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Unsealing Settlements: Recent Efforts To Expose Settlement Agreements That Conceal Public Hazards

In January 2002, the Boston Globe horrified the nation when it reported that 130 people had revealed Father John J. Geoghan of the Boston Archdiocese had sexually abused them as children. Plaintiffs had filed more than eighty civil claims alleging sexual abuse by Geoghan. Fifty more parishioners had previously settled claims of sexual molestation by the priest. In spite of the numerous accusations of abuse, court-ordered confidentiality agreements prevented their disclosure to the public. As follow-up stories were published, readers learned that the Archdiocese had settled claims involving at least seventy other priests. The few public cases, such as Geoghan's, were but a small percentage of the private agreements that the church had reached over the preceding years with abuse victims of priests. Meanwhile, allegedly predatory priests were permitted to continue their work in communities that did not know of the settlements. The scope of the abuse was made apparent when over five hundred people signed on to an $85 million settlement with the Boston


2. Carroll et al., supra note 1.

3. Id.

4. "But for all Geoghan's notoriety, the public record [of the abuse] is remarkably skeletal . . . . because almost all the evidence in the lawsuits about the church's supervision of Geoghan has been under a court-ordered confidentiality seal granted to church lawyers."). A Massachusetts judge ordered the records opened in November 2001 based on the Globe's intervention in the civil suits. See Leary v. Geoghan, No. 99-0371, 2001 WL 1902393 (Mass. Super. Ct. Nov. 26, 2001) (setting aside the impoundment order on discovery materials issued in the civil claims against Geoghan).

5. Carroll et al., Scores of Priests Involved in Sex Abuse Cases: Settlements Kept Scope of Issue Out of Public Eye, BOSTON GLOBE, Jan. 31, 2002, at A1. "[P]ublic cases [about twenty-five at the time the article was published] represent just a fraction of the priests whose cases have been disposed of in private negotiations that never brought the parties near a courthouse, according to interviews with many of the attorneys involved." Id.

6. Id.

7. See supra note 1 (discussing Father John Geoghan); Carroll, supra note 5 (discussing Fathers Robert M. Burns and Jay M. Mullin). However, according to the Globe, most of the abusive priests were removed from parish service. See Carroll, supra note 5 ("[T]he vast majority [of priests accused of abuse] have been effectively removed from parish service, and many of them are living unsupervised in local communities, among neighbors who know nothing about their past problems, or whether they might still pose a danger to children.").
Twelve years before the *Globe* exposed the abuse scandal, Florida enacted a law to address hazards to the public hidden in settlement agreements like those between the Boston Archdiocese and sexual abuse victims. Florida initiated a radical change in state approaches to dispute settlement when it passed the Sunshine in Litigation Act, the first statute to declare settlement agreements concealing potential public health and safety hazards void as a matter of public policy. Since the passage of Florida’s statute, other states have adopted laws addressing secret settlements and public dangers. Nearly twenty states now have laws affecting settlement confidentiality in varying forms and degrees.

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10. Id.


13. *See* ARK. CODE ANN. § 16-55-122(a) (2003) (prohibiting contracts or agreements that restrict anyone’s right to disclose an environmental hazard); IND. CODE ANN. § 4-21.5-3.5-18 (Michie 2003) (providing that statements submitted to settlement mediator are not public documents unless the parties agree otherwise); KY. REV. STAT. ANN. § 61.878 (Michie 2003) (exempting from public inspection except by court order personal information, scientific research, confidential or proprietary information disclosed to agencies, and other records); LA. CODE CIV. PROC. ANN. art. 1426(D) (West Supp. 2004) (declaring any agreement or contract that conceals a public hazard void and unenforceable); N.C. GEN. STAT. § 132-1.3 (2003) (presuming open for public inspection all settlement documents in any suit, administrative proceeding, or arbitration against any state government agency or subdivision); MASS. R. CT., Trial Ct. R., VIII Unif. R. on Impoundment P., Rules 1, 8 (Thompson-West 2004) (allowing the court to grant some people access to sealed materials); MICH. COMP. LAWS § 600.2912h (2003) (making medical malpractice settlements confidential and exempting such records from state Freedom of Information Act disclosure); NEV. REV. STAT. ANN. § 41.0375 (Michie 2003) (barring settlements with state government, employees, or legislators that require confidentiality in any terms and declaring such agreements void); N.Y. COMP. CODES R. & REGS. tit. 22, § 216.1(a) (2004) (directing the court to consider interests of the public and the parties in sealing court records); OR. REV. STAT. §§ 30.402(1)–(2) (1997) (barring public bodies, officers, or agents from entering settlement agreements conditioned on confidentiality); VA. CODE ANN. § 8.0-20.01(A) (2003) (providing the procedure by which an attorney can share information under protective order with another attorney in a similar or related matter); WASH. REV. CODE ANN. § 4.24.611(4)(b) (West 2004) (providing that confidentiality provisions may only be entered, ordered, or enforced if the court finds the provision is in the public interest); ARIZ. R. CIV. P. 26(c)(2) (providing that the court may consider possible risks to public health, safety, or financial welfare in determining whether to issue a protective order over discovery materials); CAL. RULES OF COURT R. 243.1(c)-(d) (2004) (prohibiting sealing court records unless the court finds the
trend toward addressing hidden dangers in litigation documents continues. Most recently, single chambers of both the Georgia and Illinois legislatures have approved Sunshine in Litigation Acts during their 2003–2004 sessions. As consideration and passage of settlement disclosure laws in state legislatures across the country illustrate, a movement is afoot to limit settlements that conceal dangers to the public.

This Recent Development will consider some states’ approaches to disclosing secret settlement agreements and argue that North Carolina and other states considering limitations on protective orders that conceal public hazards should adopt policies similar to Florida’s, declaring such private settlements void as a matter of public policy. First, this Recent Development will briefly describe the terms of Florida’s and Georgia’s Sunshine in Litigation Acts. Second, it will focus on the policies driving states to enact Sunshine laws. Third, counterarguments to these animating policy goals will be considered. Fourth, this Recent Development will contemplate the potential impacts of the policies and specific terms of Florida’s and Georgia’s Sunshine acts. Finally, it will discuss North Carolina’s current and proposed rules regarding settlement secrecy.

