Settlement Confidentiality: A "Fracking" Disaster for Public Health and Safety

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Summary

Confidentiality clauses in settlement agreements have become so commonplace that they seem like benign contractual terms. In reality, however, confidentiality clauses have formidable power to silence even the most outspoken plaintiffs, and to shield repeat environmental defendants from public scrutiny. This Article examines the effects of settlement confidentiality in the context of claims related to hydraulic fracturing, and recommends that courts align settlement bargaining with U.S. law and policy trends toward openness. It proposes a rule to uniformly regulate confidentiality clauses in the public interest, by creating a rebuttable presumption against secrecy where a court anticipates "strongly correlated culpability" between a given case and other existing or future cases.

I. Introduction

An abandoned well in Pennsylvania became a 30-foot geyser, blew methane and water into the air, and flooded nearby property.[1] People in natural gas-abundant states were filmed lighting their tap water on fire and claiming that the dangerous party trick was made possible by nearby hydraulic fracturing (fracking) processes.[2] Earthquakes became more frequent and intense near fracking wastewater injection wells in Arkansas, Colorado, Ohio, Oklahoma, and Texas.[3] As gas exploration and production processes involving fracking have become ubiquitous in the United States, so have stories like these. Why, then, does the public not know more about the science underlying potential risks from fracking?[4]

Since 2005, there have been more than 80,000 fracking wells drilled or permitted in the United States.[5] With those wells have come hundreds of claims against gas exploration and drilling companies. Only one case has gone to trial, but even there the only claim tried was for intentional

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1. Scott Detrow, *Perilous Pathways: How Drilling Near an Abandoned Well Produced a Methane Geyser*, NPR, Oct. 9, 2012, https://web.archive.org/web/20140706151140/http://stateimpact.npr.org/pennsylvania/2012/10/09/perilous-pathways-how-drilling-near-an-abandoned-well-produced-a-methane-geyser/.
2. *E.g.*, *Flaming Faucets: When Fracking Goes Wrong*, Time (video), http://content.time.com/time/video/player/0,32068,902909981001_2065158,00.html (last accessed Jan. 23, 2014). *See also* Abrahm Lustgarten, *Scientific Study Links Flammable Drinking Water to Fracking*, ProPublica, May 9, 2011, https://web.archive.org/web/20140802225412/http://www.propublica.org/article/scientific-study-links-flammable-drinking-water-to-fracking.
3. Michael Behar, *Fracking's Latest Scandal? Earthquake Swarms*, Mother Jones, Mar. 2013, at 35.
4. To many people outside the oil and gas industry, fracking is an umbrella term encompassing both drilling and completion phases of shale gas production. In the industry, fracking refers only to the completion phase, during which chemicals, water, and sand are injected into an already drilled well to break apart rock and release gas. The fluid used to break apart rock is then extracted and disposed of, often by injecting it back into the earth through a separate "injection well." Interview with Hilton M. Boothe, Drilling Consultant, in Baton Rouge, La. (Mar. 25, 2015). *See* Mike Soraghan, *Baffled About Fracking? You're Not Alone*, N.Y. Times (May 13, 2011), *available at* https://web.archive.org/web/20131005152452/http://www.nytimes.com/gwire/2011/05/13/13greenwire-baffled-about-fracking-youre-not-alone-44383.html?pagewanted=all.
5. Elizabeth Ridlington & John Rumpler, Fracking by the Numbers: Key Impacts of Dirty Drilling at the State and National Level 4 (2013).

nuisance.[6] Cases alleging harms from fracking processes[7] virtually always settle—even the earthquake cases —with confidentiality often a key provision of the settlement agreements.[8] Settlements keep the contamination claims out of the courtroom. Secrecy provisions silence plaintiffs from discussing their claims.[9]

One result is that industry leaders can claim there are no reported cases of groundwater contamination from hydraulic fracturing, even though one news organization found hundreds of groundwater contamination claims in the United States.[10] As in a Colorado case involving the family of Laura Amos, the "Erin Brockovich of Garfield County" who became an anti-fracking activist before being hushed by a settlement agreement confidentiality clause, allegations of groundwater contamination from fracking processes may be widely reported, but industry defendants condition settlement upon perpetual silence.

Secrecy stemming from settlement confidentiality has shielded defendants in cases involving public health and safety beyond the environmental sphere. Settlement confidentiality has been used to recurrently hide, among other things, tire defects that resulted in nearly 200 deaths and scores of child abuse allegations against Catholic priests.[11] Because the environment is a limited, shared resource, problems arising from settlement secrecy are heightened. Settlement confidentiality in environmental cases inhibits public policy by preventing scientists, policymakers, and the public from effectively assessing the risks and benefits of technology, including fracking. Settlement confidentiality hides—even from officials responsible for environmental protection—facts or remedial measures contained in the settlement agreement, information the plaintiffs' attorney learned through discovery, and information that could be learned from plaintiffs' own experiences.[12]

Part II of the Article discusses Laura Amos' case to illustrate how effectively settlement confidentiality silences people whose claims and experiences could provide the public, scientists, and policymakers with valuable information for evaluating environmental risks and benefits related to new technology. Part III describes the means by which secrecy in settlement agreements is achieved and regulated. Part IV discusses the arguments in favor of and against settlement confidentiality, explains why public policy opposes confidential settlements in environmental cases, and explores fracking cases in which settlement confidentiality may negatively affect the public interest. Part V proposes to resolve the problems arising from secret settlements in environmental cases, by suggesting that courts adopt a single rule that will both limit confidentiality in filed settlement agreements and regulate out-of-court settlement confidentiality if a party to the settlement later files a breach-of-contract claim or otherwise requests judicial enforcement of the out-of-court secrecy arrangement.

II. How a Settlement Agreement Silenced the "Erin Brockovich" of Garfield County

Laura Amos' half-decade battle with the international gas corporation EnCana began in 2001, when a small company, now owned by EnCana, began drilling for gas 100 yards from Laura's family home.[13] On April 30, 2001, the drilling company fractured the gas well; and during the fracking process, Laura's water well blew out,[14] sending "water into the air like a geyser at Yellowstone."[15] Then, the water turned gray, putrid, and bubbly.[16] The Colorado Oil and Gas Conservation Commission (COGCC) tested Laura's well and found methane present in the water, but the Commission's later tests revealed that the methane was "transient" and had dissipated.[17] Records showed that the state did not test for fracking fluids because they did not know what to test for.[18] The drilling company told Laura

6. Parr v. Aruba Petroleum, Inc., No. CC-11-01650-E (Tex. Cnty. Ct. Apr. 22, 2014) (finding by a 5-1 jury vote that Aruba Petroleum was guilty of intentionally creating a private nuisance). *See The Fracking Case That Wasn't: Recent Texas Jury Verdict Catching the Headlines*, Jones Day (May 13, 2014), http://www.jonesday.com/The-Fracking-Case-That-Wasnt-Recent-Texas-Jury-Verdict-Catching-the-Headlines-05-13-2014/?RSS=true. *See also* Mica Rosenberg, *Arkansas Homeowners Settle Suit Charging Fracking Wastewater Cause Quakes*, Reuters, Aug. 28, 2013, *available at* https://web.archive.org/web/20130910144847/http://www.reuters.com/article/2013/08/28/us-usa-fracking-quakes-idUSBRE97R16320130828.
7. This Article uses the term "fracking processes" to include drilling, fracking, and wastewater injection, unless the umbrella term would be confusing. *But see* Keith B. Hall, *Hydraulic Fracturing and the Baseline Testing of Groundwater*, 48 U. Rich. L. Rev. 857, 866-67 (2014). Hall rightly notes that each phase—exploration, drilling, fracking, and extraction—is distinct, and problems related thereto are not technically fracking problems. Nevertheless, because the public is unlikely to distinguish the necessary phases of gas extraction, umbrella terminology as understood by the public is more appropriate for policy discussion.
8. Jim Efstathiou Jr. & Mark Drajem, *Drillers Silence Fracking Claims With Sealed Settlements*, Bloomberg, June 5, 2013, https://web.archive.org/web/20140701075652/http://www.bloomberg.com/news/2013-06-06/drillers-silence-fracking-claims-with-sealed-settlements.html.
9. *Id.*
10. *See id.* (stating that settling fracking contamination claims and imposing confidentiality "makes it difficult to challenge the industry's claim that fracking has never tainted anyone's water").
11. *See* John Greenwald, *Inside the Ford/Firestone Fight*, Time, May 29, 2001, *available at* https://web.archive.org/web/20140314200424/http://content.time.com/time/business/article/0,8599,128198,00.html; Matt Carroll et al., *Scores of Priests Involved in Sex Abuse Cases*, Boston Globe, Jan. 31, 2002, *available at* https://web.archive.org/web/20140804181525/http://www.bostonglobe.com/news/special-reports/2002/01/31/scores-priests-involved-sex-abuse-cases/kmRm7JtqBdEZ8UF0ucR16L/story.html; David A. Dana & Susan P. Koniak, *Secret Settlements and Practice Restrictions Aid Lawyer Cartels and Cause Other Harms*, 2003 U. Ill. L. Rev. 1217, 1217 (2003).
12. *See* Ian Urbina, *A Tainted Water Well, and Concern There May Be More*, N.Y. Times, Aug. 4, 2011, at A13.
13. Nancy Lofholm, *Breached Well Fuels Feud With Gas Firm*, Denver Post, Feb. 18, 2005, at B1.
14. Soraghan, *supra* note 4.
15. Laura Amos, Blog, *A Family's Water Well Was Contaminated After Hydraulic Fracturing Near Their Home*, Earthworks, https://web.archive.org/web/20140326081128/http://www.earthworksaction.org/voices/detail/laura_amos (last accessed Dec. 27, 2013).
16. *Id.*
17. Letter from Brian J. Macke, Director, Colorado Oil & Gas Comm'n (COGCC), to Larry & Laura Amos (Feb. 3, 2005) [hereinafter Macke Letter], *available at* https://web.archive.org/web/20130313211746/http://www.earthworksaction.org/files/pubs-others/COGCC_Amos_Letter.pdf.
18. Abrahm Lustgarten, *Buried Secrets: Is Natural Gas Drilling Endangering U.S. Water Supplies?*, ProPublica, Nov. 13, 2008, https://web.ar-

