Testimony of Dan Levine and Lisa Girion, Reuters News

"The Federal Judiciary in the 21st Century: Ensuring the Public's Right of Access to the Courts"

Subcommittee on Courts, Intellectual Property, and the Internet, Committee on the Judiciary, U.S. House of Representatives, September 26, 2019

Thank you, Chairman Johnson and Ranking Member Roby, for the opportunity to testify about Reuters' investigation of court secrecy and to present our findings on the judicial supervision of sealed court filings that impact public safety.

My name is Dan Levine. I have been reporting on the U.S. judicial system for 15 years, the last nine of them at Reuters. My stories cover a range of high profile legal issues including President Trump's travel ban, the death penalty and tech privacy. During this time, it has become more and more challenging to explain the workings of our federal and state courts because of a growing number of confidential settlements, sealed motions and even closed hearings.

And my name is Lisa Girion. I came to Reuters in 2016 after 16 years at the Los Angeles Times. Much of my reporting has focused on the tragic consequences of dangerous products and anti-consumer practices. Among the topics of my stories: how health insurers dumped the sick, what J&J knew about what was in its Baby Powder and how the opioid industry duped doctors and patients. All of these stories, and more, relied on records produced in court proceedings but nevertheless kept under seal. The public interest in such evidence is demonstrated by the stories' impact. Each has prompted new legislation, government investigations or changes in corporate behavior.

The courthouse is one of the great public forums of American government. Controversies litigated there, even those nominally involving two particular parties, often impact thousands if not millions of people. That makes the courthouse an indispensable source of information for consumers, journalists, academics, investors and others. U.S. case law recognizes that transparency and open access to proceedings are fundamental to ensuring confidence in the courts and judicial accountability.

As journalists who have long covered and relied on the courts as a source of information, we often encountered court records that appeared to contain information vital to the public interest that were sealed without explanation. To be sure, there are

recognized legitimate reasons for keeping some evidence confidential: private medical records, for instance, or a trade secret like the recipe for Coca-Cola. But the public has an interest, too -- in learning about undisclosed side effects, parts that make cars unsafe to drive, dangerous minerals lurking in cosmetic powders and other hazards.

U.S. appeals courts have long recognized that documents filed in court are presumed to be public. Court rules and legal precedents require judges to weigh requests for confidentiality against the public's interest. But judges seldom do so, thereby failing to fulfill what the law demands of them.

The goal of the Reuters project that brings us here today, "Hidden Injustice," was to answer some basic questions: Is indiscriminate sealing of documents an issue in a few isolated cases? Or, is it a systemic problem throughout the courts? If it is systemic, what are the causes? And, is the public harmed by it?

We were not the first to consider these questions. But in reviewing the historical debate, we realized that no consensus had developed on the answer. Why? No one had done a quantitative analysis to develop reliable national data on the scope of secrecy in the courts.

As Arthur Miller, a recognized authority on civil procedure, put it in a widely cited 1991 Harvard Law Review article: "Is it true that protective orders and court seals keep information regarding public health and safety hidden? Thus far, assertions to that effect have been supported primarily by anecdotal evidence; research or statistical data is completely nonexistent."

So, in the summer of 2017, Reuters began to investigate how common sealed filings were in federal civil litigation.

We analyzed Westlaw data from 3.2 million civil suits filed in federal court between 2006 and 2016. Reporters used a combination of artificial intelligence tools and manual case review. The computer-driven analysis, using a process known as machine learning, reviewed 90 million court actions and identified those in which material was filed under seal. This revealed that judges allowed litigants to seal material in at least 65 percent of product liability cases, all of which involve injury or death.

But to determine whether judges were fulfilling their legal duty to weigh requests for secrecy against the public's right to know, we needed more information about those cases: What was the nature of the material that was sealed? Was it trade secrets or

other information that the law allows to be kept confidential, or did there appear to be information relevant to public health and safety? Did the judges fulfill their legal duty of balancing the public interest against the request for confidentiality?

To answer those questions, we focused on a subset of data: Multidistrict litigation involving product liability claims.The heat of the debate over sealed records is the impact on public health and safety, and those MDLs usually involve widely-used products that are allegedly defective.

We and two fellow reporters spent several months manually reviewing the docket entries in 115 of the largest product liability MDLs that had been litigated over the past 20 years. These MDLs encompassed nearly 250,000 cases -- all consolidated for pretrial proceedings before judges who are typically experienced and well-respected.

We determined the nature of the sealed material by reading unredacted passages or other public court documents that described the content. We flagged instances where it was clear that information related to public health and safety was filed under seal and recorded whether judges offered any justification for the secrecy.

Our findings support what Chairman Johnson told us earlier this month: that secrecy in court is a “life and death” issue.

We found that over the past 20 years, federal judges sealed evidence relevant to public health and safety in about half of the largest product liability cases. Those cases comprised nearly a quarter million death and injury claims involving dozens of products used by millions of consumers: drugs, cars, medical devices and other products.

Secrecy has become so ingrained in the system that judges rarely question it. In 85 percent of the cases where Reuters found health and safety information under seal, judges provided no explanation for allowing the secrecy.

Our reporting found that secrecy has become the norm because it makes things easier for everyone involved. Corporate lawyers want to protect their clients’ reputations. Plaintiffs’ lawyers want to avoid miring their clients’ cases in lengthy courtroom wrangling over requests that filings be unsealed or unredacted. And judges want to keep the business of justice moving on crowded dockets.

