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Secret Class Action Settlements

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Secret Class Action Settlements

Rhonda Wasserman*

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I. INTRODUCTION

The journalist's email arrived on a Monday morning. "Can you settle a class-action lawsuit in secret?" he asked.¹ The parties to a putative federal class action had filed a joint motion the preceding Friday, seeking a confidentiality order "sealing all documents related to the settlement" of the litigation, including the stipulation of settlement, the notice of proposed settlement, the motion seeking approval of the settlement, any order entered by the court regarding the settlement, transcripts of the fairness hearing, and any objections filed by class members.² A proposed order, filed with the motion,

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1. E-mail from Brian Bowling, Reporter, PITT. TRIB.-REV., to author (Mar. 14, 2011, 9:45 a.m. EST) (on file with author).

2. Consented-To Motion to Maintain Settlement Documents Under Seal at 3, *Hirschfield v. B'nai B'rith Int'l*, No. 2:09-cv-01535-DSC (W.D. Pa. Mar. 3,

further directed the state and federal officials to whom the settlement documents would be provided pursuant to the Class Action Fairness Act³ to maintain their confidentiality.⁴

“Can you settle a class-action lawsuit in secret?”

The question threw me for a loop. Of course I was aware that parties to civil litigation settle cases every day of the week and routinely seek to shield from public scrutiny both the terms of the settlement and the inculpatory documents produced in discovery. But can you settle a *class action* lawsuit in secret?

This Article seeks to answer that question. It proceeds in four parts. To illustrate the practice of settling a federal class action under seal, Part I examines the class action lawsuit that prompted the journalist’s email. While a case study can vividly present the issues raised by the practice, it cannot capture its scope or incidence. Part II, then, seeks to ascertain the scope of the practice of settling class actions under seal. Part III.A reveals several permutations of the practice gleaned from newspaper accounts describing class action settlements from around the country. Part III.B focuses on a single federal judicial district—the Western District of Pennsylvania—and seeks to ascertain the percentage of suits filed as class actions that were settled under seal. Having gained some understanding of the scope of the practice, the Article then seeks to assess it normatively. Part IV analyzes the policy debate surrounding secret settlements of civil suits in general, fleshing out the competing policy objectives served by public access to, and confidentiality of, settlement agreements, including those submitted to courts for their approval. Finally, Part V examines the statutory, logistical and policy-based constraints that call into serious question the legality, efficacy, and wisdom of secret class action settlements.

II. CASE STUDY: THE B’NAI B’RITH LITIGATION

On October 23, 2009, Dean and Melva Hirschfield and thirty-

2011), ECF No. 142 [hereinafter Consented-To Motion].

3. 28 U.S.C. § 1715 (2006).

4. Proposed Order at 2, *Hirschfield v. B’nai B’rith Int’l*, No. 2:09-cv-01535-DSC (W.D. Pa. Mar. 3, 2011), ECF No. 142-1.

two other named plaintiffs filed a verified class action complaint in the Court of Common Pleas of Allegheny County, Pennsylvania, against B'nai B'rith International ("BBI"), a worldwide Jewish service organization, and ten individuals affiliated with BBI, among other defendants.⁵ The plaintiffs sought recovery of deposits that they (or their decedents) had paid to gain entry into a continuing-care retirement community in Mount Lebanon, Pennsylvania, a suburb of Pittsburgh.⁶

According to the complaint, BBI had formed the Covenant of South Hills, Inc. ("Covenant") to develop the retirement community.⁷ The plaintiffs or their decedents had paid deposits (each as much as several hundred thousand dollars) to Covenant to secure entry into the facility's independent living homes.⁸ In each Residency Agreement, Covenant agreed to refund a large percentage of the deposit when the resident vacated the home and it was re-occupied.⁹

Plaintiffs alleged that BBI's name or logo appeared on the

5. Class Action Complaint, *Hirschfield v. B'nai B'rith Int'l*, No. GD 09-19799 (Ct. Com. Pl. Allegheny Cnty. Oct. 23, 2009) [hereinafter Class Action Complaint]. Two other Class Action Complaints were filed in the same state court against the same defendants, alleging the same facts, pressing some or all of the same claims and purporting to represent the same class. See Class Action Complaint, *Hartman v. Levin*, No. GD 09-23090 (Ct. Com. Pl. Allegheny Cnty. Dec. 11, 2009) (raising some of the same claims); Class Action Complaint, *PNC Bank v. B'nai B'rith Int'l*, No. GD 10-004055 (Ct. Com. Pl. Allegheny Cnty. Apr. 21, 2010) (raising all of the same claims). Like *Hirschfield*, *Hartman* and *PNC Bank* were removed to federal court and eventually consolidated with *Hirschfield* for pretrial purposes. Order of Court, *Hirschfield v. B'nai B'rith Int'l*, No. 2:09-cv-01535-DSC (W.D. Pa. July 27, 2010), ECF No. 110. To simplify the narrative, this Article will focus primarily on the *Hirschfield* case and will ignore all defendants except BBI and the individual defendants.

6. Toby Tabachnick, *Former Covenant Residents File Second Lawsuit Against B'nai B'rith*, JEWISH CHRON. (2010), http://www.thejewishchronicle.net/view/full_story/4982346/article-Former-Covenant--residents-file-second-lawsuit-against-B%E2%80%99nai-B%E2%80%99rith (last visited Mar. 24, 2012).

7. Class Action Complaint, *supra* note 5, at 13–14, 19–20.

8. Motion to Abstain and/or Remand to State Court at 3, *Hirschfield v. B'nai B'rith Int'l*, No. 2:09-cv-01535-DSC (W.D. Pa. Dec. 16, 2009), ECF No. 13; Plaintiffs' Brief in Support of Motion for Class Certification at 3, *Hirschfield v. B'nai B'rith Int'l*, No. 2:09-cv-01535-DSC (W.D. Pa. Mar. 24, 2010), ECF No. 59 [hereinafter Plaintiffs' Brief in Support].

9. Class Action Complaint, *supra* note 5, at 6, 17.

marketing materials distributed to the public, on Covenant's signage and letterhead, and on the Residency Agreements signed by the plaintiffs.¹⁰ Covenant's directors were BBI officers, directors, employees and outside counsel.¹¹ According to the complaint, plaintiffs were led to believe that BBI was "either the owner or principal of the Facility and would fully stand behind the obligations of Covenant."¹²

When Covenant later filed for protection under Chapter 11 of the Bankruptcy Code,¹³ the plaintiffs' efforts to recoup their deposits from Covenant's assets in the bankruptcy proceeding failed.¹⁴ Neither BBI nor the entity that acquired Covenant's assets, Concordia Lutheran Ministries, assumed Covenant's obligation to refund the resident deposits.¹⁵ Class action litigation against BBI and several of its officers and directors ensued.

The thirty-four named plaintiffs who filed the class action complaint purported to represent a class

consisting of all . . . Residents, former Residents and/or their successors-in-interest who are or were parties to a Residency Agreement and who have not received and will not receive all benefits due them under their Residency Agreements including, but not limited to, payment of the Deposit Refunds and other benefits.¹⁶

10. *Id.* at 5, 15–16.

11. *Id.* at 5, 7, 15.

12. *Id.* at 17. *See also id.* at 7, 21 (explaining that plaintiffs tendered deposits "with the understanding and justifiable belief" that Covenant was "owned and sponsored by" BBI and that plaintiffs relied on "marketing materials circulated by" BBI as well as "other public representations and statements" concerning BBI's ownership, control, and sponsorship of Covenant).

13. Chapter 11 Voluntary Petition and Statement Regarding Corporate Resolution, *In re* The Covenant at South Hills, Inc., No. 09-20121-JKF (Bankr. W.D. Pa. Jan. 8, 2009), ECF No. 1.

14. *See* Order Requiring the Debtor to Determine Whether to Assume or Reject Residency Agreements at 1, *In re* The Covenant at South Hills, Inc., No. 09-20121-JKF (Bankr. W.D. Pa. Oct. 30, 2009), ECF No. 584 (rejecting the residency agreements).

15. Class Action Complaint, *supra* note 5, at 6.

16. *Id.* at 26–27. Plaintiffs' brief in support of its motion to certify the class estimated a class of approximately 150. Plaintiffs' Brief in Support, *supra* note 8, at 8.

The complaint alleged a host of claims, including breach of contract, fraud, negligent misrepresentation, violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, civil conspiracy, negligent undertaking, breach of fiduciary duty, active malfeasance, unjust enrichment, bailment, and violation of the Pennsylvania Continuing-Care Provider Registration and Disclosure Act.¹⁷

The defendants promptly removed the action to the United States District Court for the Western District of Pennsylvania¹⁸ and simultaneously moved to transfer the case to the United States Bankruptcy Court.¹⁹ While plaintiffs' motion to abstain and/or remand to state court²⁰ was pending, they moved for class certification, claiming a class of approximately 150 members.²¹ In their motion to certify, plaintiffs defined the proposed class as all persons and entities "[w]ho had unsatisfied rights to [a] refund of a portion of their Resident Deposits" as of the date that Covenant filed its bankruptcy petition.²²

While these motions were still pending, the parties jointly filed a Stipulated Agreement and Protective Order on Confidentiality (the "Protective Order"), which permitted either the plaintiffs or defendants to designate as confidential any discovery material (broadly defined) "that the designating Party in good faith believes contains (i) confidential personal information; (ii) confidential

17. Class Action Complaint, *supra* note 5, at 28, 30, 32, 35, 39, 42, 46–47, 49–50, 54, 56–57. Not all of the claims were brought against all of the defendants.

18. Notice of Removal, *Hirschfield v. B'nai B'rith Int'l*, No. 2:09-cv-01535-DSC (W.D. Pa. Nov. 17, 2009), ECF No. 1-4 [hereinafter Notice of Removal]. See also Consent Motion to Amend/Correct Notice of Removal, *Hirschfield v. B'nai B'rith Int'l*, No. 2:09-cv-01535-DSC (W.D. Pa. Jan. 4, 2010), ECF No. 18 (removing the case). The Notice of Removal invoked section 1452 of Title 28 of the United States Code, which authorizes removal of cases under title 11 of the Bankruptcy Code as well as "civil proceedings arising under title 11, or arising in or related to cases under title 11." Notice of Removal, at 2; 28 U.S.C. §§ 1334(b), 1452(a) (2006).

19. Motion to Transfer Case to Bankruptcy Court, *Hirschfield v. B'nai B'rith Int'l*, No. 2:09-cv-01535-DSC (W.D. Pa. Nov. 17, 2009), ECF No. 2.

20. Motion to Abstain and/or Remand to State Court, *Hirschfield v. B'nai B'rith Int'l*, No. 2:09-cv-01535-DSC (W.D. Pa. Dec. 16, 2009), ECF No. 13.

21. Motion for Class Certification at 2, *Hirschfield v. B'nai B'rith Int'l*, No. 2:09-cv-01535-DSC (W.D. Pa. Mar. 24, 2010), ECF No. 58; Plaintiffs' Brief in Support, *supra* note 8, at 8.

22. Plaintiffs' Brief in Support, *supra* note 8, at 6.

business information; (iii) trade secrets; or (iv) sensitive proprietary, commercial, financial, or customer information”²³ The district judge signed the Protective Order several days later, on May 25, 2010.²⁴ The Protective Order limited the persons to whom confidential information could be disclosed and the uses to which it could be put.²⁵ It contemplated that third-party recipients of confidential information would sign a consent to be bound by the terms of the Protective Order.²⁶ The order further required that counsel for any party seeking to file confidential information with the court do so under seal.²⁷ With certain exceptions, the Protective Order required the parties to destroy or return all confidential information to the producing party at the conclusion of the litigation.²⁸

In the fall of 2010, pursuant to the mandatory alternative dispute resolution program of the United States District Court for the Western District of Pennsylvania,²⁹ the parties and their insurers met with a mediator and ultimately “reached an agreement on the monetary terms of a settlement”³⁰ The Joint Status Report

23. Stipulated Agreement and Protective Order on Confidentiality at 2, *Hirschfield v. B’nai B’rith Int’l*, No. 2:09-cv-01535-DSC (W.D. Pa. May 19, 2010), ECF No. 80.

24. Stipulated Agreement and Protective Order on Confidentiality (signed), *Hirschfield v. B’nai B’rith Int’l*, No. 2:09-cv-01535-DSC (W.D. Pa. May 25, 2010), ECF No. 83 [hereinafter Protective Order].

25. *Id.* ¶¶ 4, 11. The Protective Order further permitted a party to designate discovery material containing “proprietary, marketing, sensitive personal, medical, financial or other strategic information that the Party . . . believes, in good faith, will be reasonably expected to cause harm to the designating Party by its mere disclosure to the non-designating Party” as “CONFIDENTIAL—ATTORNEYS’ EYES ONLY,” and limited its disclosure even more stringently. *Id.* ¶¶ 5, 6.

26. *Id.* ¶ 9; Consent to Stipulated Agreement and Protective Order on Confidentiality, *Hirschfield v. B’nai B’rith Int’l*, No. 2:09-cv-01535-DSC (W.D. Pa. May 25, 2010), ECF No. 83-1 (Exhibit A).

27. Protective Order, *supra* note 24, at ¶ 14. In light of the Protective Order, the parties filed, and the court granted, numerous motions to file under seal briefs referring to documents that had been designated as confidential. *See, e.g.*, Motion for Leave to File Under Seal, *Hirschfield v. B’nai B’rith Int’l*, No. 2:09-cv-01535-DSC (W.D. Pa. June 11, 2010), ECF No. 97; Order of Court, *Hirschfield v. B’nai B’rith Int’l*, No. 2:09-cv-01535-DSC (W.D. Pa. June 15, 2010), ECF No. 99.

28. Protective Order, *supra* note 24, ¶ 16.

29. W.D. PA. LOCAL CIV. R. OF CT. 16.2.

30. Joint Status Report at 1, *Hirschfield v. B’nai B’rith Int’l*, No. 2:09-cv-

submitted to the court on December 1, 2010 stated that “[t]he Parties anticipate filing a joint motion for class certification and preliminary approval of the settlement in the near future”³¹ At a status conference in late January 2011, the parties presented the court with “an update of the status of the settlement” and explained how they intended “to proceed with regard to class certification, notices, [and] waiver of rights to opt out and/or object.”³² The court approved the proposed procedures.³³

In mid-March 2011, the defendants filed the motion that lies at the center of this Article—a Consented-To Motion to Maintain Settlement Documents Under Seal.³⁴ The motion sought a court order to seal

all documents related to the settlement of the Litigation including, but not limited to, the Stipulation of Settlement and accompanying exhibits, the Joint Motion for Preliminary Approval of Settlement and accompanying Memorandum of Law in Support, all orders regarding the settlement entered by this Court, transcripts of hearings regarding the settlement, and any objections to the settlement filed by class members³⁵

01535-DSC (W.D. Pa. Dec. 1, 2010), ECF No. 138 [hereinafter Joint Status Report].

31. *Id.* at 1–2.

32. Status Conference Before Judge David Stewart Cercone at 2, Hirschfield v. B’nai B’rith Int’l, No. 2:09-cv-01535-DSC (W.D. Pa. Jan. 27, 2011), ECF No. 141 [hereinafter Status Conference]. The brief record of the conference does not explain what is meant by “waiver of rights to opt out.”

33. *Id.*

34. Consented-To Motion, *supra* note 2.

35. *Id.* at 2. The proposed settlement encompassed the three class actions then pending in federal district court, see *supra* note 5, as well as a related case pending in the Court of Common Pleas of Allegheny County. See Consented-To Motion, *supra* note 2, at 1 (defining the “Litigation”). Defendants filed identical motions seeking orders sealing the settlement documents in the *Hartman* and *PNC Bank* class actions, and the plaintiffs consented to entry of the proposed orders. Consented-To Motion to Maintain Settlement Docs. Under Seal, *Hartman v. Levin*, No. 2:10-cv-00029-DSC (W.D. Pa. Mar. 11, 2011), ECF No. 107; Consented-To Motion to Maintain Settlement Docs. Under Seal, *PNC Bank v. B’nai B’rith Int’l*, No. 2:10-cv-00649-DSC (W.D. Pa. Mar. 11, 2011), ECF No. 39.

