

Concluding a Successful Settlement Conference:

It Ain't Over Till It's Over

by Morton Denlow

Have you ever attended a settlement conference and come away thinking the case was settled, only to later find out that your adversary has a different understanding of the settlement terms than you and your client? This is a frustrating experience, but is completely unnecessary. Careful lawyers and judges prevent such confusion by ironing out the details of a settlement at the time an agreement is reached. Leaving specific settlement terms unresolved to a later date may result in an unenforceable settlement or possible litigation to enforce the settlement.¹

Settlement conferences play an important role in the resolution of litigated disputes. Judges and mediators spend numerous hours and even days working with parties to bring about a settlement. With only 2.2 percent of all federal

civil cases going to trial, settlement is the predominate means by which cases are resolved.² Although most cases are settled by the parties without direct involvement by the court, numerous cases are settled with the assistance of the court or mediators at a settlement conference or court-sponsored mediation.

This article explains the steps parties and the court should take to insure an enforceable settlement. By paying careful attention to all necessary issues for resolution at the time a settlement is reached, parties can prevent future misunderstanding and conflict over the settlement terms. The principal issues parties face at the time a settlement is reached include 1) monetary terms; 2) scope of releases; 3) confidentiality of the settlement terms; 4)

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disposition of the litigation; 5) enforcement of the settlement; and 6) documenting of the settlement. This article explores these issues and strongly suggests that parties discuss, resolve, and memorialize the understandings reached at the settlement conference or as soon thereafter as is practicable in order to minimize later problems. A settlement checklist is provided for parties to use at the conclusion of the settlement conference. The use of a settlement checklist can assist parties and the court in accomplishing this goal.

MONETARY TERMS

Most settlements involve payment of money by the defendant to the plaintiff. At the time a settlement is reached, the parties agree on how much is to be paid. This is generally a straightforward pronouncement such as, defendant agrees to pay plaintiff \$100,000. However, there are a number of additional monetary issues, which should also be discussed and resolved. First, parties should agree to the timing of the payment and whether payment will be made at the time of the exchange of the executed settlement documents or some other date. Second, parties should agree as to whether payment will be made in a lump sum or installments. Third, if the settlement contemplates installment payments, the parties should discuss how the agreement will be enforced in the event of default. Will the court retain jurisdiction to enforce the settlement or will a separate action be necessary?³

Fourth, the parties should also agree whether the settlement amount includes plaintiff's attorneys' fees and in whose name to issue the check. Alternatives include payment to the attorney's client trust account, to the attorney and client jointly, or directly to the client.

Fifth, the parties should discuss how they intend to treat the payments for tax purposes. Does a portion of the settlement proceeds constitute wages for which withholding taxes will be taken? Will the defendant be issuing an IRS 1099 form and if so, in whose name and tax ID number? The characterization of the payments in the settlement agreement can have significant tax implications. For example, the circuits are split on the issue of whether a contingent fee is part of the client's taxable income.⁴ The success of a settlement agreement may depend on a thorough discussion and consensus as to payments in light of their inherent tax implications.⁵

Sixth, parties should verify whether there are any lien claims to the settlement proceeds and if so, whether and how they will be satisfied. Defendants and their insurance carriers may not make payments if there is an unresolved issue concerning attorney liens.⁶

Finally, in personal injury cases, parties may consider structured settlements, which provide for payments over a specified period of time. The question of who and how the structured settlement will be funded should be resolved.⁷

THE FORM AND SCOPE OF RELEASES

Releases are an important topic to be discussed and resolved at the settlement table. In a personal injury case or where there is no ongoing relationship between the parties, a general release of all claims, whether or not raised in the litigation, is usually requested. A general release of claims covers "all claims of which a signing party has actual knowledge or that he could have discovered upon reasonable inquiry."⁸ Where the parties have an ongoing relationship, they may seek to limit the scope of the release to the claims raised in the litigation.

Defining the breadth of the release can be instrumental in both the prevention of and prevailing in future litigation.⁹ In addition, the question of whether the release will be a one-way or mutual release can also arise. For example, in an employment discrimination case, a terminated former employee may request his ex-employer to provide a mutual release to prevent future claims arising out of his past employment conduct. Many defendants contemplate receiving a release but not giving one.

