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Ensuring Enforcement of the Eleventh-Hour Mediation Deal

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There is a strong public policy in the U.S. favoring the settlement of disputes using alternative-dispute-resolution tools such as mediation because mediating disputes before an impartial mediator allows for the confidential and expedient resolution of disputes and avoids costly, time-consuming and uncertain in-court litigation. Not surprisingly, mediation is one tool that bankruptcy practitioners and tribunals increasingly avail themselves of to facilitate settlement of bankruptcy litigation.

That being said, the mediation process is not without its pitfalls. For example, parties may mediate a dispute for hours and then at the eleventh hour reach a resolution regarding the disputed matter. Although the parties agree to settle the dispute at the eleventh hour, they may in haste only put together a handwritten agreement or term sheet to acknowledge this agreement. Further, the parties may indicate that they will later draft more comprehensive settlement documents. Before these additional settlement documents are drafted, one of the parties to the agreement may default or altogether renege on the deal. If practitioners are not fully versed in the law governing enforcement of settlement agreements, they may fall victim to the unraveling of a mediation deal that was thought to be binding. The article discusses general federal, Texas, New York and Delaware law on the issue, as well as select cases highlighting how eleventh-hour mediation deals might be challenged, and provides best practices for ensuring that eleventh-hour mediation deals withstand challenge in court.

Select Laws Regarding Enforceability of Settlement Agreements

Federal Law

Parties must look to federal law in cases in which federal law determines the substantive rights and liabilities of the parties, such as federal anti-discrimination or trademark infringement.[2] Under federal common law, both oral and written settlement agreements are enforceable if the parties have expressed mutual assent to all material terms, usually in the form of an offer and acceptance, and a present intent to be bound.[3] Although federal courts may enforce oral settlement agreements, local state rules (which require a written agreement) may conflict with this federal rule and necessitate further analysis by federal courts with regard to the enforcement.[4]

Texas Law

If federal substantive law does not govern a dispute, then generally, state contract law governs the enforcement of a settlement agreement disposing of litigation.[5] In Texas, mediated settlements, just like any other agreement, are valid and enforceable if they meet the formation requirements under the principles of general contract law.[6] A binding settlement is effectuated where the parties agree, with sufficient detail, on all essential (material) terms of the bargain.[7] The settlement is binding, even if some nonessential matters are left open for future negotiation.[8]

"Essential terms" are all terms that the parties reasonably regard as "vitally important" to their bargain.[9] What is essential, vitally important, is deter-

1 This article represents the views of the author, and such views should not necessarily be imputed to Simmons Legal PLLC or its respective affiliates and clients.

2 *See, e.g., Mid-S Towing Co. v. Har-Win Inc.*, 733 F.2d 386, 389 (5th Cir. 1984).
3 *See, e.g., Chen v. Highland Capital Mgmt. LP*, C.A. No. 3:10-CV-1039-D, 2012 WL 5935602, at *2 (N.D. Tex. Nov. 27, 2012); *Lopez v. Kempthorne*, C.A. No. H-07-1534, 2010 WL 4639046, at *4 (S.D. Tex. Nov. 5, 2010); and *McNamara v. Tourneau Inc.*, 464 F. Supp. 2d 232 (S.D.N.Y. 2006).
4 *See, e.g., Jarowey II v. Camelot Entm't Grp. Inc.*, No. 11 Civ. 2611, 2012 WL 7785096, at *2 (S.D.N.Y. Sept. 10, 2012) (discussing conflict between Second Circuit law and N.Y. CPLR § 2104).
5 *See, e.g., Ramos v. Inversiones Pelican SA (In re Ramos)*, Bankr. No. 11-11361-BKC-AJC and Adv. Pro. No. 11-3127-BKC-AJC-A, 2012 WL 3309699, at *2 (Bankr. S.D. Fla. Aug. 13, 2012).
6 *See, e.g., Old Republic Ins. Co. v. Fuller*, 919 S.W.2d 726, 728 (Tex. App. 1996).
7 *See, e.g., T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 221 (Tex. 1992).
8 *See, e.g., Scott v. Ingle Bros. Pac. Inc.*, 489 S.W.2d 554, 555 (Tex. 1972).
9 *See, e.g., Gen. Metal Fabricating Corp. v. Stergiou*, 438 S.W.3d 737, 744 (Tex. App. 2014) (citations omitted).

mined on a case-by-case basis and depends on the nature of the agreement. For example, a contract to loan money must include the loan amount, maturity date, interest rate and repayment terms.[10] Further, every settlement agreement should sufficiently address payment terms, release of claims, the present intent to be bound by the terms of the agreement, and that no condition precedent exists to formation.[11]

Under the Texas Alternative Dispute Resolution Statute, "If the parties reach a settlement and execute a written agreement disposing of the dispute, the agreement is enforceable in the same manner as any other written contract."[12] Further, pursuant to Rule 11 of the Texas Rules of Civil Procedure, a court may only enforce a settlement agreement if "it be in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record."[13]

