

Feature Article

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The Confidential Good-Faith Settlement Conundrum: The Case for Full Disclosure of Settlement Terms to Non-Settling Tortfeasors

The Joint Tortfeasor Contribution Act (the Act), 740 ILCS 100/0.01, *et seq.*, codified the Illinois Supreme Court's opinion in *Skinner v. Reed-Prentice Division Package Machinery Co.*, 70 Ill. 2d 1 (1977), and created a right of contribution among joint tortfeasors. *BHI Corp. v. Litgen Concrete Cutting & Coring Co.*, 214 Ill. 2d 356, 363 (2005). Since its inception, the Act's application has been the subject of hundreds of Illinois appellate court and supreme court opinions. Despite this abundance of jurisprudence, many questions remain unanswered when addressing the competing interests covered by the Act.

One question that has not been addressed concerns the interplay between the good faith requirement of the Act and confidential settlements. Specifically, a conflict often arises between settling parties and a non-settling defendant when the settling parties refuse to disclose the terms and amounts of the settlement but nevertheless seek a good faith finding under the Act. This scenario places the trial court in the position of deciding whether to order settlement terms disclosed to the remaining defendants or to simply find the settlement in good faith based on the court's *in camera* review of the settlement terms.

Despite the dearth of law on the issue, many Illinois trial courts choose the latter approach, perhaps believing that confidential settlement terms need not

be revealed unless and until the time for judgment set-off calculations. Although the reasoning behind this approach is unclear, the approach is inconsistent with the policy considerations underlying the Act. Rather, a non-settling tortfeasor is entitled as a matter of law to know the terms and amounts of any settlement for which a settling defendant seeks a good faith finding.

The "Good Faith" Requirement

Pursuant to the Act:

When a release or covenant not to sue or not to enforce judgment is given in good faith to one or more persons liable in tort arising out of the same injury or the same wrongful death, it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide but it reduces the recovery on any claim against the others to the extent of any amount stated in the release or the covenant, or in the amount of the consideration actually paid for it, whichever is greater.

740 ILCS 100/2(c). A tortfeasor that settles with the plaintiff under this provision is "discharged from all liability for

any contribution to any other tortfeasor." *Id.* § 100/2(d).

"The only limitation that the Contribution Act places upon the parties' right to settle and thereby extinguish contribution liability is that the settlement must be accomplished in good faith." *In re Guardianship of Babb*, 162 Ill. 2d 153, 161 (1994). The Act does not define "good faith," however; nor does it provide any procedural guidance as to when or how to make a good-faith determination. *Johnson v. United Airlines*, 203 Ill. 2d 121, 128 (2003). It is recognized that there cannot be a "single, precise formula for determining what constitutes 'good faith' within the meaning of the Contribution Act that would be applicable in every case." *Johnson*, 203 Ill. 2d at 134. Ultimately, whether a settlement is in good faith is left to the discretion of the trial court and is based upon the totality of the circumstances. *Id.* at 135.

The settling parties bear the initial burden of making a preliminary showing of good faith, which entails, at a minimum, showing the existence of a legally valid settlement agreement. *Id.*

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at 132. Once the settling parties make such preliminary showing, the party challenging the good faith of the settlement must prove the absence of good faith by a preponderance of the evidence. *Id.*

The Argument for Full Disclosure

But how can a non-settling defendant challenge a settlement—and meet the “preponderance of the evidence” standard—when the settlement terms have not been disclosed? For a trial court to make a finding of good faith based upon the “totality of the circumstances,” doesn’t that require hearing an informed argument from the parties potentially adversely affected by the finding? This cannot be accomplished when a court fails to order the settlement terms disclosed to non-settling defendants. Withholding settlement terms from non-settling defendants is not contemplated by the Act, and sound reasons exist to require settling parties to fully disclose the terms of settlement prior to a good faith finding.

The Burden of Proof Requires Disclosure

First, and most importantly, a non-settling defendant must be given an opportunity to examine the settlement terms in order to determine whether to challenge the settlement or investigate the settlement further. The burden of challenging a good faith settlement rests with the non-settling defendant once the existence of a legally valid settlement agreement has been shown. It is illogical to require a non-settling defendant to prove—by a preponderance of the evidence—that the agreement is not in good faith when that defendant is not even given an opportunity to review the agreement or its terms.