her water was safe to drink, so she, her husband, and their toddler did.[19]

No more water quality tests were done for more than two years, until Laura developed a rare tumor on her adrenal gland and began to investigate the fracking chemicals used nearby.[20] Laura's investigation uncovered that only 38 days after her well first blew out, EnCana had used a chemical linked to adrenal tumors in rodents. EnCana had used the experimental fracking chemical at a shallow depth—virtually the same depth as the underground rock formation from which Laura's family received its drinking water.[21]

In January 2004, after discovering the chemical (known as 2-butoxyethanol or 2-BE) that EnCana used, Laura again complained to the COGCC. This time, the Commission's water sampling found Laura's family well was contaminated with gas from EnCana's fracking processes,[22] but the Commission said there was no evidence that fracking fluid (the pressurized water, sand, and chemical mixture pumped into a well to create fissures through which gas escapes) had impacted Laura's well. Laura's 2-BE exposure, according to the Commission, might have been from "household cleaners such as Windex."[23] Laura became an anti-fracking activist,[24] describing herself as "ONE MAD MOTHER who intends to continue to challenge the system that allows average citizens to be ignored and trampled on."[25]

EnCana disputed even that gas from its fracking operations had entered Laura's well,[26] but the company and Laura entered into a reportedly multimillion dollar settlement agreement,[27] complete with a confidentiality clause.[28] Laura stopped talking about her case.[29] In 2012, EnCana went so far as to threaten Laura with a lawsuit if she were to comply with a subpoena to testify before the COGCC regarding a proposed water-test rule.[30] Through settlement confidentiality, EnCana altogether silenced the "Erin Brockovich of Garfield County."[31]

Laura's case is not exceptional. According to a Bloomberg analysis of hundreds of filings in which fracking processes were alleged to have contaminated groundwater, drilling companies usually settle and most settlements require silence.[32] In one particularly egregious 2011 settlement agreement between a Pennsylvania family and a drilling operator, *Hallowich v. Range Resources Corp.*, the parents were required to sign an affidavit to the effect that "there is presently no medical evidence that [the children's alleged] symptoms are definitively related" to the driller's fracking processes.[33] The drilling operator conditioned settlement on what was described by the plaintiffs' attorney to the judge during conference as a "take-it-or-leave-it" demand to accede to a proposed gag order written so broadly as to potentially "forever bar the[ ] two children from ever commenting on anything to do with fracking."[34] The drilling operator's attorney told the judge that the company intended the gag order to "apply to the whole family" and warned that the company "would certainly enforce it."[35] Only after negative international attention did the drilling company publicly backtrack and concede, two years later, that the lifetime gag order does not apply to the children.[36] These cases illustrate the extent to which defendants in environmental cases demand secrecy from settling plaintiffs, regardless of whether courts are involved.

III. The Law of Settlement Agreement Secrecy

Litigants have multiple avenues for seeking protection from public disclosure of settlement agreements and related discovery information.[37] Federal Rule of Civil Procedure 26(c) provides that a party from whom another seeks discovery may unilaterally move for a protective order to restrict the scope of the discovery request or to keep confidential the information produced. The Rule requires that the moving party show good cause as to why the court should grant the motion.[38] Nevertheless, the U.S. Supreme Court has noted that Rule 26(c) provides the trial court with "broad discretion" for shielding discovery because the "unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders."[39]

If the parties agree to settle their case at any time before trial, they may privately contract to do so.[40] Ultimately, parties can absolutely control confidentiality if they are content to settle entirely out of court[41]; however, many

chive.org/web/20140803040840/http://www.propublica.org/article/buried-secrets-is-natural-gas-drilling-endangering-us-water-supplies-1113.

19. Rebecca Clarren, *Unwell: The Dirty Side of the Clean-Fuel Boom*, Mother Jones, *available at* https://web.archive.org/web/20131013194955/http://www.motherjones.com/photoessays/2008/11/unwell-07 (last visited Jan. 2, 2014).
20. Lofholm, *supra* note 13.
21. *Id.*
22. *See* Macke Letter, *supra* note 17 (describing the complaint and findings); COGCC, Notice of Alleged Violation by EnCana Oil & Gas (USA) Inc., June 7, 2004, *available at* https://web.archive.org/web/20140803164738/http://cogcc.state.co.us/RR_HF2012/Groundwater/PrehearingStatements/TestimonyAmos20121130.pdf.
23. Macke Letter, *supra* note 17.
24. *See* Lofholm, *supra* note 13 (describing Amos as an "environmental crusader").
25. Amos blog, *supra* note 15.
26. COGCC Notice of Alleged Violation, *supra* note 22.
27. Soraghan, *supra* note 4.
28. Motion to Strike Subpoena Issued by COGCC to Laura Amos as Requested by Western Colorado Cong. et al., No. 1211-RM-03 (COGCC Dec. 5, 2012).
29. Soraghan, *supra* note 4.
30. Efstathiou & Drajem, *supra* note 8. The subpoena was withdrawn. *Id.*
31. Lofholm, *supra* note 13.
32. Efstathiou & Drajem, *supra* note 8.
33. Pls.' Aff., Hallowich v. Range Res. Corp., No. 2010-3954 (Pa. Ct. Com. Pl. July 25, 2011).
34. Tr. of In-Chambers Proceeding, Hallowich v. Range Res. Corp., No. 2010-3954 (Pa. Ct. Com. Pl. Aug. 23, 2011), at 11.
35. *Id.* at 13.
36. Don Hopey, *Hallowich Children Not Part of Gag Order*, Pitt. Post-Gazette, Aug. 7, 2013, at B1.
37. *See* Jack H. Friedenthal, *Secrecy in Civil Litigation: Discovery and Party Agreements*, 9 J.L. & Pol'y 67, 76 (2000).
38. Fed. R. Civ. P. 26(c)(1).
39. Seattle Times Co. v. Rhinehart, 467 U.S. 20, 36 (1984).
40. *See* Fed. R. Civ. P. 41 (the mechanics of dismissal).
41. *See, e.g.*, Pansy v. Stroudsburg, 23 F.3d 772, 788 (3d Cir. 1994) (stating that even where parties cannot meet the good cause requirement for a protective order, they may privately contract for settlement confidentiality).

settlement agreements include a protective provision for which the litigants will seek court approval.[42] Because the Federal Rules of Civil Procedure do not explicitly regulate confidentiality for filed settlement agreements, many federal courts have applied the discovery rule's good-cause requirement to orders concealing settlement agreements.[43] Whether or not good cause is required, when parties ask a court for a protective order over the settlement agreement, the parties' agreement as to confidentiality does not necessarily bind the court. The court always has discretion over whether and how to fashion a confidentiality order.[44]

A. *Private-Party and Court-Sanctioned Confidentiality*

The general rule is that settlements need not be approved by the court. A private out-of-court settlement contract may contain a confidentiality agreement to prohibit parties from disclosing the terms of settlement, disseminating information learned from discovery, or talking about the case at all.[45] Often private settlements will include the same nondisclosure provisions as protective orders for discovery material, and settling parties may memorialize the obligation to return or destroy confidential discovery documents upon dismissal of the underlying lawsuit.[46] Litigants may even condition their settlement on the court's approval of sealing particular documents filed in court or the court's entire file.[47] If the parties are comfortable relying solely on contractual secrecy, they can simply file a stipulation of dismissal with the court. The court cannot then order the parties to file their settlement agreement.[48]

