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REVIEW OF THE SUNSHINE IN LITIGATION ACT

Statement of the Issue

The Sunshine in Litigation Act (Act), s. 69.081, F.S., prohibits a Florida court from entering an order or judgment for the purpose of concealing information related to a public hazard or information that may be useful to the public in avoiding injury resulting from a public hazard. In the years since its enactment in 1990, the Act has been the subject of legal scholarship from various perspectives questioning its effectiveness in fairly balancing the objectives of public safety with protection of business interests and litigant privacy. Some scholars have argued that the statute does not set clear enough guidelines for courts and litigants, and that it suffers from various constitutional infirmities. To date, the Act has not been deemed unconstitutional by the courts, but commentators have called for its revision.

This issue brief addresses legal and policy research related to the Sunshine in Litigation Act, in order to give legislators a foundation for evaluating proposals that may arise on this topic in the future.

Discussion

History of the Sunshine in Litigation Act

Public concern relating to secrecy in the context of civil litigation became part of a national debate in the 1980s. "The basic reform idea—greater transparency—is simple. What it means in practice, however, is complicated. The discussion of openness in the civil justice system often begins and ends with the issue of 'secret settlements.'"[1]

In 1984, the U.S. Supreme Court held in *Seattle Times Co. v. Rhinehart* that a party does not have a First Amendment right to disseminate information it obtained during litigation that is covered by a protective order.[2] A few years later, the Florida Supreme Court followed the reasoning in *Rhinehart* in *Palm Beach Newspapers, Inc. v. Burk*, holding that the press does not have a qualified right under the First Amendment to attend pretrial discovery depositions in a criminal case or to obtain copies of unfiled depositions.[3] The Court explained that "[t]he 'right to speak and publish does not carry with it the unrestrained right to gather information.'"[4] Additionally, the Court looked at the case from a historical perspective and found that pretrial proceedings were not considered public at common law and were still considered private under modern practice; thus, discovered information not admitted at trial is not considered public information.[5] Under the Rules of Civil Procedure, discovery is very broad and allows parties to seek information that may be inadmissible at trial "if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."[6] The *Burk* Court laid out the importance of balancing liberal discovery with privacy interests as follows:

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[1] Ross E. Cheit, *Tort Litigation, Transparency, and the Public Interest*, 13 ROGER WILLIAMS U. L. REV. 232, 233 (Winter 2008).
[2] *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984).
[3] *Palm Beach Newspapers, Inc. v. Burk*, 504 So. 2d 378 (Fla. 1987).
[4] *Id.* at 383 (quoting *Zemel v. Rusk*, 381 U.S. 1, 17 (1965)).
[5] *Burk*, 504 So. 2d at 382.
[6] Fla. R. Civ. P. 1.280(b)(1).

> The discovery rules are aimed at protecting the rights of the parties involved in the judicial proceeding and of non-parties who are brought into the proceedings because of purported knowledge of the subject matter. Transforming the discovery rules into a major vehicle for obtaining information to be published by the press even though the information might be inadmissible, irrelevant, defamatory or prejudicial would subvert the purpose of discovery and result in the tail wagging the dog.[7]

A subsequent case, *Miami Herald Publishing Co. v. Gridley*, held that unfiled discovery materials in civil cases are not accessible to the public and press.[8] As one scholar has analyzed the topic, there is judicial information and litigant-centered information. The former is directly tied to the court's decision-making, such as pleadings, motions, court opinions, court orders, and settlement agreements that are judicially approved or enforced. The latter type of information is comprised of materials that are generated as a result of court processes but are not the basis for the court's decision-making process, including unfiled discovery and private settlement agreements.[9] After cases at the federal and state levels established that there is no constitutional right of public access to unfiled court material, the push in the direction of greater public access shifted "from constitutional challenge to procedural modification" and "transformed the debate into one of policy: what should the practice regarding protective orders be rather than what it must be."[10]

Debate over Secrecy in Civil Litigation

These cases touch on the ongoing philosophical discussion among scholars as to what obligation, if any, the courts should have in ensuring that safety information is shared with the public, which is at the center of the debate over court involvement in confidential settlements and protective orders. Some commentators believe that the sole purpose of the court system is to resolve disputes between the parties. At the other side of the debate, others are adamant that "courts are publicly-funded institutions that serve interests broader than those of the immediate parties. Courts administer justice, explicate and enforce public norms, and protect the broader public interest."[11] Historically, courts have treated judicial records differently than private agreements made outside of court among litigants.

