ORIGINAL

COMMONWEALTH OF PENNSYLVANIA
HOUSE OF REPRESENTATIVES
JUDICIARY COMMITTEE

In re: House Bills 724 and 725, Public Hazards, and The Use of Court Orders to Conceal

***

Stenographic record of hearing held in Room 140, Main Capitol, Harrisburg, Pennsylvania

Tuesday, August 24, 1993, 10:00 a.m.

HON. THOMAS R. CALTAGIRONE, Chairman
HON. JEFFREY E. PICCOLA, Minority Chairman

MEMBERS OF THE COMMITTEE

Hon. Albert H. Masland, Jr.
Hon. Gregory C. Fajt
Hon. Christopher R. Wogan
Hon. Frank LaGrotta
Hon. Andrew Z. Carn
Hon. Karen A. Ritter
Hon. Harold James
Hon. Jeffrey Piccola
Hon. Christopher McNally

Also Present:

Hon. Michael R. Veon

Hon. Marc Cohen

David Krantz, Executive Director

Galina Milohov, Research Analyst

Reported by:
Emily R. Clark, RPR

I N D E X

* * * * *

CHAIRMAN CALTAGIRONE: We'll get started with the House Judiciary Committee hearing on House Bills 724 and 725. We're going to be taking testimony today on both of these bills. We would like to start out with the prime sponsor, Representative Mike Veon.

REPRESENTATIVE VEON: Thank you very much, Mr. Chairman. I appreciate you and the committee taking time to consider these bills. I know it's been an important issue for you and I appreciate you putting it on the agenda today. I appreciate the work the committee is doing this summer on a lot of important issues.

Mr. Chairman, as you and members of the committee know, ensuring the health and safety of Pennsylvania workers and consumers is an important issue for me, and I believe these two bills are crucial to that protection.

Several years ago, an artificial heart valve manufactured by a subsidiary of Pfizer International was taken off the market after causing more than 150 deaths. In the years leading to that withdrawal, the company settled millions of dollars' worth of lawsuits in exchange for secrecy orders to ensure that a design defect in the valve was not disclosed. The court order gags kept knowledge of this life-threatening situation from many people who had a right to know, many of whom may have died because of their

ignorance.

In another case, Mr. Chairman, a manufacturing facility owned by Xerox Corporation in western New York found that a hazardous chemical had leaked from storage tanks and had seeped into groundwater, contaminating a private well. Xerox told residents about it, but said there was no long-term health threat.

Two families sued and claimed the contamination had caused health problems. The company and the families then made a deal, in which the families reportedly received 4.75 million dollars and were relocated. Lawsuit records were sealed and everyone involved was prohibited from speaking about the case. The remaining residents were left living with the potential health and environmental threat but had no way to obtain information about it from those involved in the court cases.

McNeil Pharmaceutical quietly settled cases concerning the painkiller Zomax out of court for years, preventing the disclosure of information connected to the suits. We later learned that Zomax was a factor in the deaths and life-threatening allergic reactions of hundreds of people.

This problem is not new, as the Chairman knows. Most of you are probably familiar with the story of how, in 1929, Johns-Manville settled lawsuits filed by eleven

employees over physical problems suffered as a result of asbestos exposure. Those cases were settled with secrecy agreements, preventing public knowledge of the dangerous diseases connected with asbestos. Not until the late 1950's did the real facts about the danger of asbestos come to public light.

It's hard for me to believe that such critical safety information continues to be locked away from public scrutiny. It's shocking to me that our legal system permits the protection of the bottom line of big companies over the health and safety of citizens and workers.

I believe this legislation, House Bill 724 and House Bill 725, would restore some sanity to our product liability consumer protection laws and policies.

House Bill 724 would prohibit a public hazard which may cause bodily injury from being concealed from the public as a result of a settlement or court order. Concealment of a public hazard would be a misdemeanor of the first degree. The bill defines the term public hazard as an instrument, device or substance, or a condition of an instrument, device or substance that has caused or may cause bodily injury to more than one person.

This bill is intended to ensure that Pennsylvanians do not operate in the dark when a defective product or practice is discovered. It would put an end to

secrets that can kill.

House Bill 725 would restrict the use of protective court orders. As this committee knows, under current law, companies that are sued for negligence often agree to pay damages to the harmed consumer only if he or she agrees never to discuss the lawsuit. The superior bargaining power of a large corporation to that of a victim often forces the victim into these secrecy agreements. The gag order applies not only to the victim but to the victim's attorney, who is prevented from discussing the case publicly or using information obtained during a case in future other cases.

This secrecy prevents people from alerting the Consumer Product Safety Commission to dangerous products. It keeps them from warning the Food and Drug Administration about reactions to drugs. It precludes people notifying licensing agencies about negligent professionals.

My bill would allow anyone subject to a protective order to make information on the matter available to any federal, state or local regulatory or law enforcement agency, or legislative or judicial body. The information also could be given to an attorney who represents someone else claiming losses from the same product, if the lawyer receiving the information agrees to be bound by the protective order.

House Bill 725 would also prohibit settlement agreements which seal the records on the amount of the settlement; require the return or destruction of documents related to the action; or which prohibit attorneys from representing any other claimant in a similar action or in any other action against any of the defendants.

Over the years, companies have tried hard to get rid of the tort system. The excuses have varied with the times. They have called these laws unfair, they've claimed they've caused excessive insurance costs, and they said that they make United States companies less competitive. But the truth is, in my opinion, these laws are irritants and sources of embarrassment. Product liability cases document some companies' mistakes, bad judgment, and willingness to cut costs and sacrifice lives.

Since business has been unsuccessful in restructuring the tort system to their advantage, they have resorted more and more over the last decade to out-of-court settlements with protective orders. Keeping their mistakes and negligence quiet is apparently the next best thing to total immunity.

These secrecy strategies must go. Our courts are public institutions, paid for by the taxpayers. Public disclosure should be preserved in our courts. It is one of the best tools we have in preventing injury and encouraging

the manufacture of well-designed, safe products.

Thank you, Mr. Chairman, for your opportunity to be here today. Hello to the gentleman, Representative Carn from Philadelphia, I appreciate him being here. And I would ask Mr. Chairman, that my colleagues on the other side of the aisle represented here by Representative Masland, really would take a good, hard look at this bill. I think this is the kind of bill that really could be done in a bipartisan fashion and I would encourage members on the other side of the aisle to take a close look at it. I think it's the kind of bill we could move together as Democrats and Republicans. Thank you for the opportunity, Mr. Chairman.

CHAIRMAN CALTAGIRONE: Thank you, Representative Veon.

Are there any questions from any of the members present? Or staff?

REPRESENTATIVE MASLAND: I don't have any.

CHAIRMAN CALTAGIRONE: No questions. Thank you again for your testimony.

We'll next move to Karen M. Hicks, Ph.D., and founder of the Dalkon Shield Information Network.

MS. HICKS: Good morning, Mr. Chairman, congressmen. My name is Karen Hicks. I live in Berks County. I'm a professor at Albright College. I'm also a survivor of the Dalkon Shield IUD. I'm not fully aware of

the scope of the bill before I came here today, but now listening to Representative Veon, I realize the context of my remarks are basically about what happens before we even get to lawsuits, and underscores the urgency of this particular bill because of the decades of denial and cover-up and lack of information that go on before we can ever get to most of the product liability lawsuits.

I suffered a life-threatening injury and lost my fertility due to my injuries from this medical device. It's estimated that some four million women around the world used this contraceptive between the years 1971 to '74, which the A. H. Robbins Company, the Richmond, Virginia-based manufacturer, promoted as the Cadillac of conception in its marketing literature at that time.

The physician inventor of this device falsified his experimental records in the medical literature. The Robbins Company, while promoting the shield as 100 percent safe, was actually engaged in concealing the grave dangers that it posed to women's bodies. Even after health advocates began pressuring the FDA around 1973 to have it withdrawn from the market, something which the FDA never did mandate, Robbins' officials refused to acknowledge, much less to even publicize, its dangers or to warn users to have it removed.

