Skeletons in the Courthouse:
Hazards to the Public Remain Secret

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Introduction

In 2001, millions of Americans driving Ford Explorers equipped with Firestone tires learned that they had entrusted their safety on the road to a potential death trap. Even worse, they discovered that numerous lawsuits had already uncovered the trouble with Firestone tires but the information had remained hidden due to court-approved secrecy agreements. All too often, lawsuits related to products that endanger the health and safety of the public remain secret, despite the future harm they may cause to unsuspecting consumers.

The secrecy which surrounded the Ford/Firestone defective tire settlements is a glaring example. Over eight years, these companies settled dozens of cases and then forced the victims to stay silent about the damage they suffered and the dangers posed by Ford trucks and Firestone tires.[1]

Secrecy agreements often prevent victims or attorneys from sharing any documents obtained in the course of a lawsuit, disclosing the size of damage awards, alerting governmental agencies, or speaking to the press. These limitations effectively force every plaintiff to start litigation from scratch.

To prevent future debacles like the Ford/Firestone litigation, Illinois must enact a Sunshine in Litigation law to prevent court concealment of public hazards. At present, *sixteen states* have enacted some form of Sunshine in Litigation laws or judicial rules. Such laws respect valid privacy concerns and still protect trade secrets, benign sensitive personal information, and juvenile justice matters. But, when defective products injure or kill a consumer, Sunshine in Litigation ensures that future users of the product will not be kept in the dark.

It is unfortunate that the Illinois General Assembly cannot pass any sort of anti-secrecy legislation, despite the fact that this state's citizens overwhelmingly support Sunshine in Litigation. The Coalition for Consumer Rights' 2001 Annual Survey of Illinois Voters found that 90.8% of the state's registered voters felt that nobody should be allowed to conceal information about dangerous products that is uncovered in a lawsuit.

This report details court secrecy's legacy of unnecessary suffering and death, one that has involved products ranging from auto parts, child safety products, and medical devices to cigarette lighters and children's toys. It illustrates why Sunshine in Litigation is long overdue in Illinois.

A History of Secret Settlements

Secrecy in the courts has a long and painful history. In product liability cases, corporations often demand that information turned over to injured consumers and their lawyers be kept absolutely secret, even when the product is defectively designed or otherwise hazardous and remains for sale to the public. From mislabeled car seats to deadly arthritis medications, corporations force confidentiality agreements on consumers as a precondition to settling a case. As a result, regulatory agencies, the media, and the public are kept in the dark about dangerous products. Not only must every consumer injured by the same product must build his or her legal case from scratch, but other consumers who own and use that product have no way of protecting themselves from injury. By leaving everyone in the dark, court secrecy allows corporations to continue to profit at the expense of their customers' life and limb.

The Mechanisms of Court Secrecy

At various points during a lawsuit, a corporation can insulate its wrongdoing from public scrutiny. These methods of concealment include the following:

- Before trial: Injury victims have a right to discover evidence that may be in the defendants' possession prior to trial. Often, defendants refuse to honor victims' rights to obtain this evidence unless they agree not to divulge the evidence to others, including governmental watchdog agencies. In these circumstances, defendants will ask the judge to issue *protective orders* to regulate the use of evidence they provide to victims.
- At the conclusion of the trial: Even after defendants have been found liable by a civil jury, they can and often do request that the case records be sealed. If the judge issues *sealing orders*, usually because defendants plan to appeal, the records are closed off from public review.
- After trial: If defendants agree to settle a claim before a verdict is rendered or even after a verdict, even though they plan no further appeals and were found liable, they can still demand that victims maintain silence about the dispute. These *confidential settlements* can be written to prevent victims from cooperating with federal regulatory authorities, speaking to the media about the nature of their injuries, or even admitting that there was ever a dispute at all.

In all of these ways, the public is denied an opportunity to critically evaluate the risk of highly dangerous products. Federal oversight agencies such as the Consumer Product Safety Commission, the National Highway Traffic Safety Administration, and the Food and Drug Administration are unable to protect the public. Other manufacturers are denied the knowledge that a practice they might engage in may be harmful. Years may pass before widespread problems come to light.

The following are examples of corporations' insistence on secrecy agreements and the consequent danger to the public. They clearly illustrate court secrecy's human costs in terms of time lost, death, and injury.

