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Opening Medical Settlements for the Public Good: Why Medical Cases Justify Secrecy in Settlement

When patients walk into their doctor's office they do not expect to walk out with a lawsuit. They probably do not expect that their visit will result in worse injuries, or that they may someday be forced to explain their medical problems to a tribunal of their peers to receive compensation. When patients must turn to the legal system, many choose settlement over a public trial. Settlement in medical cases happens for many reasons. For example, doctors can preserve their reputations from public questioning and claimants can expedite their claims, which can be crucial in cases of ongoing injuries. Whatever other benefits settlement brings, privacy may be the most important. Patients expect confidentiality when they walk into the doctor's office and that does not necessarily change when they leave, harmed.

Several jurisdictions have enacted laws that challenge this expectation of privacy. Before, claimants could include a confidentiality clause in their final settlement agreement—a contract between the parties to keep information relating to the claim confidential. Twelve jurisdictions¹ now have “[s]unshine in

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¹ ROBERT TIMOTHY REAGAN ET AL., FED. JUDICIAL CTR., SEALED SETTLEMENT AGREEMENTS IN FEDERAL DISTRICT COURT 2–3 (2004), available at [http://www.fjc.gov/public/pdf.nsf/lookup/sealset3.pdf/\\$file/sealset3.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/sealset3.pdf/$file/sealset3.pdf).

litigation” laws² that either abolish confidential or “secret” settlements or severely limit their use and enforcement in court. Other jurisdictions may feel pressure to follow this trend. However, sunshine laws, especially when applied to medical cases, threaten important rights of claimants: confidentiality, autonomy, and privacy.

Compelling cases have challenged the practice of secret settlement. Secret settlements have been justified through the legal concepts of freedom of contract, client autonomy, and the duty of confidentiality.³ But, in cases of great public interest, these concerns fade away. A claimant may have an interest in contracting for a better settlement amount by agreeing to keep her claim secret, but this interest pales in comparison to the public’s right to know – assuming there is such a right. For example, Firestone used secret settlements for eight years in resolving the early claims from injuries arising from flaws in Firestone tires and Ford SUVs.⁴ Afterward, some interest groups argued that if states had barred secret settlements many lives could have been saved.⁵ These claims fuel the fear that companies are aware of dangerous products and can effectively hide such knowledge from the public with the help of the judicial system.⁶ However, the debate over secret settlements does not merely posit defendants hiding from liability against the uninformed public. Some claimants have legitimate and important privacy interests in keeping their

² See, e.g., TEX. R. CIV. P. 76a(1); FLA. STAT. § 69.081 (2004); D.S.C. LOCAL R. 5.03 (2008).

³ See MODEL RULES OF PROF’L CONDUCT R. 1.6(a) (2007) (duty of confidentiality).

⁴ Susan P. Koniak, *Are Agreements to Keep Secret Information Learned in Discovery Legal, Illegal, or Something in Between?*, 30 HOFSTRA L. REV. 783, 783–84 (2002); Christopher R. Drahozal & Laura J. Hines, *Secret Settlement Restrictions and Unintended Consequences*, 54 U. KAN. L. REV. 1457, 1457 (2006).

⁵ Press Release, Consumers Union, Consumers Union Supports Bills to Limit Secret Out-of-Court Settlements (Dec. 4, 2000) (“Many lives could be saved and much suffering could be averted if corporations were not allowed to use secrecy orders in court settlements to hide information about product defects, environmental hazards, or financial fraud.” (quoting Elisa Odabashian, Senior Policy Analyst, Consumers Union’s West Coast Office)). Several states acted on this advice. Rebecca A. Womeldorf & William S.D. Cravens, *More Sunshine Laws Proposed: After the Firestone Recalls, 10 States and the US Senate Introduced Bills to Limit Secret Orders, Agreements*, 24 NAT’L 12, Nov. 12, 2001, at B14.

⁶ See 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 (2004). Tire cases in general have had a big impact on the implementation of sunshine laws. See, e.g., *Goodyear Tire & Rubber Co. v. Jones*, 929 So. 2d 1081 (Fla. Dist. Ct. App. 2005) (tire company case concerning Florida’s Sunshine in Litigation law); *Gen. Tire, Inc. v. Kepple*, 970 S.W.2d 520, 523 (Tex. 1998) (tire case concerning Texas’s statute barring the sealing of court records or settlements).

claims out of the public eye. The public may have an interest in protecting citizens from such exposure.

The story of the Dalkon Shield cases presents an important example in which a claimant's privacy interests conflict with the public's interest in knowing.⁷ In the early 1970s, thousands of women suffered injury or death as a result of using a contraceptive device called the Dalkon Shield. The device, sold and marketed by the A.H. Robins company throughout the United States and abroad, had disastrous effects on its consumers. Though the company tried for some time to keep the product's dangerous effects hidden from the public,⁸ eventually the affected women brought the issue to light in what was the largest medical product liability suit in U.S. history.⁹ Medical cases like this bring forth nuanced issues embedded in the debate over secret settlements. Medical products liability cases, in particular, often include products that present substantial danger to the public. The cases inevitably involve deeply personal information that claimants expect to remain private.¹⁰ The Dalkon Shield defendants did extensive discovery into the women's personal and sexual histories, forcing women to disclose sensitive information about their bodies.¹¹ In the end, the claimants exposed a disturbing story of deceit and corporate indifference in the face of immense suffering.¹² The Dalkon Shield cases only involved women; women are frequently the victims of medical device failures and face difficult obstacles if they turn to the tort system.¹³ Because of the cruel ways in which the details of the women's lives were forced into the public light, some dropped their claims or did not bring claims at all.¹⁴ Several women declined to go to trial and settled out of court instead;¹⁵ while some likely settled secretly.

⁷ See *In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir. 1989).

⁸ Richard A. Zitrin, *The Case Against Secret Settlements (Or, What You Don't Know Can Hurt You)*, 2 J. INST. FOR STUDY LEGAL ETHICS 115, 120 (1999).

⁹ RONALD J. BACIGAL, *THE LIMITS OF LITIGATION: THE DALCON SHIELD CONTROVERSY* 3 (1990).

¹⁰ See *infra* notes 73–75 and accompanying text (HIPPA regulations and the *Mann* case reflect society's perception that medical information should be private).

¹¹ BACIGAL, *supra* note 9, at 18–20.

¹² See *infra* Part II.

¹³ See *infra* notes 74, 77, 78, 80 and accompanying text.

¹⁴ Miles W. Lord, *The Dalkon Shield Litigation: Revised Annotated Reprimand by Chief Judge Miles W. Lord*, 9 HAMLIN L. REV. 7, 9, 27 n.11, 28 n.15 (1986).

¹⁵ SUSAN PERRY & JIM DAWSON, *NIGHTMARE: WOMEN AND THE DALCON SHIELD* 6 (1985).

Does public enlightenment justify the personal exposure these women had to endure to resolve their cases? Claimants must often share the intimate details of their lives in pursuit of legal redress. Yet, secret settlement offers some assurance of privacy. The move toward alternative dispute resolution was a step forward in respecting claimants' privacy. Now, sunshine laws take a step back. Rather than exposing harms, these laws subject the members of the public most harmed to another form of harm by refusing to respect their interest in privacy. Despite the importance to the public, strictly enforcing sunshine laws, particularly in medical cases, threatens other important values in our society: confidentiality, autonomy, and privacy. Thus, courts should enforce secret settlements for medical claimants with strong privacy interests, but also consider alternatives to strict enforcement of sunshine laws.

This Comment argues that the judicial system should give deference to mutually desired secrecy agreements in medical cases. Medical products liability cases, in particular, deserve a more narrowly tailored approach than most sunshine laws allow. These cases likely involve both strong privacy concerns as well as compelling arguments for public disclosure. While courts should err on the side of confidentiality, states can adopt other means of disclosing public harms that still uphold the public's interest in protecting private information.

Part I of this Comment summarizes the arguments for and against secrecy in settlements, and the particular benefits of secrecy in medical cases. Part II provides an overview of the Dalkon Shield cases and focuses primarily on the competing interests of the claimants, the defendants, and the public. Part III explains how settled cases can avoid public disclosure in states without sunshine laws and how sunshine laws alter these procedures. It also examines some important components of four states' sunshine laws and then applies those principles to the Dalkon Shield example to show how these laws fail to protect privacy in medical cases. Finally, Part IV proposes three alternative methods of protecting the public from harm while minimizing the effect on claimants with legitimate privacy interests.

I

SECRECY ISSUES

A. *Settlement and Secrecy in General*

Secrecy in settlement agreements faces harsh criticism, despite the fact that the majority of states do not prohibit it. Commentators have challenged settlement agreements in general for reasons that apply to the secret settlement debate as well. Settlement has been accused of slowing the evolution of the law by preventing certain legal issues from being adjudicated.¹⁶ Choosing to settle robs society of important factual information, especially in cases affecting the “public good.”¹⁷ For these commentators, the court’s role in shaping law and disclosing wrongdoing outweighs the individual interests of parties.¹⁸

Some arguments against secrecy highlight the public function of the judicial system.¹⁹ Secret settlements, especially those filed in court, undermine the values of open government.²⁰ Parties convert their private agreements into public documents when they seek approval or enforcement of settlement by a court.²¹ A court is “designed primarily to serve the public at large, . . . to produce public goods such as court precedents, legal rules, and factual accounts of contested events, and not private goods such as settlements”²² Lastly, secrecy is especially troubling when it hides repetitive bad behavior and risks to the public.²³

¹⁶ See Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1087–90 (1984) (arguing that all cases, but particularly “significant” cases like *Brown v. Board of Education*, should avoid settlement); David Luban, *Settlement and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2621–40 (1995) (articulating arguments in support of adjudication, including its ability to produce rules and precedents).

¹⁷ Luban, *supra* note 16, at 2622–26.

¹⁸ Fiss, *supra* note 16, at 1089; Koniak, *supra* note 4, at 789–90.

¹⁹ Luban, *supra* note 16, at 2642.

²⁰ Marc L. Miller & Ronald F. Wright, *Secret Police and the Mysterious Case of the Missing Tort Claims*, 52 BUFF. L. REV. 757, 778–79 (2004).

²¹ Zitrin, *supra* note 8, at 123; Abner J. Mikva, *The Role of Judges in Secret Judgements*, 55 S.C. L. REV. 773, 773 (2003–2004) (stating that having a secret agreement with your neighbor “is fine” but “when you ask to have a judge put his imprimatur on [an] agreement . . . it enters the public domain”).

²² Koniak, *supra* note 4, at 790.

²³ Other arguments against secret settlement include: that later claimants may be less likely to attain the same settlement as early claimants, that secrecy hides repetitive misbehavior, that it is unethical to allow bad actors to buy silence, and that public courts should not be asked to validate or enforce the arrangements of private parties. Drahozal &

However, a claimant's ability to choose settlement, and even secret settlement, remains largely unrestricted in most jurisdictions. Many commentators applaud the choice to put a client's interests above the public's interest in disclosure.²⁴ As a practical matter, codes of professional conduct compel lawyers to settle if their clients so choose.²⁵ Courts also encourage settlement,²⁶ some even allow judges to serve as mediators rather than force every case into the courtroom.²⁷ These realities reflect the judiciary's tendency to respect client autonomy. Supporting a client's decision to keep his or her settlement secret by filing it under seal or agreeing to a confidentiality clause gives deference to the party's wishes.²⁸ Despite the potential for abuse, secrecy allows parties to protect legitimately confidential information, like medical records or trade secrets,²⁹ which serves as a useful and necessary counterbalance to liberal discovery rules.³⁰ Allowing for secret settlements may promote settlement in general; thus increasing judicial efficiency while

Hines, *supra* note 4, at 1474; *see also* Alison Lothes, Comment, *Quality, Not Quantity: An Analysis of Confidential Settlements and Litigants' Economic Incentives*, 154 U. PA. L. REV. 433, 449–51 (2005) (showing that defendants can hide information from the public by buying silence from claimants) (citing Andrew F. Daughety & Jennifer F. Reinganum, *Hush Money*, 30 RAND J. ECON. 661 (1999)).