The first lawsuits women brought in the early

1980s were tough and painful for the shield's victims. Women were accused of being promiscuous, while the Robbins Company refused to admit that the device caused such damage. The legal battle to obtain sensitive company records took many years. Over the last decade, the truth behind the deception and cover-up has been disclosed and the Robbins Company has been censured widely for its reckless endangerment of public health for its distributing a known defective product.

Several books have been written that thoroughly document the extent of the company's cover-up, and I would like to add that my own book on the fight of shield survivors for justice is coming out this November.

Hundreds of thousands of women were faced with massive pelvic infections, perforated uteri, infertility, birth defects born to some children and even death. Most of us have become lifetime patients of the health care system due to the insidious and chronic nature of the injuries which have worsened over time because we had no idea what was happening to our bodies.

As some of you may know, the company eventually petitioned the bankruptcy court for protection from its creditors in 1985. Robbins was ordered to do a publicity campaign to notify users some fourteen years after it was first inserted into women's bodies. More than 300,000

people filed claims with the bankruptcy court in Richmond, Virginia.

In 1990, the Robbins Company was sold to American Home Products and the Dalkon Shield Claimants Trust was established to handle approximately 200,000 of the claims which were deemed legitimate. More than 115,000 of those claims, of the 200,000 claims, were settled for less than a thousand dollars. The long delay in disclosure meant women couldn't get their medical records or good medical proof of their injuries. All liability against Robbins and third parties was barred forever, and we lost our right to sue as well, and we became claimants.

I would like to put some perspective on the humanity involved in the scandal. I first manifested physical problems from the shield in 1972 but had no idea that the source of my problems were related to it. When the problems intensified and puzzled my doctors, who were also unsuspecting, I was told my problems were mental and emotional. Over the next ten years, my health deteriorated and no doctor could explain it.

I had a total hysterectomy in 1984. It was then that I discovered the reason, the real reason for my physical problems. I filed a lawsuit in 1985, but because of all the ensuing litigation that I cited above, I lost my right to sue and became a claimant after the trust was set

up. My compensation claim wasn't even reviewed at the trust until 1992. I still have not received any compensation because I rejected the pitiful amount that I was offered by the trust. Some 20 years have already passed since most of us used the shield. More than 30,000 women are still waiting to have their claims reviewed, and the trust itself has a 20-year life span. The Robbins Company has not only abused the public trust but also the legal system to protect itself and to delay rightful compensation to its survivors.

In 1986, I founded a national organization that attempted to reach out to other women like myself and fight for justice. A relatively small group of just average folks like myself got angry enough at how we had been treated to fight the good fight against the Robbins Company for four intense years during the Chapter 11 proceedings. Our kitchen table organization spread around the country and ultimately, we became regulars in the Richmond, Virginia courtroom along with the droves of lawyers.

We pressed three major goals for obtaining real justice in this case. One of those goals was to obtain criminal prosecution of the corporate officials who knowingly and willfully sold this defective product that created damages in unsuspecting and even trusting women. Yet the people responsible for this tragedy have never been exposed nor appropriately punished. On the contrary, it

looks to us like the culprits have been rewarded handsomely. As a result of the Chapter 11 reorganization, the Robbins family, which was the largest shareholder in the Robbins Company, became the largest single shareholder in American Home Products, thereby actually increasing the value of the stock that was exchanged in the transaction. The Aetna Insurance Company, Robbins' insurer, has been protected from any further liability and the amount that they contributed to the settlement was pitiful, was obscenely dispicable. And Mr. E.C. Robbins, Jr., former president of the Robbins Company, was appointed honorary president of the American Pharmaceutical Company in 1991.

Civil penalties don't deter crime in the suites. Your law is a necessary but small step toward making criminal sanctions possible for cases like the Dalkon Shield. I encourage you to go much farther than this law, in that direction. The corporate veils must be lifted and corporate officials must be made accountable to the public. Honorable companies should have nothing to hide. The people responsible for crimes against the public must be brought to justice. Why are people like me constantly sacrificed on the altar of the profit motive? The law should work for us and send corporate criminals packing to prison where they belong.

CHAIRMAN CALTAGIRONE: Thank you.

Questions? Representative Carns?

REPRESENTATIVE CARN: Thank you, Mr. Chairman. I certainly appreciate your testimony. I'm just at a loss for understanding why it took from 1972 to 1984 to figure out what the problem was.

MS. HICKS: Because this is the rights of companies operating as corporations to use the laws to their benefit.

REPRESENTATIVE CARN: You're going to the doctor from '72?

MS. HICKS: Doctors didn't know, either. The company that manufactured the device withheld the information of the injuries that doctors reported to them and it kind of snowballed. The company was engaged in a cover-up of the injuries that were reported early to them, and they used the laws to protect them after that time.

REPRESENTATIVE CARN: Okay.

MS. HICKS: To keep that disclosure and to stymy discovery when lawsuits even did emerge.

REPRESENTATIVE CARN: When you finally discovered, and you said that was after you had a hysterectomy, you're saying it was that operation that brought it to light?

MS. HICKS: Yeah. It was only after the operation that going into my body revealed the true reason

for my problems.

REPRESENTATIVE CARN: Thank you, Mr. Chairman.

CHAIRMAN CALTAGIRONE: Questions from any other members?

(No audible response.)

CHAIRMAN CALTAGIRONE: I want to thank you for your testimony. You're a very brave person and I personally commend you for the fight that you've been fighting against the injustice that was served on you and many of the other women in this country, and I agree with you. I would hope that there would be some finality to the process. It seems like some of these major corporations, after inflicting their pain on people, can do exactly as you've described in your testimony, and almost scoff at the law, and all of us that have paid for it so dearly and the people that's affected during their lifetimes. Thank you.

Clifford A. Rieders, Esquire?

MR. RIEDERS: Representatives and public who are here today, I feel privileged to have this opportunity to speak on behalf not only of the Pennsylvania Trial Lawyers Association, but quite honestly on behalf of myself as an attorney who does a substantial amount of pro bono litigation, and who has handled many products liability and civil rights cases, and who also has been, in a way, certainly not in the way that other speakers will say, but

in an indirect way, a victim of secrecy and confidentiality, which severely harms the public interest, and I'm going to give you some very specific examples as to why. But I would like to generally go through my statement first and give you somewhat of a legal perspective, because what you're being asked to do in 724 and 725 is anything but radical. It certainly is consistent with the law as it exists today and really is just an incremental step in terms of clarifying what really ought to be clear already but unfortunately is not, and that is the public right to know.

Just briefly, 724, of course, deals with agreements or contracts that have the purpose or effect of concealing a public hazard. And 725 deals specifically with protective orders which are intended to keep information, generally speaking as they exist today, from governmental authorities and other attorneys working in the field, as well as keeping settlements from those particular groups. So that's what the two bills address specifically.

I believe, reviewing the laws quite carefully and reviewing the case law upon which I believe they are based, that these laws are reasonably necessary and very narrowly tailored to effectuate the purpose obviously intended.

It's been repeatedly argued that confidentiality and secrecy are necessary to encourage settlements. As I

will show you here today, the exact opposite is true and, in fact, the tremendous amount of secrecy that we have in virtually every case litigated today, and it's become a very standard part of every case both in terms of discovery and in terms of the settlement, actually are one of the reasons why we have a bottleneck in the courts, not increasing litigation which actually is not occurring. If anything, we have a kind of leveling out or decrease in civil litigation in this country, but yet, the courts seem to be more busy and there seem to be more cases.

One of the reasons for that, aside from the increase in criminal cases and domestic cases, one of the reasons is that we're bottled up with the inability to resolve cases because of secrecy that we see with regard to prior litigated cases. And that secrecy makes every single case a brand new case.

The DES victims spoke and you'll hear other victims, you can't imagine how frustrating it is when you're in a situation where you know that a company has admitted, acknowledged purposely and intentionally putting into the public domain, for example, a defective product or a dangerous product, or when you know in a civil rights case that there has been a stated policy of discriminating against African Americans or women on road crews or in other situations like that -- I'm just throwing out some quick

examples -- and yet, that information is sealed, is secret, is confidential, and you've got to start from scratch in the next case. As a matter of fact, even the same lawyer has to start from scratch because he can't use the information from the prior case. It costs the taxpayers extra money.

It costs extra litigation and it results in these cases being bottled up in the courts unnecessarily because of the need to litigate every single one like it's a tabula rossa.

