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Common Law Right of Public Access - The Third Circuit Limits Its Expansive Approach to the Common-Law Right of Public Access to Judicial Records

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COMMON LAW RIGHT OF PUBLIC ACCESS—THE THIRD CIRCUIT LIMITS ITS EXPANSIVE APPROACH TO THE COMMON-LAW RIGHT OF PUBLIC ACCESS TO JUDICIAL RECORDS

Leucadia Inc. v. Applied Extrusion Technologies, Inc. (1993)

I. INTRODUCTION

The common-law right of public access to judicial records is firmly established in the American legal system.[1] In fact, its existence predates the Constitution.[2] The United States Supreme Court, however, has not

1. In addition to the common-law right of public access to judicial records, a First Amendment right of public access also exists. *See generally* Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) (holding that state statute violated media's First Amendment right to attend criminal trials and discussing instances when court may deny access to criminal trials); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (holding that public has First Amendment right to attend criminal trials); Washington Post v. Robinson, 935 F.2d 282 (D.C. Cir. 1991) (holding that First Amendment right of access applied to plea agreements); Anderson v. Cryovac, Inc., 805 F.2d 1 (1st Cir. 1986) (noting "there is general agreement among the courts that the public's [First Amendment] right of access attaches to decisions of major importance to the administration of justice" (quoting Globe Newspaper Co. v. Superior Court, 729 F.2d 47 (1st Cir. 1984))); Wilson v. American Motor Corp., 759 F.2d 1568 (11th Cir. 1985) (stating that First Amendment right of access applied to civil trial record); Publicker Indus. v. Cohen, 733 F.2d 1059, 1070 (3d Cir. 1984) ("We hold that the First Amendment embraces a right of access to civil trials."); Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165 (6th Cir. 1983) (stating that First Amendment right of access extended to civil court record), *cert. denied*, 465 U.S. 1100 (1984); Associated Press v. District Court, 705 F.2d 1143 (9th Cir. 1983) (holding that First Amendment right of public access included right of access to pre-trial documents in criminal trial); *In re* San Juan Star Co., 662 F.2d 108 (1st Cir. 1981) (stating that First Amendment requires right of access to pre-trial discovery materials in civil action).

Several law review casenotes have also discussed the First Amendment right of access. *See, e.g.*, Anne E. Cohen, Note, *Access to Pretrial Documents Under the First Amendment*, 84 COLUM. L. REV. 1813, 1814-44 (1984) (discussing history and development of First Amendment right of public access); Sherry J. Hanley, Note, *Constitutional Law—Procedural and Substantive Prerequisites to Restricting the First Amendment Right of Access to Civil Hearings and Transcripts*—Publicker Industries v. Cohen, 733 F.2d 1059 (3d Cir. 1984), 58 TEMP. L.Q. 159, 159-84 (1985) (same); David M. O'Brien, Note, *The First Amendment and the Public's "Right to Know,"* 7 HASTINGS CONST. L.Q. 579 (1980) (same); Jamie Posley-Gelber, Note, *Constitutional Law: Contemporaneous Access to Judicial Records in Civil Trials—In re* Reporters Committee for Freedom of the Press, 773 F.2d 1325 (1985), 9 WHITTIER L. REV. 67, 67-73 (1985) (same). This Casebrief, however, will focus solely on the common-law right of public access to judicial records. For a discussion of the common-law history of the right of public access, see *infra* notes 17-56 and accompanying text.

2. *See* United States v. Criden, 648 F.2d 814, 819 (3d Cir. 1981) (commenting that right of access "antedates the Constitution"); *see also* Arthur A. Miller, *Confidentiality, Protective Orders, and Access to the Courts*, 105 HARV. L. REV. 427, 429 (1991) (stating that "the right of public access to court proceedings and records derives from our English common law heritage"); Brian T. Fitzgerald, Note, Sealed v.

precisely defined the bounds of this common-law right.[3] Consequently, the law concerning public access varies among the circuit courts.[4]

The United States Court of Appeals for the Third Circuit recently has had numerous opportunities to address whether the right of access applies to various types of judicial records.[5] Recent decisions, particularly *Republic of the Philippines v. Westinghouse Electric Corp.*[6] and *Leucadia, Inc. v. Applied Extrusion Technologies, Inc.*,[7] demonstrate that the Third Circuit believes that the right of public access applies to a broad range of judicial records.[8] These cases also demonstrate, however, that this right is not absolute.[9]

Sealed: *A Public Court System Going Private*, 6 J.L. & POL. 381, 395 (1990) (noting that strong common-law presumption of access to judicial records "has been recognized since before the United States Constitution was adopted"); William O. Key, Note, *The Common Law Right to Inspect and Copy Judicial Records: In Camera or On Camera*, 16 GA. L. REV. 659, 659-66 (1982) (noting that common-law right of access predates Constitution, and discussing history of English common law concerning right of access); Alan E. Marder, Note, *The Common Law Right of Access to Taped Evidence*, 50 GEO. WASH. L. REV. 465, 465 (noting that "[t]he common law right of access to judicial records predates the Constitution, tracing its roots to early English common law").

3. For a discussion of the Supreme Court precedent concerning the right of access to judicial records, see *infra* notes 18-23 and accompanying text.

4. *See generally* Ronald A. May, Recent Development, *Public Access to Civil Court Records: A Common Law Approach*, 39 VAND. L. REV. 1465, 1468-87 (1986) (discussing varying approaches taken by United States Courts of Appeals in analyzing scope of right of access). For a further discussion of the circuit courts' approaches to the common-law right of public access to judicial records, see *infra* notes 24-56 and accompanying text.

5. *See* Leucadia, Inc. v. Applied Extrusion Technologies, Inc., 998 F.2d 157 (3d Cir. 1993) (addressing whether right of access extended to materials filed in conjunction with non-discovery pre-trial motions and discovery pre-trial motions); Republic of the Phil. v. Westinghouse Elec. Corp., 949 F.2d 653 (3d Cir. 1991) (addressing whether right of access applied to materials filed in conjunction with summary judgment motion); Littlejohn v. BIC Corp., 851 F.2d 673 (3d Cir. 1988) (addressing whether right of access applied to confidential documents admitted in civil trial as exhibits and to portions of trial record into which other confidential documents were read); Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs., 800 F.2d 339 (3d Cir. 1986) (addressing whether right of access extended to materials filed in conjunction with settlement agreement); Publicker Indus. v. Cohen, 733 F.2d 1059 (3d Cir. 1984) (addressing whether right of access applied to civil trials and civil trial records); United States v. Criden, 648 F.2d 814 (3d Cir. 1981) (addressing whether right of access extended to tapes admitted into evidence in criminal trial). For a discussion of these Third Circuit decisions, see *infra* notes 64-127 and accompanying text.

6. 949 F.2d 653 (3d Cir. 1991).

7. 998 F.2d 157 (3d Cir. 1993).

8. For a discussion of the Third Circuit's analyses in *Westinghouse* and *Leucadia*, see *infra* notes 94-132 and accompanying text.

9. *See Leucadia*, 998 F.2d at 165 (holding that common-law right of public access to judicial records does not apply to "discovery motions and their supporting documents"); *Westinghouse*, 949 F.2d at 661 (insinuating that common-law right of public access might not apply to "motions that are part of the discovery proceedings").

This Casebrief discusses the Third Circuit's approach concerning the right of public access to judicial records.[10] Part II summarizes the history of this common-law right.[11] This section reviews the scant Supreme Court precedent discussing the right of public access, and also provides an overview of the various approaches taken by the circuit courts.[12] Part III outlines the evolution of the right of access in the Third Circuit.[13] Part IV then analyzes the most recent Third Circuit decisions dealing with this common-law right.[14] This section attempts to develop an analytical framework that demonstrates the Third Circuit's approach to deciding whether

10. The common-law right of access is merely a presumptive right, not an absolute right. *See* Nixon v. Warner Communications, Inc., 435 U.S. 589, 598 (1978) (noting that "right to inspect and copy judicial records is not absolute"); SEC v. Van Waeyenburghe, 990 F.2d 845, 848 (5th Cir. 1993) (stating that "the public's common law right [of access] is not absolute"); Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs., 800 F.2d 339, 344 (3d Cir. 1986) (stating that "[j]ust as the right of access is firmly entrenched, so also is the correlative principle that the right of access . . . is not absolute"); United States v. Webbe, 791 F.2d 103, 106 (8th Cir. 1986) (noting that common-law right of access to judicial records is presumption, not absolute right); Fitzgerald, *supra* note 2, at 395-96 (same). The trial court, in its discretion, may find that other concerns override the presumption of access. *See Nixon*, 435 U.S at 599 ("[T]he decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case."); Baltimore Sun Co. v. Goetz, 886 F.2d 60 (4th Cir. 1989) (noting that trial court has discretion to grant or deny public access); *Bank of Am.*, 800 F.2d at 344 (noting that "common law right of access must be balanced against the factors mitigating against access" (citing United States v. Criden, 648 F.2d 814, 818 (3d Cir. 1981))); *see also* Donna A. Moliere, *The Common Law Right of Public Access When Audio and Video Tape Evidence in a Court Record Is Sought for Purposes of Copying and Dissemination to the Public*, 28 LOY. L. REV. 163, 167 (1982) (noting that decision to allow public access to judicial records is within trial court's discretion). Trial courts generally "justif[y] their decisions to restrict access based on the confidential, sensitive, or privileged nature of the documents at issue." Susan A. Maurer, Note, *Civil Procedure—Access to Sealed Settlement Agreements Based on Common Law Right of Access to Judicial Proceedings*—Bank of America National Trust and Savings Association v. Hotel Rittenhouse Associates (Appeal of FAB III Concrete Corp.), 800 F.2d 339 (3d Cir. 1986), 60 TEMP. L.Q. 1023, 1023 (1987). This Casebrief, however, focuses only on the Third Circuit's approach to deciding whether the presumption of the right of access applies to various judicial records. This Casebrief does not address the competing factors that may supersede this presumption.

