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A SETBACK FOR THE PUBLIC POLICY OF ENCOURAGING SETTLEMENTS

Bank of America National Trust & Savings Association v. Hotel Rittenhouse Associates[1]

I. Introduction

The advent of the "litigation explosion" has caused the legal community to adopt an alternative dispute-resolving policy of encouraging settlement negotiations. The Federal Rules of Evidence reflect this policy by expressly making evidence of settlement negotiations inadmissible at trial in an attempt to encourage frank discussion during settlement negotiations.[2] In *Bank of America National Trust & Savings Association v. Hotel Rittenhouse Associates*,[3] a majority decision by the Court of Appeals for the Third Circuit dealt this policy a crippling blow. The court held that the long-standing common law right of access to judicial records overcame this policy of encouraging settlements.[4] This casenote discusses the origin of the common law right, the emergence of the public policy in favor of encouraging settlements, and the conflict between the two as evidenced by the majority and dissenting opinions in *Hotel Rittenhouse.*

II. Facts in Hotel Rittenhouse

The situation giving rise to this dispute resulted from a construction financing arrangement between Bank of America (Bank) and Hotel Rittenhouse Associates (HRA). The original lawsuit was filed in June 1983, by the Bank to foreclose on the HRA property and collect on a loan. In April 1984, FAB III, the concrete contractor (Appellant in this case), filed suit against the Bank only, seeking over $800,000 on an alleged assurance by the Bank of direct payment to FAB III for its work on the HRA project. The Bank-HRA action proceeded to trial in January 1985, but was settled and the jury discharged without deliberation. At both parties' request, the settlement agreement was filed under seal in the district court.[5]

A short time later, there was a disagreement about the settlement, and both parties filed motions to enforce the settlement agreement. A series of

1. 800 F.2d 339 (3d Cir. 1986)
2. Fed. R. Evid. 408.
3. *Hotel Rittenhouse*, 800 F.2d at 339.
4. *Id.* at 346.
5. *Id.* at 340-41.

documents regarding this dispute were filed under seal in the district court. The district court issued a series of orders in the Bank-HRA litigation which were apparently pursuant to the motions filed to enforce the settlement agreement. On March 25, 1985, the district court rendered judgment for the Bank for over 38 million dollars on one count and dismissed all other counts of the Bank's claim. The court ordered the HRA property sold at a marshall's sale. The docket sheet shows an entry on April 26, 1985, that an "Order of Court is Filed Under Seal and Not to be Opened Until Further Order."[6]

In April 1985, FAB III and other creditors met with the district court and requested that it unseal the documents. This request was denied without an order. On July 1, 1985, FAB III filed a complaint in state court alleging a conspiracy between the Bank and HRA and charging that they "agreed to seal certain portions of the otherwise public proceedings."[7] Shortly thereafter, FAB III filed a formal motion in the district court to unseal. In a one-paragraph order, the district court stated that it had weighed "the public and private interests in settling disputes" and FAB III's interest in access and found the former paramount.[8] FAB III appealed this order.[9]

The Court of Appeals for the Third Circuit reversed the district court.[10] Judge Sloviter, writing for the majority, reversed the district court, concluding "that the district court abused its discretion in denying FAB III's motion to unseal the motions and settlement agreement papers."[11] The court concluded that the interest in encouraging settlement did not outweigh the presumption in favor of access.[12] In a vigorous dissent, Judge Garth charged the majority with showing "total disregard" for the difference between the sealing and unsealing of an agreement.[13] He could not agree with the courts' "unprecedented decision" that the public's right of access outweighs the interest in settlement.[14]

III. Common Law Right of Access to Judicial Records

The common law right of access predates the United States Constitution itself.[15] The right has been justified on the grounds of "the public's right to open courts, which has particular applicability to judicial records."[16] The right

6. *Id.*
7. *Id.* at 341.
8. *Id.*
9. *Id.*
10. *Id.* at 346.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *See* United States v. Mitchell, 551 F.2d 1252, 1260 (D.C. Cir. 1976), *rev'd on other grounds sub. nom.*, Nixon v. Warner Communications, 435 U.S. 589 (1978).
16. United States v. Criden, 648 F.2d 814, 819 (3d Cir. 1981) (hereinafter

to access has also been considered a fundamental right under the first amendment.[17] In upholding the common law right to access, six societal interests in open court proceedings have been found:

> 1) promotion of informed discussion of governmental affairs by providing the public with the more complete understanding of the judicial system;
> 2) promotion of the public perception of fairness which can be achieved only by permitting full public view of the proceedings;
> 3) providing a significant community therapeutic value as an outlet for community concern, hostility, and emotion;
> 4) serving as a check on corrupt practices by exposing the judicial process to public scrutiny;
> 5) enhancement of the performance of all involved; and
> 6) discouragement of perjury.[18]

The Supreme Court of the United States addressed the common law right of the people to access to judicial records in *Nixon v. Warner Communications, Inc.*[19] The media sought access to audio tapes which the district court denied but the court of appeals granted.[20] The Supreme Court reversed the court of appeals.[21] In an oft-quoted passage, the Court said "[i]t is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents."[22] However, the Court also states that this right is not absolute.[23] The trial judge is given a great deal of discretion in deciding which proceedings should be sealed "in light of the relevant facts and circumstances of the particular case."[24] In the *Nixon* case, the fact that an "alternative means" of access to the tapes was prescribed by statute led the Court to conclude that access should be denied.[25]

Criden I).

17. *See* Publicker Indus., Inc. v. Cohen, 733 F.2d 1059 (3d Cir. 1984).

18. *See* United States v. Smith, 787 F.2d 111, 114 (3d Cir. 1986), *quoted in* United States v. Criden, 675 F.2d 550, 556 (3d Cir. 1982) (hereinafter *Criden II*) (numbering added).

19. 435 U.S. 589 (1978).

20. *Id.* at 591. This is the celebrated "Watergate tapes" case where the the television networks attempted to secure permission to copy, broadcast, and sell to the public portions of the tapes played at trial.

21. *Id.* In weighing the arguments for and against release, the Court concluded the presumption in favor of public access was overcome by the existence of the elaborate procedures created for public access to presidential documents. *Id.* at 606.

22. *Id.* at 597 (footnote omitted).

23. *Id.* at 598.

24. *Id.* at 599.

25. *Id.* at 606. The statute involved is the Presidential Recordings Act. 42 U.S.C. §§ 3315-3324 (1974). The Act provided that the Administrator of General Services would take custody of President Nixon's tapes and documents. *Id.* at 603. Government archivists would then screen the materials, return the private documents to the president, and preserve and make available to the courts those of historical value. *Id.* The Court concluded that this administrative procedure, created and approved by Congress,

Subsequent to the *Nixon* cases, the Third Circuit faced the same issues of access and confidentialty with regard to video and audio tapes in the highly-publicized Abscam case.[26] The media sought access to video and audio tapes admitted into evidence and played for the jury.[27] The trial court denied access, in part based on the potential "serious and irreparable harm" that could result from the release of the videotape.[28] The Third Circuit reversed the district court and granted access to all material except for "material which the district court explicitly determines [on remand] to be impermissibly injurious to third parties."[29] The court addressed each of the concerns of the district court and concluded, "the trial court accorded too little weight to the strong common law presumption of access and to the educational and informational benefit which the public would derive from broadcast of evidence introduced at a trial which raised significant issues of public interest."[30] In a later appeal, the Third Circuit further concluded that the public has a first amendment right to access to video evidence in a pretrial hearing.[31]

The standard of review in a right to access case may differ, depending upon whether the trial court denied access based on the first amendment or the common law right. Under the first amendment analysis, the Third Circuit followed the Supreme Court conclusion that the record must demonstrate "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."[32] Under common law analysis, the Third Circuit has held "the strong common law presumption of

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was sufficient to satisfy the public's right of access so that the district court did not have to release the tapes. *Id.* at 603-08.

26. *See Criden I*, 648 F.2d at 814; *Criden II*, 675 F.2d at 550; United States v. Criden, 681 F.2d 919 (3d Cir. 1982) (hereinafter *Criden III*).

27. United States v. Criden, 501 F.Supp. 854, 855 (E.D. Pa. 1980).

28. *Id.* at 859-60. The court reasoned that the balance between the "public interest in free access to news and the law's regard for the dignity of every human being" would be destroyed if the defendant's misconduct is "graphically portrayed in every living room in America." *Id.* at 860. The district court also denied access based on the possible serious harm to innocent third parties, the potential for jeopardizing the right to a fair trial for those not yet tried, and because some evidence may be subject to questions of admissibility on appeal. *Id.* at 860-63.

29. *Criden I*, 648 F.2d at 829.

30. *Id.*

31. *Criden II*, 675 F.2d at 552, 562. The court reasoned that societal interests in criminal proceedings as discussed in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 569-72, 596-98 (1980), apply equally to pretrial proceedings and outweigh any argument to restrict access. *Criden II*, 675 F.2d at 556-57.

