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Extension of Scope of Recission of Contracts of Settlement

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EXTENSION OF SCOPE OF RECISSION OF CONTRACTS OF SETTLEMENT

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FOR MANY years, the state of North Dakota has had on its statute books a law which permitted any person sustaining personal injuries, or in the case of his death his personal representatives, at any time within six months after the date of such injury to avoid any settlement, adjustment or contract made in settlement of such injuries, if such settlement, adjustment or contract was made within thirty days after the injury, or within six months after such injury, if the person injured was still under disability from the effect of such injury. See North Dakota Rev. Code (1943) Sections 9-0808 and 9-0809.

This statute has done much to prevent unfair settlements which might be entered into at a time when the injured person was too ill to either realize or care what he was signing. It has protected the weak against the unfair tactics of the strong; it has prevented strong-minded persons from obtaining undue advantage over weak-minded ones. In other words, it has promoted justice and prevented much injustice.

Certain instances which have come to our attention recently have convinced us that in order to further promote justice, a statute permitting the recission of certain contracts of settlement made in pending litigation in other than personal injury cases might be desirable. The reasons which make a statute permitting recission of contracts for damages or personal injuries desirable could also be urged for extending the scope of the statute to apply to all claims and disputes. It is clear that there are other claims which are just as important to a litigant as a claim for personal injuries. All claims and disputes affecting the interests, financial and otherwise, of a litigant are important to him and every claimant is entitled to a fair consideration of his claim.

To that end, everything possible should be done to discourage and prevent one person or party to a controversy from taking unfair advantage of another. Justice demands

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that all claims be fairly decided without any undue influence or unfair advantage being taken by either side.

Where both parties are represented by attorneys it is presumed that the rights of the parties will be adequately protected. However, instances have occurred where one party has used undue influence even in such cases. No lawyer should try to settle a claim between litigants where both of the parties are represented by counsel unless the opposing attorney is present, because it is only natural for an attorney who is present at such a conference to favor his own client in any settlement arrived at.

Statutes have been enacted in some of the states providing that where attorneys have appeared in a dispute, any settlement made in the absence of any one of the attorneys for either of the parties is voidable. It is in the interest of the Bar, as well as of the general public, to have justice prevail in all cases and this can be more surely accomplished by requiring the presence of the attorneys for both sides of a controversy in all cases where attorneys have been employed.

If, for any reason, one of the litigants does not agree with the advice given him by his attorney, such attorney can always be discharged. But while he is represented by an attorney, no settlement should be permitted in the absence of the lawyer.

As long as this sort of settlement is permitted, the unscrupulous and forceful litigant can take advantage of his trusting and weaker opponent.

It may be suggested that the court has power to set aside such settlements on the ground of fraud. However, our courts have sustained settlements of this nature, and have done so because there is no statute granting to the court the power to rescind settlements arrived at in the absence of the attorney for one of the parties as an absolute right.

Our Supreme Court, in a recent decision, has held that such a settlement contract is valid even though it has been entered into in the absence of the attorney for one of the litigants where it appeared from the record that the litigant, who was not represented at the settlement conference by his attorney, knew what he was signing. *Muhlhauser v. Gappert*, 37 N. W. 2d 352 (N. D. 1949).

In the case cited, the Supreme Court was powerless to aid a client who had signed such a settlement agreement in the absence of his attorney because we have no statute in this

state making such settlements voidable even though unfair advantage of one litigant may have been taken, if such unfair advantage did not amount to downright fraud.

We believe that this is a matter that should receive the serious consideration of the members of the North Dakota Bar. If the majority of the members of this association, after careful consideration, believe that we should have a statute in this state which would make settlements of pending litigation voidable where such settlement was entered into in the absence of one of the attorneys representing one of the parties to the litigation, then appropriate legislation should be drafted for presentation to the next legislative assembly. If such legislation is desirable and the members of the Bar indicate their approval there is little doubt that such a bill would be enacted into law.

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