

## **Hands Off Mediation Confidentiality!**

**By Lee Jay Berman**

The Los Angeles Times front page recently carried a shocking headline effecting mediators and litigators everywhere: "Tire Recall Fuels Drive to Bar Secret Settlements". The article claimed the public was harmed because Firestone, Pfizer and others were making hush-hush deals to conceal product defects. U.S. Senator Herb Kohl (D-Wisc.) said, "the American public deserves full, open and complete disclosure. Anything less endangers each and every one of us." The article concluded that "Sealing settlements from public view...could jeopardize lives".

What 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 attempting to use the horror triggered by the Firestone tire debacle to frighten consumers and gain public support to remove confidentiality protections that are inherent in mediation.

While the American people should be made aware of product safety complaints, the public doesn't have a right to know the specific settlement of any individual lawsuit. 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. However, knowing whether the Jones family received \$285,000 or \$325,000 when Mrs. Jones lost an eye when her airbag inflated does not do anything more to protect public safety. 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.

According to the article, support is spreading in Washington for legislation barring confidentiality settlements in product cases. Let's step back and look at what it would do for the public if mediation confidentiality were removed.

To begin with, the timing makes no sense. Litigators know how long it takes for these cases to resolve completely. If consumers have 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. They often represent a compromise reached by both sides in order to avoid the risk and cost of litigating. In the end, we have no more certainty than we did in the beginning.

Courts have their hands full settling disputes, and shouldn't be burdened with tracking patterns or holding investigations. That is the job of the U.S. Consumer Product Safety Commission (CPCS). This independent Federal regulatory agency tracks claims of injury or death related to 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). Consumers can call the CPSC Hotline at 800-638-2772 or NHTSA's Auto Safety Hotline at 800-424-9393 to report product safety information or to obtain recall information. A simple call to either of these hotlines can trigger an investigation leading to consumer warnings or product recalls.

Under 15 U.S.C. 2064, companies must report to CPCS any knowledge they have that a product 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. One important note: they are specifically not asked to disclose the amount of any settlement in order to protect confidentiality.

What is needed, rather than asking companies and private individuals to report the final settlement of their lawsuits, is to enforce the existing law and publicize the availability of the CPSC & NHTSA. It would also help to increase fines for manufacturers who "hide the ball".

This is what the *Defective Product Penalty Act* would do. This new bill being drafted by Senator Dianne Feinstein (D-CA) and Senator Kohl proposes an increase in the civil penalties (currently \$1,000 to \$925,000) to a minimum of \$10,000 per violation, with no maximum. Criminal penalties could result in sentences from five to 15 years.

The big problem with this bill is that it proposes to prohibit courts from enforcing "secrecy agreements". What they fail to understand is that removing confidentiality from the mediation process that brings about these settlements would handcuff mediation's effectiveness. If the clarification were made between reporting complaints versus reporting verdicts and settlements, then the new bill would be well worth supporting.

It is important to recognize that there are always those who want to unveil mediation confidentiality agreements, and will use today's graphic headlines to reach the public fear in order to do so. Instead of blaming deaths and injuries on the faulty tires that caused them, they are trying to blame them on the "secret agreements" reached in mediation. This is why neutrals must pay continuous attention to proposed legislation and must continue to educate the lawmakers about the ADR field.

*Lee Jay Berman is a full-time mediator and trainer based in southern California. Since 1994, he has successfully mediated over 1,000 cases. He is a Fellow with the International Academy of Mediators and a Diplomat with the California Academy of Distinguished Neutrals. He mediates for the AAA, the National Panel of Distinguished Neutrals for the CPR Institute and AMCC. He is Director of the "Mediating the Litigated Case" program for Pepperdine's Straus Institute for Dispute Resolution and Co-Chair of the ABA Section on Dispute Resolution's Practice Development Committee. He has trained judges, lawyers and business leaders from India to Croatia and across the U.S. in mediation and negotiation skills. He can be reached at 800-195-6495 or [leejay@mediationtools.com](mailto:leejay@mediationtools.com).*