3rd Circuit Decision a Win for Confidential Settlement Agreements

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How secret is the settlement that you obtained with help from the court? Over the years, the answer in the 3rd U.S. Circuit Court of Appeals has been "not so secret" — even when you expressly provided for it to be secret. Because of the 3rd Circuit's recent decision in *LEAP Systems Inc. v. MoneyTrax* , settling parties with secrecy concerns now have a little more comfort.

In its March 2011 decision in *MoneyTrax* , the 3rd Circuit held that the common law "right of access" doctrine, which makes judicial records presumptively public, did not require the publication of a confidential settlement entered on the record. In so ruling, the 3rd Circuit determined that our judicial system's presumption of public access was outweighed by a settling party's reliance on confidentiality in settling the dispute. Though little discussed since its release on March 15, the decision is important because it marks the first time the 3rd Circuit has interpreted the public's right of access as less important than a settling party's reliance on the confidentiality of its settlement.

According to the 3rd Circuit's opinion, the *MoneyTrax* litigation began in 2005. The plaintiff, LEAP, brought claims alleging misappropriation of proprietary information against its former associate, Norman Baker, and his new employer, MoneyTrax. In March 2008, the New Jersey federal district court held a settlement conference, where, with the court's help, the parties reached a settlement. At the request of Baker's attorney, who wanted to ensure that the agreement "would not fall apart as soon as the parties left the courthouse," the court allowed the confidential terms to be recorded by the courtroom's audio system. No persons other than the parties were present in court when the recording took place, and the court assured the parties that the transcript would not be filed with the court or be considered a court document. The transcript, therefore, was not immediately sealed.

Two weeks later, the opinion said, the district court dismissed the action while retaining jurisdiction to enforce the settlement. Still concerned about the confidentiality of the settlement, LEAP submitted a motion to seal the settlement transcript. The motion was unopposed, and the court granted it.

Soon, the settlement faltered, and new disputes arose. The 3rd Circuit opinion said that LEAP sued a third party, Todd Langford, in state court, alleging that, assisted by Baker, Langford had developed a software program with confidential information misappropriated from LEAP. Contending that access to the March 2008 settlement transcript was essential to his defense, Langford intervened in the federal court proceeding and sought to unseal it under the right of access doctrine.

In ruling on Langford's motion to unseal, the district court had first to determine whether the transcript was a "judicial record" to which the doctrine would apply. The court reversed its original position and held that the transcript was a judicial record after all. As the district court observed, however, the right of access doctrine is not absolute; its presumption of access can be rebutted by a showing that the opposing party's interest in secrecy outweighs the public's interest in disclosure. Applying that balancing test, the district court found LEAP's interest in secrecy was strong both because of the confidential proprietary information involved and because LEAP had relied on the court's assurance that the transcript would be kept confidential. Langford's personal interest arising out of the state court claim was relatively weak. The district court, therefore, declined to unseal the transcript. Langford appealed.

In an opinion by Judge Thomas M. Hardiman, the 3rd Circuit affirmed. Addressing the threshold question, the court held the transcript was indeed a judicial record subject to the right of access doctrine. Citing its own precedent, the 3rd Circuit explained that the scope of the judicial records doctrine is broad, attaching "to almost all documents created in the course of civil proceedings," including evidence, transcripts, pleadings and other materials submitted by litigants. A narrow

exception applies to documents that have not been "filed with, ... interpreted or enforced by" a court, Hardiman said. A settlement document will be considered a judicial record "under either of two circumstances: (1) when a settlement is filed with a district court, and (2) when the parties seek interpretive assistance from the court or otherwise move to enforce a settlement provision." The 3rd Circuit found both circumstances present here.

Despite finding that the settlement transcript was a "judicial record," the 3rd Circuit ruled that the presumptive right of public access should give way to LEAP's request for secrecy. In so ruling, however, the court gave little weight to LEAP's "vague assertions" that disclosure would reveal confidential business information. What made LEAP's interest in privacy so strong was the fact that the trial court had assured it that the settlement terms would be confidential. The 3rd Circuit found that the trial court's assurances were a predicate of the settlement and that the settlement would not have occurred "but for" those assurances. For those reasons, the 3rd Circuit held that LEAP's reliance on the assurance of confidentiality was "sufficient to outweigh the public's common law right of access."

Moreover, the public's interest in disclosure was not compelling. In a very fact-specific analysis, the 3rd Circuit concluded that where the settlement agreement is between private parties and involves non-public, proprietary business information, the public's need for access is not particularly strong. The district court was therefore within its discretion in finding that LEAP's interest in privacy outweighed the public's interest in disclosure.

