Secret Settlement Restrictions and Unintended Consequences

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Laura J. Hines

I. INTRODUCTION

Recent high-profile cases have drawn attention to the use of secret settlements—settlements that restrict the availability of information to the public about a dispute. Firestone entered into a series of confidential settlements of claims for injuries arising out of the use of Firestone/Bridgestone tires on Ford sport utility vehicles (SUVs). The combination of Firestone tires and Ford SUVs eventually was linked to at least 148 deaths. The Boston Archdiocese used confidential settlements to resolve allegations of sexual abuse by priests. One victim later said: "I’m ashamed I took their money now . . . . I should have gone and reported it to the police, or filed a lawsuit and called a press conference to announce it. If we had done that, this problem would have been exposed long ago." A confidentiality provision in a 1993 settlement between Michael Jackson and a minor child received renewed attention in light of Jackson’s later trial for, and acquittal on, charges of child molestation.

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** Professor of Law, University of Kansas School of Law. We appreciate helpful comments from symposium participants as well as participants at the annual meeting of the Midwestern Law & Economics Association, in particular Bruce Kobayashi, Eric Rasmussen, and Larry Ribstein.

1. Susan P. Koniak, Are Agreements to Keep Secret Information Learned in Discovery Legal, Illegal, or Something in Between?, 30 Hofstra L. Rev. 783, 783–84 (2002) (“For at least eight years before the public and government authorities learned of the apparently dangerous combination of Ford Explorer sport utility vehicles (SUVs) and their Bridgestone/Firestone brand of tires, Firestone had been settling lawsuits involving injuries and deaths caused by their tires failing on Ford SUVs.”); see In re Bridgestone/Firestone, Inc., 198 F.R.D. 654, 657 (S.D. Ind. 2001) (upholding seal on discovery materials entered in previous settlement agreements).


3. Matt Carroll et al., Scores of Priests Involved in Sex Abuse Cases: Settlements Kept Scope of Issue Out of Public Eye, BOSTON GLOBE, Jan. 31, 2002, at A1 (“Under an extraordinary cloak of secrecy, the Archdiocese of Boston in the last 10 years has quietly settled child molestation claims against at least 70 priests.”).

4. Id.

Concerns about secret settlements are not new. Reports in the 1980s and 1990s identified secret settlements in cases involving alleged public health hazards from "Honda Civics, Bic lighters, DPT vaccines, Zomax and Feldene painkillers, Zenith television sets, Pfizer heart valves, General Motors fuel tanks, Xerox toxic leak sites," as well as asbestos, tobacco, and silicone breast implants.

The phrase "secret settlement" refers to a range of practices that result in a settlement between disputing parties on terms not subject to public scrutiny. The secrecy of many settlements is achieved simply by a private contract between the parties that is not filed with the court. Some settlement agreements, however, are filed under seal with the court, ensuring judicial enforcement of the parties' obligation to maintain secrecy regarding the settlement terms. Judicially mandated secrecy may extend not only to the terms and amount of the settlement but also to other court documents, such as filed discovery papers.

Critics argue that secret settlements permit harmful practices—e.g., exploding tires and child molestation—to continue for longer than they would have continued were public access to information not restricted by the settlement agreement. The United States District Court for the District of South Carolina by local rule now precludes the filing of settlements under seal with the court. A number of states regulate secret settlements in various ways, ranging from restrictions like those of the South Carolina federal court to a declaration like that in the Florida Sunshine in Litigation Act specifying that secret settlements (even those entered into out of court) are against public policy and unenforceable.

This Article evaluates the likely consequences of restrictions on secret settlements. The starting point for the analysis is that both the defendant and an early claimant—a claimant who discovers that he or she has a claim before other claimants do—have an incentive to enter into a secret settlement. The defendant has an incentive to settle secretly

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8. HUGHES, supra note 7, at 2-4.

9. Moreover, in cases involving minors or other specially-protected persons, or cases brought under the Fair Labor Standards Act, the relevant law requires court approval of any settlement. See also FED. R. CIV. P. 23(e) (class actions).

10. See infra text accompanying notes 64–67.

11. D.S.C. LOCAL R. 5.03(E); see also infra text accompanying notes 99–104.

12. FLA. STAT. ANN. § 69.081(4) (West 2005); see also infra text accompanying notes 88–98.
because it does not want information about the dispute to be publicized. The early claimant has an incentive to settle secretly because it can extract a higher settlement payment from the defendant to keep the dispute secret.

The shared interest of the defendant and the early claimant in limiting the availability of information about their dispute gives reason to doubt the effectiveness of restrictions on secret settlements. The parties have a strong incentive to maintain secrecy, and they have a variety of means by which they might do so. First, in many cases, a claimant can circumvent restrictions adopted by a single state or federal court by filing suit in a state or court without such restrictions. Second, parties might circumvent secret settlement restrictions adopted by a single state (restricting both in-court and out-of-court secret settlements) by choosing another state’s law to govern the settlement. Third, even if courts nationwide were to adopt uniform restrictions on secret settlements, parties could avoid the restrictions by settling before the claimant files suit. In such cases, the defendants face a trade-off between using the litigation process to screen out meritless claims and having the ability to enter into secret settlements. Finally, even if a nationwide ban on all secret settlements (including those entered into out of court) were enacted, many parties could accomplish much the same result by use of predispute or postdispute arbitration agreements, taking advantage of the privacy of the arbitration process.

Indeed, restrictions on secret settlements not only may be ineffective, but in fact may be counterproductive. To the extent the restrictions encourage parties to settle before the claimant files suit or to choose arbitration instead of litigation, they may reduce rather than expand the amount of information available to the public about the dispute. Currently, if the secret settlement occurs after the claimant files suit, the factual allegations in the complaint are a matter of public record for some period of time (at least until the settlement occurs). If secret settlements are prohibited, and the settlement takes place outside of court or the case goes to arbitration, even that information is lost. Thus, rather than increasing the information available to the public about alleged hazards to public health and safety, restrictions on secret settlements may have the unintended consequence of doing exactly the opposite.

Part II of this Article examines evidence on the frequency of secret settlements in civil litigation. Part III describes common defenses of the practice, while Part IV summarizes the criticisms. Part V takes an economic view of secret settlements, examining the implications of settlement bargaining theory for normative evaluations of secret settlements. Part VI provides a brief overview of the regulatory responses to secret settlements. Finally, Part VII explains in more detail
why regulation of secret settlements may be ineffective, and perhaps even counterproductive.

