Illinois resident sued the Missouri-resident driver of the car in which he was a passenger (a woman with the same last name as the plaintiff—possibly the mother or an aunt), a Missouri deputy sheriff, and the sheriff for injuries resulting from the deputy sheriff's car colliding with the car in which the plaintiff rode while the deputy sheriff was ignoring traffic signals in response to an emergency. After hearings to approve settlement with the minor plaintiff were initiated, the complaint was amended to name the second minor passenger of the car as a plaintiff—the defendant driver's daughter, who also was a Missouri resident. The court approved and sealed the settlement agreement.

Brown v. SSI Global Security Agency (MO-E 4:01-cv-00917 filed 06/08/2001).

Employment action by a pro se plaintiff for sexual harassment. The case was dismissed pursuant to a sealed settlement agreement.

Western District of Missouri

No relevant local rule.

Statistics: 4,857 cases in termination cohort; 167 docket sheets (3.4%) have the word "seal" in them; 35 complete docket sheets (0.72%) were reviewed; actual documents were examined for 27 cases (0.56%); 24 cases (0.49%) appear to have sealed settlement agreements.

Cases with Sealed Settlement Agreements

Jedrzejewski v. Reckitt & Colman Inc. (MO-W 6:97-cv-03637 filed 12/23/1997).

Employment action for wrongful termination of a Polish employee in retaliation for EEO and OSHA complaints. The case settled, and the parties asked the court to retain jurisdiction to enforce the settlement agreement, which the court ordered the parties to file under seal for court review. The court dismissed the action with prejudice, retaining jurisdiction over the settlement.

Clune v. Industrivarden Service AB (MO-W 4:98-cv-00179 filed 02/11/1998).

Product liability action by a woman and her minor children against an elevator manufacturer for the wrongful death of her husband on a construction site when he fell off an elevator platform, allegedly because of an inadequate guardrail. The case was dismissed pursuant to a sealed settlement agreement approved by the court.

Morris v. William Woods University (MO-W 2:99-cv-04062 filed 03/18/1999).

Contract action for wrongful termination of the equestrian division chair in retaliation for her reporting illegal horse trading by the university. The plaintiff's attorney apparently agreed to a settlement, which the plaintiff claimed was beyond the attorney's authority, so the defendant filed a sealed motion to enforce the settlement agreement, and the plaintiff's attorney filed a motion to withdraw. In an unsealed order, the court held that the parties had agreed to a settlement in which the plaintiff would receive $42,000 and her attorney would receive $32,851. The court also held that the plaintiff would be liable for the defendants' fees and costs in enforcing the agreement. The defendants sought $121,170.62, but the court granted the plaintiff's motion to amend the judgment, finding that the plaintiff did not act in bad faith in resisting the settlement agreement.

Moore v. Russell (MO-W 2:99-cv-04082 filed 04/15/1999).

Designated a prison-condition action, this is really a civil rights action by a now-incarcerated woman against a sheriff's department and its officers for coercing her to engage in repeated acts of sexual intercourse in exchange for their unlawfully not serving an arrest warrant on her. According to a

minute entry, the parties settled, and "proceedings [were] to remain under seal." That day the court received a check for $250,000 "to be deposited in court registry for settlement." A sealed order concerning the settlement was filed the following day, and the case was dismissed.

Thomas v. Kansas City Power and Light Co. (MO-W 4:99-cv-00464 filed 05/11/1999).

Employment action by an African-American employee claiming racial discrimination in compensation, promotion, working conditions, and supervision. The parties filed a joint stipulation of dismissal one week after the defendant filed a sealed motion to enforce settlement.

Zuno-Cajayon v. Ashton Court Partners (MO-W 4:99-cv-00560 filed 06/08/1999).

Employment discrimination and breach of contract action by a Filipino nurse. Apparently several other plaintiffs filed similar lawsuits, which were consolidated for discovery. After mediation, as part of the court's Early Assessment Program, one defendant moved to enforce an alleged settlement agreement whereby $40,000 would be paid to twenty-six plaintiffs. The court held that such an agreement had been reached and granted the motion. But the court rescinded its order upon later determination that although there was agreement on the amount of settlement, there was not agreement on which entities not parties to the case would be released from liability. The defendant subsequently renewed its motion to enforce, but while the motion was pending the consolidated cases settled at a settlement conference. The court ordered that the tape recording of the conference and the draft agreement presented as an exhibit to the conference be sealed.

Cowan v. St. Francis Hospital & Health Services (MO-W 5:99-cv-06085 filed 07/16/1999).

Medical malpractice action for the wrongful death of the plaintiffs' newborn baby as a result of negligent delivery. A settlement was reached and approved by the court at a settlement conference, and two conference exhibits were sealed. The plaintiffs' recovery is sealed, but the agreement called for their attorneys to receive $76,587.34 in fees and $30,407.19 in expenses.

Liberty Mutual Insurance Co. v. Pratt (MO-W 4:99-cv-00811 filed 08/18/1999).

Contract action by a provider of workers' compensation insurance against a trucking company for employing more workers than it acknowledged to the insurer. The parties announced a settlement at a telephonic settlement conference, the record of which the court ordered sealed. The case was dismissed by stipulation.

Banks v. Peak (MO-W 6:00-cv-03004 filed 01/06/2000).

Designated an employment discrimination action, the complaint alleges a variety of malicious actions by an employer against a 78-year-old employee. The alleged actions include gluing his toolbox shut, setting his toolbox on fire, and turning a fan on him in winter. The case settled at a settlement conference, the record of which was sealed.

James v. Tri-Lakes Newspapers Inc. (MO-W 6:00-cv-03019 filed 01/20/2000).

Action under the Family Medical Leave Act by a newspaper advertising manager for failure to reinstate her after she took leave for a hysterectomy. The case settled at a settlement conference, the record of which was sealed.

United States ex rel. Ken Babcock Sales Inc. v. Courtney Day Inc. (MO-W 5:00-cv-06018 filed 02/11/2000).

Action under the Miller Act for failure to pay five subcontractors amounts due totaling $388,648.65 in a federal construction project for the Missouri Air National Guard. The defendants filed a counterclaim alleging that one of the plaintiffs provided defective concrete. Three plaintiffs settled at a settlement conference, the record of which was sealed. The remaining plaintiffs settled at another conference, the proceedings of which also were sealed. The unsealed judgment shows a payment of $292,131.48 to the plaintiffs.

Dobbs v. Youngelman (MO-W 4:00-cv-00374 filed 04/21/2000).

Medical malpractice action for brain damage resulting from the defendant's failure to properly diagnose and treat the plaintiff's intraparenchymal hepatic hemorrhage. The case was dismissed pursuant to a sealed settlement agreement approved by the court.

Brown v. Neosho R-V School District (MO-W 4:00-cv-00457 filed 05/15/2000).

Civil rights action by a schoolteacher against the school district for wrongfully seeking her dismissal and revocation of her teaching license after

her estranged husband delivered to the school district nude pictures of her that she had sent by e-mail to private correspondents. The court sealed the record of a settlement conference, although it is not clear whether the case settled then. The following week the parties filed a joint motion under seal, and the court granted the motion by sealed order. A week later the parties filed a joint motion to dismiss the case, which the court granted.

Youngs v. ITT Industries Inc. (MO-W 4:00-cv-00463 filed 05/15/2000).

Product liability action for severe head and body injuries, resulting in permanent disabilities, including brain damage, caused by an explosion of the defendants' air tank when the plaintiff was trying to fill it. The case settled at a settlement conference, and the court sealed the conference transcript. The sealed transcript was forwarded to the county probate court for settlement approval. After the probate court approved the settlement agreement, the district court sealed an "application for approval of settlement involving an incapacitated person" and approved the agreement by sealed order. A subsequently filed unsealed order discloses a settlement amount of $725,000, including attorney fees of $363,500 and attorney expenses of $112,282.13.

Sedalia Lab Inc. v. Novacare Orthotics & Prosthetics East Inc. (MO-W 4:00-cv-00540 filed 06/01/2000).

Contract action concerning a $7 million business sale. The court sealed a transcript of an "in camera hearing on settlement agreement." An unsealed confession of judgment called for the defendants to pay $2 million unless the defendants paid $1.7 million by a certain date. Subsequently the court filed a sealed consent judgment. Other unsealed documents, however, confirm the $2 million contingent judgment.

Primus Corp. v. Bio-Rad Laboratories Inc. (MO-W 4:00-cv-00634 filed 06/23/2000).

Patent case concerning a diabetes test using high-performance liquid chromatography glycol hemoglobin blood assays. The case was dismissed pursuant to a sealed settlement agreement.

Gillihan v. D & M Masonry Inc. (MO-W 4:00-cv-00698 filed 07/11/2000).

ERISA action by benefits trustees for wrongfully paid benefit claims totaling approximately $200,000. The court denied the parties' request to seal the entire record, but granted their request to seal the settlement agreement, pursuant to which the case was dismissed.

7th Street United Super Inc. v. Duffield (MO-W 4:00-cv-01351 filed 08/11/2000).

Multidistrict consolidated contract action by retail grocers against a grocery wholesaler for fraudulent overbilling. One of the consolidated cases, a class action originally filed in the District of Utah, settled for $16 million. Plaintiffs' attorneys received $6 million in fees and approximately $300,000 in expenses, and two lead plaintiffs each received an incentive of $100,000. The defendant filed a sealed motion to enforce settlement agreements in three cases originally filed in the Western District of Missouri (*Don's United Super Inc. v. Werries*, MO-W 98-06042 filed 03/18/1998; *Coddington Enterprises v. Werries*, MO-W 98-01100 filed 10/19/1998; *J&A Foods Inc. v. Fleming Cos.*, MO-W 00-00285 filed 03/24/2000). The parties resolved the cases before the motion was heard, and it was withdrawn.

McMurry v. American Telephone and Telegraph Co. (MO-W 4:00-cv-01293 filed 12/21/2000).

Employment action by an African-American woman with epilepsy for race and disability discrimination and retaliation. The case settled at a settlement conference, the record of which was sealed.

C.S. v. Heartland Chicken Inc. (MO-W 4:01-cv-00058 filed 01/16/2001).

Designated an employment discrimination action, this is an action for rape of a minor female Popeye's employee by a male co-worker. The case was dismissed pursuant to a sealed settlement agreement approved by the court.

Fitzgerald v. New Holland North America Inc. (MO-W 2:01-cv-04032 filed 02/13/2001).

Product liability action for wrongful death when a 1949 tractor manufactured by the defendant rolled over. The parties filed a sealed motion for settlement approval. Unsealed documents show the amount of settlement to be $160,000; the plaintiffs' attorneys received $68,293.46 in fees.

Doe v. Otterville R-VI School District (MO-W 2:01-cv-04224 filed 10/30/2001).

Civil rights action for sexual abuse of a disabled 11-year-old boy by a schoolmate and for the defendant school district's failure to accommodate the resulting trauma in the boy's education. The

defendant denied that sexual abuse occurred. The case was dismissed pursuant to a sealed settlement agreement approved by the court.

Wilson v. Goody Products Inc. (MO-W 2:01-cv-06152 filed 12/21/2001).

Product liability action on behalf of a six-year-old girl for blindness to one eye caused by a springy metal headband manufactured by the defendant. The case was dismissed pursuant to a sealed settlement agreement approved by the court.

Kelly v. Ex-L-Tube Inc. (MO-W 4:02-cv-00543 filed 06/06/2002).

Employment disability discrimination action by a shipper whose right arm was amputated at the elbow as a result of an on-the-job injury. The case settled at a settlement conference, the record of which was sealed.

District of New Hampshire

The District of New Hampshire recognizes two levels of sealing. Documents sealed at Level I may be reviewed without court order by any attorney appearing in the action. D.N.H. L.R. 83.11(b)(1). Documents sealed at Level II may be reviewed without court order only by the filer (or the person to whom an order is directed if the sealed document is an order). *Id.* R. 83.11(b)(2). Documents may be sealed only by court order, and motions to seal must explain the basis for sealing and specify which level of sealing is desired. *Id.* R. 83.11(c).

Statistics: 1,157 cases in termination cohort; 2 docket sheets are sealed (0.17%)—both of these cases' disposition codes suggest no sealed settlement agreements;[57] 82 unsealed docket sheets (7.1%) have the word "seal" in them; 10 complete docket sheets (0.86%) were reviewed; actual documents were examined for 4 cases (0.35%); 4 cases (0.35%) appear to have sealed settlement agreements.

Cases with Sealed Settlement Agreements

A.S.I. Worldwide Communications Corp. v. WorldCom Inc. (NH 1:98-cv-00154 filed 03/17/1998).

Contract action between providers of telephone service. The plaintiff filed under seal a motion to enforce a settlement agreement, but before the case closed, the defendant filed for bankruptcy protection and the action was stayed.

Polyclad Laminates Inc. v. MacDermid Inc. (NH 1:99-cv-00162 filed 04/19/1999).

Patent action alleging that the defendant's product MultiBond, a chemical solution used in the manufacture of printed circuit boards, infringed the plaintiffs' patent. The defendant alleged that its product did not infringe, because it did not use a cationic surfactant, and filed a counterclaim for tortious business interference. The court granted the defendant summary judgment on the patent claim, and the plaintiffs appealed. With the plaintiffs' appeal and the defendant's counterclaim still pending, the parties settled and filed a sealed settlement agreement.

Griffin v. Odyssey House Inc. (NH 1:99-cv-00561 filed 12/03/1999).

Personal injury action against a residential facility for emotionally troubled adolescents for negligently permitting a 15-year-old resident to attempt suicide by hanging herself with her belt, which left her in a persistent vegetative state. The case settled pursuant to a confidential settlement agreement. The settlement agreement was filed under seal and then returned to the parties. The amount of settlement was kept confidential, but unsealed documents disclose that settlement funds were used to satisfy Medicaid liens and establish a special needs irrevocable trust.

Armstrong v. Correctional Medical Services Inc. (NH 1:00-cv-00532 filed 11/14/2000).

Civil rights action for wrongful death resulting from inadequate medical treatment for a head injury inflicted by a correctional officer while the decedent was held at the Hillsborough County House of Corrections under arrest for failure to pay child support. The plaintiff filed a sealed motion to approve a settlement agreement on behalf of the decedent's minor heir. The court approved the agreement, but denied the motion to seal the approval motion, and ordered the confidential agreement returned to the parties.

District of New Mexico

No relevant local rule.

Statistics: 3,084 cases in termination cohort; 3 docket sheets are sealed (0.10%)—the disposition codes for 2 of these cases suggest no sealed set-

57. Two "other" dismissals.

tlement agreements,[58] and the disposition code for 1 of these cases suggests a sealed settlement agreement;[59] 86 unsealed docket sheets (2.8%) have the word "seal" in them; 23 complete docket sheets (0.75%) were reviewed; actual documents were examined for 19 cases (0.62%); 19 cases (0.62%) appear to have sealed settlement agreements.

Cases with Sealed Settlement Agreements

Doss v. Major League Baseball Properties Inc. (NM 1:98-cv-00927 filed 08/03/1998).

Personal property damage action concerning the surreptitious appropriation of a commercial trade name. The case settled, and the stipulated order of dismissal was sealed.

Loeffler v. Transportation Manufacturing Corp. (NM 6:98-cv-01424 filed 11/19/1998).

Product liability action for wrongful death arising from the defective design and manufacture of a safety platform. The case settled. The court appointed a guardian ad litem for the decedent's minor children. There appears to be a sealed settlement agreement filed with the court.

Trout Trading Management Co. v. Trout (NM 1:99-cv-01330 filed 11/17/1999).

Statutory action by the managers of a mutual fund alleging that a former employee was engaging in an ongoing criminal conspiracy including extortion and threats to publicize false information. The defendants filed a counterclaim alleging breach of an oral partnership agreement. Two of the parties resolved their dispute by way of a confidential settlement agreement. The court entered a stipulated permanent injunction under seal as part of the settlement agreement.

Velasco v. DaimlerChrysler Corp. (NM 1:99-cv-01369 filed 11/23/1999).

Motor vehicle product liability action for the negligent design and manufacture of an automobile, which caused the vehicle to roll over several times on the highway. The plaintiff sustained permanent and disabling spinal cord injuries. The parties settled, agreeing to keep the amount and terms of the settlement confidential. The court sealed documents that disclosed the terms of the settlement agreement. The court retained jurisdiction over the settlement fund. The case was dismissed as settled.

Ramirez v. Isuzu Motors Ltd. (NM 1:00-cv-00331 filed 03/06/2000).

Product liability action for wrongful death in a vehicle rollover accident as a result of the negligent design and manufacture of an SUV. The case settled. The court approved the settlement on behalf of the surviving minor and placed the agreement under seal.

Dillon v. Jackson (NM 6:00-cv-00751 filed 05/24/2000).

Civil rights action by a female prisoner for rape and assault by six corrections officers. The case settled. The plaintiff filed a motion for a court order approving the settlement, appointing a guardian ad litem, and sealing court records of the settlement proceedings. The defendants opposed the motion. The transcript of the proceeding was sealed.

John v. United States (NM 1:00-cv-00850 filed 06/13/2000).

Medical malpractice action for a baby's brain injury resulting from lack of oxygen during delivery. The case was consolidated with *John v. United States* (NM 1:01-cv-00285 filed 03/13/2001). A guardian ad litem was appointed for the child. The case was dismissed as settled. The court order approving the minor's settlement agreement was sealed.

Hymes-Odorizzi v. Royal Maccabees Mutual Life Insurance Co. (NM 1:00-cv-00940 filed 06/29/2000).

Insurance action for recovery of benefits under a disability insurance policy. The defendants filed a counterclaim alleging that the plaintiff was not disabled while her policy was in force. The case was dismissed pursuant to a sealed settlement agreement.

Wallace v. Greer Enterprises Inc. (NM 1:00-cv-00952 filed 07/03/2000).

Stockholders' suit against a property management corporation for corporate oppression of minority shareholders. The case settled, and the tape-recorded settlement agreement, transcribed by the clerk, was sealed. A subsequent dispute arose with respect to the nondisclosure provision of the confidential settlement agreement. Each of the parties, pursuant to court order, submitted alter-

58. Two "other" dismissals.
59. One case settled.

native language under seal, and the court issued a confidentiality order. The court subsequently granted the parties' requests to remove the tape-recorded settlement agreement from the court's file and docket. The case ultimately was dismissed as settled.

Unzueta v. Pope (NM 6:00-cv-01015 filed 07/13/2000).

Motor vehicle action for serious bodily injuries. A guardian ad litem was appointed to represent the minor plaintiff. The case settled. The transcript of the evidentiary hearing on settlement was sealed.

Whitley v. New Mexico Department of Human Services (NM 2:00-cv-01101 filed 07/28/2000).

Section 1983 civil rights action by a guardian ad litem on behalf of a child alleging rape by another minor while they both were under the care and supervision of New Mexico's Children, Youth, and Families Department. The case was dismissed as settled, and the transcript of the proceedings was sealed.

Espinosa v. Flores (NM 1:00-cv-01641 filed 11/20/2000).

Section 1983 civil rights action on behalf of a minor against her elementary school teacher, alleging sexual harassment and sexually offensive touching. A guardian ad litem was appointed. The case settled. The proceedings approving the minor's settlement agreement were sealed.

United States v. New Mexico Department of Public Safety (NM 1:00-cv-01656 filed 11/22/2000).

Employment action alleging sexual harassment of a public safety employee. The parties entered into a written confidential settlement agreement. The employee filed a sealed motion to enforce the settlement agreement. The dispute alleged in the motion was resolved, and the motion was withdrawn.

Thrasher v. Albuquerque Public School Board (NM 1:01-cv-00113 filed 01/30/2001).

Employment action alleging discrimination based on race and sex, which resulted in harassment and a demotion. The case was dismissed pursuant to a sealed settlement agreement.

Miller v. Napoli (NM 1:01-cv-00145 filed 02/05/2001).

Personal injury action against a law firm, alleging breach of fiduciary duty and negligent representation in a class action suit. The law firm filed a third-party complaint against the plaintiff's brother, an attorney who advised her during the class action suit. The case settled. The court sealed the plaintiff's motion to enforce the settlement agreement.

Maguire v. Albuquerque Public School District (NM 1:02-cv-00325 filed 03/22/2002).

Personal injury action concerning the battery of a minor student with attention deficit disorder by another student, resulting in physical disfigurement. The case settled. The clerk's minutes regarding the approval of the settlement were sealed.

L.W. v. Gallup McKinley County School Board (NM 1:02-cv-00485 filed 04/29/2002).

Section 1983 civil rights action alleging the sexual abuse of a minor student by a school counselor. The case settled. A guardian ad litem was appointed for the minor. The transcript of the proceedings approving the settlement was sealed.

J.A.D. v. City of Albuquerque (NM 1:02-cv-00664 filed 06/07/2002).

Section 1983 civil rights action concerning the sexual molestation of a minor by a school bus driver. The case settled. A guardian ad litem was appointed for approval of the settlement. The clerk's minutes regarding the approval hearing were sealed.

Arviso v. Mission Manor Health (NM 6:02-cv-01072 filed 08/27/2002).

Statutory action. The docket sheet is sealed. The case was dismissed as settled.

Eastern District of New York

To clear out its vault, the district court ordered that sealed documents be archived at the records center and disposed of after twenty years there. E.D.N.Y. Admin. Order 2001-02 (Feb. 21, 2001).

Statistics: 16,001 cases in termination cohort; 495 docket sheets (3.1%) have the word "seal" in them; 88 complete docket sheets (0.55%) were reviewed; actual documents were examined for 59 cases (0.37%); 53 cases (0.33%) appear to have sealed settlement agreements.

Cases with Sealed Settlement Agreements

Aetna Casualty and Surety Co. v. Berson (NY-E 1:95-cv-01712 filed 05/01/1995).

RICO action by four insurance companies against public adjusters, company adjusters, salvors, brokers, accountants, appraisers, attorneys, contractors, investigators, and insureds. The plaintiffs alleged that the defendants inflated insurance losses. Over 100 people were criminally charged in this fraudulent scheme, and most have pled guilty. Separate settlement agreements were reached with each defendant, who then was dismissed. One settlement agreement was filed under seal at the court's request. The case was closed when one of the plaintiffs informed the court that it did not intend to pursue the case any further.

Rodolico v. Unisys Corp. (NY-E 9:95-cv-03653 filed 09/06/1995).

Employment discrimination class action on behalf of all engineers over age 40 employed by the defendant and selected for layoff effective November 23, 1993. The plaintiffs alleged that the defendant's policies and practices in the layoff discriminated against its older employees by disproportionately selecting them for discharge and by using evaluation practices which disfavored older workers. The court permitted the case to proceed as a class action for the purpose of determining liability only. The case settled during mediation. The settlement agreement was approved on the record and placed in the court vault under seal. The court dismissed the complaint with prejudice.

Coltec Industries Inc. v. Yarom (NY-E 9:96-cv-02962 filed 06/13/1996).

Copyright infringement action alleging copying of technical drawings to obtain approval from the Federal Aviation Administration to manufacture and distribute replacement parts for a fuel control system designed and manufactured by the plaintiff. Prior to the commencement of a jury trial, the case settled and the settlement agreement was sealed. The case was administratively closed until five months later, when the court received the parties' stipulation of dismissal, which was sealed and placed in the vault.

United States Small Business Administration v. Yang (NY-E 1:97-cv-01185 filed 03/11/1997).

Statutory action to liquidate assets to satisfy a judgment for violations of the Small Business Investment Act. This action was brought when the Small Business Administration, acting as receiver, discovered fraud. The case settled, and the settlement terms were placed under seal. A sealed document was placed in the vault. The court ordered the action discontinued, and the case was closed.

Chadeayne v. Don Thuber Enterprises Inc. (NY-E 9:97-cv-06043 filed 10/20/1997).

Airplane action for severe and permanent injuries sustained when the charter aircraft the plaintiff was taking to return from the defendant's gambling establishment in New Jersey crashed into the Atlantic Ocean six miles from Kennedy Airport. The plaintiff settled with all defendants, including the owner, operator, and manufacturer of the aircraft as well as providers of the air charter service. The parties stipulated to a dismissal with prejudice, and the court placed a sealed document in the vault.

Williams v. Brookwood Childcare Services (NY-E 1:98-cv-00230 filed 01/13/1998).

Civil rights action by a minor's guardian against the city of New York and various departments concerning child welfare. The court approved a settlement at an infant compromise hearing. The tape and transcript of the hearing were ordered sealed. The parties were asked to submit orders reflecting hearing rulings. A sealed document was placed in the vault a week later. Another sealed document was placed in the vault one day before the court filed the parties' stipulation and order of dismissal with prejudice.

Wang v. Liang (NY-E 1:98-cv-02786 filed 04/13/1998).

Action under the Fair Labor Standards Act by seven garment workers for failure to pay minimum and overtime wages. The parties agreed to settle in principle for $285,000. During a telephone settlement conference, two outstanding settlement issues were resolved, and a confidential stipulation was placed on the record. The transcript of this stipulation was sealed. All claims against all but three defendants were dismissed with prejudice. A default judgment was entered against the remaining defendants, and the plaintiffs were awarded $101,360.82 in compensatory and liquidated damages.

Jackson v. J.C. Penney Co. (NY-E 0:98-cv-02956 filed 04/17/1998).

Personal injury case for serious and permanent injuries from a slip and fall, which occurred while

the plaintiff was on the defendant's premises. A jury trial commenced, but the parties settled after the plaintiff presented her case. A sealed settlement agreement was placed on the record, and the case was dismissed with prejudice. The docket sheet indicates that a sealed document was placed in the vault shortly thereafter.

United States Fidelity and Guaranty Co. v. Abcon Associates (NY-E 0:98-cv-03826 filed 05/28/1998).

Designated a contract product liability action, this is a contract action by the plaintiff surety company against indemnitors for breach of an indemnity agreement under which the plaintiff issued performance and payment bonds guaranteeing payment to subcontractors and performance of construction work. The parties settled, and the settlement stipulation was placed on the record and accepted by the court. On the same day, the court dismissed the case without prejudice to renew should settlement not be consummated and placed a sealed document in the vault. The case was closed the next day.

Nu-Chem Laboratories Inc. v. Mastrorocco (NY-E 9:98-cv-03867 filed 05/29/1998).

Statutory action alleging RICO violations, including mail and wire fraud, trade libel, business disparagement, and defamation. The parties settled, and the court approved their stipulation of settlement and gave the parties permission to file it with the court. A sealed document was placed in the vault, and the case was closed.

Reid v. City of New York (NY-E 1:98-cv-05929 filed 09/23/1998).

Civil rights action against the city of New York, the city's administration for children's services, and two private foster care agencies by a mother on behalf of her deceased daughter and her two sons. The plaintiff alleged that the defendants placed the children in foster care with adults who had a prior record of child abuse and neglect and who physically and psychologically abused the children, culminating in the torture and murder of her daughter in the presence of her sons. During a settlement conference, the parties agreed to settle the case in principle and submit infant compromise orders for court approval. The court approved the settlement agreement and the plaintiff's proposed allocation and ordered the parties to immediately execute the settlement agreement, which was filed under seal with the court. The parties agreed to dismiss the action with prejudice.

Goldsmith v. J.C. Penney Co. (NY-E 9:99-cv-00068 filed 01/05/1999).

Personal injury action for serious permanent injuries resulting from an escalator's sudden stopping. After the plaintiff was sworn in at the jury trial, the case settled on the record, and the record was ordered sealed. The case closed with prejudice. One month later the defendant submitted the settlement agreement and release, after which the parties promised to file a stipulation of dismissal. The defendants agreed to pay the plaintiff $4,000. The court approved the settlement agreement and release.

Doolittle v. Board of Fire Commissioners (NY-E 0:99-cv-00495 filed 01/26/1999).

Employment discrimination suit by a hearing-impaired volunteer firefighter for violation of the Americans with Disabilities Act in excluding him from the fire department. The parties settled, and a tentative settlement was placed on the record. The court ordered the case discontinued without prejudice. The case was closed, and a little over a week later a sealed document was placed in the vault. Five months later the parties filed a stipulation of settlement outlining the terms of the settlement and agreeing to discontinue the case with prejudice.

Piscitelli v. RJM Contracting Inc. (NY-E 9:99-cv-01318 filed 03/09/1999).

ERISA action by the fiduciary of seven employee benefit plans to enforce the defendants' obligations to make contributions to the plans. In addition, as the chief executive officer of a labor organization, the plaintiff alleged that the defendants breached their collective bargaining agreement with the labor organization. The defendants informed the court that the parties had settled. The court ordered the case closed, and a sealed document was placed in the vault the same day. Several months later the parties filed a stipulation of discontinuance with prejudice stating that full settlement had been achieved.

Hutzler v. General Motors Corp. (NY-E 9:99-cv-01780 filed 03/26/1999).

Motor vehicle product liability action against the manufacturer of a vehicle and the manufacturer of its seatbelt restraint system for severe and permanent injuries sustained by a passenger in a colli-

sion. A jury was impaneled, but the case against the seatbelt manufacturer settled. The trial of the case against the vehicle manufacturer ended in a mistrial. The second jury trial commenced, and the parties settled. The settlement agreement was put on the record. The court ordered the record sealed, and the transcript was placed in the vault. The court ordered the parties to file the settlement agreement under seal within thirty days. The action was dismissed with prejudice.

Gorman v. Polar Electro Inc. (NY-E 9:99-cv-02575 filed 05/05/1999).

Patent infringement action concerning inventions for monitoring biomedical response. During a settlement conference, the case settled and the stipulation of settlement was entered on the record. Portions of the settlement were placed under seal. The case was dismissed with prejudice and ordered closed.

Siebert v. Iowa Precision Industries Inc. (NY-E 1:99-cv-03159 filed 06/04/1999).

Product liability action alleging that faulty installation of the shear and uncoiler devices at the plaintiff's work site caused a metal sheet to fall on the plaintiff, which resulted in a herniated disk, back pain, double vision, and sexual dysfunction. The parties settled on the record during a settlement conference, and the tape was sealed. The transcript of the settlement conference was filed, disclosing that the defendant agreed to pay $6,000. The court accepted the parties' stipulation of dismissal with prejudice.

Olivieri v. Del-Con Tile Inc. (NY-E 9:99-cv-03622 filed 06/25/1999).

ERISA action by trustees and fiduciaries of several employee labor–management trust funds alleging that the defendant failed to comply with its statutory and contractual obligations to the trust funds arising under the defendant's collective bargaining agreement with non-party unions. The parties agreed to settle the case, but the court rescheduled a pretrial conference after the parties failed to file a fully executed stipulation of discontinuance. Several days after the defendant informed the court of its willingness to discuss settlement terms with the plaintiffs, a sealed document was placed in the vault. After almost one year in which no activity occurred, a pretrial conference was scheduled, but the case was closed after the parties finally filed a stipulation of dismissal.

Lulo v. K-Mart Corp. (NY-E 9:99-cv-04227 filed 07/27/1999).

Personal injury action for injuries from a fall caused by the collapse of a chair in a department store's customer service area. The docket sheet shows that shortly after a settlement conference was held, a sealed document was placed in the vault. Two months later the defendants informed the court that the case had settled and submitted a stipulation discontinuing the case with prejudice.

Fasten v. Kubista (NY-E 1:99-cv-04596 filed 08/06/1999).

Action under the Fair Debt Collection Act alleging that a letter falsely represented that an attorney was participating in the collection of the plaintiff's alleged debt. During a status conference, the parties settled and entered the terms of settlement on the record and discontinued the action. The court ordered the transcript of the proceedings sealed. The action was discontinued with prejudice with leave to reopen it to enforce the settlement terms.

Manenti v. Stratem Facilities Management Inc. (NY-E 9:99-cv-05625 filed 09/14/1999).

Designated a civil rights action, this is an employment sex discrimination action alleging that the plaintiff was terminated after a maternity leave under the pretext of downsizing, despite the defendants' hiring a replacement for the plaintiff. The parties settled and submitted the original settlement agreement to the court with their stipulation of discontinuance. The court dismissed the case with prejudice and placed a sealed document in the vault.