Regarded as one of the most sweeping Sunshine in Litigation Acts, interest against openness would be substantially prejudiced by disclosure); DEL. SUPER. CT. CIV. R. 5(g)(1) to (2) (2003) (providing that court records are only sealed upon good cause and subject to discretionary in camera review); GA. R. CT. ANN., Unif. R. for the Super. Ct. 21, 21.2 (LexisNexis Publishing 2004) (requiring that courts find harm to privacy outweighing the public interest to limit access to court files); IDAHO APP. R. 49(b) (2003) (deeming settlement conferences and all associated documents to be confidential and ordering the judge to destroy documents if the parties fail to settle); S.C. R. CT. P. 41.1(a), (c) (2004) (prohibiting settlement agreements filed before the court from being conditioned on secrecy, but specifically disclaiming applicability to private settlement agreements); TEX. R. CIV. P. 76a (presuming court records to be open, including settlement agreements not filed with the court). The federal government has also considered Sunshine in Litigation Acts. Though prior attempts failed, the Senate Committee on the Judiciary recently considered the Sunshine in Litigation Act of 2003. See S. 817, 108th Cong. (2003). That bill would amend the Federal Rules of Civil Procedure, Rule 26(c) regarding protective orders. Id.


15. See supra notes 13–15.

17. See Laurie Kratky Doré, Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement, 74 NOTRE DAME L. REV. 283, 313, n.118 (1999). However, Doré argues that Texas’s Rule of Civil Procedure concerning secrecy is broader than Florida’s law
Florida's statute prohibits a judge from entering any order that intentionally or incidentally conceals a public hazard\textsuperscript{18} or any information related to a public hazard.\textsuperscript{19} The law defines "public hazard" as "an instrumentality, including but not limited to any device, instrument, person, procedure, product, or a condition of a device, instrument, person, procedure or product, that has caused and is likely to cause injury."\textsuperscript{20} Scant case law exists interpreting the definition of "public hazard," but the Florida District Court of Appeal for the Fourth District held that a financing practice that caused only monetary injury was not a public hazard within the statutory definition.\textsuperscript{21} The court interpreted the limited legislative history available as indicating that the legislature intended to address "tangible danger to public health or safety."\textsuperscript{22} Asbestos\textsuperscript{23} and defective car tires\textsuperscript{24} have been deemed public hazards.

Florida's law is broad in its scope. The act provides:

Any portion of an agreement or contract which has the purpose or effect of concealing a public hazard, any information concerning a public hazard, or any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard, is void, contrary to public policy, and may

\footnotesize{because Texas defines "court records" to include unfiled settlement and discovery documents. \textit{Id.} at 313; see also Tex. R. Civ. P. 76a(2)(b) to (c) (defining court records as "settlement agreements not filed of record, excluding all reference to any monetary consideration, that seek to restrict disclosure of information concerning matters that have a probable adverse effect upon the general public health or safety" and "discovery, not filed of record, concerning matters that have a probable adverse effect upon the general public health or safety . . . except discovery in cases originally initiated to preserve bona fide trade secrets or other intangible property rights"). Texas prohibits sealing such records unless the interest in sealing the record outweighs both the presumption of openness and any public health hazard, and there is no less restrictive means of protecting the interest. See Tex. R. Civ. P. 76a(1) (setting forth the showing required to overcome the presumption of openness).

18. Fla. Stat. Ann. § 69.081(2) (West 2004) (defining public hazard as "an instrumentality, including but not limited to any device, instrument, person, procedure, product, or a condition of a device, instrument, person, procedure or product, that has caused and is likely to cause injury").

19. \textit{Id.} § 69.081(3) (providing "no court shall enter an order or judgment which as the purpose or effect of concealing a public hazard or any information concerning a public hazard").

20. \textit{Id.} § 69.081(2). Under the terms of Florida's statute, the Catholic priest abuses would fall within the definition because "public hazard" includes a person who caused or is likely to cause injury. \textit{See id.}


22. \textit{Id.}


Thus, Florida’s Sunshine law limits court-imposed protective orders for settlement agreements that are presented to Florida courts for approval but somehow compromise public health and safety. Further, the act reaches private settlement agreements not presented to the court and nullifies those agreements that impose confidentiality as a condition of settlement when a product or procedure has caused or is likely to cause injury. However, Florida’s Sunshine law specifically exempts from disclosure trade secrets unrelated to public hazards. Opponents to disclosure of settlement agreements may petition the court for closure on a showing of “good cause” discerned through in camera review. Additionally, Florida gives affected third parties, expressly including the media, standing to contest protective orders.

Georgia recently introduced its own, more limited version of Sunshine in Litigation legislation. Georgia’s pending bill forbids any “settlement agreement, consent order, or any other dispositive document or order filed with a court or subject to enforcement by any other document filed with the court” from including “any provision restricting the disclosure of information which is relevant to the protection of public health, welfare, or safety.” Thus, settlement agreements filed in a Georgia court could not contain secrecy provisions concerning information related to potential public health or safety hazards. The Georgia bill also prohibits any “final disposition of a pending action . . ., such as a full and final settlement with a dismissal with prejudice . . .” conditioned on secrecy concerning information related to potential health and safety threats. Further, the bill forbids any agreement filed with the court from including a condition of non-disclosure to a relevant state or federal agency, regardless of any

28. Id. § 69.081(7).
29. Id. § 69.081(6).
31. Id.
32. Id.
danger to public health, welfare, or safety.\textsuperscript{33}

