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Do You Get to See What's Behind the Curtain?

Non-Settling Defendants Discovering the Settlements from Other Parties

Recently, the Ninth District Court of Appeals out of Beaumont, Texas, determined whether a remaining non-settling defendant is entitled to discover the contents of settlement agreements between the real parties in interest and the defendants with whom they settled. *In re Univar USA, Inc.*, 2010 Tex. App. LEXIS 2907 (Tex. App. Beaumont Apr. 21, 2010).

In other words, can a defendant that is still in litigation find out the amount that each individual party paid in settlement? The Court of Appeals held that this information is discoverable and should be made available to the parties that are still left in the lawsuit.

Background Facts

In February 2008, John and Carol Thompson filed suit against various suppliers of benzene-containing products and various oil and chemical companies on whose premises John had worked. Their original petition alleged that John contracted leukemia from working around products containing benzene.

Univar, although not originally named as a defendant, was subsequently named as an additional defendant in the first amended petition filed by the Thompson's. In November 2009, John died, and in February 2010, the Thompsons amended their pleadings to substitute John's estate for John and to add John's surviving child as a plaintiff.

In April 2008, before John's death, John and Carol Thompson answered a set of discovery where they were asked to disclose any settlement agreements. Through their attorney, the Thompsons said that they did not have any settlement agreements at that time.

However, almost two years later, in December 2009, Univar requested the Thompsons to supplement their answers to this discovery to tell them "the total amounts of the settlements reached with any defendants ..." When the Thompsons did not comply with this request, Univar filed a Motion to Compel specifically requesting that the trial court compel the Thompsons to disclose the settlement agreements and the amounts of the settlements.

The Thompsons stood their ground and argued that the amount of the individual settlements with the other defendants was confidential; however, the Court of Appeals noted that the Thompsons did not have any supporting case law to show that this information was indeed confidential. The Thompsons further argued at the trial court level that they could not disclose the individual settlement amounts because they had signed confidentiality agreements with the settling parties.

The trial court denied Univar's Motion to Compel; however, the trial court ordered the Thompsons to provide Univar the total amount of any and all settlements agreed upon and a list of the parties who agreed to contribute to the settlement. Univar filed a writ of mandamus to have the Court of Appeals review the trial court's Order because Univar wanted a list of each individual settlement and the corresponding party.

Are Settlement Amounts Discoverable?

The Court of Appeals held that the individual settlement documents are discoverable and should be produced to the non-settling defendants.

The Texas Rules of Civil Procedure provides that a party may obtain discovery of the existence and contents of any relevant portions of a settlement agreement. With respect to settlement agreements, the Texas Rules of Civil Procedure further require that a party, within thirty days after being served with a request, file a response to the request of another party for "any settlement agreements." The Court of Appeals noted that Univar indeed sent the Thompsons a Request for Disclosure specifically asking for settlement documents.

The Court of Appeals also held the settlement agreements containing the dollar amounts of a defendant's settlements are relevant to a remaining non-settling defendant in at least two ways:

1. to determine the amount of its settlement credit after a trial is completed; and
2. before trial, to determine whether any settlement demand being made is reasonable when compared to the likely outcome of a trial.

In this case, the Thompsons objected to the request to supplement their disclosures. However, objections to a Request for Disclosure are specifically not allowed by the Texas Rules of Procedure. The information and documents that are listed in a Request for Disclosure have to be produced. If there is a situation where a document needs to be protected, then the attorney can file a motion for a protective order; however, the Thompsons did not do so here.

While the trial court's Order was to require the Thompsons to disclose the total amount of the settlements and to make the Thompsons disclose the identity of all of the settling defendants, the Court of Appeals held that this would preclude the non-settling defendant from verifying the accuracy of the settlement credits by examining the settlement agreements and it would also prevent the Court and the remaining defendants from confirming that they received the correct credit because they would not be able to confirm the amount of the settlement.

Finally, the Court of Appeals concluded that Univar had no adequate remedy for appeal for three reasons:

1. Without the settlement documents, the non-settling defendant would not know if he was given a proper credit for the settling defendants.
2. Second, the non-settling defendant should be entitled to make their own independent assessment of the settlement credits to evaluate a settlement offer to avoid trial. In other words, if a defendant can analyze their exposure and determine what credit they would receive, then they can decide if it is best to proceed with trial or engage in settlement negotiations.
3. Third, fairness should allow a non-settling party to evaluate whether a given settlement agreement potentially affects the prospective testimony of witnesses at a trial. Is there something in the agreement that could change a witness's testimony? If so, the non-settling defendant needs to know that. Is there a bias? There could be relevant impeachment evidence.

What Can You Learn From This?

1. In Texas, we have a Request for Disclosure that we typically send along to the opposing attorney when we file our Answer. In that Request, the opposing side is asked to produce, among other items, a list of people who have any knowledge about the accident or lawsuit, the names of their experts, any witness statements, and any settlement documents. There are *no* objections that can be made to a Request for Disclosure. If we have documents that are responsive, then we need to turn them over unless there are exceptional grounds for a protective order. However, that can be a difficult argument to make.

2. On a side note, this is why we are typically cautious about taking statements of our witnesses, employees, and/or truck drivers. These statements are asked for in a Request for Disclosure, along with the settlement documents, and the documents will be turned over to the opposing side without any objections. That is why we are extra cautious about taking statements because we have to turn over all statements – good or bad.
3. If you do have a portion of a settlement agreement that you think needs to be protected, then you need to file a Motion for Protective Order. The burden is on the party that wants to withhold the document to show the Court why it needs to be protected. The Motion to Compel has to be specific and include supporting case law to show why the document or portion of the document should be protected. If you find yourself in this situation, then you may want to consider the timing of when you settle with parties because the chances are that the agreement will have to be turned over to the other party.
4. Finally, Univar got this ball rolling because they followed up on their Request for Disclosure and asked the Thompsons to supplement their response to any settlement documents. If you know that the plaintiff has settled with a defendant, then send a letter to the plaintiff requesting that they supplement their discovery responses, only if you have already sent a Request for Disclosure. If you have not sent a Request for Disclosure, and the discovery period is still open, then get that Request to the plaintiff so you can obtain the settlement documents.



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