Nevertheless, parties often do file their settlement with the court.[49] One important reason for filing settlement agreements is that a filed settlement agreement in a federal court case remains within the federal court's jurisdiction, whereas an unfiled settlement is merely a contract that would have to independently meet jurisdictional requirements. If parties file their settlement agreement, the court's dismissal order may expressly retain jurisdiction over the settlement agreement or incorporate the settlement's terms. Thus, a party's breach of confidentiality with respect to a filed settlement agreement would be a violation of the federal court order and subject to the court's supplemental jurisdiction.[50]

Whether a confidential settlement agreement is given judicial imprimatur or privately contracted for, the results are the same. Without a trial and merits determination, the public is denied information in which it may have a legitimate interest—for example, whether as a legal matter fracking and/or related processes such as wastewater injection caused earthquakes in Arkansas[51] or contaminated wells in Pennsylvania.[52] Concealing even the size of a past settlement in a similar case makes it harder for later parties to predict the outcome of their litigation, thus complicating pretrial settlement negotiations. Where cases of a similar kind or against a similar type of defendant generally settle, as often occurs in fracking suits, the settlement size may even highlight bias in judicial doctrines and the common law that favors one side in that class of disputes.[53] Perhaps most importantly in cases involving hydraulic fracturing processes and claims of environmental damage, concealing settlement terms denies the public the knowledge of and ability to oversee remedial actions agreed to by the defendant.

B. *Federal Rules Applied to Settlements Generally*

The average workload for a federal trial judge in 2012 was 464 cases, a higher level than at any point between 1992 and 2007.[54] When parties approach the court with a settlement agreement and request the court to approve a confidentiality clause, judges "face incredible pressure to go along with court-ordered secrecy in the heat of battle."[55] Federal court rules on confidentiality are varied and complicated. Local rules may regulate whether a judge can issue a protective order to seal a court-filed settlement, but only one court has a rule directly regulating filed settlements[56]: The District of South Carolina's Local Rule 5.03(E) generally prohibits sealed settlements.[57] Other district courts have rules regulating sealed documents generally,[58] some

42. *See* Friedenthal, *supra* note 37, at 76. The parties may also seek from the court a protective order for material already presented to the court, in the form of a request to seal court records. *Id*. The issue of sealing records filed in court is beyond the scope of this Article.
43. *See, e.g.*, *Pansy*, 23 F.3d at 786 (requiring good cause for confidentiality orders over settlement agreements because confidentiality orders are "functionally similar" to Rule 26(c) protective orders); Phillips ex rel. Estates of Byrd v. General Motors Corp., 307 F.2d 1206, 1210-11 (9th Cir. 2002) (requiring Rule 26(c) good cause for settlement confidentiality).
44. *See* Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 381-82 (1994) (stating that judges have discretion as to what settlement terms, if any, are embodied in a dismissal order).
45. *See* Laurie Kratky Doré, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 Notre Dame L. Rev. 283, 384-86 (1999) (discussing the general rule that parties are free to contract for settlement secrecy).
46. *E.g.*, Banco Popular de Puerto Rico v. Greenblatt, 964 F.2d 1227 (1st Cir. 1992) (upholding settlement provision incorporating stipulated protective order).
47. *E.g.*, Hartford v. Chase, 942 F.2d 130 (2d Cir. 1991) (settlement conditioned upon sealing of court record).
48. Doré, *supra* note 45, at 386.
49. Anne-Thérèse Béchamps, *Sealed Out-of-Court Settlements: When Does the Public Have a Right to Know?*, 66 Notre Dame L. Rev. 117, 119 (1990).
50. *See* Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 381 (1994) (stating that where a settlement agreement is embodied in a judicial order, "a breach of the agreement would be a violation of the order, and ancillary jurisdiction to enforce the agreement would therefore exist").
51. Hearn v. BHP Billiton Petroleum (Ark.), Inc., No. 4:11-cv-00474-JLH (E.D. Ark. Aug. 29, 2013) (dismissal with prejudice upon out-of-court settlement).
52. Pl.'s Motion to Stay All Rules to File Compl. & Leave of Ct. to Conduct Pre-Compl. Disc., Hallowich v. Range Res. Corp., No. 2010-3954 (Pa. Ct. Com. Pl. May 27, 2010).
53. *See* Goesel v. Boley Int'l (H.K.), Ltd., 738 F.3d 831, 833-34 (7th Cir. 2013).
54. Alicia Bannon, Federal Judicial Vacancies: The Trial Courts 5 (2013).
55. Joseph F. Anderson Jr., *Hidden From the Public by Order of the Court: The Case Against Government-Enforced Secrecy*, 55 S.C. L. Rev. 711, 729 (2004).
56. *See generally* Robert Timothy Reagan et al., Sealed Settlement Agreements in Federal District Court (2004) (overviewing federal court secrecy rules).
57. D.S.C. Local R. 5.03(E).
58. *See* Reagan et al., *supra* note 56, at 2-3.

of which require good cause.[59] In some circuits, judges can only seal settlements in "special circumstances,"[60] but many courts have treated Rule 26(c) as controlling whether to issue any protective order, including over a filed settlement agreement.[61] Even among circuits applying Rule 26(c), requirements for the good cause showing may vary.[62]

"[T]o address the problem of over-utilization of court-ordered secrecy associated with the settlement of civil cases," a South Carolina federal district judge proposed in 2002 that the court adopt a local rule to limit protective orders over filed settlement agreements in limited circumstances.[63] The proposed rule provided, "No documents (including court orders) may be sealed in this district if the documents contain information concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government."[64] Instead the court, "[e]schewing nuanced approaches . . . that bar court-ordered secrecy in cases affecting 'the public interest' or 'public safety,'"[65] adopted what became D.S.C. Local Rule 5.03(c) (currently 5.03(E)): "No settlement agreement filed with the Court shall be sealed pursuant to the terms of this Rule [which provides standards for discovery protective orders upon party agreement]."[66]

On its face, the South Carolina federal court rule appears to inflexibly bar judges from ever entering a protective order over a settlement agreement; however, the court's rules already allowed judges to "suspend or modify any Local Civil Rule" where "good cause [is] shown in a particular case."[67] Together, these rules "establish a preference for openness at settlement,"[68] but allow the presiding judge to seal a settlement for good cause—"when, for example, proprietary information or trade secrets need to be protected, or a particularly vulnerable party needs to be shielded from the glare of a newsworthy settlement."[69] Unfortunately, the good-cause exception under Local Rule 1.02 has the potential to swallow the Rule 5.03(E) secrecy provision whole.

Other courts regulate settlement secrecy only indirectly. The Eastern District of Michigan once limited orders sealing settlements to two years, but has since removed the time limit. That court does, however, require the party moving to seal a filed settlement agreement to, inter alia, file a supporting brief and state that there is no other available or satisfactory means to serve the movant's interest. According to the rule's comments, the court "strongly disfavor[s]" settlement sealing, "except in extraordinary circumstances."[70] In total, around one-half of the federal district courts have rules on sealing documents generally; one-third limit the length of time a document can remain sealed; and approximately one-eighth of the courts require good cause for sealing documents.[71]

IV. Settlement Secrecy: Benefits and Risks

A. *Prevalence of Litigation Settlement*

Court rules regulating secrecy in settlement agreements reach few cases because the few existing rules focus on filed settlement agreements, and claims that reach the judicial system rarely proceed to trial.[72] Civil litigators spend less than one-tenth of their time on trials, hearings, appeals, and enforcing judgments.[73] Judges are now resolving cases before trial through rulings on dispositive motions[74] and by guiding parties to settlement.[75] The legal system's focus on settling civil cases may reflect Judge Learned Hand's aphorism that a litigant "should dread a lawsuit beyond almost anything short of sickness and death."[76] By disposing of a case before trial, parties may reduce costs, time, publicity, and the risk of an all-out loss.[77]

Public policy and the Federal Rules of Civil Procedure encourage settlement. The Federal Rules are expressly aimed at "secur[ing] the just, speedy, and inexpensive determination of every action and proceeding."[78] Rule 16 encourages judges to convene pretrial conferences to "expedit[e] disposition of the action . . . and facilitat[e] settlement."[79] According to the committee behind Rule 16's promulgation, "Since it obviously eases crowded court dockets and results in savings to the litigants and the judicial system, settlement should be facilitated at as early a stage of the litigation as possible;" and while the Rule does not impose settlement on parties, it attempts to "foster" settlement, even on the judge's own motion.[80]

