

settlement confidential: must amounts be disclosed?

If you're one of multiple defendants in a lawsuit, and you want to settle, must the dollar amount of your settlement be disclosed to the non-settling defendants?

The Supreme Court of Canada has stated that, absent exceptional circumstances, the answer is "no." *Sable Offshore Energy Inc. v. Ameron International Corp.*¹ confirms that, generally, where a plaintiff settles with some but not all of the defendants to an action, the amount the settling parties paid can be kept confidential from the remaining, non-settling defendants.

The Court also clarified that the "content of successful negotiations" is protected by settlement privilege as are settlement negotiations that do not result in actual settlement.

the facts

The plaintiffs, known as Sable Offshore Energy Inc. ("**Sable**") built several offshore structures and onshore gas processing facilities in Nova Scotia. The structures corroded. Sable brought a number of lawsuits, including against the entities responsible for preparing the surfaces of and applying paint to the structures to prevent such corrosion.

¹ 2013 SCC 37.

Sable entered into a "Pierringer"² agreement to settle the action as against some but not all of the defendants. Sable disclosed the terms of the settlement to the non-settling defendants except for the amounts paid. Under the agreement settlement amounts would be disclosed to the trial judge after liability was determined to prevent over-compensating the plaintiff.

The non-settling defendants argued they were entitled to know the amounts paid by the settling defendants. Sable refused disclosure on the basis that this information was protected by settlement privilege.³

pierringer agreements

Pierringer agreements are becoming increasingly common in multi-party litigation. This form of agreement provides a mechanism to effect a settlement between the plaintiff and some, but not all, of the defendants.

A Pierringer agreement generally functions as follows:

- The plaintiff accepts a defined amount in full satisfaction of its claim against one or more of the defendants;
- The plaintiff discontinues the action as against the settling defendants;
- The plaintiff segregates the liability of the settling and non-settling defendants.

This is generally done in one of two ways:

- The plaintiff limits its claim to the damages attributable to the fault of the non-settling defendants, only. The plaintiff usually

² This form of agreement takes its name from the 1963 Wisconsin case of *Pierringer v Hoyer*, 124 NW 2d 106 (Wis 1963).

³ Settlement privilege is a common law rule holding that information exchanged, proposals made and discussions taking place for the purpose of attempting settlement will be inadmissible even if they are otherwise relevant.

amends its pleadings to reflect this claim limitation; or, less commonly,

- The plaintiff agrees to indemnify the settling defendants for their proportionate share of damages (for which the non-settling defendants would otherwise be liable due to the principle of joint and several liability;) and
- The plaintiff continues the action as against the non-settling defendants.

In essence, a Pierringer agreement eliminates joint liability as between settling and non-settling defendants. Following a Pierringer, liability as between these groups is several. Accordingly, the non-settling defendants become jointly liable only for the losses they collectively caused.

The segregation of liability has an important effect: it functionally eliminates the basis of claims for contribution and indemnity as between settling and non-settling defendants. That is because such contribution rights arise only where a defendant is required to pay more than its proportionate share of a plaintiff's damages. Following a Pierringer, the non-settling defendants will never be required to pay damages attributable to the fault of the settling defendants since they are being pursued by the plaintiff for their proportionate share of damages, only. The settling defendants can therefore withdraw from the litigation confident that they will not be faced with crossclaims from the non-settling defendants.

the decision

The Supreme Court unanimously determined that the amount of the settlements need not be disclosed to the non-settling defendants.

In coming to this decision, the Court emphasized the value of resolving disputes before trial and recognized that settlement privilege plays an important role in the promotion of settlements.

The Court acknowledged that there can be exceptions to settlement privilege, but that to find an exception a party would have to show that, on balance "a competing public interest outweighs the public

interest in encouraging settlement." For example, an exception to settlement privilege may be found where disclosure of the amount paid in settlement is necessary to prevent a plaintiff from being overcompensated.

The Court acknowledged in *Sable* that while the non-settling defendants may derive some tactical advantage from learning the settlement amounts this was not an interest that outweighed the public interest in promoting settlements.

The Court also noted that the Pierringer agreement in *Sable* had been court-approved and, in this particular case, incorporated certain protections for the non-settling defendants, including:

- that the plaintiffs were required to get production of all relevant evidence from the settling defendants and to make this evidence available to the non-settling defendants on discovery; and
- with respect to factual matters, that there be no restrictions on the non-settling defendants' access to experts retained by the settling defendants.

importance to defendants

Sable is an important decision for defendants and their counsel. In addition to clarifying the scope and nature of settlement privilege this decision suggests a framework for defendants who wish to extract themselves from multi-party litigation but wish to keep the amount and terms of their settlements confidential.

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a cautionary note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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