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COMMON LAW OR FIRST AMENDMENT RIGHT OF ACCESS TO SEALED SETTLEMENT AGREEMENTS

CHERYL LYNNE COON

THE RIGHT TO seal settlement agreements is a vital force in negotiations.¹ Parties may wish to avoid publicity and scandal and to protect their privacy.² In products liability cases or mass torts, such as airplane crashes, parties may want to prevent other potential plaintiffs from using information from one particular case in other cases.³ Parties feel this is justified because one claim may be clearly well-grounded or clearly invalid, and it may or may not be relevant to other potential plaintiffs' claims. Perhaps the particular lawyer handling one plaintiff's case was either very good or very poor at unearthing evidence before the settlement.⁴ Others may agree to sealing to obtain an increased settlement. For whatever reason, the

¹ See *infra* notes 204-229 and accompanying text for a discussion of the value of encouraging settlement and confidentiality in some cases.

² See, e.g., *Minneapolis Star & Tribune Co. v. Schumacher*, 392 N.W.2d 197 (Minn. 1986) (discussing the families' rights to keep their grief and financial affairs private by sealing plane crash settlement agreements). One article, *Sealed Lawsuits Shelter Wealthy, Influential*, lists several other reasons for sealing records: "The secret treatment of the lawsuits, according to plaintiffs lawyers, most frequently stems from attempts to avoid personal embarrassment or professional disrepute, to discourage additional lawsuits, or to coerce large settlements from defendants in return for confidentiality." *Dallas Morning News*, Nov. 22, 1987, at 1A, col. 5.

³ See *infra* notes 84-98, 114-129, and accompanying text for example of cases dealing with access of sealed settlements in products liability or mass tort cases.

⁴ See *infra* notes 114-129, 204-250, and accompanying text for a discussion of some distinctions between settlements and court records, and the necessity of confidentiality in settlements.

right to seal settlement records is frequently crucial.⁵ Yet, the right to seal records is not absolute. In fact, the right may be largely illusory and uncertain, and is often the subject of abuse.⁶

Despite the value of sealing settlements, however, access is often desirable in certain situations. For example, in institutional reform litigation such as in civil rights or employment situations where absent parties are potentially affected by the outcome of a suit, sealing of consent decrees or settlements is arguably improper and full access should be accorded.⁷ Addressing the recent notoriety of the access issue to everything from settlements to sealed discovery documents, one article notes that "[f]or

⁵ See, e.g., *Palmieri v. New York*, 779 F.2d 861 (2d Cir. 1985) (without active court participation and promise of confidentiality, settlement would never have occurred). For a discussion of *Palmieri*, see *infra* notes 143-154.

⁶ See *infra* notes 49 and 191 and accompanying text for a discussion of potential problems in right of access cases. An investigation in Dallas, Texas, for example, revealed that courts had sealed eighty cases despite the fact there were no formal court orders authorizing the sealings. See *Dallas Morning News*, Nov. 22, 1987, at 24A, col. 3. The paper interviewed a state district court judge, Judge John Marshall, who stated that the abuse stemmed, in his opinion, from a "'good ol' boy system" between judges and favored lawyers. *Id.* Further, as Judge Marshall stated, parties waive their privacy concerns when they bring their disputes into the judicial system. *Id.* "You are asking the government to come into your life. It's not like the government is coming in here as an unwelcome visitor." *Id.* at 25A, col. 4. As a means of controlling such abuse, Judge Marshall issued guidelines and form orders for all the district court judges to use in the future when parties request a sealing. *Id.* at 25A, col. 2. Several months later, Judge Marshall adopted a "good cause" standard for parties to meet if they desire to close records, based on the common law right of access. *Dallas Morning News*, Aug. 17, 1988, at 26A, col. 3-6.

⁷ See Thornburg, *Litigating the Zero Sum Game: The Effect of Institutional Reform Litigation on Absent Parties*, 66 OR. L. REV. 201 (1987) (discussing institutional reform litigation and its affect on third parties). The article explains that "[i]nstitutional reform cases aim to restructure certain units of society. In so doing, these cases affect institutions and individuals that are not before the court. Courts, commentators, and politicians have therefore expressed concern that the rights of the absent parties and institutions not be ignored in the remedy-creation process." *Id.* at 251. Thus, one factor should be availability of full review to all potentially affected. Unfortunately, this has not always been the case. See, e.g., *EEOC v. Strasburger, Price, Kelton, Martin & Unis*, 626 F.2d 1272 (5th Cir. 1980); *Southern Methodist University Association of Women Law Students v. Wynne & Jaffe*, 599 F.2d 707 (5th Cir. 1979) (two related cases on discriminatory hiring practices which settled on the stipulation that all materials remain confidential for a specified time period).

a number of years nobody thought much about secrecy or about third parties who were not litigants Now we see more concern for the public interest and a recognition that some cases affect a lot of people and not just the parties.' ”⁸ Another article cites not only abuses of sealing and protective orders but the emerging device for complete withdrawal of all the papers and documents of a case from the record “leaving no trace that the lawsuit ever existed” and giving the parties the ultimate protection sealing orders do not.⁹ Especially prevalent in products liability cases or mass accidents, such practices prevent “in the rush to secrecy . . . the early warning signals about defective products or questionable conduct [that] emerge during open court proceedings.”¹⁰ Thus, the practice may prevent the public and state review boards from receiving notice of malpractice or unprofessional conduct cases with the result that a psychologist or doctor sued, perhaps repeatedly, continues in a thriving practice.¹¹

The Supreme Court has recently decided several cases dealing with the public's right of access to criminal trials

⁸ *Should A Court Keep Secrets*, NAT'L L.J., Vol. 11 No. 6, 1, 22 (Oct. 7, 1988) (discussing recent access cases and problems they create) (quoting Cornish F. Hitchcock of the Public Citizen Litigation Group).

⁹ *Secrecy Rules Hide Dangers*, Dallas Times Herald, Oct. 23, 1988, at A-1, A-18. The article lists the following practices as reasons for the abuse which results in “secret” law: protective orders, negotiated settlements requiring secrecy in exchange for more money, sealing orders, and withdrawal orders. *Id.* at A-18, col. 2-3. Thus, each potential plaintiff not only has to repeat exact work done by past plaintiffs throughout the case, but may never relate an injury to an event or have adequate warning to prevent the harm from occurring. Arguably, this is not an efficient allocation of society's resources.

¹⁰ *Id.* at A-18, col. 3. As the article suggests:

In local and federal courthouses across the country, there are confidentiality orders in hundreds of cases that allege safety problems with widely used products and facilities. Every day, someone gets into a car, takes a drug, sees a doctor or wakes up near a toxic site that has been the subject of a lawsuit covered by a confidentiality order.

Id.

¹¹ *Id.* at A-18, col. 3-4. Some judges may be reluctant to grant sealing orders because of the significant public interests, one judge stating that “[w]hen parties litigate, they're using a public process.” *Id.* at col. 5 (quoting Judge Leonard Braman of the Washington D.C. Superior Court).

and criminal records.¹² The source of the public's right of access to both the trial and records in civil cases, however, is uncertain.¹³ Presently, two bases exist for potential access to court records, including settlement agreements. Some courts find a public right of access in the first amendment, others under the common law right of access.¹⁴ Even among courts basing decisions solely on the common law right of access, however, differences of opinion exist as to the proper standard of review and the proper test for granting a request to seal or unseal materials.¹⁵

The focus of this comment is the public's right of access to sealed civil settlement agreements which were discussed in open court or filed with the court, thus formally

¹² See *Press-Enterprise Co. v. Superior Court*, 106 S. Ct. 2735 (1986) (access to criminal pretrial proceeding); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (allowing access to voir dire in criminal proceeding); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (access to criminal trial); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (public access to criminal trial under the first amendment); see also *infra* notes 20-31 and accompanying text for a discussion of *Richmond Newspapers*.

¹³ See *In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325 (D.C. Cir. 1985). *In re Reporters* discusses the differences between civil and criminal trials, pretrial and trial material, and access to courts and records. *Id.* at 1330-1341; see also *Minneapolis Star & Tribune*, 392 N.W.2d at 205-06 (discussing the many factors and uncertainties which come into play in right of access cases as they relate to access of settlement agreements). For a discussion of the differences between pretrial materials and trial records or evidence, see Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1 (1983); see *infra* notes 230-250.

¹⁴ Compare *Palmieri*, 779 F.2d 861 (case resting on common law right of access and further separating original sealing from later unsealing) with *Wilson v. American Motors Corp.*, 759 F.2d 1568 (11th Cir. 1985) (adopting a first amendment standard to justify closure for products liability settlement sealing request). For a discussion of these and other related cases see *infra* notes 83-203. Another issue is the difference between pretrial, nonpublic and evidentiary materials, discussed at *infra* notes 120-125, 230-250 and accompanying text. Settlement agreements are similar to pretrial materials because they are "private" contracts reached with no court or public supervision in most cases. See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32-36 (1984); *In re Reporters*, 773 F.2d at 1331-37.

¹⁵ See *Bank of Am. Nat'l Trust v. Hotel Rittenhouse Assoc.*, 800 F.2d 339 (3d Cir. 1986) (disagreement between the majority and dissent as to the proper standard); *Times Herald Printing Co. v. Jones*, 717 S.W.2d 933 (Tex. Ct. App.), *vacated*, 730 S.W.2d 648 (Tex. 1986) (appellate decision split on rehearing *en banc*, subsequently vacated for lack of jurisdiction).

becoming part of the court's records.¹⁶ Access cases raise several issues under either a first amendment or common law basis, each apparently with no "clear" answer, such as the difference between access to court records versus access to the trial itself¹⁷ and the difference between granting the original seal and later attempts by a third party to unseal the agreement.¹⁸ Also, the issue of how much weight courts should give to the value of encouraging settlements in the various balancing tests used in determining a right of access arises.¹⁹ The comment addresses the first amendment right of access, followed by a discussion of the common law right and the value of encouraging settlements. Finally, the comment discusses potential solutions suggested by authorities for solving the access dilemma until a conclusive answer comes.

¹⁶ See *infra* notes 186-193, 230-250, and accompanying text for a discussion of the issue of whether filing an agreement with a court changes the nature of the material because a court may rely on the material in forming its judgment. Some commentators indicate that if a court does rely on material, the public's need for access increases so that the public can fully understand the judicial determination. See Marcus, *supra* note 13, at 49 (discussing a court's reliance on material as the proper basis for determining a right of access to material).

¹⁷ See *infra* notes 20-31 and accompanying text for a discussion of the differences; see also *In re Reporters*, 773 F.2d at 1331 (distinguishing between access to records and access to trials); Note, *The Common Law Right to Inspect and Copy Judicial Records: In Camera or On Camera*, 16 GA. L. REV. 659, 691-92 (1982) (noting the Supreme Court's distinction between a right of access to trials and records).

¹⁸ See *infra* notes 142-203 and accompanying text for a discussion of the cases discussing this issue. Courts apply several factors in the various balancing tests used for determining whether a right of access exists in a particular case. The factors arose, however, in criminal access cases. See, e.g., *Richmond Newspapers*, 448 U.S. at 555. Thus, an additional issue in right of access cases is whether these factors apply equally to civil proceedings. For a discussion of this issue, see *Gannett Co. v. DePasquale*, 443 U.S. 368, 386-87 n.15 (1979) (discussing the application of these factors to civil trials) and Fenner & Koley, *Access to Judicial Proceedings: To Richmond Newspapers and Beyond*, 16 HARV. C.R.-C.L. L. REV. 415 (1981) (in-depth analysis of the factors presented in the *Richmond Newspapers* case and their application to civil trials).

¹⁹ See, e.g., *Times Herald*, 717 S.W.2d at 933 (demonstrating the various views vividly by contrasting the majority, concurring and dissenting opinions and discussing the value of encouraging settlement).

I. FIRST AMENDMENT RIGHT OF ACCESS TO CIVIL COURT RECORDS

The Supreme Court has not directly decided whether a first amendment right to attend a civil proceeding exists.²⁰ In *Richmond Newspapers, Inc. v. Virginia*,²¹ however, the Court held that the first amendment grants the public a right to attend criminal proceedings.²² Thus, in order to close a criminal case, a party must show "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."²³

The *Richmond Newspapers* Court adopted a two-prong historical/functional test, based on the historical openness and importance of criminal proceedings and the functional value of openness to a democratic government.²⁴ The Court listed several values advanced by

²⁰ See *Richmond Newspapers*, 448 U.S. at 580 n.17 (noting that the case did not answer the question for civil trials since the issue was not raised); Fenner & Koley, *supra* note 18, at 415 (discussing the extension of *Richmond Newspapers* to civil proceedings).

²¹ 448 U.S. 555 (1980) (plurality opinion). In *Richmond Newspapers*, the press sought to vacate an order closing a murder trial. *Id.* at 560. The trial court judge held that, because the trial was the fourth trial for the defendant, caution was necessary in order to prevent the jurors from hearing details outside the courtroom. *Id.* at 561.

²² *Id.* at 580. The Court stated that the "First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted." *Id.* at 576. Moreover, the first amendment implicitly requires access to assure the public's right to gather information. *Id.* at 575-76. The Court explained that "[t]he explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe the trial could, as it was here, be foreclosed arbitrarily." *Id.* at 576-77. Justice Rehnquist, however, in the dissent, expressly rejected a public right of access under the first or fourteenth amendments as long as the parties and the judge agree to closure. *Id.* at 604-06.

²³ See *Press-Enterprise Co.*, 464 U.S. at 510 (closing of criminal voir dire proceeding); *Globe Newspaper*, 457 U.S. at 606-607. The *Globe Newspaper* Court held that in a criminal case a party must show an important governmental interest and that no less restrictive means exists to protect that interest to justify closure of either the trial or records. 457 U.S. at 606-07.