The motion stated that the plaintiffs consented to the entry of the proposed order.³⁶ The defendants' brief in support of the motion argued that the settlement terms were not "material" to any members of the general public other than the class members and that the defendants were not public officials or entities.³⁷ It assured the court that "all *named* plaintiffs in the Litigation will be provided every Settlement Document in connection with effectuating the settlement[,] and all other, *unnamed* class members will have access to all Settlement Documents through the Claims Administrators in charge of administering the settlement."³⁸ Thus, the brief suggested that general public interest in the case was low and that the proposed order would not deny access to anyone with a legitimate need for information regarding the settlement. On the other hand, the need for confidentiality was high, the brief posited, because

disclosure of the Settlement Documents would cause embarrassment and serious injury to the Defendants, many of whom have devoted significant time and effort to charitable work and community projects for years. The settlement may damage the Defendants' reputations and result in a public misperception regarding their work and focus. In particular, any public misperception that detracts from several of the Defendants' important charitable work across the world would cause them, and those they serve, serious injury.³⁹

Finally, the brief invoked "the strong public interest in promoting settlement, especially where, as in the present case, prospective confidentiality facilitated the settlement."⁴⁰

Just four days after the motion was filed (and apparently without an evidentiary hearing or even an oral argument), the court signed the order, granting the parties "leave to submit all documents

36. Consented-To Motion, *supra* note 2, at 2.

37. Memorandum of Law in Support of Consented-To Motion to Maintain Settlement Documents Under Seal at 5, *Hirschfield v. B'nai B'rith Int'l*, No. 2:09-cv-01535-DSC (W.D. Pa. Mar. 11, 2011), ECF No. 143 [hereinafter *Memorandum in Support*].

38. *Id.* at 5 (emphasis added).

39. *Id.* at 5–6.

40. *Id.* at 6.

that refer to the amount of the settlement . . . under seal” and directing the Clerk of Court “to file and maintain under seal all documents that refer to the amount of the settlement”⁴¹ The order, which was unaccompanied by a judicial opinion, applied not only to the stipulation of settlement and all accompanying exhibits (including the order preliminarily approving the settlement, the notice of proposed settlement and fairness hearing, the summary notice, the proof of claim and release form, and the order and final judgment), but also to the joint motion for preliminary approval of the settlement and brief in support thereof, all orders regarding the settlement, all transcripts of hearings regarding the settlement, and any objections filed by class members.⁴² Even the federal and state officials to whom notices of the proposed class action settlement had to be sent under the Class Action Fairness Act⁴³ were ordered to maintain them as confidential.⁴⁴

A brief flurry of sealed filings followed, including, apparently, a Stipulation of Settlement⁴⁵ and a joint request “that the Court enter a preliminary order approving settlement, providing notice and certifying a class for settlement purposes.”⁴⁶ An order was entered under seal on April 6, 2011, presumably granting preliminary approval of the settlement and certifying a class for settlement purposes.⁴⁷ The public record fails to disclose what materials, if any, were mailed to the absent class members and how

41. Order of Court at 1, *Hirschfield v. B'nai B'rith Int'l* at 1, No. 2:09-cv-01535-DSC (W.D. Pa. Mar. 17, 2011), ECF No. 144 [hereinafter Order of Court].

42. *Id.* at 1–2.

43. 28 U.S.C. § 1715(b) (2006).

44. Order of Court, *supra* note 41, at 2.

45. Sealed Document, *Hirschfield v. B'nai B'rith Int'l*, No. 2:09-cv-01535-DSC (W.D. Pa. Mar. 29, 2011), ECF No. 147. A later-filed motion identified this sealed document as a Stipulation of Settlement. Motion for Miscellaneous Relief at 2, *Hirschfield v. B'nai B'rith Int'l*, No. 2:09-cv-01535-DSC (W.D. Pa. Mar. 31, 2011), ECF No. 150 [hereinafter Motion to Withdraw] (re-docketed as Motion to Withdraw Motion to Certify Class).

46. *See id.* ¶ 4 (describing relief sought in a sealed filing). To avoid any risk of confusion regarding the definition of the class and the motion to certify before the court, the plaintiffs moved, unopposed, to withdraw their earlier motion for class certification, filed more than a year earlier, upon which the court had not yet ruled. *Id.* ¶ 5. The court granted the Motion to Withdraw the day after it was filed. Order of Court, *Hirschfield v. B'nai B'rith Int'l*, No. 2:09-cv-01535-DSC (W.D. Pa. Apr. 4, 2011), ECF No. 151.

47. Sealed Order, *Hirschfield v. B'nai B'rith Int'l*, No. 2:09-cv-01535-DSC (W.D. Pa. Apr. 6, 2011), ECF No. 152.

the Claims Administrator provided them with access to the documents if absent class members requested them. Two additional motions were filed under seal on July 27, 2011⁴⁸ accompanied by four separately-filed sealed documents.⁴⁹ The contents of these motions and documents cannot be discerned from the public record. An entry on the docket sheet on August 10, 2011 noted that a “Joint Motion for Final Approval of Settlement and Plaintiffs’ Counsel’s Application for Award of Attorney Fees were granted by the Court. Orders to follow.”⁵⁰ Two orders, filed under seal, were issued the following day⁵¹ and the status code, “Closed,” was added to the docket sheet.⁵²

Covenant’s bankruptcy and the litigation against B’nai B’rith that followed had garnered significant media attention, not only in both of Pittsburgh’s daily newspapers⁵³ and its local Jewish weekly,⁵⁴ but also in the national press.⁵⁵ The case had even been

48. Sealed Motion by All Plaintiffs, *Hirschfield v. B’nai B’rith Int’l*, No. 2:09-cv-01535-DSC (W.D. Pa. July 27, 2011), ECF No. 153; Sealed Motion by Dean and Melva Hirschfield, *Hirschfield v. B’nai B’rith Int’l*, No. 2:09-cv-01535-DSC (W.D. Pa. July 27, 2011), ECF No. 155.

49. Sealed Document by All Plaintiffs, *Hirschfield v. B’nai B’rith Int’l*, No. 2:09-cv-01535-DSC (W.D. Pa. July 27, 2011), ECF No. 154; Sealed Document by Dean Hirschfield, Melva Hirschfield, *Hirschfield v. B’nai B’rith Int’l*, No. 2:09-cv-01535-DSC (W.D. Pa. July 27, 2011), ECF No. 156; Sealed Document by Dean Hirschfield, Melva Hirschfield, *Hirschfield v. B’nai B’rith Int’l*, No. 2:09-cv-01535-DSC (W.D. Pa. July 27, 2011), ECF No. 157; Sealed Document by Dean Hirschfield, Melva Hirschfield, *Hirschfield v. B’nai B’rith Int’l*, No. 2:09-cv-01535-DSC (W.D. Pa. July 27, 2011), ECF No. 158.

50. Motion Hearing Before Judge David Stewart Cercone, *Hirschfield v. B’nai B’rith Int’l*, No. 2:09-cv-01535-DSC (W.D. Pa. Aug. 10, 2011), ECF No. 159.

51. Sealed Order, *Hirschfield v. B’nai B’rith Int’l*, No. 2:09-cv-01535-DSC (W.D. Pa. Aug. 11, 2011), ECF No. 160; Sealed Order, *Hirschfield v. B’nai B’rith Int’l*, No. 2:09-cv-01535-DSC (W.D. Pa. Aug. 11, 2011), ECF No. 161.

52. Civil Docket, *Hirschfield v. B’nai B’rith Int’l*, No. 2:09-cv-01535-DSC (W.D. Pa. Aug. 11, 2011).

53. See Chris Ramirez, *Protection for Seniors from Bad Real Estate Deals Urged*, PITT. TRIB.-REV. (Oct. 4, 2010), http://www.pittsburghlive.com/x/pittsburghtrib/s_702569.html (focusing on seniors who had lost a combined \$26 million when Covenant declared bankruptcy); Paula Reed Ward, *Sale of Bankrupt Mt. Lebanon Facility Delayed*, PITT. POST-GAZETTE, July 30, 2009, at S-4, available at <http://www.post-gazette.com/pg/09211/987305-55.stm> (reporting on delay of sale of Covenant because of financing difficulties).

54. See Toby Tabachnick, *Convenant [sic] Residents Could Recover Partial Deposits in Suit*, JEWISH CHRON. (Dec. 9, 2010), <http://thejewishchronicle.net>

the subject of testimony before the United States Senate Special Committee on Aging.⁵⁶ Notwithstanding the public interest in the case, the court-ordered secrecy surrounding the settlement denied the public and press any and all information regarding its ultimate resolution.

The B'nai B'rith litigation was the first secret class action settlement of which I was aware. In the next section, I seek to determine whether the case was singular or part of a broader, if hidden, practice.

III. SCOPE OF THE PRACTICE

By their very nature, settlements filed under seal are shielded from the public eye, and therefore it is difficult to discern the scope of the practice.⁵⁷ I took two steps to gain a preliminary understanding of the incidence of secret class action settlements. First, I searched online for newspaper articles regarding class action settlements filed under seal. Second, I undertook a modest empirical study, examining all of the class actions filed in the United States District Court for the Western District of Pennsylvania during a twenty-year period to determine the number and percentage of class action settlements that were filed under seal.⁵⁸ Neither step revealed

/view/full_story/10593506/article-Convenant-residents-could-recover-partial-deposits-in-suit (detailing agreement with confidential specific terms, which would enable former residents to recover some funds) (last visited Mar. 24, 2012).

55. See, e.g., Elizabeth Olson, *Concerns Rise About Continuing-Care Enclaves*, N.Y. TIMES, Sept. 16, 2010, at F5, available at 2010 WLNR 18348669 (highlighting the entrance fees paid by residents of the Covenant at South Hills and the financial risks assumed).

56. *Continuing Care Retirement Communities (CCRCs): Secure Retirement or Risky Investment?: Hearing Before the S. Spec. Comm. on Aging*, 111th Cong. 29 (2010) (statement of Charles Prine).

57. See David A. Dana & Susan P. Koniak, *Secret Settlements and Practice Restrictions Aid Lawyer Cartels and Cause Other Harms*, 2003 U. ILL. L. REV. 1217, 1218 (noting that it is difficult to gauge the incidence of secret settlements because they “are by definition secret” and adding that “[e]mpirical data on the frequency of these practices is . . . unreliable”); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2650 (1995) (noting that “the extent of secret settlements . . . is purely conjectural (how could it be otherwise?)”).

58. In both of these efforts, I relied heavily on work performed by my research assistant, Ian Everhart.

a single case in which a court had shielded from the public eye the settlement of a Rule 23 class action, but both identified a greater willingness on the part of courts to seal settlements in collective actions filed under the Fair Labor Standards Act.

A. *Secret Class Action Settlements in the News*

A WestlawNext search of the News database turned up a smattering of newspaper stories about secret settlements in cases filed as class actions. This undertaking was somewhat frustrating, however, as the underlying litigation papers for a number of the cases described in newspapers could not be located. Moreover, upon closer examination of the litigation papers that were available, some of the cases discussed in the news involved secret settlements of putative class actions in which no motion for class certification was ever made or in which a certification order was later withdrawn.

For example, in one putative class action filed on behalf of dog owners who purchased allegedly defective dog treats,⁵⁹ the parties reached a settlement before certification, but did not present it to the court for its approval. Instead, after agreeing to keep the terms of the settlement confidential,⁶⁰ the parties filed a Stipulation of Dismissal with Prejudice⁶¹ and the court entered an Order of Dismissal.⁶²

59. The original class action complaint was filed in the United States District Court for the Southern District of New York, Class Action Complaint, *Glass v. S&M NuTec, LLC*, No. 7:06-CV-01534-WCC (S.D.N.Y. Feb. 24, 2006), ECF No. 1, but the case was later transferred to the Western District of Missouri. See Opinion & Order, *Glass v. S&M NuTec, LLC*, No. 7:06-CV-01534-WCC (S.D.N.Y. Oct. 11, 2006), ECF No. 19 (explaining that the action could have been filed in the Western District of Missouri). See also Opinion & Order, *Glass v. S&M NuTec, LLC*, No. 06-00853-CV-W-GAF (W.D. Mo. Oct. 16, 2006), ECF No. 20 (transferring case to the Western District of Missouri); Civil Docket for Case No. 4:06-CV-00853-GAF, *Glass v. S&M NuTec, LLC*, No. 06-cv-00853-GAF (W.D. Mo. 2006) (listing transfer order as first entry on docket sheet in transferee court).

60. See *S&M NuTec Settles Greenies Class Action*, KANSAS CITY BUS. J., Sept. 17, 2007, available at 2007 WLNR 18201820 (stating that the settlement terms were “private”).

61. Stipulation of Dismissal with Prejudice, *Glass v. S&M NuTec, LLC*, No. 06-0853-CV-W-GAF (W.D. Mo. Sept. 14, 2007), ECF No. 147.

62. Order of Dismissal, *Glass v. S&M NuTec, LLC*, No. 06-0853-CV-W-GAF (W.D. Mo. Sept. 17, 2007), ECF No. 148.

In another putative class action, one filed on behalf of actors, writers and producers against all of the major movie studios, the court certified a class and approved a notice to be disseminated to the absentees,⁶³ but then, nearly two years later, vacated the certification order.⁶⁴ When the named plaintiffs and Warner Brothers later reached a confidential settlement,⁶⁵ the court entered a stipulation and order dismissing the complaint with prejudice.⁶⁶

This avenue—voluntarily dismissing with no judicial review of the settlement—is an option only if the court has not yet certified a class or has vacated its certification order.⁶⁷ In such cases, the settlement binds only the named parties and not the absent class members, so these cases are not really class actions at all. They are nevertheless worth mentioning because they were filed as class actions and may have had some effects on the absentees, such as tolling the statute of limitations on their claims⁶⁸ and lulling them

63. Order Granting in Part and Denying in Part Motion for Class Certification, *Garrison v. Warner Bros., Inc.*, No. 95-CV-08328-RMT-SH (C.D. Cal. Aug. 29, 1996), ECF No. 74; Stipulation and Order That the Notice of Pendency of Class Action Is Appropriate for Dissemination to the Members of the Class, *Garrison v. Warner Bros., Inc.*, No. 95-CV-08328-RMT-SH (C.D. Cal. Sept. 19, 1997), ECF No. 101. While the docket sheet for *Garrison* is available on both Bloomberg Law and Public Access to Court Electronic Records (PACER), neither database provides access to the underlying documents (presumably because of the date of the litigation). The description of the case is gleaned solely from entries on the docket sheet and one news story. David Robb, *Family Settles Suit Filed over "JFK" Profits*, MILWAUKEE J. SENTINEL, Apr. 12, 1999, at B6, available at <http://news.google.com/newspapers?nid=1683&dat=19990412&id=b6gaAAAIAIAJ&sjid=IToEAAAIAIAJ&pg=5420,5796956> (last visited Mar. 12, 2012).

64. Order [Vacating Prior Order Granting Class Certification], *Garrison v. Warner Bros., Inc.*, No. 95-CV-08328-RMT-SH (C.D. Cal. May 26, 1998), ECF No. 152.

65. Robb, *supra* note 63, at B6 (stating that “[t]erms of the settlement are confidential”).

66. Stipulation & Order, *Garrison v. Warner Bros., Inc.*, No. 95-CV-08328-RMT-SH (C.D. Cal. Mar. 31, 1999), ECF No. 172.

67. According to the docket sheet in *Glass*, no motion to certify was ever filed, although a scheduling order that contemplated class certification was entered. See Scheduling Order at 1, *Glass v. S&M NuTec, LLC*, No. 06-CV-0853-W-GAF (W.D. Mo. Mar. 6, 2007), ECF No. 54 (stating that “the initial stage of this litigation shall focus exclusively on class certification discovery”).

68. See *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974) (“[T]he commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been

into believing that the named representatives and their attorney were looking out for the absentees' interests. In fact, until a 2003 amendment of Rule 23(e) clarified that judicial approval is required only with respect to certified class actions, some courts read the rule "to require court approval of settlements with putative class representatives that resolved only individual claims."⁶⁹

A second group of newspaper stories involved confidential settlements in collective actions filed under the Fair Labor Standards Act ("FLSA" or the "Act").⁷⁰

For example, in *Hammond v. Lowe's Home Centers, Inc.*, plaintiffs filed a putative class action on behalf of all employees of Lowe's Home Centers seeking unpaid overtime compensation and unpaid minimum wage compensation under the FLSA.⁷¹ The court conditionally certified a class under section 216(b) of the FLSA,⁷² which permits certain actions under the statute to be maintained "by any one or more of the employees for and in behalf of himself or themselves and other employees similarly situated."⁷³ Following mediation, the parties jointly moved to file a confidential settlement

permitted to continue as a class action."). See also Rhonda Wasserman, *Tolling: The American Pipe Tolling Rule and Successive Class Actions*, 58 FLA. L. REV. 803, 805 (2006) ("[T]he statute of limitations is tolled from the date of filing of the class action complaint until denial of the motion to certify.").