Additionally, Rule 26(f) requires that parties meet "as soon as practicable" to, among other things, "consider the

59. *Id.*
60. *See, e.g.*, Brown v. Advantage Eng'g, Inc. 960 F.2d 1013, 1016 (11th Cir. 1992) (holding that "[a]bsent a showing of extraordinary circumstances," settlements filed in court are presumed open to the public, regardless of "whether the sealing of the record is an integral part").
61. *See, e.g.*, Geller v. Branic Int'l Realty Corp., 212 F.3d 734, 738 (2d Cir. 2000); Pansy v. Borough of Stroudsburg, 23 F.3d 772, 786 (3d Cir. 1994).
62. *See, e.g.*, *Pansy*, 23 F.3d at 786-88 (defining "good cause" as "a showing that disclosure will work a clearly defined and serious injury to the party seeking closure," which must be "shown with specificity," and adopting a balancing test to determine whether it exists); Penthouse Int'l Ltd. v. Playboy Enters., Inc., 663 F.2d 371, 391 (2d Cir. 1981) (noting that the court has broad discretion to determine whether good cause was shown and issue a protective order).
63. Anderson, *supra* note 55, at 720.
64. *Id.* at 721.
65. *Id.* at 720.
66. D.S.C. Local R. 5.03(E).
67. D.S.C. Local R. 1.02.
68. Anderson, *supra* note 55, at 723.
69. *Id.*
70. E.D. Mich. Local R. 5.3.
71. *See generally* Reagan et al., *supra* note 56.
72. *See* Samuel R. Goss & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. Rev. 1, 1 n.1 (1996) (noting that the trial rate for federal and state courts combined is 2.9%).
73. Doré, *supra* note 45, at 288.
74. Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 Wis. L. Rev. 631, 636-37 (1994).
75. *Id.* at 647.
76. Learned Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, *in* 3 Lectures on Legal Topics: 1921-1922 87, 105 (1926).
77. David Luban, *Settlements and the Erosion of the Public Realm*, 83 Geo. L.J. 2619, 2621 (1995).
78. Fed. R. Civ. P. 1.
79. Fed. R. Civ. P. 16(a).
80. Fed. R. Civ. P. 16 cmt.

nature and basis of their claims and defenses and the possibility of promptly settling or resolving the case."[81] If the parties are approaching trial without having settled, Rule 68, which allows a defendant to make an offer of judgment up to two weeks before trial, "prompts both parties to a suit to evaluate the risks and costs of litigation, and to balance them against the likelihood of success upon trial on the merits," its "plain purpose [being] to encourage settlement and avoid litigation."[82] Where parties have gone through trial and sought appeal, the Federal Rules of Appellate Procedure in turn also encourage settlement.[83]

B. Policies Encouraging Settlements May Carry a Public Cost

Settlements, however, are not without criticism. Open courts and public trials provide common public goods. They record a narrative about a particular event, whether the event be a minor conflict or a historical moment.[84] The materials produced during litigation—transcripts, records, and proceedings—document and preserve public history.[85] And open courts enable the public to observe patterns in claims of wrongdoing and variations in resolutions, and react accordingly.[86] Even the Supreme Court has endorsed the "principle that justice cannot survive behind walls of silence," because public trials and open courts "guard[ ] against the miscarriage of justice by subjecting . . . judicial processes to public scrutiny and criticism."[87] In effect, America's legal system is based on the premise that every aspect of litigation is "out in the open, on the record, and fully explained by the court,"[88] in no small part because trials themselves are presumed to be in open court.[89] But the trial is no longer "the culmination of civil litigation."[90]

The fact is that civil parties generally do settle.[91] Carrying a civil case to trial and possibly to appeal is expensive and risky, whereas settlement is generally cheap and reduces the risk of an all-out loss at trial.[92] In that sense, settlement is often a result of unequally distributed resources. To a party that cannot absorb or distribute the cost of litigation, settlement is more attractive.[93] In tort claims related to hydraulic fracturing, resource inequality is almost inevitable. Three multinational corporations—BakerHughes, Schlumberger, and Halliburton—control more than 60% of U.S. fracking operations.[94] Repeat defendants in fracking cases include multibillion dollar corporations[95] such as Chesapeake Energy and Antero Resources, whereas plaintiffs tend to be individuals.[96] Where financial resources affect the bargaining process, "settlement will be at odds with a conception of justice that seeks to make the wealth of the parties irrelevant."[97]

C. Loss of a Public Forum

When parties choose to settle rather than proceed to trial, "society often gets less than what appears, and for a price it does not know it is paying."[98] A trial, open to the public and press, may alert the public to alleged hazards in their communities. Because trial may increase public awareness of potential hazards, the idea that settlement resolves disputes at a low cost to society by quickly securing peace or "maximiz[ing] the ends of private parties"[99] is too narrow a view of the social functions of American courts. Where plaintiffs allege groundwater contamination due to some new technology, for example, settlement may deny the public the information that would allow it to mitigate future environmental damage. At the same time, settlement may give an appearance that the technology is no longer a threat.

Although the named parties may maximize their own interests through settlement—the defendants agree to pay a price they find reasonable, and the plaintiffs are ensured a recovery—where the alleged injury stems from an act that may have affected other parties, settlement could "leav[e] justice undone."[100] The public may remain at risk from defendants' behavior or products, and potential plaintiffs may never know of the source of their injuries or what legal claims they may have. Thus, it is the role of courts and

81. Fed. R. Civ. P. 26(f).
82. Marek v. Chesny, 473 U.S. 1, 5 (1985).
83. *See* Fed. R. App. P. 33 ("The court may direct the attorneys . . . to participate in one or more conferences to address any matter . . . including simplifying the issues and discussing settlement.").
84. Judith Resnik, *Uncovering, Disclosing, and Discovering How the Public Dimensions of Court-Based Processes Are at Risk*, 81 Chi-Kent L. Rev. 521, 536 (2006).
85. *Id.*
86. *Id.*
87. Sheppard v. Maxwell, 384 U.S. 333, 349-50 (1966).
88. Jack B. Weinstein, *Secrecy in Civil Trials: Some Tentative Views*, 9 J. L. & Pol'y 53, 53 (2000).
89. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 n.17 (1980) ("Whether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open.").
90. Yeazell, *supra* note 74, at 633.
91. *See* Theodore Eisenberg & Charlotte Lanvers, *What Is the Settlement Rate and Why Should We Care?*, 6 J. Empirical Legal Stud. 111 (2009) (analyzing civil settlement rates across various claim categories).
92. *See* Goss & Syverud, *supra* note 72, at 63-64 ("Our research adds evidence to support one part of this widely shared belief ["that litigation is dreadful"]: Those law suits that are fought to the end are indeed risky, costly, and unpredictable.").
93. Owen M. Fiss, *Against Settlement*, 93 Yale L.J. 1073, 1076 (1984).
94. Alison Sider, *Fracking Firms Face New Crop of Competitors*, Wall St. J., July 9, 2013, at B6.
95. Multibillion dollar figure based on market capitalization at close of trading on Dec. 31, 2013. Chesapeake Energy (CHK) closed at $27.08 for a market capitalization of around $18.05 billion. Antero Resources closed at $63.44 for a market capitalization of around $16.62 billion.
96. *See, e.g.*, Scoma v. Chesapeake Energy Corp., 3:10-cv-01385 (N.D. Tex. Dec. 9, 2011) (dismissal with prejudice upon out-of-court settlement); Leighton v. Chesapeake Appalachia LLC, No. 1:13-cv-2018, 2013 WL 6191739 (M.D. Pa. Nov. 26, 2013); Teel v. Chesapeake Appalachia LLC, 906 F. Supp. 2d 519 (N.D. W. Va. Oct. 25, 2012), *aff'd*, No. 12-2406, 2013 WL 5647638 (4th Cir. Oct. 17, 2013); Strudley v. Antero Res. Corp., No. 12-ca-1251, 2013 WL 3427901 (Colo. App. July 3, 2013); Dillon v. Antero Res. Corp., No. 2:11-cv-01038 (W.D. Pa. Dec. 19, 2012) (voluntary dismissal with prejudice upon out-of-court settlement). Chesapeake Appalachia LLC is a wholly owned subsidiary of Chesapeake Energy Corp.
97. *See* Fiss, *supra* note 93, at 1076 (discussing competing philosophies on settlement economy).
98. *Id.* at 1085.
99. *Id.*
100. *Id.*

judges to "explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes" by "interpret[ing] those values and [bringing] reality into accord with them."[101] Environmental law and policy is no exception.