²⁴ *Richmond Newspapers*, 448 U.S. at 564-78; see also *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984) (discussing the factors and using the two-prong test in a decision extending the first amendment right of access to civil proceed-

open trials.²⁵ These include: increasing the public's confidence in the judicial system; enhancing the quality of the system by subjecting proceedings to public view; increasing public information about important social issues; and educating the public about how the judicial system operates.²⁶ If these historical and functional values of openness outweigh the particular parties' benefits from closure, sealing is improper.²⁷

This first amendment balancing test, requiring a strong showing to prevent access, is in fact very similar to the common law right of access balancing test. Under the common law test, each case is similarly decided on a balancing of the cases's particular facts and circumstances, but with a lesser showing required to restrain access.²⁸ In fact, courts use the same reasons, such as increasing public confidence in the judiciary, as balancing factors under both tests.²⁹

After *Richmond Newspapers*, several courts extended the first amendment right of access to civil proceedings using the historical/functional test.³⁰ From this extension, some courts further held that a first amendment right of access to civil court records exists, including settlement agreements filed with a court under seal.³¹

ings). For a discussion of *Publicker Industries* see *infra* notes 48-59 and accompanying text.

²⁵ *Richmond Newspapers*, 448 U.S. at 564-78.

²⁶ *Id.*

²⁷ *Id.*

²⁸ See *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978).

²⁹ See, e.g., *Nixon*, 435 U.S. at 602; *Minneapolis Star & Tribune*, 392 N.W.2d at 202-03 (discussing balance and value of factors under common law test).

³⁰ See *Wilson v. American Motors Corp.*, 759 F.2d 1568 (11th Cir. 1985). While *Wilson* did not expressly adopt a first amendment basis, the court did adopt the increased standard of proof necessary in first amendment cases to justify closure. Thus, the court required demonstration of an important interest as a strict prerequisite to restricted access to information. *Id.* at 1570; see also *Publicker Indus.*, 733 F.2d at 1070-71; *In re Continental Ill. Sec. Litig.*, 723 F.2d 1302 (7th Cir. 1984); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165 (6th Cir. 1983).

³¹ See *infra* notes 32-100 for some of the cases extending a right to civil records. The courts, however, did not discuss the differences between the right of access to trials and the right of access to records, which is a legitimate question potentially

A. *Extension of the Richmond Newspapers Test to Non-Settlement Materials*

One of the first cases to extend the first amendment right of access to civil records was *Brown & Williamson Tobacco Corp. v. FTC*.³² In *Brown & Williamson*, the Public Citizen Health Research Group, desiring to publish information in Federal Trade Commission (FTC) reports regarding tar levels in Brown & Williamson's cigarettes, intervened in a suit to modify an order sealing reports Brown & Williamson submitted to the FTC.³³ The citizen's group asserted three bases for its right of access: the Freedom of Information Act,³⁴ a common law right of access, and the first amendment.³⁵ The *Brown & Williamson* court, using the *Richmond Newspapers* historical/functional test, held that a first amendment right to the documents

affecting a determination of the access issue. See *In re Reporters*, 773 F.2d at 1331; *The Tallahassee Democrat, Inc. v. Willis*, 370 So. 2d 867, 871-72 (Fla. 1979) (pointing out the differences between closing a trial and closing records and finding no first amendment right allowing a court to unseal records which have been properly sealed); Note, *supra* note 17, at 691 (noting the difference and that public access is fulfilled solely by the right to attend a trial). *In re Reporters* stated that the first amendment does not create a right of access to civil trials, "much less to access to records in civil trials — or, for that matter, even records in criminal trials." 773 F.2d at 1331.

³² 710 F.2d at 1165.

³³ *Id.* at 1169. The group was a non-profit organization engaged in research and publication of health and safety information. *Id.* The plaintiff, Brown & Williamson, was a cigarette manufacturer whose tar levels were under investigation by the FTC after the FTC received complaints alleging that the FTC's testing methods produced erroneously low tar levels due to the special design of the plaintiff's cigarettes. *Id.* at 1168. Thus, public health was potentially adversely affected. *Id.* After determining the test results were incorrect, the FTC proposed to publish the information, at which point Brown & Williamson sought a preliminary injunction to stop the press release. *Id.*

³⁴ 5 U.S.C. § 552 (1982). The Freedom of Information Act allows any person to request from any federal governmental agency information ranging from agency opinions and records to statements of policy and staff manuals in order to prevent "secret" government. *Id.*

³⁵ *Brown & Williamson*, 710 F.2d at 1169. During the investigation, the FTC requested comments from five major cigarette companies, including Brown & Williamson. *Id.* The FTC also agreed to seal all the information from the administrative proceeding. *Id.* at 1176. The court dismissed the Freedom of Information claim because the statute expressly exempts courts from its application. See 5 U.S.C. §§ 551(1)(B), 552(j)(2) (1982).

existed.³⁶ Thus, Brown & Williamson failed to satisfy the increased burden of proof necessary to obtain closure.³⁷ Moreover, the court noted that in certain civil proceedings, such as those with government agency involvement, the public's interest and need for access are as high as in criminal proceedings.³⁸

Echoing the *Richmond Newspapers* Court, the *Brown & Williamson* court discussed the fact that widely publicized trials allow the public to see the government in action, permit expression of public concerns on important issues and venting of emotions, increase the quality of judicial proceedings by public scrutiny, and increase the public's confidence in the fairness of the judicial system.³⁹ Although the court noted that these factors arose in criminal access cases, it held that the factors apply with equal force to civil trials.⁴⁰ The court, however, did not discuss the differences between criminal and civil proceedings.⁴¹

Ultimately, the *Brown & Williamson* court held that there are only two categories of material exempt from public access, which are: matters related to keeping order in the courtroom and matters related to the content of the information.⁴² Under the first category, the court held that a

³⁶ *Brown & Williamson*, 710 F.2d at 1177-78.

³⁷ *Id.*

³⁸ *Id.* at 1178. For example, the court listed antitrust, government regulation actions, bankruptcy cases, and discrimination actions as instances in which public interest is very high. *Id.* Public interest increases because the outcome of the trial may affect citizens directly. *Id.*; see, e.g., *In re San Juan Star Co.*, 662 F.2d 108 (1st Cir. 1981) (allowing access to pretrial discovery material in a civil rights case on a restricted basis).

Other suits where public interest is high include physician malpractice or sexual misconduct, environmental contamination suits, and products liability cases. See *Dallas Morning News*, Nov. 22, 1987, at 1, col. 4. A major concern is that professionals escape review by state regulatory boards by sealing records, which means that physicians may have many instances of complaints against them yet no record for the public to check. *Id.* at 25A, col. 6.

³⁹ *Brown & Williamson*, 710 F.2d at 1177-78.

⁴⁰ *Id.*

⁴¹ *Id.*; see also *Fenner & Koley*, *supra* note 18, at 430-32 (discussing the factors and their application to civil proceedings).

⁴² *Brown & Williamson*, 710 F.2d at 1179. Under the second category, trade secrets, national security, and protecting the privacy of third parties justify closure. *Id.*; see also *In re Knoxville News-Sentinel Co.*, 723 F.2d 470, 476-77 (6th Cir.

party must demonstrate a compelling governmental interest to override the traditional presumption of access.⁴³ Under the second category, the court employed a balancing test weighing the parties' interests in closure against the public's interest in openness.⁴⁴ Additionally, the court stated that a company's desire to keep commercially harmful information from the public is not a factor for consideration in the balancing test.⁴⁵ In the court's opinion, the result of giving weight to the private parties' desires for secrecy would lead to abuses and a "norm" of closure rather than openness.⁴⁶

In 1984, the Third and Seventh Circuit Courts of Appeal also extended the first amendment right of access to civil court records.⁴⁷ In *Publicker Industries, Inc. v. Cohen*,⁴⁸ the issue was whether the first amendment protected the public's right of access to a confidential company report entered as evidence during a trial.⁴⁹ Only the portion of

1983) (allowing the sealing of FDIC records to preserve privacy because the material contained financial information of both parties and nonparties); *In re Estate of Hearst*, 67 Cal. App. 3d 777, 136 Cal. Rptr. 821 (1977) (closure, for a temporary period only, to prevent serious threats to the lives and property of trust beneficiaries). But see *United States v. Posner*, 594 F. Supp. 930 (S.D. Fla. 1984) (permitting access to defendant's tax returns which had been entered as evidence and discussed in open court, thereby becoming part of the open court record and waiving the right to privacy). The *In re Estate of Hearst* court clearly favored openness and stressed the fact the closure was purely temporary. 136 Cal. Rptr. at 821. *In re Estate of Hearst*, therefore, was arguably an early indication of the trend toward increased public access.

⁴³ *Brown & Williamson*, 710 F.2d at 1179.

⁴⁴ *Id.* The presumption in favor of disclosure tips the balance in favor of openness under this category. *Id.* This balancing test, "weighing in" the presumption of openness, is similar to the test used in determining the common law right of access. The major difference between the two balancing tests is that the first amendment test is weighted more heavily in favor of openness due to its constitutional basis. See *infra* notes 99-203 and accompanying text for a discussion of the common law test.

⁴⁵ *Brown & Williamson*, 710 F.2d at 1179.

⁴⁶ *Id.* For examples of present abuses of sealing, see Note, *Publicker Industries v. Cohen: Public Access to Civil Proceedings and a Corporation's Right to Privacy*, 80 Nw. U. L. REV. 1319, 1324 n.36, 1350-51 (1987).

⁴⁷ See *Publicker Indus.*, 733 F.2d at 1061-70; *Continental*, 732 F.2d at 1302.

⁴⁸ 733 F.2d at 1061.

⁴⁹ *Id.* at 1064-65. The report concerned the company's use of an enzyme in the production of its Scottish whiskey. *Id.* Disclosure of this practice threatened ad-

the trial concerning the confidential report was closed to the public.⁵⁰ The court, finding that the common law right of access clearly applied, noted that a first amendment right of access is not yet explicitly recognized in civil cases.⁵¹

The court, however, extended the first amendment right of access to civil records and adopted the two-prong historical/functional test from *Richmond Newspapers*.⁵² *Publiker Industries* held that the balancing factors, although originating in criminal access cases, logically apply with equal force to civil cases. For example, the court stated that openness would increase the quality of trials and educate the public in civil as well as criminal trials. The court also noted that, historically, civil trials were as open to the public as criminal proceedings.⁵³ Further, in the court's opinion, openness in civil trials is just as necessary for the democratic process as it is in criminal trials.⁵⁴ Therefore, *Publiker Industries* held that a party must show a compelling governmental interest and the unavailability of a less restrictive method to protect that interest to justify closure.⁵⁵ Yet, while the court held that a first amendment right of access exists, it failed to critically analyze the distinctions between civil and criminal trials, or between access to a trial versus access to records.

verse economic consequences to the company, and the entire scotch industry as well, due to the widespread practice of blending different scotch whiskeys. *Id.*

⁵⁰ *Id.* The problem regarding the closure was that, by *Publiker's* own admission, at least one-third of the closed transcript did not contain truly confidential information. *Id.* Further, the sealing was not by mutual agreement but solely at the request of *Publiker* in order to protect its commercial reputation. *Id.*

⁵¹ *Id.* at 1066. Because the information was technically public at the time of the trial, the court first had to determine whether the issue of access was moot. *Id.* at 1065. The court held that because the question was one which was likely to occur again and which due to the short duration of trials could not normally be litigated before a trial ended, the court had jurisdiction to determine the issue. *Id.* The information was already "public" because the company released the material in the report to its stockholders during the pending appeal. *Id.*

⁵² *Id.* at 1067; see also *supra* notes 20-31 and accompanying text for a discussion of *Richmond Newspapers* and its test.

⁵³ *Publiker Indus.*, 733 F.2d at 1070.

⁵⁴ *Id.* at 1067-71.

⁵⁵ *Id.* at 1070-71.

Publicker Industries, however, did note that the right of access is not absolute under either the first amendment or the common law.⁵⁶ According to the court, the party seeking closure bears the burden of proving a "clearly defined and serious injury," such as that which occurs upon disclosure of a trade secret to close a record.⁵⁷ The reason for closing the *Publicker Industries* trial was proper because, if the public attended a confidentiality hearing, the material would necessarily not be confidential.⁵⁸ The problem, however, was that the district court abused its discretion by closing the entire record instead of narrowly tailoring the closure to fit the needs of the case.⁵⁹

Similarly, in *In re Continental Illinois Securities Litigation*,⁶⁰ the Seventh Circuit Court of Appeals extended the first amendment right of access not only to civil trials but also to civil records.⁶¹ In *Continental*, the press sought to obtain a special litigation committee report entered as evidence in open court during a motion to terminate shareholder derivative suits,⁶² basing its claim on the common law right of access.⁶³ The company responded

⁵⁶ *Id.* at 1070.

⁵⁷ *Id.* at 1070-71. *Publicker Industries* held that interests such as trade secrets, attorney-client privilege, or a binding contractual duty not to disclose information could justify closure. *Id.* at 1073. This raises the question of whether a binding agreement as part of a settlement justifies closure, an idea which some courts have rejected. See, e.g., *Wilson*, 759 F.2d at 1568 (allowing access to sealed settlement which was sealed by mutual agreement of all parties); *Times Herald*, 717 S.W.2d at 938 (holding that an agreement between the parties to deny access is not binding on a court).

⁵⁸ *Publicker Indus.*, 733 F.2d at 1063. Moreover, the court held that the injury must be specific in order to qualify for consideration. *Id.* at 1071. Thus, the company's desire to keep information pertaining to its poor management practices from the public did not qualify. *Id.* at 1074.

⁵⁹ *Id.* at 1072-73. Another problem was that the district court failed to make an adequate record for review. *Id.* at 1073. The *Publicker Industries* court also held that a district court should make specific findings on the record concerning access decisions in order to facilitate review. *Id.*

⁶⁰ 732 F.2d at 1302 (7th Cir. 1984).

⁶¹ *Id.* In *Continental*, shareholders were attempting to force the company to pursue certain legal claims. *Id.* at 1304. The company, in response, hired lawyers to investigate the merits of the claims. *Id.* The law firm then hired an accounting firm to investigate the company's auditors. *Id.*

⁶² *Id.* at 1304.