No Illinois court has fully addressed the issue of compelling disclosure of confidential settlement terms in conjunction with a motion for good faith finding. In one case, *Zielke v. Wagner*, 291 Ill. App. 3d 1037, 1039 (2d Dist. 1997), the settling parties sought a good faith finding and moved for a protective order, contending that the settlement contained sensitive and confidential information. The trial court ordered the settling parties to provide a copy of the settlement agreement to the non-settling defendants, but the court entered a protective order restricting the non-settling defendants from communicating the terms of the settlement to anyone but their counsel and insurer. *Zielke*, 291 Ill. App. 3d at 1039. The trial court allowed the agreement to be filed under seal and subsequently found the settlement between the plaintiff and the settling defendants to be in good faith. *Id.* at 1039-40.

On appeal, the non-settling defendants argued that the trial court improperly issued a protective order concerning the terms of the settlement. *Id.* at 1040. Specifically, they contended that such action was an unconstitutional prior restraint on speech and unfairly precluded the non-settling defendants from using jury instructions pertaining to comparative negligence. *Id.* The appellate court found that the non-settling defendants waived their constitutional argument and failed to articulate any prejudice they suffered from the protective order. *Id.* at 1040-41. Notably, however, the non-settling defendants were given a copy of the settlement agreement, and the propriety of the trial court ordering the disclosure of the agreement to non-settling defendants was not an issue on appeal.

California employs a statutory scheme similar to Illinois’s in extin-

guishing contribution liability by good faith settlement. See Cal. Civ. Proc. Code § 877.6 (2002). California courts have thoroughly addressed the issue of confidentiality of settlements in conjunction with good faith findings and have recognized the problems associated with requiring a party to challenge a settlement agreement without knowing the terms of that agreement.

In *Mediplex of California, Inc. v. Superior Court*, 40 Cal. Rptr. 2d 397, 398-99 (Ct. App. 1995), a settling defendant disclosed the settlement amount to non-settling parties in conjunction with its motion for good faith finding, but argued that the remaining “terms and contingencies” of the settlement agreement did not “have the effect of reducing the offset.” *Mediplex*, 40 Cal. Rptr. at 398. The settling defendant, therefore, refused to disclose the additional terms. *Id.* The trial court held that the settling defendant had divulged the terms of the settlement that were necessary for a determination of whether the settlement was in good faith and entered a good faith finding. *Id.*

Mediplex of California, Inc. (*Mediplex*), a non-settling defendant, sought a writ of mandate challenging the trial court’s ruling because *Mediplex* was not allowed to see the confidential settlement agreement. *Id.* at 398-99. The court of appeal granted the writ, holding that *Mediplex* was entitled to review the written settlement agreement for purposes of contesting the good faith finding. *Id.* at 401. In so holding, the court reviewed several prior cases from the court of appeal concerning disclosure of settlement terms in conjunction with motions for good faith finding. Specifically, the court reiterated that, although parties are free to maintain the confidentiality of their settlement agreement, “they may not claim a privilege of nondisclosure when

they move to confirm the good faith of their settlement.” *Id.* at 399. According to the court, a party simply “may not both seek confirmation of a settlement agreement and withhold it from nonsettling defendants on the grounds of confidentiality.” *Mediplex*, 40 Cal. Rptr. at 400. The court of appeal held that the trial court improperly required *Mediplex* to “take on faith” that its adversaries properly decided what terms were important and fairly represented those terms. *Id.* at 400.

The *Mediplex* court expressly noted that the party asserting lack of good faith bears the burden of proof on that issue, and therefore “the nonsettling party must be allowed to review the agreement if [it] is to meet [its] burden of proof.” *Id.* at 399 (citing *J. Allen Radford Co. v. Superior Court*, 265 Cal. Rptr. 535, 539 (App. Ct. 1989)). The court of appeal disapproved of the approach taken by the trial court and noted that “[a] client would be incredulous to hear his lawyer say he was relying on opposing counsel and would not be reading the agreement.” *Id.* at 401. Simply put, “if the onus [is on a non-settling defendant] to come forward with evidence, its counsel must be allowed to do the job; counsel cannot be expected to do it without reviewing the settlement agreement.” *Id.*

The rationale and analysis in *Mediplex* is sound and easily transferable to Illinois. Without having an opportunity to review the settlement agreement, a non-settling defendant simply cannot meet what Illinois courts have determined is a non-settling defendant’s burden—to prove the settlement is not in good faith. Disclosure of settlement terms is necessary for counsel to adequately assess the settlement and assert informed objections to the settlement.