Generally, there is agreement on the social good of settlement because it conserves judicial resources and allows parties to tailor a compromise that works for their particular situation; however, there is no such accord as to whether confidentiality is necessary to achieve the goal of promoting settlement.[12] "The public policy of the State of Florida, as articulated in numerous court decisions, highly favors settlement agreements among parties and will seek to enforce them whenever possible."[13] As a basis for their arguments, both sides of this debate cite the flawed aspect of human nature that leads litigants to pursue self interest. It has been argued that complete court discretion over confidentiality is necessary to temper unethical litigation tactics, such as demanding access to trade secrets and other sensitive information from a business defendant to force a more favorable settlement, or, on the other side, requesting personal or embarrassing information from a plaintiff for a similar objective.[14] The other point of view is that in a case involving a potential public hazard, the parties to the settlement agreement will both look out for their own interests at the peril of the general public. For example, the defendant will offer money to purchase the plaintiff's silence about a potentially dangerous instrumentality or practice, which the

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[7] *Burk*, 504 So. 2d at 384.
[8] *Miami Herald Publ'g Co. v. Gridley*, 510 So. 2d 884 (Fla. 1987).
[9] Andrew D. Goldstein, *Sealing and Revealing: Rethinking the Rules Governing Public Access to Information Generated Through Litigation*, 81 CHI.-KENT L. REV. 375, 379-80 (2006).
[10] Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 445 (Dec. 1991).
[11] Christine Hughes, General Counsel, New England Legal Foundation, *Confidential Settlements: A White Paper*, 12 (Apr. 2003) (on file with the Senate Committee on Judiciary).
[12] *Id.* at 9.
[13] *Sun Microsystems of California, Inc. v. Engineering and Mfg. Systems, C.A.*, 682 So. 2d 219, 220 (Fla. 3d DCA 1996); *see also Robbie v. City of Miami*, 469 So. 2d 1384 (Fla. 1985); *Am. Exp. Travel Related Servs. Co., Inc. v. Marrod, Inc.*, 637 So. 2d 4 (Fla. 3d DCA 1994).
[14] Miller, *supra* note 10, at 473.

plaintiff will typically accept regardless of the harm it may cause to others in the future. As one scholar stated, secret settlements in situations where there could be harm to the public should be regulated because while the plaintiff is compensated for his or her injury, "[p]eople external to the contract—those who either have been or will be harmed by the defendant's products—bear the cost of his silence."[15]

Legislative Responses

In 1988, the Washington Post published a series of articles about secrecy in the civil justice system[16] that reviewed a number of sealed cases and confidential settlements before concluding that these practices were preventing important safety information from becoming public.[17] The Washington Post series is an indication of the growing national sense of awareness at that time about confidentiality in the court system that set into motion legislative reforms in a number of states in the following years. One scholar called the movement "an intense, nationwide campaign…underway to create a 'presumption of public access' to all information produced in litigation that would seriously restrict the court's traditional discretion to issue protective and sealing orders shielding the litigants' documents from view."[18] Also in 1988, the Florida Supreme Court emphatically stated the importance of openness in the courts in *Barron v. Florida Freedom Newspapers*, holding that there is a strong presumption of openness in both civil and criminal proceedings and any exception should be narrowly tailored, with the burden on the party seeking closure.[19] In the following years, proposals similar to Florida's Sunshine in Litigation Act were considered in more than 30 states.[20] In that time period, legislation passed in Florida,[21] Virginia, Arkansas, and Washington, and a Supreme Court rule was adopted in Texas.[22] A federal version of the Sunshine in Litigation Act has been filed in Congress consistently from 1990 to the present, but has not become law.[23] According to a Florida organization that advocated for the Sunshine in Litigation Act when it was before the Legislature, sealed court records and suppressed documents being kept from the public and the media had become a detriment to the public's health and safety. As a result, according to this organization, "unsafe products, negligent behavior on the part of the manufacturers, and disregard for First Amendment rights" were being forced on the public "thereby jeopardizing the public's confidence in the court system."[24]