⁶³ *Id.* at 1308.

by asserting attorney-client privilege.⁶⁴ The court, however, began the opinion by stressing that a presumption of openness attaches once material is entered in the court records as evidence and relied on by the court in its decision.⁶⁵

While the *Continental* court did not expressly adopt a first amendment basis for the right of access, the court did adopt the more stringent first amendment standard requiring a compelling interest or extraordinary circumstances to justify closure.⁶⁶ *Continental* focused on the fact that if a judge relies on material, public access is necessary for the public to fully understand the judicial opinion.⁶⁷ The court also held that if parties discuss material in open court, the information becomes part of the open court record and subject to the presumption of openness.⁶⁸ Like the *Brown & Williamson* and *Publicker Industries* courts, however, the *Continental* court failed to discuss the distinctions between access to records and access to trials or the differences between civil and criminal proceedings.⁶⁹

Further, *Continental's* argument that other parties

⁶⁴ *Id.* at 1304-05. The company also asserted that the material was protected by work product immunity and that the protective order covering the report prevented disclosure. *Id.* at 1310. The court held, however, that once a party introduces material as evidence in open court, he waives these defenses. *Id.* at 1314-15. The court indicated that the report was an important determinant of whether it was proper to terminate the claims. *Id.* at 1307. In fact, the district court judge expressly indicated his reliance on the material. *Id.*; see also FED. R. Civ. P. 26.

⁶⁵ *Continental*, 732 F.2d at 1308-09. The court listed factors such as improved public confidence and better quality of court proceedings arising from openness which weigh in favor of disclosure, along with court reliance. *Id.* Additionally, the court held that due to the nature of the suit, involving the securities market, public interest was high and thus weighed in favor of openness. *Id.* at 1308 n.9. Following the *Brown & Williamson* and *Publicker Industries* courts, the *Continental* court used a balancing test weighing the parties' interests in closure against the public's interests in openness. *Id.* at 1313.

⁶⁶ *Id.* at 1313. The balance must weigh clearly in favor of closure, thus a court resolves any doubts in favor of disclosure. *Id.* Additionally, the court advocated the use of specific findings on the record at the trial court level in order to avoid the necessity of remanding cases when proper review is impossible. *Id.*

⁶⁷ *Id.* at 1313.

⁶⁸ *Id.* at 1313-14.

⁶⁹ *Id.* at 1308-12; see also *supra* notes 32-59 and accompanying text for a discussion of the *Brown & Williamson* and *Publicker Industries* cases.

would use the material against it in other lawsuits did not persuade the *Continental* court to maintain closure.⁷⁰ The *Continental* court expressly rejected the contention that, absent a claim of clear and significant present danger to the party, potential future harm can prevent disclosure.⁷¹ Moreover, the court stated that heightened scrutiny is necessary in closure cases because less scrutiny could lead to abuses and a decrease of public confidence in the judiciary.⁷² The court did recognize, however, that allowing access to the report would hamper the free flow of information which makes special litigation committees effective.⁷³

Thus, based on *Continental* and similar cases, there is an apparent trend to extend the first amendment right of access to both civil trials and civil records, based largely on the historical/functional *Richmond Newspapers*' test.⁷⁴ When dealing with evidentiary materials, courts seem to apply the *Richmond Newspapers*' factors equally to civil and

⁷⁰ *Continental*, 732 F.2d at 1315.

⁷¹ *Id.* Further, the *Continental* court stated:

Continental also argues that confidentiality is required because otherwise the report will be used against it in other litigation We have some reason to doubt that the question whether third parties may use the report in litigation against Continental is, in strict contemplation, legally relevant to the decision whether the report should be disclosed. Whether the material is damaging is a consideration apart from attorney-client privilege or work product immunity. And there is no general privilege, analogous to the fifth amendment's protection against self-incrimination, that protects against disclosure of information that may lead to civil liability.

Id.

⁷² *Id.* at 1314. The court stated that "[w]hile sealing one document in one case may not have a measurable effect on confidence . . . the effect of a consistent practice of sealing documents could prove damaging." *Id.*

⁷³ *Id.* at 1314-15. The court, however, clearly refused to adopt a *per se* rule in favor of disclosure. *Id.* Rather, the court held that each case would turn on the balancing of its unique factors. *Id.* The dissent, however, noted that the report was submitted as evidence under seal and therefore was never really part of the open court record. *Id.* at 1320 (Pell, J., dissenting). Further, the dissent believed that the effects of the decision on special litigation committees deserved more weight than the majority attributed to the issue. *Id.* at 1316.

⁷⁴ See *supra* notes 32-73 and accompanying text for a discussion of some cases which extended the right.

criminal cases.⁷⁵ In civil or criminal cases, a court's reliance on material in forming a judgment on the merits necessitates access so that the public may fully comprehend the judicial determination.⁷⁶ A major problem with the trend, however, is the fact that the cases do not provide an in-depth analysis of the distinctions between civil and criminal trials.⁷⁷ Further, some cases fail to discuss the differences between access to records and access to trials or between pretrial and evidentiary materials.⁷⁸

For example, the *Brown & Williamson* case demonstrates the difference between access to non-settlement evidentiary material and access to settlement agreements.⁷⁹ The case centered on an administrative agency and its actions⁸⁰ and dealt with significant public health issues.⁸¹ Thus, public interest in disclosure weighed heavily in the balance. By contrast, most settlement agreements normally concern only private individuals, do not relate to public issues, are not evidentiary, and occur in private with no rules regulating behavior or directing results.⁸²

⁷⁵ See *supra* notes 21-27, 65-68 and *infra* notes 230-242 and accompanying text for a discussion of factors which courts consider and the effect of court reliance on access.

⁷⁶ *Id.*

⁷⁷ See, e.g., *Publicker Indus.*, 733 F.2d at 1059; *Continental*, 732 F.2d at 1032; *Brown & Williamson*, 710 F.2d at 1165.

⁷⁸ See *Publicker Indus.*, 733 F.2d at 1059.

⁷⁹ See *infra* notes 114-129, 230-242, and accompanying text for a discussion of some of the differences.

⁸⁰ *Brown & Williamson*, 710 F.2d at 1180. One difference is that *Brown & Williamson*'s competitors had ready access to the information due to the previous administrative proceeding. *Id.* Thus, any threat of harm to *Brown & Williamson* rested solely on release to the general public. *Id.*

⁸¹ *Id.* at 1168. Because the FTC determined that the tar levels were erroneously low for *Brown & Williamson*'s cigarettes, public safety and health were expressly implicated. *Id.* Additionally, the court held that the FTC's promise of confidentiality did not bind a federal court in subsequent litigation. *Id.* at 1180; see also 5 U.S.C. § 57b-2(d)(2) (1987) (stating that disclosure of material from confidential agency documents is governed by court rules or orders).

⁸² See *infra* notes 230-242 and accompanying text for a discussion of the differences between settlement agreements and evidentiary materials. Perhaps the largest difference concerns court reliance on evidentiary material to form a judgment, thus increasing the need for public access so that the public may fully understand judicial decisions, an issue discussed at *supra* notes 64-68 and accompanying text.

B. *Extension of First Amendment Right of Access to Settlement Agreements*

Thus far the cases adopting a first amendment standard for a right of access to civil trials and records have not dealt with settlement agreements, which are arguably similar to nonpublic pretrial materials.⁸³ The cases did, however, establish a foundation which later courts used to permit access to settlements. In *Wilson v. American Motors Corp.*,⁸⁴ for example, the plaintiff sought to invoke non-mutual collateral estoppel⁸⁵ against American Motors and, therefore, wanted to unseal a previous settlement agreement between Wilson and American Motors.⁸⁶ After discussing the common law right of access, *Wilson* noted that the Supreme Court has not extended the first amendment right of access to civil trials or records.⁸⁷ The *Wilson* court also noted the varying standards and uncertainty among appellate courts regarding access to civil records.⁸⁸ Ultimately, after analyzing the cases, *Wilson* held that in view of the strong presumption of openness of courts and records, a party must show a "compelling governmental interest" in order to close either a trial or

⁸³ See *supra* notes 32-81 and accompanying text for a discussion of these cases.

⁸⁴ 759 F.2d 1568 (11th Cir. 1985).

⁸⁵ Nonmutual collateral estoppel compares to *res judicata* in that a litigant may rely on a previous determination of an issue if a party had a full and fair opportunity to litigate the issue in a previous suit. See LANDERS & MARTIN, CIVIL PROCEDURE 933-53 (1981).

⁸⁶ 759 F.2d at 1569. Both plaintiffs were injured by the same model jeep manufactured by American Motors. *Id.* The plaintiff asserted both a common law and a first amendment basis for the right of access. *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 1570. The court referred to the *Publicker Industries* and *Brown & Williamson* cases which extended the first amendment right to access to civil evidentiary materials. *Id.* The *Wilson* court further noted that the Fifth Circuit Court of Appeals held that there is no constitutional right of physical access to courtroom exhibits. *Id.* The Fifth Circuit ruling bound the *Wilson* court since the Eleventh Circuit adopted as precedent all Fifth Circuit decisions prior to October 1, 1981. *Id.* (referring to *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423 (5th Cir. 1981)). Therefore, the *Wilson* court separated the materials sought by the plaintiff into two groups: those related to the court records, such as pleadings, docket entries, and transcripts; and courtroom exhibits. *Id.*

records.⁸⁹ It thereby adopted the more stringent first amendment standard.⁹⁰ Thus, because the original party did not demonstrate "exceptional circumstances," the court held that the order granting the original seal was invalid.⁹¹ Additionally, *Wilson* held that a company cannot prevent disclosure merely by asserting that release will harm its commercial reputation.⁹²

Moreover, *Wilson* held that the need to encourage settlements cannot justify closure although recognizing that it is a valid concern.⁹³ While recognizing the existence of public and private interests in encouraging settlements, the court stated that "the payment of money to an injured party is simply not 'a compelling governmental interest'"⁹⁴ The court's major concern was that if courts give weight to parties' desires for "secrecy" many parties would agree to close records, thus leading to abuses of the system.⁹⁵ *Wilson* raises questions, however, of fairness

⁸⁹ *Id.* at 1571.

⁹⁰ *Id.* Adopting the standard from criminal access cases, the *Wilson* court also held that closure must be narrowly tailored to suit the particular situation. *Id.* (referring to *Globe Newspaper*, 457 U.S. at 606-07). *Wilson* differs from some cases in that although the court sealed the entire record, the trial itself was open to the public. *Id.* at 1569. Thus, the plaintiff or anyone could have attended the trial. *Id.* Further, the *Wilson* parties settled only after the jury answered special interrogatories, as opposed to other cases which settle before the trial or at least before the case reaches the jury. *Id.*

⁹¹ *Id.* The court, however, failed to distinguish and discuss the differences between access to a trial and access to records, simply noting that the public could have attended the trial. *Id.* For a discussion of these distinctions, see *infra* notes 108-110 and accompanying text. *Wilson* listed as examples of "exceptional circumstances" protection of trade secrets, national security, and privacy of third parties. 759 F.2d at 1570. The court even indicated that if material is relevant to another case, access is desirable in order to save costs and time for both the court and the parties. *Id.* at 1571 n.3.

⁹² *Id.* at 1571-72. Further, the court stated that a "desire to prevent the use of [the] trial record in other proceedings is simply not an adequate justification for its sealing." *Id.*

⁹³ *Id.* In fact, the *Wilson* court noted that the district court judge actively participated in the settlement, and stated that "[t]here is no question that courts should encourage settlements." *Id.* at 1571-72 n.4.

⁹⁴ *Id.*

⁹⁵ *Id.* The court stated that:

[T]he payment of money to an injured party is simply not 'a compelling governmental interest' legally recognizable or even entitled to consideration in deciding whether or not to seal a record. We feel

to the parties because settlements depend largely on the skills and efforts of counsel and the varying desires of the parties rather than upon established objective standards.⁹⁶ Thus problems arise from the *Wilson* court's failure not only to distinguish civil and criminal cases, but to separate settlement agreements from evidentiary court materials.⁹⁷ Yet, the *Wilson* decision follows the trend toward increased public access based on the first amendment and extends the right to include settlement agreements filed or discussed in a court during products liability cases.⁹⁸

II. THE COMMON LAW RIGHT OF ACCESS

The common law right of access test is essentially the same balancing test as the first amendment test except the balance is not tipped as greatly in favor of access. In fact, courts cite many of the same reasons for access in common law cases. For example, both civil and criminal trials have traditionally been open to the public with a corresponding presumption of openness attaching to the court records.⁹⁹

certain that many parties to lawsuits would be willing to bargain (with the adverse party and the court) for the sealing of records after listening to or observing damaging testimony and evidence. Such suppression of public records cannot be authorized. The situation here is further aggravated by the attempted suppression of a jury verdict because it might adversely affect American Motors in other judicial proceedings. Such action is contrary to the most basic principles of American jurisprudence.

Id.

⁹⁶ *Id.* at 1568. The danger lies in the fact that the factors relied on as supporting access arose in criminal actions. Moreover, a settlement is a private contract in contrast to evidence because evidence forms the basis of a court's judgment and is "public" information. See *supra* notes 20-31 for a discussion of *Richmond Newspapers* and *infra* notes 230-242 for a discussion of court reliance and its relationship to public access.

⁹⁷ *Wilson*, 759 F.2d at 1568-72.

⁹⁸ See *supra* notes 32-82 for a discussion of this trend and cases following it.

⁹⁹ See *Craig v. Harney*, 331 U.S. 367 (1947); *United States v. Edward*, 672 F.2d 1289, 1290 (7th Cir. 1981); Note, *supra* note 17; Fenner & Koley, *supra* note 18; Note, *supra* note 46. The *Craig* court emphasized that a "trial is a public event", thus making what transpires in the courtroom public property. 331 U.S. at 368. Another court stated that "[o]nce the evidence has become known to the mem-

In *Nixon v. Warner Communications, Inc.*,¹⁰⁰ concerning the press's efforts to gain access to the actual Watergate tapes, the Supreme Court clearly acknowledged a common law right of access to court records.¹⁰¹ The Court stated that "the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents."¹⁰² Further, the Court held that a party does not need a proprietary or evidentiary interest in the material in order to enjoy this right.¹⁰³

Nixon also stated, however, that the common law right of access is not absolute and that courts retain supervisory powers over their records.¹⁰⁴ Thus, a court may deny access in order to prevent use of the material for "improper purposes" such as sensationalism or promoting public scandal.¹⁰⁵ Additionally, a court may deny access if the party seeking the information may use the material to

bers of the public . . . it would take the most extraordinary circumstances to justify restrictions on the opportunity of those not physically in attendance at the courtroom to see and hear the evidence" *In re National Broadcasting Co. v. United States*, 635 F.2d 945, 952 (2d Cir. 1980) (criminal case concerning access to tapes played as evidence during open court). The *National Broadcasting* court noted, however, that if the evidence had been offered under a properly granted seal the case would have been entirely different because that portion of the trial would not have been open to the public. *Id.* at 952 n.4.

