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COMPELLING SETTLEMENT AGREEMENTS IN BANKRUPTCY CASES: HOLDING THEIR FEET TO THE FIRE

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I. INTRODUCTION

The vast majority of civil litigation is settled, not tried.[2] This practice is favored by our judicial system.[3] Settlement agreements are, like so many other nonbankruptcy concepts, directly affected by a bankruptcy filing. This Article will initially review the procedural requirements of settlements reached after a bankruptcy filing and proceed to the requisites of enforcing a settlement agreement in a bankruptcy case. It will conclude with a discussion of the litigants' and their attorneys' potential exposure for breached settlement agreements.

II. SETTLEMENT AGREEMENTS IN BANKRUPTCY CASES

In nonbankruptcy situations, parties to a dispute may settle their dispute on whatever terms they can agree upon, subject to basic illegalities. In bankruptcy cases, the parties to a settlement are not the only interested participants. The views of the bankruptcy court, the creditors of the debtor, the debtor, the bankruptcy trustee, if one has been appointed, the United States trustee, and the particular parties to the dispute must all be considered.[4] Despite the input required by these parties, there is no particular subsection of the U.S. Bankruptcy Code[5] which governs compromises in bankruptcy cases.

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2. *United States District Courts, Civil Cases Terminated, By Nature of Suit and Action Taken [Land Condemnation Cases Omitted] During The Twelve Month Period Ended June 30, 1997,* Administrative Office of the United States Courts, Statistics Division (finding 3% reach trial); Ostrom & Kauder, EXAMINING THE WORK OF STATE COURTS, 1995: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT, 22 (National Center for State Courts 1996) (finding overall, 3.3% of the general civil filings across the counties are disposed of by trial).

3. *E.g.*, Thomas v. State, 534 F.2d 613, 615 (5th Cir. 1976).

4. *See infra* FED. R. CIV. P. 9019(a); *see also* 11 U.S.C. § 102(1) (1978):

(1) "after notice and hearing," or a similar phrase--

(A) means after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances; but

(B) authorizes an act without an actual hearing if such notice is given properly and if

(i) such a hearing is not requested timely by a party in interest; or

(ii) there is insufficient time for a hearing to be commenced before such act must be done, and the court authorizes such act.

5. All Code provisions refer to the BANKRUPTCY REFORM ACT OF 1978, 11 U.S.C. § 101, *et seq.* (1978).

Any dispute of the debtor will be either a liability or an asset of the bankruptcy estate, depending on the debtor's relative position in the dispute. The most common example of this scenario is when a debtor is a party to litigation which was pending prior to the bankruptcy filing. If the debtor is the plaintiff, then the lawsuit is an asset of the estate under § 541.[6]

It follows, then, that the lawsuit will be a potential liability if the debtor is the defendant.[7] If the suit involves counterclaims, cross-claims, and/or third-party defendants, the analysis becomes more complex, though the basic composition will remain the same.

A. The Procedure

Federal Rule of Bankruptcy Procedure 9019(a) governs the procedure for obtaining the views of all of the aforementioned necessary participants. Rule 9019(a) provides:

> (a) 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.[8]

Rule 2002(a) provides, in pertinent part, as follows:

> (a) TWENTY-DAY NOTICES TO PARTIES IN INTEREST. Except as provided in subdivisions (h), (i) and (l) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees at least 20 days' notice by mail of:
>
> . . . .
>
> (3) the hearing on approval of a compromise or settlement of a controversy other than approval of an agreement pursuant to Rule 4001(d), unless the court for cause shown directs that notice not be sent . . . .[9]

Rule 9019(b) provides an abbreviated procedure for settlements within a class of disputes:

> (b) AUTHORITY TO COMPROMISE OR SETTLE CONTROVERSIES WITHIN CLASSES. After a hearing on such notice as the court may direct, the court may fix a class or classes of controversies and authorize the trustee to compromise or settle controversies within such class or classes without further hearing or notice.[10]

This shortened procedure permits efficient handling of multiple matters, such as the compromise of objections to proofs of claim, preference litigation, and collection litigation on behalf of the estate.

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6. 5 COLLIER ON BANKRUPTCY ¶ 541.08, at 541-41 (Lawrence P. King, 15th ed., revised 1997).
7. 4 COLLIER ON BANKRUPTCY ¶ 521.06[2][a], at 521-17 (Lawrence P. King, 15th ed., revised 1997).
8. FED. R. BANKR. P. 9019(a).
9. FED. R. BANKR. P. 2002.
10. FED. R. BANKR. P. 9019(b).

