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New Considerations for Confidential Settlements

Requiring confidentiality is understandable for prized trade secrets—for example, the formula for Coca Cola is one of a kind. Recently, however, confidentiality agreements in case resolution have transcended beyond the underlying goal of these agreements to an unprecedented level. In some circumstances, rather than serving to protect disclosure of the terms of the settlement, i.e., the amount of the monetary award, terms are being mandated that curtail a party's free speech and frustrate the intended purpose of the settlement.

Sexual Harassment Settlements and Other Recent Changes in the Law

Some states have chosen to restrict the availability of confidentiality in settlements. For example, in his final year in office, California Governor Edmund G. "Jerry" Brown signed into law S.B. 820. This law amends the *California Code of Civil Procedure, Section 1002*. It reflects the recognition that it is the identities of the victims of sexual harassment, rather than of the perpetrators, who may require protection. The legislation followed the revelations of sexual harassment and assault in the entertainment industry. This new law, which became effective on January 1, 2019, prevents non-disclosure agreements in settlements involving: (1) acts of sexual assault; (2) acts of sexual harassment; (3) workplace sexual assault; (4) workplace sexual harassment; (5) failure to prevent workplace sexual assault or sexual harassment; and, (6) retaliation for reporting workplace sexual assault and sexual harassment. A settlement non-disclosure agreement that violates these provisions is void.

In addition, the tax treatment of payments made and received for confidential settlements promotes greater transparency in the resolution of litigation. Specifically, the federal *Tax Cuts and Jobs Act of 2017, Section 13307*, addresses the deductibility of settlement payments. This law amended the Tax Reform Act of 1986. It added a new section 26 U.S.C. 162(q) which disallows the tax deductibility of a payment by the employer of a settlement for sexual harassment or sexual assault if the settlement agreement includes a confidentiality requirement. Thus, confidentiality also can be prohibited by law or punished under the Internal Revenue Code. Changes in the law both increase expectations of a more vigilant public and also call into question why confidentiality requirements in settlement agreements are so common. Confidentiality is no longer under a magnifying glass. Rather, it is under a microscope. All stakeholders must be vigilant in knowing the applicable law, procedure, and practice involved. As a result, they must demonstrate candor in considering whether a settlement really must be confidential. Balancing the interests will become more delicate as the scrutiny of confidentiality provisions increases.

In Florida, for example, a party can enter into a confidential agreement regarding trade secrets provided it is not a result of fraud or concealment. The Florida Uniform Trade Secrets Act defines a "trade secret" as one in which information, data, or documents have an independent value by not being known by others who can gain economic benefit from it. Thus, litigation based upon concealment and fraud in connection with trade secrets creates hurdles for settlement in general, and confidentiality in particular. Practitioners must focus on the gravamen of the litigation, the reasons for settlement, and the element of non-monetary terms that support the need for confidentiality.

Through the Sunshine in Litigation Act, Florida law provides enhanced protection for public hazards. Under the Act, a confidential settlement involving a public hazard is void. A public hazard is defined as an instrumentality, including, but not limited to, any device, instrument, person, procedure, product, or a condition of a device, that causes injury. Thus, the Act extends to products. (See, *Jones v. Goodyear Tire & Rubber*, 871 So. 2nd 899 (2003).) Courts also have applied the protection to tangible items, rather than pure economic losses under Florida law. (See, *Stivers v. Ford Motor Credit*, 777 So. 2nd 1023 (2000).) Thus, the nature of the case will affect the application of the Sunshine in Litigation Act.

Confidentiality also pervades the past and present employment of individuals entrusted with trade secrets. For example, in Texas, where confidentiality agreements between the parties enjoys greater contractual protection, the Texas Tenth Court of Appeals refused to permit a deposition and production of documents under Texas Rule of Civil Procedure section 202. (See, *In re Jeremy Pickrell and ERBE USA, Inc.* (2017) No. 10-17-00091-CV.) The Court reasoned that the intent of confidentiality overrode the need for information in litigation.

In some states, disclosure requirements have been routinely ignored. For example, in New York, when a case is dismissed based upon a settlement, the stipulation or settlement agreement is required to be filed publicly where it is available for public view. (See New York Civil Practice and Law Rules section 2104.) The failure to file a stipulation under seal represents an alternative, but cumbersome, procedure that has resulted in challenges to confidentiality. In *Mahoney v. Turner Construction*, 872 N.Y. 2nd 433 (2009), the court reversed a trial court decision enforcing a confidentiality provision. While the court remanded the case for an in-camera review, it serves as a reminder that mandating confidentiality and maintaining it create different challenges.