¹⁰⁰ 435 U.S. 589 (1978). The tapes were played as evidence in open court. *Id.* The public and the press, however, already had transcripts of the tapes. *Id.* Thus, as the Court noted, only physical access to the tapes themselves remained unavailable. *Id.* at 590.

¹⁰¹ *Id.* at 597. The Court held that the common law right exists although its exact historical origins are unclear and there are no cases directly on point delineating the exact scope of the right. *Id.*

¹⁰² *Id.* (footnote omitted).

¹⁰³ *Id.* For instance, *Nixon* stated that a citizen's desire to inspect the records merely to check on and observe the workings of the government justifies access. *Id.* at 598.

¹⁰⁴ *Id.* at 598.

¹⁰⁵ *Id.* The *Nixon* Court indicated that the proper test balances the factors favoring access, adding the presumption of openness, against the factors weighing against disclosure. *Id.* at 602. This test is very similar to the first amendment test yet without the increased burden of proof necessary to overcome the presumption of openness. See also *supra* notes 20-98 and accompanying text for a discussion of the first amendment standard and cases using it.

harm the commercial standing of a competitor.¹⁰⁶ Ultimately, the *Nixon* Court indicated that decisions regarding disclosure rest in the trial court's discretion and depend on the weight of the particular facts of each case.¹⁰⁷

Significantly, the *Nixon* decision further stated that neither the first nor the sixth amendments support a right of access to court records.¹⁰⁸ The Court, noting the differences between access to a trial and access to records, stated that "[t]he requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed."¹⁰⁹ Thus, the *Nixon* Court expressly rejected the

¹⁰⁶ *Nixon*, 435 U.S. at 598.

¹⁰⁷ *Id.* at 599. The Court suggested factors which trial courts should weigh in the balance, including: the value of allowing the public to view the judicial process; the value of informing the public about important events; the importance of the event in question; the parties' right to privacy; the need to protect privacy of third parties; and the use for which the material is sought. *Id.* at 600-02. The Court, however, decided the issue based on the Presidential Recordings Act, making the discussion of the common law right of access dictum. *Id.* at 603-07; see also Presidential Recordings Act of 1978, 44 U.S.C. §§ 101, 2107-2108, 2201-2207 (1982). Indeed, the fact the decision does not rest on the common law right of access causes uncertainties among courts and commentators regarding the proper standard of review and the strength of the presumption of openness. Uncertainty about the standard of review arises from the Court's statement, after discussing the balancing factors, that "[a]t this point, we normally would be faced with the task of weighing the interests advanced by the parties in light of the public interest and the duty of the courts." *Nixon*, 435 U.S. at 602. One view holds that a reviewing court should grant the lower court's decision a high degree of finality, using the normal abuse of discretion test. The other view states that a reviewing court should reweigh the factors, granting the lower court's decision only a slight degree of finality because of the *Nixon* Court's statement. See Note, *supra* note 17, at 683-85 (advocating the use of the slight degree of finality standard).

¹⁰⁸ *Nixon*, 435 U.S. at 608-10 (emphasis added). Some authorities argue that there is also an implicit right of access under the first amendment because the public cannot physically attend every trial. See, e.g., Note, *supra* note 17, at 691. The note states:

It is possible, however, that the right to attend criminal trials, as a practical matter, does not satisfy the public's right to freedom of information In order to guarantee the implicit constitutional right of [the] public and press to attend criminal trials to obtain information, the Supreme Court could recognize another implicit, indispensable right to inspect and copy evidentiary tapes

Id. The note, however, concludes that this implicit right does not exist and further, that the right of access is satisfied by the right to attend trials. *Id.* at 692.

¹⁰⁹ *Nixon*, 435 U.S. at 610. Some courts have noted the *Nixon* Court's failure to establish a first amendment right of access to civil records, as well as the uncer-

argument that the first amendment supports access to criminal court records, much less to civil records or settlement agreements.¹¹⁰

A. *Application of the Common Law Right of Access to Settlement Agreements*

Nixon firmly implanted the common law right of access to criminal judicial records in most cases.¹¹¹ Yet, *Nixon*

ainties concerning access. See *Belo Broadcasting*, 654 F.2d at 434 (criminal case dealing with access to audiotapes played as evidence). The *Belo Broadcasting* court, referring to access cases, stated:

In erecting such stout barriers against those opposing access and in limiting the exercise of the trial court's discretion, our fellow circuits have created standards more appropriate for protection of constitutional than of common law rights. With all due respect, we find such standards to be misreadings of the Supreme Court's directives, and we decline to apply them here.

Id.

¹¹⁰ *Nixon*, 435 U.S. at 608-10. The Court stated:

Respondents claim that [the first amendment] guarantees the press 'access' to — meaning the right to copy and publish — exhibits and materials displayed in open court.

This argument misconceives the holding in *Cox Broadcasting*. Our decision in that case merely affirmed the right of the press to publish accurately information contained in court records *open to the public* The First Amendment generally grants the press no right to information about a trial superior to that of the general public.

Id. at 608-09 (emphasis added) (referring to *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (dealing with the first amendment right of access to names of criminal victims)). Further, the Court stated:

Respondents contend that release of the tapes is required by the Sixth Amendment guarantee of a public trial. They acknowledge that the trial at which these tapes were played was one of the most publicized in history, but argue that public understanding of it remains incomplete in the absence of the ability to listen to the tapes

The requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed.

Id. at 610; see also Hagenbach, *Sealed Judicial Records and Infant Doe: A Proposal to Protect the Public's Right of Access*, 16 IND. L. REV. 861, 882 (1983) (noting the uncertainty of a first amendment basis for a right of access to records and advocating adoption of clear guidelines to allow lower courts to more effectively use the common law right of access); Note, *supra* note 17, at 691 (distinguishing the right of access to trials from access to records and discussing the *Nixon* Court's apparent refusal to find a first amendment basis for a right of access to records).

¹¹¹ See *supra* notes 100-110 and accompanying text for a discussion of *Nixon*.

left unanswered several questions, such as the proper standard of review, the strength of the presumption in favor of openness, and how far the decision extends to civil trials or records.¹¹² Lower courts, however, have attempted to delineate the scope of the right and create standards for applying the balancing test to actual situations.¹¹³ For example, in *Minneapolis Star & Tribune v. Schumacher*,¹¹⁴ the issue was whether the court should unseal five settlement agreements arising from an airplane crash.¹¹⁵ The appellate court granted access to the documents, focusing on the fact the parties discussed the terms of the settlements in open court.¹¹⁶ Further, the appellate

¹¹² See *infra* notes 243-250 and *supra* notes 108-110 and accompanying text for discussion of these questions and possible answers. The uncertainties arise mainly from the fact that the case ultimately rested on grounds other than the common law right of access, as well as the Court's statements about the standard of review and presumption of openness. Regarding the presumption of openness, the Court stated that "[a]lso on respondents' side is the presumption — *however gauged* — in favor of public access to judicial records." *Nixon*, 435 U.S. at 602 (emphasis added).

¹¹³ See *infra* notes 111-203 and accompanying text for a discussion of some courts' attempts.

¹¹⁴ 392 N.W.2d 197 (Minn. 1986).

¹¹⁵ *Id.* at 200. Galaxy Airlines, Inc. operated the plane which crashed. *Id.* An additional factor in the case was that state law required the parties to file the agreements with the court because minor heirs were involved. *Id.* at 200 n.1 (referring to MINN. STAT. § 573.02 (1984)). Therefore, the case is different from the majority of settlements in which filing with the court is voluntary. *Id.* For another products liability case allowing access to settlement agreements, but under a first amendment right, see *supra* notes 84-98 and accompanying text.

¹¹⁶ *Minneapolis Star & Tribune Co. v. Schumacher*, 383 N.W.2d 323, 327 (Minn. Ct. App. 1986). The appellate court stated that once material becomes part of an open court record only "compelling governmental interests" can justify closure. *Id.* at 328. Thus, the appellate court adopted the heightened scrutiny standard normally used in first amendment cases. *Id.* The dissent, however, disagreed, stating that the first amendment standard applies only to criminal cases. *Id.* at 328 (Wozniak, J., dissenting). Further, the dissent stated that the majority's prior restraint analysis was not proper because the public never had the information and no one was prohibiting dissemination of public material. *Id.* at 329. Even though the hearings were open to the public, no one but the parties attended. *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 200. Moreover, the dissent noted that the only information that the press did not have was the amount and terms of the settlements. *Minneapolis Star & Tribune Co.*, 383 N.W.2d at 329-30. The dissent believed that publication of this information would not serve any of the traditional factors used to justify access, such as increasing the quality of the judicial proceedings by public scrutiny. *Id.* at 330.

court held that encouraging settlements, even in a mass tort situation, was not a "weighty" enough factor to overcome the presumption of openness because this factor is present in all litigation.¹¹⁷

The Minnesota Supreme Court, however, noted that while some courts have extended the first amendment right of access to include civil trials and records, most have not.¹¹⁸ Thus, the court chose to adopt a standard requiring a party to demonstrate "strong countervailing reasons" or "compelling reasons" for closure.¹¹⁹ Turning to the balancing test under the "compelling reasons" standard, the court stated that the majority of settlement agreements take place in private with the court exercising no control over the events.¹²⁰ Further, as the court observed, courts are not involved at all in typical settlements because the parties normally move for voluntary dismissal

¹¹⁷ *Id.* at 328. The dissent, however, pointed out that the majority did not analyze the distinctions between criminal and civil trials before adopting the first amendment standard, which arose from criminal cases. *Id.* In the dissent's opinion, settlement agreements are not public parts of any trial. *Id.* at 330. Additionally, the dissent noted that settlements take place in private without the participation of the court and emphasized the fact that filing in the present case was not voluntary. *Id.*

¹¹⁸ *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 203. The court also noted the absence of a decision by the Supreme Court on the issue and that most courts elect to base access on the common law right. *Id.*

¹¹⁹ *Id.* at 202. One of the problems in right of access cases is the varying standards among courts using the common law right of access, in addition to the confusion as to whether a first amendment claim also exists. The court expressly limited its decision, however, to apply only to settlement documents "or transcripts made part of a civil court file by statute," thus implicitly recognizing that different materials may need different tests and standards. *Id.* at 203.

¹²⁰ *Id.* at 204. The court stated:

Historically, the majority of settlements entered into between parties have been private. The parties agree to settle in private, outside of the courtroom and without the participation of the court. The court is only involved by accepting a stipulated agreement in which the parties inform the court that there has been a settlement and ask that the case be dismissed. The court, however, does not approve, or even inquire into, the terms of the settlement. The historic privacy of settlement agreements is borne out by the fact that settlements, offers to settle, and statements made during settlement negotiations are all inadmissible under the Rules of Evidence to prove liability.

Id. (referring to MINN. R. EVID. 408).

after reaching an agreement.¹²¹ Moreover, the court noted that the present filing was not voluntary.¹²² Finally, the value of encouraging settlements, especially in cases with several potential suits like this one, was a significant factor which the court weighed in the balance.¹²³ The court stated that release of the information would not only impede further settlements between Galaxy and potential plaintiffs, but could also "chill" future settlements in other unrelated cases.¹²⁴ This "chilling effect" on settlements would then increase the time and costs of litigation, both to the parties and the courts.¹²⁵

¹²¹ *Id.* Certain exceptions to this rule, such as class action suits, require courts to approve the settlement. See FED. R. CIV. P. 23(e), 23.1 (class actions and shareholder derivative suits).

¹²² See *supra* note 115 and text for a discussion of the state's filing requirement.

¹²³ *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 205. Another factor noted by the court is the fact that parties cannot use settlement terms as evidence in trials. *Id.* at 204. In the court's opinion, this restriction demonstrates the private nature of settlements. *Id.*; see also FED. R. EVID. 408. Further, *Minneapolis Star & Tribune Co.* noted that a major reason parties settle is to avoid publicity. *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 204-06. The court also held, however, that parties cannot escape access simply by agreeing among themselves to seal the settlement. *Id.* Rather, the decision rests with the court and depends on the particular balance of all the factors of each case. *Id.*

¹²⁴ *Id.* at 205. The court indicated that by adopting a standard permitting easy access to sealed settlements, future litigants would hesitate to settle if confidentiality was a key element because confidentiality could not be guaranteed. *Id.* The court stated:

The philosophical reasoning behind allowing private settlements also leads to the conclusion that such agreements should remain private. This court has often stated that it favors the settlement of disputed claims without litigation To allow public access to settlement documents filed with a court may circumvent this policy. One of the reasons parties agree to settle is that they do not wish to go to trial and expose their disputes to the public It would therefore be inconsistent with our public policy encouraging settlement to allow the settlement documents in this case to be made public. Such reasoning would tend to discourage settlements rather than encourage them.

Id. The court feared that allowing access would hamper negotiations between Galaxy and plaintiffs whose suits were still pending. *Id.*

¹²⁵ *Id.* at 201, 205. Other factors the court weighed included the privacy of the families, their right to grieve in private, and their right to have their financial affairs private. *Id.* at 206. Additionally, disclosure of the settlement amount could increase the likelihood of theft and vandalism. *Id.* As the dissent in the appellate decision stated:

[T]he privacy interests of the grieving families in these cases is com-

Thus, contrasting the *Minneapolis Star & Tribune* appellate and supreme court opinions reveals the conflict and uncertainty over right of access cases and the proper basis for access.¹²⁶ Even though the court rejected a first amendment basis, it nonetheless confused the outcome by adopting a compelling need standard to justify closure. The value of the case, however, lies in its recognition and discussion of the importance of encouraging settlements.¹²⁷ For example, the supreme court recognized the increased value of encouraging settlement in situations like plane crashes where there are multiple plaintiffs.¹²⁸ Finally, the court recognized the distinction between settlement agreements and other court materials — a factor which courts should analyze but often neglect.¹²⁹

Yet another problem arises when, due to the identity of the parties or the nature of the lawsuit, significant public interest in disclosure exists.¹³⁰ For example, in *Miami Herald Publishing Co. v. Collazo*,¹³¹ the Miami Herald sought ac-

PELLING. They have a right to be left alone. They have a right not to have their tragedy thrust into the public eye without their consent and with no redeeming public purpose except the satisfaction of the public's idle curiosity. They have a right not to have their personal financial affairs splashed across the pages of a newspaper. They have a right to be free from burglary, harassment, and intimidation, instances of which have already been documented in these cases.

