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Settlement, Secrecy, and Judicial Discretion: South Carolina's New Rules Governing the Sealing of Settlements

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SETTLEMENT, SECRECY, AND JUDICIAL DISCRETION: SOUTH CAROLINA'S NEW RULES GOVERNING THE SEALING OF SETTLEMENTS

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I. INTRODUCTION

Recent well-publicized controversies concerning the Bridgestone/Firestone tire defect litigation,¹ the escalating number of clergy sexual abuse claims,² and high-dollar Wall Street securities scandals³ have refocused national attention upon the issue of court secrecy. In particular, the role that confidentiality orders, sealing orders, and confidential settlements played in those lawsuits has fueled the debate over whether a dangerous excess of secrecy infects our civil justice system.⁴ In the Firestone litigation, for example, the recall of over fourteen million potentially dangerous tires and the subsequent congressional investigation into Firestone and Ford's alleged culpability came eight years after the first of numerous product liability lawsuits concerning a tire that has now been linked to over two hundred and fifty deaths in the United States alone.⁵ Many of those Firestone cases were kept secret under agreed protective orders, sealing orders, and confidential settlements.⁶ Prior to these recent scandals, similar lawsuits, involving products like GM's side-mounted gas tanks, the Dalkon shield, the Shiley heart valve, and similar products and environmental hazards, flew below public radar cloaked by confidentiality orders and secret settlements.⁷ Confidential settlements and secrecy orders have been the subject of vigorous and heated debate in this country since the early to mid-1990s.⁸ In response, a number of states enacted "sunshine in litigation" statutes or rules designed to reduce the level of secrecy in their courts by restricting judicial discretion to issue confidentiality orders.⁹ The Firestone scandal renewed these

1. See Rosclyn Bonanti et al., *The Message of the Firestone/Ford Tragedy*, TRIAL, Apr. 2001, at 52; *Bridgestone-Firestone Settlement Approved*, CNN.com, March 15, 2004.

2. See Stephanie S. Abrutyn, Commentary, *Courts are Just as Guilty in Church Coverup*, HARTFORD (Conn.) COURANT, May 26, 2002, at C1; Pam Belluck, *Judge Denies Church's Bid to Seal Records on Priests*, N.Y. TIMES, Nov. 26, 2002, at A18; Ken Maguire, *Boston Archdiocese Records Show Drug Use, Sex Abuse by Priests*, NEWSDAY, Dec. 4, 2002.

3. See Martha Neil, *Confidential Settlements Scrutinized*, A.B.A. J., July 2002, at 20, 22 (reporting on proposal to change rules concerning settlement of broker complaints).

4. See generally Laurie Kratky Doré, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283 (1999) (examining the role of secrecy agreements in our judicial system) [hereinafter Doré, *Secrecy by Consent*].

5. *Bridgestone-Firestone Settlement Approved*, *supra* note 1.

6. See *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304 (11th Cir. 2001) (discussing right of press to obtain sealed discovery in settled case involving tire tread separation).

7. See Doré, *Secrecy by Consent*, *supra* note 4, at 300–01 & n.76.

8. For a discussion of the various opposing arguments made in this debate, see Doré, *Secrecy by Consent*, *supra* note 4, at 300–09; Laurie Kratky Doré, *The Confidentiality Debate and the Push to Regulate Secrecy in Civil Litigation*, The 2000 Roscoe Pound Institute Forum for State Court Judges: Secrecy Practices in the Courts (July 29, 2000), available at www.roscoepond.org/new/00Kratky.pdf.

9. Besides South Carolina, approximately eighteen states have enacted some type of sunshine rule or statute aimed at reducing the level of secrecy in their courts. The breadth of these rules varies greatly. Texas and Florida possess the earliest and broadest of these reforms. See FLA. STAT. ANN. § 69.081 (West Supp. 2004) (prohibiting concealment of public hazards); TEX. R. CIV. P. 76a (creating presumption of public access to "court records" that include unfiled settlement agreements and unfiled pretrial discovery that "have a probable adverse effect upon the general public health or safety, or the

reform efforts and prompted at least thirteen states to consider legislation that would restrict secrecy orders and agreements in cases that could compromise public safety.¹⁰

Although these recent proposals failed to make it out of their respective statehouses, the federal and state judiciaries in the State of South Carolina recently adopted their own “sunshine” rules governing the sealing of settlements and judicial records.¹¹ Indeed, the United States District Court for the District of South Carolina became the first federal court in the nation to prohibit outright the sealing of

administration of public office, or the operation of government”).

Reform efforts have been less ambitious in other states. Some statutes concern only discovery and protective orders. *See* ARIZ. R. CIV. P. 26(c)(2) (requiring findings of fact concerning non-stipulated protective orders governing discovery); VA. CODE ANN. § 8.01-420.01 (Michie 2000) (providing that protective orders issued in personal injury or wrongful death cases shall not prohibit sharing of discovery in similar or related matters).

The majority of states confine reform to the sealing of judicial records. *See* CAL. APP. CT. R. 12.5; CAL. CT. R. 243.1–243.4 (prescribing procedures for sealing of court records in trial and appellate courts); CAL. CIV. PROC. CODE § 128(8) (West Supp. 2003) (disfavoring stipulated reversal or vacatur of judgments); CONN. R. SUPER. CT. § 11-20(A) (effective July 1, 2003) (prohibiting sealing of materials “on file or lodged with the court or in connection with a court proceeding” absent notice to interested parties and affirmative trial court findings); DEL. SUPER. CT. CIV. R. 5(g); DEL. CH. CT. R. 5(g); DEL. SUP. CT. R. 9(bb) (requiring judicial determination that good cause exists for continued seal of court records); GA. SUPER. CT. R. 21 (establishing procedural and substantive requirements for sealing of judicial records); IDAHO CT. R. 32(f) (requiring that court make factual finding “as to whether the interest in privacy or public disclosure predominates” before sealing judicial records in the least restrictive fashion); IND. CODE ANN. § 5-14-3-5.5 (Michie 2001) (requiring specific balancing of interests, findings of fact, and conclusions of law before sealing “judicial public record”); LA. CODE CIV. PROC. ANN. art. 1426(C)–(E) (West Supp. 2003) (prohibiting protective order regarding discovery or sealing of records if information relates to public hazard); MASS. UNIF. R. IMPOUNDMENT P. 7 (noting that party agreement is insufficient in itself to constitute good cause necessary to impound papers, documents, or exhibits and directing that court consider other enumerated “relevant factors”); MICH. CT. R. 8.119(F)(4) (limiting court’s discretion to seal any “documents and records of any nature that are filed with the clerk”); UNIF. R. N.Y. STATE TRIAL CTS. § 216.1 (requiring written finding of good cause and consideration of public interest before sealing court records).

Still others aim at particular hazards like product liability or toxic torts. *See* ARK. CODE ANN. § 16-55-122 (Michie Supp. 2003) (voiding settlement agreement or provision concealing environmental hazard); WASH. REV. CODE ANN. § 4.24.611(4)(b) (West Supp. 2004) (restricting confidentiality provisions in court order or private agreement that involve product liability or hazardous substance claims).

Finally, some states restrict their regulation to settlements with a governmental party. *See* ARK. CODE ANN. § 25-18-401 (Michie Supp. 2002) (prohibiting governmental agency from agreeing to confidential settlement or seeking secrecy order concerning settlement terms); N.C. GEN. STAT. § 132-1.3 (2003) (restricting agencies of government or its subdivisions from entering into confidential settlements without “overriding interest”); OR. REV. STAT. § 30.402 (2001) (prohibiting public body from entering into confidential settlement).

For a discussion of these various sunshine statutes and rules, *see generally* Doré, *Secrecy by Consent*, *supra* note 4, at 310–14.

10. *See* Diana Digges, *Confidential Settlements Under Fire in 13 States*, LAW. WKLY. USA, Apr. 30, 2001, at 353 (noting then-pending legislative proposals).

11. D.S.C. LOCAL R. 5.03 (amended effective Nov. 1, 2002) (prohibiting sealing of settlement agreements filed with the court); S.C. R. CIV. P. 41.1 (establishing factors that courts should balance in deciding whether to seal documents and settlement agreements).

settlement agreements filed with the court.¹² Significant controversy and media coverage accompanied the adoption of these South Carolina antisecrecy rules—thus providing ample fodder for this Symposium.

One significant facial difference between the federal and state rules in South Carolina concerns the scope and role of judicial discretion in the decision to seal confidential settlements. On its face, the federal rule removes all discretion from the hands of the trial court, which must refuse the settling parties' request to seal their compromise.¹³ In contrast, the Supreme Court of South Carolina declined to adopt such a bright-line approach and instead chose to guide judicial discretion by enumerating various public and private balancing factors that a court must consider before sealing court records or settlements.¹⁴

This Article explores this difference in approach and suggests that, notwithstanding the controversy surrounding the South Carolina rules, a blanket ban on the sealing of settlement agreements will likely have very limited impact on either court secrecy or confidential settlements.¹⁵ Instead, judicial attention would be better focused upon the myriad other ways in which courts are asked to participate in and facilitate such compromises.¹⁶ For example, settling parties frequently move to maintain agreed protective orders that governed discovery produced during the settled dispute.¹⁷ They may condition their compromise on the sealing of discovery, pleadings, exhibits, or sometimes even entire court files.¹⁸ Or, they may request entry of a confidentiality order that restricts disclosure, not only of the terms and amount of their settlement, but sometimes even the underlying facts and documentary evidence upon which the lawsuit was premised.¹⁹ These occasions for judicial involvement present more potent opportunities for judicial

12. Only one other federal district court in the country has a local rule directed exclusively at sealed settlement agreements. The Eastern District of Michigan limits the duration that settlements may remain sealed with the court. E.D. MICH. LOCAL R. 5.4. See Tim Reagan et al., *Federal Judicial Center, Sealed Settlement Agreements in Federal District Court*, April 2004, at 3 (on file with author) [hereinafter *FJC Report*].

13. D.S.C. LOCAL R. 5.03.

14. S.C. R. CIV. P. 41.1.

15. See *infra* Part II (describing the South Carolina federal and state rules).

16. See *infra* Part III (discussing judicial involvement in confidential settlements).

17. See, e.g., *Griffith v. Univ. Hosp., L.L.C.*, 249 F.3d 658, 662–63 (7th Cir. 2001) (discussing settlement conditioned on maintenance of discovery protective order); *Banco Popular de Puerto Rico v. Greenblatt*, 964 F.2d 1227, 1229 (1st Cir. 1992) (examining stipulated protective order embodied in agreed judgment).

18. See, e.g., *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1311 (11th Cir. 2001) (requiring heightened scrutiny of request to seal entire case record); *Brown v. Advantage Eng'g, Inc.*, 960 F.2d 1013, 1014 (11th Cir. 1992) (noting defendant's agreement to settle for more than previous offers "in exchange for [the plaintiff's] agreement that the record be sealed"); *City of Hartford v. Chase*, 942 F.2d 130, 132 (2d Cir. 1991) (conditioning settlement on sealing of court file).

19. See, e.g., *Baker v. Gen. Motors Corp.*, 522 U.S. 222 (1998) (assessing settlement that barred former employee from voluntarily testifying against employer in other product liability cases); *Kalinauskas v. Wong*, 151 F.R.D. 363 (D. Nev. 1993) (evaluating settlement that barred plaintiff from discussing any aspect of her employment with defendant).

vigilance and oversight of court secrecy.²⁰ Rather than knee-jerk rejection, courts should confront these opportunities with informed discretion—a discretion that accounts for the case-specific and frequently competing public and private interests relevant to “good cause”²¹ and that utilizes the rationale for open courts as its compass.²²

II. THE NEW SOUTH CAROLINA ANTI-SECRECY RULES

A. *The Federal Local Rule*

Effective November 1, 2002, the ten judges of the United States District Court for the District of South Carolina amended their Local Rule 5.03 to prohibit the sealing of settlement agreements filed with the court. New subsection (c) of Local Rule 5.03 provides: “No settlement agreement filed with the Court shall be sealed pursuant to the terms of this Rule.”²³ In so doing, South Carolina became the first federal judicial district in the country to adopt a strict bright-line rule prohibiting the sealing of settlements.²⁴

This most recent amendment generated significant opposition among members of the South Carolina Bar.²⁵ Supporters of the amendment argued that banning court-sanctioned secret settlements would permit timely public access to information concerning product hazards, government malfeasance, environmental dangers, medical malpractice, and other threats to public health and welfare. Opponents argued that a ban on sealing orders would chill settlements, further clog congested courts, increase insurance premiums, and infringe privacy and property interests.

In actuality, however, the local federal rule will likely have limited impact on either court secrecy or confidential settlements. The local rule applies only to settlement agreements that are presented to the court for filing and approval. However, only a small number of cases—those involving minors or class actions,

20. See *infra* Part IV. (discussing judicial oversight of confidential settlements).

21. See *infra* Part IV.A. (discussing private and public considerations relevant to good cause).

22. See *infra* Part IV.B. (discussing how the rationale for open courts may guide judicial discretion concerning confidential settlements).

23. D.S.C. LOCAL R. 5.03(c).

24. Any of the local rules of the District of South Carolina may be suspended or modified “[f]or good cause shown in a particular case.” D.S.C. LOCAL R. 1.02. To the extent applicable to Local Rule 5.03(c), then, this potential “loophole” may permit courts to exercise more discretion to seal filed settlements than the unqualified language of the new rule may suggest.