The terms of Sunshine laws such as Florida's articulate the impetus for these statutes: protecting the public from concealed public hazards in court records or settlement agreements.\textsuperscript{34} According to the Court of Appeal of Florida, Fourth District, the legislative history of Florida's law shows that the Sunshine in Litigation Act was passed primarily to address products liability claims.\textsuperscript{35} The court drew its interpretation from a Florida House report:

Recently, there is a growing concern relating to the practice of settling cases, especially in the products liability area, where as part of the settlement the parties will agree not to disclose information regarding hazardous products, or the court will enter a protective order precluding such disclosure. Typical of this type of situation is the Oregon case of Oberg v. Honda Motor Co. where a jury ruled that Honda manufactured an inherently unsafe three-wheel vehicle, but the court entered a protective order requiring that all evidentiary documents obtained from Honda which identified the inherent manufacturing flaws be returned to the defendants.\textsuperscript{36}

California amplified the motivating force behind Sunshine in Litigation in its recently considered, but ultimately unsuccessful, bill:

Secrecy agreements and protective orders not reviewed by a court that prohibit disclosure to the public or public safety agencies of information that is evidence of defective products or environmental hazards are injurious to the health, safety, and well-being of all Californians.

Secrecy agreements can have tragic consequences. A widely known example of the disastrous consequences of secrecy agreements is the tragedy resulting from dangerous defects in Firestone tires, which have reportedly caused more than 150 deaths and more than 500 injuries worldwide . . . .

Secrecy agreements allow companies to shield information from public view and can permit those companies to continue illegal practices without accountability . . . . Secrecy agreements allow companies to shield life-threatening dangers and harmful practices from public view, thereby severely jeopardizing public welfare and

\begin{flushright}
\textsuperscript{33} Id. \\
\textsuperscript{34} See FLA. STAT. ANN. § 69.081(3) (West Supp. 2004). \\
\textsuperscript{36} Id. (citing Fla. H.R. Comm. on Judiciary, S. 278 (1990), Staff Analysis & Economic Impact Statement 2 (final Aug. 28 1990)).
\end{flushright}
Thus, perceived threats to public health based on specific harmful outcomes resulting from secret settlements have contributed to the campaign for Sunshine in Litigation laws.\(^\text{38}\)

In states like Florida, a policy of openness in government may also be driving Sunshine in Litigation Acts. Florida’s public records law illustrates the state’s commitment to openness, declaring, “[i]t is the policy of this state that all state, county, and municipal records shall be open for personal inspection by any person.”\(^\text{39}\) One Florida District Court of Appeal has opined, “Florida has a strong public policy in favor of open government. That policy has received clear recognition in both the legislature and the courts.”\(^\text{40}\) However, even where states have not declared policies for openness, advocates for Sunshine in Litigation legislation argue that courts are public institutions, funded by taxpayer dollars, to which the public is entitled access.\(^\text{41}\) These declared or perceived rights of access contribute to the campaign for Sunshine in Litigation.

Finally, some lawyers support Sunshine in Litigation laws as a means to alleviate ethical dilemmas faced by plaintiffs’ advocates.\(^\text{42}\) The Model


\(^{38}\) See generally James E. Rooks, Jr., Let the Sun Shine In, TRIAL 18, 18 (June 2003) (illustrating that the position of Sunshine advocates has some foundation in specific cases allegedly involving secret settlements, such as sexual abuse by priests, Firestone tires, and some baby products); see also Susan P. Koniak, Are Agreements to Keep Secret Information Learned in Discovery Legal, Illegal, or Something in Between?, 30 HOFSTRA L. REV. 783, 783–85 (2002) (discussing the Firestone tire shredding settlements); Richard A. Zitrin, The Case Against Secret Settlements (Or, What You Don’t Know Can Hurt You), 2 J. INST. STUD. LEGAL ETHICS 115, 119–21 (1999) (describing secret settlements concerning dangers from the drug Zomax, the sleep aid Halcion, the Dalkon shield contraceptive device, the Shiley heart valve, and General Motors side-mounted gas tanks).

\(^{39}\) FLA. STAT. ANN. § 119.01 (West Supp. 2004).


\(^{41}\) See Zitrin, supra note 38, at 119; Andrew D. Miller, Comment, Federal Antisecrecy Legislation: A Model Act to Safeguard the Public from Court Sanctioned Hidden Hazards, 20 B.C. ENVTL. AFF. L. REV. 371, 379. But see Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 581 n.18 (1980) (concluding that the public had a First Amendment right of access to a criminal trial, but the right was qualified, not absolute).

\(^{42}\) Zitrin, supra note 38, at 115; Miller, supra note 41, at 380; Diana Digges, Confidential
Rules of Professional Conduct mandate that lawyers follow clients' wishes regarding settlement.\textsuperscript{43} When a company offers an attractive settlement to a plaintiff's attorney that conditions the settlement on concealing a public hazard, the lawyer is bound to accept the settlement if the client so chooses.\textsuperscript{44} The attorney owes no duty to the public who may be harmed by the company's product later. A statute that prohibits secret settlement agreements where there is a risk of public harm would effectively bar lawyers from accepting such settlements on behalf of their clients because a court could open and void such agreements. Making these settlements illegal would force lawyers to consider the interests of the public when considering settlement, thus furthering the safety goals that Sunshine laws address,\textsuperscript{45} albeit at the expense of the client who wants to settle.

Opponents of Sunshine legislation respond that such laws would produce a powerful disincentive to settlement.\textsuperscript{46} A potential defendant in a products liability suit would be less likely to settle with a plaintiff where the defendant could not legally ensure that details of its product would remain secret.\textsuperscript{47} Public policy favors encouraging settlement,\textsuperscript{48} and opponents of Sunshine laws argue that the laws would undermine this policy, overburdening the already strained judicial system with cases that might have settled but for Sunshine laws.\textsuperscript{49} Beyond the settlement disincentive, Professor Arthur Miller has offered a host of arguments in favor of confidentiality in court records and secrecy in settlements.\textsuperscript{50} In a frequently referenced article on Sunshine laws and access to the courts,\textsuperscript{51}
Miller argues against presumed openness in courts and in favor of settlement confidentiality, because important privacy and property interests are implicated in the discovery process. Rather than enacting new legislation to address potential dangers to the public, Miller contends that existing protective order procedures adequately protect the public from any potential harm. Particularly, Federal Rule of Civil Procedure 26(c) and its state analogues require a showing of good cause and judicial balancing of interests before issuing protective orders. In fact, some states have chosen to address the issue of potentially hazardous secret settlements through court rules governing protective orders.