Florida's Sunshine in Litigation Act (Act), s. 69.081, F.S., prohibits a court in this state from entering an order or judgment for the purpose of concealing information related to a public hazard or information that may be useful to the public in avoiding injury resulting from a public hazard. The Act further states that any agreement or contract having the purpose of concealing information relating to a public hazard is void and unenforceable because such agreements are against public policy. First enacted in 1990, this section is invoked most commonly in products liability cases. "Any substantially affected person" has standing under the Act to contest an order, judgment, agreement, or contract, "including but not limited to representatives of news media." Upon a motion and good cause shown by a party attempting to prevent disclosure of information, the court will examine the disputed information in camera and allow the disclosure of the information if a public hazard is found. The statute defines a public hazard as "an instrumentality, including but not limited to any device, instrument, person, procedure, product, or a condition of a device, instrument, person, procedure or product, that has caused and is likely to cause injury."

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[15] Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261, 280 (Jan. 1998).
[16] Elsa Walsh and Benjamin Weiser, *Public Courts, Private Justice* (pts. 1-4), THE WASHINGTON POST, Oct. 23-26, 1988.
[17] Cheit, *supra* note 1, at 261.
[18] Miller, *supra* note 10, at 429.
[19] *Barron v. Florida Freedom Newspapers, Inc.*, 531 So. 2d 113 (Fla. 1988).
[20] Miller, *supra* note 10, at 428.
[21] Chapter 90-20, Laws of Fla. (SB 278 1990 Reg. Sess.).
[22] Hughes, *supra* note 11, at 21; *see* s. 69.081, F.S.; Va. Code Ann. s. 8.01-420.01; Ark. Code Ann. s. 16-55-122; Wash. Rev. Code s. 4.24.611; Texas R. Civ. P. 76a.
[23] Library of Congress, *Sunshine in Litigation Search Results, available at* http://www.loc.gov/search/?q=sunshine%20in%20litigation&fa=digitized:true.
[24] Press Release, the Academy of Florida Trial Lawyers, *Sunshine in Litigation Bill Filed* (Apr. 13, 1990) (on file with the Senate Committee on Judiciary).

Based on conversations with practitioners, the Act is most commonly used in products liability cases, especially those involving the automotive industry, but is not frequently invoked in general. Attorneys who specialize purely in products liability litigation see a higher percentage of cases involving Sunshine in Litigation issues. Although any substantially affected person has standing under the Act, in most cases it is raised by a party. However, there have been a limited number of circumstances in Florida where members of the media have made requests for disclosure. Additionally, even though the Act applies to private settlement agreements in addition to documents associated with litigation,[25] the former application is rare.

Constitutional Issues Relating to the Act

Since its enactment in 1990, the Sunshine in Litigation Act has been subject to scrutiny both by scholars and the courts. Some of the constitutional concerns raised by commentators have been that it fails to meet the standard of substantive and procedural due process, is a procedural rule improperly enacted by the Legislature, violates the right to contract, and can constitute an unconstitutional taking. Most of the discussion of these constitutional issues has come from scholars writing about the law; Florida courts have rarely addressed the constitutionality of the Act. Although the Act has been criticized by some scholars, it has not been found unconstitutional by a court, and some practitioners report that they can operate effectively under the Act. Following are summaries of some of the principal constitutional issues relating to the Act that have been raised.