²⁴ *See, e.g.*, Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663 (1995); Jeffrey R. Seal, *Settling Significant Cases*, 79 WASH. L. REV. 881 (2004).

²⁵ *See* MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2007).

²⁶ *See* *Marek v. Chesny*, 473 U.S. 1, 10 (1985) ("In short, settlements rather than litigation will serve the interests of plaintiffs as well as defendants."); Marc Galanter & Mia Cahill, "Most Cases Settle": *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1342–43 (1994).

²⁷ Galanter & Cahill, *supra* note 26, at 1354–55.

²⁸ As mentioned, the Model Rules compel this deference as well. MODEL RULES OF PROF'L CONDUCT R. 1.2(a).

²⁹ *See* Drahozal & Hines, *supra* note 4 at 1465–66 (describing legitimate personal privacy interests as well as commercial privacy interests).

³⁰ Miller & Wright, *supra* note 20, at 778; Laurie Kratky Doré, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 326 (1999) ("The extraordinarily broad scope of discovery necessitates the availability of confidentiality agreements and discovery protective orders. As currently framed, the discovery regime often requires production of voluminous amounts of arguably private or sensitive information concerning parties and nonparties alike that would not otherwise be subject to compelled public disclosure and that might ultimately prove inadmissible."); *see also* Luban, *supra* note 16, at 2649–50 (describing controversy over the use of protective orders authorized under Federal Rule of Civil Procedure 26(c)).

avoiding costly trials.³¹ Without the possibility of secrecy, some commentators worry that settlement will be chilled, litigation will increase, and the high costs that go with litigation will unduly burden those who seek legal remedies.³²

Until recently, the court's ability to allow secrecy in settlements was largely unchecked.³³ Secrecy is accomplished in primarily two ways: private agreements to keep matters secret, often accompanied by compensation from the defendant, or court documents filed under seal.³⁴ However, since Florida first passed its "Sunshine in Litigation Act" in 1990, several jurisdictions have adopted similar laws regulating secret agreements.³⁵ For example, the U.S. District Court of South Carolina recently joined this trend in 2004.³⁶ Thirty-two federal districts have rules regarding how long settlements may remain sealed.³⁷ Twelve districts require a showing of good cause

³¹ Miller & Wright, *supra* note 20; *see also* Lothes, *supra* note 23, at 452–57 (for an interesting analysis of the theory that openness in settlement is also costly to *defendants* who must defend a greater number of nonmeritorious "nuisance suits" and provide larger payouts).

³² Miller & Wright, *supra* note 20; *see also* Drahozal & Hines, *supra* note 4, at 1466–72 (analyzing the merits of the "chilling settlements" argument); James E. Rooks, Jr., *Settlements and Secrets: Is the Sunshine Chilly?*, 55 S.C. L. REV. 859, 867–68 (2004) (quoting insurance groups and defense attorneys making "chilling settlements" arguments in opposition to South Carolina federal district court rule, D.S.C. LOCAL R. 5.03). *But see* Anderson, *supra* note 6, at 726 ("Statistics compiled since the implementation of [South Carolina's District Court] Local Rule 5.03(c) easily refute this [chilling settlement] argument. In South Carolina, the judges in our district court actually tried two *fewer* cases in the twelve months following the promulgation of Local Rule 5.03(c) than they did in the immediately preceding twelve-month period.").

Other arguments in support of secret settlements include: that because secrecy has a market value, plaintiffs may have a "property" interest in the material that they discover in the course of a lawsuit; that if all settlements were public, later claimants would bring frivolous claims having knowledge of a potential defendant and the amount they were willing to settle for; and that some prefer autonomy through private agreements over government involvement. *See* Drahozal & Hines, *supra* note 4, at 1464–76.

³³ *See* Richard A. Zitrin, *The Laudable South Carolina Court Rules Must Be Broadened*, 55 S.C. L. REV. 883, 889–91 (2004) (showing states' efforts to address secret settlements and noting "[i]n the last five years, secrecy in settlements has become an increasingly common subject of articles in the popular legal press").

³⁴ Drahozal & Hines, *supra* note 4, at 1458. Filing a document "under seal" means that the document is "available to the litigants and may be reviewed by the court in deciding an issue before it, but [is] not available to the public." Anderson, *supra* note 6, at 713.

³⁵ Drahozal & Hines, *supra* note 4, at 1476–79.

³⁶ *Id.* at 1479.

³⁷ REAGAN ET AL., *supra* note 1, at 2–3; *see also, e.g.*, D. OR. LOCAL R. 3.11 (2008) (stating that parties have sixty days after closing a case to have the sealed document returned to the party, or it is unsealed).

before sealing.³⁸ At least twelve states have or are considering strong restrictions on sealed settlements, especially in cases involving “public safety” or “public hazards.”³⁹ Further, Texas restricts private settlement agreements as well as filed settlements.⁴⁰

These restrictions generally take the following forms:

1. A presumption, sometimes based on common law, that certain court records are open to the public, especially records of “substantive action by the court;”⁴¹
2. Narrow restrictions on the use of protective orders in discovery;⁴²
3. Good cause requirements for sealing court files;⁴³
4. Requiring public hearings before sealing court files;⁴⁴
5. Forbidding secret settlements that involve a “public hazard;”⁴⁵
6. Forbidding secret settlements filed in court,⁴⁶ and sometimes unfiled private settlements;⁴⁷ and
7. Making confidentiality clauses in unfiled settlement contracts per se void as against public policy if the agreement conceals a public hazard.⁴⁸

Allowing parties to privately agree to secrecy is less regulated than secrecy in court documents. This makes sense because these agreements are entirely private contracts. Moreover, the court’s ability to regulate these agreements, if even possible at all, is likely minimal. Court-supported secrecy, however, receives a higher degree of scrutiny.⁴⁹ Parties that bring their agreements to court to ensure its

³⁸ REAGAN ET AL., *supra* note 1, at 3; Zitrin, *supra* note 33, at 890.

³⁹ Berkeley Rice, *Malpractice: The Big Secret About Confidential Settlements*, MED. ECON., Apr. 25, 2003, available at <http://medicaleconomics.modernmedicine.com/memag/Medical+Malpractice%3A++Awards%2FSettlements/Malpractice-The-big-secret-about-confidential-sett/ArticleStandard/Article/detail/111356>.

⁴⁰ TEX. R. CIV. P. 76a(2) (2008).

⁴¹ Drahozal & Hines, *supra* note 4, at 1476; REAGAN ET AL., *supra* note 1, at 1.

⁴² Drahozal & Hines, *supra* note 4, at 1476.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *See, e.g.*, Sunshine in Litigation Act, FLA. STAT. § 69.081 (2004).

⁴⁶ *See, e.g.*, D.S.C. LOCAL R. 5.03 (2008).

⁴⁷ *See, e.g.*, TEX. R. CIV. P. 76a (2008).

⁴⁸ James E. Rooks, Jr., *Let the Sun Shine in: ‘Sunshine’ Laws Do Not ‘Chill’ Settlements Say Advocates of Open Courts*, TRIAL 20, June 2003, available at http://www.accessmylibrary.com/coms2/summary_0286-21046177_ITM.

⁴⁹ *See, e.g.*, Anderson, *supra* note 6; Mikva, *supra* note 21.

enforceability add a public aspect to their agreement.⁵⁰ In such instances, the court must balance its public role in developing law and revealing societal harms with its role in resolving disputes between individual parties.

B. Secret Settlements in Medical Cases

In certain medical cases, the public function of the court seems to justify abolishing secrecy. If a doctor has been negligent in the past, future patients should be informed. Keeping medical malpractice claims open to the public is one way of informing the public. Alternatively, medical malpractice can be regulated by medical licensing boards, hospitals, and through federal reporting requirements.⁵¹ Doctors who act negligently may be one-time offenders, could correct their behavior relatively quickly, or could be dealt with individually. Medical products liability cases present a tougher case for the secret settlement debate than medical malpractice cases do. Medical products reach a vastly larger population than do individual doctors. The harm posed to the public may rise to the level of a “public hazard” as sunshine laws define the term.⁵² Defective medical products almost always cause bodily harm, and many products cause death. Yet at the same time, medical products cases often involve deeply personal components that claimants legitimately seek to keep private. These serious concerns arose not only in the Dalkon Shield cases of the 1970s and ’80s, but also in the cases involving the drug Vioxx, the diet-drug cocktail called “fen-phen,” and silicone breast implants.⁵³

⁵⁰ See sources cited in *supra* note 21 and accompanying text.

⁵¹ Federal reporting requirements provide medical malpractice claim information to medical boards, hospitals, and other health care entities. However, the general public has no access to this information. Rice, *supra* note 39; see also *infra* Part IV.A (critiquing the federal reporting requirements).

⁵² See FLA. STAT. § 69.081(2) (2004) (defining public hazard); WASH. REV. CODE ANN. § 4.24.611(1)(a) (2005) (same).

⁵³ For more on these cases and similar products cases, see Wendy Wagner, *When All Else Fails: Regulating Risky Products Through Tort Litigation*, 95 GEO. L.J. 693, 714–20 (2007) (on the role of litigation in disclosing important information about risky products, in particular, breast implants); Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867, 908 n.167 (2007) (citing Alex Berenson, *In the Money, and in Court; Drug Industry Braces for New Suits over Even More of Its Products*, N.Y. TIMES, Apr. 22, 2006, at C1 (reporting some of these settlements: “Wyeth has spent \$15 billion . . . to resolve lawsuits over its fen-phen diet-drug combination, which can cause severe heart problems [A]nalysts estimate that

This Comment focuses on medical products liability cases and their relationship to sunshine laws.⁵⁴ It also addresses medical malpractice claims insofar as they share similar considerations. They too invoke legitimate privacy interests and create a serious threat to the public health and safety, albeit a smaller threat. As a case example, the Dalkon Shield litigation demonstrates the combination of issues that arise in medical cases: privacy, the public interest, and widespread harm to other individuals.

Medical cases require a close look at various considerations before deciding whether public disclosure should prevail over privacy. Certain factors weigh in favor of disclosure: a high degree of harm from the product, the risk of death,⁵⁵ a high likelihood that unknown third parties will be harmed, and the risk that a secret settlement will hide the harm from others.⁵⁶ Conversely, other considerations either favor secrecy or make secrecy a nonissue. For example, a high likelihood that other patients will discover the harm through the media or other channels, indications that the harm was particular to a single claimant and not widespread,⁵⁷ and instances when negligent parties have already taken remedial measures to avoid future harm. The strongest factor in support of secrecy in medical cases is privacy. On balance, courts should err on the side of confidentiality in medical cases.

Merck may eventually have to pay \$10 billion to \$50 billion to end the litigation over Vioxx, which has been linked to heart attacks and strokes.”)).

⁵⁴ The term “medical cases” in this Comment will generally refer to medical products liability cases, though I recognize that other medically related claims like malpractice share similar themes and concerns.

⁵⁵ Medical cases make up two-thirds of all wrongful death claims. THOMAS H. COHEN & STEVEN K. SMITH, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN, CIVIL JUSTICE SURVEY OF STATE COURTS, 2001: CIVIL TRIAL CASES AND VERDICTS IN LARGE COUNTIES, 2001, at 8 (2004), <http://www.ojp.usdoj.gov/bjs/pub/pdf/ctcvlc01.pdf>; see also Consumers Union, *supra* note 5 (alleging that secrecy orders put people at risk of death).

⁵⁶ For an argument that media channels may adequately reveal harm from medical products, see Moss, *supra* note 53, at 907–09.

⁵⁷ For instance, some medical products produce negative side effects either because of other medications a patient is taking or because of a patient’s genetic predisposition that could not be anticipated. See John T. Nockelby, *How to Manufacture a Crisis: Evaluating Empirical Claims Behind “Tort Reform,”* 86 OR. L. REV. 533, 568–69 (noting that no two medical malpractice cases are the same and that medical claimants’ injuries vary widely).

