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A BOLD NEW STRATEGY: COMPLEX LITIGATION COURTS

IT IS TIME TO QUESTION HOW OUR LEGAL SYSTEM CAN AFFORD TO ALLOW SECRET SETTLEMENTS

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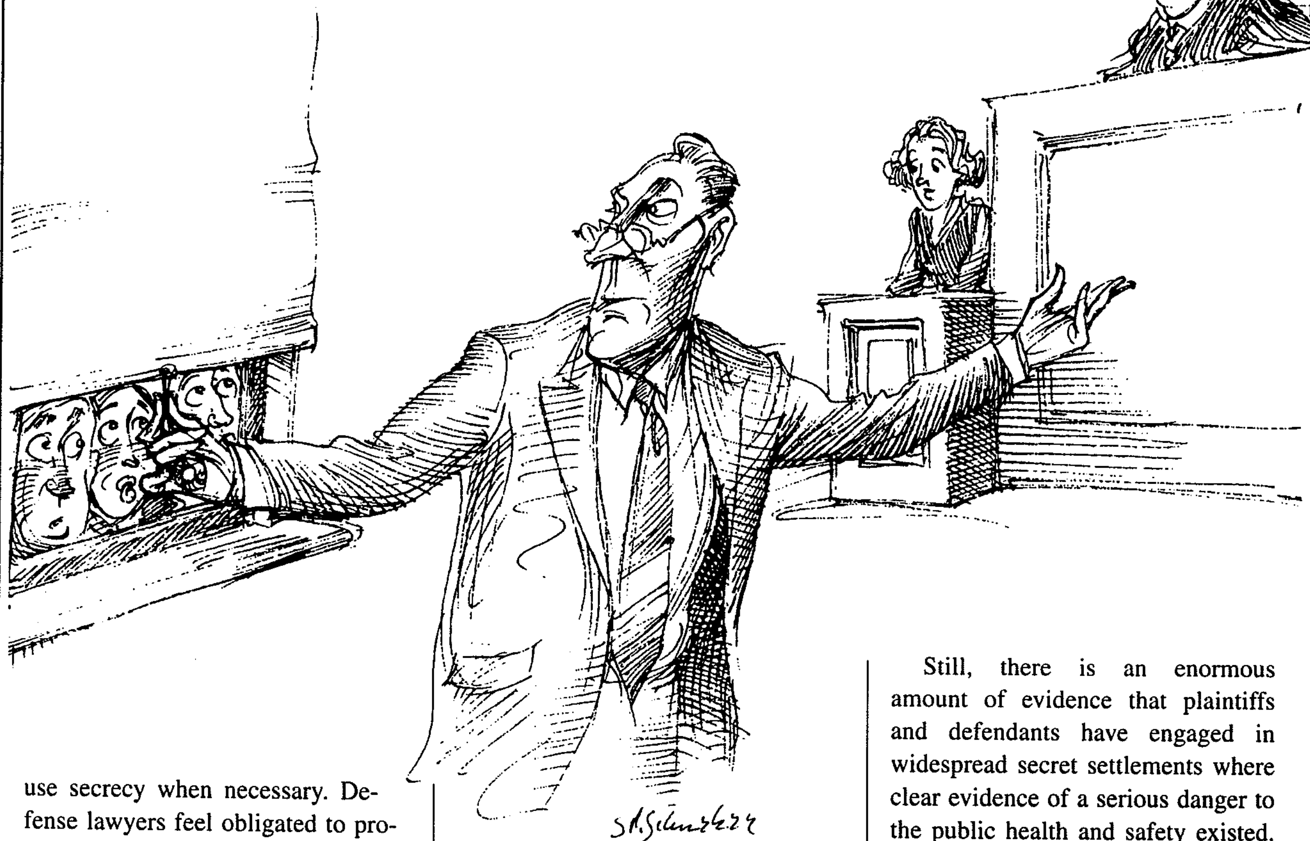
For years, plaintiffs' and defense lawyers alike have used secrecy as a settlement tool. For defense counsel, secrecy keeps accusations and evidence of a client's allegedly defective product or toxic waste from being broadcast to the world at large. For plaintiffs' lawyers, secrecy is often part of the offer they can't refuse—their clients will be paid the fair value of their case, but only if they agree to keep everything they've learned secret, often including returning discovery documents to their opponents.

