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Class Action Settlements and the Importance of Clarity

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Most class actions resemble three-act plays. In the first act, the players are adversaries – fighting to kill the case or keep it alive, and if kept alive, to keep it limited to a solitary dispute or allow it to burgeon into the combined claim of large numbers of absent parties. If the case survives these early scenes, it proceeds to Act II, in which the cast members pause to see whether they can negotiate a resolution. In cases that are mediated, Act II often extends beyond the mediation sessions and does not end until a Settlement Agreement is signed. Act III begins upon execution of the Settlement Agreement. As the matter approaches its denouement, the parties’ interests come into alignment, as both sides work together to gain court approval.

Occasionally disputes develop over whether the case was resolved in Act II. This can occur when no Settlement Agreement has been signed but one side claims that the negotiations resulted in a binding oral agreement. Although disputes over the existence of a settlement agreement can happen in any lawsuit, class actions are particularly at risk because of the complexity of most class action settlements — they typically contain many moving parts, and agreement with respect to some key terms may precede by weeks or months agreement on the rest. Especially if, as is often the case, the negotiations take place under the pressure of impending deadlines, how the status of the negotiations is documented and reported to the court takes on heightened importance.

A recent Report and Recommendation of a Magistrate Judge in the Southern District of Florida illustrates the problems that could arise if parties do not clearly document their settlement progress. In [Zamber v American Airlines Inc.](#), plaintiff claimed that the parties had reached a binding, oral settlement agreement because they had agreed to the amounts that class members would receive. Defendant disagreed, arguing that no final settlement had been reached because several material terms, including the amount of class counsel’s fees, had not been resolved.

The case involved claims concerning travel insurance sold when consumers booked flights on defendant’s airline. The Report and Recommendation describes an oral agreement-in-principle that the travel insurance company that had issued the insurance policies would fund a settlement to pay class members \$11 per policy, up to a limit of \$25 million, with attorneys’ fees to be paid by the carrier and deducted from the \$25 million cap. Because the agreement-in-principle was reached on the evening of the extended deadline for plaintiff to file a motion for class certification, plaintiff wanted to notify the court of the case status and obtain a stay of the impending deadline. The notice the parties agreed to was entitled “Notice of Settlement and Joint Motion to Stay Deadlines.” It read:

The parties have reached an agreement in principle on the financial terms of a class settlement. They are negotiating remaining terms of the settlement and expect to finalize them shortly. As a result, the parties move this Court to stay discovery and all deadlines pending submission of a motion for preliminary approval of their settlement within thirty (30) days.

The next day, the District Judge entered an order denying all pending motions as moot, describing the notice as “indicating that the parties have reached a settlement in this matter,” and directing the parties to file dismissal papers.

In the weeks following the notice, however, the parties were unable to reach agreement on the remaining terms.



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Plaintiff nevertheless filed a motion to enforce the parties' settlement, quickly followed by defendant's competing motion to restore the case to the court's active docket.

Plaintiff's core argument was that the parties' negotiations demonstrated that the unresolved terms were not material. Defendant argued that there were several material settlement terms that had not been agreed to, including how the class would be defined, whether administrative expenses would be deducted from the \$25 million cap, the specifics of the injunctive relief that would enter, whether the travel insurer would be a party to the agreement, the contours of the releases, and the amount of the attorneys' fees. After considering the detailed evidence of the parties' post-notice negotiations, the Magistrate Judge concluded that no binding contract had been reached. Among other things, he concluded that the parties' description of their filing as "Notice of Settlement" was not dispositive given the more limited language set forth in the body of the notice.

Zamber illustrates what can happen when parties who have made significant progress towards a class action settlement are faced with an imminent deadline before they have fleshed out all of the settlement's terms. In their optimism that they will be able to reach a final agreement, and their eagerness to avoid missing the deadline, they may unintentionally convey in their notice to the court more certainty about settlement than is warranted. Clarity in such filings is paramount, not only because of counsel's duty of candor with the court, but also because judges who have not participated in the settlement negotiations may misinterpret the parties' report and enter orders that do not comport with the actual state of affairs.

Clarity in the communications between the parties is also essential. Counsel who wish to avoid any dispute about whether a binding agreement has been reached should state their intentions in their written communications with each other. A simple sentence in an email, perhaps repeated in other communications, that no binding agreement will exist unless and until all parties have signed a written settlement agreement, may suffice. Such cautionary language can protect both sides from an attempt to bind them to the results of an incomplete negotiation and can help avoid unnecessary disputes. Even when most key terms are agreed to, it is a good practice for the parties to draft and sign a written term sheet that expressly states that no binding contract will be deemed to have been formed unless and until a written settlement agreement is signed by all.

With such simple precautions, only after the final lines are spoken can the actors take their bows.

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