11. For a discussion of the history of the common-law right of public access to judicial records, see *infra* notes 17-56 and accompanying text.

12. For a discussion of the Supreme Court precedent discussing the common-law right of access to judicial records, see *infra* notes 18-23 and accompanying text. For an overview of the circuit courts' approaches to the right of access, see *infra* notes 24-56 and accompanying text.

13. For a discussion of the evolution of law in the Third Circuit concerning the right of public access to judicial records, see *infra* notes 57-132 and accompanying text.

14. For an analysis of the Third Circuit's most recent decisions concerning the right of access to judicial records, namely Republic of the Philippines v. Westinghouse Electric Corp., 949 F.2d 653 (3d Cir. 1991), and Leucadia, Inc. v. Applied Extrusion Technologies, Inc., 998 F.2d 157 (3d Cir. 1993), see *infra* notes 94-127 and accompanying text.

the right of access extends to a particular type of judicial record.[15] Finally, Part V concludes that the Third Circuit consistently extends the right of access to a particular record if it determines that public access would ensure trustworthiness and respect for the judicial system.[16]

II. OVERVIEW OF THE COMMON-LAW RIGHT OF PUBLIC ACCESS

The common-law right of public access to judicial records is well-settled.[17] The United States Supreme Court, in *Nixon v. Warner Communications, Inc.*,[18] formally acknowledged the established courtroom practice of providing public access to judicial records.[19] Specifically, the Supreme Court stated that "it is clear that the courts of this country recognize a general right to inspect and copy . . . judicial records and documents."[20]

15. For a discussion of the Third Circuit's approach to extending the right of access, see *infra* notes 94-132 and accompanying text.

16. For a discussion of cases in which the Third Circuit has extended the common-law right of access, see *infra* notes 57-132 and accompanying text.

17. *See* Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978) (noting that American courts recognize general right to inspect public records); Smith v. United States Dist. Court, 956 F.2d 647, 649 (7th Cir. 1992) ("The federal common law right of access to judicial records is well recognized."); Publicker Indus. v. Cohen, 733 F.2d 1059, 1066 (3d Cir. 1984) ("The existence of a common-law right of access to judicial proceedings and judicial records is beyond dispute."); *see also* Miller, *supra* note 2, at 428 ("By longstanding tradition, the American public is free to view the daily activities of the courts through an expansive window that reveals both our criminal and civil justice systems."); Key, *supra* note 2, at 659 (noting that American courts "recognize a general common law right to inspect and copy judicial records"); Marder, *supra* note 2, at 465-66 (commenting that American courts have recognized common-law right of access for century); May, *supra* note 4, at 1466 ("Courts have long recognized a general common law right of access to courtroom proceedings and court records." (footnotes omitted)); Kevin J. Mulry, Comment, *Access to Trial Exhibits in Civil Suits: In re* Reporters Committee for Freedom of the Press, 60 ST. JOHN'S L. REV. 358, 363 (1986) ("Federal courts have consistently recognized a presumptive common-law right of access to judicial proceedings and records.").

18. 435 U.S. 589 (1978).

19. *Id.* In *Nixon*, the Supreme Court addressed whether the purported common-law right of public access to judicial records required the district court to release the infamous tapes admitted into evidence in the criminal trial of ex-President Nixon. *Id.* During the trial, various members of the media filed a motion with the district court seeking permission to copy these audiotapes, which were played to the jury and the public in attendance at the trial. *Id.* at 594. The district court denied the petition, and the Third Circuit reversed. *Id.* at 595-96.

The Supreme Court reversed the Third Circuit's decision, and thereby denied the media access to the tapes because of the Presidential Recordings and Materials Preservation Act. *Id.* at 602-08. This Act specified procedures for determining when presidential materials such as the Watergate tapes were to be released. *Id.* at 603. Although ultimately deciding the case on statutory grounds, the Court took the opportunity to acknowledge that a common-law right of public access to judicial records exists. *Id.* at 597.

20. *Id.* In reaching this conclusion, the Court referred to numerous lower court decisions. *See id.* at 597 nn.7-8. For further discussion of the Supreme Court's recognition in *Nixon* of the right of access, see also Key, *supra* note 2, at 1468-70.

The *Nixon* Court also noted that the "contours" of this common-law right have never been defined with any precision.[21] The Court, however, declined the opportunity to clarify these contours.[22] In addition, the Court has not subsequently defined them.[23]

Because of this lack of guidance from the Supreme Court, the circuit courts have not been given precise guidelines for determining whether the right of access applies to a particular type of judicial record.[24] In general, these courts have taken a case-by-case approach, determining whether the right of access applies to a particular type of judicial record as the issue comes before the court.[25] The circuit courts' decisions have demonstrated a trend toward applying the right of access to a broad range of judicial records.[26]

The first major issue that the circuit courts faced after the Supreme Court's decision in *Nixon* was whether to extend the common-law right of access to civil trial records as well as criminal trial records.[27] All circuit courts addressing this issue extended the common-law right of access to

21. *Nixon*, 435 U.S. at 597 (stating that "contours [of right of access] have not been delineated with any precision"); *see also* Maurer, *supra* note 10, at 1023 (noting that Supreme Court "has not articulated specific substantive and procedural guidelines by which to define this particular right [of access]"); May, *supra* note 4, at 1467-68 (noting that "few courts have had the opportunity to examine and define the scope and characteristics of this common law right of access to judicial records").

22. *See Nixon*, 435 U.S. at 599 (stating that "we need not undertake to delineate precisely the contours of the common-law right, as we assume, *arguendo*, that it applies to the tapes at issue here").

23. *See* Key, *supra* note 2, at 659-60 (noting "the confusing Supreme Court precedent that acknowledges a common law right of access but fails to define adequately the right"). *Nixon* is the only case in which the Supreme Court has discussed the common-law right of access. Subsequently, the Court has addressed only the First Amendment right of access. *See, e.g.*, Seattle Times v. Rhinehart, 467 U.S. 20 (1984) (discussing how protective orders affect First Amendment right of access); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) (discussing First Amendment right to attend criminal trials, and discussing instances when courts may deny access to criminal trials); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (discussing First Amendment right to attend criminal trials).

24. *See* Key, *supra* note 2, at 659-60 (noting that "judicial controversy has erupted as federal courts attempt to delineate this right of public access in light of the confusing Supreme-Court precedent"); May, *supra* note 4, at 1470 (noting that since *Nixon*, "subsequent judicial considerations of whether to allow public access to court records have resulted in inconsistent rationales and holdings").

25. *See generally* Valley Broadcasting Co. v. United States Dist. Court, 798 F.2d 1289, 1293-94 (9th Cir. 1986) (discussing differing approaches taken by circuit courts in applying right of access); May, *supra* note 4, at 1477-91 (providing overview of recent circuit court decisions concerning common-law right of access).

26. For a discussion of the circuit courts' generally expansive approaches to the common-law right of access, see *infra* notes 27-56 and accompanying text.

27. The precise issue in *Nixon* was whether the district court should allow public access to tapes admitted into evidence in a criminal trial. *Nixon*, 435 U.S. at 591. Therefore, while the Court in *Nixon* recognized that a common-law right of access exists, it is unclear whether the Court intended for this right to apply to civil court records as well as criminal court records.

civil trial records.[28] These courts noted that historically civil trials, as well as criminal trials, have been presumptively open to the public.[29] Furthermore, the courts reasoned that allowing public access to records of civil proceedings furthered the same policies as allowing public access to criminal proceedings.[30] The courts concluded that in both instances public

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The circuit courts, consequently, have invariably applied the common-law right of access to criminal trial records. *See, e.g.*, United States v. Corbitt, 879 F.2d 224 (7th Cir. 1989) (holding that common-law right of access applies to pre-sentence reports); United States v. Salerno, 828 F.2d 958 (2d Cir. 1987) (applying common-law right of access to videotaped deposition shown to jury in criminal trial); United States v. Webbe, 791 F.2d 103 (8th Cir. 1986) (applying presumption of common-law right of access to audio tapes admitted into evidence in mail fraud trial); United States v. Edwards, 672 F.2d 1289 (7th Cir. 1982) (applying presumption of common-law right of access to audio and video tapes admitted into evidence in criminal trial); Belo Broadcasting Corp. v. Clark, 654 F.2d 423 (5th Cir. 1981) (same); United States v. Janrette, 653 F.2d 609 (D.C. Cir. 1981) (same); United States v. Criden, 648 F.2d 814 (3d Cir. 1981) (same); United States v. Myers, 635 F.2d 945 (2d Cir. 1980) (same). When courts address whether to extend the right of access beyond these particular records, however, debate arises.

