

**Page Denied**

Next 1 Page(s) In Document Denied

# Rising Secrecy in Civil Cases Prompts Legislative Backlash

## *Calls for Limits Reflect Consumer Concerns*

By Elsa Walsh  
Washington Post Staff Writer

Several lawmakers—including some in Maryland, Virginia and the Congress—have undertaken separate and unprecedented efforts to enact legislation aimed at curbing the growing use of secrecy in civil lawsuits involving questions of health and safety.

Secrecy procedures have become entrenched in the past 15 years as a favored way for companies and other parties in lawsuits to avoid the disclosure of sensitive or potentially damaging information. Attorneys also use them to bargain for larger settlements, and judges rely on them as useful tools to clear crowded court calendars.

The legislative proposals face stiff opposition from corporations and the insurance industry, which tend to view lawsuits exclusively as disputes between private parties. They say the secrecy procedures are their only protection against the

disclosure of proprietary information of interest to competitors.

The initiatives, which have the backing of several consumer groups, include:

■ A bill that has won majority support in both houses of the Virginia General Assembly and that would allow attorneys to share with each other confidential documents that they obtain from companies in litigation. The measure, introduced by Del. Bernard S. Cohen (D-Alexandria), is awaiting final action in the House of Delegates after minor amendments were made Friday by the Senate. If approved, the law would make Virginia the first state in the country to legalize such sharing.

Although the legislation would not allow attorneys to share the documents directly with the public, supporters say it would significantly increase the likelihood that important safety information would reach government regulators and eventually be aired publicly at a trial.

■ A bill in Maryland, sponsored by Del. Samuel I. (Sandy) Rosenberg (D-Baltimore), that would make it more difficult for judges to seal records or close court proceedings. A similar measure is pending in the Texas Legislature.

■ A bill in Congress, introduced by Rep. Cardiss Collins (D-Ill.), that would permit attorneys to share confidential company documents with safety regulators and each other.

In addition, Sen. Arlen Specter (R-Pa.) has announced his intention to introduce federal legislation, while Sens. Edward M. Kennedy (D-Mass.) and Paul Simon (D-Ill.), who like Specter are members of the Senate Judiciary Committee, have said they may submit bills. Rep. John Conyers Jr. (D-Mich.), chairman of the House Government Operations Committee, also has announced his intention to hold oversight hearings to review how court secrecy procedures “undermine the health and safety process set up by the federal government,” according to his chief aide, Julian Epstein.

“Everyone is sort of working together to find a way to come up with something that will have a meaningful difference,” said a spokeswoman for Rep. James Scheuer (D-N.Y.), member of the subcommittee on commerce, con-

See SECRECY, B9, Col. 1

Washington Post B1, Col 2, Monday, Feb 20, 89

THE WASHINGTON POST

# Consumer Concerns Reflected in Efforts To Limit Secrecy Orders in Civil Cases

SECURITY, From B1

sumer protection and competitiveness. "Its time has come."

The proposals that may draw the most opposition are those that would restrict judges' broad discretion to grant protective orders during the early stages of a lawsuit. Such orders permit attorneys in a dispute to share confidential documents on the condition that they not share them with anyone else.

Collins filed a similar version of her legislation as an amendment to another bill last year, but the other lawmakers said their measures were prompted, in part, by a recent series of articles in The Washington Post on court secrecy. The Post reported that judges routinely grant requests for protective orders in the pretrial stages of lawsuits without reviewing any of the confidential documents. Because more than 90 percent of most lawsuits are settled before trial, the information is rarely made public or brought to the attention of government safety regulators.

For example, General Motors Corp., in defending itself against scores of lawsuits filed by victims of fiery car crashes, avoided that type of public debate about the safety of its gas tanks by obtaining protective orders preventing the disclosure of key documents.

Johnson & Johnson adopted a similar strategy in defending itself against more than 600 lawsuits that followed the company's decision to withdraw its popular painkiller Zomax from the market after reports of hundreds of adverse reactions to the drugs.

Specter's proposal would make it far more difficult for judges to grant protective orders. According to his administrative assistant, Carl Feldbaum, Specter's initiative, which is being drafted, would require judges to "consider the public interest before granting a protective order"

*"The public courts have been closing the door on a lot of information that could have saved lives and prevented injuries for too long."*

— Ralph Nader

and establish a three-pronged test that would weigh heavily toward public disclosure, including proof that no less restrictive alternative is available.

Such measures concern lawyer Victor E. Schwartz, author of a text on product liability and general counsel to the Product Liability Alliance, which represents the interests of manufacturers. Schwartz said the current procedures "are one of the greatest means we have of facilitating settlement negotiations and not going to trial." He suggested that a more appropriate remedy for ferreting out defective products would be to strengthen re-

gulatory reporting standards and investigations.

Others, such as consumer advocate Ralph Nader, disagree. "The public courts have been closing the door on a lot of information that could have saved lives and prevented injuries for too long," he said.

The Post series also reported that several local judges have sealed cases in which doctors were accused of professional misconduct. Implicit in the sealing orders was an understanding that the information would not be brought to the attention of regulatory authorities.

Under the Maryland bill, a request to seal court records or proceedings would trigger an automatic hearing, and state judges would be required to give three-day notice to the public and the media, a procedure long advocated by consumer groups such as Public Citizen, which unsuccessfully proposed that a similar process be adopted in U.S. District Court here nine years ago.

Public Citizen has fought for access to confidential documents in several courtrooms across the country, winning a federal appeals court ruling last fall that said public policy dictated that the confidential material in a liability case against a cigarette manufacturer should be made available to the public.

"The problem has been and remains acute," said Collins, whose bill would permit safety regulators to inspect the confidential documents in addition to permitting the sharing of the documents among attorneys with similar cases. "The big loser continues to be public safety."

18

F1