Likewise, on appeal, the burden is upon the non-settling defendant to show

that the trial court abused its discretion in determining whether the settlement was in good faith. Without a record of the settlement terms, this burden cannot be met.

In *Davis v. American Optical Corp.*, 386 Ill. App. 3d 866 (5th Dist. 2008), the Illinois Appellate Court Fifth District presumed the circuit court’s good faith finding was proper, even though the amounts of the challenged settlements were not included in the record. The court pointed out that the burden of presenting the court with a record that is adequate with respect to the claimed error lies with the appellant, and any doubts that might arise from an incomplete record are resolved against the appellant. *Davis*, 386 Ill. App. 3d at 873 (quoting *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 546-47 (1996)). The non-settling defendant in *Davis* did not insist on the settlement amounts being made a part of the record, and, to the contrary, consented to the confidentiality of the settlements. *Id.* In short, to adequately challenge the good faith nature of a settlement on appeal, the terms of the settlement must be disclosed and made a part of the record. Disclosure of the settlement terms is necessary for preservation purposes.

Confidential Settlements Conflict with Policy Considerations Behind the Act

Second, keeping settlement terms confidential from non-settling defendants is inconsistent with the policy considerations underlying the Act. “[T]he Act furthers two policies: promoting settlement and ensuring equitable apportionment of damages.” *BHI Corp.*, 214 Ill. 2d at 365. On a motion for good faith finding, a court must strike a balance between these two policy considerations. *Johnson*, 203 Ill. 2d at 134. The good-faith requirement

is not satisfied by an agreement that conflicts with the underlying terms or policies (or both) of the Act and thus cannot discharge a settling tortfeasor from contribution liability. *In re Guardianship of Babb*, 162 Ill. 2d at 170.

The goal of equitable apportionment is not accomplished by preventing co-defendants from knowing how much the plaintiff receives through other settlements. As reflected in Section 2(c) of the Act, the long-recognized principle in Illinois is that a plaintiff shall only have one recovery for an injury.” *Pasquale v. Speed Products Eng’g*, 166 Ill. 2d 337, 368 (1995). Double recovery is condemned and its prevention is precisely the intention of Section 2(c). *Id.* That section “ensures that a nonsettling party will not be required to pay more than its *pro rata* share of the shared liability.” *Thornton v. Garcini*, 237 Ill. 2d 100, 116 (2009). Keeping settlement terms confidential from non-settling defendants frustrates this policy, creating the possibility of a later windfall for the plaintiff in the form of subsequent settlements from the uninformed defendants.

A common response to this argument is that a windfall to the plaintiff is prevented because non-settling defendants are entitled to a set-off from any judgment. Of course, there is a set-off only if the case actually reaches judgment. If, on the other hand, like the vast majority of civil suits, a case is settled by all parties prior to judgment, the potential for a windfall to the plaintiff is very real. In the interest of preventing possible windfalls for plaintiffs, settlement terms should be disclosed.

Plaintiffs might argue further that keeping the terms of a settlement confidential encourages non-settling defendants to evaluate the case based upon

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their individual culpability and to not rely upon knowledge about what other defendants have paid. In this way, some argue, keeping the terms of settlements confidential encourages settlement (the second policy consideration underlying the Act). Of course, from a plaintiff's perspective, the purpose behind keeping the non-settling defendants in the dark is clear—to pressure those non-settling defendants into settlement and to negotiate a potentially higher settlement from each. This rationale is not compelling. Indeed, the failure to disclose the terms of settlement suggests the parties are not acting in good faith, as non-settling defendants are not given an adequate opportunity to object to the settlement. See *In re Guardianship of Babb*, 162 Ill. 2d at 166 (finding that a failure to notify non-settling defendants, in attempt to prevent their objections to petition for good-faith finding, suggested settling parties were not acting in good faith).

Moreover, the opposite is equally true—full disclosure of settlement terms actually promotes later settlement between the plaintiff and the non-settling defendants. When both the plaintiff and the non-settling defendants are equally aware of the set-off amounts, it is more likely that the non-settling defendants are able to negotiate fair and reasonable settlements with the plaintiff's counsel. Therefore, the second policy consideration behind the Act—promotion of settlements—is not hindered and actually might be advanced by disclosure of settlement terms.