32. *Publicker Indus.*, 733 F.2d at 1073, *quoting*, Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 510 (1984). In a later decision, the Third Circuit articulated this higher standard stating, "since a First Amendment right is involved, the trial court ensealment of the list of names can be sustained only if it is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." United States v Smith, 776 F 2d 1104, 1112 (3d Cir. 1985).

access must be balanced against the factors militating against access.[33] However, in *Hotel Rittenhouse*, the court declined to address the issue of whether the standard for balancing differs, depending on whether the first amendment or the common law is involved.[34] The court chose to address the issue under the common law and applied the balancing approach articulated in prior decisions.[35]

Each of the cases discussed and cited as authority for the majority's position in *Hotel Rittenhouse* arose in the context of public access to criminal trials and proceedings.[36] The Third Circuit struggled with the issue of public access to civil trial proceedings, but ruled in favor of public access under both a common law and a constitutional analysis.[37]

IV. THE RITTENHOUSE DISSENT

The major point made by the dissent is that the majority misconstrues the issue before the court.[38] Judge Garth, in dissent, asserts that the issue as framed by the majority is "whether material which is already public should now be sealed."[39] However, Judge Garth contends "the question on this appeal is 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."[40] Based on this statement of the issue, the dissent would conclude that the reliance of the parties entering into the settlement agreement on the confidentiality of the record is sufficient to shift the presumption away from openness and access to closure in the absence of "extraordinary circumstances" or "compelling need."[41]

The shift in presumption argued by the dissent finds support in a line of cases from the Court of Appeals for the Second Circuit.[42] In *Martindell v.*

33. *Hotel Rittenhouse*, 800 F.2d at 344, *construing*, *Criden I*, 648 F.2d at 818.

34. *Hotel Rittenhouse*, 800 F.2d at 344.

35. *Id.* The balancing approach of *Criden I* weighed the strong presumption of access which is based on the common law right of access to judicial records coupled with the public interest in "observation, participation and comment . . ." against legitimate privacy and reputational concerns. *See Smith*, 776 F.2d at 1112, *citing*, *Criden I*, 648 F.2d at 823.

36. For a lengthy discussion of the historical underpinnings of the public's access to criminal proceedings, *See Publicker Indus.*, 733 F.2d at 1068-1070.

37. *Id.* at 1059. The court found that the newspaper publishers enjoyed a common law right of access in a civil case, but felt compelled to reach the important constitutional issues as well. The Supreme Court has remained silent on this point.

38. *Hotel Rittenhouse*, 800 F.2d at 346.

39. *Id.*

40. *Id.* at 346-47 (emphasis in original).

41 *Id.* at 348 (Garth, J., dissenting).

42. *See* Martindell v. Int'l Tele. & Tele. Corp., 594 F.2d 291 (2d Cir. 1979);

International Telephone and Telegraph Corp.,[43] the court denied the government access to witness depositions given in a private stockholders' derivative suit. The witnesses were promised confidentiality as to the information given in their depositions so the parties could obtain the information needed for prosecution of the civil suit. According to the court, the witnesses were entitled to rely upon the terms of a valid protective order, without which their testimony would not have been given.[44]

In *FDIC v. Ernst & Ernst*,[45] a case closely on point to *Hotel Rittenhouse*, the parties filed a settlement agreement with the court under a protective sealing order. The assurance of confidentiality was the factor which induced the parties to settle what promised to be a costly and lengthy trial.[46] Appellants, Public Interest Research Group, appealed a denial of their motion to unseal. In affirming the district court's denial, the court stated that "[o]nce a confidentiality order has been entered and relied upon, it can only be modified if an 'extraordinary circumstance' or 'compelling need' warrants the requested modification."[47]

This language was again employed by the Second Circuit in *Palmieri v. New York*.[48] The court found that the appellant's reliance upon the sealing order, evidenced by their unwillingness to engage in settlement negotiations without the protection afforded, raised a presumption in favor of upholding those orders.[49] The appellate court found that the State was required to show a "compelling need" for disclosure of the terms of the settlement negotiations which had been ordered sealed by the district court.[50] However, the appellate court held that the district court did not express in its order that it had properly determined whether the State showed the requisite "compelling need" and remanded the case for a determination of that particular issue.[51]

Recently, the Court of Appeals for the Sixth Circuit decided *Meyer Goldberg v. Fisher Foods, Inc.*,[52] a case similar to *Hotel Rittenhouse*. The court reversed and remanded to the district court for a determination as to

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Federal Deposit Ins. Corp. v. Ernst & Ernst, 677 F.2d 230 (2d Cir. 1982); Palmieri v. New York, 779 F.2d 861 (2d Cir. 1985).