So even putting aside for the moment the personal aspect to the victim whose case can't get out there in public, is the fact that what the present situation causes is increased litigation, increased court time, increased trial days for the same number or less, actually, number of cases in the system. It's a terrible situation and it is getting worse.

Let me just give you a little personal perspective. I was fortunate to clerk for a federal judge here in the middle district in 1973 through 1975. It was rare that cases were sealed, that records were sealed, or that confidentiality orders were entered. Almost never happened. And most of the judges rejected out-of-hand as being inconsistent with constitutional principles. Now, it is extremely common, and it is a rare case indeed which is not amicably resolved with the sealing of the record with

secrecy and with the mandatory return of documents.

All of this results in each new case having to be litigated from scratch. And it's a tremendous problem in the Commonwealth, one that I think you may not be fully aware of. But those of us who practice are seduced into adhering to because we have clients, we have individuals who many times, emotionally as well as financially, cannot afford to relitigate each case from scratch, and need to agree or feel they must agree to these provisions either in the position of saying myself to clients, I will charge you no extra to go all the way to trial because I think that you should not be subject to secrecy, and they've said no, we really feel like we have no choice, we've been at this thing for three years or five years or seven years or ten years and they've offered us a monetary settlement which, in effect, is blackmail to buy secrecy, and we really feel we have no choice. And I've seen that happen repeatedly. And as I say, it's costing the taxpayers money and it's bottling up the courts in a very practical way.

Also, I think you have to understand in many of these cases, the attorney and his client are acting as private attorneys general. That's a very old concept in this country and it's intended to save the taxpayer money. The idea being that there is no way that the government has the resources to go after all of the defendants in the DES

cases, in the Ford Pinto cases, in the Dalkon Shield cases, in the three-wheeler cases. Every one of those cases which were cases of more or less intentional misconduct that everybody, even the manufacturers will tell you, were properly brought and properly pursued. And I wish they were here today because they would agree with me, those cases were properly brought and pursued and every single one of them were brought and pursued by private attorneys and the victims who were willing to go to court and put their lives and their emotional state on the line. And every one of those cases today are made more difficult by virtue of these secrecy orders, these confidentiality orders.

One of the greatest abuses which occurs in the Commonwealth on a regular basis is that cases which are settled are sealed. Now, in this regard, I'm not sure the law goes far enough. The law certainly can impliedly be read to prohibit that type of sealing, but by its terms, I do not see it as being as clear as I would like to see it be. However, I would still rather see the law passed than not at all. I'm speaking specifically of 725, which in subsection (b), 7104, subsection (b) says, no person shall be subject to a protective order. I would like to see that say, "or sealing of records."

Now, I think again, reading certainly either one or both of the laws in their entirety, I think the court can

reasonably indicate that certainly the spirit of the law would apply to that problem as well. But I think it's one of the problems that needs to be and ought to be directly addressed.

Even in Pennsylvania, our own government agency, the Pennsylvania Catastrophe Loss Fund, the Pennsylvania Catastrohe Loss Fund insures physicians in serious cases where the amount involved is in excess of the amount of private insurance, which today is typically $200,000. In the most serious cases, the CAT fund, as a standard matter, has a secrecy clause in its releases. That secrecy clause not only is intended to bar the litigant from going to the media, something which I certainly can understand and there would be, in my view, a variety of circumstances might be okay, although philosophically, I have problems with that as well, but also bars the attorneys from speaking with their colleagues, other attorneys, government agencies, theoretically, and a variety of other areas where the information ought to be properly sealed.

I'm sure some of you are aware of the statistics that in Pennsylvania, most medical malpractice occurs within a very, very small segment of the physician community. For example, in one particular year, I'm sure there are people have got more specifics on this than than I do, but in one particular year, 25 percent of the pay-outs from the CAT

fund, from the Pennsylvania Catastrophe Loss Fund for ophthalmologists, all related to one ophthalmologist. And yet that information under the CAT fund release could not be shared with others.

If that particular information could be shared with others, if that particular individual was not practicing or subject to restrictions, for example, with regard to surgery, which would almost certainly be the case if the information were out there within the right government agencies and private agencies, that would be a tremendous savings to the other ophthalmologists in the state who practice legitimately and are honorable and non-negligent.

Now, I gave you that one example, but in neurosurgery and obstetrics and most other fields, it's a very, very small minority, and yet our own state organization, the CAT fund, attempts to keep that information secret from the rest of us and attempts to keep from us the misdoings of the worst offenders.

Now, the legitimacy, legality and proprietary of secret confidentiality orders and secret settlements certainly raises both common law and constitutional issues. I said earlier when I began that you're not being asked to do anything that's radical or terribly unusual and you're only being asked, really, to return the law to the state

that the appellate judges, when they rarely get these issues but sometimes get these issues, say that it should be.

Article I, Section 11 of the Pennsylvania Constitution, which is cited and recited over and over again, states that all courts shall be open, all courts shall be open, and every man for an injury done him and his lands, goods, personal reputation shall have a remedy, and so forth. Cited by our Superior Court and our other courts, and I don't want to bore you with the legal citations. There are many of them in this paper and I certainly did not even try to include all of them.

The requirement of public civil trials, though not enumerated, is as old as the constitution itself. The courts have supervisory power over civil proceedings and exercise that jurisdiction when they feel they must. Unfortunately, however, this has all been watered down by opinions stating that private documents collected during discovery, during discovery, are not judicial records.

And this is one of the main concerns in DES victims and others, that information produced during this lengthy procedure whereby people's statements are taken under oath, where they're confronted with documents and sometimes make very important admissions, that public agencies and the public themselves ought to know about, the courts have said those kind of records are not necessarily

public. They have said that in discovery, at least as it stands today, is essentially a private process. Pretrial depositions and interrogatories are not public components of a civil trial, the courts have said.

The courts have said that the sealing of pleadings, that would be allegations and responses to allegations, may be warranted only when an important government interest is at stake and there is no less restrictive way to serve that government interest.

It is said that the sealing of the record may be warranted when a party can show good cause. The United States Court of Appeals for the Third Circuit which, of course, is the circuit which supervises Pennsylvania with respect to diversity cases and with respect to cases arising under federal laws and the federal constitution, have also dealt with this on a few occasions, and they've indicated that there is a presumption of openness and a presumption against limiting public access. There must be shown foreclosure that under First Amendment analysis, the denial serves an important governmental interest and there is no less restrictive way to serve that government interest.

Second, the party who attempts to establish the common law presumption in favor of access, must show that the interested secrecy outweighs the presumption.

Now, this balancing test is very nice but

unfortunately, most cases don't get to the opinion stage or or do not get to the appellate stage because of the fact that the litigants and their attorneys feel forced to sign these documents as the price of litigating the cases without a lot of hassles, and as the price of settling cases, which as I said earlier, many of the victims feel forced to do because of their emotional condition after they have suffered as a victim.

I believe that House Bill 724 and 725 very carefully delineate the limits of public access. And again, in looking at the various cases that we point out here, the law, the courts have decried the fact that there is not what they call a bright line test and, in fact, they have invited the legislature, and one of the cases I mention that does this is the famous Katz vs. Katz case. They've invited the legislature to make this area more clear for them.

The proposed legislation does not weaken protection in criminal areas, where you have minors, in divorce proceedings where you may have really no public interest at all. The legislation is reasonably tailored, I believe, to serve the public interest.

I want to just take a moment to talk about some specific cases, and I know you have some victims here. But I think it's important for you to realize the extent to which these secrecy orders serve as a way and serve as

really an expense, if I can put it that way, to the public and to the taxpayer.

For example, the three-wheeler litigation, Honda spent years and many, many millions of dollars trying to keep the inventor of the three-wheeler from ever being deposed to this country. He's a Japanese gentleman. And until one case, a case which I'm proud to say our office handled, until that case, they were successful. When he was deposed, it turned out that he was fully aware of the unusual hazards of instability of a three-wheeled vehicle as opposed to a four-wheeled vehicle. Of course, Honda attempted to keep that secret. They attempted to keep the settlement confidential and they wanted returns of records.

Think how many other people may have suffered and think of the delay in the prohibition of three-wheelers which occurred because of the fact that Honda was able to keep that testimony from not only the public, but from government officials that have the authority and should have the jurisdiction to regulate this type of conduct.