B. The Standard for Approval of Settlements

Because there is no Bankruptcy Code section which provides guidance for the creation of settlement agreements, courts have formulated a multi-pronged analysis of such agreements. A basic policy in bankruptcy cases is that compromise is favored.[11] Courts have built on this policy by adopting the standards set forth in the United States Supreme Court decision, *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson.*[12] In *TMT*, the Supreme Court held that a compromise would be approved by the bankruptcy court only after it

> apprise[s itself] of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated. Further, the judge should form an educated estimate of the complexity, expense, and likely duration of such litigation, the possible difficulties of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise.[13]

With few variations based on local precedential authority, courts have held that the following factors must be reviewed before a compromise proposed in a bankruptcy case will be approved:

(a) [t]he probability of success in the litigation;
(b) the difficulties, if any, to be encountered in the matter of collection;
(c) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it;
(d) the paramount interest of the creditors and a proper deference to their reasonable views in the premises.[14]

The Fifth Circuit standard has been stated recently in *Official Committee of Unsecured Creditors v. Cajun Electric Power Cooperative, Inc.*:

(1) [t]he probability of success in the litigation, with due consideration for the uncertainty in fact and law,
(2) [t]he complexity and likely duration of the litigation and any attendant expense, inconvenience and delay, and
(3) [a]ll other factors bearing on the wisdom of the compromise.[15]

These factors have been summarized as requiring the compromise to be "fair and equitable" and "in the best interests of the estate."[16] The Fifth Circuit in *Cajun Electric* noted that "[t]he 'fair and equitable standard' is not as vague as it might

11. 10 COLLIER ON BANKRUPTCY ¶ 9019.01, at 9019-2 (Lawrence P. King, 15th ed., revised 1997).
12. 390 U.S. 414 (1968).
13. *Id.* at 424.
14. 10 COLLIER ¶ 9019.02, at 9019-4.
15. Official Comm. of Unsecured Creditors v. Cajun Elec. Power Coop., Inc. (*In re* Cajun Elec. Power Coop., Inc.), 119 F.3d 349, 356 (5th Cir. 1997).
16. *TMT*, 390 U.S. at 424; *Cajun Elec.*, 119 F.3d at 355.

appear to be. The words 'fair and equitable' are terms of art--they mean that senior interests are entitled to full priority over junior ones."[17]

The Fifth Circuit stated in great detail in *Cajun Electric* the analysis under each prong of the settlement test. The court held that with regard to the first factor, that of analyzing the probability of success of the litigation or dispute at issue, the court need not conduct a mini-trial to determine the outcome of the claims which are the subject of the dispute being settled.[18] Rather, "[t]he judge need only apprise himself of the relevant facts and law so that he can make an informed and intelligent decision."[19]

The second factor, that of the complexity, duration, and expense of continued litigation, is a factual presentation to the court of the law on the legal issues and the facts involved, the likelihood of appeal, and the necessary expense associated therewith.[20] The third and final factor under the Fifth Circuit's statement of the settlement standard actually includes "two additional factors that bear on the decision to approve a proposed settlement."[21] These are: (1) "the best interests of the creditors, 'with proper deference to their reasonable views'" and (2) "'the extent to which the settlement is truly the product of arms-length bargaining, and not of fraud or collusion'."[22] It is important to note that with regard to the first of these additional factors, "the 'desires of the creditors are not binding'."[23] Rather, the court should consider the creditors' best interests in the overall scope of the case.[24]

These are considerations that the court must factor into its approval process when a motion to approve a settlement is filed with the court. These are likewise the factors that parties-in-interest, such as creditors in the case, may use to challenge the approval of the settlement. If an objection to the motion to approve a settlement is filed, then the motion will be heard as a contested matter under Rule 9014. The court will have a hearing on the motion where evidence on each of the settlement factors will be presented. If an objection is not filed, the court need not hold an evidentiary hearing to determine whether the compromise proposed passes muster.[25] Parties presenting the motion to approve the settlement should detail the settlement and present evidence in the motion in support of the factors necessary for approval by the court. If the factors are met and the court approves the settlement, the court should make detailed findings on each of the factors to support any challenge on appeal.[26]

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17. *Cajun Elec.*, 119 F.3d at 355 (quoting United States v. Aweco, Inc. (*In re* Aweco, Inc.), 725 F.2d 293, 298 (5th Cir. 1984)).

18. *Id.* at 356.

19. *Id.* (quoting La Salle Nat'l Bank v. Holland (*In re* American Reserve Corp.), 841 F.2d 159, 163 (7th Cir. 1987)).

20. *Id.* at 357.

21. *Id.* at 356.

22. *Id.* (quoting Connecticut Gen. Life Ins. Co. v. United Co. Fin. Corp. (*In re* Foster Mortgage Corp.), 68 F.3d 914, 917 (5th Cir. 1995)).

23. *Id.* at 358 (quoting *Foster*, 68 F.3d at 917).