In so holding, the 3rd Circuit broke with precedent disposed heavily in favor of disclosure. In the 1986 case of *Bank of America v. Hotel Rittenhouse Associates* , the 3rd Circuit put the right of access above a private party's interest in confidentiality. In that case, the parties reached a settlement agreement and filed it under seal with the court. A third party intervened and filed a motion to unseal. Applying the right of access balancing test, the district court concluded that the "public and private interests in settling disputes" outweighed the "public interest in access to judicial records," and denied the motion to unseal.

The 3rd Circuit reversed, holding: "Even if we were to assume that some settlements would not be effectuated if their confidentiality was not assured, the generalized interest in encouraging settlements does not rise to the level of interests that ... may outweigh the public's common law right of access," such as risk of serious injury to innocent third parties. The court expressly left open the question of whether a particularized showing that parties had agreed to settle on condition of confidentiality could ever justify keeping the parties' settlement terms confidential. The court implied, however, that if the answer was "yes," then the circumstances would have to be extreme.

The *Hotel Rittenhouse* decision, then, gave settling parties little reason to expect that a court weighing the interests of secrecy against the interests of disclosure would give much, if any, weight to the parties' reliance interests in confidentiality. Indeed, Judge Leonard I. Garth issued a sharp dissent that faulted the majority for failing to take special account of situations where parties agree to settlement terms only on condition of their remaining secret. As Garth described it, the majority's decision amounted to a "per se rule that the interest in settling cases can never outweigh the public's right of access."

The 3rd Circuit revisited the issue in 1994 in its decision in *Pansy v. Borough of Stroudsburg*. In that case, a municipality and its police chief had been involved in litigation that settled. Although the settlement agreement had not been filed with the court and was thus not a judicial record, it was subject to a confidentiality order issued by the district court at the request of the parties. A newspaper intervened to ask the court to remove the confidentiality order and to make the settlement agreement available under Pennsylvania's Right to Know Law.

In considering whether to grant access to the settlement, the *Pansy* court applied the same balancing test as applies to the right of access doctrine: whether the interest in secrecy outweighs the public's interest in access. Citing *Hotel Rittenhouse* , the *Pansy* court explained that it would be improper to protect the confidentiality of a settlement agreement on account of "the general interest in encouraging settlement." Going further than *Hotel Rittenhouse* , the *Pansy* court expressly held that a particularized showing that the expectation of confidentiality had induced the parties to settle would indeed weigh in favor of secrecy.

The court made clear, however, that such a particularized showing should not determine the outcome. It should be considered as just one factor among many to be applied in the balancing test. Indeed, the *Pansy* court explained that even when parties to a settlement act in reliance on a promise of confidentiality, they do so with knowledge that the order may in certain circumstances be removed. The *Pansy* court's respect for settling parties' reliance interest in confidentiality, although greater than the *Hotel Rittenhouse* court's, was thus only halfhearted. Not surprisingly, the *Pansy* court held that the trial court had acted improvidently in issuing the confidentiality order.

Although citing and purporting to rely on *Hotel Rittenhouse* and *Pansy* , the *MoneyTrax* decision is animated by a new and fundamentally different attitude about settling parties' reliance interest in confidentiality. To be sure, it is probably a stretch to read the *MoneyTrax* decision as providing that a party's reliance interest in a settlement agreement's confidentiality will always be sufficient to defeat the presumption of public access. Had the settlement agreement at issue in the case

implicated matters of significant public interest — for example, matters affecting public health or safety — perhaps the analysis would have been closer. Similarly, if the settlement did not involve legitimate business secrets, there may have been a different result. But it is plain that the *MoneyTrax* decision accords much more weight to settling parties' reliance interest than either the *Hotel Rittenhouse* or *Pansy* decision did.

There are many good reasons why litigants want to keep their settlement terms confidential. As in *MoneyTrax* , proprietary business information could be at stake. The parties may fear that the terms will be used against them in a future proceeding. Defendants may be wary of revealing to enterprising plaintiffs' lawyers just how much they may be willing to pay in settlement. And parties on both sides may want to avoid publicity.

Parties can take a number of measures to reduce the likelihood that their settlement agreements will be subject to disclosure. Private parties that settle without judicial aid can expressly provide in the settlement that the terms shall be kept confidential. As long as the settlement is not filed with or approved by the court, it is not a "judicial record" and there is a strong likelihood of secrecy. Should the parties seek judicial intervention in the enforcement or interpretation of the settlement, however, the agreement's pristine status may be lost.

By choosing not to involve the court in a settlement, however, litigants foreclose the important role that judges often play in nudging them toward a negotiated resolution. For settling parties who want court involvement and also value confidentiality, the *MoneyTrax* decision provides needed comfort, although no certainty. By making very clear throughout the settlement negotiation process that confidentiality is a judicially approved condition of their agreement to settle, parties increase the likelihood that their secrets will be safe from public scrutiny. The parties should take care to put that on the record and in the settlement agreement itself. In the end, however, the test is one of balance, not absolute priorities. And there will always be some instances where the "right to access" and the public's right to know will preclude a party's claim to confidentiality. •

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