Moreover, in New York, *Civil Practice and Law Rule Section 3101* has required disclosure of all documents in the prosecution and defense of an action. This rule has been interpreted broadly under New York law. (See, *Allen v. Crowell-Collier Publishing*, 21 N.Y. 2nd 403 (1968).) Therefore, in drafting a confidentiality provision in a settlement agreement, counsel must consider whether and how the agreement may be viewed after the passage of time.

Best Practices for Maintaining Enforceability: A Case Study

Expertise in drafting settlement agreements is essential to maintaining enforceable confidentiality. Settlement agreements have emanated from unique case origins with many common terms. Often, time constraints result in reuse of terms and conditions. For example, one of the most commonly used phrases in a settlement agreement is: "approved as to form and content," attested to by the signature of the parties' counsel. Recently, the California Supreme Court analyzed this verbiage. In an appeal arising from statements made about a settlement of a wrongful death action, the California high court scrutinized this common phrase. Thus, while case specific, it is a reminder to all practitioners not to count the words, but to ensure that the words count.

Monster Energy Company v. Bruce Lee Schechter (2019) 7 Cal.5th 781, arose from a wrongful death action against Monster Energy. The case was settled before trial. The settlement called for confidentiality. In a detailed settlement agreement, the parties bound included the parties' "attorneys." The confidentiality clause also referred to the parties and "their counsel." The settlement agreement continued to include: "in regard to any communications concerning the settlement of this Action, the Parties and their Counsel and each of them hereby agree that neither shall make any statement about the Action."

Following the settlement, plaintiffs' counsel was interviewed for LawyersandSettlement.com. The article quoted his comments about the settlement with Monster Energy. The article attributed to plaintiffs' counsel that "substantial dollars" were paid by Monster Energy and that "Monster wants the amount to be sealed." It noted that he had three other cases pending against Monster Energy. The article concluded with a link and phone number for "Monster Energy Drink Injury Legal Help."

Monster Energy brought suit against plaintiffs' counsel for breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment and promissory estoppel. In response, plaintiffs' counsel filed an Anti-SLAPP motion under the *California Code of Civil Procedure Section 425.16*. While the trial court denied the motion as to the cause of action for breach of contract, it granted relief on the remaining three causes of action. The Court of Appeal reversed as to the denial on the breach of contract cause of action. Thus, it determined that the entire action was barred by California's Anti-SLAPP statute. The California Supreme Court granted review.

The court wrote that the two prongs were: (1) whether the challenged claim arises from protective activity; and (2) if the first element is established, whether plaintiff has a probability of success on the merits. The court determined that the conduct arose from protected activity. It then focused on whether or not plaintiff had a likelihood of prevailing on the merits. The court traced the language of "approved as to form and content" to generally mean that the attorney has read the document and embodies the agreement reached between the parties citing *Freedman v. Brutzkus* (2010) 182 Cal.App.4th 1065, 1070.

The California Supreme Court reviewed the specific settlement agreement and noted the significant effort to ensure confidentiality and to bind counsel in the process. It concluded that privacy was an important interest in promoting the policy in favor of settlement. The opinion further emphasized that public disclosure would "chill" the ability of the parties to settle before trial citing *Board of Trustees of California State University v. Superior Court* (2005) 132 Cal. App. 4th 889, 899.

In contrast to the Court of Appeal, the Supreme Court found that there was substantial evidence to support the trial court's denial of the Anti-SLAPP motion on the breach of contract cause of action. Because the attorney was referred to as a party, there were numerous references to confidentiality and the negotiation history demonstrated sufficient merit to Monster Energy's allegations. As a result, the Supreme Court reversed the Court of Appeal as to the cause of action for breach of contract.

In summary, the Supreme Court focused on whether counsel was a party to a contract, not a party to the underlying litigation. Therefore, "approved as to form and content," in and of itself, may not bind an attorney to confidentiality without additional elements in California.

This case does reflect that Monster Energy was able to bind counsel to a confidentiality clause, because the settlement agreement focused on: (1) identifying all counsel as parties in addition to their clients; (2) detailing and repeating references to confidentiality required of parties and their counsel; (3) detailing references to no third party publication by parties and their counsel; (4) affirmative covenants not to communicate to third parties running to parties and counsel. Additional possible safeguards may include a liquidated damages clause that runs to the parties and counsel.

Conclusion

Based upon statutory and case law, practitioners should review the issues unique to their jurisdiction by considering the following:

- Whether the settlement must be confidential.
- If confidentiality is necessary, conduct the legal research necessary to know the elements of confidentiality required in your jurisdiction.
- Consider whether there are potentially adverse tax consequences to a confidential settlement based upon the subject matter of the case.
- Refer the client to, or associate with, competent professionals to address the tax consequences if they are beyond your area of expertise.
- Assuming that the settlement can be confidential, and the client knows of the potential adverse consequences, carefully draft the settlement agreement by including the grounds for its enforcement consistent with your state governing laws.

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