1. Medical Cases Invoke Different Considerations that Justify Secrecy in Settlement

Medical cases, perhaps more than any other personal injury claim, tend to end in settlement because of the complex issues involved and the difficulties facing both parties at a trial.⁵⁸ Claimants in both medical malpractice and medical products cases tend to choose settlement at a higher rate.⁵⁹ In 2001, the life of a medical malpractice case averaged 33.2 months, making them the second-longest trials of all tort cases.⁶⁰ Products liability cases were longest.⁶¹ Medical products cases usually fit into one or both of these categories. Many medical claimants cannot wait this long for compensation, especially if they are suffering injuries, out of work, or without health care.⁶²

Doctors, drug manufacturers, and other medical defendants also have compelling reasons for settlement. Even when culpability remains uncertain, many defendants would rather avoid the embarrassment of a public trial.⁶³ Just being in court can be damaging even to a company's name or doctor's reputation, even if innocent.⁶⁴ Settlement allows defendants a certain amount of privacy and expediency in resolving claims. *Secret* settlement prevents others from knowing how much a claimant was given in damages and what medical details prompted the claim.⁶⁵

⁵⁸ Rice, *supra* note 39; see also TOM BAKER, THE MEDICAL MALPRACTICE MYTH 68–69 (2005).

⁵⁹ Online Lawyer Source, Medical Malpractice Settlements, http://www.onlinelawyersource.com/medical_malpractice/settlements.html (last visited Dec. 23, 2008) (stating that medical malpractice suits settle ninety-six percent of the time); cf. Robert J. Rhee, *Tort Arbitrage*, 60 FLA. L. REV. 125, 157 (2008) (“The assumption is that of all cases, 72% are settled, 8% are tried, and 20% are disposed of through pretrial dismissals.”). For more on why medical cases settle, see Philip G. Peters, Jr., *What We Know About Malpractice Settlements*, 92 IOWA L. REV. 1783, 1808–12 (2007).

⁶⁰ COHEN & SMITH, *supra* note 55, at 8. This data does not even account for the appeals process.

⁶¹ *Id.* at 6. Like the Dalkon Shield cases, a medical products case can be categorized as either a medical malpractice case or a products liability case.

⁶² Rice, *supra* note 39.

⁶³ Peters, *supra* note 59, at 1786 (showing that even in cases with weak claims or little evidentiary support, defendants still settle ten to twenty percent of cases).

⁶⁴ Rice, *supra* note 39.

⁶⁵ *Id.* Medical defendants' arguments in support of secrecy gain strength when the medical problem at issue is unique to the individual claimant and not likely to be of general concern, or when the claim is frivolous. But, of course, there is no readily

Hospitals, also frequent medical defendants, have legitimate reasons for using settlement to preserve both their reputations and the reputations of their doctors. They may have remedial procedures in place to deal with tort claims when they arise. In addition to in-house procedures, federal law requires the payers of medical malpractice claims to report the payments to their state's licensing board and other regulators.⁶⁶ The report must include the name of the doctor and hospital, the amount of the payment, and a description of the acts and injuries giving rise to the claim.⁶⁷ However, federal law does not mandate that this report be accessible to the general public.⁶⁸

A medical product manufacturer may have a legitimate privacy interest as well. Manufacturers likely have a strong interest in keeping their trade secrets private. A manufacturer may be able to cure certain product flaws, recall the defective product, or adequately warn consumers in time.

Medical manufacturers also assert what scholars call the "FDA defense."⁶⁹ Because the FDA strictly regulates medical products, the need for discovering harms through the legal system should be

apparent way of distinguishing such cases from the rest. However, since such cases do exist, defendants' interest in privacy is not wholly unjustified.

⁶⁶ Health Care Quality Improvement Act of 1986, 42 U.S.C. §§ 11131, 11133 (2005).

⁶⁷ *Id.* § 11131.

⁶⁸ Rice, *supra* note 39.

⁶⁹ "Many commentators assert that the FDA standards are the most stringent standards in the world, and that compliance with these standards is extremely time consuming and expensive." Annette L. Marthaler, Comment, *The FDA Defense: A Prescription for Easing the Pain of Punitive Damage Awards in Medical Products Liability Cases*, 19 *HAMLIN L. REV.* 451, 453 (1996).

A recent Supreme Court opinion seems to have adopted this view. In that case, the defendants successfully argued that the FDA "preempted" a claim against an allegedly defective medical product so that the claimant had no recourse in court. *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1013 (2008) (Ginsburg, J., dissenting) ("The [Medical Device Amendment's] preemption clause, the Court holds, spares medical device manufacturers from personal injury claims alleging flaws in a design or label once the application for the design or label has gained premarket approval from the [FDA]; a state damages remedy, the Court instructs, persists only for claims 'premised on a violation of FDA regulations.'" (citation omitted)). Though it is beyond the scope of this Comment, the opinion raises concerns over whether most medical products cases can be litigated at all, thus giving injured potential claimants very few options. For a critical take on this case, see Editorial, *The Dangers in Pre-emption*, N.Y. TIMES, Apr. 14, 2008, available at <http://www.nytimes.com/2008/04/14/opinion/14mon2.html> ("If this perverse legal doctrine, known as federal pre-emption, continues to spread, the public will be deprived of a vital tool for policing companies and unearthing documents that reveal their machinations.").

small.⁷⁰ Furthermore, inspecting, regulating, and warning the public about harmful medical products should be the job of a government agency, not the courts. In any case, however strict the initial regulations are, the FDA does not require drug manufacturers to report hazards once the company knows of them.⁷¹ This lack of oversight supports the opposing argument for openness in settlement and the need for public disclosure of allegedly harmful products.

Plaintiffs, arguably, have the strongest claim for privacy. Plaintiffs often share a great deal of personal information in the course of their case. Though some disclosure is necessary based on the nature of the claim, some defendants abuse discovery to harass or scare claimants away. For instance, the Dalkon Shield defense counsel interrogated women about their sexual history and personal hygiene only to uncover information with no bearing on the cases whatsoever.⁷² One can imagine similarly embarrassing questioning of the claimants in the fen-phen diet-drug cases or silicone breast implant cases.

Patients should have the option to protect their personal privacy. The law upholds the privacy of medical information. The Health Insurance Portability and Accountability Act (“HIPAA”),⁷³ for example, is a highly restrictive federal law that prohibits disclosing patients’ files and protected health information. HIPAA regulations reflect what society holds to be true: medical information is highly

⁷⁰ See Marthaler, *supra* note 69, at 453. *But see* Wagner, *supra* note 53, at 696–701 (highlighting the ways in which the legal system can be used to obtain vital information from product manufacturers that federal agencies like the FDA often fail to obtain).

⁷¹ PERRY & DAWSON, *supra* note 15, at 239.

⁷² BACIGAL, *supra* note 9, at 18–20; *see also* MORTON MINTZ, AT ANY COST: CORPORATE GREED, WOMEN AND THE DALKON SHIELD 194–97 (1985) (detailing several irrelevant questions); Lord, *supra* note 14, at 28–30 (explaining A.H. Robins’s inability to establish causation with this line of questioning); *Worsham v. A.H. Robins Co.*, 734 F.2d 676, 681, 691 (11th Cir. 1984) (one case in which A.H. Robins raised this theory of alternative liability and failed).

⁷³ Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (1996) (codified as amended at 42 U.S.C. 1320d-2 and 45 C.F.R. §§ 160, 164). HIPAA reads in part:

Each person . . . who maintains or transmits health information shall maintain reasonable and appropriate administrative, technical, and physical safeguards –

(A) to ensure the integrity and confidentiality of the information;

(B) to protect against any reasonably anticipated –

(i) threats or hazards to the security or integrity of the information; and

(ii) unauthorized uses or disclosures of the information; and

(C) otherwise to ensure compliance with this part by the officers and employees of such person.

42 U.S.C. 1320d-2(d)(2).

private and deserves the utmost protection. Courts have found that disclosure of certain medical records can violate a plaintiff's constitutional right to privacy.⁷⁴ One court sanctioned a defendant for unlawfully obtaining medical information that included sexual history because it was of "such a private and personal nature" that the defendant's behavior "unquestionably offend[ed] those 'basic and fundamental rights' which we consider so 'deeply rooted in our society' as to directly bear on our privacy rights."⁷⁵ Besides HIPPA and a constitutional right to privacy, the doctor-patient privilege also reflects the law's reverence for medical privacy.⁷⁶

Female patients in particular have strong interests in protecting privacy in medical cases. Because medical cases often involve women, sunshine laws place greater burdens on women seeking secrecy. Women consume more medical products, and consequently, are more often injured by medical products and the medical system.⁷⁷ Historically, medical products have posed greater risks to women because the regulatory system did not adequately test products for

⁷⁴ See, e.g., *Mann v. Univ. of Cincinnati*, 152 F.R.D. 119 (S.D. Ohio 1993) (citing other federal and Supreme Court cases as well).

⁷⁵ *Id.* at 126.

⁷⁶ While the specific doctor-patient privilege is governed by state or common law, the federal rules protect privileged information generally. See FED. R. CIV. P. 26(b)(1).

⁷⁷ See Dolly M. Trompeter, Comment, *Sex, Drugs, and the Restatement (Third) of Torts, Section 6(c): Why Comment E is the Answer to the Woman Question*, 48 AM. U. L. REV. 1139, 1143 & n.10 (1999) (citing LESLIE LAURENCE & BETH WEINHOUSE, OUTRAGEOUS PRACTICES: THE ALARMING TRUTH ABOUT HOW MEDICINE MISTREATS WOMEN 295 (1994) (noting that "[w]omen take more prescription drugs than men and buy more over-the-counter medications for themselves and their families"); L. Elizabeth Bowles, Note, *The Disfranchisement of Fertile Women in Clinical Trials: The Legal Ramifications of and Solutions for Rectifying the Knowledge Gap*, 45 VAND. L. REV. 877, 878 (1992) (discussing the fact that women consume more prescription drugs than men and suffer a disproportionate number of side effects from these drugs); Linda Marsa, *The Breast Implant Backlash*, WORKING WOMAN, Apr. 1, 1996, at 46, 76 (noting one survey that revealed that "of all women winning punitive awards in any kind of trial, nearly 70% were injured by defective drugs or medical devices"). One small survey showed a fifty-eight percent to forty-two percent gender difference between potential medical claimants, women being more frequent. LaRae I. Huycke and Mark M. Huycke, *Characteristics of Potential Plaintiffs in Malpractice Litigation*, 120 ANNALS OF INTERNAL MED. 792, tbl.2 (1994), available at <http://www.annals.org/cgi/content/full/120/9/792>.

women.⁷⁸ The full inclusion of female patients in medical research remains a topic of concern to this day.⁷⁹

Women also bring claims that are particularly personal in nature. Women have been the victims of defective contraceptive products,⁸⁰ feminine hygiene products (e.g., tampons), breast implantation devices, and negligent birthing practices.⁸¹ Frequently, women's medical cases involve damages that are difficult to quantify, including "sexual or reproductive harm, pregnancy loss[,] . . . impaired fertility or sexual functioning, miscarriage, incontinence, trauma associated with sexual relationships, and scarring or disfigurement in sensitive, intimate areas of the body."⁸²

Some commentators have questioned whether the courts take such unquantifiable claims brought by women as seriously as other claims

⁷⁸ See generally CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982); Bowles, *supra* note 77, at 878. Notably, the Dalkon Shield IUD was never adequately tested for safety in women before it began to be marketed. MINTZ, *supra* note 72, at 69–70.

⁷⁹ See Jesselyn Clair S. Pe, Note, *Gender Issues in Health Research and the Impact of the Women's Health Office Act of 2005 on Women's Health*, 28 *WOMEN'S RTS L. REP.* 127, 127 (2007) ("More recent changes in the FDA's drug approval requirements have brought about increased female enrollment in clinical research, but such changes have not been routinely implemented across all drug research studies"); Vicki Lawrence MacDougall, *Medical Gender Bias and Managed Care*, 27 *OKLA. CITY U. L. REV.* 781 (2002).

