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Unwritten Settlement Terms May Still Be Enforceable

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In almost all jurisdictions, settlement agreements in civil cases are interpreted and enforced according to standard contract principles: offer, acceptance, consideration and mutual assent as to all essential terms. However, in practice, once both parties have reached the primary term — the monetary amount in exchange for a release of claims — the settlement is considered effective, even if not finalized.


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At that point, the essential purpose of the agreement has been reached and both parties may now walk away from the uncertainty and risks of trial. Although the details surrounding the settlement still need to be hammered out, language negotiated, releases and other forms signed, and checks cut, both sides will generally consider the matter resolved.

This is especially true where there is little time between the agreement to settle and a pending trial date, where the court must be quickly notified and all efforts are made to avoid additional fees and costs in preparation for trial.

However, it is in the gray area between an agreement to settle for a specific monetary amount and agreement to the terms surrounding that settlement where parties in a hurry to avoid trial can wind up and at a much greater cost — being stuck with settlement terms that they did not intend to agree to, and in some cases, would not have agreed to.

A Cautionary Tale: Ward v. Lassiter

The Court of Special Appeals in Maryland recently addressed such an issue in Julie Ward v. Marjorie L. Lassiter, No. 1823, Sept. Term 2015 (Md. Ct. Spec. App. Jan. 13, 2017). The Ward case arose from an automobile accident in 2010. The parties were just over a month out from a scheduled three-day trial when the parties began discussing settlement.

Counsel for the plaintiff, Ms. Ward, sent defense counsel an email confirming that Ward would accept $7,000 to settle the case, if offered, and would not counter. Counsel for the defendant, Ms. Lassiter, emailed in return, “We are settled at $7,000.” There was no evidence before the appellate court of any additional exchanges between counsel, email or otherwise, discussing the terms of the settlement

agreement or release, or addressing issues of indemnification at that time.

The following day, Ward's attorney emailed Lassiter's attorney attaching a proposed settlement agreement. However, Lassiter's attorney responded by sending her own different proposed settlement agreement and indicating that the parties would need to use that version. As is common practice, Lassiter's attorney emailed back a revised version of the agreement sent by Ward's attorney that made significant changes to the provisions regarding indemnifying Lassiter from Medicare liens and other causes of actions up to $7,000, the agreed upon settlement amount. Ward rejected the revisions via email.

Several days before trial, Ward's attorney advised Lassiter's counsel that he had notified case management that the parties had resolved and that the trial would not go forward as scheduled. Ward's attorney then filed a Line of Settlement indicating that a settlement had been reached and requested that the trial be removed from the docket. After another month and a series of additional attempts to come to an agreement about the language of the written agreement, Lassiter's counsel filed a Motion to Enforce Settlement. The Circuit Court found that there was a settlement, granted the motion and dismissed the case, but did not prescribe settlement agreement terms. Ward appealed.

On appeal, the Court of Special Appeals found that under contract principles, it was clear that both parties had entered into an agreement to settle. The primary issue before the court was whether Ward had agreed to indemnify Lassiter as part of that settlement agreement. Ward's position was that she had not agreed to any indemnification and that the failure to agree to the indemnification clause was a failure to assent to a material settlement term.

However, the court looked critically at the draft settlement agreements circulated by the parties and found that Ward's version included an indemnity provision, albeit a different one from Lassiter's version. Thus, the nature of the disagreement, then, was as to the amount of indemnification rather than the existence of indemnification itself.

Ultimately the court commented that "the point of a settlement is to end the litigation and the uncertainty about the outcome," and thus Ward's agreement to settle the case in exchange for the agreed-upon payment "necessarily included agreement to release Ms. Lassiter and to indemnify Ms. Lassiter for claims third parties could bring against her in connection with the injuries Ms. Ward suffered in the accident at issue."

Thus, despite the contention from Ward that she did not agree to, or would not have agreed to, indemnify Lassiter as set forth in Lassiter's version of the release, the court did not find the indemnification dispute to be a term so material to the agreement that it invalidated the settlement.

Although the Court of Special Appeals' opinion is unreported, it makes clear how the appellate court views the interpretation and enforceability of settlement agreements, even when sent via email and not finalized. Furthermore, it emphasizes the importance of fully vetted and considered draft agreements before courts that value the necessary role that settlements play in providing closure as well as reducing the cost and burden of trial on all parties and the court's docket.

Good Guidelines for Practice

Practically speaking, it is not always feasible to ensure that all terms of a settlement agreement are secured in writing prior to notifying the court that a case has settled. Client considerations may also take

precedence over negotiating details. Client concerns that may put pressure on a quick agreement to settle include timing — such as ensuring that a case is settled prior to a specific ruling or the beginning of trial — reporting requirements, and cost concerns, including the cost of preparing for and going to trial.

Indeed, resolving the case for an appropriate amount at the right time may ultimately be far more important to a client than the exact terms of the agreement. It is clear, however, that any "agreed upon" terms that are not secured in writing prior to an agreement to settle are not guaranteed.

It may be good practice to engage in a discussion with clients about settlement negotiation protocols that include "must haves" for the client that must be disclosed in all communications about and leading up to settlement. These protocols can make it easier for counsel to make clear to the opposing party from the beginning that any acceptance of a settlement includes the acceptance of those "must have" terms.

For example, a client who has an interest in confidentiality may be willing to walk away from any settlement that does not include a confidentiality clause. In that case, it is critical that both parties understand before any settlement agreement amount is discussed that a confidentiality clause will be part of the ultimate agreement.

Similarly, if a client views an indemnity clause as critically important to the ultimate settlement terms, that indemnity clause should be discussed in at least some fashion at the beginning of settlement negotiations. Practitioners may shy away from these kinds of "up front" disclosures because they put additional demands on the table other than just the merits of the case, reveal vulnerabilities or leverage points, and may deteriorate settlement negotiations.

Client input is therefore not just recommended, but necessary to fulfill professional responsibility obligations to the client. All questions of priority should be asked well in advance of a time-pressured "take it or try it" situation. Will your client pay more to settle a case as long as it includes the "must have" indemnity clause? Is your client prepared to walk away from any agreement that does not include a confidentiality provision?

To best represent the client's interest, and to preserve the client's right to enforce its chosen settlement terms, these settlement preferences need to be clearly communicated to the other party from the beginning of, and throughout, the negotiation process.

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