II. FREQUENCY OF SECRET SETTLEMENTS IN CIVIL LITIGATION

Much of the discussion of secret settlements is based on anecdotes rather than systematic data collection.\(^\text{13}\) Frequently cited examples are those listed in the Introduction: secret settlements involving Firestone tires, Catholic priests, and Michael Jackson.\(^\text{14}\) More systematic data collection comes from interviews with attorneys.\(^\text{15}\) The interviewed lawyers—although apparently a very small sample—state emphatically that in their practice use of secret settlements is widespread. One insurance defense lawyer stated that he has not "put a settlement together in the past five to six years that [has not] had a confidentiality clause in it."\(^\text{16}\) A labor and employment lawyer "never settles a private, single-person lawsuit without a confidentiality clause in the settlement agreement."\(^\text{17}\) On the basis of these interviews, one author concluded that "the interests of both sides in maintaining confidentiality are so strong that most attorneys will not enter into a settlement agreement without a secrecy provision of some sort."\(^\text{18}\)

The only systematic study of the use of secret settlements was published by the Federal Judicial Center (FJC) in 2004.\(^\text{19}\) The FJC studied a sample of 288,846 civil cases in fifty-two federal districts, including all eleven districts with a local rule requiring a showing of good cause to seal a court document.\(^\text{20}\) Table 1 summarizes the findings.

\(^{13}\) See Richard L. Marcus, The Discovery Confidentiality Controversy, 1991 U. ILL. L. REV. 457, 464 ("Despite the widely publicized instances of supposed cover-ups of hazards, hard data is generally lacking and the critics' broader assertions about widespread abuses may be validly questioned."); Judith Resnik, Migrating, Morphing and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts, 1 J. EMP. LEGAL STUD. 783, 828 (2004) ("How much information is walled off from the public is an empirical question in need of an answer.").

\(^{14}\) See supra text accompanying notes 1–8.


\(^{16}\) Id.

\(^{17}\) Id. at 676 n.53. According to Fromm, "the only nonconfidential settlements [the attorney] will enter are those in which the settlement is by law a matter of public record, such as a consent decree." Id.

\(^{18}\) Id. at 676; see also Jack L. Slobodin, Settlement Demands and Offers, in 3 CALIFORNIA CIVIL PROCEDURE BEFORE TRIAL 2051, 2054 (Paul Peyrat & Linda Compton eds., 3d ed. 2003) (describing "practice of many large corporate defendants . . . to insist on confidentiality terms in settlement agreements").


\(^{20}\) Id. at 3.
The FJC found 1270 cases with sealed settlements, or 0.44% of the total cases studied. \(^{21}\) According to the FJC, personal injury cases (29.7%) and employment cases (26.5%) \(^{22}\) together made up over half of the cases with secret settlements. Contract cases (11.4%), intellectual property cases (10.9%), \(^{23}\) and civil rights cases (9.7%) made up most of the rest. \(^{24}\)

The FJC also sought to identify cases with secret settlements that “might be of special public interest,” which the FJC defined to include: environmental cases, product liability cases, professional malpractice cases, cases involving a public party defendant, cases with very serious injury, and cases involving sexual abuse. \(^{25}\) As shown in Table 2, forty percent of the cases with sealed settlements included one or more of these factors; sixty percent included none of them. \(^{26}\)

The FJC noted a significant overlap among the types of cases. For example, it included 144 cases arising out of a plane crash near Peggy’s Cove, Nova Scotia in both the “products liability” category and the “very serious injury” category, along with 31 cases arising out of the crash of TWA flight 800 on takeoff from New York’s Kennedy Airport. \(^{27}\) Those two sets of cases make up over a third (175 of 503, or 34.8%) of the public interest cases found by the FJC. Notably, neither of those plane crash cases seems likely to pose the policy concerns raised by critics of secret settlements. The crashes were highly publicized, all of the potential claimants knew of their claim, and government investigations began immediately after the crash. Thus, of the 258 products liability cases with secret settlements identified by the FJC, at least 175 (67.8%) of them posed little risk of harm to third parties.

\(^{21}\) Id. at 3, 5.

\(^{22}\) The FJC evidently grouped ERISA cases, Fair Labor Standards Act cases, and other employment/labor cases in the category of “employment cases.” Id.

\(^{23}\) The FJC grouped trademark, patent, and copyright cases in the category of “intellectual property cases.” Id.

\(^{24}\) Id. at 3.

\(^{25}\) Id. at 8.

\(^{26}\) Id.

\(^{27}\) Id. at 8 nn.1–3.
Table 1. Types of Cases with Sealed Settlements

<table>
<thead>
<tr>
<th>Type of Case</th>
<th>Number of Cases with Sealed Settlements (as % of Total Cases with Sealed Settlements)</th>
<th>% of Cases of that Type with Sealed Settlements—i.e., Sealed Settlement Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Personal Injury</td>
<td>378 (29.7%)</td>
<td>0.82%</td>
</tr>
<tr>
<td>Personal Property</td>
<td>28 (2.2%)</td>
<td>0.64%</td>
</tr>
<tr>
<td>Real Property</td>
<td>7 (0.6%)</td>
<td>0.07%</td>
</tr>
<tr>
<td>ERISA</td>
<td>26 (2.0%)</td>
<td>0.19%</td>
</tr>
<tr>
<td>Fair Labor Standards Act</td>
<td>88 (6.9%)</td>
<td>2.58%</td>
</tr>
<tr>
<td>Other Employment/Labor</td>
<td>223 (17.6%)</td>
<td>0.75%</td>
</tr>
<tr>
<td>Other Civil Rights</td>
<td>124 (9.7%)</td>
<td>0.55%</td>
</tr>
<tr>
<td>RICO</td>
<td>9 (0.7%)</td>
<td>1.06%</td>
</tr>
<tr>
<td>Securities</td>
<td>10 (0.8%)</td>
<td>0.73%</td>
</tr>
<tr>
<td>Antitrust</td>
<td>10 (0.8%)</td>
<td>0.59%</td>
</tr>
<tr>
<td>Trademark</td>
<td>48 (3.8%)</td>
<td>1.19%</td>
</tr>
<tr>
<td>Patent</td>
<td>62 (4.9%)</td>
<td>2.17%</td>
</tr>
<tr>
<td>Copyright</td>
<td>29 (2.3%)</td>
<td>1.35%</td>
</tr>
<tr>
<td>Contract</td>
<td>145 (11.4%)</td>
<td>0.33%</td>
</tr>
<tr>
<td>Other</td>
<td>83 (7%)</td>
<td>0.08%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>1270 (100%)</strong></td>
<td><strong>0.44%</strong></td>
</tr>
</tbody>
</table>

28. *Id.* at 5.
Table 2. Cases of “Special Public Interest” with Secret Settlements

<table>
<thead>
<tr>
<th>Type of Case</th>
<th>Number of Cases with Secret Settlements (% of All Cases)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Environmental</td>
<td>10 (0.8%)</td>
</tr>
<tr>
<td>Products Liability</td>
<td>258 (20.0%)</td>
</tr>
<tr>
<td>Professional Malpractice</td>
<td>40 (3.1%)</td>
</tr>
<tr>
<td>Public Party Defendant</td>
<td>152 (12.0%)</td>
</tr>
<tr>
<td>Very Serious Injury</td>
<td>334 (26.3%)</td>
</tr>
<tr>
<td>Sexual Abuse</td>
<td>31 (2.4%)</td>
</tr>
<tr>
<td>Any of These Reasons</td>
<td>503 (39.6%)</td>
</tr>
<tr>
<td>None of These Reasons</td>
<td>767 (60.4%)</td>
</tr>
</tbody>
</table>

The FJC also examined the extent to which court files were sealed in connection with the settlements. It found that in the vast majority of cases with sealed settlements, basic information about the case remained publicly available. As the FJC explained:

In 97% of the cases with sealed settlement agreements, the complaint is not sealed. Almost the only time we encountered a sealed complaint was in cases in which the entire record is sealed. (Sometimes the docket sheet is sealed; sometimes although the case file is sealed, the docket sheet is not.) In one additional case, all documents in the case file are sealed, including the complaint and the settlement conference report, except for the agreed judgment, which specifies the terms of settlement.