Murphy v. Caracciolo (NY-E 9:99-cv-06797 filed 10/21/1999).

Civil rights action by a Catholic priest alleging wrongful criminal prosecution in retaliation for his lawful exercise of First Amendment rights by praying near the defendant's abortion clinic. The complaint alleges that the plaintiff was exonerated in two prosecutions. During jury selection, the plaintiff informed the court that the case had settled. A stipulation of settlement was entered on the record, and the court ordered the transcript and the two court exhibits on the record sealed. The court ordered the case dismissed with prejudice and placed a sealed document in the vault.

Automotive Management Group v. Coach Sales of Neoplan Inc. (NY-E 9:99-cv-06837 filed 10/22/1999).

Contract action concerning bus leases. The parties settled and informed the court that the stipulation of settlement resolved all matters, and the case was closed. Shortly thereafter, the court placed two sealed documents in the vault.

Abramson v. Middle Country Central School District (NY-E 9:99-cv-07150 filed 11/03/1999).

Civil rights action by twenty-six current and retired teachers concerning transfer credits for prior years of service outside the district. Prior to commencement of a jury trial, the courtroom was sealed, and the parties reached a confidential agreement with all except six plaintiffs not present in the courtroom. The stipulation of settlement was filed by the court along with the affidavit of one of the plaintiffs, who was unable to be in the courtroom to enter a settlement on the record. The school district agreed to pay each plaintiff $3,000. The case was closed upon receiving the parties' stipulation of discontinuance with prejudice.

Waskiewicz v. American Ref-Fuel Co. (NY-E 9:00-cv-00831 filed 02/09/2000).

Personal injury action against three corporate owners and operators of a garbage-burning facility at which a plaintiff suffered serious injuries from a fall while making a delivery. The injured plaintiff and his wife discontinued the action against two defendants. A jury trial was held, but before the jury returned its verdict, the plaintiffs settled with the remaining defendant. A sealed document was placed in the vault the same day, and the case was closed.

Kim v. United States Postal Service (NY-E 1:00-cv-01282 filed 03/03/2000).

Motor vehicle action for severe internal and external injuries (some alleged to be permanent) resulting from a vehicle collision. One of the driver defendants was a postal worker. The plaintiff informed the court that the case had settled. It appears that the defendants made payment according to the terms of the settlement, but the plaintiff was awaiting signed stipulations of settlement and discontinuance prior to disbursement of the funds. Two weeks after the plaintiff asked the court to issue a date by which the defendants must sign the stipulations of settlement and discontinuance, the court filed a document under seal. Two weeks later, the parties submitted a stipulation dismissing the case with prejudice.

Papaieck v. Aeroflex Inc. (NY-E 0:00-cv-01472 filed 03/15/2000).

Designated a contract action, this is an ERISA case against a former employer for misrepresenting that its retirement plan did not exist and refusing to allow the plaintiff to participate in the plan. The parties settled, and the terms of settlement were placed on the record. The docket sheet indicates that a sealed document was placed in the vault one day following settlement. This document is likely to be what the parties referred to as the consulting agreement, an essential component of the settlement, which the plaintiff needed to sign before the parties would file a stipulation of dismissal. Several months later the parties filed their stipulation to dismiss the case with prejudice, and the case was closed.

Stitt v. Nassau County Correctional Center (NY-E 0:00-cv-01544 filed 03/17/2000).

Prisoner civil rights case for failure to mail time-sensitive legal documents. Almost one year after the case was filed, the court granted the parties' request that their stipulation of discontinuance and settlement be filed under seal. The case was closed.

Carrillo v. Delgado Travel (NY-E 1:00-cv-01843 filed 03/29/2000).

Employment discrimination action by a female travel agency employee alleging sex discrimination following disclosure of her pregnancy status and retaliatory discharge after she filed charges with the New York City Human Rights Division. Following a settlement conference, the parties reported that the case had settled, and the court discontinued the case without prejudice. The parties resolved a dispute over the terms of the settlement agreement and met in court to execute a revised settlement agreement. The court ordered the minutes of the two settlement conferences placed under seal. The parties agreed to dismiss the case with prejudice.

Seide v. Seaman Furniture Co. (NY-E 9:00-cv-01934 filed 04/03/2000).

Action under the Fair Labor Standards Act for failure to pay overtime wages. The parties settled and agreed to a consent judgment in favor of the plaintiff. The case was dismissed with prejudice,

and the settlement agreement was filed under seal.

Sadd v. Brookhaven Memorial Hospital Medical Center (NY-E 9:00-cv-02548 filed 05/04/2000).

Employment discrimination action by a nurse, alleging her employer violated the Americans with Disabilities Act by terminating her because of her breast cancer and an assumption that she would miss a great deal of work because of treatment. The parties settled, and a stipulation of settlement was entered on the record. The settlement was subject to a confidentiality agreement. The transcript of the proceeding was ordered sealed, and the case was dismissed with prejudice.

Lanfranchi v. Freight Brokers International Inc. (NY-E 1:00-cv-03027 filed 05/26/2000).

Contract action alleging that a freight brokerage owed the plaintiff unpaid incentive compensation according to the terms of two sales and agency consultation agreements. Following a full-day settlement conference, the parties settled and placed the settlement terms on the record, which was sealed. The parties agreed to dismiss the case with prejudice.

Ryder v. East Meadow Union Free School District (NY-E 9:00-cv-03209 filed 06/05/2000).

Employment discrimination action by a female elementary school teacher against the school district and principal, alleging sex discrimination, including sexual harassment and retaliatory demotion. The parties settled, and the stipulation of settlement was entered on the record. The settlement was subject to a confidentiality agreement. The court sealed the transcript, and the case was dismissed with prejudice. Five months later the parties filed a stipulation and order of settlement and discontinuance.

Barrau v. Vital Care Infusion (NY-E 9:00-cv-03364 filed 06/09/2000).

Employment discrimination action by a black female plaintiff alleging disparate treatment based on race and retaliatory discharge for filing a charge with the EEOC. The parties settled and were ordered to submit to the court an executed stipulation of settlement and dismissal. A sealed document was placed in the vault, and the case was closed.

Koujan v. EgyptAir Inc. (NY-E 1:00-cv-03661 filed 06/20/2000); *Smith v. EgyptAir* (NY-E 1:01-cv-00180 filed 01/11/2001).

Airplane actions transferred from the Southern District of New York for consolidation into multidistrict litigation concerning the October 31, 1999, crash of EgyptAir Flight 990 into the sea off the coast of Nantucket Island (MDL 1344). In *Koujan*, the parties settled, and because the decedent was survived by three children under age 18, the allocation of the settlement funds with respect to the children required a court-ordered infant compromise order. The court approved an amended infant compromise order submitted by the plaintiff, and it was filed under seal. In *Smith*, the parties settled with respect to the deaths of the plaintiff's parents and submitted the confidential settlement to the court for approval. The court filed the proposed order of final settlement and distribution under seal. The case was dismissed with prejudice.

Demarco v. Jo Mi Equities Corp. (NY-E 0:00-cv-04065 filed 07/13/2000).

Employment discrimination suit by a former waitress, alleging sex discrimination, a hostile work environment as a result of sexual harassment, and retaliatory discharge. The plaintiff informed the court that the parties settled, and a stipulation of settlement was signed by the plaintiff, awaiting the defendant's signature. The court ordered the case closed, and two weeks later a sealed document was placed in the vault.

Globecomm Systems Inc. v. Gilat Satellite Networks Ltd. (NY-E 9:00-cv-04350 filed 07/26/2000).

Patent infringement action alleging that the defendants were using or selling satellite data networks embodying the plaintiff's patented invention. The parties agreed on a confidential settlement and agreed to dismiss the case with prejudice. A sealed document was placed in the vault four days later, and the case was closed.

Sealed Plaintiff v. Sealed Defendant (NY-E 9:00-cv-04693 filed 08/11/2000).

RICO case. All documents in the case are sealed. It involves one unnamed plaintiff and three unnamed defendants. On August 8, 2002, the date of termination, a sealed document "containing settlement and general release agreement" was placed in the vault. According to the docket sheet, this document was signed by the judge on November 2, 2000. On the same day another sealed

document "containing stipulation of dismissal with prejudice dated June 7, 2001" was placed in the vault. All docket entries before a May 28, 2002, reassignment of the case to another judge state only "sealed document placed in vault," but a docket entry for June 26, 2002, states that a sealed document placed in the vault contains briefs on a motion to preclude or compel, a motion for contempt and sanctions, and a motion for summary judgment, among others. It is not clear, therefore, whether the sealed settlement agreement applied to only a subset of the defendants or the settlement agreement was scuttled in some way.

Wilkinson v. Audiovox Communication Corp. (NY-E 9:00-cv-04749 filed 08/14/2000).

Designated a civil rights action, this is an employment discrimination case alleging age discrimination in an unexplained and sudden termination. The parties settled, and the settlement terms were placed on the record under seal. A sealed document was placed in the vault. The parties agreed to dismiss the case with prejudice.

Role v. Eureka Lodge No. 434 (NY-E 0:00-cv-04781 filed 08/15/2000).

Contract action alleging that an employer conspired with a union to permit the plaintiff's wrongful discharge in breach of a collective bargaining agreement. It appears that during a scheduled settlement conference, the parties reached a settlement agreement in open court. The court placed a sealed document in the vault the next day. The case was discontinued without prejudice. The plaintiff subsequently moved to vacate the settlement and reinstate the case, and to recuse the assigned judge with sanctions. The court denied the motion, and the plaintiff sought a writ of mandamus from the court of appeals. The appellate court denied the writ. The case was remanded to the district court in January 2004.

McDow-Drain v. County of Nassau (NY-E 2:00-cv-05339 filed 09/06/2000).

Employment discrimination action by a female African-American employee against the county, the county medical center, and three supervisors employed by the medical center for race discrimination and retaliation. The parties settled, and the plaintiff signed the settlement agreement and submitted it to the court. The defendants requested that references to the settlement payment be detached and kept under seal. The court agreed and filed the agreement under seal and omitted any reference to the settlement payment on the docket sheet. The court dismissed the case without prejudice in case the settlement agreement was not consummated.

Chilelli v. Schultz Metal Service Inc. (NY-E 2:00-cv-05893 filed 10/02/2000).

Motor vehicle action against the owner and the operator of a motor vehicle that collided with the plaintiff's vehicle, causing severe and permanent injuries. The parties settled on the record, the court ordered the case closed, and a sealed document was placed in the vault the next day. One day later the parties agreed to discontinue the case without prejudice.

Santangelo v. First Fortis Life Insurance Co. (NY-E 1:00-cv-06090 filed 10/11/2000).

ERISA action alleging that the defendant wrongfully terminated the plaintiff's long-term disability benefits under her employer-sponsored policy issued by the defendant. The parties settled. The defendant moved to enforce the release and settlement agreement and enjoin the plaintiff from violating a confidentiality clause contained in the agreement. At a show-cause hearing, the plaintiff agreed to the settlement and signed the settlement agreement and stipulation of discontinuance with prejudice. The court sealed the tape of the hearing and closed the case.

Kwasnik v. Kingsbrook Jewish Medical Center (NY-E 1:00-cv-06686 filed 11/08/2000).

Designated a civil rights action, this is a case for age discrimination in employment by a 63-year-old physiatrist, alleging that the defendant hospital interfered with his participation in the rotating patient assignment system. The parties settled, and the settlement was placed on the record. The court ordered the transcript sealed, pursuant to the nondisclosure order in the settlement. The parties agreed to dismiss the case with prejudice.

Golden v. Swift-Eckrich Inc. (NY-E 2:00-cv-06777 filed 11/13/2000).

Contract action alleging breach of an agreement to establish a "Frank-in-a-Blanket" operation. The parties settled, and a sealed document was placed in the vault the same day. The parties agreed to dismiss the case with prejudice.

Sterner v. Board of Fire Commissioners (NY-E 2:00-cv-07677 filed 12/29/2000).

Employment discrimination action by a female volunteer firefighter, alleging that she suffered repeated sexual harassment by members of the fire department and retaliation for her complaints. The parties settled, and the settlement was placed on the record under seal. The court indicated that the settlement was subject to approval by the Board of Fire Commissioners. Following the board's approval, the parties agreed to dismiss the case with prejudice.

Neillands v. Global Computer Co. (NY-E 2:01-cv-01312 filed 03/05/2001).

Employment discrimination suit by a female employee, alleging sexual harassment and retaliatory termination. The parties settled, and a sealed document was placed in the vault the next day. The parties filed a stipulation withdrawing the complaint with prejudice.

Fenelon v. Murachonian Export Co. (NY-E 2:01-cv-06288 filed 09/13/2001).

Employment discrimination suit by a female employee, alleging sex discrimination by her employer in refusing to rehire her after she was laid off. The parties settled and agreed to discontinue the action. A week after the court closed the case, a sealed document referred to as the confidentiality agreement was placed in the vault.

Bibbs v. Department of Housing and Urban Development (NY-E 2:01-cv-06778 filed 10/12/2001).

Statutory action for breach of contract against the Department of Housing and Urban Development and a local housing authority concerning a 1970 housing program lease. Before a jury trial began, the parties settled and the stipulation of settlement was placed on the record. The transcript was sealed as to the settlement terms. The case was dismissed with prejudice.

Blume v. Target Stores Inc. (NY-E 2:01-cv-07749 filed 11/20/2001).

Labor litigation alleging violation of the Family Medical Leave Act by terminating the plaintiff for job abandonment when she took leave to care for her son after he was in a serious car accident. The case settled, and the stipulation of settlement and confidentiality agreement were entered on the record. The transcript was sealed. The parties agreed to dismiss the case with prejudice, and the case was closed.

Nikon Inc. v. Mizco International Inc. (NY-E 2:01-cv-08559 filed 12/27/2001).

Trademark infringement action concerning photographic accessory products. The parties settled and agreed to dismiss the action with prejudice. The settlement agreement was filed under seal.

Ranpak Corp. v. Saluppo (NY-E 1:02-cv-01889 filed 03/26/2002).

Contract action against a former sales representative and his current employer for solicitation of customers and dissemination of trade secrets. The parties settled during a settlement conference. A sealed document containing a stipulation and order was filed. The court entered a default judgment against the individual defendant and permanently enjoined the defendant from disclosing the plaintiff's trade secrets for two years. The case was closed pursuant to the sealed document and injunction order.

Northern District of New York

Court documents are sealed upon motion, which itself is filed under seal. N.D.N.Y. L.R. 83.13. Sealed documents remain sealed until ordered unsealed. *Id.*

Statistics: 3,928 cases in termination cohort; 192 docket sheets (4.9%) have the word "seal" in them; 27 complete docket sheets (0.69%) were reviewed; actual documents were examined for 22 cases (0.56%); 21 cases (0.53%) appear to have sealed settlement agreements.

Cases with Sealed Settlement Agreements

Van Limburg Stirum v. Whalen (NY-N 5:90-cv-01279 filed 11/27/1990).

Securities action by individuals and limited partnerships, alleging that the defendants sold nearly worthless limited partnership units by means of misrepresentations and omissions. A confidential settlement agreement was reached between the defendants and the partnership plaintiffs. The settlement agreement, the release, the notice of proposed settlement, and all documents filed with the court concerning the settlement were sealed. The court issued a final judgment approving the settlement and requested that the plaintiffs file discontinuance papers dismissing all pending causes of action. The case was closed.

ITT Commercial Finance Corp. v. Harsco Corp. (NY-N 5:91-cv-00793 filed 07/12/1991).

Environmental action under CERCLA to recover the costs incurred in cleaning up property contaminated by the previous owners' use of the property for die cast manufacturing. Two defendants settled with the plaintiff. The court approved their settlements and granted their requests to file the agreements under seal and dismiss the contribution cross-claims. The nonsettling defendants were ordered to maintain the terms of the agreements in confidence and could only refer to them in the context of the pending motions to approve the settlement. The plaintiff reached settlements with the remaining defendants on all outstanding claims and issues. Judgment was entered in favor of the plaintiff, and the case was closed.

Saratoga Harness Racing Inc. v. Veneglia (NY-N 1:94-cv-01400 filed 10/28/1994).

Antitrust action by the owner of Saratoga Raceway against several horseman's associations and their officers, alleging boycotts. The plaintiff agreed to dismiss one of the defendants. The plaintiff and two of the remaining defendants reached a settlement agreement and order, which were filed with the court and contained settlement terms. Less than two months later, the plaintiff settled with the remaining defendants and agreed to dismiss the action with prejudice. Subsequently, the court ordered the settlement agreement, stipulation, and order to be sealed. Activity continued in the case over the plaintiff's counsel's claim for attorney fees, which eventually was settled, and the case was closed.

Soriano v. New York (NY-N 1:98-cv-00076 filed 01/14/1998).

Civil rights action by a husband and wife, who were formerly employed as corrections officers, against the state of New York, the New York Department of Correctional Services, and individual corrections officers with supervisory authority over the plaintiffs, alleging that they were subjected to various forms of race-based and sexual discrimination and harassment. A jury trial commenced, but the parties reached a settlement in chambers, and the agreement was placed on the record. The dollar amount was to remain confidential. The transcript as to the settlement terms was sealed and placed in the court vault. The individual defendants were dismissed, and judgment was entered for the plaintiffs against the remaining defendants. The parties agreed to discontinue the action with prejudice as to these defendants.

Galusha v. New York State Department of Environmental Conservation (NY-N 1:98-cv-01117 filed 07/13/1998).

Civil rights claim against the state of New York, the New York State Department of Environmental Conservation, and the Adirondack Park Agency, among others, for allegedly violating the Americans with Disabilities Act by denying the plaintiffs and other qualified disabled citizens access to New York parks in general and the Adirondack Park in particular, including areas to which access previously had been available through the aid of a motorized vehicle. A settlement was reached by all parties and was placed under seal along with a proposed consent decree. In addition, the court ordered all past and ongoing settlement negotiations to remain under seal until the parties reached agreement on the terms of the proposed consent decree. After the parties resolved all outstanding issues, the consent decree and judgment was submitted to the court. The case was closed.

Granger v. Pierce (NY-N 9:98-cv-01495 filed 09/22/1998).

Civil rights action by six pretrial and post-trial detainees against a county jail for housing in the general population an inmate known to be infected with HIV. Two years after one plaintiff withdrew from the case, the remaining parties settled and submitted their settlement agreement and general release to the court for approval and sealing. The settlement agreement and general release was placed under seal, and the case was discontinued with prejudice.

Perruccio v. Wilder (NY-N 9:98-cv-01524 filed 09/24/1998).

Prisoner civil rights action by a former inmate against the county jail and two jail officers, alleging civil rights violations, including ignoring the plaintiff's medical needs, improperly disciplining the plaintiff, and denying the plaintiff access to religious services, bible study, and the law library. The parties settled and submitted to the court the settlement agreement and general release as well as a stipulation asking the court to seal it. The court agreed. The parties agreed to discontinue the case with prejudice.

Forden v. Bristol Myers Squibb (NY-N 1:99-cv-00907 filed 06/10/1999).

Employment discrimination action by a female former employee alleging sex discrimination and disparate treatment, including retaliatory conduct following her resignation because of a sexually hostile work environment. The parties agreed to settle the case, the settlement terms were placed on the record, and the transcript was filed under seal. The parties apparently could not reach a final agreement, and several letters were submitted to the court under seal. The judge denied the plaintiff's oral application to enforce the settlement reached on the record. A jury trial was held, and the jury rendered a verdict for the defendant.

Brown v. County of Oneida (NY-N 5:99-cv-01064 filed 07/08/1999).

Employment discrimination action by an African-American employee of the sheriff's department, alleging race discrimination, including the filing of false criminal charges, aggravated disciplinary action, and disparate denial of promotional opportunities. The parties settled prior to a jury verdict. The settlement terms were placed on the record during a settlement conference in chambers, and the court ordered the settlement terms to be sealed. The court dismissed the case.

Cipolla v. County of Rensselaer (NY-N 1:99-cv-01813 filed 10/27/1999).

Civil rights action by two former county employees after a jury acquitted them of official misconduct charges. The plaintiffs alleged witness tampering, making false statements to law enforcement officials, public defamation, and presentation of knowingly perjured testimony to the grand jury and at trial. Four months after the court granted the defendants' motion for summary judgment, the court vacated the judgment and reopened the case. The case settled, and the court ordered sealed the partial stipulation discontinuing the action between the plaintiffs and the individual defendants, the settlement agreement and release, and the stipulation discontinuing the action. Three months later the court unsealed these documents, noting that there was no reason to keep them sealed because the parallel criminal proceedings in state court were completed. The court closed the case in light of the stipulations of discontinuance signed by all parties.

LaGrange v. Ryan (NY-N 1:99-cv-02133 filed 12/09/1999).

Civil rights action against police officers and a city, alleging deprivation of personal property, use of unreasonable force upon arrest, violations of due process during detention in the city jail, including denial of medication and medical care, and denial of communication with the plaintiff's family and attorney. The plaintiff accepted the defendants' offer of judgment, which was made on the record, and the transcript was sealed. The defendants moved to vacate the judgment on grounds that the plaintiff violated an implied essential condition. The court stated, "It must be noted that the condition may violate or restrict the public's right to important information." The judgment was vacated. Prior to trial, the plaintiff rejected the defendants' settlement offer made without any express or implied conditions. Because of the plaintiff's age, the fair amount of the original judgment, and the plaintiff's risk of losing at trial, and because the condition asserted by the defendants in the initial offer of judgment was not essential to the defendants and the plaintiff's violation of the condition did not cause any harm to the defendants, the court reinstated the original judgment disclosing the settlement terms and closed the case.

Gajjar v. Union College (NY-N 1:00-cv-00718 filed 05/08/2000).

Employment discrimination action by an engineering professor who is a native of India against a college and former dean of engineering, alleging race and national origin discrimination and retaliation, including denial of merit raises and promotional appointments, ridicule and humiliation at faculty meetings, and false accusations of abusing the machine shop. The court dismissed all claims against the dean. The remaining parties reached a confidential settlement agreement during a settlement conference, and the terms were placed on the record. The record was sealed. The parties agreed to discontinue the case according to terms set forth in the stipulation and order of discontinuance.

White v. Clear Channel Communication Inc. (NY-N 1:00-cv-00750 filed 05/16/2000).

Employment discrimination action by a female freelance reporter, alleging sex discrimination in failing to hire her as a full-time reporter. The case settled during a settlement conference, and the court ordered the parties to redraft the settlement agreement and forward it to the court. The case

was voluntarily dismissed with prejudice according to the terms of an executed voluntary dismissal, which was filed under seal by the court.

Maines Paper & Food Service Inc. v. McGuire (NY-N 3:00-cv-00870 filed 06/05/2000).

Contract action alleging that a former employee solicited the plaintiff's customers for a new employer. The case settled during a settlement conference, and the court granted the parties' motion to seal the transcript. The court dismissed the case as settled and sealed the order.

Kremer v. Gero Vita Laboratories (NY-N 1:00-cv-01329 filed 08/30/2000).

Trademark infringement action by a doctor specializing in rheumatoid arthritis, alleging that the defendants published an advertisement for a dietary supplement that made false representations of the plaintiff's endorsement of the supplement as a treatment for rheumatoid arthritis and related symptoms. The case settled during a settlement conference, and the terms of settlement were sealed. The court dismissed the action as settled.

Yezzo v. Hartford Life Insurance Co. (NY-N 1:00-cv-01649 filed 10/27/2000).

ERISA action against an employer and its insurance company or wrongful denial of long-term disability benefits on the grounds that the plaintiff's stroke was a preexisting condition. The plaintiff dismissed his claim against the employer and settled with the insurance company. The insurance company moved to seal the stipulation of settlement, and the court agreed.

Nationwide Mutual Insurance Co. v. DePaulo (NY-N 1:01-cv-00042 filed 01/08/2001).

Contract action alleging that the defendant agent procured the cancellation and replacement of the plaintiff's insurance policies. The parties agreed to a confidential settlement that was to be submitted to the court. The case was dismissed with prejudice. A sealed document was filed a week later.

Baker v. Maura (NY-N 1:01-cv-00525 filed 04/11/2001).

Motor vehicle action alleging that a child was seriously injured crossing a highway when she was struck by an automobile driven by the defendant driver, who was driving the wrong way in order to go around a garbage disposal truck operated by the defendant town. The case settled, and the court granted the parties' sealed motion for settlement. The parties agreed to dismiss the case with prejudice.

Palmateer v. Golub Corp. (NY-N 1:01-cv-01210 filed 07/30/2001).

Employment discrimination action against the plaintiff's employer and supervisors, alleging sexual harassment, age discrimination, and perpetuation of a hostile work environment. The parties settled and agreed to dismiss the case with prejudice thirty-one days later unless the settlement was not consummated. Two weeks later a document was filed under seal. There was no further activity in the case.

Matias v. Nevele Grande LLC (NY-N 1:01-cv-01247 filed 08/06/2001).

Pro se employment discrimination action alleging discrimination and termination on the basis of the plaintiff's Brazilian national origin. The parties apparently settled, because the docket sheet shows that pursuant to a sealed document the court ordered the confidential settlement agreement filed under seal. The confidential settlement agreement was filed under seal, and the case was closed the same day.

U.S. Foodservice Inc. v. Zehner (NY-N 3:02-cv-00821 filed 06/21/2002).

Contract action alleging that the plaintiff's former sales representatives violated their contractual nonsolicitation and confidentiality obligations after they voluntarily resigned to go to work for a direct competitor of the plaintiff. The parties settled, and the settlement was placed on the record. The court granted the parties' request to seal the transcript. The court ordered the parties to work out settlement agreements and file a stipulation of discontinuance. The court entered judgment dismissing the action by reason of settlement.

Southern District of New York

No relevant local rule.

Statistics: 20,976 cases in termination cohort; 948 docket sheets (4.5%) have the word "seal" in them; 130 complete docket sheets (0.62%) were reviewed; actual documents were examined for 95 cases (0.45%); 89 cases (0.42%) appear to have sealed settlement agreements.

Cases with Sealed Settlement Agreements

Maryland Casualty Co. v. W.R. Grace & Co. (NY-S 1:88-cv-04337 filed 06/21/1988).

Insurance case concerning insurance liability for environmental cleanup costs. The plaintiff and the defendant agreed to dismiss the action between themselves with prejudice. The case continued as to claims between the defendant and its insurers. The defendant agreed to dismiss with prejudice all but one insurer through confidential settlement agreements and releases that allowed the court to retain jurisdiction to enforce all terms and provisions of the settlement agreements. Several docket entries indicate that a sealed document was placed in the court vault. The defendant and the remaining insurer agreed to dismiss all remaining claims with prejudice, and the defendant forever waived coverage for these claims. The case was closed.

Krisley v. Kidder Peabody & Co. (NY-S 1:94-cv-03954 filed 05/26/1994).

Consolidated securities class action alleging fraudulent public filings. The class was certified. A proposed stipulation of settlement was submitted to the court along with a supplemental agreement, to be filed under seal, setting forth conditions under which the defendant could withdraw or terminate the settlement. A sealed document was placed in the vault the next day. The court issued a final judgment approving the settlement and plan of distribution. The case was dismissed with prejudice and closed.

Schonfeld v. Hilliard (NY-S 1:95-cv-03052 filed 04/28/1995).

Designated a contract action, this is a derivative suit for failure to fund a supply agreement between the defendant and the BBC after having induced the plaintiff and the BBC to enter into the interim agreement to bring the BBC to the United States as a twenty-four-hour international news and information network. The court granted the defendant summary judgment and dismissed all of the plaintiff's claims except a fraud claim. The court of appeals affirmed in part and reversed in part. Several months later the parties signed, and the court approved, a settlement agreement. A sealed document had been placed in the vault five days earlier. The parties agreed to dismiss all claims with prejudice, and the case was closed.

In re Air Crash TWA (lead case filed 10/24/1996).[60]

Consolidated airplane actions for wrongful death (with one case designated an airplane product liability action) arising from the July 17, 1996, crash of TWA flight 800 from Kennedy Airport to Paris, France, which was allegedly caused by a fuel cell explosion. In each of these cases, the plaintiffs settled with the defendants and dismissed their actions with prejudice. The docket

60. This consolidation includes thirty-three cases in our termination cohort: Dadi v. Trans World Airlines Inc. (NY-S 1:96-cv-07986 filed 10/24/1996) (lead case), consolidated with Delange v. Trans World Airlines Inc. (NY-S 1:96-cv-08701 filed 11/19/1996), Rio v. Trans World Airlines Inc. (NY-S 1:96-cv-08850 filed 11/21/1996), Ostachiewicz v. Trans World Airlines Inc. (NY-S 1:96-cv-09489 filed 12/17/1996), Rades v. Trans World Airlines Inc. (NY-S 1:97-cv-03652 filed 05/20/1997), Brown v. Trans World Airlines Inc. (NY-S 1:97-cv-03654 filed 05/20/1997), Rencus v. Trans World Airlines Inc. (NY-S 1:97-cv-04627 filed 06/23/1997), Ingenhuett-Quinn v. Trans World Airlines Inc. (NY-S 1:97-cv-05195 filed 07/16/1997), Steward v. Trans World Airlines Inc. (NY-S 1:97-cv-06271 filed 08/22/1997), Johns v. Trans World Airlines Inc. (NY-S 1:97-cv-06813 filed 09/15/1997), Schmitz v. Trans World Airlines Inc. (NY-S 1:97-cv-06814 filed 09/15/1997), Story v. Trans World Airlines Inc. (NY-S 1:97-cv-07120 filed 09/24/1997), Pares v. Trans World Airlines Inc. (NY-S 1:97-cv-08048 filed 10/30/1997), Furlano v. Trans World Airlines Inc. (NY-S 1:97-cv-08049 filed 10/30/1997), Puhlmann v. Trans World Airlines Inc. (NY-S 1:97-cv-08732 filed 11/24/1997), Taylor v. Trans World Airlines Inc. (NY-S 1:98-cv-00239 filed 01/14/1998), Chanson v. Trans World Airlines Inc. (NY-S 1:98-cv-01668 filed 03/06/1998), Feeney v. Trans World Airlines Inc. (NY-S 1:98-cv-01670 filed 03/06/1998), Richter v. Trans World Airlines Inc. (NY-S 1:98-cv-01671 filed 03/06/1998), Alex v. Trans World Airlines Inc. (NY-S 1:98-cv-02986 filed 04/28/1998), Straus v. Trans World Airlines Inc. (NY-S 1:98-cv-02988 filed 04/28/1998), Windmiller v. Trans World Airlines Inc. (NY-S 1:98-cv-03604 filed 05/20/1998), Lacaille d'Esse v. Trans World Airlines Inc. (NY-S 1:98-cv-04304 filed 06/18/1998), Von Hedrich v. Trans World Airlines Inc. (NY-S 1:98-cv-04863 filed 07/09/1998), Licari v. Trans World Airlines Inc. (NY-S 1:98-cv-04877 filed 07/10/1998), Beaumont v. Trans World Airlines Inc. (NY-S 1:98-cv-04950 filed 07/13/1998), Ferrat v. Trans World Airlines Inc. (NY-S 1:98-cv-04995 filed 07/14/1998), Cayrol v. Trans World Airlines Inc. (NY-S 1:98-cv-04997 filed 07/14/1998), Roger v. Trans World Airlines Inc. (NY-S 1:98-cv-05103 filed 07/17/1998), Karschner v. Trans World Airlines Inc. (NY-S 1:98-cv-05427 filed 07/30/1998), Baszczewski v. Trans World Airlines Inc. (NY-S 1:98-cv-06335 filed 09/09/1998), Bohlin v. Boeing Co. (NY-S 1:98-cv-06336 filed 09/09/1998), and Loudenslager v. Trans World Airlines Inc. (NY-S 1:98-cv-06341 filed 09/09/1998).

sheet for each of these cases indicates "sealed document placed in vault" either the same day as settlement or several days before or after settlement.