43. 594 F.2d at 291.
44. *Id.* at 296-297.
45. 677 F.2d at 231.
46. *Id.*
47. *Id.* at 232.
48. 779 F.2d at 861.
49. *Id.* at 865.
50. *Id.* at 866.
51. *Id.*
52. 823 F.2d 159 (6th Cir. 1987). A non-party intervened and moved to unseal some confidential tapes allegedly relied upon in reaching a settlement. The district court denied the motion to unseal, explaining that "confidentiality *relied upon* by a party in entering into a settlement should not at a later date be subject to reversal of the sealing order." *Id.* at 161 (emphasis in original).

whether the parties relied upon the sealing of the tapes as a basis of settlement. The court stated the record did not reflect the district court's consideration of the "strong underlying tradition of open records, and that only compelling reasons justify denial or continued denial of access to records. . . ."[53]

V. Public Interest in Encouraging Settlements

In his dissenting opinion in *Hotel Rittenhouse*, Judge Garth stresses the importance of settling cases to the day-to-day management of a trial court docket.[54] Indeed, he believes that if commentators and judges concur on little else, they agree on the "value and necessity of a vigorous policy of encouraging fair and reasonable settlement of civil claims whenever possible."[55] Even with the advent of other forms of alternative dispute resolution, such as arbitration, mediation and mini-trials, the key component of solving the crowded court dockets remains settlement.[56] Congress acted to further this policy of encouraging settlement when it enacted Federal Rule of Evidence 408.[57] Secrecy of settlement terms is a well-established American litigation practice.[58] A study has shown that 88% of cases are settled.[59] The courts, commentators, Congress, and practice would seem to favor the promotion of settlement of disputes without litigation.

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53. *Id.* at 164.

54. *Hotel Rittenhouse*, 800 F.2d at 348-49 (Garth, J., dissenting).

55. *Id.* at 350. Garth further cites language from his own court on the desirability of settlements:

> [v]oluntary settlement of civil controversies is in high judicial favor. Judges and lawyers alike strive assiduously to promote amicable adjustments 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).

56. *Hotel Rittenhouse*, 800 F.2d at 349.

57. FED. R. EVID. 408 provides, in pertinent part, "[e]vidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim . . . is not admissible to prove liability." *Id.* In the Advisory Committee notes explaining the reasons for promulgating such a rule, the Committee cites "[a] more consistently impressive ground is promotion of the public policy favoring the compromise and settlement of disputes."

58. *See* In re Franklin Nat'l. Bank Sec. Litig., 92 F.R.D. 468, 472 (E.D.N.Y. 1981).

59. *See Hotel Rittenhouse*, 800 F.2d at 350 (Garth, J., dissenting) (*citing*, Galanter, *Reading the Landscapes of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 28 (1983)).

VI. CONCLUSION

The public enjoys a long history of access to judicial records, but the right is one which has never been held to be absolute. The trial judge is allowed a great deal of discretion in deciding whether to seal records from public scrutiny.[60] Because of the long-standing history of access and the public policy behind it, a party wishing to shield any documents from the public must overcome a strong presumption for public access.[61] However, case law has also established that a party wishing to unseal documents filed with a court under an already relied-upon promise of confidentiality must show a "compelling need" for the documents.[62]

In *Hotel Rittenhouse*, the equities and facts of the situation dictate that more deference should have been given to the district court's decision to keep the settlement sealed. The majority's adherence to the common law in this case worked an injustice and dealt the encouragement of settlements a severe setback. In supporting its position, the majority cited many of its own previous cases, almost all dealing with highly-publicized criminal trials. In all of its case authority, none of the parties had relied upon the sealing promise when tendering documents to the court. However, the parties in this case relied to their detriment on the sealing agreement in reaching settlement. The dissent correctly pinpointed the issue of reliance, and cited compelling authority in support of its position that reliance on the confidentiality afforded the settlement agreements requires protection by shifting the presumption from access to closure. The majority holding forces parties into private contractual settlement agreements that may require a second lawsuit and a second judge, unfamiliar with the case, to resolve disputes as to the settlement agreement. The language of the majority which states that public interest in encouraging settlements is not paramount enough to justify keeping these documents away from the public access will unduly cripple attempts to settle cases and burden the already overburdened judiciary. All in all, this decision strikes a blow to both settlement agreements and efficiency.

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60. *See Martindell*, 594 F.2d at 296-297.
61. *See Ernst & Ernst*, 677 F.2d at 231.
62. *Id.* at 232.