69. FED. R. CIV. P. 23(e)(1)(A), Committee Notes on Rules—2003 Amendment (citing MANUAL FOR COMPLEX LITIGATION (THIRD) § 30.41 (1995)). See also *Crawford v. Hoffman-La Roche Ltd.*, 267 F.3d 760, 764–65 (8th Cir. 2001) (stating that judicial approval is required "even if a class has not yet been certified" because "[d]ismissal might prejudice potential members whose claims have expired under a statute of limitations . . . [or] potential members who have been relying on the named plaintiff to protect their interests . . .").

70. See 29 U.S.C. §§ 201, 216 (2006) (providing a private right of action to recover damages for violations of the Act's overtime provisions).

71. Plaintiffs' 216(b) Motion to Certify Representative Action and Approve Notice to Class Members, *Hammond v. Lowe's Home Ctrs., Inc.*, No. 2:02-cv-02509-CM-GLR (D. Kan. Dec. 15, 2004), ECF No. 136. The court denied one motion and struck a second motion submitted by plaintiffs to certify a class under Rule 23 for purposes of related state contract claims. Memorandum and Order, *Hammond v. Lowe's Home Ctrs., Inc.*, No. 2:02-CV-02509-CM-GLR (D. Kan. Sept. 1, 2005), ECF No. 187; Order, *Hammond v. Lowe's Home Ctrs., Inc.*, No. 2:02-cv-02509-CM-GLR (D. Kan. Feb. 6, 2006), ECF No. 225.

72. Memorandum and Order at 8, *Hammond v. Lowe's Home Ctrs., Inc.*, No. 2:02-cv-02509-CM-GLR (D. Kan. Sept. 1, 2005), ECF No. 187.

73. 29 U.S.C. § 216(b) (2006).

agreement under seal.⁷⁴ The court granted the motion the very day it was filed, permitting the parties to file the settlement agreement under seal and ordering that it “shall remain SEALED.”⁷⁵ The parties did so on the same day⁷⁶ (it was a busy day in Kansas City!), and just one week later, the court approved the confidential settlement agreement.⁷⁷

In another FLSA case, *Dernovish v. AT&T Operations, Inc.*, plaintiffs who provided telephone customer assistance sought compensation for the time they spent logging into telephone and computer systems before their paid shifts began.⁷⁸ The court conditionally certified a collective action (over defendant’s opposition),⁷⁹ and a year later, following discovery, discovery-related litigation, and mediation, the plaintiffs filed an unopposed motion for approval of a settlement.⁸⁰ The Settlement Agreement itself was submitted to the court *in camera*.⁸¹ The Court entered an order, scheduling a hearing and raising several concerns about the proposed settlement, including its confidentiality provisions:

[T]he Court is troubled by the settlement agreement’s confidentiality provisions. First, it calls for confidentiality regarding matters that are already in

74. Parties’ Joint Motion to File Confidential Settlement Agreement Under Seal, *Hammond v. Lowe’s Home Ctrs., Inc.*, No. 2:02-cv-02509-CM-GLR (D. Kan. Sept. 22, 2006), ECF No. 239; Memorandum in Support of Parties’ Joint Motion to File Confidential Settlement Agreement Under Seal, *Hammond v. Lowe’s Home Ctrs., Inc.*, 2:02-cv-02509-CM-GLR (D. Kan. Sept. 22, 2006), ECF No. 240.

75. Order, *Hammond v. Lowe’s Home Ctrs., Inc.*, No. 2:02-cv-02509-CM-GLR (D. Kan. Sept. 22, 2006), ECF No. 241.

76. Parties’ Joint Motion to File Confidential Settlement Agreement Under Seal, *Hammond v. Lowe’s Home Ctrs., Inc.*, No. 2:02-cv-02509-CM-GLR (D. Kan. Sept. 22, 2006), ECF No. 239.

77. Order Approving Settlement Agreement, *Hammond v. Lowe’s Home Ctrs., Inc.*, No. 2:02-cv-02509-CM-GLR (D. Kan. Sept. 29, 2006), ECF No. 245.

78. *Dernovish v. AT&T Operations, Inc.*, 720 F. Supp. 2d 1085, 1087 (W.D. Mo. 2010).

79. Order and Opinion Granting Plaintiffs’ Motion to Conditionally Certify Collective Action, *Dernovish v. AT&T Operations, Inc.*, No. 4:09-cv-00015-ODS (W.D. Mo. Jan. 12, 2010), ECF No. 95.

80. Plaintiffs’ Unopposed Motion for Approval of Collective Action Settlement and Attorney Fees with Memorandum in Support, *Dernovish v. AT&T Operations, Inc.*, No. 4:09-cv-0015-ODS (W.D. Mo. Jan. 7, 2011), ECF No. 281.

81. *See id.* at 1 (stating that the agreement has been submitted in camera).

the public record (e.g., “all allegations in the Lawsuit” and, apparently, the existence of the settlement). Second, it purports to impose liability on each class member should they disclose or discuss the settlement. Third, and most importantly, the Court is not convinced that a confidentiality provision in this case serves the public interest. The provision does not protect trade secrets, proprietary information, financial information, or other information that is normally entitled to secrecy. While Defendant understandably wants to avoid adverse publicity, the Court has not been persuaded that it—or the class—should be complicit in effectuating this desire.⁸²

In light of this concern, the defendant filed a supplemental brief in support of the motion, stating that the parties proposed to limit the scope of the confidentiality provision “to maintain the confidentiality only of the financial terms of the agreement.”⁸³ Following a hearing on the settlement, the defendant moved to seal a portion of the transcript, which revealed “the amount of attorney fees sought and the percentage of the settlement fund to be apportioned to attorney fees”⁸⁴ The court granted the motion to seal the portion of the transcript⁸⁵ and approved the settlement, including the limited confidentiality provision.⁸⁶ The court’s order did not explain how or whether the parties had assuaged the judge’s concern that the confidentiality provision did not serve the public interest.⁸⁷

82. Order Setting Hearing on Motion for Approval of Settlement at 2, *Dernovich v. AT&T Operations, Inc.*, 4:09-cv-00015-ODS (W.D. Mo. Jan. 1, 2011), ECF No. 282. The court also expressed concern regarding the lack of information needed to assess the fairness of the settlement. *Id.* at 1.

83. AT&T’s Unopposed Supplemental Brief in Support of Motion for Approval of Collective Action Settlement at 1, *Dernovich v. AT&T Operations, Inc.*, 4:09-cv-0015-ODS (W.D. Mo. Jan. 26, 2011), ECF No. 283.

84. Defendant’s Motion to Seal Portion of Jan. 27, 2011 Transcript of Hearing at 1, *Dernovich v. AT&T Operations, Inc.*, 4:09-cv-00015-ODS (W.D. Mo. Jan. 27, 2011), ECF No. 286.

85. Order Granting Motion to Seal Portion of Transcript, *Dernovich v. AT&T Operations, Inc.*, No. 4:09-cv-00015-ODS (W.D. Mo. Feb. 7, 2011), ECF No. 287.

86. Order Approving Collective Action Settlement, *Dernovich v. AT&T Operations, Inc.*, No. 4:09-cv-0015-ODS (W.D. Mo. Feb. 7, 2011), ECF No. 288.

87. Scott Lauck, *Despite Misgivings, a Federal Judge Approved a Confidential Settlement in a Class Action Lawsuit Against AT&T*, MO. LAW.

In sum, my first effort to ascertain the scope of secret class action settlement, through the examination of news stories in Westlaw, yielded just two cases, which in and of itself is noteworthy. The study identified *no* class actions filed under Rule 23 that had been settled confidentially (or at least none that could be confirmed); the two class actions settled under seal that could be confirmed were both FLSA collective actions.

Two additional points should be emphasized. First, just as Rule 23 class actions may not be voluntarily dismissed or settled without judicial approval, claims under the FLSA may not be settled or compromised unless the Department of Labor supervises the settlement or a court approves a settlement in the context of an adversarial action filed under § 216(b).⁸⁸ That judicial approval of an FLSA settlement is required renders the sealing of the settlements in *Lowe's* and *Dernovich* noteworthy given the public interest in monitoring the judiciary's performance of this duty⁸⁹ and the obstacles the public faces if it lacks access to the agreement under review.

Second, since collective actions under § 216(b) of the FLSA bind only those employees who affirmatively opt in,⁹⁰ the "absent"

MEDIA, Mar. 27, 2011, *available at* 2011 WLNR 6419278.

88. *See, e.g.,* *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1352–53, 1355 (11th Cir. 1982) (noting that the Department of Labor must supervise the settlement) (citing *Schulte, Inc. v. Gangi*, 328 U.S. 108 (1946) and *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697 (1945)); *Stalnaker v. Novar Corp.*, 293 F. Supp. 2d 1260, 1262 (M.D. Ala. 2003) ("In reviewing a settlement of an FLSA private claim, a court must 'scrutiniz[e] the settlement of fairness,' and determine that the settlement is a 'fair and reasonable resolution of a bona fide dispute over FLSA provisions.'" (citing *Lynn's Food Stores*, 679 F.2d at 1353, 1355)); *Boone v. City of Suffolk*, 79 F. Supp. 2d 603, 605, 605 n.2 (E.D. Va. 1999) ("[E]mployees cannot waive their right to overtime wages unless such a settlement is overseen by the Department of Labor or approved for fairness and reasonableness by a district court." (citing *Lynn's Food Stores*, 679 F.2d at 1355)). *But see* *Martinez v. Bohls Bearing Equip. Co.*, 361 F. Supp. 2d 608, 631 (W.D. Tex. 2005) (holding that "parties may reach private compromises as to FLSA claims where there is a bona fide dispute as to the amount of hours worked or compensation due").

89. *See, e.g., Boone*, 79 F. Supp. 2d at 609 ("[I]n an FLSA action, where federal law requires court approval for fairness before any settlement can be executed, the public has an interest in determining whether the Court is properly fulfilling its duties when it approves a back-wages settlement agreement."). *See also infra* Part IV.A (identifying the policies supporting public access to settlement agreements).

90. 29 U.S.C. § 216(b) (2006). *See also Hoffman-La Roche, Inc. v. Sperling*,

employees in a collective action are not quite as removed from the proceedings and the lawyer representing the class as absent class members in a Rule 23 class action. Therefore, the policies implicated in the FLSA secret settlements may not be identical to those in Rule 23 class actions, a matter that we will take up in Part IV. First, however, let us consider a somewhat more scientific effort to gauge the incidence of secret class action settlements.

B. Scope of Practice in One Federal Judicial District

In undertaking a modest empirical study of the incidence of secret class action settlements, I solicited the assistance of the Clerk of Court of the United States District Court for the Western District of Pennsylvania, Robert V. Barth, Jr. Searching the court's records electronically, Mr. Barth identified ninety-four cases filed between June 1991 and June 2011 in which a motion to certify a class was granted.⁹¹ Running a different query, he identified 168 additional cases filed during the same period, which were designated as class actions on the civil cover sheet but in which a motion for class certification was denied (152 of the 168) or in which no motion to certify a class was ever filed or decided (16 of the 168).⁹² Thus, a total of 262 cases were filed as class actions in the district between June 1991 and June 2011.

Interestingly, the case that first provoked my attention,

493 U.S. 165, 168–69 (1989) (discussing the process whereby employees affirmatively consent in writing to become parties to an ADEA or FLSA collective action). For a critical assessment of the FLSA's opt-in requirement, see Craig Becker & Paul Strauss, *Representing Low-Wage Workers in the Absence of a Class: The Peculiar Case of Section 16 of the Fair Labor Standards Act and the Underenforcement of Minimum Labor Standards*, 92 MINN. L. REV. 1317, 1321 (2008).

91. E-mail from Robert V. Barth, Jr., Clerk of the Court, U.S. District Court for the Western District of Pennsylvania, to author (June 22, 2011) (on file with author and THE REVIEW OF LITIGATION) (containing a report of cases for which a motion for class certification was granted). This list of cases included both Rule 23 class actions and FLSA collective actions.

92. See *id.* (containing a report of cases for which motion for class certification was denied, or in which no motion was presented). Section VII of the Civil Cover Sheet requires an attorney filing an action in federal court to indicate "if this is a **class action** under F.R.C.P. 23." JUDICIAL CONFERENCE OF THE U.S., JS 44 CIVIL COVER SHEET, available at <http://www.uscourts.gov/uscourts/FormsAndFees/Forms/JS044.pdf> (emphasis in original).

Hirschfield v. B'nai B'rith International, was included on the second list—those in which motions to certify were denied or never filed or decided. While I believe the court granted a motion to certify a settlement class (at least preliminarily) in April 2011,⁹³ the order was filed under seal, so I cannot confirm my belief. If such an order was granted in April, it may not have been “counted” as a grant of a motion to certify either because it was filed under seal or because it was only a preliminary grant. The order that finally approved the settlement and presumably finally certified the settlement class was entered and filed under seal on August 11, 2011, after the June 2011 cut-off date for this study.⁹⁴

In all events, my research assistant and I focused on the ninety-four cases flagged as certified class actions and sought to determine how many, if any, had been settled under seal. First, we sought to confirm, through analysis of docket sheets and public filings,⁹⁵ that motions to certify a class had in fact been granted in all ninety-four cases. In eleven of the ninety-four cases, we were unable to find a motion to certify a class or an order granting such a motion on the docket sheet and therefore omitted these eleven cases from our analysis. One additional case was omitted due to the lack of online access to its documents.⁹⁶

Of the eighty-two remaining cases in which a class certification order had been entered, fifteen were still pending as of September 1, 2011, and these cases were also excluded from our analysis (because a settlement might be filed under seal in the future). Of the remaining sixty-seven closed cases in which a class had been certified, three, or 4.5%, contained orders granting leave to file a class-wide settlement agreement under seal.⁹⁷ All three of

93. Sealed Order, *Hirschfield v. B'nai B'rith Int'l*, No. 2:09-cv-01535-DSC (W.D. Pa. Apr. 6, 2011), ECF No. 152.

94. Sealed Order, *Hirschfield v. B'nai B'rith Int'l*, No. 2:09-cv-01535-DSC (W.D. Pa. Aug. 11, 2011), ECF No. 160; Sealed Order, *Hirschfield v. B'nai B'rith Int'l*, No. 2:09-cv-01535-DSC (W.D. Pa. Aug. 11, 2011), ECF No. 161. *See also supra* notes 45–51 and accompanying text (discussing the order approving the settlement).

95. We searched the Bloomberg Law docket database and occasionally conducted follow-up searches on PACER.

96. *Zuleg v. Ratner*, No. 92-cv-01165 (W.D. Pa. May 1, 1992).

97. Order to Seal, *Nawojski v. First Advantage Litig. Consulting*, No. 2:09-cv-00544-DSC (W.D. Pa. Apr. 7, 2010), ECF No. 22; Order to Seal, *Abercrombie v. Pressley Ridge*, No. 2:09-cv-00468-AJS (W.D. Pa. July 19, 2010), ECF No. 92.

these cases involved FLSA collective actions with opt-in classes.⁹⁸ These figures are summarized below in Table 1.

Table 1.

	Class actions in which a motion to certify was granted
	94
Docket sheet did not reveal order to certify	11
On-line access unavailable	1
Remaining cases	82
Still pending as of 9/1/11	15
Total closed cases in which a motion to certify was granted	67
Class actions filed under seal	3
Percentage filed under seal	4.5%

Three points deserve special mention. First, this study reinforces the principal finding of the Westlaw study: courts are disinclined to seal settlements in Rule 23 class actions, while they occasionally do so in collective actions filed under the FLSA. Unlike employees in FLSA cases, who are bound only if they affirmatively opt in, Rule 23 absent class members are bound by the class action judgment unless they opt out and have little, if any,

See also Status Conference Before: Magistrate Judge Robert C. Mitchell, *Bishop v. AT&T Corp.*, No. 2:08-cv-00468-RCM (W.D. Pa. Oct. 25, 2010), ECF No. 243 (documenting, in a minute entry, court's grant at status conference of joint oral motion to file joint stipulation of settlement under seal).

