

Pseudonymous Suits in the U.S.A. – An Update

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In 1985, relatively early in the emergence of litigation in the U.S.A. in which parties sought to sue or be sued under fictional names, pseudonyms, I wrote an Article that sought to explore the tension between a developing right of public access to judicial records and proceedings, on the one hand, and pseudonymous litigation, on the other. It analyzed the existing case law that allowed or disallowed parties from so proceeding. Having found that neither the Federal Rules of Civil Procedure nor the case law provided adequate guidance, the Article proposed a balancing test that weighed the rights and interests of each litigating party and the interests of the public, positing that the balance might shift over the life of a lawsuit. The Article identified factors that courts should consider in evaluating the magnitude of a litigant's need to maintain confidentiality of his identity, and the magnitude of the public interest in his doing so, as well as factors that courts should consider in evaluating the magnitude of the opposing public and private interests in knowing litigants' identities. The Article illustrated how the proposed analysis would work by applying it to the several categories of federal litigation in which pseudonymity had been sought. Finally, the Article noted the dearth of procedures for dealing with such cases, and took a stab at suggesting procedures for managing pseudonymous litigation. Eighteen years later, I have been given this opportunity to see what has happened in the interim, and to provide some particular information concerning pseudonymous litigation.

Backdrop: The Right of Public Access

In understanding the U.S.A.'s approach to pseudonymous litigation, one must recognize that, as a matter of constitutionally grounded common law, the courts (both federal and state) recognize a right of public access to civil judicial proceedings and records which is thought to be supported by several important values, and constitutes the norm. The policies served by openness, as articulated by the United States Supreme Court and lower courts, include the following.¹

First, public scrutiny protects against judicial abuse. The right to a public trial is aimed at assuring a fair trial, predicated upon the belief that "the presence of interested spectators will keep the triers keenly alive to their sense of responsibility and to the importance of their functions."² Public trial protects the integrity of the trial by guarding against corruption, bias, or partiality on the part of the court.³

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¹ The discussion that follows concerning the policies served by openness is derived from Joan Steinman, *Public Trial, Pseudonymous Parties: When Should Litigants be Permitted to Keep Their Identities Confidential?*, 37 HASTINGS L.J. 1 (1985); see also David C. Scileppi, Note, *Anonymous Corporate Defamation Plaintiffs: Trampling the First Amendment or Protecting the Rights of Litigants?*, 54 FLA. L. REV. 333, 337-43 (2002); Colleen E. Michuda, Comment, *Defendant Doe's Quest for Anonymity: Is the Hurdle Insurmountable?*, 29 LOY. U. CHI. L.J. 141, 143-45, 168-70 (1997); Adam A. Milani, *Doe v. Roe: An Argument for Defendant Anonymity When a Pseudonymous Plaintiff Alleges a Stigmatizing Intentional Tort*, 41 WAYNE L. REV. 1659, 1665-71 (1995).

² In re Oliver, 333 U.S. 257, 270 n.25 (1948) (quoting T. COOLEY & W. CARRINGTON, CONSTITUTIONAL LIMITATIONS 647 (8th ed. 1927)).

³ Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 569 (1980); Gannett Co. v. DePasquale, 443 U.S. 368,

Second, the openness of adjudications also promises to “improve the quality of testimony, induce unknown witnesses to come forward with relevant testimony, [and] cause all trial participants to perform their duties more conscientiously.”⁴ These consequences advance both society's and the parties' interests in fair proceedings that reach results based on truthful and complete facts, and on high quality legal arguments, rulings, and jury instructions. Third, openness also promotes public respect for and confidence in the judicial system. “The ability of the courts to administer [the] laws depends in no small part on the confidence of the public in judicial remedies, and on respect for and acquaintance with the processes and deliberations of those courts Anything that impairs the open nature of judicial proceedings threatens to undermine this confidence and to impede the ability of the courts to function.”⁵ By allowing the public and press to see that parties are treated fairly, the system is strengthened.⁶

Moreover, if parties are to obey court orders, and if defendants are to recognize court authority to impose and enforce money judgements, there must be public respect for and acquaintance with civil court processes. Allowing the public and press to observe court operations enhances their understanding of, and hopefully their respect for, the civil judicial process.⁷ Fourth, openness of the justice system has therapeutic value for the community.

Characteristically, in civil proceedings, defendants stand accused of committing or threatening civil wrongs--breaking contracts, committing torts, violating civil statutory duties, or abridging constitutional rights--to the detriment of one or many individuals. Torts that result in serious bodily injury or harm to reputation may evoke outrage, hostility, and an urge to retaliate. Even contract breaches may evoke considerable community desire for redress. Litigants' freedom of action, or liberty, is subject to court orders

422 (1979) (citing M. HALE, HISTORY OF THE COMMON LAW OF ENGLAND 344 (6th ed. 1820)) (“if the judge be partial, his partiality and injustice will be evident to all by-standers”); *Gannett*, 443 U.S. at 428 (Blackmun, J., concurring and dissenting).

⁴ *Gannett*, 443 U.S. at 383; see *Richmond Newspapers*, 448 U.S. at 569 & n.7; *id.* at 596-97 (Brennan, J., concurring) (commenting upon the several benefits of accurate fact finding, and quoting as still valid 3 W. BLACKSTONE, COMMENTARIES *373: “[O]pen examination of witnesses viva voce, in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination . . . where a witness may frequently depose that in private, which he will be ashamed to testify in a public and solemn tribunal.”); *Gannett*, 443 U.S. at 421-22 (Blackmun, J., concurring and dissenting).

⁵ *Gannett*, 443 U.S. at 429 (Blackmun, J., concurring and dissenting) (citation omitted).

⁶ See *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 508 (1984); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982); *Richmond Newspapers*, 448 U.S. at 570-72; *id.* at 594-95 (Brennan, J., concurring). In his concurrence in *Richmond Newspapers*, Justice Brennan stated:

For a civilization founded upon principles of ordered liberty to survive and flourish, its members must share the conviction that they are governed equitably. That necessity . . . mandates a system of justice that demonstrates the fairness of the law to our citizens. One major function of the trial . . . is to make that demonstration Secrecy is profoundly inimical to the demonstrative purposes of the trial process.

Id.; see also *In re Oliver*, 333 U.S. 257, 270 n.24 (1948).