In short, secrecy is very much the exception rather than the rule in federal court. Even when settlements are secret, in the vast majority of cases “generally the only thing kept secret by the sealing is the amount of settlement.” However, “the complaint is not sealed, so the public has access to information about the alleged wrongdoers and wrongdoings.”

The FJC study did not examine secret settlements in state courts, nor did it attempt to uncover evidence on the extent to which disputes are

29. Id. at 8.
30. Id. at 6–7.
31. Id. at 8.
settled before the case is filed in court.\textsuperscript{32} Thus, while the FJC study provides useful data on the prevalence of secret settlements, important information remains unavailable.

III. DEFENSES OF SECRET SETTLEMENTS

An array of arguments has been made in favor of and against secret settlements.\textsuperscript{33} The most fundamental point of disagreement between

32. Although not directed at the FJC study in particular, Chief Judge Joseph F. Anderson, Jr. of the United States District Court for the District of South Carolina has made comments that may raise questions about the study’s methodology:

I will concede that the vast majority of cases are settled openly. I would also contend, however, that the number of sealed settlements is greater than the index books or docket sheets would suggest. There is no standard procedure for designating settlements as sealed settlements in the index: Sometimes the index entry denotes that a settlement has been sealed, but sometimes it merely denotes an order approving a settlement. It is not until one seeks to retrieve the order, when the file package is produced from the bowels of the courthouse, that one learns that the settlement, or some aspect of the file, has been sealed. Even worse, sometimes the order approving and sealing the settlement does not appear as an entry on the docket sheet at all . . . .


33. For a detailed listing of the arguments, see Marc L. Miller & Ronald F. Wright, Secret Police and the Mysterious Case of the Missing Tort Claims, 52 BUFF. L. REV. 757, 778–79 (2004):

A partial list of the typical arguments in favor of court-enforced secrecy includes:

- the protection of privacy and other confidential information;
- a general preference for private agreements over government regulation;
- an assertion that sealed settlements are relatively rare, and that many agreements only seal the amount of a settlement;
- a worry that . . . a ban on secret settlements will decrease settlements and increase trials and other litigation expenses;
- the prospect that banning secrecy may disadvantage individual plaintiffs (or put another way “secrecy has market value”);
- a belief that liberal discovery rules have disclosed far more information than in the past and that secrecy can counterbalance that discovery effect;
- a belief that allowing judicial discretion about sealing settlements provides sufficient protection from inappropriate confidentiality;
- an assertion that private parties can simply enter confidentiality agreements without the agreement or enforcement of the court; and
- an observation that increased electronic access to court files and documents has exposed to the public information that de facto has been relatively private, and requires secrecy as a corrective.

Among the typical arguments against secret settlements are the following:

- they undermine values of open government;
- they hide repetitive misbehavior;
- they are unethical because they allow bad actors to buy silence;
- public courts should not be asked to validate or enforce the arrangements of private parties; and
commentators is over the relationship between settlement and the nature of the judicial function. Those who view courts primarily as mechanisms for resolving private disputes (a "problem-solving" role) see settlement—which is the consensual resolution of a dispute—as something to be promoted. To the extent secrecy enhances the likelihood of settlement, under this view, it is valuable and should be preserved. Those who emphasize the public functions of courts (a "public-life conception") are more likely (in the words of Owen Fiss's well-known article) to be "Against Settlement." To the extent secrecy encourages settlement, under this view, it is undesirable.

This debate is beyond the scope of this Article. Instead, we focus on more pragmatic considerations. This section discusses several such arguments and the responses made by critics of secret settlements.

A. "The Litigants Have Privacy Rights"

A primary argument in support of secret settlements is that secrecy is necessary to protect the privacy of the parties. Privacy includes personal privacy and commercial privacy. Certainly, the publicity that attends court cases can result in the release of sensitive or painful personal information about parties. An attorney involved in settling sexual abuse claims on behalf of the Boston Archdiocese was quoted as saying that his "role was to help these victims and their families close painful chapters in their lives." One need not approve of the Archdiocese's handling of the sexual abuse scandal to recognize that victims may want their privacy protected. Other examples include sexual harassment cases, in which

- private parties seek to convert their private agreements into public agreements when they seek approval or enforcement of settlement by a court.

Id.

34. For a good overview of these different positions in the context of secret settlements, see Laurie Kratky Doré, Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement, 74 NOTRE DAME L. REV. 283, 289–324 (1999).


36. Whether secrecy in fact promotes settlement is a different issue. See infra text accompanying notes 48–58.


38. Luban, supra note 35, at 2642.


40. See Luban, supra note 35, at 2659–60.

41. The quoted phrases at the beginning of each of the following sections in this part are from Anderson, supra note 32, at 711.

42. Carroll et al., supra note 3, at A1.
victims may be further harmed by the publicity of a court case, and cases involving HIV-positive individuals.

Secret settlements can protect commercial privacy as well. Trade secrets are valuable corporate assets, and companies have a strong interest in keeping sensitive business information confidential. Of particular importance (given the common concern about secret settlements in products liability cases) is the commercial value of product safety information. According to Arthur Miller:

Consider, for example, product safety information. This material—design specifications, performance standards, and the like—is often among the most sensitive information a product manufacturer possesses. Especially in today’s marketplace, the safer the product, the more likely that it has a significant competitive edge over its rivals. That advantage can be maintained only if the information used to improve the product’s safety is kept confidential . . . . The greater the disclosure, the more likely that the information will fall into the hands of a competitor, who can then replicate the design or process without making the initial investment incurred by the original manufacturer.

The most common response to privacy concerns is that it is possible to protect personal privacy and trade secrets, and yet restrict the use of secret settlements in cases in which no privacy interests or trade secrets are at stake. David Dana and Susan Koniak describe the privacy benefits as “illusory” and conclude that, “as to secret settlements, there are no legitimate interests protected by ‘private’ secrecy agreements that could not be as well protected by court orders where appropriate.”