98. Complaint, *Nawojski v. First Advantage Litig. Consulting*, No. 2:09-cv-00544-DSC (W.D. Pa. May 5, 2009), ECF No. 1; Complaint, *Abercrombie v. Pressley Ridge*, No. 2:09-cv-00468-AJS (W.D. Pa. Jan. 22, 2009), ECF No. 1; Complaint, *Bishop v. AT&T Corp.*, No. 2:08-cv-00468-RCM (W.D. Pa. Apr. 9, 2008), ECF No. 1.

contact with the attorney charged with representing their interests.⁹⁹ As a result, courts in Rule 23 class actions have a unique obligation to protect the interests of absent class members, which may explain judicial reticence to seal class action settlements. This point will be more fully developed in Part IV.

Second, a national study by the Federal Judicial Center (“FJC”) of settlement agreements filed under seal for the two-year period 2001–02 puts these local statistics into perspective. The FJC study revealed that only 0.44% of the 288,846 civil cases examined (*not* exclusively class actions) involved settlements filed under seal¹⁰⁰ and an even smaller percentage, 0.26%, of cases examined by the FJC from the Western District of Pennsylvania involved settlements filed under seal during the 2001–02 period.¹⁰¹ These tiny percentages suggest that among parties that settle their claims, the vast majority decline to file their agreements in court or seek judicial approval. Thus, the 0.44% percentage tells us nothing about the percentage of all civil cases that settled secretly; it tells us only that a tiny percentage involved settlements *filed under seal*.

In Rule 23 class actions and FLSA collective actions, parties do not have the freedom to settle their cases without judicial approval.¹⁰² Since settlements in FLSA collective actions and Rule 23 class actions must be judicially approved, they are frequently filed.¹⁰³ Accordingly, class actions and collective actions that are settled confidentially will often (if not invariably) involve a settlement that is *filed* under seal. Thus, it is not surprising that of all settlements filed under seal, a sizeable fraction involve cases in

99. See John Bronsteen, *Class Action Settlements: An Opt-in Proposal*, 2005 U. ILL. L. REV. 903, 908–09 (2005) (noting potential pitfalls of the opt-out nature of Rule 23).

100. ROBERT TIMOTHY REAGAN ET AL., FED. JUDICIAL CTR., SEALED SETTLEMENT AGREEMENTS IN FEDERAL DISTRICT COURT 1, 3, A-2 (2004) (stating that “a sealed settlement agreement is filed in less than one-half of one percent of civil cases,” identifying a rate of 0.44% for all civil cases, and examining cases that were terminated in 2001 and 2002).

101. *Id.* at 4, Figure 1.

102. See FED. R. CIV. P. 23(e) (“The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the courts’ approval”). See also *Taylor v. Progress Energy, Inc.*, 493 F.3d 454, 460 (4th Cir. 2007) (“[T]here is a judicial prohibition against the unsupervised waiver or settlement of claims” under the FLSA) (citing *P.A. Schultz, Inc. v. Gangi*, 328 U.S. 108, 114–16 (1946)).

103. REAGAN ET AL., *supra* note 100, at 3, 5.

which the parties were required to seek judicial approval. According to the FJC study, “almost one-quarter (22%) [of the actions in which settlement agreements were filed under seal] were actions typically requiring court approval of settlement agreements,” including cases involving minors and others requiring special protection (13%), FLSA actions (7%) and class actions (6%).¹⁰⁴ Nor is it surprising that the sealed settlement rate in my local study of *class actions* (4.5%) is ten times higher than the general sealed settlement rate for civil cases (0.44%)¹⁰⁵ and seventeen times higher than the general sealed settlement rate for civil cases in the Western District of Pennsylvania for the 2001–02 period (0.26%).¹⁰⁶

Finally, it is worth noting that the 4.5% sealed settlement rate in my local class action study is markedly higher than the sealed settlement rate for FLSA actions in the FJC study (2.6%).¹⁰⁷ This difference *is* surprising since the FJC study distinguished between Rule 23 class actions, on the one hand, and FLSA cases, on the other, whereas in our study, the list of certified class actions from which we worked contained both Rule 23 and FLSA class actions.¹⁰⁸ Since courts appear more reticent to seal settlements in Rule 23 class actions, we would have expected our (combined Rule 23 and FLSA) sealed settlement rate to have been *lower* than the FLSA sealed settlement rate found in the FJC study.

In conclusion, while secret class action settlements are not unheard of—the FJC study found that 6% of settlements filed under seal involved class actions¹⁰⁹—both my Westlaw study and the modest empirical study of class actions filed in the Western District of Pennsylvania suggest that the practice is quite uncommon. Before turning to the legal, logistical, and policy-based constraints that help explain judicial reluctance to seal class action settlements, let us examine the swirl of competing policies surrounding the broader debate over sealed settlements in general.

104. *Id.* at 5. The percentages add up to more than 22% because some cases fell into more than one category. *Id.* at 5 n.8.

105. *Id.* at 3.

106. *Id.* at 4, Figure 1.

107. *Id.* at 3.

108. See *supra* notes 88–90 and accompanying text (examining cases that involved both Rule 23 and FLSA class actions).

109. REAGAN ET AL., *supra* note 100, at 5.

IV. *SECURITY AND ACCESS IN CONTEXT*

In this broader debate, courts have been called upon to issue confidentiality orders to shield settlements from public scrutiny, on the one hand, and to grant public access to settlements previously filed under seal, on the other, while lawmakers and rules committees have debated and occasionally enacted restrictions on judicial authority to seal settlements.¹¹⁰ We will outline the contours of this debate and the clash of competing policies at issue.

A. *Policies Favoring Public Access to Settlement Agreements*

Let us begin by identifying those policies that support public access to settlement agreements that are filed and presented to courts for judicial approval. Parties may seek judicial approval of a negotiated settlement because they anticipate a need for judicial enforcement¹¹¹ or because the law requires it.¹¹² Once presented to a

110. See S. 623, 112th Cong. § 2 (2011) (mentioning that the proposed Sunshine in Litigation Act of 2011 would limit judicial authority to approve settlements that would shield from public scrutiny information “relevant to the protection of public health or safety”). See also D.S.C. LOCAL CIV. R. 5.03(E) (providing that “[n]o settlement agreement filed with the Court shall be sealed pursuant to the terms of this Rule”); TEX. R. CIV. P. 76a (presuming that court records, including settlement agreements, are “open to the general public” and stating that such records may be sealed only upon a showing “a specific, serious and substantial interest” that “clearly outweighs” (1) the “presumption of openness” and (2) “any probable adverse effect that sealing will have upon the general public health or safety”); REAGAN ET AL., *supra* note 100, at 2–3, App. B (describing local rules of federal district courts that address sealed documents). In September 2011, the Judicial Conference of the United States issued a policy limiting the circumstances in which entire civil case files may be sealed. JUDICIAL CONFERENCE OF THE UNITED STATES, JUDICIAL CONFERENCE POLICY ON SEALED CASES, available at <http://www.uscourts.gov/uscourts/News/2011/docs/JudicialConferencePolicyOnSealedCivilCases2011.pdf>. For a study of this practice, see FED. JUD. CENTER, SEALED CASES IN FEDERAL COURTS (Oct. 23, 2009).

111. See, e.g., *Bank of Am. Nat’l Trust & Sav. Ass’n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339, 344 (3d Cir. 1986) (stating that parties filed their settlement agreement in anticipation that they would “disagree on the terms and would want recourse to the court”). See also REAGAN ET AL., *supra* note 100, at 5; Laurie Kratky Doré, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 388–89, 394 (1999) (stating that “litigants who rely exclusively on contractual confidentiality provisions

court for its approval, a settlement agreement becomes part of the judicial record¹¹³ and the court's ruling on the settlement "directly affect[s] an adjudication."¹¹⁴ The court's approval or rejection of the settlement determines the outcome of the case and the parties' substantive rights.¹¹⁵

In these cases, public access to the settlement agreement and public monitoring of the judicial proceedings held to review it serve a variety of related policy objectives. First, public access helps ensure that the documents and testimony submitted to the court and upon which it relies are truthful and accurate.¹¹⁶ As the Third Circuit

potentially limit their enforcement options" and that "litigants presumably do not file their agreement unless they want the court to take some action concerning it"); Anne-Thérèse Béchamps, Note, *Sealed Out-of-Court Settlements: When Does the Public Have a Right to Know?*, 66 NOTRE DAME L. REV. 117, 119 (1990) (stating that parties frequently opt to file agreements "in order to obtain a consent decree that will enable them to enforce the agreement by use of the court's contempt power without filing an entirely new lawsuit").

112. See FED. R. CIV. P. 23(e) (stating that a certified class action may be settled, voluntarily dismissed, or compromised only with the court's approval). See also *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 113 n.8 (1946) (concluding that the FLSA bars private settlements of wage claims, but appearing to sanction stipulated judgments because of "the requirement of pleading the issues and submitting the judgment to judicial scrutiny"); REAGAN ET AL., *supra* note 100, at 5 (noting that almost one quarter of cases with sealed settlement agreements were in actions in which judicial approval of a settlement was required).

113. See *Jessup v. Luther*, 277 F.3d 926, 929 (7th Cir. 2002) (stating that the agreement was submitted to and approved by the judge and a copy was deposited in the files of the court and then ordered sealed); *Rittenhouse*, 800 F.2d at 343-44 (stating that a "motion or a settlement agreement filed with the court is a public component of a civil trial"); *Stalaker v. Norvar Corp.*, 293 F. Supp. 2d 1260, 1263 (M.D. Ala. 2003) (stating that when a settlement is approved by a court, the settlement becomes part of the judicial record). Doré provides a more thorough discussion of the documents that qualify as judicial records. Doré, *supra* note 111, at 374-78.

114. *United States v. Amodeo (Amodeo II)*, 71 F.3d 1044, 1049 (2d Cir. 1995); *Stalaker*, 293 F. Supp. 2d at 1264 (citing *Amodeo II*).

115. See *Amodeo II*, 71 F.3d at 1049 (noting that "the strong weight to be accorded the public right of access to judicial documents was largely derived from the role those documents played in determining litigants' substantive rights-conduct at the heart of Article III-and from the need for public monitoring of that conduct").

116. See *In re Cendant Corp.*, 260 F.3d 183, 192 (3d Cir. 2001) (noting that the right of access strengthens confidence in the courts); *Littlejohn v. BIC Corp.*, 851 F.2d 673, 678 (3d Cir. 1988) (noting that public access "enhanc[es] testimonial trustworthiness and the quality of justice dispensed by the court")

put it, “the bright light cast upon the judicial process by public observation diminishes possibilities for . . . perjury and fraud.”¹¹⁷ Public access to judicial proceedings may even “induce unknown witnesses to come forward with relevant testimony.”¹¹⁸

Second, public access to settlement agreements and the judicial proceedings held in connection with their approval or enforcement helps monitor judicial performance.¹¹⁹ “Monitoring both provides judges with critical views of their work and deters arbitrary judicial behavior.”¹²⁰

In other words, if the public is afforded access to settlement agreements and the judicial proceedings held to review them, the public can provide feedback to judges on their performance. To the extent judges seek to avoid negative feedback, monitoring promotes careful and scrupulous judicial work.¹²¹ These monitoring functions

(citation omitted). See also Judith Resnik, *Courts: In and out of Sight, Site and Cite*, 53 VILL. L. REV. 771, 784 (2008) (discussing Jeremy Bentham’s belief that “public adjudication produced more accurate decisions”).

117. *Littlejohn*, 851 F.2d at 678 (not a settlement case).

118. *Gannett Co. v. DePasquale*, 443 U.S. 368, 383 (1979). *Accord* *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1178 (6th Cir. 1983) (asserting that open trials promote “true and accurate fact finding” and “when information is disseminated to the public through the media, previously unidentified witnesses may come forward with evidence”).

119. See, e.g., *Jessup v. Luther*, 277 F.3d 926, 928 (7th Cir. 2002) (noting that “the public cannot monitor judicial performance adequately if the records of judicial proceedings are secret”); *Amodeo II*, 71 F.3d at 1048 (noting a presumption of access to hold judges accountable and to instill public confidence in the administration of justice); *Bank of Am. Nat’l Trust & Sav. Ass’n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339, 345 (3d Cir. 1986) (stating that public access to a settlement agreement filed in court, and motions and orders related thereto, promotes “informed discussion of governmental affairs” and helps assure “that the courts are fairly run and judges are honest”) (citations omitted).

120. *Amodeo II*, 71 F.3d at 1048.

121. See *Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 161 (3d Cir. 1993) (stating that access assures that judges perform their duties in an honest and informed matter); *Littlejohn*, 851 F.2d at 682 (“[P]ublic access serves to promote trustworthiness of the judicial process.”); *Rittenhouse*, 800 F.2d at 345 (stating that public access to settlements “serves as a check on the integrity of the judicial process”); *Mokhiber v. Davis*, 537 A.2d 1100, 1110 (D.C. 1988) (stating that “public knowledge of the courts is essential to democratic government because it is essential to rational criticism and reform of the justice system”) (citations omitted). See also REAGAN ET AL., *supra* note 100, at 1 (discussing accountability); Resnik, *supra* note 116, at 784 (describing Bentham’s views on the benefits of public processes).

are especially important for federal judges, who may serve for life unless impeached, and those state judges who are not checked by the political process, because there are few formal mechanisms to hold them accountable.

Third, public access to settlement agreements and the judicial approval process promotes public confidence in the integrity of the judicial system and the conscientiousness of its judges.¹²² Public confidence is gained only if the public has an opportunity to observe courts in action and, to the extent courts are reviewing settlement agreements, if the public has access to the settlements under review.¹²³ As the Seventh Circuit Court of Appeals put it, judges claim legitimacy “by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat”¹²⁴

Fourth, in cases involving issues of general interest to the public, such as discrimination, voting rights, and antitrust, access to settlement agreements and the judicial approval process

serve[s] an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion. Without an awareness that society’s responses to [wrongful] conduct are underway, natural human reactions of outrage and protest are frustrated and may manifest themselves in some form of vengeful ‘self-help.’ . . . The crucial prophylactic aspects of the administration of justice cannot

122. See *Landmark Commc’ns, Inc. v. Virginia*, 435 U.S. 829, 839 (1978) (“The operations of the courts and the judicial conduct of judges are matters of utmost public concern.”); *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 598 (1978) (stating that public access serves the “citizen’s desire to keep a watchful eye on the workings of public agencies”); *In re Cendant Corp.*, 260 F.3d 183, 192 (3rd Cir. 2001) (stating that “[t]he public’s exercise of its common law access right in civil cases promotes public confidence in the judicial system”) (citation omitted); *Amodeo II*, 71 F.3d at 1048 (concluding that monitoring of the judicial approval process provides the public with “confidence in the conscientiousness, reasonableness . . . [and] honesty of judicial proceedings”).

123. See *Rittenhouse*, 800 F.2d at 345 (stating that public access to settlements filed with the court “promotes . . . the ‘public perception of fairness which can be achieved only by permitting full public view of the proceedings’”) (citations omitted).

124. *Union Oil Co. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000).

function in the dark. . . .¹²⁵

While this “community therapeutic value”¹²⁶ may be greatest in criminal cases that provoke shock and anger, “community catharsis . . . is also necessary in civil cases [that raise] issues crucial to the public,” such as discrimination, voting rights, antitrust, government regulation, and bankruptcy, among others.¹²⁷

In those cases in which judicial approval of settlements is required, such as FLSA collective actions,¹²⁸ these policies in favor of public scrutiny are particularly salient because “the public has an interest in determining whether the Court is properly fulfilling its duties”¹²⁹ Moreover, the substantive policy objectives underlying the law—ensuring that workers are paid fair wages and protected from pressure to work excessive hours, in FLSA cases—are served by public scrutiny of the settlement.

Even in cases where judicial approval is not required and the court disclaims jurisdiction to enforce the settlement, if the judge in fact approves the parties’ settlement before dismissing the case, “the fact and consequences of his participation are public acts[,]” and “[t]he public has an interest in knowing what terms of settlement a federal judge would approve and perhaps therefore nudge the parties to agree to.”¹³⁰

125. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571 (1980) (plurality op.) (addressing a right of public access to criminal trials).