In certain circumstances, parties prefer a covenant not to sue rather than a release. Where the litigation is resolved as to one party, but is continuing as to other parties, a covenant not to sue may avoid the problem of inadvertently releasing a remaining party.¹⁰

CONFIDENTIALITY

Confidentiality is a frequent issue in settlements. Oftentimes, defendants insist upon confidentiality of the settlement terms because they are fearful of encouraging others to bring similar actions against them. Frequently, confidentiality is not discussed, but appears in the draft of the settlement agreement from defendant on the assumption plaintiff will not object.¹¹ However, if a term appears in the written agreement that was not previously orally agreed upon, it is unenforceable.¹² Therefore it is crucial that all terms be thoroughly discussed and defined.

A confidentiality provision raises a number of issues. First, is the provision mutual? Second, what can the parties say? Are they permitted to disclose the fact of settlement without disclosing the terms? Can they say the dispute has been resolved, nothing, or refer all inquiries to defendant? What exceptions to

confidentiality will be permitted? Generally, exceptions are made for disclosures to attorneys, accountants, and close family members and by order of court. A confidential settlement agreement may be disclosed if it is filed in court and ordered sealed.¹³

Another frequent issue is the question of damages in the event of a breach. Defendants frequently seek liquidated damages as a method of insuring compliance with the confidentiality provision. The question of the enforceability of such a provision arises when it becomes a penalty.¹⁴

ENFORCEMENT OF THE SETTLEMENT AND DISPOSITION OF LITIGATION

A settlement agreement is a contract. If a settlement agreement is breached the aggrieved party does not want to file a new lawsuit to enforce the agreement. Therefore, parties should discuss the proposed enforcement mechanism. Among the methods used are an order allowing the court to retain jurisdiction, a dismissal of the underlying litigation without prejudice until the settlement is completed, or a consent decree. A federal court loses jurisdiction over the case unless the dismissal order includes a provision specifically retaining jurisdiction, requiring compliance, or incorporating the settlement into the dismissal order.¹⁵

The issue of the disposition of the litigation is tied into the issue of settlement enforcement. Most defendants require a dismissal of the litigation with prejudice to protect against a refiling of the same claims. However, if the litigation is dismissed with prejudice, a new action may be necessary to enforce the settlement.¹⁶ This can be a problem where installment payments over a period of time are called for under the settlement. The court

retains jurisdiction to enforce a settlement where the parties' obligation to comply with the terms of the settlement agreement are made part of the dismissal order either by 1) a provision retaining jurisdiction over the settlement agreement, 2) a provision requiring compliance with the settlement agreement, or 3) incorporation of the terms of the agreement into the order.¹⁷

CONFIRMING AND DOCUMENTING SETTLEMENT

Once a settlement is reached during a conference, the court should bring the parties together to confirm all terms. An important issue concerns how the settlement terms will be memorialized. One option is to place all of the settlement terms on the record in open court.¹⁸ This approach is problematic where a party seeks to keep the settlement terms confidential. Once the agreement is placed on the record, it becomes quite difficult to prevent a third party from obtaining access.¹⁹

A second option is to attempt to memorialize the settlement terms in writing. A Settlement Checklist/Term Sheet can be found in Appendix C, which can be completed and signed at the settlement conference. While there is no guarantee the settlement will not later fall apart, the more comprehensive the terms reached at the settlement conference, the less likely future problems will arise. The checklist can also be used by the court to make sure all important issues are discussed during the settlement conference. A third option is to specify a date by which a written confirmation of the settlement terms and settlement draft will be prepared and a time by which other parties may raise objections. Courtesy copies should be sent to the court and firm dates should be set for completion of the settlement documents.

The shorter the time frame the better.

The party representative's authority to enter into the settlement should be confirmed at the settlement conference. If the client is not present, the attorney should be required to demonstrate that she has express authority to settle the lawsuit or the client should be made available by telephone to confirm her agreement to the settlement terms. In certain jurisdictions, the authority of an attorney to represent a client in litigation is separate from the authority to compromise and settle the lawsuit.²⁰

CONCLUSION

Once an agreement is reached at a settlement conference, the real work begins. Counsel and the court must take the time to meet and review all settlement terms and confirm the understandings reached while all parties are present. The agreement should be placed on the record or memorialized in a contemporaneous writing. Failure to do so can lead to lost settlements and needless litigation.

