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## **Intent to be Bound: The Validity of Settlements Negotiated Over Email**

The settlement is not done until the agreement is finalized, and all parties have signed on the dotted line. Or is it? With the ubiquity of email exchanges between counsel, the question arises as to whether and at what point an exchange of settlement terms via email rises to the level of a binding settlement agreement. In two recent cases, the Appellate Division, Second Department considered the validity and enforceability of a settlement negotiated and purportedly agreed to over email, holding that where there is mutual agreement to all material terms regarding the matter, a valid settlement may exist despite its untraditional origin in a series of emails.

### ***Lorena Alessina, et al., v. El Gauchito II, Corp., et al.***

In *Alessina*, the plaintiffs, current and former employees of restaurants owned by one defendant and operated by the two other defendants, claimed to have reached an employment-related settlement during mediation. Following the mediation, the plaintiffs' attorney emailed the defendants' attorney, setting forth the terms of the settlement and asked opposing counsel to confirm the terms. The defendants' attorney replied affirmatively, stating, "Yes, confirmed." The defendants, however, refused to pay the settlement amount, which was followed by the plaintiffs bringing this action to recover the money. The Queens Supreme Court granted the plaintiffs' motion for summary judgment in lieu of a complaint, and the Appellate Division affirmed.

The Second Department started from the well-established principles that a settlement agreement is binding upon a party "if it is in a writing subscribed either by the party or by his or her attorney" and that writing must set forth all material terms and evince "a manifestation of mutual assent." The Appellate Division went on to find that the "exchange of email correspondence between the attorneys for the parties setting forth all material terms of the settlement and a manifestation of mutual assent was sufficient to constitute an enforceable settlement agreement between the parties." In so doing, the court rejected the defendants' contention that a separate settlement agreement was necessary as the attorneys' acceptance of the emailed settlement terms was not conditioned on the execution of a formal settlement or release.

### ***Harleysville Insurance Company/Nationwide General Insurance Company v. Estate of Otmar Boser et al.***

In *Harleysville*, the plaintiffs, the Estate of Otmar Boser and Ruth Boser, executor, filed a wrongful death action on behalf of Otmar Boser after he was killed in a motor vehicle accident involving a vehicle insured by the defendant insurer. During the pendency of the litigation, the parties engaged in arbitration, which resulted in an award in favor of the estate. Shortly

thereafter, the parties allegedly negotiated and finalized a settlement agreement via email. The insurance company moved to have the settlement agreement enforced, and the estate cross-moved to enforce the arbitration award. The Westchester Supreme Court denied the insurer's motion to enforce the alleged settlement and granted the estate's motion to enforce the arbitration award. On appeal, the Second Department affirmed.

Here, too, the appellate court noted that under CPLR 2104, an enforceable settlement writing needs to address all material terms and demonstrate clear mutual accord between the parties. On the facts of this case, however, the court found the exchange of email terms was not sufficient to create an enforceable settlement.

Why the difference? In this case, the email exchange between counsel included a discussion of additional terms needed to finalize the agreement and, accordingly, did not evidence a clear mutual accord. For one, the estate wanted the insurer to agree that \$50,000 of the insurance proceeds paid out by the other vehicle involved in the accident would not be set off against the total settlement. In addition, the estate had yet to confirm that following the settlement, it would inform the arbitrator that no award would be required. These outstanding terms demonstrated a lack of mutual agreement, rendering the purported settlement non-binding.

## Takeaways

Under the right set of facts, the New York courts will enforce a settlement reached via email exchange, even in the absence of a formal settlement or release. Litigators negotiating settlements should be careful when using indicia of agreement in emails, lest the court enforce their email exchange and they lose the opportunity of a more formal, thoughtfully crafted written agreement.