⁸⁰ The contraceptive market produced the Dalkon Shield and the Ortho Evra birth control patch have both been the subject of recent litigation. See Gardiner Harris and Alex Berenson, *Drug Makers Near Old Goal: A Legal Shield*, *N.Y. TIMES*, Apr. 6, 2008, available at <http://www.nytimes.com/2008/04/06/washington/06patch.html>. Unlike male methods, women often use contraceptives for several years of their lives and for various reasons. See WebMD, *Birth Control Methods*, <http://www.webmd.com/sex/birth-control/birth-control-birth-control-methods> (last visited Feb. 5, 2009) (one IUD, for example, can be used for five to ten years; other reasons for using birth control include controlling acne and reducing premenstrual symptoms).

⁸¹ Certain feminine hygiene products have been shown to cause toxic shock syndrome, which resulted in litigation. See *Hayes v. Playtex Family Prods. Corp.*, 168 F.R.D. 292 (D. Kan. 1996) (requesting class certification); *Haddix v. Playtex Family Prods. Corp.*, 138 F.3d 681 (7th Cir. 1998); *Papike v. Tambrands, Inc.*, 107 F.3d 737 (9th Cir. 1997). Breast implant litigation was the source of a great deal of controversy in the 1980s and '90s. See Wagner, *supra* note 53, at 714–17. Many medical malpractice claims are brought by women against obstetricians/gynecologists (OB/GYN) for injuries sustained during childbirth. Rich Lowry, "Suing the OB-GYNs: Our Legal System Doesn't Exactly Welcome Life Into the World," *NAT'L REV. ONLINE* (Aug. 20, 2004), available at <http://www.nationalreview.com/lowry/lowry200408201007.asp> ("On average, OB-GYNs have 2.6 claims filed against them during their careers.").

⁸² Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 *EMORY L.J.* 1263, 1266 (2004).

that involve private information, like trade secrets.⁸³ Judge Lord, in his Reprimand of the Dalkon Shield defendants, noted that “women . . . seem through some strange quirk of our society’s mores to be expected to suffer pain, suffering and humiliation.”⁸⁴ In medical cases involving women, it is likely that the empathy for women’s privacy would be somewhat diminished by society’s perception that using products like birth control or tampons is a choice and women assume the risks from that choice.

Sunshine laws require judges to make value judgments about what information deserves protection from the public, which claims are legitimate, and which are merely self-serving. Women’s general credibility in court is sometimes perceived as being less than men’s.⁸⁵ As a result, women’s concerns, especially their unquantifiable claims, have often been sidelined.⁸⁶ Thus, sunshine laws put difficult obstacles in the way of privacy that disproportionately burden female claimants.

II

THE DALKON SHIELD CASE EXAMPLE

The Dalkon Shield cases present a thought-provoking example of conflicting individual interests that have a high degree of public interest. The intrauterine contraceptive device (“IUD”), the Dalkon Shield, was introduced by the A.H. Robins Company in 1971.⁸⁷

⁸³ Lucinda M. Finley, *Female Trouble: The Implications of Tort Reform for Women*, 64 TENN. L. REV. 847, 849–50 (1996–1997) (arguing that the societal devaluation of women is reflected in the tort system); see also Thomas Koenig & Michael Rustad, *His and Her Tort Reform: Gender Injustice in Disguise*, 70 WASH. L. REV. 1, 8–10 (1995) (highlighting several examples of gender bias in tort law including smaller damages awards because “male work and lives are valued higher than female work and lives”).

⁸⁴ Lord, *supra* note 14, at 9.

⁸⁵ Lynn Hecht Schafran, *Credibility in the Courts: Why Is There a Gender Gap?*, 34 JUDGES’ J., Winter 1995; see also Finley, *supra* note 82, at 1266 (“These priceless aspects of life [including women’s reproductive health] hold little economic worth in the market” and consequently, women tend to recover less in damages.).

⁸⁶ Schafran, *supra* note 85, at 5. Take for instance, the disparate treatment of women’s punitive damage awards and their compensation for emotional injury. See Leslie Bender, *An Overview of Feminist Torts Scholarship*, 78 CORNELL L. REV. 575, 577–79 (1993) (discussing the historical trend in tort law to discount “emotional” injuries, more often claimed by women); Finley, *supra* note 83, at 858–61 (addressing the tort system’s characterization of reproductive harm suffered by women as an emotional harm ultimately resulting in smaller pecuniary damage awards); Koenig & Rustad, *supra* note 83, at 6 (examining patterns of punitive damages and concluding that “awards are subdivided into ‘his’ and ‘her’ tort worlds”).

⁸⁷ PERRY & DAWSON, *supra* note 15, at 67.

Almost immediately, female patients reported injuries caused by the defective product.⁸⁸ Like other IUDs, the Dalkon Shield was composed of a plastic part, the “body,”⁸⁹ which a doctor inserts into the uterus, and is connected by a “tail string” that extends into the vagina and allows for removal.⁹⁰ The Dalkon Shield, however, had the proclivity to cause pelvic inflammatory disease (“PID”) because of a “wicking” effect in the tail string caused by its cotton strands, which provided a pathway for bacteria to enter the uterus.⁹¹ The Dalkon Shield also carried a high risk of septic abortions if the woman became pregnant while using it, and approximately 110,000 women did.⁹² Both septic abortions and PID can cause sterility or death.⁹³ Eighteen women died from PID caused by the Dalkon Shield in the United States alone.⁹⁴

A.H. Robins marketed the Dalkon Shield widely in the United States⁹⁵ and abroad⁹⁶ through the early 1970s. Because an IUD is inserted into the uterus once and keeps working for several years, the makers touted the Dalkon Shield’s potential to virtually erase the

⁸⁸ The first legal report was made in 1972, but most early claims resulted in small settlements. *Id.* at 160, 173.

⁸⁹ *Id.* at 14–15.

⁹⁰ MINTZ, *supra* note 72, at 131.

⁹¹ See *Palmer v. A.H. Robins Co.*, 684 P.2d 187, 196 (Colo. 1984). For more explanation of the tail string, see PERRY & DAWSON, *supra* note 15, at 79–88. For an illustration of the device, see *id.* at 15 and MINTZ, *supra* note 72, at 140.

⁹² MINTZ, *supra* note 72, at 3. Approximately 66,000 of the 110,000 women who became pregnant while using the Dalkon Shield suffered septic abortions. BACIGAL, *supra* note 9, at 3; see, e.g., *Palmer*, 684 P.2d at 196. A septic abortion is a kind of spontaneous or “infected miscarriage” which can sometimes be fatal. MINTZ, *supra* note 72, at 4. Many pregnant women using the Dalkon Shield faced a difficult choice between a voluntary abortion or continuing with the pregnancy and risking this painful (and likely) outcome. See, e.g., *Palmer*, 684 P.2d at 196–97 (Carie Palmer); MINTZ, *supra* note 72, at 9–12 (Peggy Mample and Joan Smith); PERRY & DAWSON, *supra* note 15, at 155–59 (Cynthia Parker).

⁹³ MINTZ, *supra* note 72, at 156–57. Other harm from the product includes birth defects, still birth, and perforation of the uterus. *Id.* at 8–10, 13; PERRY & DAWSON, *supra* note 15, at 160–62.

⁹⁴ MINTZ, *supra* note 72, at 3, 4–5 (in some parts of the world, poor medical conditions made complications like PID more likely to be fatal).

⁹⁵ *Hawkinson v. A.H. Robins Co.*, 595 F. Supp. 1290, 1299, 1307 (1984); BACIGAL, *supra* note 9, at 18; NICOLE J. GRANT, *THE SELLING OF CONTRACEPTION: THE DALCON SHIELD CASE, SEXUALITY, AND WOMEN’S AUTONOMY* 41–48 (1992).

⁹⁶ BACIGAL, *supra* note 9, at 14 (noting that A.H. Robins continued to market the IUD abroad even after it stopped sales in the United States).

problem of human error and the hassle of once-daily birth control.⁹⁷ A.H. Robins called it a “superior” form of birth control,⁹⁸ “virtually 100% effective,”⁹⁹ and perhaps “the safest method of effective contraception available.”¹⁰⁰ In its first year on the market, the company sold more than one million units.¹⁰¹

With such vast consumer response, and corresponding widespread injury, the Dalkon Shield clearly became a topic of general public concern.¹⁰² Approximately 3.2 million women worldwide suffered harm from the product.¹⁰³ Hundreds of claims were brought, including one class action lawsuit that eventually resulted in a \$38 million settlement.¹⁰⁴ These numbers do not account for the women’s partners and families who were personally affected. Women brought claims for physical injuries to their reproductive systems, unwanted pregnancies, their lost ability to bear children, pain and suffering, and wrongful death.¹⁰⁵ Spouses also brought derivative claims and some children of the women had claims for birth defects caused by the Shield.¹⁰⁶

Even in its first year of sales, the makers of the Dalkon Shield were aware of the product’s risks.¹⁰⁷ In 1971, one of the earliest internal memos regarding the problems with the Dalkon Shield was ignored as sales soared and A.H. Robins struggled to keep up with demand.¹⁰⁸ Several individuals, including plaintiffs’ attorneys, tried to convince the company to recall the device or at least to warn doctors of the

⁹⁷ See PERRY & DAWSON, *supra* note 15, at 1 (from an A.H. Robins brochure remarking that “[b]ecause there is nothing to take, nothing to use, and nothing to remember before or after having relations, most women find the Dalkon Shield the safest and most satisfying method of contraception”).

⁹⁸ MINTZ, *supra* note 72, at 70.

⁹⁹ BACIGAL, *supra* note 9, at 9.

¹⁰⁰ *Hawkinson*, 595 F. Supp. at 1305.

¹⁰¹ *Id.* at 1300.

¹⁰² It is uncertain whether the product would fall under the term “public hazard” as is required by some sunshine laws. See, e.g., FLA. STAT. § 69.081 (2004).

¹⁰³ *Id.* For more information regarding the class action suit, see *In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir. 1989).

¹⁰⁴ MINTZ, *supra* note 72, at 13.

¹⁰⁵ Carrie Menkel-Meadow, *Taking the Mass Out of Mass Torts: Reflections of a Dalkon Shield Arbitrator on Alternative Dispute Resolution, Judging, Neutrality, Gender, and Process*, 31 LOY. L.A. L. REV. 513, 515 (1998).

¹⁰⁶ *Id.*; MINTZ, *supra* note 72, at 10, 13.

¹⁰⁷ MINTZ, *supra* note 72, at 133.

¹⁰⁸ *Id.* at 70–71; *Palmer*, 684 P.2d at 195–96.

growing problems; these early attempts were rejected.¹⁰⁹ In 1981, the company finally sent a letter to doctors “altering [their] recommendation” but refusing to acknowledge a connection between the device and the thousands of tort claims.¹¹⁰ U.S. District Court Judge Lord took an active role in the consolidated Dalkon Shield cases¹¹¹ and strongly advocated, without success, that the company “locate each and every woman who still wears this device, and . . . recall [its] product.”¹¹²

Judge Lord also criticized A.H. Robins’s failure to present an accurate report to the Food and Drug Administration (“FDA”), something that prevented the defective product from early detection.¹¹³ On top of A.H. Robins’s apparent lies,¹¹⁴ the FDA failed to perform its own investigation of the Dalkon Shield for six years.¹¹⁵ Though other entities, including medical scientists, offered to test the devices, the company actively discouraged these attempts.¹¹⁶

Doctors were also uninformed of the dangerous defects of the Dalkon Shield.¹¹⁷ A.H. Robins spent \$373,527 on false and

¹⁰⁹ In 1977, a leading plaintiff’s lawyer wrote two letters to the executives at A.H. Robins urging them to immediately call for the removal of the devices. MINTZ, *supra* note 72, at 19, 207. About 800,000 women were using the IUD at the time, and most had no clue of the danger it posed to them. *Id.* at 19. Not only did the company ignore this lawyer’s suggestions, it later tried to silence several lawyers in the litigation with conditions in the settlement agreements that the attorney never again represent a Dalkon Shield claimant. *Id.* at 197–98; Zitrin, *supra* note 8, at 120. These types of conditions are now illegal under rule 5.6(b) of the ABA Model Rules of Professional Conduct. See MINTZ, *supra* note 72, at 197.