⁷ See *In re Reporters Comm. for Freedom of Press*, 773 F.2d 1325, 1352 (D.C. Cir. 1985) (Wright, J., concurring and dissenting) (indicating that civil adjudication, no less than criminal trials, must maintain its public legitimacy).

for injunction or specific performance, and defendants' property is very much at risk. Thus, in the civil realm, as in the criminal, a great deal may be at stake, and the policy grounds favoring open criminal trials also strongly favor open civil trials.⁸ “When the public is aware that the law is being enforced and the ... justice system is functioning, an outlet is provided for ... [people’s] emotions. Proceedings held in secret would deny this outlet and frustrate the broad public interest; by contrast, public proceedings vindicate the concerns of the ... [parties] and the community.”⁹ When the defendant is the government, the expenditure of public funds may be in issue, and open proceedings allow public scrutiny of challenges to legislation and other government action.

Given the above policies, for a litigant to sue or be sued under a fictional name is exceptional and has to be justified.¹⁰ However, the right of public access is qualified, rather than absolute. As the discussion below will show, many litigants have succeeded in persuading courts to permit them to sue under fictional names, and have helped the courts to design mechanisms that allow the litigation to proceed, provide adversaries what they need to defend themselves or to pursue their claims, provide courts what they need to perform their functions, and minimize the deprivation of information to the public. Thus, despite what often is described as “the customary and constitutionally-embedded presumption of openness in judicial proceedings,”¹¹ the judicial system in the U.S.A. does not ruthlessly disseminate all sorts of personal data. Through the use of pseudonyms, protective orders, and other mechanisms, it does afford some protection to litigants.¹²

⁸ See *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1179 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984):

The policy considerations discussed in *Richmond Newspapers* apply to civil as well as criminal cases. The resolution of private disputes frequently involves issues and remedies affecting third parties or the general public. The community catharsis, which can only occur if the public can watch and participate, is also necessary in civil cases. Civil cases frequently involve issues crucial to the public—for example, discrimination, voting rights, antitrust issues, government regulation, and bankruptcy.

The concern of Justice Brennan that secrecy eliminates one of the important checks on the integrity of the system applies no differently in a civil setting. In either the civil or the criminal courtroom, secrecy insulates the participants, masking impropriety, obscuring incompetence, and concealing corruption.

Finally, the fact-finding considerations relied upon by Justice Brennan obviously apply to civil cases. Openness in the courtroom discourages perjury and may result in witnesses coming forward with new information regardless of the type of the proceeding.

⁹ *Press-Enterprise*, 464 U.S. at 508-09 (citation omitted); see *Richmond Newspapers*, 448 U.S. at 567-72 (“The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is ‘done in a corner [or] in any covert manner.’ . . . To work effectively, it is important that society’s criminal process ‘satisfy the appearance of justice,’ . . . and the appearance of justice can best be provided by allowing people to observe it.” (quoting 1677 Concessions and Agreements of West New Jersey, reprinted in *SOURCES OF OUR LIBERTIES* 188 (R. Perry ed. 1959)); *Gannett*, 443 U.S. at 428 (Blackmun, J., concurring and dissenting).

¹⁰ The nature of the tensions between pseudonymous litigation and public access to judicial proceedings and judicial records are spelled out in Steinman, *supra* note 1, at 18-33.

¹¹ *Doe v. Stegall*, 653 F.2d 180, 186 (5th Cir. 1981).

¹² Confidential information may be disclosed to the court and to litigation adversaries in many cases in which no one sought to sue or be sued under a pseudonym. Protective orders, redaction of confidential information, and sealing of parts of the record all are available to prevent availability to the general public. For scholarly writings about such

Statistics

To my knowledge, no court systems or independent agencies have attempted to collect and disseminate data on pseudonymous litigation, but a few commentators have made attempts to estimate the growth in such cases. Writing in 1995, one commentator reported: Prior to [the abortion cases that were decided by the Supreme Court in 1973 and] which began hitting the federal reporters in 1969, only one Supreme Court case,¹³ three court of appeals' decisions, and one district court decision in the previous quarter-century featured an anonymous individual as the sole or lead plaintiff.¹⁴ Between 1969 and January 22, 1973, the date when the Supreme Court decided *Roe* and *Doe*, there were twenty-one district court and two court of appeals decisions featuring anonymous plaintiffs.¹⁵ Almost all of these cases were filed by persons challenging the validity and/or constitutionality of state or federal laws and regulations. In fact, of the twenty-three decisions between 1969 and the Supreme Court's ruling in *Roe*, ten decisions involved challenges of welfare regulations governing payments to single mothers and nine decisions dealt with abortion laws.

The years following *Roe*'s tacit approval of the practice have seen a virtual explosion not only in the number of cases brought by anonymous plaintiffs but also in the types of actions using the procedure. In 1994 alone, cases brought by anonymous plaintiffs resulted in eighteen federal court of appeals decisions, thirty-three district court decisions and fifty-seven state appellate court decisions.¹⁶ While some of these suits are like *Roe v. Wade* in that they were brought against government officials to challenge the constitutionality of state or federal practices, the vast majority of the cases are common law tort actions between private parties.¹⁷

mechanisms, *see, e.g.*, Richard L. Marcus, *The Discovery Confidentiality Controversy*, 1991 U. ILL. L. REV. 457.

¹³ *Poe v. Ullman*, 367 U.S. 497 (1961) (challenging a Connecticut statute barring distribution of contraceptives to married couples). (internal footnote)

¹⁴ The author searched for cases with anonymous plaintiffs by using the Westlaw databases for Supreme Court ("SCT"), Court of Appeals ("CTA") and District Court ("DCT") decisions reported before 1970 using the following query: Date(Before 1970) & Ti(Roe Doe Moe Poe Soe +20 "v"). These databases all start their coverage with cases decided in 1945. Sondra J. Lambert, *Westlaw Database List - Winter/Spring 1995* 3,4 (1995). The results of the search were then examined to identify cases in which the sole named plaintiff or the first of multiple plaintiffs used a pseudonym such as John Doe, Mary Roe, etc. A search using the identical query in Westlaw's "Allstates" database yielded more cases with anonymous plaintiffs, but the use of this practice was limited almost exclusively to cases involving juveniles, divorce, child custody, child support or paternity. Copies of the searches are on file with the author. Because of the difficulty of formulating an accurate search, no attempt was made to find cases brought by plaintiffs using only their initials for identification. (internal footnote)

¹⁵ The author searched for cases with anonymous plaintiffs by using the Westlaw databases for Supreme Court ("SCT"), Court of Appeals ("CTA") and District Court ("DCT") decisions using the following query: Date (After 1970 & Before 1/22/73) & Ti(Roe Doe Moe Poe Soe +20 "v."). (internal footnote) The cases referenced in the text at this footnote are *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 401 U.S. 179 (1973).

