So You Think It's Really Over?

Survival Tips for Resolving the Personal Injury Case

by Anthony J. Murgatroyd

Personal injury settlements are no longer easy. They can involve many issues. One of the toughest is Medicare's interest in a personal injury case, and whether a Medicare set aside (MSA) is needed. An MSA is an account to be established, or dollars set aside, to cover Medicare's funding of future medical treatment stemming from an injury for which a Medicare beneficiary received a settlement or damage award. Other issues that arise are hold harmless and indemnity agreement requests, requests for confidentiality agreements, and concerns over Medicare liens.

The Medicare issue is nothing new. But with recent revisions requiring insurers (and self-insurers) to report settlements, things have certainly become worse. The defendant is usually expected to pay the plaintiff earlier than Medicare's time to issue a final payment letter. In fact, Medicare won't issue a final payment letter without a fully executed release. As such, defense counsel and the insurers fear the plaintiff will not pay Medicare the final payment amount, and that the insurers will be exposed for the payment, with interest and penalties. Added to these problems is the current uncertainty over MSAs.

The Medicare issues, indemnity and hold harmless requests, and the requests for confidentiality agreements typically surface after a verbal agreement is reached on a settlement amount, but before the defendants tender the settlement check.

The problems begin when the defense attorney sends the plaintiff's attorney the insurance carrier's release and closing documents. The problems may take the form of requiring the plaintiff's attorney indemnify the defendant and/or the defendant's insurance carrier. A confidentiality provision may also be present.

The problems continue when the defendant's insurance carrier will not issue the settlement check until it receives Medicare's final payment letter. The defendant may threaten to hold back settlement funds until they receive the Medicare final payment letter or they may only agree to issue the settlement check with Medicare as a co-payee.

There is often a breakdown at this point, and the plaintiff then moves to enforce the settlement without the offending requirements. The defendant then cross-moves to enforce the settlement with their required conditions. The settlement is halted. More time and expense is incurred. Several months later, the court resolves the issue. Someone wins and someone loses, or both parties may be partly satisfied and partly dissatisfied.

Here are some tips to avoid this painful experience:

Avoid the Risk Upfront

Attorneys historically only focused on a settlement number (*i.e.*, the value of the payment settling the case). There was a time when some attorneys actually sent a one-page preprinted Allstate release (not printed by the insurance company) that contained two or three paragraphs confirming the case was settled, and a secretary would type a number on it. The number was really the main material term of the settlement. Closing documents weren't that important or detailed.

Those days are long gone. Now agreeing on the settlement number can sometimes be the easiest part of the settlement. So thinking a case is settled simply because there is an agreement on a number can be risky.

The devil is in the details, and failing to address the important settlement terms can kill, or at least substantially delay,

resolution of the case.

There is no one universal way to settle a case and each varies depending on the client's desires and the strength and weakness of the case, if the case were to proceed to trial. Here are some things the practitioner may wish to consider:

