

NEGOTIATION/OUT-OF-COURTROOM SKILLS

I. OVERVIEW

“A good settlement is one that neither party is truly happy with.”

A. Rule 9019(a), Fed. R. Bankr. P.

Compromise

On motion by the Trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct.

B. Justice Oaks Factors

The Eleventh Circuit Court of Appeals has articulated four factors for a bankruptcy court to consider in its analysis of a proposed settlement:

1. The probability of success in the litigation;
2. The difficulties, if any, to be encountered in the matter of collection;
3. The complexity of the litigation involved, and the expense and convenience and delay necessarily attending it; and
4. The paramount interest of the creditors and the proper deference to their reasonable views and the premises.

Wallis v. Justice Oaks II, Ltd (In re Justice Oaks II, Ltd., 898 F.2d 1544, 1549 (11th Cir. 1990).

Thus, the Court is not required “ to *decide* the merits of those claims – only the *probability* of succeeding on those claims.” *Justice Oaks*, 898 F.2d at 1549.

C. Collier on Bankruptcy

10 Collier on Bankruptcy § 9019.02 (15th Ed. Revised): provides that a compromise will be approved when it is both “fair and equitable” and in the best interests of the estate. The Bankruptcy Court is not required to hold a full evidentiary hearing or a even a “mini-trial” before a compromise can be approved (otherwise, there would be no point in compromising). Instead,

courts should canvass the issues and see whether the settlement falls below the lowest point in the range of reasonableness.

The decision of the bankruptcy judge as to the approval or disapproval of a compromise agreement rests in the judge's sound discretion and will not normally be set aside on appeal except where there is an abuse of discretion.

II. TYPES OF CASES SUBJECT TO SETTLEMENTS:

1. Objection to exemptions
 - (a) T or C vs. D.
 - (b) § 522; O.C.G.A. § 44-13-100; BR 4003
2. Non-exempt equity in assets
 - (a) T vs. D
 - (b) § 522; 542; 363; BR 6004
3. Administering, selling assets co-owned by D and third party
 - (a) T vs. D and co-owner(s)
 - (b) 363(h); BR 6004 and BR 7001(3)
4. Recovery of preference payments
 - (a) T vs. transferee lender
 - (b) 547; 550; and BR 7001; 28 U.S.C. §§ 1409 and 1391(c)
5. Avoidance of preferentially perfected lien
 - (a) D or T vs. S/C
 - (b) 547; 551; and BR 7001
6. Avoidance of unperfected lien
 - (a) D or T vs. S/C (note existence of title insurance)
 - (b) 544; 551; 542; 363; and BR 6004 and BR 7001

7. Discharge of debt
 - (a) C vs. D
 - (b) 523; BR 4007 and BR 7001(6)
 - (c) Note: Substantial justification requirements for action under 523(d)

8. Objection to discharge
 - (a) T, UST, or C vs. D
 - (b) 727; BR 4004-4006; BR 7001(4)

9. Avoidance of fraudulent transfer (usually to an insider)
 - (a) T vs. D and insiders
 - (b) 544; 548; 550; 551; O.C.G.A. 18-2-74 *et seq.*; 101(31) and 727(a)(2); BR 7001

10. Objection to discharge combined with avoidance of fraudulent transfer or undisclosed or undervalued assets combined with objection to discharge
 - (a) T, UST, or C vs. D and transferee(s)
 - (b) See preceding paragraphs for applicable code sections and rules

11. Objections to Claims
 - (a) D, T, C vs. C
 - (b) 501; 502; BR 3001--3008

NEGOTIATION/OUT OF COURTROOM SKILLS AND TECHNIQUES**Litigation vs. Settlement**

The question of litigation or settlement should be considered from the beginning of each conflict. However, the decision is a process which may force a change in direction as knowledge increases and new developments are taken into account. Good preparation and strategic thinking are the key principles in both litigation and settlement. Preparation and strategy build the confidence of the people involved and improve the chances of meeting the established goals.

The best strategy will vary tremendously depending on a number of factors, including, but not limited to, the people involved, the dynamics of the relationships, and the issues involved in the case. Strategic planning can take various forms from considering how to present issues to the other parties involved, to the location of a meeting to present those issues, to meeting with colleagues to go over the issues involved and obtaining objective feedback from someone not intimately involved in the case, to reviewing statistical analyses of different actions and options. But, the late, great coach, Bear Bryant summed up strategic planning best when he said, “It’s not the will to win, but the will to prepare to win that makes the difference.”

