Secrecy's dangerous side effects

When legal settlements allow companies to hide their mistakes, what we don't know can hurt us.

By Richard Zitrin

DRUG GIANT Eli Lilly & Co. recently settled 18,000 lawsuits brought by people claiming they were injured by the side effects of its biggest-selling drug, Zyprexa, which is used to treat schizophrenia and bipolar disorder. But the $500 million in settlements says less about the dangers of the drug than the dangers of secrecy.

About 18 months earlier, Lilly had settled 8,000 other Zyprexa cases for $700 million. But those settlements required the plaintiffs to return all sensitive documents obtained through the legal discovery process to Lilly — a requirement that kept the strongest smoking-gun evidence out of public view. The plaintiffs also had to agree "not to communicate, publish or cause to be published, in any public or business forum or context, any statement, whether written or oral, concerning the specific events, facts or circumstances giving rise to [their] claims."

Lilly had strong motivation to settle. The documents contained evidence that Zyprexa caused large, often enormous, weight gain in many patients, significantly increasing the risk of dangerously high blood-sugar levels and diabetes. They also showed that Lilly knew about the problems in 1999, largely through its own research. Other documents outlined a marketing scheme to encourage physicians to prescribe Zyprexa for elderly patients with early signs of dementia. This strategy not only had no clinical evidence to support it, it promoted an "off-label" use not approved by the Food and Drug Administration, a violation of federal law.

Lilly gave the original 8,000 plaintiffs ample incentive to settle. Those plaintiffs received substantial compensation, and by agreeing to secrecy, they surely avoided years of scorched-earth litigation, extremely costly in terms of time, money and emotion.

When secrecy is the price of a legal settlement, wrongdoers hide their mistakes as if they never happened and continue with business as usual. That's what happened in the Lilly case. The thousands of plaintiffs and dozens of lawyers involved in the 2005 settlements kept their part of the bargain, while Lilly continued to sell Zyprexa in huge quantities — a reported $4.2 billion in sales in 2005 — without warning either patients or doctors about the drug's dangers.

Part of the problem was that those plaintiffs had little control over their cases. They were consolidated — as these matters often are — in one huge federal case in which a committee of plaintiffs' lawyers has much more say over a settlement than in typical civil suits. In exchange for access to key Zyprexa data in the Lilly case, the committee agreed to a "protective order" that kept the information secret. That may have expedited things for their clients, but it was a public disservice.

Courts have the power to grant protective orders only to limit the disclosure of highly personal information and legitimate trade secrets. But when all the lawyers in a case agree, judges often grant protection even if the trade secrets in question show how the product does *not* work, not how it does. Neither lawyers nor judges should ever be party to such agreements. It is simply unacceptable as a matter of public policy to permit secret deals that conceal evidence of dangers to the public.

In the Zyprexa cases, the documents eventually were exposed when Alaska attorney James B. Gottstein, working on an entirely unrelated case, subpoenaed the records of one of the plaintiffs' expert witnesses. Gottstein not only used the documents in his lawsuit but, to his great credit, disclosed them to the New York Times and several healthcare groups. Gottstein was almost immediately ordered to return all the documents he had, but the train had left the station: The New York Times published articles about the dangers of Zyprexa, and excerpts from the documents began appearing on the Internet. Within two weeks, with much of the Zyprexa evidence now out in the open, Lilly settled the additional 18,000 cases. Negotiated secrecy, Lilly's primary goal, had become moot.

Some intrepid plaintiffs and their lawyers refuse to play the secrecy game. In Northern California, plaintiffs in dozens of Catholic Church sexual abuse cases have banded together and refused to keep the names

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PETER O. ZIERLEIN *For The Times*

and whereabouts of molesters secret. And recently, Eva Rowe, who lost her parents as the result of an explosion at a Texas oil refinery in 2005, refused to settle with BP unless the oil company agreed to release the millions of documents obtained as evidence. Rowe and her lawyer hope that the documents, which they say show how BP's under-funding and lackadaisical attitude created significant safety problems, will serve as an industry blueprint on how refinery safety should, and shouldn't, be handled.

Unfortunately, disclosure is still the exception. But we should have learned our lesson by now. From Zomax and Halcion in the 1980s to shredding Firestone tires and GM gas-tank fires in the 1990s, to Vioxx and Zyprexa today, when lawyers cut secret deals behind the public's back, what we don't know can and does hurt us. The civil justice system belongs to all of us, and no one should be allowed to use it to keep the public in the dark.

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Cooling off costs too much

PUBLIC POLICY is all about trade-offs. Economists understand this better than politicians because voters want to have their cake and eat it too, and politicians think whatever is popular must also be true.

Economists understand that if we put a chicken in every pot, it might cost us an aircraft carrier or a hospital. We can build a hospital, but it might come at the expense of a little patch of forest. We can protect a wetland, but that will make a new school more expensive.

You get it already. But let me just add that in the great scheme of trade-offs in the history of humanity, never has there been a better one than trading a tiny amount of global warming for a massive amount of global prosperity. The Earth got about 0.7 degrees Celsius warmer in the 20th century while it increased its GDP by 1,800%, by one estimate. How much of that 0.7 degrees can be laid at the feet of that 1,800% is unknowable, but let's stipulate that all of the warming was the result of our prosperity and that this warming is in fact indisputably bad (which is hardly obvious). That's still an amazing bargain. Life spans in the United States nearly doubled (from 44 to 77 years). Literacy, medicine, leisure and even, in many respects, the environment have improved mightily over the course of the 20th century, at least in the prosperous West.

Given the option of getting another 1,800% richer in exchange for another 0.7 degrees Celsius warmer, I'd take the heat in a heartbeat. Of course, warming might get more expensive for us. (And we might do a lot better than 1,800% too.) There are tipping points in every sphere of life, and what cost us little in the 20th century could cost us enormously in the 21st — at least that's what we're told. And boy, are we told. Al Gore has a new incarnation as the host of an apocalyptic infomercial on the subject, complete with fancy renderings of New York City underwater.

Skeptics like me are heckled for calling attention to the fear-mongering that suffuses global warming activism. But the simple fact is that the activists need to hype the threat, and not just because that's what the media demand of them. Their proposed remedies cost so much money — bidding starts at 1% of