Car Seats

On March 12, 1989, Michael Wright suffered a broken neck in a car accident, paralyzing him from the waist down. Sixteen-month-old Michael, at 22 pounds, was the appropriate weight for the car seat as indicated by the manufacturer, Kolcraft Enterprises. However, other car seat manufacturers and the National Highway Transportation Safety Administration recommended that children under 30 pounds not use that style of car seat. Three months after Michael's accident, Kolcraft raised the advertised recommended minimum weight for its booster car seats to 30 pounds.

Kolcraft agreed to a settlement that reportedly could reach eight figures, but only under terms of a confidentiality agreement requiring, among other things, that Kolcraft not be named, and that any media contact be promptly reported to its lawyers. The family's attorney, an outspoken critic of companies' insistence on confidentiality agreements, said, "in the end, I agreed, because my job is to secure proper care for my client. And I deemed it inappropriate for the confidentiality agreement to stand between my client and the settlement."[2]

Zomax

McNeil Laboratories manufactured an arthritis pain reliever called Zomax that caused severe and sometimes fatal allergic reactions in many consumers in the early 1980's. Court secrecy kept this dangerous drug under wraps for five years. McNeil knew the drug was in wide distribution and potentially dangerous. Yet, in repeated lawsuits filed in 43 states, McNeil insisted on protective orders and confidential settlements, keeping information secret that could have sounded the alarm to potential Zomax users. By the time the FDA recalled the drug in 1985, the agency believed that Zomax was probably a factor in 14 deaths and 403 life-threatening allergic reactions.

One lawyer, representing several clients who settled confidentially, stated "what they are trying to do is not be accountable to the vast majority of the public for what they've done.... They paid my clients a ton of money for me to shut up." Another attorney said, "the problem is that they have a gun to our head. The client is concerned with being compensated in full. The lawyer must abide by the concerns and wishes of his client...not the fact that [information will remain secret or] other victims may be injured." Devra Davis, a toxicologist who nearly died from using Zomax, said court secrecy hampers "free scientific inquiry and the right of the public to know specific information about drugs it consumes."[3]

Water Slides

In 1991, while sliding on a yard toy called the Slip 'N Slide, Bill Evans broke his neck. He is paralyzed from the neck down, wheelchair bound, and requires 24-hour-a-day care. Believing something was defective about this product, Evans sued the manufacturer, Kransco. Evans' lawyer discovered that there had been at least seven other broken necks involving the Slip 'N Slide and found a videotape that was sealed as part of a confidential settlement in an earlier case. The video showed that Kransco knew exactly how adults might be severely injured using the Slip 'N Slide.

Evans reached a confidential settlement with the manufacturer, but he wanted to alert other consumers by issuing a press release about the dangers of the Slip 'N Slide. Evans was told that if he did this, the deal would be off and he would have to return the settlement money. Evans sued for the right to speak out, and Kransco capitulated.[4]

GM Fuel Tanks

Between 1973 and 1987, General Motors manufactured approximately 9.6 million pickup trucks equipped with unsafe fuel tanks that resulted in at least 750 fire-related deaths. The company knew very well it was dangerous to use this fuel tank design. In fact, a 1973 document, authored by GM engineer Edward Ivey, evaluated the cost to GM of these expected "burned deaths."

When victims of these fiery crashes first sued, GM disclosed documents and settled cases only on the condition that plaintiffs and their lawyers would agree to complete secrecy.[5] Due to such agreements, the risks of driving these trucks were not made public until nearly 15 years after the design was first introduced.

Bjork-Shiley Heart Valves

The Bjork-Shiley heart valve, first put on the market in 1980, contained severe defects. In many cases the heart valve would suffer fractures, causing fatal injuries about two-thirds of the time, while many other instances led to serious injury. The FDA finally removed the valves from the market in 1986. As of January, 1990, the company had reported a total of 389 fractures and 248 deaths (numbers generally agreed to be greatly understated due to the limited number of autopsies taken). Because of the manufacturer's insistence on confidential settlements and protective orders during early litigation, the valve's defects remained undercover and more heart patients received the valve.

The husband of one victim stated "I learned that many [victims'] families had filed lawsuits against [the

manufacturer and its parent company]. I also learned that documents and information obtained in those lawsuits were never made public because of agreements or court orders which kept the information secret. I learned that Shiley had settled every fracture case out of court and in each settlement required that the victims keep the settlements confidential."[6] Because of these confidential settlements, six years passed before the public was notified of the danger and hundreds of heart valves were implanted into unsuspecting victims.