¹⁶ Westlaw searches were conducted using the date restriction: Date (After 12/31/93) & Date (Before 1/1/95). The "CTA," "DCT" and "Allstates" databases were used with the query: Ti(Doe Roe Soe Moe Poe +20 "v."). Any case resulting in more than one decision was counted only one time. The state court figure does not include paternity, divorce, custody, support or juvenile actions. Again, no effort was made to identify cases brought by plaintiffs using solely their initials because of the difficulty of formulating a search for such cases. (internal footnote)

¹⁷ Milani, *supra* note 1, at 1660-63 (several internal footnotes omitted); *id.* at 1698-1712 (arguing in favor of sometimes allowing defendants accused of a stigmatizing tort to be sued pseudonymously, and discussing how that could

Another commentator spoke of “anonymous litigation” having been virtually unknown thirty years ago, and an “onslaught” having begun in the early 1970's, with the number of cases having grown significantly since then.¹⁸ So, while firm data is not available, the fact of significant increase in the numbers of these cases is clear.¹⁹

Sources of Law: Statutes, Rules and Case Law

Occasionally, cases in which litigants seek to sue or be sued pseudonymously discuss the bearing of particular statutes on the decision whether to allow fictional party-identifiers. For example, in *Doe v. Hall*²⁰ the Court of Appeals of the state of Georgia held that an exception to a state statute generally requiring confidentiality of information concerning AIDS, disclosed or discovered within the patient-physician relationship, did not prohibit plaintiff from suing under a pseudonym. The court held that the provisions permitting disclosure in specified circumstances were not triggered by a suit alleging improper disclosure. Thus, the trial court had to exercise discretion in deciding whether to permit the suit to go forward with plaintiff's name cloaked by a fiction. (The appeals court strongly hinted at what it thought the proper exercise of discretion should be, noting that, absent a pseudonym, “one would be required to disclose their identity in suing for improper disclosure ..., which would defeat the purpose of the statute.”²¹)

Some states, by statute, allow anonymity in certain cases involving juveniles, sexual molestation, sexually transmitted diseases, and matrimonial suits.²² Cases requiring application of these statutes will come down, from time to time.²³

be accomplished).

¹⁸ Michuda, *supra* note 1, at 141, 142, 145.

¹⁹ One also can get some sense of the number and varieties of such cases from Francis M. Dougherty, Annotation, *Propriety and Effect of Use of Fictitious Name of Plaintiff in Federal Court*, 97 A.L.R. FED. 369 (1990 & 2002 Pocket Part).

²⁰ 260 Ga. App. 421, 579 S.E.2d 838 (2003).

²¹ *Id.* at ___, 579 S.E.2d at 840.

²² See Michuda, *supra* note 1, at 149, citing statutes. As to matrimonial suits in particular, see generally, Gale Humphrey Carpenter, Comment, *Protecting the Privacy of Divorcing Parties: The Move Toward Pseudonymous Filing*, 17 J. AM. ACAD. MATRIM. LAW 105 (2001) (arguing for greater accommodation of the privacy interests of divorcing parties).

Financial information is among the private information that commonly is revealed in divorce proceedings. Another context in which normally private financial information always is revealed is bankruptcy proceedings. For a discussion of privacy issues generally, but not of pseudonymity in particular, in United States bankruptcy courts, and the particular threats posed by increasing remote access to electronic case files, see Mary Jo Obee & William C. Plouffe, Jr., *Privacy in the Federal Bankruptcy Courts*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1011 (2000).

²³ See, e.g., *Doe v. Conn. Bar Examining Comm.*, 263 Conn. 39, 818 A.2d 14 (2003) (interpreting section of Practice Book not to extend a presumption of confidentiality that applied to a plenary judicial action challenging the findings and conclusions of the defendant Committee); *T.S.R. v. J.C.*, 288 N.J. Super. 48, 671 A.2d 1068 (N.J. Super. Ct. App. Div. 1996) (concluding that a statute granted the right to refuse to disclose identifying information only to victims of child molestation, not to alleged molesters).

Also, codified court rules occasionally confer authority to allow fictional identifiers, but thus far those rules have conferred authority in circumstances that the rules only vaguely define. As a result, the rules have had little real influence on analyses or results. For instance, the state of Illinois Supreme Court has indicated that jurisdiction to sue a fictitious person can be obtained only pursuant to a statute expressly authorizing such a suit.²⁴ The Illinois Code of Civil Procedure, section 2-401(e), states that “[u]pon application and for good cause shown the parties may appear under fictitious names,”²⁵ and section 2-401(e) has been held to be an authorizing statute. When the time came to interpret this section, the Appellate Court of Illinois looked for guidance to federal cases and cases decided by other state courts, none of which had rendered their decisions (as to whether to permit the use of pseudonyms) under a comparable statute.

Most of the time, neither statutes nor such rules exist. Typically, the courts make their determination against the backdrop of codified rules that call for the caption of pleadings and of other papers to include the names of all the parties,²⁶ and for actions to be prosecuted in the name of the real party in interest.²⁷ The federal courts, and many state courts, have held that, despite these general rules, they have discretion to permit litigants to use pseudonyms, in appropriate circumstances, and case precedent provides guidance as to whether to grant permission.

The Courts’ Tendencies: What Kinds of Litigants Do Courts Allow to Use Pseudonyms, and What Kinds Do They Compel to Use Their Own Names, if They Desire to Proceed?

There now are a great many judicial rulings, especially from trial courts, on requests to proceed under pseudonyms. I will discuss here decisions of *appellate courts* in the federal and various state systems, to provide a sense of their approaches and their resolutions. These decisions carry precedential authority. I also will attempt some generalizations concerning the myriad trial court opinions that do not have precedential effects, and refer in footnotes to decisions so recent that they are likely not to be cited in other scholarly work.²⁸ It should be noted that parties sometimes seek to keep their names confidential only from the public, and sometimes seek to keep their names confidential from their litigation adversary as well. The scope of the anonymity requested may influence a court’s resolution of the issues.

The areas of federal and state litigation in which pseudonymity most commonly has been sought

²⁴ See *Bogseth v. Emanuel*, 166 Ill.2d 507, 65 N.E.2d 888 (1995); see also *Doe v. Doe*, 282 Ill. App. 3d 1078, 668 N.E.2d 1160 (1st Dist. 1996), *appeal denied*, 169 Ill. 2d 565, 675 N.E.2d 632 (1996).

²⁵ 735 ILCS 2-401(e) (West 1992).

²⁶ See, e.g., FED.R.CIV.P. 10.

²⁷ See, e.g., FED.R.CIV.P. 17.