Minneapolis Star & Tribune Co., 383 N.W.2d at 330 (Wozniak, J., dissenting).

¹²⁶ See *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 197; *Minneapolis Star & Tribune Co.*, 383 N.W.2d at 323.

¹²⁷ See *infra* notes 204-250 and accompanying text for a discussion of the value of encouraging settlements.

¹²⁸ *Minneapolis Star & Tribune Co.*, 392 N.W.2d at 205.

¹²⁹ See *supra* notes 120-125 and accompanying text for a discussion of the distinctions between settlements and other trial materials, and *supra* notes 32-98 and accompanying text for a discussion of cases in which these distinctions were not recognized.

¹³⁰ See, e.g., *In re San Juan Star Co.*, 662 F.2d at 108 (allowing access to pretrial discovery materials in a civil rights case because of the high public interest); see also *supra* notes 38 and 65 and accompanying text for types of cases with great public interest. Another example of a topic of great public interest is Aids, a deadly viral infection recently sparking public controversy. One judge refused to seal court records in a suit involving a pediatrician alleged to have the Aids virus, in spite of the fact that the publicity could, and did, ruin the physician's practice. See *Dallas Morning News*, Nov. 22, 1987, at 24A, col. 1.

¹³¹ 329 So. 2d 333 (Fla. Dist. Ct. App.), *cert. denied*, 342 So. 2d 1100 (Fla. 1976).

cess to a sealed settlement between the city of Miami and Collazo, who was the victim of a police shooting.¹³² The trial, however, was open to the public except for the portion in which the parties discussed the settlement terms.¹³³ The trial court denied access to the sealed settlement, stating that "the amount of money involved was no one's business but those of the parties involved themselves."¹³⁴ The Miami Herald appealed, asserting a first amendment right of access to the settlement.¹³⁵

The appellate court, however, focused on the common law right of access rather than the first amendment.¹³⁶ One significant factor to the court was the involvement of a governmental unit as a party.¹³⁷ The court stated that the public had a substantial interest weighing in favor of disclosure because the suit involved city funds obtained from public taxes, which were used for the city's insurance, salaries and the cash settlement.¹³⁸ Balancing the

¹³² *Id.* at 334. The police shot and paralyzed Collazo during a burglary investigation. *Id.* Collazo's suit alleged that police misconduct and improper police training were the causes of the injury. *Id.*

¹³³ *Id.* The trial lasted only two days before the parties settled. *Id.*

¹³⁴ *Id.* at 335.

¹³⁵ *Id.* Collazo and the city defended by asserting a right to privacy and the right to reach a private agreement. *Id.*

¹³⁶ *Id.* at 336-38. The court stated that it was "unaware of any specific constitutional or statutory provision giving the press or the public a right to attend a judicial proceeding." *Id.* at 337. Further, the court enunciated that an open court is "an indispensable part of our system of government and our way of life" and that "what transpires in the courtroom is public property." *Id.*

¹³⁷ *Id.* at 338. The court stated that the value of open courts in a representative form of government is great and, therefore, with the city's involvement as a party the presumption in favor of openness increased. *Id.* at 336. Also, after reviewing criminal and civil cases, the court stated that the two justifications for closure are significant privacy concerns and the need to guarantee an impartial and fair trial. *Id.* Privacy concerns cited by the court included certain juvenile proceedings, adoption, and bastardy actions. *Id.*

¹³⁸ *Id.* at 338. The court stated:

Further, appellants' right to know the terms of the settlement agreement is particularly compelling here because of the nature of the issues being litigated, i.e., alleged police misconduct and improper police training involving a City of Miami police officer acting in his official capacity. These issues created a substantial monetary liability for the City and influenced its insurance rates for the future, which costs must be borne by the taxpayers. Moreover, the activities complained about are by their very nature newsworthy.

factors of the case, the court therefore held that the trial court abused its discretion by granting the request to seal the settlement.¹³⁹

Collazo provides a good example of how the common law balancing process can work to provide an acceptable answer if courts consider all the factors, including the nature of the suit and the identity of the parties.¹⁴⁰ Thus, the proper balancing of the factors should act to eliminate potential abuses of closure requests while adequately protecting both public and private interests because the balancing process takes in all relevant factors, ranging from privacy interests to potential decreases in court costs and time if settlements are encouraged by guaranteeing confidentiality.¹⁴¹ Because the court balances the factors, and not the parties, the potential for abuse is limited.

B. *Distinguishing Between Sealing and Unsealing*

While the balancing tests under the common law right of access works, albeit with some confusion, other factors besides the identity of the parties or nature of the suit come into play. Another factor which some courts recognize in right of access cases is that courts may need to apply a different standard when determining the appropriateness of later attempts by unrelated third parties to unseal settlements. This difference is important because the original parties may have relied on confidentiality in reaching the settlement agreement.¹⁴² In *Palmieri*

Id. The insurance company had already indicated that premiums would increase due to the city's claim experience. *Id.* at 336.

¹³⁹ *Id.* at 338-39. Further, the court declared that the city's fears that the information would affect pending litigation against the city was not a factor to weigh in the balance. *Id.* at 337. This reason did not rise to the level of being a "cogent reason for sealing" and the city failed to show "any immediate threat to the administration of justice" to justify the closure. *Id.*

¹⁴⁰ See *supra* notes 123, 130-139, for cases in which the balance arguably works well regardless of the circumstances.

¹⁴¹ See *supra* notes 46, 50, 95 and *infra* note 177 and accompanying text for examples of abuses.

¹⁴² See *infra* notes 142-203 and accompanying text for a discussion of the issues of parties' reliance and fairness.

v. New York,¹⁴³ for example, the court drew a distinction between the original sealing of the settlement and the later attempt to unseal it.¹⁴⁴ In *Palmieri*, the state of New York intervened in a private antitrust action between Palmieri and DIC Concrete Corp. to modify the order sealing the settlement so that the district attorney could use the information in grand jury proceedings against the parties.¹⁴⁵ After the district court granted the motion to unseal, Palmieri appealed to the Second Circuit Court of Appeals.¹⁴⁶

Recognizing the differences between sealing and unsealing, the Second Circuit adopted a standard requiring a party seeking *disclosure* to show "extraordinary circumstances or compelling need," the opposite of the test for sealing.¹⁴⁷ Thus, *Palmieri* held that when parties rely on a settlement's confidentiality, the party seeking access must satisfy the greater burden of proof.¹⁴⁸ Indeed, the court stated that a party's reliance "raises a presumption in favor of upholding [the sealing] orders."¹⁴⁹

In *Palmieri*, the court was faced with two competing in-

¹⁴³ 779 F.2d 861 (2d Cir. 1985).

¹⁴⁴ *Id.* at 863. The parties and the court acknowledged the great overlap between the state's antitrust action and the parties' case. *Id.* In fact, this is one reason the state sought to unseal the settlement agreement. *Id.* at 864-65.

¹⁴⁵ *Id.* at 864.

¹⁴⁶ *Id.* at 862. The parties' main argument was that they were deprived of legal rights because they had relied heavily on the sealing order in reaching the settlement. *Id.*

¹⁴⁷ *Id.* at 866. This standard is the exact opposite of the usual standard which requires the party seeking *closure* to demonstrate compelling need. See *supra* notes 99-125 and accompanying text for a discussion of the usual standard.

¹⁴⁸ *Palmieri*, 779 F.2d at 865. One factor the court noted was the magistrate's very active role in achieving the settlement due to the parties' concern that the Attorney General would obtain the information. *Id.* Thus, it would be unfair for the court to first encourage and actively assist in settlement only to then allow access to the material which the court promised would remain sealed. *Id.* The magistrate even stated that the settlement would have been extremely hard, if not impossible, without the promise to seal the agreement. *Id.* at 864. Earlier, the Attorney General used information from a sealed agreement against DIC Concrete Corp., which led to the parties' fears in *Palmieri*. *Id.* at 863.

¹⁴⁹ *Id.* Additionally, the court stated:

As appellants have argued, here the very papers and information that the Attorney General seeks apparently would not even have existed but for the sealing orders and the magistrate's personal assur-

terests: (1) the state's interest in criminal investigation and obtaining evidence for grand jury proceedings; and (2) the interest in promoting settlement.¹⁵⁰ The court first noted that, in a previous decision, it held parties are entitled to rely on protective orders to prevent third party access even if the third party is a governmental unit.¹⁵¹ Also, the court stated that a state begins the battle against any private litigant with a distinct advantage due to its extensive investigative power.¹⁵² Thus, while a party's reliance would not automatically foreclose unsealing, the court held the decision whether to unseal a settlement agreement is best left to the trial court's discretion.¹⁵³ The court further stated that the trial court should decide based on the unique facts of each case with a view toward *maintaining closure* in cases where the parties relied on confidentiality.¹⁵⁴

*Times Herald Printing Co. v. Jones*¹⁵⁵ also demonstrates the uncertainty and conflicting views regarding the right of access to judicial records and settlement agreements and the value of encouraging settlements, although the case was later vacated for lack of jurisdiction.¹⁵⁶ The Times Herald attempted to unseal a settlement agreement, court orders, and non-discovery materials to publish the mate-

ances of confidentiality, upon which the appellants apparently relied in agreeing to enter closed-door settlement negotiations.

Id.

¹⁵⁰ *Id.* at 864.

¹⁵¹ *Id.* (referring to *Martindell v. International Tel & Tel Corp.*, 594 F.2d 291 (2d Cir. 1979)). Thus, by analogy a party should be entitled to rely on an order sealing settlement documents as neither order deals with evidentiary materials. In *Martindell*, the court held that a party must show compelling need or extraordinary circumstances to overcome a protective order regardless of whether the party seeking access was a governmental unit. 594 F.2d at 296.

¹⁵² *Palmieri*, 779 F.2d at 866.

¹⁵³ *Id.* at 865.

¹⁵⁴ *Id.* (emphasis added). The court remanded the case to the district court after developing the new standard for unsealing. *Id.* The court also held that if the state could demonstrate a compelling need, such as the impossibility of obtaining the information by any other means after a good faith effort, disclosure would be proper. *Id.* at 865-66.

¹⁵⁵ 717 S.W.2d 933 (Tex. Ct. App), *vacated*, 730 S.W.2d 648 (Tex. 1986).

¹⁵⁶ *Id.* at 933-48.

rial arguing that the public needed the facts to evaluate a judge seeking re-election.¹⁵⁷ The trial court had sealed the record upon the requests of both parties after the parties settled before the actual trial began.¹⁵⁸ The *Times Herald* argued it had a right of access under the common law, first amendment, and the Texas Constitution.¹⁵⁹

After disposing of the other two claims, the *Times Herald* court accepted the existence of the common law right of access based on *Nixon*.¹⁶⁰ The court reiterated, however, that the right is not absolute¹⁶¹ and stressed the discretion of the trial court in the balancing test.¹⁶² Thus, the court held that closure is proper if the information sought contains a trade secret; pertains to national security; involves the privacy of third parties; or if there is a binding contractual duty not to disclose the information.¹⁶³ Significantly, the court analyzed the difference between unsealing, which raises questions of the parties' reliance on confidentiality, and sealing.¹⁶⁴ Thus, like the *Palmieri* court, the *Times Herald* court held that a party seeking to

¹⁵⁷ *Id.* at 934-35. The original suit involved physician misconduct. *Id.* at 935. The newspaper did not seek access to discovery materials, which both the parties and court stated were non-public parts of the trial process. *Id.* at 938 n.1. However, settlement agreements are also arguably non-public aspects of a trial. For a discussion of the special nature of settlement agreements, see *infra* notes 230-242 and *supra* notes 114-129 and accompanying text.

¹⁵⁸ *Times Herald*, 717 S.W.2d at 934. The fact the case never went to trial refutes some courts' fears concerning abuse. For example, one court stated that everyone would agree to settle after hearing damaging evidence and therefore closure would become the "norm". *Wilson*, 759 F.2d at 1571.

¹⁵⁹ *Times Herald*, 717 S.W.2d at 934. The court rejected the Texas constitutional claim, stating that the only case law pertained to criminal cases. *Id.* at 936. The court similarly rejected the first amendment claim after noting that it also only applied to criminal cases and that the Supreme Court had rejected a first amendment right of access to records in the *Nixon* decision. *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 939. The court also stated that private agreements alone, however, will not bind a court, a view similar to the *Wilson* and *Minneapolis Star & Tribune* courts. *Id.* at 938; see also *supra* notes 84-98, 114-129, for a discussion of the two cases.

¹⁶³ *Times Herald*, 717 S.W.2d at 938.

¹⁶⁴ *Id.* The court referred to *FDIC v. Ernst & Ernst*, 677 F.2d 230 (2d Cir. 1982), which supports the presumption of maintaining closure and distinguishes between unsealing and sealing. *Times Herald*, 717 S.W.2d at 938.

unseal documents must show "extraordinary circumstances" in order to gain access to previously sealed material.¹⁶⁵

Unlike some courts, however, *Times Herald* stated that the value of encouraging settlement is a significant factor which courts should consider in the balancing test in many cases.¹⁶⁶ The court indicated that a state has a great interest in encouraging settlements which weighs against the public's need to have access to settlement terms.¹⁶⁷ In the court's opinion, adopting a less stringent test would affect future settlements.¹⁶⁸ Impeding settlements would in turn increase the overload in trial courts because parties could not depend on lasting confidentiality when negotiating settlements.¹⁶⁹ Additionally, by allowing easy access to sealed material, a "chilling effect" on potential litigants could occur with the effect of nonlitigation of valid claims.¹⁷⁰ Finally, the *Times Herald* court noted that many of the common balancing factors which support public access do not apply to settlement agreements because of the private nature of the agreements.¹⁷¹ Thus,

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 938-40. The *Times Herald* court noted that the trial court's agreement to seal the settlement was a significant factor in the parties' attaining settlement. *Id.* at 940.