a. Raise the issues early in settlement negotiations. When there is a discussion about numbers, consider holding off on giving any final acceptance until the exact settlement terms are known. Ask if there is an expectation of a hold harmless and indemnity agreement. Ask if the defendants will expect the client to indemnify, or expect the attorney to indemnify, or both. Ask what other conditions their client or carrier will expect to satisfy the Medicare issues. Ask if they are expecting a confidentiality provision. A settlement checklist can be developed to go through the issues.
b. Once the defendants' settlement terms are known, discuss them with the clients before giving any final numbers. Depending on the client's input, and the strengths and weaknesses of the case, the practitioner can now go back and accept or reject the terms, or even require additional consideration.
c. When negotiating from a point of weaknesses—that is, the case is not particularly strong, and the defendant is making or suggesting an offer that can't be refused, but can't provide the terms—the practitioner can accept the offer conditioned on approval of the settlement terms. It is recommended this be made clear in writing.
d. Another variation on c., above, is to simply send a confirming settlement letter outlining the understanding of the number and the terms. This will almost immediately flesh out or expose the defendant's position in an effort to avoid the risk of the practitioner being bound to his or her understanding of the terms.
e. Another approach that is particularly useful when negotiating from a position of strength is to advise the defendant's attorney that the plaintiff will only sign a standard release. Then provide an unexecuted copy of the release to the defendant's attorney with the settlement number left blank. In the cover letter the defense counsel should be advised that a confirmed agreement is expected on the documents before a settlement number will be agreed upon.
f. If negotiating before a mediator or judge, consider bringing an unexecuted, blank release so offers or counteroffers can be linked to changes in any of the written terms of the release.
g. Since the defendant is typically expected to pay the plaintiff earlier than Medicare's time to issue a final payment letter, and there is concern the plaintiff will not pay Medicare the final payment amount, and that the defendant will be exposed to the payment, the best advice is to get the ball rolling early in the game. Secure a Medicare conditional payment letter as soon as possible, and certainly when it is clear the client is done treating. Secure it again within 90 days of trial. The 90-day cushion is based on the fact that Medicare has 65 days to provide the conditional payment letter, but it often can take longer. Also, secure all injury-related medical bills early in the case. This will provide a good estimate on the amount Medicare has paid. If the defendant remains reluctant to issue payment because they still want to assure Medicare's interests will be satisfied, then armed with a current conditional payment letter, and all of the medical bills, the practitioner can perhaps negotiate a deal where there is an agreement that upon receipt of the settlement funds the amount of the lien is to be held in escrow by the plaintiff's attorney pending Medicare's final payment amount. If a settlement is not possible, having a current conditional payment letter, and all of the medical bills will help the practitioner avoid the risk of undervaluing the lien at trial. Remember, Medicare is not bound by its conditional payment letter, so if a final payment letter is received requesting a higher amount post-verdict the client may still be responsible for that amount.
h. The parties may disagree on whether an MSA is necessary. It is the author's opinion that an MSA is not necessary where there is no reported need for future treatment. But if there is dispute on the issue, consider securing an opinion letter from a recognized lien resolution company. The parties can agree that if an MSA is recommended by the letter, the plaintiff will secure it. If not, then the parties have considered Medicare's interests and no MSA is necessary. It is also not a bad idea, in the case of a Medicare- or Medicare-eligible claimant, to expressly indicate in the release that no future medical treatment has been recommended and, as such, the settlement is not intended to compensate the plaintiff for any future medical care.
i. Confidentiality agreements expose a plaintiff to tax liabilities and are generally not recommended.[1] However if one must be completed, consider phrasing the release to read that the plaintiff does not ask for confidentiality, and derives no benefit from it, and the parties agree the same consideration would be paid and accepted for the settlement of this case without confidentiality. If that provision is not acceptable, try to gain acceptance on a clause that indicates both parties require mutual confidentiality in

exchange for consideration. Alternatively, consider insisting the defendant indemnify the plaintiff for any adverse tax consequences due to the inclusion of the confidentiality provision. A final option is to define the potentially taxable portion allocated toward the confidentiality provisions and consider negotiating a low amount. None of the above measures are guaranteed to avoid a major tax liability, but they are certainly better than failing to address the issue.

j. Consider the tax implications in personal injury cases involving past and future economic loss. While a personal injury case involving just pain and suffering is not taxable, the economic loss component may be. Therefore, the economic loss component needs to be considered at the time of settlement and trial. It may be that in a personal injury case involving claims for past and future economic loss, the economic losses may be de-emphasized or dropped altogether if the tax implications outweigh the benefit of putting those claims in the release or 'on the board' at trial. Indeed, to avoid an unsuccessful audit, the author recommends the tax consequences be considered prior to the commencement of suit, or prior to the drafting of a demand letter as a precursor to filing suit, where there is still flexibility in the theories and claims being advanced. In all cases where economic losses are claimed, their consideration should be broken out and specifically accounted for in the release. The bottom line for clients and their personal injury counsel is to get the advice of a competent tax professional before the case settles.