For a discussion of the circuit courts' application of the right of access to various judicial records, see *supra* notes 24-26 and *infra* notes 28-56 and accompanying text.

28. *See, e.g.*, FTC v. Standard Fin. Management Corp., 830 F.2d 404, 409 (1st Cir. 1987) ("[W]e rule that relevant documents which are submitted to, and accepted by, a court of competent jurisdiction in the course of [civil] adjudicatory proceedings, become documents to which the presumption of public access applies." (footnote omitted)); *In re* Continental Ill. Sec. Litig., 732 F.2d 1302, 1308 (7th Cir. 1984) (finding that right of access extended to civil cases, and applying right of access to special litigation committee report entered into evidence in civil trial); Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165 (6th Cir. 1983) (stating that both First Amendment and common-law right of access apply to civil court records, and holding that sealed court documents concerning civil litigation should be released for public inspection), *cert. denied*, 465 U.S. 1100 (1984); Newman v. Graddick, 696 F.2d 796, 802-03 (11th Cir. 1983) (applying common-law right of access to civil record for first time, specifically to prisoner lists submitted in civil trial); *see also* Smith v. United States Dist. Court, 956 F.2d 647, 650 (7th Cir. 1992) (noting that "right of access applies to civil as well as criminal cases").

29. *See, e.g., Brown*, 710 F.2d at 1178-79 ("For many centuries, both civil and criminal trials have traditionally been open to the public." (quoting Gannett Co. v. De Pasquale, 443 U.S. 368, 386 n.15 (1979))); *Newman*, 696 F.2d at 802 (noting that "historically both civil and criminal trials have been presumptively open" (quoting Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 n.17 (1980))). *See generally Standard Fin.*, 830 F.2d at 408 n.4 (applying presumption of right of access to financial statement filed in conjunction with litigation, and noting that "[w]hile this presumption has most commonly been applied to records in criminal proceedings, several courts have applied it, as we do here, to civil proceedings").

30. *Continental*, 732 F.2d at 1308 ("[T]he policy reasons for granting public access to criminal proceedings apply to civil cases as well."); *Brown*, 710 F.2d at 1179 (noting that "policy considerations [of right of access] apply to civil as well as to criminal cases"); *Newman*, 696 F.2d at 801 ("If it is beneficial to have public scrutiny of criminal proceedings . . . then it is also helpful to allow public access to [certain] civil proceedings . . . .").

access insured integrity in the judicial system, respect for the judicial system, and a well-informed public.[31]

Subsequently, the circuit courts have had to delineate the extent of the right of access within the civil system.[32] One major issue that these courts have faced is whether the right of access extends to documents filed with the court in conjunction with settlement agreements.[33] The main concern with extending the right of access to these records is that settlement agreements are traditionally a non-public aspect of litigation.[34] This tradition raises the issue of whether there is a need for public scrutiny of settlement agreements.[35] Nonetheless, every court addressing this issue, namely the United States Court of Appeals for the Third, Fifth, Ninth and

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31. *Continental*, 732 F.2d at 1308 (reasoning that in civil cases, as well as in criminal cases, "policies [of right of access] relate to the public's right to monitor the functioning of our courts, thereby insuring quality, honesty and respect for our legal system"); *Brown*, 710 F.2d at 1178 ("Public access creates a critical audience and hence encourages truthful exposition of facts, an essential function of a trial."); *Newman*, 696 F.2d at 803 (noting that common-law right of access "is important if the public is to appreciate fully the often significant events at issue in public litigation and the workings of the legal system").

For a general discussion of the policy considerations underlying the right of public access to judicial proceedings and records, see Fitzgerald, *supra* note 2. The author begins his article with this introductory quote:

> A strong and independent judiciary is the bulwark of a free society. If there were no public access to proceedings before the trial judge, there would be no safeguard for judicial independence nor any assurance of judicial integrity. It is the existence of the right of access that is critical to the court's autonomy, not the public's exercise of that right.

Id. at 381 (quoting Florida Freedom Newspapers, Inc. v. Sirmons, 508 So. 2d 462, 464 (Fla. Dist. Ct. App. 1987)); *see also* Marder, *supra* note 2, at 466-67 (discussing "several policy interests support[ing] the right of access to judicial records").

32. For a discussion of the circuit courts' treatment of the common-law right of access, see May, *supra* note 4, at 1477-91.

33. For a discussion of the circuit courts' application of the right of access to settlement documents, see *infra* notes 34-37 and accompanying text. For a specific discussion of the Third Circuit's approach, see *infra* notes 73-79 and accompanying text.

34. *See* Brown v. Advantage Eng'g, Inc., 960 F.2d 1013, 1016-18 (11th Cir. 1992) (Edmundson, J., dissenting) (noting that settlement negotiations "involve[ ] in no way . . . public nature of trials . . . in open court"); *see also* EEOC v. Erection Co., 900 F.2d 168, 169-70 (9th Cir. 1990). In *EEOC v. Erection Co.*, the Ninth Circuit discussed whether allowing public access to a consent decree filed with a settlement agreement would violate Erection Company's privacy interests. *Id.* at 170. Particularly, the court considered whether allowing public access to monetary figures contained in the consent decree would harm the company's competitive bidding status. *Id.* The court also noted the possibility that allowing public access to settlement agreements, which are traditionally private, might discourage parties from settling and, therefore, increase litigation. *Id.*

35. *See Brown*, 960 F.2d at 1017 (Edmundson, J., dissenting) ("It is nowhere . . . plain to me that the public wants much or needs much to know about every dispute settled between private parties . . . ."). For an in-depth discussion of the need for public access to documents filed with settlement agreements, see Anne-Therese Bechamps, Note, *Sealed Out-of-Court Settlements: When Does the Public Have a Right to Know?*, 66 NOTRE DAME L. REV. 117, 120-32 (1990).

Eleventh Circuits, included the right of access to these documents.[36] Ultimately, these courts decided that settlement agreements are an important aspect of the civil judicial system, and therefore, public access to these documents is necessary to promote trustworthiness in the judicial system and enhance public understanding of the system.[37]

The Second, Third, Fourth and Seventh Circuits also considered whether the right of access applies to documents filed in conjunction with summary judgment motions.[38] Materials filed with summary judgment motions, much like settlement agreements, have not historically been made available to the public.[39] All of these courts, however, concluded that the right of access applied to these documents.[40] Each court rea-

36. *See* SEC v. Van Waeyenberghe, 990 F.2d 845, 849 (5th Cir. 1993) ("The presumption in favor of the public's common law right of access to court records . . . applies to settlement agreements that are filed and submitted to the district court . . . ."); *Brown*, 960 F.2d at 1015-16 (applying right of access to documents filed with court in case where parties eventually settled); *Erection Co.*, 900 F.2d at 169-70 (applying presumption of right of access to consent decree filed with settlement agreement); Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs., 800 F.2d 339 (3d Cir. 1986) (holding that right of access applied to documents filed with settlement agreement). For an extensive discussion of the Third Circuit's analysis in *Bank of America*, see *infra* notes 73-79 and accompanying text.

37. *See Waeyenberghe*, 990 F.2d at 849 ("Public access [to settlement agreements] serves to promote trustworthiness of the judicial process, . . . and to provide the public with a more complete understanding of the judicial system . . . ." (quoting Littlejohn v. BIC Corp., 851 F.2d 673, 682 (3d Cir. 1988))); *Brown*, 960 F.2d at 1016 (noting that even if parties eventually settle, "[o]nce a matter is brought before the court for resolution, it is no longer solely the parties' case, but also the public's case"); *Erection Co.*, 900 F.2d at 170 (noting that policies favoring public access to settlement agreements "include public interest in understanding the judicial process").

38. *See* Republic of the Phil. v. Westinghouse Elec. Corp., 949 F.2d 653 (3d Cir. 1991) (addressing whether common-law right of access was applicable to material filed in conjunction with summary judgment motion); Rushford v. New Yorker Magazine, 846 F.2d 249 (4th Cir. 1988) (discussing whether right of public access applied to pleading and documents filed with summary judgment motion in defamation case); *In re* Continental Ill. Sec. Litig., 732 F.2d 1302, 1309 (7th Cir. 1984) (discussing whether common-law right of access applied to evidence offered in support of motion to terminate shareholders derivative suit); Joy v. North, 692 F.2d 880 (2d Cir. 1982) (addressing whether special litigation committee reports filed in connection with summary judgment motion should be made available to public), *cert. denied*, 460 U.S. 1051 (1983).

