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THE SETTLEMENT SERIES: PART 10

Accepting or Rejecting a 'Final' Settlement Offer

Critical points for the attorney-client discussion

By Lawrence R. Jones

Editor's Note: This is the tenth and closing article in a special, 10-part weekly series on settlement of litigation.

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Over the past 10 weeks, we have visited various aspects of the process of settlement. In this final installment of the series, we will address the critical time when a client has to make a decision whether to accept the opposing party's alleged "final" settlement offer, or to instead continue the litigation by proceeding to trial.

Some offers by an adversary are so favorable that acceptance is a foregone conclusion. Conversely, other offers are so unreasonable that they invite rejection. In the middle of these two extremes, however, are the bulk of most settlement offers, i.e., those which fall short of what the recipient has hoped to obtain from the litigation, but are not so lopsided as to virtually compel an automatic no.

Some say that "there is no such thing as a final offer." For certain, the attorney representing the recipient of a "final" offer can always extend a "final" counter-offer, and negotiations may sometimes still continue back and forth from that point. In many negotiations, however, there does in fact come a time when it becomes likely that the opposing party's "final" offer is in fact final, and there are no more counter-offers or compromises left to negotiate.

At such a time, the recipient of the "final" offer has to make an extremely tough decision. He or she may decide to forge full-speed ahead to trial. In fact, he or she may ultimately do much better at trial than by accepting the proposed settlement. Yet, before the client

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makes such a decision to reject a "final" settlement offer based on emotion or impulsivity, it is important for the attorney to discuss with the client, in detail some of the critical aspects of the decision on settlement vs. trial, including the following.

Litigation Expenses

The settlement of a case generally saves a party the ongoing expense of legal fees and other professional fees which may arise in a case, such as expert fees. In many cases, such professional fees accrue at an hourly rate, meaning that so long as the case is running, the meter is running too. This issue is logically less of a concern in case where the client is not paying an attorney by the hour, such as in a personal injury matter where the client is paying the lawyer a contingency fee against any recovery via settlement or judgment. The client must have at least a general understanding of what the litigation may cost if he or she goes to trial.

Time

The settlement of a case generally saves a litigant time, which otherwise must be dedicated to perhaps multiple court appearances, meeting with counsel at his or her law office, reviewing correspondence from the lawyer, reviewing further correspondence from the opposing lawyer or pro se party, and engaging in discovery such as compiling and producing documents, answering interrogatories and attending depositions when applicable. Further, perhaps the largest expenditure of time will take place in the weeks leading up to a trial and the trial itself, when both attorney and client must prepare in depth for the proceeding, which may or may not yield the desired result.

Stress

The ongoing investment of money and time may itself cause a party to incur mental and emotional stress during litigation. Perhaps the most stress-inducing element of litigation, however, is the uncertainty of the end result and the fact that, absent a settlement, the party has no control over the final outcome. Some find it extremely difficult to live continuously under a cloud of ambiguity as a matter proceeds through litigation. There may be even additional general stress and anxiety over having to appear in court and possibly testify under both direct and cross examination.

Risk

A large source of stress in litigation is uncertainty of result. Even without considering stress, however, any person who proceeds to trial on a case is incurring risk by gambling upon a possible future outcome that may not materialize. Depending on the particular contested issues in a case, and the opportunity for reasonable settlement, such gambling may be ill-advised. Simply put, a judge or jury of strangers may decide a matter in a way that catches a party by surprise. Moreover, since both judges and jury members are human beings, mistakes and errors in reaching conclusions can be made as well. Finally, even if a party is completely convinced as to the strength of his or her case and the inevitability of result, even objectively strong cases can fall apart when an important witness performs poorly on the stand or wilts under cross examination in an unintended manner.

Appeal

Many parties erroneously believe that once the case goes to trial, then one way or the other the matter will finally conclude. Such litigants, however, often do not understand that once a trial ends, all parties have an automatic right to appeal the decision. Depending on the circumstances, an appeal may keep the case going

for several months or even years after the trial, along with more investment of money and time, stress and risk. Further, an appellate court which finds that the trial court erred in some fashion may choose to reverse or remand the case back for whole a new trial, i.e., a do-over, which carries its own inherent risks. Conversely, when parties voluntarily settle a case, there is less likelihood of an appeal since all parties all consent to the disposition.

No Admission of Liability

Often, one of the most important considerations for a defendant in a civil action is that he or she can potentially settle without any finding or admission of liability or wrongdoing. Whereas, if a defendant proceeds to trial, then, except in certain circumstances, the matter is generally tried in open court. Further, if the judge or jury finds in favor of the plaintiff, the court may enter a judgment against the defendant, which is much different than a settlement agreement with no finding of wrongdoing. Among other considerations, a judgment for money damages may well appear on the defendant's credit report and cause damage to his or her credit. Further, a money judgment may become part of public record.

Rescission of Offer

Very often, the recipient initially rejects the settlement offer, but later changes course and decides to accept the offer. The problem, however, is that the offeror has also experienced a change in heart, and has pulled back and rescinded the offer. The lawyer representing the recipient may emphasize to the client that while he or she is free to accept or reject an offer, the other party has no obligation to keep such offer indefinitely on the table as an indefinite option.

Overall, an attorney should never presume that his or her client has already thought about all or any of these points in great detail, particularly in highly charged litigation where emotions sometimes override reason and logic. While none of the above points, independently or in the aggregate, require a party to accept a so-called "final" settlement offer, they are valid points for an attorney and client to discuss, weigh and contemplate before the client personally determines whether settlement or trial is in fact the better choice under the totality of the circumstances.■

Author's Note: At this juncture, we reach the conclusion of the 10-week Settlement Series in the *New Jersey Law Journal*. I want to thank all of the attorneys, judges, mediators, law students and members of the public who have joined along as readers over the past weeks, and hope that the series has been and will be helpful and relevant to all of you in your legal travels. Best of luck and happy holidays to all!