It happened with regard to the multi-district split rim litigation. You may recall that at one time, trucks had multi-piece rims which have now been banned. It took years and years of repeat litigation over and over and over, the same case, the same type of cases, to get those banned, when, in fact, it may have been able to have them

banned the first year if that information could have been shared with the public and with the government agencies. It was true with DES, it was true with much toxic tort litigation. It was true with the GM brake lock cases. It was true with asbestos litigation. Certainly true with Dalkon Shield and DES.

I want to address some of the arguments briefly and I'm, very briefly, that you'll hear the opponents make to these, because I think it's really important to understand the tip of the iceburg that we hear as litigators and I think the public may hear as to why it's necessary to have all this sealing of records and sealing of documents and return of documents.

First, I think you need to know that even cases without merit are subject to secrecy. It's not just those cases where there's some concern. It's across the board. And those cases should be open, should be subject to openness, too, because the truth is, that lawyers on a contingent fee and their clients do not want to litigate cases that they're going to get nothing out of or that have no merit.

And just like in the cases with merit, the cases without merit, if that information was open to the public, if it was open to government officials and authorities, open, of course, to the attorneys who litigate them, it

would discourage non-meritorious suits from being brought where it takes some time to find out whether they were meritorious or not.

And what does it take to find out this incremental occurrence of case after case after case? A building up of a body of knowledge which is otherwise there perhaps from the first case.

Of course, as to a significant and meritorious case, openness would encourage settlements, because obviously the defendants don't want to go through this process and have their dirty linen washed in public when they know that they're going to be held responsible. They would much rather litigate this case by case by case. The cost benefit ratio for the wrongdoer, now, we're talking about the cause where there is merit, is such that it pays to litigate, it pays for them to litigate these cases so long as the information developed during litigation is not shared with anyone else. And if you subpoena records, you will find that generally to be the case.

Openness would encourage sharing of information with government officials and would save government and government investigators tremendous amounts of money. The Consumer Products Safety Commission, for example, spends a tremendous amount of money gathering information which largely has already been gathered. That's true of state

agencies as well, which spend a lot of time gathering information that's already subject to having been obtained through the litigation process that already exists.

Sharing information would, I believe, would decrease insurance rates because it would get rid of the bad actors, particularly in the medical malpractice cases, where as I say, it's typically the same doctor over and over and over again who is the problem. And again, I can give you many personal annecdotes about this. But the information, the public information about the small number of physicians that are problems are out there, and you have that information, it's been developed in this chamber. And if that information could be shared either with the public or with the government agencies that supervise these people, you would see them out of the practice and you would see those rates affected in a positive downward manner.

I believe, incidentally, that public hazards, which is in 724, and I don't mean this facetiously at all, should include persons. I mentioned that to somebody a little bit earlier in one of the victims groups. It includes products. It does not include persons. And I believe that the reason why products are dangerous is because of conduct by persons, such as Mr. Robbins, such as the one ophthalmologist in this state who was responsible for 25 percent of the pay-outs from the CAT fund.

I also believe that secrecy runs counter to the entire American system and to American values. The litigation process is supposed to be an open process, and that which is secret smacks of the star chamber system outlawed a long time ago in great Britain. I think it's time to confront these issues and to open them up to public view. Thank you.

CHAIRMAN CALTAGIRONE: Thank you.

Representative Carn?

REPRESENTATIVE CARN: Thank you, Mr. Chairman.

I would like to pursue the point that you made about the overuse of the secrecy agreements. How do you come up with that perception?

MR. RIEDERS: I come up with it from several areas. Number one, I come up with it as a trial lawyer myself.

Number two, I come up with it as a member of a committee of the American Trial Lawyers Association which has been constituted to study secrecy agreements.

Number three, I've come up with it, having been a law clerk to a federal judge myself.

Number four, I come up with it in spending a lot of time through the Bar Association being liaison with judges, and what judges will complain to you about, if you talk to them, is that they're constantly confronted with

secrecy orders, confidentiality agreements, both during litigation and at the end. They know the standards themselves. They know the presumption against secrecy, but where both sides agree and there's no third party to impose any kind of moral or ethical sense, it typically occurs because it's the path of least resistance.

REPRESENTATIVE CARN: So you're saying the judges, although they have the power to deny these secrecy orders, acquiesce?

MR. RIEDERS: Generally they acquiesce. It's the path of least resistance, and especially which is usually the case, where both sides will agree to it. And I think we need to emphasize -- unfortunately, and I'm not being critical of the lawyers who feel they have to agree with it because *normally* they're doing it because they're acting at the client's instructions -- but unfortunately, we frequently get a situation where both lawyers are forced to agree.

REPRESENTATIVE CARN: Has there been a numerical increase in the secrecy orders over a period of time that you can show?

MR. RIEDERS: I don't have those statistics with me but I think if you will check West Law, the West Law data base as well as the data base of the American Trial Lawyers Association, you will see a vast increase in the use of

confidentiality orders. In terms of numbers, I would estimate to you it's 2 to 300 percent in the last 15 years. But again, the data bases can be consulted and I would be happy to take a look at that specifically.

REPRESENTATIVE CARN: Thank you, Mr. Chairman.

CHAIRMAN CALTAGIRONE: Chairman Piccola?

REPRESENTATIVE PICCOLA: Thank you, Mr. Chairman.

Mr. Rieders, I would like to make a statement and ask you some questions. I find very disturbing just the general tenor, and I'm speaking as an attorney, the tenor of your comments, and I believe somewhere, and I can't locate it in your written statement but you used the words that you function in some of these cases as a private attorney general. I would recommend that you check out the code of conduct, because an attorney's responsibility, the way I read it, is to his client and no one else, when it comes to these kinds of cases.

Now, I'm confused as to why you think, having the opportunity for confidentiality being imposed, and I might point out, confidentiality is being imposed before the litigation is in the courts, obviously the pleadings are public. As soon as the pleadings are filed, they're public. Everything that happens or generally, most everything that happens unless there's a motion or

preliminary objection, discovery and so forth, happens outside of the courtroom. It doesn't take place in a public forum. So it is not public.

But I'm curious, it doesn't make any sense to me why you think that having the opportunity to have these cases settled and sealed privately is a detriment to settlement, particularly if you're indicating that the interests of the defendants is to, number one, not have them aired in public, and number two, I believe you said somewhere along the line that they would prefer to try these things on a case-by-case basis for economic purposes, although I question that as well.

I would think having the opportunity to have these records sealed and confidentiality imposed in some of these limited cases would be a boon to settlement. And I've had a couple judges over the years tell me that if lawyers don't settle cases, they're not doing their job, and I think it's in the best interests of the litigants in most cases that they be settled, and if confidentiality is a condition for that, with the approval of the court, I don't know why that is such a terrible thing.

MR. RIEDERS: I'm glad you asked those questions and I, as a matter of fact, I'm here to answer the hard questions. So I will try to answer you directly and I hope that you will ask me any other questions that you might

have.

First of all, I totally disagree with you as to what the code of professional responsibility says. I think that I'm somewhat of a student of the code and I have been involved in litigation on behalf of lawyers and judges where the issue has been raised. I think to some degree, every single lawyer has an obligation to act on behalf of the public interest. And I think one of the quite correct criticisms of the legal profession today is that we do not at all times as we should, take account of the public interest.

One of the interests that the public has is also the governmental interest. That is making sure that government operates with information, efficiently and expeditiously. When we represent private clients, either in class, especially in class action cases but not only class action cases, we are in every single case to some degree vindicating public interest. And the reason for that is to the extent that a meritorious suit is brought and the extent that an individual benefits, the concept is that the whole body positively benefits.

We look at these cases for the effect on industry, and I've handled enough civil rights cases, as an example of a class of cases, to tell you that those cases have a tremendous benefit to the public interest when they

are meritorious cases, as many of them are.

So that I think an attorney should realize that he's operating for the public interest, at least indirectly, if not directly, and that's where the private attorney general theory comes from. And I --

REPRESENTATIVE PICCOLA: Can I interrupt you just a moment on that point?

MR. RIEDERS: Certainly you may, any time. Certainly.

