Legal and Practical Issues Impacting Settlement ADR Services, Inc. 2022 MCLE Day Michael G. Balmages ADR Services, Inc. mbalmages@adrservices.com 714-852-2773

Barriers to Settlement



SOME REASONS WHY PLAINTIFFS AND/OR THEIR COUNSEL DO NOT WANT TO SETTLE

We can win this.I don't want to discount my claim.We can't let that jerk get away with this.I want to make sure he/she never does this to anyone else ever again.We're in no hurry, we can wait it out.We must go to trial to maintain our credibility.It's a matter of principle!

SOME REASONS WHY DEFENDANTS AND/OR THEIR COUNSEL DO NOT WANT TO SETTLE

The time value of money.

The plaintiff does not have the staying power.

We can defense this.

We should set an example, otherwise everyone will sue us.

I'd rather pay my lawyer than pay that jerk anything.

My associate needs trial experience.

It's a matter of principle!

TROUBLE FROM BOTH SIDES:

- The lawyers' frequent failure to convey to their clients just how expensive and painful litigation really is.
- Lawyer bravado, or the lawyer's inability to admit that the other side might have a good case or a good defense.



The Room Where it Happens

The hardest person to settle with is the person who is not in the room:

- Significant other (husband, wife, best friend, lover)
- Boss
- Adjuster
- Partner
- Cousin/Friend Who is a Lawyer
- The Trial Lawyer



OCSC Local Rule 316 -MSCs

- ... the attorney who will try the case must be present or ... someone completely familiar with the case and who has full authority ...
- All plaintiffs ... must be personally present. An appearance by an attorney claiming to have settlement authority does not satisfy ...
- All defendants ... must be personally present, unless an insurance carrier acknowledges an unqualified and unlimited duty to indemnify ... An appearance by an attorney claiming to have settlement authority does not satisfy ...
- If the defendant ... is an entity ... all persons whose consent ... is necessary must be present ...
- Each insurance carrier which acknowledges a duty to indemnify ... and each insurance carrier as to which any party contends there is a duty to indemnify ... must have a representative present ... who has the unlimited and unconditional authority to enter into a settlement.

LACSC Local Rule 325 (d) – Settlement Conferences

- (1) Attendance. ... all persons whose consent is required to effect a binding settlement must be personally present ... including ...: (1) the parties ...; (2) an authorized representative of any insurance company which has coverage, or has coverage at issue, in the case; and (3) an authorized representative of a corporation or other business or government entity which is a party. These persons must have full authority to negotiate and make decisions on settlement of the case. ...
- (3) Familiarity with Case. Counsel must attend the settlement conference and be familiar with the pertinent available evidence involving both liability and damages. Counsel must be prepared to discuss the case in depth and, except for good cause shown, must be the person who will try the case.
- (4) Liens. Plaintiff's counsel must ascertain whether there are liens which bear on a potential settlement and, if so, request the claimants or their representatives to attend the settlement conference or be available for telephone communication during the conference. ...

California Rules of Court Rule 3.1380. Mandatory settlement conferences

 Trial counsel, parties, and persons with full authority to settle the case must personally attend If any consent to settle is required for any reason, the party with that consensual authority must be personally present ...

USDC CD CAL General Order No. 11-10 -ADR

- 8.5 Each party shall appear at the mediation in person or by a representative with final authority to settle the case... . A corporation or other ... entity satisfies this attendance requirement if represented by a person who has final settlement authority and who is knowledgeable about the facts of the case.
- Representatives of insurers with decisionmaking authority are required to attend ...
- 8.6 Each party shall be represented at the mediation by the attorney who is expected to try the case

The Hamlet Dilemma

"And thus the native hue of resolution Is sicklied o'er with the pale cast of thought"

Paralysis by Analysis: Over thinking mediation strategy



Over-Thinking

- To counter or not to counter
- I don't want to signal ...
- We're moving up too fast
- Last, best, and final
- I don't want you to tell them ... because ...
- I don't want them to think we'd go there
- I don't want to bid against myself



Over-Thinking

- They're not here in good faith
- That's higher than their premediation demand
- That's lower than their premediation offer
- We've come down \$30,000 and they have only gone up \$1,500
- We've doubled our offer (from \$2,500 to \$5,000), and they've only come down 10%
- We don't want to waste your time



Barriers to Settlement

ATTORNEY'S FEES

3 Constituencies

- Plaintiff
- Counsel
- Costs/Liens
- Defendant: If you're going to settle, you've got to pay money to these 3 constituencies

