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Benham: Texas court should reject lawsuit secrecy

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Posted: 6:00 p.m. Wednesday, July 30, 2014

By Dustin B. Benham - Special to the American-Statesman

The West fertilizer plant explosion killed 15 people and injured hundreds more. Faulty GM auto ignitions have killed at least 12 by turning victims' cars into rolling death traps. What do these tragedies have in common? Both GM and the defendants in the West explosion lawsuits sought and obtained broad court confidentiality orders that prevent the public from learning how so many people died.

The confidentiality orders, otherwise known as "protective orders," keep information gathered in lawsuits from the public. In multiple instances, GM secretly settled cases in which the orders had been entered. The public was kept in the dark about GM's dangerous ignitions, and more people died.

Incredibly, at the same time that GM is reeling from allegations it took lives by covering up settlements and delaying a recall, it is aggressively litigating in the Texas Supreme Court in favor of more court-protected secrecy. Under current Texas law, courts are required to allow information sharing between similar cases and cannot enter confidentiality orders that forbid sharing.

This sharing law allows people who have been injured to work together in developing proof of public harms such as product defects, dangerous drugs and pedophile clergy. GM is now asking the Supreme Court to change the law to prevent individuals who have been injured from sharing information they lawfully obtain through publicly funded courts.

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To sway the court, GM argues that sharing information between lawsuits threatens to devalue its "trade secrets." Protecting the value of legitimate trade secrets is important, but corporate litigants, like GM, often seek to protect stale information that is years old and is of questionable worth. Even where legitimate trade secrets are at stake, court orders that allow sharing between similar lawsuits forbid GM's competitors from accessing the information. The Supreme Court should reject GM's ploy as pretext.

In recent months, a committee of the State Bar of Texas, a quasi-public entity that oversees the state's lawyers, has also asked the Supreme Court of Texas for a pro-secrecy change in the law. The committee recently forwarded a proposed rule to the court that would standardize court-confidentiality orders, making secrecy the default and making it easier for accused wrongdoers to conceal information in lawsuits. Like GM's request, the committee's proposal would effectively lift the current requirement that judges allow sharing between similar lawsuits.

The victims of the West and GM tragedies deserve better. The Supreme Court should reject strict court confidentiality in favor of at least minimal transparency. Texas taxpayers and litigants, who foot the bill to operate the court system, should not be kept in total darkness about information turned over through court power.

Benham is an associate professor of law at Texas Tech University School of Law.

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