REPRESENTATIVE PICCOLA: If I'm an attorney, and put civil rights aside because that's based on some statutory, but let's just talk about a civil negligence case, let's talk about an automobile accident case. Am I supposed to have in the back of my mind in terms of making recommendations to my client whether or not we should settle or not, whether this action or this case should go to a public trial because there's some public benefit to know that the driver of that automobile should be pilloried before the public because he's a bad driver? I mean, am I supposed to have that in the back of my mind? Or am I supposed to make a recommendation to my client based upon the amount of the proposed settlement and the prospects for winning or losing the case in the courtroom?

If you're suggesting to me that I'm supposed to consider whether or not Mr. Jones, the defendant, should be

held up to public scrutiny for being a lousy driver, as part of the considerations that I discuss with my client, I don't agree with you on that. Now, maybe you would like to respond.

MR. RIEDERS: Sure. Public interest is not an appropriate consideration. Regardless of who the defendant is, public interest is a continuum. Some matters that are litigated have very minimal public interest. Some have a very great public interest. I think that the lawyer may not spend a lot of time thinking about the public interest in the settlement of a negligence case, of an automobile accident case. However, typically insurance carriers do not ask for secrecy, interestingly enough. This is a case that may have very little public interest, and therefore, those are probably the one class of cases where releases do not typically contain confidentiality agreements. So I think that actually supports the need for this legislation only when something is more important to the public interest, and you get further down on that continuum, and you get into something that's more important in the public interest, do defendants want it kept secret. That's the very reason why you have to question whether the secrecy is antithetical to the public interest.

REPRESENTATIVE PICCOLA: How am I, the practitioner in the law, the private practitioner in the

law, to know where I am on that continuum? I'm not going to disagree with you that the body of case law that develops that we see on our library shelves is not in the public interest. I agree with that 100 percent. What I disagree with is that the lawyer, in making his decisions on a case-by-case basis, is trying to decide what should or should not be on that book shelf in terms of a written opinion. His responsibility is to his client and no one else in terms of making that decision. If that decision results in a public trial that results in an opinion that goes on the shelf, yes, it's part of that continuum. But I don't think where he wants to place himself in that continuum should be part of his considerations as he makes decisions in that case.

MR. RIEDERS: Well, again, I don't mean to be disrespectful, but when we take our oath to become attorneys, we do not take an oath to individual clients. We take an oath to the system, to the legal system and to the public. The public includes obviously private individuals. When you represent a private individual in a case that has a public interest, as many cases do, especially where you're involved in rock products and civil rights cases which, incidentally, I disagree with you. You cannot put aside, those are the, that's the very evil you seek to prevent. I think every legitimate practitioner knows in those cases

that the sharing of information with government agencies and other attorneys, which is really all you're talking about, interest sharing, not pillorying in the public. I don't see that in the bill. I see in the bill a sharing with other attorneys and government agencies is crucial to vindicating not only the win or the favorable settlement that that individual client has obtained, Okay? But also to vindicating the public interest.

I would like to give you an example of a case that I handled where I represented teacher aides who were paid half the salary of male shop assistants although, in essence, they did the same thing, and that was assisting teachers. That was a case which, because of its public nature, had a crucial effect on the change in the way women teacher aides were paid in the Commonwealth of Pennsylvania. It would have been a tragic violation of the public interest to keep that secret, and what's important is that part of the reason why these women were willing to bring this case is basically they wanted positively to affect the public interest, and in fact, many people.

REPRESENTATIVE PICCOLA: The client wanted to do it from that?

MR. RIEDERS: That's right.

REPRESENTATIVE PICCOLA: Then the client might have --

MR. RIEDERS: I'm sorry to interrupt you, but many clients want to do it but feel they have no choice. Client after client in cases, in significant cases, and I could give you many dozens of examples, want information to be shared with other lawyers or with the public agencies, at least. They will say to you, yes, I would just as soon it be out of the newspapers, but boy, would I like other people not to have to suffer the way I did. You hear that all the time in significant cases. And yet, they get these releases and they must sign them. Defense lawyers run in to the judges and get orders ex parte sealing records and there's virtually nothing you can do.

And if you're a lawyer who goes into the judges, as I sometimes do, and say, gee, you know, I don't think it's really right to have sealed that record, especially without my having input, because one of the reasons why my client brought this cause was because their 15-year-old girl was killed in a car accident because of a defective GM brake system and they want other people to know about it. They want me to send this information to the Consumer Products Safety Commission, and to state agencies, and the judge says, I think it helps settle the case so we're going to seal it.

Now, that gets me to my next point, which was your point. Does it help to settle cases to keep things

secret? You hear that all the time. My own personal experience is that it is not true, that actually what it does is quite the opposite. Because if a judge can keep the facts of each case sealed, secret, it's easier for them to say to the plaintiff, prove your case. In other words, go through the discovery process, go through the litigation, maybe we'll settle out at the courthouse steps, but show us your stuff, redevelop all the information.

So perhaps it doesn't affect settlement so much as secrecy encourages litigation because defendants know that plaintiffs cannot and do not want to spend hundreds of thousands of dollars to prove the same thing in a similar case. So perhaps what it does, I have to concur with you, it may not affect settlement that much in every single case, but what it does do, what secrecy does do, it promotes litigation. It promotes use of the court's time and expenses.

Keeping things open in meritorious cases would encourage early settlement and as you know, undoubtedly because you're an attorney, all of the stress today in the legal system is getting rid of, resolving early on cases of merit. The whole rule of the federal system has been changed. The rules within the federal court system, rule 16, et cetera, have all been altered to try to get people to have early settlements. It will never work. I participated

in seminars with the federal judges in this district and they will tell you it will not work unless there is open discovery, and there will not be open discovery so long as there is secrecy of important matters of public interest. You can't have open discovery early on.

And the best example of that is if you can get the information of meritorious cases into the data bases, the government and the private data bases, it's easy when you sit down and talk settlement early on as federal rules now demand and as state rules are increasingly demanding. You can really talk about it. Does this case have merit or is frivolous, is that one of those we want to discourage or is it one of the ones where a defendant should come up with the money early on, compensate his victim and let them go on with their lives? You can't do that without information in the public domain. And that's not pillorying, that's information sharing to allow that public interest to be served. Incidentally, to the interests served when a client has a case handled by an attorney. I think there's a coalescence of those two aspects.

REPRESENTATIVE PICCOLA: This is a fascinating discussion. Two points. First of all, the prosecution of discovery, interrogatories, documents, depositions, what have you, the prospect that they will be in the public domain, would in my view, if a defendant is inclined not to

want those to be in the public domain, do you not think, given our free-ranging rules of discovery in Pennsylvania, maybe, that you can go on all kinds of fishing expeditions pretty freely under our discovery rules, don't you think that there would be a lot of resistance to discovery, that people would be going back to the court frequently asking for sanctions because somebody doesn't want to comply with discovery because what they're requesting isn't relevant? I mean, I can see all kinds of problems if a litigant doesn't have at least the prospect of confidentiality sometime down the road, that the whole discovery process could be weighted down.

MR. RIEDERS: I think you're getting into things not covered by the bill. For example, the bill does not deal with proprietary information such as pricing information, and that's typically where defendants get excited, and rightfully so. And I've represented defendants where we have felt that way. So the bill doesn't deal with that, doesn't prohibit receiving that type of protection.

I'm not quite sure I understand what you're saying. If your concern is that a defendant will become uncooperative because of their fear of public hazard being exposed, then I say so be it. I think that the judges have ways of dealing with defendants who would become uncooperative in that manner.

As far as fishing expeditions, again, we're getting a little bit off on a tangent. We're not really dealing with that in the discovery process, but both the federal and state rules have ample protections, it seems to me, to prevent fishing expeditions. And I think the average competent practitioner in this Commonwealth doesn't want to waste a lot of time with fishing expeditions. It's expensive, it doesn't lead anywhere, they have to deal with legitimate confidentiality issues, and they have to deal with the sanctions of judges who are unprepared to put up with that kind of nonsense today. So I really think what you're talking about, while it may be an issue in the legal domain, really isn't related to what these bills are attempting to address.

REPRESENTATIVE PICCOLA: You may be right, I just, it just occurred to me.

