Zombie Settlements

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THE TYPICAL SETTLEMENT OCCURS AT THE END OF A LONG DAY OF MEDIATION. The exhausted parties pen the basic terms in a memorandum of agreement. But unless the attorneys are careful to create an enforceable settlement agreement, a case that appears to be settled can unexpectedly spring back to life.

Can a "settled" case come alive again? Sadly, yes. Failing to pound the last nail into a case's coffin can leave enough of an opening to allow an apparently settled case to rise from the dead. Here are some horror stories and tips on how to avoid zombie settlements.

Lack of authority to settle

Robison v. Orthotic & Prosthetic Laboratory, Inc. illustrates the nightmare that results when a lawyer misrepresents having authority to settle.[1]

The plaintiff filed a products-liability lawsuit in 2008 claiming a defective prosthesis. After years of litigation, the attorneys for the parties negotiated toward a settlement. On Sept. 24, 2013, the plaintiff's lawyer sent an email that stated, "My client has instructed me to accept [redacted amount] in full and final settlement of this matter." As the attorneys were documenting the settlement, the plaintiff's lawyer disclosed that the plaintiff had died—in January 2013—eight months earlier. The defendant refused to go forward with the settlement. The circuit court granted the plaintiff's motion to enforce the settlement. The defendant appealed.

The appellate court reversed because the plaintiff's lawyer had no authority to agree to the settlement. An attorney's employment and authority are revoked upon the death of the client. Because the plaintiff's son did not move to substitute as the personal representative until January

1. *Robison v. Orthotic & Prosthetic Laboratories, Inc.*, 2015 IL App (5th) 140079.

2014, there was no plaintiff at the time of the settlement negotiations. So, no settlement.

Moreover, "[i]n failing to disclose the fact of the plaintiff's death, [plaintiff's lawyer] intentionally concealed a material fact that would have reduced the overall value of the claim for damages. In addition, and equally troubling, [plaintiff's lawyer] led the defendant to believe that he had authority to negotiate a settlement on behalf of the party plaintiff, when the action was without a plaintiff …."[2] Conclusion: The settlement agreement was invalid and unenforceable.

But wait, there's more! The appellate court referred the plaintiff's lawyer *and* the defendant's lawyer to the Attorney Registration and Discipline Commission. The appellate court concluded that the plaintiff's lawyer committed "serious violations" of Illinois Rule of Professional Conduct (IRPC) 8.4(c), which concerns engaging in dishonesty, fraud, deceit, or misrepresentation. The appellate court also referred the defendant's lawyer to the ARDC for failing to report the plaintiff's lawyer's misconduct.

The moral of the story: An attorney must have authority from an existing client to agree to a settlement. A lack of candor before the court and with opposing counsel may result in sanctions and disciplinary proceedings.[3]

Misrepresentations and material omissions during negotiations

Doe v. Archdiocese of Milwaukee hinged on the admissibility of evidence that misrepresentations had been made in settlement negotiations.[4]

In 2007, plaintiff Doe (then not represented by counsel) settled a sexual-abuse claim against the Archdiocese of Milwaukee for $80,000 in a private mediation. In 2011, the archdiocese filed for bankruptcy. Doe submitted a claim in the bankruptcy, which the archdiocese opposed by asserting the 2007 settlement. Doe said the settlement had been induced by fraud—that, during the mediation, the archdiocese represented that the most it was paying abuse victims was $80,000. Doe alleged that some victims received as much as $200,000. The bankruptcy court ruled that evidence of the alleged misrepresentation in the mediation was inadmissible and granted summary judgment for the archdiocese. The district court affirmed and Doe appealed.

The court of appeals affirmed, applying Wisconsin law. Wisconsin's mediation statute precludes admitting any oral or written communication by the mediator or a party except in a "distinct" proceeding where admitting the evidence would be necessary to prevent a manifest injustice "of sufficient magnitude to outweigh the importance of protecting the principle of confidentiality in mediation generally."[5] The damages that Doe claimed in the bankruptcy proceeding—based on the suffering he incurred from sexual abuse—were not distinct from the claim he settled in 2007. Any evidence of statements during the mediation could not be introduced, so summary judgment was appropriate.