²⁸ E.g., *EW v. N.Y. Blood Ctr.*, 213 F.R.D. 108 (E.D.N.Y. 2003) (allowing use of pseudonym by plaintiff who sued blood bank, alleging she had contracted hepatitis B through contaminated blood transfusion); *Roe v. City of New York*, 151 F. Supp. 2d 495 (S.D.N.Y. 2001) (permitting HIV-infected drug user to pseudonymously sue police for targeting for arrest members of needle exchange programs); *Doe v. Evans*, 202 F.R.D. 173 (E.D. Pa. 2001) (allowing sexual assault victim to bring civil rights action under pseudonym, and to use that fictitious name in pleadings and in open court; concluding, however, that victim had not shown good cause for protective order preventing parties from referring to her true name during discovery, and that protective order would interfere with defendants’ ability to conduct discovery).

involve: reproductive rights (including abortion); sexual abuse or harassment; homosexuality and transsexuality; HIV status; views concerning religious observances and other unpopular stances; mental illness or deficiency; drug use and testing; criminality and unprofessional conduct; juveniles, including delinquents, neglected, abused, and illegitimate children; public aid (welfare); fears of bodily injury or economic or professional reprisal for activity in, or revealed by, the litigation; and fear of disclosure of business information. The underlying concerns range across a spectrum from privacy interests to concerns about physical, emotional, and economic security.²⁹ While courts often allow litigants in the above-listed types of cases to sue pseudonymously (less so where mere embarrassment, professional or economic injuries are invoked), there certainly are cases that are “outliers,” either allowing pseudonyms where one familiar with the relevant case law would not expect it, or disallowing pseudonyms where one absolutely would expect them to be authorized. Some judges are hostile to the concept and indicate their belief that, if you sue, and especially if, by suing, you subject the defendant to embarrassment or worse, you have to expect to publicly reveal your identity.

Federal Court Cases

Federal appellate cases that have approved the use of pseudonyms include:

Does I thru XXIII v. Advanced Textile Corporation,³⁰ where the Court of Appeals for the Ninth Circuit found that plaintiffs, foreign employees working in the garment industry in the Mariana Islands who sued alleging violations of the U.S. Fair Labor Standards Act, demonstrated objectively reasonable fear that disclosure of their true identities would result in their termination, deportation, and arrest and imprisonment in their country of origin. The court counseled that, when parties seek to use a pseudonym, the trial court should evaluate the severity of the threatened harm, the reasonableness of the fears and the vulnerability to the feared harms of the parties seeking to shield their identity. It should weigh those concerns against the public interest in open proceedings, as well as against any prejudice to the opposing party, and should use its management powers, including the power to issue protective orders, to preserve anonymity to the greatest extent possible, without prejudicing the opposing party, when the requisite need has been established. The court also noted that the “standing” to sue requirement of Article III of the U.S. Constitution does not prevent courts from allowing plaintiffs to sue under fictitious names.³¹ On the facts, the appeals court concluded that the district court had abused its discretion in denying permission to proceed pseudonymously, noting the public interest in having the case proceed, rather than be chilled by the fear of reprisals.³²

²⁹ For both textual and footnoted summary descriptions of many of the cases in these categories, *see generally*, Scileppi, *supra* note 1, at 345-49; Michuda, *supra* note 1, at 146; Annot., *supra* note 19; Milani, *supra* note 1, at 1683-97; Joseph Meltzer, *Saying No to Doe: How the D.C. Circuit Saved Microsoft from Fighting with Its Eyes Closed* – United States v. Microsoft, 56 F.3d 1448 (D.C. Cir. 1995), 14 TEMP. ENVTL. L. & TECH. J. 309, 316-21 (1995).

³⁰ 214 F.3d 1058 (9th Cir. 2000).

³¹ *Id.* at 1068-70.

³² *Id.* at 1073; *see also* OSRecovery, Inc. v. One Groupe Int’l Inc., 2003 WL 23313 (S.D.N.Y. 2003) (holding investors, alleging securities fraud and RICO claims, entitled to sue under pseudonyms where they demonstrated a genuine risk of retaliation involving economic and physical harm); Javier H. v. Garcia-Botello, 211 F.R.D. 194 (W.D.N.Y. 2002) (holding migrant farm workers’ fear of retaliation by employer-defendants sufficiently well-founded to warrant pseudonymity); *cf.* In re Blackwell, 263 B.R. 505 (Bankr. W.D. Tex. 2000) (refusing to permit creditors to proceed anonymously in a bankruptcy proceeding, finding that they had failed to make a sufficient showing of need based on their fears that, if their investments became a matter of public record, they would be perceived as wealthy and might be kidnapped in their homeland of Mexico). For a perspective that criticizes the *Advanced Textile Corp.* opinion,

When the goal is the protection of children, courts tend to permit parents and their children to sue under pseudonyms. For example, in *James v. Jacobson*,³³ the Court of Appeals for the Fourth Circuit reversed a trial court's refusal to permit parents to pseudonymously bring an action to recover against a physician who had artificially inseminated the suing mother with his own sperm, rather than her husband's. While much of the opinion commented on ways in which potential unfairness to the defendant could be combated, the impetus for allowing fictitious names was the potential harm to the children from revelation of the circumstances of their conception.³⁴

A relatively recent case that follows a long line of cases permitting pseudonymity to women who sought, or had had, abortions is *Roe v. Aware Woman Center for Choice, Inc.*³⁵ The Court of Appeals for the Eleventh Circuit noted that it could find only two published decisions, from any jurisdiction, that had denied a request to proceed anonymously in a case involving abortion,³⁶ and that abortion is the paradigm of the type of highly sensitive and personal matter that warrants pseudonymity.³⁷ The court rejected the characterization of case precedent as limited to challenges to criminal abortion statutes, or to constitutional or statutory challenges to abortion-regulating laws.³⁸

By contrast, federal appellate cases that have *rejected* efforts to use pseudonyms include:

see *Amy Self, Does I Thru XXIII v. Advanced Textile Corp.: Saipan Workers Permitted to Sue Their Employers Pseudonymously*, 2 ASIAN-PAC. L. & POL'Y J. 313 (2001). For a careful examination of the special challenges of protecting plaintiffs who sue to vindicate international human rights under the U.S.' Alien Tort Claims Act, see Jed Greer, *Plaintiff Pseudonymity and the Alien Tort Claims Act: Questions and Challenges*, 32 COLUM. HUM. RTS. L. REV. 517 (2001).

Another Ninth Circuit decision (but one which is "unpublished," and hence lacking in precedential effect) is *Doe v. Alaska*, 122 F.3d 1070 (9th Cir. 1997) (unpublished). There too the court held for the party seeking pseudonymity, reversing a dismissal for failure to file in plaintiffs' true names, in a case where persons subject to the requirements of a state sex offender registration act sued seeking an injunction prohibiting enforcement of the act. The court noted that disclosure of plaintiffs' identities would deny them the very relief they sought.

³³ 6 F.3d 233 (4th Cir. 1993).

