

# PUBLIC HEALTH VERSUS COURT-SPONSORED SECRECY

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## I

### INTRODUCTION

Public health practice—the prevention of disease and injury and the protection of the population—relies on access to information. Legal practice treats information very differently: it is a weapon; has power and value, and it is rarely yielded without getting something in return. Civil litigation uncovers a great deal of otherwise unavailable information about practices and products which may cause disease and injury. However, common practices in and related to lawsuits, trials, and courts, such as protective orders, sealing orders, and confidential settlements, can deprive public health authorities and the public itself of information that might be helpful to prevent disease, injury, disability, and death. In the United States, this conflict between public health and legal practice over the availability of information is nowhere more evident than in tort litigation. It remains both highly contentious and unresolved.<sup>1</sup> This article describes the important debate about “court-sponsored” secrecy: Should courts, as public entities devoted to dispute resolution, tolerate, endorse, or protect secrecy when the sequestered information might help protect the public health?

An examination of public health decisions—decisions concerning how to protect the health of the population—reveals the kinds of information that can be useful when the objective is to ensure such protection. Information is, however, only one of the elements needed to protect the public. We do not suggest that whenever and wherever information is available, action to protect the public will certainly result. What follows is perhaps, an overly simple look at public health.

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1. *See, e.g.*, *Frankl v. Goodyear Tire & Rubber Co.*, 181 N.J. 1, 853 A.2d 880 (2004) (rejecting an application by public interest and media groups and opposed by pharmaceutical and manufacturing groups for access to information revealed during pretrial discovery in a lawsuit involving allegations of tread separation in Goodyear tires).

## II

## PUBLIC HEALTH PRACTICE

Harmful exposures that injure people or cause disease, either immediately or after a latent period, are likely to be avoidable or preventable. This makes them an appropriate target of public health intervention. An investigation may begin with any of several observations.

Starting an investigation with a patient, the nature of the illness or injury may suggest a particular exposure: a patient short of breath, for example, may be examined by chest x-ray, which may show a pattern typical of a pneumoconiosis (silicosis, asbestosis, and other diseases which restrict breathing by causing fibrous changes in the lungs) caused by inhaling fine dust. The patient's work history then leads to examining the workplace, revealing the kind of dust, at what concentration, and often other workers similarly exposed. Investigating the process that produces the dust may suggest whether and how the dust can be controlled and exposure to it eliminated.

When a public health investigation begins with the hazardous agent, perhaps the dust identified above, it can search the human environment in a community for places, processes, and products that expose people to the same dust and the risk of similar disease, disability, or death. To how much, where, and for how long are people exposed? How can the exposure be avoided? Can a safer material or agent be substituted?

When a public health investigation is triggered by an outbreak of disease affecting many people, investigators may seek detailed information about each individual affected to learn of a common exposure. Sometimes outbreaks go undetected by public health agencies because no one has assembled the cases that would identify an exposed group or, more importantly, the person or corporation who has the information keeps it secret. For example, for several years Ford knew its Explorers were rolling over and Bridgestone/Firestone knew treads were peeling off certain of its tires.<sup>2</sup> Neither company informed a public health agency that might have acted to save lives.

Gathering private information to serve a public has long characterized public health practice.<sup>3</sup> Even before bacteriology made it possible to associate infectious diseases with particular microbes, public health authorities went beyond sanitation to isolate and quarantine sick people from the rest of the population. When disease control depended on isolation or treatment of carriers, as for tuberculosis and "venereal diseases," public health authorities routinely tracked down contacts, demanding to know with whom the patient lived, worked, shared needles, or had sex. No doubt, public officials have occasionally

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2. Anita Kumar, *Attention Shifts from Firestone to Ford*, ST. PETERSBURG TIMES, June 17, 2001, at A1, available at [http://www.sptimes.com/News/061701/Firestone/Attention\\_shifts\\_from.shtml](http://www.sptimes.com/News/061701/Firestone/Attention_shifts_from.shtml).

