UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
901 RICHLAND STREET
COLUMBIA, SOUTH CAROLINA 29201

JOSEPH F. ANDERSON, JR.
UNITED STATES DISTRICT JUDGE

TELEPHONE (803) 765-5136

January 2, 2008

Senator Herb Kohl
330 Hart Senate Office Building
Washington, DC 20510

In re: Sunshine In Litigation Testimony — Followup Questions

Dear Senator Kohl:

Thank you for your letter of December 19, 2007, posing followup questions regarding the Sunshine in Litigation Act. Attached are my responses to those questions. I am also sending an electronic version of my responses to Margaret Horn.

Should you need anything further, please don't hesitate to contact me.

With warmest personal regards, I remain

Sincerely yours,

Joseph F. Anderson, Jr.

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Enclosure

Responses to Follow-up Questions

United States District Judge Joseph F. Anderson, Jr.,

regarding the hearing entitled

"The Sunshine in Litigation Act:

Does Court Secrecy Undermine Public Health and Safety?"

before the

Subcommittee on Antitrust, Competition, and Consumer Rights

Committee on the Judiciary

United States Senate

Tuesday, December 11, 2007

Question 1 from Senator Kohl:

Q. *Judge Anderson, critics of my bill are concerned that as a result of limitations on secret settlements, cases will not settle and judges will have to deal with more trials. What has your experience been in South Carolina?*

A. When our local rule was published for public comment, nearly every writer who opposed the rule predicted that if our court adopted the rule, we would see a dramatic rise in the number of cases going to trial, overwhelming an already overburdened court system. This has not been the case. In none of the five calendar years following the enactment of Local Rule 5.03 we have tried as many cases as we did the year immediately preceding the Rule's adoption. In other words, our trials have held steady or decreased in number despite the fact that civil filings have increased virtually every year. This five-year experience should completely debunk the argument that sunshine reforms will result in more trials.

Question 2 from Senator Kohl:

Q. *Judge Anderson, some people say that the civil justice system should focus on settling private disputes between parties and that it is the role of regulators, not the court system, to protect the public health and safety. Would you agree with that?*

A. I believe that the court system is more than just a mechanism to resolve private disputes between the parties. Many times, civil litigation exposes hazards and products and other threats to public safety that have gone unnoticed by state and federal regulators. Often, the regulatory machinery begins operating once dangers are brought to light through civil litigation. Of course, when a judge signs a consent order requiring secrecy, there is no way for the regulators to find out about the problem.

Moreover, as I mentioned in the law review article that I submitted as part of my testimony before your subcommittee, some have suggested that litigants hide behind the judge's confidentiality order to escape reporting requirements. For example, in an article entitled "System Helps Hide Hospitals' Mistakes," Durham, North Carolina Herald Sun Writer Jim Shamp reports that "closed door settlements may allow hospitals and doctors to deny culpability and circumvent error-reporting requirements of regulatory agencies." He explains that hospitals are required to report to the Joint Committee on the Accreditation of Health Care Organizations ("JCAHO") all "sentinel events" meaning any expected outcome resulting in a patient death or permanent loss of function. Shamp contends that under-reporting to the JCAHO is rampant. Since the sentinel event reporting requirements started in 1995, there have been 1,959 events reported. Meanwhile, a 1999 report by the National Academies of Sciences Institute of Medicine entitled "To Err is Human" linked as many as 98,000 deaths per year to medical errors in United States' hospitals. Shamp's premise is that some institutions may not report because the institutions hide behind gag orders issued by judges – orders that they invited the judges to sign.

A similar phenomenon may be occurring in the products liability area. The Consumer Product Safety Act requires that the manufacturer of a consumer product self-report to the Consumer Product Safety Commission (CPSC) when the product is the subject of three verdicts or settlements arising out of claims for death or severe bodily injury. Between 1991 (when the reporting requirement began) and 2002, there have been 551 reports to the CPSC. During this same period of time, there have been 156,085 product liability lawsuits filed in the federal court system alone. Of course, it is possible, though unlikely, that the vast majority of those cases were resolved with a verdict for the defendant. It is also possible that massive under-reporting is occurring because litigants hide behind gag orders issued by the court at settlement.

Question 3 from Senator Kohl:

Q. *Judge Anderson, as you know, the Federal Judicial Center studied sealed settlements and the Judicial Conference conducted follow-up research and concluded that information found in complaints and accompanying public documents were enough to notify the public of a potential health or safety hazard. How do you respond to this?*

A. To suggest that members of the public can learn of dangerous products and other safety threats through reading a complaint filed in civil cases is absurd. For the calendar year 2006, the last year for which figures were available, there were 335,868 civil actions filed in the United States District Courts. Some of these cases are totally frivolous and many others are dismissed by way of summary judgment. Anyone reading the complaints in those cases would be wasting time. It is only after the allegations have been tested through the adversary process, and the facts explored through civil discovery, that real dangers to the public safety and health are made clear.

Question 1 from Senator Hatch:

Q. *Could you please explain in greater detail the operation of Local Rule 5.03(E), adopted by the District of South Carolina? Is it a complete ban on court approval of protective orders? Could you compare the ban on secret settlements in South Carolina with the ban proposed in the Sunshine in Litigation Act of 2007, S. 2449?*

A. Actually, the ban on secret settlements in South Carolina is much broader than I had proposed to the members of our court. My original proposal was almost identical to the legislation proposed by Senator Kohl. That is to say, it would address a small number of cases where public safety or the public interest was implicated. Some judges on our court, however, were of the mind that the prohibition on sealed settlements should be made more broad. As enacted, it purports to be a complete ban on all secret settlements. There is, however, an escape valve which allows our court to continue to preserve confidential information in those cases where confidentiality is appropriate.

Specifically, Local Rule 1.02 provides that for good cause shown, any of our district's local rules may be overriden by a judge in a specific case. This gives judges the leeway to continue to seal proprietary information, trade secrets, personal identifiers, sensitive government information, and the like. As I explained in my law review article, these two rules, read together, express a preference for openness at settlement, with the understanding that some situations deserve confidentiality, and in those cases, the local rule is no impediment.