And one other point, getting back to the client. You indicated that in some of these cases, and I have to confess, I've never represented a client in that context, but one of their motivations you indicated to us is that they want the world to know what happened to them and they want to prevent others, prevent it from happening to others.

If that is a prime motivating factor in their consideration, proceed to trial.

MR. RIEDERS: That's what sometimes happens. And that is a problem because wouldn't it be great and wouldn't it save a lot of time and money if you got the best of both worlds. That is, settled cases, make sure the information goes where it should go, legitimately as these bills cover and settle the case. Think of the time and the expense and the money and the court time, not to mention the emotional time that you would save. Going to trial is traumatic for most people.

You know, we have a funny idea in this country that everybody sues and likes to sue and has a great time with it. I think that most lawyers will tell you and most clients will tell you that it's not an enjoyable experience. And really, very few people want to do it and have a good time doing it. Most of them find it emotionally devastating. Most people would like to settle cases, which is why in this country 88 percent of cases do settle. And would like that interest, that public interest vindicated to the extent that there is a public interest. Nobody ever says to me in an auto case, I want to make sure that the Center for Auto Safety in Washington D.C. gets a report of this case. Those are not the people -- I've never had it happen in 20 years -- those are not the people concerned about the public interest being vindicated. It's usually the people who have a reason to feel that there is something

being kept secret that shouldn't be. So you could have the best of both worlds. You could have a limited disclosure that these bills would permit, and at the same time you have settlements.

REPRESENTATIVE PICCOLA: You may not, though. Conversely, if the defendant knows that whatever he's trying to keep secret is going to be, is not going to be, cannot be kept secret, what motivates him to offer any kind of a settlement? Maybe he'll say go to trial and then --

MR. RIEDERS: Why should he want to go to trial if he's going to have -- it's a meritorious case and he's going to have all this stuff exposed even more broadly, not now just to the other lawyers and government agencies but now to the whole world? So, and as far as the unmeritorious cases, the defendant may say that. And all you need is one or two of those tried and that's going to be the end of those cases being brought. So either way, the public and the taxpayer is the winner.

REPRESENTATIVE PICCOLA: Well, you make a very interesting argument. I have some real reservations about the bills, but it was interesting. Thank you, Mr. Rieders.

MR. RIEDERS: I would be happy to give you any other information I can. Thank you.

CHAIRMAN CALTAGIRONE: Representative Ritter? There's some additional questions.

REPRESENTATIVE RITTER: As a non-lawyer, I found the discussion interesting between the two of you, but frankly, and while I think I agree with Jeff, more in terms of the responsibility of the attorney being, his responsibility is primarily to his or her client, I don't really care about that at this point. I don't see that that's a problem for the legal system. But I think it's something that we can deal with in the legislature, that our responsibility is to look at the public good. And maybe that individual attorney, if he or she is focusing entirely on the client, and maybe that is their primary responsibility, why should that attorney have to choose between the client's interests and that of the public? Our responsibility is to make sure that the public interest is addressed.

And so that's why I think this legislation is appropriate, because it will take away from the attorney that conflict where it occurs in those cases. It will take away from the client the conflict between their own family's interests in receiving some financial reimbursement for what they've suffered, and the guilt that they might feel because it will be kept from other people who might suffer also.

So I think this is an appropriate thing for us to do to protect the public good in this case, and so that we can improve that aspect of the judicial system without

changing the attorney's primary focus. And so I think it's important to maintain the confidentiality in most of these cases for most of this information, but where this public hazard exists, and if the language needs to be tightened to guarantee that, that may be. But I think if we can focus on what is a public hazard and what may cause injuries to other folks, that's where we, as the General Assembly, I think it's appropriate for us to step in and say, all right, we're going to, we, this information is important to us, and we want it to be released to the appropriate authorities.

So I think this is a great bill and I don't think it conflicts, I don't think that, you know, Jeff's view of the attorney's responsibility or your view of the attorney's responsibility, I don't know that that's necessarily of any consequence to us in this legislation, because both of you can continue to pursue your own viewpoints if this bill were in place, and the public would still be protected.

MR. RIEDERS: I agree with you completely. I think that the, I don't, didn't mean to and I don't think I said that the lawyer does not have a primary obligation to his client. But as you really quite well point out, there is always inherent conflict which perhaps does involve the rules of ethics when a lawyer is put in a position of being asked to keep something secret that his client, may be

inconsistent with the reason why his client brought the case. So that's the real conflict for the lawyer. And I think you're quite right, that the legislature has the right to say that we want to benefit from the work in those significant cases and we want the public to benefit.

REPRESENTATIVE RITTER: Thanks.

CHAIRMAN CALTAGIRONE: Are there any other questions?

REPRESENTATIVE JAMES: Thank you, Mr. Chairman.

I also being a non-lawyer, found the conversation interesting and even what Representative Piccola said was fascinating. My concern is that these litigations that are put in secrecy, I'm more concerned that other attorneys be able to use this information, and I may be, can go along with the fact that they should be confidential and they should be secret, whatever, but then I'm also concerned, as you described, that other attorneys who have the same kind of case with somebody else would have to start from scratch.

I was just wondering if this legislation would make it so that maybe that kind of information can be put into some kind of computer system, even if they all agree that it should be confidential with other attorneys, anyway, can be able to find the same information, thereby being able to help people.

MR. RIEDERS: I think that's one of the most important goals. The beauty of America is the capitalist system, and that is, that to some extent we each operate with different interests in mind. Obviously, the lawyer is working hard for his client and perhaps for the public interest, certainly incidentally for the public interest. As I said earlier, I think it's part of his oath. But when that information is all developed, I think the legislature has a right to step in and say, now you can share this with other people. Just like every major corporation in America does. They have data bases and data banks with respect to people who sue and how much they sue for and what their claims were and who their experts were and they're prepared to defend, whether it's meritorious or frivolous, they're prepared to do the job that they have every right to do under the American system.

But what these agreements do is they bar the victim, the ordinary citizen whose contingent fee lawyer is the key to the courthouse, from doing the same thing. It's an unfair playing field. We don't have those resources. We can't buy a super computer for 10 million dollars. So we have to rely on networks of people who deal with or become involved in the same kind of cases.

For example, right now the breast implant cases are major problems, and other gel implants, which can even,

for example, go in the face. Jaw implants, we're finding serious defects with many of these products. These are cases that are developing today where manufacturers knew or had every reason to know of the public hazard. Many of these products are off the market and yet it's very, very difficult for the attorneys representing the victims to garner and to gather the information they need without going through a whole full complete trial.

And this information ought to be in the data bases and the data banks. We have such data banks and data bases, but unfortunately the information doesn't get in there to the extent that it should as a result of the ability to keep these kind of things secret and confidential. And as we open up that process, I think you're going to see a much more expeditious handling of legitimate cases and the getting rid much faster of the frivolous ones, because we would know they were frivolous.

I mean, many times, just to give you a personal example, when I write to a data base or consult a data bank, I want to know is there anything legit here. I have somebody with an injury. Is this something that somebody has worked on before? If it's not, I don't want to deal with it. But I do want to be able to tell my client I've looked into it, and such and such lawyer in Pittsburgh has looked into it and, in fact, lost his case because it turned

out that there was no defect in this product or no problem with this physician or whatever the case may be. Or no violation of the civil rights laws by that particular defendant.

So it becomes important to share this information so that we can do our job, which is the job of narrowing the cases, getting rid of the bad ones and pursuing the legitimate ones.

REPRESENTATIVE JAMES: Thank you, Mr. Chairman.

CHAIRMAN CALTAGIRONE: Representative Masland?

REPRESENTATIVE MASLAND: Thank you, Mr. Chairman.

As I was listening to your discussion, I was paying more attention to House Bill 724 and particularly the penalty section. Most of my courtroom experience was as a prosecutor so I'm looking at this from a practical point of view as to who exactly is going to be prosecuted for a violation of this section.

I can see a scenario where a judge may order something sealed, not believing it is public hazard. Now, under Section D, anybody has standing to contest that order saying that it violates it. And ultimately, it may be determined that that order violated. So under those situations and that scenario, has the judge committed a misdemeanor? Have both attorneys committed misdemeanors?