24. *Id.*

25. 10 COLLIER ON BANKRUPTCY ¶ 9019.02, at 9019-4 (Lawrence P. King ed., 15th ed., revised 1997).

26. *Id.*

III. ENFORCING A SETTLEMENT

It is surprising how often parties or attorneys will agree to a settlement of pending litigation and then attempt to renege on the agreement. Consider the following hypothetical: a business Chapter 11 case is pending in a Mississippi bankruptcy court. The parties to disputes in the case have agreed to mediation before a bankruptcy judge. The disputes include contested matters and adversary proceedings. After four days of mediation, the parties and their counsel believe that a settlement has been reached. In fact, the debtor's counsel, in the presence of the debtor's representative, acknowledges the specific terms of the settlement agreement before the parties and their counsel meet with the bankruptcy judge. After reviewing all of the terms of the settlement agreement with the bankruptcy judge, the representative of the debtor announces that he has had a change of heart. He specifically states that he does not want to give a complete release as previously agreed, but instead wants to reserve certain claims for his company. The mediation is concluded. Counsel for one of the parties is asked by his client what action should be taken. All of the parties and their counsel, excluding the debtor, still believe that the settlement is in the best interest of all concerned. What is the appropriate analysis?

In the Fifth Circuit, "[s]ettlement agreements have always been a favored means of resolving disputes."[27] The law in the Fifth Circuit is clear that "settlement agreements, when fairly arrived at and properly entered into, are generally viewed as binding, final, and as conclusive of the rights of the parties as is a judgment entered by the court."[28] Additionally, settlement agreements may not be repudiated "[a]bsent fraud, deception, coercion or overreaching . . . ."[29]

In light of these principles, the bankruptcy court has the inherent power not only to recognize and encourage settlements, but also to enforce such agreements when reached by the parties.[30] The power of courts to recognize and enforce settlements supports what the Fifth Circuit has addressed as "three important goals encouraged by our judicial system: voluntary settlements of disputes, the enforcement of agreements according to the objective intent of the parties, and an end to litigation."[31]

A. Applicable Law Controlling Enforcement

Because a compromise is a contract, a court, when faced with the issue of enforcement, must determine whether an agreement was reached under applicable state law, unless there is a federal jurisdiction issue involved in the creation of

27. Thomas v. State, 534 F.2d 613, 615 (5th Cir. 1976).

28. Rodriguez v. Via Metro. Transit Sys., 802 F.2d 126, 128 (5th Cir. 1986) (citing *Thomas*, 534 F.2d at 613, and Cia Anon Venezolana de Navegacion v. Harris, 374 F.2d 33 (5th Cir. 1967)).

29. *Rodriguez*, 802 F.2d at 129 (citing Strange v. Gulf & S. Am. Steamship Co., 495 F.2d 1235 (5th Cir. 1974)).

30. Bell v. Schexnayder, 36 F.3d 447, 449 (5th Cir. 1994).

31. *Id.* at 450.

the agreement.[32] This concept flows into a bankruptcy court's enforcement of settlements.[33]

In *Houston, OTR v. Holder (In re Omni Video, Inc.)*, the Fifth Circuit addressed a bankruptcy trustee's motion to enforce the terms of the settlement agreement in an adversarial proceeding by stating that there is

> [n]o strong federal interest in the issue of the validity of settlements entered into to resolve a bankruptcy suit. Federal bankruptcy law fails to address the validity of settlements and this gap should be filled by state law. As we have held in federal diversity suits, a settlement is a contract that is best resolved by reference to state contracts law.[34]

Which state's laws govern the enforcement issue in the hypothetical? The settlement was reached after many hours of discussion during a mediation ordered by the bankruptcy court located in Mississippi. The mediation occurred as a result of a notice of the bankruptcy court in Mississippi. The mediation took place and the agreement was reached and potentially breached in Mississippi. The debtor is a Mississippi corporation. All of these material ties to Mississippi exist despite the parties' various origins. Accordingly, Mississippi law should control the enforcement of the settlement.[35]

B. Mississippi Law on Compromise and Settlements

The Mississippi Supreme Court has long held that the enforcement of settlements is governed by contract law.[36] In *Middlesex Banking Co. v. Field*, the Mississippi Supreme Court, as early as 1904, recognized the need to enforce settlements of pending litigation.[37] In recognizing this principle in *Field*, the court held that the complainant was

> [c]apable of contracting, fully informed, advised of her rights and her prospects, counseled by attorneys of unblemished character and of unquestioned ability, [and] after full and calm deliberation, . . . convert[ed] her chances of future success into ready cash. Such a transaction is supported by every principle of law and justice and right.[38]

Similarly, the Fifth Circuit held in *State v. Thomas*[39] that agreeing to end litigation is sufficient consideration to enforce settlement agreements.