Effective Negotiation

Effective negotiation is a skill, just like effective questioning of witnesses at trial or any other litigation skill. In its broadest definition, negotiation is something done everyday and on a constant basis, from when to take a lunch break to assure phone coverage at the office, to which parent is going to drop off the children at school in the

morning, to where to go for dinner on Friday evening. Each conversation could be described as a negotiation of some type. Effective negotiation skills can have a huge impact on day to day tasks. Some people cave in early to avoid conflict and others take a “win at all costs” approach, neither of which is likely to get the desired result.

Listening is Essential

To effectively negotiate, one must be willing to listen to what one’s opponent has to say and to imagine one’s self in the position of the opponent. Find out the needs of the others involved in the negotiation and assist them in defining what they hope to achieve at the end of the day. Ask good questions of opponents and listen carefully to the responses. It will strengthen your case if you can learn the goals and objectives of the other side.

Many aspects of settlement negotiations go on inside the minds of the parties involved. Perception motivates many decisions, and all too often, perception becomes reality. The challenge of settlement discussions is apparent when you consider that two people may have different perspectives of the same situation and facts. Individuals may be closer to common ground realistically than they perceive they are initially.

Know the Issues

As attorneys, we have heard from the beginning of our careers to know our case, and this statement is true when negotiating. The best preparation for settlement is to prepare a good case for trial. Know the facts and legal precedent that support your position, as well as that of your opponent. Identify those factors that will make your opponent want to join with you to figure things out, not convince them to change their mind or support your cause, but rather to engage in meaningful problem-solving

discussions. Playing hardball frequently can damage future negotiations, as can caving in too early. Knowing the issues will avoid this trap. Breaking the case down into smaller parts and initiating settlement discussions first on those topics that are most likely to result in an agreement between the parties may assist in building momentum on larger, more contentious topics.

While establishing a strategy before beginning settlement discussions is important, it is important to retain some flexibility in the discussions, also. Information revealed during the preliminary discussions may impact the strategy or change the direction that you are moving. Adapting to the changes in the direction of the discussion will improve your success.

Identify Legal and Other Costs

Litigation has costs associated with it for the parties involved. The tangible costs of attorney fees and litigation expenses must be weighed, but so also should the intangible costs of emotional damage done to the parties involved, as well as possible lost business opportunities resulting from the litigation. The intangible costs may outweigh the more tangible costs, and are overlooked frequently by attorneys focused solely on the more easily identifiable tangible expenses of litigation.

Learn to Compromise

By design, the judicial system in America is adversarial. Attorneys are competitive, with a strong desire to win. Attorneys frequently keep their eye on the ideal and sometimes overlook the opportunity for a great deal. Weighing the costs associated with the litigation, especially intangible costs, may make compromise desirable. Former Supreme Court Justice, Sandra Day O'Connor said, "The courts of this country should

not be the places where resolution of disputes begins. They should be the places where the disputes end after alternative methods of resolving disputes have been considered and tried.”

Bring the Right Parties to the Table

One problem that often happens during negotiations is that the wrong parties are involved. When dealing with corporate opponents or clients, the individuals involved initially in the case may have limited to no settlement authority. Learn when to escalate a matter to senior officers and managers. Get information into the hands of the individuals who can make decisions. Factual information learned during discovery and preliminary settlement discussions may indicate a need to involve different parties.

Ethical Considerations in Negotiations

Rule 4.1 of the Georgia Rules of Professional Conduct provides that “(i)n the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client unless disclosure is prohibited by Rule 1.6.”

When this rule is taken on its face, it might be said that every attorney involved in negotiating a settlement violates the rule. For example, an attorney who has been given settlement authority by the client of \$200,000, may begin negotiations by telling the opponent, that the client authorized settlement of \$100,000, while the opponent may advise that he has no authority to accept anything less than \$300,000, when in fact he is authorized to accept \$150,000. Fortunately, the drafters of this rule took this possibility

into account and added comments following the rule that the rule refers to statements of fact only, stating, “Comments which fall under the general category of “puffing” do not violate this rule. Estimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement of a claim are in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.” However, what statements constitute fact and what statements constitute “puffing” depend on the circumstances surrounding the statements. Attention should be paid to assure compliance with this rule during all negotiations.

The rule may also dictate what information is disclosed during settlement negotiations and what information is held back. The comments to the rule address this issue by stating that a lawyer has a duty to be truthful, “but generally has no affirmative duty to inform an opposing party of the relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by failure to act.” The Rule should be reviewed in conjunction with Federal Rule of Bankruptcy Procedure 9011, also.

REFERENCES

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