



Civil Practice and Procedure

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Are Settlement Agreements Between Plaintiff and Third-Party Defendants Made in Good Faith? The Devil is in the Details.

Under the Joint Tortfeasor Contribution Act, 740 ILCS 100/2(a), (“Contribution Act”), where two or more persons are subject to tort liability arising out of the same injury, there is a right of contribution among them. The Illinois Supreme Court has identified two public policies the Contribution Act is intended to promote: (1) the encouragement of settlement and (2) the equitable apportionment of damages among tortfeasors. *Antonicelli v. Rodriguez*, 2018 IL 121943, ¶ 13.

In promotion of these public policies the Contribution Act also states that, “where a release is given in good faith by the claimant to one of the joint tortfeasors, that tortfeasor is discharged from all liability for contribution, and the recovery against the remaining tortfeasors is reduced by the amount of the settlement (*i.e.* setoff).” *Hartley v. North American Polymer Company, Ltd.*, 2020 IL App (1st), 192619, ¶ 25. To determine if the settlement is reached in good faith, the settling parties carry the initial burden of making a preliminary showing of good faith by a preponderance of the evidence. *Johnson v. United Airlines*, 203 Ill.2d 121, 133 (2003). The burden then shifts to the objecting party to prove by a preponderance of the evidence the absence of good faith. *Johnson*, at 203 Ill.2d. at 132. While there is no definition of “good faith” in the Contribution Act, the court has held that, at minimum, there is no good faith where: the settling parties engaged in wrongful conduct; the settlement conflicts with the terms of the Contribution Act; or is inconsistent with the policies underlying the Act. *Id.* at 134. No one factor is dispositive, and the court may consider various factors, including: (1) whether the settlement amount was reasonable and fair; (2) whether the parties had a close personal relationship; (3) whether the plaintiff sued the settling party; or (4) whether information about the settlement agreement was concealed. *Palacios v. Mlot*, 2013 IL App (1st), 121416, ¶ 22. Whether a settlement is made in good faith is within the court’s discretion “based upon the totalities of the circumstances.” *Johnson*, 203 Ill.2d. at 135.

The cases below highlight the various factors and circumstances analyzed to determine if a settlement agreement between a plaintiff and a third-party defendant are made in good faith and what impact such a settlement has on the non-settling defendants’ right to contribution.

Hartley v. North American Polymer Company, Ltd.

The plaintiff filed a wrongful death case, based on both strict products liability and negligence, on behalf of her son who died after inhaling fumes from a product while he was refinishing a bathroom. *Hartley v. North American Polymer Company, Ltd.*, 2020 IL App (1st) 192619, ¶ 3. The plaintiff sued both the manufacturer and seller of the product. The manufacturer and seller in turn filed a third-party complaint for contribution against the decedent’s uncle and the uncle’s business, where the decedent was working construction at the time of his death. The defendants alleged that the uncle had failed to properly train and supervise the decedent while he was using the product and failed to provide him with the proper protection equipment. *Hartley*, 2020 IL App (1st) 192619, ¶ 5. The plaintiff and uncle entered into a settlement agreement for \$50,000 and the trial court found the settlement was made in good faith. *Id.* ¶ 1. The defendants questioned

whether the settlement was really made in good faith considering it was between family and for a sum they described as “peanuts” in comparison to the potential exposure. *Id.* ¶ 10.

On appeal, the court first considered the extent of the familial relationship between the settling parties and held that it weighed in favor of a finding that the settlement was not made in good faith. *Id.* ¶ 32. The evidence showed that the settling parties were strongly connected to the plaintiff because the family members ran a business together, including with the decedent’s father and brother. *Id.* ¶ 33. The court also found that the fact the plaintiff did not file suit against the uncle, despite evidence that he supplied the decedent with ineffective protective equipment, as indicative of the settlement not being made in good faith. In so holding the court noted that “a close personal connection between the settling parties is considered in making a finding that the settlement was made in good faith, especially where the plaintiff chose not to sue the settling tortfeasor directly or bring a worker’s compensation claim.” *Id.* ¶ 35, citing to *Warsing v. Material Handling Services, Inc.*, 271 Ill. App. 3d 556, 558 (2d Dist. 1995). However, the court was clear that a familial relationship was not a dispositive factor in and of itself. *Hartley*, 2020 IL App (1st) 192619, ¶ 37.

In analyzing the amount of the settlement, the court noted that it “must be viewed in relation to the probability of recovery, the defenses raised, and the settling party’s potential legal liability. *Id.* ¶ 38. Here, the court found that the uncle’s potential liability could have been considerable because OSHA found the uncle violated 13 safety regulations in connection with decedent’s death. *Id.* ¶ 39. While the probability of recovery is a factor to consider, it is important to note that a motion for good-faith finding “is not the time to determine the merits” of the underlying claims and defenses. *Id.* ¶ 55.

