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Ethical Compass: Three Different Judicial Treatments for Settlement Fever

Elayne E. Greenberg

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By Elayne E. Greenberg

Introduction

This is the first of a three-part series that examines different aspects of the settlement fever that has stricken our justice system. What can we learn from judicial decisions about how individual judges assess the *settlement means* that lawyers, in consultation with their clients, have chosen to resolve their case?

This column will provide snapshots of how judges, as part of their thoughtful oversight obligation, have dealt with three different dispute resolution processes in three different types of cases: the ***negotiation class*** in the opioid multi-district litigation;[1] the request for ***mediation*** in the bankruptcy case of *The Diocese of Buffalo, N.Y. v. The Continental Insurance Co. ,*[2] and the request to compel the ***arbitration of sexual harassment*** in *Latif v. Morgan Stanley & Co. LLC*.[3] Unlike the majority of cases where parties can choose to settle cases using whatever means they feel appropriate, these three cases involved judicial approval that considers the selected *means* of settlement. The first two cases involve statutes regarding multi-district litigation and bankruptcy that require judicial oversight of the chosen settlement means. Distinguishably, the third case, involving the motion to compel arbitration, required judicial intervention to decide if the parties' pre-dispute resolution arbitration agreement was still in force after a state law was enacted that proscribed such arbitration. The goal of this column is to help guide lawyers and their clients in their selection of the appropriate means to achieve the client's settlement objectives when their cases require judicial oversight.

Undoubtedly, settlement fever is upon us, and most practicing lawyers have caught it. Contributing to New York's spike of settlement fever, New York has adopted a presumptive ADR approach. Even litigators have caught the bug. Section Chair of our Dispute Resolution Section, Laura Kaster, in collaboration with the Chairs of the Commercial and Federal Litigation, Intellectual Property and Corporate Counsel Sections, have spearheaded a Call to Action to all litigators to promote settlement. This initiative encourages litigators to consider settlement of their cases where *appropriate* (emphasis added), given the in-person court backlog caused by COVID-19 and court budgetary cuts. Yes, many judges also support settlement[4] and often allow settlement fever to continue unabated. Caveat! This endorsement is not a blanket endorsement and, in fact, when it comes with judicial oversight, both the timing and the means for achieving settlement may be scrutinized.

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Ethically, the decision to settle rests with a client in consultation with their lawyer(s). Once clients have decided to explore settlement, lawyers are then ethically obligated to discuss with their clients the *means* for exploring the client's settlement objective. In these discussions concerning the case objectives and the means of achieving those objectives, lawyers should be able to provide clients with sufficient information, including where there is judicial supervision of settlement and information about the likely perspective of the judge overseeing the case, to assist the client to participate intelligently in the settlement objectives and means selection.

Explicitly, the ethical parameters of these ethical obligations are provided in Rule 1.2(a), Rule 1.4 (a)(2) and Rule 1.4 Comment 5.

> **RULE 1.2: SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY**
>
> **BETWEEN CLIENT AND LAWYER**
>
> (a) Subject to the provisions herein, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by

PROFESSOR ELAYNE E. GREENBERG is assistant dean of dispute resolution, professor of legal practice and faculty chair of the Hugh L. Carey Center for Dispute Resolution at St. John's Law School. She can be reached at greenbee@stjohns.edu She thanks Danielle Marino (St. John's Law '21) for her assistance in the editing of this column.

which they are to be pursued. A lawyer shall abide by a client's decision whether to settle a matter.

RULE 1.4: COMMUNICATION

(a) A lawyer shall:

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;[5]

Rule 1.4 comment 5 explains:

> Explaining Matters [5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interest and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(j).[6]

From each of the three cases spotlighted in this column, we attempt to extrapolate judicial guidance that will help lawyers have more realistic conversations with their clients about selecting the appropriate settlement means for their particular case.

The Negotiation Class

The creation of a negotiation class in the Opioid multi-district litigation, while innovative, *"is not authorized by the structure, framework or language of Rule 23."*[7] On September 24, 2020, the U.S. Court of Appeals for the Sixth Circuit overturned in a 2-1 decision District Judge Polster's approval of the formation of the first negotiation class, an innovative dispute resolution process to help settle the multi-district opioid litigation.[8] The Appeals Court found that the negotiation class did not comport with the procedural requirements of Rule 23 and the rule's class authorization limited to a litigation class and a settlement class. An animated dissent voiced a broader interpretation of Rule 23 that viewed the negotiation class as within the ambit of the Rule 23 contours.

The "negotiation class" is the brainchild of the late Professor Francis E. McGovern, respected special master of major U.S. mass claims and a dispute resolution innovator, and his colleague William B. Rubenstein.[9] The duo had conceived of the concept of a negotiation class to help overcome what they observed to be the two impasses to reaching a settlement in multi-district litigation cases: the defendant needed clearly defined parameters about its financial liability, and the plaintiff needed the imprimatur of a judicially approved class before plaintiffs could have any negotiating legitimacy with the defendant. What is novel about the negotiation class is that it requires all class members to either agree or opt out of the agreed-upon pro-rata settlement payout framework for class members *before* the defendant even makes any settlement offer to the class. Prior to the existence of a negotiation class, those class members who were dissatisfied with a defendant's settlement offer could then opt out of the class *after* the offer was made and begin their own litigation proceedings against the defendant, creating additional and unforeseen liability costs for the defendant. Such financial settlement uncertainty was an impasse to MDL settlements.

