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108th CONGRESS

1st Session

S. 817

To amend chapter 111 of title 28, United States Code, relating to protective orders, sealing of cases, disclosures of discovery information in civil actions, and for other purposes.

IN THE SENATE OF THE UNITED STATES

April 8, 2003

Mr. KOHL introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend chapter 111 of title 28, United States Code, relating to protective orders, sealing of cases, disclosures of discovery information in civil actions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Sunshine in Litigation Act of 2003'.

SEC. 2. RESTRICTIONS ON PROTECTIVE ORDERS AND SEALING OF CASES AND SETTLEMENTS.

(a) IN GENERAL- Chapter 111 of title 28, United States Code, is amended by adding at the end the following new section:

'Sec. 1660. Restrictions on protective orders and sealing of cases and settlements

`(a)(1) A court shall not enter an order under rule 26(c) of the Federal Rules of Civil Procedure restricting the disclosure of information obtained through discovery, an order approving a settlement agreement that would restrict the disclosure of such information, or an order restricting access to court records in a civil case unless the court has made findings of fact that--

`(A) such order would not restrict the disclosure of information which is relevant to the protection of public health or safety; or

`(B)(i) the public interest in the disclosure of potential health or safety hazards is outweighed by a specific and substantial interest in maintaining the confidentiality of the information or records in question; and

`(ii) the requested protective order is no broader than necessary to protect the privacy interest asserted.

`(2) No order entered in accordance with paragraph (1), other than an order approving a settlement agreement, shall continue in effect after the entry of final judgment, unless at the time of, or after, such entry the court makes a separate finding of fact that the requirements of paragraph (1) have been met.

`(3) The party who is the proponent for the entry of an order, as provided under this section, shall have the burden of proof in obtaining such an order.

`(4) This section shall apply even if an order under paragraph (1) is requested--

`(A) by motion pursuant to rule 26(c) of the Federal Rules of Civil Procedure; or

`(B) by application pursuant to the stipulation of the parties.

`(5)(A) The provisions of this section shall not constitute grounds for the withholding of information in discovery that is otherwise discoverable under rule 26 of the Federal Rules of Civil Procedure.

`(B) No party shall request, as a condition for the production of discovery, that another party stipulate to an order that would violate this section.

`(b)(1) A court shall not approve or enforce any provision of an agreement between or among parties to a civil action, or approve or enforce an order subject to subsection (a)(1), that prohibits or otherwise restricts a party from disclosing any information relevant to such civil action to any Federal or State agency with authority to enforce laws regulating an activity relating to such information.

`(2) Any such information disclosed to a Federal or State agency shall be confidential to the extent provided by law.

`(c)(1) Subject to paragraph (2), a court shall not enforce any provision of a settlement agreement between or among parties that prohibits 1 or more parties from--

`(A) disclosing that a settlement was reached or the terms of such settlement, other than the amount of money paid; or

`(B) discussing a case, or evidence produced in the case, that involves matters related to public health or safety.

`(2) Paragraph (1) does not apply if the court has made findings of fact that the public interest in the disclosure of potential health or safety hazards is outweighed by a specific and substantial interest in maintaining the confidentiality of the information.'

(b) TECHNICAL AND CONFORMING AMENDMENT- The table of sections for chapter 111 of title 28, United States Code, is amended by adding after the item relating to section 1659 the following:

'1660. Restrictions on protective orders and sealing of cases and settlements.'

SEC. 3. EFFECTIVE DATE.

The amendments made by this Act shall--

- (1) take effect 30 days after the date of enactment of this Act; and
- (2) apply only to orders entered in civil actions or agreements entered into on or after such date.

END



Congressional Record: April 8, 2003 (Senate)
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STATEMENTS ON INTRODUCED BILLS AND JOINT RESOLUTIONS

[...]

By Mr. KOHL:

S. 817. A bill to amend chapter 111 of title 28, United States Code, relating to protective orders, sealing of cases, disclosures of discovery information in civil actions, and for other purposes; to the Committee on the Judiciary.

Mr. KOHL. Mr. President, I rise today to introduce the Sunshine in Litigation Act of 2003, a measure to address the abuse of secrecy orders issued by federal courts. All too often, courts sign off on secret settlements that shield important public health and safety information from the public view from mothers and fathers and children whose lives are potentially at stake, and from public officials we have asked to protect our health and safety.