Sunshine advocates recognize the privacy and proprietary interests of parties to litigation or settlement. However, these privacy and property concerns are alleviated by the limits Sunshine laws place on disclosure. Specifically, only information related to the public health and safety is generally subject to disclosure. Washington justified its version of Sunshine in Litigation with a moderate policy explicitly balancing public health concerns with privacy interests:

The legislature finds that public health and safety is promoted when the public has knowledge that enables members of the public to make informed choices about risks to their health and safety. Therefore, the legislature declares as a matter of public policy that the public has a right to information necessary to protect members of the public from harm caused by alleged hazards to the public. The legislature also recognizes that protection of trade secrets, other

n.4; Marcus, supra note 46, at 464 n.42; Zitrin, supra note 38, at 117 n.2.
53. Id. at 467–74.
54. Id. at 474–77, 490–501; see also Marcus, supra note 46, at 488–505 (arguing that the goals of anti-secrecy advocates can be met with existing judicial practices); Richard J. Vangelisti, Proposed Amendment to Federal Rule of Civil Procedure 26(c) Concerning Protective Orders: A Critical Analysis of What It Means and How It Operates, 48 BAYLOR L. REV. 163, 179–82 (opposing federal Sunshine in Litigation legislation but supporting an amendment to Federal Rule of Civil Procedure 26(c) to address threats to public health).
55. FED. R. CIV. P. 26(c).
56. See TEX. R. CIV. P. 76a(1) to (2) (providing that settlement agreements “not filed of record” that have a probable impact on general public health or safety are presumed open but may be sealed based on judicial balancing of interests). Some states have more narrow definitions of court records than Texas does. See, e.g., CAL. RULES OF COURT R. 243.1 (2004) (providing that “all or a portion of any document, paper, exhibit, transcript, or other thing filed or lodged with the court” are presumed open but may be sealed based on judicial balancing of the interests involved).
57. See Koniak, supra note 38, at 802; Miller, supra note 41, at 375–77.
58. See FLA. STAT. ANN. § 69.081(5) (West Supp. 2004) (specifically excepting from disclosure trade secrets not pertinent to public hazards); WASH. REV. CODE ANN. § 4.24.611(3) (2003) (recognizing that the public has a right to protect trade secrets and certain other confidential information).
confidential research, development, or commercial information concerning products or business methods promotes business activity and prevents unfair competition. Therefore, the legislature declares it a matter of public policy that the confidentiality of such information be protected and its unnecessary disclosure prevented.\(^{59}\)

By balancing the need for confidentiality with the need to protect public health and safety, Sunshine laws seek to limit the harm disclosure can cause to a settlement. However, Miller also argues that Sunshine and related legislation would likely produce negative effects on the judicial system. Responding to arguments in favor of openness based on benefits to the legal system, Miller counters that such laws extend discovery, encourage complete adjudication to vindicate negative publicity rather than settlement, and create incentives to litigation by business competitors in the hopes of gaining access to valuable commercial information.\(^{60}\) Further, judicial resources, already under tremendous strain, would be made into “information clearinghouses,”\(^{61}\) collecting and parceling out court records when members of the public request access.

Others have extended Miller’s general argument noting that Sunshine laws create a significant advantage for plaintiffs’ attorneys.\(^{62}\) Opening discovery and settlement agreements allows the plaintiffs’ bar access to valuable information for use in pursuing additional claims against alleged threats to public health and safety.\(^{63}\) Though Sunshine laws are beneficial to the public welfare, the corporate defense bar vocally opposes such laws because of this perceived plaintiffs’ advantage.\(^{64}\) Critics of the legislation argue that the access to information allowed by broad Sunshine laws reduces plaintiffs’ attorneys’ time, effort, and the cost of similar litigation and exposes new areas of potential litigation to plaintiffs’ attorneys.\(^{65}\) One Sunshine opponent argues that the advantages Sunshine laws give to

\(^{59}\) WASH. REV. CODE § 4.24.601 (2003) (emphasis added). Washington’s statute goes on to declare that confidentiality provisions in court orders or private settlement agreements may only be entered if the court finds them to be in the public interest. Id. § 4.24.611(4)(b). All other confidentiality provisions are voidable. Id. § 4.24.611(5)(a).

\(^{60}\) Miller, supra note 49, at 483–87.

\(^{61}\) Id. at 487–89. Miller analogizes Sunshine laws (with their resulting “clearinghouse” function) to “a court-administered Freedom of Information Act.” Id. at 487.

\(^{62}\) See Digges, supra note 42 (explaining that currently “a lot of the requests for secrecy in settlement are [made] to allow corporations to continue to hide the information that other plaintiffs’ lawyers would like to find.”); Friedenthal, supra note 51, at 96 (noting that if confidentiality provisions were not honored, the dynamics of settlement would change in favor of plaintiffs).

\(^{63}\) See Digges, supra note 42 (referring to open settlement records as “litigation kits” for plaintiffs).

\(^{64}\) See id.

