1984

Motions to Enforce Settlements: An Important Procedural Tool

Jeffrey W. Stempel
University of Nevada, Las Vegas -- William S. Boyd School of Law

ARTICLES

Motions to Enforce Settlements: An Important Procedural Tool

DAVID F. HERR*
ROGER S. HAYDOCK**
JEFFREY W. STEMPEL***

It is widely accepted that over 90 percent of today's litigation terminates in settlement. Most often the parties, satisfied if not enthralled with their bargain, fulfill the terms of the settlement and retreat from the battle to their tents, carrying on their lives. Occasionally, one party fails to fulfill part of the bargain. Breakdowns in settlement are comparatively rare, but do occur. One party may belatedly recognize a bad bargain, and balk at consummating the settlement. Another party may be unable to comply with agreed upon settlement terms because of lack of money. Occasionally, outside circumstances may change after the settlement is reached, adversely affecting the value or cost of settlement for a party. For example, the 3,000 shares of XYZ Oil Co. stock accepted in settlement plummet in value upon expropriation of the company's Persian Gulf assets. Sometimes, the breaching party is simply unscrupulous.

 This article is derived in substantial part from a section of the authors' book *Motion Practice*, recently published by Little, Brown & Company, Boston.

*B.A. (1974), M.B.A. (1977), University of Colorado; J.D. cum laude (1978) William Mitchell College of Law. Mr. Herr is a partner in the Minneapolis law firm of Maslon, Edelman, Borman & Brand, and is Adjunct Professor of Law at William Mitchell College of Law.

**B.A. (1966) St. Mary's College; J.D. (1969), DePaul University College of Law. Mr. Haydock is Professor of Law at William Mitchell College of Law and a Trainer with the National Institute of Trial Advocacy.

***B.A. summa cum laude (1977) University of Minnesota; J.D. (1981) Yale Law School. Mr. Stempel is associated with the Minneapolis law firm of Maslon, Edelman, Borman & Brand, and was formerly law clerk to the Honorable Raymond J. Broderick, United States District Judge for the Eastern District of Pennsylvania.

Three available remedies are:

1. Amendment or supplementation of the pleadings to allege the settlement agreement as an executory accord;
2. Initiation of a separate action for breach of the settlement agreement; and
3. A motion to enforce settlement.

The third remedy is the most common and is usually the most cost-effective. Amending the pleadings and commencing a separate action both require significant delay, and require the parties to expend additional resources. A motion to enforce the settlement may be an effective tool to accomplish the intended result of the settlement agreement.

Judges frequently show greater disdain for motions to enforce settlement than for other types of motions. In reviewing the enforceability of a written settlement agreement, the judge may have to find or imply that one party is dishonest. In reviewing oral settlement agreements between counsel, a judge may have to determine whether an attorney was authorized by the client to settle, whether an attorney properly represented and counseled a client, whether an attorney exceeded the authorization of the client, or whether one party deceived the other party or has attempted to deceive the court. Despite the unpleasantness of airing a breach of settlement, the court will probably be favorably disposed to the party who can establish that a settlement occurred and was breached. Consequently, the reported cases enforce settlement far more often than they find an absence of settlement. One surmises that the judicial pain of implying dishonesty of a party or ultra vires action by counsel is outweighed by the joy of removing a case from the docket.

Jurisdiction

A motion to enforce settlement should be made before the court which had jurisdiction over the original claim. Amendment of the pleadings to seek enforcement of a settlement is unnecessary and superfluous because a motion will accomplish the same result. The commencement of a new action may only be necessary in a situation in which the original court no longer has personal or subject matter jurisdiction over the underlying action and settlement. The new action would begin with a short complaint alleging the existence of the settlement agreement and a cause of action for breach. The requested relief may be

either specific performance or reinstatement of the original claim. The latter would subsequently require reinitiating the original claim in the new forum if the complaint for breach of settlement is granted. The movant's best tactic will be a simple motion to enforce directed to the original judge, a judge who thought the case had settled some time ago. This judge, who may have even entered an order of dismissal because of the settlement and instructed the calendar clerk to close the file, will want to resolve the matter expeditiously. The original court also knows the procedural background of the case, and may even have been involved in the settlement discussions upon which the settlement was based.