As conceived, the negotiation class benefits defendants and plaintiffs in their settlement discussions. The negotiation class provides the defendant some degree of certainty about the expected cost of settlement *before* any offer is made by helping to identify before any settlement offer those rogue plaintiffs who might opt out of the class and pursue independent litigation. The negotiation class provides plaintiffs with greater certainty that their class would get judicial approval, giving plaintiffs added leverage in their settlement negotiations with defendants. Furthermore, the negotiation class, consistent with the MDLs' goal to promote the *efficient* appropriation of judicial resources and *efficient* resolution of MDL cases, was designed to help mitigate the financial settlement uncertainty impasse and the uncertainty of judicially approved class formation.

As stated in the introduction, most cases are settled by individual plaintiffs without judicial supervision. Innovation is unsupervised; however, in multi-district litigation and class action cases settlements are tightly managed by Rule 23. One takeaway from the Court of Appeals decision is that any dispute resolution innovation must still comport with the Rule 23 mandates. A more general takeaway from this analysis may be that pre-approval of settlement should not be assumed when the actual terms of settlement are unknown. One reason this innovation

seems to have faltered was because the class could not fully understand what consent to settle meant.

Another takeaway is the importance of understanding the context in which multi-district litigation takes place. Multi-district litigation was initially adopted to conserve judicial resources by allowing for the efficient resolution of related cases. However, multi-district litigation is not without critics who question whether plaintiffs receive appropriate justice outcomes.[10] Such scrutiny may have contributed to the U.S. Court of Appeals' willingness to even consider an innovation such as the negotiation class that strengthened a group of plaintiff's negotiation leverage at the expense of forgoing the existing protections for individual plaintiffs.

Motion to Request Mediation

Mediation should be used when all parties may be properly involved and the case is ripe for mediation and not misused to delay resolution.

In *The Diocese of Buffalo, N.Y. v. The Continental Insurance Co. et al*., Hon. Carl Bucki, the bankruptcy judge for the Western District of New York, denied without prejudice the diocese's application to refer their case to mediation in connection with an adversary proceeding with eight insurance carriers. By way of background, the Diocese of Buffalo had filed for Chapter 11 on February 28, 2020 after it had been named as the defendant in over 200 sexual abuse complaints. The New York State Child Victims Act extended the deadline for child abuse victims to file their complaints up to August 14, 2021, and the diocese anticipates an additional 400 complaints to be filed against them. In the meantime, the diocese sought to determine the coverage obligations for the claims of eight insurance companies by commencing an adversary proceeding for a declaratory judgment. The diocese then made a motion to resolve these adversary proceedings in mediation.a

Judge Bucki provided three reasons for denying the diocese's request for mediation. First, all the parties in an adversary proceeding must participate in mediation to achieve a comprehensive settlement. In this case, the identity of all the insurance companies are not known. Second, the identity and scope of all the abuse claims are needed before a case is referred to mediation. The scope of the abuse claims are unknown, and will not be known until August 14, 2021. Third, litigants need to share the information necessary to assess their rights and defenses before they enter mediation. In the case at hand, discovery had not even begun.

> The court recognizes the potential value of mediation, particularly in situation like the present case, in which the legal costs threaten to dissipate resources that might otherwise be used to address the claims of creditors and to advance the mission of the debtor. But mediation provides no guarantee of settlement. Consequently, it must be used with discretion, in ways that minimize the risk of delay in the resolution of claims.

In bankruptcy matters especially, the efficient resolution of a case is a priority to help preserve the assets at hand. In this judicial decision, Judge Bucki evaluated the diocese's request to mediate against the Bankruptcy Court's overarching mandate to preserve, not waste, diminishing funds. The judge decided that mediation was not appropriate for this case, at this time. The court, in its wisdom, believed that in this particular case, the Court would provide needed oversight and a tight timetable for discovery by following a litigation process. The court recognized that information exchange is often a pre-requisite to successful mediation. Yes, information exchange can, and often does, take place as part of mediation. However, in this case, the Court concluded that based on its assessment of the parties, the Court needed to supervise that information exchange to make sure that needed information exchange took place in an expedient manner.

An important takeaway is that courts will not support a request to mediate if that request is viewed as disingenuous and just one more strategy to delay the case. This case reminds lawyers that courts assess the parties and

their intent by the way the parties engage with the court. This case also counsels a clear understanding of what is known, unknown and what the consequences are to the client. This decision highlights the importance of identifying all the parties who must be included in the claim and in the settlement process.

Granting Motion to Compel Arbitration for Sexual Harassment

The FAA pre-empts the CPLR 7515 prohibition against mandatory arbitration clauses for sexual harassment cases.

