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Virginia Supreme Court Rules that Confidentiality of Private Settlements Not Guaranteed

A recent decision by the Virginia Supreme Court has nearly eliminated the protections of confidentiality for settlements of lawsuits alleging wrongful death and jeopardizes the confidentiality of settlements by healthcare providers with infant plaintiffs. In litigation where court approval is required for a settlement agreement to be enforceable, the settling parties will likely be required to disclose the financial terms of the settlement in the court's public record.

Wrongful Death

In Perreault v. The Free Lance-Star, No. 071978 (Va. Sept. 12, 2008), the Supreme Court upheld a trial court's decision to compel parties who settled a wrongful death case to file with the court a complete recitation of the terms of the confidential settlement between the parties, including the financial terms of the settlement. The settling parties had mediated a confidential settlement and initially sought court approval of the settlement under Va. Code § 8.01-55.

In cases alleging wrongful death, Va. Code § 8.01-55 allows the personal representative of the decedent to

settle the claims of the decedent's statutory beneficiaries only with court approval. Under the statute, settling parties typically file with the court a joint petition for approval of the settlement indicating that the parties have agreed to settle the matter. At a hearing on the joint petition, the parties represent to the court the terms and distribution of the settlement. However, the only documents filed with the court are the joint petition (not containing the specifics of the confidential agreement) and the court's Order approving the settlement. If requested by the court, settling parties may typically provide the court with a written recitation of the terms of the settlement for *in camera* review. The Perreault parties proceeded in similar fashion in the trial court, having mediated a confidential settlement. The parties filed a joint petition for approval of the settlement and made oral motions for a closed, *in camera* hearing for the petition, which the court granted. The court approved the settlement.

Two weeks later, media outlets The Free Lance-Star (Fredericksburg, Virginia) and The Richmond Times-Dispatch (Richmond, Virginia), which had been following the litigation,



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sought to intervene in the settlement proceedings. The newspapers argued that the terms of the confidential settlement should be of public record. Ultimately, the trial court granted the newspapers' request and required the settling parties to file with the court a joint petition including an unredacted copy of the settlement release, setting forth the financial terms of the settlement. The settling parties appealed.

The Virginia Supreme Court affirmed the trial court's decision. Specifically, it balanced the requirement under Va. Code § 8.01-55 that the parties' petition for approval "shall state the compromise, its terms and the reasons therefor" (emphasis added) versus the protection of Va. Code § 8.01-581.22 that a confidential settlement agreements generated in mediation proceedings "are not subject to disclosure . . . in any judicial or administrative proceeding." The Court made several holdings:

- The "shall state . . . its terms" requirement of Va. Code § 8.01-55 denotes that settling parties must include the financial terms of a settlement.
- Va. Code § 17.1-208 generally recognizes a "right of public access" to free access to the records of Virginia Circuit Courts.
- The Virginia General Assembly did not intend for the confidentiality protections of Va. Code § 8.01-581.22 to trump the requirements of Va. Code § 8.01-55 or the right of public access to court records under Va. Code § 17.1-208.

The Court also upheld the trial court's denial of the settling parties' motion to allow redactions of the settlement agreement or in the alternative, file the documents under seal. The Court held that for a trial court to allow a document to be filed under seal, it

may not base its decision to limit public access to court

proceedings or records upon the conclusory assertions of the party requesting the closure. Thus, the court must make specific factual findings only to support a decision to restrict public access to court records or proceedings.

Perreault, supra, at 19-20 (internal citations omitted).

The Court upheld the trial court's ruling that the circumstances of the case did not warrant redaction of the financial terms of the settlement. This ruling was despite the fact that plaintiffs asserted that the claims were "private matter[s] between [the beneficiaries] and the defendants"; that publicity would cause the beneficiaries "to re-live the trauma" of the events at issue; and the fact that the defendant medical device manufacturer submitted exhibits showing adverse media coverage of wrongful death actions involving facts similar to that at issue.

Infant Settlement

The Perreault case did not directly address settlement of claims by infants, but by analogy, it may have a similar impact. Va. Code § 8.01-424 grants Circuit Courts the power to approve the compromise or settlement of any matter involving a party under a disability (e.g., minors, incapacitated persons and incarcerated persons). Unlike wrongful death settlements, Court approval of these settlements is not specifically required. However, as a practical matter, obtaining court approval is in the best interests of a settling defendant. Without it, the settlement release may not always be enforceable against the plaintiff. If court approval is sought and obtained, the argument for enforcement is stronger. See Va. Code § 8.01-424(A) ("Any order or decree approving and confirming the compromise shall be binding upon such party, except that the same may be set aside for fraud.") Following Perreault, confidentiality of



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court approved infant settlements is similarly in doubt.

Conclusion

The Perreault decision has significant adverse implications for the confidentiality of settlements requiring court approval, even when all parties to the agreement wish to keep the terms of the settlement private. Even when no third-party requests that the court require the terms of the settlement be made part of the public record, the court may *sua sponte* so require under Perreault to avoid unnecessary dealings with third-parties in the future. As such, the confidentiality of any future settlement requiring court approval is no longer guaranteed.

Clients seeking to privately settle cases requiring court approval should consider the possibility that the fact and terms of the settlement may come to light. To reduce the potential for adverse publicity, when settling claims for which there is no underlying lawsuit, clients may want to consider seeking court approval in a remote Virginia Circuit Court jurisdiction. Currently, the Commonwealth of

Virginia courts website (<http://www.courts.state.va.us/courts/courts.html>) allows only for docket searches on an individual Circuit Court level, although that is subject to change at any time.

Unfortunately, the Supreme Court's decision does not establish a statute of limitations within which a third party may challenge a trial court's approval of a joint petition for settlement that omits the terms of the settlement. It is unclear whether the Perreault decision will affect the confidentiality of past approved settlements. Should you have any additional questions regarding this issue or any other issue regarding the confidentiality of settlements of claims requiring court approval, please contact Richard L. Nagle (rnagle@hdjn.com) or Armand B. Alacbay (aalacbay@hdjn.com), at 703-591-3440 or by e-mail.

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