126. *Id.* at 570.

127. *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1179 (6th Cir. 1983). *Accord Gannett Co. v. DePasquale*, 443 U.S. 368, 386 n.15 (1979) (stating that in “some civil cases the public interest in access, and the salutary effect of publicity, may be as strong as, or stronger than, in most criminal trials”).

128. *See supra* notes 88–90 (examining FLSA actions).

129. *Boone v. City of Suffolk*, 79 F. Supp. 2d 603, 609 (E.D. Va. 1999). *Accord Baker v. Dolgencorp, Inc.*, No. 2:10cv199, 2011 WL 166257, at *2 (E.D. Va. Jan. 19, 2011) (noting that “the public has an interest in determining whether the Court is properly fulfilling its duties when it approves an FLSA settlement agreement”); *Stalnaker v. Novar Corp.*, 293 F. Supp. 2d 1260, 1264 (M.D. Ala. 2003) (noting that “the sealing from public scrutiny of FLSA agreements between employees and employers would thwart the public’s independent interest in assuring that employees’ wages are fair and thus do not endanger ‘the national health and well-being’”) (quoting *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 706–07 (1945)).

130. *Jessup v. Luther*, 277 F.3d 926, 929 (7th Cir. 2002). *Accord LEAP Sys., Inc. v. MoneyTrax, Inc.*, 638 F.3d 216, 221 (3d Cir. 2011) (noting that the

Where the court dismisses the plaintiff's complaint without scrutinizing the parties' settlement agreement,¹³¹ public access to the agreement may promote public health and safety if the case involves a defective product, a negligent physician, an abusive priest, or another matter affecting public health or safety.¹³² When a lawsuit alleging a defective product or other hazard is filed and settlement of the claim is publicly disclosed, individuals learn of the danger and can protect themselves by avoiding it. Government agencies charged with public safety may glean from the case enough data to justify a full-blown investigation.¹³³ On the other hand, if cases identifying these hazards are settled confidentially, the public may not learn about the dangers until other individuals suffer harm that could have been avoided had the case been publicized (or at least had the settlement been accessible).

For example, it has been reported that people were injured or killed *after* certain products (including the drugs Zomax and Halcion, the Dalkon Shield IUD, certain heart valves, General Motors pick-up trucks, and Bridgestone/Firestone tires) were identified as defective, but because claims involving the products were settled confidentially, unknowing consumers continued to use

public has an interest in knowing the settlement terms that a judge would approve).

131. In such cases, the settlement agreement is not a "judicial record" but rather a private contract. *Jessup*, 277 F.3d at 928. See also *B.H. v. McDonald*, 49 F.3d 294, 300 (7th Cir. 1995) (differentiating private settlements from consent decrees, which are "entered as judgments and . . . backed by the court's powers of enforcement").

132. See, e.g., *LEAP Sys., Inc.*, 638 F.3d at 222 (balancing public interest in health and safety against the need for confidentiality and favoring the former). See also *REAGAN ET AL.*, *supra* note 100, at 7–8 (concluding that approximately two-fifths of the cases in which settlement agreements were filed under seal involved matters that "might be of special public interest," including the environment, product liability, professional malpractice, a public party defendant, a very serious injury, or sexual abuse); Joseph F. Anderson, Jr., *Secrecy in the Courts: At the Tipping Point?*, 53 *VILL. L. REV.* 811, 814–15 (2008) (making the case for public access); Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 *N.C. L. REV.* 927, 948 (2006) (making the argument that secret settlements may endanger public safety and using examples of secret settlements involving defective breast implants); Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (in Some Cases)*, 83 *GEO. L.J.* 2663, 2695 (1995) (suggesting mass tort settlements inherently implicate public interests).

133. *Dana & Koniak*, *supra* note 57, at 1232.

them.¹³⁴ Today, as the nation debates the public health risks posed by hydraulic fracturing (or “fracking”) of shale to release natural gas, executives from the oil and gas industry maintain that “there is not one, not one reported case of a freshwater aquifer having ever been contaminated from hydraulic fracturing. Not one.”¹³⁵ Yet the Environmental Protection Agency has documented a contaminated water well and suggests there may be others that “[r]esearchers . . . were unable to investigate . . . because their details were sealed from the public when energy companies settled lawsuits with landowners.”¹³⁶ Even beyond the public health and safety context, public access to settlements may deter other undesirable behaviors, such as employment discrimination, by denying defendants the option of shielding their discriminatory conduct from public scrutiny.¹³⁷

134. See *id.* at 1229–30 (arguing that Firestone would have discontinued production of defective tires had prior settlements not been secret); Luban, *supra* note 57, at 2650–51 n.124 (listing products whose defects were hidden by protective orders); 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, 119–21 (1999) (identifying products alleged to have been defective that were the subject of secret settlements); Davan Maharaj, *Tire Recall Fuels Drive to Bar Secret Settlements*, L.A. TIMES, Sept. 10, 2000, at A1, available at 2000 WLNR 8376803 (examining effects of secret settlements on product safety). But see Arthur R. Miller, *Confidentiality, Protective Orders and Public Access to the Courts*, 105 HARV. L. REV. 428, 480–82 (1991) (questioning the accuracy of anecdotal reports).

135. Ian Urbina, *A Tainted Water Well, and Concern There May Be More*, N.Y. TIMES, Aug. 4, 2011, at A13, available at 2011 WLNR 15390732 (quoting Rex W. Tillerson, chief executive officer of ExxonMobil).

136. *Id.* See also SEC v. Citigroup Global Mkts., Inc., No. 11 Civ. 7387(JSR), 2011 WL 5903733, at *4, *6 (S.D.N.Y. Nov. 28, 2011) (declining to approve a settlement that would have “deprived [the public] of ever knowing the truth in a matter of obvious public importance” because the alleged wrongdoer neither admitted nor denied the government’s allegations; “in any case like this that touches on the transparency of financial markets . . . , there is an overriding public interest in knowing the truth”); Kirk Johnson, *E.P.A. Links Tainted Water in Wyoming to Hydraulic Fracturing for Natural Gas*, N.Y. TIMES, Dec. 9, 2011, at A23, available at 2011 WLNR 25454422 (discussing the issue of contaminated water wells and the effect of the private nature of researchers’ efforts).

137. See THE SEDONA CONFERENCE, THE SEDONA GUIDELINES: BEST PRACTICES ADDRESSING PROTECTIVE ORDERS, CONFIDENTIALITY & PUBLIC ACCESS IN CIVIL CASES 43 (Mar. 2007) (noting that “disputes . . . brought by individual consumers or employees to vindicate statutory rights . . . may not be appropriate for private dispute resolution given the public interest in their

The public may also have an interest in scrutinizing a settlement (even one not approved by a court) that resolves a claim against a governmental official.¹³⁸ Just as the public has an interest in monitoring judges as they perform their official duties, the public has an interest in monitoring other governmental officials.¹³⁹ A classic example is the public's interest in the Watergate tapes, which cast light on "an immensely important historical occurrence."¹⁴⁰ The settlement of a claim against a governmental official may cast light on her performance and may reveal new obligations undertaken by

resolution"); Kotkin, *supra* note 132, at 930, 952–53 (maintaining that the "whole thrust of equal employment legislation was that, by facilitating employee suits, discrimination would be brought to public attention and that the litigation process would serve to deter other employers from similar conduct").

138. See *LEAP Sys., Inc. v. MoneyTrax, Inc.*, 638 F.3d 216, 222 (3d Cir. 2011) (noting that courts are more likely to require public disclosure when a case involves a public official); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3d Cir. 1994) (same); *Mokhiber v. Davis*, 537 A.2d 1100, 1117 (D.C. 1988) (noting similar transparency concerns about issues of historical importance). See also THE SEDONA CONFERENCE, *supra* note 137, at 49 (stating that "when a public entity enters into a settlement, no expectation of confidentiality should exist"); Richard L. Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1, 41 (1983) (conceding that public access to discovery materials "may be justified . . . when there is a strong public interest in the alleged governmental misconduct that is the subject of the suit"); *id.* at 50–53 (discussing the "rare cases in which alleged governmental misconduct justifies access").

139. See *FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 410 (1st Cir. 1987) (finding that in cases in which the government is a party, "the public's right to know what the executive branch is about coalesces with the concomitant right of the citizenry to appraise the judicial branch"); THE SEDONA CONFERENCE, *supra* note 137, at 49 (arguing for the public's right to know about executive branch activities); Resnik, *supra* note 116, at 804 (noting the public interest in observing the enormity of the power of the bureaucratic state); Janice Toran, *Secrecy Orders and Government Litigants: "A Northwest Passage Around the Freedom of Information Act"?*, 27 GA. L. REV. 121, 127 (1992) (maintaining that arguments favoring public access to protective orders are "considerably stronger" when the government is a party); Susan M. Angele, Note, *Rule 26(c) Protective Orders and the First Amendment*, 80 COLUM. L. REV. 1645, 1656, 1665 (1980) (noting that the Freedom of Information Act evinces a policy in favor of public access to governmental material). *But see* Marcus, *supra* note 138, at 51 (arguing that "[e]ven when governmental activity is involved . . . general public access to confidential materials will only rarely be appropriate").

140. *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 602 (1978). In *Nixon*, the Court held that "the common-law right of access to judicial records does not authorize release of the tapes" because Congress had enacted a statute to govern access to presidential recordings. *Id.* at 608.

the official, which the public may have an interest in monitoring.¹⁴¹ Thus, the public's interest in scrutinizing governmental conduct, also protected by state right-to-know laws and the Federal Freedom of Information Act,¹⁴² strongly counsels in favor of public access to settlements resolving claims against governmental officials.¹⁴³

If the general public has an interest in scrutinizing settlements of claims affecting health, safety, and government competency, a subset of the public—litigants, their attorneys, and judges—has an interest in settlements of claims that are substantively related to matters they are pressing or charged with deciding. Just as litigants bargain in the shadow of the law,¹⁴⁴ today—when a large fraction of civil cases settle out of court—litigants bargain in the shadow of settlements. Given the paucity of jury verdicts, litigants and their attorneys need access to benchmark settlement figures against which to compare their claims.¹⁴⁵ Thus,

141. See *Pansy*, 23 F.3d at 786, 788 (“The public’s interest is particularly legitimate and important where, as in this case, at least one of the parties to the action is a public entity or official.”); *Standard Fin. Mgmt. Corp.*, 830 F.2d at 410 (discussing the public’s interest in monitoring the executive branch). See also Miller, *supra* note 134, at 485 (conceding that “public access may be important when one of the settling litigants is a governmental agency, public entity, or official”); Toran, *supra* note 139, at 122 (identifying “the public’s undeniable interest in monitoring the health and safety activities of a government agency”) (footnote omitted).

142. Federal Freedom of Information Act, 5 U.S.C. § 552 (2006). All fifty states have some form of freedom-of-information law. See *Pansy*, 23 F.3d at 791 n.29 (citing Toran, *supra* note 139, at 129 n.38); *State Public Record Laws*, FOIADVOCATES, <http://www.foiadvocates.com/records.html> (last visited Aug. 12, 2011) (linking to the freedom-of-information laws of each state).

143. See *Pansy*, 23 F.3d at 791–92 (discussing the implications of FOIA); Toran, *supra* note 139, at 177–78, 181–82 (discussing the same).

144. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 950 (1979).

145. See Doré, *supra* note 111, at 398 (noting that settlement terms “might strategically assist other present or future litigants in assessing the settlement value of their cases”); Kotkin, *supra* note 132, at 969–70 (discussing how “invisible settlements” hamper lawyers and judges in subsequent cases); Menkel-Meadow, *supra* note 132, at 2680–81 (noting that attorneys rely on reports of settlement values to guide their demands and settlements); Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867, 898–900 (2007) (explaining how public access to settlement data may accelerate the settlement of other filed cases). Cf. Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 567 (1991) (noting that “in a world where all cases settle, it may not

access to settlement agreements enables litigants in other cases to accurately value their claims. Not only does access to settlement data help litigants with related claims, but it also helps courts determine the adequacy and fairness of proposed settlements. The Manual for Complex Litigation, for example, encourages courts reviewing class action settlements to “[i]dentify . . . the historic values of cases involving the same or similar claims and defenses.”¹⁴⁶ If settlements are routinely filed under seal, courts will lack the comparative data needed to gauge the fairness of settlements submitted for their approval.¹⁴⁷

Finally, in addition to policies that counsel in favor of access to settlement agreements themselves, there are strong policies that counsel in favor of access to the underlying discovery materials, at least when litigants with related claims exist. Often, an important term in a confidential settlement agreement is the commitment to return to the producing party any materials disclosed in discovery.¹⁴⁸ But litigants and lawyers pursuing related claims could reduce their litigation costs if they had access to the discovery materials uncovered in the settled case, and the judicial system would operate more efficiently.¹⁴⁹ Likewise, regulatory agencies, charged with

even be possible to base settlements on the merits because lawyers may not be able to make reliable estimates of expected trial outcomes In short, there is nothing to cast a shadow in which the parties can bargain”).

146. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.924 (2004).

147. See Alexander, *supra* note 145, at 566 (“[J]udges . . . [will] have little relevant experience to draw on”); Marc Galanter & Mia Cahill, “*Most Cases Settle*”: *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1385 (1994) (agreeing with Alexander’s assessment).

148. See Luban, *supra* note 57, at 2649 (stating that the defendant “offers the original plaintiff a generous settlement in return for a promise of secrecy and the return of the discovery materials”).

149. See FRANCIS H. HARE, JR., ET AL., CONFIDENTIALITY ORDERS 24–26, 60–64 (1988) (arguing that plaintiffs are uniquely harmed by protective orders because they must unnecessarily duplicate the discovery efforts of one another); Alan B. Morrison, *Protective Orders, Plaintiffs, Defendants and the Public Interest in Disclosure: Where Does the Balance Lie?*, 24 U. RICH. L. REV. 109, 115–16 (1989) (stating that failing to allow the sharing of information among plaintiffs’ attorneys maximizes inefficiency). Even Professor Marcus, a strong advocate of umbrella protective orders to secure confidentiality of discovery materials, concedes that public access “may be justified when litigants seek to obtain evidence relevant to other litigation.” Marcus, *supra* note 138, at 41. In his view, “the most important justification for granting nonparties access to discovery information is their need to use the information in other litigation.” *Id.* See also

protecting the public, should have access to information uncovered in litigation if it would enable them to work more effectively.¹⁵⁰ Professor Luban calls this the “other-litigants argument”: “Discovery material is a public good, which is ‘purchased’ by one litigant and should be made available for other litigants to avoid unnecessary multiplication of expense.”¹⁵¹

In sum, public access to settlement agreements submitted to courts for their approval and to the judicial approval process itself permits the public to monitor judicial performance as well as the accuracy of materials and testimony upon which the courts base their decisions. Public access also promotes public confidence in the integrity of the judicial system and provides an outlet for public concern and emotion. Access to unfiled agreements may protect public health and safety. Moreover, litigants may have unique interests in gaining access to settlement agreements and the discovery underlying them if their claims are related to the settled claims.

While there is a presumptive right of public access to settlement agreements that are filed in court and to other judicial records, the right is not absolute.¹⁵² A number of competing policies support confidentiality orders to shield certain settlement agreements and judicial records from public view. It is to these competing

Ex parte Uppercu, 239 U.S. 435, 440 (1915) (stating that “[s]o long as the object physically exists, anyone needing it as evidence at a trial has a right to call for it . . . however proper and effective the sealing may have been as against the public at large”). Professor Miller argues that parties will be more likely to contest discovery in the underlying litigation if they know that “compliance . . . could lead to uncontrolled dissemination of private or commercially valuable information . . .” Miller, *supra* note 134, at 483.

150. See Morrison, *supra* note 149, at 123 (arguing that regulatory agencies should have freer access to litigation materials). Cf. Miller, *supra* note 134, at 494 (cautioning against the release of “any confidential information unrelated to the potential harm”).

151. Luban, *supra* note 57, at 2653. Accord Morrison, *supra* note 149, at 122–23 (advocating disclosure of discovery materials to other plaintiffs’ attorneys).