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32. Resolution Trust Corp. v. Accardo, 1995 U.S. Dist. LEXIS 11997 (E.D. La. 1995).

33. *See, e.g.*, Houston, OTR v. Holder (*In re* Omni Video, Inc.), 60 F.3d 230 (5th Cir. 1995); Equity Management II Corp. v. Carroll Canyon Assoc. (*In re* Carroll Canyon Assoc.), 73 B.R. 236, 238 (S.D. Miss. 1987).

34. *Omni*, 60 F.3d at 232.

35. *Id.*

36. Middlesex Banking Co. v. Field, 37 So. 139, 149 (Miss. 1904) (Truly, J., specially concurring).

37. *Id.* at 148.

38. *Id.* at 149.

39. 464 F.2d 156, 159 n.3 (5th Cir. 1972) (applying Mississippi law).

C. An Objective Standard

In *Hudgins v. Security Bank (In re Hudgins)*,[40] the Bankruptcy Court for the Eastern District of Texas addressed a case factually similar to the hypothetical. The Chapter 11 debtors and a creditor reached a settlement agreement after a 14-hour mediation session. While a "Settlement Agreement" was roughed out and signed by the parties at the conclusion of the mediation, the agreement contemplated more formal documentation. The creditor maintained that there was merely an "agreement to agree" and that the documentation at the close of the mediation session was part of ongoing negotiations.[41] The bankruptcy court, however, held that the subsequent documentation was meant only to formalize the agreement of the parties and that "at the conclusion of the mediation all parties believed they had reached an agreement which resolved all issues between the parties."[42] In so holding, the bankruptcy court followed the cardinal rule of contracts law that "[t]he determination of whether there was a meeting of the minds must be based on objective standards of what parties said and did and not on their alleged respective states of mind."[43]

This principle applies in the hypothetical. All parties and their counsel at the mediation understood that the intent of the mediation was to attempt a settlement of the various issues involved in the debtor's case affecting the parties. The debtor and its counsel agreed to the settlement. To the extent that the debtor's representative "harbored a secret intent . . ." to withhold a right from the settlement, this secret intent cannot justify setting aside a settlement which was agreed to and relied upon by all persons present or represented at the mediation, based upon their objective understanding.[44] As in the Fifth Circuit decision of *Bell v. Schexnayder*, from "all outward appearances, the settlement negotiations were intended to resolve all claims and release the [parties] from all liability relating to the subject matter of the [debtor's case]."[45] The debtor's representatives cannot, after the settlement was reached, make the allegation that he did not intend for the settlement to be all-inclusive.

D. Lack of a Writing or Record Is Irrelevant

Does the lack of a writing or court record preclude enforcement? Enforcement should not be precluded in the hypothetical because Mississippi law recognizes oral settlements.[46] As such, the material terms of the settlement reached at the end of the mediation are binding and enforceable against the debtor, despite the lack of a writing evidencing the specific terms of the settlement. It has been held that

40. 188 B.R. 938 (Bankr. E.D. Tex. 1995).
41. *Id.* at 941.
42. *Id.* at 942.
43. *Id.*
44. Bell v. Schexnayder, 36 F.3d 447, 450 (5th Cir. 1994); Resolution Trust Corp. v. Accardo, 1995 U.S. Dist. LEXIS 11997, 2 (E.D. La. 1995).
45. *Bell*, 36 F.3d at 450.
46. Collins v. Dixie Transp., Inc., 543 So. 2d 160, 166-67 (Miss. 1989); Taylor v. Firestone Tire & Rubber Co., 519 So. 2d 436, 437-38 (Miss. 1988); *but cf.* Travis v. Hartford Acc. & Idem. Co., 630 So. 2d 337 (Miss. 1993); Houser v. Brent Towing Co., 610 So. 2d 363, 365 (Miss. 1992).

"[F]ifth Circuit precedent does not demand that the court have the terms of the relevant written settlement agreement before it in order to enforce oral settlement agreements."[47] Additionally, settlement agreements which contemplate further documentation are as effective as if the settlement had been fully documented.[48]

E. A Party Is Bound by His Attorney's Agreement to Settlement

In the hypothetical, the debtor accepted the settlement through his or her authorized representative. To the extent that the debtor's representative should later deny this fact, however, the result is the same since his counsel accepted the settlement. It should be noted that counsel accepted the settlement in the presence of the debtor's representative with the representative's manifest approval.