Given the choice, most lawyers on both sides feel ethically bound to use secrecy when necessary. Defense lawyers feel obligated to protect the well-being of their clients by not stirring up the litigation pot. Plaintiffs' lawyers feel bound to recommend a settlement that is in the best interests of their individual clients, even when they know secrecy might hurt other victims who stand in their clients' shoes.

But it doesn't have to be this way. And in a few states—those with strong sunshine in litigation laws—it's not. Most lawyers—it seems almost all defense lawyers—oppose these laws. But we believe that sunshine in litigation rules come with a silver lining for attorneys on both sides: No longer will they feel ethically compelled to cover up information that may directly and substantially impact the public health and safety. Instead, they will be freed to take the ethical high road by telling their clients that they can't participate in these secret settlements because the rules simply don't allow it.



Is There A Problem?

Clearly, allegations in a lawsuit don't prove anything. Some cases are filed for sensationalism or publicity, others to reach into deep pockets. Still others, while filed in good faith, may not have merit. Just because a car has defective brakes doesn't mean that the brakes caused the accident in every case; maybe the driver was drunk or inattentive. Even if the brake defect played a role, there may have been other contributing causes. A settlement may mean nothing more than that a defendant doesn't want its name linked with accusations of a defective product, whether true or false. It may be smarter to settle, particularly if all evidence of the defect remains secret.

Still, there is an enormous amount of evidence that plaintiffs and defendants have engaged in widespread secret settlements where clear evidence of a serious danger to the public health and safety existed. Where such a danger exists—or even the serious possibility of such a danger—it is time to question how our legal system can afford to allow secrecy.

Some, like Harvard Law School Professor Arthur Miller, protest that such evidence is only anecdotal, or what Miller calls stories. But the stories are too numerous and wide-

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ranging to ignore. The prescription drugs Zomax and Halcion, the Shiley heart valve, and the Dalkon Shield intrauterine device were all taken off the market as too dangerous, but only after numerous secret settlements left the public in the dark long after the products' defects were well known to those involved in the litigation. Discovery in the defamation suit between General Motors lawyers and Ralph Nader and the Center for Auto Safety disclosed over 200 individual cases charging fire-related problems with GM pickup trucks with side-mounted gas tanks. Almost all these cases had been closed, the results, and the information exchanged, kept secret.

The issue goes beyond dangerous products. The Catholic Church's Chicago archdiocese secretly settled a molestation case, ostensibly to protect the child; a 1994 investigation by Chicago Lawyer discovered an estimated 400 lawsuits that had been settled by the Catholic Church in the previous decade—almost all of them secretly.

What about the concern, often expressed by lawyers from both sides, that without secrecy, cases will no longer settle, at least not for their true value? So far, there's no evidence to support this. In those states with sunshine in litigation laws, cases continue to settle, and no one has yet shown that they settle for less than before the laws went into effect.

A Case Study: Collusion in Louisville

Prozac, from the weight of evidence, appears to be a relatively safe drug. But the nation's first Prozac trial is a case study of what can happen when secret settlements are taken to their illogical extreme—in this case, a sham trial in which the plaintiffs and their lawyers were paid to pull their punches so the defendant could get a favorable verdict.

It started in September 1989, when Joseph Wesbecker armed himself with an AK-47, walked into the Louisville printing plant where he had worked, and started shooting. He killed eight people, wounded twelve more, and finished matters by killing himself. One month before, Wesbecker had begun taking Prozac. The lawyers for the shooting victims soon focused on the drug as the cause for Wesbecker's extraordinary violence, and they targeted Eli Lilly, Prozac's manufacturer, as the deep pocket.

The Fentress case, named for one of Wesbecker's victims, was the first of 160 cases pending against Prozac to go to trial. The circumstances made Fentress a tough plaintiffs' case: the lawyers would have to prove that the drug had affected not their own clients' behavior, but Wesbecker's. Still, Lilly and its lawyers were determined to defend Prozac with everything they had.