k. If an acceptable number is reached at trial, consider all of the terms discussed above and be sure to place all the important terms of the settlement on the record. The settlement record at trial should include, among other things: the closing documents that have been accepted by both parties, preferably marked as exhibits and identified in the record; responsibility for Medicare liens; confirmation the defendant will tender the full amount of the settlement to the plaintiff, and that the plaintiff will pay Medicare; that the payment will be made from the settlement proceeds; that all parties will receive copies of Medicare's final payment letter; and proof of payment to Medicare. Also include any indemnity language that is part of the settlement. The settlement on the record should also state there are no other terms express or implied to the settlement.

l. The same need for specificity expressed in k., above, applies equally to settlements reached in mediation. In fact, the Supreme Court has recently expressed, in the matter of *Willingboro Mall v. 240/242 Franklin Avenue,*[2] that a settlement agreement reached at mediation will not be enforceable unless it is reduced to a signed, written agreement. Although the Supreme Court analyzed a court-authorized mediation under the Complementary Dispute Resolution Program of Rule 1:40-4, and referenced Rule 1:40-4(i), which requires a settlement to be reduced to writing in reaching its decision, there is no reason to believe the Court's rationale would not be extended to all private mediations.

As previously stated, there is no one-size-fits-all for these issues. The above steps may smooth the path to a binding settlement, but they are not exclusive. In every case, the plaintiff's attorney must use skill and judgment to resolve these and similar issues in settlement. Each case is different, and what the parties expect and require to settle in each case may also be different. Knowing the law, and showing the support for why the plaintiff has adopted a position on the above issues, can help the plaintiff reach final settlement.

Know the Law to Support a Position

Opposing counsel will be more amendable to moving off a position if the practitioner can demonstrate that the law favors his or her client.

Plaintiff's Counsel Cannot Indemnity the Defendant

Plaintiff's counsel may not personally agree to hold the defendant harmless from claims arising out of the defendant's payment of settlement consideration. The defendant's counsel may not ask the plaintiff's counsel to provide this financial assistance; it violates ethical rules for the defendant's attorney to request the indemnity and for the plaintiff's counsel to agree to the indemnity. It is viewed as creating a conflict of interest and can be construed as an effort to provide financial assistance to the client.[3]

The prohibition restricts not only the defendant from making these requests, but also the defendant's insurance carrier and the defendant's attorney.[4]

Medicare as a Co-payee on the Settlement Check

Courts may enforce a settlement that omits Medicare as a co-payee on a settlement check where the plaintiff, by release, acknowledges his or her responsibility to pay any Medicare claim and agrees to indemnify the released parties.[5] Private parties do not have the standing to assert the government's Medicare interest in the litigation.[6]

One court has held that an insurer's insistence that Medicare be listed as a payee on a settlement check evidenced bad faith. In that case, the plaintiff had agreed to indemnify the carrier and the defendant against any Medicare claims.[7]

Other courts see it differently. In *Wilson v. State Farm*,[8] the plaintiff settled a

case with State Farm on an uninsured motorist claim. State Farm held back the settlement check after the plaintiff refused to accept a check with Medicare as a co-payee. During this time, State Farm did not know the amount of the Medicare lien. Two months later, State Farm learned the amount and paid the plaintiff and Medicare a day later, apparently with separate checks. On this record, the Kentucky Federal District Court granted summary judgment dismissing the plaintiff's motion for bad faith against State Farm. It found State Farm's action reasonable to protect against overpayment in light of Medicare's requirements.[9]

The district court in *Wilson* cited two cases that also found it reasonable for a defendant or its insurer to include Medicare on a settlement check: *Lewis v. Allstate Ins. Co.*[10] and *Wall v. Leavitt*.[11]

Medicare Set Asides

Medicare set asides are not required in personal injury claims where a claim for future medical expenses does not exist, and are not linked to any reporting requirements placed on defense carriers or self-insured defendants.

Any MSA obligation in a liability settlement could only possibly exist in a case where a definitive allocation for future injury-related medical expenses exists for an injured Medicare beneficiary. An example is a verdict sheet with a future medical expense line item or—expert reports identifying the need and cost of future medical care—or albeit rare—a settlement release with a descriptive allocation for future medical treatment, such as a future surgery contemplated by the parties.