³⁴ *Id.* at 241; see also *id.* at 243 (Williams, J., concurring in part, dissenting in part) (opining that the risk of substantial harm to the minor children so significantly outweighed the minimal risk of prejudice to defendant that, as a matter of law, plaintiffs should be permitted to proceed to trial under pseudonyms, and that he would so instruct, rather than giving the district judge another opportunity to exercise discretion); *Doe v. Harlan County Sch. Dist.*, 96 F. Supp. 2d 667 (E.D. Ky. 2000) (allowing student and her parents, who challenged classroom displays of the Ten Commandments and other religious documents, to sue using pseudonyms).

³⁵ 253 F.3d 678, *cert. denied*, 534 U.S. 1129 (2002).

³⁶ One was *M.M. v. Zavaras*, 139 F.3d 798 (10th Cir. 1998), discussed *infra* text at notes 48-49; the other was an early case (*Akron Ctr. For Reprod. Health, Inc. v. City of Akron*, 651 F.2d 1198 (6th Cir. 1981), *rev'd in part on other grounds*, 462 U.S. 416 (1983)), that found, with no discussion, that the district court had not abused its discretion in denying the request.

³⁷ *Roe*, 253 F.3d at 685.

³⁸ *Id.* at 686.

Coe v. County of Cook,³⁹ where the Court of Appeals for the Seventh Circuit held pseudonymity not warranted to save from embarrassment one who fathered a child out of wedlock, and who sued to challenge a hospital policy of performing abortions without notice to fathers. It observed that “the embarrassment felt by a person who engages in immoral or irresponsible conduct is not a compelling basis for a waiver of the general rule that parties ... must litigate under their real names.”⁴⁰

Doe v. Blue Cross & Blue Shield United of Wisconsin,⁴¹ where the Court of Appeals for the Seventh Circuit *sua sponte* admonished trial courts that they have an independent duty to determine whether exceptional circumstances justify a departure from the norm of disclosure of litigants’ identities, even when no one objects. The court, in dicta, commented that the fact that plaintiff (in an action complaining of the termination of disability benefits) suffered from obsessive-compulsive syndrome was not “an automatic ground” for concealing his identity. The disorder was “common enough,” was not a sufficient “badge of infamy or humiliation,” and to make it the basis for pseudonymity would “propagate the view that mental illness is shameful.”⁴² The court did invite the judge to require any psychiatric records containing material that was highly embarrassing, yet pertinent, to be placed under seal.⁴³

The Court of Appeals for the Eleventh Circuit similarly rejected pseudonymity predicated on plaintiff’s alcoholism, in a suit in which he alleged unlawful employment discrimination based upon that disability.⁴⁴

Cases have come out both ways in situations in which sex offenders have challenged registration and notification statutes. One that went against an offender seeking to use a fictitious name is *Femedeer v. Haun*.⁴⁵ There, the Court of Appeals for the Tenth Circuit emphasized the public interest in proceedings attacking the constitutionality of legislation, although it did not explain how that interest would be impaired by not knowing plaintiff’s true name. It noted the difficulty of applying claim- and issue-preclusion principles if plaintiff’s true identity is not in the public record,⁴⁶ and minimized plaintiff’s interest in

³⁹ 162 F.3d 491 (7th Cir. 1998), *cert. denied*, 526 U.S. 1040 (1999).

⁴⁰ *Id.* at 498; *see also* *Doe v. Sheriff of DuPage County*, 128 F.3d 586 (7th Cir. 1997) (opining that embarrassment of one who brought civil rights action to protest her booking before she was allowed to post bail did not justify her proceeding under pseudonym); *Coe v. U.S. Dist. Court*, 676 F.2d 411 (10th Cir. 1982) (denying writ of mandamus to overturn trial court’s refusal to permit physician to proceed under pseudonym in action in which he sought to force board of medical examiners to close disciplinary proceedings against him); *Doe v. City of New York*, 201 F.R.D. 100 (S.D.N.Y. 2001) (denying a pseudonym to an attorney who sued over arrest and detention, and feared reputational injury and embarrassment).

⁴¹ 112 F.3d 869 (7th Cir. 1997).

⁴² *Id.* at 872.

⁴³ *Id.*

⁴⁴ *Doe v. Frank*, 951 F.2d 320 (11th Cir. 1992).

⁴⁵ 227 F.3d 1244 (10th Cir. 2000); *cf.* *Doe v. Alaska*, 122 F.3d 1070 (9th Cir. 1997), *supra* note 32.

⁴⁶ Other courts have not found this an insurmountable difficulty. *See, e.g.*, *OSRecovery, Inc. v. One Groupe Int’l Inc.*, 2003 WL 23313 (S.D.N.Y. 2003) (noting that, to protect defendants from subsequent suits on the same claims,

preventing disclosure of his status as a sex offender by finding that such disclosure presumably had occurred in connection with his underlying conviction, and by denying that forcing him to disclose his identity would impose the very harm that plaintiff sought to avoid: disclosure on the internet was likely to be far more extensive than the exposure deriving from his real name-filing of this suit. The court found that plaintiff had not established imminent personal danger. Its opposition to pseudonymity also was reflected in its statement of philosophy that, “Ordinarily, those using the courts must be prepared to accept the public scrutiny that is an inherent part of public trials.”⁴⁷

In a case that departed from the usual honoring of the privacy interests of those seeking, or having to admit to, abortions, *M.M. v. Zavaras*⁴⁸ upheld a refusal to permit an indigent inmate to sue under a fictitious name when alleging that correction officials unconstitutionally had denied her funds for transportation and medical expenses for an abortion. The court predicated its decision on plaintiff’s identity already being known to those whom she allegedly feared would humiliate, intimidate, and retaliate against her, and on the public interest in knowing how state revenues are spent. The court did not explain why disclosure of plaintiff’s identity was essential to that public interest.⁴⁹

Rare cases have held that a federal court acquires no jurisdiction over a case that, without permission, is filed under a pseudonym.⁵⁰

While most cases involve efforts by plaintiffs to sue under a fictitious name, some involve situations in which both plaintiffs and non-corporate private defendants have been permitted to use pseudonyms. Other commentators have found that few of these cases reveal who requested the anonymity, and few explain why anonymity was permitted,⁵¹ although one sometimes can infer a reason, such as protection of minor children.

State Court Cases

The state appellate courts have not taken any significantly different path. Indeed, they cite to and follow federal precedents in developing their own body of case law. Although there is some variation in how

by the same plaintiffs, plaintiffs can be required to file their names and addresses with the court clerk, under seal, and a defendant sued again can apply to the court for an order determining whether the plaintiff in the later action previously sued under a pseudonym).

⁴⁷ *Femedeer*, 227 F.3d at 1246.