The impact of this pro forma secrecy is broad. And deadly. Although secrecy makes complete analysis impossible, Reuters found that hundreds of thousands of people were killed or seriously injured by allegedly defective products after judges in just a

handful of cases -- including opioids -- allowed litigants to file under seal, beyond public view, evidence that could have alerted consumers and regulators to potential danger.

The opioid epidemic is the most significant example we found of the lethal results of this secrecy. The epidemic has been blamed on greedy drug makers, feckless doctors and lax regulators. But judges' contribution to the depth and duration of the catastrophe had gone largely unnoticed.

In 2001, West Virginia was the first state to sue Purdue Pharma over its marketing practices for OxyContin. The state accused the drugmaker of duping doctors into widely prescribing the narcotic by minimizing its risks, convincing them it was less addictive than other opioids because just one dose delivered steady relief for 12 hours.

Although the case was in state court, its path typified current federal court procedure. The parties exchanged evidence during discovery, outside the court record and inaccessible to the public. This exchange occurred, as it almost always does, under the judge's protective order that the material remain confidential.

Then Purdue asked the judge to rule in its favor before trial. That's when documents describing Purdue's marketing strategies began to hit the docket. Evidence entered into the court record to support pre-trial arguments is generally the only way, short of a trial, that discovery material can become public. But in this case, as is routine, the judge allowed that evidence to remain sealed without any explanation.

And because -- as is routine -- the case settled before it went to trial, that evidence remained hidden, out of sight to regulators, doctors and patients. Over the next few years, as OxyContin sales and opioid-related deaths climbed, more than a dozen other state and federal judges overseeing similar lawsuits against Purdue took the same tack, keeping the company's records secret.

It wasn't until my colleagues and I reported on the contents of some of those sealed documents in 2016 at the LA Times that doctors would learn that Purdue's drug didn't work as promised in many patients. And it wasn't until after our stories were published that the West Virginia judge would decide to unseal the evidence -- nearly 12 years after the fact.

Yet the practice of sealing evidence without any public justification continued into the MDL currently proceeding before Cleveland federal judge Dan Polster who, despite existing 6th Circuit case law, allowed sealing and redaction in court filings without any analysis as to whether the material deserved to be secret. Only after the 6th Circuit

specifically rebuked Polster in June did he allow much more information to become public from that proceeding.

We saw the same pattern of secrecy in litigation against Remington Arms Co. Beginning in the early 1980s, judge after judge kept under seal evidence that the trigger on Remington's 700 hunting rifle was prone to misfiring. In 2014, after decades of secrecy, a judge presiding over a class-action lawsuit in Missouri refused to seal a trove of documents that showed the company had been aware of the defective trigger since the late 1940s. By the time the information came out, nearly 200 people had died from accidental shootings blamed on the problem. The company then recalled the defective rifles.

Thousands more people died in rollover accidents involving General Motors Co cars and trucks while judges agreed to hide records showing the company knew that reinforcing vehicle roofs would save lives. After a decade of lawsuits in which those records were kept secret, a Los Angeles judge released the information in 2004 at the request of plaintiffs who wanted to share it with regulators. In 2009, the federal government upgraded a decades-old standard on roof strength.

And as we reported earlier this month, a federal judge in Brooklyn has sealed -- again, without explanation -- evidence that plaintiff lawyers say shows that Merck exaggerated the safety record of its baldness drug Propecia. Citing internal company communications, plaintiffs allege that Merck's label understates the number of men who experienced sexual symptoms in clinical trials and how long those symptoms lasted.

Serious sexual and mental health impacts have been reported among Propecia users. From 2009 to 2018, the FDA received about 5,000 reports of sexual side effects or mental health side effects – and in many cases, both – occurring in men who took Propecia. Of those, about 350 reported suicidal thoughts, and about 50 said a patient committed suicide.

Reuters learned about the nature of the sealed evidence only after discovering filing errors in briefs that left some of it exposed. Earlier this month, we filed a motion to unseal those documents, which is pending.

Though undoubtedly plaintiffs sue companies in search of monetary compensation for deaths and injury, many of them also see their lawsuits as an important vehicle for public accountability. They quickly become disillusioned by the secrecy that pervades the judicial process. Plaintiff lawyers told us they are reluctant to fight defendants'

requests for confidentiality because the argument would prolong the case, costing their clients more in legal fees.

The pro forma secrecy prompts some people of conscience to take unorthodox and even legally questionable actions to do what they feel is right by leaking confidential material to journalists.

David Egilman was an expert witness in a lawsuit alleging Eli Lilly & Co's antipsychotic drug Zyprexa could cause excessive weight gain and diabetes. Egilman, a clinical professor of family medicine at Brown University, made Lilly records he had reviewed in the case available to the New York Times.

After the newspaper published articles based on the documents, Lilly threatened to seek criminal sanctions against Egilman. In 2007, he agreed to pay the drug maker $100,000 to resolve the matter. About a year later, Lilly pleaded guilty and agreed to pay $1.4 billion to resolve charges it had illegally marketed Zyprexa.

That experience weighed on Egilman when, as an expert witness in the opioid litigation, he tried to persuade a Massachusetts judge to allow documents he had reviewed about Purdue's development and marketing of OxyContin to become public under open records regulations. But, fearing he would set a bad precedent, he dropped the case after the judge expressed skepticism.

"I could have stopped this," Egilman told us in an interview for our June 25 story about sealed evidence in the opioid litigation. "I am morally and ethically responsible. I took an oath to protect my patients' health, not corporate profits."

For more details on our findings and methodology, we refer you to our stories from June 25 and September 11, which we attached to our written statement, along with a description of our methodology.