3. See Anthony Robbins & Phyllis Freeman, *How Organized Medical Care Can Advance Public Health*, 114 PUBLIC HEALTH REPORTS 120, 122 (1999).

misused this information, but our society, more often than not, trusts public health agencies to protect it from misuse when they seek such information.

### III

#### LEGAL IMPEDIMENTS

The assumption that public health authorities need and should have information in order to protect the population seems at odds with the actions of parties in many lawsuits, particularly civil suits that seek compensation for alleged torts. When the information about the cause of disease or injury is sufficiently convincing to cause the parties to settle, it also might be sufficient to convince public health authorities to take actions to protect others similarly exposed or at least to undertake research to learn about the consequences of similar exposures.

Lawyers acting for their clients often seek help from courts to enforce secrecy. They can ask for *protective orders* to conceal information uncovered in pretrial discovery. The defendant frequently asks the judge to order the plaintiff not to divulge this information to the public or even to government agencies authorized to protect the public. Lawyers can also ask judges for *sealing orders* during or at the conclusion of litigation to protect records from public scrutiny. Similarly, after the parties have agreed to settle, and occasionally after a verdict, attorneys can ask the judge to enter an order for a *confidential settlement*, prohibiting, on pain of contempt, the parties or their lawyers from revealing information contained in the settlement. This prohibition might include talking with the press, cooperating with regulatory authorities—the Food and Drug Administration, the Environmental Protection Agency, or the National Highway Traffic Safety Administration, for example—and sometimes prohibiting even an admission that there was a dispute in the first place. Or the parties to a lawsuit might agree between themselves as a condition of settlement that the information revealed during the pretrial proceedings remains confidential. Although not formally “court-sponsored” in the sense that the court played a role in the initial terms of secrecy, courts can become involved if one party to a private confidentiality agreement sues the other, claiming breach of contract.

Protective orders and other secrecy agreements have shielded many patterns of injury and disease associated with dozens of materials, products, and processes, such as pharmaceuticals, truck and automobile design, child car seats, cigarette lighters, school lunch tables, and water slides. Three well-known examples illustrate the problem: asbestos, the Dalkon Shield, and Bridgestone/Firestone tires.

Asbestos was perhaps the earliest, and certainly among the most pervasive and devastating, public health hazards sequestered by court-sponsored secrecy. Eleven asbestos exposure victims, suffering from asbestosis, settled their lawsuit against Johns Manville Company in 1933. Their attorney won \$30,000 for his

clients, but agreed he would not “directly or indirectly participate in . . . bringing . . . new actions against the Corporation.”<sup>4</sup> Only forty-five years later did anyone discover this agreement. Both asbestos producers and corporate users of the mineral fiber had hidden this fact from workers and customers.<sup>5</sup> During that time, asbestos, used in many products from insulation to brakes to concrete pipe, caused not only a deadly pneumoconiosis, but lung cancer and mesothelioma. In 1981, federal scientists published data showing that asbestos contributed to causing more cancer cases than any other workplace exposure.<sup>6</sup>

The Dalkon Shield was an intrauterine contraceptive device (IUD) shaped like a turtle shell with prongs and a string tail. It was sold by A.H. Robins starting in 1971 and was used by more than two million American women. The multifilament tail string wicked pathogenic bacteria from its vaginal end into the uterus, where the bacteria could cause infections—pelvic inflammatory disease—and induce septic abortions. The prongs or fins penetrated the endometrium, contributing further to these infections. The Robins Company knew of these design flaws when it began marketing the IUD in 1971.<sup>7</sup> Despite thousands of reports of problems, however, Robins continued to market the Dalkon Shield and aggressively defended routine lawsuits while reaching confidential settlements in cases involving the risk of disclosure of particularly damaging information.<sup>8</sup> By the time Robins ceased worldwide sales of the Dalkon Shield in April 1975 (it had withdrawn the IUD from the domestic market under FDA pressure the previous year), fifteen deaths and 245 nonfatal septic abortions attributable to the IUD had been reported.<sup>9</sup>

More recently, Bridgestone/Firestone tires mounted on Ford Explorers had resulted in at least 250 injuries and eighty deaths in the United States when, in 2000, a pattern of secrecy and confidentially settled lawsuits became public. The companies had known for several years about the tire safety defect that caused tread to peel off and the vehicles to roll over.<sup>10</sup> When sued by injured citizens, the companies regularly sought protective orders about the design and manufacture of Firestone tires and Explorers. About 6.5 million Firestone tires

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4. PAUL BRODEUR, *OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL* 114 (1985).