¹¹⁰ MINTZ, *supra* note 72, at 207–08.

¹¹¹ BACIGAL, *supra* note 9, at 23; *In re A.H. Robins Co.*, 880 F.2d 709, 712 (4th Cir. 1989) (summarizing Judge Lord’s role in the cases).

¹¹² Lord, *supra* note 14, at 13. He continued, “The only conceivable reasons you have not recalled this product are that it would hurt your balance sheet and alert women, who already have been harmed, that you may be liable for their injuries. . . . This is corporate irresponsibility at its meanest.” *Id.* at 10–11.

¹¹³ *Id.* at 13.

¹¹⁴ MINTZ, *supra* note 72, at 126–27; PERRY & DAWSON, *supra* note 15, at 6. Inevitably, thousands of women never brought claims; others settled early, many went through arbitration, and a few went to trial independent from the class action. See *id.* at 173 (no claim before 1975 went to trial). Menkel-Meadow, *supra* note 105, at 518–19.

¹¹⁵ RICHARD B. SOBOL, BENDING THE LAW: THE STORY OF THE DALKON SHIELD BANKRUPTCY 4, 343 n.5 (1991). The device was labeled a “device” rather than a “drug” like most contraceptives, which at least partially explains the FDA’s lack of initiative. *Id.*; BACIGAL, *supra* note 9, at 7–8.

¹¹⁶ See MINTZ, *supra* note 72, at 115–23 (chapter 7, “Dodging the FDA”).

¹¹⁷ See *id.* at 69–88 (chapter 5, “Deceiving Doctors”).

misleading advertising in medical journals.¹¹⁸ Its salesmen, who had no background in gynecological products, were encouraged to push the product not only in the OB/GYN doctors market, but also toward general practitioners who would be less likely to know of inherent risks of IUDs and more likely to insert them improperly.¹¹⁹ Several physicians, whom A.H. Robins had added as third party defendants, were actually driven to cooperate with the plaintiffs because of A.H. Robins's tactics of shifting blame to the doctor and even the victim.¹²⁰

A. The Dalkon Shield Litigation's Effect on Privacy

The women who brought their claims suffered doubly. They had to relive their painful experiences in the course of litigation,¹²¹ and were subjected to a demeaning barrage of questioning about their bodies and sexual histories.¹²² In depositions and at trial, A.H. Robins pushed their alternative theory of causation by blaming the patients for their bacteria-related injuries.¹²³ A.H. Robins suggested that the women might have exposed themselves to bacteria and STDs by having numerous sexual partners or by practicing poor hygiene.¹²⁴ This tactic was aimed at deterring women from pursuing their claims

¹¹⁸ *Id.* at 69–70.

¹¹⁹ *Id.* at 71–72.

¹²⁰ BACIGAL, *supra* note 9, at 20–21. A.H. Robins blamed doctors for the damage done by the Shield, especially in the early litigation. PERRY & DAWSON, *supra* note 15, at 172–73. Thus, certain doctors would no doubt have a legitimate claim to privacy in resolving the cases in which they were named defendants.

¹²¹ Some cases were litigated separately, some as a class, and some settled out of court. Others went through an arbitration process when A.H. Robins eventually went bankrupt. Menkel-Meadow, *supra* note 105, at 518–19.

¹²² BACIGAL, *supra* note 9, at 19–21; *Worsham v. A.H. Robins Co.*, 734 F.2d 676, 681 (1984).

¹²³ MINTZ, *supra* note 72, at 194–96; BACIGAL, *supra* note 9, at 19–20 (listing A.H. Robins's "Dirty Questions List").

¹²⁴ MINTZ, *supra* note 72, at 194–96.

and scaring other women away; it served no legal purpose.¹²⁵ Sadly, in many instances, the tactic worked.¹²⁶

Carrie Menkel-Meadow, an arbitrator in some of the cases, advocated for a more private way of resolving the Dalkon Shield mass tort litigation – mediation and settlement.¹²⁷ She said, “In the kind of sensitive cases that comprise many of women’s health issues, many individuals want to tell their story . . . , but not necessarily in a very public forum.”¹²⁸ In fact, for many, “the fear of cross-examination on past sexual history . . . [and] the actual conduct of the cross-examination in depositions and trials was experienced as another layer of harm.”¹²⁹ Hundreds of women experienced a public trial or the public arbitration process that Ms. Menkel-Meadow described. But several Dalkon Shield claimants settled early, and some likely had the option of settling secretly.¹³⁰ These claimants may have agreed to hide a great public health risk, but they likely did so, in large part, to protect their privacy.

III

SUNSHINE LAWS AND THE DALKON SHIELD

What is the legal system’s role in warning the public when the FDA, corporations, and the medical community fail to prevent a

¹²⁵ See *Worsham*, 734 F.2d at 681–82 (plaintiff’s expert testifying that it would be “highly unlikely” that STDs were the cause of the plaintiff’s PID); MINTZ, *supra* note 72, at 195 (arguing that even if the women *had* had multiple sex partners while using the IUD or had practiced less than perfect hygiene, “[w]hat could be *less* surprising . . . ?” or in other words, foreseeable?). Courts in some jurisdictions intervened in the discovery process to stop A.H. Robins’s inappropriate questioning, while other courts allowed the questioning. MINTZ, *supra* note 72, at 195.

¹²⁶ Lord, *supra* note 14, at 27 n.11.

¹²⁷ Menkel-Meadow, *supra* note 105, at 545.

¹²⁸ *Id.* at 531.

¹²⁹ *Id.* at 516–17.

¹³⁰ For obvious reasons, there is little evidence of secret settlements between claimants and A.H. Robins. However, the company did make settlement offers to attorneys containing confidentiality clauses that would prohibit the attorneys from representing any future Dalkon Shield claimants. MINTZ, *supra* note 72, at 197. It also used secrecy to hide negative test results revealing the defects in the Dalkon Shield’s design and to prevent the information from being disclosed in discovery. *Id.* at 198–206. Based on the company’s adversity to public disclosure, it is quite likely that it would utilize confidentiality agreements in settlement when possible. In addition, confidentiality agreements are quite common in any settlement. See Lance P. McMillian, *The Nuisance Settlement “Problem”: The Elusive Truth and a Clarifying Proposal*, 31 AM. J. TRIAL ADVOC. 221, 234–35 (2007) (describing confidentiality agreements as a “near-universal provision in any settlement agreement”).

defective medical product from getting to the market? What burden should be placed on early plaintiffs who discover dangerous products to reveal the danger to others?

Sunshine in litigation laws aim to disclose dangerous products to the public, but in doing so, they burden plaintiffs by requiring disclosure to not only the defendant's alleged wrongdoing, but also the plaintiffs' own personal story. These laws create unfortunate side effects for parties with legitimate privacy interests. By requiring disclosure, sunshine laws risk turning people away from the very system that they ought to go to for justice. When applied broadly, they risk decreasing the chance of ever disclosing the public hazards that they seek to expose.

A. *What Is Kept Secret, and How?*

In order to assess how sunshine laws specifically affect medical cases like Dalkon Shield, it is important to understand what types of documents these laws apply to, and how the laws disclose information to the public.

Courts receive and produce a variety of documents that may be kept secret.

1. *Discovery*

Courts can issue protective orders providing that discovery exchanged between the parties will be kept confidential from anyone outside of the litigation.¹³¹ Courts may also approve a settlement with an order that requires the parties to return all documents produced during discovery.¹³²

2. *The Settlement Agreement*¹³³

Secret settlement agreements usually contain a confidentiality clause requiring that the parties and counsel never discuss the case or

¹³¹ "A protective order will be issued for good cause [when it is shown] necessary to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." 23 AM. JUR. 2D *Deposition and Discovery* § 63 (2008). Courts have issued protective orders for medical records and strongly enforced them with sanctions. *See, e.g., Mann v. Univ. of Cincinnati*, 152 F.R.D. 119 (S.D. Ohio 1993).

¹³² Anderson, *supra* note 6, at 713–14.

¹³³ Settlement agreements include those filed with the court or private contractual agreements. *See DRAHOZAL & HINES, supra* note 4, at 1458. A survey of federal district courts showed that the most frequently sealed piece of information was the settlement amount. REAGAN ET AL., *supra* note 1, at 8.

share information with individuals outside the case.¹³⁴ Sometimes only certain terms must be kept confidential, such as the settlement amount.¹³⁵ Courts keep settlement agreements secret by enforcing these private contracts, or by allowing the agreement to be filed with the court “under seal.”¹³⁶

3. Court Documents¹³⁷

Courts may seal all documents in the case file including pleadings, motions, filed discovery, and court orders.¹³⁸ Some parties have asked for the total destruction of documents filed with the court, though this has little chance of happening.¹³⁹ Some courts allow vacating or de-publishing substantive orders previously entered.¹⁴⁰

4. Other Means of Obtaining Secrecy

A court may agree to stipulations to change the names of parties so they are unrecognizable to the public.¹⁴¹ A court may also close the courtroom so that only the parties and court personnel are present.¹⁴² However, a court’s authority to do this may depend on the type of

¹³⁴ See Emily Fital, Note, *Respecting Litigants’ Privacy and Public Needs: Striking Middle Ground in an Approach to Secret Settlements*, 54 CASE W. RES. L. REV. 503, 506 (2004) (referencing “confidentiality provisions” in settlements).

¹³⁵ See Anderson, *supra* note 6; Miller & Wright, *supra* note 20, at 778.

¹³⁶ See *supra* note 34 (defining “under seal”).

¹³⁷ “Court documents” can include everything filed with the court, including the pleadings, filed discovery, motions to compel, other pretrial motions, records of hearings or conferences, evidence, jury instructions, and any substantive court orders. See Anderson, *supra* note 6, at 713–14; see, e.g., D.S.C. LOCAL CIV. R. 7.01 (filing motions); see also REAGAN ET AL., *supra* note 1, at 1 (on substantive court orders). Notably, complaints are rarely sealed. REAGAN ET AL., *supra* note 1, at 8. A survey of federal district courts showed that even in cases with sealed settlement agreements, the complaint was unsealed ninety-seven percent of the time. *Id.*

¹³⁸ Substantive court orders, however, are likely subject to the common law presumption of openness. See *supra* note 41 and accompanying text.

¹³⁹ Anderson, *supra* note 6, at 714 n.14 (citing *Secrecy and the Courts: The Judges’ Perspective*, 9 J.L. & POL’Y 169, 193 (2000)).

¹⁴⁰ *Id.* at 713–14.

¹⁴¹ See Richard A. Zitrin, *Open Courts with Sealed Files: Secrecy’s Impact on American Justice* 9 n.4 (July 29, 2000) (unpublished paper, presented at the 2000 Forum for State Appellate Court Judges), available at <http://www.roscoepound.org/new/00zitrin.pdf> (referring to cases involving “professionals who did not want their names sullied . . . condition[ing] settlement on such ‘sanitization’”).

¹⁴² Anderson, *supra* note 6, at 713.

hearing or meeting taking place, because courtrooms are typically open to the public.¹⁴³

In medical cases like *Dalkon Shield*, the defendants would likely seek to keep the following secret: the settlement amount, any substantive court orders indicating liability or determining fault, certain discovery documents (e.g., “smoking gun” memos or documents revealing trade secrets), and even the allegations of wrongdoing in the pleadings. Plaintiffs would be more interested in protecting discovery documents of a private nature. These include medical records and deposition transcripts with answers to personal questions, any terms of the settlement agreement describing the injuries or damages, and perhaps the settlement amount.

B. State “Sunshine Laws” and Similar Restrictions on Secrecy

Sunshine laws vary based on jurisdiction. Depending on how broadly the statute applies, certain documents may or may not be kept confidential. Parties can sometimes keep documents confidential by going through procedural hurdles or by arguing that an exception applies based on the type of information contained in the document.¹⁴⁴ Certain aspects of these statutes present particularly troublesome consequences when applied to medical cases like *Dalkon Shield*. These components are described below by examining four jurisdictions’ sunshine laws.

