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# REPORT

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## BETTER SAFE THAN SORRY: WHEN TO CHALLENGE A GOOD FAITH SETTLEMENT DETERMINATION



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For decades, the question of whether a writ petition is the exclusive means to challenge a trial court's good faith settlement determination under California Code of Civil Procedure section 877.6 ("section 877.6") has split appellate courts.

It seemed like the California Supreme Court would finally resolve this split when it granted review of the issue in *Pacific Fertility Cases* (2022) 78 Cal. App.5th 568 (*Pacific Fertility*), in August 2022. But in 2023, after fully briefing the case, the *Pacific Fertility* parties moved to dismiss review, and the Supreme Court granted the motion. So, for now, this important practical question remains open—despite the serious consequences a good faith settlement determination can have in cases where less than all of the joint tortfeasors or co-obligators settle with the plaintiff.

### Why challenge a good faith settlement determination?

If the trial court determines that a settlement was made in good faith, section 877.6, subdivision (c), bars non-settling defendants from asserting future claims against their settling co-defendants for equitable indemnity or contribution. This rule incentivizes settling defendants to resolve cases on terms warranting a good faith determination and rewards them with immunity from future liability.

Meanwhile, non-settling defendants will want to protect their indemnity and contribution rights by challenging the good

faith settlement determination, if there is a proper basis to do so. To prevail, "[t]he party asserting [a] lack of good faith" must meet the "burden" of proving "that the settlement is so far 'out of the ballpark' in relation to" the following factors "as to be inconsistent with the equitable objectives of" section 877.6: (1) "a rough approximation" of the plaintiff's eventual recovery after trial, (2) the settling defendant's proportionate liability for those estimated damages; (3) the settlement amount; (4) the settling defendant's financial condition and insurance policy limits; and (5) "the existence of collusion, fraud, or tortious conduct aimed to injure the interests of nonsettling defendants." (*Tech-Bilt, Inc. v. Woodward-Clyde & Associates* (1985) 38 Cal.3d 488, 499-500.)

### The split in authority.

After the trial court makes a good faith settlement determination, section 877.6, subdivision (e), provides that "any party aggrieved by the determination may petition the proper court to review the determination by writ of mandate." But with the Supreme Court's dismissal of *Pacific Fertility*, the courts of appeal remain split on whether this means a writ of mandate is the *exclusive* means to challenge a good faith settlement order or whether litigants can raise the issue later, on appeal from the final judgment.

Some courts have held that the plain language of section 877.6, subdivision (e), provides a *permissive* procedure to challenge a good faith settlement determination that doesn't eliminate the right to pursue the challenge on appeal, regardless of whether a writ petition was ever filed. (See, e.g., *Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 951-956 (*Cahill*); *Wilshire Ins. Co. v. Tuff Boy Holding, Inc.* (2001) 86 Cal.App.4th 627, 634-637 (*Wilshire*); *Maryland Casualty Co. v. Andreini & Co.* (2000) 81 Cal.App.4th 1413, 1420-1426 (*Maryland Casualty*)).

As the *Cahill* court explained, section 877.6, subdivision (e), states that an aggrieved party “*may*” petition for writ review, and the word “*may*” demonstrates that writ review is “a permissive, not mandatory, means of challenging a good faith settlement determination, and the availability of writ review, or the summary denial of a writ petition, does not preclude an appeal after a final judgment.” (194 Cal.App.4th at pp. 955-956, italics added; see *Maryland Casualty*, *supra*, 81 Cal.App.4th at p. 1420 [section 877.6(e)’s “use of the words ‘*may* petition,’ together with ‘shall be filed,’ suggests that a writ petition might not be the exclusive means of reviewing a good faith settlement determination”]; *Wilshire*, *supra*, 86 Cal.App.4th at p. 636 [“agree[ing] with the analysis and conclusion of *Maryland Casualty*” to conclude that “section 877.6(e) does not foreclose postjudgment review”].)

Other courts have construed section 877.6, subdivision (e), as completely eliminating the right to appeal for policy reasons including finality. (See, e.g., *Pacific Fertility*, *supra*, 78 Cal. App.5th at pp. 574-585; *O’Hearn v. Hillcrest Gym & Fitness Center, Inc.* (2004) 115 Cal.App.4th 491, 498-499 (*O’Hearn*); *Main Fiber Products, Inc. v. Morgan & Franz Ins. Agency* (1999) 73 Cal.App.4th 1130, 1134-1137 (*Main Fiber*).)

For example, the appellate court in *Pacific Fertility* reasoned that section 877.6’s statutory language is ambiguous and rejected the interpretation “that the word ‘*may*’ necessarily makes the section 877.6 writ review procedure nonexclusive.” (78 Cal.App.5th at p. 577.) Instead, by examining the statute’s legislative history and its other features—i.e., section 877.6’s 20-day deadline to seek writ review, 30-day deadline for a court to determine whether it will hear the writ, and the tolling of time periods for dismissal for want of diligent prosecution—*Pacific Fertility* concluded “that the Legislature wanted to provide settling tortfeasors with a *swift and final* procedure for reviewing a trial court’s good faith settlement determination before the verdict or judgment in the underlying trial.” (*Id.* at pp. 578-581, italics added, relying on *Main Fiber*, *supra*, 73 Cal. App.4th at pp. 1135-1136; see *O’Hearn*, *supra*, 115 Cal.App.4th at pp. 498-499 [following *Main Fiber*].)

### When to challenge a good faith settlement determination?

Although some courts disagree “that the word ‘*may*’ necessarily makes the section 877.6 writ review procedure nonexclusive” (see *Pacific Fertility*, *supra*, 78 Cal.App.5th at p. 577), the plain language interpretation is the best view because all litigants—regardless of whether they are represented by able counsel—should be able to rely on the plain language of section 877.6, including its use of “*may*,” without worrying about forfeiture. Furthermore, there can be powerful strategic or economic reasons in a particular case for litigants to avoid the expense and distraction of a writ petition, deferring any challenge to a good faith settlement determination until after they learn whether the case will produce any liability judgment at all.

But without an answer from our Supreme Court, it’s better to be safe than sorry. Where circumstances allow, litigants and counsel should avoid potential forfeiture by challenging a good faith settlement determination via petition for a writ of mandate. Under section 877.6, such a petition must be filed within 20 days after service of written notice of the determination—extendable by the trial court up to an additional 20 days.

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