25. See BNA, Inc., *South Carolina Federal Court Adopts Rule That Will End Sealing of Some Settlements*, 71 U.S. LAW WKLY., Nov. 26, 2002, at 2342 (describing controversy); Clif LeBlanc, *Secret Settlements Banned: Federal Judges Approve Strict Rules; State Courts Might Seek Similar Ban*, THE STATE (Columbia, S.C.), Nov. 7, 2002 (stating that South Carolina lawyers opposed new rule 2 to 1). See also James E. Rooks, Jr., *Let the Sun Shine In: “Sunshine” Laws Do Not “Chill” Settlements, Say Advocates of Open Courts*, TRIAL, June 2003, at 18, 20 (describing opposition to proposed South Carolina rule amendments).

for instance—require that settlements be submitted to or approved by the court,²⁶ and even then, the settlement itself will generally contain only limited information regarding the underlying facts or documents in the case.²⁷

As discussed further below, the majority of cases settled confidentially involve no court filing other than the stipulation of dismissal.²⁸ In such cases, confidentiality, like other settlement terms, becomes a matter of private contract that entails no judicial scrutiny or involvement.²⁹ Moreover, the local rule explicitly does not limit “the ability of the parties, by agreement, to restrict access to documents which are not filed with the Court.”³⁰ Thus, unfiled discovery, even if relevant to public health, safety, or welfare, may remain confidential pursuant to private protective agreements.³¹ Although other provisions police the sealing of judicial records or court files,³² the rule does not address requests to issue or maintain protective orders governing discovery produced in the settled case. Nor does it guide courts asked to issue confidentiality orders that incorporate private nondisclosure agreements.³³ The local federal rule thus does not regulate many of the other more prevalent means by which courts arguably endorse secrecy in settlement.³⁴

B. South Carolina Rule of Civil Procedure 41.1

Following the lead of the federal judiciary in South Carolina, the Supreme

26. See *infra* notes 93–97 and accompanying text (discussing the small subset of disputes that require such judicial review).

27. See *Huffy Corp. v. Superior Court*, 4 Cal. Rptr. 3d 823, 833 (Cal. Ct. App. 2003) (recognizing that much of settlement contained “routine verbiage which appears in most settlement agreements”). See also *FJC Report*, *supra* note 12, at 10 (concluding that “generally the only thing kept secret by the sealing [of settlements] is the amount of settlement”).

28. See *Jessup v. Luther*, 277 F.3d 926, 929 (7th Cir. 2002).

29. See *infra* notes 46–52 and accompanying text (discussing the wide latitude parties possess to privately contract for confidentiality).

30. D.S.C. LOCAL R. 5.03.

31. “[P]rotective agreements intended to limit access to and use of materials gained in discovery” do not require prior judicial approval. D.S.C. LOCAL R. 5.03.

32. The 2002 amendments to Local Rule 5.03 relate only to the sealing of filed settlement agreements. Requests to seal documents other than settlements are governed by separate provisions of the rule. Subsections (A) and (B) of Local Rule 5.03, adopted in 2001, prohibit the sealing of documents filed with the court unless strict procedural requirements are satisfied. D.S.C. LOCAL R. 5.03(A)–(B). Under that mandatory procedure, a party seeking to file documents under seal must specifically identify the particular “documents or portions thereof for which sealing is requested” and “state the reasons why sealing is necessary.” *Id.* at 5.03(A)(1)–(2). The motion to seal must further explain “why less drastic alternatives to sealing will not afford adequate protection” and address various public and private factors set forth in applicable case law. *Id.* at 5.03(A)(3)–(4). The rule additionally requires the clerk of the court to provide public notice of the motion to seal. *Id.* at 5.03(B).

33. See *infra* notes 63–71 and accompanying text.

34. The Federal Judicial Center has recently completed its exhaustive study of the prevalence of sealed settlement agreements filed in federal district court. That study concludes that “[s]ealed settlement agreements are rare in Federal court. They occur in less than one-half of one percent of civil cases.” *FJC Report*, *supra* note 12, at 9.

Court of South Carolina adopted a new rule of civil procedure to govern the sealing of documents and settlement agreements. South Carolina Rule of Civil Procedure 41.1, effective May 5, 2003, establishes guidelines intended to aid a court in balancing “the right of public access to court records with the need for parties to protect truly private or proprietary information from public view and to insure that rules of court are fairly applied.”³⁵ The state rule does not apply to private settlement agreements, but “shall not be interpreted as approving confidentiality provisions in private settlement agreements where the parties agree to have the matter voluntarily dismissed . . . without court involvement.”³⁶ In addition to mirroring the federal local procedures concerning the sealing of records,³⁷ the state rule directs courts to consider specific balancing factors. These concerns include:

- (1) the need to ensure a fair trial; (2) the need for witness cooperation; (3) the reliance of the parties upon expectations of confidentiality; (4) the public or professional significance of the lawsuit; (5) the perceived harm to the parties from disclosure; (6) why alternatives other than sealing the documents are not available to protect legitimate private interests . . . ; and (7) why the public interest, including, but not limited to, the public health and safety, is best served by sealing the documents.³⁸

Finally, settlement agreements submitted for court approval “shall not be conditioned upon [their] being filed under seal.”³⁹ Although the rule originally proposed by the supreme court would have altogether banned the sealing of filed settlements, that blanket prohibition now applies only to settlements involving “a public body or institution.”⁴⁰ When considering whether to approve the sealing of nongovernmental settlements, a court must engage in the balancing of public and private interests enumerated in the new rule.⁴¹ Thus, the state rule does not go as far as the federal local rule in altogether banning confidential filed settlements, but instead guides courts in balancing the desire for confidentiality against the need for public access.⁴²

35. S.C. R. Civ. P. 41.1(a).

36. *Id.*

37. *See supra* note 32.

38. S.C. R. Civ. P. 41.1(b)(1)–(7).

39. *Id.* at 41.1(c).

40. *Id.* (“Under no circumstances shall a court approve sealing a settlement agreement which involves a public body or institution.”). *See infra* notes 105–13 and accompanying text (discussing why the presence of a governmental litigant might militate against entry of a confidentiality order).

41. *Id.* at 41.1(c)(1)–(4). Except for concerns regarding a fair trial, witness cooperation, and party expectations, the factors for sealing a settlement that a court must address mirror those for sealing records.

42. *Erie*-like concerns with vertical forum shopping may arise if this facial difference in rules leads to differences in result concerning the sealing of settlement agreements in state versus federal court in South Carolina. *See* Jack H. Friedenthal, *Secrecy in Civil Litigation: Discovery and Party*

III. JUDICIAL INVOLVEMENT IN CONFIDENTIAL SETTLEMENTS

Opponents of antisecrecy rules like those recently enacted in South Carolina virtually all contend that restricting the ability of litigants to settle their cases confidentially will “chill” settlements and further burden an already overtaxed court system.⁴³ This principal criticism, however, probably overstates the risk that “sunshine” poses to settlement. Settlements would likely continue to occur without secrecy given the costly, time-consuming, and risky alternative of trial.⁴⁴ Confidentiality does, however, undoubtedly facilitate the settlement process, and many compromises could not be reached in the absence of a confidentiality covenant.⁴⁵

A. Confidentiality Through Private Contract

Neither the federal nor the state rules in South Carolina impede the ability of litigants to contract privately for confidentiality as a condition of their compromise.⁴⁶ Left to their own devices, litigants possess wide latitude to craft provisions that will cloak their settlements with seemingly impenetrable layers of confidentiality. Settling parties, for instance, may provide for the destruction or return of potentially incriminatory documents produced during discovery or agree to abide by the nondisclosure provisions of a stipulated protective order following

Agreements, 9 J.L. & POL’Y 67, 98 (2000) (“Neither the possibility of protection nor a threat of disclosure should become a motivation for forum shopping.”). *But see* Jack B. Weinstein & Catherine Wimberly, *Secrecy in Law and Science*, 23 CARDOZO L. REV. 1, 24 (2001) (suggesting that approach toward court secrecy “should . . . be deemed procedural so that . . . federal court[s] would not have to apply the laws of fifty states”).

43. See Richard L. Marcus, *The Discovery Confidentiality Controversy*, 1991 U. ILL. L. REV. 457, 484–85 (1991) (contending that sunshine reforms impede settlement); Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 429 (1991) (arguing that confidentiality is “essential” to settlement).

44. See *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 788 (3d Cir. 1994) (predicting that settlements will likely be entered regardless of confidentiality promise (quoting *United States v. Ky. Utils. Co.*, 124 F.R.D. 146, 153 (E.D. Ky. 1989), *rev’d*, 927 F.2d 252 (6th Cir. 1991)). See also Friedenthal, *supra* note 42, at 95 (finding it “unlikely that even a total ban on confidentiality provisions would be a major deterrent to settlement”).

45. See Michael F. Connolly, Esq., Massachusetts Continuing Legal Education, Inc., *Winning Through Settlement: Enforcement or Rescission of Settlement Agreements*, § 13.4.2 (2001) (describing confidentiality as a “highly valuable bargained-for term” without which “parties are loathe to settle”); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2656 (1995) (admitting that some settlements will collapse without confidentiality); Weinstein & Wimberly, *supra* note 42, at 7, 20 (discussing how confidentiality assists in settlements that often require “some sort of secrecy agreement”).

46. South Carolina Rule of Civil Procedure 41.1, however, prohibits parties seeking court approval of their compromise from conditioning it upon its being filed under seal. S.C. R. CIV. P. 41.1(c).

dismissal.⁴⁷

Settlements commonly covenant not to disclose the existence, terms, or amount of the resolution.⁴⁸ Some further attempt to “gag” the parties with respect to the underlying controversy itself.⁴⁹ For sufficient consideration, a settling party might agree not to voluntarily disclose information concerning the historical facts of a controversy—information that may be relevant to a public hazard or a defendant’s wrongdoing.⁵⁰ Although some existing sunshine laws cast doubt on the validity of these types of confidentiality agreements,⁵¹ courts will generally enforce them as

47. See *Ky. Utils. Co.*, 927 F.2d at 253 & n.1 (reviewing stipulated dismissal that required destruction of unfiled discovery); see also Doré, *Secrecy by Consent*, *supra* note 4, at 385–86 n.398 (discussing agreements to return or destroy discovery after settlement).

48. See, e.g., *Jessup v. Luther*, 277 F.3d 926, 928 (7th Cir. 2002) (recognizing that parties often settle “in part anyway, because they do not want the terms of the resolution to be made public”); *EEOC v. Rush Prudential Health Plans*, No. 97-C 3823, 1998 WL 156718 (N.D. Ill. Mar. 31, 1998) (discussing whether confidential settlement precluded disclosure of settlement amount).

49. See Michael D. Moberly, *The Discoverability of Severance Agreements in Wrongful Discharge Litigation*, 20 HOFSTRA LAB. & EMP. L.J. 1, 11 (2002) (discussing severance and other settlement agreements that forbid disclosure of “even nonconfidential, truthful information” relating to the underlying facts (quoting *Farmers Group, Inc. v. Lee*, 28 P.3d 413, 419–20 (Kan. Ct. App. 2001))).

50. See, e.g., *Fomby-Denson v. Dep’t of Army*, 247 F.3d 1366 (Fed. Cir. 2001) (refusing to enforce settlement agreement that prohibited Army from making criminal referrals of federal employee’s conduct); *In re JDS Uniphase Corp. Sec. Litig.*, 238 F. Supp. 2d 1127, 1138 (N.D. Cal. 2002) (holding that confidentiality agreements did not preclude former employees from disclosing nonprivileged information regarding defendant’s wrongdoing); *Channelmark Corp. v. Destination Prods. Int’l, Inc.*, No. 99-C 214, 2000 WL 968818, at *5 (N.D. Ill. July 7, 2000) (discussing confidential settlement that “would allow a defendant to continue a pattern of harmful behavior while being shielded from the legal system” (citing *Kalinauskas v. Wong*, 151 F.R.D. 363, 366 (D. Nev. 1993))).

51. The Florida statute, for example, voids as against public policy “[a]ny portion of an agreement or contract which has the purpose or effect of concealing” either a “public hazard” or a government settlement. FLA. STAT. ANN. § 69.081(4), (8)(a) (West Supp. 2004). See also ARK. CODE ANN. § 16-55-122 (Michie Supp. 2003) (voiding settlements that restrict disclosure concerning the “existence or harmfulness of an environmental hazard”); WASH. REV. CODE ANN. § 4.24.611 (West Supp. 2004) (permitting court to void private settlements of product liability or hazardous substance claims).

In addition, an increasing number of commentators question the enforceability of confidentiality provisions that “gag” settling parties in this manner. See Connolly, *supra* note 45, § 13.2.8 (characterizing enforcement of such confidentiality provisions as “problematic” when they “seek to conceal information affecting public health or welfare”); 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 (arguing “that the use of secrecy agreements and practice restrictions in settlement contracts should be prohibited” by ethics rules and criminal and civil law); John P. Freeman, *The Ethics of Using Judges to Conceal Wrongdoing*, 55 S.C. L. REV. 829, 832 (2004) (contending that sale of silence constitutes illegal “compounding” agreement); Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261, 275–76 (1998) (criticizing inadequacy of existing law regulating confidential settlements that restrict public disclosure of important information); Stephen Gillers, *Speak No Evil: Settlement Agreements Conditioned on Noncooperation Are Illegal and Unethical*, 31 HOFSTRA L. REV. 1, 2–3 (2002) (arguing that noncooperation clauses that prevent the voluntary disclosure of “information of civil or criminal wrongdoing to the government or other persons with a claim” violate federal obstruction of justice laws and rules of professional

long as they merely restrict voluntary disclosure and do not otherwise prohibit disclosures required by law or court order.⁵²

In most cases, then, confidentiality does not depend upon judicial involvement or approval. Many settlements are reached without any judicial participation in their negotiation or court approval of their terms. In such cases, confidentiality, like other settlement terms, becomes purely a matter of private agreement to be enforced, like other contracts, through separate suit for breach.⁵³ The settlement itself need not be filed with the court, and the litigants can consummate their compromise simply by filing a stipulation of dismissal with the court.⁵⁴ In such cases, the court exercises no judicial discretion and cannot, unless requested, condition the parties' agreement, order the filing of their settlement, or mandate the public disclosure of its terms.⁵⁵ Such confidential settlements, standing alone, do not implicate any right of public access because no court action has been taken and no judicial record exists.⁵⁶

responsibility); Susan P. Koniak, *Are Agreements to Keep Secret Information Learned in Discovery Legal, Illegal, or Something in Between?*, 30 HOFSTRA L. REV. 783, 793 (2002) (contending that secrecy deals "should be treated as legally void, i.e., unenforceable, and in some cases . . . classified as criminal").

52. See Connolly, *supra* note 45, §13.4.2(b) (noting that while some confidentiality agreements arguably offend public policy, "this view has met with little support in decided case law"); Koniak, *supra* note 51, at 786–87 (recognizing that few states "explicitly prohibit or restrict private agreements . . . to keep discovery material or the details of a settlement secret").

A settlement risks violating public policy if it does not except court-ordered or legally-compelled disclosures from its nondisclosure requirements. See *Fomby-Denson*, 247 F.3d at 1378 (holding settlement that prohibited Army from making criminal referrals of federal employee's conduct unenforceable as matter of public policy); *Kalinauskas*, 151 F.R.D. at 367 (refusing to enforce contractual penalties regarding compelled disclosures).