Substantive Due Process

The Fifth Amendment and the Fourteenth Amendment of the U.S. Constitution[26] provide that the government cannot deprive a person of life, liberty, or property without due process of law. These amendments provide two different types of protection: substantive due process and procedural due process. Substantive due process relates to whether the government has a legitimate reason for taking one's life, liberty, or property.[27]

The Sunshine in Litigation Act defines a public hazard as "an instrumentality, including but not limited to any device, instrument, person, procedure, product, or a condition of a device, instrument, person, procedure or product, that has caused and is likely to cause injury."[28] A statute will be deemed constitutional from a substantive due process standpoint "if it bears a reasonable relationship to a legitimate public purpose and is not discriminatory, arbitrary, or oppressive."[29] In a recent article, the authors stated that the Act is not reasonably related to the government objective of protecting the public from unreasonable hazards or defects because the definition does not limit the scope of the Act only to those products that cause injury due to a defect. Thus, it could apply to any product because almost any product has caused some past injury and is likely to cause future injury. According to the authors, this definition "could lead to the public hazard label being affixed, and trade secrets destroyed because a product poses risks that the public routinely accepts as a part of daily life."[30]

This leads to the argument that the law is unconstitutionally vague. A law is unconstitutionally vague if a person "of common intelligence must necessarily guess at its meaning."[31] The same authors argue that the law is impermissibly vague and overbroad because it is unclear whether the standard applies only to legally defective products or some larger pool of products; thus the statute does not put potential defendants on notice as to what products may be included and is not rationally related to the legislative purpose of protecting public safety.[32] In practice, the Act is intended to be used where there is a continuing hidden defect known to the manufacturer that

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[25] Section 69.081(4), F.S.
[26] *See also* FLA. CONST. art. I, s. 9.
[27] Erwin Chemerinsky, CONSTITUTIONAL LAW, 521 (2d ed. 2005).
[28] Section 69.081(2), F.S.
[29] *Goodyear Tire & Rubber Co. v. Jones*, 929 So. 2d 1081, 1086 (Fla. 3d DCA 2005) (citing *Haire v. Florida Dep't of Agric. & Consumer Servs.*, 870 So. 2d 774, 782 (Fla. 2004)).
[30] Wendy F. Lumish and Cristina Alonso, *Time for a Legislative Overhaul of the Sunshine in Litigation Act*, 85 May FLA. B.J. 22, 27 (2011).
[31] *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).
[32] Lumish and Alonso, *supra* note 30, at 27.

could cause unforeseeable injury to others if information about the hazard is not shared with the public.[33] However, the definition of "public hazard" is broadly written and does not narrow the scope of the statute to known hazards that are unforeseen to the public.[34]

Some of the confusion with the definition on its face has since been cleared up by the courts. *Stivers v. Ford Motor Company* held, for example, that a financing company's allegedly improper credit practice was not a "public hazard" within the meaning of the Act in light of the legislative history, which indicates that the term "connotes a tangible danger to public health or safety" and offers no indication that it was meant to include economic fraud leading to financial loss.[35] Similarly, in *State Farm Fire & Casualty Co. v. Sosnowski*, the court refused to set aside a previously agreed upon protective order because the alleged public hazard that would have been subject to disclosure was State Farm's internal procedures that were relevant only to alleged economic fraud.[36]

In *Goodyear Tire & Rubber Co. v. Jones*, Goodyear challenged the validity of the Act for the first time on appeal, which the court found was not permissible unless the error being raised was fundamental to the extent of denying due process.[37] The court found that if the Act were "arbitrary, unreasonable, and not rationally related to a reasonable government objective" as Goodyear alleged, that would rise to the level required for appellate review.[38] Ultimately the court held: "Prohibiting the concealment of information concerning a public hazard is rationally related to the goal of protecting the public from the hazard….We, therefore, find that the Act is not arbitrary or unreasonable, and that it is rationally related to a reasonable government objective, and thus constitutional on its face."[39] In another case, where a party properly raised and preserved constitutional challenges, the court declined to address them, citing judicial restraint, meaning that resolution of the constitutional issues was not necessary for the disposition of the case.[40]

Procedural Due Process

Procedural due process refers to the procedures the government must follow before taking one's life, liberty, or property.[41] "Due process mandates that in any judicial proceeding, the litigants must be afforded the basic elements of notice and opportunity to be heard."[42] The Sunshine in Litigation Act provides that "[u]pon motion and good cause shown by a party attempting to prevent disclosure of information or materials which have not previously been disclosed, including but not limited to alleged trade secrets, the court shall examine the disputed information or materials in camera."[43] Although the statute specifies that the court must examine the disputed information in camera, or in private, it does not address what type of hearing, if any, should be afforded the parties with an interest in the potential disclosure of the information or materials. Although the statute itself is silent on the issue of a hearing to determine whether information will be disclosed, Florida courts have found that such a hearing is required by basic procedural due process standards. However, there seems to be confusion as to the format and timing of the hearing.