For an extensive discussion of the Third Circuit's analysis in *Westinghouse*, see *infra* notes 94-108 and accompanying text.

39. *See Continental*, 732 F.2d at 1309 (noting that, traditionally, courts have not applied common-law right of access to pre-trial motions such as summary judgment motions). *See generally* May, *supra* note 4, at 1501 (commenting that "pretrial information, even if filed in court, [such as material filed with summary judgment motions,] generally has not been open for public inspection").

40. *See Westinghouse*, 949 F.2d at 659-62 (concluding that common-law right of access applied to discovery materials filed with summary judgment motion); *Rushford*, 846 F.2d at 252-54 (applying common-law presumption of right of access to pleading and documents filed with summary judgment motion in defamation case); *Continental*, 732 F.2d at 1309 ("We hold . . . that the presumption of access

soned that it was important for the public to scrutinize a district court's ruling on a summary judgment motion.[41] Consistent with the analyses in the settlement agreement cases, the courts determined that allowing public access to summary judgment motions was essential to promote honesty and respect in the judicial system.[42]

Thus, the circuit courts believed that public access is necessary with respect to a variety of judicial records in order to uphold the integrity of the judicial system.[43] Significantly, however, the courts have not extended the common-law right of public access to all judicial records under consideration.[44] The First Circuit, for example, has decided that the right of

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applies to the hearings held and evidence introduced in connection with [the] motion to terminate."); *Joy*, 692 F.2d at 893 (applying presumption of right of public access to special litigation committee report filed in connection with summary judgment motion). While the motion considered in *Continental* was technically a motion to terminate a derivative suit and not a summary judgment motion, the Seventh Circuit's analysis in this case is relevant because the court characterized the motion to terminate as a "hybrid summary judgment motion." *Continental*, 732 F.2d at 1309.

Interestingly, the United States Court of Appeals for the District of Columbia Circuit, in *In re Reporters Committee for Freedom of the Press*, concluded that a right of access did not apply to documents filed with cross-motions for summary judgment. 773 F.2d 1325, 1330-39 (D.C. Cir. 1985). However, the D.C. Circuit only addressed the specific issue of whether the First Amendment guaranteed a right of access to these documents. *Id.* The court never addressed whether the common-law right of access applied to the documents. *Id.* For a discussion of the D.C. Circuit's analysis in *Reporters Committee*, see Mulry, *supra* note 17, at 359, and Posley-Gelber, *supra* note 2, at 75-81.

41. *See Rushford*, 846 F.2d at 252 (noting that public access to materials filed with summary judgment motions is necessary "[b]ecause summary judgment adjudicates substantive rights and serves as a substitute for trial"); *Continental*, 732 F.2d at 1309 (noting that public access to materials filed with motion to terminate was essential because "[t]he district court was required to make complex factual and legal determinations"); *Joy*, 692 F.2d at 892-93 (noting significance of public right of access to materials filed in connection with summary judgment motions).

42. *See, e.g., Rushford*, 846 F.2d at 253 (emphasizing that right of access serves important public interests); *Continental*, 732 F.2d at 1308 (reasoning that public access was essential to further "the public's right to monitor the functioning of our courts, thereby insuring quality, honesty and respect for our legal system").

43. *See generally* Miller, *supra* note 2. In this article, Professor Miller of Harvard University remarks that a "nationwide campaign is underway [in American courts] to [apply] a presumption of . . . access to *all* information produced in litigation." *Id.* at 429. Miller concludes that such a trend is "ill-advised." *Id.* at 431-32. Miller discusses the policy reasons for limiting public access with respect to some documents. *Id.* at 463-502. Specifically, Miller reasons that an unlimited right to access would hinder judicial efficiency and "unduly impinge upon litigants' rights to maintain their privacy, to protect valuable property interests, and to resolve their legal disputes freely with minimal intrusion from outside forces." *Id.* at 432.

44. *See* Miller, *supra* note 2, at 429 (noting that common-law right of access has not yet been applied to all judicial records); Bechamps, *supra* note 35, at 121-25 (noting that courts still disagree about "documents to which the public right [of access] attaches," and attempting to distinguish various courts' approaches).

access does not apply to documents filed in conjunction with discovery motions.[45]

In *Anderson v. Cryovac, Inc.*, the First Circuit addressed whether a newspaper company possessed a right of access to materials filed in conjunction with a discovery motion.[46] In *Anderson*, the Globe Newspaper Company intervened in a class action suit brought by Massachusetts residents petitioning for access to materials filed by the plaintiffs with a discovery motion.[47] The district court denied the Globe's petition.[48] On appeal, the First Circuit affirmed, concluding that the common-law right of access does not apply to documents filed in conjunction with discovery motions.[49]

In its analysis, the First Circuit initially noted that no common-law right of public access to discovery motions traditionally existed.[50] Further-

45. *See* Anderson v. Cryovac, Inc. 805 F.2d 1 (1st Cir. 1986) (holding that common-law right of public access does not extend to materials filed with discovery motions); *accord* Leucadia, Inc. v. Applied Extrusion Technologies, Inc., 998 F.2d 157 (3d Cir. 1993) (holding that common-law right of access to judicial records does not extend to materials filed with discovery motions). *But cf.* Mokhiber v. Davis, 537 A.2d 1100 (D.C. 1988) (holding that common-law right of public access extends to materials filed in connection with discovery motions).

For a discussion of the First Circuit's analysis in *Anderson*, see *infra* notes 46-52 and accompanying text. For a discussion of the Third Circuit's analysis in *Leucadia*, see *infra* notes 109-24 and accompanying text. For a discussion of the District of Columbia Court of Appeals' analysis in *Mokhiber*, see *infra* note 53.

46. 805 F.2d 1 (1st Cir. 1986). Specifically, the court addressed whether the common-law right of access applied to papers filed with the court in connection with plaintiffs' motions to compel the production of documents and to quash a deposition subpoena. *Id.* at 4.

47. *Id.* The residents of Woburn, Massachusetts alleged that Cryovac, Inc., the John J. Riley Co., and other unidentified companies contaminated Woburn's water supply, causing an increase in cancer, leukemia and other serious diseases. *Id.* at 3. These serious allegations generated great publicity. *Id.* Consequently, the district court issued a protective order prohibiting the parties from revealing information about the case, except to certain government agencies. *Id.* Globe Newspaper moved to modify or vacate the protective order with respect to the materials at issue. *Id.* at 4.

48. *Id.* The district court denied all motions to vacate or modify the protective order. *Id.*

49. *Id.* at 13 ("We decline to extend to materials used only in discovery the common law presumption that the public may inspect judicial records."). Interestingly, subsequent to its decision in *Anderson*, the First Circuit, in *FTC v. Standard Financial Management Corp.*, broadly characterized the right of access, stating that "relevant documents which are submitted to, and accepted by a court of competent jurisdiction in the course of adjudicatory proceedings, become documents to which the presumption of public access applies." 830 F.2d 404, 409 (1st Cir. 1987) (holding that presumption of public access applied to financial statements submitted to Federal Trade Commission during litigation). For a discussion of the First Circuit's decision in *Standard Financial*, see Bechamps, *supra* note 35, at 123. The First Circuit, however, has not overruled its decision in *Anderson*, and therefore, the First Circuit still maintains that the right of access does not apply to materials filed with discovery motions.

50. *Id.* Specifically, the court noted that before the Federal Rules of Civil Procedure were enacted in 1938, parties were not required to reveal information

more, the court reasoned that public access "would be incongruous with the goals of the discovery process" and might make the discovery process "more complicated and burdensome than it already is."[51] Finally, the First Circuit concluded that discovery motions have no bearing on a "litigant's substantive rights" and, therefore, public scrutiny was not necessary.[52]

Thus, the First Circuit decided that the common-law right of access does not extend to materials filed with discovery motions because public access would not significantly further the objectives sought by the common-law right.[53] As exemplified in *Anderson*, circuit courts often decide

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about their cases, and therefore, the public had no means of gaining access to this information. *Id.* at 12 (citing 8 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2001, at 14, § 2002, at 21 (1970)). The Federal Rules of Civil Procedure now provide guidelines for the filing of discovery motions. *See* FED. R. CIV. P. 5(d), 26(c).

51. *Anderson*, 805 F.2d at 12-13.

52. *Id.* at 13. Because the court found that discovery proceedings have no bearing on a litigant's substantive rights, the court concluded that "discovery is fundamentally different from those proceedings for which a public right of access has been recognized." *Id.* Thus, the court implied that public scrutiny is only valuable when a court adjudicates substantive issues not procedural matters.

For a discussion of the value of public access to pre-trial, procedural litigation, see Bechamps, *supra* note 35, at 124. Bechamps rejects the distinction commonly made between materials filed in connection with substantive proceedings and materials filed with procedural motions. *Id.* at 123-25. Bechamps states that "[a] system that limits access to court documents not on the basis of the information they contain, but on the basis of the label they bear, is not conducive to the goals of confidence, understanding and respect." *Id.* at 124.