Disclosure Advances Judicial Efficiency and Economy

Third, in the interest of judicial efficiency and economy, settlement terms should be disclosed upon request of any non-settling defendant. The entry of a

good faith finding necessarily means that the settling defendant will not be included on the jury verdict form. *Ready v. United/Goedecke Servs., Inc.*, 232 Ill. 2d 369, 385 (2008) (“We hold that section 2–1117 does not apply to good-faith settling tortfeasors who have been dismissed from the lawsuit”). In other words, jurors will be unable to apportion any degree of fault to the previously-settled defendant (absent sole proximate cause). This result, of course, is problematic if the court failed to require disclosure of settlement terms at the good faith hearing.

If it becomes clear to the non-settling defendants that the settlement terms, revealed for the first time at judgment for set-off purposes, were not in good faith, a new trial might be warranted. Specifically, if the court improperly granted the motion for good faith finding, the non-settling defendants were very likely prejudiced by the settling co-defendant's absence from the verdict form. Of course, if the settlement terms had been disclosed at the time of the good faith finding, all parties would have been able to challenge the settlement properly at that time and the added expense of additional litigation would have been averted.

Due Process Might Require Disclosure

Finally, granting a motion for good faith finding without advising the non-settling defendants of the amounts and terms of the settlement could violate procedural due process. Entry of a good faith finding extinguishes a non-settling defendant's cause of action for contribution against the settling defendant. *Johnson*, 203 Ill. 2d at 128. A statutory cause of action is considered property under the Fourteenth Amendment, and therefore due process requirements are

implicated. See *Bradford v. Soto*, 159 Ill. App. 3d 668, 672-73 (4th Dist. 1987) (citing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-33 (1982)). “At a minimum, procedural due process requires notice, an opportunity to respond, and a meaningful opportunity to be heard.” *Gold Realty Group Corp. v. Kismet Café, Inc.*, 358 Ill. App. 3d 675, 681 (1st Dist. 2005) (emphasis added).

At least one Illinois court has held, however, that a party *does not* have a due process property interest in a contribution claim unless and until the tortfeasor bringing the claim has paid more than his or her pro rata share. In *Snoddy v. Teepak, Inc.*, 198 Ill. App. 3d 966 (1st Dist. 1990), the Illinois Appellate Court First District held that non-settling defendants did not have a protected property interest in a contribution cause of action because the Fourteenth Amendment does not apply to “unaccrued causes of action.” *Snoddy*, 198 Ill. App. 3d at 970. The Court noted that, although “contribution among tortfeasors is an *inchoate* right at the time of the injury, [citation omitted] the cause of action does not *accrue* until a tortfeasor pays more than his pro rata share.” *Id.* at 971 (emphasis in original). Because the plaintiff and the settling defendant had settled already, the non-settling defendants' *inchoate* property interests were abolished prior to any cause of action accruing. *Id.* The *Snoddy* court, therefore, found that the non-settling defendants had no due process rights in their contribution claims. *Id.*

The *Snoddy* court, however, failed to harmonize its holding with the fact that a defendant is required to assert a contribution claim in the underlying case and is not allowed to wait until such action accrues. See *Laue v. Leifheit*, 105 Ill. 2d 191, 196 (1984). If a defendant is *required by law* to assert a contribu-

tion action, that defendant should be entitled to due process with respect to that action. Under the *Snoddy* holding, it is difficult to imagine a scenario in which a defendant would be entitled to any due process with respect to its contribution claims. Because a non-settling defendant will lose its right to seek contribution from a settling defendant if the settlement is found in good faith, a property right (and therefore procedural due process concerns) is implicated. See *In re Guardianship of Babb*, 162 Ill. 2d at 166 (recognizing that non-settling defendants had “a legitimate interest” in receiving notice and in having an opportunity to challenge a petition for good faith finding). Notwithstanding the holding in *Snoddy*, therefore, any due process argument concerning the failure to disclose settlement terms should be explored fully and preserved.

Mechanism for Disclosure of Settlement Terms

From the perspective of a settling defendant, there is one option that protects confidentiality, at least until the time to determine set-off. That is, a settling defendant might choose not to seek a good faith finding at all. Of course, this approach lacks finality and the settling defendant still risks being pursued for contribution. As such, a settling defendant must weigh the interests of finality and protection from contribution claims against the interest in maintaining confidentiality of the settlement.

