

**THE FINAL HURDLE:
AVOIDING PITFALLS IN PERSONAL INJURY SETTLEMENTS**

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November 21-22, 2024
Boerne

CHAPTER 13

OVERVIEW

As a seasoned and highly regarded trial attorney, William has successfully tried more than 70 civil jury trials to verdict. His trial experience throughout Texas includes tort litigation, ranging from negligence and transportation matters to more complex premises liability, Deceptive Trade Practices Act (DTPA), commercial and contractual dispute litigation.

On top of his thriving legal practice, William is a member of the American Board of Trial Advocates (ABOTA) National Executive Committee and International Society of Barristers (ISOB), both of which are by invitation only and involve rigorous screening processes that take into consideration each lawyer’s ability, experience, accomplishments and ethical standards as assessed by trial lawyers and judges. He also serves on the Board of Directors for the Cotton Bowl Athletic Association and is a member of the Salesmanship Club of Dallas and the State Fair of Texas Chairman’s Task Force. Actively involved in his church, he has been a member of the Steward Board for two decades.

ACHIEVEMENTS

- American Bar Foundation (Fellow)
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- American College of Trial Lawyers
- D Magazine* – Best Lawyers in Dallas (Tort, Product & Medical Liability Litigation, 2016-2024)
- Dallas Bar Foundation (Fellow)
- The Dallas Assembly
- International Society of Barristers
- Litigation Counsel of America
- Martindale-Hubbell*® AV Preeminent®, Peer Review Rated™
- Texas Bar Foundation (Life Fellow)
- Thomson Reuters* – Texas Super Lawyers (2012-2024); Texas Rising Stars (2008-2011); Top 100: Dallas/Fort Worth Super Lawyers (2012-2024)
- Woodward/White, Inc.* – Best Lawyers in America, Commercial Litigation (2023-2025); Best Lawyers in America, Personal Injury Litigation – Defendants (2024-2025); Best Lawyers in America, Product Liability Litigation – Defendants (2025)

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- Bar Association of the Fifth Federal Circuit
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- National Retail and Restaurant Defense Association
- Salesmanship Club of Dallas
- State Fair of Texas Chairman's Task Force
- The Supreme Court Historical Society
- Texas Association of Defense Counsel
- Transportation Lawyers Association
- Washington and Lee University Board of Trustees (May 2016 – Present)



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- Construction
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- Real Estate
- Restaurants
- Retail
- Transportation

EDUCATION

- Washington and Lee University School of Law, J.D.
- Washington and Lee University, B.A.

OVERVIEW

Sonia's practice focuses on complex litigation matters across a variety of industries.

Before attending law school, Sonia worked in the non-profit industry as a Programs Manager for Crossroads Community Services and an Immigrant & Refugee Support Services Program Assistant for Catholic Charities. Sonia's bilingual services were invaluable to both organizations and allowed her to create strong community ties.

Prior to joining Munsch Hardt, Sonia was a Judicial Intern for the Honorable Irma Carrillo Ramirez at the U.S. Court of Appeals for the Fifth Circuit and for the Honorable Judge Martin Hoffman in the 68th Civil District Court. She received her Juris Doctor from the University of North Texas College of Law, where she served as the Chief Executive Officer for the UNT Dallas Law Review and as a Teaching Fellow for the UNT Dallas Legal Writing Center.

EDUCATION

University of North Texas, J.D., *magna cum laude*

- *UNT Dallas Law Review* (CEO)
- Dallas Bar Foundation Sarah T. Hughes Scholar
- Hispanic Law Student Association (Vice President)
- The William "Mac" Taylor American Inn of Court (Pupil)

University of Notre Dame, B.S.

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CLERKSHIPS

The Honorable Irma Carrillo Ramirez, U.S. Court of Appeals for the Fifth Circuit (Judicial Intern)

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THE FINAL HURDLE: AVOIDING PITFALLS IN PERSONAL INJURY SETTLEMENTS

This paper provides a brief overview of Texas case law that discusses settlement and release agreements. The paper will also address the addition of negotiated terms that often cause issues in drafting the settlement and release agreement, such as confidentiality, non-disparagement, and indemnification provisions.

I. INTRODUCTION

Once a Rule 11 Agreement or Mediated Settlement Agreement exists, ordinarily, defense counsel prepares a draft of the Settlement and Release Agreement and provides it to opposing counsel for revisions. Generally, Defendant is interested in keeping the terms of the agreement confidential, ensuring Plaintiff refrains from publicly disparaging them, and requiring Plaintiff to indemnify Defendant for any claims that third parties may assert against Defendant arising from the matter being settled. These clauses—confidentiality, non-disparagement, and indemnification—are generally included in the full and final Settlement and Release Agreement, which the Plaintiff signs. However, there is case law to suggest that these often crucial terms should be addressed or at least contemplated, by way of specific language, before the Rule 11 agreement or mediated settlement agreement is determined.