Absent the documented need for continued future medical care related to the accident, courts will not require an MSA or order that an MSA be required as part of a settlement.[12]

While the author does not recommend ignoring consideration of an MSA where there is a documented need for future treatment, it is worth noting that at the present time there are no statutory requirements promulgating the use of MSAs, or any other vehicle, in liability settlements. In fact, the term MSA does not appear in any currently enacted statute, and is nowhere defined in any currently enacted regulation. Nor, as discussed more fully below, is there any guidance from CMS.

Despite considerable urban legend, the Medicare, Medicaid and SCHIP (State Children's Health Insurance Program) Extension Act of 2007 (MMSEA) does not contain any new guidance or requirements related to MSAs. Section 111 of the MMSEA requires the providers of liability insurance (including self-insurance), no fault insurance and workers' compensation insurance (hereinafter insurers) to determine the Medicare enrollment status of all claimants and report certain information about those claims to the secretary of health and human services.

In fact, CMS, in town hall teleconferences related to the implementation of the MMSEA, has told the legal community that CMS's routine recovery processes have not changed since the passage of the act.

For a specific example, consider the call transcript dated March 24, 2009.[13] In that transcript, the set-aside process (whether it is for workers' compensation or liability) is: 1) voluntary, not mandatory; and 2) the same as it has been in the past. In another CMS teleconference call on Sept. 30, 2009, addressing policy questions related to the implementation of the MMSEA Section 111 reporting rules, the topic of MSAs in third-party liability cases was raised by a participant on the call. His question was whether the MMSEA required the use of MSAs in third-party liability cases. The response from CMS officials bears repeating.

According to CMS officials, Section 111 reporting is not related to the use of MSAs in third-party liability cases. The MMSEA imposes a reporting obligation on responsible reporting entities (RREs) in certain settlements involving claimants currently entitled to Medicare at the time of settlement, judgment, award or other payment. The MMSEA does not change MSA obligations in any way. The use of MSAs in third-party liability cases is the same as it was prior to the July 1, 2009, effective date and the Dec. 29, 2007, enactment date of the MMSEA.

On Oct. 22, 2009, the issue arose once again. The caller advised that the American Association for Justice (AAJ) was telling its members MSAs were not required in liability cases. CMS agreed, stating:

> If you go back on some of the earlier transcripts we've done short points on liability set asides. The AAJ is correct in that Section 111 does not require liability set asides as we said at the beginning of this call 111 is a new and separate reporting requirement.
>
> And all it is a reporting requirement but we also said Section 111 doesn't change any preexisting obligations. The idea of set asides is based on the fact that Medicare is prohibited from making payment where payment has already been made.
>
> So that if you have a settlement, judgment or other payment that takes into account in any way future medicals that settlement, judgment, award or other payment should be exhausted or appropriately before Medicare is billed for the associated services.
>
> We do not have the same formal process for liability set asides that we have for worker's comp set asides.[14]

On Sept. 29, 2011, the CMS prepared a memo indicating that where a treating physician prepares a certification indicating treatment to be complete at the time of a settlement in a liability claim

and that future medical expenses will not be required, Medicare will consider "its interest, with respect to future medicals for that particular settlement satisfied."

Furthermore, when reviewing the regulations that interpret the Medicare secondary payer statute, it is relevant to note that remedies for failure to properly consider Medicare's past payments, as a function of its conditional payment reimbursement rights, include direct recovery against the third-party (primary) payer,[15] but nowhere in the statutes that address future medical expenses is there a similar recovery right against third parties. So while the carriers have a reporting requirement, the MSA obligation is to the client and plaintiff's counsel, not the defendants or their carriers.

As previously stated, the MMSEA statute requires defendant/insurers to report certain information regarding settlements with Medicare beneficiaries to the secretary of health and human services. In fact, the sole purpose of Section 111 of the MMSEA is to ensure that settling parties fully comply with the Medicare secondary payer requirement—that is, past Medicare payments must be verified and resolved in all liability, workers' compensation and no-fault settlements. The MMSEA has nothing to do with identifying Medicare-covered future costs of care, which leads to MSA issues and analysis.