\(^{65}\) Id.
plaintiffs’ lawyers present a serious threat to “Corporate America” because they expose trade secrets and proprietary information. 66

Traditional notions of freedom of contract may also support arguments in favor of settlement confidentiality. 67 Parties are generally free “to bind themselves as they see fit, subject . . . to the qualification that contractual provisions violative of the law or contrary to some rule of public policy are void and unenforceable.” 68 Indeed, freedom of contract is a time-honored tradition that judges do not cursorily set aside. 69 Proponents of confidentiality might argue that secrecy about terms is merely part of the bargain in a settlement contract. 70

Though they may disagree about the interests that Sunshine in Litigation Acts serve or undermine, neither advocates nor opponents of Sunshine laws can offer empirical evidence in support of their positions. Miller argues that only isolated anecdotal evidence supports a fear of dangerous settlements that harm public health and safety. 71 Meanwhile, James Rooks, policy research counsel at the Center for Constitutional Litigation, 72 argues that evidence collected thus far does not support opponents’ contentions that prohibiting secrecy would chill settlements; rather, Rooks found, when he analyzed Florida data from 1986 to 2000, that per capita filings for all torts declined “substantially,” and the per capita number of case dispositions also declined over the years. 73 One

66. Id. “This type of legislation gives plaintiffs’ attorneys a huge advantage against Corporate America . . . . Corporate America does not want their proprietary and trade secret information available to the public, and they will resist in every legal way they can.” Id. (quoting the president of the International Association of Defense Counsel). But see Fla. Stat. Ann. § 69.081(5) (West Supp. 2004) (excepting trade secrets unrelated to public hazards from disclosure).

67. “The principle of freedom of contract is . . . rooted in the notion that it is in the public interest to recognize that individuals have broad powers to order their own affairs by making legally enforceable promises.” Restatement (Second) of Contracts ch. 8 introductory n. (1981).


70. But see Koniak, supra note 38, at 788–92 (arguing that the settlement secrecy debate should be framed not as a matter of civil procedure or ethics but as a matter of contract law subject to contract law’s principles of voidability).

71. Miller, supra note 49, at 480.


73. Rooks, supra note 38, at 22. The per capita number of filings went from 2.76 per 1,000 residents to 2.23 over the fourteen-year period. Id. at 22. The per capita number of dispositions went from 3.01 per 1,000 residents to 2.16 per 1,000 residents. Id. Rooks acknowledged, however, that “evidence will not yet support analysis with scientific rigor . . . .” Id. The validity
would expect to see more claims filed if Sunshine laws had actually chilled settlements. However, few cases concerning Florida’s law have been litigated, making it difficult to gauge the real impact of Sunshine acts on litigation and the judicial system. Thus, the actual effect of Sunshine statutes on settlements—either supporting the chilled settlements argument or supporting benefits to public health and safety—is not yet clear.

In spite of the lack of empirical settlement data, other practical effects of the statute can be deduced. Sunshine in Litigation statutes seek to protect the public from hazards hidden in settlement agreements. However, the scope of the settlement agreements included in the statutes’ terms greatly influences the extent to which those statutes can actually achieve their purposes. For example, Florida’s statute expressly states portions of settlement agreements—whether filed or not filed with the court—that conceal public hazards are “void, contrary to public policy, and may not be enforced.” But, Georgia’s proposed legislation merely prohibits parties from including provisions in settlement agreements that are filed with the court or otherwise part of the court record that restrict “disclosure of information which is relevant to the protection of public health, welfare, or safety.” The difference between Florida’s and Georgia’s Sunshine statutes is significant. While Florida can reach private settlement agreements that were never filed with the court, Georgia’s bill would only affect settlements that were filed with the court.


74. Rooks, supra note 38, at 22.
75. See Doré, supra note 17, at 314. “Although much controversy surrounded the initial enactment of these sunshine reforms, there has been little subsequent appellate discussion or empirical review of them. Assessment of their actual effect upon the judicial system itself, the parties, or the public in general thus remains speculative at best.” Id.
76. See supra notes 34–37 and accompanying text.
77. FLA. STAT. ANN. § 69.081(4) (West Supp. 2004).
78. H.B. 1019, 147th Gen. Assem., Reg. Sess., at 9-11-72(a) (Ga. 2003), available at http://www.legis.state.ga.us/legis/2003_04/versions/hb1019_LC_29_1019_a_2.htm (on file with the North Carolina Law Review). Specifically, Georgia’s prohibition includes “settlement agreements, consent orders, or any other dispositive document or order filed with a court or subject to enforcement by any other document filed with the court.” Id. (emphasis added). It also includes “final disposition of a pending action . . . , such as a full and final settlement with a dismissal with prejudice” conditioned on secrecy concerning potential health and safety threats. Id. at 9-11-72(c).
The typical procedure for court involvement in settlements once actions are filed illustrates the limited practical effect of Georgia's bill. Settlements generally come before a state court in one of two ways: parties who have agreed to settle out of court may file a motion to voluntarily dismiss a claim with prejudice, or parties who have already settled may file a judgment setting forth an agreement (the details of which are at the parties' discretion) and seeking the court's assistance in enforcement. In either case, neither law nor procedural rules requires the parties to accompany their filings with the full terms of the settlement agreement. Thus, a party who does not want a provision restricting disclosure of a public hazard to come before the court can easily avoid such exposure in the initial litigation—that party merely needs to follow the typical procedure of not including a copy of the settlement with its motion or judgment.

Private settlement may never come before the court at all if the parties agree to terms before the plaintiff files a claim. The Boston Archdiocese settlements illustrate the danger of secret, pre-litigation settlements hiding public dangers that can become rampant by the time they are discovered. The Bridgestone/Firestone tire debacle also involved numerous secret settlements reached before fatalities and injuries caused by the tires' shredding became widely known. Pre-filing settlements of this general kind served as the impetus for some legislatures to consider Sunshine bills. Florida's Sunshine act would have effectively reached both of these high-profile cases, perhaps even preventing the harms that followed. The Florida law's ability to invalidate such settlements and prohibit the parties from making agreements to conceal public hazards represents powerful evidence in support of Florida's Sunshine in Litigation Act.

