Confidential settlements vs. non-settling defendants' right to know

By John J. Kohnke, Segal McCambridge Singer & Mahoney, Ltd., Chicago

Parties in civil lawsuits involving multiple defendants are facing new questions when less than all of the defendants remain in the litigation at the time of trial or pre-trial.

Litigants and Illinois courts are currently struggling with balancing the interest of protecting the privacy of confidential settlement agreements and the remaining defendants' right to know the settlement amounts.

This article will look into the current approach taken by litigants and various Illinois courts in balancing the confidentiality clauses of settlement agreements and the remaining defendants' desire to obtain information regarding possible setoffs that they may be entitled to prior to trial or a preliminary pre-trial conference.

The current approach leaves unresolved questions including whether the remaining defendants can present evidence against originally named defendants who are absent at the time of trial and can submit a jury verdict form allowing the jury to apportion responsibility to an absent defendant.

Illinois statutory provisions are silent on whether plaintiff's counsel shall or should advise the remaining parties as to the amount of any settlement prior to trial. Illinois statutory law provides that a contribution action remains viable until the court conducts a hearing and determines that a tortfeasor has settled with the injured party in good faith.[1]

In order to obtain a court finding of a good-faith settlement, the settling parties carry the initial burden to make a preliminary showing that any settlement entered into had, in fact, been made in "good faith."[2] The fact that a contribution defendant has settled its dispute with plaintiff does not dismiss the contribution actions made against it until the court has formally entered an order finding that such resolution had been entered into "good faith".

Although the Contribution Act does not formally define the term "good faith," Illinois courts have looked to the totality of the circumstances surrounding the settlement to insure that said settlement was not made pursuant to collusion or constituted a "Mary Carter" agreement.[3]

Recently, defendants in personal injury actions have found themselves preparing for a settlement conference or trial in lawsuits which initially involved several other defendants or third-party defendants who are no longer present at the time of trial. Additionally, despite contribution actions filed between the various defendants and third-party defendants in these actions, no motions were presented to the court seeking a good-faith finding for any settlement, and no orders were entered by the court identifying the amount of any settlement or whether the settlements had, in fact, been entered into in good faith.

Defendants have argued that they should be entitled to know the amount of any potential set-off prior to a pre-trial or trial so that they have the same knowledge as plaintiff in entering into settlement discussions or preparing for trial.

I. Fairness and the right to know

With respect to the issue of equal knowledge regarding settlement amounts previously paid or owing to plaintiff from contribution defendants, plaintiffs' attorneys have argued that public policy considerations of encouraging settlements support their position that disclosure of settlement amounts would lessen the likelihood of settlements with respect to the remaining defendants.

Frequently, settlements will be entered into with plaintiffs pursuant to a confidential agreement. Plaintiffs then utilize the confidential settlement arrangement as evidence that if disclosures of confidential settlement amounts are made to the remaining defendants, it would reduce the likelihood of settlements in the future.

The defense bar's position is that it is entitled to the same knowledge plaintiff's counsel has prior to engaging in settlement discussions or proceeding to trial with respect to the amounts that it might be entitled to pursuant to set-off.

The Illinois Joint Tortfeasors Contribution Act provides that a defendant is entitled to a set-off against the jury's verdict for any settlement proceeds paid to a plaintiff by defendants. 740 ILCS 100/2. Some courts, such as Madison County Circuit Judge Crowder, have outright rejected the defendants' position that they should be entitled to know the settlement amounts from contribution defendants.

Judge Crowder issued an order denying a civil defendant's motion seeking disclosure of confidential settlement amounts entered into between numerous named defendants and plaintiff finding that: "Whether a party is entitled to know the dollar amount of another party's confidential settlement prior to trial appears to be a case of first impression."[4]

Judge Crowder, denied defendant's motion seeking pre-trial setoff amounts reasoning that the set-off amounts would not affect the evidence that defendant could produce at trial in the defense of its case regarding the absence of negligence or the sole proximate cause of another's conduct. Judge Crowder, however, failed to address the strategic gamesmanship of the defense bar and plaintiffs' bar in negotiating a settlement with only one side aware of the set-off amounts.