As with the law governing the enforcement of settlements, Mississippi law is clear that a client is bound by the acts of his or her attorney.[49] This is true in all aspects of the attorney-client relationship, including representations to the court.[50] The Mississippi Supreme Court has held that a client is bound by the statement of his or her attorney "[w]hen, during the course of a trial [the] attorney, with intent to influence the ruling or decision by the court on a point in issue, makes a solemn statement to the court committing his client to some legal position on the issue before the court . . . ."[51]

In this regard, the Mississippi Supreme Court has also stated the following:

> An attorney, employed to manage a party's conduct of a lawsuit, has *prima facie* authority to make relevant judicial admissions by pleadings, oral or written stipulations, or formal statements into the record, which unless allowed to be withdrawn are conclusive . . . . Therefore, the plaintiff should be bound not only by his own admissions but also the admissions of his attorneys since they were obviously made in the course and scope of his authority to manage the conduct of the lawsuit.[52]

In fact, any stipulations or agreements made by an attorney are binding on a client, notwithstanding the client's actual knowledge of or consent to those stipulations or agreements.[53]

In *Sears, Roebuck & Co. v. Devers*, confusion existed as to whether the plaintiff was proceeding on a theory of negligence or assault and battery.[54] The plaintiff's attorney, therefore, assured the court that the plaintiff's theory was based on negligence.[55] The court then held that the party was bound by the attorney's rep-

47. Noble Drilling, Inc. v. Davis, 64 F.3d 191, 195 (5th Cir. 1995) (recognizing the enforceability of oral settlement agreements); *see also* Strange v. Gulf & S. Am. Steamship Co., Inc., 495 F.2d 1235, 1236 (5th Cir. 1974) (stating an oral agreement to settle is enforceable).

48. Hudgins v. Security Bank, 188 B.R. 938, 941 (Bankr. E.D. Tex. 1995).

49. Stringer v. State, 627 So. 2d 326, 330 (Miss. 1993), *cert. denied*, 114 S. Ct. 2684 (1994); Pace v. Financial Sec. Life, 608 So. 2d 1135, 1138 (Miss. 1992).

50. Webb v. Jackson, 583 So. 2d 946, 952 (Miss. 1991).

51. Sears, Roebuck & Co. v. Devers, 405 So. 2d 898, 900 (Miss. 1981).

52. Henry v. Gulf Coast Mosquito Control Comm'n, 645 F. Supp. 1447, 1456 (S.D. Miss. 1986).

53. *Devers*, 405 So. 2d at 900.

54. *Id.*

55. *Id.*

resentation.[56] The Mississippi Supreme Court quoted from 7A C.J.S. *Attorney and Client* § 205(a) in support of its conclusion:

> An attorney employed for purposes of litigation has the general implied or apparent authority to enter into such stipulations or agreements, in connection with the conduct of litigation, as appear to be necessary or expedient for the advancement of his client's interests or to accomplishment of the purpose for which the attorney was employed.[57]

The legal principle from which attorney authority arises is the apparent authority of an agent acting on behalf of a principal.[58] The Fifth Circuit addressed this issue specifically in *Terrain Enterprises, Inc. v. Western Casualty & Surety Co.* Two weeks before trial, an attorney for the plaintiff directed a settlement offer to the attorney for the defendant. Defense counsel accepted the offer. The plaintiff then attempted to renounce the settlement as unauthorized. In response, the defendant moved to enforce the settlement. The trial court found that a settlement offer had been made and accepted between the parties' attorneys, but that there was a misunderstanding between the plaintiff and its attorney regarding the attorney's authority to settle the case.[59] The trial court, therefore, sent the issues on the merits of the case to the jury, which returned a verdict for the plaintiff.[60]

On appeal, the Fifth Circuit found that it was uncontradicted that "there was an offer of settlement by counsel for [the plaintiff] and an acceptance by counsel for [the defendant]."[61] In light of this finding, the Fifth Circuit recognized its long-standing position that "[w]here the parties, acting in good faith, settle a controversy, the courts will enforce the compromise without regard to what the result might have been had the parties chosen to litigate."[62]

The Fifth Circuit further held that Mississippi law regarding apparent authority governed the determination of whether the plaintiff's counsel in *Terrain Enterprises* in fact bound the plaintiff to the settlement.[63] In so doing, the Fifth Circuit noted that Mississippi law provides

> [a]n act is considered to be within the agent's apparent authority when a third party is justified in concluding that the agent is authorized to perform it from the nature of the duties which are entrusted to him . . . . Apparent authority is to be determined from the acts of the principal and requires reliance and good faith on the part of the third party.[64]

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56. *Id.*
57. *Id.* (quoting 7A C.J.S. *Attorney and Client* § 205(a)).
58. Terrain Enters., Inc. v. Western Cas. & Sur. Co., 774 F.2d 1320, 1322 (5th Cir. 1985), *cert. denied*, 475 U.S. 1121 (1986).
59. *Id.* at 1321.
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* at 1322.