53. *Anderson*, 805 F.2d at 12-13; *see also* Mokhiber v. Davis, 537 A.2d 1100 (D.C. 1988). The *Mokhiber* court also addressed whether the right of access applies to materials filed with discovery motions. *Mokhiber*, 537 A.2d at 1111-13. In contrast to the First Circuit, the *Mokhiber* court determined that the common-law right of access does extend to materials filed with discovery motions. *Id.*

The underlying litigation in *Mokhiber* involved a lawsuit filed by an employee who alleged that she had been improperly fired from the American Association of Retired Persons and the National Retired Teachers Association. *Id.* at 1103. The trial court issued protective orders preventing the parties from disclosing any information learned in discovery. *Id.*

Four years after the underlying litigation was settled, Mokhiber, a reporter who was investigating "corporate misconduct in America," intervened to challenge the protective orders and asserted that he had a common-law right of access to the protected materials. *Id.* at 1104. The trial court denied the petition. *Id.*

On appeal, however, the District of Columbia Court of Appeals reversed. *Id.* The court of appeals concluded that "the presumptive public right of access does apply to motions filed with the court concerning discovery, to evidence submitted with such motions - including materials produced during discovery - and to the court's dispositions, if any." *Id.* at 1111. The court reasoned that, although traditionally no common-law right of access to discovery motions exists, this lack of tradition should not defeat the claim for access. *Id.* at 1111-12. It concluded that this lack of tradition exists only because discovery proceedings are a relatively new type of proceeding. *Id.* at 1112. Therefore, the court extended the right of access to materials filed with discovery motions because it reasoned that this right should not be "frozen in history," but rather it must "reflect changes brought by the times." *Id.* Furthermore, the court stated that public access to discovery motions serves the same purpose as public access to other kinds of motions. *Id.* The court

whether to apply the right of access to a particular type of judicial record largely upon whether public access is necessary to promote trustworthiness and respect in the judicial system.[54] Generally, circuit court decisions demonstrate a trend toward finding that public access is necessary with respect to most types of judicial records.[55] Nevertheless, the First Circuit's decision in *Anderson* demonstrates that this right does not extend unequivocally to all judicial records.[56]

III. THIRD CIRCUIT OVERVIEW

The right of public access to judicial records was formally recognized by the Third Circuit in *United States v. Criden*.[57] The *Criden* case concerned the highly publicized criminal trial of two members of Philadelphia's City Council.[58] The three major television networks and Westinghouse Broad-

viewed discovery motions as indistinguishable from other judicial records and, consequently, concluded that public access is necessary to uphold the integrity of the judicial system. *Id.*

For further analysis of the District of Columbia Court of Appeals' decision in *Mokhiber*, see Bechamps, *supra* note 35, at 131.

54. *See generally* SEC v. Van Waeyenberghe, 990 F.2d 845, 849 (5th Cir. 1993) (extending right of access and emphasizing that public access promotes trustworthiness and promotes public understanding of the judicial system); EEOC v. Erection Co., 900 F.2d 168, 170 (9th Cir. 1990) (extending right of access and emphasizing that public access promotes "public interest in understanding the judicial process"); *In re* Continental Ill. Sec. Litig., 732 F.2d 1302, 1308 (7th Cir. 1984) (extending right of access and emphasizing that public access "insur[es] quality, honesty and respect for our legal system"); Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1178 (6th Cir. 1983) (extending right of access and emphasizing that public access "encourages truthful exposition of facts"); Newman v. Graddick, 696 F.2d 796, 803 (11th Cir. 1983) (extending right of access and emphasizing that public access allows public to fully appreciate judicial system). For a discussion of circuit court cases emphasizing policies served by the right of public access, see *supra* notes 24-53 and *infra* notes 55-56 and accompanying text.

55. For a discussion of circuit court decisions extending the right of access to a broad range of judicial records, see *supra* notes 24-54 and *infra* note 56 and accompanying text. For a general discussion of state court approaches to the right of access, see C. Karnezis, Annotation, *Restricting Public Access to Judicial Records of State Courts*, 84 A.L.R.3D 598 (1978).

56. *See Anderson*, 805 F.2d at 13 (concluding that common-law right of access does not apply to materials filed in connection with discovery motions). For a discussion of why some courts are reluctant to apply the common-law right of access to discovery proceedings, see Fitzgerald, *supra* note 2, at 390-91. Fitzgerald suggests that this common-law right is seldom asserted to gain access to discovery materials because the common-law right of access "does not apply to non-public documents or records." *Id.* at 391.

57. 648 F.2d 814 (3d Cir. 1981). The Third Circuit quoted the Supreme Court and stated, "[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." *Id.* at 819 (quoting Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978)). *See generally*, Moliere, *supra* note 10, at 170-73 (discussing Third Circuit's analysis of right of access in *Criden*).

58. *Criden*, 648 F.2d at 815. This trial arose out of the highly publicized Abscam prosecutions, in which the FBI charged numerous public officials with bribery and other offenses. *Id.* at 814.

casting, Inc. requested permission to copy the audio and video tapes that had been admitted into evidence.[59] The district court denied the request.[60]

The Third Circuit reversed, pronouncing a strong common-law right of public access to judicial records.[61] In its decision, however, the Third Circuit applied the right of access only to materials entered into evidence in a criminal trial.[62] Therefore, after *Criden*, it remained unclear whether the right of access extended to civil proceedings in the Third Circuit.[63] In subsequent decisions, the Third Circuit has attempted to define the types of judicial records to which the common-law right of access applies.[64]

Generally, the Third Circuit has extended the right of access to a particular type of judicial record if it concludes that "public access [would] serve[ ] to promote trustworthiness of the judicial process, to curb judicial abuses, and to provide the public with a more complete understanding of the judicial system."[65] For example, in *Publicker Industries, Inc. v. Cohen*,[66] the Third Circuit addressed whether the right of access applies to civil proceedings as well as criminal proceedings.[67] Philadelphia Newspapers,

59. *Id.* at 816. These networks also requested other district courts to provide them with access to Abscam tapes in their possession, thus requiring the Second Circuit and the District of Columbia Circuit to confront the issue of whether the right of access applied to the tapes. *See In re* National Broadcasting Co., 653 F.2d 609, 612 (D.C. Cir. 1981) (applying common-law right of access to Abscam tapes); *In re* National Broadcasting Co., 635 F.2d 945 (2d Cir. 1980) (same). *See generally* David Marburger, Comment, *In Defense of Broadcaster Access to Evidentiary Video and Audio Tapes*, 44 U. PITT. L. REV. 647, 655-57 (1983) (discussing Second, Third, and D.C. Circuits' application of common-law right of access to Abscam tapes); Lisa Kakaty Starczewski, Note, *Media Access to Tape-Recorded Evidence in Criminal Trials*, 32 VILL. L. REV. 183, 196-201 (1987) (same).

60. *Criden*, 648 F.2d at 816. The district court released transcripts of the tapes to the media, but refused to allow the media to copy the actual tapes. *Id.*

61. *Id.* at 819.

62. *Id.* at 822-23. For another example of the Third Circuit's application of the common-law right of access to criminal trial records, see United States v. Martin, 746 F.2d 964, 968 (3d Cir. 1984) (applying common-law right of access to audio tapes admitted into evidence in criminal trial and to transcripts of tape recordings given to jury).

63. The court in *Criden* did not elaborate on the breadth of this right in the Third Circuit; it simply acknowledged its existence. *See Criden*, 648 F.2d at 819 ("It is clear that the courts of this country recognize a general right [of access].").

64. For a discussion of the development of the law concerning the right of access in the Third Circuit, see *supra* notes 57-63 and *infra* notes 65-132 and accompanying text.

65. Littlejohn v. BIC Corp., 851 F.2d 673, 682 (3d Cir. 1988) (citing Publicker Industries, Inc. v. Cohen, 733 F.2d 1059, 1069-70 (3d Cir. 1984)). In *Littlejohn*, the Third Circuit considered these policy objectives when applying the right of access to transcripts of a civil trial and exhibits admitted into evidence. *Id.* For a discussion of *Littlejohn* and other cases in which the Third Circuit examines the policies served by public access, see *infra* notes 66-93 and accompanying text.

66. 733 F.2d 1059 (3d Cir. 1984).

67. *Id.* at 1066-67. *See generally* May, *supra* note 4, at 1483-86 (discussing Third Circuit's analysis in *Publicker*).

