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Confidential Settlements: The Defense Perspective

Stephen E. Darling

CONFIDENTIAL SETTLEMENTS: THE DEFENSE PERSPECTIVE

STEPHEN E. DARLING*

I. THE DEFENSE POSITION

As a general statement, the defense bar in South Carolina favors confidential settlements. Much has been written and published on the topic of so-called secret settlements. That moniker is misleading. *Webster's Dictionary* defines "secret" as the following: "1. Hidden, concealed; 2. Covert, stealthy."[1] The term "stealthy" seems to imply some sort of spying. On the other hand, "confidential" is defined in the lexicon as the following: "1. Secret, private."[2]

As indicated by the definitions above, the inflammatory use of "secret" to describe confidential settlements connotes an undercover, hidden, and less than above-board activity. The word "confidential," denoting privacy in the context of settlements of civil actions, is a much more descriptive and accurate modifier.

Based on these definitional parameters, the following sections enumerate the

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* Shareholder, Haynsworth Sinkler Boyd, P.A., Charleston, South Carolina; B.S., J.D., University of South Carolina. Immediate Past President, South Carolina Defense Trial Attorneys' Association (SCDTAA) (2003). Mills Gallivan, past president of the SCDTAA, and Bill Duncan, chair of the Practice and Procedure Committee of the SCDTAA, contributed to this Article.

1. NEW MERRIAM-WEBSTER POCKET DICTIONARY 448 (1964).
2. *Id.* at 103.

factors and rationale supporting the defense perspective of confidential settlements.

II. REASONS AND FACTORS FAVORING AND PROMOTING CONFIDENTIAL SETTLEMENTS

A. Protection of Trade Secrets, Financial Information, and Other Proprietary Information

Confidentiality plays an important role in civil litigation. From a defense standpoint, confidential settlements are of paramount importance in an effort to protect trade secrets, financial information, and other proprietary information from reaching the general public. As such, "[p]arties who settle a legal dispute rather than pressing it to resolution by the court often do so, in part anyway, because they do not want the terms of the resolution to be made public."[3] "Defendants in particular are reluctant to disclose the terms of settlement, lest those terms encourage others to sue."[4]

Eliminating confidential settlement agreements may ultimately foster litigation by virtue of reports of "big money settlements" which encourage potential plaintiffs to litigate. Thus, the potential clearly exists that elimination of confidential settlements would promote unnecessary litigation without making any more useful information available to the public.

B. Invasion of Personal Privacy

Elimination of confidential settlements would impede the process of protecting the parties' private or proprietary information or both, and therefore, runs the risk of an unwarranted invasion of personal privacy and deprivation of property rights protected by the United States Constitution. Upholding the continued use and enforceability of confidential settlements serves both the public and private interests at issue; namely, the public interest in promoting the settlement of civil disputes without court intervention so as to preserve judicial resources and the private interest of litigants in a civil suit that have a compelling interest in keeping the terms of the resolution of their dispute private. Although openness is an important way of maintaining confidence in public institutions, openness of judicial proceedings exists primarily to ensure the appropriate functioning of our courts—not to disclose private and confidential information that the litigants agreed to protect.[5]

Confidentiality plays an important and necessary role in litigation. Plaintiffs,

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3. Jessup v. Luther, 277 F.3d 926, 928 (7th Cir. 2002).

4. *Id.*

5. Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 428, 484–87 (1991) (arguing monetary terms of a settlement agreement "have no relationship to a potential public hazard or matters of public health, and unless official conduct is at issue, matters of proper governance are not involved").

defendants, and witnesses are often compelled to expose very personal, sensitive information in court. Thus, impeding the process of protecting such information runs the risk of an unwarranted invasion of that privacy.

C. *Chilling Effect*

Among the potential, and probably unintended, consequences of prohibiting confidential settlements is the chilling effect on the settlements themselves. Specifically, the elimination of confidential settlement agreements would serve as a disincentive for settlement in a majority of civil disputes. Settlements, by their very terms, are mutual resolutions of disputed claims. That is, a settlement is not an admission on the part of the defendant that its product or behavior was in any way defective, negligent, or wrong. By prohibiting confidential settlements, the mere existence of a settlement and the terms thereof, usually including a recitation of the perceived defect or detrimental behavior, will be made public and emasculate any protection from assumed liability which generally exists with voluntary settlement agreements. Accordingly, by eliminating the protection generally afforded by the confidential nature of sealed settlements, a chilling effect on voluntary settlements undoubtedly will result.

D. *Questionable Enforceability*

Eliminating confidential settlements, by rule or otherwise, arguably affects the enforceability of privately negotiated confidential settlement agreements. Currently, federal and state procedural rules have no effect whatsoever on settlement agreements entered into by the parties if the parties themselves agree to confidentiality without court involvement. However, under the scrutiny of an inventive lawyer, eliminating confidential settlements under court seal may inadvertently result in the inability of the court to enforce privately negotiated confidential settlements. Specifically, the ability to enforce the confidentiality provisions of any privately negotiated settlement may ultimately require the parties' submission of the issue to the court. Although negotiated as confidential, the settlement would come under the perusal of the court to enforce its very terms. Therefore, the intent of the parties—confidentiality—would be lost.