State and federal governments acknowledge the threats posed by environmental risks and have shown great interest in protecting the public from them.[102] Public awareness of the magnitude of environmental risks has helped establish a "strong public policy interest in safety from environmental hazards."[103] A number of laws passed since the 1980s to protect the public against environmental contamination require disclosure of environmental hazards to relevant government agencies responsible for regulating the activities at issue, further illustrating the policy tilt toward public access to information about environmental risks and hazards.

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, for example, requires in §103 that notification of certain unauthorized hazardous releases from a vessel or facility be sent to the National Response Center as soon as the person in charge of the vessel or facility has knowledge of the release.[104] Under §304 of the Emergency Planning and Community Right-to-Know Act (EPCRA), in most cases where CERCLA notice is required, the disclosure of a chemical release must be made immediately to local officials in charge of emergency planning.[105] The Pollution Prevention Act of 1990 requires owners and operators of certain facilities to annually report to the Administrator of the U.S. Environmental Protection Agency (EPA) the quantity of chemicals discharged into the environment and the reduction practices used with regard to that chemical.[106] And the Safe Drinking Water Act (SDWA) requires the EPA Administrator to promulgate regulations to provide states with a floor of requirements to "prevent underground injection which endangers drinking water sources."[107]

EPA is at the center of federal law and policy establishing transparency in business operations that affect the environment. Its mission is "to protect human health and environment;"[108] its purpose, "to ensure that . . . all parts of society—communities, individuals, business, and state, local and tribal governments—have access to accurate information sufficient to effectively participate in managing human health and environmental risks."[109] But the repeated settlement of virtually every tort claim against drilling operators and gas companies in fracking contamination suits has shielded fracking and related processes from scrutiny and denied the public the information needed to effectively regulate environmental safety. The availability of information about environmental risks is key to shaping environmental policy and ensuring that the public is adequately protected from environmental risks. When a court seals settlement agreements or enforces out-of-court settlement confidentiality clauses that involve claims of environmental hazards, it risks seriously jeopardizing public safety.[110]

D. Pros and Cons of Secrecy in Settlement Agreements

Settlement secrecy implicates both law and policy. Although the Federal Rules of Civil Procedure and court practice favor settlement, public policy favors openness. The policies seem to conflict, especially in fracking cases where secrecy is the price of settlement. America's openness policy stems from common-law principles and the First Amendment, which provide members of the public, including media representatives, a general right to access courtrooms and court records.[111] When parties file a civil settlement with the court, the settlement itself is, by definition, a court record. It follows that parties requesting that the court seal the settlement agreement necessarily implicate the public's right to access judicial records.

Moreover, in many environmental cases, the need for public access is heightened. In lawsuits involving groundwater contamination from leaching, for example, the public has a significant interest in judicial records, including the settlement terms. Access to settlement terms allows people whose groundwater lies between the contaminant's point of origin and the settling plaintiff's well to determine their chances of success and efficiently resolve their own potential contamination disputes. The public at large has an interest in the settlement terms because environmental damage may be long-term, and the settlement agreement may require remedial measures best overseen by the public.

The Supreme Court ruled in *Richmond Newspapers, Inc. v. Virginia* that the First Amendment protects the public's right to attend criminal trials.[112] The Court suggested that the right may extend to civil trials as well: "Whether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both

101. *Id.*
102. Irma S. Russell, *Unreasonable Risk: Model Rule 1.6, Environmental Hazards, and Public Law*, 55 Wash. & Lee L. Rev. 117, 120 (1998).
103. *Id.*
104. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, 42 U.S.C. §§9601-9675, ELR Stat. CERCLA §§101-405. *See* 42 U.S.C. §9603(a) (2006).
105. Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. §§11001-11050, ELR Stat. EPCRA §§301-330. *See* 42 U.S.C. §11004.
106. 42 U.S.C. §13106(b)(1).
107. Safe Drinking Water Act (SDWA), 42 U.S.C. §§300f to 300j-26, ELR Stat. SDWA §§1401-1465. *See* 42 U.S.C. §300h(b)(1).
108. U.S. Envtl. Prot. Agency (EPA), Our Mission and What We Do, https://web.archive.org/web/20140630062201/http://www2.epa.gov/aboutepa/our-mission-and-what-we-do (last visited Nov. 1, 2013).
109. *Id.*
110. Amie Sloan, *Secret Settlements and Protecting Public Health and Safety: How Can We Disclose With Our Mouths Shut?*, 3 Appalachian L.J. 61, 69 (2004).
111. *See* Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 596-97 (1978) (discussing a common-law principle of open courts); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980) (plurality opinion) (citations omitted) (discussing the First Amendment right to access criminal trials and in dicta extending the right to civil trials); In re Continental Ill. Sec. Litig., 734 F.2d 1302, 1314 (7th Cir. 1984) (describing the right to access court and court documents as "fundamental").
112. *Richmond Newspapers*, 448 U.S. 555.

civil and criminal trials have been presumptively open."[113] Some circuits have analogized to *Richmond Newspapers* and found that a First Amendment right of access to civil trials and records may exist.[114] But the D.C. Circuit, in an opinion by then-Circuit Judge Antonin Scalia, distinguished the constitutional right of access to civil trials from access to documents before trial, holding that while the common law may provide a right of access to pretrial documents in a civil matter, the First Amendment recognizes no such right.[115]

American common law initially adopted English common law's rules regulating public access to court records.[116] Because there were few interactions between the English government and its constituents that required or resulted in records, courts felt little pressure by citizens to enable individuals to review public records. Thus, the general common-law rule in England was that there was no general right of access to public records.[117] However, where an individual sought access to a public record to aid in ongoing or prospective litigation, English common law recognized a limited right of access to public records, including judicial records.[118]

Many early American courts adopted the English rules, but over time, the rules evolved to expand access to public records in the public interest.[119] Courts began to allow access to documents when the record-seeker wanted to investigate a governmental body's financial situation or expose governmental wrongdoing.[120] Although the common-law right of public access to public records expanded in the 20th century, it was limited.[121] In his seminal 1953 book, *The People's Right to Know*, Harold L. Cross[122] described the "modern common law rule" as providing that a "person may inspect public records in which he has an interest or make copies or memoranda thereof when necessity for inspection is shown and the purpose does not seem improper, and where the disclosure would not be detrimental to the public interest."[123] Disclosing information related to environmental settlement agreements is often beneficial, not detrimental, to the public interest, especially where the settled claims involve allegations of contamination or unsafe gas discovery and production processes that may affect persons not privy to the suit or may have long-term environmental effects. In such cases, disclosure would inform and empower the public to protect itself from further risks and harms.

The Supreme Court has agreed that there is a general right of public access to court records, but the scope of the right remains unclear. In *Nixon v. Warner Communications*,[124] the Court stated that it was "clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents."[125] The right of public access extends beyond people with "proprietary interest in the document or . . . a need for it as evidence in a lawsuit" to include citizens or media seeking to watch over government, but because courts have supervisory power over their own records, "the right to inspect and copy judicial records is not absolute."[126] The Court noted that lower courts recognizing the common-law right of public access to judicial records agree that the decision to allow access is within the trial court's discretion on a case-by-case basis, but the *Warner Communications* Court stopped without addressing the scope of the common-law right of access.[127] Nevertheless, then-Circuit Judge Scalia had noted in *In re Reporters Committee for Freedom of the Press* that "the federal common law . . . can of course go beyond constitutional prescriptions," and provide a right of access to even pretrial civil documents.[128]

Although fracking cases generally involve allegations of environmental contamination, only one case has ever gone to trial—but not on the merits of environmental damage.[129] Moreover, confidentiality is virtually always a part of the settlement agreement. Documents exchanged during discovery may contain information that would harm the defendant if disseminated to the public. Defendants want to keep the harmful information secret, while plaintiffs want to use it as a bargaining tool.[130] Defendants in civil cases may offer to increase their settlement with a plaintiff on condition of secrecy, or may simply threaten to scuttle settlement entirely and proceed to a costly trial if the plaintiff does not agree to a confidential settlement.[131] Bargaining for secrecy in settlements, however, only heightens the