3 Irrelevancies(?)

- Fairness
- Justice
- Equity
- Maybe also the facts and the law.
- "SMARTNESS" is the goal

More To Talk About

Bottom Lines & Top Lines

Last, Best, & Final

Money (Cash) Talks – Bag of Money

No Good Deed Goes Unpunished

You're On Your Own: Current Employees Will NOT support you; neither will exemployees

The "dance" – The Process Works

Confidentiality

Liquated Damages

Non-Disparagement

Liquidated Damages

MSJ Pending

Mediation Briefs

More To Talk About

Mediation Briefs

No Plaintiff Demand; No Chance for Defendant/Insurer to Evaluate

"New" Evidence First Presented at Mediation

Liens

Lawyer Not Prepared For Mediation - No Strategy/Target

Client Not Prepared For Mediation - Doesn't Know How It Works

Blackmail/Extortionary Threat

B & P 17200

PAGA Claims

THE MEDIATOR'S PROPOSAL

- "I define the mediator's proposal as the exact point in time where the mediator ran out of skills."
- "Some mediators use it as a tool of selfimportance in a way that says, 'Here, I'll resolve this for you.'"
- "Could it be that if more mediators possessed ... a wider variety of skills and techniques, then the mediator's proposal might quietly slip away?"
- "Unfortunately, I think many counsel looking for a mediator's proposal are more lazy than savvy."



Settlement amount of \$20,000, with stip to judgment for \$60,000 upon failure to pay the \$20,000; Could be a problem • Greentree Fin. Grp., Inc. v. Execute Sports, Inc., 163 Cal. App. 4th 495 (2008):

"The stipulated judgment of \$61,232.50 would result in a penalty assessment of approximately \$40,000 more than the total \$20,000 due under the stipulation. A late payment penalty fee of approximately \$40,000 bears no reasonable relationship to any actual damages that might flow from ESI's failure to make the first installment payment. ... The judgment must therefore be reversed."

• But see, Jade Fashion & Co. v. Harkham Indus., Inc., 229 Cal. App. 4th 635, 651 (2014):

As the Supreme Court described in Ridgley, " '[t]he characteristic feature of a penalty is its lack of proportional relation to the damages which may actually flow from failure to perform under a contract. [Citations.]' " ...)The contract at issue here expressly obligated Harkham Industries to pay off the entirety of the original debt in weekly installments payments and entitled it to a discount from its final payment only if each installment was timely paid. Because Harkham Industries failed to fully perform under the Agreement by paying five installments late, it remained liable to Jade Fashion for the full amount of its \$341,628.77 debt. As a matter of law, the \$17,500 discount provision was not an unenforceable penalty or forfeiture."

CCP § 664.6. Entry of judgment pursuant to terms of stipulation for settlement

- (a) If parties to pending litigation stipulate, in a writing signed by the parties outside of the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement.
- (b) For purposes of this section, a writing is signed by a party if it is signed by any of the following:
- (1) The party.
- (2) An attorney who represents the party.
- (3) If the party is an insurer, an agent who is authorized in writing by the insurer to sign on the insurer's behalf. ...
- (d) In addition to any available civil remedies, an attorney who signs a writing on behalf of a party pursuant to subdivision (b) without the party's express authorization shall, absent good cause, be subject to professional discipline.

Prohibited Settlement Terms

- Code Civ. Proc. 1001
 - Agreement may not prevent the disclosure of factual information related to:
 - a claim of sexual assault
 - an act of sexual harassment
 - an act of workplace harassment or discrimination based on sex, or failure to prevent an act of workplace harassment or discrimination based on sex or an act of retaliation against a person for reporting harassment or discrimination based on sex,

Prohibited Settlement Terms

- Code Civ. Proc. 1002.5
 - An agreement to settle an employment dispute shall not contain a provision ... restricting a settling party that is an aggrieved person from obtaining future employment with the employer against which the aggrieved person has filed a claim ...
- Civil Code 1670.11
 - An agreement that <u>waives a party's right to</u> <u>testify in an administrative, legislative, or</u> <u>judicial proceeding</u> concerning alleged criminal conduct or alleged sexual harassment ... is <u>void</u> <u>and unenforceable</u>

Mediator's Keys to Success

RapportPersistence

Legal and Practical Issues Impacting Settlement

Michael G. Balmages ADR Services, Inc. mbalmages@adrservices.com 714-852-2773 Case Manager: Megan Nomura megan@adrservices.com 949-863-9800