Illinois Settlement Pitfalls

By Timothy Miller

Settlements in Illinois can pose significant pitfalls for lawyers practicing in Illinois. Almost all litigators are familiar with the rules of evidence and procedure that govern trials. Yet, most lawsuits never to go trial, nor are most lawsuits resolved by summary judgment or some other dispositive action.

Instead, most cases are resolved by settlements negotiated by the parties' attorneys. Settlements are documented by written settlement agreements drafted by attorneys, many of whom are not as familiar with the "rules" of settlement as they are with the rules of evidence.

Written settlement agreements should reflect the parties' agreement and intent. But written settlement agreements also should protect against unintended consequences. In Illinois, there are some significant pitfalls associated with settlement agreements.

For example, Illinois law differs from federal law with respect to the admissibility of evidence of statements made during settlement negotiations. A litigator unaware of this difference might say something (or fail to advise his client not to say something) that can come back to hurt the client if the case does not settle. Other pitfalls can lead to the release of defendants or potential defendants whom the client did not intend to let off the hook. A few of these traps for the unwary will be discussed in the remainder of this article.

Admissions in Settlement Negotiations

Many litigators assume that the statements that they or their clients make in settlement negotiations are inadmissible in evidence if the case does not settle. And, in *federal court*, that assumption is usually correct. Federal Rule of Evidence 408 provides that "conduct or statements made in compromise negotiations regarding the claims" are not admissible to “prove liability for, invalidity of, or amount of a claim . . . or to impeach through a prior inconsistent statement….”

Illinois law, however, is somewhat different, and there is a risk that a statement made in settlement negotiations would be admitted into evidence. In *Skonberg v Owens-Corning Fiberglas Corp.*, 215 Ill. App. 3d 735, 745, 576 N.E.2d 28, 34 (1st Dist. 1991), the court held that "[e]vidence of offers of settlement or compromise are ordinarily inadmissible . . . , but admissions of fact are not excluded simply because they are made in the course of negotiations." In *Stathis v. Gelderman, Inc*., 295 Ill. App. 3d 844, 861, 692 N.E.2d 798, 810 (1st Dist. 1998), one party was allowed to describe to the jury settlement negotiations that "did not constitute an admission of liability" because the court deemed the discussions relevant to a disputed issue in the case. The other litigant was undoubtedly disappointed that the jury was allowed to hear that he had been willing to voluntarily pay something to settle. See also, *Niehaus v. Merrill Lynch Pierce, Fenner & Smith, Inc.*, 143 Ill. App. 3d 444, 450, 492 N.E.2d 1356, 1360 (1st Dist. 1986).

There is Illinois authority that takes a broader view of the inadmissibility of statements made during settlement discussions. See, e.g., *Liberty Mut. Ins. Co. v. Am. Home Assurance Co.*, No.

1-05-2441, 2006 Ill. App. LEXIS998 (1st Dist. Nov. 2, 2006) ("As a general rule, matters concerning settlements and negotiations are not admissible"). Given the uncertainty in Illinois law, however, one cannot be confident that settlement negotiations will not be admitted during a subsequent trial.

There are at least two ways that a lawyer can avoid statements made in negotiations from coming back to haunt a client. First, and most importantly, do not make them and tell your client not to make them. If no admissions are made, nobody will need to decide whether they are admissible in evidence. This is the safest way to approach the issue.

A second approach is to precede any settlement negotiations with a written agreement between the parties stating that the negotiations and any statements made in the course of settlement discussions are inadmissible for any purpose. The following language likely would suffice:

> All such meetings, negotiations, and discussions shall be considered for settlement purposes only, and nothing said during such meetings, negotiations, or discussions, nor communications or documents generated as a result of such meetings, negotiations, or discussions, shall be offered or admitted into evidence for any purpose at any proceeding, or inquired or testified about at any deposition in any pending or future litigation or arbitration between or among any of the parties; provided, however, that information otherwise discoverable in the absence of such meetings, negotiations, or discussions shall not be precluded from being discovered merely because the meetings, negotiations or discussions occurred or by reason of anything said or raised thereat.

Although such agreements are common, there does not appear to be any Illinois authority addressing their validity. Thus, even if such an agreement is executed, the safest course is not to say anything that you would not want repeated in court if the settlement discussions fail.