Therefore, where there is a written agreement resulting from mediation in which "a party has knowingly and voluntarily agreed to settle his claims and no change of circumstances warrants repudiation of the agreement, the courts will enforce the settlement agreement."[14] However, in suits involving marital property or affecting the parent/child relationship, the Texas Family Code provides that a mediated settlement agreement is only enforceable if it conspicuously provides that it is not subject to revocation and is signed by all parties, including attorneys present at the mediation.[15]

New York Law

New York law is akin to Texas law. In New York, a settlement is enforceable if there is mutual assent regarding all material terms (though non-material terms are left open), as well as an expression of a present intent to be bound by the agreement.[16] In addition, § 2104 of the New York Civil Practice Law and Rules provides that a settlement agreement is only binding and enforceable if it is an executed writing signed by the parties to be bound, made in open court on the record, or reduced to the form of an order and entered.[17]

Delaware Law

Under Delaware law, a binding agreement is generally formed if all parties demonstrate, on an objective basis, mutual assent to all essential terms.[18] Further, an attorney participating in a mediation may only bind a client if the attorney has the "actual authority from his client to reach a settlement agreement on the client's behalf."[19]

In addition, some courts in Delaware, like courts in many other jurisdictions, have local rules that govern the enforceability of settlement agreements. For example, Court of Chancery Rule 174 sets forth the enforceability requirements for mediated settlements, and in order for it to be binding, the settlement must be (1) in "writing and signed by the parties and the mediator," (2) "set for the terms of the resolution of the issues and the future responsibility of each party" and (3) filed by the mediator to become part of the court's record.[20]

Select Bankruptcy and Seventh Circuit Decisions

A few bankruptcy cases highlight the critical importance of following applicable law to ensure enforcement of eleventh-hour mediation deals. In June 2016, the U.S. Bankruptcy Court for the District of Idaho had to determine whether a term sheet resulting from a mediation was a binding and enforceable agreement.[21] The court concluded otherwise, given that the filed mediator's report noted that "an agreed course of action" remained to be completed and implemented, and because a material term had not been agreed upon.[22]

Similarly, in *In re Immunology Partners Inc.*,[23] the U.S. Bankruptcy Court for the District of Delaware found a memorandum of understanding that resulted from mediation to be nonbinding and unenforceable because a material term remained outstanding and unresolved. Likewise, the U.S. Bankruptcy Court for the District of New Jersey recently failed to enforce a settlement term sheet due to its lack of inclusion of all material terms.[24]

In contrast, the U.S. Bankruptcy Court for the Western District of Pennsylvania found that a handwritten mediated term sheet was enforceable because it included all material terms of the deal.[25] Further, in that same case, the mediator filed a certificate of completion with the court, noting that the parties had reached a settlement that would "'form the basis of a further settlement document and a related Motion."[26]

In March 2016, the Seventh Circuit Court of Appeals also had the occasion to decide whether a handwritten agreement resulting from a mediation was binding and enforceable on the settling parties. In *Beverly v. Abbott Laboratories*,[27] the plaintiff brought an action against Abbott Laboratories for federal employment discrimination and retaliation.

The parties used a private mediation session to try to resolve the dispute.[28] The day before mediation, Abbott's counsel circulated a six-page "template settlement agreement" to the plaintiff's counsel,[29] which included deadlines for review, response, and revocation or acceptance.[30] It also detailed the release, waiver requirements and payment protocol for the unspecified settlement amounts and mediation costs.[31]

The 14-hour mediation concluded with a deal evidenced by a handwritten agreement signed by all parties and their counsel.[32] The handwritten agreement provided that the plaintiff demanded $210,000 and mediation costs in exchange