Motion to Vacate

Because the court may have entered an order dismissing the case or placing it in the inactive file, the movant seeking to enforce settlement may first need to make a motion to vacate the earlier action, which removed the case from the calendar, and to reinstate the action. This can be accomplished either through a short motion filed in advance of the motion to enforce or in a request for reinstatement made as part of the underlying motion to enforce. Where the movant makes a separate and preceding motion to vacate and reinstate, the movant should file a notice of motion, motion, proposed order, memorandum and affidavit setting forth the facts which justify reinstatement.[1] Because the same supporting documents will be required for a motion to enforce settlement and because even the contents of the documents will be identical in part, it is easier and probably a better practice to submit a combined motion to reinstate and enforce settlement. If this is done, a single notice of motion or motions, affidavit or affidavits and memorandum need be filed. It is probably desirable to submit separate proposed orders even if a combined motion is filed. One advantage of specifically seeking both reinstatement of the action and enforcement of the settlement is the flexibility it allows the court. In the event that the court denies the motion to enforce, the movant will nonetheless want to reopen the original action as soon as possible to avoid problems with the statute of limitations, res judicata,

1. A detailed discussion of these procedural requirements is beyond the scope of this article. Generally, however, the formal requirements of a motion are contained in FED. R. CIV. P. 7, 10 and 11. In addition to the requirements of the rules of civil procedure, many district courts have adopted local rules which create more stringent requirements for motions.

collateral estoppel and similar doctrines. A separate proposed order or reinstatement makes this possible.

Often, an order dismissing the action or placing it in the "suspense" file will be entered upon the court's learning of the settlement. These orders are routinely entered by some judges without the request of the parties, or even despite requests that they not be entered. Such an order will normally specifically reserve to the court the possibility of reopening the matter if the settlement is not achieved or if other good cause is shown. If the order mentions the possible vacation of dismissal or suspense and of reinstatement, it should not be difficult to establish entitlement to relief if the settlement is breached. The memorandum supporting reinstatement in this case may be terse, and the factual support in the affidavits may be brief.

If the order dismissing the action or placing it in the suspense file is silent about reinstatement, some discussion about the court's inherent power to reopen the matter on the basis of its inherent authority, the authority granted by Fed. R. Civ. P. 60(b), and the interests of justice is in order. Failure to comply with the terms of a settlement agreement constitutes misconduct of an adverse party within the meaning of Fed. R. Civ. P. 60(b)(3).[2] That rule permits the court to relieve a party of the effect of an order or judgment upon a showing of fraud, misrepresentation or other misconduct. It would appear that the breach of settlement also qualifies as "any other reason justifying relief" from the order under Fed. R. Civ. P. 60(b)(6).[3] By its terms, Rule 60(b) applies only where a party seeks relief from a judgment or final order. Depending upon the wording of the order in question, the movant seeking to enforce settlement may be able to argue that the order of dismissal or suspense is not final within the meaning of Rule 60, especially where the order was conditioned upon a settlement that has not been performed. Rule 60 applies only to final orders because of the court's clear authority to change, modify, reverse or vacate any interlocutory order. In the case of an interlocutory order, no further authority from the rules is required.

Enforcement Procedure

The motion to enforce, whether alone or in combination with a motion to reopen, should contain the usual package of motion

2. 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2860 (1970) [hereinafter WRIGHT & MILLER].

3. WRIGHT & MILLER, *supra* note 2, at § 2864.

papers—notice, motion, memorandum in support, proposed order and supporting affidavit or affidavits. Depending upon the jurisdiction, the proposed order may be unnecessary. Some judges may frown on submission of proposed orders because it seems presumptuous. Accordingly, it is important to determine the local practice and custom before submitting proposed orders. While courts will not literally "weigh" the evidence of settlement on a scale, the movant should try to include the affidavits of the party and any individuals negotiating or witnessing the settlement. Other corroborating evidence by affidavit, in reasonable number, is also helpful. In determining whether settlement exists, the court will usually have to weigh evidence of credibility. Proper and complete use of affidavits will discourage the opposing party from denying the obvious or fabricating an explanation. Where the affidavits can eliminate factual disputes, the hearing on the motion is less likely to produce conflicting oral testimony and is more likely to produce enforcement of the settlement according to its true terms.

The movant should normally schedule a hearing on the motion to enforce. Preferably, the movant obtains the hearing date and time from the court prior to serving the motion. Where the court does not regularly conduct a motion day, the court may be reluctant to schedule a hearing prior to service and filing of the motion. In that event, the movant should press for a hearing immediately after the motion is made.

At the hearing, the movant should arrive with the witnesses and exhibits necessary to prove the case if the motion is contested. In effect, the hearing on the motion is a mini-trial on a breach of contract claim, the contract being the settlement agreement. In some instances it will be obvious that the opposing party has few or no factual contentions in opposition to the enforcement motion. In these situations, the opposing party will either interpose a legal argument based on the relatively uncontested facts (e.g., lack of actual or implied authority of counsel) or will not contest the motion and will chalk one up to delay and anticipated judgment dodging.