Holtz v. Rockefeller & Co. (NY-S 1:96-cv-09484 filed 12/17/1996).

Employment discrimination action by a female employee alleging age and sex discrimination, including retaliatory discharge. The district court granted the defendants' motion for summary judgment, and the court of appeals affirmed in part and vacated in part. A little over a year later, the parties settled and agreed to dismiss the case with prejudice. The docket sheet indicates a sealed document was placed in the vault a month later.

Martinez-Torrejon v. Trustees of Columbia University (NY-S 1:97-cv-00503 filed 01/23/1997).

Employment discrimination action by a former assistant professor of Spanish national origin alleging that the university discriminated against him based upon his sex, national origin, race, ethnicity, and ancestry by denying him a promotion to the position of associate professor and not renewing his appointment. The parties settled, and the court ordered sealed the confidential settlement agreement and all documents filed in connection with the plaintiff's application for attorney fees. The fee application was resolved, and the court ordered the case closed.

Powell v. Consolidated Edison Co. of New York (NY-S 1:97-cv-02439 filed 04/04/1997).

Employment discrimination action by a black man with AIDS against his employer, two supervisors, and two co-workers, alleging race and disability discrimination, including denial of promotions, creating a hostile and oppressive work environment, and threatening termination or demotion in retaliation for objecting to the defendant's racist policies and practices. The court granted the defendants summary judgment on some of the plaintiff's claims. The case was dismissed with prejudice pursuant to a sealed stipulation of settlement.

Casper v. Lew Lieberbaum & Co. (NY-S 1:97-cv-03016 filed 04/28/1997).

Employment discrimination action by three female former employees, alleging sexual harassment, including demands for sexual favors. The parties agreed to dismiss the action against one defendant—the employer's chief executive officer. The remaining parties agreed to settle their claims and discontinue the case with prejudice. The court dismissed the action with prejudice pursuant to a sealed settlement agreement.

A.I.A. Holding SA v. Lehman Brothers Inc. (NY-S 1:97-cv-04978 filed 07/08/1997).

Fraud action by 276 plaintiffs against an investment adviser. Twenty-two plaintiffs agreed to dismiss their claims with prejudice. Five years after the original complaint was filed and various motions were ruled upon by the court, the remaining parties settled and agreed to dismiss the case with prejudice. A sealed document was placed in the vault five days prior to the order dismissing and closing the case.

Shepheard v. Pentagon Federal Credit Union (NY-S 1:97-cv-07464 filed 10/08/1997).

Action pursuant to the federal Fair Credit Reporting Act and the Fair Debt Collection Practices Act for wrongfully designating several of the plaintiff's loan accounts as delinquent. The parties settled, and the terms of the settlement agreement were placed on the record. The transcript was sealed, and the action was dismissed with prejudice. The case was closed.

Orce v. Wackenhut Corp. (NY-S 7:97-cv-09246 filed 12/16/1997).

Action under the Fair Labor Standards Act by thirty-nine nuclear power plant security officers for unpaid overtime compensation. A confidential settlement agreement was reached and placed under seal. The court entered judgment dismissing each action with prejudice.

Sonex International Corp. v. Tactica International Inc. (NY-S 1:98-cv-02931 filed 04/24/1998).

Patent infringement action concerning an automatic flosser and plaque remover. The parties settled, and the court ordered the settlement agreement filed under seal. The action was dismissed with prejudice.

Koh v. Premier Equity Funds Inc. (NY-S 1:98-cv-04318 filed 06/19/1998).

Securities class action alleging that class members suffered millions of dollars in damages by purchasing overpriced shares. The court certified the class. A settlement was reached. The settlement agreement included a supplemental stipulation defining the circumstances under which the de-

fendants could withdraw from the settlement agreement. One version of this supplemental stipulation was publicly available. A second version defining with greater specificity the circumstances under which the defendants could withdraw from the settlement agreement was filed under seal.

Fanelli v. Town of Harrison (NY-S 7:98-cv-07683 filed 10/28/1998).

Civil rights action alleging false arrest for First Amendment activities. The parties agreed to a confidential settlement on the record, and the court ordered the transcript of the settlement proceeding sealed. The parties agreed to discontinue the action.

Joel A. v. Giuliani (NY-S 1:99-cv-00326 filed 01/15/1999).

Civil rights class action by young people in the defendants' custody and care who identify themselves as lesbian, gay, bisexual, or transgendered or are experiencing feelings or confusion about their sexual orientation or gender. The defendants operate the New York City child welfare and foster care system. The plaintiffs alleged discrimination based on actual or perceived sexual orientation and gender atypicality; failure to protect the class from bias-related violence, harassment, and abuse; and failure to provide the class members with supportive environments in which they can safely disclose and express feelings of same-sex attraction, discuss issues relating to sexual identity, and develop healthy sexual identities. The action was not certified as a class action. The defendants agreed to pay $15,000 in full satisfaction of all claims of one of the six named plaintiffs. The remaining five named plaintiffs settled with the city defendants, and the court ordered the settlement agreement to be filed under seal "solely in order to protect the confidentiality of the identity of settling plaintiffs." The case was closed.

Jacob v. Porcari (NY-S 7:99-cv-01216 filed 02/18/1999).

Contract action alleging legal malpractice in failing to advise the plaintiff of statutes of limitation on his civil rights claims of false arrest, malicious prosecution, and use of excessive force against the police department. The parties settled on the record, and the court ordered the proceedings sealed. The parties agreed to dismiss the case with prejudice.

Jack Schwartz Shoes Inc. v. Buffalino USA Inc. (NY-S 7:00-cv-01007 filed 02/10/2000).

Trademark infringement action with patent claims, alleging that the defendant represented its footwear as looking "just like" the plaintiff's shoes. The parties settled, and the settlement agreement was sealed and placed in the vault. The case was closed the same day.

Cassina SPA v. Strada Design Associates Inc. (NY-S 1:00-cv-02852 filed 04/13/2000).

Contract action for refusal to pay for furniture and installation services. A bench trial was held, and the case settled. The parties entered on the record a stipulation placing their confidential settlement agreement under seal. The court ordered the transcript sealed, and the docket sheet indicates that two sealed documents were placed in the vault.

Watcher Technologies LLC v. Tradescape.com Inc. (NY-S 1:00-cv-03050 filed 04/20/2000).

Copyright action against day-trading firms for offering customers access to the plaintiff's software. The parties settled, and the court dismissed the case without prejudice to restore it if settlement was not effectuated within thirty days. The case was closed. A month later a sealed document was placed in the vault. A month after that another sealed document was placed in the vault.

Franco v. Saks & Co. (NY-S 1:00-cv-05522 filed 07/26/2000).

Labor litigation under the Family Medical Leave Act for wrongful replacement after the plaintiff returned from an approved unpaid FMLA leave to care for his dying father. The parties settled, and the court dismissed the case without prejudice to restore it if settlement was not effectuated within sixty days. A little over a year and a half later, a sealed document was placed in the vault.

Millinnium LP v. Captiva Software Corp. (NY-S 1:00-cv-05908 filed 08/09/2000).

Patent infringement action concerning computer software technology used for scanning hard-copy documents. The parties settled and agreed to a consent decree that incorporated a confidential settlement and license agreement, which was filed under seal. The action was dismissed with prejudice.

United States v. American Cyanamid Co. (NY-S 1:00-cv-06015 filed 08/14/2000).

Environmental action by the EPA under CERCLA against the owner and operator of a landfill where hazardous substances had been dumped and against the substance owners. The EPA settled its claims with the owners of the hazardous substances, and the court entered a consent decree. The owners brought cross-claims against one another for contribution. The EPA settled with the owner of the landfill, and the terms of the settlement were embodied in a separate consent decree. Two years later the owners settled their cross-claims and agreed to dismiss them with prejudice. The court retained jurisdiction to decide whether to enter a contribution bar order and to resolve any disputes in connection with the settlement agreement. A motion for entry of a contribution bar was brought, attaching the settlement agreement as an exhibit. A sealed document was placed in the vault a few days later. The motion for a contribution bar was denied, and no further activity occurred in the case.

Isler v. Mount Vernon Hospital (NY-S 7:00-cv-06048 filed 08/15/2000).

Medical malpractice and wrongful death action. The defendant hospital brought a third-party complaint against the plaintiff's two private physicians and the medical group sponsoring an HIV/AIDS clinical trial in which the plaintiff participated. The case settled. The order settling the case with two of the plaintiff's treating physicians was filed under seal and placed in the vault. The parties agreed to discontinue the case against all defendants with prejudice.

Uptown Nails LLC v. Lemax World Inc. (NY-S 1:00-cv-06195 filed 08/18/2000).

Trademark infringement action concerning artificial nails and related products. The parties settled, and the court dismissed the case with prejudice. The court informed the parties that if they wished the court to retain jurisdiction to enforce the settlement agreement, they must submit it to the court. A month later, in an attempt to settle unresolved issues in court-ordered mediation, the plaintiff asked the court to file under seal the confidential settlement agreement. The court sealed a copy of the settlement agreement and exhibits. The parties settled their issues through mediation.

Jeremy M. v. Giuliani (NY-S 1:00-cv-06498 filed 08/30/2000).

Civil rights action by a minor and his mother for retaining the child in foster care without a legal basis. The parties settled, and the court issued an infant compromise order approving the settlement. A sealed document was placed in the vault. Two months later the parties agreed to discontinue the action with prejudice, stating that the parties settled pursuant to a separate settlement agreement.

Messina v. Local 1199 SEIU (NY-S 1:00-cv-07375 filed 09/28/2000).

Case under the Labor–Management Reporting and Disclosure Act alleging that the plaintiff was removed as an elected delegate in reprisal for her zealous representation of union membership, assertion of free speech rights, and bringing of charges against an elected vice-president. The court granted in part the defendants' motion to dismiss and motion for summary judgment. The parties settled, and the court dismissed the case without prejudice to restore it if requested within forty-five days. A sealed document was placed in the vault a month later.

Jack Schwartz Shoes Inc. v. Skechers USA Inc. (NY-S 1:00-cv-07721 filed 10/12/2000).

Trademark infringement action with patent claims concerning footwear that embodied the design claimed in the plaintiff's patent. The court granted the plaintiff partial summary judgment as to infringement, awarded the plaintiff damages, and issued an injunction against the defendant. The defendant's motion for summary judgment was denied as to patent infringement and granted as to trade dress infringement. Several weeks later the parties settled all remaining claims, and the court discontinued the action. Although the defendant requested that the court file under seal a stipulation and order of dismissal with prejudice, the court refused to take further action, stating that the parties' agreement of settlement need not be filed. Despite this statement, one week later a sealed document was placed in the vault.

Murphy v. Transitional Services Inc. (NY-S 1:00-cv-08169 filed 10/25/2000).

Employment discrimination action by a male counselor alleging that he was terminated for not having sex with his female director. The parties settled, and the confidential settlement agreement

was sealed and placed in the vault. The case was dismissed with prejudice.

Crooks v. Metro-North Railroad Co. (NY-S 1:00-cv-08420 filed 11/03/2000).

Federal employers' liability action by a signalman for on-the-job injuries. The parties settled, and a sealed document was placed in the vault three days later. The case was dismissed with prejudice.

McFachin v. Kerik (NY-S 7:00-cv-08998 filed 11/27/2000).

Prison condition action for multiple physical injuries resulting from an assault by prison staff and retaliatory segregation. The parties settled during a settlement conference, and the court sealed the tape of the conference and placed it in the court vault. The parties agreed to dismiss the action with prejudice according to the terms of the stipulation and order of settlement and discontinuance.

Reese v. Consolidated Edison Co. (NY-S 1:00-cv-09390 filed 12/11/2000).

Employment discrimination action by a black man for race discrimination, including denials of promotion. The parties settled, and the settlement conference transcript of the parties' agreement was sealed. The action was dismissed with prejudice.

Gold v. Unumprovident Corp. (NY-S 7:00-cv-09854 filed 12/29/2000).

Insurance action for refusal to pay the plaintiff disability benefits. The parties settled, and the terms of settlement were placed on the record. Because the settlement agreement ultimately signed by the parties contained a confidentiality provision, the parties asked the court to seal the tape and transcript of the settlement conference. The court agreed to seal the tape. The case was discontinued with prejudice and with leave to reopen it solely for the purpose of enforcing the settlement.

Weisman v. Doremus Advertising Inc. (NY-S 1:01-cv-00080 filed 01/04/2001).

ERISA action alleging failure to provide the plaintiff with the same benefits offered to other employees. A settlement agreement was reached on the record, and the case was dismissed with prejudice. A sealed document was placed in the vault a little over a month after the case closed.

Archer v. City of New York (NY-S 1:01-cv-00402 filed 01/18/2001).

Designated a civil rights action, this is an employment discrimination action by a female employee against the sheriff's office for sexual harassment and retaliation. The parties settled during a settlement conference, and the settlement terms were placed on the record. One month later a sealed document was placed in the vault the same day as the parties filed their stipulation and order of discontinuance dismissing the action with prejudice.

SBAM Inc. v. U.S. Roads Inc. (NY-S 1:01-cv-01848 filed 03/02/2001).

Negotiable instrument action. The parties settled and discontinued the action. A sealed document was placed in the vault three days later. A little over two months later, judgment was entered against the defendant subject to the terms of the stipulation of settlement.

Cook v. Stroock & Stroock & Lavan LLP (NY-S 1:01-cv-02065 filed 03/12/2001).

Employment discrimination action by an African-American woman against a law firm and partner for sexual harassment and retaliation. The parties settled on the record during a settlement conference and agreed to dismiss the case with prejudice. A sealed document was placed in the vault six days after the case closed.

ON2 Inc. v. ECOIN Co. (NY-S 1:01-cv-03618 filed 04/30/2001).

Contract action concerning the exclusive right to market the plaintiff's encoding and server technologies to third parties in South Korea. The parties settled on the record during a settlement conference. The court dismissed the case with prejudice and retained jurisdiction over the settlement pursuant to the terms of the settlement agreement. A sealed document was placed in the vault.

Pacific Sunwear of California v. Crest Inc. (NY-S 1:01-cv-04072 filed 05/14/2001).

Trademark infringement action concerning a line of men's, women's, and children's clothing. The parties settled, and their stipulation of dismissal was sealed. A sealed document was placed in the vault, and the court dismissed the case with prejudice.

Avon Products Inc. v. Kim (NY-S 1:01-cv-04163 filed 05/16/2001).

Trademark infringement action concerning cosmetic products and services similar to those sold by Avon. The parties settled and filed their settlement agreement and order under seal. The case was discontinued with prejudice.

Twentieth Century Fox Film Corp. v. Bermuda Cablevision Ltd. (NY-S 1:01-cv-04748 filed 06/01/2001).

Action under the Communications Act of 1934 by several large motion picture studios and their affiliates, alleging that a cable television provider in Bermuda pirated encrypted satellite signals at an enormous profit. The parties settled and agreed to discontinue the case with prejudice. Five months later the plaintiffs informed the court of their intention to file a motion to enforce the settlement agreement reached with the defendants. Shortly thereafter two sealed documents were placed in the court vault. The parties met and finalized their settlement. They agreed to dismiss the case with prejudice.

CBC Holdings Inc. v. Medina (NY-S 7:01-cv-05168 filed 06/11/2001).

Action alleging violations of the Cable Communications Policy Act of 1984 for use of an unauthorized converter-decoder. The parties settled during a settlement conference, and the court sealed the tape of the conference. The parties agreed to the issuance of a consent injunction against the defendant and to discontinue the case with prejudice according to the terms of the stipulation of discontinuance.

Freeman v. City of New York (NY-S 1:01-cv-05360 filed 06/14/2001).

Civil rights action by an incarcerated prisoner against the city of New York and several correctional officers for verbal abuse, physical attack, and failure to provide medical attention. The case settled on the record during a settlement conference. The court ordered the tape of the conference sealed, and the tape was placed in the vault. The parties dismissed the action with prejudice.

Shieldkret v. Park Place Entertainment Corp. (NY-S 1:01-cv-05471 filed 06/18/2001).

Action under the Fair Labor Standards Act by a female marketing employee of a gaming industry company, alleging violations of the Equal Pay Act for deliberately paying her substantially less than male employees. A jury trial was held, but the parties settled before the jury returned a verdict. The court ordered the order of discontinuance, a letter from the plaintiff, and an additional order to be filed under seal. Two sealed documents were placed in the vault, and the case was closed.

Kattini v. Republic of South Africa (NY-S 1:01-cv-05648 filed 06/21/2001).

Employment age discrimination action by a 64-year-old employee of the South African consulate in New York, alleging an attempt to force the plaintiff into involuntary retirement, demotion of the plaintiff from a permanent position to a temporary one, and termination. The parties settled and agreed to discontinue the action with prejudice. The court placed a sealed document in the vault the same day. The parties were given 120 days to restore the action if settlement was not effected. Five months later another sealed document was placed in the vault. No further activity occurred in the case.

Roach v. Young's Equipment (NY-S 7:01-cv-05979 filed 07/02/2001).

Product liability action for a hand injury caused by a frame machine. The case settled, and the court ordered the tape of the settlement conference to be sealed. The case was discontinued with prejudice.

Menaker v. Westchester Jewish Community Services Inc. (NY-S 7:01-cv-06127 filed 07/06/2001).

Employment discrimination case for sex and age discrimination and harassment. The parties settled, and a stipulation of settlement was placed on the record. The transcript was sealed, and the case was discontinued with prejudice with leave to reopen it solely for the purpose of enforcing the settlement.

Caesar v. Sugarhill Music Publishing Inc. (NY-S 1:01-cv-06180 filed 07/09/2001).

Copyright infringement action concerning songs. Settlement was reached between the plaintiffs and one defendant. Court-ordered mediation produced a stipulation settling all issues in the case. A sealed document was placed in the vault the same day the court ordered the case to be discontinued without prejudice.

Toumarkine v. Hollywood Media Corp. (NY-S 1:01-cv-06623 filed 07/20/2001).

Employment discrimination action alleging pretextual termination to conceal illegal age discrimination. The case settled on the record in open court and was discontinued with prejudice. The court retained jurisdiction to enforce the settlement terms. A sealed document was placed in the vault two weeks later.

Charley v. Andin International (NY-S 1:01-cv-08302 filed 09/05/2001).

Employment discrimination action by a black male employee with kidney and skin cancer, alleging discrimination based on race, color, and disability, including wrongful termination and failure to accommodate disabilities. The parties reached a settlement agreement on the record, and a sealed document was placed in the vault two days later. The parties agreed to dismiss the case with prejudice.

Top Rank Inc. v. Kelepeses (NY-S 1:01-cv-08382 filed 09/07/2001).

Action for violation of the Cable Communications Act and for copyright infringement in transmitting without authorization the plaintiff's pay-per-view programs, including boxing matches. The parties entered into an executed stipulation of settlement, which was filed by the court under seal. The court placed the sealed document in the vault and ordered the case dismissed with prejudice the same day.

Albany International Corp. v. J.M. Voith Fabrics Inc. (NY-S 1:01-cv-09455 filed 10/26/2001).

Patent infringement action concerning fabrics and methods for making such fabrics. The parties reached a settlement and agreed to dismiss the case with prejudice, but only as to the allegations of infringement concerning fabrics sold by the defendants prior to the effective date of the settlement agreement. The stipulated order of dismissal indicated that the settlement agreement was filed along with the stipulation. Several days later a sealed document was placed in the vault.

Gund Inc. v. Ganz Inc. (NY-S 1:02-cv-00801 filed 02/01/2002).

Copyright infringement suit alleging that the defendants' toy animals were substantially similar to the plaintiff's plush toys. The parties settled, and the court granted their request to file their consent judgment under seal because unrestricted access to the consent judgment would result in inappropriate disclosure of trade secrets and other proprietary information. The case was dismissed without prejudice to reopen it within thirty days if the settlement was not consummated.

Centre Group Holdings Ltd. v. American International Group Inc. (NY-S 1:02-cv-01955 filed 03/08/2002).

Trademark infringement action concerning financial and insurance services. The parties settled and agreed to dismiss the case with prejudice. The stipulation of dismissal states that the terms of the settlement agreement are attached and the court retains jurisdiction to enforce it. The agreement was not attached to the stipulation of dismissal, so it was probably the document the docket sheet indicated was filed under seal three days previously.

McVicker v. Pactiv Corp. (NY-S 7:02-cv-02548 filed 04/03/2002).

Patent infringement case concerning garbage bags. The parties agreed to settle all claims and dismiss the action with prejudice. The court ordered the taped settlement agreement sealed and placed in the vault.

Mannain v. J-Len Inc. (NY-S 7:02-cv-02919 filed 04/16/2002).

Employment discrimination action by four female employees for sex discrimination, including sexual harassment, a hostile work environment, and retaliation. The parties settled and submitted their confidential settlement agreement and release to the court under seal. The case was dismissed with prejudice.

Clyde Otis Music Group v. MTV Networks Enterprises Inc. (NY-S 1:02-cv-05326 filed 07/11/2002).

Copyright infringement action for unlawful airing of a musical composition. The parties reached a settlement agreement and agreed to dismiss the case with prejudice. A sealed document was placed in the vault a little over a month later.

CDC IXIS Capital Markets North America Inc. v. Parker (NY-S 1:02-cv-06436 filed 08/13/2002).

Personal property fraud action for theft of trade secrets. The parties settled and submitted to the court a settlement agreement set forth in a consent order. The court granted the parties' request to file an attachment to the consent order under seal in order to protect the plaintiff's highly sensitive

confidential and proprietary information. The case was dismissed with prejudice.

Western District of New York

The Western District of New York has a new local rule requiring a "substantial showing" to seal a document, W.D.N.Y. L.R. 5.4(a), but this rule is newer than the cases in this study. "Unless an order of the court otherwise directs, all sealed documents will remain sealed after final disposition of the case." *Id.* R. 5.4(f).

Statistics: 3,000 cases in termination cohort; 12 docket sheets are sealed (0.40%)—the disposition codes for 10 of these cases suggest no sealed settlement agreements,[61] and the disposition codes for 2 of these cases suggest sealed settlement agreements;[62] 106 unsealed docket sheets (3.5%) have the word "seal" in them; 20 complete docket sheets (0.67%) were reviewed; actual documents were examined for 12 cases (0.40%); 11 cases (0.37%) appear to have sealed settlement agreements.

Cases with Sealed Settlement Agreements

Burns v. Imagine Films Entertainment Inc. (NY-W 1:92-cv-00243 filed 04/08/1992).

Copyright case alleging use of the plaintiffs' copyrighted screenplays in the motion picture *Backdraft*. As a discovery sanction, the court ordered the defendants' answers stricken and entered a default judgment against the defendants; trial was set on the question of damages. The parties settled all claims. The plaintiffs moved to enforce the confidential settlement agreement. The court ordered the parties to resolve outstanding issues. One week later the parties filed a stipulation and order of dismissal with prejudice, requesting that the court vacate its prior judgment of liability in favor of the plaintiffs, which was based on the striking of the defendants' answers. On the day the case was closed, a document was filed under seal. The court agreed to vacate its prior judgment of liability.

Tops Markets Inc. v. Quality Markets Inc. (NY-W 1:93-cv-00302 filed 04/02/1993).

Antitrust action by a large supermarket chain against other supermarkets and a commercial developer, who filed a counterclaim. The district court bifurcated the case, and the jury returned a liability verdict against the plaintiff on all counts and in favor of the commercial developer on his counterclaim. The plaintiff settled the counterclaim with the developer. The plaintiff's original attorney was discharged, and he filed to have a lien placed on the case until he was paid for his services. The district court denied the attorney's motion for fees and a lien, and the attorney appealed. The plaintiff moved to enter the settlement agreement with the developer into the record. The plaintiff sought to do this under seal to preserve a nondisclosure agreement. The court agreed to seal the settlement agreement. The court of appeals affirmed the district court's denial of the attorney's lien.

United States v. Genesee Valley Card (NY-W 6:97-cv-06502 filed 11/12/1997).

Statutory action. The docket sheet is sealed. The case was dismissed as settled.

Airsep Corp. v. ICAR SPA (NY-W 1:00-cv-00089 filed 01/26/2000).

Contract action alleging that defects in capacitors manufactured and distributed by the defendants caused oxygen concentrators manufactured and sold by the plaintiff to catch fire. The parties settled, and the court dismissed the case without prejudice, with leave to reopen it within sixty days if settlement was not consummated. Two months later a document was filed under seal, and a final settlement conference was held to discuss the status of settlement. No further activity occurred in the case.

Weidner v. Town of Eden (NY-W 1:00-cv-00162 filed 02/16/2000).

Civil rights action concerning the plaintiffs' real property. The case settled, the settlement terms were put on the record, and the court recording was sealed. The parties agreed to dismiss the action with prejudice, and the case was closed upon court approval of the dismissal.

Nevarez v. Pittsford Central School District (NY-W 6:00-cv-06096 filed 03/06/2000).

Civil rights action under the Americans with Disabilities Act against a school district, its board of education, and a principal for discrimination against the plaintiffs and their disabled daughter. The parties settled, and the court placed the settlement terms on the record. The parties executed the stipulation and order to dismiss in open court,

61. Two judgments on motions before trial, 1 voluntary dismissal, 6 "other" dismissals, 1 "other" judgment.

62. One consent judgment, 1 case settled.

and the court sealed the stipulation. The case was closed.

Jeswald v. Frontier Central School District (NY-W 1:00-cv-00824 filed 09/22/2000).

Employment discrimination action by an obese Native-American woman, alleging wrongful termination on the basis of her race and disability by a school district. The defendant informed the court that the parties had settled. Five months later a document was filed under seal, and the case was closed the same day.

Harms v. Dow Chemical Co. (NY-W 1:00-cv-01040 filed 12/19/2000).

Product liability action alleging that the decedent's workplace exposure to the defendants' vinyl chloride caused him to develop several illnesses, including liver cancer, which resulted in his death. The defendants brought a third-party complaint against the decedent's employer for contribution. The case settled, and the court sealed an order of settlement. All parties agreed to dismiss all claims with prejudice, and the court dismissed the case.

United States v. 2986 Tallman Road (NY-W 6:01-cv-06155 filed 03/23/2001).

Case involving the drug-related seizure of property. The docket sheet is sealed. The case was resolved by consent judgment.

Buchalski v. Dow Chemical Co. (NY-W 1:01-cv-00309 filed 04/27/2001).

Product liability action by a surviving wife alleging that the decedent's workplace exposure to the defendants' vinyl chloride caused him to develop several illnesses, including angiosarcoma of the liver, which resulted in his death. The defendants brought a third-party complaint against the decedent's employer for contribution. The case settled, and the court sealed tapes of a teleconference held three days later. About a week later the court issued a sealed order of settlement. All parties agreed to dismiss all claims with prejudice, and the court dismissed the case.

Roberts v. County of Erie (NY-W 1:01-cv-00565 filed 08/09/2001).

Employment action for sexual discrimination against the Erie County Sheriff's Department by a former nurse employee, alleging repeated instances of sexual harassment, discrimination, and retaliation. During a settlement hearing, the parties settled, and the court ordered the proceedings sealed. The parties were ordered to exchange a written settlement agreement and sign a general release. The court dismissed the case, and the parties stipulated to dismiss all claims with prejudice.

Eastern District of North Carolina

The court amended its local rule on sealed documents effective January 1, 2003. Absent statutory authority, court filings may be sealed only on court order obtained by motion. E.D.N.C. L. Civ. R. 79.2(a). Sealed documents must be delivered to the court in red envelopes with three lines of specified text designating the date of filing and that the document is to be filed under seal. *Id.* R. 79.2(c). The docket designates "generically the type of document filed under seal, but it will not contain a description that would disclose its identity." *Id.* R. 79.2(c). "After the action concludes and all appeals have been completed, counsel is charged with the responsibility of retrieving and maintaining all sealed documents. Upon 10 days notice by mail to counsel for all parties, and within thirty days after final disposition, the court may order the documents to be unsealed and they will thereafter be available for public inspection." *Id.* R. 79.2(d).

Statistics: 2,808 cases in termination cohort; 143 docket sheets (5.1%) have the word "seal" in them (but 57 of these merely have Crown Cork and Seal Company as a party); 12 complete docket sheets (0.43%) were reviewed; actual documents were examined for 4 cases (0.14%); 3 cases (0.11%) appear to have sealed settlement agreements.

Cases with Sealed Settlement Agreements

Lloyd v. Newton (NC-E 7:00-cv-00034 filed 02/22/2000).

Housing and accommodations action under the Americans with Disabilities Act and state law for failure to rent a hotel room to a disabled person who had a service dog but who was not blind. The parties filed a consent protective order, and the transcript of the settlement conference was sealed. The case ended in a stipulation of dismissal. Because the complaint included a claim for negligent supervision, settlement discussions may have included trade secrets on employee training.

Ramirez v. Beaulieu (NC-E 5:00-cv-00536 filed 07/25/2000).

Action under the Fair Labor Standards Act and state law by carpenters for unpaid wages. The

parties reached a confidential settlement agreement and filed a joint stipulation of dismissal. The stipulation specified that if the plaintiff notified the court within ninety days that the defendants had breached the agreement, then an attached sealed consent order would become effective. The ninety days elapsed without such notice, and the case was closed.

Watson v. Life Insurance Co. of North America (NC-E 5:01-cv-00870 filed 11/07/2001).

ERISA action for wrongfully denying disability benefits to a processing clerk. The disabled beneficiary was represented by her mother, who had power of attorney. The case settled, and the court approved the settlement. A sealed settlement agreement was filed.

Middle District of North Carolina

Sealed documents are sent to the records center in Atlanta along with the rest of the case file, where "[t]he confidentiality of sealed documents cannot be assured." M.D.N.C. L.R. 83.5(c). At the end of the case, after the opportunity for appeal is exhausted, the clerk sends the parties a notice that they may retrieve sealed documents.

Statistics: 2,284 cases in termination cohort; 63 docket sheets (2.8%) have the word "seal" in them; 10 complete docket sheets (0.44%) were reviewed; actual documents were examined for 7 cases (0.31%); 6 cases (0.26%) appear to have sealed settlement agreements.

Cases with Sealed Settlement Agreements

Queen v. rha Health Services Inc. (NC-M 1:00-cv-00101 filed 02/01/2000).

Class action under the federal Fair Labor Standards Act and state law by employees of a residential facility for developmentally disabled adults, alleging that the employees working a night shift were required to remain on the premises without compensation for eight hours of their eighteen-hour shifts. The court dismissed the state law claims as preempted by the federal claim. The case settled, and the parties filed a joint motion under seal for an order approving the settlement. Such an order was granted, but the order says nothing about the terms of the settlement.

Saine v. Bristol-Myers Squibb Co. (NC-M 1:00-cv-00271 filed 03/20/2000).

ERISA action by a drug sales employee to challenge denial of short-term disability benefits for migraine headaches. The court granted the defendants summary judgment on the ERISA claim, but denied them summary judgment on a counterclaim for the return of mistakenly issued salary checks. The parties settled the counterclaim before trial, but the plaintiff apparently violated the settlement agreement (before the case was dismissed), so the defendant employer moved for enforcement of the agreement, attaching the agreement as a sealed exhibit. The plaintiff apparently violated the court's order to enforce the agreement by failing to return money and sales supplies, including a car, a computer, and drugs, so the employer moved for an order of contempt. The court did not rule on this motion, because the parties settled their dispute and filed a stipulated dismissal.

Kurth v. BioSignia Inc. (NC-M 1:00-cv-00534 filed 06/01/2000).

Stockholders' suit for wrongful cancellation of a stock certificate allegedly worth $3.3 million. The plaintiff received the certificate in exchange for legal services provided to a CEO of a subsidiary of the defendant. The defendant alleged that the CEO's interest in the certificate never vested because he was forced to resign, with a suggestion of wrongdoing. The case settled on the eve of trial, and the court sealed the transcript of the settlement conference. The plaintiff thereafter refused to sign the settlement papers because of a term impairing his ability to sell his stock, so the defendant filed a sealed motion to enforce the agreement. The plaintiff's unsealed response included the agreement as an exhibit. The disagreement was resolved, and a copy of the settlement agreement was attached to an unsealed stipulation of dismissal.