Reliance on Statements in Negotiations

A lawyer also should avoid having his or her statements come back to hurt a client if the case does settle. If a written settlement agreement does not contain strong non-reliance and integration clauses, it is entirely possible that statements made during settlement negotiations could form the basis for future fraud claims.

Many things are said in settlement negotiations, including statements by lawyers and their clients that are not true. Sometimes, truthful things are said that are later perceived as having been untrue. Sometimes people don't remember what was said, and sometimes people lie about what was said. To protect clients from subsequent claims that settlement agreements were fraudulently induced, strong integration and non-reliance clauses should be included in all settlement agreements. This means that, if a client is relying on a specific representation of fact, the settlement agreement must repeat the representation and the other party warrant its truth.

In *Tirapelli v. Advanced Equities, Inc.*, 351 Ill. App. 3d 450, 453, 813 N.E.2d 1138, 1140-1141 (1st Dist. 2004), the court considered a securities fraud claim based on an alleged oral

misrepresentation. The written sale document, however, contained non-reliance and integration clauses:

> [T]he undersigned has relied solely upon the materials made available to the undersigned at the undersigned's request and independent investigations made by the undersigned in making the decision to purchase the Preferred Membership Interests subscribed for herein, and acknowledges that no representations or warranties (oral or written), have been made to the undersigned with respect thereto.
>
> The Subscription Documents constitute the entire agreement among the parties hereto with respect to the subject matter hereof. 351 Ill. App. 3d at 453.

Relying on these two provisions, the appellate court affirmed the trial court's grant of summary judgment. It held that, in light of the non-reliance clause, the plaintiff's reliance on an oral representation was unreasonable. 351 Ill. App. 3d at 452.

In contrast to *Tirapelli*, in *Astor Chauffeured Limousine Co. v. Runnfeldt Investment Corp.*, 910 F.2d 1540, 1545-1546 (7th Cir. 1990), the court allowed a fraud claim based on an oral misrepresentation to go forward, where a written contract contained a "wimpy" integration clause that made no reference to prior representations. The lesson is clear: settlement agreements should include strong integration and non-reliance clauses.

Agreements containing even broader provisions than those at issue in *Tirapelli* are possible. For example, the following language would seem to make it absolutely clear that a subsequent fraud claim should not be allowed.

> This Release Agreement constitutes and represents the complete and entire agreement among the Parties. This Release Agreement merges and supersedes any and all other prior agreements, discussions, negotiations, and communications among the Parties. The Parties acknowledge and expressly represent and warrant that they have relied solely upon their own judgment, together with advice of counsel, when deciding whether to enter into this Agreement. Each Party further agrees, acknowledges and expressly warrants that no information, statement, promise, representation, warranty, condition, inducement, or agreement of any kind, whether oral or written, made by or on behalf of any other Party shall be, or has been, relied upon by it unless specifically contained and incorporated herein.

Scope of Release

Most settlement agreements contain release language, but releases are fraught with peril. For example, many lawyers have a vague recollection that settlement agreements once were drafted with covenants not to sue instead of releases. And some lawyers even know that settlements were drafted this way because a covenant not to sue was deemed not to fall within the "release one, release all" rule. But many lawyers believe that the common law rule that a release of one wrongdoer releases all wrongdoers has been abrogated by statute.

This is partially correct. By statute, Illinois has abrogated the common law rule that a release of one joint tortfeasor releases all tortfeasors. See 740 ILCS 100/2(c). What many lawyers do not recognize is that this statute applies only to tortfeasors. As a result, the common law rule that an unqualified release of one who caused a monetary loss precludes a claim against any other parties who caused the loss continues to apply to, for example, co-obligors on a contract and to claims for joint breaches of fiduciary duty. See *Cherney v. Soldinger*, 299 Ill. App. 3d 1066, 1073, 702 N.E.2d 231, 237 (1st Dist. 1998) (release given to one party accused of breaching fiduciary duty released all joint breachers).

There are at least two ways to avoid the "release one, release all" problem. First, a covenant not to sue -instead of a release -protects against releasing other potentially liable parties. *Id*.

Additionally, according to *Cherney*, the common law "release one, release all" rule applies to unqualified releases. 299 Ill. App. 3d at 1067.