53. See *Herrnreiter v. Chicago Hous. Auth.*, 281 F.3d 634, 636–37 (7th Cir. 2002) (noting that a "settlement agreement is a contract" whose breach may justify damages in separate action); *Jessup*, 277 F.3d at 929 (noting that with stipulated dismissal, "settlement is just another contract to be enforced in the usual way, that is, by a fresh suit"); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 788–89 (3d Cir. 1994) (commenting that litigants can always privately contract for confidentiality and sue to enforce provision in separate contract action).

54. Federal Rule of Civil Procedure 41(a)(1) provides that "an action may be dismissed by the plaintiff without order of the court . . . by filing a stipulation of dismissal signed by all parties who have appeared in the action." FED. R. CIV. P. 41(a)(1)(ii). See also *Jessup*, 277 F.3d at 928 (indicating that Rule 41 stipulation results in dismissal "without further ado or court action"); *Smith v. Phillips*, 881 F.2d 902, 905 (10th Cir. 1989) (noting that court has "no role to play in the settlement" of a case dismissed by stipulation).

55. See *Smith*, 881 F.2d at 904–05 (holding that court lacked postdismissal authority to order litigants to disclose publicly terms of settlement); *Daines v. Harrison*, 838 F. Supp. 1406, 1409 (D. Colo. 1993) (refusing to order disclosure of unfilled settlement in case dismissed by stipulation).

56. See *Jessup*, 277 F.3d at 928 (noting that unfilled settlements, even if reached after commencement of suit, do not require "balancing the interest in promoting settlements . . . against the interest in making public materials upon which judicial decisions are based"); *Smithkline Beecham Corp. v. Pentech Pharm., Inc.*, 261 F. Supp. 2d 1002, 1008 (N.D. Ill. 2003) (observing that settlement "that merely motivates the dismissal of a suit is not a judicial order"); see also Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471, 1495 (1994) (recognizing that third party cannot access settlement not filed with or approved by the court). But see TEX. R. CIV. P. 76a(2)(b)

B. Justifications for Judicial Involvement in Confidential Settlements

Litigants frequently are not content to rely solely upon private agreement to assure confidentiality and may additionally request judicial involvement in, or approval of, their settlement.⁵⁷ The injunctive nature of discovery protective orders may necessitate court approval of any agreement to maintain the nondisclosure or “return or destruction” provisions of an agreed umbrella order entered during discovery in the settled case.⁵⁸ Likewise, any compromise conditioned on the sealing, or continued seal, of confidential documents filed with the court would similarly require judicial endorsement.⁵⁹

In addition, settling parties may forgo an unconditioned stipulated dismissal if they foresee a need for subsequent judicial oversight of their settlement or interpretation of its terms.⁶⁰ Instituting an independent enforcement action to remedy postsettlement unauthorized disclosures may entail inconvenient delay, unwanted expense, and, absent an independent basis for federal subject matter jurisdiction, an undesirable state court forum.⁶¹ If the parties want the federal court that presided over their settled dispute to possess postdismissal jurisdiction to enforce its terms, they must request that the court expressly retain enforcement jurisdiction or embody the confidentiality provision in its order of dismissal.⁶²

(designating certain settlement agreements “not filed of record” as “court records” subject to presumptive right of access).

57. See *Geller v. Branic Int'l Realty Corp.*, 212 F.3d 734, 737 (2d Cir. 2000) (noting that “[i]n many cases, a stipulated settlement will contemplate actions that are not within the power of the litigants to perform, but rather lie within the power of the district court ordering the settlement”).

58. A court retains the power to modify or lift its protective or confidentiality orders at any time, even after judgment or settlement. See *Pansy*, 23 F.3d at 784–85 (noting court’s power to modify or lift confidentiality orders); *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 535 (1st Cir. 1993) (recognizing court’s “inherent power . . . to relax or terminate the order, even after judgment”); *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990) (discussing court’s post-dismissal authority to modify); see also MOORE’S FEDERAL PRACTICE, MANUAL FOR COMPLEX LITIGATION § 21.432, at 69, 72 (3d ed. 1995) (describing stipulated protective order as always subject to modification or termination, even after judgment or settlement).

59. See, e.g., *Geller*, 212 F.3d at 737 (discussing court’s endorsement of settlement conditioned on sealing entire record); *Carty v. Gov’t of Virgin Islands*, 203 F.R.D. 229, 230 (D.V.I. 2001) (indicating that party has “no authority to ‘self-seal’ a document absent court order” even when stipulated).

60. See *Bank of America Nat’l Trust & Sav. Ass’n v. Hotel Rittenhouse Assoc.*, 800 F.2d 339, 344 (3d Cir. 1986) (suggesting these as reasons to file settlement). See also *FJC Report*, *supra* note 12, at 5–6 (noting that “[s]ealed settlement agreements appear to be filed typically to facilitate their enforcement” by same judge through contempt powers).

61. See *Herrnreiter v. Chicago Hous. Auth.*, 281 F.3d 634, 638 (7th Cir. 2002) (noting that suits to enforce oral contracts are governed by state law and must occur in state court unless diversity jurisdiction is satisfied); *Pansy*, 23 F.3d at 788–89 (recognizing that commencement of new suit is “more arduous” than enforcement of court order).

62. In *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375 (1994), the Supreme Court indicated that a federal court must embody a “settlement contract in its dismissal order (or, what has the same effect, retain jurisdiction over the settlement contract)” in order to retain postdismissal enforcement jurisdiction. *Id.* at 381–82. Otherwise, absent an independent basis for federal jurisdiction, “enforcement of the settlement agreement is for state courts.” *Id.* at 382. See generally Margaret

Parties may move a court to issue a confidentiality order for nonjurisdictional reasons as well. Contractual penalties for breach of a confidentiality pledge, whether in the form of attorneys' fees, costs, or liquidated damages,⁶³ might not prove as effective a deterrent as the Damoclean sword of contempt associated with violation of a court order.⁶⁴ The parties can enhance the likelihood of future compliance by converting their private confidentiality agreement into a court order enforceable on pain of contempt.⁶⁵

Moreover, a private confidentiality agreement merely bars voluntary disclosure by the parties to the settlement.⁶⁶ It will not bind nonparties⁶⁷ and does not create any evidentiary privilege.⁶⁸ A privacy promise thus might not justify withholding confidential information in the face of a Freedom of Information Act request or a court discovery order in collateral proceedings.⁶⁹ A confidentiality order concerning settlement-related information mitigates both these dangers. Freedom of information statutes generally do not apply to the courts, and confidentiality orders issued in suits when the government is a party may trump the otherwise

Meriwether Cordray, *Settlement Agreements and the Supreme Court*, 48 HASTINGS L.J. 9 (1996) (discussing *Kokkonen*); Morton Denlow, *Federal Jurisdiction in the Enforcement of Settlement Agreements: Kokkonen Revisited*, 2003 FED. CTS. L. REV. 2 (discussing trial court retention of jurisdiction to enforce settlement agreements); Jeffrey A. Parness & Matthew R. Walker, *Enforcing Settlements in Federal Civil Actions*, 36 IND. L. REV. 33 (2003) (exploring unsettled questions remaining after *Kokkonen*).

63. Harm caused by an unauthorized disclosure might be speculative and not susceptible of ready proof. See Garfield, *supra* note 51, at 289, 323 (noting that contract remedies are "ill-suited" for remedying wrongful disclosures). Stipulated damages clauses aim to avoid prolonged litigation concerning these damages. They may prove unenforceable, however, if they do not reasonably estimate the prospective damages from breach of a confidential settlement. See Doré, *Secrecy by Consent*, *supra* note 4, at 336 n.218, 386 n.401 and accompanying text (discussing stipulated damages clauses in confidentiality agreements); Garfield, *supra* note 51, at 292 (suggesting that courts refuse to enforce stipulated damages provisions in some contracts of silence).

64. See *Pansy*, 23 F.3d at 788–89 (recognizing that separate enforcement action is "more arduous" than reliance on "court's contempt power to enforce a court order of confidentiality"); *City of Hartford v. Chase*, 942 F.2d 130, 137 (2d Cir. 1991) (Pratt, J., concurring) (noting that court order serves as a "powerful means of maintaining and enforcing secrecy"); *Smith v. Phillips*, 881 F.2d 902, 905 (10th Cir. 1989) (indicating that, in absence of confidentiality order, unauthorized disclosures can only be remedied by separate suit).

65. See Connolly, *supra* note 45, § 13.4.3(d) (suggesting that litigants seek "court imprimatur upon settlements for the purpose of strengthening enforcement or deterring breach of the agreements").

66. See *Westinghouse Elec. Corp. v. Newman & Holtzinger, P.C.*, 992 F.2d 932, 936–37 (9th Cir. 1993) (comparing violation of confidentiality agreement, which merely makes parties directly liable to each other, with violation of court order, which makes breaching party liable to the court for sanctions).

67. See Wayne D. Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 HASTINGS L.J. 955, 1026 (1988) (cautioning that nonparties might need access to "all the evidence that will help the jury ascertain the truth").

68. In contrast, communications made in furtherance of settlement negotiations (as opposed to settlement agreements that result from those negotiations) may be privileged and thus immune from subsequent third-party discovery. See *infra* notes 196–200 and accompanying text.

69. See Doré, *Secrecy by Consent*, *supra* note 4, at 387–88.

statutorily required disclosure of "agency" records.⁷⁰ Further, as a matter of comity, a sister court could recognize the confidentiality order in collateral litigation and accordingly shield protected information from the prying eyes of similarly situated litigants and other third parties.⁷¹

Finally, parties to a lawsuit might file or seek court approval of their settlement even if they do not contemplate the court's retention of enforcement jurisdiction or issuance of a confidentiality order. As recognized by Judge Posner:

[L]itigants may negotiate with more confidence if they know that a neutral third party, namely the judge presiding over their case, will look over the settlement agreement and note any ambiguities or other flaws in it that might frustrate or complicate its enforcement should the parties ever come to blows over its meaning. The judge's participation, though informal, may be helpful; it is not improper merely because it gives rise to no enforceable rights or duties.⁷²

Thus, litigants frequently seek to involve the courts in their confidential settlements for diverse reasons and in myriad ways. Whether to issue or continue a stipulated protective or sealing order, to retain enforcement oversight,⁷³ to embody nondisclosure provisions in a court order, or simply to promote settlement through judicial hand-holding, courts are being asked to facilitate secret accords in ways beyond the mere sealing of settlement agreements themselves. A blanket ban like the local South Carolina federal rule does not address these other, arguably more

70. A judicial secrecy order may permit a federal agency to withhold information or documents that it would otherwise have to disclose under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2000). See *GTE Sylvania, Inc. v. Consumers Union of the United States, Inc.*, 445 U.S. 375, 387 (1980). Cf. *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 784 n.13 (3d Cir. 1994) (finding that information restricted by a confidentiality order is not a public record for purposes of state "right to know" act). See generally Doré, *Secrecy by Consent*, *supra* note 4, at 318 n.141, 370 n.347 and accompanying text (discussing impact of government litigant or freedom of information law upon good cause analysis); Janice Toran, *Secrecy Orders and Government Litigants: "A Northwest Passage Around the Freedom of Information Act"?*, 27 GA. L. REV. 121 (1992) (evaluating intersection of confidentiality orders and freedom of information laws).

71. The Full Faith and Credit Clause does not mandate recognition of a confidentiality order by other courts, and such an order cannot bind persons who were not party to the proceedings in which it was entered. *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 235–36 (1998). See Doré, *Secrecy by Consent*, *supra* note 4, at 365 n.330 (discussing the political and logistical difficulties that arise when confidentiality orders are presented for recognition and enforcement in other courts).

72. *Jessup v. Luther*, 277 F.3d 926, 929 (7th Cir. 2002).

73. A federal court can exercise discretion when deciding whether to initially retain enforcement jurisdiction, to employ discretion when enforcement is sought, or to subsequently terminate jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381–82 (1994); *Arata v. Nu Skin Int'l, Inc.*, 96 F.3d 1265, 1268–69 (9th Cir. 1996); see also *Parness & Walker*, *supra* note 62, at 40–44 (discussing discretionary retention or refusal of settlement enforcement jurisdiction).

significant, requests for judicial assistance.⁷⁴

IV. JUDICIAL OVERSIGHT OF CONFIDENTIAL SETTLEMENTS

The South Carolina courts' recent sunshine amendments grow out of a broader concern with what many perceive as an escalating incidence of routine judicial endorsement of stipulated secrecy orders. As noted by the Third Circuit Court of Appeals:

Disturbingly, some courts routinely sign orders which contain confidentiality clauses without considering the propriety of such orders, or the countervailing public interests which are sacrificed by the orders. Because defendants request orders of confidentiality as a condition of settlement, courts are willing to grant these requests in an effort to facilitate settlement without sufficiently inquiring into the potential public interest in obtaining information concerning the settlement agreement.⁷⁵

In dispensing with any meaningful determination of good cause, such courts abdicate their responsibility over court records and permit the parties to control access based on self-interest rather than public interest.⁷⁶ At the same time, a blanket bar on the sealing of settlement agreements abdicates judicial responsibility to exercise discretion to determine whether good cause supports the confidentiality request. This section addresses the public and private considerations relevant to good cause and suggests a functional approach that might guide a court in exercising its discretion concerning confidential settlements.

A. "Good Cause"

As with protective orders governing discovery, courts must determine that "good cause" justifies entry of any confidentiality order concerning a settlement. As stated by the *Pansy* court:

Protective orders and orders of confidentiality are functionally similar, and require similar balancing between public and private

74. See *Geller v. Branic Int'l Realty Corp.*, 212 F.3d 734, 737–38 (2d Cir. 2000) (cautioning courts to "carefully scrutinize the terms of a stipulated confidentiality order before endorsing it").

75. *Pansy*, 23 F.3d at 785–86 (citation omitted).

76. See *Citizens First Nat'l Bank v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999) (warning against "rubber stamp[ing]" party agreements and delegating "carte blanche" decisions to seal record); *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 227 (6th Cir. 1996) (criticizing trial court for abdicating "responsibility to oversee the discovery process and to determine whether filings should be made available to the public" and for permitting "parties to control public access to court papers").

concerns. We therefore . . . conclude that whether an order of confidentiality is granted at the discovery stage or any other stage of litigation, *including settlement*, good cause must be demonstrated to justify the order.⁷⁷

Although the level of good cause necessary to support such an order might vary depending on the type of order and the nature of the information for which protection is sought,⁷⁸ similar private and public considerations factor into the good cause calculus.