Bic Lighters

In the 1980s, Bic Corporation quietly settled a number of lawsuits stemming from butane cigarette lighters that would explode and either burn to death or severely wound users. Bic routinely demanded that victims return all company documents provided during discovery in exchange for settling the case. Not until 1987, after several years had passed and newspapers began reporting that 10 deaths had been linked to these lighters, did Congress begin investigating. They found that Bic and other popular brand lighters were so unsafe that they sometimes failed to meet the industry's own voluntary safety standards.[7]

Chrysler Fuel Tanks

After her husband burned to death when his 1971 Dodge Demon was hit and burst into flames, Shirley LoPrest sued Chrysler. She alleged that, because of the car's fuel tank design, there was a serious risk that fire would enter the passenger compartment on impact. In 1987, responding to LoPrest's discovery requests, Chrysler obtained a protective order from the judge that limited access to the company's documents to only the parties and their attorneys, consultants, and expert witnesses. Consequently, Chrysler's crash test results and other company safety documents were kept secret. The case settled confidentially and the Chrysler files are still secret nearly thirty years later.[8]

Asbestos

In 1933, the Johns-Manville Company settled with an attorney for 11 former Manville employees, all asbestosis victims. The attorney received $30,000 for the victims, in exchange for a written promise that he would not "directly or indirectly participate in the bringing of new actions against the Corporation." This fact did not come to light for more than 45 years. In the meantime, the company avoided damage suits. Had the public known about this settlement, it is likely that the hazards of asbestos would have come to light decades earlier.

As recently as October 17, 2000, a Louisiana jury returned a multimillion dollar verdict in favor of the families of two men who started working at an Exxon refinery in the 1940's and later died from cancer

caused by exposure to asbestos. "The jury was obviously shocked at what Exxon knew and when it knew it," according to attorneys for the plaintiffs. Exxon was apparently one of the first companies to learn of the dangers of asbestos, but hid that knowledge while thousands of workers were fatally exposed. Among the exhibits presented was a 1937 Exxon report stating that dust concentrations at the refinery "are considered too high for working without adequate protection."[9]

These asbestos cases also show that an employer's insistence on secrecy can be costly. By concealing known hazards, they often pay in the long run. For instance, after James Hutcheson worked as a roofer for the Shell Wood River Refining Company, he developed cancer from exposure to asbestos. The court issued a default judgment on issues of liability and damages against Shell Wood for failure to turn over documents which indicated the company's knowledge of the cancer hazard as early as 1945. The jury ruled in favor of the the retired roofer, holding Shell Wood liable for millions of dollars in damages.[10]

Corvair

In 1962, a man who drove his General Motors Corvair more than 100 miles each day for work developed permanent brain damage. Unlike other cars, the Corvair used the same air that cooled the engine to heat the passenger compartment, allowing the driver to breathe deadly carbon monoxide. GM settled his claim, but demanded both that the settlement be kept secret and also that he amend his original complaint to say that the car was defectively manufactured, not that it was defectively designed. A design defect could trigger other individuals' claims since it would apply to *all* Corvairs, while a manufacturing defect would only apply to a single car. As a result, other Corvair drivers were not warned about the risk of breathing engine-heated air.

Dalkon Shield

After eleven deaths and 209 spontaneous abortions, the FDA suspended use of the intrauterine birth control device known as the Dalkon Shield. Attorneys for the product's manufacturer, A.H. Robins, reached numerous confidential settlements and even tried to extract promises from plaintiffs' attorneys to never take another Dalkon Shield case.[11]

A.H. Robbins knew that the device could cause Pelvic Inflammatory Disease but released it to the public anyway. 3.6 million women worldwide have used the Dalkon Shield, approximately 2.2 million of whom were American. In the first fifteen years of its use there were thousands of reports of injuries but A.H. Robbins continued to market the Shield and forced consumers to stay silent through secret settlements.

School Lunch Tables

Certain lunch tables in use at schools in Illinois and other states have a tendency to collapse. Such tables are believed responsible for six deaths and fourteen injuries. The mother of a Schaumburg boy who was killed reluctantly agreed to a confidential settlement in an effort to put the tragedy behind her. The lunch tables were not recalled and many remain in use at schools.

