

Non-disclosure of Pierringer agreement amounts – is there a “way out” for LAWPRO insureds?

“Pierringer” agreements allow one or more defendants in a multi-defendant proceeding to settle with the plaintiff, leaving the remaining defendants responsible only for the loss they actually caused.

In *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37, the Supreme Court of Canada held that the financial terms of a Pierringer settlement need not be disclosed to the non-settling defendant(s).

Facts and lower court decisions

Sable Offshore Energy Inc. sued several defendants over alleged problems with corrosion-preventing paint. Sable entered into Pierringer agreements with some of the defendants, allowing those defendants to withdraw from the litigation while permitting Sable’s claims against the non-settling defendants to continue. The terms of the settlements were disclosed to the remaining defendants, with the exception of the settlement amounts. The non-settling defendants sought disclosure of the amounts.

The trial judge dismissed the application, concluding that the details were protected by settlement privilege. The Court of Appeal overturned that decision and ordered the amounts disclosed.

At the Supreme Court

The Supreme Court of Canada allowed the settling parties’ appeal and reversed the disclosure order. The court held that settlement privilege protects the efforts parties make to settle their disputes by ensuring that communications made in the course of those negotiations are inadmissible. Since the negotiated amount is a key component of the content of successful negotiations, it too is protected by the privilege.

The court noted that the parties had, as is always the case with a Pierringer agreement, the assurance that they would not be held liable for more than their share of damages. Protecting the details of the amount of the settlements would not prejudice the non-settling defendants, because non-settling defendants can only be held liable for their share of the damages and are severally, not jointly, liable with the settling defendants. There was no public policy reason, therefore, to override settlement privilege.

Application to cases that include a legal malpractice claim

In *Sable Offshore*, all of the claims related to the same kind of harm: corrosion damage. The court had only to decide which defendants contributed to that single kind of harm, and to what extent. The *Sable Offshore* defendants were concurrent tortfeasors. In some cases, LAWPRO insureds WILL be concurrent tortfeasors, along with one or more co-defendants. In such cases, *Sable Offshore* will apply, and the plaintiff need not tell LAWPRO what the settling co-defendants have paid.

But what about cases in which defendants are alleged to have caused harm that is NOT concurrent? For example, an owner sued a contractor and an engineer for negligent building construction. These two defendants were concurrent tortfeasors. The owner also sued a solicitor, who (allegedly), was responsible for obtaining a performance bond, which would have covered off the owner’s losses for negligent work in constructing the building. The performance bond claim became statute barred. The owner, contractor and engineer enter into a Pierringer Agreement, and relied on *Sable Offshore* in refusing to disclose the settlement amounts to LAWPRO. LAWPRO was nevertheless invited to make a settlement offer.

LAWPRO took the position that the solicitor was NOT a concurrent tortfeasor with the contractor and the engineer. The contractor’s and engineer’s alleged negligence on the one hand, and the solicitor’s alleged negligence on the other, were different in nature, and separated in time.

Liability on the part of the contractor and the engineer, and on the part of the solicitor, were mutually exclusive. To the extent the contractor and engineer were liable and the owner collected damages from them, the solicitor's liability for failing to obtain the performance bond was extinguished. To put it another way, the solicitor "caused" damage to the owner, only to the extent it could not collect the damages caused by the contractor and the engineer, which would have been covered by the performance bond. The owner's claim against the solicitor was "secondary" to its claim against the contractor and the engineer, not "concurrent" with it. While the amount of the owner's settlement with the contractor and the engineer may have been subject to settlement privilege, the owner could not prove damages against the solicitor, without waiving privilege and disclosing the amount of the settlement.

The settlement amount between the plaintiff and the contractor and engineer was eventually disclosed to LawPRO.

While there will doubtless be cases where the LawPRO insured is a concurrent tortfeasor with one or more co-defendants, in many others, this will not be the case. LawPRO will be paying close attention to ensure that plaintiffs cannot rely on *Sable Offshore*, where they are not entitled to do so.