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## Feature Article

### Who Is the Master of Your Settlement?

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Do you, as a party, think that you are the master of your settlement? That you dictate the terms of your settlement? That you cannot be forced into a settlement on terms to which you did not agree? A recent Mississippi Supreme Court decision in a product liability case casts some doubt on these seemingly basic notions—at least, if you do not commit the specific terms of your settlement to writing.

#### The Basic Facts

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. The parties ultimately disputed what agreement came out of that meeting. Plaintiffs alleged that the parties agreed to settle all the claims of all plaintiffs. *Id.* at ¶3. Illinois Central Railroad Company (ICRR), by contrast, alleged that the parties agreed to 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" (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). *Id.* Importantly, whatever agreement truly was reached apparently was not reduced to writing. There is no discussion in the opinion to indicate that there was any sort of writing made at any point to evidence what transpired at the meeting, and there is no explanation for why there was no writing.

After the meeting, ICRR executed settlements with most of the plaintiffs but declined to settle with a small number of them. ICRR claimed that the conditions for settlement had not been met by those plaintiffs 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 other legal proceedings. *Id.* at ¶¶3-4. Approximately 25 of these "non-settled" plaintiffs moved to enforce the settlement. In response, ICRR moved to sever and dismiss the claims of these plaintiffs, challenging both joinder and venue. *Id.* at ¶4.

At the hearing on these motions, 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. Based only on these affidavits and arguments made by other counsel, 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 then submitted new B-reads from different readers, but ICRR still refused to pay, claiming 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 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.

### **The Issues Raised on Appeal**

ICRR raised the following issues on appeal:

- The trial court committed plain error in deciding the motion to enforce settlement, before determining if plaintiffs' claims were properly before the court;
- The trial court erred by deciding disputed, material factual issues in granting plaintiffs' motion to enforce;
- Alternatively, the trial court's enforcement of the settlement agreement was clearly erroneous and an abuse of discretion;
- Alternatively, ICRR was erroneously denied discovery related to the second, unreliable B-reads tendered by plaintiffs and to the effect of the prior releases on plaintiffs' current claims; and
- Alternatively, the settlement agreement was unenforceable under the Mississippi Statute of Frauds. *Id.* at ¶8.

### **The Plurality Opinion**

The plaintiffs ultimately prevailed, but the en banc appellate decision from the Mississippi Supreme Court was sharply divided with only eight of the nine justices participating. 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. The court next found the trial court's actions in making findings of fact related to the existence and terms of the settlement agreement were proper. Citing a number of Mississippi Supreme Court cases, including a prior case involving ICRR, 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 ICRR never asked the trial court to hold any additional hearing, evidentiary or otherwise, even though it had the opportunity to do so, and thus could not for the first time raise the need for one on appeal. *Id.* at ¶¶13-14.

The court further held 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 there was evidence that some of the "settled" plaintiffs had also already signed prior releases. *Id.* at ¶17. Applying an abuse of discretion standard, the court held that the trial court found the second B-reads sufficient and further, that ICRR did not ask for a hearing about the additional discovery it claimed it was denied. *Id.* at ¶19. Finally, the court held that the Mississippi Statute of Frauds, Miss. Code Ann. § 15-3-1 (Rev. 2003), did not apply because ICRR could have paid the claims of all of the plaintiffs within 15 months, even though it did not. *Id.* at ¶¶20-22.

### **The Dissenting Opinions**

The two separate dissents took issue with similar points in the plurality ruling. The first dissent, authored by Justice Dickinson and joined by Justices Carlson and Lamar, objected to the trial court deciding both

the existence and terms of a disputed settlement agreement in the absence of a writing without even actually hearing live testimony from the lawyers present at the settlement meeting. *Id.* at ¶¶ 26-27. Calling the ruling absurd, he argued that finding the existence of a settlement based on such thin evidence of agreement opened significant potential for abuse. In his estimation, a plaintiff's attorney who wanted to settle could now simply manufacture a settlement by claiming the parties agreed to settle (for a very large amount) and moving to enforce the claimed "settlement" based on little more than his own word. *Id.* at ¶¶ 28-29.

In the 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 distinguished each case relied on by the plurality and concluded that there really were no Mississippi cases to support an assertion that trial judges customarily make findings of fact to enforce settlement. *Id.* at ¶31. She opined that, as is done in many other jurisdictions, a motion to enforce settlement should be treated like a summary judgment motion. It should not be granted if, considering all evidence in the light most favorable to the non-moving party, a genuine issue of fact exists as to either the existence or the terms of the settlement. *Id.* at ¶¶32-33. Justice Lamar relied on a federal court decision applying Mississippi law that 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 also noted that in the prior ICRR case cited by the plurality, ICRR had consented to having the trial judge make findings of fact. Here, by contrast, multiple times during the process, 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.

## Conclusion

This opinion came in a product liability case, but it actually but has implications for any type of litigated matter. Prior to this opinion, the law on this issue in Mississippi was, at best, thin. In fact, at least one justice would say this was an issue of first impression. Unfortunately, for cases governed by Mississippi law, there is now specific precedent that a trial judge has 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 case and on what terms. The exercise of that authority turned out poorly for the defendant in this case. But even beyond Mississippi, in any state where this issue is unsettled, the opinion provides a road map to any court that wishes to step in to enforce a settlement to justify its authority to do so. And, of course, this opinion can be cited as support that "other jurisdictions" have found this approach to handling motions to enforce settlements reasonable.

The clear lesson to be learned from this case is that any settlement agreement, even if preliminary, should be documented in some manner at the time the "meeting of the minds" occurs. If not, your client might not like what the court has to say when it steps in as the ultimate "master" of your settlement.

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