Additionally, the Fifth Circuit held that an attorney who has represented a party throughout litigation is presumed to be authorized to take any and all action necessary to conduct the litigation.[65]

In *Terrain Enterprises*, the Fifth Circuit also recognized that Mississippi law requires a party who is challenging counsel's authority to act to suffer the burden of proof on this issue.[66] Accordingly, the Fifth Circuit held that, because the plaintiff in *Terrain Enterprises* failed to offer any proof that its attorney exceeded his apparent authority to act on the plaintiff's behalf, the defendant was justified in relying in good faith upon the settlement offer made by plaintiff's counsel, based upon said counsel's previous actions as representative of the plaintiff and its agents.[67]

Similarly, in *McCain v. Cox*, the U.S. District Court for the Northern District of Mississippi held that a party who benefited from the services of an attorney and who acquiesced therein could not later repudiate the acts of that attorney, despite the fact that the attorney was not actually representing the party.[68] *McCain* involved a complicated real estate transaction. The court found that two attorneys were authorized to act for the purchaser in obtaining amendments to a contract for the purchase of real estate. The court further found that although the attorneys had been employed by a third party, the purchaser was aware of the attorneys' involvement and accepted the benefits of their services, attempting to renounce their authority to bind the purchaser only after the real estate transaction fell through.[69] The court specifically found that the purchaser had acquiesced in the attorneys' request for an extension of time on the real estate transaction and that, despite the purchaser's contention that the attorneys were not acting as his attorneys, his failure to disclaim the attorneys' acknowledgment of the extended deadline to seek contract modifications clothed the attorneys with apparent authority to act on the purchaser's behalf.[70] As such, the court found that the purchaser was estopped from disavowing the attorneys' apparent authority.[71]

According to the hypothetical, the debtor's representative was present at and participated in the mediation. Consequently, he was fully informed and advised of the details of the settlement. Moreover, he consulted with counsel during the course of the mediation prior to agreeing to the settlement. Conferring with counsel immediately in advance of agreeing to settle has been held to be strong evidence in favor of enforcing settlement agreements.[72]

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65. *Id.* (citing Great Atl. & Pac. Tea Co. v. Majure, 168 So. 468 (Miss. 1936)); *see also* Federal Land Bank v. Sullivan, 430 N.W.2d 700 (S.D. 1988); Edwards v. Born, Inc., 792 F.2d 387 (3d Cir. 1986).

66. Terrain Enters., Inc. v. Western Cas. & Sur. Co., 774 F.2d 1320, 1322 (5th Cir. 1985), *cert. denied*, 475 U.S. 1121 (1986) (citing Hirsch Bros. & Co. v. R.E. Kennington Co., 124 So. 344 (Miss. 1929)).

67. *Id.*

68. McCain v. Cox, 531 F. Supp. 771, 779-81 (N.D. Miss. 1982), *aff'd*, 692 F.2d 755 (5th Cir. 1982).

69. *McCain*, 531 F. Supp. at 779.

70. *Id.* at 781.

71. *Id.*

72. *See, e.g.*, State v. Thomas, 464 F.2d 156, 159 n.3 (5th Cir. 1972); Middlesex Banking Co. v. Field, 37 So. 139, 148-49 (Miss. 1904).

F. Consent to Settlement May Not Be Withdrawn

The Fifth Circuit has held, in *White Farm Equipment Co. v. Kupcho,* that "a settlement agreement once entered into cannot be repudiated by either party and will be summarily enforced."[73] *White Farm* involved a challenge to the entry of a judgment on a settlement which had been read into the record and approved by the court where one party attempted to withdraw from the settlement prior to entry of the judgment.[74] The Fifth Circuit held that "[l]itigants may not disavow compacts thus made and approved, for avoiding the bargain would undermine its contractual validity, increase litigation, and impair efficient judicial administration."[75] Where parties "compose their differences, . . . they may not back and fill."[76] Here, the debtor's attempt to renounce the settlement flies squarely in the face of the Fifth Circuit's rationale in *White Farm.*

G. The Settlement May Not Be Avoided for Mistake

There was no mistake in the hypothetical that the settlement was reached, nor what its terms were. Even if there had been a mistake by the debtor's representative, unilateral mistakes as to the terms of settlements made by parties thereto and their counsel may not serve as a basis to invalidate the settlement, absent evidence of fraud, duress, overreaching, or misconduct.[77]

The Mississippi Supreme Court's decision in *Taylor v. Firestone Tire & Rubber Co.* is instructive.[78] The plaintiff's attorney in *Taylor* offered to settle the personal injury claim.[79] The defendant accepted the offer and forwarded plaintiff's attorney a check and a release.[80] The release was not signed and the check was never cashed.[81] The plaintiff's medical condition deteriorated, and she returned the check and release, demanding an increase in the settlement amount.[82] The court found that when the defendant's attorney accepted the original settlement demand, the plaintiff became bound by her attorney and could not subsequently increase the demand.[83]

Neither fraud, duress, overreaching, nor misconduct is involved in this hypothetical. Instead, the parties to the mediation reached an agreement and did so

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73. White Farm Equip. Co. v. Kupcho, 792 F.2d 526, 530 (5th Cir. 1986) (citing Cia Anon Venezolana de Navegacion v. Harris, 374 F.2d 33, 35 (5th Cir. 1967)).