¹⁶⁷ *Id.* at 939.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* The court stated:

In our litigious society, for us to take the position that private litigants, who have settled their dispute before calling upon a court or jury to find true the facts alleged in the pleadings, and who have settled in reliance upon the court's agreement to seal the record from public disclosure, have no right to expect the confidentiality to which they agreed and to which they were assured, would seriously impair the settlement process and would increase the trial overload which presently exists in our judicial system.

Id.

¹⁷⁰ *Id.* Denying confidentiality would deter people from pursuing valid legal claims because one reason people settle is to avoid publicity. *Id.* Moreover, the public, as well as the state, has an interest in encouraging settlement because of the increased time and costs of litigation compared to settling disputes. *Id.*

¹⁷¹ *Id.* at 940. The court noted that most settlement agreements occur in private with no court supervision and reflect the private desires of the particular parties. *Id.* Therefore, the argument that openness serves to increase judicial quality by public scrutiny does not apply to settlements. *Id.* at 939-40.

the majority held that the newspaper did not meet its burden of proof and denied access to the sealed settlement.¹⁷²

Yet, the *Times Herald* decision was strikingly far from unanimous.¹⁷³ The concurring opinion emphasized the value of encouraging settlements and stated that neither the press nor the public has a right to unlimited gathering of information.¹⁷⁴ The dissenting opinion, focusing on the Supreme Court cases establishing a first amendment right of access to criminal trials and the two-prong *Richmond Newspapers* test, however, believed a first amendment right of access exists for civil trials and records.¹⁷⁵ The dissent stated that many of the factors pertaining to the value of openness in criminal proceedings apply equally to civil trials, especially when the nature of the suit itself concerns the public directly or indirectly.¹⁷⁶ Finally, the dissent stated that the more significant concerns are the parties' rights to privacy rather than the value of encouraging set-

¹⁷² *Id.* The court stated that "the trial court's action in sealing the records was within his [sic] discretionary authority, that there was a substantial basis for the court's refusal to unseal the records, and no abuse of discretion is shown." *Id.*

¹⁷³ *Id.* at 940. The court, sitting *en banc* on rehearing, tallied seven members in the majority, one concurring opinion, and five in the dissent. *Id.*

¹⁷⁴ *Id.* at 941 (Whitham, J., concurring). Judge Whitham stated that "[t]he right to speak and publish does not carry with it the unrestrained right to gather information." *Id.* Further, Judge Whitham indicated that even if the first amendment supports access, the value of encouraging settlement is so significant that the balance would still tip in favor of nondisclosure. *Id.*

¹⁷⁵ *Id.* at 943-44 (Howell, J., dissenting). The dissent distinguished *Nixon* as a case of special access because the public already had written transcripts of the tapes and the press was seeking the actual tapes. *Id.* The dissent relied heavily on *Richmond Newspapers*, stating that "a new day dawned" with the decision. *Id.* Judge Howell interpreted the case as establishing constitutional protection for the acquisition of newsworthy material. *Id.* at 943; see *supra* notes 20-31 for a discussion of *Richmond Newspapers* and *supra* notes 108-110 for a discussion concerning the distinction between access to the trial and access to records, which indicates the dissent's reliance may have been misplaced.

¹⁷⁶ *Times Herald*, 717 S.W.2d at 944 (referring to factors such as increasing the quality of trials). Further, the dissent stated that the majority failed to critically analyze potential differences and/or similarities between criminal and civil cases before adopting the factors from criminal cases. *Id.* Judge Howell referred to environmental, products liability, and discrimination cases, which potentially can have a great impact on the public. *Id.* Thus, in these cases public interest in access would weigh heavily in the balance. *Id.*

tlements, and that even these rights might not tip the balance in favor of closure.¹⁷⁷

Other cases further demonstrate the uncertainties over access to sealed settlements. In *Bank of America National Trust v. Hotel Rittenhouse Association*,¹⁷⁸ FAB III, a concrete contractor, requested access to a sealed settlement agreement between the Bank of America and Hotel Rittenhouse (HRA).¹⁷⁹ The Bank and HRA settled the dispute before jury deliberations on the condition that the court seal the agreement.¹⁸⁰ FAB III, a creditor of HRA, alleged that the Bank and HRA had engaged in a conspiracy to prevent public access to "otherwise public proceedings."¹⁸¹ The district court denied the motion to unseal in a "one-paragraph order" stating that the private and public interests in settling disputes outweighed the public's interest in disclosure of the information.¹⁸²

On appeal, the Third Circuit Court of Appeals adopted

¹⁷⁷ *Id.* at 946-47. The dissent stated:

[T]he primary factor set forth in opposition of access is the parties' agreement to seal the records. This should be given little weight. The public has an independent interest in the record that the parties may not foreclose by mere agreement. If the matter were left entirely to the litigants and disclosure forbidden unless at least one party consented to public access, the vast majority of civil records would be screened from the public view. A drastic diminution of the stock of information available to those who pay for the creation and operation of the courts would inevitably result.

Id. at 946 (citations omitted). Further, the dissent pointed out that in the present case the court sealed the entire record instead of the legitimately confidential portions. *Id.* at 947. Thus, the closure exceeded the limit necessary to protect the privacy interests of the parties. *Id.* at 934, 947. The dissent also disagreed with the majority's valuation of encouraging settlement, ranking it as a very minor factor. *Id.* at 946.

¹⁷⁸ 800 F.2d 339 (3d Cir. 1986).

¹⁷⁹ *Id.* at 340-41. The Bank contracted with HRA to finance the construction of the hotel, a relationship which ended in a suit for foreclosure. *Id.* at 340.

¹⁸⁰ *Id.* The trial itself, however, was open to the public. *Id.* at 341. FAB III did not want evidence from the trial, only the settlement, even though the settlement itself was never "public information." *Id.*

¹⁸¹ *Id.* FAB III did not assert a first amendment right of access, thus the court did not address the issue. *Id.* at 343.

¹⁸² *Id.* For a discussion of the abuses of sealing records, see *supra* notes 46, 50, 95, and accompanying text. Other courts hold that the lower court must make a specific record for review to prevent waste of time and abuses. See also *supra* notes 59 and 66 and accompanying text for a discussion of the requirement of a record.

the common law balancing approach from *Nixon* and placed the burden of proof on the party seeking closure to overcome the presumption of openness.¹⁸³ According to the majority, the issue before the court was "whether the district court abused its discretion in holding that the judicial policy of promoting the settlement of litigation justifies the denial of public access to records and proceedings to enforce such settlements."¹⁸⁴ The Bank and HRA argued that settlement agreements are non-public aspects of trials.¹⁸⁵ The court, however, distinguished between a settlement which is not filed with a court and one like the settlement between the Bank and HRA.¹⁸⁶ According to the court, when the Bank and HRA filed their settlement with the court, the settlement technically became part of the judicial record.¹⁸⁷ Therefore, *Bank of America* held that once parties file an agreement with the court, the settlement takes on the same qualities as evidence or court rulings with a corresponding public

¹⁸³ *Bank of Am.*, 800 F.2d at 344. The court refused to apply the more stringent first amendment test. *Id.* The court also emphasized the fact that the common law right of access was not absolute. *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 343. The Bank and HRA relied on *Seattle Times*, a case concerning the press' right of access to names and addresses of donors and members of a religious organization. *Id.* (referring to *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984)). In *Seattle Times*, the press wanted to publish information obtained during discovery in a defamation suit between the newspaper and the organization. 467 U.S. at 23. The Supreme Court, in denying access to the information, discussed and emphasized the distinction of discovery as a non-public part of a trial. *Id.* at 32-33.

¹⁸⁶ *Bank of Am.*, 800 F.2d at 343-44. Moreover, the court stated that the parties could have avoided disclosure by not filing the agreement with the court and moving for voluntary dismissal. *Id.* at 344. The parties filed the agreement with the court anticipating future problems with compliance, thus hoping to avoid the need to initiate a new suit. *Id.*

¹⁸⁷ *Id.* at 343. The court stated:

Similarly, unlike the civil discovery materials at issue in *Seattle Times*, a motion or a settlement agreement *filed with the court* is a public component of a civil trial. As in the cases involving trial rulings or evidence admitted, the court's approval of a settlement or action on a motion are matters which the public has a right to know about and evaluate.

Id. at 343-44 (emphasis added).

right of access.¹⁸⁸

Yet, the *Bank of America* court, like the *Times Herald* court, recognized the value of encouraging settlements to both the public and the courts.¹⁸⁹ After balancing the factors of the particular case, however,¹⁹⁰ the *Bank of America* court determined that the district court abused its discretion in granting the motion to seal.¹⁹¹ The court, therefore, allowed access to the agreement and declared that such openness would promote an informed public; increase the public's confidence in the system and public understanding of the judicial process; act as a "check" on the system by subjecting the court to public view, thus promoting honesty and fairness within the courts; and prevent abuses of closure.¹⁹² Finally, the court noted that the case was a single claim between two parties rather than a multi-district, multi-party, complex case in which

¹⁸⁸ *Id.* at 344.

¹⁸⁹ *Id.* at 344, 346. The court stated that by adopting a policy of encouraging settlements the public and courts could save time and costs, and mentioned that settlement agreements generally may not be used as evidence to prove liability. *Id.* (referring to FED. R. EVID. 408).

¹⁹⁰ *Bank of Am.*, 800 F.2d at 342-46. The factors included: the presumption of openness of trials and records; court reliance on filed materials such as settlement agreements requiring access for complete public understanding of the opinion; the private nature of settlements contrasted with "public" evidence; the fact the case was simple rather than complex; and the effects of access on future settlements. *Id.*

¹⁹¹ *Id.* at 344, 346. In addition to the typical fears of abuse and secrecy related to access of court records, the court focused on the fact the parties filed the settlement with the court. *Id.* at 345. The majority stated:

In the name of encouraging settlements, [the dissent] would have us countenance what are essentially secret judicial proceedings. We cannot permit the expediency of the moment to overturn centuries of tradition of open access to court documents and orders.

Having undertaken to utilize the judicial process to interpret the settlement and to enforce it, the parties are no longer entitled to invoke the confidentiality ordinarily accorded settlement agreements. Once a settlement is filed in the district court, it becomes a judicial record, and subject to the access accorded such records.

Id.

¹⁹² *Id.* These benefits and factors are the same factors used in *Richmond Newspapers'* historical/functional balance for a first amendment right of access, discussed at *supra* notes 110-112. *Bank of America*, however, failed to distinguish between civil and criminal trials, or even between access to records and access to trials.

encouraging settlement becomes paramount.¹⁹³

By contrast, the *Bank of America* dissent, as did the *Palmeri* and *Times Herald* courts, separated the original sealing and later unsealing of settlements and advocated two separate standards.¹⁹⁴ To Judge Garth, the real issue was "whether a privately negotiated settlement agreement, agreed to and entered into a court record *only on condition that it remain secret*, should now be *unsealed* because of the district court's supposed abuse of discretion in permitting it to be filed under seal."¹⁹⁵ The dissent advocated adopting a standard requiring a third party to prove extraordinary circumstances or a compelling need in order to unseal a record.¹⁹⁶ Further, the dissent stated that the effect of the majority's opinion was to create a *per se* rule in which the public's right of access would always prevail over the interest in settling the case and privacy.¹⁹⁷ Therefore, Judge Garth asserted that the majority decision would "impair seriously the efficacy of judicial efforts to encourage [the] settlement of many cases" ¹⁹⁸

In summary, therefore, there are two distinct situations which may arise in some jurisdictions in "unsealing" cases, varying with the parties' reliance.¹⁹⁹ If the parties

¹⁹³ *Bank of Am.*, 800 F.2d at 346. The dissent relied on *FDIC v. Ernst & Ernst*, to support its argument for the *unsealing* standard and necessity of encouraging settlement. *Id.* at 348 (referring to *FDIC v. Ernst & Ernst*, 677 F.2d 230 (2d Cir. 1982)).

¹⁹⁴ *Bank of Am.*, 800 F.2d at 346-47 (Garth, J., dissenting).

¹⁹⁵ *Id.* at 347. The dissent also noted that *both* parties requested the sealing, as distinguished from cases in which only one party seeks closure. *Id.* at 346.

¹⁹⁶ *Id.* at 348 (referring to *Ernst & Ernst*, 677 F.2d at 232). The dissent noted that the settlement was never public information to start with because it was entered under seal. *Id.* at 347. This fact, according to the dissent, gave "rise to a new and different factor: the reliance of the parties on the initial and continuing secrecy of the settlement agreement." *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* Further, Judge Garth stated that the majority decision "utterly ignores the importance of, and the practical realities surrounding, the process of settling lawsuits." *Id.*

¹⁹⁹ *Id.* at 348. As the dissent in *Bank of America* stated, "[a]lthough the common law right of access must be given due regard, a court cannot operate in a vacuum. To apply mechanistically the same test no matter what the factual circumstances, is to risk doing injustice to parties before the court." *Id.*

have not relied on the confidentiality of the settlement agreement, the normal common law balancing test with the presumption in favor of openness applies.²⁰⁰ If, however, the parties have relied on the confidentiality, the burden of proof for the third party rises to a level requiring a showing of extraordinary circumstances or compelling need in order to unseal the settlement agreement.²⁰¹ Recognizing such a two-level standard could alleviate the fear that emphasis on the value of encouraging settlements would result in secret trials.²⁰² Courts avoid such abuses because it is the *court's* weighing of all relevant factors which controls the outcome rather than the private parties' agreement.²⁰³ Yet, in the already uncertain area of access, adopting another standard based on a factor such as reliance may create as many problems as it solves.

III. THE VALUE OF PROMOTING SETTLEMENT

Besides fairness and party reliance, which may support maintaining closure, the value of encouraging settlement may also support maintaining closure in some cases. There are several reasons why courts should give the value of encouraging settlements significant weight in the balancing tests — both from the public's and the courts' points of view.²⁰⁴ One reason is the litigation explosion of recent years. This phenomenon has forced courts to increasingly advocate alternative means of dispute resolution.²⁰⁵ To some courts and authorities, the increasing

²⁰⁰ See, e.g., *Times Herald*, 717 S.W.2d at 938. Normally, under the common law balance test the presumption of openness tips the balance in favor of disclosure, whereas here the balance shifts to favor maintaining closure if parties relied on confidentiality. *Bank of Am.*, 800 F.2d at 348.