Would the result be the same under the Illinois Mediation Act, which applies to mediated negotiations?[6] Perhaps not. Under the Act, a communication made during a mediation is generally not discoverable or admissible in evidence.[7] But there are exceptions:

> b) There is no privilege under Section 4 if a court, administrative agency, or arbitrator finds, after a hearing [*in camera*], that the party seeking discovery or the proponent of the evi-

2. *Id*.
3. A check of the ARDC website shows that the plaintiff's attorney was censured but does not show any disciplinary action against the defendant's attorney.
4. *Doe v. Archdiocese of Milwaukee*, 772 F.3d 437 (7th Cir. 2014).
5. Wis. Stat. § 904.085(4)(e).
6. 710 ILCS 35/1 *et seq*.
7. *Id*. at § 35/4(a).

TAKEAWAYS >>

- Expressly state whether a formal written agreement is a condition of settlement.
- Make all of the material terms so clear that there is no need to find out whether the court can interpret them.
- Before mediation begins, discuss potential settlement outcomes with your client and, if possible, exchange a draft settlement agreement with opposing counsel.

THE PLAINTIFF OFFERED TO SETTLE OUT OF COURT FOR $17,500 TO WHICH THE DEFENDANT'S LAWYER AGREED PENDING CONFIRMATION FROM HIS CLIENT. THE PLAINTIFF AND DEFENDANT'S LAWYER SHOOK HANDS. THE PLAINTIFF LATER TRIED TO GET OUT OF THE SETTLEMENT, SAYING THAT HE DID NOT BELIEVE THAT THE CONVERSATION WAS A SETTLEMENT AGREEMENT. THE COURT STILL ENFORCED THE SETTLEMENT.

> dence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and that the mediation communication is sought or offered in …
>
> 2) … a proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation.[8]

If a court determines after an *in camera* hearing that the need for the evidence outweighs confidentiality, then evidence may be admitted. Thus, a court could allow evidence of misrepresentations made during mediation to set aside a settlement agreement. But no reported case has yet to test this section of the Act.

Also, if Doe's allegation of misrepresentation was true, a lawyer for the archdiocese with knowledge of the previous settlements could not sit silently by while the client made misrepresentations. IRPC 4.1(a) forbids a lawyer from knowingly making a false statement of material fact or law to a third person; Rule 8.4 prohibits a lawyer from engaging in dishonesty, deceit, misrepresentation, or knowingly assisting another person to do so.

Settlement conditioned on future documentation

Settlements that are not properly documented are notorious for rising from the dead.

Billhartz v. Billhartz involved a settlement that came back to life and led to cases in state and federal court.[9] William Billhartz died in 2006, leaving a multimillion-dollar estate. In 2007, the children of his first marriage reached a settlement agreement with the estate regarding their respective shares. On June 12, 2012, two of the children filed suit in state court to rescind the 2007 agreement as fraudulently induced.

The Billhartz children and the estate agreed to mediate the case with a retired judge. After 13 hours, they reached an agreement, which the mediator orally confirmed. The terms were set out in a "memorandum of settlement," including an agreement by the parties to execute a global settlement agreement. But no one actually signed the memorandum. After the mediator orally confirmed the settlement, one party (Jean) said she "wanted to sleep on it before signing anything."[10] Jean subsequently refused to sign the settlement agreement. The circuit court granted the other parties' motion to enforce the settlement. Jean appealed.

The appellate court reversed. Even if the essential terms of a contract have been agreed upon orally, if the clear intent of the parties is that neither will be legally bound until the execution of a formal agreement, then no contract comes into existence until such execution. In this case, the premediation agreement contemplated a formal settlement agreement and provided that no "offers, promises and statements" made in the mediation would be admissible in any judicial proceeding. The Illinois Mediation Act likewise contemplates that a successful mediation will result in a fully signed agreement and states that oral communications in the mediation generally are not admissible.[11]

Determining whether a future document is an essential condition of settlement or whether it is only an expectation is not always easy. For example, compare *Beverly v. Abbott Laboratories*,[12] where the settlement agreement was enforced, with *Brownlee v. Hospira, Inc.*,[13] where it was not.