1. *Promotion of Settlement*

The need to promote settlement via confidentiality orders and agreements figures prominently in the debate concerning court secrecy, in general, and the new South Carolina antisecrecy rules, in particular.⁷⁹ A strong and deeply held public policy favoring the private settlement of disputes pervades our civil justice system, which carries as its mantra, the “just, speedy, and inexpensive determination of every action.”⁸⁰ Not surprisingly, litigants religiously intone this policy when they contend that their settlement will collapse unless the court accords it some level of confidentiality. Absent some judicial assurance of privacy, they urge, defendants will hesitate to settle high profile nuisance suits that would otherwise be tried to take-nothing judgments. More importantly, repeat players might be unwilling to settle for fear of establishing a benchmark that would encourage other would-be plaintiffs to sue and that could be used against them in future, related litigation.⁸¹ In short, the argument goes, restricting secrecy orders will chill settlements and contribute to an escalating judicial backlog.

Faced with such dire predictions, an over-worked trial judge may be tempted to find the prospect of settling a case on her over-crowded docket “good cause” in itself to issue a confidentiality order. A mere generalized interest in promoting settlement, however, does not, standing alone, justify judicial endorsement of the parties’ confidentiality agreement. Instead, litigants should be required to make “a particularized showing of the need for confidentiality in reaching a settlement.”⁸² Moreover, even a particularized interest in encouraging settlement, while a

77. *Pansy*, 23 F.3d at 786 (emphasis added) (citation omitted).

78. See *infra* Part IV.B.

79. See *Rooks*, *supra* note 25, at 20 (describing “chilled settlements” as one of the principal arguments against the South Carolina amendments).

80. FED. R. CIV. P. 1. For a discussion of how our civil justice system actively encourages settlement from the inception of a lawsuit through its appeal, see *Doré*, *Secrecy by Consent*, *supra* note 4, at 290–92 & nn.19–31.

81. See *Jessup v. Luther*, 277 F.3d 926, 928 (7th Cir. 2002) (noting that “[d]efendants in particular are reluctant to disclose the terms of settlement lest those terms encourage others to sue”). See generally *Doré*, *Secrecy by Consent*, *supra* note 4, at 304 (discussing how public policy favoring settlement supports the argument of confidentiality proponents).

82. *Pansy*, 23 F.3d at 788.

legitimate factor in the good cause formula, must be assessed in light of the litigants' need for secrecy concerning specific information or documents and the countervailing interest of the public in obtaining access to those materials.⁸³

2. *The Need for Confidentiality and Harm from Disclosure*

Demonstrating good cause requires a particularized showing of the need for confidentiality and the harm that might result from disclosure of the settlement or settlement-related information. In this regard, generalized and unsubstantiated allegations should not suffice. Instead, good cause requires "a showing that disclosure will work a clearly defined and serious injury" to a cognizable personal or proprietary interest.⁸⁴

A trial court possesses extensive latitude to grant a confidentiality order to prevent disclosure of a wide array of information and to protect against "annoyance, embarrassment, oppression, or undue burden or expense."⁸⁵ Personal privacy, in particular, deserves heightened protection in today's world of identity theft and reality television.⁸⁶ Courts thus might properly find a "compelling interest in secrecy"⁸⁷ concerning intimate personal information, individual financial data,⁸⁸ or the privacy of minors.⁸⁹

For commercial litigants, nonmonetizable claims of embarrassment or damaged

83. *Phillips v. Gen. Motors Corp.*, 307 F.3d 1206, 1211 (9th Cir. 2002) (indicating that if court finds particularized harm from disclosure, it must balance public and private interests to determine necessity for protective order).

84. *Phillips*, 307 F.3d at 1210–11; *Pansy*, 23 F.3d at 786 (quoting *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1071 (3d Cir. 1984)); see also *Baxter Int'l, Inc. v. Abbott Lab.*, 297 F.3d 544, 548 (7th Cir. 2002) (denying unsubstantiated and nonspecific request to seal appellate record).

85. *FED. R. CIV. P.* 26(c); see also *Phillips*, 307 F.3d at 1211–12 (discussing substantial latitude courts possess in granting protective order governing discovery); *Baxter*, 297 F.3d at 547 (recognizing that "[t]rade secret law does not exhaust legitimate interests in confidentiality"); *Pansy*, 23 F.3d at 787 (suggesting that protection of private information may hinge on whether it is sought for legitimate or illegitimate purpose).

86. Friedenthal, *supra* note 42, at 94–95 (insisting that privacy of involuntary defendants and witnesses with no stake in controversy is "valuable in and of itself"). The advent of electronic filing arguably increases the need to protect legitimate privacy interests. See George F. Carpinello, *Public Access to Court Records in New York: The Experience Under Uniform Rule 216.1 and the Rule's Future in a World of Electronic Filing*, 66 ALB. L. REV. 1089, 1123 (2003).

87. *Jessup v. Luther*, 277 F.3d 926, 928 (7th Cir. 2002).

88. See *Boston Herald, Inc. v. Connolly*, 321 F.3d 174, 190 (1st Cir. 2003) (finding countervailing privacy interest in personal financial information).

89. See *Jessup*, 277 F.3d at 928. The new South Carolina state court rule recognizes the special privacy concerns triggered in family court matters. Rule 41.1(b) provides that "[i]n family court matters, the judge shall also consider whether documents: 1) contain material which may expose private financial matters which could adversely affect the parties; and/or 2) relate to sensitive custody issues, and shall specifically balance the special interests of the child or children involved . . ." S.C. R. CIV. P. 41.1(b). See generally Melissa F. Brown, *Family Court Files: A Treasure Trove for Identity Thieves?*, 55 S.C. L. REV. 777 (2004).

corporate reputation do not furnish good cause.⁹⁰ A court should not, however, automatically refuse to issue a confidentiality or sealing order simply because business or commercial interests are at stake. Indeed, “trade secret[s] or other confidential research, development, or commercial information” can furnish compelling justification for a confidentiality order, especially if the unauthorized disclosure of the information would harm a commercial party’s competitive or financial position.⁹¹

Confidential settlements may seek to guard against disclosure of similar personal, proprietary, or commercial information.⁹² A court should not shy away from safeguarding such interests, if sufficiently important and supported, simply because it wishes to keep its hands clean of any taint of “judicial secrecy.”

3. *Public Interest in Disclosure*

Even if a court finds that a settlement depends upon confidentiality and that particularized harm will result from its disclosure, the court must still balance the litigants’ private interest in secrecy against any countervailing public interest in access. Only a small subset of disputes, such as class actions,⁹³ certain antitrust claims,⁹⁴ shareholder derivative suits,⁹⁵ and those involving minors,⁹⁶ require court review and approval of their settlement. These cases are of particular public interest because they affect persons absent from the bargaining table, as well as the public-at-large. In evaluating these settlements, then, the judge plays a role beyond

90. See *Baxter*, 297 F.3d at 547 (rejecting “bald assertion that confidentiality promotes [litigants’] business interests” without explanation as to how disclosure would harm competitive position); *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 225 (6th Cir. 1996) (finding “litigants’ interest in protecting their vanity or their commercial self-interest” insufficient to justify seal); *Pansy*, 23 F.3d at 787 (recognizing difficulty that corporate litigants face in establishing non-monetizable embarrassment).

91. FED. R. CIV. P. 26(c)(7). Marketing plans, revenue and pricing information, and similar confidential research and development materials, for example, may justify judicial protection. *Cumberland Packing Corp. v. Monsanto Co.*, 184 F.R.D. 504, 506 (E.D.N.Y. 1999). See Doré, *Secrecy by Consent*, *supra* note 4, at 330–31 nn.190–196 and accompanying text (discussing difficulty commercial parties encounter in demonstrating harm from disclosure of information that does not satisfy nebulous definition of “trade secret”).

92. *Phillips v. Gen. Motors Corp.*, 307 F.3d 1206, 1212 (9th Cir. 2002) (recognizing that “courts have granted protective orders to protect confidential settlement agreements”).

93. FED. R. CIV. P. 23(e)(1) (requiring that class settlements be “fair, reasonable, and adequate”).

94. 15 U.S.C. § 16(b)–(h) (2000) (requiring determination that consent decree is in “public interest” considering the “competitive impact of such judgment” and its “impact . . . upon the public generally and individuals alleging specific injury from the violations”).

95. FED. R. CIV. P. 23.1 (prohibiting dismissal or compromise of shareholder derivative actions without notice and court approval).

96. See D.S.C. LOCAL R. 17.02 (prohibiting settlement or dismissal of any “civil action to which a minor or incompetent person is a party” without court order of approval); S.C. CODE ANN. § 62-5-433 (West Supp. 2003) (requiring court approval of settlements with minors that exceed \$25,000).

resolution of the case at hand and serves as guardian of a broader public interest.⁹⁷

A judge's function in other types of arguably more "private" cases is less clear. A court's primary purpose is adjudication of the substantive merits of the case before it.⁹⁸ Unlike legislative or executive branches of government, courts are not principally charged with disseminating information for public consumption, formulating major social policy, or protecting public health or safety.⁹⁹

At the same time, courts are not merely a public service for private dispute resolution.¹⁰⁰ Litigants can obtain such private justice by opting out of the public court system in favor of increasingly prevalent—and confidential—alternative dispute resolution.¹⁰¹ Instead, courts are public institutions, created, staffed, and heavily subsidized by the broader community.¹⁰² The resolution of at least some controversies can resonate beyond the immediate parties and the particular court and affect others, such as similarly situated litigants or other persons who have been

97. See *United States v. Glens Falls Newspapers, Inc.*, 160 F.3d 853, 856 (2d Cir. 1998) (recognizing court's "'larger role' . . . in the resolution through settlement of suits 'affecting the public interest'" (quoting *City of Hartford v. Chase*, 942 F.2d 130, 136 (2d Cir. 1991)); *Janus Films, Inc. v. Miller*, 801 F.2d 578, 582 (2d Cir. 1986) (discussing court's broader role in resolution of "class actions, shareholder derivative suits, bankruptcy claims, antitrust suits brought by the United States, and any suits 'affecting the public interest'" (quoting *Adams v. Bell*, 711 F.2d 161, 170 n.40 (D.C. Cir. 1983) (citation omitted)); see also Natalie C. Scott, Note, *Don't Forget Me! The Client in a Class Action Lawsuit*, 15 GEO. J. LEGAL ETHICS 561, 578 (2002) (describing judges as guardians of the best interests of the class and as responsible to the public).

98. See *United States v. Amodeo*, 71 F.3d 1044, 1049 (2d Cir. 1995) ("*Amodeo II*") (describing the determination of litigants' substantive rights as "conduct at the heart of Article III" judicial powers).

99. See Friedenthal, *supra* note 42, at 72 (viewing courts as "method for private adjudication" and "not an arm of the executive branch . . . investigators[, or] attorneys general").

100. See David Luban, *Limiting Secret Settlements by Law*, 2 J. INST. FOR STUD. LEGAL ETHICS 125, 127 (1999) (contending that courts do not merely provide "system of private justice for dispute resolution" and do not exist solely "for the private convenience of the litigants"); Weinstein & Wimberly, *supra* note 42, at 25 (arguing that judges are not merely neutral arbiters resolving private disputes).

101. See *Baxter Int'l, Inc. v. Abbott Lab.*, 297 F.3d 544, 548 (7th Cir. 2002) (noting that closed arbitration presents "a sure path to dispute resolution with complete confidentiality"); *Union Oil Co. v. Leavell*, 220 F.3d 562, 567–68 (7th Cir. 2000) (stating that "[p]eople who want secrecy should opt for arbitration"); see also Patrick E. Higginbotham, *Judge Robert A. Ainsworth, Jr. Memorial Lecture, Loyola University School of Law: So Why Do We Call Them Trial Courts?*, 55 SMU L. REV. 1405, 1415 (2002) (stating that "marker of arbitration is 'privacy'"); Weinstein & Wimberly, *supra* note 42, at 20, 25 n.102 (indicating that public interest is "more readily ignored" in arbitration when public is "shut out of information almost completely").

102. As stated by the Seventh Circuit in *Union Oil*:

When [litigants] call on the courts, they must accept the openness that goes with subsidized dispute resolution by public (and publicly accountable) officials. Judicial proceedings are public rather than private property, and the third-party effects that justify the subsidy of the judicial system also justify making records and decisions as open as possible.

Union Oil Co., 220 F.3d at 568 (citations omitted); see also *Citizens First Nat'l Bank v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999) (stating that "public at large pays for the courts and therefore has an interest in what goes on at all stages of a judicial proceeding"); Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 513 (1994) (asserting that the "public, which created and funds our judicial institutions, depends upon those institutions to protect it").

or will be affected by the activities or conduct at issue.¹⁰³ As illustrated by the most recent secrecy scandals, nonparties and the general public possess an interest in some cases that may outweigh the parties' desire to settle them confidentially—at least with judicial assistance. The difficulty lies in distinguishing cases that implicate such a legitimate public interest from those in which access merely satiates idle curiosity or voyeurism.¹⁰⁴

a. Government Litigants

Case law and antisecrecy rules consistently recognize one class of case in which the public arguably has a significant, legitimate public interest—those involving a public official or governmental entity, or otherwise bearing on the administration of public office or the functioning of government.¹⁰⁵ Unlike private litigants, government litigants “represent and serve a public constituency, even in litigation.”¹⁰⁶ Besides facilitating public monitoring of the judiciary,¹⁰⁷ access to these cases educates the public about the government itself and the specific governmental action in controversy.¹⁰⁸ With settlement in particular, the public possesses a fundamental interest in supervising the use and expenditure of public

103. See Marc Galanter & Mia Cahill, “Most Cases Settle”: *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1379 (1994) (asserting that focus in settlement should shift from “results among the parties (and the forum) to consider the effects a given process has on others”).

104. See Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2667 n.24 (1995) (noting difficulty of identifying cases of legitimate public interest); Marcus, *supra* note 43, at 469 (noting thin line between “public law” and “private law” cases); Miller, *supra* note 43, at 467 (criticizing sunshine reform as feeding public interests of curiosity and voyeurism). The FJC study concerning sealed settlements indicates that approximately two-fifths of the cases found with sealed settlement agreements had at least one feature “that might make them of special public interest.” *FJC Report*, *supra* note 12, at 8.

