Sills Cummis & Gross P.C.

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How to Avoid Unwanted Oral 'Settlement'

At my age, the word "strain" — as in eye strain and muscle strain — is not a good thing. Yet New Jersey courts have declared that they will "strain" to find and enforce an oral settlement, even where the alleged oral terms are incomplete. This can lead to something worse than physical pain ... your company may end up being ordered by a court to pay money, release claims and take other unwanted steps that will cause significant distress throughout the company. However, this "strain" can be avoided by taking a few simple steps.

NJ's Strong Public Policy in Enforcing Oral Settlement Agreements

In other jurisdictions, settlements of disputes must be in writing. This is designed to ensure that the parties know what terms are — and are not — part of a settlement, and to avoid disputes over what exactly was "orally" understood. Not so in New Jersey.

In New Jersey, "settlement of litigation ranks high in our public policy."[1] In recognition of this strong public policy, "courts will strain to give effect to the terms of a settlement wherever possible."[2] Taking this policy to its limits, New Jersey law provides that "an agreement to settle a lawsuit, voluntarily entered into, is binding upon the parties, whether or not made in the presence of the court and even in the absence of a writing."[3] Indeed, where the parties agree on the essential terms of a settlement, so that the mechanics can then be "fleshed out" in a to-be-executed writing, the court will still enforce the settlement even where one party refuses to sign the writing.

New Jersey does not allow a party to reconsider — or back out of — an oral settlement even if later reflection (which one would do in drafting a written agreement) shows that the terms are ill-advised. As the Appellate Division cogently stated, "second thoughts are entitled to absolutely no weight as against our policy in favor of settlement."[4]

Richard H. Epstein, Esq.

Richard Epstein is general counsel of Sills Cummis & Gross PC and co-chairman of the firm's litigation department. He represents Fortune 500 corporations and financial institutions in litigation involving complex commercial issues, including business tort and lender liability, in federal and state courts. Epstein is resident in the firm's Newark, N.J., office.

One good example of how New Jersey courts look to enforce a settlement is the decision in *Bistricer*. There, the parties, brothers embroiled in litigation over the control of a high-rise condominium conversion in Jersey City, settled the case at a conference with the court. The settlement was placed on the record and the parties further agreed that "[a] written agreement was [to be] prepared which embodied the basic terms agreed upon at the settlement conference."[5] Thereafter, the defendants prepared a written settlement agreement that the plaintiffs refused to sign. The plaintiffs argued that they had only agreed to a "framework" for a settlement, subject to a subsequent written agreement. The plaintiffs then sought to add and/or alter settlement terms in the written agreement.[6]

The court enforced the settlement and declined to allow the plaintiffs to inject terms and conditions that were not previously agreed upon because "the parties agreed on the essential terms of a settlement of this litigation" and "the terms are sufficiently clear for the settlement to be implemented fairly." The court found that the terms the plaintiffs sought to add "are not the essentials of the settlement."[7]

The court held that even "if these matters do constitute gaps in an agreement, that does not mean that the entire agreement must be set aside," adding that:

> Here the parties agreed to the essential terms of a settlement. Plaintiffs' objections are basically either "afterthoughts" or pertain to implementation of the settlement. Setting aside the settlement under these circumstances would allow plaintiffs to avoid a fair agreement duly entered into to resolve pending and burdensome litigation.
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> Moreover, the proposition that a case is not settled until the last "i" is dotted and the last "t" is crossed on a written settlement agreement carries the germ of much mischief. A party could, in bad faith, waste the time of the court and the other litigant in protracted settlement negotiations, and then, after a "framework" has been established wiggle out of that framework by creating a flood of new issues and questions. Conceivably that could be the case here.[8]

Of course, just because one party says there is an oral settlement does not make it so. Some courts will require a hearing with testimony to learn what each party understood, whether each party had authority to consent to the alleged terms and whether in fact there was a "meeting of the minds" at least as to the material terms of the settlement. Even here, however, a recent District of New Jersey case holds that a court need not hold such a hearing in order to enforce a settlement where the court participated in the settlement discussions and had sufficient affidavits.

How to Avoid an Unwanted "Settlement"

Parties should, of course, be encouraged to discuss possible settlement terms at all stages of litigation. However, in the modern business world, there is often a need for the person conducting the negotiations to consult with superiors and/or reflect on the ramifications of a proposed deal. These legitimate considerations may be lost if one side claims that during settlement discussions an oral agreement on "material terms" was reached.

This unwanted outcome can be avoided by taking a few relatively easy steps. First, prior to any serious settlement discussions, there should be a writing stating that: (i) there is no agreement on any term unless and until all terms have

been agreed upon; and (ii) there is no agreement on settlement terms unless and until those terms are reduced to a writing signed by authorized representatives of all parties.

Second, prior to entering into serious settlement negotiations, each party should have its own internal discussion as to what terms must be in the settlement agreement. In addition to how much will be paid or received, other terms to consider include: (i) the scope of release (general or limited); (ii) confidentiality; (iii) restrictive covenants; (iv) cooperation provisions; and (v) how to address a breach (including, without limitation, liquidated damages, arbitration and/or fee shifting). As shown by the case law above, New Jersey might enforce a settlement where the parties agreed on monetary and release terms, even where one party needed other important provisions such as a restrictive covenant or confidentiality.

Third, when an attorney is doing the negotiating without the client present, it should be made clear what the attorney is — and is not — authorized to do. Again, this should be done in writing so that there is no "misunderstanding" as to what is binding and what is just the attorney considering terms "subject to approval from my client."

In sum, encouraging settlement is a public policy "good." Yet, an oral settlement that has not been fully thought through — or fully "approved" up the ladder at the corporation — can result in a dissatisfied client bound to terms that are, in the end, worse than litigating. Taking a few simple steps will allow all parties to have time to reflect, include all necessary terms and receive all appropriate authorizations "up the ladder." Otherwise, this public policy "good" will only result in undue and unwarranted "strain."

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[1] *Jannarone v. W.T. Co.*, 65 N.J. Super. 472, 476 (App. Div. 1961). *See Bistricer v. Bistricer*, 231 N.J. Super. 143, 147 (Ch. Div. 1987).

[2] *Dep't of Pub. Advocate, Div. of Rate Control v. New Jersey Bd. of Pub. Utilities*, 206 N.J. Super. 523, 528 (App. Div. 1985).

[3] *United States v. Lightman*, 988 F. Supp. 448, 459 (D.N.J. 1997). *See Pascarella v. Bruck*, 190 N.J. Super. 118, 124 (App. Div. 1983); *Lahue v. Pio Costa*, 236 N.J. Super. 575, 596 (App. Div. 1993).

[4] *Dep't. of the Pub. Advocate*, 206 N.J. Super at 530.

[5] *Bistricer*, 231 N.J. Super. at 145.

[6] *Id*. at 148-149.

[7] *Id*.

[8] *Id*. at 151-152.

[9] *Alexander v. New Jersey Department of Transportation*, 2014 U.S. Dist. LEXIS 158683 (D.N.J. Nov. 14, 2014).