Footnotes

1. Higbee v. Sentry Ins. Co., 253 F.3d 994, 999-1000 (7th Cir. 2002) (no settlement was reached where three material issues were left unresolved at settlement conference with court).

2. Hope Viner Samborn, *The Vanishing Trial*, A.B.A. J., Oct. 2002, at 25-26. From 1996 to 2000 the total number of federal civil trials declined 23 percent. 2000 U.S. COURTS ANN. REP. OF THE DIRECTOR 25.

3. Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 381 (1994) (holding that where case is dismissed, court loses jurisdiction to enforce settlement unless compliance with settlement is made part of the dismissal order or the court specifically retains jurisdiction to enforce the settlement contract).

4. Kenseth v. Comm'r, 259 F.3d 881, 883 (7th Cir. 2001) (holding the contingent fee amount is taxable as to the client and citing cases evidencing the circuit

split).

5. See *Young v. Comm'r*, 240 F.3d 369 (4th Cir. 2001). “[The plaintiff’s] anticipatory assignment of a portion of her settlement proceeds to her attorney does not foreclose taxation of those proceeds” *Id.* at 377. Further, the issue of which party was responsible for paying capital gains taxes resulting from the appreciation of property transferred pursuant to the settlement agreement was also decided. *Id.* at 379-80.

6. *Neuberg v. Michael Reese Hosp. Foundation*, 123 F.3d 951, 953 (7th Cir. 1997).

7. See Gregory Scott Crespi, *Selling Structured Settlements: The Uncertain Effect of Anti-Assignment Clauses*, 28 PEPP. L. REV. 787 (2001) (discussing the widespread practice and the resulting litigation caused by plaintiffs, who have entered into structured settlements, later attempt to assign deferred payment rights to a finance company in exchange for a lump sum).

8. *Howington v. Ghourdjian*, No. 00 C 7394, 2002 WL 1793648 at *2 (N.D. Ill. Aug. 5, 2002) (quoting *Fair v. Int’l Flavors & Fragrances, Inc.*, 905 F.2d 1114, 1116 (7th Cir.1990): “A general release is inapplicable to unknown claims.”); *Farm Credit Bank of St. Louis v. Whitlock*, 581 N.E.2d 664, 667, 144 Ill. 2d 440, 448 (Ill. 1991).

9. See *Blockley v. The Work Center, Inc.*, No. 99 C 1421, 2000 WL 127118 (7th Cir. 2000) (holding that the release is not limited to back injuries sustained during the course of employment because the language “any and all” back injuries is comprehensive).

10. *Aiken v. Insull*, 122 F.2d 746, 751 (7th Cir. 1941). “[A] covenant not to sue is not the same as a release, and has no effect upon the liability of the other wrongdoers to the injured person” *Id.*

11. See *Meek & Assoc., Inc., v. First Union Ins. Group*, No. 99-2519CM, 2002 WL 1998204 (D. Kan. Aug. 6, 2002). Although the parties had orally reached an agreement as to the essential terms of the settlement, their actions and statements did not demonstrate their intent to make the agreement

confidential. *Id.* at *3.

12. See *Defalco v. Oak Lawn Public Library*, No. 99 CV 02137, 2000 WL 263922 (N.D. Ill. Mar. 1, 2000). Orally, an agreement in principle was reached, however the court held that the subsequent written agreement was unenforceable because there was no meeting of the minds with respect to the meaning of the confidentiality agreement and scope of release. *Id.* at *1, *5.

13. See *Jessup v. Luther*, 277 F.3d 926, 929 (7th Cir. 2002) (requiring disclosure to intervening newspaper of confidential settlement agreement sealed by district court).

14. See *Checkers Eight Ltd. Partnership v. Hawkins*, 241 F.3d 558, 562 (7th Cir. 2001). A provision in an agreement is a liquidated damages clause if “(1) the actual damages from a breach are difficult to measure at the time the contract was made; and (2) the specified amount of damages is reasonable in light of the anticipated or actual loss caused by the breach.” *Id.*

15. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 381 (1994).

16. See *Miener v. Missouri Dep’t of Mental Health*, 62 F.3d 1126, 1127-28 (8th Cir. 1995) (holding that the district court did not have jurisdiction to enforce settlement where dismissal order did not require compliance with settlement agreement and where jurisdiction was not retained).