More than just reaching private settlements, Florida's statute seems to allow a plaintiff who agrees to settle on condition of secrecy before filing a

79. See FED. R. CIV. P. 41(a)(1) (indicating that parties may stipulate to a dismissal with prejudice); see also N.C. R. CIV. P. 41(a)(1).
81. See id. However, a breach of contract action based on a violated settlement agreement would likely require the full terms of a settlement agreement to come before the court. See id.
83. See supra notes 1–8 and accompanying text.
84. See Koniak, supra note 38, at 783–86 (discussing the settlement history of the Bridgestone/Firestone tire cases).
85. See supra notes 36–37 and accompanying text.
86. See supra notes 25–26 and accompanying text.
claim or after dismissal to divulge a public hazard to a government agency and potentially face no liability for breach of contract. This result is legally possible because Florida’s Sunshine law allows the court to declare void and unenforceable portions of settlement agreements concealing public hazards while leaving the rest of the agreement intact. Obviously, Georgia would not permit such a result because an unfiled settlement does not come within its proposed statute’s coverage.

Arguably, the Florida approach raises a question of fairness—justice may not be served if someone who agrees to settle a claim based on specific conditions then violates those conditions. The plaintiff in any breach of contract action could make an equitable argument that the breaching party should not be allowed to profit from the settlement and later breach the terms of a contract subsequently declared void; however, any equitable remedy would be at the court’s discretion. The Florida statute appears to provide a potent counter to an equitable argument of this kind because any portion of the agreement can be declared void without canceling the entire agreement. Inequity may still persist because one party did not receive the confidentiality for which it bargained. A fair remedy under these circumstances would be for the disclosing party to lose all or part of its compensation for having entered the agreement in bad faith, intending to disclose. The disclosing party should then be able to pursue a remedy for its injury from the public hazard in court. Currently, no positive law exists that addresses what would happen to a Florida settlement agreement concealing a public hazard that one party breaches after having received compensation. Certainly, though, contract principles

88. Id. § 69.081(4). However, a party seeking to prevent disclosure can, on a showing of good cause, move the court to prevent disclosure after in camera review. See id. § 69.081(7).
90. Thompson v. Soles, 299 N.C. 484, 487, 263 S.E.2d 599, 602 (1980) (“[I]t offends every principle of equity and morality to permit a party to enjoy the benefits of a transaction and at the same time deny its terms or qualifications . . . . [O]ne cannot accept the benefits of a transaction and deny accompanying burdens.”).
91. See Roberts v. Madison County Realtors Ass’n, 344 N.C. 394, 399, 474 S.E.2d 783, 787 (1996) (stating that “[w]hen equitable relief is sought, courts claim the power to grant, deny, limit, or shape that relief as a matter of discretion”).
92. See supra notes 25–26 and accompanying text. No reported cases have addressed this issue. See supra note 75 (discussing the lack of appellate review). In Stivers v. Ford Motor Credit Co., 777 So. 2d 1023 (Fla. Dist. Ct. App. 2000), a defendant agreed to a settlement with the plaintiff on the condition that plaintiff not testify as an expert witness. Plaintiff continued to testify and defendant sought to have the agreement declared void under section 69.081(4) when plaintiff sued to enforce the agreement. Id. at 1024. The court did not address the application of section 69.081(4) because it found that the financial harm involved was not a public hazard. Id.
such as the voidability of contracts that are contrary to the public interest and the Sunshine statute’s policy foundation—protection of the public—present an obstacle to an equitable argument by the party that created the public hazard.

As the potential equity issues with Florida’s law illustrate, determining the reach of Sunshine in Litigation Acts is a policy decision. A state seeking to pass a statute to limit confidential settlement terms that endanger public health and safety must make a policy choice: will the state seek to govern private, out-of-court agreements or only documents filed in court? If states decide to use the judiciary’s power to address public dangers manifested in cases such as the Catholic sexual abuse scandals, states should model their legislation on Florida’s rather than Georgia’s Act.

Another reason for modeling Sunshine Litigation after Florida’s Act is its treatment of valuable commercial information. Corporations have legitimate concerns about their privacy and property interests in settlement agreements. Settlement agreements may involve sensitive or valuable company information, concerning new products, business practices, trade secrets, or trademarks. A law that does not make an exception for confidentiality of a legitimate, non-hazardous trade secret could potentially damage a company’s business. Although Georgia does not include an exception for trademarks or trade secrets in its Sunshine law, Florida expressly provides that trade secrets not related to public hazards are to be protected. Florida’s approach to protecting trade information thus correctly allows protection for both public safety and for specific types of benign but invaluable business information.

Unlike most other states, North Carolina has an existing settlement

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93. Bicycle Transit Auth., Inc. v. Bell, 314 N.C. 219, 228, 333 S.E.2d 299, 305 (1985) (stating that “generally, parties are free to contract anything as long as it is not illegal, unconscionable, or against the public interest”) (emphasis added).
94. Furthermore, a fundamental principle of equity is that one must come to equity with “clean hands.” See, e.g., Creech v. Melnik, 347 N.C. 520, 529, 495 S.E.2d 907, 913 (1998).
95. See Miller, supra note 49, at 464–74.

[information, including a formula, pattern, compilation, program, device, method, technique, or process that: (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Id. § 688.002. Texas’s protective order practice protects trade information as well because it allows courts to balance certain interests, presumably including privacy and property, against the interest in maintaining open court records. See Tex. R. Civ. P. 76a(1).
disclosure law that affects only public officials and employees.\textsuperscript{98} Codified as part of North Carolina's public records laws rather than as a rule of state civil procedure relating to protective orders, North Carolina's settlement disclosure rule covers "all settlement documents in any suit, administrative proceeding or arbitration instituted against any agency of North Carolina government or its subdivisions."\textsuperscript{99} These records are presumed to be open and may only be sealed pursuant to a judicial order "concluding that (1) the presumption of openness is overcome by an overriding interest and (2) that such overriding interest cannot be protected by any measure short of sealing the settlement."\textsuperscript{100}

North Carolina's current settlement disclosure law reaches only settlements for claims filed before courts or administrative agencies, but not private settlement arrangements.\textsuperscript{101} The statute's scope is further limited by its application to claims against state governmental bodies or public employees or officials.\textsuperscript{102} The statute does not directly address settlements concerning potentially dangerous products or environmental hazards created by private individuals or companies.