By the time Fentress went to trial in the Fall of 1994, Prozac had become the aspirin of anti-depressants—the wonder drug everyone was talking about and millions were using. Prozac represented almost one-third of all Lilly sales in 1994—$1.7 billion. A great deal was at stake: If Lilly lost, other plaintiffs waiting in the wings would gain strength and resolve. But a defense verdict might make those plaintiffs reconsider.

Throughout the case, plaintiffs' attorneys pushed Judge John Potter to allow evidence about another Lilly product, the anti-inflammatory drug Oraflex, which had been taken off the market in 1982 as too dangerous. In 1985, Lilly had pled guilty to 25 criminal counts of failing to report

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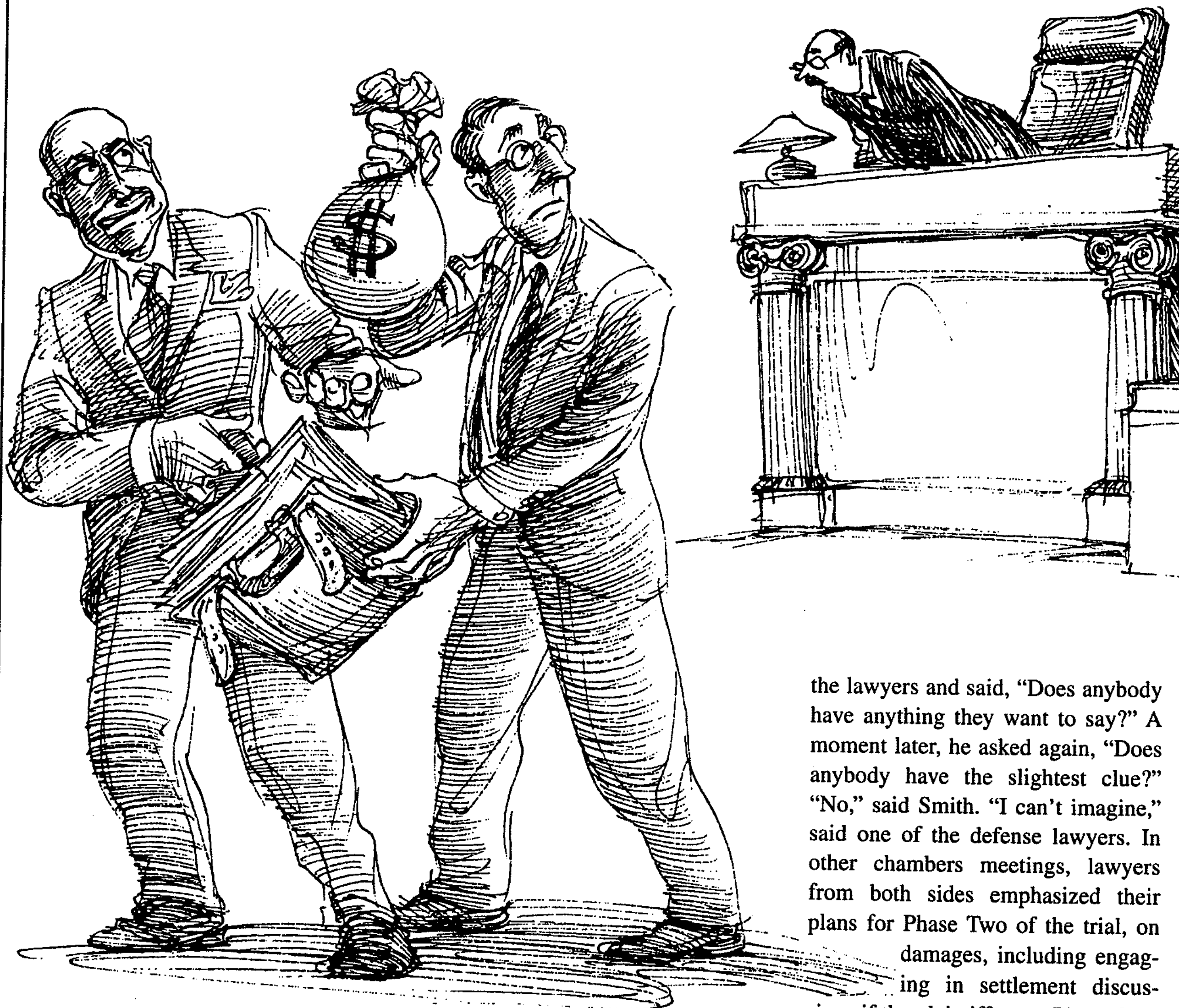
adverse reactions to Oraflex, including four deaths, to the Food & Drug Administration. Central to the plaintiffs's claims was that Lilly had done the same thing with Prozac. Potter refused to allow the evidence, saying its prejudice outweighed any probative value.