B. “A Deterrent to Settlements”

Another argument in support of secret settlements is that secrecy makes settlement more likely. Stated otherwise, eliminating secrecy would reduce the likelihood of settlement, resulting in a growing backlog

44. Marcus, supra note 13, at 482–83.
46. Miller, supra note 37, at 469 n.214.
in the courts. Arthur Miller, the most frequently cited advocate of this “chilled settlements” argument, has written the following in defense of secret settlements:

[W]hatever the value of disclosure, it should not obscure the strong public interest in, and policy objectives furthered by, promoting settlement. Settlement not only reduces the need for further governmental involvement, but also reduces the cost of dispute resolution to the litigants and helps free valuable judicial resources and thereby promotes more efficient operation of the courts. Our civil justice system could not bear the increased burden that would accompany reducing the frequency of settlement or delaying the stage in the litigation at which settlement is achieved. 48

A past president of the South Carolina Defense Trial Attorneys’ Association made the argument in more definitive (but surely exaggerated) terms: “[T]he elimination of confidential settlement agreements would serve as a disincentive for settlement in a majority of civil disputes.” 49

In response, critics of secret settlements find no evidence to support the “chilled settlements” fear. 50 James E. Rooks, Jr., a Senior Policy Research Counsel with the Center for Constitutional Litigation, has undertaken the most extensive analysis of the issue. 51 He finds little anecdotal support for the view that restrictions on secret settlements deter settlement. 52 He also examines case filing and disposition data from Florida after enactment of its “Sunshine in Litigation Act” 53 (which are reproduced in Table 3 and graphed in Figure 1), and finds that “tort dispositions have tracked the state’s declining filing rate. Were the

48. Miller, supra note 37, at 486 (concluding that “absent special circumstances, a court should honor confidentiality that are bargained-for elements of settlement agreements”).


50. See Luban, supra note 35, at 2656 (describing Miller’s argument as a “makeweight”).

51. See generally Rooks, Is the Sunshine Chilly?, supra note 49; James E. Rooks, Jr., Let the Sunshine In, TRIAL, June 2003, at 18 [hereinafter Rooks, Let the Sunshine In]. See also Anderson, supra note 32, at 726 (“Statistics compiled since the implementation of Local Rule 5.03(c) easily refute this [deterrent to settlement] argument. In South Carolina, the judges in our district court actually tried two fewer cases in the twelve months following the promulgation of Local Rule 5.03(c) then they did in the immediately preceding twelve-month period.”); Dana & Koniak, supra note 47, at 1225 (“To our knowledge, there is no evidence that these differences among jurisdictions [in the extent of restrictions on secret settlements] have translated into differences in settlement timing and/or settlement rates.”).


53. Sunshine in Litigation Act, FLA. STAT. ANN. § 69.081 (West 2005).
chilled-settlements argument valid," according to Rooks, "one would expect to see noticeably fewer dispositions."54 Hence, Rooks concludes, "[t]hese data are inconsistent with the chilled-settlements argument."55

<table>
<thead>
<tr>
<th>Year</th>
<th>Per Capita Tort Filings</th>
<th>Per Capita Tort Dispositions</th>
</tr>
</thead>
<tbody>
<tr>
<td>1987</td>
<td>2.76</td>
<td>3.01</td>
</tr>
<tr>
<td>1988</td>
<td>2.68</td>
<td>2.75</td>
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<td>2000</td>
<td>2.23</td>
<td>2.16</td>
</tr>
</tbody>
</table>

55. Id.; see also Rooks, *Is the Sunshine Chilly?*, supra note 49, at 870–71 (concluding that the caseload data from Florida "undercuts claims that restrictions on secrecy discourage settlement").
56. See Rooks, *Is the Sunshine Chilly?*, supra note 49, at 881–82 tbls.1, 2 & 3. Per Capita Tort Filings are calculated by dividing the data in Rooks' table 1 ("Tort Cases Filed in Florida Circuit Courts") by the data in Rooks' table 3 ("Florida Population"). Per Capita Tort Dispositions are calculated by dividing the data in Rooks' table 2 ("Tort Cases Concluded in Florida Circuit Courts") by the data in Rooks' table 3 ("Florida Population").
Actually, the data are not so clear. Using Rooks’ data, Table 4 illustrates the ratio of per capita tort dispositions to per capita tort filings in Florida from 1987 through 2000. The ratio is plotted in Figure 2. Rooks’ hypothesis is that if the Florida Act “chilled settlements,” one would expect the ratio of dispositions to filings to decline after enactment (i.e., after 1990). In fact, although the ratio is relatively flat from 1990 to 1992, it declines substantially thereafter (from around 1.00 in 1992 to 0.87 in 1996), before recovering to near the 1992 level (0.98 in 1999 and 0.97 in 2000). Thus, tort dispositions per capita do not “track” the state’s declining filing rate—dispositions per capita decline more rapidly although rather erratically. That said, there are far too many variables to link the relatively greater decline in dispositions to the Florida Sunshine in Litigation Act.\(^{57}\) It remains true that there is no empirical evidence in support of the chilled-settlements argument.\(^{58}\)

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58. *See* id. at 874 (“The lawyers and tort ‘reform’ publicists who have made the ‘chilled settlements’ argument for over a dozen years have cited no empirical evidence to support it, and the empirical evidence that does exist appears to contradict it.”).
Table 4. Ratio of Per Capita Tort Dispositions to Per Capita Tort Filings in Florida, 1987–2000\textsuperscript{59}

<table>
<thead>
<tr>
<th>Year</th>
<th>Ratio of Per Capita Tort Dispositions to Per Capita Tort Filings</th>
</tr>
</thead>
<tbody>
<tr>
<td>1987</td>
<td>1.09</td>
</tr>
<tr>
<td>1988</td>
<td>1.03</td>
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<tr>
<td>1989</td>
<td>0.99</td>
</tr>
<tr>
<td>1990</td>
<td>1.02</td>
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<td>0.97</td>
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</table>

\textsuperscript{59} See id. The Ratio of Per Capita Tort Dispositions to Per Capita Tort Filings is calculated by dividing Per Capita Tort Dispositions by Per Capita Tort Filings. See supra Table 3 accompanying note 56.
C. "Secrecy Has a Market Value"

A final argument sometimes made in support of secret settlements is that they benefit claimants—at least those claimants who settle secretly. Some attorneys have argued that regulation of secret settlements will hurt such claimants, who otherwise can use secrecy as a negotiating chip to obtain higher settlements. 60 Chief Judge Joseph F. Anderson, Jr. of the United States District Court for the District of South Carolina describes this argument as "[p]erhaps the most bizarre argument against" secret settlement restrictions. 61 According to Judge Anderson, "[w]hat this means is secrecy—court-ordered secrecy, government-enforced secrecy—is a commodity that has a market value and is bought and paid for, not just under the judge's nose, but with the judge's complicity." 62

Certainly, both sides seem to agree that secrecy has value. If secret settlements were to be eliminated, plaintiffs who otherwise would settle secretly presumably would receive less in settlement. Unless plaintiffs who settle secretly receive nothing in return, they would be worse off as a result. The question is whether other parties (either other claimants or

60. Anderson, supra note 32, at 731.
61. Id.
62. Id. at 731–32.
the public as a whole) are made sufficiently better off to justify restrictions on secret settlements.