²⁰¹ See, e.g., *Bank of Am.*, 800 F.2d at 348; *Palmieri*, 779 F.2d at 862.

²⁰² See, e.g., *Palmieri*, 779 F.2d at 865. In fact, the *Bank of America* dissent stated that "branding such an action [sealing the record] as a 'secret judicial proceeding,' with all that such a term may connote, and claiming that sealing practices will 'overturn centuries of tradition of open access' is not an adequate substitute for reasoned judicial analysis." *Bank of Am.*, 800 F.2d at 349 n.3.

²⁰³ See, e.g., *id.* at 348-49 n.3 (Garth, J., dissenting).

²⁰⁴ *Id.* at 349.

²⁰⁵ *Id.* Judge Garth noted that "[b]etween 1973 and 1983, new filings of civil cases in the federal district courts rose from 98,560 to 241,842, an increase of 145

use of alternative dispute resolution is evidence of the need to encourage settlements.²⁰⁶ Additionally, an express goal of Rule 16 of the Federal Rules of Civil Procedure is to encourage settlement.²⁰⁷ Other factors which support closure and the need to encourage settlement are: the avoidance of wasting courts' and parties' resources when settlement is successful; the fact that confidentiality is a key factor in many settlements; and the fact that settlement agreements may contain information which the parties legitimately desire to keep from the public but for which they cannot obtain a protective order.²⁰⁸

In re Franklin National Bank Securities Litigation,²⁰⁹ cited by several courts in their attempts to balance factors pertaining to the right of access,²¹⁰ exemplifies the significant value of settlement in certain cases.²¹¹ *Franklin* was a complex, multi-district case involving the insolvency of one of

percent." *Id.* (referring to Levin & Colliers, *Containing the Cost of Litigation*, 37 RUTGERS L.J. 219, 227-29 (1985)).

²⁰⁶ *Id.*; see also PROVINCE, SETTLEMENT STRATEGIES FOR FEDERAL JUDGES (1986). The increase has not only been in the number of suits, but also in the length and complexity of suits. *Bank of Am.*, 800 F.2d at 349. According to one authority, "[t]he federal courts held 213 trials lasting 20 days or more in 1973 [which] doubled to 426 by 1983." *Id.* (referring to Levin & Colliers, *supra* note 205). The judge stated that the majority of commentators and judges agree on "the value and necessity of a vigorous policy of encouraging fair and reasonable settlement of civil claims whenever possible," finding that "the literature . . . focuses not on whether settlement is desirable, but on how best to achieve it and how far a judge should go to encourage it." *Id.* at 350.

²⁰⁷ See FED. R. CIV. P. 16. Rule 16 states that one purpose of a pretrial conference is to "facilitat[e] the settlement of the case," and that the parties may discuss at the conference "the possibility of settlement or the use of extrajudicial procedures to resolve the dispute." *Id.* at 16(a)(5), (c)(7).

²⁰⁸ *Bank of Am.*, 800 F.2d at 350. Judge Garth pointed out in *Bank of America* that one study of ten federal courts showed that 88 percent of cases settle pretrial, with only nine percent actually reaching trial. *Id.* Thus, adoption of a policy which discourages settlement would increase the already existing overload without any new cases.

²⁰⁹ 92 F.R.D. 468 (E.D.N.Y.), *aff'd sub nom.* FDIC v. Ernst & Ernst, 677 F.2d 230 (2d Cir. 1982). This comment merely touches on the value of settlement as it may relate to the balancing tests in access cases.

²¹⁰ See *Bank of Am.*, 800 F.2d at 345, 348; *Palmieri*, 779 F.2d at 865; *Times Herald*, 171 S.W.2d at 938.

²¹¹ See *supra* notes 166-177, 191-193, and accompanying text for a discussion of this issue.

the nation's largest banks.²¹² Two years after some of the parties reached a settlement based on confidentiality, third parties sought to unseal the agreement.²¹³ The district court denied the motion, focusing on the parties' reliance on confidentiality in reaching the agreement and the enormous costs involved.²¹⁴ In fact, the court stated that the only reason the parties ever settled was due to their reliance on both protective orders and the sealing orders.²¹⁵ According to the court, without the settlement, the trial would have continued for at least six more months.²¹⁶ Continuing the trial would have forced an even greater investment by the parties and the court and consumed the balance of the insurance funds which protected both the defendants and their creditors.²¹⁷

Moreover, in mass torts where problems are also complex, the value of promoting settlements is also substantial. As one authority, Judge Williams, noted, in a society where parties file an ever increasing number of mass tort lawsuits, "it is not an overly pessimistic prediction that, absent some legislative or judicial solution, our attempt to try these virtually identical lawsuits, one-by-one, will bankrupt both the state and federal court systems."²¹⁸

²¹² *Franklin*, 92 F.R.D. at 472.

²¹³ *Ernst & Ernst*, 677 F.2d at 231.

²¹⁴ *Franklin*, 92 F.R.D. at 472. The court noted that the case lasted over five years, contained volumes of discovery materials and documents, and cost the parties millions of dollars in legal fees before the parties settled. *Id.* at 469. Further, the court stated that "[h]ad the trial continued, many millions of dollars more would have been expended in legal fees, a trial court would have been heavily engaged for a long period, more appeals were inevitable and jurors would have been inconvenienced." *Id.* at 470.

²¹⁵ *Id.* at 472. The court stated:

The settlement agreement resulted in the payment of substantial amounts of money and induced substantial changes of position by many parties in reliance on the condition of secrecy. For the court to induce such acts and then to decline to support the parties in their reliance would work in injustice on these litigants and make future settlements predicated upon confidentiality less likely.

Id.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ See S. Williams, *Mass Tort Class Actions: Going, Going, Gone?*, 98 F.R.D. 323, 324 (1983). Williams further noted that several current mass tort suits "[threaten] to

Williams separates mass tort cases into two categories.²¹⁹ He classifies the first category as mass products liability cases and the second as mass accident cases such as plane crashes.²²⁰ Williams advocates using the class action device to alleviate some of the problems with certain mass torts, such as products liability cases.²²¹ Nevertheless, Williams also recognizes that mass accident cases are not normally suitable for class actions and that many courts persist in opposing the use of class actions in such cases.²²² Finally, Williams notes that "the cost of retaining experts, collecting medical or technical data and collecting hundreds of depositions and affidavits preclude[s] the vigorous maintenance of a complex product liability suit by an individual plaintiff."²²³ Therefore, due to the high costs of suits and absence of alternatives such as class actions, settlement is possibly the most desirable and feasible alternative in mass accident cases.²²⁴ Any actions hindering settlement, therefore, could be extremely costly.²²⁵

last well into the next century." *Id.* He noted that according to the 1981 Annual Report of the Administrative Office of the United States Court, over 9,000 new products liability suits were filed in district courts, representing a 17 percent increase over the 1980 figures and following a trend which began in 1974. *Id.* at 324 n.2.

²¹⁹ *Id.* at 324 n.1.

²²⁰ *Id.*

²²¹ *Id.* at 325.

²²² *Id.* at 329.

²²³ *Id.* at 329 n.19.

²²⁴ See *supra* note 222 and accompanying text for a discussion of the absence of alternatives.

²²⁵ See *Franklin*, 92 F.R.D. at 472 and *supra* notes 209-217 and accompanying text for a discussion of mass torts, options and costs. One court stated:

Voluntary settlement of civil controversies is in high judicial favor. Judges and lawyers alike strive assiduously to promote amicable adjustment of matters in dispute, as for the most wholesome of reasons they certainly should. When the effort is successful, the parties avoid the expense and delay incidental to litigation of the issues; the court is spared the burdens of a trial and the preparation and proceedings that must forerun it.

Pennwalt Corp. v. Plough, Inc., 676 F.2d 77, 80 (3d Cir. 1982) (quoting *Aultra v. Robinson*, 419 F.2d 1197, 1199 (D.C. Cir. 1969)); see also *Times Herald*, 717 S.W.2d at 941-42. The *Times Herald* concurring opinion indicated that even if the court used the heightened scrutiny test from a first amendment basis for access that the

Additionally, in mass tort lawsuits, encouraging settlement takes on an even greater value since the defendant cannot look solely at an isolated agreement but rather must consider the potential of many suits by many parties.²²⁶ This requires the defendant to anticipate the effect of a single settlement agreement on all the possible suits.²²⁷ Moreover, if settlement is the most desirable alternative in these cases court supervision and approval of settlements may protect the plaintiffs by "evening out the odds" between defendant corporations and individual plaintiffs.²²⁸ Yet, ironically, court involvement also de-

substantial value of encouraging settlement to a state alone could tip the balance in favor of closure. *Id.* The concurring opinion further stated that the value of settlement is a "compelling governmental interest" and a trial court's order sealing an agreement is "no greater than [is] necessary or essential to the protection of the State's interest in encouraging and facilitating the settlement of lawsuits pending in its courts." *Id.* at 941.

²²⁶ See *Minneapolis Star & Tribune*, 392 N.W.2d at 205 (access to settlement in plane crash case with pending suits).

²²⁷ *Bank of Am.*, 800 F.2d at 351 (Garth, J., dissenting). The dissent stated that because the defendant has to look to the effect of any agreement on many cases, the defendant will be less likely to settle favorably with a party in the absence of confidentiality. *Id.* The dissent stated:

Moreover, it is precisely in the context of mass torts with multiple plaintiffs such matters as air disasters, toxic injuries, and products liability claims — that the interest in settlement is particularly strong. Such cases are characteristically long, complex, and costly to try, and the savings in public and private resources achieved by settling them are immense. As one judge familiar with the trial of mass tort cases noted: 'Even saving one week of judicial time per case would, as most trial judges know, be substantial. For example, in the Dalkon shield litigation, the record disclosed that, if the usual percentage (90) of the 1000 member statewide class settled their case, the savings of judicial resources in the trial of the remaining 100 would amount to 400 weeks, or, roughly, eight years of trial time. In addition, there would be an estimated savings of \$26 million in litigation expense to the parties and \$7 million of court expenses.'

Id. at 352 (quoting Williams, *supra* note 218, at 323, 328).

²²⁸ See *supra* note 225 for a discussion of why courts may need to supervise settlements because of party inequality; see also *The Dallas Morning News*, Nov. 22, 1987, at 8A, col. 2. The article, *Sealed Lawsuits Deal with Poisonings, Sex, Surgery*, stated that court supervision and approval of settlements is necessary in some cases, as well as non-disclosure of the parties' names, if the parties are mentally retarded or children who may fall victim to frauds. *Id.* The article cited one case involving lead poisoning of mainly young children which resulted in a \$20 million sealed settlement. *Id.* The plaintiffs' attorney agreed to seal the records to prevent exploitation of the children by "aluminum-siding people." *Id.*

stroys any opportunity for confidentiality in some jurisdictions.²²⁹

IV. POSSIBLE SOLUTIONS AMID THE UNCERTAINTY

Besides giving weight to the value of encouraging settlement, there are solutions and other considerations which could alleviate some of the confusion regarding access to settlement agreements. One consideration in settlement access cases, for example, should be the distinctions between pretrial versus trial proceedings or records, distinctions which are related to the "court reliance" factor.²³⁰ In *In re Reporters Committee for Freedom of the Press*,²³¹ the court separated pretrial materials and trial records, stating that pretrial information is not part of the open court record upon which a court relies to form a judgment on the merits.²³² The court further stated that

²²⁹ See *supra* notes 64-68, 186-191, and accompanying text for a discussion of the view that filing any material with a court makes the material part of the official court record and therefore subject to access.

²³⁰ See, e.g., *In re Reporters*, 773 F.2d at 1335. This case concerns third party attempts to obtain sealed discovery documents used to support a motion for summary judgment in a civil defamation case. *Id.* Other authorities, however, have the opinion that any material, even settlements, become public property once the parties file a lawsuit regardless of whether a court relies on the material. See Dallas Morning News, Nov. 22, 1987, at 24A, col. 6. The article quotes David Anderson, professor of law at the University of Texas, as stating:

[The parties have] invoked the public processes, and we pay for the court, we pay the judge's salary and we pay for that courtroom. It is not then their option to decide that having availed [themselves] of all these public resources [they can] now decide to make this a purely private matter.

Id.

²³¹ *In re Reporters*, 773 F.2d at 1334. The court reviewed the history of access to pretrial materials and the status of state and federal law regarding access to such materials. *Id.* The court held that as a general rule there is not a common law right of access to prejudgment records in civil cases. *Id.* Similarly, settlements are prejudgment, nonpublic parts of a trial.

²³² *Id.* Pretrial materials include pleadings and discovery materials — items not yet entered as evidence. *Id.* The court held that, since a court does not rely on pretrial materials for an ultimate judgment on the merits, public access will not serve to enlighten the public as to the rationale behind a decision. *Id.* at 1335. The court stated that:

The factor most obviously distinguishing the request for records in the present case from the requests at issue in the vast majority of reported cases — and the factor that obviously caused the District

pretrial materials are private efforts, occurring without court direction and with the content determined solely by the private individuals.²³³ Thus, public access to pretrial material may not serve any of the functions usually cited to support access.²³⁴ For example, access will not serve to increase the quality of judicial proceedings by placing the trial participants under public scrutiny.²³⁵ Further, *In re Reporters* noted that the factors which plaintiffs cite in support of a right to access arose in criminal cases.²³⁶ In the court's opinion, these factors do not apply equally to civil proceedings.²³⁷

Thus, to the extent settlement agreements are comparable to private, pretrial aspects of a trial upon which the

Court to deny access without the document-by-document examination that ordinarily accompanies Rule 26(c) protective orders — was the pendency of the litigation at the time the request was made. We must consider, therefore, whether the tradition of public access includes pre-judgment access '[A] record or transcript brought into this court on appeal, *after judgment entered on the proceedings by the tribunal appealed from*, do [sic] not stand upon the footing of original papers placed in the files of a court of original jurisdiction, and where *there has been no trial had or judgment entered thereon*.'

Id. at 1333 (quoting an earlier opinion, *Ex parte Drawbaugh*, 2 App. D.C. 404 (1894)).

²³³ *Id.* at 1335. The court drew an analogy to the fact that a party may not base a defamation suit on pretrial documents as pleadings because the material at this point is entirely private and the court has not heard nor acted upon the information. *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.* at 1336-37.