17. *Kokkonen*, 511 U.S. at 381.

18. See *Lynch, Inc. v. Samatamason Inc.*, 279 F.3d 487, 490-91 (7th Cir. 2002) (at the end of a successful settlement conference the judge should call in a court reporter and dictate the terms of the settlement, and make sure the parties agree).

19. See *Jessup*, 277 F.3d at 929 (granting a newspaper publisher access to a settlement agreement that had been sealed and deposited in federal court).

20. *Brewer v. Nat’l R.R. Passenger Corp.*, 649 N.E.2d 1331, 1333-34, 165 Ill. 2d 100, 105 (Ill. 1995) (holding no settlement was reached where client did not give attorney express authority to agree to terms).

SETTLEMENT CHECKLIST/TERM SHEET

CASE NAME: _____ vs. _____

CASE NO. _____ CV _____ DATE: _____

A. PAYMENT OF MONEY TO: _____ FROM: _____

1. Total amount to be paid: \$ _____

2. When: _____

3. Payment terms: _____

4. Does payment include attorney's fees? Yes or No

5. Any third party liens to be paid from proceeds? Yes or No

a. If yes, to whom: _____

6. Tax Treatment: _____

7. Other payment terms: _____

B. RELEASE OR COVENANT NOT TO SUE (Circle One):

1. a. One Way From Plaintiff(s) to Defendant(s), or
b. Mutual Release

2. Scope of Release:

a. General:

- 1) All claims raised in the litigation, or
2) All claims, whether or not raised in the litigation.

b. Limited: _____

3. Scope of Covenant Not To Sue: _____

4. Exceptions to release or covenant not to sue: _____

5. Other Release or Covenant Not to Sue Terms: _____

C. CONFIDENTIALITY: Yes or No MUTUAL: Yes or No

1. What can be said about litigation?

- a. Dispute amicably resolved, or
- b. Nothing, or
- c. Other: _____

2. Exceptions to confidentiality?

- a. Attorneys
- b. Tax advisors
- c. Immediate family
- d. As otherwise required by law
- e. Other: _____

3. Liquidated damages in event of breach: Yes or No

4. Amount: (Not too large to avoid being a penalty) \$ _____

D. OTHER SETTLEMENT TERMS:

1. No admission of liability. 2. _____

E. EMPLOYMENT CASES: 1. Ability to reapply: Yes or No;

2. Type of reference: _____

F. EFFECTIVE DATE:

- 1. A binding agreement today; or
- 2. No binding agreement until the typed settlement agreement is signed.

G. DISMISSAL OF LITIGATION AND ENFORCEMENT OF AGREEMENT
(Circle one):

1. Immediate dismissal with prejudice; Court cannot enforce agreement.
2. Dismissal with prejudice entered on _____; Court cannot enforce agreement after that date. (Choose date that allows sufficient time to execute written agreement and fulfill obligations.)
3. Immediate dismissal without prejudice that automatically converts to with prejudice on _____; Court cannot enforce agreement after that date.
4. Dismissal without prejudice that bars relitigation of underlying claims; Court retains jurisdiction to enforce settlement agreement; parties waive rights under FRCP 65 to have terms of agreement included in dismissal order. (Best for long-term obligations where confidentiality is desired.)
5. Consent decree that expressly includes settlement terms; Court retains jurisdiction to enforce decree. (Best for long-term obligations where confidentiality is not desired.)

H. DO PARTIES CONSENT TO MAGISTRATE JUDGE JURISDICTION?
Yes or No

I. CONFIRMING AND DOCUMENTING SETTLEMENT:

1. Do parties wish to place settlement on the record? Yes or No
2. Settlement terms to be incorporated in a typed written agreement? Yes or No
 - a. Typed agreement to be prepared by _____
and sent to other parties on or before _____
 - b. Other parties to respond with changes, if any, by _____
3. Typed settlement agreement to be executed on or before: _____
4. Will settlement agreement be filed in court? Yes or No
5. Other terms regarding documenting settlement: _____

J. DO PARTY REPRESENTATIVES HAVE FULL AUTHORITY TO ENTER INTO SETTLEMENT AGREEMENT? Yes or No

Identify party representatives and their titles:

K. NEXT COURT DATE TO REPORT ON SETTLEMENT: _____

AGREED TO:

AGREED TO:
