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THE SETTLEMENT SERIES: PART 1

The 'Unintended' Settlement

A common-sense approach to avoiding 'Harrington' hearings

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Editor's Note: This article is the first in a special 10-part series.

As a matter of public policy, courts strongly encourage settlement of contested civil litigation. *Pascarella v. Bruck*, 190 N.J. Super. 118, 124 (App. Div., 1983), *certif. denied*, 94 N.J. 600, (1983). In light of this policy, one of the most ironically frustrating civil proceedings for judges, attorneys and litigants alike is what is known as a *Harrington* hearing.

A *Harrington* hearing involves a scenario where one party alleges that during a settlement conference and/or ongoing negotiations, the litigants had actually entered into an oral settlement agreement which the court should now enforce over the other party's objection. Sometimes, the dispute requires a full plenary hearing, relative to issues and principles enunciated by the appellate court in the namesake case of *Harrington v. Harrington*, 281 N.J. Super. 39 (App. Div., 1995).

The paradox arising from a *Harrington* hearing is that, pursuant to public policy, settlement conferences and negotiations are designed to help parties *end* time-consuming and stressful litigation. A *Harrington* hearing, however, has the reverse effect in constituting a whole new round of legal proceedings beyond the original dispute itself.

In *Harrington*, the matter involved a matrimonial dispute in which one litigant claimed that the parties had reached an oral resolution during a settlement conference. Meanwhile, the other party claimed that the settlement discussions were only negotiations, and denied that there was any intention to settle the case without a signed written agreement. The appellate court held that to be enforceable, a settlement agreement "need not necessarily be reduced to writing or placed on the record." *Id.* at 46-47. The appellate court further remanded the matter to the trial court for a plenary hearing on the contested issue of whether the parties did, or did not, reach an oral

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settlement of the case during their negotiations. In essence, *Harrington* opened the door for case-within-a case litigation, involving the enforceability of an alleged oral settlement arising during ongoing negotiations.

In 2013, however, the New Jersey Supreme Court held in *Willingboro Mall v. 240-242 Franklin Avenue,* 215 N.J. 242 (2013), that "if the parties to mediation reach an agreement to resolve their dispute, the terms of that settlement must be reduced to writing and signed by the parties before the mediation comes to a close." *Id.* at 262-63. Alternatively, the terms of settlement may be evidenced by an audio- or video-recorded agreement made consensually in mediation. *Ibid.*

Notably, *Willingboro* expressly addressed the issue of settlements within the specific context of mediation only, with the participation of a neutral mediator. *Willingboro*, however, did not address the issue of settlement negotiations and alleged oral agreements outside of mediation. In fact, *Willingboro* did not even reference or mention *Harrington*, much less expressly overrule the case. Further, the dispute in *Harrington* did not involve a mediator.

Accordingly, while it may be logical for counsel to seek to apply the policy reasons behind *Willingboro* to any alleged "oral settlement" arising from negotiations or a settlement conference outside of mediation, it may be premature, absent further case law, to conclude that the Supreme Court intended *Willingboro* to overrule *Harrington* in cases which do not involve a mediator and the mediation process.

Given the arguable ambiguity of whether *Harrington* or *Willingboro* applies to alleged oral settlements reached outside of mediation, it is prudent for counsel to proactively anticipate potential *Harrington* issues in non-mediation settings before they actually arise.

Even if not dispositive or foolproof, an advance 'anti-Harrington' letter may constitute material evidence as to whether both parties ever had a true meeting of the minds.

In this respect, one practical and logical approach is for counsel to consider including, in either the initial letter of representation or other pre-negotiation correspondence to the other party's attorney, a boldface paragraph containing language similar to the following:

> My client and I are always willing to amicably discuss possible settlement of all disputed issues in this case in a mutually fair and equitable manner. For purposes of clarity, however, please note in advance that unless and until there is either (A) a written settlement agreement signed by both parties, or (B) a mediated agreement (if applicable) memorialized in a tape recording prepared by the mediator with the confirmation of both parties and/or their attorneys, or (C) an agreement placed on the record in court with the consent and participation of both parties and/or counsel, all oral and written communications and discussions regarding settlement are to be construed as *negotiations only.* Any such communications and/or discussions, whether in person, or by phone, letter, email, text, or in any other form of communication, are not to be considered as a binding settlement, and neither party shall be considered bound by any such proposed terms until both parties have either signed a written settlement agreement containing such terms, or have otherwise directly or through counsel orally confirmed the terms of the settlement in a jointly and consensually audio-recorded confirmation at mediation (if applicable), or on the record in court. This provision is designed to help prevent any future ambiguity or confusion between the parties on this issue, and/or avoid any otherwise costly and time-consuming and unnecessary *Harrington* hearings regarding same.

The language concerning mediation may simply be deleted in cases where mediation is not permissible or applicable, such as in custody cases where a domestic violence restraining order is in effect.

As every case is fact-sensitive, such language does not automatically serve as an absolute guarantee against possible future *Harrington* litigation. The use of such an "anti-*Harrington*" clause before the start of any actual negotiations, however, is certainly relevant from an evidentiary standpoint, and may in fact significantly help reduce the risk of a bona fide *Harrington* dispute arising in a particular case.

In both substance and spirit, this provision is similar to one which attorneys often place in the so-called boilerplate section of a settlement agreement, stating that any modification to the agreement "shall only be effective if made in writing and signed by both parties." Such a provision is designed to prevent post-judgment litigation over an alleged oral stipulation to modify a written settlement agreement. As with an anti-*Harrington* provision, however, the inclusion of such a clause does not necessarily constitute an absolute defense against enforcement of an alleged oral modification in every case.

For example, in the unreported opinion of *Loch v. Loch* (A-1225-11T2, Aug. 16, 2013), the appellate court found that the parties' long-term course of conduct for six years after entry of the written settlement agreement, coupled with detrimental reliance upon such conduct by one party, may constitute sufficient evidence of an enforceable oral modification of the agreement under equitable principles as estoppel, laches and waiver. Said the court, "it is well-settled that a contract provision requiring modification by writing may be expressly or impliedly waived by the clear conduct of the parties or their duly authorized representatives." *See Home Owners Constr. Co. v. Borough of Glen Rock*, 34 N.J. 305, 316 (1961)

For certain, not every case, involves a long-term, multi-year stretch of subsequent mutual conduct and detrimental reliance as allegedly existed in *Loch*. To the contrary, in the case of a written, pre-negotiation, anti-*Harrington* statement clarifying that any potential future final agreement must be in writing or placed on the record, it is less likely that a period of six years, or even six months, will pass, while combined with lengthy and substantial ongoing detrimental reliance. To the contrary, *Harrington* issues more generally and naturally arise very quickly following a settlement conference, with one party immediately claiming that the ongoing litigation has been orally settled, and the other party disputing the claim. Thus, a *Harrington* dispute during ongoing contested litigation more logically and likely comes to the court's attention at the first scheduled court date following a settlement conference, when one party claims the case has settled and the other party claims that the case must still continue toward trial as an unresolved matter.

In principle, counsel's inclusion of a conspicuous anti-*Harrington* provision in pre-negotiation communication to the adversary may potentially help reduce the risk of litigation over ongoing settlement proceedings. It is true that an enforceable agreement need not necessarily be reduced to writing or placed on the record. *Harrington*, 281 N.J. Super. at 46. Yet, perhaps the most pertinent question regarding a *Harrington* hearing is whether opposing parties have or have not actually agreed on the essential terms of a settlement. *Ibid.* In order for a contract to form, there must be a "meeting of the minds." *State v. Ernst & Young*, 386 N.J. Super. 600, 612 (App. Div. 2006) (quoting *Johnson & Johnson v. Charmley Drug Co.*, 11 N.J. 526, 538 (1953)). A "meeting of the minds" means there is "a common understanding and mutual assent of all the terms of a contract." *Knight v. New England Mut. Life Ins. Co.*, 220 N.J. Super. 560, 565 (App. Div. 1987) (citation omitted), *certif. denied*, 110 N.J.184 (1988). Even if not dispositive or foolproof, an advance "anti-Harrington" letter may constitute material evidence as to whether both parties ever had a true meeting of the minds that their oral negotiations could, in fact, actually result in a binding and enforceable verbal settlement agreement.■