Thus, a qualified release may protect against an unexpectedly overbroad release. For example, a settlement can provide: "This release releases the named person only, does not release Mary Doe or Bob Roe." This language would appear to be adequate to restrict the scope of a release, but no recent Illinois cases have addressed similar language.

Unknown Claims

Especially when individuals are involved, settlement agreements are frequently drafted with the expectation that the settlement is bringing total peace between the parties. But a general release that purports to release unknown claims will not release claims that a party did not "contemplate" releasing.

For example, in *Thornwood, Inc. v. Jenner & Block*, 344 Ill. App. 3d 15, 20, 799 N.E.2d 756, 761 (1st Dist. 2003), a release applied to all claims "whether known or unknown." Nonetheless, the court refused to construe the release as releasing an unknown claim, concluding that "general releases do not serve to release unknown claims, which the party could not have contemplated releasing when it gave the release." *Id*.

In a similar vein, a release will not be deemed to release a claim that arises after the release is executed -even if the claim involves pre-release conduct. For example, *Feltmeier v. Feltmeier*, 207 Ill. 2d 263, 286, 798 N.E.2d 75, 89-90 (2003), involved a spouse's claim for intentional infliction of emotional distress that allegedly began before, and continued after, a marital settlement agreement was signed. The court held that the cause of action did not accrue until the date of the last tortious act -which was after the settlement agreement had been signed. As a result, a claim based, in part, on pre-settlement conduct was allowed to proceed. The court held that "a contractual release cannot be construed to include claims not within the contemplation of the parties and it will not be extended to cover claims that may arise in the future." *Id*. The court went on to say that "a release covering all claims that might later arise between the parties would constitute a consent to the foregoing of legal protection for the future and would plainly be against public policy." 207 Ill. 2d at 286.

Many individuals who settle lawsuits by paying significant sums of money would be surprised if their adversary turned around and sued them again soon thereafter. Yet the realities of litigation are such that many individuals would love to settle with their adversary, receive a large sum of money, and then "stick it" to the adversary by suing again. An assertion that a claim was unknown when a settlement was reached is an easy way to achieve such a result.

A lawyer and client may decide that unknown claims should not be released by an agreement. The lawyer and client should make that decision knowingly and not wrongly assume that generic “known or unknown" language in a release will be adequate to buy total peace. If a lawyer truly wants a settlement agreement to release all existing claims between the parties, the settlement agreement needs to be very explicit in that regard. A series of recitals that lists the parties' known disputes and that also indicates that the settlement is fully intended to release unknown claims may be adequate in that regard.

Attorneys' Fees

Many clients would be surprised to hear that if they are sued on a claim that was carefully included within a settlement agreement's release, the expense of defending them on such a claim is not recoverable. Illinois state and federal courts have held that attorneys' fees are not an element of damage for breach of a release or a covenant not to sue. See, e.g., *Child v. Lincoln Enterprises, Inc.*, 51 Ill. App. 2d 76, 83, 200 N.E.2d 751, 754 (4th Dist.1964) (covenant not to sue breached, but attorney's fees not awarded as damages from breach); *In re Weinschneider*, 2004 U.S. Dist. LEXIS 3810 (N.D. Ill. March 8, 2004) (same).Thus, if a party wants to avoid paying attorneys' fees to defend against a claim that has been settled or released, he should make sure that the settlement agreement explicitly provides that attorneys' fees are a recoverable element of damage for breach of the release or the covenant not to sue. An agreement that contains the following language should be adequate:

> If any Releasor hereafter sues or commences an arbitration against any Releasee for the purpose of enforcing any claims that are released under this Release Agreement, this Release Agreement shall be and constitute a complete defense thereto and such Releasee(s) shall, in addition to all other remedies, be entitled to recover damages from such Releasor(s) (which shall include reasonable expenses and attorneys' fees)and/or to receive a declaratory judgment and/or an injunction against conduct or litigation which violates or threatens to violate this Release Agreement.

Conclusion

Settlements are common, and most lawsuits will settle rather than go to trial. But there are several pitfalls that the lawyer faces in settling matters. This article has addressed some, but not all of the pitfalls. To avoid potential surprises, a lawyer should at least consider the foregoing issues when negotiating a settlement.

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