Over the last three years the North Carolina General Assembly has twice considered its own version of Sunshine in Litigation, first during the 2001 legislative session and again during the 2003 session. Senate Bill 1071 introduced in 2001, attempted to address public hazards concealed in court documents.\textsuperscript{103} Although the bill failed to leave the Senate Committee on the Judiciary,\textsuperscript{104} the need for change in North Carolina's policy toward

\textsuperscript{98} Nevada and Oregon, however, have rules very similar to North Carolina's. Nevada bars any settlement with state government, employees, or legislators that requires confidentiality in any terms, declaring any such agreement void. \textit{See Nev. Rev. Stat. Ann.} § 41.0375 (Michie 2003). In Oregon, a settlement agreement with a "public body, or officer, employee or agent of a public body" cannot be conditioned on confidentiality. \textit{Or. Rev. Stat.} § 30.402(1) (1997).


\textsuperscript{100} \textit{Id.} § 132-1.3(b). Settlement documents include "all documents which reflect, or which are made or utilized in connection with, the terms and conditions upon which any proceedings described in this section are comprised, settled, terminated or dismissed, including but not limited to correspondence, settlement agreements, consent orders, checks, and bank drafts." \textit{Id.} § 132-1.3(c).

\textsuperscript{101} \textit{See} text accompanying note 99.

\textsuperscript{102} \textit{N.C. Gen. Stat.} § 132-1.3(a) (2003). The statute defines an agency of North Carolina or its subdivisions as "every public office, public officer or official (State or local, elected or appointed), institution, board, commission, bureau, council, department, authority or other unit of government of the State or of any county, unit, special district or other political subdivision of government." \textit{Id.} § 132-1(a).


potentially dangerous settlement agreements makes its terms worth considering. Given the increasing public distrust of private industry because of recent and highly visible mismanagement, frauds, and scandals, the electorate and, by extension, their representatives may be more amenable to legislation that sheds light on possible corporate misconduct.\footnote{105}

The 2001 bill contained elements of the approaches already discussed, and mirrored Florida’s legislation in some ways. The bill was premised on findings that the public often has an interest in private litigation settlements.\footnote{106} Like other Sunshine laws, Senate Bill 1071 prohibited protective orders for documents that could pose threats to public health or safety.\footnote{107} Like Florida’s Sunshine law, the bill specifically exempted trade secrets that posed no threat to public safety from potential disclosure.\footnote{108}

Senate Bill 1071 also added some features not present in other states’ Sunshine laws. In civil actions involving “personal injury, wrongful death, monetary or property damages caused by a defective product, an environment hazard, or a financial fraud,” courts would not be allowed to issue protective orders that would “keep from public disclosure information that provides evidence of a threat to public health or safety” unless a final protective order had been issued.\footnote{109} The final protective order procedure in the proposed 2001 legislation provided that a court could notify the state attorney general if the judge entered a protective order (at her discretion) but found evidence of “a threat to public health or safety.”\footnote{110} Thus, Senate Bill 1071 would allow a judge to issue a protective order even though she perceived some potential threat to public safety. The judge would have two levels of discretion—first, in determining whether or not to issue a protective order and, second, in deciding whether to alert the attorney general.\footnote{111}

What is less clear about Senate Bill 1071 is the wisdom of its scope. The bill defined applicable documents as “materials produced, generated, specifically to medical malpractice settlements. See infra notes 116–26 and accompanying text.

\footnote{105} See Rooks, supra note 38, at 20 (quoting South Carolina Supreme Chief Justice Joseph Anderson, Jr.’s statements about lack of public confidence in institutions); see also Bradley K. Googins, Time for Companies to Invest in Good Citizenship, BOSTON GLOBE, Aug. 25, 2002, at E4.

\footnote{106} N.C. S. 1071 § 7C-2; cf. WASH. REV. CODE § 4.24.601 (2003) (declaring the public right to know information that may affect public health and safety).

\footnote{107} N.C. S. 1071 § 7C-4; cf. FLA. STAT. ANN. § 69.081(3) (West Supp. 2004).

\footnote{108} N.C. S. 1071 § 7C-6; cf. FLA. STAT. ANN. § 69.081(5) (West Supp. 2004).

\footnote{109} N.C. S. 1071 § 7C-4.

\footnote{110} Id. § 7C-5(a).

\footnote{111} Id. The bill expressly did not limit the court’s discretion to prohibit enforcement of confidentiality agreements “in any other cases,” presumably those not involving threats to public health or personal injury or other applicable causes of action. See id. § 7C-5(d).
or obtained in the course of litigation in any court," 112 but specifically excluded "settlement documents." 113 Although the bill failed to define what "settlement document" meant, intuitively it must at least have included the written terms of a settlement agreement produced during litigation. Rather, the bill appears to have primarily addressed discovery material. 114 The benefit of this kind of provision is that it would allow the public and other interested non-parties access to court records obtained in discovery that related to public health threats—arguably the richest source of information about potentially dangerous products, procedures, or processes. The threat of public access to potentially damaging discovery would likely serve as an added incentive for defendants to settle.

However, the legislature undermined its stated concerns by failing to include a provision making unenforceable settlement agreements contingent on keeping threats to public health and safety secret. The bill drafters found:

Matters of interest to the public health, safety, and welfare are often the subject of private litigation in which representatives of the general public do not participate and which frequently are settled or resolved under circumstances in which matters of the greatest concern to the public interest are kept confidential from disclosure to the representatives of the public by agreement of the private litigants. 115

By leaving settlement agreements completely out of the statutory scheme, the bill cannot have any effect on secret settlements reached before any civil action commences. The threat of non-enforcement of such settlements would provide a powerful disincentive to settlements that conceal public hazards. With a bill of this kind, North Carolina would create a great incentive to settle—certainly a boon to judicial economy but at too great a cost. As the Catholic priest sexual abuse settlements and Bridgestone/Firestone settlements illustrate, secret settlements can and have exposed the public to serious health and safety dangers, sometimes with fatal consequences. Public policy would not be served if the legislature struck the balance in favor of judicial economy over public health. Like Florida, North Carolina should include in its statutory scheme settlement agreements that conceal public hazards.