5. *Id.*

6. See Kenneth Bridbord, Pierre Decoufle, Joseph F. Fraumeni, Jr., David G. Hoel, Robert N. Hoover, David P. Rall, Umberto Saffiotti, Marvin A. Schneiderman & Arthur C. Upton, *Estimates of the Fraction of Cancer in the United States Related to Occupational Factors*, in *BANBURY REPORT 9: QUANTIFICATION OF OCCUPATIONAL CANCER*, App. (Richard Peto & Marvin Schneiderman eds., 1981).

7. RICHARD B. SOBOL, *BENDING THE LAW: THE STORY OF THE DALKON SHIELD BANKRUPTCY* 7–8 (1991).

8. SHELDON ENGELMAYER & ROBERT WAGMAN, *LORD'S JUSTICE* 81 (1985).

9. SOBOL, *supra* note 7, at 11.

10. In some parts of the world, Bridgestone manufactured its Firestone tires with a nylon cap to prevent the loss of tread and had recalled the tires with the design flaw in Venezuela and Saudi Arabia. U.S. regulators were not informed.

were in use, including those on 4 million Ford Explorers, when Firestone recalled 14.4 million tires in 2000.<sup>11</sup>

#### IV

##### THE CASE AGAINST SECRECY

The United States tort system has significant influence on the safety-related decisions made by those who produce the vast majority of products used and consumed by the American public. It is also a major influence on systemic behaviors that might endanger people. The tort system can achieve the economist's dream of forcing the avoidance of unnecessary injuries only if it generates accurate signals about the costs imposed by particular products or practices. Yet secrecy agreements are designed, among other things, to avoid enforcement by suppressing information that would otherwise affect the behavior of other injured parties and those at risk of injury.

The public health case against the secret resolution of lawsuits involving dangerous products and practices is straightforward. Suppressing information about the dangers inherent in corporate behavior and consumer products deprives regulators, litigants, and consumers of knowledge relating to safety. Regulators might have acted earlier with respect to the dangers posed by asbestos, the Dalkon Shield, and Bridgestone/Firestone tires had they been aware of the number of lawsuits, the settlements, or information revealed in pretrial discovery. Other potential litigants might have been encouraged to sue earlier and in greater numbers had they been aware that their injuries were not unique. These suits, in turn, could well have affected the manufacturer's calculus of when the liability generated by continuing to produce or market a particular product outweighed the profit flowing from product sales.

The free flow of information might advance public health in a more straightforward fashion. Consumers armed with information about the dangerous attributes of a product might well choose not to consume it. Cigarette smoking declined significantly in this country long before any cigarette smoker succeeded in holding a tobacco company liable for disease.<sup>12</sup>

Would the world have been a safer place if there had been no secrecy agreements of any kind in connection with tort litigation? There is no way to provide an empirical answer to this question because we inhabit a world in which secrecy agreements are ubiquitous. If we were to rerun the film of the past fifty years, keeping everything constant but eliminating secrecy agreements respecting asbestos, Dalkon shield, Bridgestone/Firestone tire, and the like, earlier and more complete information about the dangers of these products would almost

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11. Memorandum of Law of Amicus Curiae Public Citizen in Support of Plaintiff's Motion to Compel and Opposition to Protective Order, *Trahan v. Ford Motor Co.*, No. 99-62989 (61st Dist. of Harris County, Tex. Sept. 18, 2000), available at <http://www.citizen.org/litigation/briefs/OpenCourt/articles.cfm?ID=1070>.

