

PRODUCT LIABILITY

December 2010

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The author reviews the importance of documenting settlement terms in writing as soon as they are reached, based on the recent Mississippi Supreme Court case Illinois Central Railroad Company v. Byrd.

Did We Settle This Case or Not? Don't Risk Letting the Court Decide

ABOUT THE AUTHOR



Stephanie M. Rippee is a shareholder with Baker, Donelson, Bearman, Caldwell & Berkowitz located in the firm's Jackson, Mississippi, office. She focuses her practice on the defense of products liability litigation, commercial litigation, and personal injury litigation. She was appointed to, and is currently serving on, the ABA Task Force on Federal Agency Preemption.

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Jennifer Haltom Doan
Vice Chair of Newsletters
Haltom & Doan
(903) 255-1000
jdoan@haltomdoan.com

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A recent Mississippi Supreme Court decision gives trial judges the authority to intercede, in the absence of a written settlement agreement, as a finder of fact to answer disputed questions as to whether the parties settled their cases and on what terms. The decision on this issue came in a recent product liability case, but it has implications for almost any matter litigated under Mississippi law.

In *Ill. Cent. R.R. Co. v. Byrd*, 2009-CA-00065-SCT (Miss. 2010), a large group of former employees sued the railroad alleging occupational exposure to asbestos. After litigating for a couple of years, counsel for both sides had a meeting in Pittsburgh, Pennsylvania to discuss settlement. Plaintiffs alleged that at the meeting the parties agreed to settle all the claims of all plaintiffs. *Id.* at ¶3. Illinois Central Railroad Company (“ICRR”) alleged that the parties entered into a conditional settlement process whereby each plaintiff’s claim would be settled if the plaintiff met the following criteria: 1) plaintiff had not signed a prior occupational release; 2) plaintiff’s claim was not barred by the applicable statute of limitations; and 3) plaintiff completed and signed a pulmonary questionnaire, provided proof of employment, and submitted to a chest x-ray from a credible “B-reader.”¹ *Id.* Importantly, whatever agreement truly was reached was not reduced to writing.

After the meeting, ICRR did, in fact, execute settlements with most of the plaintiffs. ICRR declined to settle with a small number of the plaintiffs, however, claiming that the conditions for settlement had not been met. *Id.* at ¶3-4. ICRR claimed that these plaintiffs

failed to meet the settlement conditions primarily because they had signed a prior occupational release and/or their chest x-rays had been read by Dr. Harron, a physician whose credibility as “B-reader” had been challenged in legal proceedings. *Id.* at ¶4. Approximately twenty-five of the plaintiffs with whom ICRR refused to settle moved to enforce the settlement. In response, ICRR moved to sever and dismiss the claims of these plaintiffs challenging both joinder and venue. *Id.*

The trial court held a hearing on the motions. At the hearing, the parties presented only affidavits (not live testimony) from the attorneys for both sides who had been present at the Pittsburgh meeting. *Id.* at ¶5. The trial court denied ICRR’s motion to sever and dismiss as moot and ruled that: 1) no agreement existed to disqualify a plaintiff who had executed a release from the settlement process; 2) no agreement existed to disqualify a plaintiff based on statute of limitations; 3) an agreement existed to settle the claims of the plaintiffs after submission of a release, a pulmonary questionnaire, proof of employment and a B-read from a competent reader; 4) ICRR had grounds to question the B-reads submitted that were performed by Dr. Harron and could require submission of another B-read from a competent reader; and 5) plaintiffs had complied with the terms of the settlement agreement except for the submission of an appropriate B-read. The trial court ordered ICRR to pay each plaintiff after submission of a new B-read from a competent reader. *Id.*

Plaintiffs submitted new B-reads from different readers, but ICRR still refused to pay. ICRR claimed that the credibility of the new B-reads was also questionable. ICRR attempted to propound discovery to plaintiffs about the doctors who performed the second B-reads. Plaintiffs refused to answer the

¹ A “B-reader” is a doctor certified by the National Institute for occupational Safety and Health to identify on chest x-rays the precursors of asbestos and similar related disease. *Choctaw, Inc. v. Campbell-Clony-Harrison-Davis and Dove*; 965 So.2d 1041, 1046, n.10 (Miss. 2007 (citations omitted)).

discovery as irrelevant. *Id.* at ¶6. Plaintiffs then filed a second motion to enforce the settlement. After a hearing where counsel presented argument, but again no live witnesses were called, the trial court issued a final order holding that the plaintiffs had complied with the terms of settlement. *Id.* at ¶7.

ICRR appealed raising five issues:

1. Did the trial court commit plain error in deciding the motion to enforce settlement before determining if plaintiffs claims were properly before the court;
2. Did the trial court err by deciding disputed, material factual issues in granting plaintiffs motion to enforce;
3. Alternatively, was the trial court's enforcement of the settlement agreement clearly erroneous and an abuse of discretion;
4. Alternatively, was ICRR erroneously denied discovery related to the second, unreliable B-reads tendered by plaintiffs and to the effect on plaintiffs' current claims; and
5. Alternatively, was the settlement agreement unenforceable under the Mississippi Statute of Frauds.

