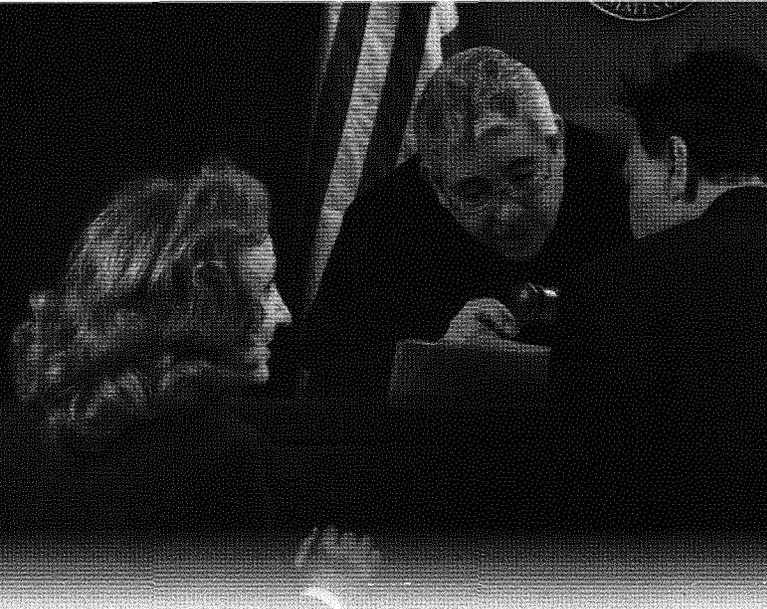


# Getting Appellate Review of a Good Faith Settlement Determination

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A settlement among fewer than all of the parties in a case can have many consequences for the parties who are left to litigate.

A settlement's consequences become particularly dramatic when the trial court certifies that it was made in good faith: Under California Code of Civil Procedure section 877.6, a good faith determination bars non-settling defendants from later suing the settling joint tortfeasors or co-obligors for contribution or equitable indemnity. In other words, no matter how large the eventual verdict, the non-settling defendants who are jointly liable for the judgment cannot pass along any part of their obligation to their former co-defendants.

Given the significance of a good faith determination, non-settling defendants should closely examine any settlement before it receives the court's stamp of approval. Relevant factors include whether the settlement amount reasonably relates to the settlor's proportionate share of liability (the "ball park" test), the total settlement amount, the idea that a settling defendant should generally pay less than one found liable at trial, the financial conditions and insurance policy limits of settling defendants, and whether the settling parties colluded to hurt the non-settling defendants' interests. *Tech-Bilt, Inc. v. Woodward-Clyde & Assocs.* (1985) 38 Cal.3d 488, 499-500.

If there is a basis for arguing under these standards that a settlement was not made in good faith, non-settling parties can and should oppose court approval of the settlement. Section 877.6 lays out

the procedure for doing this, including applicable deadlines.

But what is a non-settling party to do if the trial court finds, over its opposition, that the settlement was made in good faith?

File a writ petition in the Court of Appeal – right away.

Section 877.6, subdivision (c) provides that "any party aggrieved" by a good faith determination can seek appellate review by a petition for writ of mandate. There isn't much time to do this: The petition must be filed in the Court of Appeal within 20 days of service of written notice of the good faith determination (extended to 25 days if service is by mail). (*L. C. Rudd & Son, Inc. v. Superior Court* (1997) 52 Cal.App.4th 742, 746.)

Fortunately, there is a short reprieve available: Section 877.6, subdivision (c) also authorizes the trial court to extend the writ petition deadline by up to 20 days. Trial courts often do not know that they have this authority. But once they know, they are generally willing to exercise it.

In light of the tight timeline and busy court calendars, it's prudent to ask for the extension at the earliest opportunity – for example, by requesting in your moving papers or during the hearing that, if the trial court determines that the settlement is in good faith, it also enter an order extending the time to petition for writ review.