Have the clients for both attorneys committed misdemeanors? Because they've been parcel of this concealment? I have some concerns with practically how this is going to be enforced.

MR. RIEDERS: I really don't think that's what C was intended to address. First of all, judges have immunity in Pennsylvania, so a judge for making a decision within his, certainly within his jurisdiction is not going to have to worry about this at all.

REPRESENTATIVE MASLAND: What if it was intentionally or reckless? The way it's worded there, in my opinion, is not clear as to exactly who is going to be prosecuted.

MR. RIEDERS: I would have no problem with a definition of person and you'll find, of course, in many statutes such a definition. I think we can easily borrow it from other statutes.

I don't see a problem with it as written because of the standard that the act be intentional knowing or reckless, and "conceal" in the ordinary sense and certainly as it's legally understood today, would not be a lawyer who requests an action from a court or the court which conducts that, which makes a decision on that action. But I think it would be very easy to write an exception in here to provide that it would not apply to requests for confidentiality or

decisions by a judge with respect thereto so long as these requests are to a tribunal with jurisdiction.

REPRESENTATIVE MASLAND: I think there needs to be some clarification there.

MR. RIEDERS: I can see handling that in one or two sentences very easily.

REPRESENTATIVE MASLAND: Thank you.

CHAIRMAN CALTAGIRONE: Any other questions? Representative Wogan?

REPRESENTATIVE WOGAN: Thank you, Mr. Chairman.

Mr. Rieders, this question only bears peripherally on your direct testimony, but maybe you can help me out here. In Philadelphia County, we have cases consolidated, say, in the asbestos area, where one judge handles all the asbestos cases and that principally involves his overseeing the settlements, which I guess is somewhat analogous to what we've had with the Dalkon Shield, which correct me if I'm wrong, was handled out of Richmond, Virginia, I think, federal court.

MR. RIEDERS: Correct.

REPRESENTATIVE WOGAN: Are you aware, are there anywhere else in Pennsylvania where cases, related cases, whether they be asbestos or any cases in the negligence field, have been consolidated either in federal court, which I would doubt, or maybe in some of the Common Pleas courts

around the state, other than the case of the asbestos cases in Philadelphia?

MR. RIEDERS: I can't think of any specifically, but I do want to briefly comment on that. The courts normally do not like to consolidate tort cases because of the difference in damages. It's unusual that that happens. When it does happen, there is sometimes, although not always, a greater sharing of information. But unfortunately, there is resistance by virtue of court decision interpreting the rules, there's some resistance to consolidating like tort cases. Now, there have been some unusual examples of that happening but it's more the exception than the rule unfortunately.

REPRESENTATIVE WOGAN: I'm just guessing also that there may be, say, large accidents involving large numbers of people that may be consolidated, although I can't think of any at the moment.

MR. RIEDERS: Rarely. Again, they normally get resistance to that as somehow being violative of the spirit of the rules because there could conceivably be different measure of damages. Sometimes it's happened in aircraft crash litigation where the liability phase will be consolidated and then there will be separate trials, for example, on damages which has happened in some of the cases you're talking about as well.

So consolidation can be an aid, but you have the same problems there, where the defendant will attempt to force upon the plaintiff confidentiality orders, secrecy in settlements. And as a matter of fact, I just ran into a recent situation with a Vytek litigation out in Texas, which involves jaw implants, and the settlement of those cases again was seeing secrecy agreements, even though they're supposedly consolidated. Yet it would be a great aid for the judge and for others to know how these cases are being settled. I think it would result in other settlements. So there are some situations where even when there is consolidation, you have some of the same problems with secrecy and confidentiality.

REPRESENTATIVE WOGAN: Thank you, Mr. Rieders.

CHAIRMAN CALTAGIRONE: Any other additional questions?

Thank you very much, we appreciate your testimony.

MR. RIEDERS: Thank you for giving me the opportunity.

CHAIRMAN CALTAGIRONE: Before we get to Gene, I would like to call again on Dr. Hicks who has some further comments that she would like to make.

MS. HICKS: I understand after the discussion a lot better about the content of this bill. I'm sorry I

didn't put on these particular remarks, but I feel it's very important to underscore a couple of points that he is trying to make in the case of the Dalkon Shield, for example.

All of those claims now are lumped in the, and are treated or reviewed by the Dalkon Shield claimants' trust. The U.S. Bankruptcy court in that district has ultimate jurisdiction over them. But all records are sealed.

We have been encouraged not to hire lawyers to pursue our claims. We don't have lawsuits now. We have claims against the trust; the Dalkon Shield trust now stands in Robbins' place. But the court records are sealed. So how can women possibly prepare their cases to know how they can get the best possible compensation without access to those records?

Now, this is on top of all that private litigation that went on for years ahead of this time, and we are still now more than 20 years into a process where we do not have access to records in something as massive and bureaucratic and standardized. All of the injuries are known, the categories, the paths that you can take to get all the choices you have to make. It's all completely standardized and in this case, product defect has been conceded. They concede product defect. So you're simply trying to prepare your individual claim for compensation,

not even a lawsuit, and you do, we do not have the right of access to that information.

The trust itself has a 20-year life span so that all tens of thousands of us who have opted for the highest levels of settlement are winding slowly exactly through, if we have a lawyer, exactly as he said, each one has to prepare an individual case in something that's become entirely standardized. What is the need for that? And if it's encouragement for you at all, if there was some access to this kind of information, you would also reduce lawyer's fees because it wouldn't be necessary, as necessary for people to have to file with individual lawyers. It's a very dramatic example of exactly why this kind of law is needed.

CHAIRMAN CALTAGIRONE: Thank you, Dr. Hicks.

We'll next hear testimony from Mary Jean Greco Golomb and Sherry Santivasi. Did I pronounce that right?

MS. GOLUMB: I'm Mary Jean Greco Golumb. I'm from Columbia County. I'm DES action state chairwoman. I would like to thank you today for bringing up this topic. This is a topic that's very near and dear to my heart as products liability secrecy laws. I've been fighting on a federal level as well as on a state level to try and open up the system. I have also included a packet of some research information that I have done personally that I have been going through papers, sifting and researching on my own so

that I could be knowledgeable, more knowledgeable to come in front of the Judiciary Committee. So you can review the packets that I have enclosed.

In December of 1954, an obstetrician, in an effort to help a patient who he felt was in danger of miscarrying her second child, prescribed a drug called diethylstilbestrol, which he believed would help his patient carry her child to term. The pregnancy continued without incident and in July of 1955, the child was born, and I was the child.

Today, I am still paying for that drug my mother took more than 38 years ago. And according to most informed medical studies, I will continue to pay till I die. Children of DES mothers, both male and female, suffer from infertility, genital and reproductive malformations, high-risk pregnancies, ectopic pregnancies, and increased incidence of clear-cell carcinoma, undescended testicles, and an increased chance of testicular cancer.

There was written medical evidence as early as 1953 that DES did nothing to lower the incidence of miscarriage. Even with this study, done by a prominent physician associated with the University of Chicago, the drug continued to be widely prescribed until 1971, when an article in the New England Journal of Medicine revealed that seven daughters of mothers who had taken DES during their

pregnancy developed a rare clear-cell vaginal cancer.

More than 300 drug companies manufactured DES under more than 200 brand names. DES was widely prescribed and could be found in vitamin supplements, vaginal suppositories, creams and injections.

In the State of Pennsylvania alone, nearly a half-million mothers, daughters and sons have been exposed to this drug. Insufficient information exists to prove carryover to the third generation grandchildren of DES mother's.

House Bill 724 which addresses the Pennsylvania Consolidated Statutes prohibiting the concealment of public hazards, and House Bill 725, judiciary and judicial procedures of Pennsylvania Consolidated Statutes, providing for protective court orders, will help the DES-exposed in Pennsylvania gain additional insight into long-term effects of this drug.

I spoke with two DES daughters who have recently won lawsuits against drug companies who sold DES. In both cases, a protective order was filed and neither daughter can speak about any aspects of this case. Not on the dollar amount of their settlement, not on any of their side effects which led them to their settlement, which led them to bring the case about, not even the name of the drug company who they sued and eventually won their settlement.