10 *See T.O. Stanley Boot Co.*, 847 S.W.2d at 221; *Stergiou*, 438 S.W.3d at 744-50.
11 *See Padilla v. LaFrance*, 907 S.W.2d 454, 460-61 (Tex. 1995). *See also Lerer v. Lerer*, No. 05-02-00124-CV, 2002 WL 31656109, at * 2-4 (Tex. App. Nov. 26, 2002).
12 Tex. Civ. Prac. & Rem. Code Ann. § 154.071(a).
13 Tex. R. Civ. P. 11. *See also In re Allen*, No. 07-96-0195, 1996 WL 686895, at *2 (Tex. App. Nov. 27, 1996) (concluding that agreement reached in mediation was unenforceable because it was never filed with trial court and made part of record).
14 *See, e.g., Bell v. Schexnayder*, 36 F.3d 447, 449 (5th Cir. 1994) (quoting *Lyles v. Comm. Lovelace Motor Freight Inc.*, 684 F.2d 501 (7th Cir. 1982)).
15 Tex. Fam. Code Ann. §§ 6.602(b) and 153.0071(d).
16 *See, e.g., Trolman v. Trolman, Glaser & Lichtman PC*, 114 A.D.3d 617, 618 (N.Y. App. Div. 2014).
17 N.Y. CPLR § 2104.
18 *See, e.g., United Health Alliance LLC v. United Med. LLC*, C.A. No. 7710-VCP, 2013 WL 6383026, at *6 (Del. Ch. Nov. 27, 2013).
19 *See, e.g., Nagyiski v. Smick*, C.A. No. U507-08-0055, 2009 WL 5511159, at *2 (Del. Com. Pleas Dec. 9, 2009).
20 *See* Del. Ch. R. 174(g). *See also Capano v. State*, 832 A.2d 1250 (Del. 2003).
21 *See Zazzali v. Goldsmith (In re DBSI Inc.)*, Adv. No. 12-06056, 2016 WL 3619798, at *1 (Bankr. D. Idaho June 28, 2016).
22 *Id.*
23 No. 12-13259, 2013 WL 1385272, at *1 (Bankr. D. Del. April 3, 2013).
24 *See In re Singh*, No. 15-20348, Adv. Pro. Nos. 15-02159, 15-02085, 2016 WL 5845676, at *1 (Bankr. D.N.J. Oct. 5, 2016).
25 *In re BG Petroleum LLC*, 525 B.R. 260 (Bankr. W.D. Pa. 2015).
26 *Id.* at 271.
27 817 F.3d 328 (7th Cir. 2016).
28 *Id.* at 331.
29 *Id.*
30 *Id.*
31 *Id.*
32 *Id.* at 331-32.

for dismissal of the suit.[33] The offer remained open for five days.[34] The following day, through an email exchange, counsel for both parties acknowledged acceptance of the deal.[35] Counsel for Abbott forwarded a draft settlement agreement in that same email exchange,[36] but upon receipt, the plaintiff refused to sign.[37]

The Seventh Circuit concluded that the handwritten agreement, which was accepted by the plaintiff's counsel the day after the mediation, was binding and enforceable.[38] All parties and their counsel signed the agreement, evidencing an intent to be bound, and all material terms where included, even though formal terms such as "waiver," "release" and "covenant not to sue" were not included.[39] The court was satisfied that the agreement provided that the plaintiff "offered to 'resolve this matter' — *i.e.*, voluntarily dismiss her alienage and disability claims — if Abbott paid $210,000 and mediation costs" and the plaintiff's counsel accepted the deal the next day.[40]

Best Practices

As this discussion evidences, to ensure enforcement of eleventh-hour mediation deals, it is imperative that parties think through the pertinent issues to be settled and sufficiently prepare before the mediation takes place.

Begin with the End in Mind: Preparation of a "Working Draft" Agreement

Before the mediation, practitioners may consider preparing and circulating to all mediating parties and the mediator a "working draft" agreement that highlights the sections, which will include the terms they deem to be "material." In addition, prior to the mediation session, to the greatest extent possible, opposing parties should attempt to gain consensus regarding what terms are material. They should also assess whether a state or federal statute or procedural rule may outline the requirements for creating a binding enforceable settlement agreement.

All-Material-Terms Provision

As a further precaution, litigating parties should insist that the agreement signed at the eleventh hour contain a provision stating that all parties agree to the agreement, including all material terms. They may even consider specifically noting what terms are considered material or essential to the deal.

Authority to Bind

Each party to the dispute attending the mediation should make sure that the attorney or other party representative present has the actual authority to compromise and bind the settling litigant.

Intent-to-Be-Bound Provision

Practitioners should also include a provision in the settlement agreement that states that notwithstanding anything else contained in the agreement, including the fact that further documents evidencing and effectuating the deal will be drafted, the parties intend to immediately be bound by the eleventh-hour agreement and that the agreement is not contingent on or subject to the completion of the yet-to-be-drafted documents. That is, the contemplated formal documentation of the deal is not a condition precedent to formation of the contract. The provision should also note that the parties agree that the agreement is not subject to revocation.

Filing the Mediator's Report

In those jurisdictions that require the mediator to file a report with the court, the mediator should file a report as soon as possible noting that a settlement has been reached. Further, the report should specify that the settling parties have agreed that the settlement is immediately binding and enforceable, even though some non-material matters may have been left open for further negotiation.

Court-Approval Procedures

Last, but not least, to ensure enforcement, parties should be careful to follow local rules. For example, the U.S. Bankruptcy Court for the Eastern District of Michigan requires that a settlement agreement resulting from mediation be reduced to writing and a Rule 9019 motion seeking approval of the agreement be filed with the court no later than 14 days after full execution of the agreement.[41] abi

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33 *Id.* at 332.
34 *Id.*
35 *Id.*
36 *Id.*
37 *Id.*
38 *Id.* at 333.
39 *Id.* at 333-36.
40 *Id.* at 333.

41 *See* Bankr. E.D. Mich. Local R. 7016-2(a)(5).