IV. CRITICISMS OF SECRET SETTLEMENTS

The principal argument against secret settlements has already been noted. Secret settlements harm the public by suppressing information about health and other hazards. The two parties to the settlement agreement, the defendant and the early claimant, make a deal that benefits them but comes at the expense of third parties, later claimants who do not yet have a claim or who have a claim but do not know of it. The defendant, the argument goes, is able to keep selling its product or avoid some future lawsuits. The early claimant gets paid more in settlement. But were the settlement not confidential, other interested parties and government regulators would find out about the possible hazard sooner than they otherwise would.

This argument is summarized by Consumers Union (arguing in favor of California legislation to limit the use of secret settlements) as follows:

Many lives could be saved and much suffering could be averted if corporations were not allowed to use secrecy orders in court settlements to hide information about product defects, environmental hazards, or financial fraud.

...[T]his law will motivate corporations to correct the errors that brought them into court in the first place, instead of hiding behind secrecy orders and continuing business as usual until hundreds of unsuspecting consumers are harmed or killed, and recalls are required.

Some use more strident rhetoric, but to the same effect: “People are dead because of practices we condone; practices that serve no legitimate principles; practices that not only risk life and limb but which distort our judicial process, produce perverse incentives, and threaten legitimate

63. As noted above, another, more general argument focuses on differing visions of the role of the judicial system. See supra text accompanying notes 33–40.
64. See supra text accompanying notes 1–8; see also Richard A. Zitrin, The Laudable South Carolina Rules Must Be Broadened, 55 S.C. L. REV. 883, 889 (2004) ("Without court rules that provide for open settlements, open discovery fights, and stricter rules on obtaining protective orders, these private agreements will remain off trial courts' radar screens, posing a danger to public health and safety.").
secrets as well.\textsuperscript{66} As stated more concisely by the former president of the Association of Trial Lawyers of America: "Secrecy kills."\textsuperscript{67}

The criticism is based largely on anecdotal rather than empirical evidence, and there is no systematic study of the costs of secret settlements. Arthur Miller, writing in 1992, set out to debunk some of the anecdotes used to argue against secrecy. According to Miller, information on possible side effects of a prescription medication and alleged defects in heart valves, asserted to have been suppressed by secret settlements, "had already been disseminated to the medical community."\textsuperscript{68} In another case, the court had already disclosed to relevant health authorities information on possible groundwater contamination that was otherwise subject to a protective order.\textsuperscript{69} Miller concluded:

By looking beyond each of these accusations against protective orders and court seals to the actual circumstances, one can see that either the alarms were false or the relevant information was available from other sources. None of these anecdotes reveals a cause and effect relationship between sealed court records and harm to public health or safety.\textsuperscript{70}

No one has attempted a similar debunking of more recent anecdotes, although whether such a debunking would be successful is uncertain.

A narrower criticism of secret settlements, made most forcefully by Judge Anderson, focuses not on the harm to the public but on the harm to the judicial system. Parties use secret court settlements to add legitimacy to the practice, making judges appear as accomplices in the suppression of information. As Judge Anderson writes: "The evil that [the South Carolina rule] is designed to address is \textit{court involvement} in the business of enforcing secrecy."\textsuperscript{71} Under this view, it is not the third-party effects of settlements that are the evil to be addressed, but rather the judge's personal involvement in approving settlements that might harm third parties.

\begin{footnotes}
\footnotetext{66}{Koniak, \textit{supra} note 1, at 809.}
\footnotetext{67}{Thomas A. Fogarty, \textit{Can Courts' Cloak of Secrecy Be Deadly? Judicial Orders Protecting Companies Kept Tire Case Quiet}, USA TODAY, Oct. 16, 2000, at 1B (quoting Fred Baron).}
\footnotetext{68}{Miller, \textit{supra} note 37, at 481--82.}
\footnotetext{69}{\textit{Id.} at 482 (citing Anderson v. Cryovac, Inc., 862 F.2d 910, 914 (1st Cir. 1988)).}
\footnotetext{70}{\textit{Id.}}
\footnotetext{71}{Anderson, \textit{supra} note 32, at 732.}
\end{footnotes}
V. ECONOMIC ANALYSIS OF SECRET SETTLEMENTS: A BRIEF SURVEY

The law-and-economics literature also has considered the effects of secret settlements. Most notably, in a series of articles, Andrew Daughety and Jennifer Reinganum have analyzed secret settlements in the context of economic models of settlement bargaining.\(^{72}\) A central assumption of their analysis is that in cases of sequential bargaining between a single defendant and multiple claimants, a settlement between an early claimant and the defendant affects the likelihood that a later claimant will discover that he or she has a claim against the defendant.\(^{73}\)

Daughety and Reinganum’s conclusions are strikingly similar to those of the critics of secret settlements. First, early claimants have negotiating leverage that enables them to obtain a higher settlement payment from the defendant in exchange for a secret settlement. Daughety and Reinganum explain:

[W]hen one party wants to limit the diffusion of information to parties outside of the current negotiation, this provides bargaining power to the other party involved in the current negotiation. This effect is capitalized in a higher payment by the first party to the second, a payment that is frequently financed (implicitly) by the unsuspecting third party.\(^{74}\)

They describe the practice as the payment of “hush money,” which they use as the title of one of their articles.\(^{75}\)

Second, although early claimants are unambiguously better off as a result of the availability of secret settlements, in at least some cases, claimants as a whole are worse off.\(^{76}\) Certainly later claimants are worse off with secret settlements under Daughety and Reinganum’s analysis. Indeed, from the defendants’ perspective, a primary benefit of secret


\(^{73}\) Or stated more generally, “[t]he essential feature of multilateral bargaining is the creation or presence of externalities that arise when bargaining between two litigants is influenced by the possibility, or necessity, of simultaneous or subsequent bargaining by a litigant with other parties.” Daughety & Reinganum, Economic Theories, supra note 72, at 35.

\(^{74}\) Daughety & Reinganum, Hush Money, supra note 72, at 674.

\(^{75}\) Id. at 661.

\(^{76}\) Daughety & Reinganum, Informational Externalities, supra note 72, at 588.
settlements "is the reduction in later suits due to reduced publicity surrounding the confidential settlement of an early suit." Whether the later claimants' losses exceed the early claimants' gains depends on how closely the claims of early claimants are related to the claims of later claimants as a factual matter.

Third, the level of safety produced by defendants may be lower when secret settlements are permitted than when they are not. Daughety and Reinganum "find that an open regime involves higher liability costs and higher [research and development] costs, while a confidential regime involves consumer wariness, which exacts a cost associated with signaling safety." In other words, if firms agree to public settlements, they face greater potential liability and higher costs of upgrading technology, while if they use secret settlements, they will lose business due to consumer distrust of their products. The result is that "the average safety of products sold" in future periods "is lower in a confidential regime than in an open regime," for two reasons: first, the reduced liability faced by firms (if confidentiality reduces the viability of future cases); and, second, the lower sales of safer products (which cost more). Under the model, however, some firms may prefer openness to confidentiality because they may earn higher profits without secret settlements. If secret settlements do not reduce the firm's potential liability for future claims, firms may increase their profits by committing to open settlements. But the greater the degree to which secret settlements reduce the viability of future cases, the stronger the firm's preference for confidentiality.