The prudent movant will view these situations on a sliding scale. Where the facts are in hot dispute, the moving lawyer should come to the enforcement hearing as if to a trial or hearing on a motion for a preliminary injunction. This level of preparation should be limited only by the constraints of the availability of probative evidence. Where the facts at issue are relatively minor, where the opposition to the motion is essentially legal, or where

the delaying, breaching party is not likely to contest the motion vigorously, the client's resources should be preserved. But, as always, erring on the side of caution and over-preparation is advisable.

Depending on the nature of the alleged settlement, either affidavits, witnesses, documents or exhibits should accompany the motion for enforcement. For example, where the settlement provided that the opposing party would pay attorney's fees, at least a portion of one affidavit should aver this fact and set forth the amount of fees requested. The request for fees should be explained, including dates, description of services rendered, time expended and extension at a normal billing rate. The billing rate should be established to be reasonable under the prevailing standards of the legal community. This approach is consistent with the "lodestar" approach to determining fees to be awarded in actions under certain statutes and in class actions.[4] Where specific performance or a confession of judgment is part of the settlement, these too should be set forth in the relief requested in the motion and should be supported with affidavits and proof at a hearing. If the successful movant expects the opposing party to take irreparably harmful action to avoid an order enforcing the settlement, the movant should request appropriate injunctive relief and be prepared to prove the case for the injunction at the main hearing.

The Law of Settlement

As previously noted, the law favors settlements.[5] Settlement promotes judicial economy, saving valuable court time as well as avoiding delay for the parties, while removing the uncertainty inherent in trial, particularly jury trial. Settlement also conserves the resources of the parties, and therefore society, that would otherwise be spent on court costs, legal fees and other expenses.[6] There is also a widely held view that settlements, being by definition satisfactory to the parties, are more effective at removing discord within our social and commercial fabric, and are,

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4. *See, e.g.,* Hensley v. Eckerhart, ___U.S. ___, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983) (outlining method for calculation of fees in civil rights class actions).

v. Director, Office of Workers' Compensation, 519 F.2d 536 (7th Cir. 1975), *cert. denied,* 424 U.S. 965 (1976).

6. *See* Autera v. Robinson, 419 F.2d 1197 (D.C. Cir. 1969).

therefore, more desirable from a societal view. Consequently, the law of settlement has established relatively low barriers to proving settlement.

In order to be enforceable, a settlement need not be in writing.[7] To prove a settlement, a party must establish the elements of an enforceable contract by showing the mutual assent of the parties to the terms of the purported settlement, and the consideration supporting it.[8] The agreement can be oral and "informal."[9] Once the moving party has established a settlement agreement, the burden falls on the opposing party to prove facts which would invalidate the settlement. Otherwise, the breaching party is bound by the settlement.[10]

Although settlement is essentially a contract between the parties and proof of the settlement resembles proof of contract (e.g., offer, acceptance, consideration), most courts have held that the proper contract law to be applied varies with the case. In determining the applicable law in construing settlements, the court will usually examine the underlying causes of action. Where the underlying claim is federal or "implicates the operation of a network of federal statutes," the court should apply the federal common law of contracts.[11] Thus, federal law would apply to settlements of disputed claims in civil rights, patent, trademark, copyright and antitrust actions.[12]

Where the underlying cause of action is based on state law, the court will apply the contract law of the state with the closest nexus to the settlement.[13] This will usually be the state whose law would supply the rule of decision in the underlying cause of action.[14] However, in certain cases, choice of law principles would support the application of the law of a non-forum state.

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7. *See* Green v. John H. Lewis & Co., 436 F.2d 389 (3d Cir. 1970); Bergstrom v. Sears, Roebuck & Co., 532 F. Supp. 923, 932 (D. Minn. 1982).

8. *See* Russell v. United States, 320 F.2d 920 (Ct. Cl. 1963).

9. *See* Main Line Theatres, Inc. v. Paramount Film Distributing Corp., 298 F.2d 801 (3d Cir.), *cert. denied,* 370 U.S. 939 (1962).

10. *See* Strange v. Gulf & S. Am. S.S. Co., 495 F.2d 1235 (5th Cir. 1974).

11. *See* Bergstrom v. Sears, Roebuck & Co., 532 F. Supp. 923, 931 (D. Minn. 1982). *See generally* Note, *Displacement of State Rules of Decision in Construing Releases of Federal Claims,* 63 CORNELL L. REV. 339 (1978).