Inc. (PNI) and Dow Jones & Company petitioned for access to the closed hearings of the civil trial.[68] The court held that PNI and Dow Jones possessed a common-law right of access to these hearings.[69]

The Third Circuit first noted that the United States Supreme Court has only addressed the common-law right of access in connection with criminal trials.[70] However, the court also recognized that the civil trial "plays a particularly significant role in the functioning of the judicial process."[71] Therefore, the Third Circuit ultimately concluded that public scrutiny of civil records is necessary "so that truth may be discovered in civil *as well as* criminal matters."[72]

The Third Circuit subsequently expanded the right of access by concluding, in *Bank of America National Trust & Savings Ass'n v. Hotel Rittenhouse Associates*,[73] that the right of public access also applied to documents filed in connection with a settlement agreement.[74] In *Bank of America*, a contractor moved to unseal documents filed in connection with a settle-

68. *Publicker*, 733 F.2d at 1063. In the underlying litigation in *Publicker*, Publicker Industries filed suit against Cohen, who attempted to gain control of Publicker's board of directors. *Id.* at 1062. The district court closed the hearings in this lawsuit because of the sensitive business nature of the materials that were to be discussed. *Id.* at 1063.

69. *Id.* at 1067 ("[W]e hold that appellants PNI and Dow Jones possess a common law right of access to civil trials."). Although this language specifically refers to civil trials and not civil court records, the court referred to civil records in its analysis. *See id.* at 1066 (reasoning that "the public's right of access to civil trials and records is as well established as that of criminal proceedings and records"). Thus, the court's analysis has been interpreted as applying equally to records. *See* May, *supra* note 4, at 1478 n.99 ("[The *Publicker* decision] did discuss, and has a tremendous impact on . . . the right of access to civil court *documents*. This Recent Development, therefore, will discuss *Publicker Indus.* together with the recent decisions that have addressed specifically the issue of access to civil court documents.").

In *Publicker*, the Third Circuit also held that the First Amendment right of access applies to civil proceedings. *Publicker*, 733 F.2d at 1061. For a list of cases discussing the First Amendment right of access, see *supra* note 1.

70. *Publicker*, 733 F.2d at 1066.

71. *Id.* at 1070 (quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1982)).

72. *Id.* at 1067 (quoting Gannett Co. v. DePasquale, 443 U.S. 368, 386 n.15 (1979)). The Third Circuit proceeded to elaborate on the particular objectives served by public access. *See id.* at 1066-71. The court stated that public access "enhances the quality of justice" in the legal system and "provides information leading to a better understanding of the operation of government as well as confidence in and respect for our judicial system." *Id.* at 1070 (citing 6 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1834, at 435 (J. Chadbourn ed. 1976)); *see also* May, *supra* note 4, at 1485 ("The court [in *Publicker*] emphasized that the public right of access to civil trials is fundamental to the democratic form of government. According to the Third Circuit, public access to civil trials is crucial to guarantee free and informed discussion of governmental affairs.") .

73. 800 F.2d 339 (3d Cir. 1986).

74. *Id.* at 343. *See generally* Maurer, *supra* note 10, at 1043 (discussing Third Circuit's analysis in *Bank of America*).

ment agreement between a bank and project developer.[75] The district court denied the motion and the Third Circuit reversed, concluding that the right of access applied to these documents.[76]

Again, throughout its decision-making process, the Third Circuit focused on the need for public scrutiny. The court noted that a settlement agreement filed with a court is a "public component" of a civil trial.[77] Therefore, the Third Circuit concluded that settlement agreements are a matter "which the public has a right to know about and evaluate."[78] Thus, the Third Circuit extended the right of access to the settlement documents because it ultimately concluded that public access to these documents ensures trustworthiness and respect for the judicial system.[79]

The Third Circuit, in *Littlejohn v. BIC Corp.*,[80] had the opportunity to further elaborate on the rationale behind its expansive approach to the right of public access. In *Littlejohn*, PNI intervened in a products liability action initiated against BIC Corp.[81] PNI sought access to confidential documents admitted as trial exhibits and confidential material found in other portions of the trial record.[82] The district court permitted access to all the

75. *Bank of Am.*, 800 F.2d at 341. Bank of America and Hotel Rittenhouse Associates filed a settlement agreement with the district court. *Id.* Many documents concerning a motion to enforce this agreement were also filed with the court. *Id.* In connection with separate litigation, a concrete contractor and other creditors of Hotel Rittenhouse Associates requested access to the settlement documents. *Id.*

76. *Id.* at 341, 343.

77. *Id.* at 343-44. The court rejected the parties' arguments that "a settlement agreement is a nonpublic aspect of litigation that may properly be sealed from strangers to the agreement." *Id.* at 343 (citations omitted).

78. *Id.* at 344.

79. *Id.* at 345. The court noted that allowing public access to such settlement documents would provide the public "with [a] more complete understanding of the judicial system" and would "serve[ ] as a check on the integrity of the judicial process." *Id.* (citations omitted). Significantly, the court concluded that public access was necessary only because the parties chose to file their settlement agreement in court; if they had entered into a private agreement, access would have been denied. *See id.* at 345-46 ("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."); *see also* Maurer, *supra* note 10, at 1043 ("Because the documents . . . [in *Bank of America*] included motions and orders evidencing judiciary proceedings, the court refused to deny access.").

80. 851 F.2d 673, 682 (3d Cir. 1988).

81. *Id.* at 677. Plaintiff Littlejohn alleged that she had been seriously injured by a lighter manufactured by BIC. *Id.* at 676.

82. *Id.* at 676-77. The district court issued a protective order prohibiting the dissemination of any information or documents that BIC determined contained confidential trade secrets. *Id.* at 676. PNI desired access to materials subject to this protective order. *Id.* at 677. *See generally* Alan B. Morrison, *Protective Orders, Plaintiffs, Defendants and the Public Interest in Disclosure: Where Does the Balance Lie?*, 24 U. RICH. L. REV. 109 (1989) (discussing competing interests concerning protective orders and public access).

documents requested.[83]

On appeal, the Third Circuit affirmed, concluding that PNI had a right of access to these records.[84] In reaching this conclusion, the Third Circuit extolled the "social utility" of the right of access.[85] The court noted that the right of access ensures trustworthiness and "quality of justice" in the legal system.[86] In addition, the court commented that the "bright light" cast by public access deters incompetence and fraud.[87] Finally, the court stated that the right of access provides the public with a better understanding of the judicial system and its fairness.[88]

The great value that the Third Circuit has attributed to the right of access demonstrates why the court has extended the right of access to such a broad range of judicial records.[89] Significantly, however, the court has not extended the common-law right of public access to all judicial records it has considered.[90] In two recent cases, *Republic of the Philippines v. Westinghouse Electric Corp.*[91] and *Leucadia, Inc. v. Applied Extrusion Technologies, Inc.*,[92] the court declined to extend the right of access to materials filed in conjunction with discovery motions. These cases are noteworthy because they further elucidate the factors that the Third Circuit considers crucial in deciding whether to extend the right of access to a particular judicial record.[93]

IV. THE THIRD CIRCUIT'S EVOLVING APPROACH

In *Republic of the Philippines v. Westinghouse Electric Corp.*,[94] the Third Circuit recently addressed whether a common-law right of public access

83. *Littlejohn*, 851 F.2d at 677.

84. *Id.* at 687. The court conceded that the right of access applied to these documents because " 'there is a strong presumption that material introduced into evidence at trial should be made' available for public access." *Id.* at 678 (quoting United States v. Criden, 648 F.2d 814, 823 (3d Cir. 1981)).

85. *Id.* at 678.

86. *Id.*

87. *Id.*

88. *Id.* Essentially, the overview presented in *Littlejohn* summarizes the public policy concerns expressed by the Third Circuit in all of its public access cases decided before 1988. *Id.* For a discussion of these public access cases and the policy concerns addressed therein, see *supra* notes 57-79 and accompanying text.

89. *See* Maurer, *supra* note 10, at 1453 ("According to the Third Circuit, public access to civil trials is crucial to guarantee free and informed discussion of governmental affairs.").

90. *See* Leucadia, Inc. v. Applied Extrusion Technologies, Inc., 998 F.2d 157, 164 (3d Cir. 1993) (refusing to extend right of access to documents filed in connection with discovery motions).

91. 949 F.2d 653 (3d Cir. 1991).

92. 998 F.2d 157 (3d Cir. 1993).

93. For a discussion of the Third Circuit's analyses in *Westinghouse* and *Leucadia*, see *infra* notes 94-132 and accompanying text.

94. *Westinghouse*, 949 F.2d at 661. For a discussion of other circuit court cases addressing whether the right of access applies to materials filed with summary judgment motions, see *supra* notes 38-42 and accompanying text.

applied to documents filed in conjunction with a summary judgment motion. Consistent with its expansive approach to the right of access, the court extended the common-law right to these documents.[95] In dicta, however, the court implied that this right might not extend to materials filed in conjunction with discovery motions.[96]

In *Westinghouse*, the Republic of the Philippines and a Philippines government agency brought suit against a contractor, alleging that the contractor secured a contract by bribing the former president of the Philippines.[97] The contractors moved for summary judgment and the motion was subsequently denied.[98] The district court subsequently ordered that all previously sealed materials filed with the summary judgment motion be opened.[99] On appeal, the Third Circuit affirmed, concluding that the common-law right of access applied to materials filed in conjunction with a summary judgment motion.[100]

While other circuit courts have extended the right of access to materials filed with summary judgment motions that have been granted, the Third Circuit is the first circuit court to extend the right of access to materials filed with summary judgment motions that have been denied.[101] The Third Circuit reasoned that although a denial of summary judgment is not dispositive of litigation, it nonetheless "shape[s] the scope and substance of the litigation."[102] Furthermore, the court generalized that a dis-

95. *Westinghouse*, 949 F.2d at 662.