II. RULE 11 AGREEMENTS & MEDIATED SETTLEMENT AGREEMENTS

Rule 11 agreements have long been recognized as “an effective tool for finalizing settlements by objective manifestation so that the agreements do not themselves become sources of controversy.” *Dickason v. Hunt*, No. 10-21-00093-CV, 2023 WL 1444177, at *5 (Tex. App.—Waco Feb. 1, 2023, no pet.) (quoting *Knapp Med. Ctr. v. De La Garza*, 238 S.W.3d 767, 768 (Tex. 2007)). To be enforceable a settlement must “be in writing, signed and filed with the papers as part of the record, or ... be made in open court and entered of record.” Tex. R. Civ. P. 11. Similarly, if parties reach a settlement and execute a written agreement disposing of the dispute—such as a mediated settlement agreement—the agreement is enforceable in the same manner as any other written contract. Tex. Civ. Prac. & Rem. Code § 154.071(a).

In contemplating its enforcement, the agreement must contain all essential terms of the settlement, such as the amount of compensation and liability to be released. *Disney v. Gollan*, 233 S.W.3d 591, 595 (Tex. App.—Dallas 2007, no pet.). As such, a settlement agreement must be “complete within itself in every material detail, and [contain] all of the essential elements of the agreement.” *Jennings v. Jennings*, 625

S.W.3d 854, 861 (Tex. App.—San Antonio 2021, pet. denied) (quoting *Cohen v. McCutchin*, 565 S.W.2d 230, 232 (Tex. 1978)). Essential terms are those terms that the parties “would reasonably regard as vitally important elements of their bargain.” *Dickason*, 2023 WL at *5 (quoting *Potcinske v. McDonald Prop. Invs., Ltd.*, 245 S.W.3d 526, 531 (Tex. App.—Houston [1st Dist.] 2007, no pet.)).

Courts employ the same procedures used to enforce other contracts when examining mediated settlement agreements. *W. Beach Marina, Ltd. v. Erdeljic*, 94 S.W.3d 248, 256 (Tex. App.—Austin 2002). However, a binding settlement may exist when parties agree upon some terms, understanding them to be an agreement, and leave other terms to be made later. *MKM Engineers, Inc. v. Guzder*, 476 S.W.3d 770, 778 (Tex. App.—Houston [14th Dist.] 2015, no pet.).

III. SETTLEMENT AND RELEASE AGREEMENTS

The settlement and release agreement extinguishes a cause of action in the same way a judgment would. *Dresser Indus. v. Page Pet., Inc.*, 853 S.W.2d 505, 508 (Tex. 1993). The release agreement may be *broad* (releasing all claims, known or unknown) or *narrow* (releasing only the particular claims asserted in the lawsuit). see, e.g., *Memorial Med. Ctr.*, 943 S.W.2d at 435 (all present and future claims relating to doctor's relationship with hospital); *Brady*, 811 S.W.2d at 938 (claims attributable to specific loan transaction between bank and customer); *Kalyanaram*, 225 S.W.3d at 299–300 (all known and unknown claims arising from employment relationship). The full and final settlement and release agreement incorporates the agreed-to terms from a Rule 11 agreement, and it will be sent to Plaintiff as a draft which may include additional terms, to which both parties must agree, such as confidentiality, non-disparagement, and indemnification provisions, which most Defendants request. A release which includes these additional terms, like any contract, must be supported by valid consideration. *Tamez v. Sw. Motor Transp., Inc.*, 155 S.W.3d 564 (Tex. App.—San Antonio 2004, no pet.). Although in most cases, where the consideration is the payment of money damages, the settlement of a contested lawsuit may itself be sufficient consideration to support a release. *Adams v. Petrade Int'l*, 754 S.W.2d 696, 723 (Tex. App.—Houston [1st Dist.] 1988, writ denied).

IV. COURTS HAVE FOUND THAT THERE IS NO BREACH OF A RULE 11 AGREEMENT BASED ON REVISIONS INCLUDED IN THE DRAFT OF A SETTLEMENT AND RELEASE AGREEMENT.