12. *See* Fulgence v. J. Ray McDermott & Co., 662 F.2d 1207, 1209 (5th Cir. 1981).

13. *See* Roberts v. Browning, 610 F.2d 528, 533 (8th Cir. 1979); Okono v. Union Oil, 519 F. Supp. 372 (C.D. Cal. 1981).

14. *Id.*

Usually, however, the forum state will be the location where settlement is negotiated, reached and memorialized. In such cases, forum state contract law should usually be applied even if it would not have been applied to the original underlying claim.

A recent Fourth Circuit case, *Gamewell Manufacturing, Inc. v. HVAC Supply, Inc.*,[15] stated that federal courts should apply a federal common law of contracts in construing settlement disputes with respect to federal litigation already in progress because such disputes "implicate federal procedural interests distinct from the underlying substantive interests of the parties."[16] The Fourth Circuit essentially views settlement law as purely procedural and not within the substantive law arm of the *Erie* doctrine.[17] Although this approach would presumably be more consistent than other choice of law methods, the *Gamewell* decision is a trailblazer, and it is not yet clear whether it will be followed.

Showing breach of the settlement, once settlement has been established, should be relatively straightforward. The major controversy in a motion to enforce usually concerns the authority of counsel (or some other agent of a party) to agree to the settlement terms and bind the party. A party in breach of a settlement seldom questions its terms, at least not if the settlement terms have been memorialized in some writing. More commonly, the party breaching the settlement argues that the attorney made the agreement without the party's authority. Usually that ultra vires agent is the attorney for the party, or was formerly attorney for the party.

Most jurisdictions require that attorneys compromise and settle claims only with the actual authority of their clients.[18] The Code of Professional Responsibility and the Model Rules of Professional Conduct mandate that an attorney obtain the approval of a client before agreeing to a settlement.[19] This authority may be express because of the words of the party to counsel or implied because of the actions of the party and counsel.[20] Apparent authority,

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15. 715 F.2d 112 (4th Cir. 1983).

16. *Id.* at 115.

17. *See* Erie R. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).

18. *See, e.g.*, Aetna Life & Casualty v. Anderson, 310 N.W.2d 91, 95 (Minn. 1981).

19. *Compare* ABA Code of Professional Responsibility EC 7-7, EC 7-8 & DR 7-101(A)(3) *with* ABA Model Rules of Professional Conduct 1.2.

20. *See* Carroll v. Pratt, 247 Minn. 198, 76 N.W.2d 693, 698 (1956).

however, is not enough in most jurisdictions, even though apparent authority is binding in most contexts other than settlement.[21] In some states, an exception to this rule arises when the settlement is reached by counsel in the presence of the court.[22] The party's behavior after settlement may prove the existence of implied actual authority of counsel to effect a binding settlement or may establish ratification of the settlement by the party.[23] Similarly, a representative sent to a pre-trial conference before a judge requiring such persons to be clothed with full settlement authority, may be found, despite his or her actual authority, to have sufficient authority to bind the party.

The party opposing a motion to enforce settlement has a relatively simple objective—to show that no settlement was ever reached or agreed to. That party can show this by refuting the moving party's proof of settlement or by showing that counsel or another agent who agreed to the settlement lacked authority to settle.

Once settlement is established, the court will force the party to elect a remedy, and either seek specific performance of the terms of the settlement or reinstate the original claim.[24] The preferred route will vary according to the terms of the settlement, the likelihood of success in the underlying action, the time and expense required for trial, and the resources of the parties.

Conclusion

A motion to enforce settlement presents a powerful tool for effecting the final resolution of an action when one party reneges on a settlement agreement. Although it is unfortunate that resort to such a remedy is necessary, every litigator needs to be aware of its availability and knowledgeable in its use if needed.

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21. *See* Ghostley v. Hetland, 295 Minn. 376, 204 N.W.2d 821, 823 (1973).

22. *See, e.g.,* Minn. Stat. § 481.08 (1982).

23. *See* Fingerhut Mfg. Co. v. Mack Trucks, Inc., 267 Minn. 201, 125 N.W.2d 734 (1964); Aetna Life & Casualty v. Anderson, 310 N.W.2d 91, 95 (Minn. 1981).

24. *See* Dankese v. Defense Logistics Agency, 693 F.2d 13 (1st Cir. 1982); Village of Kaktovik v. Watt, 689 F.2d 222, 223 (D.C. Cir. 1982).