96. *Id.* at 661 (declining to consider "whether [when extending right of access to civil court documents] there might be a basis to distinguish motions that are merely part of the discovery proceedings").

97. *Id.* at 656. Westinghouse Electric Corporation secured a contract with the Republic of the Philippines to build a nuclear power plant. *Id.*

98. *Id.* at 657. The district court denied the motion in a hearing that was open to the public. *Id.*

99. *Id.* Prior to the summary judgment hearings, the magistrate entered a protective order allowing Westinghouse to classify certain information as confidential. *Id.* at 656. Two magazine publishing companies and a chemical engineer intervened for the purpose of modifying the protective orders to gain public access to certain information. *Id.* at 657. The district court partially granted the intervenors' motions. *Id.* Specifically, the court ordered that material filed in connection with the summary judgment motion be released. *Id.*

100. *Id.* at 662.

101. *See id.* at 661 (noting that courts other than Third Circuit have applied right of access to materials filed with summary judgment motions that have been granted). For a discussion of circuit court cases applying the right of access to materials filed with summary judgment motions, see *supra* notes 38-42 and accompanying text.

102. *Westinghouse*, 949 F.2d at 660. The court reasoned that because the denial of summary judgment "put the litigants squarely on a path toward trial . . . the need for public scrutiny . . . of the district court's decision is almost as important as when the court has made a dispositive ruling." *Id.* The court also referred to lower court decisions that applied the right of access to materials filed with preliminary motions that were denied. *Id.* at 661-62; *see also In re* Petroleum Prods. Antitrust Litig., 101 F.R.D. 34 (C.D. Cal. 1984) (allowing access, before motion was ruled upon, to materials filed with summary judgment motion); *In re* Agent Orange Prod. Liab. Litig., 98 F.R.D. 539, 547-48 (E.D.N.Y. 1983) (allowing access to materi-

trict court's ruling on a motion is something that "the public has a right to know about and evaluate."[103]

Interestingly, the Third Circuit explicitly noted that it made this generalization "without considering whether there might be a basis to distinguish motions that are merely part of the discovery proceedings."[104] The court recognized that, in light of its liberal approach in *Westinghouse* and other recent decisions, litigants might infer that the Third Circuit would extend the right of access to all judicial records.[105] Therefore, the court stressed that its expansive analysis of the right of access did not implicitly mean that this right extended to discovery motions.[106]

The Third Circuit's reluctance in *Westinghouse* to extend the right of access to materials filed with discovery motions had two implications. First, the court implied that it might consider discovery motions to be inherently different than other types of judicial records.[107] Second, by emphasizing that its conclusion did not encompass discovery motions, and declining to mention any other types of records that its conclusion did not encompass, the court implied that discovery motions are the only type of judicial record to which it might not allow public access.[108] Because it made only a brief statement in dicta concerning the right of access to materials filed with discovery motions, however, the *Westinghouse* court's views concerning this matter were unascertainable.

Subsequently, in its most recent public access case, *Leucadia, Inc. v. Applied Extrusion Technologies, Inc.*,[109] the Third Circuit had the opportunity to directly address whether the right of public access extends to discovery motions. In this case, Leucadia sued Applied Extrusion

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als filed with summary judgment motions that were denied); Cianci v. New York Times Publishing Co., 88 F.R.D. 562, 564-65 (S.D.N.Y. 1980) (allowing public access to discovery materials filed in conjunction with party's unsuccessful motion to dismiss).

103. *Westinghouse*, 949 F.2d at 661 (quoting Bank of American National Trust & Savings Ass'n. v. Hotel Rittenhouse Associates, 800 F.2d 339, 344 (3d Cir. 1986)).

104. *Id.*

105. *See id.* Specifically, the Third Circuit referred to the language in *Bank of America* stating that the right of public access applied generally to "motions filed in [civil] court proceedings." *Id.* (quoting Bank of America National Trust & Savings Ass'n v. Hotel Rittenhouse Associates, 800 F.2d 339, 343 (3d Cir. 1986)). The court noted that Westinghouse Electric argued that this language was "too broad." *Id.*

106. *See id.* (emphasizing that court reached its conclusion without considering whether right of access extended to materials filed with discovery motions).

107. *Cf.* Anderson v. Cryovac, Inc., 805 F.2d 1, 12 (1st Cir. 1986) (declining to extend right of access to materials filed with discovery motions primarily because "discovery proceedings are fundamentally different from proceedings to which the courts have recognized a public right of access").

108. *Westinghouse*, 949 F.2d at 661 (stressing that court reached its conclusion "without considering whether there might be a basis to distinguish [discovery] motions," but declining to mention any other types of judicial records).

109. 998 F.2d 157 (3d Cir. 1993).

Technologies (AET) for misappropriating trade secrets.[110] In a separate action, a shareholder brought a class action suit against AET and filed a motion to unseal discovery materials that were under protective seal in the *Leucadia* litigation.[111] The sealed materials consisted of discovery materials filed in connection with both discovery and non-discovery motions.[112] The district court denied access to all sealed materials.[113]

On appeal, the Third Circuit held that the common-law right of public access extends to all material filed in conjunction with non-discovery pre-trial motions, but that the right of access does not extend to material filed in conjunction with discovery motions.[114] In distinguishing between materials filed with non-discovery pre-trial motions and discovery pre-trial motions, the court looked to common-law tradition and evaluated the First Circuit's decision in *Anderson v. Cryovac*.[115] The Third Circuit ultimately concluded that the right of public access does not apply to materials filed

110. *Id.* at 158. Leucadia alleged that AET misappropriated Leucadia's trade secrets by hiring former Leucadia employees who had access to confidential information. *Id.*

111. *Id.* at 160. The district court issued a protective order applying to all pre-trial discovery in the Leucadia litigation because of the "sensitive commercial issues raised in the complaint." *Id.* at 158. *See generally* Miller, *supra* note 2, at 483-84 (discussing significance of protective orders, particularly in context of discovery).

112. *Leucadia*, 998 F.2d at 158. Specifically, the non-discovery pre-trial motions included a motion to dismiss and motions for a preliminary injunction, a more definite statement, and preclusion of evidence. *Id.* at 163-64. The discovery pre-trial motions included motions to compel production of documents, to answer interrogatories, and to shorten the time for production of documents. *Id.* at 164.

113. *Id.* at 160 (denying shareholder's request to examine and copy sealed documents).

114. *Id.* at 165.

115. *See id.* at 162-65. First, the court considered whether the right of access applied to the materials filed with the non-discovery motions. *Id.* at 162-64. The court relied on its decision in *Westinghouse*, in which it extended the right of access to materials filed with summary judgment motions. *Id.* at 164; *see also* Republic of the Phil. v. Westinghouse Elec. Corp., 949 F.2d 653, 661 (3d Cir. 1991). The court concluded that it saw "no reason to distinguish between material submitted in connection with a motion for summary judgment" and material filed with any other non-discovery pre-trial motion. *Id.* at 164. Again, the court emphasized that the "public has a right to know about and evaluate" these motions. *Id.* (quoting Bank of American National Trust & Savings Ass'n v. Hotel Rittenhouse Assocs., 800 F.2d 339, 344 (3d Cir. 1986)).

In contrast, the court found great reason to distinguish materials filed with discovery motions from materials filed with summary judgment motions and other pre-trial motions. *Id.* at 164-65. The court extensively analyzed the First Circuit's opinion in Anderson v. Cryovac, Inc., 805 F.2d 1 (1st Cir. 1986), and the District of Columbia Court of Appeals' decision in Mokhiber v. Davis, 537 A.2d 1100 (D.C. 1988). *Id.* The court ultimately adopted the First Circuit's approach. *Id.* at 163-65. Presumably, the Third Circuit, like the First, considers discovery proceedings to be "fundamentally different" than other types of proceedings. *See Anderson*, 805 F.2d at 12 (concluding that "discovery proceedings are fundamentally different from other proceedings to which the courts have recognized a right of access").