105. The new South Carolina Rule of Civil Procedure, for instance, provides that “[u]nder no circumstances shall a court approve sealing a settlement agreement which involves a public body or institution.” S.C. R. CIV. P. 41.1(c). See also ARK. CODE ANN. § 25-18-401 (Michie Supp. 2002) (prohibiting governmental agency from agreeing to confidential settlement or seeking secrecy order concerning settlement terms); N.C. GEN. STAT. § 132-1.3 (2003) (restricting agencies of government or its subdivisions from entering into confidential settlements without “overriding interest”); OR. REV. STAT. § 30.402 (2001) (prohibiting public body from entering into confidential settlement); TEX. R. CIV. P. 76a (creating presumption of public access to settlement agreements that “have a probable adverse effect upon . . . the administration of public office, or the operation of government”). See generally Doré, *Secrecy by Consent*, *supra* note 4, at 369–70, 397–98 (discussing the public interest in cases and settlements involving the government).

106. Doré, *Secrecy by Consent*, *supra* note 4, at 369.

107. See *infra* notes 146–49 and accompanying text for a discussion of the rationale for open courts.

108. See, e.g., *Charlie H. v. Whitman*, 213 F.R.D. 240, 251–52 (D.N.J. 2003) (recognizing great public importance of case involving child welfare system and need for “letting in some reasonable sunlight on the way government works”); *Doe v. Marsalis*, 202 F.R.D. 233, 239 (N.D. Ill. 2001) (permitting postsettlement access to discovery in police sexual misconduct case because “[p]olice misconduct” is matter of “general concern to the workings of our democratic society”).

funds.¹⁰⁹ Thus, public litigants “stand in a different light” than private parties with respect to access¹¹⁰ and courts “should favor revelation and openness with respect to government and other institutional activity.”¹¹¹

Relatedly, settlements may be of potential public interest if the confidential information would otherwise be subject to disclosure under an applicable freedom of information act.¹¹² Such legislation aims to facilitate public monitoring and government accountability. As previously discussed, a confidentiality or sealing order can contravene the purpose of these laws by permitting the bound governmental litigant to escape statutory disclosure obligations. To prevent such frustration of legislative intent, a court can narrowly draw—or refuse altogether—any type of order that impedes public access to settlements or settlement-related information otherwise subject to disclosure under federal or state “right to know” provisions.¹¹³

b. *Public Health and Safety*

Another common target of many antisecrecy rules concerns information relevant to public health and safety.¹¹⁴ This consideration raises both pragmatic and theoretical difficulties. As a pragmatic matter, before refusing the parties’

109. See *Daines v. Harrison*, 838 F. Supp. 1406, 1408–09 (D. Colo. 1993) (stating that neither desire to hide bad behavior nor the interest in promoting settlement outweighs the “public[’s] . . . interest in seeing that public funds are utilized properly”).

110. Friedenthal, *supra* note 42, at 73–74, 98.

111. Weinstein & Wimberly, *supra* note 42, at 30–31; see also *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 785–86 (3d Cir. 1994) (describing public interest “as particularly legitimate and important” where at least one party is a public entity or official); *Tower v. Leslie-Brown*, 167 F. Supp. 2d 399, 404 (D. Me. 2001) (stating that presumption of access “accumulates . . . more weight when the government . . . is accused of wrongdoing”).

112. See, e.g., *Jessup v. Luther*, 277 F.3d 926, 930 (7th Cir. 2002) (addressing newspaper’s attempt to access settlement involving public college through state’s freedom of information act); *Ford v. City of Huntsville*, 242 F.3d 235, 241–42 (5th Cir. 2001) (vacating confidentiality order concerning settlement between city and employee because trial court failed to consider effect of that order on disclosure under Texas Public Information Act); *Pansy*, 23 F.3d at 791 (discussing impact of sealing order on newspaper’s effort to obtain civil rights settlement with borough and its officials under Pennsylvania’s Right to Know Act).

113. In discussing this factor, the Third Circuit in *Pansy* stated that “[n]either the interests of parties in settling cases, nor the interests of the federal courts in cleaning their dockets, can be said to outweigh the important values manifested by freedom of information laws.” *Pansy*, 23 F.3d at 792. Accordingly, “a strong presumption [exists] against entering or maintaining” a secrecy order in such cases. *Id.*

114. See, e.g., ARK. CODE ANN. § 16-55-122 (Michie Supp. 2003) (voiding settlement agreement or provision concealing environmental hazard); FLA. STAT. ANN. § 69.081 (West Supp. 2004) (prohibiting concealment of public hazards); LA. CODE CIV. PROC. ANN. art. 1426(C)–(E) (West Supp. 2003) (prohibiting protective order regarding discovery or sealing of records if information relates to public hazard); TEX. R. CIV. P. 76a (creating presumption of public access to “court records” that “have a probable adverse effect upon the general public health or safety . . .”); WASH. REV. CODE ANN. § 4.24.611(4)(b) (West Supp. 2004) (restricting confidentiality provisions in court order or private agreement that involve product liability or hazardous substance claims).

confidentiality request on this ground, a court must determine that a safety risk exists, an inquiry arguably reaching the merits of the controversy. Whether a court possesses sufficient information to make this assessment when presented with a settlement depends, among other things, on the maturity of the litigation and the amount of discovery that has been produced, filed, or otherwise made known to the court. The effort, time, and cost involved in making additional investigation into this issue may well undercut the very benefits that settlement is meant to offer.¹¹⁵

Likewise, “uncertainties as to what is and what is not a danger to public health or safety” further complicate the inquiry.¹¹⁶ Some types of cases obviously implicate public health, welfare, and safety concerns more than others. Product liability litigation alleging a design defect in a standard product that is marketed on a national or international scale—like that involved in the Firestone tire litigation—presents one such example.¹¹⁷ Environmental hazards that affect broader communities¹¹⁸ or fraudulent securities and financial schemes that potentially harm whole markets illustrate others.¹¹⁹ A court’s approval or sealing of a confidential settlement in such cases may deny similarly situated plaintiffs, potential victims, regulatory authorities, or the media timely access to information regarding a continuing hazard.¹²⁰

Courts can take some comfort in the fact that they are generally not the first line

115. As noted by Professor Friedenthal:

To do its job properly, the court would have to hear from experts and other witnesses. Much of the value of the settlement would be lost, and the cost in time and energy of the court as well as the parties could be substantial. There would be an enormous burden on the judicial system if extensive inquiry were required of courts any time a confidentiality agreement was presented for approval.

Friedenthal, *supra* note 42, at 91.

116. *Id.* at 90.

117. *See, e.g.,* Phillips v. Gen. Motors Corp., 307 F.3d 1206, 1209–10 (9th Cir. 2002) (discussing access to settlement information in case involving pickup fuel-fed fires); Chicago Tribune Co. v. Bridgestone/Firestone, Inc., 263 F.3d 1304, 1315 (11th Cir. 2001) (indicating that interest in preserving trade secrets must still be balanced against “public’s legitimate interest in health and safety”).

118. *See, e.g.,* Union Oil Co. v. Leavell, 220 F.3d 562, 567 (7th Cir. 2000) (reversing sealing of file in settlement of environmental case); Ashcraft v. Conoco, Inc., 218 F.3d 288 (4th Cir. 2000) (addressing impropriety of sealing confidential settlement in environmental tort lawsuit brought by residents of a trailer park whose drinking water had been contaminated by defendant’s underground wells); United States v. Glens Falls Newspapers, Inc., 160 F.3d 853, 858 (2d Cir. 1998) (recognizing “great public importance” of CERCLA suit involving contamination of town water supply).

119. *See, e.g., In re JDS Uniphase Corp. Sec. Litig.*, 238 F. Supp. 2d 1127 (N.D. Cal. 2002) (discussing confidentiality agreement in securities fraud class action).

120. *See* Bonanti, *supra* note 1, at 53 (arguing that Firestone settlements concealed information regarding dangerous product from consumers, media, and government regulators); Gillers, *supra* note 51, at 22 (asserting that nondisclosure agreements keep information regarding “financial frauds, dangerous products, or dangerous people” from others who have been or will be harmed); Weinstein & Wimberly, *supra* note 42, at 21–22 (asserting that judge must weigh interests of other litigants, regulatory agencies, future plaintiffs, and public interest groups); Richard Zitrin, *Why Lawyers Keep Secrets About Public Harm*, PROF. LAW. SUMMER 2001, at 1 (arguing that secret settlements conceal information from the public regarding known harms).

of defense against these potential public dangers.¹²¹ Presumably, the legislative and executive branches of government have greater expertise and primary prophylactic responsibility in this area.¹²² Ultimately, the question of whether a settlement triggers a legitimate public interest in access will depend on case specifics and the court's assessment of the public's need to know.¹²³

4. Similarly Situated Litigants

The anonymous "general public" may well possess rights too amorphous to identify, let alone protect. The pendency of related litigation involving one or more of the parties, however, may indicate that a narrower class of nonparties possesses a more particularized and weightier interest in access to information generated in the settled case.¹²⁴ Indeed, one of the most compelling reasons to modify a discovery protective order, even after a case has been long-settled and dismissed, is to permit the sharing of the otherwise protected discovery with collateral litigants in other sufficiently related pending cases.¹²⁵ Such evidence-sharing avoids the needless duplication of discovery that would otherwise occur in the related lawsuit, resulting in an overall savings of time and expense.¹²⁶

The mere existence of collateral litigation, however, should not altogether preclude judicial involvement in confidential settlements. Instead, a court can foresee and account for the prospect of similarly situated litigants by carefully

121. Some would contend, however, that courts are the last resort after the executive and legislative branches of government have failed to identify and prevent public hazards. See Weinstein & Wimberly, *supra* note 42, at 21–22 (noting the frequent inadequacy of government regulatory systems); Harvey Weitz, *Symposium Comment*, 9 J.L. POL'Y 103, 106 (2000) (contending that open courts play a "vital role" in assisting government regulatory agencies to ensure public safety).

122. See Friedenthal, *supra* note 42, at 89 (attributing safety failures to "governmental agencies who knew of the dangers and the members of the media who did not adequately publicize the information available to them").

123. See *Jessup v. Luther*, 277 F.3d 926, 928 (7th Cir. 2002) (noting that the "interest in secrecy is weighed against the competing interests case by case").

124. Besides seeking access to unfiled discovery covered by a protective order in a settled case, similarly situated litigants can request disclosure of discovery, motions, and other judicial records filed under seal as part of the settlement. See *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1136–37 (9th Cir. 2003) (discussing collateral litigants' effort to unseal eighty-five documents, including discovery and motions for summary judgment, that had been filed under seal in settled case).

125. In *Foltz*, the Ninth Circuit recently reaffirmed that it "strongly favors access to discovery materials to meet the needs of parties engaged in collateral litigation." 331 F.3d at 1131–32. It then clarified when and how collateral litigants may obtain discovery materials produced under a blanket protective order in the settled case. *Id.* at 1132–34. See generally Doré, *Secrecy by Consent*, *supra* note 4, at 363–68 (discussing the considerations that guide courts in determining whether to modify a stipulated discovery order to permit evidence-sharing in related litigation).

126. *Foltz*, 331 F.3d at 1131–32 ("Allowing the fruits of one litigation to facilitate preparation in other cases advances the interests of judicial economy by avoiding the wasteful duplication of discovery.").

crafting its secrecy order.¹²⁷ “Fishing expeditions” by current or prospective litigants should be rebuffed if the need for confidentiality in the settled case remains strong, while the need for access in the collateral case is weak.¹²⁸ Collateral litigants who wish to penetrate a confidentiality order should be required to demonstrate the relevance of and legitimate need for the protected information,¹²⁹ as well as an inability to procure similar materials without undue burden or expense.¹³⁰

The court thus can veto the settling parties’ request to wholly bar evidence-sharing with similarly situated litigants and, instead, expressly provide for such collateral disclosure to eligible litigants. Although this might scuttle some confidential compromises, the court can protect the privacy interests of the settling parties by conditioning any evidence-sharing on the collateral litigants’ consent to the nondisclosure provisions of the order and by retaining subsequent enforcement jurisdiction.¹³¹

5. *Settlement Facts versus Adjudicative Facts*

As previously discussed, some confidential settlements prohibit the parties from

127. See *Tucker v. Ohtsu Tire & Rubber Co.*, 191 F.R.D. 495, 499–501 (D. Md. 2000) (cautioning courts to “avoid issuing discovery orders that are applicable only to collateral litigation in another court” and that would forever insulate the settling defendant from producing protected discovery in other actions).

128. See *Griffith v. Univ. Hosp., L.L.C.*, 249 F.3d 658, 663 (7th Cir. 2001) (denying plaintiffs in related arbitration from obtaining discovery in confidentially settled class action because disclosure would upset settlement and prejudice rights of class members); *SRS Techs., Inc. v. Physitron, Inc.*, 216 F.R.D. 525, 531 (N.D. Ala. 2003) (denying disclosure of protected discovery in settled case when defendant’s reliance on and need for secrecy outweighed plaintiff’s “interest in avoiding duplicative discovery in a possible future civil case”).

129. The relevance of collateral disclosure “hinges ‘on the degree of overlap in facts, parties, and issues between the suit covered by the protective order and the collateral proceedings.’” *Foltz*, 331 F.3d at 1132 (quoting Doré, *Secrecy by Consent*, *supra* note 4, at 366–67). Compare *Walker v. Prudential Prop. & Cas. Ins. Co.*, 286 F.3d 1270, 1280 (11th Cir. 2002) (denying collateral litigants access to irrelevant confidential settlements in other insufficiently similar employment discrimination cases) with *Menasha Corp. v. News America Mktg. In-Store, Inc.*, No. 00-C 1895, 2002 WL 664067, at *2 (N.D. Ill. Apr. 23, 2002) (modifying protective order to permit sharing in virtually identical collateral antitrust suit), *LeBlanc v. Broyhill*, 123 F.R.D. 527, 530 (W.D.N.C. 1988) (permitting sharing of discovery in cases based on “same set of operative facts”), and *Deford v. Schmid Prods. Co.*, 120 F.R.D. 648, 654 (D. Md. 1987) (stating that “[s]haring . . . may be particularly appropriate where multiple individual plaintiffs assert essentially the same alleged wrongs against a national manufacturer of a consumer product”).