But when Lilly executives testified that the company had an excellent reputation for reporting problem incidents—what they euphemisti-



cally called adverse events—plaintiffs' counsel immediately renewed their request to bring in the Oraflex evidence. Potter agreed, noting that Lilly has injected the issue into the trial.

Potter's ruling set off a flurry of activity around his courtroom. The lawyers jointly asked for a recess, and then asked to adjourn for a day. By mid-afternoon, a strong scent of settlement was in the air. But when court reconvened the next day, chief plaintiffs' counsel Paul Smith announced that the plaintiffs would rest without presenting the Oraflex evidence unless the trial went to its second phase, on damages. That, of course, would occur only if the jury first decided Lilly was liable. The strategy puzzled Judge Potter enough for him to ask the lawyers whether they had reached a settlement. He was told unequivocally that they had not.

While the jury was deliberating, a juror came forward and told Judge Potter that she had overheard settlement negotiations going on in the hallway. She repeated this in chambers with the lawyers present and was then excused. Potter turned to the lawyers and said, "Does anybody have anything they want to say?" A moment later, he asked again, "Does anybody have the slightest clue?" "No," said Smith. "I can't imagine," said one of the defense lawyers. In other chambers meetings, lawyers from both sides emphasized their plans for Phase Two of the trial, on damages, including engaging in settlement discussions if the plaintiffs won Phase One.

On December 12, only three court days after Potter's ruling allowing the Oraflex evidence, the jury returned a defense verdict. In January 1995, Judge Potter formally entered his order in Fentress v. Eli Lilly, dismissing the case after verdict by jury. As soon as the verdict was in, Lilly and its lawyers trumpeted their victory across the country. "We were able, finally," said one of Lilly's lead attorneys, "to get people head to head in a courtroom and say 'Put up or shut up'. . . . [T]his is a complete vindication of the medicine."

Had John Potter not been the judge, the Fentress case might have

ended there. Despite the lawyers' denials and their references to a damages phase, Potter suspected that a deal had been made before closing

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argument. When the plaintiffs didn't file a notice of appeal, Potter called in the lawyers from both sides. They continued to deny that a settlement had been reached. Although Potter was more suspicious than ever, he had no jurisdiction, except as to his own order of dismissal. So in April 1995, stating it is more likely than not that the case was settled, Potter filed an unusual document: On his own motion, he changed his post-trial order from a dismissal after verdict to dismissed as settled. He set a hearing for May.

Quickly, the lawyers on both sides joined forces to file an objection with Kentucky's appeals court to prevent Judge Potter's hearing anything about what they considered a closed case. Paul Smith stated flatly that "there was no secret settlement. . . . This was a hard fought case." Potter, meanwhile, found himself in need of counsel.

After Potter's changed order had become public, Richard Hay, then president of the Kentucky Academy of Trial Attorneys, told reporters that if money had been traded for evidence, the trial was a sham, like taking a dive in a boxing match. Potter read Hay's comments, called him, and asked how outraged Hay was about the case. "Enough to represent you," Hay replied. Together, Hay and Potter filed a brief that emphasized "a public silence [that] has been bought and paid for, robbing those who want the truth."