152. See, e.g., *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 598 (1978) (addressing access to audiotapes admitted into evidence at a trial and stating that the “right to inspect and copy judicial records is not absolute”); *LEAP Sys., Inc. v. MoneyTrax, Inc.*, 638 F.3d 216, 221 (3d Cir. 2011) (addressing access to the transcript of a hearing memorializing a settlement agreement); *In re Cendant Corp.*, 260 F.3d 183, 194 (3d Cir. 2001) (addressing access to bids to serve as lead counsel).

policies that we now turn.

B. *Policies Favoring Confidential Settlement Agreements*

Several policies that counsel in favor of confidentiality have greater relevance to discovery materials than to settlement agreements. For example, few deny the importance of shielding trade secrets from the public.¹⁵³ In what may be the classic trade secret case, a federal district court noted that the formula for Coca-Cola “is one of the best-kept trade secrets in the world,”¹⁵⁴ and concluded that “any disclosure of [the formulae for Coke products] would be harmful to the company.”¹⁵⁵

Just as few contest a need to protect true trade secrets, few contest the need to protect the identity of informants who have provided information to law enforcement officers with an expectation (and perhaps an assurance) that their names would be shielded from the public.¹⁵⁶ “If such informants in the present or

153. See *Jessup v. Luther*, 277 F.3d 926, 928 (7th Cir. 2002) (identifying “a compelling interest in secrecy . . . in the case of trade secrets”); *Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 166 (3d Cir. 1993) (noting that documents that hold trade secrets may remain sealed); *Doré*, *supra* note 111, at 308 (same); *Marcus*, *supra* note 138, at 9 (discussing the merits of withholding trade secrets); *Miller*, *supra* note 134, at 429, 433–34 (same). Rule 26(c) authorizes issuance of a protective order not only for true trade secrets, but also to protect “other confidential research, development, or commercial information . . .” FED. R. CIV. P. 26(c)(1)(G). See also 8A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2043, at 302 (4th ed. 2010) (discussing FED. R. CIV. P. 26(c)(1)(G)). But confidential business information that is not a true trade secret is not entitled to the same level of protection as true trade secrets. *Littlejohn v. BIC Corp.*, 851 F.2d 673, 685 (3d Cir. 1988).

154. *Coca-Cola Bottling Co. of Shreveport, Inc. v. Coca-Cola Co.*, 107 F.R.D. 288, 289 (D. Del. 1985).

155. *Id.* at 294. In a suit between the company and its bottlers over the pricing of Diet Coke syrup, the court nevertheless required disclosure of several formulae to plaintiffs’ trial counsel, subject to the terms of a protective order to be negotiated by the parties to prevent public disclosure of the secret information. *Id.* at 300. This decision is consistent with the advisory committee note to Rule 26(c), which states that “[t]he courts have not given trade secrets automatic and complete immunity against disclosure, but have in each case weighed their claim to privacy against the need for disclosure.” FED. R. CIV. P. 26(c), Notes of Advisory Committee on Rules—1970 Amendment.

156. See *Jessup*, 277 F.3d 926, 928 (7th Cir. 2002) (noting that a record can be sealed in the interest of protecting the identities of informants); *United States v.*

future cases anticipate that their cooperation will likely become a matter of public knowledge, valuable cooperation might cease.”¹⁵⁷ And courts have recognized that military secrets and other classified material affecting national security may be filed under seal or otherwise shielded from public scrutiny.¹⁵⁸ But since trade secrets, informants’ identities, military secrets, and other classified information are rarely disclosed in settlement agreements, these policies rarely, if ever, justify sealing settlement agreements.

Scholars, courts, and litigants have invoked a variety of other policies to justify shielding settlement agreements from public view. For example, some have cited a strong public interest in encouraging settlements because they save the parties time and money, conserve scarce judicial resources, and permit the parties to resolve their disputes creatively in a manner that serves their idiosyncratic interests.¹⁵⁹

Amodeo (Amodeo II), 71 F.3d 1044, 1050 (2d Cir. 1995) (discussing the merits of withholding court documents if there is a risk of injury to a party); *United States v. Amodeo (Amodeo I)*, 44 F.3d 141, 147 (2d Cir. 1995) (noting that, among other reasons, courts seal trial documents in the interests of furthering law enforcement); *In re Knight Publ’g Co.*, 743 F.2d 231, 236 (4th Cir. 1984) (same); Miller, *supra* note 134, at 429 (discussing the merits of sealing trial documents). The Freedom of Information Act also exempts from its disclosure requirements “records or information compiled for law enforcement purposes” if its production “could reasonably be expected to disclose the identity of a confidential source” 5 U.S.C. § 552(b)(7)(D) (2006).

157. *Amodeo II*, 71 F.3d at 1052.

158. See, e.g., *United States v. Reynolds*, 345 U.S. 1, 10–12 (1953) (examining state secrets in a time of “vigorous preparation for national defense”); *In re United States*, 872 F.2d 472, 474, 476 (D.C. Cir. 1989) (discussing the state secrets privilege shielding classified material); *United States v. Progressive, Inc.*, 467 F. Supp. 990, 999–1000 (W.D. Wis. 1979) (withholding documents concerning thermonuclear technology), *appeal dismissed*, 610 F.2d 819 (7th Cir. 1979). But see *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam) (holding that the government’s interest in national security did not justify an injunction barring the press from publishing the then-classified Pentagon Papers). The Freedom of Information Act also exempts from its disclosure requirements “matters that are . . . [properly classified as] secret in the interest of national defense or foreign policy” 5 U.S.C. § 552(b)(1) (2006).

159. See *Bank of Am. Nat’l Trust & Sav. Ass’n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339, 344–46 (3d Cir. 1986) (stating that there is a strong public interest in encouraging settlement of private litigation); Béchamps, *supra* note 111, at 128 (noting that settlement saves parties the time, expense, and publicity of an open trial); Richard P. Campbell, *The Protective Order in Products Liability Litigation: Safeguard or Misnomer?*, 31 B.C. L. REV. 771, 835 (1990) (noting that

According to Professor Marcus, “[a] party may desire a settlement in part to avoid a trial at which confidential information will be disclosed. Such a party is likely to condition his willingness to settle upon the entry of a court order prohibiting the disclosure of the terms of the settlement or of information obtained through discovery Such settlements may substantially reduce the burden on the courts.”¹⁶⁰ This interest may be particularly powerful in massive multi-party cases in which a trial could last months and cost millions of dollars if a settlement cannot be reached.¹⁶¹

Similarly, some argue that it is necessary to shield settlement terms in order to reduce the likelihood of copycat claims. “Defendants in particular are reluctant to disclose the terms of settlement lest those terms encourage others to sue.”¹⁶² If the settlement terms are attractive enough, even those without meritorious claims may bring nuisance suits to extract a

“facilitation of settlements is increasingly being recognized as a ‘legitimate and desirable goal for courts to pursue’”); Doré, *supra* note 111, at 293, 384 (noting that “settlement produces significant institutional benefits in addition to benefiting the immediate parties”); Menkel-Meadow, *supra* note 132, at 2669–78 (justifying settlement over adjudication); Miller, *supra* note 134, at 486 (noting that settlement reduces need for further governmental involvement, reduces cost of dispute resolution, and frees judicial resources). Some scholars decry (or at least critically examine) the rise of settlements and the concomitant loss of the “public goods” that adjudication produces, such as precedents. See, e.g., Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984) (arguing that the settlement process should “be treated . . . as a highly problematic technique for streamlining dockets”); Galanter & Cahill, *supra* note 147, at 1384–86 (noting the dissolution of legal standards resulting from settlements); Luban, *supra* note 57, at 2622–26 (noting that settlements fail to produce rules and precedents).

160. Marcus, *supra* note 138, at 28. See also THE SEDONA CONFERENCE, *supra* note 137, at 42 (stating that “[c]onfidentiality of settlement terms is generally believed to encourage such settlements”); Miller, *supra* note 134, at 432, 486 (noting that settlements conserve scarce judicial resources); Moss, *supra* note 145, at 874, 878 (explaining the traditional model, in which defendants settle “to avoid costly public disclosures of negative information”).

161. See, e.g., *In re Franklin Nat’l Bank Secs. Litig.*, 92 F.R.D. 468, 469–70 (E.D.N.Y. 1981) (noting that lawyers had collected millions of documents, more than a hundred thousand pages of depositions, and more than ten million dollars in legal fees), *aff’d sub nom.*, *FDIC v. Ernst & Ernst*, 677 F.2d 230 (2d Cir. 1982).

162. *Jessup v. Luther*, 277 F.3d 926, 928 (7th Cir. 2002). *Accord Baker v. Dolgencorp., Inc.*, No. 2:Wcv199, 2011 WL 166257, at *2 (E.D. Va. Jan. 19, 2011) (noting that “confidential settlements provide parties with incentives to reach amicable resolutions, especially where one party fears that publicity of a settlement could potentially encourage additional litigation”).

settlement.¹⁶³

In addition to concern for copycat claims, litigants have expressed the fear that public access to the terms of settlements will improperly influence litigants' expectations in related cases. As a settling defendant argued in a brief urging the court to approve a confidential settlement agreement,

The public disclosure could prejudice the parties in related litigation if they desire to enter into settlement negotiations in the future by creating an artificial expectation of the value of that case (which could impose an artificial ceiling or floor on the negotiations—ultimately harming one party or the other). In addition, although the parties here agree that the settlement agreement does not constitute any admission of wrongdoing or liability by the Defendant, there is a significant risk that counsel, parties, or jurors in similar litigation would treat the information contained in this settlement agreement as an indication [that the defendant had violated the law].¹⁶⁴

Professor Miller not only expresses concern for defendants, who wish to “to avoid encouraging nuisance claims,” but also for the plaintiff, who might face “harassment . . . by unscrupulous free riders,”¹⁶⁵ such as long-lost relatives seeking a piece of the recovery. He also expresses concern that public disclosure of a small settlement with one defendant might undercut the plaintiff's ability to pursue her claims against other defendants.¹⁶⁶

Another policy often invoked to shield settlements and other

163. See Miller, *supra* note 134, at 485 (noting that parties “often have a compelling interest in keeping the settlement amount confidential to avoid encouraging nuisance claims”). Professor Moss counters that access to settlement data may actually *decrease* the filing of frivolous or “low-odds” claims. See Moss, *supra* note 145, at 902–03 (arguing that banning confidentiality may reduce trivial filings by exposing modest settlement values of similar prior cases).

164. AT&T's Unopposed Supplemental Brief in Support of Motion for Approval of Collective Action Settlement at 3, *Dernovich v. AT&T Operations, Inc.*, No. 4:09-cv-00015-ODS (W.D. Mo. Jan. 26, 2011), ECF No. 283.

165. Miller, *supra* note 134, at 485.

166. *Id.*

material from the public eye is privacy,¹⁶⁷ especially where the “subject matter is traditionally considered private rather than public,” such as “family affairs, illnesses[, and] embarrassing conduct with no public ramifications”¹⁶⁸ Since discovery processes require the production of intensely personal information, such as medical records, financial records, and facts about one’s personal life,¹⁶⁹ courts need discretion to shield such disclosures from public view. These privacy concerns are exacerbated in the information age, when anyone with a personal computer or smart phone and a credit card can access litigation papers filed virtually anywhere in the country. While organizations, such as labor unions and publicly-held corporations, have “diminished” expectations of privacy,¹⁷⁰ some scholars argue that their interests in their reputation deserve protection since “the disclosure of unsubstantiated information could unjustifiably damage the reputation, profitability, and conceivably

167. See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34–36, 35 n.21 (1984) (discussing the importance of protective orders in discovery); *United States v. Amodeo (Amodeo II)*, 71 F.3d 1044, 1050–51 (2d Cir. 1995) (weighing privacy concerns against the presumption of access); *United States v. Amodeo (Amodeo I)*, 44 F.3d 141, 147 (2d Cir. 1995) (weighing privacy concerns); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 787 (3d Cir. 1994) (examining whether good cause exists for a protective order); 8A WRIGHT ET AL., *supra* note 153, § 2042, at 229–30 (“Because of the liberality of pretrial discovery permitted by Rule 26(b)(1), it is necessary for the trial court to have the authority to issue protective orders conferred by Rule 26(c).”); *Menkel-Meadow*, *supra* note 132, at 2683–84 (arguing that confidentiality can protect privacy rights); *Miller*, *supra* note 134, at 447, 464–67, 474–77 (1991) (discussing privacy concerns in litigation, confidentiality, and protective orders); *Resnik*, *supra* note 116, at 808 (noting that the cost of public adjudication is exposure to the public, which participants in a dispute may find disquieting).

168. *Amodeo II*, 71 F.3d at 1051. *Accord* *Jessup v. Luther*, 277 F.3d 926, 928 (7th Cir. 2002); *Marcus*, *supra* note 138, at 62–63. The Freedom of Information Act exempts from its disclosure requirements “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6) (2006).

169. *Miller*, *supra* note 134, at 466–67.

170. *Amodeo II*, 71 F.3d at 1052. See also *Cippollone v. Liggett Grp., Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986) (stating that it may be difficult for businesses to demonstrate embarrassment—a nonmonetizable harm—because their “primary measure of well-being is presumably monetizable”); *Angele*, *supra* note 139, at 1663 (“Only private individuals are protected: a corporation has no legal right to privacy.”); *Doré*, *supra* note 111, at 330 (noting that “courts generally frown upon claims of commercial embarrassment or damaged corporate reputation”).

the viability of a product or even the enterprise itself.”¹⁷¹

In conclusion, confidential settlements in the non-class action context serve a variety of policies, including a need to facilitate settlements; reduce the risks of copycat claims, unreasonable expectations, and harassment; and protect personal privacy.

V. *SECRECY AND ACCESS TO CLASS ACTION SETTLEMENTS*

Against this backdrop of the competing policies served by public access to, and confidentiality of, settlement agreements, let us now turn to the unique considerations that affect class action settlements. Statutory, logistical and policy-based constraints all call into serious question the legality, efficacy, and wisdom of secret class action settlements.

A. *Statutory and Logistical Constraints*

Rule 23 of the Federal Rules of Civil Procedure limits the parties' freedom to settle a certified class action confidentially. The Rule provides that a certified class action “may be settled, voluntarily dismissed, or compromised only with the court's approval”¹⁷² and requires the court to “direct notice in a reasonable manner to all class members who would be bound by the proposal.”¹⁷³ Moreover, if class members are to be bound by the settlement, “the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.”¹⁷⁴

These requirements of judicial scrutiny after notice and a

171. Miller, *supra* note 134, at 470.

172. FED. R. CIV. P. 23(e). The unique issues that arise when the named representative seeks to dismiss a putative class action that has *not* been certified and to settle her individual claims are beyond the scope of this Article. See 5 ALBA CONTE & HERBERT NEWBERG, *NEWBERG ON CLASS ACTIONS* § 11:13, at 20–21 (4th ed. 2002) (“Under certain circumstances, settlement with a class plaintiff before class certification may be available, with approval of the court.”); *MANUAL FOR COMPLEX LITIGATION (FOURTH)* §§ 21.312, 21.61 (2004) (noting that when a proposed class has not been certified, special circumstances might lead a court to impose terms to prevent abuse). For ease of reference, “statutory” is used in lieu of “Rules-based” constraints.

173. FED. R. CIV. P. 23(e)(1).

174. FED. R. CIV. P. 23(e)(2).

hearing seriously constrain the parties' ability to shield a class action settlement from public view.¹⁷⁵ By its terms, the Rule requires that absent class members be notified of the settlement. In those class actions in which the names and addresses of the class members are unknown,¹⁷⁶ notice by publication in print media or via television, radio or the Internet may be ordered.¹⁷⁷ In such cases, it will be impossible to shield the settlement's general terms from the public.¹⁷⁸

Even in cases where the class members' names and addresses are known and notice of the settlement can be mailed to them, the class itself may include hundreds of thousands¹⁷⁹ or even millions of members.¹⁸⁰ Once that many people learn the terms of the

175. *Accord* NAT'L ASSOC. OF CONSUMER ADVOCATES, NACA CLASS ACTION GUIDELINES 47 (2006), available at <http://www.naca.net/sites/default/files/pdfs/RevisedGuidelines.pdf> (stating that "[c]lass action documents must remain open and available to the public in virtually all circumstances"); Marcus, *supra* note 138, at 49 n.206 (stating that "[i]n view of the extent of disclosure and judicial evaluation of the merits, it is questionable whether class actions can often be settled on a confidential basis"); Menkel-Meadow, *supra* note 132, at 2695 (noting that "courts must engage in some scrutiny of the adequacy of counsel and the reasonableness of [a class action] settlement").

