Say What You Need to Say: Avoiding Familiar Pitfalls in Settling Claims

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Sophisticated parties settle hundreds of claims every day. Yet the sheer volume and familiarity of forging and finalizing agreements can create headaches when not approached thoughtfully. Some parties mistakenly assume the standard terms of their agreements are generally understood and accepted without even mentioning them amid negotiations. And others accept offers similarly assuming certain conditions are a given or will only become firm when reduced to writing. Naturally, neither are a given, and assumptions lay at the root of many avoidable disputes. The Georgia Court of Appeals recently decided the case of *Progressive v. Butler*, A22A0322, 2022 WL 2236137, 2022 Ga. App. LEXIS 320 (June 22, 2022), providing an instructive reminder to parties of the double-edged sword of negotiating agreements with vague assumptions.

In March 2019, a tractor-trailer driven by Julio Maden side-swiped a personal auto driven by Ernest Butler. Butler hired counsel Sarah Jett to negotiate settlement of his negligence claim with Progressive, the insurer for Maden's motor carrier, Carrier Compliance Service. After having discussed the matter with Progressive, Jett emailed Progressive the following:

> Attached is the hold harmless letter. Please send the check and settlement documents to [law firm name and address].

Also attached to the email was a letter:

> Please allow this letter to confirm that Ernest Butler accepts Progressive Mountain Insurance Company's offer of $17,500 as full and final settlement of the above-referenced claim. This settlement is for the bodily injury claim ONLY. Please make the check payable to Ernest Butler and The Law Offices of Gary Martin Hays & Associates, P.C. Further our firm agrees to address any statutorily valid liens filed prior to the distribution of the settlement funds.

The letter went on to repeat the email's request for the check and settlement documents to be forwarded to the firm's address. But eight days later, Jett informed Progressive her firm no longer represented Butler and provided notice of her firm's lien against any settlement proceeds or verdict.

About a month later, Butler resurfaced with new counsel and, surprisingly, a new demand for $350,000. Despite being reminded of the prior agreement with Jett to resolve Butler's claim for $17,500, Butler's new counsel did not respond. So Progressive filed suit against Butler asking the Superior Court of Gwinnett County to declare the claim had been settled with Butler's original attorney, Jett. The trial court, however, disagreed, finding Jett's hold harmless letter (1) did not include any specific terms; (2) had not been made available to Butler by Jett; and (3) that neither Butler nor Jett ever signed any release or settlement agreement.

On appeal, the Georgia Court of Appeals disagreed with every finding made by the Superior Court, and its reasoning for doing so bears some thoughtful review for anyone negotiating settlement of a claim or suit.

First, attorneys acting on behalf of their clients have "apparent authority" to broker settlement agreements. This means adverse parties can rely on attorneys' offers and acceptance in reaching a compromise even if those attorneys overstep the authority provided by their clients. The only exception to this general rule is if the adverse party knows the attorneys' clients have expressly restricted their attorneys from extending or accepting the offers at issue. Put another way, if attorneys overstep their authority and reach a settlement, that mistake does not implode the settlement; it simply creates a cause of action for those attorneys' clients to pursue against them for doing so.

Second, at base, settlement agreements are contracts, and courts will analyze them as such. In this case, Progressive extended an offer via phone to settle Butler's claim for $17,500. In turn, Butler's counsel accepted and then memorialized that acceptance in a hold harmless letter, asking for the check and settlement documents to be completed. Simply put, Progressive made an offer, and Butler's counsel accepted the offer, so a settlement was reached. Had Butler's counsel neglected to memorialize acceptance of the offer in writing, the fact remains: a settlement was reached, and he could not renege on his counsel's negotiated agreement.

Now, consider this wrinkle: Suppose the settlement agreement proposed by Progressive and its insured contained a confidentiality provision. And further assume the word "confidentiality" was never mentioned during negotiations. After all, Butler's counsel agreed to sign the "settlement documents," right? This most likely will not be considered part of the bargain, and a careful reading of the court's opinion sheds some guidance on the difference between such "terms" and "purely informational" requests.

For example, Butler's counsel provided instructions on how to submit payment and how liens would be handled, but these points do not add a condition to the bargain itself. Consider this versus Butler's counsel sending an email agreeing to settle but adding, "And, I assume you will be satisfying the liens?" This would likely be considered an effort to add a term to the agreement. Compare ***Torres v. Elkin***, 317 Ga. App. 135, 142–43(2) (2012) (acceptance letter expressing assumption that offerer would satisfy liens held as counteroffer) with ***Herring v. Dunning***, 213 Ga. App. 695, 689–99 (1994) (letter

asking about the existence of liens held not to be counteroffer but simply confirmation of counsel's belief). And similar to the confidentiality clause example above, had Progressive insisted on Butler signing a general release as opposed to a limited-liability release after Butler's counsel accepted its offer, a court would likely view Progressive's requirement of a specific release as too little, too late. Compare *Turner v.*, *Williamson*, 321 Ga. App. 209, 213(1) (attorney's letter proposing use of a different release form was a counteroffer rather than an acceptance where offer was condition on execution of a particular release) with *Vildibill v. Palmer Johnson of Savannah, Inc.*, 244 Ga. App. 747, 749(1) (2000) (letter accepting offer to settle in return for "any release you deem appropriate" created a binding settlement agreement).

A common tactic used by savvy attorneys is to offer to resolve a case in exchange for a "standard release and settlement agreement" or similar loose language. Of course, a "standard release" or "standard settlement agreement" is anyone's guess. But one can readily assume the language will be most favorable to the drafter. The word of wisdom is to be certain about the non-negotiable terms a client wants to see in a settlement and that those terms and conditions are expressed clearly, simply, and then ultimately put in writing to prevent the opposing party's sudden amnesia of deal-breaking provisions to the agreement.

On the other hand, perhaps limited details are favorable to the client's position. In such a case, some merit might be placed in making an agreement and reflecting those few details in a memorialized writing, fully anticipating and leveraging against the other party's failure to specify all the terms of their offer. Taking such an approach may likely trigger some frustration from the other parties and additional legal expenses to have a court affirm the client's position, but depending on the circumstances of a claim or case, those costs may be a small price to pay on balance.