ADR Confidential

Published in Daily Journal Magazine

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The public doesn't have an inherent right to breach privacy and learn the outcome of any particular suit, contrary to what consumer advocates might think.

Recently, Los Angeles Times carried a horrifying headline effecting mediators and litigators everywhere. It was entitled, "Tire Recall Fuels Drive to Bar Secret Settlements". The article quoted "consumer advocates" who claim that "secret settlements" of product liability suits threaten innocent people.

It went on to say that the public was harmed by Firestone, McNeil laboratories, Pfizer and others for making secret, hush-hush deals in an effort to hide the ball and contain awareness of their problem-ridden products. It said, "Many of these cases were kept out of the public eye because Bridgestone/Firestone, Inc. and the Ford Motor Company, without acknowledging liability, quietly settled many lawsuits resulting from tire-related crashes." It concluded that "Sealing settlements from public view... could jeopardize lives".

The thing they didn't say is that many of these "secret settlements" were confidential mediations, where the process and outcome were protected by confidentiality agreements.

These advocates are trying to frighten consumers in the wake of the recent Firestone incident in order to gain public support for the removal confidentiality protections that are inherent in mediation. David Bladeck of Public Citizen, a consumer advocacy group, is quoted as saying, "Some companies dangle this money in front of you and say this is yours if you keep everything confidential. It's a benefit some people get at the expense of future victims."

U.S. Representative Lloyd Doggett (D-TX) called the Firestone recall, "the perfect illustration of why the public needs access to defective-product complaints." He said, "The public has a right to protect itself, and information is the best safeguard." U.S. Senator Herb Kohl (D-Wisc.) was recently quoted as saying, "the American public deserves full, open and complete disclosure. Anything less endangers each and every one of us..."

They are all correct about the American people needing to know about complaints. The public needs to be protected. The problem is that the public doesn't have a right or a need to know the settlement outcome of any particular lawsuit. Knowing the outcome of individual settlements does not tell them anything more about the fact that Firestone had problems with bad tires. This is where we must clarify and bifurcate the issues. In truth, it makes no difference to the "public good" whether the Jones family received $285,000 or $325,000 when Mrs. Jones lost an eye when her airbag inflated. What should be of

interest to the public is that she filed a lawsuit alleging that the manufacturer was to blame, and that she wasn't the first to do so.

Privacy is a diminishing American right. With internet commerce on an astronomical rise, our personal information is zipping all over the internet. With software that allows others to read the information on my computer's hard drive, I don't even know what's private in my life anymore. Recently, a credit card company required my mother's maiden name, my social security number, and place of birth, in addition to a password in order to access my account through their web site. I realized that armed with all of that information, anyone could access everything in my life as easily as I could.

Then I tried to imagine that my family had lost a loved one to a Firestone/Ford accident. Horrible thought, I know. For me, about the last thing I would want is to participate in lengthy, drawn out, gory litigation. Even worse, however, would be for my name to be published somewhere for the public record alongside the amount of money that I received as compensation. Imagine my telephone at the dinner hour with every salesman or crazy person knowing that I now possess what they see as newfound riches.

What is happening here is that in their zeal to act quickly, these consumer advocates have confused privacy with secrecy. Webster's defines private as "of or concerning a particular person or group... not open to or controlled by the public". Secret is defined as "kept from, or acting without, the knowledge of others... beyond general understanding; mysterious... concealed from sight; hidden".

These are different concepts. Privacy is a constitutional right each of us possesses. It means that something is ours to do with what we choose. Secrecy is one of the choices available to us under the right to privacy. Secrecy carries the connotation that I am keeping something from someone else. I may or may not choose to keep it secret, but my right to privacy insures that I get to make that choice.

According to the article, "Support is spreading in Washington for legislation barring manufacturers from sealing court records". The consumer advocates say that when cases are settled, even out of court, they should be made public or reported in order to protect the public's safety. But what public safety issue is protected by knowing the private statements and settlement discussions (which are not made under oath) or the dollar amount paid to settle a case in mediation?

Let's step back and look at what it would do for the public if mediation confidentiality were removed.

To begin with, their timing does not make any sense. Any litigator who has tried product liability or environmental cases knows that such cases generally take anywhere from six months to several years to be completely resolved. If consumers are to wait until cases are settled, they will be in danger for far too long. The time to report these patterns is when the cases are first filed.