The Federal District of South Carolina passed Local Rule 5.03 in 2004, which reads as an outright ban on sealing settlement agreements.¹⁴⁵ However, the court may suspend the ban for “good cause.”¹⁴⁶ The good cause exception in this jurisdiction appears to extend to both business and privacy interests. Judge Anderson of the South Carolina District Court stated that a court may agree to seal a settlement to protect proprietary interests or trade secrets, or when “a particularly vulnerable party needs to be shielded from the glare of an otherwise newsworthy settlement.”¹⁴⁷ Other court documents may be sealed at the court’s discretion when certain procedural hurdles are

¹⁴³ Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 429 (1991) (explaining that the “right of public access to court proceedings” is well rooted in the common law).

¹⁴⁴ See *infra* Part III.C.3.

¹⁴⁵ D.S.C. LOCAL CIV. R. 5.03(E) (2008); see also Zitrin, *supra* note 33, at 884.

¹⁴⁶ D.S.C. LOCAL CIV. R. 1.02.

¹⁴⁷ Anderson, *supra* note 6, at 723.

overcome, including providing a description of the documents filed in a motion to seal, with public notice of the motion.¹⁴⁸

The district court rule has one exception: private settlement agreements not filed in court are unaffected by the sunshine law.¹⁴⁹ This exception for private settlement agreements contrasts with the Texas statute on secret settlements, which applies a strong presumption of openness to *all* “court records.”¹⁵⁰ “Court records” includes documents filed with the court, “settlement agreements not filed of record,” and any discovery documents concerning “matters that have a probable adverse effect upon the general public health or safety.”¹⁵¹ This broad definition of court records allows Texas courts to require open disclosure of nearly every document in the case. The courts have found an exception for unfiled discovery documents, however.¹⁵²

One problem facing statutes like Texas’s is determining what qualifies as matters that affect the “public health or safety.”¹⁵³ The Texas statute does not define this phrase.¹⁵⁴ Washington has a statute that similarly limits secrecy in “product liability” and “hazardous substance” claims.¹⁵⁵ Washington’s definition expressly includes personal injury claims involving products that present “an alleged risk of similar injury” to others.¹⁵⁶ In hindsight, the Dalkon Shield device clearly fits within this definition. Early in the course of the litigation, however, patients are less likely to perceive the widespread threat of harm. Medical products can react with certain patients in ways that would never affect other patients. Thus, this definition of a “hazard”

¹⁴⁸ See D.S.C. LOCAL CIV. R. 1.02. Other procedural hurdles are explained, *infra* Part III.C.3.

¹⁴⁹ See D.S.C. LOCAL CIV. R. 5.03 (“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 also S.C. R. CIV. P. 41.1 (2003) (a similar state statute that provides “[t]his Rule does not apply to private settlement agreements”). Because of these and other loopholes, these rules have been criticized as being too permissive of secrecy in general. See Zitrin, *supra* note 33, at 885.

¹⁵⁰ See TEX. R. CIV. P. 76a.

¹⁵¹ *Id.*

¹⁵² *Gen. Tire, Inc. v. Kepple*, 970 S.W.2d 520, 523 (Tex. 1998) (may not include trade secrets); *In re Dallas Morning News, Inc.*, 10 S.W.3d 298 (Tex. 1999). For interpretation, see generally *Upjohn Co. v. Freeman*, 906 S.W.2d 92 (Tex. App. 1995).

¹⁵³ TEX. R. CIV. P. 76a(1)(a)(2).

¹⁵⁴ See *id.*

¹⁵⁵ See WASH. REV. CODE ANN. § 4.24.611(1)(a) (West 2005).

¹⁵⁶ *Id.*

creates doubt as to whether medical products cases would be subject to Washington's secrecy limitations.

Florida's Sunshine in Litigation Act prohibits courts from allowing the concealment of a "public hazard."¹⁵⁷ That statute defines "public hazard" as "an instrumentality, including but not limited to any device, instrument, person, procedure . . . or product . . . that has caused and is likely to cause injury."¹⁵⁸ The Florida courts have not concretely defined what is included in this broad definition.¹⁵⁹ For instance, a tire found to be the cause of a plaintiff's injuries was declared a public hazard, and the court refused to grant a pretrial confidentiality order pursuant to the sunshine statute.¹⁶⁰ Yet, in an action against an insurer for economic fraud, the court allowed a protective order.¹⁶¹ Economic fraud was not deemed a public hazard because the hazard must be tangible.¹⁶² Thus, a tangible medical device like the Dalkon Shield that causes injury to a plaintiff would classify as a "public hazard" if the court finds the device is likely to injure again. Unlike the Washington statute, the future injury need not be similar to the instant case.¹⁶³

Sunshine laws run into due process problems when they allow courts to act on factual assumptions that are not yet determined. Florida, for example, prohibits courts from enforcing private settlement agreements that conceal a public hazard.¹⁶⁴ But, the statute does not provide the party with the alleged public hazard any notice or opportunity to be heard on the issue of whether there is a real "public hazard."¹⁶⁵ In contrast, the Texas statute requires notice and a public evidentiary hearing.¹⁶⁶ Thus, while Florida prohibits concealing hazards in any way, these due process restraints may keep

¹⁵⁷ FLA. STAT. § 69.081(2) (2004).

¹⁵⁸ *Id.*

¹⁵⁹ See Zitrin, *supra* note 33, at 891–92.

¹⁶⁰ Jones v. Goodyear Tire & Rubber Co., 871 So. 2d 899 (Fla. Dist. Ct. App. 2003).

¹⁶¹ State Farm Fire & Cas. Co. v. Sosnowski, 830 So. 2d 886 (Fla. Dist. Ct. App. 2002).

¹⁶² See Stivers v. Ford Motor Credit Co., 777 So. 2d 1023 (Fla. Dist. Ct. App. 2000).

¹⁶³ Florida's broad definition only seems to exclude hazards that are distinctly not tangible. Thus, it may reach medical malpractice claims, especially those resulting in physical damages. Medical malpractice claimants would share several of the same concerns as other claimants in medical cases with substantial privacy interests.

¹⁶⁴ See FLA. STAT. § 69.081(4) (2004).

¹⁶⁵ See Zitrin, *supra* note 33, at 891–92.

¹⁶⁶ TEX. R. CIV. P. 76a(4).

courts from applying the statute to private settlement agreements that, by nature, have not resolved important factual questions in court.

Washington's statute on confidential settlements presumes openness in all settlement agreements but allows the court to apply a balancing test to determine when and if it will enforce a confidential agreement.¹⁶⁷ The court must determine whether confidentiality is in the public interest by balancing: (1) the public's right to the information, against (2) the public's right to protect the confidentiality of "trade secrets . . . , other confidential research, development, or commercial information concerning products or business methods."¹⁶⁸ The court balances the public interest in disclosure against business interests in secrecy, but fails to account for individual plaintiffs' interests, including interests in privacy. The other sunshine in litigation statutes also recognize exceptions for trade secrets.¹⁶⁹ Personal privacy interests have not received the same level of concern.¹⁷⁰

C. Problems with These Statutes in the Context of the Dalkon Shield Cases

If the Dalkon Shield cases had been subject to the rules of South Carolina, Texas, Florida, and Washington, several issues would have arisen. For advocates arguing for secrecy to protect the claimants' privacy, these sunshine laws present significant disadvantages because of costly procedural hurdles and a lack of express exceptions for documents that invade parties' privacy.

¹⁶⁷ WASH. REV. CODE ANN. § 4.24.611 (West 2005). The statute does not apply to other court documents such as discovery documents. *Id.* § (4)(a).

¹⁶⁸ *Id.* § 4.24.611(3)–(4)(b).

¹⁶⁹ *See, e.g.*, FLA. STAT. § 69.081(7) (2004) (by showing good cause, a party can prevent disclosure of information, "including but not limited to alleged trade secrets").

¹⁷⁰ *Compare* Boardman v. Elm Block Dev. Ltd. P'ship, 872 S.W.2d 297, 299 (Tex. App. 1994) (sealing portions of a lease dispute record regarding tenant's settlement tactics was overturned because no "specific, serious and substantial interest" outweighed presumption of openness), *with* Gen. Tire, Inc. v. Kepple, 970 S.W.2d 520, 523 (Tex. 1998) (trade secrets may constitute a "specific, serious, and substantial interest" justifying sealing records.).

The comments from Judge Anderson show some concern for the privacy of litigants, but apparently only in cases that have attained a high degree of public exposure – not the early cases. *See supra* note 147 and accompanying text.

1. *Discovery Records*

Some discovery records involving private information might evade sunshine laws, but the more that documents relate to the public hazard, the more likely the court will refuse to keep it confidential. Because of A.H. Robins's tactics in discovery, several women were forced to disclose highly personal information under sworn depositions or through requests for production of medical records. The defendants also shared sensitive information in discovery, information revealing the design of the Dalkon Shield and other potential trade secrets. After a long battle, A.H. Robins finally disclosed the memos and tests that revealed the risks associated with the device.¹⁷¹

States with sunshine laws allow discovery documents to be kept confidential in two main ways. First, the documents will evade the statute if they are not filed discovery. Unfiled discovery can be further protected by petitioning the court for a protective order requiring that those documents be returned.¹⁷² Second, if the statute does apply to the discovery documents, parties can argue that the documents fall under an exception, the clearest of which is the exception for trade secrets. The trade secret exception favors defendant corporations over individual plaintiffs in medical products cases. The plaintiffs' medical records, while not explicitly protected from disclosure, do invoke HIPAA protections and are commonly kept private.¹⁷³

If a judicial discretion exception like South Carolina's applies, the court can be more receptive to privacy arguments because the court can consider *any* "good cause" for confidentiality. In contrast, Washington's balancing test for granting exceptions only weighs business interests against the public interest in disclosure. The lack of

¹⁷¹ MINTZ, *supra* note 72, at 226.

¹⁷² For Washington procedures, for example, see "Order for Access to Discovery Materials" 9A Wash. Prac. Series 26.103.

¹⁷³ Parties do not have unrestricted access to nonparty medical records; and conversely, nonparties should not have access to parties' medical records. 78 Am. Jur. Trials 559, §7 (2007) ("A plaintiff is entitled to disclosure of information regarding incidents giving rise to claims similar to his or her own. However, nonparty patients of a private physician have a privacy interest in not having their names revealed to a plaintiff in a medical malpractice action. Consequently, relevant patient records normally may be discovered after identifying information is redacted from the records. In those cases in which mere redaction of the records is deemed insufficient to protect the patients' right of privacy, the trial court, in its discretion, also may order the medical records sealed and allow only the parties' attorneys and medical experts to have access to the medical records.").

express exceptions for privacy makes it tougher and more time consuming for claimants to argue for a protective order or an exception to the sunshine statute.

Another problem with a balancing test is that it tends to pit the public's interest in disclosure against the plaintiff's interest in privacy. This approach does not recognize that the plaintiff is part of the public or that the public may have other interests, such as promoting settlement and protecting its members from unwanted exposure.

2. *The "Good Cause" Requirement to Seal Other Court Documents*

Although some statutes provide exceptions to the rule of openness in settlements and other court documents when parties show "good cause," the statutes do not clearly express an exception for privacy. This unfairly disadvantages claimants in medical cases.

Florida's statute is especially ambiguous. It allows parties to oppose disclosure of specific facts with a motion showing good cause.¹⁷⁴ If the court finds good cause but the records still contain "information which may be useful to members of the public in protecting themselves from injury," the court must allow disclosure of only the information "necessary or useful to the public regarding the public hazard."¹⁷⁵ Thus, only the facts that are neither necessary nor useful may be kept confidential. Though the statute does not define such facts, they might include names, medical history, or personal background information. On the other hand, the public may have an interest in knowing whether the harm caused by the product was particular to an individual patient or whether it could affect other consumers similarly – personal medical information will often reveal this distinction.