74. *White Farm,* 792 F.2d at 527.

75. *Id.* at 528.

76. *Id.* at 530.

77. Taylor v. Firestone Tire & Rubber Co., 519 So. 2d 436, 437 (Miss. 1988); Sooner Fed. Sav. & Loan Ass'n v. Depositors Sav. Ass'n, 386 So. 2d 1125, 1128 (Miss. 1980) ("Even if [the party] made a mistake, either in violation of instructions, or in their thinking at the time, there was no mutual mistake.").

78. 519 So. 2d 436 (Miss. 1988).

79. *Id.* at 437.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 438; *see also* Houser v. Brent Towing Co., 610 So. 2d 363, 365-66 (Miss. 1992).

with full information and anticipation of such a settlement. Consequently, the effect of the settlement is a compromise which is as conclusive of the rights of the parties as a judgment would be and should be enforced accordingly.[84]

IV. THE PROCEDURE FOR ENFORCEMENT

Once it has been determined that an agreement to settle has been reached and it is clear that the other side is attempting to renege, a motion to compel the settlement should be filed with the bankruptcy court.[85] This will be a contested matter under Rule 9014.

To avoid having to file a separate motion to approve a settlement under Rule 9019, the motion to compel should include a request that the settlement be approved under Rule 9019 and the substantive law on settlements.[86] The motion should contain all aspects of a motion to approve a settlement under Rule 9019, including the terms of the settlement, and be noticed to the appropriate parties as provided by Rule 2002.

The burden of proof on the existence of a settlement and its terms is on the party seeking to enforce the settlement.[87] This burden includes proving counsel's authority to settle where there is a question of an attorney's authority to enter into settlement.[88]

V. THE AFTERMATH

Even though the bankruptcy court has entered an order compelling the settlement and the settlement has been approved by the court, the litigant and the attorney involved in the attempted breach may face additional repercussions flowing from their conduct. While the ethical issues involved in settlement can be quite complex, especially with regard to the negotiation aspect,[89] there are some equally difficult issues that are associated with the enforcement of a settlement agreement.

First, Rule 9011, "the bankruptcy counterpart of Civil Rule 11,"[90] provides that all pleadings must be signed "by at least one attorney of record . . . ."[91] This signature certifies that the pleading is presented only after the attorney has read it and

> that to the best of the attorney's or party's knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact and . . . law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation or administration of the case.[92]

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84. Noble Drilling, Inc. v. Davis, 64 F.3d 191, 194 (5th Cir. 1995).

85. Houston, OTR v. Holder (*In re* Omni Video, Inc.), 60 F.3d 230, 231 (5th Cir. 1995); Huennekens v. Trash Mgmt. Serv., Inc. (*In re* Or-Grow, Inc.), 209 B.R. 386, 389 (Bankr. E.D. Va. 1997).

86. *Omni*, 60 F.3d at 231.

87. *Or-Grow*, 209 B.R. at 390.

88. *In re* Rhoads Indus., Inc., 162 B.R. 485, 488-89 (Bankr. N.D. Ohio 1993).

89. *See, e.g.*, David Geronemus, *Lies, Damn Lies and Unethical Lies - How to Negotiate Ethically and Effectively*, BUS. LAW TODAY, May-June 1997, at 11.

90. 10 COLLIER ON BANKRUPTCY ¶ 9011.02, at 9011-3 (Lawrence P. King, 15th ed., revised 1997).

91. FED. R. BANKR. P. 9011(a).

92. *Id.*

Rule 9011 applies to the enforcement of settlements since the respective counsel will have to take a position on whether a settlement occurred and what the parties understood the terms of any settlement to be.

Due to the ability of the court to award sanctions for frivolous pleadings under Rule 9011, attorneys must be sure of what they understand the facts to be regarding the settlement and only file pleadings consistent with that understanding. If the client agreed to a settlement and then merely changed his mind, challenging a motion to compel the settlement under the standards of Rule 9011 could be problematic. Unless some material fact issue on the settlement was truly unresolved and provided an independent basis for challenge, the litigant and the attorney may face sanctions for such a contest.