The plaintiffs' bar contends, and this position has been adopted by circuit courts in Madison, Grundy,[5] and Cook County,[6] that if the remaining defendants had knowledge of potential set-offs, *i.e.* prior settlements entered into with plaintiff, these remaining defendants would be less inclined to offer as much money for settlement, believing they would be protected by a potential set-off if they were to receive an adverse verdict for damages.

There have been no statistical or psychological studies cited by the parties or the courts supporting or rejecting this position reflecting the strategy or gamesmanship involved with settling a lawsuit based upon equal or unequal knowledge of prior settlement amounts in subsequent negotiations.

An argument can be made that discovery rules have been amended over the years to insure that the disclosure of evidence is no longer done pursuant to surprise or ambush and that all parties should have equal knowledge regarding the facts and evidence which will be presented to the jury prior to trial and settlement negotiations. Illinois courts have always attempted to facilitate a fair process in order to insure an equitable procedure for all parties and would not condone a process or procedure by which one party would have superior knowledge of any aspect of the case.

The plaintiffs' bar believes that if the re-

maining defendants were prohibited from knowing available set-offs that they may be entitled to at the time of trial, they may proceed with caution and underestimate the amount of possible set-offs, thereby increasing an offer of settlement.

Federal courts have also struggled with this issue of defendants' right to know what co-defendants paid plaintiff to settle their part of a case prior to trial.

In *Dent v. Westinghouse,*[7] defendant Warren Pumps sought a court order requiring plaintiff to respond to written discovery which requested the amounts plaintiff received from settling co-defendants in an asbestos lawsuit. Defendant Warren Pumps argued that Fed. R. Evid. 408 was not applicable to its request for prior settlements amounts as it was seeking this information to test the credibility of plaintiff's claims.

Rule 408 addresses the public policy of promoting settlement, and several federal courts have held that a defendant must show with specificity that prior settlements are relevant and calculated to lead to discovery of admissible evidence at trial.[8] The *Dent* court was not persuaded by defendant Warren Pumps' argument, and found its discovery requests in conflict with Fed. R. Evid. 408.

Both plaintiffs and defendants frequently seek confidentiality agreements in a release so that their current resolution may not affect subsequent settlement agreements with other defendants or other plaintiff's law firms. If a similar defendant manufacture learned that the plaintiff's attorney was accepting less money for an injury from a similar product, it would be less inclined to continue the current settlement dollar amounts which they may have reached with plaintiff's counsel. Additionally, a plaintiff's attorney who learns that a particular defendant is paying other plaintiffs' firms larger sums of money for similar cases may increase his or her demand to that defendant. Therefore, both sides frequently request confidentiality agreements, especially in large mass tort litigation.

Several solutions to this issue have been advanced by defense counsel, including a lump sum disclosure of set-offs prior to trial and no disclosure regarding individual settlements. In litigation involving several defendants, the court has been asked to release the total amount of potential settlement/set-offs without specific information as to how much each defendant paid. This resolution appears to make sense in cases involving three or more defendants.

Another suggested compromise is that all parties enter into a confidentiality agreement, and that any amounts paid by defense counsel pursuant to a confidentiality agreement be disclosed to all parties for the sole purpose of the pending litigation. Any disclosure beyond the current litigation would be in breach of this agreement and subject to court sanctions.

While this solution has the effect of maintaining confidentiality for one particular lawsuit, it does not resolve the strategy or gamesmanship in settlement negotiations for separate or future litigation as all parties would be aware of what other parties have paid.

II. Procedural issues

In the current situation where no good faith order has been entered and the court does not order disclosure of possible set-offs to requesting defendants at the time of trial, a procedural issue arises with respect to the defendants' opening statements, evidence to be introduced at trial, as well as jury instructions.

A tortfeasor is not entitled to recover contribution from another tortfeasor who has settled with the injured party in good faith.[9] All contribution liability is discharged pursuant to the Illinois Joint Tortfeasor Contribution Act if that tortfeasor settles in good faith. Therefore, absent a good-faith finding by the court, the counter-defendant remains subject to the allegations of the contribution action.

If we were to use facts of a typical personal injury lawsuit filed against multiple defendants and assume none of the defendants were dismissed by a good faith order, the case would eventually be presented for a jury trial. One of the first phases of an Illinois jury trial is the presentation of opening statements.