Because of its ambiguity, this requirement could be abused in cases like Dalkon Shield. Since the statutes tend to favor business interests, a business can put its resources toward arguing against a plaintiff's motion to keep her private information confidential, while the business's important secrets remain protected. A defendant can also argue for openness as a tactic to slow the case down, add to claimants' costs, or discourage others from bringing claims. For example, A.H. Robins eventually faced bankruptcy and lost

¹⁷⁴ FLA. STAT. § 69.081(7) (2004).

¹⁷⁵ *Id.*

credibility with the public.¹⁷⁶ Damaging information about the company was being disclosed through the mass tort litigation and the media. It would have had very little to lose in arguing against any efforts from the claimants to keep personal information private.

Thus, by expressly providing exceptions for business reasons and not personal privacy reasons, the statutes give a negligent business the upper hand while burdening vulnerable claimants. These businesses can scare a plaintiff with the threat that her personal information will become public knowledge. In the Dalkon Shield cases, many plaintiffs were scared away at the thought of disclosing such personal information.¹⁷⁷ A clearly expressed exception for personal, private information— especially medical information — would vastly improve sunshine laws for medical claimants.

3. *Procedural Requirements*

The procedure by which the court decides whether to exempt certain information from the public file often disadvantages a claimant with privacy interests. Many statutes allow for an *in camera* review of documents that a party seeks to keep confidential or sealed.¹⁷⁸ This approach respects the parties' desire for confidentiality. Other statutes, however, call for a public hearing to decide a motion to seal records. For example, Texas's statute requires a public hearing and even allows nonparties to intervene in the proceedings.¹⁷⁹ It only allows a court to review the records *in camera* "when necessary," and does not indicate any circumstances that would necessitate a private review.¹⁸⁰ Before the court decides the motion, a party can obtain a temporary sealing order only upon showing a "compelling need" through specific facts that "immediate and irreparable injury will result."¹⁸¹ Again though, it does not indicate whether damage to one's privacy interest would qualify as an immediate and irreparable injury. Even if parties can make this showing, they must still endure a public hearing to make the sealing

¹⁷⁶ The A.H. Robins company filed for bankruptcy in 1985. BACIGAL, *supra* note 9, at 42. In 1981, "60 Minutes" aired a "highly unfavorable" segment on the Dalkon Shield. MINTZ, *supra* note 72, at 207.

¹⁷⁷ Lord, *supra* note 14, at 27 n.11.

¹⁷⁸ See, e.g., § 69.081(7).

¹⁷⁹ TEX. R. CIV. P. 76a(4).

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 76a(5).

final. This puts significant procedural hurdles in the way of claimants seeking privacy and forces their claims into the public eye.

Having procedures for sealing documents and keeping settlements secret offers some promise of confidentiality for claimants in medical cases. However, public hearings severely compromise this promise. Furthermore, nothing seems to be gained by requiring a public hearing on the question of openness. An *in camera* review would allow courts to apply the same balancing test mandated by statute. In a closed review, the court can consider the public's interest in disclosure and the parties can represent their own interests. Although the public is arguably absent from these proceedings, a judge can adequately account for what the public might want or need to know. Sunshine statutes already impose a presumption of openness. Forcing claimants to argue for their own privacy in a public hearing submits them to more scrutiny than necessary, is disrespectful of the parties' wishes, and demeans the court's ability to weigh competing interests.

4. Other Hurdles for Claimants

Restrictions on secret settlements present two other problems for claimants in medical cases with privacy interests. First, they may chill litigation by leading claimants to believe they must choose between their privacy and legal redress. As Ms. Menkel-Meadow points out, injured claimants often want to tell their story, but not always in a public forum.¹⁸² This fear should not exclude these individuals from pursuing compensation for defendants' wrongdoing.

Second, even though courts can grant exceptions to the presumption of openness, medical defendants have many advantages when arguing against plaintiffs who are seeking these exceptions. Defendants, such as product manufacturing companies, have express business-interest exceptions on their side and often have more time and money.¹⁸³ While a business can wait litigation out, an injured claimant may need relief immediately. Thus, defendants—the very entities that secrecy bans purport to regulate—may have an advantage in medical cases and other cases in which the plaintiff might desire secrecy.

¹⁸² See Menkel-Meadow, *supra* note 105, at 516–17.

¹⁸³ The Dalkon Shield defendants certainly took advantage of the disparity in resources by causing delays and using procedural maneuvers to rack up the costs for plaintiffs' attorneys. BACIGAL, *supra* note 9, at 16.

IV

ALTERNATIVES TO SUNSHINE LAWS IN MEDICAL CASES

Claimants in medical cases should not be subject to sunshine laws. States with sunshine laws should provide express exemptions to the rule of openness for parties with strong privacy interests, particularly for claimants involved in medical claims. States that do not have sunshine laws should consider other means of disclosing dangers to the public that do not compromise legitimate privacy interests.¹⁸⁴ Rather than forcing medical claimants to “report” public dangers through open settlement, states can place the burden of reporting elsewhere. For example, states can require that the payers of the claims (usually defendants), the lawyers, or the court report the danger to the public.

A. Payers of Claims Reporting to the Government

One option for reporting public harms is to require those who pay the claims to report the harm. Federal regulations currently provide that payers, including insurance companies, must report the settlement of any medical malpractice action or claim to the National Practitioner Data Bank.¹⁸⁵ This only requires reporting the doctor’s name, the amount of the payment, the name of the hospital, and a description of the acts or omissions and injuries that gave rise to the claim.¹⁸⁶

This amount of information may not be sufficient to fully investigate every known medical claim. To strengthen this reporting requirement, states or the federal government should: (1) expand the types of claims beyond medical malpractice to include medical products and drug claims; (2) require payers to submit additional information regarding the product, drug, or instrument that caused the harm; and (3) require an agency like the FDA to investigate the alleged defect in those products. The investigation may require checking the tests done by the defendant or it could involve full independent research.

¹⁸⁴ Other reasons for sunshine laws exist aside from merely informing the public of public harms. See Fital, *supra* note 134, at 533 (citing Doré, *supra* note 30, at 402). These include public trust in the judicial system and public monitoring of the system.

¹⁸⁵ 42 U.S.C. §§ 11131, 11133; 45 C.F.R. pt. 60.

¹⁸⁶ 42 U.S.C. § 11131. The payer must also report information that will assist the Secretary in interpreting the information reported. *Id.*

Federal agencies could implement a process to determine which claims merit an in-depth investigation, taking account of their financial limitations, the gravity of the harm, the number of related claims, and other factors.¹⁸⁷ Based on their findings, the agency could then report the results of the investigation to hospitals, medical suppliers, pharmacies, individual doctors, and the media, as necessary.

The federal reporting system has several advantages. First, it places the burden of reporting on the party most likely to be at fault and least likely to have a legitimate claim to privacy and confidentiality. Second, it protects trade secrets by reporting directly to the government and limiting outsiders' access to the information. Lastly, federal reporting places important information into the hands of the governmental body with the power to exact regulations over the medical product or recall it altogether.

The problem with the federal reporting system is that the payers of claims have too much control over what they report. Requiring the payers of claims, such as manufacturers and their insurance companies, to report their products' defects opens the door to abuse. Payers of claims have every incentive to minimize the appearance of defects in their products or to underreport. For example, A.H. Robins misrepresented facts to the FDA when the Dalkon Shield first came to the FDA's attention.¹⁸⁸ It even ignored its own internal memoranda and testing that revealed the inherent dangers in its product. Only the eventual pressure of litigation stopped the company— but it remains uncertain whether A.H. Robins's executives ever owned up to the damage they caused or whether they felt remorse.¹⁸⁹

Therefore, even defendants whose liability is certain may be incapable of owning up to their flaws and reporting their errors. Defendants who settle suits in which several elements of the product liability claim remain uncertain will not necessarily know what to report and may underreport. Thus, a federal reporting by payers

¹⁸⁷ For instance, the agency could ask courts to submit their findings of fact, if any were produced, on the question of whether a "public hazard" existed. They could use these findings to determine whether an in-depth investigation is necessary. Requiring or at least encouraging courts to submit these findings would also avoid the due process problems described in Part III.B.

¹⁸⁸ See Lord, *supra* note 14, at 13; Menkel-Meadow, *supra* note 105, at 518–19.

¹⁸⁹ Judge Lord's Annotated Reprimand notes that A.H. Robins executives heard his entire speech and then said, "I didn't think that was so bad." Lord, *supra* note 14, at 26–27 n.10.

system lacks teeth. However, it offers one alternative to open settlements by requiring that at least *some* information will make it to the public.

B. Amend the Ethical Rules to Require Lawyer Reporting

Ethical rules could be amended to allow or require lawyers to report public harms in cases of great public interest. Commentators have suggested rules that prohibit lawyers from hiding public harms through secret settlement agreements.¹⁹⁰ Richard Zitrin proposed the following addition to Model Rule 3.2:

A lawyer shall not participate in offering or making an agreement, whether in connection with a lawsuit or otherwise, to prevent or restrict the availability to the public of information that the lawyer reasonably believes directly concerns a substantial danger to the public health or safety, or to the health or safety of any particular individual(s).¹⁹¹

This rule would effectively act as a sunshine law that cuts off the use of secret settlements before they are created. It would reach a wide range of agreements, including private settlement agreements not filed with the court and agreements not connected with a lawsuit. It would also require attorneys, rather than the courts, to determine when a claim involves a “substantial danger to the public health or safety.”¹⁹² Mr. Zitrin primarily envisions a lawyer torn between his client’s financial interest and his concern for the public good. His rule would allow a lawyer to simply point to an ethical rule and say “we cannot participate in such agreements.”

A lawyer who represents medical claimants may find this suggestion offensive. Telling a client with strong privacy interests at stake that the lawyer simply cannot make her claim or other private information confidential contradicts the lawyer’s duty to his client. It is also at odds with both the duty of loyalty and the duty of confidentiality.

A more targeted solution for lawyers facing the competing interests of the public good and their clients, would be to report out, rather than

¹⁹⁰ Richard Zitrin, *Why Lawyers Keep Secrets About Public Harm*, 12 PROF. LAW. 4, Summer 2001, at 13; *see also* Fiftal, *supra* note 134, at 513 (noting other commentators). For an interesting argument that existing ethical rules already prohibit secret settlements including public harms, *see* Jon Bauer, *Buying Witness Silence: Evidence-Suppressing Settlements and Lawyers’ Ethics*, 87 OR. L. REV. 481 (2008).

¹⁹¹ Zitrin, *supra* note 8, at 116.

¹⁹² *Id.* at 116.

prohibit secret settlements altogether. Lawyers could be required or allowed to report dangers to the public by expanding the current Model Rule 1.6(b),¹⁹³ which permits disclosure of client information in certain instances. Expanding this rule would allow lawyers to reveal the information particularly important to the public while retaining the ability to use secret settlements. Reporting out by lawyers, like federal reporting requirements, would put information in the hands of the authorities that can address the public harm. Yet, expanding exceptions to Rule 1.6(b) would take another slice out of lawyers' duty of confidentiality, already significantly altered since the 2000 amendments to the rule.¹⁹⁴

Several aspects of Rule 1.6(b) would necessarily change to allow attorneys to report public harms—likely, too many aspects would change. Rather than allowing lawyers to reveal only information that would prevent “reasonably certain” death, substantial bodily harm, financial crimes, or fraud, the rule would need to extend to information *likely* to cause harm to the public.¹⁹⁵ This would include information in medical products cases in which the cause of the patient's harm and the defendant's liability had not been proven with absolute certainty, as is the case in many settlements. The rule would also need to extend to information not necessarily related to the lawyer's own client, unless defendants' attorneys can be expected to disclose harmful information about their clients.¹⁹⁶ Then, if the rule were to have the full effect of a reporting requirement, it would need to replace “may reveal” with “shall reveal.”¹⁹⁷ Lawyers already have the option of revealing adverse parties' harmful information, short of a protective order or a secrecy agreement.¹⁹⁸ An affirmative duty to reveal this information would eliminate hiding public harms. Secrecy

¹⁹³ ABA Model Rule 1.6(b)(1) states: “A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to prevent reasonably certain death or substantial bodily harm.” MODEL RULES OF PROFESSIONAL CONDUCT R. 1.6(b)(1) (2007).

