

CONFIDENTIALITY CLAUSES IN CLAIM SETTLEMENTS: IS THIS ETHICAL?

"He who doesn't risk
never gets to drink
champagne."

Russian Proverb



IT IS BECOMING MORE COMMON to include confidentiality clauses in settlement agreements. Should governments, who flaunt their transparency in business dealings, include them? I have included confidentiality requirements in negotiated settlement agreements for many years. In two cases the Plaintiff asked that the clause be removed. In both cases, I advised that removal would be "a deal breaker". In both situations, the Plaintiff opted to take the money and no media carried stories of the settlement. Publicity of both cases would have been detrimental to the public image of the Defendant.

Most public entity Defendants want to avoid negative publicity and want to avoid being seen as an easy target for (especially) liability claims. There can also be a perception that settling with a Plaintiff means the Defendant knows that they were guilty of some wrong.

Most Plaintiffs are uninterested in publicity especially where they can obtain a financial settlement. There are some, however who want to 'make a point' of showing how they were wronged by the Defendant and who look forward to telling all and sundry (especially the media!) of how they beat City Hall.

The Plaintiff's lawyer does not sign the settlement agreement which, theoretically, leaves them free to discuss the case with anyone, including future clients. In practice, most lawyers keep names and details private but will, regardless of the confidentiality agreement discuss cases in general with colleagues and others.

TWO MAIN TYPES

The least restrictive form is to bar the plaintiff from discussing the terms of the settlement with the media. More limiting forms bar the Plaintiff from disclosing to anyone any facts or documents, legal theories, etc.

Because proving hard damages from the breach of a confidentiality clause is difficult, some agreements may contain liquidated damages provisions. They may also allow the prevailing party to recover attorney's fees from the breaching party in a suit to enforce the clause.

PUBLIC INTEREST

It is generally accepted that the public has a right to know about legal proceedings against their local government and the ultimate consequences

of those cases. Using 'secrecy' clauses may be seen as contrary to this principle and that it has been used to allow improper behaviour to continue.

CONSEQUENCES

Another objection to confidentiality clauses is that the Defendant has no practical legal remedy if publicity does occur after the settlement is concluded. Potentially, publishing the terms of a settlement could result in the settlement agreement being declared void; this would cause the client to forfeit settlement funds. In practice it is highly unlikely that a confidentiality clause will prevent anyone from telling those near and dear to them of the lawsuit's result. The real value is that the confidentiality clause significantly discourages spreading the story of their settlement far and wide to anyone who will listen to their story.

Using 'secrecy clauses' may be seen as contrary to the public interest and that it has been included to allow improper behaviour to continue.

CONCLUSION

To reduce publicity problems after settlement, determine exactly what you want the confidentiality agreements to do and address those issues while it is being drafted.

When it is important that key settlement terms be kept confidential, include a plainly written confidentiality clause in the agreement. Keep in mind that parties have the right (and obligation) to disclose terms if required to do so for legitimate purposes, such as seeking financial advice or in response to a court order. Remember that, regardless of the language used, the plaintiff is likely to discuss the case and the settlement with close family.

The greatest concern of most public entities is the need to avoid negative publicity which may lead to more claims. The use of a confidentiality clause is helpful, and I believe, perfectly acceptable for this purpose.

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