Daughety and Reinganum's conclusions are very similar to the criticisms raised by consumer groups and the plaintiffs' bar against secret settlements. Surprisingly, those insights have rarely made their way into the legal literature, and have only been cited in other law-and-economic analyses of settlement behavior.

A recent student comment by Alison Lothes extends Daughety and Reinganum's analysis. She considers the possibility that non-secret

77. Id.
78. Daughety & Reinganum, Secrecy & Safety, supra note 72, at 1086.
79. Id. at 1083.
80. Id. at 1084–85.
81. A Lexis search of the "U.S. Law Reviews and Journals, Combined" database reveals that Daughety and Reinganum's articles on secret settlements have been cited only twice. See Keith N. Hylton, Agreements to Waive or to Arbitrate Legal Claims: An Economic Analysis, 8 SUP. CT. ECON. REV. 209, 247 n.83 (2000); Alison Lothes, Comment, Quality, Not Quantity: An Analysis of Confidential Settlements and Litigants' Economic Incentives, 154 U. P.A. L. REV. 433, 449 & n.77 (2005).
82. Lothes, supra note 81.
settlements between defendants and early claimants might induce later claimants to bring frivolous claims, rather than enabling later claimants to bring meritorious claims. Under this view, secrecy in settlements may benefit defendants both by reducing their potential liability to later claimants with meritorious claims and by protecting them from vexatious litigation by later claimants without meritorious claims. Lothes argues that the type of information involved is central to the likely effect of secret settlements. She explains: "An open settlement may provide useful facts about the incident, or it may indicate only that the defendant is willing to settle for a certain amount. The first may encourage injured plaintiffs to obtain rightful compensation, while the second might incentivize frivolous suits." This argument provides a possible basis for distinguishing among different types of information included in a settlement, and in particular, permitting secrecy at least as to information that reveals a defendant's bargaining strategy (such as the amount of the settlement) as opposed to the underlying circumstances of the case.

VI. REGULATION OF SECRET SETTLEMENTS

Jurisdictions have taken a variety of approaches to dealing with issues of secrecy in litigation. Most of the responses focus on secrecy in the court system rather than on out-of-court secret settlements. Examples of regulatory approaches include the following:

1. adopting a presumption that all court records are open to the public;

2. limiting the use of protective orders in discovery;

3. requiring a party to show good cause before sealing court files;

4. requiring public hearings before sealing court files;

5. forbidding secret settlements in court; and

6. making confidentiality agreements void as against public policy if the agreement conceals a public hazard.

In response to concerns about secret settlements in particular, several state legislatures have enacted "Sunshine in Litigation" statutes, and the

83. Id. at 459 ("Daughtey and Reinganum assume that only truly injured plaintiffs will succeed, while Rosenberg and Shavell's models demonstrate the possible success of nonviable suits."); see David Rosenberg & Steven Shavell, A Model in Which Suits Are Brought for Their Nuisance Value, 5 Int'l Rev. L. & Econ. 3 (1985); see also Lucian Arye Bebchuk, A New Theory Concerning the Credibility and Success of Threats to Sue, 25 J. Legal Stud. 1 (1996); Thomas J. Miceli, Optimal Deterrence of Nuisance Suits by Repeat Defendants, 13 Int'l Rev. L. & Econ. 135 (1993).

84. Lothes, supra note 81, at 461.

85. Rooks, Let the Sun Shine In, supra note 51, at 20.

86. For a review of state regulations, see generally Roscoe Pound Institute, Materials on Secrecy Practices in the Courts 101-303 (July 29, 2000), available at
United States District Court for the District of South Carolina has adopted a local rule precluding courts from approving sealed settlements. The Florida Sunshine in Litigation Act and the South Carolina local rule are discussed in more detail as well-known regulatory responses to secret settlements.

A. Florida Sunshine in Litigation Act

In 1990, Florida enacted the Sunshine in Litigation Act, one of the first and farthest reaching efforts to regulate secrecy in litigation, including secret settlements. The Act first deals with court-ordered secrecy, providing as follows:

Except pursuant to this section, no court shall enter an order or judgment which has the purpose or effect of concealing a public hazard or any information concerning a public hazard, nor shall the court enter an order or judgment which has the purpose or effect of concealing any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard.

But the Act is not limited to court orders and judgments; it applies to out-of-court agreements as well.

Any portion of an agreement or contract which has the purpose or effect of concealing a public hazard, any information concerning a public hazard, or any information which may be useful to members of the public in protecting themselves from injury which may result from


87. D.S.C. LOCAL R. 5.03(E). The Eastern District of Michigan also has adopted a local rule limiting the duration of secret settlement agreements. E.D. MICH. LOCAL R. 5.4. For a survey of federal court local rules dealing with sealed records, see Reagan et al., supra note 19, at B-1 to B-27.

88. At about the same time, the Texas Supreme Court approved (by a 5-4 vote) Rule of Civil Procedure 76a, which creates a "presumption of openness" for court records in Texas. TEX. R. CIV. P. 76a(1). The rule defines "court records" broadly to include "settlement agreements not filed of record, excluding all reference to any monetary consideration, that seek to restrict disclosure of information concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government." Id. Rule 76a(2)(b). For a detailed discussion of the Texas rule, see Lloyd Doggett & Michael J. Mucetti, Public Access to Public Courts: Discouraging Secrecy in the Public Interest, 69 TEX. L. REV. 643 (1991).


90. See Zitrin, supra note 64, at 891 ("[A]lthough the statute sounds broad enough to apply to unfiled settlements or even agreements to secrete discovery, no court has so ruled.").
the public hazard, is void, contrary to public policy, and may not be enforced.\textsuperscript{91}

The key limitation in the statute is it applies only to a “public hazard.” The Act defines a “public hazard” as “an instrumentality, including but not limited to any device, instrument, person, procedure, product, or a condition of a device, instrument, procedure or product, that has caused and is likely to cause injury.”\textsuperscript{92} Some commentators have criticized the potential breadth of the definition. Richard Marcus argues that an HIV-positive individual, for example, would meet the definition of “public hazard” under the Florida statute because he or she would be a “person . . . that has caused and is likely to cause injury.”\textsuperscript{93} Thus, the statute may infringe on important personal privacy interests.\textsuperscript{94} Florida courts have not addressed the issue raised by Marcus, nor have they definitively construed the scope of the Act.\textsuperscript{95} Cases have held that exploding tires\textsuperscript{96} and asbestos\textsuperscript{97} constitute public hazards, but that “economic fraud causing financial loss” is not a public hazard.\textsuperscript{98}