¹⁹⁴ See Jason Popp, *The Cost of Attorney-Client Confidentiality in Post 9/11 America*, 20 GEO. J. OF LEGAL ETHICS 875, 879 (2007).

¹⁹⁵ The “reasonably certain” requirement replaced the prior “imminent harm” requirement. ABA Center for Professional Responsibility, *Proposed Rule 1.6 Public Discussion Draft*, Mar. 23, 1999, available at <http://www.abanet.org/cpr/e2k/rule16draft.html>.

¹⁹⁶ Richard Zitrin strongly disagrees that defense attorneys would report their clients. Zitrin, *supra* note 190, at 20.

¹⁹⁷ For more on the benefits of an affirmative duty to reveal public harms and the lack of incentives to do so, see Popp, *supra* note 194, at 880–81.

¹⁹⁸ Lawyers owe no duty of confidentiality to opposing parties.

agreements would still be possible, although the reporting requirement would severely limit the information that may be kept secret, giving defendants little incentive to agree to them.

These expansions to Rule 1.6(b) have not been adopted and should not be adopted for many reasons. Imposing an affirmative duty on attorneys to reveal public harms would be unwieldy to enforce and hard to follow, especially given a lawyer's more important duty to her client. Requiring attorneys to determine when they must report dangers to the public puts attorneys in the position of effectively representing an illusive third party – the public.

One way of avoiding some of the problems with expanding Rule 1.6(b) would be to provide lawyers with a mechanism for reporting information about public harms to a court or government body. An amendment to the current rule might state:

A lawyer may reveal information relating to a client's case that the lawyer reasonably believes is likely to prevent substantial danger to the public health or safety. The lawyer may report as much information as he or she believes would assist a court or government body to investigate the harm. The report need not disclose the names of the client, the lawyer, or the case. The lawyer shall either make the report to the court in the jurisdiction where the case arose, or an appropriate government body. Disclosure to a court or government body will not breach a contractual agreement to not reveal such information, but disclosure to other entities such as news media may still breach such a contractual agreement.

A report to the court or governmental body would disclose helpful information to those who could then address the harm. At the same time, because the report can be made anonymously, plaintiffs' attorneys could maintain their clients' confidentiality. This permissible mechanism for disclosure would still disincentive defendants from agreeing to secret settlements, knowing that opposing counsel could lawfully breach that confidentiality. But, limiting the disclosure to a court or government body would assure defendants that a regulating body would at least investigate the harm before disclosing it to the public. The express prohibition on reporting to the media may provide defendants with enough protection that secret settlements will continue to be a viable option.¹⁹⁹ The amendment would also prevent attorneys from

¹⁹⁹ See Doré, *supra* note 30, at 398–99 (arguing against rules allowing disclosure of specific facts because “defendants pay a premium to secure the confidentiality of their compromise and would not settle at all if its amount or conditions could be readily broadcast to the media or other existing or potential claimants”).

maliciously disclosing information that was irrelevant to investigating a public harm. Thus, providing lawyers with a permissive mechanism for disclosing specific information on public harms would address many of the concerns for the public good, as well as the concerns of individual parties.

C. Allow Courts to Disclose Certain Facts to Regulating Bodies, Like the FDA

Another alternative to sunshine laws would enable courts involved with secret settlements to disclose certain important facts from those settlements. When parties seek to file settlement documents under seal, courts acting under sunshine laws are compelled to deny such requests except in rare cases. States without sunshine laws must consider the public's common law right of access to court documents before sealing records.²⁰⁰ However, courts in these jurisdictions commonly allow sealing court documents like settlement agreements that have "no direct relation to court action."²⁰¹ There is room between these two extremes, of public disclosure and nondisclosure, for courts to determine what information should be disclosed and in which cases.

Courts should be encouraged to consider the benefits of public access, but only to the extent that public access is necessary to avoid injury to other third parties. Courts have typically had a limited role in the agreements made between parties out of court. However, once parties seek to file these agreements with the court, the court's involvement brings a public aspect to the case. Even those who strongly support litigants' right to make a secret settlement would likely feel troubled by the court's complacency in hiding significant public harms.

Commentators have suggested judicial balancing tests to determine when to allow sealing court documents. Sharon Sobczak recommends balancing several factors with the goal of public access being paramount.²⁰² These factors include harm done to the parties by not sealing, harm to the public by sealing, whether less restrictive alternatives exist, and whether the public has alternate means of

²⁰⁰ Fiftal, *supra* note 134, at 511–12.

²⁰¹ *Id.* at 511.

²⁰² Sharon L. Sobczak, *To Seal or Not to Seal? In Search of Standards*, 60 DEF. COUNS. J. 406, 415–18 (1993).

getting the information, such as the media or government agencies.²⁰³ Other balancing tests incorporate fewer considerations, providing for more narrow exceptions to the presumption of public access. For example, Oregon has adopted a balancing test that strongly favors public access to settlements in civil cases where a public body is the defendant.²⁰⁴ In these cases, the court may only keep certain identifying information in the settlement agreement confidential if it finds the identified person's interest in privacy outweighs the public's interest in disclosure.²⁰⁵ Drake University Professor Laurie Doré recommends a balancing test that errs on the side of protecting confidentiality.²⁰⁶ Rather than forcing all settlements to be open, her test focuses on whether openness will achieve an important objective of public access.²⁰⁷

Courts can refuse to keep harmful products and other hazards hidden from the public, while still allowing for secret settlements, by taking action that would disclose the harm but not the entire case. The judicial system is in the unique position of being aware of alleged wrongful conduct and having the ability to act on this knowledge. Judge Lord, before signing the settlement agreement in a consolidated Dalkon Shield case, expressed his desire to take action in the Dalkon Shield litigation when he said,

If this were a case in equity, I would order that your company make an effort to locate each and every woman who still wears this device, and to recall your product. I would order you now to take to the [FDA] a correct and proper report on what's happened with these devices. If I did that, they would order you to recall.²⁰⁸

²⁰³ *Id.* at 415–18. Regarding the “alternative means” factor, Sobczak points out:

In most cases, judges can be fairly confident that an executive or administrative agency will discover such information through its own processes, but if they are not certain that this will be successful, they can condition the sealing on restricted disclosure to a government agency. This would put pressure on a manufacturer to correct potentially dangerous aspects of a product.

Id. at 418.

²⁰⁴ OR. REV. STAT. § 17.095 (2007).

²⁰⁵ *Id.* at § 17.095(2)(b)(B).

²⁰⁶ Doré, *supra* note 30, at 286. For another example of a proposed balancing test, see Jillian Smith, *Secret Settlements: What You Don't Know Can Kill You!*, 2004 MICH. ST. L. REV. 237, 265 (2004) (balancing a “specific, serious, and substantial interest” against “any probable adverse effect that sealing will have on the public health or safety”) (citing TEX. R. CIV. P. 76a(1)(a)).

²⁰⁷ Doré, *supra* note 30, at 286.

²⁰⁸ Lord, *supra* note 14, at 13.

States should consider giving courts the kind of equitable powers that Judge Lord describes. Courts could carefully disclose important information in two ways.

First, rather than applying a presumption of openness to every filed settlement, state statutes should respect the parties' mutual desire for confidentiality. Statutes should allow courts to issue temporary sealing orders upon the parties' request.²⁰⁹ Then courts could determine, *in camera*, whether any information *should* be disclosed. The court should then disclose that information by leaving it out of the otherwise sealed settlement file, or the court can disclose it to a regulating body, like the FDA. This accomplishes several things: (1) it respects parties' autonomy in agreeing to a confidential settlement, (2) it protects vulnerable plaintiffs with privacy interests, and (3) it actively puts important information in the hands of a group with the ability to address the public harm. This approach is especially appropriate in medical products cases because it accounts for both the deeply private aspects of the case as well as the important public issues.

The second option for court-initiated reporting would allow the courts to require defendants to inform the class of people in danger of harm. If, after inspecting the information that parties have agreed to keep secret, the court determines that a certain group should be informed of a potential harm, it may order a defendant to inform that group. In the Dalkon Shield cases, this group would likely have included every woman currently using the device and every doctor who possessed a Dalkon Shield. The burden would fall on the company to find the people in the affected class. The court could oversee this process and it could specify the type of notice defendants must provide. For products liability cases, the notice could be a strong warning or a total recall, depending on what the situation merits. If the company failed to inform the class in a reasonable time, the court could disclose certain facts in a manner best apprised to reach the class—such as public service announcements or a newspaper story. This approach could also work in contexts other than medical products cases. For example, a defendant who had done environmental harm in a single community could confine its notice to that community while preserving its reputation in other geographic areas.

²⁰⁹ Compare *supra* note 181 and accompanying text.

There are several issues that arise within each approach. The primary problem with the first approach, which gives courts the discretion to report public harm information in settlements, is the chance for wide variations among courts and judges in how much information to report and how often. Allowing courts to pick information out of an otherwise confidential settlement places a great deal of discretion and responsibility on judges. Judges with large dockets may fail to take the time to probe the documents for evidence of a public harm.²¹⁰ However, Professor Doré points out that courts will not blindly endorse confidentiality agreements in the settlements that come before them.²¹¹ She also notes that some degree of discretion is inevitable when balancing public interest against the will of the parties.²¹²

Due process is the main issue that arises in the second approach, which grants courts the authority to require that defendants notify a specific at-risk class of individuals. If the court determines that a defendant must take some action that assumes fault or liability, that court may be imposing punishment before determining liability. The Florida District Court of Appeals held that a court cannot preempt these determinations, such as determining that something constitutes a “public hazard” under Florida’s law, pursuant to the Due Process Clause.²¹³ However, that court remanded the case for an evidentiary hearing, which would have resolved the due process problems from the start.²¹⁴ Thus, courts could avoid due process problems, while still protecting litigants’ privacy, by holding closed evidentiary hearings on whether something constitutes a public harm before taking action to disclose that harm. In addition to these measures, courts should take other steps to protect privacy by redacting the parties’ identities from the record or by using pseudonyms. After determining if and how much of the settlement will be sealed, the court can open future proceedings or include the identities in the record. Until that point, however, parties’ mutual agreement of confidentiality can and should be upheld.

²¹⁰ See Zitrin, *supra* note 190, at 20.

²¹¹ Doré, *supra* note 30, at 396.

²¹² *Id.*

²¹³ *DuPont De Nemours & Co. v. Lambert*, 654 So. 2d 226, 227–28 (Fla. Dist. Ct. App. 1995).

²¹⁴ *Id.*

CONCLUSION

Medical cases involve very private information that claimants legitimately seek to keep confidential in settlement. Yet, as several states have found, the public may also have a compelling interest in knowing the contents of a medical settlement. The Dalkon Shield cases exemplify the difficult tension in medical products liability cases when the public's strong interest in knowing runs counter to its interest in protecting privacy. Sunshine laws are too broad, forcing medical cases into the open when less invasive action could adequately inform the public. Sunshine laws should expressly provide exceptions to the presumption of openness when litigants show a strong interest in keeping personal and private information confidential. States should err on the side of confidentiality in cases involving medical claims with a mutually agreed-upon secrecy agreement.

However, the legal system need not take a passive role in confidential settlements that invoke strong public interest concerns. Federal regulations can be broadened to require medical product manufacturers to report the claims they pay out. Lawyers could be allowed or required to report known harms likely to cause injury to the public. The most effective means of disclosing public harms through the legal system, however, starts with the courts. Courts, while still respecting litigants' confidentiality, should be empowered to closely consider filed settlement records that might involve a public harm. If the court finds the settlement seeks to hide a public harm, it can either refuse to seal certain specific information, or it can take action to disclose that information to a government body or the class of at-risk individuals. Rather than imposing openness in all instances, these narrower approaches can adequately inform the public while respecting litigants' desire for confidentiality.

