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Corporate Headquarters
1776 Main Street
P.O. Box 2138
Santa Monica, California
90407-2138
TEL 310.393.0411
FAX 310.393.4818

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Would Increased Transparency Improve the Civil Justice System?

The process of resolving disputes through the U.S. civil justice system has become increasingly opaque. The cause is a sharp decline in the number of disputes that result in a jury trial, which provides a public record of the proceedings, the decision, and the amount of compensation, if any. Today, more than 95 percent of disputes end in settlements before they get to trial, and the terms of these settlements are rarely disclosed.

The public debate over secret settlements has largely polarized into two camps. Some argue that the confidentiality of this system is the lubricant that keeps it working efficiently and fairly, and others argue that the public is being denied information about hazards that may threaten its well-being. A collection of essays from the UCLA-RAND Center for Law and Public Policy, *Confidentiality, Transparency, and the U.S. Civil Justice System* (Oxford University Press, 2012), addresses the issue of transparency from a public policy perspective by examining whether policies that increase transparency would improve the civil justice system.

Although secrecy is a difficult issue to address empirically, the essays describe studies that drew from existing databases or employed novel data collection, three case studies that illustrate the benefits of transparency, and several reform proposals that call for expanding access to existing databases or using technology to create new databases. Taken together, the essays point to the need for reforms that increase transparency while balancing the need for privacy.

Rare Empirical Studies of Secrecy

Three essays in the collection explore existing data and solutions to data gaps to provide a more detailed picture of settlements and how knowledge of precedent affects case outcomes.

Secrecy Premium. One of the essays in the volume, by Eric Helland and Gia Lee, presents findings from what may be the first empirical research on the impact of secrecy in civil litigation.

Key findings:

- Increased transparency would improve the functioning of the market in claims settlements, decrease fraud, reduce transaction costs, decrease public misperception, and increase public confidence in the civil justice system.
- It is possible to increase transparency and protect confidentiality through expanded access to databases built on systems of claims and settlements.
- The effects of confidentiality and transparency on the civil justice system can be analyzed empirically.

The authors looked at the disclosure of medical malpractice data on websites in 17 states. Some of these states require that all settlements, including private settlements, be posted online; others post only trial and arbitration judgments. Comparing the outcomes of cases in these two sets of states, the authors found no difference in the rate at which cases settled, but settlement amounts in the full-disclosure states were lower. These results suggest that some defendants value secrecy and pay a premium to ensure it.

Data Scarcity in Class Actions. Another essay, by Nicholas M. Pace and William Rubinstein, describes the authors' attempts to determine how much of the settlement amount in class actions is actually distributed to the class of plaintiffs. Although class actions receive more judicial and public scrutiny than most areas of civil litigation, judges rarely require public reporting of the amount of settlements or how many class members actually receive compensation. As a result, court records seldom contain distribution data. By searching through case files

and communicating directly with participants, the authors gained access to data on compensation in fewer than one in five cases, and these few cases revealed a great disparity in distribution rates—from a low of 1 percent of class members receiving any compensation to a high of 82 percent.

Value of Reasonable Expectations of Outcomes. In their essay, Stephen Carroll and Joseph W. Doherty use data collected as part of the Civil Justice Reform Act evaluation to show that the litigants who have a sense of how much a case is or should be worth have more confidence in the court system. The authors propose that a more detailed system of disclosure, in which participants in litigation—judges, juries, attorneys, and litigants—have more accurate information about the details of settlements and verdicts in similar cases, could increase public confidence in the system by managing expectations and helping participants exercise their discretion in adopting or deviating from precedent.

Case Studies on Increased Transparency

The book includes three case studies that address transparency in the context of mass torts. All three cases describe situations in which targeted transparency brings benefits, including improvements in claims settlements, decreased fraud, decreased misperception and increased confidence, and reduced transaction costs. While the circumstances of these cases may be atypical, the cases challenge the prevailing view of disclosure as a benefit primarily for plaintiffs.

September 11th Victim Compensation Fund (VCF).

Jeremiah Goulka and Robert T. Reville explore how transparency was used to increase participation in the VCF, a voluntary alternative to litigation after the September 11, 2001, terrorist attacks. In this case, transparency was intended to build trust and attract participants rather than promote accountability among those in authority. With unprecedented participation rates, the partial transparency of the VCF may be a model for compensating large numbers of victims in cases in which liability is not disputed, swift compensation is seen as a public good, and media scrutiny is intense.

Bayer Baycol Litigation. James Anderson, in describing a product liability case against Bayer concerning the cholesterol-lowering drug Baycol, illustrates the benefits of transparency that can be achieved through targeted or partially transparent strategies without sacrificing the benefits of privacy. Instead of pressing for secret settlement agreements, Bayer chose to settle nearly all its cases according to a fixed

schedule, without confidentiality. This agreement was attractive to Bayer because it reduced the overall costs of a mass tort, as well as to plaintiffs, who were assured that they were getting the same treatment as others with similar injuries.

Silica Litigation. Lloyd Dixon and Stephen Carroll's essay describes how increased transparency can expose widespread fraud in mass torts. They examine the proceedings of U.S. District Court Judge Janis Jack in the Southern District of Texas, who expanded the role of discovery proceedings to include *Daubert* hearings of the plaintiffs' own diagnosing experts. In this unprecedented step, she uncovered fraudulent diagnostic practices in thousands of silicosis claims and effectively brought the litigation to a halt.

Recommendation: Expand Access to Existing Databases

The book concludes with three chapters exploring distinct transparency-related issues: the market for settlements, the role of technology, and the role of liability insurance.

- Stephen Yeazell describes the civil litigation system as a market in which the plaintiff's right to sue is traded for a defendant's settlement. He argues that the system is currently operating without adequate pricing information and proposes that courts require settling parties to disclose anonymized information—and that this information be made publicly available.
- Lynn M. LoPucki examines the future of public access to court records, arguing that the technology necessary to increase court system transparency is already available and can be implemented at a modest cost. He recommends that the government automate the processes of data extraction and analysis in court records while eliminating the fees charged for obtaining court documents.
- Tom Baker highlights the individual claims information collected by liability insurers. He recommends that the government mandate public disclosure of individual claims data in all areas (e.g., medical, auto, product liability) to foster understanding and increase the legitimacy of the system.

While exploring distinct themes, all three concluding essays converge on a policy recommendation that reflects a recurring theme of the book. They propose that the civil justice system will be improved by promoting public access to databases built on systems of claims and settlement reporting that appropriately protect confidentiality. ■

This research brief describes work done for the UCLA-RAND Center for Law and Public Policy documented in *Confidentiality, Transparency, and the U.S. Civil Justice System*, edited by Joseph W. Doherty, Robert T. Reville, and Laura Zakaras, Oxford University Press, 2012. This research brief was written by Kristin Leuschner. The RAND Corporation is a nonprofit institution that helps improve policy and decisionmaking through research and analysis. RAND's publications do not necessarily reflect the opinions of its research clients and sponsors. RAND® is a registered trademark.

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