



To enforce or not to enforce

If that's the question about a settlement, the answer the court gives can vary



Wondering whether a settlement you've drawn up is enforceable? Consider this scenario: a logistics services provider is sued by one of its customers for negligence and breach of contract with respect to transportation and logistics services the company provided. The 4PL offers to settle the dispute; the customer accepts the offer and is delighted with the deal. But the 4PL has second thoughts and wants to undo the settlement and avoid having to comply with its terms.

Can the provider do that? Has a binding settlement not been drawn up? And will the court enforce the settlement?

The answer to all these questions is the same: it depends. The factual background and context of the settlement agreement as well as the pertinent principles of law—including those relating to contract law, the law of agency, the rules of equity, and rules of procedure—must be understood before reaching any conclusions as to whether there is a binding and enforceable settlement in any given case. Some of these principles are summarized below.

Settlements are special

An agreement that is an explicit settlement of litigation or a compromise of a dispute is a special class of contracts that will generally be enforced by the courts. Since it is in everyone's interest to conclude the dispute by the agreement made by the parties, the court's policy is to strongly favour enforcement of the settlement.

Settlements are also contracts

A settlement is a contract formed when the parties agree to the essential terms. Once those terms have been agreed to—freely, voluntarily, and deliberately, well knowing their nature and what effect they will have—contract law requires that the parties be held to what they have promised and to their negotiated bargains.

Strict rules for exceptions

A party looking to set aside a settlement must convince a court with strong evidence that valid grounds exist for doing so. A settlement agreement, like other contracts, can be set aside on several grounds, including misrepresentation, fraud, duress, mistake of fact, lack of capacity, or if the agreement is unconscionable. But the party claiming those grounds must make it clear through evidence what the assertions are based on.

The courts require full compliance with the strict rules that govern when exceptions will be allowed to invalidate, or refuse to enforce, a settlement. The court will refuse bald assertions by the party who wants to set aside the agreement if those assertions don't meet any of the grounds listed above. That party must therefore support its allegations with evidence that meets the very

high threshold set for parties asking the court to set aside a settlement. And frequently, since those parties do not meet the strict requirements to succeed on their claims, they fail in their attempt to have the court set aside their settlement.

Lessons Learned

To achieve a binding and enforceable settlement you have to do it right or don't settle at all. To minimize the risk of the other side successfully challenging the settlement and therefore costing you money, consider the following:

- Don't assume the settlement agreement can't or won't be challenged by the other side; and
- Don't settle unless you understand the full nature and effect of the terms of settlement.

Also, it's best to:

- Review the nature and effect of the proposed settlement;
- Properly detail, confirm and record the terms and conditions of the settlement; and
- Clearly and concisely draft the settlement documents, including formal minutes of settlement, an indemnification agreement, a release, a confidentiality agreement and a court order (as are appropriate in the circumstances) especially if minors or other special parties are involved.

Challenges to settlement agreements arise frequently. It is better to read about these cases in the media and law reports when they involve others, rather than having to deal with them yourself. To paraphrase an ancient proverb: a wise person should learn from the mistakes made by others, and not from his or her own mistakes.

With the exercise of some due diligence we can maximize opportunities for achieving binding and enforceable settlements. We can minimize the risk of the other side successfully challenging the settlement and having it set aside by the Court. **MM&D**

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