Parks v. Alteon Inc. (NC-M 1:00-cv-00657 filed 07/13/2000).

Product liability case in which the plaintiff sued drug companies, alleging that their experimental diabetes drug caused kidney failure. The parties reached a confidential private settlement agreement, but one defendant apparently was late in making its settlement payment. The settlement agreement was filed under seal as an exhibit to a motion to enforce it. The case was dismissed without action on the motion.

Gaskins v. Carolina Manufacturer's Service Inc. (NC-M 1:00-cv-01219 filed 12/01/2000).

Employment civil rights action in which black plaintiffs sued their employer for race discrimina-

tion. One plaintiff had second thoughts about the confidential settlement agreement and moved pro se to set it aside. The defendant attached a sealed copy of the settlement agreement to a motion to enforce it. The court ruled against the plaintiff's motion and ordered her to pay a $3,600 sanction to cover the defendant's attorney fees to enforce the agreement.

Estate of Mayo v. Kindred Nursing Centers East LLC (NC-M 1:02-cv-00260 filed 04/05/2002).

Medical malpractice action against a nursing home for wrongful death resulting from the insertion of a feeding tube into a patient's trachea instead of her esophagus, resulting in her lungs receiving feeding solution. The case was dismissed pursuant to a sealed consent order.

Western District of North Carolina

Local Rule 5.1(D)(4) states: "Unless otherwise ordered by a court, any case file or documents under court seal that have not previously been unsealed by court order shall be unsealed at the time of final disposition of the case." According to the clerk, sealed documents are not sent to the records center. If there were an order to keep a document sealed, the court probably would keep the whole file, because there would be so few.

Statistics: 2,203 cases in termination cohort; 2 docket sheets are sealed (0.09%)—both of these cases' disposition codes suggest no sealed settlement agreements;[63] 101 unsealed docket sheets (4.6%) have the word "seal" in them; 27 complete docket sheets (1.2%) were reviewed; actual documents were examined for 14 cases (0.64%); 11 cases (0.50%) appear to have sealed settlement agreements.

Cases with Sealed Settlement Agreements

Estate of Carr v. Louisiana-Pacific Corp. (NC-W 5:99-cv-00023 filed 02/24/1999), consolidated with *Estate of Carr v. Louisiana-Pacific Corp.* (NC-W 5:99-cv-00024 filed 02/24/1999), *Estate of Carr v. Louisiana-Pacific Corp.* (NC-W 5:99-cv-00025 filed 02/24/1999), *Estate of Phillips v. Louisiana-Pacific Corp.* (NC-W 5:99-cv-00026 filed 02/24/1999), and *Estate of Carr v. Louisiana-Pacific Corp.* (NC-W 5:99-cv-00027 filed 02/24/1999).

Consolidated motor vehicle tort action in which five decedents' estates sued the alleged employers of a logging truck driver. According to the complaints, the driver became distracted while changing a tape in his cab. He veered into oncoming traffic and ran a church van off the road. He then swerved back into the correct lane, and the truck's logs spilled, crushing the van's five occupants. The district court granted summary judgment to the defendants on the grounds that the driver was not their agent, and the plaintiffs appealed. The case settled on appeal. The court had to approve the settlement agreement, because one of the plaintiffs was a minor representing her father's estate. Terms of the settlement agreement are under seal.

Delaney v. Stephens (NC-W 3:00-cv-00138 filed 03/24/2000).

Medical malpractice action by a three-year-old boy for "cardiac arrest and cephalad hematoma" allegedly resulting from his mother's physician's using a "vacuum assisted delivery device" during delivery. More than two years later the court denied a motion to continue the trial date, and one week in advance of the scheduled trial date, a document was filed under seal. A week later another document was filed under seal, and the case was closed the following day, with the disposition of the case coded as a consent judgment. A sealed settlement agreement apparently was filed.

McKinney v. CVS Pharmacy Inc. (NC-W 1:01-cv-00124 filed 06/08/2001).

Housing and accommodations action for refusal to permit a customer with a service dog to bring her dog into the store. The plaintiff alleged that she brought in the dog while filling a prescription and was rudely shooed away. A district manager allegedly told the plaintiff, "we don't have to let handicapped people in . . . if we don't want to." Subsequently the dog needed a prescription filled, and when the plaintiff visited the store to fill it she was humiliated, injured, and prosecuted for violating the store's no-dog rule. The defendants claimed that the plaintiff was not disabled, the dog was not a service dog, and the dog was not sufficiently well-behaved. The case was dismissed pursuant to a sealed settlement agreement. Nearly two months later another document was filed under seal—apparently a motion by the defendants to enforce the agreement. The plaintiff's counsel notified the court that the plaintiff had not yet signed the agreement or received the settlement check and that the plaintiff was no longer permitted to visit counsel at his office. Thereafter the plaintiff represented herself. Two additional

63. One case transferred to another district, 1 voluntary dismissal.

documents were filed under seal, at least one of which was an order.

McGinnis v. Eli Lilly and Co. (NC-W 5:02-cv-00010 filed 01/22/2002).

Product liability action by a surviving husband and three children claiming that Prozac caused the decedent's suicide. Prior to a mediation conference the parties settled, and four documents were filed under seal.

J.M. Huber Corp. v. Potlatch Corp. (NC-W 3:02-cv-00034 filed 01/25/2002).

Trademark action concerning a plywood substitute called oriented strand board. The case was dismissed in reliance on a settlement agreement, which was sealed and filed as an exhibit to the order dismissing the case. The order included the statement that "[t]he parties . . . consent to the Court retaining jurisdiction of this matter to enforce the terms of a confidential Settlement Agreement . . . ."

Estate of Neville v. United States (NC-W 1:02-cv-00029 filed 02/04/2002).

Medical malpractice action alleging wrongful death at a Veterans' Administration hospital following surgery to correct bile peritonitis, which had resulted from an earlier negligent Veterans' Administration hospital surgery. A mediator's report was filed under seal, and the case was dismissed as settled.

Rasavong v. Fortis Benefits Insurance Co. (NC-W 3:02-cv-00132 filed 03/29/2002).

ERISA action challenging the defendant's refusal to pay life insurance benefits on the grounds that the plaintiff was a suspect in her husband's murder. The parties moved for approval of a confidential settlement agreement, which the court ordered filed under seal. The docket sheet, however, does not show such a filing, but the court did approve the agreement. Unsealed documents disclose that the defendant paid the $370,000 insurance claim in full to the plaintiff and that this was deemed in the best interest of her minor children, who would receive the payment themselves if she were ineligible. It is not clear what term of the settlement agreement remains confidential.

District of North Dakota

Unless the court orders otherwise, sealed documents are returned to the parties filing them when the case is over. D.N.D. L.R. 5.1(F)(1). If an entire file is permanently sealed, then the court retains custody of it. *Id.* R. 5.1(F)(3).

Statistics: 574 cases in termination cohort; 126 docket sheets (22%) have the word "seal" in them; 8 complete docket sheets (1.4%) were reviewed; actual documents were examined for 6 cases (1.0%); 5 cases (0.87%) appear to have sealed settlement agreements.

Cases with Sealed Settlement Agreements

Jones-VanTassel v. Richland County (ND 3:99-cv-00060 filed 04/16/1999).

Civil rights employment action by an emergency manager against her former employer for wrongful termination based on sex. The transcript of the settlement conference was sealed. The court retained jurisdiction to enforce the terms of the settlement agreement.

United States v. BM&H Partnership (ND 3:99-cv-00163 filed 11/17/1999).

Action under the Fair Housing Act by husband and wife caretakers of an apartment complex for wrongful termination and eviction. The complaint alleged retaliation for aiding tenants in asserting their right to fair housing. The transcript of the settlement conference was sealed. The court approved the settlement on behalf of the plaintiffs' three minor children.

Steen v. United States (ND 4:00-cv-00040 filed 03/21/2000).

Personal injury action under the Federal Tort Claims Act by an Air Force base maintenance worker who was employed by a civilian contractor, for sexual harassment and assault by a civilian employee who inspects the work of contractors. During the settlement conference the court agreed to keep the settlement amount under seal. About a month after the settlement conference, the government filed a motion to unseal the settlement amount of $30,000 because confidentiality provisions in settlement agreements are contrary to the policy of the Department of Justice

Johnson v. Pharmacia & Upjohn Co. (ND 1:00-cv-00047 filed 04/10/2000).

Personal injury action by a pharmaceutical sales representative for wrongful termination based on his felony conviction, which had been divulged to the defendant prior to his employment. The parties settled at a pretrial conference. The court or-

dered that transcripts and any settlement documents that contain monetary amounts be sealed.

Binstock v. The Finder (ND 1:00-cv-00087 filed 07/14/2000).

Personal injury action under the Family Medical Leave Act and state law by a woman who was unaware that she was entitled to twelve weeks of maternity leave and returned to work after five weeks so that she would not lose her benefits. The court granted summary judgment on the state law claim of negligence. The transcript of the settlement conference was sealed.

Northern District of Oklahoma[64]

"No pleading, document, or record shall be placed under seal without a prior, specific order of the court finding good cause to do so." N.D. Okla. L.R. 79.1(D).

Statistics: 1,954 cases in termination cohort; 176 docket sheets (9.0%) have the word "seal" in them; 35 complete docket sheets (1.8%) were reviewed; actual documents were examined for 15 cases (0.77%); 11 cases (0.56%) appear to have sealed settlement agreements.

Cases with Sealed Settlement Agreements

First National Bank and Trust Co. of Miami v. Ottawa County Chapter of the American Cancer Society (OK-N 4:99-cv-00691 filed 08/18/1999).

Contract action concerning the identity of the rightful claimants of a $1.6 million residuary trust fund. The case settled. The clerk's minutes indicate that the court ordered the settlement agreement and the agreed order for distribution of funds filed under seal. Shortly thereafter, two sealed documents were filed with the court.

Whelan v. Saint John (OK-N 4:00-cv-00109 filed 02/07/2000).

Medical malpractice action against a plastic surgeon, alleging negligence and battery resulting in serious permanent injury. The case was dismissed as settled. The confidentiality order relating to the case dismissal was filed under seal.

Rogers v. Kaplan (OK-N 4:00-cv-00321 filed 04/19/2000).

Medical malpractice action on behalf of an incompetent person, alleging negligence in the administration of epidural anesthesia, which resulted in severe and permanent brain injury. The case was dismissed as settled. The settlement hearing transcript was sealed.

Ramsey v. Brighter Day Inc. (OK-N 4:00-cv-00593 filed 07/18/2000).

Action under the Fair Labor Standards Act for failure to pay habilitation training specialists and supervisors overtime compensation. The case was dismissed as settled, and the confidential settlement agreement was filed under seal.

Doe v. City of Tulsa (OK-N 4:00-cv-00896 filed 10/18/2000).

Civil rights action alleging failure to take adequate precautions to avoid public disclosure of the plaintiff's medical condition. The case was dismissed as settled. The court ordered all matters related to the case sealed except for the agreed judgment, which discloses the amount of settlement to be $9,000. The sealed documents include the complaint, settlement conference report, and administrative closing order.

Raimond v. Toys "R" Us—Delaware Inc. (OK-N 4:00-cv-01090 filed 12/29/2000).

Product liability action on behalf of a minor who was severely injured by a dangerously designed and manufactured water toy sold by the defendant. The case was dismissed as settled. Documents related to the joint settlement report hearing, including the court's order dismissing the case, were sealed.

Momper v. Hartford Life Insurance Co. (OK-N 4:01-cv-00597 filed 08/10/2001).

Insurance action on behalf of a minor to recover benefits for injuries incurred during a soccer match. The case settled. The court approved the settlement and ordered the transcript of the settlement proceedings sealed.

Sandoval v. Travelers Property Casualty (OK-N 4:01-cv-00847 filed 11/15/2001).

Insurance action by a surviving spouse alleging failure to pay benefits for the decedent's lethal injuries sustained in an automobile accident that was caused by an uninsured motorist's negli-

64. This district is included in the study because of its good-cause rule.

gence. The case settled. The court appointed a guardian ad litem for the decedent's minor child and approved the settlement. The court order was filed under seal.

Ainsworth v. Bailey Inc. (OK-N 4:02-cv-00191 filed 03/08/2002).

Civil rights action on behalf of children, alleging race discrimination by the defendant's hotel. The case settled, and the court order approving the settlement was sealed.

Impressions on Hold International Inc. v. AMFYOYO LLC (OK-N 4:02-cv-00216 filed 03/21/2002).

Trademark infringement action alleging the attempted conversion of an on-hold message company and the wrongful use of the company's name. The defendants filed a counterclaim alleging breach of contract. The case settled, and the court ordered the transcript of the settlement proceedings sealed.

United States ex. rel Seneca-Cayuga Tribe of Oklahoma v. Humble Riggs & Associates LLC (OK-N 4:02-cv-00239 filed 04/01/2002).

Statutory action concerning the management of a tobacco enterprise on United States property entrusted to an Indian tribe. The case settled. The court granted the plaintiff's motion to seal certain filed documents, including the settlement agreement.

Eastern District of Pennsylvania

No relevant local rule.

Statistics: 19,520 cases in termination cohort; 655 docket sheets (3.4%) have the word "seal" in them; 208 complete docket sheets (1.1%) were reviewed; actual documents were examined for 192 cases (0.98%); 183 cases (0.94%) appear to have sealed settlement agreements.

Cases with Sealed Settlement Agreements

Tara M. v. City of Philadelphia (PA-E 2:97-cv-01041 filed 02/11/1997).

Civil rights case involving a foster child who was sexually abused and seriously burned by her foster parents. The plaintiff alleged that the foster parents were not properly screened. After the child was injured, the defendant failed to properly treat the child's physical and mental injuries. A third-party complaint was filed by the Department of Human Services against the attorney who was appointed counsel for the child. Another third-party complaint was filed against the insurer of the company with which the defendant contracted to provide foster care services. A petition for leave to compromise the minor's claims and the defendant's response were sealed. The order of dismissal reported that the settlement amount was $4,310,000.

Lord v. Living Bridges (PA-E 2:97-cv-06355 filed 10/14/1997).

Personal injury case against an adoption agency that falsely represented the background and health status of three Mexican minors adopted by the plaintiffs. A sealed settlement agreement was filed.

Graco Children's Products Inc. v. Regaldo International LLC (PA-E 2:97-cv-06885 filed 11/10/1997).

Patent case involving a "foldable play yard." The defendant filed a sealed motion to enforce the settlement agreement. Three months after the motion was filed, the court denied it as moot, because the parties had filed a consent judgment and voluntary permanent injunction. The consent judgment noted that the defendant would pay the plaintiff a set amount, but the amount was not revealed.

Keyes v. Deere & Co. (PA-E 2:98-cv-00602 filed 02/06/1998).

Product liability case involving a minor. Early in the case the mother was removed as plaintiff and a guardian ad litem was appointed. The entire case file is sealed. A settlement agreement is among the sealed documents. The final entry on the docket sheet reports that the minor received $21,024.

Slater v. Liberty Mutual Insurance Co. (PA-E 2:98-cv-01711 filed 03/31/1998).

Insurance case involving a workers' compensation claim. The entire case was sealed. The plaintiff filed a motion to enforce the settlement agreement. After a four-day jury trial, the case was settled.

E.B. v. Easton Area School District (PA-E 2:99-cv-00256 filed 01/19/1999).

Civil rights case involving a 13-year-old boy who was assaulted by a teacher. The signed release and order permitting compromise of the minor's claims were sealed.

Official Committee of Unsecured Creditors v. Shapiro (PA-E 2:99-cv-00526 filed 02/01/1999).

Securities fraud case involving a scheme to register, offer, and sell securities. A sealed settlement agreement was filed.

Ruiz v. Metrobank of Philadelphia NA (PA-E 2:99-cv-00655 filed 02/08/1999).

Contract action by a woman and her minor child involving default on a promissory note. The petition to settle the minor's claims was sealed. A motion for sanctions included an exhibit revealing that the minor received $224,455.

Miller v. Hygrade Food Products Corp. (PA-E 2:99-cv-01087 filed 03/01/1999).

Employment class action by African-American plaintiffs against their employer for race discrimination. The transcript of a settlement hearing was sealed.

In re Air Crash Disaster Near Peggy's Cove, Nova Scotia on September 2, 1998 (MDL 1269 transferred 04/07/1999).[65]

Airline cases claiming that an aircraft crashed because of a malfunction in the in-flight entertainment center, killing 229 passengers and crew members. A stipulation and order was filed under seal in each member case on the same day that the case was closed.

65. This multidistrict litigation includes 144 Pennsylvania Eastern member cases in our termination cohort: Tschudin v. McDonnell Douglas Corp. (PA-E 2:99-cv-02291 filed 05/04/1999); Dwek v. McDonnell Douglas Corp. (PA-E 2:99-cv-02293 filed 05/04/1999); Kalogridakis v. Swissair (PA-E 2:99-cv-02523 filed 05/17/1999); Arnaldi v. Sair Group (PA-E 2:99-cv-02524 filed 05/17/1999); Junod v. Swissair (PA-E 2:99-cv-02528 filed 05/17/1999); Economopoulos v. Swissair (PA-E 2:99-cv-02554 filed 05/18/1999); Kief v. Swissair (PA-E 2:99-cv-02534 filed 05/19/1999); Kessler v. Swissair Transport Co. (PA-E 2:99-cv-02586 filed 05/19/1999); Librett v. Swissair Transport Co. (PA-E 2:99-cv-03146 filed 06/21/1999); Neuweiler v. Swissair Transport Co. (PA-E 2:99-cv-03147 filed 06/21/1999); Lee v. Sair Group (PA-E 2:99-cv-03148 filed 06/21/1999); Harrity v. Swissair Transport Co. (PA-E 2:99-cv-03245 filed 06/25/1999); Scott v. Swissair Transport Co. (PA-E 2:99-cv-03753 filed 07/23/1999); Rizza v. Swissair Transport Co. (PA-E 2:99-cv-03948 filed 08/04/1999); Wilson v. Swissair Transport Co. (PA-E 2:99-cv-04058 filed 08/11/1999); Rogers v. Swissair Transport Co. (PA-E 2:99-cv-04193 filed 08/19/1999); Rogers v. Swissair Transport Co. (PA-E 2:99-cv-04194 filed 08/19/1999); Myers v. Swissair Transport Co. (PA-E 2:99-cv-04195 filed 08/19/1999); Shuster v. Swissair Transport Co. (PA-E 2:99-cv-04235 filed 08/20/1999); Caripides v. Swissair Transport Co. (PA-E 2:99-cv-04236 filed 08/20/1999); Watson v. Delta Airlines Inc. (PA-E 2:99-cv-04869 filed 09/30/1999); Estate of Tahmoush v. Swissair Transport Co. (PA-E 2:99-cv-04971 filed 10/07/1999); Diba v. Swissair Transport Co. (PA-E 2:99-cv-04972 filed 10/07/1999); Troyon v. Swissair Transport Co. (PA-E 2:99-cv-05236 filed 10/22/1999); Estate of Colmery v. Swissair Group (PA-E 2:99-cv-05269 filed 10/25/1999); Estate of Kleinman v. Delta Airlines Inc. (PA-E 2:99-cv-05316 filed 10/27/1999); Nelson v. Sair Group (PA-E 2:99-cv-05372 filed 10/29/1999); Lamotta v. Interactive Flight Technologies Inc. (PA-E 2:99-cv-05526 filed 11/08/1999); Estate of Hopcraft v. Swissair Transport Co. (PA-E 2:99-cv-05584 filed 11/09/1999); Arnaldi v. Sair Group (PA-E 2:99-cv-05623 filed 11/12/1999); Diasparra v. Swissair Group (PA-E 2:99-cv-05624 filed 11/12/1999); Thompson v. Swissair Transport Co. (PA-E 2:99-cv-05773 filed 11/19/1999); Estate of Kief v. Swissair (PA-E 2:99-cv-05775 filed 11/19/1999); Smith v. Swissair Transport Co. (PA-E 2:99-cv-05776 filed 11/19/1999); Conley v. Swissair Transport Co. (PA-E 2:99-cv-05778 filed 11/19/1999); Mann v. Swissair Transport Co. (PA-E 2:99-cv-05779 filed 11/19/1999); Estate of Gerety v. Swissair Transport Co. (PA-E 2:99-cv-05780 filed 11/19/1999); McGinnis v. Interactive Flight Technologies Inc. (PA-E 2:99-cv-05809 filed 11/22/1999); Diasparra v. E.I. Dupont de Nemours and Co. (PA-E 2:99-cv-05812 filed 11/22/1999); Alleaume v. Swissair Transport Co. (PA-E 2:99-cv-05854 filed 11/23/1999); Monay v. Swissair (PA-E 2:99-cv-05855 filed 11/23/1999); Dwek v. Swissair (PA-E 2:99-cv-05857 filed 11/23/1999); Faherty v. Swissair Transport Co. (PA-E 2:99-cv-05858 filed 11/23/1999); Wight v. Swissair Transport Co. (PA-E 2:99-cv-05860 filed 11/23/1999); Fetherolf v. Swissair Transport Co. (PA-E 2:99-cv-05861 filed 11/23/1999); Abady v. Swissair Transport Co. (PA-E 2:99-cv-05997 filed 12/01/1999); Estate of Smith v. Swissair (PA-E 2:99-cv-06002 filed 12/01/1999); Mcginnis v. Swissair Transport Co. (PA-E 2:99-cv-06003 filed 12/01/1999); Hawkins v. Swissair Transport Co. (PA-E 2:99-cv-06004 filed 12/01/1999); Amposta v. Swissair Transport Co. (PA-E 2:99-cv-06010 filed 12/01/1999); Dalmais-Kitzinger v. Swissair Transport Co. (PA-E 2:99-cv-06013 filed 12/01/1999); Brown v. Swissair Transport Co. (PA-E 2:99-cv-06014 filed 12/01/1999); De Roussan v. Swissair Transport Co. (PA-E 2:99-cv-06019 filed 12/01/1999); Albertsen v. Swissair Transport Co. (PA-E 2:99-cv-06024 filed 12/01/1999); Rizza v. Swissair Transport Co. (PA-E 2:99-cv-06026 filed 12/01/1999); Levina v. Swissair Transport Co. (PA-E 2:99-cv-06027 filed 12/01/1999); St. George-Kreis v. Swissair Transport Co. (PA-E 2:99-cv-06030 filed 12/01/1999); De Graef v. Swissair Transport Co. (PA-E 2:99-cv-06031 filed 12/01/1999); Estate of Ezell v. Swissair Transport Co. (PA-E 2:99-cv-06032 filed 12/01/1999); Smith v. E.I. Dupont de Nemours

and Co. (PA-E 2:99-cv-06033 filed 12/01/1999); Kassel v. E.I. Dupont de Nemours and Co. (PA-E 2:99-cv-06035 filed 12/01/1999); Boure v. Sair Group (PA-E 2:99-cv-06040 filed 12/01/1999); Valade v. Sair Group (PA-E 2:99-cv-06043 filed 12/01/1999); Richard v. Sair Group (PA-E 2:99-cv-06044 filed 12/01/1999); Rossi v. Sair Group (PA-E 2:99-cv-06046 filed 12/01/1999); Burckhardt v. Sair Group (PA-E 2:99-cv-06049 filed 12/01/1999); Babolat v. Sair Group (PA-E 2:99-cv-06050 filed 12/01/1999); Pavrette v. Sair Group (PA-E 2:99-cv-06052 filed 12/01/1999); Baconnier v. Sair Group (PA-E 2:99-cv-06053 filed 12/01/1999); Foxford v. Sair Group (PA-E 2:99-cv-06055 filed 12/01/1999); Gabourdes v. Sair Group (PA-E 2:99-cv-06056 filed 12/01/1999); Gardner v. Sair Group (PA-E 2:99-cv-06058 filed 12/01/1999); Salakhoutdinov v. Sair Group (PA-E 2:99-cv-06059 filed 12/01/1999); Kenneth v. Sair Group (PA-E 2:99-cv-06060 filed 12/01/1999); Levina v. Swissair Transport Co. (PA-E 2:99-cv-06061 filed 12/01/1999); Bell v. Swissair (PA-E 2:99-cv-06075 filed 12/01/1999); Burrus v. Swissair (PA-E 2:99-cv-06084 filed 12/02/1999); Mendo Martínez v. E.I. Dupont de Nemours and Co. (PA-E 2:99-cv-06086 filed 12/02/1999); Burrus v. E.I. Dupont de Nemours and Co. (PA-E 2:99-cv-06087 filed 12/02/1999); Kief v. E.I. Dupont de Nemours and Co. (PA-E 2:99-cv-06088 filed 12/02/1999); Dwek v. E.I. Dupont de Nemours and Co. (PA-E 2:99-cv-06093 filed 12/02/1999); Monay v. E.I. Dupont de Nemours and Co. (PA-E 2:99-cv-06094 filed 12/02/1999); Hastie v. Sair Group (PA-E 2:99-cv-06100 filed 12/02/1999); Dwek v. McDonnell Douglas Corp. (PA-E 2:99-cv-06102 filed 12/02/1999); Baconnier v. Sair Group (PA-E 2:99-cv-06110 filed 12/02/1999); Mendo Martínez v. Swissair (PA-E 2:99-cv-06113 filed 12/02/1999); Mendo Martínez v. McDonnell Douglas Corp. (PA-E 2:99-cv-06119 filed 12/02/1999); Alleaume v. McDonnell Douglas Corp. (PA-E 2:99-cv-06150 filed 12/03/1999); Thompson v. Swissair Transport Co. (PA-E 2:99-cv-06169 filed 12/06/1999); de la Soudiere-Gerety v. Interactive Flight Technologies Inc. (PA-E 2:99-cv-06170 filed 12/06/1999); Scarboro v. McDonnell Douglas Corp. (PA-E 2:99-cv-06172 filed 12/06/1999); Estate of Mir-Alai v. McDonnell Douglas Corp. (PA-E 2:99-cv-06173 filed 12/06/1999); Estate of Benjamin v. McDonnell Douglas Corp. (PA-E 2:99-cv-06174 filed 12/06/1999); Estate of Makarevitch v. McDonnell Douglas Corp. (PA-E 2:99-cv-06176 filed 12/06/1999); Smith v. Interactive Flight Technologies Inc. (PA-E 2:99-cv-06178 filed 12/06/1999); Jhurani v. Sair Group (PA-E 2:99-cv-06180 filed 12/06/1999); Schachter v. Sair Group (PA-E 2:99-cv-06181 filed 12/06/1999); Wilkins v. Sair Group (PA-E 2:99-cv-06182 filed 12/06/1999); Estate of Mozes v. E.I. Dupont de Nemours and Co. (PA-E 2:99-cv-06242 filed 12/08/1999); Kokoruda v. Swissair Transport Co. (PA-E 2:99-cv-06267 filed 12/09/1999); Sheer v. Swissair Transport Co. (PA-E 2:99-cv-06268 filed 12/09/1999); Houtait v. Swissair Transport Co. (PA-E 2:99-cv-06269 filed 12/09/1999); Karamanoukian v. Swissair Transport Co. (PA-E 2:99-cv-06270 filed 12/09/1999); Smith v. Swissair (PA-E 2:99-cv-06418 filed 12/15/1999); Leite de Roussan v. McDonnell Douglas Corp. (PA-E 2:99-cv-06438 filed 12/17/1999); Rizza v. McDonnell Douglas Corp. (PA-E 2:99-cv-06443 filed 12/17/1999); Levina v. McDonnell Douglas Corp. (PA-E 2:99-cv-06444 filed 12/17/1999); Levina v. McDonnell Douglas Corp. (PA-E 2:99-cv-06446 filed 12/17/1999); St. George-Kreis v. McDonnell Douglas Corp. (PA-E 2:99-cv-06448 filed 12/17/1999); Sutton v. E.I. Dupont de Nemours and Co. (PA-E 2:99-cv-06450 filed 12/17/1999); Ezell Brown v. Interactive Flight Technologies Inc. (PA-E 2:99-cv-06497 filed 12/21/1999); Burghardt v. Swissair Transport Co. (PA-E 2:99-cv-06537 filed 12/23/1999); Estate of Hoche v. Swissair Transport Co. (PA-E 2:00-cv-00011 filed 01/03/2000); Beckett v. Sair Group (PA-E 2:00-cv-00130 filed 01/10/2000); Estate of Springer v. Sair Group (PA-E 2:00-cv-00155 filed 01/11/2000); Mallin v. Sair Group (PA-E 2:00-cv-00330 filed 01/18/2000); Viollet v. McDonnell Douglas Corp. (PA-E 2:00-cv-00418 filed 01/24/2000); Viollet v. McDonnell Douglas Corp. (PA-E 2:00-cv-00419 filed 01/24/2000); Noceto v. McDonnell Douglas Corp. (PA-E 2:00-cv-00420 filed 01/24/2000); Viollet v. McDonnell Douglas Corp. (PA-E 2:00-cv-00421 filed 01/24/2000); Kennett v. Interactive Flight Technologies Inc. (PA-E 2:00-cv-00422 filed 01/24/2000); Diasparra v. Interactive Flight Technologies Inc. (PA-E 2:00-cv-00694 filed 02/08/2000); Sutton v. Interactive Flight Technologies Inc. (PA-E 2:00-cv-00695 filed 02/08/2000); O'Gara v. Sair Group (PA-E 2:00-cv-00912 filed 02/18/2000); Rizza v. Interactive Flight Technologies Inc. (PA-E 2:00-cv-01417 filed 03/20/2000); Estate of Milne v. Swissair (PA-E 2:00-cv-02258 filed 05/01/2000); Estate of Ezell v. E.I. Dupont de Nemours and Co. (PA-E 2:00-cv-02259 filed 05/01/2000); Estate of Hoche v. Swissair Transport Co. (PA-E 2:00-cv-02623 filed 05/23/2000); Estate of Ikonomopoulou v. Interactive Flight Technologies Inc. (PA-E 2:00-cv-02676 filed 05/25/2000); Rizza v. Santa Barbara Aerospace Inc. (PA-E 2:00-cv-03558 filed 07/13/2000); Estate of Coppola v. Swissair Transport Co. (PA-E 2:00-cv-04105 filed 08/14/2000); Kennett v. Santa Barbara Aerospace Inc. (PA-E 2:00-cv-05281 filed 10/16/2000); Estate of Donaldson v. Swissair Transport Co. (PA-E 2:00-cv-05495 filed 10/30/2000); Froghi v. Swissair Transport Co. (PA-E 2:00-cv-05497 filed 10/30/2000); Gabourdes v. Sair Group (PA-E 2:00-cv-05499 filed 10/30/2000); Scarboro v. Swissair (PA-E 2:00-cv-05526 filed 10/31/2000); Makarevitch v. Swissair (PA-E 2:00-cv-05527 filed 10/31/2000); Guely v. Swissair (PA-E 2:00-cv-05528 filed 10/31/2000); Rizza v. E.I. Dupont de Nemours and Co. (PA-E 2:00-cv-05557 filed 11/01/2000); Estate of Gerety v. Santa Barbara Aerospace Inc. (PA-E 2:00-cv-05857 filed 11/16/2000); Coop Generale d'Assurances SA v. Swissair (PA-E 2:00-cv-06392 filed 12/18/2000); Lamotta v. Santa Barbara Aerospace Inc. (PA-E 2:01-cv-00092 filed 01/08/2001); Coop Generale d'Assurances SA v. McDonnell Douglas Corp. (PA-E 2:01-cv-00200 filed 01/16/2001); Hoche v.

Monument Builders of Pennsylvania Inc. v. Catholic Cemeteries Association (PA-E 2:99-cv-02030 filed 04/22/1999).

Antitrust case involving restraint of trade and conspiracy to fix prices for monuments and markers. A settlement agreement was filed, but the amount of the settlement was sealed. The plaintiff filed a motion to enforce the settlement agreement.