113. *Id.* at 580 n.17.
114. *See, e.g.*, Publicker Indust. v. Cohen, 733 F.2d 1059, 1069 (3d Cir. 1984); Brown & Williamson Tobacco Corp. v. Federal Trade Comm'n, 710 F.2d 1165, 1179 (6th Cir. 1983).
115. In re Reporters Comm. for Freedom of the Press, 773 F.2d 1325 (D.C. Cir. 1985).
116. Harold L. Cross, The People's Right to Know: Legal Access to Public Records and Proceedings 26 (1953).
117. *Id.* at 25.
118. *Id.* at 26.
119. *Id.* at 27-29 (discussing cases in which courts allowed access to public records by parties with no special interest in the records).
120. John J. Watkins, *Access to Public Records Under the Arkansas Freedom of Information Act*, 37 Ark. L. Rev. 741, 744 (1984).
121. *See* Cross, *supra* note 116, at 26-29 (discussing cases in which courts shifted from denying to granting newspaper access to court records).
122. Cross was then legal counsel to the American Society of Newspaper Editors. *The People's Right to Know* is described as having provided the groundwork for the federal Freedom of Information Act. Harold L. Cross, First Amendment Ctr., https://web.archive.org/web/20140629004547/http://www.firstamendmentcenter.org/hall-of-fame/harold-l-cross (last visited Oct. 21, 2013).
123. Cross, *supra* note 116, at 29. Inspection of records where prohibited would be "improper," as would accessing records to merely satisfy curiosity, gain commercial advantage, stoke scandal or defamation. *See id.* at 32, 37.
124. 435 U.S. 589 (1978).
125. *Id.* at 597.
126. *Id.* at 598. The Court noted that the common-law right of access could not overcome the trial judge's discretion to prevent its records for being used for "private spite or [to] promote public scandal," at least in divorce cases, or as repositories of "libelous statements for press consumption . . . and business information that might harm a litigant's competitive standing." *Id.* The Supreme Court's recognition of these limits to the common-law right of public access largely reflects Cross' "modern common law rule."
127. *Warner Commc'ns*, 435 U.S. at 598.
128. In re Reporters Comm. for Freedom of the Press, 773 F.3d 1325, 1340 (D.C. Cir. 1985).
129. In *Parr v. Aruba Petroleum, Inc.*, No. CC-11-01650-E (Tex. Cnty. Ct. Apr. 22, 2014), the cause of action was intentional nuisance.
130. Weinstein, *supra* note 88, at 57.
131. *Id.* at 56.

threat of leaving justice undone. Whether confidentiality is appropriate is debatable, and arguments for and against provide a backdrop for understanding issues with secrecy in environmental cases.

Confidentiality supporters generally value the use of confidentiality in settling civil cases, believing that secrecy issues arising during litigation are adequately resolved by trial court discretion, whereas supporters of public access generally favor restrictions on trial court discretion to approve secrecy in civil cases.[132] At the outset, confidentiality proponents tend to prefer settlement over adjudication,[133] often seeing the court system as existing to efficiently resolve private disputes.[134] Given that the Federal Rules of Civil Procedure have evolved to encourage settlement—and parties and judges apparently have embraced the changes—confidentiality proponents have a strong case against confidentiality restrictions. According to this camp, confidentiality agreements preserve court and party resources by incentivizing parties to cooperate in discovery, thereby reducing the need for judicial intervention.[135]

The same may be said for secrecy in settlement agreements. Confidentiality proponents further posit that if parties are unable to protect harmful information from public dissemination, they will be less likely to settle.[136] If courts were to restrict secrecy orders, defendants would be less likely to cooperate in discovery, to settle high-profile cases with little chances of liability, or to establish a settlement benchmark for future claims.[137] In that sense, confidentiality encourages settlement and efficiently resolves disputes, in furtherance of the efficiency goal expressed in Federal Rule of Civil Procedure 1.[138] Allowing secrecy in settlement agreements also protects "trade secrets . . . and legitimate privacy rights."[139] After all, the parties to a civil suit "do not give up their privacy rights simply because they have walked, voluntarily or involuntarily, through the courthouse door."[140]

Those in the anti-secrecy camp, on the other hand, often rely on a "public life conception"[141] of the court system. By their measure, the courts are publicly funded, institutional "guardians of the general public"[142] that primarily exist to "give meaning to our public values, not to resolve disputes."[143] To fulfill their role in cases involving "sociopolitical problems," such as environmental cases and mass torts, "the court must look to the effect on the community. The individual litigant's needs cannot be the court's sole concern . . . . The public, which created and funds our judicial institutions, depends upon those institutions to protect it."[144] Those favoring restrictions on civil-suit secrecy argue that where settlements and discovery are kept secret from future litigants involving the same issue, the later party bears a substantial cost in repeating discovery, and the later judge has to repeat the work his predecessor likely did when deciding discovery matters.[145]

Those who favor limits on judicial discretion to seal settlements or otherwise impose confidentiality also reject the argument that confidentiality is critical to settlements.[146] They argue that it would be "illogical" for a party who sought but was denied settlement confidentiality to opt instead for "the most public of all resolutions—a trial before a jury in an open courtroom."[147] As one federal judge wrote in response to confidentiality proponents' suggestion that restricting secrecy denies parties the right to privacy, that argument is "[p]erhaps the most bogus of all" because parties are free to privately settle and agree to keep their mouths shut.[148]

In a 2013 opinion regarding secrecy of filed settlement agreements, Judge Richard Posner summarized the value of settlement confidentiality as so uncertain that it is "difficult to imagine what arguments or evidence parties wanting to conceal the amount or other terms of their settlement (apart from terms that would reveal trade secrets or seriously compromise personal or institutional privacy or national security) could present to rebut the presumption of public access to judicial records."[149] Judge Posner's observations—that lawyers negotiating settlements know from experience what settlement terms are attainable, that the value of one settlement may encourage quicker resolution of a later similar case, and that openness may prevent settlements that are too large or too small when compared to other similar settlements—are no less applicable to out-of-court settlements.

E. The Public as an Interested Third Party to Environmental Cases: Fracking, Groundwater Contamination, and Earthquake Swarms

The judiciary's routine approval of settlement agreements containing secrecy clauses inhibits the public's ability to

132. Doré, *supra* note 45, at 303.
133. *E.g.*, Richard L. Marcus, *The Discovery Confidentiality Controversy*, U. Ill. L. Rev. 457 (1991); Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 Harv. L. Rev. 427 (1991).
134. *See* Luban, *supra* note 77, at 2622 (discussing the theory that adjudication is a private good).
135. *See* Miller, *supra* note 133, at 483-84 (arguing that limits on confidentiality agreements will increase the number of contested documents during discovery).
136. *See, e.g.*, *id.* at 486 (discussing how reducing settlements would affect courts).
137. Doré, *supra* note 45, at 74.
138. *See* Fed. R. Civ. P. 1 ("These rules . . . should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.").
139. Susan P. Koniak, *Are Agreements to Keep Secret Information Learned in Discovery Legal, Illegal, or Something in Between?*, 30 Hofstra L. Rev. 783, 802 (2002).
140. Miller, *supra* note 133, at 466.
141. Luban, *supra* note 77, at 2634.
142. Doré, *supra* note 45, at 307.
143. Owen M. Fiss, *Foreword: The Forms of Justice*, 93 Harv. L. Rev. 1, 29 (1979).
144. Weinstein, *supra* note 88, at 58.
145. Anderson, *supra* note 55, at 743-44.
146. *See, e.g.*, *id.* at 726 (citing the South Carolina federal court's experience in the year after banning sealed settlements as refuting the argument that restricting secrecy would reduce settlements).
147. *Id.*
148. *Id.* at 727.
149. Goesel v. Boley Int'l (H.K.) Ltd., 738 F.3d 831, 835 (7th Cir. 2013).

oversee its court system and learn of potential risks. When discovery documents contain particularly damning information, such as evidence of cover-ups or suppression of information regarding a product's dangers to the public, the defendant has a strong interest in keeping the information secret and the plaintiff has a powerful bargaining tool.[150] Thus, precisely where the public has a significant interest in the information at issue, the litigants have an incentive to settle and agree to secrecy. As Judge Jack Weinstein put it, "Secrecy often has been, in fact, the price of settlement."[151] Settlements in groundwater contamination cases exemplify this problem.

As early as 1987, EPA reported to the U.S. Congress that fracking for natural gas could contaminate groundwater, citing a case of such contamination in West Virginia.[152] The report's lead author told the *New York Times* in 2011 that researchers working on the 1987 report had found "dozens" of similar cases, but were prevented from investigating because of legal settlements,[153] and "current and former EPA officials" told the newspaper that confidential settlements "prevent them from fully assessing the risks of certain types of gas drilling," such as fracking.[154] Thus, the Agency whose "broad mandate" President Richard M. Nixon had created to, among other things, engage in "the conduct of research on the adverse effects of pollution and on methods and equipment for controlling it, the gathering of information on pollution, and the use of this information in strengthening environmental protection programs and recommending policy changes"[155] is hindered by secrecy from actually doing research.

