

# Settlement Secrecy Wrongly Hurts The Public's Right to Know

by Sanford M. Jaffe and Linda Stamato

In the wake of accidents and deaths attributed to defects in certain tires, particularly those installed on Ford Motor Co.'s popular SUV model, the Explorer, Bridgestone/Firestone Inc. has recalled 6.5 million tires. Public outrage has not subsided despite the recall.

Why? Largely because of the significant delay in informing the public of the threat to its safety in the first place. According to press reports, cases involving Firestone tires occurred over an 8-year period. Some cases were settled with payments to plaintiffs along with signed agreements—by all involved—committing to secrecy not only the terms of the settlements but providing confidential protection for all documents, testimony and expert reports relating to them. Evidently, the public, including the National Highway Traffic Safety Administration, was among the last to know.

Confidentiality becomes controversial under these circumstances, raising, among other things, an important administration of justice issue: How should courts and legislatures treat settlements of cases alleging defects in products that may cause serious harm? After parties reach agreement, courts often are asked to dismiss the action and protect the documents. Judges approve such requests routinely.

Had Firestone and Ford settlements been made public, lives may well have been saved. Disclosure of settlements could have alerted regulators and helped consumers make informed decisions. An effectively functioning free market depends, after all, on access to information.

The issue is far broader than this controversy. Indeed, using settlement to avoid public scrutiny is not unusual: Pain-relieving drugs, side-mounted gas tanks and silicone gel implants come immediately to mind.

## **TESTING THE PROPOSITION**

Given the impact of secrecy in these critical instances and compelling public policy in favor of access to information, why are settlement terms made confidential?

Because, the argument goes, society has an interest in settling suits and confidentiality is critical to settlement.

Lees test that proposition: Most cases filed in courts (90% to 98% depending on the jurisdiction) do not go to trial. Some cases are abandoned or leave the system “on motion”; the overwhelming number settle. There is a myriad of reasons why cases settle, but most often it’s because lawyers and clients do not want to take the risk and want to avoid the cost, disruption to business and time involved in a trial.

While it is widely believed that defendants settle to avoid greater potential liability, we know of no quality studies demonstrating a causal link. It is difficult to make the case that the public's interest in information should fall to the untested notion of confidentiality in this context.

How then to deal with this issue? No more than 12 states regulate secrecy, attempting to prevent dangers to public safety and health from taking second place to settlement confidentiality. New York, for example, has a court rule that requires a finding of good cause before a court can grant a request to seal a court file as part of a settlement. N.Y. Ct. R Sec. 216.1(a). The Texas Rules of Civil Procedure (76a) state that “all court records” are presumptively public and can be sealed only upon a showing that disclosure would damage a specific and serious interest that outweighs the presumption of openness; no less restrictive means can adequately protect that interest. In New Jersey's the state Supreme Court, in *Hammock Jr. v. Hoffmann-LaRoche, Inc.*, 139 N.J. 288 (1995), set forth a presumption of access that could be rebutted. The Court detailed how a trial court should administer the standard. Interestingly, the Court also noted that it perceived that the national trend was away from sealing documents and material filed with courts.

## **OPEN RECORDS OFTEN AREN'T OPEN**

For the most part, though, these efforts appear to be insufficient, at least in New Jersey where, as *The Star Ledger* of Newark reported in early September, settlements still are often sealed.

We offer the following for consideration: Settlements filed with courts should not be given the protection of the court for secrecy. They should be made available to the

public. The courts, particularly in this context, have no vital reason to keep information from the public.

Where parties can show a compelling reason to vitiate the policy in favor of access, however, courts could, on notice and hearing, protect confidentiality. Thus, courts could protect trade secrets, for example, in a settlement otherwise made public. In this approach, disclosure becomes the norm.

When parties do not come to court at all and settle their matters entirely on their own, freedom to contract on terms would seem to prevail; whether lawyers have an obligation larger than that to their clients in situations where settlements shield information the public needs to avoid potentially harmful consequences is an important subject that needs full airing as well.

Perhaps a national consensus will finally move state courts and legislatures to act. Courts that have the power to set forth the rules that govern their operations should strengthen access to settlements; where that power is unclear or does not exist for this subject, legislatures should enunciate policy in this regard.

The Firestone-Ford matter, bringing the issue to the forefront as it has, provides the opportunity to act on this critical issue. The public's safety and health depend on access to life-threatening information. Settlement records that limit access should not be sealed, and certainly not in a system of justice that the public pays for.

**Sanford M. Jaffe is director and Linda Stamato is deputy director of the Center for Negotiation and Conflict Resolution at Rutgers, The State University, in New Brunswick, N.J.**

*This article was originally published in Alternatives, Vol. 18 No. 9, October 2003. Alternatives is the national newsletter of the CPR Institute for Dispute Resolution.*