In sum, the court held the totality of the circumstances weighed against a good faith finding because: the settling parties shared a close personal relationship; the settling parties’ potential liability was considerable, but despite that considerable exposure the plaintiff chose not to sue the uncle directly and settled for a modest amount of \$50,000 even though the uncle’s insurance coverage provided \$1 million per occurrence. *Id.* ¶ 58. The court held that letting the plaintiff settle with the uncle under these circumstances would not promote one of the policies underlying the Contribution Act because “it would remove a party who potentially bears a great deal of responsibility for decedent’s death, resulting in an apportionment of damages that is anything but equitable.” *Id.* ¶ 59.

Klein-Koziol v. M-J-T-J Contractors & Builders, Inc.

In *Klein-Koziol*, the court examined the same factors and held the settlement agreement between the plaintiff and the third-party defendant was made in good faith. *Klein-Koziol v. M-J-T-J Contractors & Builders, Inc.*, 2020 IL App (1st) 192380-U, ¶ 33. The plaintiff filed a wrongful death claim against the contractor and sub-contractors, general contractor, and owner of the premises after the decedent was injured and died while working as an electrician. *Klein-Koziol*, 2020 IL App (1st) 192380-U, ¶ 5. The general contractor then filed a third-party complaint against the decedent’s employer under the Contribution Act, alleging that the employer negligently failed to inspect the area the plaintiff was working, failed to provide a safe work environment, and failed to properly train and instruct the plaintiff. *Id.* ¶ 6.

The plaintiff and the third-party defendant entered into a settlement agreement whereby the employer agreed to pay \$10,000 to the plaintiff that the plaintiff would not have to repay as part of the workers’ compensation lien. *Id.* ¶ 8. The agreement also provided for a conditional waiver of the workers’ compensation lien held by the employer’s insurer; if the matter settled before trial then the insurer would accept 30% of the gross settlement proceeds for satisfaction of the workers’ compensation lien (which was \$900,000); or if plaintiff was successful at trial then the insurer was entitled to recover their workers’ compensation lien from the verdict proceeds. *Id.*

All three defendants objected and argued the settlement was not made in good faith and violated the Contribution Act because it deprived the non-settling defendants of their right to obtain contribution from the employer in an amount proportional to the potentially significant share of liability that the employer had for the decedent's death. *Id.* ¶ 11. They argued the effect of the settlement would be that, in the event of a verdict against the non-settling defendants, they would be entitled to a setoff of only \$10,000; but if the workers' compensation lien had been waived as part of the settlement, then they would be entitled to a setoff of up to \$900,000. *Id.* They further argued that \$10,000 was a nominal value for a wrongful death case. *Id.* ¶ 12.

On appeal, the court affirmed that the settlement was made in good faith. *Id.* ¶ 36. The court stated that the "[d]isparity between the settlement amount and the amount initially sought by plaintiff is not an accurate measure of good faith, and the small amount of settlement alone does not require a finding of bad faith." *Id.* ¶ 20. The court also stated that "the settlement will not be found to lack good faith merely because the employer or its insurer has a workers' compensation lien that is not waived as part of the settlement. Rather, adequate consideration exists where a plaintiff-employee receives cash in excess of the workers' compensation benefits received for which the employer or insurance company retained its lien." *Id.* Moreover, the court pointed out that the trial court allowed the non-settling defendants to engage in discovery, both on the issue of good faith and the underlying merits, but nonetheless "were unable to show through evidence, affidavits, or even attorney arguments" that there was some act by the employer suggesting that it had any liability for the incident that led to decedent's death." *Id.* ¶ 26. The court found this to be a "determinative factor." *Id.* The court explained that absent the defendants' ability to "point to some act or omission suggesting liability" on the part of the settling third-party defendant, it could not say that the settlement agreement failed to equitably apportion damages among the tortfeasors. *Id.*

By way of contrast, in this case OSHA had not found any evidence of violations by the employer, while in *Hartley* OSHA had cited the settling-employer with 13 violations related to the decedent's death. As such, the "nominal" settlement value in this case was not an indication of bad faith because there was no accompanying evidence or argument that the settling-third party defendant, did in fact, have potential liability for the plaintiff's death.