\begin{itemize}
\item \textsuperscript{91} Fla. Stat. Ann. § 69.081(4) (West 2005).
\item \textsuperscript{92} § 69.081(2).
\item \textsuperscript{93} Marcus, supra note 13, at 482.
\item \textsuperscript{94} The Florida statute does protect trade secrets, but only those “not pertinent to public hazards.” § 69.081(5).
\item \textsuperscript{95} Zitrin, supra note 64, at 892 (stating that “the definition of ‘public hazard’ is still unclear”).
\item \textsuperscript{96} Jones v. Goodyear Tire & Rubber Co., 871 So. 2d 899, 906 (Fla. Dist. Ct. App. 2003).
\item \textsuperscript{97} ACandS, Inc. v. Askew, 597 So. 2d 895, 899 (Fla. Dist. Ct. App. 1992).
\item \textsuperscript{98} State Farm Fire & Cas. Co. v. Sosnowski, 830 So. 2d 886, 887–88 (Fla. Dist. Ct. App. 2002) (alleged fraud in insurance claims); Stivers v. Ford Motor Credit Co., 777 So. 2d 1023, 1024 (Fla. Dist. Ct. App. 2000) (credit practices in sale and lease of automobiles). The Stivers court quoted from an analysis of the statute by the Florida legislative staff as follows:

Recently, there is a growing concern relating to the practice of settling cases, especially in the products liability area, where as part of the settlement the parties will agree not to disclose information regarding hazardous products, or the court will enter a protective order precluding such disclosure. Typical of this type of situation is the Oregon case of Oberg v. Honda Motor Co. where a jury ruled that Honda manufactured an inherently unsafe three-wheel all terrain vehicle, but the court entered a protective order requiring that all evidentiary documents obtained from Honda which identified the inherent manufacturing flaws be returned to the defendants. Other such instances have been reported in cases against automobile manufacturers and oil corporations.

Id. at 1025 (quoting Fla. H.R. Comm. on Judiciary, SB 278 (1990), Staff Analysis & Economic Impact Statement 2 (Aug. 28, 1990)). Thus, the court concluded that “section 69.081 arose from concerns about settlements in product liability cases, where health and safety issues were implicated.” Id.
B. Local Rule 5.03 of the U.S. District Court for the District of South Carolina

In 2002, the judges of the United States District Court for the District of South Carolina amended Local Rule 5.03 to provide that “[n]o settlement agreement filed with the Court shall be sealed pursuant to the terms of this Rule.” The local rule is subject to two important limitations. First, Local Rule 5.03 is subject to the court’s Local Rule 1.02, which provides that “[f]or good cause shown in a particular case, the [c]ourt may suspend or modify any Local Rule.” According to Judge Anderson:

Read together, Local Rules 1.02 and 5.03[E] establish a preference for openness at settlement, while still preserving the ability of the presiding judge to seal a settlement when, for example, proprietary information or trade secrets need to be protected, or a particularly vulnerable party needs to be shielded from the glare of an otherwise newsworthy settlement.

Second, the rule applies only to settlement agreements filed in court. Nothing in the language of the rule applies to out-of-court settlements regardless of whether a case actually has been filed, and elsewhere Rule 5.03 makes clear that “[n]othing in this Rule limits the ability of the parties, by agreement, to restrict access to documents which are not filed with the Court.”

This latter point is a key distinction between the approach of the South Carolina federal court and the broader approach taken by the state of Florida. While the Florida Sunshine in Litigation Act appears to apply to all settlements with confidentiality provisions, not just those filed in court, the South Carolina rule is limited to court-approved secret settlements. Thus, although Judge Anderson recites the standard grounds for opposing secret settlements in his discussions of the South Carolina rule, as noted above, an important justification for the rule from his perspective is that it ends the judge’s involvement in approving secret settlements.

100. D.S.C. LOCAL R. 1.02.
102. D.S.C. LOCAL R. 5.03.
104. See supra text accompanying note 71.
VII. EFFECTIVENESS OF SECRET SETTLEMENT RESTRICTIONS: AVOIDANCE AND UNINTENDED CONSEQUENCES

An important goal of restrictions on secret settlements is to protect the public: i.e., to prevent the settling parties from keeping information secret that, if made public, could prevent future harms. By restricting secret settlements, the information will become public, and public health hazards will be averted. Assuming that disclosure does not create its own harms, such as by harming the privacy interests of individuals and businesses, society would be better off by restricting such a practice, or so the argument goes.

This section contends that this argument ignores how parties are likely to respond to restrictions on secret settlements, particularly, but not only, restrictions on secret settlements in court. Parties plainly have an incentive to avoid the restrictions: both early claimants and defendants share the benefits from settling secretly.¹⁰⁵ Moreover, the parties have a variety of options for maintaining secrecy even in the face of regulation of secret settlements. As a result, such restrictions may be ineffective, or at least not as effective as proponents might hope. Indeed, not only may the regulations be ineffective, they may in fact be counterproductive—they may reduce the amount of information available on public health hazards.

A. Avoidance of Secret Settlement Restrictions

Parties can use a variety of means to evade restrictions on secret settlements. One option for a party that faces a rule adopted by an individual court (such as the South Carolina federal court rule described above)¹⁰⁶ is for the claimant simply to file suit in a different forum—i.e.,

¹⁰⁵ Dana and Koniap argue that the claimant's attorney gains an additional advantage from secret settlements: "[S]ecrecy agreements may benefit the settling plaintiff's lawyer both because he receives a cash payment up-front for entering the agreement and because he reaps advantages later on as a result of the competitive advantage he enjoys by virtue of information that he possesses exclusively or that only a few other lawyers (with similar secrecy agreements) possess." Dana & Koniap, supra note 47, at 1229–30. As a result, the ability to settle a claim confidentially gives the plaintiff's lawyer added incentive to investigate and pursue claims that might give rise to future secret settlements. Prohibiting or otherwise regulating secret settlements would reduce this incentive, perhaps reducing the extent of such litigation below the socially optimal level. Cf. Bruce H. Kobayashi & Larry E. Ribstein, Class Action Lawyers as Lawmakers, 46 ARIZ. L. REV. 733, 736 (2004) (arguing that "lawyers creating class action complaints may invest a socially suboptimal amount of resources because they do not internalize all of the pleadings' potential lawmaking benefits. As in other cases, litigants and their lawyers cannot internalize all of the lawmaking benefits generated for future litigants, who are free to use any publicly disclosed facts, litigation documents or precedents.").

¹⁰⁶ See supra text accompanying notes 99–104.
engage in forum shopping. The forum shopping can take various forms. If a federal court regulates secret settlements and the state court in the state in which the federal court is located does not, the claimant can file suit in state court and avoid the federal court restriction. 107 Because the defendant has an interest in settling secretly, it has an incentive not to remove the case to federal court. Alternatively, the claimant might file suit in a state that does not regulate secret settlements. Such a strategy, of course, is constrained by jurisdictional requirements. One would expect that such a strategy would be more readily used by claimants in products liability cases—in which there likely will be several states in which the defendant is subject to suit—than in medical malpractice cases—in which personal jurisdiction constraints may limit the claimant to filing suit in a single state.