HomeNexus Inc. v. DirectWeb Inc. (PA-E 2:99-cv-02316 filed 05/05/1999).

Trademark case involving theft and execution of the plaintiff's business plan for a computer and Internet service. The plaintiff's motion to dismiss the case with prejudice pursuant to a settlement agreement was sealed.

Valitek Inc. v. Hewlett-Packard Co. (PA-E 2:99-cv-03024 filed 06/15/1999).

Copyright case in which the entire record was sealed. The court granted a joint motion to seal the record of the negotiated settlement.

Talus v. D&L Co. (PA-E 2:99-cv-03386 filed 07/02/1999).

Product liability action by the parents of an eight-year-old boy who suffered an eye injury while playing with a '"Stomp Rocket" toy. A sealed settlement agreement was filed. An order approving the petition to compromise the minor's action reveals a settlement amount of $400,000.

Spaziani v. Chester County Hospital (PA-E 2:99-cv-04172 filed 08/18/1999).

Medical malpractice case involving the premature birth of the plaintiffs' child, which resulted from a misdiagnosis of an infection. The plaintiffs' son was born with cerebral palsy. The plaintiffs' motion to approve the settlement was sealed.

Mahoney v. Daisy Manufacturing Co. (PA-E 2:99-cv-04286 filed 08/25/1999).

Product liability action by the parents of a 16-year-old boy who suffered a severe brain injury when he was shot in the head with an air gun by a friend. The plaintiffs alleged that the air gun was defective because a BB became lodged in the internal parts of the gun and allowed numerous rounds of air to be fired, which caused the user to erroneously believe the gun was empty. A third-party complaint was filed by the manufacturer and distributor against the person who fired the air gun. The petition to seal court documents related to the settlement was granted.

Dunkin' Donuts Inc. v. Shree Dev Donut LLC (PA-E 2:99-cv-06655 filed 12/30/1999).

Trademark case involving continued use of the "Dunkin' Donuts" mark after termination of a franchise agreement. The consent judgment was sealed.

Holdsworth v. Allegheny University Medical Practices at Hahnemann Hospital (PA-E 2:00-cv-02443 filed 05/11/2000).

ERISA and wrongful death action involving delay and denial of benefits to provide the plaintiff's decedent minor daughter with health care services to treat her cancer. The court order approving the settlement was filed under seal.

Villanova University v. Villanova Alumni Education Foundation Inc. (PA-E 2:00-cv-03007 filed 06/13/2000).

Trademark case concerning an affiliation agreement. The tape of the settlement conference and the order dismissing the case were sealed.

Travelers Casualty & Surety Co. v. Church of the Lord Jesus Christ of the Apostolic Faith (PA-E 2:00-cv-03320 filed 06/29/2000).

Insurance case against a church, its officers, and other individuals. The entire case file is sealed. The last document filed was a stipulation of dismissal.

Shumake v. Toyota Motor Sales USA Inc. (PA-E 2:00-cv-03427 filed 07/06/2000).

Motor vehicle product liability action by the parents of a man who died in a car crash when the restraint system failed in a 1994 Toyota Tercel in which he was a passenger. A sealed settlement agreement was filed.

InterDigital Communications Corp. v. Lomp (PA-E 2:00-cv-04579 filed 09/11/2000).

Labor litigation case involving breach of an employment contract. The plaintiff filed documents under seal three weeks before the case was dismissed as settled. A sealed settlement agreement apparently was filed.

Santa Barbara Aerospace Inc. (PA-E 2:01-cv-01722 filed 04/09/2001).

Sealed Settlement Agreements

Dusewicz v. National Casualty Co. (PA-E 2:00-cv-04625 filed 09/12/2000).

Insurance action by a mother and father and their four minor children against their health insurance company for denying coverage of the minors' Lyme disease. The plaintiffs' petition to settle or compromise a minor's action was sealed.

Ford Motor Co. v. Cattco Marketing (PA-E 2:00-cv-04672 filed 09/14/2000).

Trademark case involving infringement of the "MOTORCRAFT" mark in the defendant's Web site domain name. A sealed settlement agreement was filed.

Windowwizards Inc. v. Window Wholesalers Inc. (PA-E 2:00-cv-04679 filed 09/14/2000).

Trademark case alleging unfair competition in making disparaging remarks about the plaintiff's window product to potential customers. Three months after the case was dismissed, a sealed consent order was filed.

Coles v. University of Pennsylvania Health System (PA-E 2:00-cv-05178 filed 10/12/2000).

Employment action by an African-American female dietetic assistant based on sex, race, and age discrimination. One day before the case was dismissed, the record of a status conference was sealed.

Pilotti v. Bell (PA-E 2:00-cv-05695 filed 11/08/2000).

Employment action by a sales assistant against her former employer for sexual harassment. The plaintiff filed a sealed motion to enforce the settlement agreement. Three days later the plaintiff withdrew the motion.

Estate of Bailey v. NBC News Productions Inc. (PA-E 2:00-cv-05717 filed 11/09/2000).

Product liability action by the estate of a man who died when he fell 100 feet while installing a cable on a television tower. A third-party complaint was brought against the manufacturer of the clip used by the decedent to attach his harness to the hoisting line. The petition for approval of settlement and the order approving settlement were sealed.

Booth v. Grand Pacific Finance Corp. (PA-E 2:00-cv-06034 filed 11/28/2000).

Contract case involving breach of a graphic design and printing services contract. The plaintiff filed a sealed motion to enforce the settlement agreement. The court denied the motion as moot, but the order contained settlement terms that were crossed out.

Susavage v. Bucks County Schools Intermediate Unit No. 22 (PA-E 2:00-cv-06217 filed 12/08/2000).

Civil rights action by the parents of a handicapped child who died from injuries sustained when she was strangled by an ill-fitting safety harness while being transported to school. The tape of the settlement conference was sealed.

McCollins v. Woods Services Inc. (PA-E 2:01-cv-00110 filed 01/08/2001).

Personal injury action by a woman and her 12-year-old son, who was sexually abused by a 15-year-old student at a private residential school for the mentally retarded. The plaintiffs' petition to approve the settlement and the order approving settlement were sealed.

Travelers Indemnity Co. v. Schmalz (PA-E 2:01-cv-00361 filed 01/24/2001).

Contract action involving breach of an employment agreement and misappropriation of trade secrets. A sealed settlement agreement was filed.

Millard v. Nasoya Foods Inc. (PA-E 2:01-cv-01313 filed 03/20/2001).

Motor vehicle personal injury action by the estate of a man who was burned to death when the defendants' tractor-trailer crashed into his car. A sealed settlement agreement was filed.

Slaymaker v. Rival Co. (PA-E 2:01-cv-03912 filed 08/02/2001).

Product liability action by the father of an 11-month-old boy who sustained serious burns as a result of coming in contact with hot oil spilled from the defendant's multi-cooker. The plaintiff alleged that the cooker had a design defect that allowed it to slide off of surfaces. A sealed settlement agreement was filed.

Eisen v. Temple University (PA-E 2:01-cv-04165 filed 08/15/2001).

Employment action by a tenured mathematics professor against his former employers, who fired

him when he refused to pass all students in a remedial math class. The same day that the case was closed, a court order, presumably containing terms of the settlement, was sealed. The defendant filed a settlement statement the same day, stating that the plaintiff did not have evidence to support grade inflation.

Harris v. Rohm & Haas Co. (PA-E 2:01-cv-05184 filed 10/12/2001).

Employment action by an African-American woman alleging race discrimination with respect to promotion and compensation. The defendant filed a sealed motion to enforce the settlement agreement. The plaintiff's response to the motion also was sealed. The court granted the defendant's motion to enforce.

Burgee v. Vision Quest Ltd. (PA-E 2:01-cv-05948 filed 11/28/2001).

Civil rights action by an African-American treatment family advocate, who suffered from post-traumatic stress disorder, against his former employer for discrimination based on age and disability. A sealed settlement agreement was filed.

Ely v. Doylestown Lumber and Millwork Inc. (PA-E 2:02-cv-00423 filed 01/25/2002).

Employment action by a delivery driver against his former employer for age discrimination. A sealed settlement agreement was filed.

Medina v. Rose Art Industries Inc. (PA-E 2:02-cv-01864 filed 04/05/2002).

Product liability action by the parents of a minor child who suffered burns while playing with a "Creative Case Soap Making" art project. The plaintiffs' motion to settle and compromise the minor's action was sealed.

Dougherty v. Dougherty (PA-E 2:02-cv-06683 filed 08/09/2002).

Civil rights action by the mother of a 13-year-old boy who was grabbed by a police officer while walking home, verbally assaulted, beaten, and arrested for disorderly conduct and resisting arrest. The petition to settle or compromise the minor's claims was sealed.

Middle District of Pennsylvania

Court documents are unsealed two years after the case is over, unless good cause is shown. M.D. Penn. L.R. 79.5.

Statistics: 4,678 cases in termination cohort; 520 docket sheets (11%) have the word "seal" in them; 25 complete docket sheets (0.53%) were reviewed; actual documents were examined for 12 cases (0.26%); 10 cases (0.21%) appear to have sealed settlement agreements.

Cases with Sealed Settlement Agreements

Could Inc. v. A & M Battery & Tire Service (PA-M 3:91-cv-01714 filed 12/23/1991).

Environmental action seeking declaratory judgment under CERCLA for causing pollution on the plaintiff's property. After a bench trial the court ordered that the defendants were responsible for 25% of the cleanup costs. The plaintiff filed two motions to enforce two settlement agreements with three of the defendants. The two settlement agreements were filed as sealed attachments to the motion. One motion was withdrawn, and the court ordered that the second settlement agreement could not be enforced because the attorney did not have the authority to settle. The plaintiff was awarded approximately $10 million by the remaining forty-two defendants. The plaintiff filed three sealed motions to enforce the settlement agreement against three of the remaining defendants.

Havenstrite v. Toyota Motor Sales USA Inc. (PA-M 3:93-cv-00120 filed 01/26/1993).

Personal injury action that was consolidated with two other cases. The lead case involved an employee of a battery-crushing and lead-processing facility who suffered health problems when exposed to excessive quantities of lead. After the cases were consolidated all filings occurred in the lead case. The two companion cases involved families with residences near the processing facility. After an eight-day bench trial, the court awarded $130,000 to four children who suffered from learning disabilities as a result of lead exposure. The plaintiffs' claims of diminution of property value and loss of use and enjoyment were dismissed. Two other plaintiffs were awarded $145,000 for injuries caused by lead exposure. The approval of a partial distribution of funds was sealed.

Doe v. Chamberlin (PA-M 3:97-cv-01765 filed 11/18/1997).

Personal injury action by the parents of minors ages 15 and 16 who were photographed by the defendants in sexually suggestive positions. The plaintiffs filed a sealed motion to enforce the set-

tlement agreement. The court granted the motion to enforce a settlement amount of $350,000. The transcript of the hearing to enforce was sealed.

Van Arsdale v. Toyota Motor Sales USA Inc. (PA-M 1:99-cv-02206 filed 12/22/1999).

Product liability action involving the death of a man who suffered head injuries while operating a Toyota fork-lift. A sealed settlement agreement was filed.

First Union National Bank v. Solfanelli (PA-M 3:00-cv-00732 filed 04/21/2000).

Statutory action involving an appeal of a bankruptcy judgment. The defendant had defaulted on a stipulation and security agreement with the plaintiff that was initiated during the defendant's bankruptcy. The plaintiff decided to liquidate stock collateral that the defendant had pledged, but the defendant still owed $1,191,496. The defendant filed an adversary proceeding against the plaintiff, alleging that it violated the agreement, and the court ruled in favor of the defendant and deemed the entire debt satisfied. The same day that the case settled, two sealed documents were filed.

Tessler v. Losch Plumbing & Heating Inc. (PA-M 3:00-cv-01456 filed 08/14/2000).

Statutory action under the Family and Medical Leave Act by a husband and wife who were wrongfully terminated after they took time off after the birth of their child. The tape of a settlement conference was sealed.

Sampson v. Wayne Memorial Hospital (PA-M 3:00-cv-01581 filed 09/06/2000).

Medical malpractice action by the parents of a minor who was misdiagnosed by the defendants and subsequently lost his right testicle. The plaintiffs' petition to approve distribution of funds was sealed.

Graham Packaging Co. v. Mooney (PA-M 1:00-cv-02027 filed 11/20/2000).

Patent case involving "blown-finish hot fill containers." The last entry on the docket sheet notes that all documents in the case were sealed. A joint sealed settlement agreement was filed.

Bosserman v. Lloyd-Silber Orthopedics Inc. (PA-M 1:01-cv-02288 filed 12/03/2001).

ERISA action by a woman against her former employer for withholding $18,771 in principal from her employee stock ownership trust account. A sealed settlement agreement was filed.

Mizerak v. Webster Trucking Corp. (PA-M 3:02-cv-00277 filed 02/20/2002).

Motor vehicle case in which one defendant's car struck the plaintiffs' van from behind while it was stopped in traffic and then forced it into another lane of a highway, where it was hit by another defendant's tractor-trailer. This accident resulted in the death of the plaintiffs' youngest child, injury to two other minor children, and a traumatic injury that has left the father in a vegetative state. The court granted the plaintiffs' sealed petition to approve the settlement. The order noted that the allocation of $120,000 was to be used for the benefit of the father's medical care.

Western District of Pennsylvania

No relevant local rule.

Statistics: 6,218 cases in termination cohort; 306 docket sheets (4.9%) have the word "seal" in them; 44 complete docket sheets (0.71%) were reviewed; actual documents were examined for 20 cases (0.32%); 16 cases (0.26%) appear to have sealed settlement agreements.

Cases with Sealed Settlement Agreements

Koppers Co. v. Aetna Casualty and Surety Co. (PA-W 2:85-cv-02136 filed 09/16/1985).

Insurance case involving a manufacturing company's coverage for chemical-waste liability. Shortly before trial, the plaintiff settled with most of the insurance companies. At least some of these settlement agreements were confidential and filed under seal. A jury awarded the plaintiff $70,072,341. The court reduced the verdict against the remaining defendants to account for the limits of the insurance policies and the amounts of settlement.

Keystone Powdered Metal Co. v. Borg-Warner Automotive Morse TEC Corp. (PA-W 1:98-cv-00106 filed 03/24/1998).

Contract case involving breach of a confidentiality agreement and a supply agreement. A sealed motion and six sealed documents were filed two days before the case was closed.

SGL Carbon Corp. v. Dupenn Inc. (PA-W 1:98-cv-00231 filed 08/12/1998).

Personal property damage case involving misappropriation of trade secrets, breach of an employment contract, and breach of fiduciary duties. A sealed settlement agreement was filed as an attachment to the stipulation of dismissal. The court retained jurisdiction to enforce the settlement agreement until the conclusion of the terms of the agreement.

CCL Container (Hermitage) Inc. v. Exal Corp. (PA-W 2:98-cv-01786 filed 10/28/1998).

Patent case involving infringement of a "method of forming a metal container having an elongated neck." A joint sealed settlement agreement was filed.

Joseph v. Sears Roebuck & Co. (PA-W 1:99-cv-00013 filed 01/20/1999).

Personal injury action by the parents of a minor who injured her face in the defendant's store when she fell into glass shelving. The plaintiffs' motion for settlement was filed under seal.

T.M. v. Perry (PA-W 2:99-cv-00831 filed 05/27/1999).

Personal injury case involving the sexual abuse of the plaintiffs' 11-year-old granddaughter by her minor cousin while visiting her aunt and uncle over the summer. The plaintiffs' motion for settlement of the minor's claims was filed under seal.

United States ex rel. Diehl v. Three Rivers Family Hospice Inc. (PA-W 2:00-cv-00077 filed 01/12/2000).

Qui tam action under the False Claims Act for fraudulent Medicare billing against providers of rehabilitative medical services. The plaintiff filed a settlement agreement as an attachment to a motion to enforce. Two weeks later the court sealed the motion and the settlement agreement.

Etzel v. General McLane School District (PA-W 1:00-cv-00032 filed 01/28/2000).

Civil rights case involving a middle school student who was suspended from school without a hearing for using the word "kill" in a talent show video. The parties filed a sealed motion for approval of settlement. One month after the case was dismissed, the court granted a newspaper's request to unseal the motion. The motion included a letter to the student's parents stating that the school district was "satisfied that violent action was not intended" by the plaintiff. The motion for approval did not disclose any other terms of settlement.

Southwest Recreational Industries Inc. v. Turf USA Installations Inc. (PA-W 2:00-cv-00342 filed 02/23/2000).

Designated a slander case, this case is really an unfair competition case that includes causes of action for commercial disparagement and defamation and involves a synthetic sports surface product. A sealed settlement agreement was filed.

Angelo v. General Motors Corp. (PA-W 2:00-cv-00871 filed 05/04/2000).

Product liability case. The court granted a joint motion to approve the minor's settlement and seal the record. All documents were sealed.

Benson v. First Energy Nuclear Operating Co. (PA-W 2:00-cv-01101 filed 06/05/2000).

Designated an employment discrimination case, this is really a class action under the Fair Labor Standards Act by power plant employees for failure to pay overtime wages. A sealed settlement agreement was filed.

Aguirre v. Alamo Rent-A-Car Inc. (PA-W 2:00-cv-01374 filed 07/14/2000).

Motor vehicle action by a woman injured in an accident. The transcripts from two settlement conferences were sealed. The case was dismissed as settled twelve days after the second sealed settlement conference.

Performance Health Inc. v. Kustomer Kinetics Inc. (PA-W 2:00-cv-02323 filed 11/22/2000).

Trademark infringement case involving "analgesic balm" products. The defendant's motion to enforce the settlement agreement was sealed.

Estate of Grannis v. City of New Castle (PA-W 2:01-cv-00033 filed 01/04/2001).

Civil rights action by the estate of a man who committed suicide while being held for public drunkenness and disorderly conduct at the defendant's jail. In the order closing the case, the court noted that the case was settled and ordered the parties to file a motion to approve settlement. Ten days later the plaintiff filed a sealed motion.

Smith v. City of Monessen (PA-W 2:01-cv-00744 filed 04/26/2001).

Civil rights case in which the police removed an 11-year-old from the custody of her mother and did not allow her mother to accompany her daughter to the hospital. The police released the minor into the custody of a non-family member, who sexually abused her. The court denied the defendant's sealed motion to enforce the settlement agreement. The joint motion for dismissal noted that the minor would receive $359.71 per month for ten years after she turned 18. The settlement also provided for $4,000 for future burial of the mother and $9,200 for attorney fees.

APT Acquisition Corp. v. Southwest Recreational Industries Inc. (PA-W 2:01-cv-01893 filed 10/10/2001).

Designated a patent case, this case is really a trademark infringement case involving a polyurethane product. A sealed consent judgment was filed.

District of Puerto Rico

No relevant local rule.

Statistics: 3,562 cases in termination cohort; 223 docket sheets (6.3%) have the word "seal" in them; 159 complete docket sheets (4.5%) were reviewed; actual documents were examined for 120 cases (3.4%); 117 cases (3.3%) appear to have sealed settlement agreements.

Cases with Sealed Settlement Agreements

Generadora de Electricidad del Caribe Inc. v. Foster Wheeler Corp. (PR 3:94-cv-01405 filed 03/29/1994).

Designated a personal injury action, this is really a contract action concerning a partnership to construct a $200 million electric plant in the Dominican Republic. In their third amended complaint, the plaintiffs added a claim for development of stress-related lupus by one of the principals. Several defendants filed counterclaims under seal. The case was dismissed pursuant to a sealed settlement agreement.

Guillemard Noble v. Sánchez Rodríguez (PR 3:94-cv-01961 filed 07/14/1994).

Motor vehicle action for permanent brain injury by a passenger in an automobile crash that killed the driver. The plaintiff alleged that two defendants were racing their cars, and one of them hit a five-foot-tall mound of dirt, constructed by other defendants, causing the car to fly and hit the car in which the plaintiff was riding. The dirt mound was created in excavation for a warehouse's water pipe, and the plaintiff named as defendants various entities associated with the excavation. The defendants filed cross-claims against each other. The plaintiff settled with all defendants pursuant to sealed settlement agreements, but the court was asked to decide whether the warehouse owners' insurance policy covered the action. The court decided that it did not, and the warehouse owners appealed. The court of appeals affirmed. An unsealed order discloses that the warehouse owners' share of settlement obligations was $126,500.

Serrano Moran v. Toledo Davila (PR 3:96-cv-01383 filed 03/29/1996).

Civil rights action by the parents of a mentally impaired man who was beaten by the police during an arrest and later died of his injuries. The medical malpractice claims against the hospital were dismissed. A sealed settlement agreement was filed. The court granted a motion for disbursement of funds in the amount of $40,103 to the plaintiffs.

Landrau Romero v. Banco Popular de Puerto Rico (PR 3:96-cv-01470 filed 04/16/1996).

Employment action for wrongful constructive termination because of race. The case was dismissed pursuant to a sealed settlement agreement approved by the court.

Dominguez Cruz v. Suttle Caribe Inc. (PR 3:96-cv-01611 filed 05/20/1996).

Statutory action for wrongful termination because of age. The court granted summary judgment to the defendant on the federal claims and dismissed the state claims without prejudice, but the court of appeals reversed the summary judgment. The case settled on the eve of trial, but a dispute arose over the terms of settlement, such as confidentiality. An unsealed "motion in further support of motion for entry of judgment" discloses the amount of settlement to be $250,000. The parties resolved their dispute by sealed stipulation.

Cines Vega v. Crowley American Transport Inc. (PR 3:96-cv-01638 filed 05/24/1996).

Motor vehicle action against the owner of a trailer hauled by a trucker who sped through a red light and collided with a car, killing the car's driver and three passengers and injuring the fourth passenger. The plaintiffs included the injured passenger and many relatives of the deceased and injured, including minors. The trailer's owner

filed a third-party complaint against the driver, the driver's employer, the truck's owner, the consignee of the cargo, insurance companies, and conjugal partnerships of the individuals. Cross-claims and third-party complaints also were filed. The case was consolidated with three other related actions. A sealed settlement agreement was filed. Unsealed documents indicate that the entire litigation included several half-million-dollar settlements.

Herrera v. Ports Authority of the Commonwealth of Puerto Rico (PR 3:96-cv-01743 filed 06/19/1996).

Employment action by a chief of purchases clerk and her minor children against her former employer for race and political discrimination. A sealed settlement agreement was filed.

Arrivi Cros v. Torres Rivera (PR 3:96-cv-02216 filed 10/07/1996).

Employment action by attorneys against the president of the Industrial Commission of Puerto Rico for wrongful demotion and termination because of political party affiliation. The case was dismissed pursuant to sealed settlement agreements with each plaintiff. The plaintiffs subsequently filed a motion to show cause why settlement payments were not made on time, and just over two weeks later the defendant deposited a check for $125,000 with the court. The plaintiffs then filed an unsealed motion for disbursement of funds, specifying individual settlements of $53,000, $40,000, and $32,000. The following month the court issued checks for $53,175.08, $40,133.39, and $32,108.40.

Saavedra Rodriguez v. Enron Corp. (PR 3:96-cv-02443 filed 11/22/1996).

Personal injury action consolidated with over 500 other cases and including over 1,500 plaintiffs against a gas company for deaths and injuries resulting from a massive gas explosion. Additional actions were filed in commonwealth court. The litigation is sometimes referred to as the Rio Piedras Explosion Litigation. The 632-page docket sheet catalogs 3,685 documents. Over the course of the litigation, there were numerous settlements, and there appear to be some settlement agreements filed under seal. It appears that settlement amounts sum to several dozen million dollars. Some settlement payments were jeopardized by Enron's bankruptcy.

San Antonio Mendoza v. WMS Industries (PR 3:97-cv-01717 filed 05/07/1997).

Labor litigation by three casino employees against their former employer for age discrimination and failure to pay minimum wage. A sealed settlement agreement was filed. Eleven months later the court granted a disbursement of funds in the amount of $28,083 to one plaintiff and her minor child.

González Sampayo v. Fuentes Agostini (PR 3:97-cv-01784 filed 05/20/1997).

Civil rights action by two special agents of Puerto Rico's justice department against the department for interfering with their investigation of a senator's drug trafficking and other organized crime involvement. The case was dismissed pursuant to a sealed settlement agreement. An unsealed motion for consignment states that the department of justice paid $50,000 in settlement. The court subsequently released $50,193.67.

Rivera Rodgríguez v. Frito Lay Snacks Caribbean Inc. (PR 3:97-cv-01825 filed 05/28/1997).

Employment action for wrongful termination of a human resources director. The plaintiff alleged that after the defendant's Puerto Rico operation came under the control of the defendant's Mexican office, he was terminated because he was over 40 (he was 46), he was Puerto Rican, and he had a history of chronic asthma and lymphoma. The case was dismissed pursuant to a sealed settlement agreement.

Caribe Shipping Co. v. Puerto Rico Ports Authority (PR 3:97-cv-01837 filed 05/30/1997).

Bankruptcy withdrawal. A shipping company filed for bankruptcy and sought an injunction against eviction by the port authority. The port authority filed a third-party action against the shipping company's principals for $1.2 million in back rent, penalties, and interest. The adversary actions were withdrawn to the district court. The case was dismissed pursuant to a sealed settlement agreement.

Howe Investment Ltd. v. Perez & Compania de Puerto Rico Inc. (PR 3:97-cv-01864 filed 06/05/1997).

Contract action for $1.5 million unpaid in an agreement to buy stevedoring services stock options for $4,250,000. The case was dismissed pursuant to a sealed settlement agreement.

Valles Santiago v. General Motors Corp. (PR 3:97-cv-02209 filed 08/12/1997).

Motor vehicle product liability case against the manufacturer and designer of a Chevrolet van. The plaintiffs' van was parked in the emergency lane on a roadway and was struck behind by another car, which caused the fuel tank to explode. Two children died, and three other children and three adults were seriously burned. The plaintiffs alleged a failure to warn and that the van had a faulty fuel system, bumper, and chassis because of manufacturing and design defects. A sealed settlement agreement was filed.

Pandolfi de Rinaldis v. Varela Havona (PR 3:97-cv-02699 filed 11/18/1997).

Civil rights action by an executive director for wrongful termination after he denounced his coworkers' irregular use of council funds. A sealed settlement agreement was filed. The court granted disbursement of funds in the amount of $27,586 to the plaintiff.

Mejías Miranda v. BBII Acquisition Corp. (PR 3:98-cv-01107 filed 02/06/1998).

Labor litigation alleging wrongful termination following pregnancy complications. The case was dismissed pursuant to a sealed settlement agreement approved by the court.

Colón v. Hospital Damas Inc. (PR 3:98-cv-01237 filed 03/09/1998).

Medical malpractice action alleging that a patient's treatment for a sore shoulder ultimately resulted in extensive brain surgery for a nonexistent tumor, which rendered the patient permanently comatose. The plaintiffs were the patient's wife, two minor sons, parents, brother, and sister. The sixteen defendants included physicians and corporate medical service providers. Nine defendants settled for $4,000 each. After additional litigation, the remaining defendants settled for an additional $2,250,000 total, and a sealed settlement agreement showing how much each defendant contributed was filed.

Batiste Perez v. Cruz (PR 3:98-cv-01267 filed 03/16/1998).

Civil rights action by three municipal officials against the new municipal administration for politically motivated curtailments of responsibility. The case was dismissed pursuant to a sealed settlement agreement.

Portalatin v. Feliciano de Melecio (PR 3:98-cv-01336 filed 04/01/1998).

Employment action for wrongful constructive discharge because of party affiliation. The case was dismissed pursuant to a sealed settlement agreement.

Rosado v. Puerto Rico Pepsi Cola Bottling Co. (PR 3:98-cv-01384 filed 04/09/1998).

Contract action alleging that the defendant employer induced the plaintiff to transfer from the employer's operations in Puerto Rico to operations in Brazil without disclosing that he would lose substantial employment benefits. The case was dismissed pursuant to a sealed settlement agreement.

Ramírez Cancel v. Loomis Fargo and Co. (PR 3:98-cv-01574 filed 05/27/1998).

Civil rights action for the wrongful identification of five adults and one minor as suspects in an armed robbery. The case was dismissed pursuant to a sealed settlement agreement.

FAC Inc. v. Cooperativa de Seguros de Vida (PR 3:98-cv-01592 filed 05/29/1998).

RICO action by a company with the responsibility for filing Medicare claims on behalf of Puerto Rico's health department against a company with the responsibility for reviewing such claims. The plaintiff alleged that the defendant sought illegal kickbacks for approving the claims. The defendants filed a counterclaim, alleging defamation. The case was dismissed as settled, and the plaintiff filed a sealed motion to enforce it. The matter was resolved, and the plaintiff's principals were paid $1,521,416.58 by docketed check.

Madre v. Ortiz Ramos (PR 3:98-cv-01594 filed 06/01/1998).

Civil rights action by a mother and her two daughters, age four and six, for wrongful removal of the daughters to foster care, where they were sexually abused. All plaintiffs appeared by pseudonyms. The case was dismissed pursuant to a sealed settlement agreement. Docketed attorney fees and expenses were $106,933.92.

Ramos Christian v. Ochoa Fertilizer Co. (PR 3:98-cv-01987 filed 08/28/1998).

Employment action by an administrative manager for wrongful termination. The plaintiffs included the employee, his wife, and their children. The

case settled on the morning scheduled for trial, and the court approved a sealed settlement agreement.

Colón Mulero v. Mitsubishi Motors Corp. (PR 3:98-cv-02090 filed 09/29/1998).

Motor vehicle product liability action for injuries suffered when a Mitsubishi Expo's air bags deployed in a low-speed head-on collision. A month-old baby riding in her mother's arms became a quadriplegic. The mother also was injured. A second child and the woman's mother also were in the accident and were plaintiffs in the case. The case was dismissed pursuant to a sealed settlement agreement approved by the court.

Alvarado Rivera v. American Airlines Inc. (PR 3:98-cv-02120; filed 10/06/1998).

Airplane case consisting of twelve cases (three from the Virgin Islands) that were transferred by the MDL Panel to the District of Puerto Rico as MDL 1284. This case became the lead case and was filed against the airline and engine manufacturer of a plane that was forced to make an emergency landing after the engine caught fire. The plaintiffs were injured while exiting the plane using the inflatable ramps. A sealed stipulation was filed to approve the settlement agreements of minor plaintiffs in two member cases.

Vázquez Casas v. Commercial Development Administration (PR 3:98-cv-02198 filed 10/22/1998).

Designated a civil rights prisoner petition, this is really an employment sex discrimination action by the former director of the Commonwealth of Puerto Rico's Commercial Development Administration's Center in Caguas for wrongful termination. The case was dismissed pursuant to a sealed settlement agreement, and the plaintiff was paid $85,000, according to the docket sheet.

Quinones González v. Loomis Fargo & Co. (PR 3:98-cv-02248 filed 11/04/1998).

Labor–management relations action by an armored truck driver against his union for breach of a collective bargaining agreement by failing to request arbitration or appeal his dismissal. A sealed settlement agreement was filed.

Meléndez Arroyo v. Cutler-Hammer de P.R. Co. (PR 3:98-cv-02395 filed 12/14/1998).

Labor litigation by a 58-year-old accountant against her former employer for age discrimination. The district court granted the defendant summary judgment, but the court of appeals reversed. The case subsequently was dismissed pursuant to a sealed judgment, which was followed by a sealed motion brought jointly by the parties and a sealed order.

Bernabel Díaz v. Detroit Diesel Allison Division (PR 3:99-cv-01002 filed 01/04/1999).

Product liability action by a Coast Guard engineer who lost a thumb and three fingers from his dominant hand while servicing a ship's diesel engine. The case was dismissed as settled, and settlement terms pertaining to payment to a minor dependent were sealed.

Garcia Medina v. Compagnie Generale des Eaux (PR 3:99-cv-01114 filed 02/02/1999).