In June 1995, the appeals court ruled against Potter, saying he no longer had jurisdiction over the case. Potter appealed to the Kentucky Supreme Court. Before the fall Supreme Court hearing, lawyers for both sides finally acknowledged they had indeed settled all money issues and had agreed to try only the liability phase of the case no matter what the result. Still, they refused to disclose specifics. Meanwhile, in Indianapolis, Lilly's hometown, Paul Smith suddenly withdrew as lead counsel in a series of consolidated Prozac cases in federal court. He wouldn't say whether he had settled his Indianapolis cases as part of the Fentress settlement, and the judge refused to ask.

In May 1996, the Kentucky Supreme Court decided the case of Hon. John W. Potter v. Eli Lilly unanimously in Judge Potter's favor, citing the lawyers' serious lack of candor and evidence of bad faith, abuse of process, even fraud. Although the court said that the only result of exposing the secret Fentress agreement is that the truth will be revealed, the decision was less a victory for open settlements, and more a demand that the judge be included in the secret.

Judge Potter, though, still saw the larger issue. Armed with Supreme Court authority to conduct an investigation and hold a hearing, Potter asked Deputy State Attorney General Ann Sheadel to investigate, giving her the power to subpoena documents and question witnesses under oath. Sheadel's March 1997 report uncovered new twists to the story. A complex agreement did exist between Lilly and the plaintiffs, one so secret that it was never fully reduced to writing. All Sheadel could find was a written summary of the verbal agreement. No lawyer would admit preparing it, and no plaintiff was allowed to have it.

In exchange for the plaintiffs agreeing not to present the evidence of Lilly's criminal conduct with Oraflex, Lilly had agreed to pay all plaintiffs, win or lose. Part of the agreement was that all of chief plaintiffs' counsel Smith's Prozac cases, including those in Indianapolis, were settled, and half his overall expenses paid by Lilly.

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Judge Potter set a hearing to take sworn testimony on March 27, 1997. The hearing never happened. On March 24, in a surprise move, attorneys for Lilly and the plaintiffs presented Judge Potter with a new stipulation and order in Fentress showing that the case was dismissed as settled, exactly what Potter had insisted on two years before. The judge signed the order. Three days later, the attorneys went before the appeals court to argue that any further proceedings would be moot. One claimed that Potter was on a vendetta against Lilly. Potter recused himself, saying "the spotlight should be on what . . . is under the log, not the person trying to roll it over."

The judge had succeeded in uncovering the collusive settlement. But of the approximately 160 active Prozac cases in December 1994, less than half remained. The only thing that anyone ever learned about the amount of the settlement was the comment of a Louisville lawyer who represented one of the Fentress plaintiffs in a divorce. The amount, he said, was tremendous.

What Should We Do?

Nothing that happened in Fentress proved that Prozac caused Wesbecker's behavior or that the drug was in fact a danger. But what concerns us is what bothered Judge Potter—the public's right to significant safety-related information so that people can decide for themselves. Secrecy is certainly not important to the millions of people taking Prozac and the thousands of doctors prescribing Prozac, said Potter's first appellate brief.

At present, only three states, Florida, Texas, and Washington, have strong prohibitions against secrecy in litigation. These states have clear language creating presumptions of openness, not just for filed court documents but for all discovery. By most accounts, these laws seem to be working well; other states should follow their lead and pass similar regulations. But even these strong laws have exceptions. Plaintiffs' and defense counsel in those states can work together in the name of zealous advocacy to convince a judge that their case is the rare one where secrecy is needed. And too often, judges are more focused on clearing their dockets than on larger issues.

So we would take these laws one small but significant step further: Attorneys should be ethically prohibited from advocating for a secret settlement where there is a substantial danger to the public health and safety. In 1998 at two national ethics conferences, we proposed a new ABA disciplinary rule that would do just that. Neither Florida, nor Texas, nor Washington discipline lawyers for violating their sunshine laws.

Only a proposed 1992 California law would have disciplined lawyers who entered into secret settlements in violation of the act. Though the bill won approval of both houses of the California legislature, then-Governor Pete Wilson vetoed it.

Thus, as it stands, nothing in the ethics rules of any state prevents lawyers from settling cases secretly and keeping the public in the dark, no matter what information is being withheld. We believe this must be changed. As Congressman Lloyd Doggett, architect of Texas's groundbreaking rule, put it, to close a court to public scrutiny of the proceedings is to shut off the light of the law.

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