Evidence is then introduced at trial pursuant to the existing pleadings. At the conclusion of the evidence, closing arguments occur, after which the jury is presented with instructions pursuant to the Illinois Pattern Jury Instructions, otherwise referred to as IPI.

IPI instructions have specific references to contribution, and the jury is allowed to apportion responsibility to all parties who have not been dismissed. (IPI (Civil) No. 600 *et seq*.) The court then enters an order in favor or against each party pursuant to the jurors' findings, including findings based upon contribution.

It is common for one or more defendants to resolve their dispute with the plaintiff prior to trial. If a defendant or third-party defendant who was named in a contribution claim resolves its dispute with plaintiff's counsel prior to trial, the Illinois Joint Tortfeasor Contribution Act provides that the remaining defendants are entitled to a set-off against the jury's verdict for any settlement proceeds paid to plaintiff by other defendants. 740 ILCS 100/2. In order to insure that the plaintiff receives only one satisfaction for any one injury, this Illinois statue provides that a payment by one tortfeasor will reduce plaintiff's claim against the remaining tortfeasors.

The circuit courts in Madison, Cook and Grundy County have generally addressed the issue of set-off subsequent to a finding by the court or jury with respect to damages. Generally, the court will reduce the trier of fact's damage award on its own motion or pursuant to a post-trial motion.

Currently, statute, practice and procedure of Illinois courts provide that the remaining defendants at the time of trial can identify, discuss, and present evidence against a remaining named defendant so long as a counterclaim for contribution has been raised as to that defendant and no order has been entered dismissing that defendant pursuant to a good-faith settlement.

Therefore, while the original complaint may have identified many defendants, absent a good-faith finding and dismissal by the court prior to the time of trial, it would seem the remaining defendant or defendants can identify these multiple defendants to the jury, as well as introduce evidence as of their culpability in an attempt to establish sole proximate cause or establish their proportions of responsibility. This would also be applicable to the use of Illinois pattern jury instructions to allow the jury to apportion responsibility as to the culpable defendants absent at the time of trial.

It would seem that any ruling by the court to prohibit a defendant from mentioning an absent defendant, introducing evidence as to an absent defendant, or prohibiting an absent defendant's inclusion on a jury instruction prior to a good-faith hearing and an order of dismissal would be in contravention of the Illinois Code of Civil Procedure, as well as the Illinois Supreme Court Rules.

The issue of settlements prior to trial,

amounts, and confidentiality agreements are becoming more common and problematic. The trial court has not received guidance from an appellate court or from specific legislation addressing this issue. The courts can follow the spirit of prior statutes and rules requiring equal disclosure and equal knowledge by litigants in a civil lawsuit, however, each trial judge and litigant is currently left to follow what they believe to be issues of fairness, common sense, and public policy to promote settlements. ■

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1. 704 ILCS 100/2(c), *Muro v. Abel Freightlines, Inc.,* 283 Ill.App.3d 416, 419 (1st Dist. 1996).

2. *Johnson v. United Airlines,* 203 Ill.2d 121, 132 (2003).

3. *In re Guardianship of Babb,* 162 Ill.2d 153, 162 (1994).

4. Judge Crowder's October 27, 2011, Order in the matter of *James and Judy Napierala v. American Optical.* (Defendants' request for interlocutory appeal was denied.)

5. Grundy County: Judge Marsiglia had ordered the disclosure of prior settlement amounts in the matter of *Provance v. A.W. Chesterton*; however, Judge Marsiglia changed his mind in the matter of *Carkhuff v. Aurora Pump,* refusing to enter an order requiring plaintiff to disclose prior settlement amounts, indicating that subsequent to the *Provance* order, he had an opportunity to discuss this issue with Judge Crowder from Madison County.

6. Cook County: Judge Maddux has denied various defendants' motions seeking information regarding prior settlements without a good faith finding, with rulings similar to that by Judge Crowder.

7. 2010 WL 56054 (E.D.Pa, Jan. 4, 2012).

8. *Block Drug,* 2007 WL 1183828; *Lesal Interiors, Inc. v. Resolution Trust Corp.,* 153 F.R.D. 561, 562 (D.N.D. 1994).

9. 740 ILCS 100/2(c); *Dubina v. Mesirow Realty Dev., Inc.*, 197 Ill.2d 185, 191 (2001).

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