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Consistent application of good-faith finding proves allusive

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Comparison of statistics is at the heart of the determination of who belongs in the Baseball Hall of Fame. Comparison is the sports' worlds equivalent of the randomized controlled trial. It was just such comparisons to Brooks Robinson, the largely undisputed greatest third baseman of all time, that, in part, ultimately led to Ron Santo's induction into the Hall of Fame, belated though it was. And it is just such comparisons that will ultimately see justice done for White Sox greats Dick Allen and Minnie Minoso.

Comparison is similarly useful in the law. Three recent cases addressing whether there was good faith under the Joint Tortfeasor Contribution Act in the settlement between the plaintiff and a third-party defendant decided by three different panels of the 1st District Appellate Court and coming from three different trial judges illustrate the point made here on Dec. 16, 2020: the act needs to be reformed.

Below are the relevant facts of the three recent cases. In each of these cases the trial court held that the settlement was in good faith and in only one did the appellate court reverse. See if you can tell which settlement was found not to be in good faith.

Case No. 1

Settlement of $50,000 from a $1 million policy of insurance involving the death of a 21-year-old where the third-party defendant was not sued by the plaintiff and there was a dispute as to whether the third-party defendant was liable to the plaintiff in tort. The representative of the estate of the deceased was divorced from the brother of the principal of the third-party defendant and that takers included other relations of the representative.

Case No. 2

Settlement of $15,000 from a $1 million policy of insurance involving claimed losses of $21 million where the third-party defendant landlord was not sued by the plaintiff, who was the tenant's subrogor and there was a dispute as to whether the landlord could be liable to the tenant in tort based upon various provisions of the lease. The court decided that the landlord could not be liable to the plaintiff in tort based upon the lease.

Case No. 3

Settlement of $10,000 plus a 30% waiver of the $930,323.21 workers' compensation lien if the underlying dispute settled, but no waiver if the matter was tried. The plaintiff could not have used the third-party defendant under the exclusive remedy provision, but the settlement was reached before any discovery was conducted that could have been used to determine whether the employer could have been liable.

A bit more of a comparison regarding these settlements. The settlement in Case No. 1, which is the highest amount directly paid, represents 5% of the available insurance policy whereas the settlements in Case No. 2 and Case No. 3 represent 1.5% and 1.07% of the available insurance recovery respectively and in Case No. 2 about .07% of the total amount sought. The amount sought in Case No. 1 is difficult to ascertain as it involves a death, but it seems likely that it would be less than the amount sought in Case No. 2.

In case you had not figured it out it was Case No. 1, *Hartley v. North American Polymer Co.*, 2020 IL App (1st) 192619, where the court found that the trial court had abused its discretion in finding the settlement in good faith. That is despite the fact that there was no direct evidence of collusion or fraud and, of these three recent cases, is the one in which the third-party defendant made the highest initial payment. For completeness, Case No. 2 is *Hartford Fire Insurance Company v. Adobo Limited Partnership*, 2020 IL App (1st) 1792422-U, and Case No. 3 was *Klein-Koziol v. M-J-T-J Contractors & Builders, Inc.*, 2020 IL App (1st) 192380-U. Notice also that *Hartley* is the only one of the three that was published.

These results seem entirely incongruous as it would be impossible to predict the outcome based upon the facts of each case. The mere fact of a familial relationship, which in the *Hartley* case was likely at the very least strained given the divorce, is a thin reed upon which to rest a finding of lack of good faith. Indeed, the contractual and ongoing business relationship between the landlord and tenant in *Hartford* and the employment and insurance relationships in *Klein-Koziol*, seem far more likely to produce collusion than the relationship between the parties in *Hartley*.

As cited here on Sept. 30, 2020, Federalist No. 62 advises that "[l]aw is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?" So too it is the case with the current good-faith analyses that when applied they are so malleable and amorphous that the courts have come to such incompatible results. In addition to the previous suggestions to reform the act, as seen in the dissent in *Klein-Koziol*, perhaps there should be a rule that permits discovery before having to respond to a motion for good-faith finding akin to Supreme Court Rules 187(b), 191(b), or 201(l). In addition, to reviewing the value of the plaintiff's claim and the potential liability of the settlement defendant, evaluation of the potential costs of defending the case should be considered as a further factor in evaluation of the good faith of a settlement. None of the settlements that were found in good faith remotely approached the cost of defense and were in the nuisance settlement range.

The current state of the law in this area does encourage settlements, but at the high price of ignoring the second goal of the act: the equitable apportionment of damages among joint tortfeasors. In the next legislative session, the General Assembly should recognize this problem and rectify it by amending the act.