Over the past few years, as hydraulic fracturing for natural gas has expanded, the public has begun to question its safety.[156] A common claim among critics is that liquids used in fracking may contaminate drinking water.[157] Energy industry leaders assert that there has been no case of such contamination.[158] Nevertheless, individuals have filed numerous lawsuits against fracking companies, many of which ultimately settled.[159] However, the details of those settlements are generally confidential, sometimes sealed by court order, leaving researchers unable to amass the data needed to evaluate fracking processes' effects on underground aquifers.[160]

Between 2009 and 2013**,** there were at least 40 lawsuits relating to fracking in the United States. One-half have been dismissed or settled.[161] The settlements were all sealed or confidential.[162] The 40 filed suits claimed a variety of harms, including excessive noise, air pollution, and groundwater contamination.[163] Several suits have alleged that fracking-related wastewater injection wells caused earthquakes that damaged their homes.[164]

From September 2010 to March 2011, more than 800 small earthquakes hit Arkansas in what was labeled the "Guy-Greenbrier" earthquake swarm.[165] Although earthquake swarms had occurred in Arkansas before, Arkansas Geological Survey researchers found a "'strong temporal and spatial' relationship between these quakes and the injection wells [used for fracking fluid disposal]."[166] In December 2010, the Arkansas Oil and Gas Commission (AOGC) imposed a temporary moratorium on drilling new injection wells in the area.[167] Then in late February 2011, a magnitude 4.7 earthquake struck Arkansas—the largest earthquake there in three decades.[168] In response, the AOGC requested two companies to immediately shut down their injection wells in the area for 60 days. The companies complied.[169] The Arkansas Geological Survey reported to the AOGC that after the shutdown, the number of earthquakes in the region decreased dramatically from 85 earthquakes with a magnitude of at least 2.5 in the 18 days before the shutdown to only 20 earthquakes

150. Weinstein, *supra* note 88, at 57-58.
151. *Id.* at 56.
152. *See* U.S. EPA, Report to Congress: Management of Wastes From the Exploration, Development, and Production of Crude Oil, Natural Gas, and Geothermal Energy IV-22, vol. 1 (1987) (concluding that because of fracking, "the water well can be permanently damaged," and citing an example where fracking fluid was found in a West Virginia water well).
153. Urbina, *supra* note 12.
154. *Id.*
155. Special Message to Congress About Reorganization Plans to Establish the Environmental Protection Agency and the National Oceanic and Atmospheric Administration, 1971 Pub. Papers 578, 582 (July 9, 1970).
156. *See, e.g.*, Hunter Stuart, *Nuns Against Fracking*, Huffington Post, Aug. 16, 2013, https://web.archive.org/web/20131106050823/http://www.huffingtonpost.com/2013/08/16/nuns-against-fracking-kentucky-pipeline_n_3769146.html.
157. Urbina, *supra* note 12; Linda Stamato, Blog, *The Unacceptable Price of Secret Settlement*, NJ.com (Aug. 28, 2011), https://web.archive.org/web/20130210004303/http://blog.nj.com/njv_linda_stamato/2011/08/the_unacceptable_price_of_secr.html.
158. *See* Urbina, *supra* note 12; Stamato, *supra* note 157.
159. *See Fracking Damage Cases and Industry Secrecy*, EarthJustice, https://web.archive.org/web/20140629223455/http://earthjustice.org/features/campaigns/fracking-damage-cases-and-industry-secrecy (last visited Oct. 31, 2013).
160. *See* Urbina, *supra* note 12; Stamato, *supra* note 157.
161. Rosenberg, *supra* note 6.
162. *Id.* In *Hallowich*, the Pennsylvania case in which the settlement's gag order was intended to apply to children defendants for life, the order sealing the record and settlement was later reversed. *See* Op. and Order, Hallowich v. Range Res. Corp., No. 2010-3954 (Pa. Ct. Com. Pl. Mar. 20, 2013).
163. Rosenberg, *supra* note 6.
164. *See, e.g.*, Hearn v. BHP Billiton Petroleum (Ark.), Inc., No. 4:11-cv-00474 (E.D. Ark. 2013); Frey v. BHP Billiton Petroleum (Ark.), Inc., No. 4:11-cv-00475 (E.D. Ark. 2013). *See also* Andrew Trotman, *BHP Billiton Settles With Homeowners Over "Fracking Damage,"* Telegraph, Aug. 29, 2013, https://web.archive.org/web/20130902194808/http://www.telegraph.co.uk/finance/newsbysector/energy/10272592/BHP-Billiton-settles-with-homeowners-over-fracking-damage.html.
165. Alec Liu & Jeremy A. Kaplan, *Earthquakes in Arkansas May Be Man-made, Experts Warn*, Fox News, Mar. 1, 2011, https://web.archive.org/web/20130515064123/http://www.foxnews.com/scitech/2011/03/01/fracking-earthquakes-arkansas-man-experts-warn/.
166. Campbell Robertson, *A Dot on the Arkansas Map, Until the Earth Started Shaking*, N.Y. Times, Feb. 6, 2011, at A18.
167. Arkansas Oil & Gas Comm'n (AOGC)), Docket Rep., Dec. 7, 2010, at 67.62-64, *available at* https://web.archive.org/web/20140803170759/http://www.aogc2.state.ar.us/PDF/minutes/2010/December%20Minurtes%20Final.pdf.
168. Campbell Robertson, *Latest Earthquake in Arkansas Is Its Most Powerful in 35 Years*, N.Y. Times, Mar. 1, 2011, at A14.
169. AOGC, Minutes, Mar. 9, 2011, *available at* https://web.archive.org/web/20140803170828/http://www.aogc2.state.ar.us/PDF/minutes/2011/March%20Minutes,%20Special%20Hearing.pdf.

in the 18 days after. The AOGC voted to ban wastewater injection in the earthquake-prone region.[170]

In *Hearn v. BHP Billiton Petroleum (Arkansas), Inc.*, residents filed suit in federal court against two companies that owned and operated wastewater disposal wells in the affected region.[171] That case was consolidated with other similar cases. The consolidated plaintiffs alleged that the companies had negligently operated and maintained the injection wells with respect to the risk of causing or contributing to seismic activity.[172] The plaintiffs sought compensatory and punitive damages for physical damage to their homes and masonry, loss of fair market property value, and emotional distress as a result of earthquakes induced by the injection wells.[173] The court entered a protective order to guard confidential discovery,[174] and the case ultimately was dismissed upon a confidential out-of-court settlement.[175]

At the time *Hearn* settled, however, other cases involving claims against the same defendants for earthquake-related injuries remained open in the same district.[176] According to news reports, Arkansas lawyers expected to file similar lawsuits in state court.[177] Had the settlement terms in *Hearn* not been shrouded in secrecy, these later plaintiffs, at the least, would have been able to accelerate settlement and increase judicial efficiency by narrowing the range in which they negotiated with the drilling operator defendants.[178] Knowing the ratio of damages sought to settlement amount received in *Hearn* would have allowed later plaintiffs' attorneys to more efficiently communicate to their clients a realistic expectation for relief, which would likely shorten disputes and allow for the plaintiffs' quicker recovery. Further, transparency would allow calculation of a ratio of recovery sought to settlement size, which could help later plaintiffs, the public, and decisionmakers evaluate and judge the voracity of the link between fracking-wastewater injection and earthquake swarms. Though settlements often avoid admitting liability, a high ratio of relief sought to settlement amount—that is, where the defendant is willing to settle for an amount close to that sought by the plaintiff—could indicate the defendant accepts at least the probability that a judge or jury would find its acts caused at least some of the alleged harm.

170. Associated Press, *Arkansas Commission Votes to Ban Wells*, Fox News (July 27, 2011), https://web.archive.org/web/20140803170912/http://www.foxnews.com/us/2011/07/27/arkansas-commission-votes-to-ban-wells/.
171. Hearn v. BHP Billiton Petroleum (Ark.), Inc., No. 4:11-cv-00474 (E.D. Ark. Apr. 9, 2013).
172. Second Amended & Consolidated Complaint at 15, Hearn v. BHP Billiton Petroleum (Ark.), Inc., No. 4:11-cv-00474 (E.D. Ark. Apr. 9, 2013).
173. *Id.* at 18-23.
174. Protective Order, Hearn v. BHP Billiton Petroleum (Ark.), Inc., No. 4:11-cv-00474 (E.D. Ark. Apr. 9, 2013).
175. *See* Trotman, *supra* note 164 (reporting that the plaintiffs' lawyer said the settlement is confidential).
176. *Id.*
177. *Id.*
178. *See* Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 Mich. L. Rev. 867, 899 (2007) (discussing the utility of disclosing settlement amounts).