As the following summary (Table 1) indicates, court secrecy has taken an enormous toll on American lives. The number of deaths and severe injuries that could have been prevented had the public known about the dangers posed by these products is staggering.

Table 1. The Legacy of Secret Settlements

Product	Years kept secret	Death and injury toll
Zomax, McNeil Laboratories	5	14 deaths, 403 life threatening allergic reactions
General Motors Fuel Tanks	15	At least 750 deaths
Bjork-Shiley Heart Valves	6	At least 248 deaths
Bic Lighters	7	10 deaths, total burn injuries unknown
Asbestos	40+	Total deaths and injuries incalculable
Dalkon Shield, A.H. Robins	15	11 deaths, 209 septic abortions, thousands of reported injuries

Recent Tragedies Highlight the Need for Sunshine in Litigation

Ford/Firestone Tire Tread Separation

After recalls of faulty tires from Saudi Arabia to Venezuela, Americans finally became aware of the chronic tire tread separation problems present in certain lines of Firestone tires that were standard equipment for Ford vehicles. For eight years, Ford and Firestone quietly and confidentially settled lawsuits without admitting liability. Meanwhile, the death toll mounted.[12] The Ford/Firestone debacle has put a glaring spotlight on the atrocities committed by negligent corporations.

Many of the documents proving that Firestone had knowledge of tire tread separation are online at http://com-notes.house.gov/tabs/index.html. One letter, dated February 14, 1999, underscores the explicit way in which a Bridgestone official was notified of the problem. In the letter, the national service director of a Saudi Arabian auto dealership writes a senior Bridgestone engineer regarding an accident in which tire tread separation occurred over the complete circumference of a tire while the tire remained inflated. The service director concluded that "the tread separation cannot have been caused by being run flat or impact damage" and service records indicated appropriate prior maintenance. Combined with earlier tire related accidents, the service director goes on to state "you have a very serious problem on your hands" and the fact there had been no deaths or serious injuries to date "is simply sheer luck."

As we now know, Firestone took no concerted actions to look into the problem or check production runs for defects. Instead, Firestone settled suits over accidents resulting in deaths and injuries and chose to seal court documents instead of taking action to protect consumers and save lives.

Collapsing Cribs

In 1993, after three deaths, Kolcraft/Playskool Travel-Lite Portable cribs were finally recalled, yet children are still at risk because of ineffective recall strategies. For example, between 1996 and 1998, 32 children per year died because of crib-related injuries.[13] Due to the limited authority of the Consumer Product Safety Commission (CPSC) to mount recalls, Kolcraft halfheartedly attempted to alert the public to the dangers of Travel-Lite cribs, but thousands still remain unaccounted for, each one a potential trap for a young child. While Travel-Lite cribs are designed to fold up at the midpoints of the top rails to allow for storage, they also have a tendency to collapse unexpectedly, causing injury or strangulation.

In 1998, five years after the recall, 16-month-old Danny Keysar died in a licensed, recently inspected Chicago day care home when a Travel-Lite crib strangled him. While Danny's parents first thought it

was just a freak accident, they soon learned that four other children had died in similar accidents. After a protracted lawsuit against Kolcraft, Danny's parents finally settled the case for $3 million in December, 2001. One of the largest settlements in a case involving a defective children's product, the case is notable because Danny's parents chose to make the settlement and the record of the case public. They resisted Kolcraft's attorneys' insistence on a confidential settlement agreement, and as a result they are able to tell the story of Danny's death to the world. Hopefully, this will result in more concerted efforts to ensure that no more children die in Travel-Lite cribs.

While Kolcraft could have prevented Danny's death by acting in good faith when faced with the CPSC recall order, Danny's parents have courageously resisted corporate pressure and have taken the lead in promoting awareness of dangerous children's products. As the co-founders of Kids in Danger, they have worked tirelessly to save other families from similarly tragic circumstances, and have shown that consumers do not have to cave in to corporate interests in order to obtain justice and redress for their injuries.