176. For example, in a class action filed on behalf of millions of purchasers of Milli Vanilli records, tapes and CDs, the names and addresses of the absent class members were presumably unknown. *Freedman v. Arista Records, Inc.*, 137 F.R.D. 225, 226–27 (E.D. Pa. 1991). See also Reuters, *Small Victory for Milli Vanilli Fans*, N.Y. TIMES, Aug. 31, 1991 (late ed.), at 16, available at 1991 WLNR 3030334 (discussing the Milli Vanilli case).

177. See 7B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE, § 1797.6, at 201–02 (3d ed. 2005) (describing the ways in which notice may be ordered); MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.312 (2004) (same).

178. See 5 CONTE & NEWBERG, *supra* note 172, § 11:53, at 164 (stating that the notice under Rule 23(e) "must inform class members . . . of the settlement's general terms").

179. See, e.g., *Brown v. Cameron-Brown Co.*, 92 F.R.D. 32, 37 (E.D. Va. 1981) (finding that the numerosity requirement was satisfied where "plaintiffs assert the class to number 'at least several thousand' and the defendants refer to a potential class of 200,000"); *Fischer v. Weaver*, 55 F.R.D. 454, 458 (N.D. Ill. 1972) (considering a class with 833,055 members).

180. See, e.g., *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2547 (2011) (reviewing a class action with 1.5 million members); *Freedman*, 137 F.R.D. at 228 (stating that "[i]t is safe to assume that 7,000,000 people cannot be joined practically to one litigation"); *Kendler v. Federated Dep't Stores, Inc.*, 88 F.R.D. 688, 691 (S.D.N.Y. 1981) (considering a class estimated to include 1.9 million members).

settlement, it will be extremely difficult, if not impossible, to keep its terms secret. After all, in deciding whether to accept the terms of the settlement, to object, or to opt out (assuming that remains an option), the class members may need to discuss the terms of the settlement with their partners, parents, and children; their attorneys and accountants; and other trusted advisors. It is difficult to imagine that even a court committed to ensuring the confidentiality of a class action settlement would deny class members that opportunity.

But once the absent class members, their family members, and other advisors learn the terms of the settlement, both legal and logistical constraints limit the efficacy of a confidentiality requirement, even one imposed by court order. If any of the absent class members or non-party family members or other advisors were to disclose the terms of the settlement, it would be difficult, if not impossible, for the court to identify which individual(s) had breached confidentiality. Even if the court, somehow, could identify the person(s) who had revealed the terms of the settlement, it would lack authority to sanction a non-party. Unlike absent class members, who are deemed, however improbably, to have consented to the court's jurisdiction by declining to opt out,¹⁸¹ non-parties are neither served with process nor afforded an opportunity to opt out from which their consent might be inferred.

Rule 65(d), which has been read to govern not only injunctions but all "equitable decrees compelling obedience under the threat of contempt,"¹⁸² provides that such decrees bind only parties and their "officers, agents, servants, employees, and attorneys," and "other persons who are in active concert or participation" with them if they "receive actual notice of [the decree]

181. In *Phillips Petroleum Co. v. Shutts*, the Supreme Court held that absent class members who lack minimum contacts with the forum state nevertheless may be bound by the court's judgment because they consent to jurisdiction by declining to opt out. 472 U.S. 797, 812–14 (1985). For critiques of this consent rationale, see Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1561–62 (2004); Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148, 1170 n.95, 1185–86 (1998); Rhonda Wasserman, *The Curious Complications with Back-end Opt-out Rights*, 49 WM. & MARY L. REV. 373, 407–12 (2007).

182. 11A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE, § 2955, at 309 (2d ed. 1995) (citing, *inter alia*, *Int'l Longshoremen's Ass'n, Local 1291 v. Phil. Marine Trade Ass'n*, 389 U.S. 64, 75 (1967)).

by personal service or otherwise”¹⁸³ The non-parties with whom absent class members might consult likely would not receive notice of a court order requiring confidentiality and might well be beyond the court’s jurisdiction. If the class has not yet been certified, even the putative absent class members themselves might be beyond the court’s authority.¹⁸⁴ Thus, it is highly unlikely that the court would have authority to punish a breach of confidentiality even if it could identify the individual(s) who released the terms of the settlement.

In addition to requiring notice to absent class members of the proposed settlement, Rule 23(e) requires the court to conduct a “hearing” before approving a class action settlement.¹⁸⁵ While Rule 23 does not, by its terms, require that the hearing be open to the public, and while Rule 77(b) permits proceedings other than trials on the merits to be “conducted by a judge in chambers,”¹⁸⁶ there is a large body of precedent that strongly supports a right of public access to fairness hearings. For more than thirty years, the Supreme Court has recognized a First Amendment right of public access to criminal trials¹⁸⁷ and pretrial proceedings in criminal cases.¹⁸⁸ While the Court has not had occasion to consider whether there is a First Amendment right to attend civil trials,¹⁸⁹ all of the federal Courts of

183. FED. R. CIV. P. 65(d)(2).

184. See *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2379–80 (2011) (rejecting the “surely erroneous argument that a nonnamed class member is a party to the class-action litigation *before the class is certified*” and stating that “[n]either a proposed class action nor a rejected class action may bind nonparties”) (quoting *Devlin v. Scardelletti*, 536 U.S. 1, 16 n.1 (2002) (Scalia, J., dissenting)).

185. FED. R. CIV. P. 23(e)(2). Before 2003, federal courts had discretion whether to conduct an evidentiary hearing before approving a class action settlement. 7B WRIGHT ET AL., *supra* note 177, § 1797.5, at 178–80. In 2003, the Rule was amended and “settlement hearings now are mandatory.” *Id.* at 180 & 51 (2010 Supp.).

186. FED. R. CIV. P. 77(b).

187. See *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 604–06 (1982) (discussing why a right of access to criminal trials is protected by the First Amendment); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) (plurality op.) (“[T]he right to attend criminal trials is implicit in the guarantees of the First Amendment . . .”).

188. See *Press-Enterprise Co. v. Super. Ct.*, 478 U.S. 1, 10 (1986) (holding that the First Amendment “right of access applies to preliminary hearings”). See also *Press-Enterprise Co. v. Super. Ct.*, 464 U.S. 501, 508–10 (1984) (finding a “presumption of openness” to the jury selection process in criminal cases).

189. See *Whistleblower 14106-10W v. Comm’r*, 137 T.C. No. 15, 2011 WL

Appeals that have considered the issue have held such a right exists.¹⁹⁰

As the Sixth Circuit stated in *Brown & Williamson Tobacco Corp. v. FTC*, “[t]hroughout our history, the open courtroom has been a fundamental feature of the American judicial system.”¹⁹¹ And as the Seventh Circuit declared in *Union Oil Co. of California v. Leavell*, “[w]hat happens in the halls of government is presumptively public business. Judges deliberate in private but issue public decisions after *public arguments* based on public records.”¹⁹² If, as these cases suggest, the First Amendment guarantees the public a right to attend a class action fairness hearing, it will be impossible to keep the terms of the settlement secret.

Even if the First Amendment does not secure a right of public access to civil trials, Rule 43(a) of the Federal Rules of Civil Procedure requires that “[a]t trial, witnesses’ testimony must be taken in open court” unless otherwise provided by law or in

6110061, at *4 n.8 (2011) (stating that the Supreme Court “has not expressly ruled on whether there is a First Amendment right of access to civil proceedings and documents”). *Cf. Richmond Newspapers*, 448 U.S. at 580 n.17 (plurality op.) (stating that “[w]hether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open”).

190. *See, e.g., Whistleblower 14106-10W*, 2011 WL 6110061, at *4 n.8 (noting that the “Courts of Appeals that have addressed the issue agree that there is such a constitutional right”); *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 120, 124 (2d Cir. 2006) (noting that the public has a right to attend trials); *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 700 (6th Cir. 2002) (concluding that “Deportation hearings, and similar proceedings, have traditionally been open to the public”); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1061 (3d Cir.1984) (“We hold that the First Amendment does secure a right of access to civil proceedings.”); *In re Cont’l Ill. Sec. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984) (agreeing that “the policy reasons for granting public access to criminal proceedings apply to civil cases as well”); *Newman v. Graddick*, 696 F.2d 796, 801 (11th Cir. 1983) (deciding that “civil trials which pertain to the release or incarceration of prisoners and the conditions of their confinement are presumptively open to the press and public”). *See also Rushford v. New Yorker Magazine*, 846 F.2d 249, 253 (4th Cir. 1988) (holding that “the more rigorous First Amendment standard should also apply to documents filed in connection with a summary judgment motion in a civil case”). *Cf. N.J. Media Grp., Inc. v. Ashcroft*, 308 F.3d 198, 204–05 (3d Cir. 2002) (concluding that there is no First Amendment right to attend administrative deportation proceedings).

191. 710 F.2d 1165, 1177 (6th Cir. 1983).

192. 220 F.3d 562, 568 (7th Cir. 2000) (emphasis added).

compelling circumstances.¹⁹³ If the fairness hearing is characterized as a trial, the Rules, too, require that it be open to the public.

Finally, the Class Action Fairness Act (“CAFA”) requires defendants participating in proposed class action settlements to serve upon state and federal governmental officials the class action complaint, the proposed settlement, any side deals, and related documents.¹⁹⁴ The purpose of this provision is to ensure that responsible governmental officials are “in a position to react if the settlement appears unfair to some or all class members or inconsistent with applicable regulatory policies.”¹⁹⁵ In fact, these government officials sometimes appear in court at the fairness hearing and voice their objections to proposed class action settlements.¹⁹⁶ It would be difficult, if not impossible, for these governmental officials to perform their duties under the statute if they were ordered to maintain the materials received “as confidential in order to maintain the confidentiality of the settlement”¹⁹⁷

Read together, Rule 23, CAFA, and the resulting logistical constraints render it impossible for the parties, the court, and other governmental officials to keep the terms of a class action settlement confidential. These constraints serve a variety of policies supporting public access to class action settlements to which we now turn.

B. Policy-Based Constraints

As the Third Circuit stated in a case involving public access to bids submitted by attorneys seeking to serve as class counsel, the “right of public access is particularly compelling”¹⁹⁸ in the class

193. FED. R. CIV. P. 43(a).

194. 28 U.S.C. § 1715(b) (2006).

195. S. REP. NO. 109-14, at 27 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 32.

196. See Nicholas M. Pace & William B. Rubenstein, *How Transparent Are Class Action Outcomes? Empirical Research on the Availability of Class Action Claims Data*, SSRN 7, July 2008, available at <http://ssrn.com/abstract=1206315> (providing an example of government officials’ objections to proposed settlements).

197. Order of Court, *supra* note 41, at 3. See also *supra* notes 34–44 and accompanying text (discussing the court order entered in the B’nai B’rith litigation).

198. *In re Cendant Corp.*, 260 F.3d 183, 193 (3d Cir. 2001). See also *id.* at 194 (stating that the “test for overriding the right of access [in a class action] should be applied . . . with particular strictness”).

action context. Even Professor Miller concedes that “public access may be important . . . when the settlement is a court-approved class settlement”¹⁹⁹ Numerous differences between standard civil suits and class actions help explain why public access is particularly important in this context.

In standard civil litigation, the client retains an attorney to represent her, while reserving “ultimate authority” over the important decisions to be made in the suit,²⁰⁰ including whether or not to settle and on what terms.²⁰¹ While the client’s ability to monitor her attorney’s performance is limited, the rules of professional ethics enhance that ability by requiring the attorney to “promptly inform the client of any decision or circumstance with respect to which the client’s informed consent . . . is required . . . ; reasonably consult with the client about the means by which the client’s objectives are to be accomplished; [and] . . . keep the client reasonably informed about the status of the matter”²⁰² These rules assume that a client who is informed of the progress of her suit and who retains decision-making authority will be a more effective monitor.²⁰³

Unlike this standard litigation model, the attorney representing a class is often the driving force behind the lawsuit, has more at stake financially than any individual class member, and rarely communicates with absent class members, who are dispersed and disorganized and lack incentive to monitor the conduct of their ostensible agent.²⁰⁴ Even the named representative may have little

199. Miller, *supra* note 134, at 485–86.

200. MODEL RULES OF PROF’L CONDUCT R. 1.2(a), 1.2 cmt. (2006) (stating that “a lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued”).

201. MODEL RULES OF PROF’L CONDUCT R. 1.4 cmt. (2006) (requiring “a lawyer who receives from opposing counsel an offer of settlement in a civil controversy . . . [to] promptly inform the client of its substance”).

202. MODEL RULES OF PROF’L CONDUCT R. 1.4(a)(1)–(3) (2006).

203. See Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 14–15 (1991).

204. See John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 884–85 (1987) (explaining that “the members of a plaintiff class usually have very little capacity to monitor their agents”); Macey & Miller, *supra* note 203, at 3, 7–8, 19–20; William B. Rubenstein, *The Fairness Hearing: Adversarial and*

influence over the lawyer representing the class.²⁰⁵ In this context, the risks of collusion between the defendant and class counsel and of a deal that would maximize class counsel's fee while minimizing recovery for the class are of real concern.²⁰⁶

To reduce these risks, Federal Rule 23 bars class action settlements without judicial approval and permits the court to approve a class action settlement only if it finds "that it is fair, reasonable, and adequate."²⁰⁷ While judicial scrutiny of settlements is particularly important in the class action context, it is not a panacea both because the reviewing court lacks the information it needs to assess the settlement's fairness and because the court has its own incentive to favor class action settlements.²⁰⁸ If a court approves a class action settlement (whether fair or not), it is freed of the burden of overseeing a large and potentially time-consuming

Regulatory Approaches, 53 UCLA L. REV. 1435, 1441–43 (2006).

205. See John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 COLUM. L. REV. 288, 297 n.22 (2010) (analyzing the powerlessness of named representatives); Macey & Miller, *supra* note 203, at 5, 20 (arguing that class members have no incentive to take on a "litigation monitor" role because they would incur individual costs, with only a pro rata share of the benefits); Geoffrey P. Miller, *Competing Bids in Class Action Settlements*, 31 HOFSTRA L. REV. 633, 634 n.2 (2003) (same).

206. See John C. Coffee, Jr., *Rethinking the Class Action: A Policy Primer on Reform*, 62 IND. L.J. 626, 647–48 (1986/1987) (describing "structural collusion"); Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461, 470–73 (2000) [hereinafter Wasserman, *Dueling Class Actions*] ("The attorney's interest in securing the highest fee and the class members' interest in attaining the greatest recovery often diverge."). The additional risks posed by side deals, pursuant to which inventories of claims would be settled at a premium outside of the class action in order to reduce the presence of objectors, have been reduced by the enactment of Rule 23(e)(3), which requires the "parties seeking approval" to "file a statement identifying any agreement made in connection with the proposal." FED. R. CIV. P. 23(e)(3). See Dana & Koniak, *supra* note 57, at 1233–40 (describing the unique risks of collusion posed by such side deals and exacerbated by secrecy).

207. FED. R. CIV. P. 23(e)(2).

208. See Dana & Koniak, *supra* note 57, at 1234–35 (arguing that parties have incentives to conceal information regarding the unfairness of a settlement to the court, and that the court has an interest in approving the settlement to clear its docket); Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1105–15 (1996) (same); Rubenstein, *supra* note 204, at 1445 (same); Wasserman, *Dueling Class Actions*, *supra* note 206, at 479–83 (discussing the "informational disadvantage" of courts in fairness hearings).

case.²⁰⁹ It may also gain prestige as the court that oversaw the settlement of a complex class action.²¹⁰ Thus, courts may be too quick to approve settlements regardless of their adequacy.

Proposals advocating the appointment of a guardian *ad litem* to represent the interests of the class during the settlement process or a “devil’s advocate” to raise objections to any proposed class action settlement²¹¹ have not gained traction with the Advisory Committee on Civil Rules.²¹² In the absence of a guardian or class advocate, the public’s role in scrutinizing class action settlements and the judicial approval process itself assumes particular importance.