V. Proposal: Limit Settlement Confidentiality in Cases of Strongly Correlated Culpability

A. *Secrecy in Cases of "Strongly Correlated Culpability" May Cause Public Harm*

State and federal courts should revise court rules to limit settlement confidentiality in cases where the public is an interested third party. Currently, parties who settle out of court are largely free to contract for confidentiality as they see fit. Only when the parties file their settlement agreements in court does the court become involved. In environmental cases, especially those involving groundwater contamination from fracking and fracking-related processes, whether a settlement is confidential because the parties agree out of court to keep its terms secret or because they file the settlement and seek judicial imprimatur, the public retains its interest in the allegations and outcome. Thus, courts should craft a rule to govern confidentiality in settlements of record that also reaches out-of-court confidential settlements.

One such rule, which has received little attention, was proposed in a 2002 article by two Vanderbilt University economists.[179] Their rule is based on the idea that in cases of what they term strongly correlated culpability (SCC), confidential settlements adversely affect public safety. SCC occurs when "a behavior or product associated with . . . two plaintiffs' harms is similar."[180] Effectively, SCC is "a series of events," such as a single company's multiple well blowouts or failure of multiple well casings manufactured by the same company, "traceable to the same failure," such as a company's policy to drill underbalanced for speed or a manufacturer's inadequate quality control.[181]

The economists proposed resolving the problem created when settlement confidentiality denies the public information needed to effectively govern, make policy, or protect its interests, by encouraging courts "to maintain a rebuttable presumption against allowing confidentiality in cases where [courts] anticipate[ ] that there is strongly correlated culpability."[182] Since courts are not positioned to go beyond the facts of the case before them and actually observe and determine whether SCC exists, the economists proposed requiring that parties approaching the court to request a sealed settlement must present "evidence or testimony (on penalty of perjury) to the effect that there are no other similarly affected plaintiffs."[183] According to the economists, if parties reached an out-of-court settlement agreement that included a confidentiality clause but later filed a court case for enforcement or breach of contract, a court "could refuse to enforce such contracts . . . if subsequent plaintiffs

179. Andrew F. Daughety & Jennifer F. Reinganum, *Informational Externalities in Settlement Bargaining: Confidentiality and Correlated Culpability*, 33 Rand J. Econ. 587 (2002).
180. *Id.* at 588.
181. *Id.* at 589.
182. *Id.* at 600.
183. *Id.*

arise who were similarly affected at the time the contract of silence was made."[184]

B. *Refining the Economists' Rule to Guide Courts*

The economists' rule, although it largely addresses the settlement confidentiality problem in and out of court, needs refining before it can usefully guide courts. First, the economists' rule appears to require somewhat different standards for courts to apply, depending on whether a confidential settlement receives judicial imprimatur or occurs out of court but reaches the judge by way of a breach of contract claim. Differing standards are not desirable. Ideally, courts should adopt one rule to resolve confidentiality in both situations, which would provide clarity for litigants drafting and courts enforcing settlement agreements (or breaches thereof).

Second, the economists' proposal requires that parties who confidentially settled out of court and subsequently file a breach-of-contract claim must show that no plaintiffs have come forward who were similarly situated when the out-of-court settlement occurred. This formula would allow parties to eschew an in-court settlement, where they would be required to present evidence that no other similarly situated plaintiffs *exist at all*, and confidentially settle out of court knowing that if the settlement agreement ever reached a judge, the parties would only have to show that no other similarly situated plaintiffs *have come forward*. Thus, in the latter case, if there were similarly situated plaintiffs at the time of the settlement, the confidentiality agreement would be enforceable as long as those plaintiffs have not yet made claims. The weakness in this element of the economists' rule is that confidential settlement itself may deny the public and potential plaintiffs of knowledge that they have a claim at all.

The economists' proposal should be refined to resolve these problems and allow courts to regulate both in-court and out-of-court secrecy within the same standard. The refined rule would create a rebuttable presumption against secrecy where a court anticipates SCC in a given case. Courts would require that when parties request confidentiality for a filed settlement agreement or other settlement agreement that requires judicial imprimatur, they must present testimony or evidence, on penalty of perjury, that there are no other similarly affected plaintiffs. Likewise, courts would refuse to enforce out-of-court settlement confidentiality unless the party or parties seeking to enforce the confidentiality clause presented testimony or evidence, on penalty of perjury, that there were no other similarly affected plaintiffs at the time the parties reached their confidentiality agreement.

C. *Applying the Solution to the Arkansas Earthquakes Cases*

Applying the refined rule to a given case is complicated by the fact that secret settlements are generally secret. A hypothetical built on the Arkansas earthquakes settlement, however, illustrates how the rule would operate.

If one of the settling plaintiffs in *Hearn*[185] were to allegedly breach the confidentiality agreement entered into with the drilling company, the court would surely anticipate SCC. After all, news reports that Hearn had settled also included statements by Arkansas lawyers that they were preparing similar lawsuits involving different plaintiffs' claims related to the injection wells and earthquakes.[186] If the breach of contract claim were pursued, the court would apply the rule proposed here and refuse to enforce the confidentiality clause unless the drilling company could prove that at the time it settled there were no other similarly affected plaintiffs. The drilling company would not be able to meet its burden for at least two reasons: At the time it settled the *Hearn* case, BHP Billiton faced several similar suits in the same federal court[187]; and, according to news reports, other plaintiffs were preparing to file state-court claims arising from the drilling and earthquakes. Thus, the confidentiality clause would be unenforceable, and remaining plaintiffs would be able to bargain for settlement—or go to trial—armed with knowledge of the drilling company's prior settlement agreement. Furthermore, other people affected by the drilling and earthquakes who may not have known of their potential claims would have additional information with which to evaluate whether to pursue those claims against the drilling operator.

VI. Conclusion

Settlements promote efficiency and allow litigating parties to maximize their fiscal interests. Both parties avoid the uncertainty of trial outcome. Settling plaintiffs are ensured recovery, and settling defendants agree to a price they find reasonable. But settlement confidentiality changes the equation.

Confidentiality is often a bargaining chip, the value of which is synchronous with the public's interest in disclosure. Where information contained in a settlement agreement or known to the plaintiffs is most damning to defendants, the public has a strong interest in that information being disclosed, but the defendant has a countervailing interest in keeping the information secret. Because settlements are generally not required to be filed in court, and because where settlement occurs out of court judges have no say over the agreement, the public suffers.

Settlement confidentiality allegedly allowed the Catholic Church to cover up sexual abuse of minors for decades and to transfer alleged abusers "from church to church without informing parishioners or law enforcement authorities" of the alleged abuses and settlements.[188] In the product liability context, repeated settlements containing confidential-

184. *Id.*

185. Hearn v. BHP Billiton Petroleum (Ark.), Inc., No. 4:11-cv-00474 (E.D. Ark. Apr. 9, 2013).

186. Trotman, *supra* note 164.

187. *Id.*

188. Martha Neil, *Confidential Settlements Scrutinized*, A.B.A. J., July 2002, at 20, 22.

ity clauses prevented the public from discovering alleged defects in Bridgestone/Firestone tires that ultimately resulted in more than 100 deaths.[189] Settlement secrecy poses an even greater threat to the public in environmental cases. The public is almost always an interested third party, but settlement confidentiality means the public may never know of alleged risks that it may face. Further, the synchronous relationship between litigants' interest in secrecy and the public's interest in transparency dovetails with the Federal Rules of Civil Procedure's laissez-faire approach to settlement, creating a system in which litigants maximize their interests by denying the public the information that it most direly needs.

For example, a manufacturer of underground gasoline storage tanks for a national chain of gas stations has an incentive to keep secret any information regarding shoddy manufacturing or design processes that have a high probability of leading to leaks. The public's interest in the information is based on its need to test for contamination, protect people from drinking contaminated water, oversee environmental cleanup, and prevent future damages. The information has high economic value for the manufacturer: If the information becomes public in a suit or settlement alleging groundwater contamination, the manufacturer will likely face suit from people whose water may come from sources between the station and plaintiffs' source, as well as copycat lawsuits by other plaintiffs living in areas near gas stations using the manufacturer's tanks. And the plaintiff who brought the original claim holds a bargaining chip—information—that can be traded for an increase in settlement amount.

To protect the public, courts must rein in secrecy for both in-court and out-of-court settlement agreements. The rule proposed in this Article allows the parties to bargain for secrecy out of court, but if a party allegedly breaches the confidentiality clause, the court will apply the same presumption to that bargain as it would to a secrecy agreement seeking court approval. The result will be that in cases where the public may be interested in the underlying allegations and the resolution, the court will not contribute to denying that information. Further, the uniform rule may take secrecy off the bargaining table in a number of cases, since there is no guarantee that confidentiality will be honored or enforced where there is SCC. If unbridled power to fashion settlement secrecy remains in the hands of litigants, the public interest will virtually always fall prey to litigants' greed.

189. *See id.*; Greenwald, *supra* note 11.