Disputes arising out of the drafting of the settlement and release agreement frustrate the purpose of a settlement. In *Dickason v. Hunt*, the court affirmed

the trial court's denial of Plaintiff's motion for summary judgment because Plaintiff failed to meet their burden of establishing they were entitled to judgment a matter of law for Defendant's alleged breach of a Rule 11 agreement. No. 10-21-00093-CV, 2023 WL 1444177 at *6 (Tex. App.—Waco Feb. 1, 2023, no pet.). In that case, Plaintiff sued the director of a gun club and the club itself over a scoring dispute during an elite shotgun trap-shooting competition. *Id.* at *1. The parties ultimately agreed to mediate the case, and after discussion, the club agreed to settle all claims for \$15,000. *Id.* In exchange, the Plaintiff and her boyfriend agreed not to come back to the club's property. *Id.* All parties, the Plaintiff, her boyfriend, and the club, signed a "Rule 11 and Settlement Agreement," which included the following: "It is contemplated that counsel for defendants shall deliver drafts of any further settlement documentation to the other parties by [], the parties agree to cooperate with each other in the drafting and execution of such additional documents." *Id.*

Following this mediation, defense counsel drafted a "Settlement and Release Agreement," which included several provisions that were not listed in the Rule 11 agreement, including a non-disparagement clause, a clause requiring Plaintiff's boyfriend's signature (who was not a party to the suit), and a clause requiring Plaintiff to release her right to a balance of approximately \$50.00 on her "target card" used to pre-pay for the club's goods and services. *Id.* at *2. Plaintiff's counsel responded with their proposed revisions, to which Defendant agreed. *Id.* However, Plaintiff ultimately refused to sign the finalized settlement and release agreement because of the non-disparagement clause, asserting that it infringed on her First Amendment rights. *Id.* Without Plaintiff's signature, Defendant refused to tender the \$15,000 payment. *Id.* As such, Plaintiff amended her petition to include, among other things, a claim for breach of the Rule 11 agreement, and moved for summary judgment. *Id.*

The court reasoned that a movant for summary judgment on a breach-of-contract claim based on a Rule 11 agreement is required to establish entitlement to judgment as a matter of law on each element of the breach-of-contract claim, except the amount of damages. *Id.* at 5* (citing Tex. R. Civ. P. 166a(c); *Rivera v. White*, 234 S.W.3d 802, 805-07 (Tex. App.—Texarkana 2007, no pet.)). To prevail on a breach-of-contract claim the plaintiff must establish that (1) there is a valid, enforceable contract; (2) the plaintiff performed, tendered performance, or was excused from performing her contractual obligations; (3) the defendant breached the contract; and (4) the defendant's breach caused the plaintiff injury. *Id.* (citing *Pathfinder Oil & Gas, Inc. v. Great W. Drilling, Ltd.*, 574 S.W.3d 882, 890 (Tex. 2019)). The court emphasized that the "Rule 11 and Settlement Agreement" agreed to at

mediation included language that contemplated revisions or additions to the settlement, and the parties did indeed make such revision to their agreement—namely, the addition of a non-disparagement clause. *Id.* The court concluded that the Defendants' failure to pay Plaintiff the settlement amount was due to Plaintiff's refusal to agree to the subsequent revisions made to the agreement by the parties, which were contemplated by the parties at the time the Rule 11 agreement was written and agreed to. *Id.* at *6. Accordingly, the trial court did not err by denying Plaintiff's motion for summary judgment because they failed to meet their burden of establishing they were entitled to judgment as a matter of law on their breach-of-contract claim. *Id.*

V. TO FIND A RULE 11 AGREEMENT OR MEDIATE SETTLEMENT AGREEMENT ENFORCEABLE, A COURT MAY CONSIDER THE PARTIES' INTENT TO BE BOUND THE AGREEMENT.

In some cases, a binding settlement may exist when parties agree upon some terms, understanding them to be an agreement, and leave other terms to be determined later. In *MKM Engineers, Inc. v. Guzder*, the court reversed a trial court's ruling on two motions for summary judgment and held that the Rule 11 agreement at issue was an enforceable agreement, as is--without the additional terms negotiated after its signing. 476 S.W.3d 770, 774 (Tex. App.—Houston [14th Dist.] 2015, no pet.). In that case, Plaintiff sued Defendants, two corporations, seeking to enforce a Rule 11 agreement. *Id.* Plaintiff moved for summary judgment on his claim for breach of the Rule 11 agreement, which the trial granted, and Defendants filed a cross-motion for summary judgment arguing that the Rule 11 agreement was unenforceable, which the trial court denied. *Id.* Under the Rule 11 agreement in that case, the parties agreed to execute a "final settlement agreement" to include specified material terms, including the exchange of mutual releases and payment of the settlement amount. *Id.* However, for a span of six months—*after* the Rule 11 agreement was signed—the parties negotiated terms such as the scope and content of the releases, confidentiality provisions, covenants not to sue, disclaimers of rights, and non-disparagement provisions to be included in final settlement documents. *Id.* at 775.

