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CONFIDENTIALITY OF SETTLEMENT AGREEMENTS - CAN YOU BANK ON IT?

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Confidentiality of Settlement Agreements - Can You Bank on It?

Just as our banking system has taken a hit, parties cannot "bank" on a Settlement Agreement being held confidential, or, once entered, remaining so.

The ying and yang arises through the use, by the trial courts, of confidentiality orders to facilitate settlements and the consequential sacrifice of public access to information deemed confidential by such orders. By no means will settlement agreements be deemed confidential simply because the parties to these agreements wish it so. The courts that have addressed this issue have enunciated factors which weigh for and against confidentiality of settlement agreements. While there is no bright-line test to guide the final outcome, there are a number of guide posts that can mark the path toward a successful resolution at journey's end.

Courts have recognized that the right of access to judicial proceedings and judicial records is "beyond dispute". *Littejohn v. BIC Corp.*, 851 Fed.2d 673, 677-78 (3d Cir. 1988).

In the first instance, it is committed to the discretion of the trial courts to make the decision as to whether the terms of a Settlement Agreement are made accessible to the public or whether a confidentiality order, if entered, is subsequently modified.

Factors to be considered by the court include the following:

Whether the Settlement Agreement has been filed with the court. If not, the Settlement Agreement would not be deemed a judicial record and the right of access doctrine cannot be used as a basis to obtain access to the Agreement. In contrast, a Settlement Agreement filed with the trial court, and with the intent of the parties for interpretation and enforcement by the trial court, would be deemed a judicial record and more likely subject to access by third parties.

Even a Settlement Agreement which is briefly viewed by the trial court and returned to the parties, and thereby closing out the case, does not make the Settlement Agreement a judicial record.

Protective orders and orders of confidentiality are functionally similar and require similar balancing between public and private concerns. This also focuses upon the status of the parties to the litigation itself. Are the litigants purely private parties or is one or more a public or governmental entity? The former would be a factor weighing in favor of confidentiality while the latter is a factor in favor of a right to access.

These considerations and others were exhaustively reviewed in the case of *Pansy v. Borough of Stroudsburg*, 23 F.3d 772 (3d Cir. 1994).

The Third Circuit admonished that good cause should exist when the district court considers whether to grant confidentiality orders at any stage of a litigation, including settlement. The balancing test requires the weighing of factors marshalled by the requesting parties' need for information against any injury that might result to the parties to the Agreement if the disclosure is compelled. If terms are to be disclosed, the trial court is directed to craft the terms and

conditions to minimize negative consequences while serving the public interest, such as limiting the number of persons that have access to it and the use to which certain persons may put the information.

Often, the party seeking confidentiality alleges embarrassment should the terms of a settlement agreement be revealed. The court again must weigh whether the embarrassment would be particularly serious and whether the information under seal encompasses more than simply monetary compensation, i.e., whether the information sought would be important to the public health and safety.

The Third Circuit in *Pansy* recognized that while fostering settlements are preferred, it is only one factor to be considered. It went on to find that most cases proceeding to settlement will resolve whether or not confidentiality can be maintained. Of course, should a case proceed to trial in the absence of a confidentiality agreement it is more likely that disclosures sought to be kept confidential would be made public in pretrial proceedings in any event.

Other options exist. The parties may agree among themselves, without assistance of the trial court, to craft a Settlement Agreement with confidentiality clauses and enforce such Agreement in a separate contract action. Also, the trend towards private mediation is growing which allows for less public scrutiny than would be the case should parties avail themselves of case resolution through the court system.

A strong presumption against granting or maintaining an order of confidentiality is likely where the information sought would be obtainable under other applicable statutes such as the Freedom of Information Act, 5 U.S.C. Section 552 or the Pennsylvania Right to Know Act 65 P.S. § 67.101 - 67.3104.

The case of *Bank of America National Trust and Savings Association v. Hotel Rittenhouse Associates*, 800 F.2d 339 (3d Cir. 1986) is instructive in circumstances wherein the confidentiality of a Settlement Agreement was set aside. Here, the parties filed their Settlement Agreement with the district court because they anticipated disagreement arising in the future concerning its terms and would want recourse to the court should that occur; that is precisely what did occur. Motions were subsequently filed and orders entered that were kept secret by the trial court. This was held to be in contravention to open access to judicial records which the common law protects. The court held that once parties utilize the judicial process to interpret a Settlement Agreement and to enforce it, the parties are no longer entitled to invoke the confidentiality that is normally accorded Settlement Agreements. The court went on to note that the Settlement Agreement in issue pertained to a single dispute between a small group of private parties. While recognizing that courts do encourage settlements, and evidence of a settlement or offers of settlement are ordinarily not admissible in federal proceedings (see Federal Rule of Evidence 408), had the parties then chosen to settle and voluntarily stipulate to the dismissal of their action under Federal Rule of Civil Procedure 41(a)(1) they would have been able to prevent public access to these papers.

