Even in 2022, Non-Disclosure Clauses are Not ‘Standard’ Settlement Terms

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Despite the modern rise of the (mis)use of non-disclosure agreements (NDAs) or confidentiality clauses in settlement agreements, the law does not consider such clauses to be ‘standard terms’ for private settlements contracts.

In September 2022, the Ontario Superior Court confirmed in *Bouzanis v. Greenwood et al.* that non-disclosure clauses are not considered “standard” terms within agreements for private settlements.

Bouzanis concerned a disagreement over whether a settlement for a civil suit had been reached. Ms. Bouzanis sued the defendants for professional negligence, which prompted negotiations to settle the matter out-of-court. When the defendants later tried to enforce the proposed settlement, Ms. Bouzanis maintained that no agreement had been reached because the full and final release for their settlement included an NDA that she had seen and did not consent to.

For context, a settlement agreement in a civil case outlines the terms that the disputing parties have discussed and agreed upon in their negotiations. It also contains a set of clauses – usually in template form and simply dropped in - that accept that the legal action will now be discontinued, and no further legal action taken in this matter. This is sometimes described as a “release” form or “waiver” of future legal action.

If the terms of a settlement reflect what was discussed and agreed upon by the parties, and include a standard release or waiver regarding future legal action, then a court may find that an agreement was reached and enforce the settlement, even if the release has not been signed or fully executed.

This is because it is legally implied that a “standard” final release (nothing more and nothing less) will follow after parties agree to the settlement terms. This is a matter of standard business practice and common sense.

The key word here is “*standard*.”

Accordingly, the court in *Bouzanis* assessed whether the NDA added by the defendants to the settlement release, which had not been previously

negotiated, could be considered a ‘standard’ term of a settlement release. The defendants’ lawyer argued that, in today’s world, NDAs are so common that they could be considered standard terms in settlement releases.

The Ontario Superior Court rejected this argument and found that the law does not support the conclusion that NDAs have become standard terms in settlements. The court also rejected the defendants’ argument that the NDA was insignificant because Bouzanis did not explain that the NDA was the reason she had rejected the final release until after the defendants began their motion to enforce the settlement. Justice Hooper reasoned at paragraphs 17 and 22:

> “Dealing with the first argument – whether a confidentiality clause should now be considered a standard term of settlement – the caselaw does not support this position . . .
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> The second submission – that the confidentiality clause should not be considered significant because it was not raised by the responding party as an issue until the delivery of his responding material to this motion – also fails. I was not provided with any caselaw to support the proposition that a party must explain why they are rejecting an essential term of a settlement offer. The responding party clearly indicated she was rejecting the LawPRO release. The moving parties had made that [NDA] release an essential term. As a result, there was no meeting of the minds and there is no settlement.”

The significance of this decision for parties who are unwilling to be bound by an indefinite gag clause is that it dismisses the growing presumption that an NDA is a necessary component of a settlement. Some parties who have signed NDAs in the past report being told that they would not achieve a settlement if they did not sign an NDA.[1] *Bouzanis* confirms that this view, while perhaps an intimidating negotiation tactic, is not the law. While it is common sense practice to sign a release or waiver following a settlement, there is no legal requirement to sign or include an NDA.

The decision puts a distance between standard settlements and the use of NDAs, which further affirms that lawyers advising their clients on whether to include or sign and NDA must explain that the addition of an NDA is just that; an optional, significant addition.

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[1]Julie Macfarlane, "How a Good Idea Became a Bad Idea: Universities and the Use of Non-Disclosure Agreements in Terminations for Sexual Misconduct" (2020) 21:2 Cardozo J Conflict Resol. 361 at 364.

Bouzanis affirms that NDAs or confidentiality clauses are significant non-essential terms with significant legal consequences that must be specifically negotiated and agreed upon by parties. If an NDA is to be included in a settlement, it will be treated as an additional term that must be understood and agreed upon by the parties. NDAs cannot be assumed, 'snuck in' or implied as 'standard practice', despite the commonality of their use today.

The information contained herein is not, and should not be construed as constituting, legal advice. If you have questions about the impact or use of an NDA in a settlement you should seek legal advice.