⁴⁸ 139 F.3d 798 (10th Cir. 1998).

⁴⁹ *Id.* at 803.

⁵⁰ See *W.N.J. v. Yocom*, 257 F.3d 1171 (10th Cir. 2001) (dismissing appeal from grant of summary judgment to defendant, on grounds that that trial court had no jurisdiction to enter such a judgment where plaintiff proceeded anonymously, without permission, and that, while appeal was pending, trial court had no power to grant nunc pro tunc plaintiffs’ motion to use pseudonym); *Estate of Rodriguez v. Drummond Co., Inc.*, ___ F. Supp. 2d ___, 2003 WL 1889330 (N.D. Ala. 2003) (following *Yocom*, granting without prejudice and for lack of jurisdiction defendants’ motion to dismiss complaint of unnamed plaintiffs, but welcoming a motion to proceed anonymously to be filed by plaintiffs before their filing of a second amended complaint); *but cf.* *EW v. N.Y. Blood Ctr.*, 213 F.R.D. 108 (E.D.N.Y. 2003) (holding that filing of complaint under pseudonym, without prior permission, did not deprive court of jurisdiction).

⁵¹ See *Michuda*, *supra* note 1, at 157-58; *Milani*, *supra* note 1, at 1702.

hospitable state court judges are to pseudonymous litigation, just as there is among federal judges and courts, for the most part the results reached by the state cases, as well as the analyses they employ, very much resemble the federal court jurisprudence.

Thus, state appellate courts have approved the use of pseudonyms by a patient alleging breach of confidentiality of medical records and invasion of privacy through dissemination of his AIDS diagnosis,⁵² and by persons complaining of sexual demands and threats.⁵³ They have declined to permit the use of pseudonyms by one who brought an employment discrimination action claiming that the exhibitionism for which he was discharged qualified as a handicap,⁵⁴ one who alleged that he had been falsely accused of public lewdness,⁵⁵ an attorney who was civilly accused of having sexually molested his niece,⁵⁶ one whose drug abuse was disclosed to a referring physician in alleged breach of professional duty,⁵⁷ another who was civilly accused of child molestation,⁵⁸ and one who complained of having been infected by herpes.⁵⁹ These cases include among them at least two⁶⁰ in which non-corporate, non-governmental, defendants sought to be sued under fictional names, for their own protection. In neither case did the court “go along.”⁶¹

While leaving the decision to the trial judge, the Supreme Court of Connecticut noted that it was not persuaded by the arguments for pseudonymity made by one who sought to challenge a state bar committee’s recommendation that he be denied admission to the bar, relying on his privacy interest in his moral

⁵² Doe v. Shady Grove Adventist Hosp., 89 Md. App. 351, 598 A.2d 507 (1991); *see also* Doe v. Hall, 260 Ga. App. 421, 579 S.E.2d 838 (2003) (vacating decision denying motion of HIV-positive plaintiff from suing under pseudonym, holding that statutory nondisclosure exception did not prohibit it, and remanding with direction to trial court to exercise its discretion).

⁵³ Riniker v. Wilson, 623 N.W.2d 220 (Iowa App. 2000). In an unusually liberal allowance of anonymity, a trial judge allowed anonymity to a cafeteria owner, sued for negligence in connection with an assault on its premises, where the defendant persuaded the court that its right to a fair trial would be endangered by “trial by newspaper” if its name were made public. Anonymous v. Anonymous, 191 Misc. 2d 707, 744 N.Y.S.2d 659 (N.Y. Sup. Ct. 2002).

⁵⁴ A.B.C. v. XYZ Corp., 282 N.J. Super. 494, 660 A.2d 1199 (N.J. Super. Ct. App.Div. 1995).

⁵⁵ Bittner v. Cummings, 188 A.D.2d 504, 591 N.Y.S. 2d 429 (N.Y. App. Div. 1992).

⁵⁶ Doe v. Doe, 282 Ill. App. 3d 1078, 668 N.E.2d 1160 (1st Dist. 1996), *appeal denied*, 169 Ill. 2d 565, 675 N.E.2d 632 (1996).

⁵⁷ Doe v. Heitler, 26 P.3d 539 (Colo. Ct. App. 2001).

⁵⁸ T.S.R. v. J.C., 288 N.J. Super. 48, 671 A.2d 1068 (N.J. Super. Ct. App. Div. 1996).

⁵⁹ Unwitting Victim v. C.S., __ Kan. __, 47 P.3d 392 (2002).

⁶⁰ The two cases are Doe v. Doe, 282 Ill. App. 3d 1078, 668 N.E.2d 1160 (1st Dist. 1996), *appeal denied*, 169 Ill. 2d 565, 675 N.E.2d 632 (1996), and T.S.R. v. J.C., 288 N.J. Super. 48, 671 A.2d 1068 (N.J. Super. Ct. App. Div. 1996).

⁶¹ *See also* Doe v. Diocese Corp., 43 Conn. Supp. 152, 647 A.2d 1067 (Conn. Super. Ct. 1994) (rejecting requests by defendant clergyman, accused of sexual abuse, and clerical institutions to which he belonged, to shield their identities, while permitting the plaintiff to sue under a fictitious name). For a discussion of arguments for and against defendant anonymity, *see generally*, Michuda, *supra* note 1, at 171-79.

character.⁶²

A state supreme court also declined to permit the use of a pseudonym by one whose suit against a former domestic partner would reveal his homosexuality, but the court found determinative that the case had been filed and pursued for several months with the parties' true names revealed, so that any right to litigate under a pseudonym had been waived.⁶³

Although the state appellate decisions predominantly have held against seekers of pseudonymity, that appears to be a function of the fact patterns that have come before those courts. I suspect there is more balance in the dispositions reached by the state trial courts.⁶⁴

Corporate Efforts to Sue or be Sued Pseudonymously

A controversial area that has emerged rather recently involves corporations that wish to sue or be sued under pseudonyms. A somewhat unusual situation was presented in *U.S. v. Microsoft Corporation*,⁶⁵ an antitrust suit in which the district court permitted companies who identified themselves only as "Doe Companies" to file papers, and participate in a hearing, in opposition to a proposed consent decree. On appeal, they participated as amici.⁶⁶ The Court of Appeals for the D.C. Circuit was distressed that these companies had been permitted to participate anonymously, finding this to be unprecedented, and firmly criticized the district court for allowing it on the basis of claimed fear of retaliation by Microsoft, but without inquiry, and without consideration of the impact on the public interest or of possible unfairness to Microsoft.⁶⁷ On this and additional grounds, the court remanded, with instructions that the case be assigned to a different district court judge.⁶⁸

Some state cases also have raised questions about the availability of pseudonyms for corporate entities. In *America Online, Inc. v. Anonymous Publicly Traded Company*,⁶⁹ the Supreme Court of Virginia confronted a situation in which an unnamed corporation sought a *subpoena duces tecum* requiring an internet

⁶² Doe v. Conn. Bar Examining Comm., 263 Conn. 39, 818 A.2d 14 (2003).