12. See Phillip Cook & Jens Ludwig, *Fact-Free Gun Policy?*, 151 U. PA. L. REV. 1329, 1333 (2003) (citing the role of scientific research and public awareness in causing the smoking decline).

certainly have produced earlier recalls and withdrawals, thus reducing injuries and deaths.

To the (unknowable) extent that a secrecy agreement is today a *sine qua non* of settlement, without such agreements there would be fewer settlements and more trials. Plaintiffs would lose some of the cases in which they have received a settlement, both because of the vagaries of litigation and because the realization that every case would have to be tried might reduce the enthusiasm of plaintiffs' lawyers for filing claims in less than clear cases. Some of these "less than clear" cases may be the early cases that begin the process of establishing that a new Dalkon Shield or Bridgestone/Firestone tire may be dangerous.

Although it is an extreme example, the extraordinary success of the tobacco industry's "scorched-earth" litigation policy, which succeeded in avoiding any judgments against a tobacco company for more than forty years, should not be overlooked. The success of the tobacco companies turned largely on their ability to blame the victim—a defense not likely to be available with most other dangerous products.<sup>13</sup> Nonetheless, if a particular defendant or industry, motivated by the realization that secret settlements cannot occur, chose to litigate every case, fewer plaintiffs would receive compensation that might otherwise be offered in a secret settlement. This might be a victory for public health, but the plaintiff who forewent a likely settlement in return for the uncertainty of trial might not see it that way.

Assuming that the defendants behave at all rationally, the cases in which a defendant would refuse to settle without a secrecy agreement are likely to be the cases in which they consider disclosures to be very damaging. If the defendants know their business, then, a requirement that all tort cases go to trial or settle without a secrecy agreement is likely to lead to the disclosure of considerably more damaging information concerning products and practices than currently occurs. Plaintiffs would win a fair number of these cases, and the public health would likely be enhanced as a result of the information thus disclosed.

These arguments reflect an instrumentalist view of the role of courts and litigation: secrecy is bad because it reduces the public goods that come from open litigation and increases what David Luban has referred to as the "public bads."<sup>14</sup> A competing view is that in resolving private disputes, courts are merely articulating public values and that the "reasoned elaboration and visible expression of public values" is an end in itself.<sup>15</sup> On this view, settlements generally are questionable, secret settlements particularly so.

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13. Daniel Givelber, *Cigarette Law*, 73 IND. L.J. 867, 881-82 (1998).

14. David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2626 (1995).

15. *Id.*

## V

## THE CASE FOR SECRECY

Those who support secrecy agreements respond to the public health case against concealment in two ways. The first acknowledges that secrecy may put some at risk but gives more weight to other values—autonomy, privacy, and efficiency.<sup>16</sup> If courts exist primarily to serve the parties and the parties can agree to a settlement—even a secret one—the court has no independent interest in the dispute. For the court to insert itself in the matter interferes needlessly with the autonomy of the parties. Litigation might reveal confidential information damaging to one or both parties that had no relevance to public health. If secrecy disappears once a lawsuit is filed, frivolous suits may be brought simply to uncover private and embarrassing information. Even when the lawsuit is not frivolous, public disclosure of information generated through discovery—such as the number of sexual partners of a woman injured by a Dalkon Shield—may injure a party without serving any public safety interest. Finally, a trial is a notoriously inefficient way to resolve a dispute. Rules prohibiting secret settlements would likely increase the number of trials. This would inconvenience parties who would have gladly settled in secrecy and would impede courts' ability to hear and resolve other disputes that cannot be settled, even with a secrecy agreement.

A second response to the notion of a rule barring secrecy agreements is that the public health case remains anecdotal and therefore unproven.<sup>17</sup> At a minimum, the argument proceeds, speculative concerns based on anecdotes without supporting statistical evidence of harm to the public health do not outweigh the values inherent in secrecy. This argument can be advanced because no one has assessed quantitatively the public health consequences of secrecy agreements. Such an assessment would be a difficult task as it depends upon speculation as to how public health authorities and consumers would have behaved had there been no secrecy agreements.