In its analysis, the court relied on *General Metal Fabricating Corp. v. Stergiou*, which notes that courts have often "enforced settlement agreements that contemplate additional documentation or leave open certain terms for future negotiation." *Id.* at 779 (quoting *Stergiou*, 438 S.W.3d 737, 747–48 (Tex. App.—Houston [1st Dist.] 2014, no pet.)). As such, "[t]he critical issue for determining enforceability when the parties agree that some terms will remain open is whether the parties intended for their agreement to be a

present, binding agreement in the absence of an agreement on the remaining terms, or whether they intended their agreement to have no legal significance until agreement on the remaining terms is reached.” *Id.* In *MKM Engineers, Inc. v. Guzder*, the court reasoned that the Rule 11 Agreement was enforceable for the following reasons: (1) the document at issue was expressly drafted as a Rule 11 Agreement, (2) the document contained no language indicating that it was merely intended as a preliminary, non-binding agreement, and (3) the document did not provide that the parties’ agreement was “subject to” a more formal agreement or contain language indicating that certain actions were conditions precedent to the agreement’s enforceability. *Id.* (citing *John Wood Grp. USA, Inc. v. ICO Inc.*, 26 S.W.3d 12, 19 (Tex.App.—Houston [1st Dist.] 2000, pet. denied) (cautioning that a party who does not wish to be prematurely bound by a letter agreement should include a provision clearly stating that the letter is nonbinding)).

Further, other terms negotiated after the Rule 11 Agreement was signed remained unresolved—namely, the confidentiality provisions, covenants not to sue, disclaimers of rights, damage caps on suits related to the final settlement agreement, non-disparagement provisions, and discovery and associated costs in related litigations. *Id.* at 781. As to these terms, the court reasoned that while these provisions may have importance to one party, “the parties’ failure to resolve their differences concerning other non-essential or collateral matters left for future negotiation do not render the Rule 11 Agreement unenforceable as a matter of law.” *Id.* at 782. Accordingly, the Rule 11 Agreement was considered enforceable as it was signed and the obligations of both parties under the terms of the agreement was remanded back to the trial court for determination. *Id.* at 785.

VI. COURTS HAVE ENFORCED THE TERMS OF A MEDIATED SETTLEMENT AGREEMENT ACCEPTED BY BOTH PARTIES WHEN FIRST PROPOSED, EVEN IF THE DETAILS OF PERFORMANCE TERMS WERE NOT YET DETERMINED.

A trial court may enter a judgment enforcing a mediated settlement agreement even where one of the parties contests their intent to be bound. In *Carlson v. Sweatt*, the court affirmed a trial court’s decision to order that all terms initially proposed by the mediator and accepted by the parties would be included in the final settlement and release agreement. No. 14-22-00660-CV, 2023 WL 7201241, at *2 (Tex. App.—Houston [14th Dist.] Nov. 2, 2023, no pet.). In that case, parties to a property dispute went to mediation but were unable to settle their dispute during the mediation. *Id.* at *1. However, the mediator sent the parties a mediated settlement proposal by email, which contained multiple

terms including the following concluding line: “Upon acceptance by all Parties, the agreement reflected in this mediator’s proposal is fully binding, irrevocable, and enforceable.” *Id.* All parties accepted the terms of the mediated settlement proposal. *Id.* at *2. In this mediated settlement agreement, the mediator had purposefully left off specific items for performance and payment terms, which would require a Rule 11 agreement to sort out the details. *Id.* The parties, ultimately emailed their agreement with the proposed performance timeline. *Id.* at *3. At the final hearing on the matter at the trial court, the judge determined that mediated settlement agreement required performance by one of the parties, at their expense, to be completed within a set amount of time of the court’s signing of the final judgment. *Id.* at *2. Upon this decision, the trial court signed the final judgment enforcing the mediated settlement agreement. *Id.*

On appeal, the party required to perform under the settlement terms argued that the trial court abused its discretion when it enforced the mediated settlement agreement because “the parties had not consented to all of the required terms of the Order, including the deadlines for compliance.” *Id.* Additionally, this party asserted that the trial court erred by “unilaterally adding terms” to the mediated settlement agreement “without legally sufficient evidentiary support.” *Id.* In affirming the trial court’s decision, the appellate court reasoned that there was nothing in the record establishing that either party withdrew their consent to the mediated settlement agreement prior to the trial court signing the final judgement. *Id.* at *3. The court further reasoned that neither party lodged an objection or otherwise informed the trial court that they had withdrawn their consent to the mediated settlement agreement. *Id.* Because the trial court has a ministerial duty to enforce a mediated settlement agreement, the court concluded that the party waived any complaint that they may have had in the trial court. *Id.* (citing *Allright, Inc. v. Pearson*, 735 S.W.2d 240, 240 (Tex. 1987)).