130. See *Friedenthal*, *supra* note 42, at 92–93 (recognizing “substantial merit” of evidence-sharing but limiting disclosure to “serious attempts to obtain information that otherwise might not be available or would be costly and time consuming to duplicate”).

131. In *Foltz*, the Ninth Circuit stressed the need to ensure that “reasonable restrictions on collateral disclosure will continue to protect an affected party’s legitimate interests in privacy” 331 F.3d at 1131–32. See *Friedenthal*, *supra* note 42, at 98 (stressing that the “entire situation,” including “reasons for confidentiality,” should be addressed and proper restrictions imposed before permitting collateral disclosure).

voluntarily discussing the settlement itself, its terms or conditions, or the factual and legal merits of the settled controversy.¹³² Such an agreement calls for a particularly discriminating exercise of judicial discretion since a valid distinction can (and probably should) be drawn between settlement facts concerning the specific terms, amounts, and conditions of a compromise, and adjudicative facts relevant to the underlying merits of the settled case.¹³³

The general public seldom possesses a strong interest in obtaining information regarding the specific terms or amounts of a settlement between nongovernmental, private litigants.¹³⁴ The specific amount paid to resolve a dispute has scant relevance to public health, welfare, or safety.¹³⁵ Its disclosure may invade the countervailing privacy interests of the settling parties, who frequently have a peculiar interest in securing, often through the payment of a premium, the confidentiality of these settlement terms. Not even similarly situated present or future litigants can lay good claim to such settlement facts.¹³⁶ Although access to the amounts or terms of a compromise may strategically assist a collateral litigant to assess the settlement value of his related case, it generally will not advance the determination of the substantive merits of his claim.¹³⁷ Unlike discovery produced in the settled case or the historical facts comprising the dispute, settlement

132. See, e.g., *McKnight v. Stein Mart, Inc.*, 1996 WL 481079, at *1 (E.D. La. 1996) (evaluating nondisclosure provision covering “any and all information relating to any aspect of [plaintiff’s] employment”); *Scott v. Nelson*, 697 So. 2d 1300, 1300–01 (Fla. Dist. Ct. App. 1997) (describing confidentiality agreement that prohibited plaintiff “from responding ‘in any way to any inquiry of any kind whatsoever with regard to the facts surrounding the case/claim’”).

133. See *Gillers*, *supra* note 51, at 4 (distinguishing between settlement amounts and information establishing liability); *Menkel-Meadow*, *supra* note 104, at 2685 (differentiating “settlement facts” from adjudicative facts); *Weinstein & Wimberly*, *supra* note 42, at 18–19 (distinguishing “documents that appear to reveal a defendant’s wrongful conduct” from “amount and terms of a settlement”); *Zitron*, *supra* note 120, at 1 (focusing on “information about the claimed harm,” rather than settlement amount).

134. See *Weinstein & Wimberly*, *supra* note 42, at 25 (finding no strong reason to oppose confidentiality of amount and other settlement details, which are “normally a matter of much less public interest than is evidence of the merits”).

135. See *Gillers*, *supra* note 51, at 22 (finding no impropriety in a “desire to keep confidential the amounts paid in settlement”); *Koniak*, *supra* note 51, at 791 n.41 (doubting that settlement amounts “provide much useful information to anyone outside of future litigants and their lawyers”).

136. See *Cason v. Builders Firstsource-Southeast Group, Inc.*, 159 F. Supp. 2d 242, 249 (W.D.N.C. 2001) (holding settlement documents between employer and EEOC not discoverable); *Butta-Brinkman v. FCA Int’l, Ltd.*, 164 F.R.D. 475, 476–77 (N.D. Ill. 1995) (refusing to compel production of confidential settlement in other sexual harassment suits against settling defendant unless plaintiff could not otherwise obtain the information); *Kalinauskas v. Wong*, 151 F.R.D. 363, 367 (D. Nev. 1993) (requiring collateral litigant to “show a compelling need” to justify disclosure of specific settlement terms).

137. See *In re New York County Data Entry Worker Prod. Liab. Litig.*, 616 N.Y.S.2d 424, 426 (Sup. Ct. 1994) (finding that nonsettling defendants’ need to obtain terms and consideration of settlements was “nothing more than trial strategy” and did not arise “out of materiality or necessity but, rather, desirability”); see also *Gillers*, *supra* note 51, at 4 (acknowledging that nondisclosure agreements concerning settlement amounts have potentially “proper purpose” and “generally do not describe information . . . establish[ing] . . . liability”).

information does not predate or exist independent of the litigation. The settling parties create and control this settlement information, which would not otherwise exist but for their compromise.¹³⁸ Absent demonstrated relevance to collateral claims or defenses or some other compelling need for public disclosure,¹³⁹ a court can appropriately promote settlement by safeguarding the confidentiality of its contents.

In contrast, a court should deny judicial protection to any nondisclosure provision that suppresses evidence potentially relevant to other cases.¹⁴⁰ Although a common impetus for settlement, the desire to shield oneself from potential claims should not impede the discovery rights of third parties.¹⁴¹ Thus, while the parties themselves may pledge not to voluntarily disclose factual information surrounding their settled dispute,¹⁴² their private undertaking should not bind regulatory authorities or nonparties to the agreement.¹⁴³ Certainly, a court should hesitate to “condone the practice of buy[ing] the silence of a witness with a settlement agreement”¹⁴⁴ or to “seal existing evidence that would ordinarily be accessible to

138. See Koniak, *supra* note 51, at 803 n.96 (recognizing that settlement information “belong[s] jointly to both parties in a way that discovery information does not—because it is jointly created by them (and does not preexist the dispute in any form)”).

139. See, e.g., *Phillips v. Gen. Motors Corp.*, 307 F.3d 1206, 1209 (9th Cir. 2002) (compelling production of information regarding total number and aggregate dollar amount of prior settlements as potentially relevant to punitive damages claim); *White v. Kenneth Warren & Son, Ltd.*, 203 F.R.D. 364, 367 (N.D. Ill. 2001) (requiring production of settlement that was relevant to nonsettling defendant’s potential liability and litigation risks); *EEOC v. Rush Prudential Health Plans*, No. 97-C 3823, 1998 WL 156718, at *5 (N.D. Ill. Mar. 31, 1998) (ordering employer to disclose amount of settlement with former employee so that EEOC could decide whether the public interest required further prosecution).

140. See *In re JDS Uniphase Corp. Secs. Litig.*, 238 F. Supp. 2d 1127, 1133–34 (N.D. Cal. 2002) (holding that confidentiality agreement signed by former employees did not preclude them from disclosing nonprivileged information regarding defendant’s wrongdoing); *Channelmark Corp. v. Destination Prods. Int’l, Inc.*, No. 99-C 214, 2000 WL 968818, at *5 (N.D. Ill. July 7, 2000) (stating that the “public reaps no benefit by allowing settlement agreements to suppress evidence”); *McKnight v. Stein Mart, Inc.*, 1996 WL 481079, at *1 (E.D. La. 1996) (permitting discovery of underlying factual information, but protecting contents of negotiations and terms of settlement agreement).

141. See *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1137 (9th Cir. 2003) (finding no entitlement to judicial protection from future suits and exposure to additional liability).

142. But see *supra* note 51 (discussing the arguments against enforcing these types of nondisclosure agreements). In some jurisdictions, including South Carolina, these settlement provisions may additionally raise issues of professional ethics. See S.C. Bar Ethics Adv. Comm. Op. 93-20 (1993) (suggesting that a defense lawyer may violate Rule 3.4(f) by requesting that a plaintiff promise to “withhold relevant information from another party,” and that a plaintiff’s lawyer may violate Rule 8.4(a) by recommending that his client make the promise). See generally Yvette Golan, *Restrictive Settlement Agreements: A Critique of Model Rule 5.6 (B)*, 33 SW. U. L. REV. 1 (2003); Heather Waldbeser and Heather DeGrave, Current Development, *A Plaintiff’s Lawyer’s Dilemma: The Ethics of Entering a Confidential Settlement*, 16 GEO. J. LEGAL ETHICS 815 (2003).

143. See *Channelmark*, 2000 WL 968818, at *5 (compelling discovery to prevent settling defendant from “continu[ing] a pattern of harmful behavior while being shielded from the legal system”).

144. *Kalinauskas v. Wong*, 151 F.R.D. 363, 365 (D. Nev. 1993).

other litigants.”¹⁴⁵

B. *The Rationale for Open Courts*

“Good cause” thus entails consideration of potentially infinite case-specific private and public factors. How is a court to balance these frequently competing interests and determine whether the need for secrecy outweighs the public interest in disclosure? As I have argued elsewhere, the rationale for public access to judicial records and proceedings provides a functional touchstone that can assist courts in this endeavor.¹⁴⁶ In particular, the purpose of public access can serve as a valuable compass for courts deciding whether to seal settlements or otherwise sanction the parties’ confidentiality agreement.

Access to judicial records facilitates public monitoring of the judicial system and enhances public understanding of, and confidence in, the courts.¹⁴⁷ As noted by the Second Circuit Court of Appeals:

[P]ublic monitoring is an essential feature of democratic control. Monitoring both provides judges with critical views of their work and deters arbitrary judicial behavior. Without monitoring, moreover, the public could have no confidence in the conscientiousness, reasonableness, or honesty of judicial proceedings. Such monitoring is not possible without access to testimony and documents that are used in the performance of Article III functions.¹⁴⁸

The level of good cause necessary to sustain a confidentiality or sealing order thus

145. *United States v. Alex Brown & Sons, Inc.*, 963 F. Supp. 235, 241 (S.D.N.Y. 1997). Arguably, gag orders of this type inflict greater harm than protective orders that prohibit the sharing of discovery in related cases. In the discovery context, collateral litigants can at least conduct their own independent discovery to obtain information equivalent to that covered by the protective order. In contrast, a nondisclosure order that impedes witness testimony may interfere with even this right to independent discovery.

146. *Doré, Secrecy by Consent*, *supra* note 4, at 402 (applying this functional touchstone to discovery protective orders, sealing orders, and confidentiality orders concerning settlements).

147. *See Phillips v. Gen. Motors Corp.*, 307 F.3d 1206, 1212–13 (9th Cir. 2002) (discussing common law right of access and “public interest in understanding the judicial process” (quoting *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995))); *Jessup v. Luther*, 277 F.3d 926, 928 (7th Cir. 2002) (noting that “the public cannot monitor judicial performance adequately if the records of judicial proceedings are secret”); *Baxter Int’l, Inc. v. Abbott Lab.*, 297 F.3d 544, 546 (7th Cir. 2002) (citing public’s need “to know what the heavy financial subsidy of litigation is producing”); *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1309 (11th Cir. 2001) (stating that “[t]he operations of the courts and the judicial conduct of judges are matters of utmost public concern” (quoting *Landmark Comm. v. Virginia*, 435 U.S. 829, 839 (1978))); *Columbus-America Disc. Group v. Atl. Mut. Ins. Co.*, 203 F.3d 291, 303 (4th Cir. 2000) (recognizing necessity of publicity “so that the public can judge the product of the courts in a given case”).

148. *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995).

appropriately varies depending upon the nature of that order, the information it seeks to protect, and the role that those materials play in the core adjudicative function of the court.¹⁴⁹

1. *Discovery, Judicial Records, and Sealing Orders*

This functional approach might produce different decisions regarding two distinct requests that settling parties frequently make of a court: (1) continuation of the nondisclosure provisions of an agreed protective order covering unfiled discovery; and (2) sealing orders governing judicial records.¹⁵⁰ Protective and sealing orders frequently predate settlement and occur during the pretrial litigation phase of the dispute. Indeed, courts routinely enter umbrella protective orders at the inception of the discovery process, and such discovery orders commonly anticipate and mandate the filing of protected materials under seal. I have elsewhere addressed the public access issues implicated by these distinct types of secrecy orders and will not reiterate that extensive discussion here.¹⁵¹ Similar issues and concerns, however, resurface when litigants condition their confidential settlement on the court's maintenance of discovery protective orders or the sealing of case files. As with pre-settlement decisions, the rationale for open courts offers guidance.

a. *Protective Orders Regarding Unfiled Discovery*

Public access to unfiled discovery, for instance, does not assist the public in monitoring or understanding a court's primary adjudicative function. Discovery is largely a self-regulating process that ideally entails minimal judicial involvement.¹⁵² A significant amount of discovery is never filed with, reviewed by, or relied upon by the court in its decision-making.¹⁵³ Further, unfiled discovery is never filtered for reliability or admissibility and much of it may be irrelevant to the claims and defenses of the parties. In *Seattle Times v. Rhinehart*, the United States Supreme

149. See *Baxter*, 297 F.3d at 548 (indicating that "strong presumption of public disclosure applies only to the materials that formed the basis of the parties' dispute and the district court's resolution").

150. See *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1130 (9th Cir. 2003) (recognizing that discovery documents and court records require different analysis); *Baxter*, 297 F.3d at 545 ("Secrecy is fine at the discovery stage, before material enters the judicial record."); *Chicago Tribune Co.*, 263 F.3d at 1311 (distinguishing between "those items which may properly be considered public or judicial records and those that may not").

151. See Doré, *Secrecy by Consent*, *supra* note 4, at 324–71 (discussing discovery and stipulated protective orders); *id.* at 371–83 (discussing sealing of judicial records).

152. See Higginbotham, *supra* note 101, at 1417 (characterizing discovery as "almost exclusively conducted as a private matter away from the courthouse"); Zitrin, *supra* note 120, at 20 (commenting on vast amount of unfiled discovery handled entirely by lawyers "outside the view of the court").

153. See *Union Oil Co. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000) (recognizing that "[m]uch of what passes between the parties remains out of public sight because discovery materials are not filed with the court").

Court described discovery as a historically closed proceeding, the “sole purpose” of which is “assisting in the preparation and trial, or the settlement, of litigated disputes.”¹⁵⁴ The “raw fruits” of discovery thus should not trigger any presumption of public access that may otherwise tip the scales in favor of disclosure.¹⁵⁵

Although a court must still find “good cause” for the postsettlement issuance or continuation of a stipulated discovery protective order,¹⁵⁶ both the strong public policy favoring settlement and the parties’ need for and justifiable reliance upon its confidentiality provisions rightly factor into that determination.¹⁵⁷ Moreover, because access to unfiled discovery does not advance public oversight of the judicial function,¹⁵⁸ these private factors may well outweigh any countervailing public interest in disclosure and support the court’s decision to maintain the non-disclosure provisions in an agreed judgment, order of dismissal, or confidentiality order.¹⁵⁹

b. Sealing of Judicial Records

In contrast, a more onerous and particularized showing of good cause should be required to justify sealing documents, including discovery, that are filed with the court and utilized in connection with judicial proceedings.¹⁶⁰ Anything useful and

154. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34–35 (1984). According to the Supreme Court, a right of public access hinges on a tradition of accessibility surrounding the particular process at issue and on whether access will play a significant positive role in the functioning of that process. *See Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8–9 (1986); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605–06 (1982).