Workplace Hazards

Lead

Often, workers will unwittingly take home toxins endangering spouses, children, and others with whom they are in contact. For instance, when Antoinette Trotter noticed significant behavioral changes in Shawn, her six-year-old son, she was dumbfounded over what could be wrong. After she took him to the doctor, she was shocked to learn that his blood contained four times the level of lead acceptable for children. She was even more stunned to learn that the boy was being poisoned by her husband's job. Shawn's father came into contact with lead in his work repairing and rebuilding batteries. The family's lawsuit alleged that, upon returning home from work, lead on the father's clothing and body would create a toxic bath when Shawn would play with or hug his dad.

Shawn, now 13, suffers from permanent learning disabilities and other behavioral problems due to exposure to lead on his father's work clothes and on the furniture and rugs in his home.[14] The family's lawsuit settled out of court for an undisclosed sum. The agreement requires that the family not disclose the employer's name. Since the settlement, the parents have struggled with their desire to make other families aware of the danger. Antoinette Trotter says of the situation "employees, they don't know the danger. They don't know they can bring this stuff home."

Unknown Toxins

Industries such as nuclear medicine, lead smelting, chemical manufacturing, farming, medical research, and radiator repair present family members with possible exposure to mercury, radioactive material, lead, asbestos, PCB's, pesticides, and arsenic.[15] Too often, workers are not aware of the hazards, employers do not provide adequate safety measures, and when a court challenge is mounted, the potential to increase awareness is often thwarted by forced secrecy agreements.

In Illinois, for example, the Amoco Research and Development facility in Naperville recently settled cases related to brain tumors suffered by its employees. Although the amounts of the settlements were released, there was no information as to the possible causes of the tumors. Other workers at this same facility have developed tumors, but will not be able to review these court records to determine their own health risk. This type of secrecy is a disservice to those working at similar facilities around the world who might benefit from possible preventative measures.

Recommendation

Sunshine in Litigation: Let the People Know

In the Coalition for Consumer Rights' 2001 Annual Survey of Illinois Voters, 90.8% of those interviewed opposed hiding information about dangerous products through the use of secret settlements. A Sunshine in Litigation law can help end the history of suffering and death that such secret agreements have produced in Illinois and the rest of the United States. Typical anti-secrecy measures do not affect the confidentiality of criminal records, divorce or other family court matters. Trade secrets, medical records and other proprietary information would not be opened to the public. However, the public would be protected in instances where a product poses a safety hazard.

In the aftermath of the Ford/Firestone tragedies, Senator John McCain shepherded an auto safety bill through Congress calling for criminal sanctions for defective goods. McCain's bill included civil penalties as well as criminal sanctions for failure to recall, and required manufacturers to provide detailed records of problems related to defective parts, was passed out of committee. Unfortunately, the bill ultimately passed by Congress did not have many of these provisions. A major weakness of the final bill, as noted by Joan Claybrook, president of Public Citizen and former head of the NHTSA, is that "it allows the Secretary of Transportation to keep safety information secret."[16] The bill called for disclosure only after a case-by-case determination by the secretary that it is needed. Clearly, state anti-secrecy legislation is needed to protect Illinois consumers and citizens across the country.

At the state level, anti-secrecy legislation has made little or no progress in the Illinois General Assembly. Sixteen other states, however, have taken steps to ensure that public safety risks are not hidden from public view. These states include:

Arkansas	Georgia	Michigan	Oregon
California	Idaho	New Jersey	Texas
Delaware	Indiana	New York	Virginia
Florida	Louisiana	North Carolina	Washington

While California has not adopted an official Sunshine in Litigation law, the state's judiciary has insituted rules that put the public's right to know above a corporation's drive to hide dangerous practices via secrecy agreements. Rules adopted by the California Judicial Council prohibit the sealing of any records filed in a court case merely upon agreements of the parties. Under the new rules, sealing of

court-filed documents will be frowned upon unless there is an overriding interest that outweighs the public's right to access court records could documents be sealed. The public also has the right to request that previously sealed records be opened. Bills have also been introduced in the California legislature which would extend these right-to-know protections to information contained in settlement agreements.

As of this year, Sunshine in Litigation bills are also being considered in Rhode Island and Massachusetts.

With the public outrage over the Firestone scandal, the time is right to pass a life saving Sunshine in Litigation Act in Illinois to allow regulatory agencies, retailers, and consumers to be warned of defective goods. With such an act in place, Illinois citizens will have a greater chance to protect themselves and their families from the dangerous products that all too frequently enter the marketplace undetected.

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