Settlement agreements are contracts too . . .
By Mark Ferguson of Gates, Shields & Ferguson

For each of us in subrogation, our end game goal is to achieve a resolution of the claim, maximize our financial recovery and enter into a settlement agreement. The resolution of the claim is concluded through the settlement agreement, which is a “contract” for the release and resolution of the claim. Whether you are a claim representative, adjuster, insurance underwriter or first-year law student, you have learned the basic definition of a Contract: A Contract is an agreement between two or more persons consisting of a mutual promise that is legally enforceable.1 The law of contracts governs the enforcement and interpretation of settlement agreements.2

As the negotiations of a claim wind down and a settlement appears likely, the primary focus becomes the amount of the settlement and oftentimes other important issues fall by the wayside. Claim fatigue can set in and there is a tendency at this stage of the negotiations to focus only on the dollar value of the settlement, even when there are other important terms of the settlement. The terms of the contract for settlement are typically reached by a simple offer and acceptance of a set dollar amount necessary to resolve the dispute, with a settlement agreement to follow thereafter. However, this is a risky proposition. If you do not pay careful attention to the other important terms of the settlement, and reach a clear understanding between the parties as to all of the critical elements of the contract, you may have invited another legal battle and a motion to enforce a settlement agreement.

When essential settlement terms not discussed during negotiation are attempted to be imposed later, it can create conflict and mistrust. Hard feelings, resentment and further conflict result when two parties focus only on the dollar value of the settlement and fail to spell out other critical elements of the settlement. There is a sense of reneging on the agreement, changing of the terms, embarrassment with the client, lack of authority or other significant emotional insults and legal challenges to completing the settlement. Coming back to the negotiation table with new terms which were presumed to be included can be legally problematic as well.

Therefore, it is essential to treat the last phase of the claim or litigation process -- settlement negotiations -- with as much attention to detail as you did during the earlier phases. You likely placed great care and emphasis in conducting your investigation, documenting the claim, itemizing damages, building your defense, substantiating the facts and tendering your subrogation claim to the responsible party. Do not get sloppy or careless now. Otherwise, you face the potential of being forced into a settlement or a legal challenge to what is an enforceable settlement agreement.

The Kansas Court of Appeals recently considered a case which is instructive on several of these concepts. O’Neill v. Herrington, 317 P.3d 139 (Kan. App. 2014). The Court concluded that “[b]ecause a settlement agreement is a contract, what is required is that the parties reach
agreement on all material terms.”³ The material terms are of critical importance to communicate during the offer and acceptance portion of the negotiations, because once one party has made a settlement offer and the other party has unconditionally accepted it, neither party may call off the agreement. Neither party may impose conditions at a later time. Therefore, be careful not to find yourself in the trap of simply responding to a settlement offer with the following: “My client has authorized an offer to settle this case for $x.” Although the parties may be flexible and willing to accept additional terms later, there is no requirement to do so. An unconditional acceptance of the offer could preclude either party from imposing further settlement terms that are of critical importance to the resolution of the claim or essential to one of the parties or its legal counsel. This would include the provisions which are typically found in settlement agreements, including confidentiality provisions, indemnity provisions, specific release language, timing and payment requirements, or designation of the signatories on the settlement agreement. These provisions are often taken for granted during the last few e-mail exchanges when the final settlement amount is being negotiated between the parties.

In the O’Neill case, further litigation ensued in an effort to enforce the settlement of a lawsuit between the parties.⁴ The relevant facts of the case are that the plaintiffs sent a short, unsolicited e-mail to the defendant law firm offering to dismiss the law firm from the lawsuit in exchange for a mutual release. While the plaintiffs expressly preserved their claims against a separate defendant, they did not preserve nor express any intent to preserve any claims against the defendant law firm. The law firm accepted the offer by return e-mail. After receiving the law firm’s acceptance of the plaintiffs’ offer, the plaintiffs asked that the defendant law firm prepare and sign a written agreement for the release that same day. The defendant law firm did so. After receiving the written settlement agreement, the plaintiffs then asked that their attorneys be specifically mentioned by name in the agreement. The defendant law firm again modified the agreement as requested and inserted the names of the plaintiffs’ attorneys in the agreement, signed it and e-mailed the agreement back to the plaintiffs on the same day. When the plaintiffs failed to sign the agreement, the defendant law firm moved to dismiss the case and requested the Court to enforce the settlement agreement. The trial court ruled that the plaintiffs had agreed to a settlement agreement to dismiss the defendant law firm in the lawsuit in exchange for a mutual release. The trial court found that the agreement was binding even though the formal agreement had not been signed by both parties.⁵ At the pretrial conference, the plaintiffs stated that they had not signed the formal written release because they never intended to release the defendant law firm as to all of the pending counts, only some. While the plaintiffs agreed to dismiss certain claims against the defendant law firm, they “maintained that they never intended to provide a full release of all claims.”⁶ The plaintiffs argued that they were still considering the settlement agreement and that they wished to have an attorney review the formal written agreement before they signed it. On the other hand, the defendant law firm argued that the plaintiffs contacted them and offered a mutual release. The defendant law firm accepted that offer and mutual release and maintained that an agreement was formed even though the agreement was not yet formally drafted.⁷ The trial court ruled in favor of the defendant law firm, enforcing the settlement agreement and dismissing defendant law firm with prejudice. The trial judge stated that Kansas contract law is clear that the judge
has to enforce agreements based on what the parties intend. Based on the dialogue between the parties, the parties clearly intended that both parties completely and fully release each other. The settlement agreement exchanged thereafter was not controlling. The expressed intent of the parties dictates the terms of the settlement, not the subsequently drafted settlement agreement. Therefore, based upon this ruling and referring back to the discussion above, it is important to remember that if you simply state that you agree to a settlement and mutual dismissal of claims for a sum certain amount, you will be bound to those limited terms and will not be permitted, as a matter of law, to later introduce other terms of the settlement which were not bargained for at the time that the “contract” to settle the case was reached.

