

SETTLEMENT NEGOTIATIONS: WHEN DOES AN “UNDERSTANDING” RISE TO AN “AGREEMENT?”

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A settlement agreement is a special form of contract that is designed to prevent or end litigation. An enforceable contract is made when a party makes an offer and the second party accepts the offer. If all of the essential elements of an agreement have been expressed and accepted, a binding and

enforceable contract may be formed. When settling litigation or a legal dispute, lawyers often include a provision stating that the agreement is subject to subsequent approval of a “definitive written agreement.” However, a court recently enforced a settlement agreement even though the settling parties

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were unable to agree on terms for the written agreement. The decision highlights the importance of taking care when confirming terms of any proposed settlement.

Lucas Contracting filed suit on a commercial account against Altisource. For the parties entered in negotiations to resolve the case. Settlement terms were discussed over the phone and the parties reached an agreement. Counsel for Lucas Contracting then confirmed to opposing counsel by email that the parties had “tentatively agreed” to settle the case. The email set out three specific terms. This email further stated “...all of this is subject to approval of settlement documents.” Counsel for Altisource sent an email in response which did not specifically accept, contradict, repeat or even discuss the stated terms. The email from counsel Altisource indicated that the “...executed settlement and release agreement will establish the parties’ respective obligations.”

Subsequently, counsel for Altisource forwarded a draft settlement agreement which contained terms different from what was stated in the initial email from Plaintiff’s counsel. Altisource wanted a personal signature of a non-party, a term not mentioned in the initial email exchange. Plaintiff’s counsel asked the trial court to enforce the settlement on the terms originally proposed by Plaintiff, even though

the parties never reached agreement on the terms of written settlement documents. The trial court entered judgment enforcing the settlement as originally proposed by counsel for Lucas Contracting. That decision was affirmed on appeal. The rationale of the decision was that counsel for Altisource had not “contradicted or challenged” the recitation of terms by counsel for Lucas Contracting.

This decision is noteworthy because the court rejected the argument that there could be no enforceable settlement until the terms had been reduced to a mutually acceptable, written agreement. All cases like this are fact specific. There is a suggestion that the outcome might have been different if the parties had offered oral testimony about their respective intentions at the court hearing.

Confirming settlement terms subject to approval of a formal written documents is a standard operating procedure in litigation matters. A litigant should respond specifically to each element of a proposal from an opponent and not omit any essential terms. If a response does not “contradict or challenge” the proposed terms, a court may enforce the “agreed upon” terms. A term calling for the settlement agreement to be memorialized in a subsequent writing will not keep a court from finding that the parties had an enforceable settlement agreement.

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Larry McClatchey joined Kegler Brown in 1985 in the area of commercial litigation having ten years of civil practice experience. Since then, he has led the effort to establish, grow and lead a dedicated Creditors’ Rights + Bankruptcy practice area within the firm’s Litigation group.

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