Whatever the deadline, filing a timely writ petition is critical. As the recent decision

in *Oak Springs Villas Homeowners Ass'n v. Advanced Truss Systems, Inc.* (2012) 206 Cal.App.4th 1304, demonstrates, parties who miss the writ petition deadline may forfeit their opportunity to challenge the trial court's determination that a settlement was made in good faith – and with it, their opportunity to seek indemnification or contribution from the settling defendant.

*Oak Springs Villas* arose out of a dispute about who should pay damages for construction defects in a condominium development. The homeowners' association sued the developers and various parties involved in the construction; the defendants cross-complained against each other for indemnity.

The homeowners' association eventually settled with the developers. The developers then sought a good faith determination. Over the opposition of a non-settling subcontractor, the trial court agreed that the homeowners' association and developer had settled in good faith. Under Code of Civil Procedure section 877.6, subdivision (c), that determination barred the remaining defendants from claiming that the developers were liable for any contribution or indemnity.

The subcontractor did not petition for writ review of the good faith determination, as allowed under section 877.6. Instead, it *appealed* from the good faith order. That procedural choice turned out to be dispositive: The Second Appellate District, Division Eight held that a good faith

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settlement determination is not appealable and dismissed the subcontractor's appeal without reaching the merits.

The Court of Appeal rejected the subcontractor's argument that the good faith settlement determination was an appealable final judgment under Code of Civil Procedure section 904.1. The court reasoned that in order to be appealable as a final judgment, an order must be final *as to the party appealing*. An order determining that a settlement was made in good faith is not final as to the non-settling parties, because they remain in the lawsuit. The non-settling parties therefore cannot appeal from the order.

The court in *Oak Springs Villas* expressly disagreed with a contrary rule set forth in *Cabill v. San Diego Gas & Elec. Co.* (2011) 194 Cal.App.4th 939. There, the Fourth Appellate District, Division One summarily concluded that a non-settling defendant *can* appeal from a good faith settlement order. *Cabill* apparently assumed that so long as an

order is final as to *some party, any party* may appeal from it.

*Oak Springs Villas* dismissed *Cabill's* analysis as "bare" and as providing "no legal support for its conclusion." In particular, *Oak Springs Villas* pointed out that the general rule is that *the party as to whom a judgment is final* may immediately appeal that judgment. But that rule does not "stand for the proposition that a party remaining in the action may seek review by appeal."

Based on its conclusion that the good faith determination was not appealable and that the subcontractor should not "get a second bite of the apple before its final judgment," *Oak Springs Villas* dismissed the subcontractor's appeal.

After *Oak Springs Villas*, a question remains as to whether the subcontractor could challenge the good faith determination later, as part of its eventual appeal from a final judgment in the case. The case law on that issue is mixed.

Some decisions have held that a good faith settlement determination *is* reviewable on appeal from the final judgment in the case. These decisions' rationale is that section 877.6 says that a party *may* petition for writ review of a good faith determination, not that writ review is the *only* avenue for appellate review. *Maryland Cas. Co. v. Andreini & Co. of Southern California* (2000) 81 Cal.App.4th 1413. That rationale would seem to give the non-settling subcontractor in *Oak Springs Villas* some prospect for appellate review at the end of the tunnel.

But other authority points to a different conclusion. In *Main Fiber Products, Inc. v. Morgan & Franz Ins. Agency* (1999) 73 Cal. App.4th 1130, the Court of Appeal refused to review a good faith determination on appeal from the final judgment. The court reasoned that allowing post-judgment review of settlements entered months or years earlier would undermine the settling parties' interest in finality, discouraging settlement. To avoid that result, the court held that a non-settling party may not skip the statutory writ petition and instead challenge the good faith determination on appeal at the end of the case. In other words, according to *Main Fiber*, a non-settling defendant must seek immediate writ review of a good faith settlement determination in order to preserve that issue for appeal.

The bottom line is that a good faith settlement determination is not immediately appealable, and that a court might refuse to review the determination on appeal from the final judgment unless the appellant has already challenged the determination via a timely writ petition. Accordingly, there is only one prudent course of action: If you are aggrieved by a good faith settlement determination and there is a meritorious basis for challenging it, file a writ petition right away. ●

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