Nonetheless, the court ended its order with a cautionary warning that "we do not encourage a settlement at the very outset of a construction negligence case between a plaintiff and a third-party defendant employer that retains a workers' compensation lien." *Id.* ¶ 34. The court explained that such a situation poses a risk of collusion or bad faith because the plaintiff and employer both have an interest in minimizing the liability of the employer and maximizing the liability of the non-settling defendants. *Id.* An early settlement also results in the risk of the non-settling defendants being deprived of full discovery which could support a finding of possible liability on the part of the employer. *Id.* Based on these reasons, one justice dissented because there was not full and complete discovery on the issue so there could be no substantive analysis of the settling third-party defendant's potential liability exposure. *Id.* ¶¶ 38-45.

Hartford Fire Insurance Co. v. Adobo Limited Partnership

In *Hartford*, a fire at an Adobo Grill damaged parts of a building leased by various other tenants in the building. *Hartford Fire Insurance Co. v. Adobo Limited Partnership*, 2020 IL App (1st) 192422-U, ¶¶ 2-3. The tenants filed suit against the owner of Adobo, a maintenance company that had inspected Adobo and provided fire suppression equipment, and the kitchen-hood cleaning company that had cleaned Adobo's event hoods and ductwork. *Hartford*, 2020 IL App (1st) 192422-U, ¶ 6. One of the defendants then filed a third-party complaint seeking contribution against the owner and landlord of the building, alleging that it was a direct and proximate cause of the fire because it failed to ensure the building complied with applicable safety codes. *Id.* ¶ 12.

The third-party defendant eventually settled with the plaintiffs for \$15,000. *Id.* ¶ 52. The non-settling defendants argued the settlement was not in good faith given the nominal value of settlement while the potential liability was \$21 million. *Id.* ¶ 21. In response, the third-party defendant, who was the owner of the building, argued that its lease agreement with the tenant-plaintiffs waived liability and required the owner to be co-insured on the plaintiffs' insurance policies. *Id.* ¶ 26. In short, the owner could not be liable to the tenant-plaintiffs, and therefore, could not be liable for any contribution owed to the non-settling defendants.

On appeal, the court agreed that there was no basis for contribution where the third-party defendant could not be liable to the plaintiff. The court reiterated the well-established principle that "a party's obligation to make contribution rests on his liability in tort to the injured or deceased party, *i.e.* the plaintiff in the underlying action." *Id.* ¶ 36. The court further stated that "if a defendant is not a tortfeasor *vis-à-vis* the original plaintiff, it cannot be a joint tortfeasor *vis-à-vis* a codefendant and may not be held liable to that codefendant for contribution." *Id.* The court affirmed that since the building owner could not be liable to the tenant-plaintiffs based on contractual provisions in the lease agreement, the other defendants could not seek contribution against the building owner either. *Id.* ¶ 54.

Springbrook Partners, LLC v. Konewko & Associates

In *Springbrook*, the plaintiff filed a legal malpractice claim, and the defendant law firm filed a third-party claim for contribution against another firm. *Springbrook Partners, LLC v. Konewko & Associates, Ltd.*, 2021 IL App (2d) 190776-U, ¶ 1. The plaintiff and the third-party defendant entered a settlement agreement that assigned the third-party claim to the plaintiff. *Springbrook*, 2021 IL App (2d) 190776-U, ¶ 5. The settlement agreement did not indicate that the original defendant would be entitled to any set off against the amount the third-party defendant would pay to the plaintiff. *Id.* ¶ 17. Instead, the settlement agreement included language that the plaintiff would still be able to seek the "full amount of its damages" from the non-settling defendant and would "only attempt to recover and collect the damages" from the non-settling defendant. *Id.*

On appeal, the court found the settlement was not made in good faith because the agreement failed to give the non-settling tortfeasor any right to set off against damages recovered from the settling tortfeasor. *Id.* ¶ 17. Specifically, the failure to state that the amount the plaintiff could recover from the non-settling defendant would be reduced or set off by the settlement amount, was a violation of the Contribution Act section 2(c). *Id.*

Conclusion and Takeaways

As the above cases demonstrate, whether a settlement agreement between a plaintiff and third-party defendant was made in good faith is a fact intensive inquiry that often hinges on the underlying merits, and ultimately left to the discretion of the trial judge. Some key takeaways are, first, if the third-party defendant could not be liable directly to the plaintiff for the plaintiff's injuries, there is no basis for a defendant to seek contribution from the third-party defendant. Second, if a settlement agreement attempts to limit, reduce, or eliminate the non-settling defendants' right to a setoff, the settlement agreement may be in violation of the Contribution Act and not made in good faith. Finally, a seemingly nominal settlement amount is not always an indication of bad faith. The key is whether the settlement amount is proportionate to the settling defendant's potential liability. Thus, some investigation to the merits of the underlying claim is crucial in challenging a good faith finding. When in doubt seek discovery on both the formation of the settlement agreement *and* the merits of a liability claim against the settling third-party defendant.



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