155. *See Jessup v. Luther*, 277 F.3d 926, 928 (7th Cir. 2002) (describing discovery materials as “private documents, not judicial records” (citation omitted)); *Chicago Tribune Co.*, 263 F.3d at 1310–11 (finding no common law right of access to unfiled discovery materials, which are “neither public documents nor judicial records”). *But see Phillips v. Gen. Motors Corp.*, 307 F.3d 1206, 1210 (9th Cir. 2002) (holding that “fruits of pre-trial discovery are, in the absence of a court order to the contrary, presumptively public”).

156. *See Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1131 (9th Cir. 2003) (remanding for “actual showing of good cause” to continue post settlement protection of unfiled discovery produced under blanket protective order); *Chicago Tribune Co.*, 263 F.3d at 1313 (remanding for Firestone to show need for confidentiality of discovery filed under seal in settled case).

157. Although settlement obviates the need to expedite discovery via an agreed protective order, the parties’ reliance on the postsettlement maintenance of that order properly factors into the court’s good cause determination. *See Miller, supra* note 43, at 486 (asserting that if “effectiveness of the protective order cannot be relied on, its capacity to motivate settlement will be compromised”). *See also Doré, Secrecy by Consent, supra* note 4, at 360–63 (discussing party reliance as good cause factor).

158. *See S.E.C. v. TheStreet.Com*, 273 F.3d 222, 233 (2d Cir. 2001) (determining that pretrial depositions are not judicial records because they “play no role in the performance of Article III functions” (quoting *United States v. Amodeo*, 71 F.3d 1044, 1050 (2d Cir. 1995))).

159. *See Friedenthal, supra* note 42, at 80 (contending that a presumption of confidentiality should attach to unfiled discovery).

160. *See Chicago Tribune Co.*, 263 F.3d at 1313 (hinging analysis on whether filed discovery was used for judicial resolution of merits); *Union Oil Co. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000) (stating that “most portions of discovery that are filed and form the basis of judicial action must eventually be released”).

relevant to a court's decision-making qualifies as a "judicial record" that carries a qualified presumption of public access.¹⁶¹ Although courts differ concerning the strength of that rebuttable presumption, it should vary with the role the filed materials play in the court's decision-making and its determination of the litigant's substantive rights.¹⁶²

Accordingly, courts should critically evaluate settlements conditioned on the sealing of materials filed with the court.¹⁶³ If the presumption of public access concerning those matters is sufficiently strong, a court may justifiably deny the litigants' mutual request for a sealing order even if that refusal will derail their compromise.¹⁶⁴

Requests to indiscriminately seal the whole record are particularly suspect, since the sealing decision requires particularized review.¹⁶⁵ Without itemization of the file contents, a court cannot assess the role that a pleading, exhibit, motion, or other paper plays in its decision-making.¹⁶⁶ Further, the strength of the access presumption hinges on that determination. For instance, records that are central to a court's adjudication of a case trigger a strong presumption of public access that neither party's reliance on a sealing agreement nor its importance in achieving

161. See *In re Policy Mgmt. Sys. Corp.*, 67 F.3d 296 (4th Cir. 1995) (unpublished opinion), available at 1995 U.S. App. LEXIS 25900, at **4 (holding that a "document becomes a judicial document when a court uses it in determining litigants' substantive rights," and that "a document must play a relevant and useful role in the adjudication process . . . for the common law right of public access to attach"); *United States v. Amodio*, 44 F.3d 141, 145 (2d Cir. 1995) ("*Amodio I*") (holding that filed materials "must be relevant to the performance of the judicial function and useful in the judicial process" to qualify as judicial documents).

162. In *Amodio II*, the Second Circuit utilized this sliding scale approach, stating:

We believe that the weight to be given the presumption of access must be governed by the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts. Generally, the information will fall somewhere on a continuum from matters that directly affect an adjudication to matters that come within a court's purview solely to insure their irrelevance.

United States v. Amodio, 71 F.3d 1044, 1049 (2d Cir. 1995).

163. Because judicial records are presumptively accessible, courts must give interested parties notice of and an opportunity to object to any motion to seal, consider less drastic alternatives to sealing, and provide specific reasons and factual findings to support sealing. *Ashcraft v. Conoco, Inc.*, 218 F.3d 288, 302 (4th Cir. 2000); *In re Knight Publ'g Co.*, 743 F.2d 231, 235-36 (4th Cir. 1984).

164. See *Brown v. Advantage Eng'g, Inc.*, 960 F.2d 1013, 1014, 1016 (11th Cir. 1992) (finding it "immaterial" that sealing of entire record was the "key negotiated element[]" of court-facilitated settlement).

165. See *Baxter Int'l, Inc. v. Abbott Lab.*, 297 F.3d 544, 548 (7th Cir. 2002) (requiring that motions to seal appellate record "analyze in detail, document by document, the propriety of secrecy, providing reasons and legal citations"); *Chicago Tribune Co.*, 263 F.3d at 1311 (requiring heightened scrutiny of decision to seal "record of an entire case, making no distinction between those documents that are sensitive or privileged and those that are not").

166. See *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 898 (7th Cir. 1994) (requiring that litigants "itemize for the court's approval which documents have been introduced into the public domain").

settlement will likely rebut.¹⁶⁷ By the same token, privileged material may present a sufficiently compelling reason to seal even a dispositive document that would ordinarily be presumptively accessible.¹⁶⁸

Even when a court finds a significant need for confidentiality, it must adopt the least restrictive alternative to sealing.¹⁶⁹ If feasible, options narrower than wholesale closure, such as redaction of private, privileged, or proprietary information, should be utilized.¹⁷⁰ In short, “the entirety of a trial record can be sealed” only in “extreme cases” that implicate a “compelling interest in secrecy.”¹⁷¹

2. Sealing Settlements

Whether a settlement agreement itself triggers any presumption of public access depends upon whether it constitutes a “judicial record.”¹⁷² As noted by Judge Posner, private settlement agreements that are never filed with the court,

167. See *Foltz v. State Farm Mut. Ins. Co.*, 331 F.3d 1122, 1135–36 (9th Cir. 2003) (indicating that only “compelling reasons” can rebut presumption of access to sealed material that “adjudicates substantive rights and serves as a substitute for trial”); *Amodeo II*, 71 F.3d at 1049 (attributing strong presumption to “matters that directly affect an adjudication”).

Obviously, then, an extraordinary showing must justify sealing the judicial product itself—the judge’s opinions, orders, and judgments. See *Union Oil Co. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000) (stating that “it should go without saying that the judge’s opinions and orders belong in the public domain”); *Commercial Union Ins. Co. v. Lines*, 239 F. Supp. 2d 351, 358 (S.D.N.Y. 2002) (stating that “[a]t a minimum, the Court’s orders and decisions should be available for public review”); see also *Friedenthal*, *supra* note 42, at 74 (acknowledging that court decisions, “with few exceptions, should be open to the public, although they may be written carefully so as not to reveal private information considered by the court when making its determinations”); *Weinstein & Wimberly*, *supra* note 42, at 29–30 (cautioning courts against withdrawing their opinions, which “assist other courts and parties”).

168. See *Foltz*, 331 F.3d at 1137–38 (permitting continued seal of attorney-client communications and work product); *The Diversified Group, Inc. v. Daugerdas*, 217 F.R.D. 152 (S.D.N.Y. 2003) (permitting the sealing of privileged matters contained in successful motion for summary judgment); *Rapkin v. Rocque*, 87 F. Supp. 2d 140, 143 (D. Conn. 2000) (finding that public interest in preserving attorney-client privilege outweighed presumption of access to entire complaint).

169. Most court rules governing the sealing of records, including those in South Carolina, require the least restrictive alternative to sealing. See D.S.C. LOCAL R. 5.03(a) (requiring that movant “explain (for each document or group of documents) why less drastic alternatives to sealing will not afford adequate protection”); S.C.R. CIV. P. 41.1(b)(6) (requiring that motion to seal address why alternatives to sealing are insufficient “to protect legitimate private interests”).

170. See *Foltz*, 331 F.3d at 1137 (finding sealing order overbroad since limited amount of private information could be easily redacted); *Citizens First Nat’l Bank v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999) (holding that even if document contains trade secrets, secrecy interest can be protected adequately by redaction).

171. *Jessup v. Luther*, 277 F.3d 926, 928 (7th Cir. 2002) (suggesting that extreme cases may concern “trade secrets, the identity of informers, and the privacy of children”); see also *Union Oil Co.*, 220 F.3d at 567 (noting that “parties’ confidentiality agreement can not [sic] require a court to hide a whole case from view”); *Miller v. Indiana Hosp.*, 16 F.3d 549, 551 (3d Cir. 1994) (describing heavy burden on party seeking to seal entire record).

172. See *Boston Herald, Inc. v. Connolly*, 321 F.3d 174, 180 (1st Cir. 2003) (noting that presumption of access applies only to judicial documents); see generally *Doré, Secrecy by Consent*, *supra* note 4, at 394–95 (discussing the sealing of settlement agreements).

like most arbitration awards and discovery materials, are private documents, not judicial records, and so the issue of balancing the interest in promoting settlements by preserving secrecy against the interest in making public materials upon which judicial decisions are based does not arise—there is no judicial decision. Even if the parties reach settlement after suit has been filed, the settlement agreement will not be a judicial record, because the parties will file a stipulation of dismissal pursuant to which the suit will be dismissed without further ado or court action, and the settlement agreement that motivated the stipulation of dismissal will then have the identical status as any other private contract.¹⁷³

Thus, an unfiled settlement does not become a judicial record even if the court retains enforcement jurisdiction, issues a confidentiality order, or reviews its terms.¹⁷⁴

As previously discussed, however, litigants sometimes file their confidential settlement with the court. Presumably, they do so because they seek some type of court action concerning their agreement—the entry of a consent judgment, the issuance of a confidentiality order, the retention of enforcement jurisdiction, or merely the review and approval of its terms.¹⁷⁵ Whatever the reason for filing the instrument, the filing, together with the request for judicial assistance, turns what would otherwise be a private contract into a record relevant and useful to judicial decision-making—a judicial record subject to a presumptive right of public access.¹⁷⁶

Those controversies requiring judicial review of the fairness or reasonableness of their settlement clearly trigger a strong presumption of public access to the filed settlement agreement.¹⁷⁷ Public disclosure of settlements in class actions and other

173. *Jessup*, 277 F.3d at 928 (citations omitted); see also *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3d Cir. 1994) (analogizing unfiled settlement to “functionally similar” unfiled discovery).

174. *Pansy*, 23 F.3d at 782–83 (holding that confidentiality order was independent of settlement terms and did not convert unfiled agreement into court record). Cf. *Jackson v. Delaware River & Bay Auth.*, 224 F. Supp. 2d 834, 839 (D.N.J. 2002) (indicating that draft settlement memorandum became judicial record when filed and referred to on the record).

175. See *supra* notes 57–74 and accompanying text (discussing litigants’ potential motivations for requesting judicial participation in their settlements). See also *FJC Report*, *supra* note 12, at 5–7 (finding that sealed settlement agreements are filed to facilitate their enforcement or to request court approval).

176. See *Ashcraft v. Conoco, Inc.*, 218 F.3d 288, 302 (4th Cir. 2000) (invalidating contempt order because trial court failed to account for presumption of access to sealed settlement agreement). Even if a court does not retain continuing jurisdiction and unconditionally dismisses the settled suit, a settlement filed for court “approval” may nevertheless “reflect[] input by a federal judge, and so the document is presumptively a public document.” *Jessup*, 277 F.3d at 929–30.

177. See *Smithkline Beecham Corp. v. Pentech Pharms., Inc.*, 261 F. Supp. 2d 1002, 1008 (N.D. Ill. 2003) (indicating that when settlement is embodied in a consent decree, the judge “must determine that it does not offend public policy, as by harming third parties, before he can approve it”).

types of representative actions not only permits monitoring of the court's "fairness" determination, but also notifies those represented whether the settlement is in their best interests.¹⁷⁸

Even a settlement contract in an otherwise private case may lose its confidential status if one of the settling parties subsequently sues to enforce or interpret its terms.¹⁷⁹ In such a case, the contents of the filed settlement would be pivotal to the court's adjudication of the parties' substantive rights under the contract. A strong presumption of access to the agreement would accordingly arise.¹⁸⁰

In most cases, though, only a weak presumption of public access will exist because the settlement agreement, even if filed, plays no role in the court's adjudication of the litigants' substantive rights.¹⁸¹ Other than a noninculpatory refusal to admit or deny liability, a settlement agreement generally does not address the underlying merits of the controversy. Its amount, terms, and conditions are far-removed from the facts, exhibits, pleadings, discovery, or other materials on which judicial decisions are based.¹⁸² The waning of the presumption somewhat liberates the court's discretion concerning public access. The litigants' need for confidentiality and its importance in achieving settlement may well rebut the low presumption of public access. Ultimately, the sealing decision hinges on that case-

178. See *F.T.C. v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 408-09 (1st Cir. 1987) (holding that court's approval of consent decree created strong presumption of public access); *Stalnaker v. Novar Corp.*, 293 F. Supp.2d 1260, 1264 (M.D. Ala. 2003) (recognizing strong presumption of access to FLSA wage settlement approved by district court); *Boone v. City of Suffolk*, 79 F. Supp. 2d 603, 609-10 (E.D. Va. 1999) (discerning a strong presumption of access to filed back wages settlement approved by the court); see also *Friedenthal*, *supra* note 42, at 75-76 (indicating that "heavy burden must be placed on those who would limit access" to settlements in public cases such as class actions).

179. See *In the Matter of the Application of [Sealed] to Confirm and Enforce an International Arbitral Award*, 64 F. Supp. 2d 183, 184 (E.D.N.Y. 1999) (warning litigants that "agreement to secrecy in the arbitration" would not automatically carry over to suit seeking court assistance to enforce the award).