Although, as previously stated, Medicare has established a process for MSAs in workers' compensation cases, as of May 30, 2014, Medicare has not established a similar process for claimants to use to meet their obligations with respect to future medical payments in personal injury claims. It is worth noting, however, that Medicare has issued an advanced notice of proposed rulemaking on June 14, 2012,[16] and is expected to issue a notice of proposed rulemaking in the near future to outline such a process. The author believes any such process is not likely to require MSAs in any cases where there is no documented need for future medical treatment.

Verbal Settlement Agreements Can be Enforceable in the Absence of a Release

Often only a settlement number is discussed, with an acknowledgment for responsibility on liens, and then disputes arise over the unmentioned terms in the defendant's release. Then a motion to enforce the settlement ensues, often followed by a cross-motion by the defendant to enforce settlement under the terms expressed in the release.

While the author certainly does not recommend avoiding settlement discussion on hold harmless and indemnity agreements, or confidentiality clauses, New Jersey case law does make clear that where there is simply a verbal agreement on a settlement amount, along with an acknowledgment the plaintiff will be responsible for any liens out of the settlement proceeds, a reviewing court can enforce the verbal terms of the settlement, regardless of the lack of agreement on the specific form of the release.

A disputed motion to enforce a settlement is treated under the same standard as a motion for summary judgment, in that "a hearing is to be held to establish the facts unless the available competent evidence, considered in a light most favorable to the non-moving party, is insufficient to permit that judge, as a rational fact finder, to resolve the disputed factual issues in favor of the non-moving party."[17]

A settlement agreement between parties to a lawsuit is a contract.[18] New Jersey courts favor the settlement of cases and treat an agreed-upon settlement as a contract that should be honored unless there is fraud or other compelling circumstances.[19] Thus, "a settlement agreement is governed by principles of contract law."[20]

"A settlement agreement usually involves the payment of money by one party in consideration for the dismissal of a lawsuit by the other party."[21]

When parties reach a settlement agreement with certain and specific terms, the agreement should be enforced.[22] Failure to execute a written document does not void the original agreement, nor does it make it deficient from the outset, because execution of a release is "a mere formality, not essential to formation of the contract of settlement."[23] Rather, the parties "objective intent" governs because the "contracting party is bound by the apparent intention he or she outwardly manifests to the other party. It is immaterial that he or she has a different, secret intention from that outwardly manifested."[24]

In *Hagrish, supra*, the two parties reached a verbal settlement, but that settlement began to break down because certain additional terms could not be agreed upon.[25] After one party sought to enforce the settlement, the trial court found no binding settlement agreement was entered into.[26] However, the Appellate Division reversed, holding that even though there was no written agreement, the verbal agreement was enforceable, since the terms were specific and clear: One party would pay a sum of money and the other party would not pursue their appeal.[27] Therefore, the case law is clear. A verbal agreement can be enforced, as long as the terms are certain and specific.

Confidentiality Orders

Confidentiality requests have special financial, legal and ethical implications that should be considered.

First, portions of settlements involving confidentiality orders have been taxed as not representing damages received on account of personal injuries

or sickness under 26 U.S.C. §104(a)(2).[28]

In *Amos*, the plaintiff settled his case for assault against Dennis Rodman for $200,000. The tax court held that $80,000 of that settlement was paid for the confidentiality agreement. It held that amount taxable because the plaintiff did not receive the $80,000 for personal injury or sickness under 26 U.S.C. §104(a)(2).[29]

The court found that Rodman paid the remaining $120,000 for personal injury. It therefore excluded that amount from taxable income.