For a discussion of the District of Columbia Court of Appeals' decision in *Mokhiber v. Davis*, see *supra* note 53.

with discovery motions because it did not find this common-law right necessary to ensure honesty and respect in the judicial system.[116]

Unlike its previous considerations of whether to extend the right of access to a particular type of document, the Third Circuit never mentioned any purpose that would be served by allowing public access to discovery motions.[117] Instead, the court noted that discovery is traditionally a private aspect of litigation and, therefore, implied that public scrutiny would have little value.[118] Furthermore, even if the Third Circuit found some value in public scrutiny of discovery proceedings, the court was more concerned about the implications of extending the right of access to these documents.[119] Like the First Circuit, the Third Circuit feared that public access would make the discovery process more burdensome.[120] Finally, the court noted that a source of law governing access to discovery materials already exists, namely Federal Rules of Civil Procedure 5(d) and 26(c).[121] Therefore, the court concluded that the common-law right of access is not necessary to provide scrutiny.[122] Thus, confirming the implications of the *Westinghouse* court's decision, the Third Circuit explicitly

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116. *See Leucadia*, 998 F.2d at 163-64 (explicitly rejecting *Mokhiber* court's conclusion that public access to materials filed with discovery motions "will serve same values and policies which underlie the common law's recognition of the public right to view other parts of court procedure" (quoting Mokhiber v. Davis, 537 A.2d 1100, 1112 (D.C. 1988))).

117. *See id.* at 164-65 (considering whether to extend right of access to discovery motions, and not mentioning any benefits public access would promote). For a discussion of cases in which the Third Circuit emphasized the values promoted by the right of access, see *supra* notes 64-93 and accompanying text.

118. *Leucadia*, 998 F.2d at 164 ("[Discovery] proceedings were not open to the public at common law and, in general, they are conducted in private as a matter of modern practice." (quoting Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33 (1984))).

119. *Id.* at 164 ("[W]e do not know what the effect would be on the discovery process itself of holding . . . [materials filed with discovery motions] presumptively accessible."). *See generally* Miller, *supra* note 2, at 483-84 (discussing possible detrimental effects of allowing public access to discovery proceedings).

120. *See Leucadia*, 998 F.2d at 164-65 (quoting Anderson v. Cryovac, Inc., 805 F.2d 1, 12 (1st Cir. 1988)).

121. *Id.* at 165. Federal Rule of Civil Procedure 5(d) provides that a court may order that discovery motions and materials not be filed. FED. R. CIV. P. 5(d). Federal Rule of Civil Procedure 26(c) provides factors that a court should consider when determining whether to issue a protective order on discovery materials. *See* FED. R. CIV. P. 26(c). *See generally* 8 CHARLES A. WRIGHT & ARTHUR R. MILLER, PRACTICE AND PROCEDURE (1970) (discussing effect that Federal Rules of Civil Procedure have had upon disclosure of discovery information); Miller, *supra* note 2, at 475-76 (discussing Rule 26(c) discovery motions and effect this rule has had on public access).

122. *Leucadia*, 998 F.2d at 165 ("[W]e see little need to extend the [ ] common law to discovery motions at this time when there is in existence a source of law for the normative rules governing public access to discovery materials, that is Rules 5(d) and 26(c) of the Federal Rules of Civil Procedure.").

stated in *Leucadia* that it considered discovery motions to be inherently different from all other types of judicial proceedings.[123]

It is important to note, however, that although the Third Circuit declined to extend the right of access to discovery motions, it simultaneously extended the right of access to a broad range of judicial records.[124] Consequently, one can draw certain inferences from the court's analysis.

The Third Circuit has an expansive approach to extending the right of access.[125] The court allows public access to all judicial records as long as such access promotes trustworthiness in the judicial system and increases public respect for the system. Evidently, the Third Circuit views public access as effectively serving these purposes with respect to a wide variety of judicial records.[126] To date, the Third Circuit has refused public access only to materials filed with discovery motions.[127]

The Third Circuit distinguishes discovery motions because it finds them to be unique.[128] Discovery has traditionally been handled privately and without court intervention.[129] In addition, discovery proceedings have little bearing on a litigant's substantive case.[130] Because of the unique nature of discovery motions, it is reasonable to conclude that the Third Circuit's reluctance to extend the right of access to these motions is an isolated exception.[131] The emphasis that the court's recent decisions

123. *See* Republic of the Phil. v. Westinghouse Elec. Corp., 949 F.2d 653, 661 (3d Cir. 1991) (implicitly distinguishing discovery motions when generalizing that public has right to examine district court's action concerning motions).

124. *Leucadia*, 998 F.2d at 165 (holding that common-law right of access applies to "all material filed in connection with non-discovery pretrial motions").

125. For a discussion of cases in which the Third Circuit has expanded the right of access, see *supra* notes 65-124 and *infra* notes 126-32 and accompanying text.

126. For a discussion of cases in which the Third Circuit has extended the common-law right of access to various judicial records, see *supra* notes 65-125 and *infra* notes 127-31 and accompanying text.

127. *See Leucadia*, 998 F.2d at 165 (holding that common-law right of access does not apply to discovery motions).

128. *See* United States v. Smith, 776 F.2d 1104, 1112 (3d Cir. 1985) (concluding that common-law right of access applied to bills of particulars in federal prosecution). The Third Circuit concluded that the right of access extended to bills of particulars because bills of particulars were "more properly regarded as supplements to [an] indictment than as the equivalent of civil discovery." *Id.* at 1111. The court clearly implied that discovery documents are distinct from other judicial documents to which the right of access applies. *Id.*; *see also* Fitzgerald, *supra* note 2, at 390-91 (noting that common-law right of access is seldom applied to discovery documents because they are generally "non-public documents").

129. *See* Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33 (1984) ("[Discovery] proceedings were not open to the public at common law, and, in general, they are conducted in private as a matter of modern practice." (citation omitted)); Fitzgerald, *supra* note 2, at 391 ("[L]itigants gather discovery materials on their own initiative prior to the trial.").

130. *See* Anderson v. Cryovac, Inc., 805 F.2d 1, 12-13 (1st Cir. 1986) (discussing why discovery has little relation to litigant's substantive case).

131. *See Leucadia*, 998 F.2d at 165 (holding that right of access applies to all pre-trial motions and distinguishing only discovery motions); Republic of the Phil.

place on the value of public access suggests that in the future the court will continue its expansive approach to extending the right of access.[132]

V. CONCLUSION

Since declaring in *Criden v. United States* that a common-law right of public access to judicial records exists, the Third Circuit has liberally extended this right to various types of documents.[133] Today, the right of access in the Third Circuit extends to both civil and criminal trial records, documents admitted into evidence in both types of trials, documents filed in conjunction with settlement agreements and summary judgment motions, and documents filed with all pre-trial motions *except* discovery motions.[134]

In all of its public access cases, the Third Circuit has refused to extend the right of access only to materials filed with discovery motions.[135] The court's reasons for refusing to extend the right of access to these documents are based upon the uniquely private nature of discovery proceedings.[136] Therefore, the court's approach to extending the right of access

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v. Westinghouse Elec. Corp, 949 F.2d 653, 661 (3d Cir. 1991) (generalizing that right of access applies to motions and court proceedings and implicitly distinguishing only discovery motions).

132. For a discussion of Third Circuit cases extending the right of access, see *supra* notes 65-131 and accompanying text.

133. For a discussion of the Third Circuit's analysis in *Criden*, see *supra* notes 57-62 and accompanying text.

134. *See Leucadia*, 998 F.2d at 165 (extending right of access to materials filed with all pre-trial motions except discovery motions); *Westinghouse*, 949 F.2d at 661 (extending right of access to materials filed with summary judgment motions); Littlejohn v. BIC Corp., 851 F.2d 673, 683 (3d Cir. 1988) (applying common-law right of access to confidential documents admitted as trial exhibits and to portions of trial record into which confidential documents were read); Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs., 800 F.2d 339, 343 (3d Cir. 1986) (extending right of access to materials filed with settlement agreements); United States v. Smith, 776 F.2d 1104, 1112 (3d Cir. 1985) (extending right of access to bills of particulars); United States v. Martin, 746 F.2d 964, 968-69 (3d Cir. 1984) (applying common-law right of access to tapes admitted into evidence in criminal trial and to transcripts of tape recordings that had been shown to jury); Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1067 (3d Cir. 1984) (extending right of access to civil trials and records); United States v. Criden, 648 F.2d 814, 819 (3d Cir. 1981) (recognizing common-law right of access and applying right to tapes admitted into evidence at criminal trial).

135. *See Leucadia*, 998 F.2d at 165 (holding that right of access does not extend to materials filed in connection with discovery motions). For a discussion of the Third Circuit's analysis in *Leucadia*, see *supra* notes 109-24 and accompanying text.

136. *See id.* at 164 (stating that court was reluctant to extend right of access to discovery motions because discovery motions were private in nature). The court also stated that extending the right of access to discovery motions would be "a holding based more on expediency than principle." *Id.*

to judicial records is consistent.[137] When considering whether the Third Circuit will apply the common-law right of access to a document at issue, a practitioner can expect the court to extend the right to the particular document. The court will most likely extend the common-law right to preserve honesty and competence in, and respect for, the judicial system.[138]

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137. For a discussion of cases in which the Third Circuit consistently extended the right of access to various judicial records, see *supra* notes 65-88 and accompanying text.

138. *See* Littlejohn v. BIC Corp., 851 F.2d 673, 682 (3d Cir. 1988) ("Public access serves to promote trustworthiness of the judicial process, to curb judicial abuses, and to provide the public with a more complete understanding of the judicial system, including a better perception of its fairness.").