⁶³ Doe v. Burkland, 808 A.2d 1090 (R.I. 2002).

⁶⁴ The following typify state trial court cases in which the courts permitted litigants to sue using pseudonyms: Doe v. Tris Comprehensive Mental Health, Inc., 298 N.J. Super. 677, 690 A.2d 160 (N.J. Super. Ct. Law Div. 1996) (as to a gay, HIV-positive man); Doe v. Diocese Corp., 43 Conn. Supp. 152, 647 A.2d 1067 (Conn. Super. Ct. 1994) (as to a sexual abuse victim); E.K. v. N.Y. Hosp. Cornell Med. Ctr., 158 Misc. 2d 334, 600 N.Y.S.2d 993 (N.Y. Sup. Ct. 1992) (as to a patient treated for mental illness).

⁶⁵ 56 F.3d 1448 (D.C. Cir. 1995).

⁶⁶ *Id.* at 1453-55.

⁶⁷ *Id.* at 1463-64. The court also noted that statutory language permitting a district court to authorize "participation in any other manner and extent which serves the public interest," 15 U.S.C. § 16(f), did not legitimate the district court's action.

⁶⁸ *Id.* at 1463-65. For commentary on the *Microsoft* case, see Meltzer, *supra* note 29.

⁶⁹ 261 Va. 350, 542 S.E.2d 377 (Va. 2001).

service provider to disclose the identities of unknown persons who allegedly had defamed the plaintiff corporation and published confidential information about it, and whom the unnamed corporation had purported to sue as “John Does,” in another state. The Court, for the time being, disallowed the unnamed corporation from so proceeding under the Uniform Foreign Depositions Act. While opining that economic harm may rise to so extraordinary a level as to permit plaintiffs to proceed anonymously, it held that the corporation’s unsupported contention that self-identification would cause it irreparable harm did not reveal the degree and nature of the potential harm sufficiently to allow independent judicial evaluation, and remanded for further proceedings.⁷⁰

The Analyses that Courts Perform

If one focuses on the nature of the analyses that courts perform when deciding whether to allow a litigant to sue or be sued under a fictitious name, one finds much commonality in the cases, in part because they rely on one another and in part because some rely on the same commentators’ proposed analyses. All the courts engage in a balancing act. One often cited appellate opinion directed the trial courts in its federal circuit to weigh the following factors:

- whether the requesting party merely seeks to avoid annoyance and criticism, or seeks to preserve privacy in a matter of sensitive and highly personal nature;
- whether party identification poses a risk of retaliatory physical or mental harm to the requesting party or, even more critically, to innocent non-parties;
- the ages of the persons whose privacy interests are sought to be protected;
- whether the action is against a governmental or private party; and
- the risk of unfairness to the opposing party from allowing an action against to proceed anonymously.⁷¹

Other factors (or other ways of describing the factors) that courts often consider are:

- the extent to which the identity of the litigant has been kept confidential;
- the bases on which disclosure is feared, and the substantiality of those bases (including the degree of invasion of privacy that would be entailed, the seriousness, in likelihood and severity, of threats to physical, emotional, and financial well-being);
- the magnitude of the public interest in maintaining the confidentiality of the litigant’s identity;
- the undesirability, from the public’s standpoint, of dismissal of a suit for lack of the protection of a pseudonym;
- the weakness or strength of the public interest in knowing the litigants’ identities, in light of the nature of the case, of the issues, of the parties, or otherwise;
- whether the party seeking to sue pseudonymously, or the party opposing pseudonymity, is illegitimately motivated;
- whether a party seeks to remain unidentified not only as to the public, but as to its litigation adversary or the court and, if so, whether the court can manage the lack of identification in such a way as to eliminate, or keep within acceptable bounds, any resulting disadvantage to the litigation adversary.⁷²

⁷⁰ The court also held, for various reasons, that comity did not require Virginia courts to honor an Indiana court’s grant of permission, to the unnamed corporation, to sue anonymously. *Id.* at 383. For commentary on *America Online* and similar cases, see Scileppi, *supra* note 1, at 356-60.

⁷¹ James v. Jacobson, 6 F.3d 233, 238 (4th Cir. 1993).

⁷² See Steinman, *supra* note 1, at 38-43, relied upon by the following cases, among others: Doe v. Burkland, 808 A.2d 1090, 1096 n.6 (R.I. 2002); Unwitting Victim v. C.S., ___ Kan. ___, 47 P.3d 392, 400-01 (2002); Doe v. Provident Life & Acc. Ins. Co., 176 F.R.D. 464, 467-68 (E.D. Pa. 1997).

Some Grand Generalizations

Rather grossly generalizing, U.S. courts are relatively inhospitable to requests for anonymity or pseudonymity from adult litigants whom they view as merely seeking to avoid embarrassment, especially from revelation of their own frailties. The courts are far more accommodating of those who seek to shield (what the courts view as) intensely personal matters, especially when those matters involve alleged wrongdoing by others, but not necessarily limited to situations of such wrongdoing. The courts are likely to allow pseudonyms when persuaded that so doing will help to protect the well-being of minor children. The courts' accommodation of those who fear retaliation depends upon how reasonable the plaintiffs' fears are, and how probable and severe the forms of threatened retaliation are. Of course, throughout the cases, other considerations (such as those listed above)⁷³ may be determinative.

Preferred and Customary Pseudonyms ... and the Non-obvious

In the U.S.A., the pseudonyms most commonly employed are Doe, Roe, and (to a lesser extent) variations such as Coe and Poe. However, courts also frequently allow litigants to guard their identities by permitting them to sue using only initials.⁷⁴ And the word "anonymous"⁷⁵ or a generic description such as "patient"⁷⁶ or "unwitting victim"⁷⁷ may be permitted. Courts generally do not permit litigants to use fictitious names that are likely to be the name of real persons, who erroneously may be thought to be parties. In at least one case, the court required a litigant to change his pseudonym, when a stranger to the litigation who bore the name being used complained to the court.⁷⁸

One cannot always tell from a case caption that the opinion being reported addresses whether to permit a litigant to sue or be sued using a fictitious name. All of the cases cited in the accompanying footnote

⁷³ See text at nn. 71-72.