Furthermore, almost all of these cases settle without any admission of liability by either side. All too often, they represent a compromise reached by both sides in order to avoid the risk and cost of the litigation process. So in the end, we do not know anything with certainty that we did not know in the beginning.

The job of the courts, however, is to settle disputes, not track patterns or hold investigations. That is the job of the U.S. Consumer Product Safety Commission (CPCS). This independent Federal regulatory agency helps keep American families safe by reducing the risk of injury or death from consumer products. If the product is a vehicle or vehicle part, then the complaint should be directed to the National Highway Traffic Safety Administration (NHTSA).

Alan Schoem, Director of the Office of Compliance for CPCS, explains, "There are two different reporting requirements." Under 15 U.S.C. 2064, companies must report if they have knowledge that they have a product that could present a substantial product hazard. 15 U.S.C. 2084 requires manufacturers to report defects in their products if they have been involved in three court judgments or private settlements in a two-year period.

Schoem points out that companies do not have to give the amount of any settlement. They are specifically not asked in order that they may protect the confidentiality of the specific process and settlement.

Any consumer can call the CPSC Hotline at 800-638-2772 or access their web site at www.cpcs.gov to report product safety information or to obtain recall information. For vehicles, child safety seats or vehicle parts, NHTSA can be reached via the D.O.T. Auto Safety Hotline at 800-424-9393 or on the web at www.nhtsa.dot.gov. A simple call to either of these hotlines can trigger an investigation leading to consumer warnings or product recalls.

What is needed, rather than asking companies and private individuals to report the final settlement of their lawsuits, is to enforce the law that is already in place, and publicize the availability of the CPSC & NHTSA. The other thing that would help is to increase the deterrent against "hiding the ball" and entice manufacturers to report problems or face more stern financial consequences.

This is what the Defective Product Penalty Act would do. This is the name of a new bill being drafted by Senator Dianne Feinstein (D-CA) and Senator Kohl. Not only would this Act dramatically increase manufacturers' penalties for non-reporting, but it would also impose criminal penalties on those knowingly releasing dangerous and defective vehicles or vehicle parts. The civil penalties for failure to recall a defective vehicle or part are currently $1,000 to $925,000. The proposed legislation would increase the penalty to a minimum of $10,000 per violation, with no maximum. Criminal penalties can result in sentences from five to 15 years.

There is one big problem with this bill. While this sounds good so far, the final provision in the proposed bill could prohibit federal courts from enforcing "secrecy agreements". In

other words, no longer would a company and plaintiff agree to keep quiet about a potential threat to public safety. This is a good concept, but is too vaguely worded. While plaintiffs should be allowed and even encouraged to report potential defects or dangers to regulatory agencies (and defendant companies must), there needs to be an understanding that removing the confidentiality from the mediation process that brings about these settlements would render mediation nearly ineffective in resolving such matters. This would only force people back into overcrowded courtrooms, costing taxpayers more money. If the clarification were made between reporting complaints versus reporting verdicts and settlements, then the new bill would be well worth supporting.

If these other consumer advocates really want to serve the public's safety interests, instead of trying to unlock mediation's confidentiality after cases have settled, they would focus their energies on organizing interested volunteers and student interns to a.) promote these hotlines and web sites to heighten consumer education and awareness; b.) help track product liability case filings; and c.) work with the CPSC & NHTSA to ensure self-reporting and increase sanctions against those who do not comply.

The Times article, almost a full page in size, devotes only two paragraphs to Harvard law professor Arthur R. Miller's argument that litigants do not give up their right to privacy when they voluntarily, or involuntarily, enter the courthouse door. Miller is quoted as saying, "There's no doubt you don't want health and safety matters hidden from public view, but you don't want to throw out the baby with the bathwater." He went on to say, "You don't want to deter people from using the courts because they fear they would lose their privacy."

This is the whole point about mediation. In a mediation, people know that they can say things in an informal setting that may help to resolve the case. These same people may be afraid to say these things under oath, if they might negatively impact a judge or jury's perception of them or their case. In mediation however, they can admit things that the other side usually needs to hear.

For example, I mediated a sexual harassment case in which the defendant asked if we could adjourn briefly to confer with his attorney after he heard the plaintiff's sincere and tearful opening statement.
When we reconvened, and after being reassured of the confidentiality of the mediation process and that nothing he said here could be used against him later, he bravely said, "I did it. I did just what she said." He proceeded to apologize to the couple, explaining that he was totally unaware that his actions were having such an effect on their lives. He explained that he only meant it all jokingly, and never meant to hurt her. From that point, after months of litigation, we were able to fully resolve this case in only 45 minutes.