The Second District in *DuPont De Nemours & Co. v. Lambert* overturned the trial court's decision to set aside a confidentiality order it had entered previously after the verdict based on evidence it heard during the trial itself,

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[33] Telephone conversation with William Partridge, Legislative Liaison for the Executive Council of the Florida Bar Trial Lawyers Section (Aug. 11, 2011).
[34] *Id.*
[35] *Stivers v. Ford Motor Credit Co.*, 777 So. 2d 1023, 1026 (Fla. 4th DCA 2000).
[36] *State Farm Fire & Casualty Co. v. Sosnowski*, 830 So. 2d 886 (Fla. 5th DCA 2002).
[37] *Goodyear Tire & Rubber Co. v. Jones*, 929 So. 2d 1081, 1086 (Fla. 3d DCA 2005) (quoting *State v. Johnson*, 616 So. 2d 1, 3 (Fla. 1993)).
[38] *Jones*, 929 So. 2d at 1086.
[39] *Id.*
[40] *Ford Motor Co. v. Hall-Edwards*, 21 So. 3d 99, 103 (Fla. 3d DCA 2009) (quoting *North Florida Women's Health and Counseling Services, Inc. v. State*, 866 So. 2d 612, 640 (Fla. 2003)).
[41] Chemerinsky, *supra* note 27, at 521.
[42] *DuPont De Nemours & Co. v. Lambert*, 654 So. 2d 226, 228 (Fla. 2d DCA 1995) (citing *County of Pasco v. Riehl*, 635 So. 2d 17 (Fla. 1994); *Cavalier v. Ignas*, 290 So. 2d 20 (Fla. 1974)).
[43] Section 69.081(7), F.S.

leading to the determination that a chemical at issue in the trial was a public hazard.[44] Although the parties objected, the trial court never held a hearing on the merits of the Sunshine in Litigation Act issues.[45] The appellate court held that denying the litigants a hearing violated due process.[46] "Attention to a proper evidentiary hearing and due process are plainly required. Such a [public hazard] label has significant and far-reaching consequences in a day when court orders can make it around the world before the sun sets on the day they are filed."[47]

The fact that the court has to make determinations based on examining materials in products liability cases, which may often involve highly technical information not within the a judge's expertise, has also presented challenges in cases where the Act is invoked. In one recent case, the trial court directed the parties to conduct discovery under a protective order and bring only those disputes they could not resolve among themselves to the court's attention.[48] Although the Second District acknowledged that the trial court's approach was logical, it concluded that the process ran afoul of the plain language of the statute. The appellate court held that "regardless of how technically difficult the matter may be, the Sunshine in Litigation Act requires the trial court to act as a gatekeeper-it must view and consider the disputed documents and information and determine whether the provisions of the Act apply."[49] One solution that some trial courts have utilized is having the Sunshine in Litigation hearings conducted by a special master.[50] However, the referral of these issues to a special master is not permissible without the consent of the parties.[51]

An additional issue left open by the statute is when the hearing should take place. The courts have articulated some guidelines, but there is still not a clear blueprint of exactly when and how the hearing should be conducted. First, a court has held that the statute is only applicable "if the trial court has entered a confidentiality order, or if there is a pending motion by the defending party for a confidentiality order."[52] Thus, it cannot be used preemptively if confidentiality is not being actively sought. The Third District has also specified that when the Act is raised, a trial court must hold a hearing to determine which documents, if any, are subject to disclosure prior to entering the order, as opposed to deferring the determination until after the trial.[53] The fact that the Sunshine in Litigation determination must be made before the trial could be viewed as problematic because the question of whether the instrumentality in question caused injury is often the central issue to be decided at trial. However, the court must necessarily come to some conclusion on causation in order to determine if a public hazard exists "long before that issue is established at trial, and possibly even before evidence that would inform that conclusion has been requested or produced in discovery."[54]

