

## Lawmakers want OK to seal court settlements

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Published: April 29th, 2011

Federal lawmakers would like to require judges to consider public health and safety issues before allowing court records to be sealed in settlement agreements.

The Sunshine in Litigation Act (S.623), reintroduced in March by Sen. Herb Kohl, D-Wis., is to prohibit courts from shielding important health and safety information from the public as part of settlement agreements.

It was prompted, according to a press release from Kohl, by dozens of cases in which hazards and threats to public health were not disclosed during court settlements and subsequently resulted in additional fatalities, serious injuries or illnesses.

A hearing on the proposed legislation is scheduled for Thursday during an executive meeting of the Senate Committee on the Judiciary, of which Kohl is a member.

"I don't see the need of it," said Kevin S. Cooman, a partner at McConville Considine Cooman & Morin PC, whose practice includes civil litigation work in federal and state courts. "I guess maybe I have more confidence in our judges than the congressmen appear to have. I would count on the judiciary and the parties who are litigating the case to do the right thing."

He said not a lot is closed in federal proceedings, but there has been a concern that if a case, for example in a product liability suit, is quietly resolved, it will be kept hidden from view.

"I guess I'm not convinced that in the vast majority of cases you need to mandate what the judge can and cannot seal," Cooman said. "I think the good judgment of the parties and the courts should be able to resolve it reasonably without needing this additional legislative mandate."

Kohl cites a number of examples of court secrecy agreements that resulted in injuries or fatalities including defective heart valves, dangerous playground equipment, side-saddle gas tanks prone to causing deadly car fires and the 2010 Toyota recall of more than 8 million cars for unintended acceleration problems cited in the deaths of more than 80 people.

The proposed legislation, originally introduced by Kohl in the 1990s, calls for amending Chapter 111 of Title 28, U.S. Code, to put restrictions on protective orders and sealing of cases and settlements.

It would prevent a court from entering into an order under Rule 26 (c) of the Federal Rules of Civil Procedure restricting the disclosure of information relevant to the protection of public health or safety.

"This legislation does not prohibit secrecy agreements across the board," Kohl said. "And, it does not place an undue burden on judges or on our courts. It simply states that where the public interest in disclosure outweighs legitimate interests in secrecy, courts should not shield important health and safety information from the public."

A similar version has been introduced in the House by Rep. Jerrold Nadler, D-8th, of Manhattan, who serves on the House Committee on the Judiciary.

The Judicial Conference has not taken a position on the proposal, but federal Judge Mark R. Kravitz, U.S. District Court for the District of Connecticut, addressed the House Judiciary Subcommittee on Commercial and Administrative Law in June 2009.

Representing the Judicial Conference Committee on Rules of Practice and Procedure and its Advisory Committee on Civil Rules, which he still chairs, Judge Kravitz said the bill is unnecessary.

He said it would impose an intolerable burden on federal courts and have significant adverse consequences on civil litigation including making litigation more expensive and making it more difficult to protect important privacy matters.

Judge Kravitz said the proposed act, then the Sunshine in Litigation Act of 2009, would effectively amend the Federal Rules of Civil Procedure outside of the rulemaking process, contrary to the Rules

Enabling Act (28 U.S.C. 2071-2077) which provides for extensive scrutiny by the public, bar and bench through an advisory process carefully considered by the Judicial Conference and then presented after approval by the U.S. Supreme Court to Congress.

"The rules committees studied the examples of cases in which information was hidden from the public commonly cited to justify legislation such as H.R. 1508 [now H.R. 592]," Judge Kravitz testified. "In these cases, the rules committees found that there was information available to the public sufficient to protect public health or safety."

He said pertinent information was found in court documents available to the public, such as pleadings and motions and stories in the media.

"Even when a protective order is entered, it usually does not result in the sealing of all, or even many, documents or information submitted to the court," Judge Kravitz said. "Case law shows that courts are rightly protective of the public's right to gain access to information and documents submitted to the courts."

Dick Carelli, a spokesman for the U.S. courts, said the committee's position is unchanged.

The Senate Committee on the Judiciary, on Thursday, is also scheduled to consider the nomination of Denise E. O'Donnell of Buffalo to be director of the Bureau of Justice Assistance within the Department of Justice.

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