As the Court relied upon in O’Neill, it is important for the readers to remember the general rule that courts favor the settlements of disputes.\(^8\) Courts prefer that parties settle their disputes rather than engage in litigation and therefore will err on the side of enforcing settlements. In fact, settlements need not be in writing to be enforceable.\(^9\) One limited exception to this general rule is that a mediator may not testify about whether parties reached an oral settlement in mediation.\(^10\) This is why a written agreement as to the critical terms are written out and signed by the parties at the conclusion of a successful mediation.

As the introduction to this article discusses, a settlement agreement is a contract. What is required is that the parties reach agreement on all material terms: “Once that is done, any non-material discrepancies can be resolved by the court consistent with the parties’ intent when they agreed upon the material terms.”\(^11\) Once one party has made a settlement offer and the other party has unconditionally accepted it, neither party may call off the agreement.\(^12\) Conversely, one party may move forward and attempt to enforce a settlement which is hastily reached. There must be a “meeting of the minds” on all essential terms, which means that neither party may impose material terms that were not part of the initial offer or part of the unconditional acceptance. Only disclosed intentions can be part of the parties’ contract; undisclosed intentions are not to be considered when construing the intent of the parties to a contract.\(^13\) So, for example, if a party making an offer or the party making an unconditional acceptance intends that there be a confidentiality provision in the settlement agreement, then this “secret intent” cannot legally be imposed on the settlement after the fact. Similarly, if the defendant expects both the insured and the insurer to sign the settlement agreement when all of the discussions have been about the release by the insured, then this material provision should not be brought to the table after the “contract for settlement” has been consummated.

One can think of a number of other fairly standard and boilerplate provisions which he or she considers important to include in settlement agreements, such provisions would be deemed material but which may be excluded from the terms of the settlement if the acceptance of the settlement is unconditional. The cautionary warning here is that an offer and acceptance must include all material terms. Otherwise, there is no “meeting of the minds” as to the additionally anticipated terms and the contract for the settlement of the claim will proceed, but only upon those terms which have been clearly expressed.

The best way to assure that the full and complete disclosure of all material issues and a complete meeting of the is to condition the acceptance of the settlement on the settlement
being reduced to writing and signed by the parties. Therefore, the following phrase should be used in your conditional responses to settlement offers: “My client accepts your offer subject to the terms of a mutually agreeable settlement agreement which will be exchanged between the parties shortly hereafter.”

**10 TIPS TO CONSIDER FOR YOUR SETTLEMENT AGREEMENT**

Tip #1: Be sure that you have the full authority of your client before extending or accepting a settlement offer.

Tip #2: Do not be hurried to offer or accept a settlement just because you have arrived at the “correct dollar number” to achieve a settlement. There are likely other material terms of the settlement which are essential and must be included in the settlement communication. This applies to offers and acceptances.

Tip #3: Consider whether there is any physical evidence that needs to be returned or destroyed as part of the settlement. This applies to documents provided in litigation pursuant to a Protective Order.

Tip #4: Are original signatures required or are electronic signatures sufficient? Do the signatures need to be notarized, acknowledged, verified or made under oath?

Tip #5: Be precise about what parties are to be included as payees on the payment and the manner of payment? Will a “Bank Draft” or certified funds be required? Be clear about time requirements for making payment.

Tip #6: Make sure you know who is being expected to execute the settlement agreement. Does this include the insured, the insurer, or both? Who is the real party in interest? Will the attorneys be required to be included as signatories?

Tip #7: Is a confidentiality provision a material term of the settlement agreement?

Tip #8: Settlement agreements do not have to be reduced to writing to be valid. So, in order to avoid ambiguity and confusion, do put them in writing. Communicate all detailed settlement communications in writing. E-mail is sufficient.

Tip #9: Stay focused and engaged in the specific details of the case all the way through the settlement of the matter, which includes receiving the fully-executed settlement agreement.

Tip #10: Always use the following key language when accepting a settlement offer: “My client accepts your settlement offer of $___, subject to the terms of a mutually agreeable settlement agreement which will be exchanged between the parties shortly hereafter.”
Pattern Instructions in Kansas, 3rd Edition at § 124.01; see also UCC at K.S.A. § 84-1-201(3), (11).


Id., 317 P.3d at 142 (emphasis added).

Id. at 144.

Id.

Id. at 145 (citing Bright v. LSI Corp., 869 P.2d 686 (1994)).

Id. (citing Lewis v. Gilbert, 785 P.2d 1367 (Kan. App. 1990). Settlement agreements do not have to be reduced to writing to be valid. 15A Am. Jur. 2d, Compromise and Settlement, § 10, p. 782.


Id.; see First Nat’l Bank and Trust Co. v. Lygrisse, 647 P.2d 1268 (1982) (“[i]t is the intention that is expressed in the contract that controls, not an intention secretly cherished by one of the parties.”) (citations omitted).

Where parties condition a contract on it being reduced to writing and signed, there is no enforceable contract until such act is accomplished. Id. at 146; Short v. Sunflower Plastic Pipe, Inc., 500 P.2d 39 (1972).


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