This issue was again most recently addressed by the Third Circuit in the case of *Leap Systems, Inc. v. Moneytrax, Inc.*, 638 Fed. 3d 216 (3d Cir. 2011). Here, the Third Circuit affirmed the district court's order denying a motion to unseal portions of a judicial record containing the terms of a confidential Settlement Agreement.

While acknowledging the precedent cited above, the court went on to uphold the confidentiality despite the fact that the Settlement Agreement was filed with the district court and the parties sought interpretive assistance from the court to enforce the settlement provisions. The court held that the right to access to judicial records is not absolute, while acknowledging that the burden is on the party who seeks to overcome the presumption of access to show that the interest in secrecy outweighs this presumption. Citing *in re Cendant Corp*, 260 Fed.3d 183, 190 (3d Cir. 2001).

What turned the tide in favor for confidentiality, the Third Circuit found that the district court's decision to deny access was based beyond the mere assertions of financial injury and a generalized concern about discouraging Settlement Agreements. Specifically, the district court found that the Defendant would not have entered into the Settlement Agreement "but for" the trial court's assurance of confidentiality. In citing *Pansy* for precedential support, it noted with approval the extent to which a party relies upon an order of the court sealing a judicial document which would induce a party either to settle a case or allow certain discovery. See *Pansy*, supra at 790.

As the record in *Leap Systems* made clear, counsel asked the court several times in court proceedings whether the transcript reflecting a terms of settlement would not be disclosed. After assurances were given by the district court that the terms of the Settlement Agreement would be sealed, the Third Circuit determined that the assurances of confidentiality were reasonable and sufficient to outweigh the public's common law right of access.

In finding that the parties expressed privacy interests were significant, the countervailing issues of importance to public health and safety; sharing of information among the litigants to promote fairness; the involvement of a public entity or official; or whether matters of legitimate public concern were present, the court found those countervailing factors to be absent and the public's interest in such disclosure to be minimal. The court, in upholding confidentiality held "the parties are private entities, the dispute has no impact on the safety and health of the public, and their Settlement Agreements demonstrate a clear intent to maintain confidentiality." *Id.* at 220. No abuse of discretion was found.

Under Pennsylvania state law, a broad reading of the Right to Know Act was issued by the Commonwealth Court in the case of *SWB Yankees v. Gretchen Wintermantel*, 999 A.2d 672 (Pa. Cmwlth. 2010), allowance of appeal granted 2011 Pa. LEXIS 1045. In that case, the *Scranton Times Tribune* sought access to all bids being submitted for concessionaire contracts at Pittsburgh's PNC field. Under Sections 701 and 506 of the Right to Know Act, 65 P.S. § 67.101 et. seq., the court held that the SWB Yankees operation of a professional baseball team and concessions at a multi-purpose stadium constitutes a "governmental function" within the meaning of the RTKL and further held that the information requested in its suit constituted a "record" within the statute's meaning.

Finally, other specialized statutes may come into play with respect to the strength of confidentiality which attaches to Settlement Agreements. For instance the court in *Dibble v. Penn State Geisinger Clinic, Inc.*, 806 A.2d 866 (Pa. Super 2002) address the issue of trade secrets and confidentiality under the Uniform Trade Secrets Act, 12 Pa. C.S.A. § 5301-5308. Among its holdings, in actions under that Act, a court shall preserve the secrecy of an alleged trade secret by reasonable means which may include, but are not limited to, granting protective

orders in connection with discovery proceedings. These factors are outlined in greater detail by the Dibble court at 806 A.2d at 871. In addition, provisions are made for the sealing of such information through Pennsylvania Rule of Civil Procedure 4012(a)(9).

Equivalency on the federal side can be found through the case of *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 529 F. Supp. 866 (E.D. Pa. 1981) and Federal Rule of Civil Procedure 26(c)(1)(G).

Under such circumstances, the extent to which a party can rely on a protective order should depend on the extent to which the existence of such an order induced the party to allow discovery or to settle the case. For instance, the reliance would be greater where a trade secret was involved.

Counsel may not have the ability to completely shape an argument for confidentiality depending upon the parties involved in a litigation i.e., public officials and/or public entities, or underlying issues impacting public health and safety. But, should counsel wish confidentiality to be part of a Settlement Agreement, that aspect should be brought into discussions with opposing counsel and the court at the earliest opportunity, emphasizing the importance placed upon securing a protective order, the serious harm that would result to the parties should one not be secured, and the reliance upon securing confidentiality as an incentive to bring the litigation to a close.

First Amendment issues in this arena are addressed in other materials submitted in this panel's presentations.



Mark N. Cohen practices in the Environmental/Toxic Tort Department at Margolis Edelstein, representing litigants under the Comprehensive Environmental Response, Compensation and Liability Act; Resource Conservation and Recovery Act; Federal Insecticide, Fungicide and Rodenticide Act; Pennsylvania Hazardous Sites Cleanup Act; Underground Storage Tank Act; and Clean Streams Law.

Mr. Cohen also serves as National Coordinating Counsel for manufacturers, suppliers, and distributors in asbestos litigation. He defends landlords and property owners in lead paint and toxic mold litigation, and manufacturers, suppliers and landowners in a variety of chemical exposure and premises liability claims.