On the other hand, repudiation of a mediated settlement agreement or a Rule 11 agreement prior to entry of judgment may not be sufficient to unbind a party to its terms. In *West Beach Marina, Ltd. v. Erdeljac*, the court held that the parties mediated settlement agreement was enforceable. 94 S.W.3d 248, 253 (Tex. App.—Austin 2002, no pet.). In that case, after a lengthy mediation, the parties’ representatives left after the negotiations concluded, and the parties’ attorneys remained and drafted the mediated settlement agreement, which the mediator and attorneys signed. *Id.* at 254. West Beach later repudiated this agreement, so the Erdeljacs sought declaration that the agreement was an enforceable contract or Rule 11 Agreement, which West Beach was now breaching. *Id.* The trial court jury found that West Beach intended to be bound by the Agreement and had breached it. *Id.*

On appeal, West Beach argued that the mediated settlement agreement could not be an enforceable Rule 11 Agreement because West Beach withdrew its consent to the agreement prior to entry of judgment. *Id.* at 255. The court relied on *Padilla* and reasoned that, “[a]lthough a court cannot render a valid agreed judgment absent consent at the time it is rendered,” the court may still, after proper notice and hearing, enforce a settlement agreement complying with Rule 11 even though one side no longer consents to the settlement. *Id.* (citing *Padilla*, 907 S.W.2d at 461).

Additionally, on appeal, West Beach argued that the mediated settlement agreement is governed by the Alternative Dispute Resolution Procedures Act of Section 154.071 of Texas Civil Practice and Remedies Code, and not Rule 11 of the Texas Rules of Civil Procedure. *Id.* Through this argument, West Beach asserted that the mediated settlement agreement was signed by its attorney, but not by a West Beach representative, and thus, not enforceable under the Act. *Id.* The court disposed of this argument by reasoning that, “[t]he policy behind the act is not to hinder settlement by restricting previous practice, but “to encourage the peaceable resolution of disputes.” *Id.* at 256 (quoting Tex. Civ. Prac. & Rem.Code Ann. § 154.002). As such, the court declined to hold that parties may not authorize their attorneys to sign mediated settlement agreements on their behalf. *Id.*

Lastly, on appeal, West Beach argued that the mediated settlement agreement is unenforceable because its terms were indefinite, as the agreement contemplated future negotiation and it failed to address important issues in dispute. *Id.* The court reasoned that although the mediated settlement agreement failed to resolve all non-material terms, the agreement “lacks an expression of clear intent not to be bound.” *Id.* at 258. Further, although there were open terms that would affect the settlement, the writing in its entirety provided sufficient detail to determine the obligations of the parties in their settlement. *Id.* As such, the court concluded that the settling parties’ failure to settle all disputed issues does not render a mediation agreement unenforceable. *Id.* at 259.

VII. CONCLUSION

Based on the caselaw above, in a situation where a Rule 11 Agreement or Mediated Settlement Agreement will be signed/agreed to before a full Settlement and Release Agreement is finalized and counsel requires additional terms, counsel should include the following in the Rule 11 or Mediated Settlement Agreement:

1. client’s non-negotiable terms, such as confidentiality or non-disparagement clauses;
2. language to suggest that both parties contemplate revisions or additions to the settlement;

3. language indicating that a written agreement is intended as a preliminary, non-binding agreement, not an enforceable Rule 11 agreement;
4. language indicating that parties intend their agreement to have no legal significance until agreement on the remaining terms (i.e., confidentiality) is reached;
5. language that provides that the parties’ agreement was “subject to” a more formal agreement; or
6. language indicating that certain actions were conditions precedent to the agreement’s enforceability.

Similarly, to avoid and address disputes that arise out of settlement agreements, counsel should keep the following in mind:

1. if a resolution is reached at mediation, memorialize the agreement with the mediator and other parties, with attorney signatures if possible;
2. characterize the memorialized settlement—before the full and final release with party signatures—as a Mediated Settlement Agreement and/or a Rule 11 Agreement;
3. if a party disagrees with terms of a Rule 11 Agreement or Mediated Settlement Agreement, the party should inform the trial court of their objection or withdraw their consent to it at the first opportunity—before a final judgment is ordered; and
4. communicate your non-monetary, non-negotiable requests to the mediator and other parties early on throughout mediation—before an agreement exists as to money.