## VI

## POSSIBLE SOLUTIONS

Assuming current secrecy-agreement practices compromise the public health, how can this problem be addressed? Prescriptions put forward to correct the problem have been directed at judges (and the court system) and lawyers. For judges and courts, the most straightforward response is to refuse to enter protective orders calling for secrecy relating to materials divulged during pretrial discovery or settlement agreements. Thus, someone who breaches a confidentiality agreement would no longer risk being in contempt of court. This

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16. Richard A. Epstein, *The Disclosure Dilemma: Why a Ban on Secret Legal Settlements Does More Harm than Good*, BOSTON GLOBE, Nov. 3, 2002 at D1.

17. Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 480 (1991).

approach, however, does not prevent the parties themselves, without involving the court, from signing confidentiality agreements with respect to discovery or settlement.

Another possible approach is to declare confidentiality agreements in derogation of public health or safety as contrary to public policy and thus unenforceable. That is, rather than simply insist that courts not turn confidentiality agreements into enforceable judicial orders, we could insist that courts refuse to enforce confidentiality agreements that suppress information relevant to the public health.

Focusing on the behavior of lawyers rather than judges, one scholar has proposed an ethical rule barring a lawyer from

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.<sup>18</sup>

Such a rule obviates the possibility that the judge might never learn of a confidentiality agreement by prohibiting lawyers from creating them in the first instance. This proposal, if adopted, would mean that the defendant could never offer, nor the plaintiff's lawyer urge acceptance of, a settlement contingent on secrecy if either lawyer reasonably believed that the information suppressed "concerns a substantial danger to the public health."<sup>19</sup> This difficult to enforce rule would be in considerable tension with what has traditionally been viewed as the lawyer's central ethical obligation—to place her client's interests ahead of any other.

Public health advocates might consider a third possible line of attack on court-sponsored secrecy: allowing the jury to use confidentiality agreements as a factor in weighing liability for punitive damages. If courts are reluctant to decide that confidentiality agreements affecting the public health are unenforceable as against public policy, they might consider the intermediate step of permitting a jury to decide, given what the defendant knew and the plaintiff did not, whether the defendant's conduct in insisting upon confidentiality agreements in earlier suits involving the same product or practice merited punitive damages. In a recent case, Richard Posner identified a defendant motel's practice—resisting all claims arising from a bedbug infestation by refusing to settle and forcing all plaintiffs to litigate—as relevant to the damages that a defendant should pay for behaving outrageously.<sup>20</sup> If a defendant who employs the full panoply of legally available litigation techniques to discourage meritorious plaintiffs in lawsuits involving relatively small injuries can be punished for that conduct, so too, could a defendant charged with inflicting serious injuries be

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18. 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, 116 (1999).

19. *Id.*

20. *See Mathias v. Accor*, 347 F.3d 672, 677 (7th Cir. 2003).

punished when that defendant requires confidentiality agreements in order to continue to manufacture a product that results in such injuries.

## VII

### CONCLUSION

With increasing attention to the use of scientific knowledge for policy and public health, it is time for those who would use information to protect the public health to confront judges and lawyers who make the task far more difficult. Litigation-related secrecy can result in the withholding of information vital to protecting the public health, and the values served by permitting parties to sequester information do not obviously outweigh the public health interest that is potentially compromised. We cannot know how many women would have escaped death or nonfatal septic abortion had the information about the Dalkon Shield been available earlier but there are a number of them. Their fate weighs heavily against the values embodied in the manufacturer's ability to suppress information by insisting on confidentiality when litigation disclosures would have been particularly damaging. A ban on all secrecy agreements may be unenforceable and perhaps unwise. Thus we suggest a range of options including judicial refusal to enter protective orders, ethical rules limiting attorney behavior, and punitive damages when nondisclosure leads to avoidable injury. The law and legal practice should accommodate the community's need for information relevant to the public health.