⁷⁴ See, e.g., *W.N.J. v. Yocom*, 257 F.3d 1171 (10th Cir. 2001); *M.M. v. Zavaras*, 139 F.3d 798 (10th Cir. 1998); *K.F.P. v. Dane County*, 110 F.3d 516 (7th Cir. 1997); *EW v. N.Y. Blood Ctr.*, 213 F.R.D. 108 (E.D.N.Y. 2003); *Javier H. v. Garcia-Botello*, 211 F.R.D. 194 (W.D.N.Y. 2002); *W.G.A. v. Priority Pharmacy, Inc.* 184 F.R.D. 616 (E.D. Mo. 1999); *Heather K. by Anita K. v. City of Mallard, Iowa*, 887 F. Supp. 1249 (N.D. Iowa 1995).

Examples of state court cases using initials are *T.S.R. v. J.C.*, 288 N.J. Super. 48, 671 A.2d 1068 (N.J. Super. Ct. App. Div. 1996); *A.B.C. v. XYZ Corp.*, 282 N.J. Super. 494, 660 A.2d 1199 (N.J. Super. Ct. App. Div. 1995); *E.K. v. N.Y. Hosp. Cornell Med. Ctr.*, 158 Misc. 2d 334, 600 N.Y.S.2d 993 (N.Y. Sup. Ct. 1992).

⁷⁵ See, e.g., *Am. Online, Inc. v. Anonymous Pub. Traded Co.*, 261 Va. 350, 542 S.E.2d 377 (Va. 2001); *Anonymous v. Legal Svs. Corp. of P.R.*, 932 F. Supp. 49 (D.P.R. 1996); *Anonymous v. Anonymous*, 191 Misc. 2d 707, 744 N.Y.S.2d 659 (N.Y. Sup. Ct. 1992).

⁷⁶ E.g., *Patient v. Corbin*, 37 F. Supp. 2d 433 (E.D. Va. 1998).

⁷⁷ E.g., *Unwitting Victim v. C.S.*, ___ Kan. ___, 47 P.3d 392 (2002).

⁷⁸ See *Rowe v. Burton*, 884 F. Supp. 1372 (D. Alaska 1994), *appeal dismissed sub nom. Doe I v. Burton*, 85 F.3d 635 (9th Cir. May 13, 1996) (unpublished), *appeal after remand, Doe v. State of Alaska*, 122 F.3d 1070 (9th Cir. Sep 02, 1997) (unpublished).

are opinions of that kind.⁷⁹

Mechanisms for Allowing Litigation to Proceed when One or More Parties are Protected by Pseudonyms as Against the Public, the Adversary, or the Court

Since the early days of pseudonymous litigation, the courts collectively have learned a great deal about how to manage such litigation. The brevity dictated for this article prevents me from going into detail, but the basic management tools include: public filings under pseudonyms or with true names and other identifiers redacted, filings “under seal” that reveal the parties’ true names, and protective orders or non-disclosure agreements that require non-disclosure by persons to whom the parties’ true names are disclosed. When parties seek to keep their names confidential only from the public, the procedures are somewhat less cumbersome than when the parties also seek to keep their names confidential from their litigation adversary. However, courts can manage the latter situations, as well. The nature of the issues raised sometimes may be such that defendants do not need to know the plaintiffs’ true names. When that is not the case, the court can delay disclosure until it is necessary, and can seek to provide a measure of protection to the theretofore unnamed party through protective orders and non-disclosure agreements. Of course, there are limits on the protections that the courts can afford.

I list in the footnote some cases and Articles that have gone into detail about the procedures that some courts have embraced to shield parties’ identities or that make recommendations as to how pseudonymous litigation should be managed.⁸⁰

Conclusion

Pseudonymous litigation in the U.S.A. has grown substantially over the last two decades, despite courts’ reluctance to allow litigants to sue or be sued using fictitious names. Our constitutionally-embedded presumption of openness will keep such litigation exceptional, and the discretion that courts must exercise in determining whom to allow to litigate pseudonymously always will result in some unpredictability and incoherence in results. However, the balancing test continues to be refined, as does the courts’ skill in managing pseudonymous litigation. While complete control over party-identifying information is unattainable, lawyers, litigants, and the public increasingly will know when fictitious names will be permitted,

⁷⁹ *Femedeer v. Haun*, 227 F.3d 1244 (10th Cir. 2000); *James v. Jacobson*, 6 F.3d 233 (4th Cir. 1993); *Akron Ctr. For Reprod. Health, Inc. v. City of Akron*, 651 F.2d 1198 (6th Cir. 1981), *aff’d in part & rev’d in part on other grounds*, 462 U.S. 416 (1983); *OSRecovery, Inc. v. One Groupe Int’l Inc.*, 2003 WL 23313 (S.D.N.Y. 2003); *Estate of Rodriguez v. Drummond Co., Inc.*, ___ F. Supp. 2d ___, 2003 WL 1889330 (N.D. Ala. 2003); *In re Blackwell*, 263 B.R. 505 (Bankr. W.D. Tex. 2000); *Luckett v. Beaudet*, 21 F. Supp. 2d 1029 (D. Minn. 1998); *Barth v. Kaye*, 178 F.R.D. 371 (N.D.N.Y. 1998); *Amnesty Am. v. County of Allegheny*, 822 F. Supp. 297 (W.D. Pa. 1993); *A.C.L.U. of Fla., Inc. v. The Fla. Bar*, 744 F. Supp. 1094 (N.D. Fla. 1990). State court cases of this kind include: *Riniker v. Wilson*, 623 N.W.2d 220 (Iowa App. 2000); *Bittner v. Cummings*, 188 A.D.2d 504, 591 N.Y.S. 2d 429 (N.Y. App. Div. 1992).

⁸⁰ *Coe v. County of Cook*, 162 F.3d 491, 498 (7th Cir. 1998) (discussing need for a party-filed certificate of interest, to enable judges to determine whether to recuse themselves), *cert. denied*, 526 U.S. 1040 (1999); *James v. Jacobson*, 6 F.3d 233, 235-36 (4th Cir. 1993) (detailing procedures for preserving anonymity during pretrial, including orders forbidding disclosure, non-disclosure agreements, use of pseudonyms in publicly filed documents, filing under seal of name-revealing filings, redactions, and identification of the persons to whom plaintiffs’ identities are revealed, among other things); *Unwitting Victim v. C.S.*, ___ Kan. ___, 47 P.3d 392, 399-400 (2002); *see generally*, Greer, *supra* note 32, at 528-38; Michuda, *supra* note 1, at 148; Carol M. Rice, *Meet John Doe: It Is Time for Federal Civil Procedure to Recognize John Doe Parties*, 57 U. PITT. L. REV. 883, 918-19, 949-52 (1996); Milani, *supra* note 1, at 1706-12; Steinman, *supra* note 1, at 86-87.

and what protections the courts can afford.