On June 26, 2019, Judge Denise Cote of the Southern District of New York granted defendant Morgan Stanley's motion to compel the arbitration of sexual harassment allegations by Morgan Stanley's former employee and plaintiff in this case, Latif.[11] In 2017, Latif, as part of his employment with Morgan Stanley, entered into employment agreement that required *inter alia* that all "covered claims," including Latif's sexual harassment allegations against Morgan Stanley, be arbitrated. Then, in 2018, New York State enacted CPLR 7515 which prohibited employers from requiring employees to arbitrate sexual harassment claim. The passage of CPLR 7515 was a response to the public demand that sexual harassment claims be resolved in a more public, transparent means rather than arbitration.. In her order, Judge Cote stated that the recently passed CPLR sec. 7515, proscribing mandatory arbitration clauses for sexual harassment cases, was not a bar to enforcement of Latif's obligation to arbitrate.

The takeaway from this case is that when the *predispute mean selection* is arbitration, the court is likely to enforce that choice. Courts have demonstrated their longstanding support of the FAA,which precludes hostility to arbitration. The cases have established strong support for enforcing arbitration, including in employment cases. This strong public policy favoring the FAA pre-empts the state statute disfavoring the arbitration secrecy in sexual harassment cases. It also shows that at this point in time, when courts are deciding whether to enforce pre-dispute arbitration agreements, they are likely to decide that the countervailing state laws reflecting public demands to handle sexual harassment cases in an open and transparent way cannot override federal policy in favor of arbitration. Thus, when attorneys and clients are committing to pre-dispute arbitration as a settlement means, clients should understand that the courts are likely to enforce that means, even in the face of changing social policies and norms. Instead, those lawyer and clients who do not wish to arbitrate their employment discrimination claims have found that the strategic use of social media is a more effective tool for convincing employers to change their own policies and to remove from or decline to enforce, mandatory arbitration clauses in their employment agreements.[12]

Takeaway …

While many judges are supportive of the settlement fever that has stricken the legal profession, judges, judicial oversight obligations have a substantial impact on individual cases supervised by individual judges mindful of those obligations. This column reminds us that when attorneys and clients are selecting the appropriate means to achieve a client's settlement objectives, the attorney must be aware of any potential for judicial intervention, such as in class action and bankruptcy cases. Furthermore, attorneys should be mindful that in addition to the process concerns and timing issues that clients need to understand, they must make clear in these cases that any settlement is also subject to the approval of the judge overseeing the case. Depending on the judge, the judge may either wholeheartedly endorse your chosen settlement means or opt to intervene and direct a different course of action. As we have seen in the three cases highlighted, context matters. Therefore, when a lawyer and a client are having the ethically required conversation about selecting the appropriate means to achieve the client's settlement objective, they should also consider these issues. Judicial oversight in these cases, offers a different perspective about the selection of an appropriate means for settlement.

Endnotes

1. *In re Nat'l Prescription Opiate Litig*., 976 F.3d 664 (6th Cir. Sept. 24, 2020).
2. *The Diocese of Buffalo, N.Y. v. The Continental Insurance Co. et al*, 630 B.R. 445 (W.D. N.Y. Sept. 11, 2020).
3. *Latif v. Morgan Stanley & Co. LLC, et al*., No. 18cv11528 (DLC), 2019 WL 2610985, at *1 (S.D.N.Y. Jun. 26, 2019).
4. Ellen Deason, *Beyond 'Managerial Judges': Appropriate Roles in Settlement*, 78 Ohio State L. J. 74 (2017).
5. N.Y. Rules of Prof'l Conduct R.1.4.(a)(2) (2018). https://nysba.org/app/uploads/2020/02/NEW-YORK-RULES-OF-PROFESSIONAL-CONDUCT.pdf.
6. *Id*. at R.1.4 cmt. 5. https://nysba.org/app/uploads/2020/02/NEW-YORK-RULES-OF-PROFESSIONAL-CONDUCT.pdf .
7. *In re Nat'l Prescription Opiate Litig*. 976 F.3d at 16.
8. *See In re Nat'l Prescription Opiate, Litig*. 976 F.3d 664 (6th Cir. 2020); *see also* Order Certifying Negotiation Class and Approving Notice, *In re Nat'l Opiate Litig*., *All Cases and The County of Summit, Ohio, et. al. v. Purdue Pharma L.P. et al*., (Nos. 1:17-md-2804) (Sept. 11, 2019). https://static.reuters.com/resources/media/editorial/20190912/opioidsmdl--negotiatingclassorder.pdf.
9. *See generally* Francis E. McGovern & William B. Rubenstein, *The Negotiation Class: A Cooperative Approach to Class Actions Involving Large Stakeholders*, 99 Tex. L. Rev. 73 (2020) (providing further information on the negotiation class).
10. *See, e.g.,* Elizabeth Chamblee Burch, Mass Tort Deals: Backroom Bargaining in Multidistrict Litigation (Cambridge Univ. Press 2019).
11. *Latif v. Morgan Stanley & Co. LLC, et al*., No. 18cv11528 (DLC), 2019 WL 2610985, at *1 (S.D.N.Y. Jun. 26, 2019).
12. *See, e.g.,* https://www.thenation.com/article/archive/harvard-law-students-are-taking-on-forced-arbitration/.