In *Beverly*, the parties engaged in a private mediation that ended with the lawyers and the clients signing a handwritten notation of the plaintiff's final demand. The defendant sent an email the following day accepting that demand and the plaintiff's counsel acknowledged the settlement. Later, the plaintiff refused to sign the formal settlement agreement, contending there was no settlement. The district court

ISBA RESOURCES >>

- Hon. Anna M. Benjamin, *Ten Tips for an Effective Settlement Conference*, Bench & Bar (Feb. 2019), law.isba.org/2uwLt4N.
- ISBA Free On-Demand CLE, *Civil Practice and Procedure Update: Pleadings, Motions, Discovery, and Resolving Cases Through Settlement and Mediation* (recorded Nov. 9, 2018), law.isba.org/2FuGVSF.
- Albert E. Durkin, *Good-Faith Settlement—When to Settle*, Tort Trends (Oct. 2016), law.isba.org/2TUi5o6.

8. *Id.* at § 35/6(b).
9. *Billhartz v Billhartz*, 2015 IL App (5th) 130580-U; *Billhartz v. Commissioner of IRS*, 794 F.3d 794 (7th Cir. 2015).
10. *Billhartz*, 2015 IL App (5th) 130589-U, ¶ 13.
11. 710 ILCS 35/6(a)(1) provides an agreement evidenced by a record signed by all parties to the agreement is not subject to a privilege of disclosure under section 4 of the Act.
12. *Beverly v. Abbott Laboratories*, 817 F.3d 328 (7th Cir. 2016).
13. *Brownlee v. Hospira, Inc.*, 869 F.3d 509 (7th Cir. 2017).

enforced the settlement and dismissed the case. The court of appeals affirmed, stating that "anticipation of a more formal future agreement does not nullify an otherwise binding agreement."[14] The plaintiff, the court held, had not shown that any of the terms were "so vital that the parties would not have settled the dispute without them."[15]

The facts in *Brownlee* are similar: A private mediation concluded with a "Settlement Checklist/Term Sheet" that was signed by all parties. But the plaintiff later changed her mind and refused to sign a formal agreement tendered by defendant's attorney.[16] Citing the Seventh Circuit's decision in *Beverly*, the district court enforced the settlement agreement.[17] The court of appeals, however, reversed. The difference? The "Settlement Checklist/Term Sheet" set out dates for drafts of the formal agreement and thus demonstrated that there would be no binding agreement unless the formal settlement agreement was signed.[18]

The bottom line: A memorandum of settlement should expressly state whether a formal written agreement is a condition of settlement. Parties who expect that an agreement reached at mediation is binding—whether or not a formal settlement agreement is signed—should say exactly that.

Mistakes of fact, prediction, and unilateral assumption

The *federal* case involving the Billhartz estate, *Billhartz v. Commissioner of IRS*, illustrates another potential zombie, but with a subtle distinction.[19] In 2007, the estate filed a tax return with the IRS claiming a $14-million deduction for distributions to the children based on the 2007 agreement described above. The IRS disputed the deduction, but on April 5, 2012, the eve of trial, the estate reached an agreement with the IRS in which 52 percent of the deduction was allowed. The trial was cancelled and the parties were ordered to file a document reflecting the terms of the settlement by July 24, 2012.

Meanwhile, in June 2012, two of the children brought the state court lawsuit mentioned earlier that contested the 2007 agreement. The estate then tried to get out of its settlement with the IRS, arguing a "mutual mistake of fact." That is, the estate and IRS believed the estate would owe the children the amounts established by the 2007 agreement. (Ultimately, the estate paid the children more than the 2007 agreement provided.) The tax court enforced the settlement and the estate appealed.

The court of appeals affirmed. A contract can be voided under the doctrine of mutual mistake, if, at the time the contract was made both parties were mistaken as to a basic assumption on which the contract was made and the mistake had a material effect on the agreed exchange of performances. But rules governing rescission and the mutual mistake doctrine don't apply to a party's erroneous prediction or judgment about future events. "A party may later come to believe that it received a bad (or good) deal, but only rarely will that provide grounds for setting aside the settlement."[20] The settlement with the IRS was enforced.

Likewise, an oral settlement may be enforced even where one party thinks the negotiations are just "preliminary." The owner of the plaintiff in *County Line Nurseries & Landscaping, Inc. v. Glencoe Park Dist*. talked to the defendant's attorney outside the courtroom.[21] The plaintiff offered to settle for $17,500, to which the defendant's lawyer agreed pending confirmation from his client. The plaintiff and defendant's lawyer shook hands. The plaintiff later tried to get out of the settlement, saying that he did not believe that the conversation was a settlement agreement. The court still enforced the settlement, which the plaintiff's subjective belief did not invalidate.