E. *Interference with Judicial Discretion*

A ban on court enforced secret settlements would interfere with the court's discretion to enforce confidentiality. Under former rules and practices, a judge had the discretion to protect private and confidential information when and if appropriate to provide a balanced and efficient method of administering justice in individual cases. A flat prohibition on court enforced confidential settlements is inconsistent with a judge's authority and discretion under Article III of the United States Constitution to protect the litigants' privacy, property rights, and to prevent

injustice in particular cases.

III. ADVOCACY OF THE DEFENSE POSITION

A. The Federal Rule

The United States District Court for the District of South Carolina, under the leadership of Chief Judge Joseph F. Anderson, led the analysis of court-enforced confidential settlements. Driven by the desire to protect the public from products or matters endangering health and safety, the efficacy of confidential settlements was thrown open to debate. Judge Anderson invited comments from defense, plaintiff, and public organizations on proposed amendments to Local Rule 5.03[6] concerning the procedure for sealing court documents.

Chief Judge Anderson's original proposal, copied essentially from a Florida statute,[7] prohibited the sealing of court orders if the documents contained information concerning matters that had a probable adverse effect upon the general public's health, safety, the administration of public office, or the operation of government.[8] Realizing that such a proposal might not engender support for passage, Judge Anderson narrowed his proposal to deal solely with product liability actions where the product was still a danger to the public.[9]

However, when the judges of the District Court of South Carolina met, the proposed rule was expanded. Although the judges considered various positions on the topic, the resulting federal rule stated the following: "No settlement agreement filed with the court shall be sealed pursuant to the terms of this rule."[10] The Rule, as amended, still carries the caveat of Local Rule 1.02, D.S.C.,[11] which provides that, for good cause shown, a judge can override any of the local rules in a particular case, thus preserving the court's discretion to allow confidential settlements.[12] To qualify for relief under Rule 1.02, there must be a demonstrable need for secrecy in cases involving trade secrets, proprietary information, or cases where there is a mutual agreement of a need for privacy such as sexual harassment cases.

Furthermore, the court rule has no effect whatsoever on settlement agreements entered into by the parties when the parties themselves agree to confidentiality without the need for court approval of the settlement.

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6. D.S.C. LOCAL R. 5.03.

7. FLA. STAT. ANN. § 69.081 (West Supp. 2002).

8. *Id.*

9. Letter from Chief Judge Joseph F. Anderson Jr., District of South Carolina, to H. Mills Gallivan, President, South Carolina Defense Trial Attorney's Association (Aug. 6, 2002) (on file with author).

10. D.S.C. LOCAL R. 5.03(c).

11. *Id.* at R. 1.02.

12. *Id.*

B. The State Rule

Following the lead of the South Carolina Federal District Court, Chief Justice Jean Hoefer Toal of the Supreme Court of South Carolina proposed a rule of civil procedure governing sealing documents and settlement agreements. The court published a request for written comments and notice of a public hearing. The South Carolina Defense Trial Attorney's Association, as in the federal venue, submitted written comments to the court advocating the continued use of confidential settlement agreements.

The court held a public hearing on January 21, 2003, with comments made by approximately eighteen witnesses. Several individuals spoke at the public hearing, including Will Cleveland, on behalf of the International Association of Defense Counsel (IADC); Mills Gallivan, on behalf of the Federation of Defense and Corporate Counsel (FDCC); Bill Davies, on behalf of the Defense Research Institute (DRI), and others. Likewise, advocates of confidential sealed settlement bans made remarks as well.

After considering the written and oral presentations, the supreme court enacted a new rule setting forth guidelines for state judges to approve secret settlements or sealed documents used in lawsuits. The Rule permits judges to keep private financial matters and sensitive custody issues confidential. Under the Rule, judges must consider why sealing the documents would best serve public's health or safety.

IV. RESULTS AND EFFECT

So, where does that leave us? We now have a federal rule prohibiting approval of all confidential settlements by the court. The state rule allows secrecy after the court considers several factors.

The bottom line is that the federal and state rules will not affect most settlements. In most cases, private settlement agreements do not need court approval. These settlements, if confidential, will not be influenced at all by either rule. For example, settlements of wrongful death actions or minors' claims requiring court approval under the federal rules could not be confidential and under the state rules might not be confidential.

Even with confidential settlements, discovery filed with the court would not be confidential. Dangerous products and public hazards can still be revealed to the public through discovery unless the court issues a confidentiality order to protect those documents during the discovery process.

Only time will tell if the confidentiality rules in state and federal courts will have an effect on how those courts handle the litigation. Anecdotally, I understand that some courts are not approving confidential sealed settlement agreements. It remains to be seen how the new rules will play out.