Designated a civil rights action, this really is an action by a Puerto Rican woman claiming sex and national origin discrimination in employment. The case was dismissed pursuant to a settlement agreement approved and sealed by the court.

Algarin Rodríguez v. Santiago Rivera (PR 3:99-cv-01178 filed 02/17/1999).

Personal injury action by the wife of a man who was killed when a truck carrying chemicals exploded, blowing the truck's doors into her husband's car. The defendants include the truck driver, the owner of the truck, the company that provided maintenance for the truck, the owner of the chemicals being transported, and the owner of the container in which the chemicals were stored. Both the truck driver and the maintenance company filed cross-claims against all other defendants. A sealed settlement agreement was filed. An informative motion by the owner of the chemicals revealed a payment to the plaintiff of $65,000.

Cintrón Parrilla v. Eli Lilly Industries Inc. (PR 3:99-cv-01229 filed 03/05/1999).

ERISA action for disability benefits by a chemist who developed carpal tunnel syndrome and thoracic outlet syndrome. The defendants filed a motion to enforce a settlement agreement, specifying the amount of settlement to be $60,000. The case was dismissed pursuant to a sealed settlement agreement, but the plaintiff filed a letter pro se asking the court's help concerning some settlement terms. The case continues.

Sealed Settlement Agreements

Rios Reyes v. Wackenhut Corrections Corp. (PR 3:99-cv-01306 filed 03/24/1999).

Prisoner civil rights action by an incarcerated former police officer, alleging that the defendants subjected him to disparate and highly restrictive conditions of confinement while in administrative segregation and refused to transfer him to another facility in direct violation of court orders. A sealed settlement agreement was filed. The court granted the motion to disburse $8,500 in funds to the plaintiff.

Ojeda del Rio v. Pfizer Pharmaceuticals Inc. (PR 3:99-cv-01398 filed 04/13/1999).

Designated a personal injury action, this is an employment discrimination action by a chemical plant worker, alleging failure to accommodate his diabetes, ulcers, and carpal tunnel syndrome. The action was dismissed pursuant to a sealed settlement agreement.

Figueroa Rodríguez v. Volkswagen of America Inc. (PR 3:99-cv-01422 filed 04/16/1999).

Motor vehicle product liability action for complications from a fractured arm, which resulted from a Volkswagen Golf's airbag exploding in a fender-bender. The plaintiffs filed a sealed informative motion on September 18, which the court granted "until October 19." The parties filed a stipulation for dismissal on October 3, and the case was dismissed on October 18. The sealed motion probably contained terms of settlement.

Caraballo Rodríguez v. Clark Equipment Co. (PR 3:99-cv-01446 filed 04/26/1999).

Product liability action by two construction workers against the manufacturer of a crane that dropped a four-ton load on their legs, causing each to lose a leg and suffer permanent disabilities in the remaining leg. The case was dismissed by sealed judgment pursuant to a settlement agreement.

Yannello v. Patriot American Hospitality Inc. (PR 3:99-cv-01597 filed 06/01/1999).

Personal injury action for a fractured ankle suffered by the plaintiff when using a Wave Runner personal water craft at a resort. The plaintiff alleged that the injury resulted from improper training for the plaintiff. The plaintiff also alleged improper medical treatment of the ankle. The action was dismissed pursuant to a sealed settlement agreement. After the case was closed, the plaintiff filed a motion to seize assets of the renter of the Wave Runner for nonpayment of its $15,000 (12%) settlement contribution. (This implies that the total amount of settlement was $125,000.) The defendant paid $12,500 of the amount owed, and the court subsequently issued a writ of attachment for the remaining amount due.

Santiago Marrero v. Laboy Alvarado (PR 3:99-cv-01601 filed 06/02/1999).

Civil rights action for the group rape of a 17-year-old pretrial detainee who was improperly housed with young adults. The minor appeared in court papers by his initials; his parents appeared by their full names. The case was dismissed pursuant to a sealed settlement agreement.

Muniz Suffront v. Bidot de Jesus (PR 3:99-cv-01616 filed 06/04/1999).

Civil rights prisoner petition for inadequate medical care. After jury selection, the case was dismissed pursuant to a sealed settlement agreement.

Hernández Alfonso v. San Juan Motors Co. (PR 3:99-cv-01620 filed 06/04/1999).

Employment action by a salesman against his former employer for age discrimination. A sealed settlement agreement was filed.

Lorenzo Carrero v. Caribbean Refrescos Inc. (PR 3:99-cv-01708 filed 06/25/1999).

Employment action for wrongful termination and failure to accommodate foot pain arising from psoriasis and psoriatic arthritis. The case was dismissed pursuant to a sealed judgment incorporating terms of settlement.

Microsoft Corp. v. Computer Shack Inc. (PR 3:99-cv-01757 filed 07/06/1999).

Copyright case for unlawful distribution and sale of counterfeit computer programs. The complaint was temporarily sealed. The court awarded the plaintiff a partial judgment of $9,354. A sealed settlement agreement was filed.

Majewska v. Bared & Sons Inc. (PR 3:99-cv-01770 filed 07/08/1999).

Employment action by a jewelry salesperson for sexual harassment. The case was dismissed pursuant to a sealed settlement agreement approved by the court.

Cruz Jiménez v. Mueblerías Delgado Inc. (PR 3:99-cv-01792 filed 07/14/1999).

ERISA action for failure to notify the plaintiff of his COBRA rights upon his termination. The case was dismissed pursuant to a sealed settlement agreement.

Carl v. Cohen (PR 3:99-cv-01810 filed 07/19/1999).

Employment action by a naval base elementary school teacher for the school's refusal to administer prescribed injections to alleviate the teacher's periodic severe allergic reactions. The case was dismissed pursuant to a sealed settlement agreement. The Defense Department's unsealed notice of satisfaction of judgment discloses that the plaintiff received $255,334 and her attorneys received $124,666.

Rosário Rodríguez v. Trans Union de Puerto Rico Inc. (PR 3:99-cv-01819 filed 07/21/1999).

Designated a personal injury action, this is an action against two credit report services for damages arising from identity theft. Sealed documents were filed after a motion to enforce a settlement agreement and a stipulation for entry of judgment. The case was dismissed pursuant to a private settlement agreement "to remain under seal."

Ferretería Re-Ace Inc. v. Heil Environmental Industries Ltd. (PR 3:99-cv-01820 filed 07/21/1999).

Contract action concerning distribution of refuse-collection products. The case was dismissed pursuant to a sealed settlement agreement.

López Rivera v. Ramos (PR 3:99-cv-01829 filed 07/23/1999).

Personal injury case alleging that the defendant, who was acting as a medical expert in another personal injury case, performed a medical examination on the plaintiffs that included offensive touching of private body parts. The defendant filed a third-party complaint against his medical malpractice insurer. A sealed settlement agreement was filed.

Carmona Ríos v. Aramark Corp. (PR 3:99-cv-01985 filed 09/01/1999).

Labor litigation for wrongful termination of a food services director because of age. The case was dismissed pursuant to a sealed settlement agreement. An unsealed joint information motion of parties' settlement efforts states that the settlement conference judge recommended a settlement amount between $130,000 and $140,000.

Fernández Martínez v. Citibank NA (PR 3:99-cv-02009 filed 09/10/1999).

Civil rights action by an account executive and her minor daughter against her former employer for discrimination based on her physical disabilities. A sealed settlement agreement was filed.

Rodríguez v. First Hospital Panamericano Inc. (PR 3:99-cv-02019 filed 09/13/1999).

Employment action under the Americans with Disabilities Act for failure to hire the plaintiff as a nursing director because of her lupus. The case was dismissed pursuant to a sealed settlement agreement.

Mendoza v. Hospital Doctor's Center of Manati (PR 3:99-cv-02027 filed 09/14/1999).

Medical malpractice action by the estate of a woman, including her minor child, who died from complications following an improper intubation during a Caesarian section. The doctor's insurance company filed a third-party complaint seeking reimbursement of any payments made to the plaintiff. A sealed settlement agreement was filed.

Nuñez González v. United Parcel Service Inc. (PR 3:99-cv-02060 filed 09/22/1999).

Employment action by a black Dominican UPS driver for race and national origin discrimination. The case was dismissed pursuant to a sealed settlement agreement approved by the court.

Baez v. Puerto Rico Electrical Power Authority (PR 3:99-cv-02139 filed 10/07/1999).

Employment action by an electrician assistant for wrongful failure to promote him to a managerial position because of his political affiliation. The case was dismissed pursuant to a sealed settlement agreement.

Cruz Montes v. Cooperativa de Seguros de Vida (PR 3:99-cv-02158 filed 10/14/1999).

Employment action for sexual harassment. The case was dismissed pursuant to a sealed settlement agreement.

Rosario Zayas v. Klosterman Baking Co. (PR 3:99-cv-02246 filed 11/10/1999).

Employment action by a maintenance worker for sexual harassment by her supervisor. On the third day of a jury trial, the case was dismissed pursuant to a sealed settlement agreement.

Guerrero Torres v. Clean Harbors Inc. (PR 3:99-cv-02290 filed 11/24/1999).

Designated a civil rights action, this really is an action for employment discrimination on the basis of sex and pregnancy. The case settled just after the jury was impaneled and sworn. After the case was dismissed, the plaintiff filed a sealed motion for execution of settlement. The defendant's unsealed response and the plaintiff's unsealed reply show a dispute over confidentiality of the settlement. The defendant claimed that the plaintiff agreed to confidentiality, and the plaintiff claimed that she did not. The dispute apparently was resolved by the parties.

Ramos Girald v. Compresores y Equipos Inc. (PR 3:99-cv-02308 filed 12/02/1999).

Designated a federal employers' liability action, this is an employment action by a billing clerk for wrongful termination because of age. The case was dismissed pursuant to a sealed settlement agreement.

Durieux Rodríguez v. Toledo (PR 3:99-cv-02344 filed 12/10/1999).

Civil rights action against police officers for a group beating. The defendants claimed that the beating was a figment of the plaintiff's imagination, and alleged that his severe facial injuries resulted from a motorcycle accident. The case was dismissed pursuant to a sealed settlement agreement. The docket sheet shows that the plaintiff was paid $150,300.99 and his attorney was paid $50,000.

Mario Rivera v. Yory's Hallmark (PR 3:99-cv-02348 filed 12/13/1999).

Copyright case involving the unauthorized reproduction of artwork. A sealed settlement agreement was filed.

Perez Rodríguez v. Irizarry Cancel (PR 3:99-cv-02407 filed 12/27/1999).

Civil rights action against police officers by a father, mother, and 14-year-old son for the warrantless search of their house and seizure of fifteen firearms and 1,169 munitions. The case was dismissed pursuant to a sealed settlement agreement, but an unsealed motion to issue payment discloses that the amount of settlement was $55,000; the parents received $33,916.67, their attorney received $18,083.33, and the minor received $3,000.

Roman Castro v. Kelly Services Inc. (PR 3:99-cv-02430 filed 12/30/1999).

Sex discrimination employment action for wrongful termination because of pregnancy. The case was dismissed pursuant to a settlement agreement approved and sealed by the court.

Pramco LLC v. San Juan Bay Marina Inc. (PR 3:00-cv-01008 filed 01/03/2000).

Foreclosure action to recover $471,733.73 in principal and $18,043.81 in interest due on a $500,000 Small Business Administration loan. The parties informed the court of settlement at a pretrial hearing, the tape of which the court ordered sealed. In a motion requesting more time to draw up settlement papers, the defendants stated that they had made one payment of $200,000 to the plaintiff and the first monthly installment of $4,500. The settlement agreement was subsequently filed under seal. A dispute over settlement payments arose, and the plaintiff threatened to foreclose on real property security for the loan, but the dispute was resolved and the case dismissed.

Adorno Colón v. Toledo Davila (PR 3:00-cv-01101 filed 01/25/2000).

Civil rights action by a man and his son, who were beaten by the police after the father's car crashed into a police car. A sealed settlement agreement was filed. An informative motion revealed that the plaintiffs received $125,000.

Sierra Reyes v. San Jorge Children's Hospital (PR 3:00-cv-01246 filed 02/25/2000).

Medical malpractice case involving the death of the plaintiffs' 11-year-old son from complications of improper anesthesia. The hospital filed a third-party complaint against the anesthesiologist. A sealed settlement agreement was filed. The motion requesting disbursement of funds notes that the hospital paid $400,000 and the doctors paid $300,000. The decedent's minor brother received $100,000 of the settlement.

Avian Technology International Inc. v. Industrias Avícolas de Puerto Rico Inc. (PR 3:00-cv-01346 filed 03/16/2000).

Contract case involving breach of a purchasing agreement. On the second day of a jury trial, the settlement was placed on the record under seal.

J.A. Rafael Doll Inc. v. Lowell Shoe Inc. (PR 3:00-cv-01352 filed 03/17/2000).

Contract case involving breach of an exclusive sales representative agreement. A sealed settlement agreement was filed.

Díaz Colón v. Pepsi Cola of Puerto Rico Bottling Co. (PR 3:00-cv-01424 filed 04/05/2000).

Employment action by a truck driver against his former employer for age discrimination. The court denied the defendant's motion to enforce the settlement agreement, because the defendant never signed it. Seven weeks later a sealed settlement agreement was filed.

Martínez v. Commonwealth of Puerto Rico (PR 3:00-cv-01468 filed 04/13/2000).

Civil rights action by a firefighter for sexual harassment by her supervisor. A sealed settlement agreement was filed. The court granted the disbursement of funds in the amount of $75,186 to the plaintiff.

Mercado Negrón v. Toledo (PR 3:00-cv-01577 filed 05/09/2000).

Civil rights action by a man for unlawful arrest and conviction for the sale of cocaine against the arresting officers, prosecutor, and a jury member who he claimed knew him. (A key witness later claimed he was coerced.) Claims were dismissed against the prosecutor and juror. A sealed settlement agreement was filed.

Mora Monteserín v. Intel Puerto Rico Ltd. (PR 3:00-cv-01659 filed 05/26/2000).

Employment action by an engineer against his former employer for discrimination based on his age and disability. A sealed settlement agreement was filed.

Rodríguez v. Morales Tefel (PR 3:00-cv-01731 filed 06/09/2000).

Copyright case involving illegal reproduction of the plaintiff's songs. The defendant filed a counterclaim for breach of contract. A sealed settlement agreement was filed.

Martínez Rosado v. Instituto Médico del Norte Inc. (PR 3:00-cv-01748 filed 06/14/2000).

Personal injury and medical malpractice action by the parents of a woman who died of injuries sustained in a car accident after she was transferred from the defendants' hospital to another hospital. A sealed settlement agreement was filed. The court granted a motion for disbursement of funds in the amount of $100,000 to the plaintiffs.

Nazario Robles v. Raytheon Aerospace (PR 3:00-cv-01844 filed 07/10/2000).

Labor litigation for wrongful termination because of age. The case was dismissed pursuant to a sealed settlement agreement.

Dapena Thompson v. Municipality of San Juan (PR 3:00-cv-01928 filed 07/19/2000).

Employment action for wrongful demotion because of political party affiliation. The case was dismissed pursuant to a sealed settlement agreement, but unsealed documents disclose that the plaintiff received $150,807.63 and a job reclassification to the highest pay grade of $4,994.

Correa Cardona v. Municipality of San Juan (PR 3:00-cv-01995 filed 08/07/2000).

Employment action by the director of San Juan's legal aid program, claiming adverse employment actions related to the plaintiff's support of a losing candidate for mayor. The case settled, and the magistrate judge filed a sealed final settlement conference report stating the terms of the agreement. The plaintiff subsequently filed a motion to enforce it. The court responded by dismissing the case pursuant to the sealed agreement. San Juan moved to set aside the judgment on the grounds that settlements by San Juan must be approved by its municipal assembly. The court agreed that legally required approval by the assembly meant that the judgment had to be vacated, but the court sanctioned San Juan $3,500 and sanctioned its attorneys the same amount for raising the issue so late. The court's order disclosed that the disputed settlement agreement called for a raise in the plaintiff's salary from $4,738 per month to $5,488 per month. The case again settled during trial, and a sealed document was filed. An informative motion subsequently disclosed that the assembly approved the settlement at a public hearing.

Ruiz v. Home Depot (PR 3:00-cv-02082 filed 08/24/2000).

Employment action by a service representative who was terminated by the defendant when she requested an accommodation of fixed hours because of her hepatitis C condition. The court granted the joint stipulation for voluntary dismissal. The plaintiff filed a motion pro se to vacate the judgment on the ground that she revoked the settlement agreement. The defendant filed a sealed settlement agreement along with its opposition to the motion to vacate. The court determined that the settlement agreement was not revoked.

Bender v. Loomis Fargos and Co. of Puerto Rico Inc. (PR 3:00-cv-02150 filed 09/08/2000).

Personal injury action for the wrongful death of the plaintiff's 10-year-old daughter when the defendant's out-of-control armored truck collided with a car in which the girl was a passenger. The case was dismissed pursuant to a sealed settlement agreement.

Cruz Osorio v. Northwest Security Management Inc. (PR 3:00-cv-02223 filed 09/21/2000).

Employment action by a security officer for sexual harassment and wrongful termination because of sex and pregnancy. The case was dismissed pursuant to a sealed settlement agreement.

Santos Marín v. Kiewit Construction Co. (PR 3:00-cv-02470 filed 11/17/2000).

Employment action by a field service engineer for wrongful termination because of Puerto Rican national origin. The case was dismissed pursuant to a sealed settlement agreement.

Rosa Flores v. Kiewit Kenny Zachary (PR 3:00-cv-02471 filed 11/17/2000).

Employment action by a construction worker for wrongful termination and harassment because of Puerto Rican national origin. The action was dismissed pursuant to a sealed settlement agreement.

Banco Bilbao Vizcaya Puerto Rico v. Dellsky Realty Corp. (PR 3:00-cv-02540 filed 12/06/2000).

Contract case in which the plaintiff sought reimbursement of money spent on remodeling the defendant's property. A sealed settlement agreement was filed. One month later the court granted the motion to disburse funds in the amount of $403,015 to the plaintiff.

Jorge Rodríguez v. Toledo Davila (PR 3:00-cv-02558 filed 12/11/2000).

Civil rights action by a police officer wrongfully convicted of selling drugs to an undercover officer, who later was found to have participated in other sham prosecutions. The plaintiff served 2.5 years of a 15-year sentence. The case was dismissed pursuant to a sealed settlement agreement approved by the court. An unsealed motion requesting disbursement of funds states that the amount of settlement was $30,000. The docket sheet shows that the plaintiff received a check for $30,090.37.

Sánchez v. Pavarini Merit LP (PR 3:01-cv-01107 filed 01/23/2001).

Employment case filed under the Pregnancy Discrimination Act and ERISA by an administrative assistant against her former employer for terminating her while out on maternity leave and failing to comply with notice requirements concerning continuation of medical plan coverage. A sealed settlement agreement was filed.

Perez Corchado v. Puerto Rico Police Department (PR 3:01-cv-01189 filed 02/14/2001).

Designated a civil rights action, this is an employment action by a policewoman for sexual harassment by her supervisor. The case was dismissed pursuant to a sealed settlement agreement approved by the court. Thereafter the court disbursed $125,188.13.

Estrada Berríos v. Daewoo Motor de Puerto Rico Inc. (PR 3:01-cv-01217 filed 02/21/2001).

Designated a civil rights action, this is an employment action alleging unwanted sexual advances and adverse treatment because of pregnancy. The action was dismissed pursuant to a settlement agreement, which appears to have been filed under seal.

RJO Inc. v. López (PR 3:01-cv-01284 filed 03/09/2001).

Trademark case involving the illegal use of the "Son By Four" mark by a recording company. The defendants filed a counterclaim for breach of contract. A sealed settlement agreement was filed.

Matos Morales v. Searle A. Monsanto Co. (PR 3:01-cv-01346 filed 03/26/2001).

Labor action by a woman who had a job offer withdrawn by a defendant when he found out about her disability. A sealed settlement agreement was filed.

Cortes Jiménez v. González Fernández (PR 3:01-cv-01419 filed 04/09/2001).

Medical malpractice action against doctors who misdiagnosed the plaintiff's medical condition and performed an unnecessary open-heart surgery. A sealed settlement agreement was filed. The court granted the motion for the authorization of funds for the plaintiff's minor child in the amount of $10,000.

Santiago Ramos v. Rodríguez Otero (PR 3:01-cv-01444 filed 04/16/2001).

Employment action by thirty-three employees who did not have their position renewed by the newly elected mayor because of their political affiliations. Two other plaintiffs who retained their position alleged that they were harassed because of their political affiliation. A sealed settlement agreement was filed.

Dupprey Valentín v. K-Mart Corp. (PR 3:01-cv-01540 filed 05/01/2001).

Employment action by a part-time customer service representative against her former employer for terminating her when she revealed she was pregnant. A sealed settlement agreement was filed.

Rivera Requena v. Trailer Bridge Inc. (PR 3:01-cv-01575 filed 05/04/2001).

Employment action by an area manager against his former employer for age discrimination. A sealed settlement agreement was filed.

Quinones v. American Airlines Inc. (PR 3:01-cv-01708 filed 05/30/2001).

Airplane action by a woman who fractured her knee while on the defendant's plane. The settlement conference report was sealed.

Rivera Berríos v. Alvarado (PR 3:01-cv-01763 filed 06/07/2001).

Medical malpractice action for a botched removal of wisdom teeth. The case was dismissed pursuant to a sealed settlement agreement.

Cortés v. First Bank of Puerto Rico Inc. (PR 3:01-cv-01776 filed 06/11/2001).

Employment action for sex and age discrimination. The case was dismissed pursuant to a sealed settlement agreement approved by the court.

Rivera v. Puerto Rico Electrical Power Authority (PR 3:01-cv-01784 filed 06/12/2001).

Personal injury action by the wife of a man who was electrocuted when the pole he was using to pick fruit hit the defendant's power line. The defendant filed a third-party complaint against the owner of the fruit trees that blocked the clear view of the power line. A sealed settlement agreement was filed.

Lebrón Santiago v. Qualex Caribe Corp. (PR 3:01-cv-01802 filed 06/14/2001).

Civil rights action by a chemical driver against his former employer, who terminated him after he returned from a work-related back injury and requested light duty. A sealed settlement agreement was filed.

Ewing v. Rivera (PR 3:01-cv-01866 filed 06/27/2001).

Civil rights action by a man held in jail for twenty-one days for wrongful arrest and prosecution for rape. A sealed settlement agreement was filed. The court granted the motion to consign funds in the amount of $8,000 to the plaintiff.

Lopez Cuevas v. Acevedo Sevilla (PR 3:01-cv-01871 filed 06/28/2001).

Employment action for wrongful constructive discharge in retaliation for jury service. The court appointed counsel to represent the plaintiff and dismissed the action pursuant to a sealed settlement agreement.

Velez Virola v. Casiano Quiles (PR 3:01-cv-01890 filed 07/03/2001).

Employment action by an administrative official who was reassigned to another position without notice because of his political affiliation. A sealed settlement agreement was filed.

Fuladoza Alequín v. First Federal Finance Corp. (PR 3:01-cv-01891 filed 07/03/2001).

Employment action for wrongful termination because of pregnancy. The case was dismissed pursuant to a sealed settlement agreement.

Sealed Settlement Agreements

Santos Santiago v. Banco Bilbao Vizcaya Argentina (PR 3:01-cv-02030 filed 08/01/1001).

Action under the Fair Labor Standards Act by a bank employee for unpaid overtime compensation. The case was dismissed pursuant to a sealed settlement agreement.

Rodríguez Meléndez v. First Hospital Panamericano (PR 3:01-cv-02050 filed 08/06/2001).

Labor action by a woman against her former employer, who terminated her after she continued to ask for time off to attend therapy for her carpal tunnel syndrome and to take her son to therapy for his hyperactivity. A sealed settlement agreement was filed.

Microsoft Corp. v. SkyTalkwest Telecom LLC (PR 3:01-cv-02127 filed 08/21/2001).

Designated a contract action, this is an action for infringement of computer software copyrights by a lessor of computer equipment. The complaint was filed under seal, the court issued a temporary restraining order, the complaint was unsealed, and the parties filed a sealed, consented preliminary injunctive decree. The case was closed that day.

Gracia Delgado v. Calderón (PR 3:01-cv-02198 filed 09/07/2001).

Employment action by an administrator against his former employer, the governor of Puerto Rico, for political discrimination. A sealed settlement agreement was filed. The court granted the motion to disburse funds in the amount of $135,000 to the plaintiff.

Perez Salamán v. Banco Santander Puerto Rico (PR 3:01-cv-02208 filed 09/12/2001).

Employment action by a black bank employee against his former employer for race discrimination. A sealed settlement agreement was filed.

Rivera Bou v. Premier Varnell Co. (PR 3:01-cv-02373 filed 10/15/2001).

Employment action by a saleswoman against her former employer for age discrimination. A sealed settlement agreement was filed.

Colón Andujar v. Cooperativa de Ahorro y Credito Vegabajena Inc. (PR 3:01-cv-02378 filed 10/15/2001).

Designated a civil rights action, this is really an employment action by an executive vice president against her former employer for age discrimination. A sealed stipulation for voluntary dismissal was filed.

Quinones v. Castro Rios (PR 3:01-cv-02495 filed 11/02/2001).

Contract case involving breach of a performance agreement by the defendants' band. The plaintiff filed a civil suit in Ohio and was awarded a default judgment of $77,786. The plaintiff filed this case to domesticate the judgment. A sealed settlement agreement was filed. Four months later the plaintiff filed a motion for attachment of the defendants' property, because they did not pay the settlement.

Medina Tejeda v. Dencarribbean Inc. (PR 3:01-cv-02518 filed 11/06/2001).

Designated a product liability action, this is really an employment action by a black waitress against her former employer for race discrimination. A sealed settlement agreement was filed.

Don King Productions Inc. v. Santana (PR 3:01-cv-02741 filed 12/28/2001).

Statutory action against the owner of a bar who charged customers to view a televised boxing match without a license agreement with the plaintiff. A sealed settlement agreement was filed.

Rodríguez v. Commonwealth of Puerto Rico (PR 3:02-cv-01193 filed 02/08/2002), consolidated with *Perez Hernández v. Commonwealth of Puerto Rico* (PR 3:02-cv-01582 filed 04/16/2002).

Employment actions by commonwealth employees for wrongful termination in retaliation for supporting a losing candidate for governor. Four cases were consolidated. The actions were dismissed pursuant to sealed settlement agreements, three of which were filed in the lead case and one of which was filed in a member case. Docket sheets in the four cases indicate settlement payments of $160,223.59, $141,025.95, $110,153.72, and $100,139.75.

Vázquez Ortiz v. Raytheon Aerospace Inc. (PR 3:02-cv-01682 filed 05/06/2002).

Classified as a personal injury case, this is an employment action for wrongful termination and disability discrimination. The case was dismissed pursuant to a sealed settlement agreement.

Popular Inc. v. Popular Staffing Services Corp. (PR 3:02-cv-02058 filed 07/11/2002).

Trademark action concerning use of the name "POPULAR." The action was dismissed pursuant to a sealed settlement agreement.

District of South Carolina

A new local rule proscribes the filing of a sealed settlement agreement. D.S.C. L.R. 5.03(C).

Statistics: 8,126 cases in termination cohort; 311 docket sheets (3.8%) have the word "seal" in them (but 136 of these merely have "seal" as the docket entry clerk identifier, and another 13 merely have "seal" in the party name); 25 complete docket sheets (0.31%) were reviewed; actual documents were examined for 8 cases (0.10%); 8 cases (0.10%) appear to have sealed settlement agreements.

Cases with Sealed Settlement Agreements

Doe v. Florence School District No. 1 (SC 4:99-cv-01007 filed 04/08/1999).

Civil rights action by a developmentally disabled 15-year-old girl for rape by a school security guard, who had been transferred to his current position from another school where he had been accused by parents of sexually harassing students. The court dismissed the case as settled and scheduled a settlement conference one week later to approve the settlement agreement because there was a minor party. The settlement agreement is sealed.

Johnson v. Prime Inc. (SC 8:00-cv-01523 filed 05/17/2000).

Motor vehicle action against a truck driver and trucking companies for wrongful death caused by the truck's colliding with traffic stopped for road construction. The plaintiff dismissed the trucker and settled with the trucking companies, whose liability insurer paid the settlement. The court dismissed the action without prejudice and then conducted a sealed settlement conference two weeks later, at which it dismissed the action with prejudice after the terms of the settlement apparently were satisfied.

Seeling v. Norfolk Southern Railway Co. (SC 3:00-cv-01893 filed 06/14/2000).

Action under the Federal Employer's Liability Act by a trainman for unspecified injuries allegedly resulting from his employer's negligence in maintaining a safe working environment. Documents filed in the case indicate the trainman may have fallen off a train. The judge issued an order dismissing the case as "settled by the payment of a sum of money" and sealing "the record of this settlement, other than the fact of its existence."

Curry v. Tripp Co. (SC 9:00-cv-02579 filed 08/18/2000).

Contract action for payment of a $4.5 million commission on facilitating the sale of a golf course business. The court dismissed the action without prejudice as settled, retaining jurisdiction for sixty days to enforce the settlement agreement. Near the end of that sixty-day period, the plaintiff filed a motion to enforce the agreement, attaching a sealed copy of the agreement. The defendants apparently missed the first settlement payment of $100,000 and raised objections concerning drafts of the settlement documents. Court documents indicate that other material terms of the settlement agreement concern stock certificates and a golf course. Seven months after the motion to enforce was filed, the court dismissed the case with prejudice as fully resolved.

Fanning v. Columbia Housing Authority (SC 3:00-cv-02833 filed 09/12/2000).

Housing action for disability discrimination. The plaintiff alleged that she was wrongfully denied public housing on the incorrect ground that she could not live without assistance. The court dismissed the action without prejudice as settled on February 6, 2001, retaining jurisdiction for thirty days to enforce the settlement. On March 20 the court dismissed the action as settled with prejudice and ordered "these documents" sealed. On April 12 the court again dismissed the action with prejudice.

Williams v. Ford Motor Co. (SC 2:00-cv-03398 filed 10/26/2000).

Motor vehicle product liability action for wrongful death resulting from a Ford Aerostar van's rolling over. One plaintiff—who was not involved in the accident—represented himself as well as the estates of his late wife and his late 12-year-old daughter, who were killed. The other plaintiff was a 17-year-old son, who was injured. The court dismissed the action as settled without prejudice, retaining jurisdiction for sixty days to enforce the settlement. One month later the plaintiffs moved to reopen the case so that the court could approve the settlement agreement with the minor plaintiff. The court approved the agreement. The amounts of the settlement and the plaintiffs' attorneys' contingency fee were sealed, but unsealed records

show that 59% of the settlement went to the mother's claim, 40% went to the daughter's claim, and 1% went to the son's claim.

White v. DaimlerChrysler Corp. (SC 2:00-cv-03803 filed 12/05/2000).

Motor vehicle product liability action alleging that defective designs of the roof and seatbelts of a Jeep Grand Cherokee caused the death of the driver and two passengers, and the injuries of two additional passengers, in a rollover caused by another vehicle. The plaintiffs representing estates and a minor filed a sealed petition, which was granted, along with a sealed order approving a settlement. The court dismissed the action as settled without prejudice, retaining jurisdiction for sixty days to enforce the settlement agreement. Three months later the court granted a motion under seal.

Davis & Small Decor Inc. v. Desperate Enterprises Inc. (SC 2:01-cv-00914 filed 03/27/2001).

Copyright action concerning the novelty signs "Mom's Bed & Breakfast," "Dad's Fix-It Shop," and "Grandma's Babysitting Service." The plaintiff filed a sealed "motion . . . to file under seal, and for sanctions, or to enforce settlement agreement." The case was dismissed pursuant to an agreed order of injunction and dismissal permanently enjoining the defendant from selling signs similar to the plaintiff's.

District of South Dakota

No relevant local rule.