The drug companies have been using this legal blackmail, that's what it is, legal blackmail, for many years to settle with claimants and at the same time, prevent the rest of the general public from finding out the true picture which every DES-exposed mother and child deserve.

Because literally all settlement data has been sealed, many people who suffer the side effects of DES may not even realize the underlying causes of their medical problems. By sealing medical and scientific records, access to important technical information has prevented the members of the scientific community from initiating research projects or publishing the results. The end result is that drug companies win and the many DES mothers and children continue to suffer.

Another related and very important topic is Senate Bill 563, products liability, Section 2, Title 42, as amended to read: Limitations of protective orders and products liability actions. This section would limit the court's ability to issue protective orders unless the court could show good cause. The court must not only consider the confidentiality of the person seeking the order, but also address the public interest in product safety information. And if the court would issue a protective order, it could release information concerning a hazardous product to an appropriate government agency for action or public

dissemination of information as the agency might see fit. DES Action Pennsylvania and DES Action U.S.A. both strongly support this limit on protective orders.

In a unique application of the law, many DES children have no legal recourse to manufacturers of this drug because of the Pennsylvania statute of limitations. According to current law, a victim has two years from the date of discovery to file a legal action. Many of the female DES-exposed initially find out their symptoms during their first routine gynecological exam at age 16 or 17, and they may not realize the reproductive problems for many years. The courts, however, consider the date of discovery as the first exam, a time at which there may be no outwardly apparent complications from the drugs. Side effects from DES may not become apparent for more than ten or more years after the realization of exposure.

It would be the job of the Pennsylvania House to consider readdressing the topic of statute of limitations in cases where there is a substantial lag time between initial realization of exposure and appearance of classic symptoms or complications.

I would like to thank you for hearing the concerns of nearly a half a million DES-exposed in the state. Our medical problems seem minor compared to the legal roadblocks we run into on a day-to-day basis. We need

the public to become more aware of the DES problems which has not been addressed by the Pennsylvania state organization since the problem first came to light more than 50 years ago. We as a group would appreciate and encourage a bill which would address private and public awareness of DES and its dangers and help enlighten your constituents who may themselves be exposed to DES and not be aware.

Thank you for your time and consideration.

CHAIRMAN CALTAGIRONE: Thank you.

Sherree?

MS. SANTIVASI: Mr. Caltagirone, the first thing I just wanted to say before I read my letter, the only reason I met Jean was I had some problems, gynecological problems and I didn't know where to turn. And somebody suggested I call the DES network and just to have somebody to say, did this happen to you and to find some doctor. So we've been networking and that's how I met her, through networking, and luckily. I'll read my letter.

Dear Mr. Caltagirone, and everyone else, the reason I'm writing this letter to you is because I have some health care concerns that I wish to make you aware of. The State of Pennsylvania has not dealt with the issue of DES and we really need your support for state funding. I would like to tell you my personal story and struggle with DES exposure.

In 1988, I became pregnant. It was a very exciting timing for my husband and I. When I went to the doctor for my prenatal visit, he discovered that I was DES exposed. I was confused, because I always went to the doctor and was very aware of my health. I later learned that no one contacted my mother and let her know that she took this drug during her pregnancy with me. Also, when this issue became public, she called her doctor and he assured her that she did not take this drug. The medical society only worried about protecting themselves, not the welfare of the people affected.

Well, my doctor said he would watch and see what happened during the pregnancy. Everything seemed fine until 22 weeks of pregnancy when I started to experience premature labor. This was very scary for a 24-year-old girl. I was put on strict bed rest at home. The condition became worse. I was hospitalized and put on medication to prevent premature labor. The labor continued for about two months in the hospital. I would go down to labor and delivery and they would try to stop the labor. After an eight-week hospitalization, my doctor felt I was stable enough to go home. My husband had to empty my commode and I could only shower twice a week. I was very depressed and humiliated.

Well, I went into labor at home at 32 weeks pregnant. A normal pregnancy is 40 weeks, and my child was

born two months early. He was put on a heart monitor and in the intensive care nursery. I went to visit him every day and tried to nurse him but he would regurgitate his feeding. But I never gave up. Once while I was nursing him, he stopped breathing. I am a registered nurse but the terror of watching my child stop breathing put me into a panic. These episodes of apnea continued, so they put my child on a drug to help him breathe.

He was sent home two weeks later on an apnea monitor and the medication. It was scary and overwhelming for my husband and I. Eventually he came off his monitor and began to develop normally, and he's a wonderful four-year-old. He's a real fighter and I plan to tell him all about our ordeal when he is older. Not a day goes by that I don't check on him when he is sleeping to see if he is breathing.

Since the pregnancy, I've had two abnormal pap smears. I have to have yearly colposcopies and six specimen pap smears. I need to go to a DES specialist once a year to see if the adenosis I have will eventually turn to cancer. I have a wonderful attitude towards life and I live a healthy lifestyle. I take great care of myself. It is very frustrating because there isn't a lot known about DES. We exposed women are sometimes guinea pigs because there isn't a lot of data out there that gives doctors the information

about the effects of DES. I recently found a lump on my breast and was advised to have it removed and biopsied. I don't know if this is DES related, but it makes me fearful of all the unknown aspects yet to be discovered about this drug and its side effects.

People and doctors need to be educated about it. They don't even know if there are third generation effects of this drug. We (the) exposed, formed and financed our own support group, but we need government funding and we need an 800 number to call with fears and concerns. Our bodies are not like anybody else's. Some of our reproductive organs are deformed or don't exist at all. Some of us are infertile, some of us have rare cancers and some of us, like myself, cannot carry a pregnancy to term. I would like to discuss another complication a little further.

My husband and I did a lot of soul searching before deciding to have another baby. We knew the risk involved but felt that with a cerciage, cervical stitch, I would make it closer to term. When I found that I was pregnant this time I was excited but scared. I stayed off my feet and ate right. We told my son all about the new baby and that mommy might have to go to the hospital but he would have a brother or sister.

Immediately the doctors knew something was

wrong. My hormone levels were not normal, so for five weeks I went to get a blood test and every time the levels were off. Finally I had to make the decision to terminate the pregnancy because they felt it was incompatible with life. I had a D&C the day before Mother's Day. When they went in, they found no pregnancy sack. They woke me up to tell me they had to go into my tubes because now they were sure it was an ectopic pregnancy. They put me under and removed the pregnancy from the tube. It was bulging and bruising the tube but they managed to save my tube. My doctor said he only saw one other patient who this happened to and she was also DES exposed. Most women have horrible pain with a tubal pregnancy, but these two cases did not.

I was very devastated when I lost the baby. I was so early into my pregnancy, but it still makes you sad to suffer such a loss. This is the other side effect DES exposure, high incidence of tubal pregnancies. And once you've had one, your risk to have another becomes even higher.

I don't know if I will try to conceive again but I am glad to know that there are other women out there with the same problems as me. I'm not writing this letter for you to pity my because I've been blessed with a wonderful life, husband and child. I am writing you to make you aware that we need funding research and support for this awful

problem we DES survivors have. I look forward to hearing from you and would be willing to serve on any committees or groups that you set up. I would like to be there to help all the survivors less fortunate than myself.

Please consider my letter and try to set something up to help us. We need support and an 800 number to call to alleviate our fears and answer our questions and refer to us specialists.

I thank you for reading this letter. I hope I have inspired you to be aware of this issue. I hope to hear from you soon. Sincerely yours, Sherree Santivasi.

CHAIRMAN CALTAGIRONE: Questions from members or staff?

I want to thank you for your testimony. And I would hope that when we come back on the 21st, I believe it is for voting legislation, that these two bills will be on the agenda for consideration. And Sherree, if you would like to talk to Galina after the hearing, we can look into that and I'll check with the Appropriations Committee to see exactly what, if anything, might be able to help you with that request.

MS. SANTIVASI: Thank you.

CHAIRMAN CALTAGIRONE: Since there's no further debate or witnesses, we'll adjourn the hearing. Thank you.

(Whereupon, the hearing was concluded at

11:36 a.m.)

* * * * *

I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me on the within proceedings, and that this copy is a correct transcript of the same.

Emily Clark, CP, CM
Registered Professional Reporter

The foregoing certification does not apply to any reproduction of the same by any means unless under the direct control and/or supervision of the certifying reporter.