The lack of clarity as to exactly what procedure should be followed for a Sunshine in Litigation hearing is a subject that has been raised both by proponents and critics of reforms to limit confidentiality in litigation. One proponent suggests that the law is underutilized because of the statute's "fatal flaw" of failing "to provide a framework or standard for courts to apply to effectively and uniformly address Sunshine Act issues during litigation."[55] Another problem with the lack of statutory framework is that there is no protection for the potential damage caused to a defendant whose product is deemed a public hazard initially even if a jury later determines that the harm was not caused by the product or that the product was not defective.[56] However, some practitioners who specialize in products liability have indicated that the Act works well in practice and that attorneys who are familiar with this area of the law are able to effectively work with the Act as currently written.

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[44] *DuPont*, 654 So. 2d 226.
[45] *Id.* at 228.
[46] *Id.* (citing *Riehl*, 635 So. 2d 17; *Fickle v. Adkins*, 394 So. 2d 461 (Fla. 3d DCA 1981)).
[47] *Ford Motor Co. v. Hall-Edwards*, 21 So. 3d 99, 103 (Fla. 3d DCA 2009)
[48] *Goodyear Tire & Rubber Co. v. Schalmo*, 987 So. 2d 142, 146 (Fla. 2d DCA 2008).
[49] *Id.*
[50] *See Goodyear Tire & Rubber Co. v. Jones*, 929 So. 2d 1081 (Fla. 3d DCA 2005).
[51] *Novartis Pharmaceuticals Corp. v. Carnoto*, 798 So. 2d 22 (Fla. 4th DCA 2001).
[52] *Hall-Edwards*, 21 So. 3d at 102 (citing *Jones*, 929 So. 2d at 1084).
[53] *Jones*, 929 So. 2d at 1084.
[54] Hughes, *supra* note 11, at 22.
[55] Roma Perez, *Two Steps Forward, Two Steps Back: Lessons to be Learned from How Florida's Initiatives to Curtail Confidentiality in Litigation Have Missed Their Mark*, 10 FLA. COASTAL L. REV. 163, 193-94 (Winter 2009).
[56] *Id.* at 197.

Separation of Powers

Florida's constitution articulates a separation-of-powers doctrine under section 3 of article II, which prohibits one branch of government from exercising powers appertaining to one of the other branches. The Senate staff analysis for the Sunshine in Litigation Act pointed out that "[i]t has been held that the Supreme Court has the sole authority to promulgate, rescind and modify the Florida Rules of Civil Procedure."[57] The analysis also pointed out that the Florida Constitution states that a statute repealing a rule of procedure must pass the Legislature by a two-thirds vote of the membership of each house.[58] These references in the analysis at the time the bill was being considered signal a potential separation-of-powers concern about the bill encroaching on the judiciary by improperly repealing a court rule. This sentiment has been echoed by scholars and commentators since the bill's passage. The House staff analysis raised the same concern but also noted that "the Court has allowed the legislature to set public policy for purposes of determining the disclosure of judicial records in some cases, and accordingly, there is a basis upon which the legislation may be sustained."[59] The court rule in question provides that a court may enter a protective order upon a motion and showing of good cause.[60] One of the enumerated categories for entering a protective order is to protect from disclosure "a trade secret or other confidential research, development, or commercial information."[61] In order to pass by two-thirds, the Act would have needed 80 favorable votes in the House of Representatives, but only received 79.[62] The bill passed with well over two-thirds of the Senate voting favorably.[63]

In a Third District case, one of the parties challenged the constitutionality of the Act on the grounds that it was a procedural rule improperly enacted by the Legislature. The court did not discuss the merits of this argument because it was raised for the first time on appeal and the court did not consider it a fundamental error sufficient to trigger appellate review under the circumstances.[64] Substantive laws either create rights or impose new obligations or duties, and procedural laws enforce those rights or obligations.[65] In federal proceedings, courts will generally apply the substantive law of the state where the court is sitting and federal procedural law.[66] A federal court has held that the Sunshine in Litigation Act "may apply if this case were in state court. However, this statute does not apply here because F.S. [s.] 69.081 is a procedural rule inapplicable in this federal proceeding."[67]