Assuming that the claimant cannot file suit in a jurisdiction that permits secret settlements, a second option is for the early claimant and the defendant to settle the dispute before the claimant files suit. 108 In at least some cases—assuming its general counsel and any liability insurer go along—a defendant will be willing to settle before the claimant files suit to obtain the benefits of secret settlements; once the claimant files suit, those benefits are lost. Certainly in some cases the litigation process permits defendants to screen out meritless claims. Although claimants have an incentive to reveal favorable information to defendants to induce them to settle before filing suit, claimants have no comparable incentive to reveal unfavorable information. 109 In such cases, defendants face a trade off—if they settle before the claimant files suit, the defendant retains the benefits of secret settlements, but faces the costs of losing the ability to screen out some meritless claims. Whether settlement will take place prefiling in such cases depends on how the defendant resolves that trade off.

If one of the parties is located in a jurisdiction that bans secret settlements altogether, a third option is choice of law: Parties may be

107. Forum shopping between state courts and federal courts in the same state raises interesting issues of federal-state relations that are beyond the scope of this article. Note, however, that to date the Florida federal courts have declined to apply the Florida Sunshine in Litigation Act in cases pending in federal court. See Ronque v. Ford Motor Co., No. 91-622-CIV-J-16, 1992 WL 415427, at *1 (M.D. Fla. May 19, 1992) (classifying FLA. STAT. ANN. § 69.081 (West 2005) as “a procedural rule inapplicable in this federal proceeding” under Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938)).


able to avoid the effect of the prohibition by choosing to have their settlement agreement governed by the law of a different jurisdiction, one in which any secrecy requirement is enforceable. Bruce Kobayashi and Larry Ribstein explain that “[a]ctors may be able to exit state regulation inexpensively by contracting ex ante for the application of a particular law rather than physically avoiding regulating states.”\textsuperscript{110} To the extent courts or arbitrators enforce parties’ choice of governing law, “state regulation may have little effect since the parties can escape regulation by contracting for choice of law.”\textsuperscript{111}

A fourth option is for the parties to agree to arbitrate their dispute, either after the dispute arises—in a postdispute arbitration or “submission” agreement—or before the dispute arises—in a predispute arbitration clause. According to Carrie Menkel-Meadow, for example, “a legal system that requires full disclosure of all discovered facts and all the terms of settlements in every case likely will lead to a ‘private market’ in dispute resolution.”\textsuperscript{112} The degree of secrecy and confidentiality in arbitration is not completely certain, as other panelists in this symposium have discussed.\textsuperscript{113} At the very least, however, proceeding in arbitration avoids any restrictions on secret settlement in courts. More broadly, it may be that settling an arbitration proceeding would accomplish many of the same ends for the parties as a secret settlement of their dispute. If so, the parties would have an incentive to use arbitration as at least a partial substitute for a secret settlement.

In short, given the gains to both the defendant and the early claimant from entering into a secret settlement, one would expect them to try to avoid restrictions on such settlements. As a result, the effectiveness of any regulations likely will be less than expected.


\textsuperscript{112} E.g., Carrie Menkel-Meadow, \textit{Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)}, 83 GEO. L.J. 2663, 2684 (1995); \textit{see also} Sunshine in Litigation: Rule 26(C), Memorandum on Protective Orders (prepared by Dean Edward H. Cooper, Reporter to the Advisory Committee on Civil Rules), \textit{available at} 1994 WL 230344 (F.D.C.H.) (arguing that loss of confidentiality in discovery “would add to the pressures that encourage some parties to pursue nonpublic means of dispute resolution”). \textit{See generally} Doré, \textit{supra} note 34, at 308 (“Confidentiality proponents express the fear that unless parties can rely upon stipulated secrecy agreements and orders, they may opt out of the public court system in favor of private dispute resolution.”).

B. Unintended Consequences of Secret Settlement Restrictions

Avoidance activity by parties may do more than merely render the regulation ineffective. If the parties move their disputes out of the court system altogether—either by settling before the claimant files suit or by using arbitration—secret settlement restrictions may actually reduce the amount of information available to the public.\textsuperscript{114} With secret settlements in court, at least the filing of the complaint itself is a public act, which gives notice of the facts on which the claim is based. Indeed, the FJC study found that in the vast majority of secret settlements, the complaint remains publicly available after the case is settled.\textsuperscript{115} That information presumably has some value in preventing future harms, although likely less than information provided by a publicly available settlement or trial of the action on the merits. But even the information provided by the complaint is lost if the claimant and defendant settle before filing suit, or have their dispute resolved in arbitration—as secret settlement restrictions give them an incentive to do. Thus, an unintended consequence of restrictions on secret settlement may be to increase health and other hazards to the public, rather than to reduce them.

Some advocates of secret settlement restrictions recognize that parties can readily avoid those restrictions by prefiled settlement or other means. Judge Anderson, for example, acknowledges that the South Carolina local rule on secret settlements does not prohibit "bilateral secrecy covenants between the litigants."\textsuperscript{116} Anderson writes that "in [his] view, there is no way a rule could legitimately ban such agreements."\textsuperscript{117} Instead, "[t]he evil that [the South Carolina rule] is designed to address is court involvement in the business of enforcing secrecy."\textsuperscript{118} The possible counterproductive consequences from such rules suggest that Judge Anderson's focus on the court system is shortsighted. While protecting judges from giving their approval to secret settlements, such rules may make the public worse off.

\textsuperscript{114} Although Daughety and Reinganum (see supra text accompanying notes 72–81) do not formally consider avoidance behavior, they recognize the possibility, albeit in more general terms:

Both the feasibility and optimality of banning confidentiality are problematic. In order to truly eliminate confidentiality, courts would have to refuse to seal documents and settlements. In addition, they would have to refuse to enforce private contracts of silence. Otherwise, confidential settlements would simply be pushed into the area of contracts, where they would be subject to even less judicial oversight.

Daughety & Reinganum, Secrecy and Safety, supra note 72, at 1087.

\textsuperscript{115} See supra text accompanying notes 30–31.

\textsuperscript{116} Anderson, supra note 32, at 732.

\textsuperscript{117} Id.

\textsuperscript{118} Id.
VIII. CONCLUSION

We do not advocate either for or against restrictions on secret settlements in this Article. It may be that the risks to public health and safety identified by critics are sufficiently great to justify some degree of regulation of the practice. Our point is simply that such regulations are likely to be less effective than their supporters claim. Both defendants and early claimants have strong incentives to avoid restrictions on secret settlements and a variety of means by which they might do so. Indeed, regulations of secret settlements are particularly likely to be ineffective when adopted by a single court, rather than on a more widespread basis. Moreover, as parties adopt means of resolving their disputes that avoid the court system altogether, regulations of secret settlements may have the unintended consequence of reducing, rather than increasing, the information available to the public and to regulators on possible health hazards. Only with this more realistic view of the effects of restrictions on secret settlements can policymakers make a reasoned choice among the different policy alternatives.