Ideally, this is how disputes should be resolved. Had this defendant admitted his guilt in front of an arbitrator, judge or jury, he would be finished. The only question remaining would be "How much?" Knowing this, his counsel would likely advise him to deny all counts if he stands a chance of defending the claim. However, in the mediation process, his confession and sincerity went a long way to helping the plaintiff resolve her

emotional trauma over the events. What is worse, absent the protection of confidentiality afforded by California's Evidence Code, he never confesses or apologizes, the value it had for her disappears, and the mediation is reduced to offsetting denials and loses its effectiveness in resolving the case.

The unfortunate thing about our adversarial legal system is that this is the first time he had ever heard her side of the story and how the events that he thought were simply fooling around and office pranks had severely impacted her life. The litigation process doesn't promote such dialogue, instead it pits parties against one another in a winner-take-all oppositional format. Mediation can promote open and honest communication, but only if the parties and their statements are protected by airtight confidentiality.

In resolving disputes, good resolutions include more collaboration than compromise - consumers, government agencies and private individuals working together to resolve a problem. In a win-win solution, all parties involved work together to fight a problem that exists, rather than the traditional framework perfected by the litigation process where people fight against each other while the problem persists. This is where the mediation forum is very beneficial.

Creative solutions are another benefit of the mediation process. In a case I mediated where a tooling employee nearly lost an eye due to a faulty drill bit, the plaintiff's trouble was that his identity and sense of self came from being a successful tooling worker and providing for his young family. He was more upset that he wouldn't be able to find another tooling job. Through creative thinking and conversation, the tool shop where he had been employed, which was in the process of closing its doors, agreed to give him several of the major tools on which he had worked as part of the settlement. Rather than sell them for pennies on the dollar and give him a monetary settlement, we realized that this machinery had the greatest value in his hands. We maximized one party's assets by matching them to the other's needs. Without the aid of a facilitator and open discussion about needs and wants, rather than just legal theory, this opportunity would not exist.

The other major benefit of a confidential mediation is the emotional cost it spares the plaintiff, compared to a public litigation forum. In another case I mediated, the plaintiff had lost an eye when her car's airbag inflated. She was a beautiful, proud Asian woman with a husband and child. Her attorney described a morning when her child walked in while she was inserting the saline pouch that was her artificial eye, and was now afraid to come near her. As he did so, her head sank lower and lower into her lap. When I spoke with her privately, she told me she didn't feel like a woman anymore with her husband. Meanwhile, in private, the husband told me he felt responsible because he had bought the car and personally fixed the brakes that had failed her that day.

The last thing these folks needed was months of interrogatories, depositions, independent medical examinations and a three-week jury trial. Their overriding need was to settle that case, quickly and quietly, and get on with their lives. If this mediation forum did not exist, complete with the privacy it affords, this family would have been forced to testify

publicly, only further damaging their fragile emotions and further disgracing the mother. Trust me, she had suffered enough.

Protracted litigation is a horrible thing for the parties involved. The time, money and emotional drain are usually what deters parties from litigating and seeking their "day in court".

It is not my intent to sound like I oppose litigation. There are many cases where precedents need to be set. We are fortunate that we live in a time where we are defining constitutional issues surrounding privacy and consumer issues such as protection from defects and antitrust right now. Litigation is the best forum for these kinds of cases. Many of the remaining cases are best suited for some form of Alternative Dispute Resolution (ADR), usually mediation.

For most cases, however, the money and time protracted litigation requires are often what deters parties from litigating. On the flip side however, it is these settlements reached in mediation that have reduced the time for a jury trial in Los Angeles from over two years to less than a year. As a former court ADR Director for the Santa Barbara Superior Court's multi-door courthouse model, I can tell you from the inside that fast-tracking cases is only possible under the existing court infrastructure because of the existence of ADR.

There is no question that the public good and safety is among our most important concerns. However, it is not more important than our privacy. Moreover, the two are not mutually exclusive. If consumer advocates are doing their job and tracking complaints and cases filed, and using that information to launch investigations to determine if a problem actually exists, they need not invade our privacy to do so. The two can live side by side, and should continue to do so.