Statistics: 820 cases in termination cohort; 40 docket sheets (4.9%) have the word "seal" in them; 6 complete docket sheets (0.73%) were reviewed; actual documents were examined for 0 cases; no case appears to have a sealed settlement agreement.

Eastern District of Tennessee[66]

Court records may be sealed only upon a showing of good cause. E.D. Tenn. L.R. 26.2(b). Absent a court order to the contrary, court records are unsealed thirty days after the conclusion of the case. *Id.* R. 26.2(d). "All such orders shall set a date for the unsealing of the Court Records." *Id.*

Statistics: 3,128 cases in termination cohort; 249 docket sheets (8.0%) have the word "seal" in them (but 52 of these merely have the word "seal" in a party name); 15 complete docket sheets (0.48%) were reviewed; actual documents were examined for 11 cases (0.35%); 8 cases (0.26%) appear to have sealed settlement agreements.

Cases with Sealed Settlement Agreements

Kunis v. Murray (TN-E 3:98-cv-00365 filed 06/18/1998).

Securities action for fraudulent sale of unregistered securities. The case settled. The details of the settlement agreement were sealed by the court's granting a protective order.

Gutierrez v. Bridgestone/Firestone Inc. (TN-E 3:98-cv-00484 filed 07/31/1998).

Product liability action concerning the defective manufacture of a tire, which caused the tread to separate and the vehicle to overturn, ejecting the plaintiffs from the car. The plaintiffs sustained severe injuries. One plaintiff died. The case settled. Each plaintiff received $2,777.78 from the Ford Motor Company. The transcript of a minor's settlement hearing with regard to Bridgestone/Firestone was sealed.

Walker v. Hospital of Morristown (TN-E 2:99-cv-00081 filed 02/23/1999).

Medical malpractice action concerning negligent pulmonary care of a woman after the delivery of her child via cesarean section. As a result, the plaintiff's spouse suffered permanent brain damage, leaving her in a permanent vegetative state. She subsequently died. The case settled. The minutes of the minors' settlement hearing and the court order approving the minors' settlements were sealed for one year.

Monroe v. National Seating Co. (TN-E 3:99-cv-00363 filed 07/09/1999).

Employment discrimination action by a 51-year-old vice president for age discrimination and wrongful termination stemming from his refusal to sign allegedly fraudulent financial reports. The case was dismissed pursuant to a sealed settlement agreement.

Samaduroff v. Corrections Corp. of America (TN-E 1:00-cv-00062 filed 02/25/2000).

Civil rights action for the wrongful death of an inmate, alleging that a corrections facility's failure to provide medically necessary methadone treatment resulted in the inmate's suicide. The case

66. This district was selected at random for the study, and it has a good-cause rule.

was dismissed pursuant to a sealed settlement agreement.

Conner v. DHS Truck Division Co. (TN-E 2:00-cv-00150 filed 05/04/2000).

Motor vehicle action for wrongful death caused by the defendant's negligent driving of a tractor-trailer, which resulted in a violent collision. The plaintiff's husband sustained serious external and internal injuries and died six days after the accident. The case settled. A minor's settlement conference and the court order approving the details of the minor's settlement agreement were sealed.

Lee v. Harper (TN-E 1:00-cv-00381 filed 11/10/2000).

Motor vehicle action for wrongful death, which occurred when the defendant's speeding car catapulted onto the decedent's car, crushing him. The case was dismissed pursuant to a sealed settlement agreement.

Floyd v. Tennessee Secondary Schools Athletic Association (TN-E 3:01-cv-00538 filed 11/14/2001).

Civil rights action arising from the defendants' dismissal of the plaintiff's daughter from the girls' basketball team in retaliation for the mother's voicing concerns about the coach's temperament and behavior. The case settled. The settlement agreement and the court order approving the minor's settlement, which detailed the settlement payments, were sealed.

Middle District of Tennessee

No relevant local rule.

Statistics: 3,162 cases in termination cohort; 581 docket sheets (18%) have the word "seal" in them; 39 complete docket sheets (1.2%) were reviewed; actual documents were examined for 24 cases (0.76%); 18 cases (0.57%) appear to have sealed settlement agreements.

Cases with Sealed Settlement Agreements

Catalano v. Federal Extradition Agency, Inc. (TN-M 3:97-cv-00790 filed 07/30/1997).

Motor vehicle action for wrongful death as a result of transporting prison inmates in a negligently maintained Ford Econoline Van, which caught on fire. Six companion cases also were filed. The court designated this to be the lead case. Ford settled. The court approved the settlement on behalf of a minor in the case by sealed order. The settlement agreement does not appear to be filed in the other cases, nor does there appear to be a minor involved in the other cases. A year later, the court approved another settlement agreement on behalf of the minor by sealed order. However, an unsealed order reveals that the insurance company defendant had to pay the minor's guardian $80,000 to be used for college.

Bryant v. Potter (TN-M 3:98-cv-00872 filed 09/18/1998).

Labor action by a postal employee alleging sexual harassment and discrimination by the town postmaster. The case settled, and the court ordered the settlement agreement filed under seal. The plaintiff filed a motion to reopen the case, alleging that the defendant failed to fulfill his obligations under the terms of the settlement agreement. The court denied the plaintiff's motion.

Murphy v. RMD Corp. (TN-M 3:99-cv-00886 filed 09/15/1999); *Murphy v. RMD Corp.* (TN-M 3:99-cv-00907 filed 09/23/1999).

Class action lawsuits pursuant to the Fair Labor Standards Act for failure to properly compensate restaurant managers and service employees for overtime work. The cases settled, and the settlement agreements were filed under seal.

EEOC v. Strategic Outsourcing Inc. (TN-M 3:99-cv-00938 filed 09/30/1999).

Age and sex discrimination employment action on behalf of a sales manager. The case settled. The plaintiffs filed a sealed motion to enforce the settlement agreement. The transcript of the original settlement conference later was filed under seal.

Pruitt v. Rutherford County (TN-M 3:99-cv-01155 filed 12/10/1999).

Section 1983 civil rights action on behalf of a minor, alleging rape by another minor while they both were serving time in a juvenile detention center. The case settled. The settlement agreement was approved by the court and sealed.

Matiaz v. Eidson (TN-M 3:00-cv-00485 filed 05/19/2000).

Wrongful death action arising from the negligent driving of a pickup truck, which resulted in the truck's rolling over and the plaintiff's husband, who was riding in the bed of truck, being pinned beneath the vehicle. Passengers who were able to escape from the vehicle attempted for thirty minutes to extricate the deceased. They then walked over an hour to a telephone, called a friend, and

went home to change clothes before going to the police station to report the incident. A passerby with a tractor arrived at the scene of the accident and turned the truck upright. The defendant employer, who had remained at the scene, then threw the man into a nearby pig pond. To prevent the body from floating to the surface, the defendant held the body down in the pond with a stick. Drowning was the cause of death. The case settled. The court approved a minor's settlement and placed the settlement agreement under seal.

United States ex rel. Bledsoe v. Community Health Systems Inc. (TN-M 2:00-cv-00083 filed 09/22/2000).

Fraud action concerning Medicaid and Medicare claims. The government declined to intervene. The plaintiff, relying on government settlement drafts, maintained that the parties reached a settlement and filed under seal a motion to recognize the settlement. The motion was denied, and the case was dismissed.

Doe v. Aramark Educational Resources Inc. (TN-M 3:01-cv-00245 filed 03/13/2001); *Ridge v. Aramark Educational Resources Inc.* (TN-M 3:01-cv-00281 filed 03/23/01); *Doe v. Aramark Educational Resources Inc.* (TN-M 3:01-cv-00282 filed 3/23/2001).

Personal injury actions on behalf of minors, alleging rape and sexual molestation by a teacher. The cases settled. The court approved the minors' settlement agreements and placed them under seal.

Heil v. Gotee Records Inc. (TN-M 3:01-cv-00284 filed 03/26/2001).

Trademark infringement action concerning records. The case settled. The court reporter filed under seal the transcript of the settlement agreement announced in open court. The court found no reason for the transcript to be maintained under seal in the file. Accordingly, the court ordered the docket entry stricken and the transcript destroyed.

Clinard v. M.J. Halgard Construction (TN-M 3:01-cv-00467 filed 05/22/2001).

Employment discrimination action for retaliatory discharge after the plaintiff attempted to end her affair with her supervisor. The case settled. The settlement agreement was filed under seal.

Chargois v. Troxell (TN-M 3:01-cv-00554 filed 06/22/2001).

Section 1983 civil rights action on behalf of a minor, alleging sexual molestation by a teacher. The plaintiff further alleged that the school principal and other school personnel were aware of the sexual relationship but failed to intervene on the minor's behalf or notify her parents. The case settled. The court approved the minor's settlement and sealed the settlement agreement.

Deuss v. Ebenezer Home of Tennessee Inc. (TN-M 3:01-cv-00589 filed 06/29/2001).

Class action pursuant to the Fair Labor Standards Act, alleging that a nursing home failed to properly compensate its employees, including the activities director and nursing technician, for overtime work. The case settled. The settlement agreement was filed under seal.

United Shows of America Inc. v. Rubin (TN-M 3:01-cv-01331 filed 09/20/2001).

Anticipatory breach of contract action concerning investment in an expo center. The case was dismissed as settled. The defendant filed a sealed motion to enforce the settlement agreement. The plaintiffs filed for bankruptcy, which has stayed the action.

Dolgencorp Inc. v. Big Lots Inc. (TN-M 3:01-cv-01533 filed 11/28/2001).

Trademark infringement action. The case settled. The plaintiffs filed a sealed motion to enforce the settlement agreement. A final settlement was reached, and the clerk was directed to "terminate minutes for enforcement of settlement agreement."

Fletcher v. Kolcraft Enterprises Inc. (TN-M 3:02-cv-00422 filed 04/25/2002).

Personal injury action for the negligent manufacture of a stroller, which collapsed and severed the tip of a child's finger. The case settled. The plaintiff filed a sealed motion to approve the minor's settlement agreement. The court granted the motion.

Western District of Tennessee

No relevant local rule.

Statistics: 2,759 cases in termination cohort; 222 docket sheets (8.0%) have the word "seal" in them; 37 complete docket sheets (1.3%) were reviewed; actual documents were examined for 16 cases (0.58%); 7 cases (0.25%) appear to have sealed settlement agreements.

Cases with Sealed Settlement Agreements

Lammey v. Ford Motor Co. (TN-W 2:99-cv-02156 filed 02/19/1999).

Product liability action for the negligent manufacture of a car, resulting in the car's rolling out of the plaintiff's driveway and rolling over the 3-year-old plaintiff's head. The case was dismissed as settled. The court order approving the minor's settlement and settlement payment was sealed.

Doe v. City of Memphis Board of Education (TN-W 2:99-cv-03075 filed 12/09/1999), consolidated with *C.W. v. City of Memphis Board of Education* (TN-W 2:99-cv-03076 filed 12/09/1999).

Civil rights actions for failure of the principal and school board to intervene on behalf of children to prevent emotional, physical, and sexual abuse by their special education teachers. The court appointed a guardian ad litem for the minors. The cases were dismissed as settled. The court orders approving the minors' settlements and detailing the payments to the plaintiffs were sealed.

Reed v. Corrections Corp. of America (TN-W 2:00-cv-02473 filed 05/26/2000).

Section 1983 civil rights action for failure of a juvenile detention center to prevent the plaintiff's suicide attempt, which resulted in severe and permanent brain injury. The case settled. The transcript of the settlement hearing and the order approving the cash settlement were sealed.

Warner v. Owens (TN-W 2:01-cv-02250 filed 03/28/2001).

Motor vehicle action by a child arising from a car accident, claiming that the uninsured defendant negligently drove her car over the median and into oncoming traffic. The plaintiff suffered severe permanent injuries to her head, face, mouth, teeth, and entire nervous system, which required extensive medical treatment. The case settled. The order approving the minor's settlement and detailing payment was sealed.

Harper v. Gordon (TN-W 2:02-cv-02347 filed 05/07/2002); *Northfield Insurance Co. v. Gordon* (TN-W 2:02-cv-02503 filed 06/21/2002).

Harper is a personal injury action for wrongful death by a father for the negligent driving of a day care center's bus driver, which resulted in an accident and the death of his son and several other children. The plaintiff alleged that the bus driver, who had a history of drug use, allowed the bus to leave the road and strike highway structures and that the defendants failed to provide proper safety restraints and procedures in and for the bus.

Northfield Insurance is an insurance contract action against the owner of the day care center that hired the bus driver. The insurance company claimed that the accident was not covered under the day care center's policy.

The cases were dismissed as settled. Settlement agreements were sealed and filed in a related case, *Robinson v. Tennessee Department of Human Services* (TN-W 2:02-cv-2370 filed 5/13/02) (still pending).

District of Utah[67]

The sealing of a court document requires a showing of good cause. D. Utah L. Civ. R. 5-2(a). Absent an order to the contrary, sealed documents are unsealed at the end of the case. *Id.* R. 5-2(f).

Statistics: 2,387 cases in termination cohort; 3 docket sheets are sealed (0.13%)—all of these cases' disposition codes suggest no sealed settlement agreements;[68] 179 unsealed docket sheets (7.5%) have the word "seal" in them; 11 complete docket sheets (0.46%) were reviewed; actual documents were examined for 8 cases (0.34%); 8 cases (0.34%) appear to have sealed settlement agreements.

Cases with Sealed Settlement Agreements

Flying J Inc. v. Comdata Network Inc. (UT 1:96-cv-00066 filed 07/01/1996).

Antitrust action by a truck-stop company against a credit company. The case settled. The plaintiffs filed a motion to enforce the settlement agreement. Attached to the motion was a sealed exhibit containing the settlement agreement and release; however, the accompanying memorandum of

67. This district is included in the study because of its good-cause rule.

68. One dismissal for lack of jurisdiction, 2 "other" dismissals.

support reveals that the defendants agreed to provide the plaintiffs with unrestricted fuel-card access to their point-of-sale devices at major truck stops.

Icon Health & Fitness Inc. v. Keys Fitness Products Inc. (UT 1:97-cv-00114 filed 10/02/1997).

Patent infringement action concerning treadmills. The case settled. The plaintiffs filed a motion to enforce the settlement agreement. The accompanying memorandum was sealed. Another document—perhaps the settlement agreement—also was filed under seal.

Scott v. Riddle (UT 2:99-cv-00042 filed 01/25/1999).

Class action alleging violation of the Fair Debt Collection Practices Act. The case settled, and the settlement agreement was filed under seal. An order allows the class administrator to distribute unclaimed funds in the amount of $5,121.47 to a charity.

Iomega Corp. v. Castlewood Systems Inc. (UT 1:99-cv-00080 filed 07/06/1999).

Patent infringement action by a data storage manufacturer. The case settled. The defendants failed to fulfill their obligations under the settlement agreement. The plaintiffs filed a sealed motion for entry of a stipulated judgment pursuant to the settlement agreement. The judgment later was unsealed. For the defendants' failing to make the $10,000 payment by the date specified in the settlement agreement, the court awarded the plaintiffs $1,775,000 in damages plus attorney fees.

Mohamed v. International Rescue Committee (UT 2:00-cv-00588 filed 07/26/2000).

Employment discrimination action. The case settled at mediation. A dispute arose regarding the amount of the settlement, and both parties filed motions seeking to enforce the settlement agreement; however, only the defendant's motion was sealed. The plaintiff's motion notes that he would only accept an after-tax offer of $24,000. The court, unable to determine if there was a meeting of the minds, denied the motions. The case ultimately was dismissed as settled.

Crosslin v. Hansen (UT 2:00-cv-00648 filed 08/15/2000).

Medical malpractice action arising from the negligent insertion of a feeding tube, resulting in the plaintiffs' daughter's death. The case settled, and the settlement agreement appears to be sealed. However, the docket shows a check in the amount of $39,000 payable to a third party claiming to have a lien.

Financial Freedom International v. International Credit Repair Services Inc. (UT 2:00-cv-00659 filed 08/17/2000).

Copyright infringement action concerning the reproduction of credit education materials. The case settled, and the settlement agreement was filed under seal.

Turner v. MacKenzie (UT 2:00-cv-00697 filed 09/01/2000).

Personal injury action concerning defamatory comments posted on the Internet regarding the plaintiff's professional competence and integrity. The parties entered into settlement discussions. Although the defendant maintained that parts of the discussions have appeared on the Internet, the court sealed all matters dealing with the settlement agreement. The defendant filed a sealed motion to enforce the settlement agreement, which the court granted.

Eastern District of Virginia

No relevant local rule. Practices vary among the divisions: in Alexandria a document can be sealed by handwriting the word "sealed" on the document, but in Richmond a motion to seal is required. The district's rules committee will consider a proposed uniform rule this spring.

Statistics: 14,448 cases in termination cohort; 330 docket sheets (2.3%) have the word "seal" in them; 57 complete docket sheets (0.39%) were reviewed; actual documents were examined for 47 cases (0.33%); 44 cases (0.30%) appear to have sealed settlement agreements.

Cases with Sealed Settlement Agreements

United States ex rel. Groshans v. Unisys Corp. (VA-E 1:02-cv-01589 filed 02/29/1996).

Qui tam action under the False Claims Act for false billing in contracting for the Trident Missile Program. The docket shows only the four documents that the government asked to be unsealed, including an amended complaint. The case was dismissed pursuant to a settlement agreement. Because of sealed docket entries, however, it cannot be determined with certainty that the agreement was filed.

America Online Inc. v. CN Productions Inc. (VA-E 1:98-cv-00552 filed 04/16/1998).

Statutory action under the Lanham Act, alleging that the defendants sent the plaintiff's subscribers unsolicited electronic mail containing the plaintiff's trademark along with information on pornographic Web sites, products, and services. The defendants were held in contempt for violating a permanent injunction. An additional sixteen individuals and thirteen entities were held in civil contempt for conspiring with the defendants to violate the injunction. The plaintiff was awarded $6,904,712 in damages. The court sealed the memorandum opinion and judgment because it contained details of the settlement amount. The plaintiff filed a motion to partially unseal the judgment and memorandum opinion to show that this type of public violation will be punished and substantial damages awarded. One month later a redacted version of the order was unsealed.

United States ex rel. Doe v. University of Virginia Health System (VA-E 1:01-cv-01691 filed 07/16/1998).

Qui tam action under the False Claims Act for fraudulent Medicare billing. A settlement agreement initially was filed under seal, but it, the complaint, and other documents were unsealed when the case was dismissed. The defendant paid the United States $3 million and the relator $800,000.

Price v. Foster (VA-E 1:99-cv-00549 filed 04/19/1999).

Personal injury action for wrongful death resulting from the defendants' severing a hospital oxygen line. A sealed settlement agreement was filed and approved, and the order of approval stated that the decedent's three adult children each would receive $1,000 and the plaintiff's attorneys would receive $35,000. The guardian ad litem rejected the settlement of $1,000 for the decedent's minor grandchild. One month after the case was dismissed, the plaintiff filed a motion to reconfirm approval of the settlement agreement. The court reconfirmed approval and awarded the minor grandchild $5,000 to be used solely for education and support.

Franklin v. First Union Corp. (VA-E 3:99-cv-00344 filed 05/05/1999), consolidated with *Franklin v. First Union Corp.* (VA-E 3:99-cv-00610 filed 09/07/1999).

ERISA actions including RICO allegations concerning 401(k) plans of current and former bank employees. The defendants denied liability, but agreed to pay $26 million to named plaintiffs and a class of approximately 150,000. The list of potential class members was filed under seal.

MCI Communications Corp. v. Essential Voice Computing Inc. (VA-E 3:00-cv-00105 filed 02/25/2000).

Patent infringement action involving a telephone-based personnel tracking system. Three months after a settlement agreement was reached, the defendants refused to execute the final documents. The plaintiff filed a motion to enforce the settlement agreement, and the court granted a motion to seal the motion because it contained settlement terms. The court ordered a consent judgment with a permanent injunction. The court retained jurisdiction to enforce the consent judgment and permanent injunction.

Advamtel LLC v. Sprint (VA-E 1:00-cv-01074 filed 04/17/2000).

Statutory action concerning collection of telecommunications charges, alleging that Sprint used ninety plaintiffs' telephone lines without paying applicable tariffs. Sprint filed a counterclaim for overbilling. A few plaintiffs dismissed their actions pursuant to confidential settlement agreements as the litigation proceeded. After Sprint reached settlement agreements with all plaintiffs but one, it filed under seal a motion to enforce the settlement agreement. Disagreements with the remaining plaintiff ultimately were resolved, and the case was dismissed as settled.

Fordham v. OneSoft Corp. (VA-E 1:00-cv-01078 filed 06/29/2000).

Computer software copyright infringement action. An order concerning settlement proceeds stated that the defendant deposited $644,285. The plaintiff filed a motion and memorandum under seal for disbursement of the settlement proceeds. One week later the plaintiff filed a suggestion of bankruptcy. The court granted the plaintiff's motion for disbursement of settlement proceeds eleven weeks later. The attorney in the case was granted a lien against the settlement funds, and

the court ordered that the attorney fees and expenses be paid out of the settlement funds.

Garcia v. Gloucester Seafood Inc. (VA-E 4:00-cv-00069 filed 06/30/2000).

Class action under the Fair Labor Standards Act for failure to pay minimum and overtime wages. The plaintiffs were Mexican citizens recruited to work at the defendants' seafood-processing plant. The court dismissed the action as settled, retaining jurisdiction to enforce the settlement agreement. Approximately three months later the court issued an agreed order to reopen the case for entry of judgment pursuant to a sealed settlement agreement. Approximately three months later the case was closed upon the court's satisfaction that settlement payments had been made.

Alegre v. United States (VA-E 4:00-cv-00074 filed 07/19/2000).

Medical malpractice action for severe brain injury resulting from improper treatment after routine surgery at a Veterans Administration Hospital. The government admitted liability and agreed to pay $950,000. The government's attorney filed under seal a motion to approve the settlement agreement, but unsealed documents disclose the settlement agreement's terms.

Doe v. Holcomb (VA-E 2:00-cv-00597 filed 08/15/2000).

Personal injury action for sexual molestation of a Headstart student by a school bus driver. An agreed protective order held confidential (1) medical and psychological information about the plaintiff, (2) information concerning the criminal investigation of the bus driver, and (3) the identity of the plaintiff. The court approved a sealed settlement agreement.

*Opsahl v. E*Trade Group* (VA-E 1:00-cv-01501 filed 09/06/2000).

Contract action for breach of a corporate acquisition agreement. After acquiring a company in which the plaintiff was a corporate officer with significant stock options, the defendants allegedly failed to timely file a registration statement with the SEC, causing the plaintiff significant delay in his ability to exercise his stock options. A sealed settlement agreement was attached as an exhibit to the plaintiff's motion to enforce. The motion involved disputed escrow arrangements. Six days later the plaintiff withdrew the motion to enforce and asked the court to destroy the sealed settlement agreement or return it to the plaintiff's counsel. In the final order of dismissal the court ordered that the settlement agreement remain permanently sealed.

Bryant v. Southside Gin Inc. (VA-E 3:00-cv-00616 filed 09/22/2000).

RICO action by farmers, alleging that the defendants stole their cotton while it was being processed at the defendants' gins. A sealed settlement agreement was filed. A confessed judgment was granted in favor of some plaintiffs for $184,106. In the order of dismissal the court ordered that the plaintiffs "shall not pursue enforcement of the confessed judgment."

Zeller v. America Online Inc. (VA-E 1:00-cv-01603 filed 09/27/2000).

Employment discrimination action by a manager against his former employer for wrongful termination resulting from his reporting sexual harassment of co-workers. The case was dismissed as settled. One month after the case was dismissed, the defendant filed a motion to enforce the settlement agreement and attached a sealed settlement agreement as an exhibit. The plaintiff also filed a motion to enforce the settlement agreement. A report and recommendation were filed under seal, and the court granted the defendant's motion to enforce the settlement agreement.

Asbestos Multidistrict Litigation: Estate of Lott v. American Standard Inc. (VA-E 2:00-cv-03931 filed 10/10/2000); *Blackburn v. American Standard Inc.* (VA-E 2:00-cv-03981 filed 10/19/2000); *Estate of Chapman v. American Standard Inc.* (VA-E 2:01-cv-04223 filed 02/01/2001); *Estate of Smith v. American Standard Inc.* (VA-E 2:01-cv-04291 filed 02/09/2001); *Estate of Johnson v. American Standard Inc.* (VA-E 2:01-cv-04343 filed 02/22/2001); *Estate of Carpenter v. American Standard Inc.* (VA-E 2:01-cv-04451 filed 03/26/2001); *Dreyer v. American Standard Inc.* (VA-E 2:01-cv-04787 filed 04/17/2001); *Estate of Russell v. American Standard Inc.* (VA-E 2:01-cv-04977 filed 04/23/2001); *Estate of Howell v. American Standard Inc.* (VA-E 2:01-cv-05007 filed 04/23/2001); *Estate of Dickey v. American Standard Inc.* (VA-E 2:01-cv-05427 filed 05/14/2001); *Estate of Holland v. American Standard Inc.* (VA-E 2:01-cv-05431 filed 05/14/2001); *Estate of Boyette v. American Standard Inc.* (VA-E 2:01-cv-05511 filed 06/01/2001).

Asbestos product liability litigation for the wrongful deaths of workers who were exposed to the

inhalation of asbestos and industrial dust and fibers. These cases were transferred by the MDL Panel to the Eastern District of Pennsylvania as MDL 875. All of the plaintiffs were represented by the same law firm in Norfolk, Virginia. Claims were dismissed against two of the defendants. A settlement was reached with one of the defendants, and the petition for approval of the compromised settlement was sealed. The order approving the compromised settlement also was sealed.

Wyatt v. S. C. Jones Service Inc. (VA-E 3:00-cv-00720 filed 11/01/2000).

Employment discrimination action by a black plaintiff who sued a former employer for wrongful termination. The defendant sought sanctions against the plaintiff for filing a frivolous lawsuit, because the plaintiff had filed similar claims in the past. The court ordered sanctions prohibiting the plaintiff from filing a civil action or filing pro se without prior approval of the court for five years. The plaintiff also was ordered to pay the defendants' attorney fees and expenses. The court granted the defendants' motion to dismiss and motion for summary judgment. A sealed settlement agreement was filed eight days after the sanctions were imposed.

Cousino v. Sunbeam Corp. (VA-E 2:00-cv-00876 filed 11/22/2000).

Product liability action by two parents and their five-year-old daughter, alleging that an electric blanket caught fire. The court conducted a sealed settlement conference and approved a sealed settlement agreement.

Haider v. American Honda Motor Co. (VA-E 1:00-cv-02079 filed 12/14/2000).

Motor vehicle action for wrongful death in a traffic accident in which the driver of a Honda Accord survived, but two passengers were killed. A mediation report was filed under seal. The defendants' response to the plaintiff's petition for approval of the settlement agreement stated that confidentiality of the agreement was an essential term.

SY Technology Inc. v. System Studies and Simulation Inc. (VA-E 1:00-cv-02129 filed 12/22/2000).

Contract action for breach of a proprietary data agreement by the defendant, who alleged that a former employee used sensitive financial and trade secrets to benefit his new company. After a jury trial had commenced the parties reached a settlement. The case was dismissed, and the final order was placed under seal presumably because it contained terms of the settlement agreement.

Alley v. Core Inc. (VA-E 2:01-cv-00065 filed 01/29/2001).

Designated a product liability case, this is an ERISA action for wrongful denial of disability benefits to an employee for a work injury to a knee and subsequent unsuccessful arthroscopic surgery. The case was consolidated with *Alley v. Sickness and Accident Disability Plan for Bell Atlantic Employees* (VA-E 2:01-00123 filed 02/26/2002). The court awarded the plaintiff summary judgment, and the plaintiff moved for $53,432.50 in attorney fees and $2,770.97 in costs. The defendant appealed the summary judgment. While the case was on appeal, it settled pursuant to a settlement agreement, which was filed under seal in district court.

Jappell v. American Association of Blood Banks (VA-E 1:01-cv-002228 filed 02/09/2001).

Personal injury action involving the wrongful death of a woman who contracted HIV from the defendant's blood products. The complaint alleged that the defendant failed to properly screen blood donors. A sealed settlement agreement was filed, and the case was dismissed as settled. Eight days after the case was dismissed, the plaintiff filed a motion to enforce the settlement agreement. The hearing on the motion to enforce the settlement agreement has not occurred.

Verizon Online Services Inc. v. McDonald (VA-E 1:01-cv-00432 filed 03/19/2001).

Statutory action under the Computer Fraud and Abuse Act, alleging that the defendants sent unsolicited electronic mail advertising goods and services to the plaintiff's subscribers. A sealed settlement agreement was filed as an attachment to the motion for stipulated judgment.

Breeden v. PYA/Monarch Inc. (VA-E 2:01-cv-00194 filed 03/20/2001).

Employment action for disability discrimination by a warehouse worker who was not relieved of lifting duty while he recovered from an off-work wrist injury. The action was dismissed as settled, but nearly four months later the plaintiff filed a sealed motion to enforce the settlement agreement, which subsequently was sealed by agreed order. The motion to enforce was denied by a sealed order.

Vance v. Everly Funeral Homes Inc. (VA-E 1:01-cv-01048 filed 07/05/2001).

Employment action in which an assistant manager sued a former employer for sexual harassment and constructive termination. The plaintiff filed a sealed motion to enforce the settlement agreement. The defendant's memorandum in opposition to the settlement agreement also was sealed. The case was dismissed as settled.

Canon USA Inc. v. Lease Group Resources Inc. (VA-E 1:01-cv-01086 filed 07/10/2001).

Contract action seeking nearly $5 million in payment for the provision of several hundred photocopiers to the federal government. The parties moved for dismissal pursuant to a settlement agreement and asked the court to appoint a magistrate judge as special master to supervise the settlement, "[g]iven the complex nature of the settlement obligations, the period of time over which they will be performed, and the possibility that the resolution of disputes will require factual determinations and legal analysis." The memorandum in support of the motion, presumably containing a copy of the settlement agreement, was sealed. But the 23-page settlement agreement was filed unsealed as an exhibit to two enforcement motions subsequently filed by the defendant. The court continues to oversee the agreement.

Estate of Bui v. DaimlerChrysler Corp. (VA-E 2:01-cv-00612 filed 08/13/2001).

Motor vehicle product liability action for wrongful death resulting from a wheel coming off a Dodge van carrying church group youths. The decedent's estate sued manufacturers of the van, the wheel, and the tire. The estate filed a sealed petition for approval of a settlement agreement, which initially was approved by sealed order and subsequently approved by unsealed order after the decedent's sisters in Vietnam had been given notice of the agreement. An unsealed Vietnamese translation of the settlement agreement suggests that the settlement was for $282,500—$82,500 from the van manufacturer, $140,000 from the wheel manufacturer, and $60,000 from the tire manufacturer.

Fredley v. Huthwaite Inc. (VA-E 1:01-cv-01337 filed 08/29/2001).

Employment discrimination action alleging that the defendants paid the plaintiff less than her male counterparts for equal work. The plaintiff filed a motion to enforce a settlement agreement two weeks after the case was settled and filed the sealed settlement agreement as an exhibit. In their response to the plaintiff's motion, the defendants reported that they attempted to pay the plaintiff $14,500 by check, but she wanted cash. The court ordered the case dismissed as settled because the parties had reached an agreement.

Hoffstaetter v. Gwaltney of Smithfield Ltd. (VA-E 2:01-cv-00665 filed 08/31/2001).

Class action under the Fair Labor Standards Act by employees of a pork-processing and hog-slaughtering facility for failure to pay overtime wages. A sealed settlement agreement was filed.

Automall Online Inc. v. American Express Travel Related Services Co. (VA-E 1:01-cv-01705 filed 11/08/2001).

Contract action for breach of a rewards participation agreement. After a jury trial had commenced, the parties settled. The settlement was placed on the record under seal pursuant to a confidentiality order.