The problem is a simple one and has been recurring for decades. An individual brings a cause of action against a manufacturer for an injury or fatality resulting from a product defect. The plaintiff, often reticent to continue the litigation process because of grief or lack of resources, settles the lawsuit quickly. In exchange, the defendant insists that the plaintiff agree to the inclusion of a confidentiality clause. This mechanism prevents either party from disclosing information revealed during the process of litigation. Both of the parties to the lawsuit believe that they have "won": the plaintiff won a satisfactory financial settlement, and the defendant won the right to conceal "smoking gun" documents.

But not everybody wins. Future victims of injuries or fatalities resulting from the same product defect lose, because they or their families must "re-invent the wheel" as they litigate virtually the same case. Even worse, the American public loses with this outcome, because they remain unaware of the critical public health and safety information which could prevent harm and save lives.

Currently, judges have broad discretion in granting protective orders when "good cause" is shown. But these protective orders are being misused. Tobacco companies, automobile manufacturers and pharmaceutical companies have settled with victims and used the legal system to hide information which, if it became public, could protect the American public but endanger their business or reputation. We can all agree that the only appropriate use for such orders is to protect trade secrets and other truly confidential company information and our legislation makes sure it is protected. But protective orders are certainly not supposed to be used to hide public safety information from the public, especially when such information is neither trade secret nor proprietary.

There are no records kept of the number of confidentiality orders accepted by state or federal courts. However, anecdotal evidence suggests that court secrecy and confidential settlements are prevalent. Let me share some examples that illustrate the dangerous and often deadly consequences

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that result from protective orders: Although an internal memo suggests that General Motors, ``GM'', was aware of the risk of fire deaths from crashes of pickup trucks with ``side saddle'' fuel tanks, an estimated 750 people were killed in fires involving these fuel tanks. When victims sued, GM disclosed documents only under protective orders and settled these cases only on the condition that these documents remained secret. This type of fuel tank was installed for 15 years before being discontinued.

Sixteen month-old Michael Bancroft was buckled into a Kolcraft booster-style safety seat in his mother's car when the car was involved in an accident. Due to a defect in product design, however, the seat did not protect him from a broken neck and paralysis. Kolcraft and the Bancrofts settled for \$4.25 million and signed a confidentiality agreement that concealed the product's defect. Because this information remained a secret, countless parents continued to feel a false sense of safety when securing their children in Kolcraft safety seats.

From 1992-2000, tread separation of certain Bridgestone and Firestone tires caused a great number of car accidents, many involving serious injuries or fatalities. Bridgestone/Firestone quietly settled dozens of lawsuits resulting from faulty tire crashes, most of which included secrecy agreements. It was only in 1999, when a Houston public television broke the story, that the company admitted the defect and recalled 6.5 million tires.

Some States have been proactive in dealing with this problem. Florida, for example, has in place a Sunshine in Litigation law that severely limits the ability of parties to conceal information that affects public health and safety. Michigan has a rule that requires that secret settlements be unsealed two years after they are approved. And just last year, the judges of the United States District Court for the District of South Carolina unanimously agreed not to accept any secret settlements at all.

While these steps indicate movement in the right direction, we still have a long way to go. It is time to initiate a federal solution for this problem. The Sunshine in Litigation Act is a modest proposal that would require Federal judges to perform a simple balancing test to ensure that the defendant's interest in secrecy truly outweighs the public interest in information related to public health and safety. Specifically, prior to making any portion of a case confidential or sealed, a judge would have to determine by making a particularized finding of fact--that doing so would not restrict the disclosure of information relevant to public health and safety. Moreover, all courts, both Federal and State, would be prohibited from issuing protective orders that prevent disclosure to relevant regulatory agencies.

And don't just take it from me. During his confirmation hearings before the Judiciary Committee in January 2001, Attorney General John Ashcroft voiced his support for this legislation, saying, ``I think unnecessarily hiding or otherwise concealing from the public those [public health and safety hazards] would be against the interests of the people . . . I think there's great danger in not providing public information.''

This legislation does not prohibit secrecy agreements across the board. It does not place an undue burden on judges or our courts. It simply states that where the public interest in disclosure outweighs legitimate interests in secrecy, courts should not shield important health and safety information from the public and from regulators. This is an entirely reasonable balancing test. It is time to eliminate the dark dangers of court secrecy and bring matters of public health and safety into the light, where they belong.