This point is particularly true in light of the amendment to Rule 9011, effective December 1, 1997. The amended Rule 9011 broadens the scope of the Rule and includes verbal representations of counsel:

> Rule 9011. Signing of Papers; Representations to the Court; Sanctions; Verification and Copies of Papers
> (a) Signature. Every petition, pleading, written motion, and other paper, except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name. A party who is not represented by an attorney shall sign all papers. Each paper shall state the signer's address and telephone number, if any. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.
> (b) Representations to the Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,
>
> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.[93]

The National Bankruptcy Review Commission endorsed the amendment to Rule 9011 in its recent report:

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93. National Bankr. Rev. Comm'n Final Report, BANKRUPTCY: THE NEXT TWENTY YEARS (October 20, 1997), 113 n. 196. (Full report available in print from the United States Government Printing Office or on the internet at <http://www.nbrc.gov/index.html>.)

> The Commission endorses the amended Rule 9011 of the Federal Rules of Bankruptcy Procedure, to become effective on December 1, 1997, which will make an attorney's presentation to the court of any petition, pleading, written motion, or other paper a certification that the attorney made a reasonable inquiry into the accuracy of that information, and thus will help ensure that attorneys take responsibility for the information that they and their clients provide.[94]

Secondly, the Mississippi Rules of Professional Conduct apply directly to settlements made by attorneys on behalf of clients. Specifically, Mississippi Rule of Professional Conduct 1.2(a) provides, in pertinent part, that "[a] lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter."[95] As in *Attorney W.L. v. The Mississippi Bar*, even when an attorney has acted ethically in settlement for a client, the attorney may still have to defend a Bar complaint.[96] Certainly, failure to abide by the Rule could result in a malpractice claim.[97]

Rule 8.4(c) of the Mississippi Rules of Professional Conduct provides that "[i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . . ."[98] Rule 3.3 prohibits lawyers from knowingly making a false statement of material fact or law to the court and from failing to disclose a material fact to the court "when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client . . . ."[99] These Rules of Conduct clearly encompass situations where a client wants to renege on a settlement agreement. When a settlement is effected, the counsel involved should not acquiesce in a client's request to effectuate a breach. Satisfying such a request could violate Rules 8.4 and 3.3 governing dishonesty, fraud, and candor to the tribunal. Moving to withdraw as counsel may pose the only viable option if the client will not accept the attorney's advice.[100]

Finally, both litigants and their counsel should be cognizant of the Litigation Accountability Act of 1988.[101] This Act applies to "any civil action commenced or appealed in any court of record in this state . . . ."[102] The Act provides the sanction of an award of reasonable attorney's fees and costs against any party or attorney

> if the court, upon the motion of any party or on its own motion, finds that an attorney or party brought an action, or asserted any claim or defense, that is without substantial justification, or that the action, or any claim or defense

94. *Id.* at 112.
95. MISSISSIPPI RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1996).
96. Attorney W.L. v. Mississippi Bar, 621 So..2d 235, 237 (Miss. 1993); *see also* Mays v. Neal, 938 S.W.2d 830 (Ark. 1997); *In re* Stern, 406 A.2d 970 (N.J. 1979); *In re* Montrey, 511 S.W.2d 805 (Mo. 1974).
97. People v. Podoll, 855 P.2d 1389, 1392 (Colo. 1993).
98. MISSISSIPPI RULES OF PROFESSIONAL CONDUCT Rule 8.4(c) (1996).
99. MISSISSIPPI RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1996).
100. Hartford Acc. & Indem. Co. v. Foster, 528 So. 2d 255 (Miss. 1988).
101. MISS. CODE ANN. §§ 11-55-1 through 11-55-15 (Supp. 1997).
102. MISS. CODE ANN. § 11-55-5(1) (Supp. 1997).

> asserted, was interposed for delay or harassment, or if it finds that an attorney or party unnecessarily expanded the proceedings by other improper conduct including, but not limited to, abuse of discovery procedures available under the Mississippi Rules of Civil Procedure.[103]

The power granted to courts under the Act is in addition to Civil Rule 11, both state and federal, and Rule 9011.[104]

VI. CONCLUSION

It comes as no surprise that lawyers are focusing more attention on traditional concepts of professionalism, collegiality, and civility in litigation.[105] The public demands it, the courts dictate it, and oaths of attorneys require it. In the context of settlement agreements, basic notions of honesty and fidelity should be overriding principles adhered to by litigants and their attorneys.

In bankruptcy cases, compromises and settlement are essential to the efficient administration of justice. By definition, bankruptcy cases deal with a limited pool of assets. Accordingly, litigation of disputes depletes assets of the estate and further limits creditor recoveries. Once settlement agreements are reached, there is ample authority for compelling performance, or "holding their feet to the fire." Moreover, the exposure for the breach may extend beyond compelling compliance: litigants and their counsel, who are compelled, may be "burned."

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103. *Id.*

104. Stevens v. Lake, 615 So. 2d 1177, 1184 (Miss. 1993).

105. *Professionalism Handbook: In Your Practice, With Your Clients & In the Legal System*, THE MISSISSIPPI BAR (1997).