Leavitt-Imblum v. McNeil (VA-E 2:01-cv-00942 filed 12/18/2001).

Copyright infringement action alleging that the defendants incorporated the plaintiffs' cross-stitch patterns into a computer program, allowing users to stitch uncountable copies of the plaintiffs' designs without payment of royalties. The settlement agreement was filed under seal.

Drexler v. Aeon Knowledge Inc. (VA-E 1:02-cv-00174 filed 02/01/2002).

Statutory action under wiretapping law for misappropriation of the Internet domain name "wonderful.com," which was registered by an individual for his personal use. The case was dismissed pursuant to a sealed settlement agreement.

Venelus v. Dav-El Capital City Inc. (VA-E 1:02-cv-00417 filed 03/21/2002).

Designated a civil rights action, this is an employment discrimination action by a black chauffeur for discrimination, assault and battery, and constructive termination. The plaintiff filed a motion and memorandum under seal to enforce the settlement agreement. The case was dismissed before the court ruled on the motion.

Western District of Virginia

A standing order "governs the unsealing of documents," but a presiding judge may make exceptions. Sealing of a document generally may be considered "only upon written motion." W.D. Va. L.R. Part XIII.A. Documents generally "are to be unsealed within thirty (30) days from the date of the order to seal." *Id.*

Statistics: 3,593 cases in termination cohort; 112 docket sheets (3.1%) have the word "seal" in them; 41 complete docket sheets (1.1%) were reviewed; actual documents were examined for 31 cases (0.86%); 28 cases (0.78%) appear to have sealed settlement agreements.

Cases with Sealed Settlement Agreements

Sales v. Grant (VA-W 6:96-cv-00027 filed 04/01/1996).

Civil rights action by two assistant election registrars for the City of Lynchburg, who alleged that they were not reappointed to their positions because they are Democrats. The court awarded the defendants judgment as a matter of law at the close of evidence in a jury trial, but the court of appeals reversed. After a second appeal, a second jury awarded one plaintiff $55,000 in compensatory damages and $40,000 in punitive damages and the other plaintiff, $57,000 in compensatory damages and $35,000 in punitive damages. Following the trial the parties settled the action pursuant to a sealed settlement agreement incorporated by reference into an unsealed consent decree. Although the defendants denied liability, they agreed to pay each plaintiff $26,000 plus ten years of periodic payments in accordance with the agreement, with payments totaling close to $400,000. Thereafter the court awarded the plaintiffs $814,893 in attorney fees and $28,893.19 in expenses for the five-and-a-half years of litigation in this case. The court destroyed the sealed settlement agreement eight months later.

Thompson v. Town of Front Royal (VA-W 5:98-cv-00083 filed 11/04/1998); *Blackman v. Town of Front Royal* (VA-W 5:99-cv-00017 filed 03/19/1999).

Employment race discrimination actions by a public works laborer and a public works carpenter, who alleged overt and severe racism against African-Americans by the director of public works and another supervisor. Parties agreed to a settlement at a settlement conference before a magistrate judge, who filed the terms of settlement under seal for review by the district judge, who in turn dismissed the action as settled.

Weber v. Rivanna Solid Waste Authority (VA-W 3:98-cv-00109 filed 11/17/1998).

Environmental action by twenty-six plaintiffs against operators of a landfill dump. The defendant filed a motion for a protective order against discovery of material the defendant claimed was protected by attorney–client privilege and as attorney work product. A few months later sealed documents were filed, including reports and recommendations and orders. One sealed document was labeled "order and settlement agreement." But the action by most of the plaintiffs was dismissed pursuant to a lengthy settlement agreement that was filed unsealed. Two separate orders each dismissed the action as settled as to a pair of plaintiffs. Documents pertaining to an interpleader action by a third party refer to settlement with the remaining pair of plaintiffs.

Spanky's LLC v. Travelers Commercial Insurance Co. (VA-W 7:99-cv-00095 filed 02/11/1999), consolidated with *Spanky's of Virginia LLC v. Travelers Commercial Insurance Co.* (VA-W 7:99-cv-00096 filed 02/11/1999) and *Macher v. Travelers Commercial Insurance Co.* (VA-W 7:99-cv-00097 filed 02/11/1999).

Insurance actions for a pattern of unreasonable practices by an adjuster. After mediation by a magistrate judge, a sealed memorandum of settlement was filed and the case was dismissed.

Rogers v. Pendleton (VA-W 7:99-cv-00164 filed 03/16/1999).

Civil rights action against two police officers for unlawful search and seizure when the officers responded to a noise complaint concerning the plaintiff's party. A sealed document was filed the same day as a stipulation of dismissal.

Carter Machinery Co. v. Time Collection Solutions Inc. (VA-W 7:99-cv-00255 filed 04/15/1999).

Contract and fraud action for a faulty payroll system. The defendant filed a counterclaim for unpaid bills. A memorandum of settlement was filed under seal, and the case was dismissed four and a half months later. Four months after that, the parties were ordered to remove sealed materials.

Dean v. Crescent Mortgage Corp. (VA-W 3:00-cv-00035 filed 04/19/2000).

Truth in lending action for the defendant's refusal to let the plaintiff rescind a $400,000 loan secured by the plaintiff's home. After a settlement confer-

ence before a magistrate judge, a sealed settlement agreement was filed.

Green v. Ford Motor Co. (VA-W 3:00-cv-00049 filed 06/01/2000), consolidated with *Carey v. Ford Motor Co.* (VA-W 3:00-cv-00050 filed 06/01/2000).

Consolidated motor vehicle product liability actions against Ford and U-Haul for the wrongful deaths of the driver and a passenger of a U-Haul truck. The truck burst into flames—allegedly because of a design defect—in a rollover accident apparently caused by the driver's falling asleep at the wheel. Ford filed a cross-claim against U-Haul for destroying the damaged truck without letting Ford inspect it. The parties reached a confidential settlement agreement, which the court had to approve because Virginia law requires court approval of wrongful death settlements. (An action by an additional passenger who survived also was consolidated, but approval of the settlement in that case apparently was not necessary.) Several sealed documents subsequently were filed.

Longwall-Associates Inc. v. Wolfgang Preinfalk GmbH (VA-W 1:00-cv-00086 filed 06/23/2000).

Contract product liability action against a German manufacturer of mining equipment. The defendant's North American distributor alleged that gearboxes sold to a third party were defective. The defendant filed a counterclaim for 767,520.96 DM and $155,312 US in unpaid bills, plus additional damages. Four days after the court denied the defendant's motion for partial summary judgment on two of the plaintiff's five claims, a sealed document was filed and the case was closed as settled.

Lashea v. Ringwood (VA-W 7:00-cv-00556 filed 07/12/2000).

Prisoner petition against a prison nurse, challenging the quality of medical care for appendicitis. The case settled, and on the same day that a stipulation of dismissal was filed a sealed document was filed.

Village Lane Rentals LLC v. Capital Financial Group (VA-W 5:00-cv-00061 filed 07/13/2000).

Securities action by investors in a Texas apartment complex for false and misleading statements about the condition, occupancy rate, and profits of the complex. On the eve of trial, an unsuccessful settlement conference was held in the morning, and a sealed settlement conference was held in the afternoon. Approximately three weeks later, a stipulated dismissal was filed, and a sealed document was filed a week and a half after that. This sealed document most likely contained terms of the settlement agreement.

Hale v. Elcom of Virginia Inc. (VA-W 3:00-cv-00085 filed 09/28/2000).

Class action under the Fair Labor Standards Act against the CBS television affiliate in Richmond for denial of overtime compensation to television announcers. The parties settled and filed their settlement agreement under seal for the court's approval pursuant to the court's order "and applicable law." The dismissal order disclosed that one provision of the settlement agreement was that the plaintiff's attorney not represent "similarly-situated individuals in future litigation against the defendants."

Advance Stores Co. v. Exide Corp. (VA-W 7:00-cv-00853 filed 11/03/2000).

Breach of contract action by an auto parts retailer against a motor vehicle battery wholesaler. The case was litigated under a protective order, and many sealed documents were filed. The action was dismissed as settled the same day that a sealed settlement agreement was filed. Three sealed documents were filed three months later, and then an unsealed response to the defendant's motion to enforce the agreement was filed. Six sealed documents of renewed litigation followed two to three months later, and the matter ultimately was dismissed again as settled.

Bryant v. Delta Star Inc. (VA-W 6:00-cv-00113 filed 12/11/2000).

Employment action, originally filed pro se, for discrimination on the basis of age and disability. The plaintiff ultimately obtained representation, and her case was consolidated with two others against the same defendant. The court dismissed the disability discrimination claims as not first presented to the EEOC, and the cases went to trial on the age discrimination claims. A memorandum of settlement pertaining to all three cases was filed under seal but docketed only for the lead case, and the lead case was dismissed.

Ebelt v. Dotson (VA-W 4:01-cv-00025 filed 05/04/2001).

Personal property damage action against a car dealer for odometer fraud. The parties filed a sealed document one day, and a sealed motion to

dismiss the next day. On the third day, the court dismissed the action as settled.

Comsonics Inc. v. TVC Communications Inc. (VA-W 5:01-cv-00053 filed 06/20/2001).

Patent infringement case concerning a portable sampling spectrum analyzer. A sealed settlement and licensing agreement was filed under seal, and the case was dismissed as settled.

American Red Cross v. Central Virginia Safety Concepts LLC (VA-W 3:01-cv-00068 filed 06/22/2001).

Contract action against former employees who started a competing health training business for improper use of confidential business information. A consent order of dismissal ordered the defendants to refrain from soliciting new business from parties on a sealed list.

Smith v. Goodyear Tire & Rubber Co. (VA-W 4:01-cv-00041 filed 07/24/2001).

Employment discrimination action by a quality inspector at a tire plant against a supervisor for sexual harassment and against their employer for failure to stop it. After the case was referred to a magistrate judge for mediation, two sealed documents and a sealed motion to dismiss were filed, followed by an order to dismiss the action as settled.

Epperly v. Southstar Corp. (VA-W 7:01-cv-00654 filed 08/27/2001).

Employment action by a person with epilepsy for wrongful failure to rehire because of disability. A memorandum of settlement was filed under seal, and the case was dismissed.

Palmer v. Shire Richwoods Inc. (VA-W 7:01-cv-00739 filed 09/26/2001).

Employment action by a male 47-year-old recovering alcoholic with a brain tumor, alleging discrimination on the basis of age, disability, and sex, and violation of the Family and Medical Leave Act in his employer's replacing him with a younger, healthier woman. The case was dismissed pursuant to a sealed memorandum of settlement.

Teamsters National Automobile Transporters Industry Negotiating Committee v. Hook Up Inc. (VA-W 7:02-cv-00035 filed 01/10/2002).

Labor action alleging that the closing of a truck distribution terminal violated the Worker Adjustment and Retraining Notification Act by not giving employees sixty days' notice. The case was dismissed pursuant to a sealed memorandum of settlement, which was subsequently destroyed.

Phi Delta Theta International Fraternity v. Phi Delta Alpha (VA-W 3:02-cv-00028 filed 03/05/2002).

Designated a trademark infringement action, this is an action by the international Phi Delta Theta fraternity against an expelled University of Virginia chapter, which changed its name to Phi Delta Alpha, but continued to suggest association with Phi Delta Theta, such as by referring to its members as "Phi Delts." The chapter was expelled for serving alcohol, which resulted in the hospitalization of an underage student. The case was dismissed pursuant to a sealed "sketch settlement agreement." The unsealed consent order dismissing the action states that the settlement did not include an award of damages.

Reyes-Ibarra v. Miller (VA-W 7:02-cv-00681 filed 05/23/2002).

Action by migrant agricultural workers under the Migrant and Seasonal Agricultural Worker Protection Act and the Fair Labor Standards Act for improper wages, working conditions, and notice of labor regulations. The plaintiffs were hired to create Christmas decorations from evergreens. The action was dismissed pursuant to a sealed memorandum of settlement.

Younger v. TWC Inc. (VA-W 6:02-cv-00038 filed 06/19/2002).

Employment discrimination action for sexual harassment and retaliatory discharge. The case was dismissed pursuant to a sealed memorandum of settlement.

Eastern District of Washington

No relevant local rule.

Statistics: 1,355 cases in termination cohort; 70 docket sheets (5.2%) have the word "seal" in them; 3 complete docket sheets (0.22%) were reviewed; actual documents were examined for 2 cases (0.15%); 2 cases have sealed settlement agreements (0.15%).

Cases with Sealed Settlement Agreements

United States ex rel. Carbaugh v. Westinghouse Hanford Co. (WA-E 2:96-cs-00171 filed 03/19/1996).

Qui tam action under the False Claims Act for fraudulently billing for workers' fringe benefits. A sealed settlement agreement was filed.

Lohr v. Komatsu Electronic Materials (WA-E 2:00-cs-00225 filed 06/29/2000).

Product liability case in which two employees were seriously injured and one was killed when a pressure line exploded. Three minor plaintiffs in the case had guardians ad litem. The court sealed five documents filed during the thirty days preceding the filing of the recommendation by the guardians ad litem and ordered that "counsel shall file all further pleadings concerning settlement of this matter under seal." A stipulation order dismissing the case gives no additional information.

Western District of Washington[69]

"There is a strong presumption of public access to the court's files and records which may be overcome only on a compelling showing that the public's right of access is outweighed by the interests of the public and the parties in protecting files, records, or documents from public review." W.D. Wash. L. Civ. R. 5(g)(1). In civil actions, after the case is over, if the entire record is sealed, the file is destroyed, *id.* R. 5(g)(5)(D); if part of the record is sealed, then sealed documents are returned to submitting parties, *id.* R. 5(g)(5)(C).

Statistics: 6,116 cases in termination cohort; 741 docket sheets (12%) have the word "seal" in them; 23 complete docket sheets (0.38%) were reviewed; actual documents were examined for 16 cases (0.26%); 12 cases (0.20%) appear to have sealed settlement agreements.

Cases with Sealed Settlement Agreements

Costco Wholesale Corp. v. Commonwealth Insurance Co. (WA-W 2:98-cv-01454 filed 10/14/1998).

Contract action involving an insurance coverage dispute for losses suffered by the plaintiff for excessive soil settlement at the plaintiff's warehouse. A cross-claim was filed against the architect and the engineer who were responsible for the design, planning, and construction of the warehouse. A settlement was reached with the engineer. A motion for setoff of the amount paid by the settlement was filed under seal. A stipulated protective order noted that the settlement agreement was confidential. The plaintiff was awarded $10,845,740 from the insurance company. The decision was affirmed on appeal.

MetroNet Services Corp. v. U.S. West Communications Inc. (WA-W 2:00-cv-00013 filed 01/05/2000).

Antitrust case challenging the defendant's monopoly over local and long-distance telecommunication services. The plaintiff filed a motion under seal to enforce the settlement agreement. The court denied the plaintiff's motion. The court granted the defendant's motion for summary judgment. The case currently is under appeal.

Kim v. Méndez (WA-W 2:00-cv-00071 filed 01/14/2000).

Employment action by a Korean cook against his former employer and two former co-workers for race discrimination and retaliation. A guardian ad litem was appointed to oversee the interests of the plaintiff, who was hospitalized for psychiatric care. The court granted a partial summary judgment for one of the co-worker defendants. A joint stipulated agreement provides that the terms of the settlement agreement remain confidential. The court approved and sealed the guardian ad litem report.

Supnick v. Amazon.com Inc. (WA-W 2:00-cv-00221 filed 02/11/2000).

Class action involving Web navigation software that gave the defendant access to users' names, passwords, and other confidential information. A sealed settlement agreement was filed. One week after the settlement agreement was filed, it was unsealed. The defendant agreed to modify its software so that it does not collect confidential information. The defendant agreed to pay $1.9 million to named plaintiffs and a class of approximately 47,500, and $100,000 to a fund that will provide grants to university-based programs with Internet public policy issues.

Lambert v. Henderson (WA-W 3:00-cv-05165 filed 03/21/2000).

Employment discrimination action by a black mailman against his former employer for refusing to provide light-duty work for him after his surgery. Minutes of the settlement were placed on

69. This district was selected at random for the study, and it has a good-cause rule.

the record under seal during the settlement conference.

Savage v. Combined Insurance Co. of America (WA-W 3:00-cv-05319 filed 06/01/2000).

Labor litigation involving failure to pay commissions on the sale of Medicare supplemental policies. The settlement agreement was placed on the record under seal during the settlement conference.

White v. Johnston & Culberson Inc. (WA-W 2:00-cv-00982 filed 06/07/2000).

Action under the Fair Labor Standards Act for failure to pay overtime wages. A sealed settlement agreement was filed. The court approved the settlement.

Gorchoff v. North Shore Agency (WA-W 2:00-cv-01329 filed 08/07/2000).

Class action under the Fair Debt Collection Act for failing to provide the name of the original creditor in a collection letter and for threatening to take action not legally allowed by the defendant. The case was dismissed as settled, and the order of dismissal was filed under seal. A sealed settlement agreement apparently was filed.

Precor Inc. v. Brunswick Corp. (WA-W 2:00-cv-01392 filed 08/17/2000).

Patent infringement case involving a patent for a treadmill. Six weeks after the case was dismissed, the defendant filed a motion under seal to enforce the settlement agreement. The court granted the defendant's motion.

Chance v. Avenue A Inc. (WA-W 2:00-cv-01964 filed 11/20/2000).

Class action by persons who were secretly tracked by the defendant as they surfed the Internet. The defendant's motion for summary judgment was granted. The plaintiffs appealed, but later voluntarily dismissed the appeal. The court granted a joint motion for preliminary approval of the class action settlement that was filed under seal.

Chilbeck v. Deere & Co. (WA-W 3:01-cv-05287 filed 05/29/2001).

Product liability wrongful death case involving a man who suffocated when his tractor tipped over, pinning him between the tractor's rollover protective structure and the ground. The decedent's minor child was represented by a guardian ad litem, whose report on the settlement was sealed. A joint stipulation was filed that the settlement documents be filed under seal.

In re Arctic Rose LLC (WA-W 2:01-cv-01360 filed 08/31/2001).

Statutory action in admiralty by owners of a fishing vessel for exoneration from or limitation of liability arising from an accident that resulted in the deaths of thirteen people. Seven guardian ad litem reports were filed under seal and approved by the court for the decedents' minor children. The order authorizing settlement was filed under seal.

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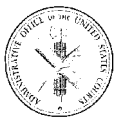
ATTACHMENT 3



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MEMORANDUM TO THE ADVISORY COMMITTEE ON CIVIL RULES

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

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

Date: **December 12, 2003**

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

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

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

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

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

A. *Media and Public Perceptions Regarding Settlement Secrecy*

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

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

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

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

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

B. *Three Major Misconceptions Regarding Settlement Secrecy*

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

1. *Secret ≠ Sealed*

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

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

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

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

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

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

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

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

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

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

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

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

3. *Secret Settlements ≠ Secret Cases*

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

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

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

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

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

II. Analysis of Complaints in Cases with Sealed Settlement Agreements

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

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

A. *Methodology*

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

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

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

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

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

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

4. Environmental damage (2 cases);

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

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

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

B. *Content of Complaints*:

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

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

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

1. *Products Liability*

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

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

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

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

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

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

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

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

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

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

2. *Other Categories of Health and Safety Cases*

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

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

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

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

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

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

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

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

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

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

Case Profiles
(By Nature of Claim)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. Environmental Damage: (2 cases total)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ANSWERS TO POST-HEARING QUESTIONS FROM RICHARD D. MEADOW,
THE LANIER LAW FIRM, PLLC

Hearing on H.R. 5884, the Sunshine in Litigation Act
Subcommittee on Commercial and Administrative Law
July 31, 2008, at 10:30 a.m.

POST-HEARING WRITTEN QUESTIONS & ANSWERS
From Linda T. Sanchez, Chair

Richard D. Meadow

We know that many confidentiality orders – including protective orders – are agreed upon by the parties. In your experience, how much judicial scrutiny do such proposed orders receive from courts?

There is little to no judicial scrutiny on protective orders as the parties normally negotiate a consent order. Judges are more involved with confidentiality in settlement agreements and, at that time, plaintiffs counsel must represent the interests of their client and not the public at large.

Some critics of the Sunshine in Litigation Act fear that it would result in the disclosure of proprietary business information. What is your response?

Most documents that implicate the public health do not involve proprietary information or trade secrets. A judge, along with the parties, could craft an order which expressly exempts trade secrets and proprietary information. Materials and documents which are marked confidential and/or privileged are then entered on a privilege log and subject to judicial scrutiny.

Does information uncovered during litigation about dangerous products often reveal trade secrets and other proprietary information?

See response above

Would the limitations on the issuance of confidentiality orders provided for in the Sunshine in Litigation Act reduce the flow of discovery materials? That is, would plaintiffs get less discovery if protective orders were not as freely given as they are now?

No. There is a delay in the discovery process right now due to the negotiations necessary for confidentiality orders. A Sunshine Act would help reduce this time period and actually speed up discovery.

Why do you believe that the public cannot just rely on regulatory agencies – like the FDA, for instance – to disseminate information about health and safety hazards? Why is it important that the public receive such information when it is uncovered during litigation?

> *The FDA normally does not have the records that show health and safety hazards. This is the basis of many pharma and medical device cases. Since the FDA does not have the records, they cannot disseminate them to the public. Furthermore, if the FDA did have the raw data, it is too underfunded and overworked to focus appropriately and to move with speed and clarity. For example, the FDA approved Ketek even after being informed that the clinical trial data upon which the approval was based was falsified. The FDA did not move to strengthen the Avandia label until Dr. Nissen published his meta-analysis. And, in Vioxx, Merck steamrolled the FDA into placing a precaution on its label rather than a warning. In addition, a recent Congressional investigation of the FDA's ability to protect the public safety by the Committee on Energy and Commerce and its Subcommittee on Oversight and Investigations revealed well documented allegations that senior management at the FDA arm regulating the safety of medical devices, CDRH, ordered, intimidated and coerced FDA experts to modify their scientific reviews, conclusions and recommendations in violation of the law, and to make safety and effectiveness determinations that are not in accordance with scientific regulatory requirements, to use unsound evaluation methods, and accept clinical and technical data that is not scientifically valid or obtained in accordance with legal requirements. Transparency in litigation would certainly be in the best interests of the public.*

ANSWERS TO POST-HEARING QUESTIONS FROM JOHN P. FREEMAN, DISTINGUISHED PROFESSOR EMERITUS, UNIVERSITY OF SOUTH CAROLINA LAW SCHOOL

Hearing on H.R. 5884, the Sunshine in Litigation Act
Subcommittee on Commercial and Administrative Law
July 31, 2008, at 10:30 a.m.

POST-HEARING WRITTEN QUESTION
From Linda T. Sanchez, Chair

John P. Freeman

You note in your written statement (at 5) that the litigation system produces information about health and safety that, if disseminated to the public, might help guide consumer choice. What is your response to critics of sunshine-in-litigation legislation (among them Professor Arthur Miller) who say that the federal courts should not be used as "clearinghouses" for health and safety information — that they should stick to the business of resolving disputes between parties?

JOHN FREEMAN'S RESPONSE TO POST-HEARING WRITTEN QUESTION

I respectfully and emphatically disagree with the view of Professor Miller and some others. They are wrong in arguing courts should perform the limited service of private dispute resolution and not serve an important informational function for the benefit of the public. I note that Professor Miller advocated this position in his article, Confide*ntiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427 (1991), a piece "assisted" with money from the pro-business, pro-defense Product Liability Advisory Council Foundation. Lest there be any doubt, nobody has "assisted" or guided my views on the present subject as articulated before the Subcommittee or elsewhere.

I disagree with the position taken by Professor Miller and those like him. One of tort law's key purposes is deterrence. *See Yarborough v. Alvarado*, 541 U.S. 652, 674 (2004) (noting deterrence was a "recognized purpose" underlying tort law concepts). Courts are tort data generators day-in and day-out. The fruits of that effort are paid for by the nation's taxpayers. For the precious data generated to deter misconduct, it must be visible. The more visible the data, the more the deterrence function is served, and the wider the dissemination, the better.

I reject categorically the notion that courthouses are really clubhouses for privately resolving private parties' differences. If the parties want privacy, they have arbitration available as an option. I also reject the notion litigants enjoy some inherent right to keep conduct secret. I say instead that when a public forum is used to resolve disputes, the public has an ownership interest in the data generated by the lawsuit.

Two common business buzzwords are "transparency" and "accountability." Talk is cheap. Our courtrooms should epitomize those words in action. As I said in my pre-filed testimony, what happens there teaches us "about which goods are safe and which goods are dangerous, which employers share our values of non-discrimination and which employers retain discriminatory policies, which institutions deserve our trust, and which institutions deserve our scorn." I say, respectfully, that in these disturbing and uncertain times, we need more disclosure and more accountability, not less.

ANSWERS TO POST-HEARING QUESTIONS FROM THE HONORABLE MARK R. KRAVITZ, JUDGE, U.S. DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

Response to Post-Hearing Written Questions from Representative Linda T. Sánchez Regarding H.R. 5884

Mark R. Kravitz

Question 1: You contend in your written statement (at 7) that the Sunshine in Litigation Act would impose "intolerable burdens" on courts when they are asked to issue protective orders. How would the Act burden courts any more than do the existing requirements under which courts must scrutinize requests for protective orders?

Under current law, when parties seek protective orders for discovery, the motions are generally made early in a case, before discovery begins. Parties seek protective orders to be able to exchange documents and information in discovery among themselves without frequent and expensive litigation over protecting such items as trade secrets, proprietary information, or sensitive personal information. Typically, motions for protective orders do not require the judge, who at that point has little information about the case, to examine all documents and information that may be produced in discovery to try to determine in advance whether any of it is relevant to protecting public health or safety. Instead, the parties generally request protective orders that seek confidentiality for categories of documents or information. The lawyers for each side can present arguments and the judge can evaluate whether particular categories of documents should be covered by a protective order and what the terms should be. If entered by the judge, protective orders provide the parties and the court with a procedural framework that allows the parties to produce documents and information much more quickly than would be the case if item-by-item judicial examination was required.

Protective orders typically provide that after documents are produced in discovery, the receiving party may challenge whether particular documents or information should be kept confidential. Such challenges are often made when the judge knows more about the case and they typically involve a much smaller subset of the documents produced in discovery. In considering such requests, the judge also has the benefit of input from the lawyers after they have received the documents and know what they contain. The judge can order that documents designated as "confidential" during discovery no longer be subject to such protection. *See, e.g.*, *In re Zyprexa Prods. Liab. Litig.*, — F.R.D. —, Nos. 04-MD-1596, 05-CV-4155, 05-CV-2948, 06-CV-0021, 06-CV-6322, 2008 WL 4097408, at *158–59 (E.D.N.Y. Sept. 5, 2008). Current law also allows the courts to tailor protective orders to be sure that they are no broader than necessary. Finally, when documents are filed in court, the common law or constitutional interest of the public in open proceedings will apply.

By contrast, H.R. 5884 requires the judge to make specific fact findings in any case in which a protective order is sought in discovery. To make those fact findings, the judge would have to review all the documents and information, item-by-item. In many cases, the parties will be asking for and producing huge volumes of information and documents in discovery, only a very small percentage of which will ultimately be used by the parties in the case. The review required by H.R. 5884 will often involve huge amounts of information. Because the review occurs early in the case, when the judge knows relatively little, it will often be very difficult for the judge to tell if specific information or documents are relevant to public health or safety. The parties and lawyers will be unable to help because they do not have each other's documents at this stage. The review must take place and the findings of fact must be made before any protective order can issue, and the parties are usually unwilling to produce their documents before then. The result is a much larger burden on the courts than is imposed under current law, and greater delay and cost in getting needed information to the parties and their lawyers.

Question 2: You note in your written testimony (at 5) that the Rules Committee of the Judicial Conference "studied the examples of cases in which information was hidden from the public commonly cited to justify legislation such as H.R. 5884." It found, "in particular, that the complaints in these civil cases typically contained extensive information describing the alleged actions sufficient to inform the public of any health or safety issue." But how can the public and regulatory agencies realistically identify health and safety risks from the many untested allegations in the 200,000-plus complaints filed in the federal court system each year? A complaint allegation is one thing; a smoking-gun document uncovered during discovery is another.

The protective-order issue arises in a small fraction of cases. As noted in my written statement, the available empirical data shows that protective orders are requested in only about 6% of the 200,000 plus civil cases filed in the federal courts each year. Nearly 75% of these requests are by motion, which courts carefully review and deny or modify as required. In addition, half of the requested protective orders involve orders governing the return or destruction of discovery materials or imposing a discovery stay pending some event, and only the other half deals with restricting disclosure of information. Accordingly, there is currently substantial information that is publicly available about most cases filed in federal court.

As to that small fraction of cases in which protective orders are entered, the allegations in the complaints, though not tested, contain enough information and details to provide notice of what claims are asserted and why those claims are a plausible basis for relief. In product defect cases, for example, complaints typically at a minimum identify the

allegedly defective product or alleged wrongdoer, identify the accident or event at issue, and describe the harm. Complaints are readily accessible to the public, the press, and regulatory agencies. Remote electronic access to court filings, now available in virtually all federal courts, makes it easy, efficient, and inexpensive to find complaints with allegations that raise public health and safety issues. Filed complaints are where the public, the press, and regulatory agencies would be expected to look for case information on public health and safety issues. Based on the allegations in the complaint, the public, the press, or regulatory agencies can decide whether to monitor a case, investigate further, or seek information through the court handling the case.

Unlike complaints, materials produced in discovery are not filed with the court and cannot be remotely or easily accessed. The public does not have the right to materials produced in discovery. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984). As a result, even in the absence of a protective order, the public has no right to know of, or obtain access to, documents produced in discovery, including the rare "smoking gun" document. The public does have a right to learn of and have access to documents produced in discovery if they are filed with the court or introduced into evidence in a hearing or at trial.

Under current law, if a protective order is in place, the public, the press, or regulatory agencies can use the allegations in a complaint to decide whether to ask the court to lift or modify the protective order to allow the parties to disseminate information or documents obtained in discovery. H.R. 5884 is not necessary to achieve this result. Moreover, as a practical matter, "smoking guns" will be difficult, if not impossible, for the judge to recognize in the mountain of documents that must be reviewed, all without the assistance of the requesting party's counsel or expert.

ANSWERS TO POST-HEARING QUESTIONS FROM THE HONORABLE JOSEPH F. ANDERSON, JR., JUDGE, U.S. DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

H.R. 5884 — SUNSHINE IN LITIGATION TESTIMONY POST-HEARING QUESTIONS WRITTEN RESPONSES BY JUDGE JOSEPH F. ANDERSON, JR.

Q. *Do you believe that the Sunshine in Litigation Act would deny confidentiality protection to proprietary commercial information, trade secrets, or private personal information?*

A. I do not believe that the pending legislation would deny confidentiality protection for sensitive information such as proprietary, trade secret, or personal identifying information. The legislation is drafted to make it clear to judges that this information is, and should always remain, confidential.

Q. *Are you concerned that judges would encounter difficulties in determining whether discovery information "is relevant to the protection of public health and safety"? What is the basis of your conclusion?*

A. Although I am certain some judges will suggest that a requirement that they make a determination regarding public health and safety would add to our workload, I am convinced that judges could handle this additional assignment with relative ease. Litigation regarding an allegedly defective go kart or ground water contamination is relevant to public health and safety. Litigation involving a contract dispute between two business competitors, or an action to enforce a patent on a new invention is not relevant to public health and safety. In my view, the line is not one that is difficult to draw.

Q. *The Sunshine in Litigation Act would require judges to balance the public interest in disclosure of certain information against a litigant's interest in confidentiality. How would judges go about doing that?*

A. Balancing competing interests is what judges do on a daily basis. In my opinion, a judge should look at the competing interests involved here (the litigant's interest in confidentiality versus the public interest) with a slight preference for confidentiality. After considering all the factors, if the public's interest tips those scales such that the public interest is more important, then the judge should not sign a confidentiality order.

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