Right to Contract

Although there has been a long-standing tradition of granting the public presumptive access to judicial records, purely private settlement agreements have generally been considered beyond the reach of public scrutiny unless the settlement is filed with the court or the parties look to the court for enforcement.[68] However, under the Sunshine in Litigation Act and similar laws, private settlement agreements that have no interaction with the court system are subject to disclosure to the public, which has given rise to discussion of potential violation of the right to contract. A contract is a legally enforceable promise; this definition includes confidential settlement agreements.[69] The U.S. Constitution bars a state from passing any law that would impair the obligation of

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[57] *Senate Staff Analysis and Economic Impact Statement*, Senate Bill 278 (Apr. 25, 1990) (citing *Ser-Nestler, Inc. v. General Finance Loan Co. of Miami Northwest*, 167 So. 2d 230 (Fla. 3d DCA 1964)) (on file with the Senate Committee on Judiciary).
[58] FLA. CONST. art. V, s. 2
[59] *House of Representatives Committee on Judiciary Staff Analysis and Economic Impact Statement*, House Bill 839 (May. 8, 1990) (on file with the Senate Committee on Judiciary).
[60] Fla. R. Civ. P. 1.280(c).
[61] Fla. R. Civ. P. 1.280(c)(7).
[62] *House Journal*, Reg. Session, May 28, 1990, 1300.
[63] *Senate Journal*, Reg. Session, May 30, 1990, 708 (the final vote in the Senate was 34-2).
[64] *Goodyear Tire & Rubber Co. v. Jones*, 929 So. 2d 1081, 1086 (Fla. 3d DCA 2005).
[65] *See Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352, 1358 (Fla. 1994); *In re Florida Rules of Criminal Procedure*, 272 So. 2d 65, 65 (Fla. 1972).
[66] *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).
[67] *Ronque v. Ford Motor Co.*, 1992 WL 415427, at *1 (M.D. Fla.1992) (citing *Erie*, 304 U.S. 64).
[68] Hughes, *supra* note 11, at 2.
[69] Garfield, *supra* note 15, at 268.

contracts.[70] Absent public policy or First Amendment limitations, contracting parties are generally free to agree to be silent about almost anything.[71] As discussed previously, the courts have not found a First Amendment right to litigation materials not filed with the court, making the debate over the disclosure of private agreements one focused on public policy.

Although the Constitution guarantees freedom to contract, that freedom is not absolute. "A contract that contravenes an established interest of society can be found void as against public policy."[72] Courts may derive a public policy against the enforcement of a contract from legislation relevant to the policy or the need to protect public welfare through judicial policies against interference with protected interests.[73] "The first indication that a term violates public policy is when legislation explicitly provides that such a provision is unenforceable. Indeed, there could hardly be a more certain indication of public policy."[74] Through enactment of the Sunshine in Litigation Act, the Florida Legislature has signaled that the right to contract is outweighed by the policy of disclosure of otherwise non-public information when a public hazard exists. In fact, the Act very clearly states that an agreement or contract that conceals a public hazard "is void, contrary to public policy, and may not be enforced."[75]

Takings

The Takings Clause of the Fifth Amendment states that private property shall not "be taken for public use, without just compensation."[76] It has been argued that parties have a property right in their trade secrets, the government disclosure of which, without just compensation, may constitute a taking of private property in violation of the Fifth Amendment.[77] Florida law defines a trade secret as:

> information, including a formula, pattern, compilation, program, device, method, technique, or process that: (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[78]

The Florida Evidence Code provides for an evidentiary privilege with respect to trade secrets, allowing parties to refuse to disclose such information or prevent others from disclosing it.[79] The statute creating the privilege also contemplates exceptions, such as the Sunshine in Litigation Act allowing for disclosure of materials concerning a public hazard "including but not limited to alleged trade secrets,"[80] as it further states that "[w]hen the court directs disclosure, it shall take the protective measures that the interests of the holder of the privilege, the interests of the parties, and the furtherance of justice require."[81] However, scholars have argued that the Act offends the state and federal constitutions because it converts private property for public use without any opportunity for compensation.[82] "Once the data that constitute a trade secret are disclosed to others, or others are allowed to use that data, the holder of the trade secret has lost his property interest in the data."[83]

