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Professional Malpractice

When Confidential Settlements Become Discoverable

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Have you ever coveted the terms of a confidential settlement between two or more other parties to gauge how much you should pay or receive in the same matter? Although such settlement terms may be jealously guarded, there may be ways to lift the veil of secrecy and learn how other parties and counsel presently value the case in contrast to perhaps outsized demands or paltry offers announced earlier.

Secrecy is often a key component to settlement negotiations. Confidentiality keeps private terms that an adversary or competitor might otherwise use to gain an undue advantage and places the settling party at a distinct disadvantage by revealing a strategy or pattern of factors on which the settling party resolves similar disputes. As the Second Circuit in *In re Lake Utopia Paper Ltd.*, 608 F.2d 928, 930 (2d Cir. 1979) observed:

"If participants cannot rely on the confidential treatment of everything that transpires during these sessions, then counsel of necessity will feel constrained to conduct themselves in a cautious, tight-lipped, noncommittal manner more suitable to poker players in a high-stakes game than to adversaries attempting to arrive at a just resolution of a civil dispute."

Disclosure of settlement terms not only might jeopardize settlements already reached but also might deter others from either entering into confidential discussions to settle disputes early or without extended trials.

Generally, a non-settler has no right to obtain disclosure of settlement terms from a party who wishes to protect the settlement's confidentiality. See generally *Zuckerman v. Piper Pools, Inc.*, 256 N.J. Super. 622 (App. Div.), certif. denied, 130 N.J. 394 (1992), and *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976 (6th Cir. 2003), which confirms that settlement documents and communications are subject to a federal settlement privilege.

There are occasions, however, when confidentiality is trumped by competing legal principles or practicalities. Courts in New Jersey and elsewhere have held settlements are not to be kept secret or excluded from review when information about them is offered for purposes other than establishing liability.

What confidential settlement information should be disclosed depends on a balancing process undertaken by the court: Does the probative value of the terms of the confidential settlement on a particular issue outweigh the harm that may result from disclosure?

The exposure of criminal activity perhaps most starkly counterbalances a confidentiality of settlement desired by the parties. The Third Circuit has held that "society's interest in the assiduous prosecution of criminal wrongdoing almost always will outweigh its interest in the resolution of a civil matter between private parties." *In re Grand Jury*, 286 F.3d 153, 163 (3d Cir. 2002).

Other factors to be weighed by a court include:

- the good-faith basis of the request for disclosure;
- any restrictions on use of information found in the settlement document itself;
- the relevance and materiality of the sought evidence to the issue before the court; and
- the ability to obtain the information sought from sources other than the confidential settlement.

As one court reflected, "sensitive balancing is essential to accommodate [one's] need for discovery while at the same time preventing unwarranted disclosure of the confidential settlement agreement." *Llerena v. J.V. Hanauer & Co.*, 368 N.J. Super. 256, 268 (Law Div. 2002).

The competing principles outweighing confidentiality vary with the circumstances and the relevance of such principles to the particular factual setting under scrutiny.

Confidential settlement discussions and communications with a government agency to compromise threat-

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ened or actual litigation may be subject to disclosure where the health, safety and other concerns of the public transcend the litigants' interests involved. For example, a federal appeals court has held that a federal settlement privilege is an open question in the context of an investigation of manipulation in the natural gas market. See *In re Subpoena Duces Tecum Issued to the Commodities Future Trading Comm'n*, 439 F.3d 740 (D.C. Cir. 2006).

In another instance, because New Jersey courts abhor double recovery and have repeatedly expressed the strong public policy against it, settlement payments to a party relating to a claim for a liquidated sum require disclosure to avoid paying an unwarranted windfall.

A case not concerning confidential settlements — *Johnesee v. Stop & Shop Cos.*, 174 N.J. Super. 426 (App. Div. 1980) — still illustrates the point. There, the court held that a plaintiff who was unable to work after contracting hepatitis due to defendant's negligence could not recover for lost salary while at the same time keeping an award equal to the amount his employer spent in hiring a replacement. The payment for lost salary would have made the plaintiff whole, and any payment to plaintiff beyond salary improperly constitutes "a double recovery for the same loss," the court found.

An instance is where the settling parties have already allowed public access to an integral part of their settlement by filing papers with the court or even conducting a friendly hearing in open court. The policy favoring settlements does not trump the presumption of access to what occurred in court. *Hammock v. Hoffman LaRoche, Inc.*, 142 N.J. 356 (1995). A purely personal interest in privacy and freedom from annoyance and harassment does not outweigh the presumption of open judicial proceedings. In *Verni ex rel. Burstein v. Lanzaro*, 404 N.J. Super. 16 (App. Div. 2008), an appeals court held that the public has a right to disclosure of a confidential settlement entered under seal too sweeping in scope in a civil lawsuit between private parties.

The settling parties may not at once irreversibly disclose part of the overall settlement in the effort to gain the court's imprimatur and then simultaneously keep the balance of the overall settlement hidden from full view of a nonsettlor when secrecy is to their liking at the moment. The shield of confidentiality should not, in such circumstances, be converted into a sword upon which to impale another party as it prepares for further proceedings or trial. Rather than reveal only some of the settlement terms, the settling parties should be required to expose the settlements in full so the terms can be assessed for relevancy to the non-settling party's claims or defense.

As expressly referenced in Evidence Rule 408, evidence arising from confidential settlement negotiations may be introduced for a purpose other than establishing liability or the amount of damages. The purposes of such evidence may extend beyond the competing substantive legal principles set forth in the above examples; other non-liability purposes to introduce evidence of a confidential settlement include witness impeachment. See *Rynar v. Lincoln Transit Co.*, 129 N.J.L. 525 (E.&A.1943) (showing bias of a witness in giving particular testimony), and inconsistency of position, and *Burns v. Burns*, 223 N.J. Super. 219 (Ch. Div. 1987) (refuting a prior explanation by a party that his refusal to secure a "get" or Jewish bill of divorcement was allegedly based on religious belief).

Regardless of the purpose for which disclosure of confidential settlement terms may be sought, the court may well resist any effort to breach the litigation practice of secrecy. To ease that resistance and to diminish the force of the anticipated argument that disclosure will somehow undermine the social good of encouraging settlements, counsel may express a willingness to restrict disclosure of the sought information to the non-settling party and its counsel.

As the above recital demonstrates, the competing principles that may outweigh confidentiality are many and are limited only by the issues pertinent to the case and the imagination of counsel. ■