For now, the General Assembly seems to have postponed or

112. Id. §7C-3(1).
113. Id. §7C-3(1)(a).
114. See id. §7C-3(1)(b) (including "any and all materials produced, generated, or obtained in discovery" whether filed with the court or held by the parties' attorneys, but excluding discovery documents not offered at trial).
115. N.C.S. 1071 §7C-2.
UNSEALING SETTLEMENTS

abandoned changing the state’s policy on secret settlements. In April 2003, both chambers of the North Carolina General Assembly introduced Sunshine-like bills specifically designed to prohibit confidential settlements in medical malpractice actions. Senate Bill 879 and House Bill 1148, which are identical, propose the following provision to the North Carolina General Statutes: “In a medical malpractice action, any agreement to settle claims against any party on a confidential basis is void and unenforceable.” Among the bill’s findings is the following: “Health care providers can now settle medical malpractice lawsuits on a confidential basis, and injured patients have no leverage to insist that settlements be open so as to advise the public of continuing public safety risk from practices and procedures at facilities or from repeat malpractice offenders.” The 2003 bills are both narrower and broader than the Senate’s 2001 bill. The 2003 bills have considerably limited the scope of public hazards to address only medical malpractice rather than public health and safety generally. However, the 2003 bills are broader in enforcement because any confidential settlement agreement for medical malpractice can be declared void.

Though North Carolina has not yet enacted laws affecting confidential settlements that conceal public dangers, it appears to have recognized the importance of making agreements that undermine stated public policy goals unenforceable. Clearly, the 2003 bills, if passed, would affect private agreements reached before plaintiffs file claims because all confidential malpractice settlements are declared void. In their ability to reach pre-litigation agreements, the 2003 proposals represent an improvement over the 2001 bill. However, the latest bills are an incomplete solution. Negligent medical care certainly qualifies as a danger to the public, but the proposed statute completely ignores other legitimate public hazards. Public health threats from prescription drugs, defective products, and

117. N.C. S. 879 § 2; N.C. H.R. 1148 § 2.
118. Id. § 1(2) (emphasis added).
119. N.C. S. 1071 §§ 7C-3(5), 7C-4.
120. N.C. S. 879 § 2; N.C. H.R. 114 § 2.
121. See id.
122. Id.
123. See Zitrin, supra note 38, at 119 (describing the dangers of the drug Zomax).
clergy, among others, would all be unaffected by the medical malpractice bills. In fact, the 2003 bills are not true Sunshine laws because they focus so narrowly on one particular kind of public hazard rather than a broad class of health and safety risks. Though enacting the 2003 bills would represent a positive step for Sunshine legislation in North Carolina, the impact of the law on public health and safety would be restricted.

If North Carolina is committed to protecting the public from dangerous, even life-threatening products or conditions hidden in settlement agreements, it must follow Florida’s example by enacting a statute strongly protective of public health, safety, and welfare. Statutes that fail to bring private, unfiled settlement agreements under their rubric cannot adequately address the grave dangers these agreements sometimes conceal. One need only consider the example of Father John Geoghan to understand the devastating consequences of secrecy about public hazards. North Carolina, then, should pass a Sunshine law that declares any agreement that contains a condition of confidentiality regarding a public hazard void as a matter of public policy. Further, North Carolina, like Florida, should define “public hazard” so that at the very least the term includes a “device, instrument, person, procedure, [or] product.” To ensure that businesses receive some protection, North Carolina should exempt from disclosure trademarks, trade secrets, or other commercial information that is not relevant to the public hazard.

Sunshine in Litigation Acts and confidential settlement laws assume varied forms in the many states that have adopted them. While Florida’s Sunshine law was enacted fourteen years ago, the trend toward addressing concealed public hazards in litigation-related documents has not abated. As North Carolina and other states continue or begin contemplating Sunshine in Litigation Acts, they must consider the existence of settlements conditioned on secrecy that never become part of the court record and the scope of public dangers their laws seek to prevent. Unless legislatures affirmatively act to bring out-of-court settlements under the authority of Sunshine laws, these settlements can effectively undermine

124. See Koniak, supra note 38, at 783–86 (describing the dangers of Firestone tires).
125. See supra notes 1–8 and accompanying text (discussing the Catholic priest sexual abuse crisis).
126. Florida, for example, defines “public hazard” broadly. See supra notes 18–24 and accompanying text.
127. See supra notes 1–4 and accompanying text.
129. See supra note 13.
the very purpose of Sunshine acts—protecting the public from hidden dangers to health and safety. Laws that void the parts of settlement agreements that conceal public hazards represent an effective method for promoting the laws' prophylactic goals; the authority to render void agreements that compromise the public welfare allows the exposure of hidden dangers in pre-litigation agreements. Alternatively, statutes that do not confer the power to void settlement agreements concealing public hazards effectively permit some of the most dangerous settlements to escape the cleansing light of Sunshine laws. So long as parties are free to condition settlement on keeping dangers to public health secret, Sunshine in Litigation Acts cannot achieve their full protective potential.

ELIZABETH E. SPAINHOURL

131. "As Mr. Justice Brandeis correctly observed, 'sunlight is the most powerful of all disinfectants.'” N.Y. Times v. Sullivan, 376 U.S. 254, 305 (1964) (Goldberg, J., concurring) (citing FREUND, THE SUPREME COURT OF THE UNITED STATES 61 (1949)).
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