As suggested in Part III.A above, public access to settlements submitted for judicial approval helps police the accuracy of materials submitted to the court in connection with the settlement and ensure that courts perform their reviews with diligence and care. Given the court’s unique role in protecting the interests of the class and given the risk that the court’s self-interest may skew the process in favor of approval, these monitoring functions are particularly important in the class action context. A court order shielding a class action

209. See Koniak & Cohen, *supra* note 208, at 1122–23, 1127 (discussing judicial self-interest); Luban, *supra* note 57, at 2660 (suggesting that settlement was reached in part as a result of the court’s “overwhelming interest in damming the flood of asbestos cases”); Macey & Miller, *supra* note 203, at 45–46 (“If the judge approves the settlement, the result will be to remove a potentially complex and time-consuming case from the judge’s calendar.”); Rubenstein, *supra* note 204, at 1445 (“Settlement removes the matter from the judge’s docket, not an unimportant factor in a time of onerous caseloads.”); Wasserman, *Dueling Class Actions*, *supra* note 206, at 476 (“[T]he court may . . . have an interest in approving a settlement to clear its docket.”).

210. See Koniak & Cohen, *supra* note 208, at 1123 (arguing that “[j]udicial self interest may lead judges to seek power, prestige, and autonomy,” which is gained by overseeing high-profile cases); Wasserman, *Dueling Class Actions*, *supra* note 206, at 476, n.73 (citing Koniak & Cohen in arguing that judges occasionally act in their own self-interest).

211. See Macy & Miller, *supra* note 203, at 47–48 (discussing various proposals for appointing a guardian *ad litem* to reform the current class action system); Rubenstein, *supra* note 204, at 1453–56, 1475–77 (advocating the appointment of “an attorney to argue against the settlement”); Wasserman, *Dueling Class Actions*, *supra* note 206, at 529 (endorsing a proposal advanced by Professor John Leubsdorf that defendant and class counsel should be required to post bond for the appointment of a court-appointed advocate who would scrutinize the fairness of the proposed settlement).

212. See Koniak & Cohen, *supra* note 208, at 1109 n.190 (describing judges’ and lawyers’ “chilly reception” of Professor Leubsdorf’s proposal).

settlement from public view would obviously compromise the public's ability to serve in this role.

Like absent class members, the public at large may lack the incentives and the data needed to scrutinize the adequacy of the settlement.²¹³ But public interest groups may appear and voice their objections to a class action settlement (assuming it is accessible to them).²¹⁴ Moreover, the government officials that receive notice of proposed class action settlements under CAFA sometimes appear in court and voice their objections²¹⁵—that is, as long as no court bars them from voicing their objections in open court. And one should not underestimate the efficacy of press coverage, which a right of public access enables, both in monitoring the judicial approval process and in notifying the public of health and safety threats that are the subject of litigation.²¹⁶ After all, while Joe Q. Public may lack the incentive and resources to assess the fairness of a particular settlement, investigative journalists are paid to research, expose wrongdoing and write about it. For example, while the media coverage of the fen-phen litigation may not have affected the ultimate recovery by class members, it certainly shed considerable light on the behavior of class counsel, the doctors they relied upon for medical expertise, and the judicial review process.²¹⁷ The fallout of that press scrutiny is arguably still being felt, as one state bar association recently recommended the disbarment of both a

213. Even class member objectors are frequently denied the opportunity to take the discovery needed to assess the adequacy of the settlement. *See, e.g.*, Koniak & Cohen, *supra* note 208, at 1109–10 (noting that “discovery accorded objectors in the settlement process is limited”); Wasserman, *Dueling Class Actions*, *supra* note 206, at 477–78 (same). It is highly unlikely that members of the public at large would have access to the data needed to assess the settlement's fairness.

214. Pace & Rubenstein, *supra* note 196, at 7; Rubenstein, *supra* note 204, at 1450–51.

215. Pace & Rubenstein, *supra* note 196, at 7. *But see* Rubenstein, *supra* note 204, at 1448 (noting that CAFA does not require the government officials to comment on the adequacy of the proposed settlement or to do anything else).

216. *See* Menkel-Meadow, *supra* note 132, at 2686–87 (noting that “[p]ress coverage and open court hearings . . . facilitate . . . public discourse”).

217. *See* Alison Frankel, *Third Circuit (Again) Upholds \$567 Million Fee Award in Fen-Phen Class Action*, AM. LAWYER, June 8, 2010 (describing the fen-phen litigation); Alison Frankel, *\$982 an Hour for Fen-Phen Plaintiffs' Lawyers*, AM. LAWYER, Apr. 10, 2008 (same); Alison Frankel, *Still Ticking: Mistaken Assumptions, Greedy Lawyers, and Suggestions of Fraud Have Made Fen-Phen a Disaster of a Mass Tort*, AM. LAWYER, Mar. 1 2005 (same).

prominent class action attorney who represented claimants in fen-phen litigation filed in state court and the judge who approved the settlement of that case.²¹⁸

Public (and media) access to class action settlements not only permits testing of the accuracy of the data upon which settlements are predicated and monitoring of judicial performance, but it also provides an outlet for the release of public sentiment on matters of public importance and reduces the risk of “vengeful ‘self-help.’”²¹⁹ Since class actions, by definition, affect large groups of people and often involve matters of great public importance, such as discrimination or environmental contamination, this policy in favor of public access appears particularly strong in the class action context. Likewise, public access to class action settlements permits notice to the public of health and safety risks posed by the product or behavior that underlies the litigation. If a confidentiality order barred class members from discussing not only the settlement but also the problem that gave rise to the litigation, it could inhibit reporting to governmental agencies such as the Consumer Product Safety Commission and the National Highway Safety Traffic Administration, which would greatly compromise their effectiveness.

Finally, while class actions are intended to resolve the claims of large groups of similarly-situated class members in a single proceeding, they often fail to include all those affected by the defendant’s conduct or product. For example, given the choice-of-law problems that can arise in nationwide class actions,²²⁰ lawyers often structure class actions to include only class members from a single state.²²¹ Class members injured by the same product but

218. See Peter Smith, *Lawyer Faces New Troubles*, THE COURIER-J. (Louisville, Ky.), Nov. 13, 2011, at B1, available at 2011 WLNR 23518428; Andrew Wolfson, *Fen-Phen Judge Under Fire Again; Ky. Bar Association Wants Bamberger Disbarred over Diet-Drug Case*, THE COURIER-J. (Louisville, Ky.), June 17, 2011, at A1, available at 2011 WLNR 12192510.

219. See *supra* note 125 and accompanying text (citing and discussing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571 (1980) (plurality op.)).

220. See, e.g., *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821–22 (1985) (applying constitutional limitations on choice of law in a nationwide class action suit).

221. See, e.g., *Altria Grp., Inc. v. Good*, 555 U.S. 70, 73 (2008) (challenging cigarette advertising in the context of a statewide class action and considering whether a state unfair trade practices statute was preempted by federal law). Cf. Dana & Koniak, *supra* note 57, at 1233–34 (explaining that class actions are sometimes structured so as to exclude plaintiffs whose claims are settled outside

living in different states, who may be participating in other statewide class actions or pressing individuals suits, would benefit from access to the benchmark settlement figures produced in the first class action to settle.²²²

In sum, many of the policies identified in Part III.A counsel in favor of public access to class action settlement agreements with particular force. While they also counsel strongly in favor of public access to settlement agreements in FLSA collective actions, there are differences between the two types of group litigation that may explain why courts appear more willing to seal settlements in the FLSA context. First, class members in FLSA cases can be bound only if they affirmatively opt in.²²³ Thus, they are aware of the litigation, are sometimes required to participate in discovery,²²⁴ and presumably have at least some contact with the attorney representing the class.²²⁵ The need for public scrutiny of the approval process in such cases may be less obvious. Second, since class members in FLSA cases are all employees of the same employer and often work together in the same plant, they may be less dispersed and disorganized than class members in the typical Rule 23(b)(3) class action and therefore better able to monitor the attorney representing them.²²⁶ Although there are good reasons to doubt this conclusion,²²⁷ it, too, may explain what appears to be a greater

the class action in an effort to “buy off” potential objectors).

222. See *supra* note 145 and accompanying text (discussing benefits of such access).

223. 29 U.S.C. § 216(b) (2006). See also *supra* note 90 and accompanying text (discussing § 216(b) opt-in requirement).

224. See, e.g., *Ingersoll v. Royal & Sunalliance USA, Inc.*, No. C05-1774-MAT, 2006 WL 2091097, at *1–3 (W.D. Wash. July 25, 2006) (allowing defendants to conduct depositions of all opt-in plaintiffs); *Coldiron v. Pizza Hut, Inc.*, No. CV03–05865TJHMCX, 2004 WL 2601180, at *2 (C.D. Cal. Oct. 25, 2004) (allowing the same).

225. See Scott A. Moss & Nantiya Ruan, *The Second-Class Class Action: How Courts Thwart Wage Rights by Misapplying Class Action Rules*, 61 AM. U. L. REV. (forthcoming 2012) (manuscript at 4–6, 14, 30–32, 42–43) (positing that the agency problems and asymmetric information problems that plague Rule 23 class actions are far less pronounced in FLSA collective actions).

226. Cf. *id.* at 26 (noting that in FLSA cases, the claims of the employees against the same employer are “presumptively similar”).

227. See Becker & Strauss, *supra* note 90, at 1325–29 (suggesting that low-wage workers often decline to opt into FLSA collective actions because they do not receive the notice; do not understand it; or lack the knowledge, experience or fortitude to sue their employer).

willingness on the part of courts to seal settlements in FLSA collective actions.

Whether or not the FLSA cases should be treated differently, it is clear that regarding Rule 23 class actions, numerous policies strongly counsel in favor of public access to both filed settlement agreements and the judicial approval process. And the policies often cited in support of confidentiality are unlikely to overcome the presumptive right of access to class action settlement agreements submitted for judicial review.

First, class action settlement agreements rarely, if ever, contain trade secrets, identify confidential informants or disclose military secrets. Settlement amounts themselves are obviously not trade secrets.²²⁸ If ever there is a case in which a trade secret, informant's name, or military secret is disclosed in a class action settlement agreement, the secret itself can be shielded from the public without shielding the entire settlement agreement.²²⁹

Second, while settlements may conserve both private and public resources and enable the parties to resolve their disputes in ways that best serve their idiosyncratic interests, one should question the frequent claim that parties will decline to settle unless they are assured confidentiality.²³⁰ After all, whether or not a confidentiality order issues, the parties will save time and money and reduce risk if they settle.²³¹ And if they are genuinely worried about publicity, the alternative of a public trial likely will bring even more unwanted publicity.²³² Data from the United States District Court for the

228. Dana & Koniak, *supra* note 57, at 1226.

229. See *Union Oil Co. of Cal. v. Leavell*, 220 F.3d 562, 567 (7th Cir. 2000) (“Litigation about trade secrets regularly is conducted in public; the district court seals only the *secrets* (and writes an opinion omitting secret details); no one would dream of saying that every dispute about trade secrets must be litigated in private.”).

230. See, e.g., Zitrin, *supra* note 134, at 118 (stating that “there are no empirical studies or even ‘anecdotal’ evidence indicating that it is actually harder to attain a settlement when secrecy is not permitted”). In fact, Professor Moss’s economic analysis suggests that a ban on confidential settlements likely would “accelerate settlement.” Moss, *supra* note 145, at 887 (emphasis added). See also *id.* at 892, 910 (offering further economic analysis of a potential ban on confidential settlements).

231. See, e.g., Béchamps, *supra* note 111, at 130 (arguing that “[g]iving preference to the public interest in access should not seriously hinder efforts to settle”).

232. See *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 788 (3d Cir. 1994)

District of South Carolina, which enacted a local rule barring sealed settlements in 2002,²³³ reveals a *decline* in the number of trials following enactment of the rule, suggesting that parties prefer public settlements to public trials.²³⁴ Thus, the claim that parties will decline to enter into class action settlements unless they are assured confidentiality seems overstated.

Third, while defendants may fear that a public settlement will give rise to copycat claims,²³⁵ this fear is not likely to justify an order sealing a class action settlement. If a public settlement apprises others who have been injured by the defendant's product or wronged by its conduct of their potential right to recover, the defendant's interest in evading or reducing its liability to those with meritorious claims hardly justifies confidentiality.²³⁶ While the defendant has a legitimate interest in avoiding trumped-up charges, that interest may not be best served by sealing the class action settlement. As Professors Dana and Koniak argue, "[t]he most effective way for a defendant to combat truly frivolous suits, arguably, would be to prevail (or pay only a nominal settlement) and publicize, rather than hide, the outcome."²³⁷ While this advice will not help a defendant who settles bona fide claims in the class action and fears frivolous copycat claims if the settlement is publicized, that risk seems no greater than the risk of copycat claims following a trial of the class claims, something that surely would occur in public. It is unclear why the concern for copycat claims would justify an order sealing a class action settlement any more than an order closing the courthouse door. And while it is true that settlement values in a class action may influence the expectations of litigants in related cases, one must question whether that concern is sufficient to overcome a

("[I]f the case goes to trial, even more is likely to be disclosed than if the public had access to pretrial matters."); Zitrin, *supra* note 134, at 118 ("[P]arties who don't want their conduct exposed still have substantial incentive to settle before the heightened scrutiny of a trial.")

233. D.S.C. LOCAL CIV. R. 5.03(E) ("No settlement agreement filed with the Court shall be sealed pursuant to the terms of this Rule.")

234. Anderson, *supra* note 132, at 817 n.34.

235. District Judge Anderson of the United States District Court for the District of South Carolina finds this argument persuasive. *Id.* at 818.

236. Moss, *supra* note 145, at 902 (discussing the possibility that "some of the 'copycats' are deserving plaintiffs who simply had not known enough to sue") (footnote omitted).

237. Dana & Koniak, *supra* note 57, at 1225.

presumptive right of access to a settlement agreement filed with a court for its approval.

Finally, while personal privacy interests may justify confidentiality orders in certain cases, the corporations, labor unions and other institutions that are the typical class action defendants have diminished expectations of privacy.²³⁸ Like the “repeat players” in Professor Marc Galanter’s classic article, “Why the ‘Haves’ Come Out Ahead,” they may have legitimate interests in “maintaining credibility . . . as combatant[s]” and in their “bargaining reputation[s].”²³⁹ But in class actions, where the law requires judicial scrutiny of the fairness and adequacy of settlements, it is difficult to conclude that corporations’ interests in their reputations as tough bargainers can outweigh the presumptive right of the public to monitor the courts.

VI. CONCLUSION

It may be that the class action that first attracted my attention, *Hirschfield v. B’nai B’rith International*—in which the court agreed to seal not only the settlement agreement itself, but also the transcript of the fairness hearing and the objections filed by absent class members—is a very rare breed. Certainly my modest efforts to learn the scope of the practice—through a Westlaw search and an examination of the class actions filed in a single federal judicial district—suggest as much, although a more comprehensive study by the FJC found that 6% of all settlements filed under seal involve class actions.²⁴⁰

Even if secret class action settlements are rare, it is nevertheless a useful exercise to understand the constraints on the practice. A combination of statutory, logistical and policy-based considerations all constrain the discretion of federal district courts to

238. See *supra* note 170 and accompanying text (citing several examples of the diminished privacy expectations of institutional defendants); Zitrin, *supra* note 134, at 119 (“[P]ersonifying corporations by ascribing to them intensely personal feelings—including annoyance and embarrassment—stretches credulity.”).

239. Marc Galanter, *Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 99 (1974). See also Moss, *supra* note 145, at 878 (admitting that repeat class action defendants may be concerned about developing a “reputation for settling”).

240. See *supra* note 104 (citing to the FJC study).

seal class action settlements. Both Rule 23, which requires notice to class members of proposed settlements and judicial review at fairness hearings, and CAFA, which requires notice to governmental officials of proposed class action settlements so they can “react” if the settlements are unfair, seriously limit the court’s authority to shield class action settlement agreements from public scrutiny. Even if a court were to order absent class members to keep the terms of a proposed class action settlement confidential, it would be a logistical nightmare to police such an order.

Moreover, the inability of absent class members to monitor the behavior of their agent (the class counsel) highlights the need for judicial scrutiny of class action settlements. And the court’s potential bias in favor of approval highlights a need for public scrutiny of the court itself. Such scrutiny would be impossible if the public were denied access to the very settlement agreement that was the subject of judicial review. Thus, secret class action settlements should be very rare indeed given that public access to class action settlement agreements is a critical prerequisite to public monitoring of the judicial approval process.