²³⁷ *Id.* The court stated:

Even assuming, *as seems unlikely*, that these functions are as important in the context of civil suits between private parties as they are in criminal prosecutions, they are not greatly enhanced by access to documents (which, unlike live proceedings, do not contain unrecordable subtleties) *before judgment rather than after*.

Id. at 1337 (emphasis added). The *In re Reporters* dissent, however, focused more on a court's reliance rather than on a private/public analysis of pretrial materials. *Id.* at 1342-43 (Wright, J., dissenting). The dissent stated that once a party files any material with a court, regardless of the stage of litigation, on which the court subsequently relies to make any judgment, the right of access attaches to the material. *Id.*; see also *In re Coordinated Pretrial Proceedings in Petroleum Prod. Antitrust Litig.*, 101 F.R.D. 34 (C.D. Cal. 1984) (holding that the right of access attaches when the documents are submitted in connection with any motion to the court).

court does not rely to form a judgment, the value of a right of access should decrease.²³⁸ Special problems arise, however, when a court must approve a settlement agreement.²³⁹ This is because the approval requires court assessment, which in turn may support access based on the court's reliance to form a judgment.²⁴⁰ One commentator noted this particular problem and advocated, as a solution to access problems, adopting an access test based on whether the material formed the basis of a decision on the merits.²⁴¹ In a case requiring court approval of a class action settlement, for example, one court dealt with the problem by holding that because the court opinion approving the settlement served to give the public enough indicia of the court's rationale, the court should deny access to the actual settlement.²⁴²

²³⁸ See *supra* notes 230-250 and accompanying text for a discussion of the qualities of pretrial materials and why access is not as vital. Further, settlement agreements depend largely upon the desires of the parties and their counsels' skills. For example, settlement may only reflect a desire to avoid publicity or the time and costs of litigation, rather than any belief in guilt or innocence. See *supra* notes 117, 120-125, 171, and accompanying text for a discussion of the distinctions of settlements; see also FED. R. EVID. 408 advisory committee's note.

²³⁹ See Marcus, *supra* note 13, at 49. Marcus discusses the right of access to pretrial materials and settlements and the distinctions of pretrial materials. *Id.* He stated that in pretrial situations, the court has not determined whether a "genuine dispute" exists. *Id.* Therefore, disclosure of the information would "provide little insight into the decision on the merits. . . . Moreover, a ruling that a party must disclose to the public all materials offered in connection with a motion for summary judgment that is ultimately denied could preclude later settlement conditioned on confidentiality." *Id.*

²⁴⁰ *Id.* at 49 n.206. Marcus noted:

Particularly difficult problems may result from a court's duty under rule 23(e) to approve any settlement of a class action. To do so, a court must conclude that the settlement is 'fair, reasonable and adequate', a process that requires some assessment of the evidence unearthed by the parties. If that material is covered by a protective order, the court's process of assessment may provide a basis for vacating the order. Yet, disclosure might preclude a settlement contingent on confidentiality.

Id. (citation omitted). Because Marcus feels that the critical issue justifying public access is the interest of the public in overseeing the judicial process, the test should focus on the court's reliance on the material occurring when the court enters a judgment on the merits. *Id.* at 49.

²⁴¹ *Id.*

²⁴² See *In re Corrugated Container Antitrust Litig.*, 659 F.2d 1322 (5th Cir. 1981).

Other commentators have also proposed solutions to some of the problems generated by third party access to sealed settlement agreements and other confidential materials.²⁴³ First, some suggest that courts should recognize the value of confidentiality in encouraging settlements and guarantee confidentiality in "good faith" cases.²⁴⁴ For example, courts could give greater weight to the value of encouraging settlements in the balancing tests.²⁴⁵ Alternatively, courts could determine if a court relied on the information in forming a judgment on the merits, thereby increasing the need for disclosure.²⁴⁶ Additionally, courts could develop clearer guidelines delineating the proper inquiry and standards for granting sealing requests, which could not only make better records, but prevent abuses as well.²⁴⁷

²⁴³ See *supra* notes 6, 59, 66, and accompanying text for a discussion of some problems and suggestions for reform.

²⁴⁴ See Annual Judicial Conference, Second Judicial Circuit of the United States, 101 F.R.D. 161, 233 (1983) (Dean Edward A. Dauer speaking on the topic of "How Lawyers and Judges Can Use Alternatives to Litigation").

²⁴⁵ See *id.* at 233. Dean Dauer stated:

There are legitimate, good faith reasons for the parties who are trying to work out a solution to something like [a] toxic tort case to want their discussion to be private, immune both from later admission and immune from discovery by other potential plaintiffs' lawyers later down the road, maybe even from competitors, and I think there are good faith reasons for wanting that privacy. That confidentiality is a very large advantage that will, if it can be guaranteed, make [alternate methods of dispute resolution] even more useful as adjuncts to the judicial process than they already are.

Id.

²⁴⁶ *Id.* Further, Dauer stated that "in the current state of the law in most jurisdictions, practically every place, we can't guarantee that degree of confidentiality that the parties would ideally like to have." *Id.* He concluded with the statement:

We need a little evolution, I think, and maybe a little clarification of what the applicable law of privilege or confidentiality might be. Judges, I am told, don't make law, but they do adapt it to changing circumstances, and I think the development of [alternative methods of dispute resolution] is a changing circumstance.

Id.; see also *supra* notes 63-68, 230-242, and accompanying text for a discussion of reliance as the test for disclosure.

²⁴⁷ See Note, *supra* note 46, at 1350-51. The author advocates clear guidelines in order to prevent "some of the harm from . . . hasty closures." See also *supra* notes 59 and 66, and accompanying text for a discussion of the related concern that lower courts fail to make an adequate record for review. Thus, one simple reform

Another authority suggests the adoption of the "clear and convincing" standard to justify closure. This standard avoids the uncertainties and inconsistencies until the Supreme Court rules on whether the first amendment supports access to civil trials or records and clarifies the standard which courts should use.²⁴⁸ In any case, courts need to ultimately resolve the questions concerning the nature of settlement agreements.²⁴⁹ If settlement agreements are non-public aspects of the trial process, courts must answer the question of whether voluntary filing, or discussion of the agreement in court, truly alters this private nature and justifies access.²⁵⁰

IV. CONCLUSION

The scope of the public's right of access to sealed settlement agreements is uncertain.²⁵¹ Yet, by adopting clearer guidelines and a uniform standard for all cases, courts could alleviate some of the uncertainties.²⁵² Most

is for lower courts to specify the exact factors and weight of each on the record to facilitate review.

²⁴⁸ See Hagenbach, *supra* note 110, at 882. Hagenbach advocates the use of the clear and convincing standard instead of the more stringent first amendment test, which requires a party to show "compelling governmental interests." *Id.*

²⁴⁹ See Marcus, *supra* note 13, at 29-41 (discussing the differences between pre-trial materials and protective orders in view of the non-public nature of the information). Marcus stated:

Many of the most troubling consequences of the public access approach result from the assumption that nonparties have some right to obtain discovery material. This attitude is likely not only to foster litigation over protective orders and preclude settlement, but also to sanction lawsuits designed to obtain information rather than judicial relief.

Id. at 29; see also *supra* notes 120-125, 230-242, and accompanying text for a discussion of the private nature of certain materials and records. Unless a suit actually goes to trial and the parties discuss the settlement in court, settlement is merely a private contract based on discovery materials.

²⁵⁰ See *supra* notes 68, 230-243, and accompanying text for the view that filing or discussion makes the settlement part of the record and subject to access the same as evidentiary materials.

²⁵¹ See *supra* notes 13-242 and accompanying text for a discussion of the differing views and tests, ranging from a first amendment basis to a common law basis with two variations.

²⁵² See *supra* notes 107, 232-250, and accompanying text for a discussion of possible reforms.

importantly, courts should address critical issues in-depth. These issues include the differences between access to trials and access to court records, as well as the differences between civil and criminal proceedings.²⁵³ Some courts, however, have not recognized these issues in the past.²⁵⁴ This situation in turn causes much of the uncertainty in right of access cases. Unfortunately, the problems cannot be completely eliminated until the Supreme Court decides whether a first amendment right of access applies to civil proceedings and records.²⁵⁵

Furthermore, some cases raise legitimate questions about reliance of parties on confidentiality.²⁵⁶ This should also be considered by the courts in an analysis of whether to grant public access to sealed settlement agreements.²⁵⁷ The difference between the original sealing of a settlement and later unsealing is a valid concern. Yet, the solution of adopting two different standards for closure and access adds to the confusion by introducing subjective questions of the parties' reliance.²⁵⁸ Reliance, in turn, raises additional questions such as how much reliance is necessary to justify continuing closure and how courts should measure reliance.²⁵⁹

²⁵³ See *supra* notes 41, 117, 176, 238, and accompanying text for a discussion of the failure to discuss distinctions between civil and criminal proceedings and records. The civil/criminal distinction is significant because the factors which courts cite to support first amendment access arose in criminal cases. Another issue some courts neglect is a party's reliance on confidentiality in agreeing to settle. Without the sealing order, the very materials that the third party seeks would never have existed. See *supra* notes 142-203 and accompanying text for a discussion of party reliance.

²⁵⁴ See *supra* notes 32-98 and accompanying text for a discussion of cases where courts failed to recognize or discuss issues such as the distinctions between access to trials and access to records, or between civil and criminal actions.

²⁵⁵ See *supra* notes 99-110 and accompanying text for a discussion of the Supreme Court decision in this area and the distinctions between access to records and access to trials.

²⁵⁶ See *supra* notes 142-203 and accompanying text for a discussion of cases discussing party reliance and later third party access. This is especially significant when the court actively encouraged settlement and guaranteed confidentiality.

²⁵⁷ *Id.*

²⁵⁸ See *supra* notes 142-203 and accompanying text for a discussion of the two tests.

²⁵⁹ *Id.*

Additionally, courts must address questions regarding the unique nature of settlement agreements.²⁶⁰ Courts recognize the private, non-public nature of pretrial discovery materials. Nevertheless, they sometimes fail to apply such distinctions to settlements which also occur in private and depend on many of the same factors. For example, if a public right of access rests in part on the public's need for access in order to understand the workings of the judiciary, courts should analyze whether release of settlements will really aid the public in its effort to understand court actions.²⁶¹ If courts do not rely on settlement agreements to form a judgment on the merits, the need for access should decrease because release will not facilitate public understanding of the judicial system.²⁶²

Also, the value of encouraging settlements is a factor which affects the balancing process.²⁶³ Courts should, therefore, recognize the value of encouraging settlements as a means to decrease court overloads and the costs of lawsuits.²⁶⁴ Yet, recognizing the value of encouraging settlements does not address the issue of *how much* weight courts should give the factor in the balancing tests.²⁶⁵ Moreover, concerns such as whether allowing access to sealed agreements will prevent some litigants from pursuing valid claims in order to avoid publicity may have no clear, quantitative answer to "balance" in the various tests.²⁶⁶ Another issue with no apparent conclusive an-

²⁶⁰ See *supra* notes 117, 120-125, 185, and accompanying text for a discussion of the private nature of settlements as opposed to evidentiary materials.

²⁶¹ See *supra* notes 63-68, 187-237, and accompanying text for a discussion of the "public understanding" issue and court reliance on material necessitating release.

²⁶² *Id.* Moreover, if the court balances the value of encouraging settlement with all the relevant factors, the common law balancing process should adequately protect the parties and prevent abuses.

²⁶³ See *supra* notes 114-129, 204-229, and accompanying text for a discussion of the need to encourage settlements, especially in mass tort cases.

²⁶⁴ *Id.*

²⁶⁵ *Id.* Other factors, such as party reliance, time, costs, and the number of potential suits, come into play. *Id.*

²⁶⁶ See *supra* notes 120-125, 166-174, 204-250, and accompanying text for a discussion of the possible chilling effect when parties cannot rely on confidentiality.

swer is whether a policy of permitting access will truly impede settlements.²⁶⁷ A possible effect could be to encourage faster settlement in order to avoid trial entirely. If the litigants could not rely on confidentiality of the settlement terms to shield them once a trial began or they filed the agreement with the court, they arguably might settle faster.²⁶⁸

Finally, courts should recognize the issues raised when they hold that voluntary filing of an agreement with the court determines accessibility.²⁶⁹ A party may, for example, anticipate compliance problems and wish to avoid filing a completely new suit in the future.²⁷⁰ Thus, the filing serves judicial efficiency and brings the settlement under the view of the court.²⁷¹ Filing could also act to even-out the odds when parties on opposite sides of a case are not equal in terms of power or resources.²⁷² Moreover, in mass tort cases, such as airplane disasters, the value of encouraging a settlement takes on a new dimension and may deserve more recognition and weight in the balancing tests.²⁷³

No easy or single solution appears, ultimately, to answer the issues raised by third party access to sealed settlement agreements.²⁷⁴ A more critical analysis *recognizing* such issues should be the goal of both the parties and the

Additionally, equitable concerns come into play if a court encouraged and actively participated in a settlement, agreeing to closure, while a later court overrules and permits access by third parties. Thus, not only party reliance but court participation may become a factor to weigh in the balance.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ See *supra* notes 42, 186-188, 230-242, and accompanying text for a discussion of cases holding that filing changes the nature of the material.

²⁷⁰ See, e.g., *Bank of Am.*, 800 F.2d at 344.

²⁷¹ *Id.*; see also *supra* notes 223 and 228 for a discussion of the "inequality" issue.

²⁷² Inequality between the parties may suggest that courts should approve settlements, without the danger that approval will later enable third parties to gain access based on a "court reliance" theory.

²⁷³ See *supra* notes 128 and 218-228 for a discussion of the value in mass torts. Yet, factors such as whether the case is a mass tort and how many potential plaintiffs exist also add to the complexity of the analysis.

²⁷⁴ See *supra* notes 32-98 and accompanying text for a discussion of cases in which the courts failed to analyze issues in access cases.

courts until the Supreme Court provides the conclusive answer. In the interim, lower courts could alleviate part of the problem and abuse by specifying the factors weighed and the weight given to each factor.²⁷⁵ Until a conclusive answer comes, however, litigants should be aware of potential access and the false security of sealing settlements.

²⁷⁵ See *supra* notes 59, 66, 182, and accompanying text for a discussion of this view and courts holding that a specific record is necessary.