Material terms are not agreed upon or are too indefinite

A settlement that lacks agreement on all material terms is another notorious zombie candidate.

SETTLEMENTS THAT ARE NOT PROPERLY DOCUMENTED ARE NOTORIOUS FOR RISING FROM THE DEAD.

What is a material term? *Academy Chicago Publishers v. Cheever* is the leading Illinois case defining a "material term."[22] The plaintiff sued to enforce a written, signed agreement with the widow of author John Cheever to publish a collection of the author's stories. The widow backed out of the deal and returned her advance. The trial court ruled for the publisher and interpreted the agreement. The appellate court affirmed but interpreted the agreement's terms somewhat differently. The publisher appealed.

The Illinois Supreme Court reversed, finding that the contract lacked "the definite and certain essential terms required for the formation of an enforceable contract."[23] A contract is sufficiently definite and certain, even if some terms are missing, if the court is able, under the proper rules of construction and equity, to ascertain what the parties have agreed to do. Essential terms were lacking in the Cheever contract, such as the number of stories or pages, who would decide what stories are included, and when the manuscript was due.

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14. *Beverly*, 817 F.3d at 334.
15. *Id.* at 335.
16. *Brownlee v Hospira, Inc.*, 2016 WL 9711035 (N.D. Ill. April 6, 2016).
17. *Id.* at *1.
18. *Brownlee*, 869 F.3d at 509.
19. *Billhartz v. Commissioner of IRS*, 794 F.3d 794 (7th Cir. 2015).
20. *Id.* at 799.
21. *County Line Nurseries & Landscaping, Inc. v. Glencoe Park District*, 2015 IL App (1st) 143776.
22. *Academy Chicago Publishers v. Cheever*, 144 Ill. 2d 24 (1991).
23. *Id.* at 29.

Wilson v. Wilson demonstrates that even if the parties disagree, it's enough if the court can discern the agreement.[24] In that case, the beneficiary of a trust sued the trustees claiming breach of fiduciary duty. The parties worked out a tentative agreement outside of court and then had a pretrial conference with the district judge. At the conclusion, the judge stated the terms on the record, including that the plaintiff would be forever barred from bringing any claims against the defendants for any acts that gave rise to the lawsuit. The lawyers offered to draft a written document, but the court said, "[T]here is an agreement and nothing needs to be signed."[25] (It's important to note that settlement conferences in court are not subject to the Illinois Uniform Mediation Act.[26])

Although the parties were unable to draft a mutually agreeable document, and disputed whether there would be mutual releases or covenants not to sue, the district judge still enforced the settlement and barred the plaintiff from bringing any other claims against the defendants that had accrued on or before the date of the pretrial conference.

The defendants appealed. The court of appeals affirmed, holding that the district judge's recitation of the terms on the record to which all parties assented was sufficient evidence of a contract. (The court distinguished *U.S. v. Orr Construction Co.*, in which the court refused to enforce a settlement agreement that said the parties were to exchange "proper legal releases,"[27] a phrase the court of appeals described as "hopelessly indefinite."[28])

The best practice, of course, is to make all of the material terms so clear that there is no need to find out whether the court can interpret them.

Bonus practitioner's tip: Before mediation begins, discuss all potential terms of a settlement agreement with your client and, if possible, exchange a draft settlement agreement with opposing counsel.

Conclusion

Relatively few cases are tried to judgment. Most settle. When the clients have agreed to a settlement, the lawyers are responsible for making sure the dispute does not arise from the dead. They must identify the material terms that the parties must agree to, clearly express the agreement on those terms, and decide whether the settlement will be conditioned on a detailed future agreement rather than a memorandum of understanding. Zombie settlements can be avoided by finalizing a settlement with the care it deserves. IBJ

24. *Wilson v. Wilson*, 46 F.3d 660 (7th Cir. 1995).
25. *Id.* at 662.
26. 710 ILCS 35/3(b)(3).
27. *United States v. Orr Construction Co.*, 560 F.2d 765 (7th Cir. 1977).
28. *Wilson*, 46 F.3d at 666.