180. See, e.g., *Herrnreiter v. Chicago Hous. Auth.*, 281 F.3d 634, 636-37 (7th Cir. 2002) (indicating that when parties request judicial enforcement or interpretation of confidential settlement, "the contract enters the record of the case and thus becomes available to the public, unless it contains information such as trade secrets that may legitimately be kept confidential"); *Union Oil Co. v. Leavell*, 220 F.3d 562, 567-68 (7th Cir. 2000) (holding that suit for breach of confidential settlement agreement must be conducted in public).

181. See *S.E.C. v. TheStreet.Com*, 273 F.3d 222, 233 (2d Cir. 2001) (analogizing unfiled discovery to settlement documents that "do not carry a presumption of public access"); *Janus Films, Inc. v. Miller*, 801 F.2d 578, 582 (2d Cir. 1986) (comparing court's "larger role" in entering "settlement judgment" in representative suits with "minimal determination" required of judge in other types of cases).

182. According to the recent FJC study, in 97 percent of the .05 percent of federal civil cases involving sealed settlements, "the complaint is not sealed, so the public has access to information about the alleged wrongdoers and wrongdoings." *FJC Report*, *supra*, note 12, at 9-10. Indeed, generally "the only thing kept secret by the sealing is the amount of settlement." *Id.* at 10. See also *Smithkline Beecham Corp.*, 261 F. Supp. 2d at 1008 (permitting the sealing of portions of settlement that contained "legitimately confidential information to which . . . competitors should not be entitled and which the American public does not need to know in order to evaluate the handling of . . . litigation by the judiciary").

specific balancing of applicable private and public interests relevant to good cause.¹⁸³

The no-discretion approach of the new South Carolina federal local rule apparently rests upon a completely contrary assumption regarding the strength of the access presumption concerning filed settlement agreements. Indeed, in stating that “[n]o settlement agreement filed with the Court shall be sealed,”¹⁸⁴ the federal rule renders the ordinarily qualified presumption irrebuttable.¹⁸⁵ In so doing, the rule goes too far; the rationale for public access to judicial records “support[s] a strong presumption rather than an absolute rule.”¹⁸⁶

3. “Judicial Kibitzing” and Settlement

Thus far, discussion has focused upon confidentiality and sealing orders governing unfiled discovery, factual and legal information, judicial records, and settlement agreements generated in the course of a settled dispute. Any judicial participation in confidential settlements, however, arguably implicates the need to monitor our judiciary in action.¹⁸⁷ As Judge Posner recently observed:

Whatever the rationale for the judge’s participation in the making of the settlement in this case, the fact and consequences of his participation are public acts. He was not just a kibitzer. But even if he had been, judicial kibitzing is official behavior. The public has an interest in knowing what terms of settlement a federal judge would approve and perhaps therefore nudge the parties to agree to.¹⁸⁸

Judges today increasingly participate in the settlement process.¹⁸⁹ They schedule and direct settlement conferences,¹⁹⁰ preside over court-annexed alternative dispute

183. See *Geller v. Branic Int’l Realty Corp.*, 212 F.3d 734, 738 (2d Cir. 2000) (commenting on “considerable discretion” district court enjoys in considering “a request to seal a file . . . or take other protective measures” concerning a confidential settlement).

184. D.S.C. LOCAL R. 5.03(c).

185. As discussed, the seemingly unbending character of the rule may be ameliorated by the “good cause” exception applicable to all local rules of the South Carolina district courts. See *supra* note 24.

186. *Jessup v. Luther*, 277 F.3d 926, 928 (7th Cir. 2002).

187. See *United States v. Glens Falls Newspapers, Inc.*, 160 F.3d 853, 856 (2d Cir. 1998) (acknowledging that “[i]n a perfect world, the public would be kept abreast of all developments in the settlement discussions of lawsuits of public interest”).

188. *Jessup*, 277 F.3d at 929.

189. See generally Doré, *Secrecy by Consent*, *supra* note 4, at 288–95 (exploring the shift from adjudication to settlement and the concomitant increase in judicial involvement in settlement).

190. See FED. R. CIV. P. 16(a)(5), (c)(9) (making facilitation of settlement a proper purpose and subject of pretrial conferences).

resolution proceedings,¹⁹¹ cajole parties onto common ground,¹⁹² and generally manage a “cluster of dispute processes.”¹⁹³ As judicial efforts to actively promote the private settlement of disputes intensify, so arguably does the public’s need to monitor those judicial activities.¹⁹⁴ At the same time, the success of the negotiation process itself frequently depends upon a closed bargaining forum.¹⁹⁵ Resolution of this dilemma again requires determining whether this need for confidentiality outweighs any presumption of access to court-sponsored bargaining.

Litigants often require some assurance of confidentiality before they will fully and frankly state bargaining positions, evaluate the strengths or weaknesses of their respective positions, or make tentative concessions toward compromise.¹⁹⁶ Indeed, the “strong public interest” favoring the “secrecy of matters discussed . . . during settlement negotiations” recently led the Sixth Circuit Court of Appeals to create a new federal common law privilege protecting such communications.¹⁹⁷ The court reasoned:

In order for settlement talks to be effective, parties must feel

191. The Alternative Dispute Resolution Act of 1998 requires federal district courts to authorize the use of alternative dispute resolution in all civil cases and to implement their own alternative dispute resolution programs. 28 U.S.C. §§ 651–71 (2000).

192. See *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 979 (6th Cir. 2003) (recognizing that settlement negotiations “often include specific, creative recommendations by the Court on how to resolve disputes” in order to overcome parties’ “entrenched . . . adversarial roles” (quoting Order Re: Denying Petition to Vacate or Modify Confidentiality Order at 3, *Goodyear Tire & Rubber Co.*, 332 F.3d at 976)).

193. Galanter & Cahill, *supra* note 103, at 1390 (discussing nonadjudicatory proceedings over which courts today preside). See also Richard L. Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. 1561, 1590–93 (2003) (discussing the “acceleration of judicial settlement promotion” and its concomitant enhancement of judicial discretion).

194. As recognized by the Second Circuit, the judicial function now includes facilitation of settlement:

There is no question that fostering settlement is an important Article III function of the federal district courts. Every case must be dropped, settled or tried, and a principal function of a trial judge is to foster an atmosphere of open discussion among the parties’ attorneys and representatives so that litigation may be settled promptly and fairly so as to avoid the uncertainty, expense and delay inherent in a trial.

United States v. Glens Falls Newspapers, Inc., 160 F.3d 853, 856 (2d Cir. 1998). See also Marcus, *supra* note 43, at 505 n.285 (acknowledging that judicial promotion of settlement “may one day provide a basis for allowing the public to observe judges at work on this effort”); Miller, *supra* note 43, at 485–86 & n.290 (recognizing argument for public access in cases involving “significant judicial participation in the [settlement] process”).

195. See *Goodyear Tire & Rubber Co.*, 332 F.3d at 980 (discussing the need for confidentiality in settlement negotiations); *Herrnreiter v. Chicago Hous. Auth.*, 281 F.3d 634, 637 (7th Cir. 2002) (recognizing that motion to implement settlement could undermine confidentiality of appellate settlement conference); *Glens Falls Newspapers, Inc.*, 160 F.3d at 858 (recognizing need for private forum concerning settlement negotiations).

196. See *Glens Falls Newspapers, Inc.*, 160 F.3d at 858 (describing court-supervised settlement conference as presenting opportunity for “frank discussion about the value of avoiding a trial”).

197. *Goodyear Tire & Rubber Co.*, 332 F.3d at 980–81.

uninhibited in their communications. Parties are unlikely to propose the types of compromises that most effectively lead to settlement unless they are confident that their proposed solutions cannot be used on cross examination, under the ruse of “impeachment evidence,” by some future third party. Parties must be able to abandon their adversarial tendencies to some degree. They must be able to make hypothetical concessions, offer creative *quid pro quos*, and generally make statements that would otherwise belie their litigation efforts. Without a privilege, parties would more often forego negotiations for the relative formality of trial. Then, the entire negotiation process collapses upon itself, and the judicial efficiency it fosters is lost.¹⁹⁸

Thus, confidentiality is of pressing importance to settlement negotiations, “whether . . . done under the auspices of the court or informally between the parties.”¹⁹⁹ And, as the ultimate objective of such negotiation, settlement itself serves important public ends by promoting “a more efficient, more cost-effective, and significantly less burdened judicial system.”²⁰⁰

The question then becomes whether this need for confidentiality and the policy favoring settlement rebut any presumption of access that may arise by virtue of a court’s participation in settlement activities. “Settlement proceedings are historically closed procedures,”²⁰¹ and “confidential settlement communications are a tradition in this country.”²⁰² Thus, these proceedings implicate no “tradition of accessibility.”²⁰³

More significantly, court-supervised alternative dispute resolution “does not present any matter for adjudication by the court.”²⁰⁴ Indeed, most information

198. *Id.* at 980; *see also* Cason v. Builders Firstsource–Southeast Group, Inc., 159 F. Supp. 2d 242, 249 (W.D.N.C. 2001) (denying discovery of mediation and settlement documents between employer and EEOC); Allen County, OH v. Reilly Indus., 197 F.R.D. 352, 354 (N.D. Ohio 2000) (denying motion to compel settlement letters between litigants in environmental contamination case); Folb v. Motion Picture Indus. Pension & Health Plans, 16 F. Supp. 2d 1164, 1180–81 (C.D. Cal. 1998) (creating federal common law privilege against discovery of formal mediation proceedings).

199. *Goodyear Tire & Rubber Co.*, 332 F.3d at 980.

200. *Id.*; *see also* Folb, 16 F. Supp. 2d at 1177 (explaining that mediation privilege promotes “conciliatory relationships among parties to a dispute,” reduces “litigation costs,” and decreases “size of state and federal court dockets, thereby increasing the quality of justice in those cases that do not settle voluntarily”).

201. *In re Cincinnati Enquirer*, 94 F.3d 198, 199 (6th Cir. 1996); *see also* Boone v. City of Suffolk, 79 F. Supp. 2d 603, 607 (E.D. Va. 1999) (commenting upon historically closed nature of settlement proceedings).

202. *Goodyear Tire & Rubber Co.*, 332 F.3d at 980–81.

203. *See supra* note 154 and accompanying text (discussing relevance of tradition and functional utility in access decision).

204. *In re Cincinnati Enquirer*, 94 F.3d at 199 (denying request for access to summary jury trial, which court analogized to settlement proceedings); *see also* B.H. v. McDonald, 49 F.3d 294, 300 (7th Cir. 1995) (noting that court was not “adjudicating anyone’s rights or enforcing any provision of the consent decree” in settlement conference).

exchanged during a typical settlement negotiation is of questionable accuracy and relevance. Negotiations are “punctuated with numerous instances of puffing and posturing” and are “motivated by a desire for peace rather than from a concession of the merits of the claim.”²⁰⁵ Settlement discussions are “not the product of truth seeking” and their public disclosure would be “highly misleading.”²⁰⁶ When a judge facilitates settlement, she does not exercise core judicial powers or adjudicate any of the litigants’ substantive rights.²⁰⁷ Even if judicial settlement activities trigger a presumption of public access, then, the strength of that presumption is negligible or weak at best.²⁰⁸ The countervailing interest in promoting compromise may outweigh this frail presumption and supply good cause for closure of the settlement proceedings.²⁰⁹

V. CONCLUSION

The recent debate surrounding the adoption of the antisecrecy rules in South Carolina mirrors a national controversy concerning whether courts should facilitate or discourage confidential settlements. Certainly, a court need not blindly sign off on unsubstantiated requests by litigants to sanction their mutual desire for secrecy. The parties’ private confidentiality agreement does not bind the court, and a confidentiality order, if issued, need not be coextensive with the settlement terms. Litigants have no incentive to consider the broader public interest when they settle confidentially, and there are some cases in which nonparties possess a legitimate interest.

At the same time, courts should not meet all stipulated requests for

205. *Allen County, OH v. Reilly Indus.*, 197 F.R.D. 352, 354 (N.D. Ohio 2000) (quoting *Cook v. Yellow Freight Sys., Inc.*, 132 F.R.D. 548, 554 (E.D. Cal. 1990)) (both denying discovery of settlement negotiations).

206. *Cook*, 132 F.R.D. at 554.

207. *Cf. Boston Herald, Inc. v. Connolly*, 321 F.3d 174, 181, 189 (1st Cir. 2003) (noting that the administrative process of determining eligibility for Criminal Justice Act funds related merely to court’s management role and was “far removed from the core of the judicial function” of determining litigants’ substantive rights).

208. *See United States v. Glens Falls Newspapers, Inc.*, 160 F.3d 853, 857 (2d Cir. 1998) (stating that settlement discussions and documents play “negligible role” in the trial judge’s exercise of judicial power until presented to court for final approval); *United States v. Town of Moreau*, 979 F. Supp. 129, 135 (N.D.N.Y. 1997) (stating that “presumption of public access in the case of settlement conferences is . . . very low indeed, if not nonexistent”).

209. *See generally Doré, Secrecy by Consent*, *supra* note 4, at 392–394 (discussing the sealing of court-sponsored bargaining).

The same will probably hold true even in cases of significant public interest or those involving a public official or entity. Although a strong presumption of access will eventually attach to the settlement itself, the need for the litigants in such high profile cases to negotiate out of the public limelight may prove essential to any compromise. *See Glens Falls Newspapers, Inc.*, 160 F.3d at 856 (acknowledging trial court’s “power to prevent access to settlement negotiations when necessary to encourage the amicable resolution of disputes” (quoting *City of Hartford v. Chase*, 942 F.2d 130, 135 (2d Cir. 1991))); *Town of Moreau*, 979 F. Supp. at 135 (finding confidential settlement negotiations critical even in case of significant public concern).

confidentiality with knee-jerk rejection or adopt a “one size fits all” approach to confidential settlements. Party autonomy and the promotion of settlement are important values in our civil justice system that, in many cases, might justify some form of confidentiality or sealing order.

Informed judicial discretion, exercised on a case-by-case basis by a court cognizant of the competing interests implicated by secrecy orders, thus offers the best solution to the perceived crisis of court secrecy. The public and private considerations that comprise “good cause,” together with the guiding purpose for open courts, will sufficiently restrain that discretion and, hopefully, lead to the appropriate balance between privacy and public disclosure.