Assuming a motion for good faith finding is sought, however, there does not appear to be any current mechanisms or procedures in place that address the concerns of both the settling parties and non-settling defendants in disclosing settlements. One alternative is request-

ing that the court conduct an *in camera* inspection of the settlement documents, without filing the documents with the court. Another is filing the settlement documents under seal, without revealing the settlement terms to the other parties. These approaches, however, neither preserve the record on appeal nor afford the non-settling defendants the opportunity to uncover evidence in opposition to the motion for good faith finding.

Another common approach is that the parties request that the court disclose the terms to all parties on the record and then seal the record. This accomplishes the disclosure of the terms, allows all parties to be heard, and preserves the issues and arguments for appeal. Of course, the law favors public access to court records, and “[t]he judge, as a primary representative of the public interest in the judicial process, should not rubber stamp a stipulation to seal a record.” *A.P. v. M.E.E.*, 354 Ill. App. 3d 989, 995 (1st Dist. 2004). As such, a trial court might be unwilling to allow the documents to be filed under seal, and, even if the court did permit such, the documents potentially could be unsealed later.

Given the narrowly-tailored rules concerning sealed documents, a more sensible approach would be to allow all non-settling defendants to review the signed release/settlement agreement outside of the record. If settling defendants are concerned about secondary disclosure of terms, they can request a protective order, similar to that in *Zielke*. Given that settlements are almost always found to have been made in good faith, this informal disclosure of settlement terms likely will reveal that the settlement is in good faith. There would then be no need to place the terms of the settlement in the record, as the non-settling defendants are not likely to object to the

finding. The non-settling defendants are adequately informed and the terms of the settlement remain confidential except with respect to the parties to the case. If there is a basis to oppose the good faith finding after this initial informal review and a record needs to be preserved, then either (1) the court can seal the record (with the potential for the record to be later unsealed) or (2) the record is made and the settlement is publicly available.

There is no statutory or common law right or privilege to confidential settlements. Indeed, as outlined above, the interests of non-settling defendants outweigh the settling parties’ interest in confidentiality.

Practical Considerations

Despite the legal arguments, there are practical reasons why a non-settling defendant might not wish to force disclosure of settlement terms. The most compelling reason for allowing another defendant’s settlement terms to remain confidential is to prevent being asked to disclose the terms of your client’s confidential settlement later in the same or a similar cause of action. Potentially, being the only defendant to force disclosure of settlement terms could isolate your client and make your client more of a target to a plaintiff’s counsel who feels strongly about maintaining confidentiality of settlements.

The decision to challenge the confidential settlement should take these strategic considerations into account and balance them with the potential benefits to be gleaned from learning the details of the settlement. Such a decision is necessarily a case-by-case determination and certainly depends on the relative liabilities of the parties and the plaintiff’s damages.

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Conclusion

A non-settling defendant is entitled to know the terms of any settlement for which a settling co-defendant and the plaintiff seek a good faith finding. There is no statutory or common law authority supporting an argument that a confidential settlement is privileged from disclosure to the other parties. Indeed, knowledge of a co-defendant's settlement terms is critical to a non-settling defendant's arguments against a good faith finding and is necessary to meet their burden. It is also helpful for a non-settling defendant's subsequent exposure analysis and settlement approach. As a non-settling defendant, knowing the terms and amounts of prior settlements helps prevent your client from overpaying and diminishes the likelihood of a windfall for the plaintiff. In addition, knowing prior settlement terms could assist a non-settling defendant in showing bias or prejudice in trial testimony. Moreover, requiring disclosure of settlement terms helps to prevent and deter bad faith or collusive settlement arrangements.

Absent special strategy considerations, when settling parties seek a good faith finding and refuse to disclose the settlement terms, counsel for non-settling defendants should request disclosure of the terms and object to any good faith finding absent such disclosure. Given the potential judicial efficiency and economy implications, a good faith finding without disclosure of settlement terms should not go unchallenged. Under the right circumstances, counsel for non-settling defendants should consider a request to certify the question for appeal under Illinois Supreme Court Rule 308 or seek a motion for supervisory order under Supreme Court Rule 383.