Id. at ¶8. The en banc appellate decision created a sharp divide among the eight participating justices of the Mississippi Supreme Court, as evidenced by the lack of a majority for the primary opinion and the two dissenting opinions. Ultimately, the plaintiffs again prevailed.

Justice James Graves, writing for a four justice plurality (with one justice concurring in result only), held that it was not error for the trial court to consider the motion to enforce before deciding ICRR's motion to sever and dismiss. The Court noted that if the

settlement was held to be valid, as it ultimately was, defenses to the plaintiff's claims – even valid ones – simply were not relevant unless they were part of the settlement agreement. Here they were not. *Id.* at ¶¶9-10.

Citing a number of Mississippi Supreme Court cases, including a prior case involving ICRR, the Court next found the trial court's actions in making findings on fact related to the existence and terms of the settlement agreement were proper. The Court held that the trial court made informed findings of fact and law, considering all evidence submitted by both sides at two separate hearings, and that there was no evidence that the trial court stopped any party from gathering and/or submitting additional evidence. *Id.* at ¶¶11-13. The Court noted that, even though given the opportunity, ICRR never asked the trial court to hold any additional hearing, evidentiary or otherwise, and thus could not for the first time raise the need for one on appeal. *Id.* at ¶¶13-14. The Court further held that in light of the arguments and evidence considered by the trial court, it was not clearly erroneous or an abuse of discretion for the trial court to find that plaintiffs had met their burden of proving that there had been a meeting of the minds, and thus, an enforceable settlement agreement for all plaintiffs. *Id.* at ¶¶15-17. The Court seemed to be particularly persuaded that prior occupational releases should not be a condition of settlement because some of the "settled" plaintiffs that ICRR had already paid had signed prior releases. *Id.* at ¶17. Applying an abuse of discretion standard, the Court also held that the trial court found the second B-reads sufficient, and further, that ICRR did not ask for a hearing about the discovery it claimed it was denied as to both the second B-reads and the prior occupational releases. *Id.* at ¶19.

Finally, the court held that the Mississippi Statute of Frauds Miss. Code Ann. § 15-3-1 (Rev. 2003), which requires that an agreement that cannot be performed in fifteen months be in writing, did not apply. The court noted that ICRR could have paid the claims of all of the plaintiffs within fifteen months, even though it did not. *Id.* at ¶¶20-22.

The first dissent, authored by Justice Dickinson and joined by Justices Carlson and Lamar, took issue with the trial court deciding both the existence and terms of a settlement agreement in the absence of a writing and without even actually hearing live testimony from the lawyers present at the settlement meeting. *Id.* at ¶¶ 26-27. Calling the ruling absurd, he noted the potential for abuse created by such a ruling. He theorized that a plaintiff's attorney who wanted to settle, even if the defendant really did not, could now simply claim the parties agreed to settle for a very large amount. Then, he could move to enforce the claimed "settlement" and prevail based on not much more than his own word that a meeting of the minds had occurred. *Id.* at ¶¶28-29.

In a second dissent, Justice Lamar, joined by Justices Waller, Carlson and Dickinson, also objected to the trial court weighing evidence and judging credibility based on affidavits alone. *Id.* at ¶30. She noted that there were no Mississippi cases to support an assertion that trial judges customarily make findings of fact to enforce settlement, distinguishing each case relied on by the plurality. *Id.* at ¶31. Relying instead on a federal court decision applying Mississippi law, she indicated that a motion to enforce settlement should be treated like a summary judgment motion and should not be granted if, considering all evidence in

light most favorable to the non-moving party, a genuine issue of fact existed as to either the existence or terms of the settlement. *Id.* at ¶¶32-33. In the federal court case upon which she relied, the federal court denied defendant's motion to enforce a settlement agreement when the scope of that agreement was disputed, holding "it is not for the court to weigh the evidence or evaluate the credibility of witnesses, but to consider the evidence submitted by the parties in support of and in opposition to the motion and grant all inferences to the non-moving party..." *Volland v. Principal Residential Mortgage*, 2009 WL 1293547, at *3 (S.D. Miss. May 7, 2009). She noted the numerous other jurisdictions that use this approach. *Id.* at ¶¶32-33. She also noted that, unlike in the prior ICRR case cited by the plurality, multiple times during the process that ICRR made it clear that while it understood that the trial judge had the power to make rulings of law based on undisputed facts, it did not agree or stipulate that the trial judge could make findings of fact. *Id.* at ¶34.

What is the obvious lesson from this case? Get it in writing. Do not leave the terms of a settlement in the hands of a court applying Mississippi law. Your client may not like the result. The Court might force your client to settle claims it would never voluntarily agree to settle. If a settlement agreement was actually reached, even if a more formal agreement will be drafted later, get at least the basic facts of the agreement in principle committed to writing before a settlement meeting or mediation ends.



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