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[70] U.S. CONST. art. I, s. 10, cl. 1.
[71] Garfield, *supra* note 15, at 268.
[72] *City of Hialeah Gardens v. John L. Adams & Co., Inc.*, 599 So. 2d 1322, 1324 (Fla. 3d DCA 1992) (citing *American Casualty Co. v. Coastal Caisson Drill Co.*, 542 So. 2d 957 (Fla. 1989)); *see also Duplig v. City of South Daytona*, 195 So. 2d 581 (Fla. 1st DCA 1967).
[73] Restatement (Second) of Contracts s. 179 (1981).
[74] Garfield, *supra* note 15, at 296.
[75] Section 69.081(4), F.S.
[76] U.S. CONST. amend. V; s*ee also* FLA. CONST. art. X s. 6.
[77] Miller, *supra* note 10, at 468.
[78] Section 688.002(4), F.S.
[79] Section 90.506, F.S.
[80] Section 69.081(7), F.S.
[81] Section 90.506, F.S.
[82] Lumish and Alonso, *supra* note 30, at 29; *see also* Miller, *supra* note 10, at 468.
[83] Lumish and Alonso, *supra* note 30, at 29 (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011 (1984)).

One scholar has stated that the problem with Florida's law is that it is a categorical ban that does not require a balancing of the parties' interests or provide meaningful exceptions. The only thing the Act excludes is trade secrets "which are not pertinent to public hazards."[84] The scholar argues that this language "excludes nothing in practice since relation to a public hazard is what triggers the law's application in the first place. Thus, under the terms of the statute, even if the 'information concerning a public hazard' is a valuable trade secret or implicates important privacy concerns, it cannot be concealed."[85] However, while not providing specifically for a balancing of interests, the Act does provide that, "[i]f allowing disclosure, the court shall allow disclosure of only that portion of the information or materials necessary or useful to the public regarding the public hazard."[86] This provision provides some protection by directing the court to maintain confidentiality for sensitive information not relating to a hazard, including trade secrets. Additionally, as one practitioner noted, it can also be argued that the court-ordered disclosure of trade secrets in the Sunshine in Litigation context does not constitute a taking because courts generally have the discretion to compel production of a trade secret if the necessity for production outweighs the interest in confidentiality. Thus, the necessity for production will be demonstrated if the trade secret information in question is deemed a public hazard under the Act.[87] The statute is silent as to "what happens when the allegedly-confidential documents sought to be disclosed on 'public hazard' grounds are subject to the attorney-client privilege or work product doctrine."[88]

Summary

The Sunshine in Litigation Act prohibits a court from entering an order or judgment for the purpose of concealing a public hazard and authorizes substantially affected persons to contest such an order or judgment. The Act remains good law, with no court having declared its provisions to be unconstitutional since its original enactment in 1990. However, the constitutional concerns raised by some commentators writing about the Act, as summarized in this issue brief, may provide a framework for litigants to challenge portions of the Act, as well as a framework for advocates to recommend that the Legislature revise the Act.

[84] Section 69.081(5), F.S.
[85] Goldstein, *supra* note 9, at 424.
[86] Section 69.081(7), F.S.
[87] Telephone conversation with Lauri Ross, appellate attorney handling Sunshine in Litigation Act cases, including *Goodyear Tire & Rubber Co. v. Jones*, 929 So. 2d 1081 (Fla. 3d DCA 2005) (Aug. 25, 2011); *see Am. Exp. Travel Related Servs., Inc. v. Cruz*, 761 So. 2d 1206 (Fla. 4th DCA 2000).
[88] *Ford Motor Co. v. Hall-Edwards*, 21 So. 3d 99, 102 (Fla. 3d DCA 2009); *see* s. 90.502, F.S.; Fla. R. Civ. P. 1.280(b)(3).