Second, the American Bar Association and several bar associations have supported the limits on the scope of confidentiality agreements, recommending a prohibition on the right of an attorney to represent any other claimant in a similar action against the defendant and limits on the circumstances under which a plaintiff's attorney would be required to destroy information or records furnished pursuant to a protective order. They also recommend against any agreement that would require a plaintiff's attorney to return copies of documents obtained in such agreements, without an agreement from the defendant not to destroy the documents.[30]

Third, in the context of a public entity, the New Jersey Supreme Court found that the Open Public Records Act requires disclosure of a settlement agreement. As such, the Court held that a governmental entity cannot enter into a voluntary agreement to keep a settlement confidential and then claim a reasonable expectation of privacy in the amount of the settlement.[31]

Finally, in New Jersey, the Court in *Vares-Ebert v. Kelberg*[32] refused to enforce a settlement agreement that contained confidentiality provisions in a medical malpractice case. Although the Court reasoned that the confidentiality provisions were inconsistent with specific statutes that regulate the medical field, it also opined that the provisions violated New Jersey Court Rule 1:38, which permits access to court records.

Conclusion

In conclusion, settlements are a safe, less costly, and effective way to resolve a case. Settlements are preferred by the court and the vast majority of clients and insurers. Giving forethought and addressing the formalities and concerns of all the settlement terms during the negotiation process will go a long way to limiting subsequent litigation and to obtaining certainty and finality. ⚖

Endnotes

1. *See Amos v. Commissioner*, 86 T.C.M. (CCH) 663 (Tax Ct. 2003).
2. 215 N.J. 242 (2013).
3. New Jersey's Rules of Professional Conduct, Rule 1.8 (e) provides that while representing a client a "lawyer shall not provide financial assistance to the client in connection with pending or contemplated litigation." There are exceptions for advancing the costs and expenses of litigation; however, there is no exception that permits a lawyer to agree to indemnify or guarantee the client's obligations under a settlement. *See also,* NYC Bar Ass'n Comm. On Professional and Judicial Ethics, Formal Op. 2010-3 (2010)(settlement agreements requiring the financial assistance of counsel); Florida Bar Staff Informal Op. 30310 (2011)(finding that a plaintiff's counsel could not indemnify a defendant for payment by the client of a Medicare lien); Ohio Bd. Commissioners on Grievances and Discipline Informal Op. 2011-1 (2011); State Bar of Arizona Formal Op. 03-05 (2003); Ill. State Bar Ass'n Advisory Op. 06-01 (2006); and Oklahoma Ethics Op. 323 (2011).
4. *See* Indiana State Bar Ass'n Advisory Op.1 (2005); Kansas Bar Ass'n Op. 01-5 (2001); Missouri Sup. Ct Adv. Comm. Formal Op. 125 (2008); North Carolina State Bar Ass'n Op. RPC 228 (1996); South Carolina Bar Op. 08-07 (2008); Tennessee Sup. Ct. Board Prof. Responsibility Formal Op. 2010 F-154 (2010); and State Bar of Wisconsin O. E-87-11.
5. *See Hearn v. Dollar Rent a Car, Inc.*, 2012 Ga. App. LEXIS 338 (Ct. Appeals GA. March 26, 2012); *Wright v. Liberty Medical Supply*, 2011 U.S. Dist. LEXIS 81621 (D.S.C. 2011); *Riccardi v. Strunk*, 2010 Conn. Super. LEXIS 186 (D. New London, Case No. CV085008671, decided Jan. 22, 2010); *Tomlinson v. Landers*, 2009 U.S. Dist. LEXIS 38683*16 (M.D. Fla. 2009)(denying defendant's motion to enforce a settlement where defendant's insurer had insisted on putting Medicare on a settlement check as a co-payee and plaintiff rejected the check and sued defendant on the underlying cause of action).
6. *See Zeleppa v. Seiell*, 2010 Pa Super. 208 (P.A. Super. 2010); *see also McBride v. Brown*, 2011 Conn. Super. LEXIS 830 (D. New Haven, Case No. CV085012165, decided April 4, 2011)(stating that no authority existed for insurer to insist that Medicare be placed on a settlement check as a co-payee, in the context of ruling on a settlement with a Texas child support lien).
7. *See Wisinski v. American Commerce Group*, 2011 U.S. Dist. LEXIS 320 (N.D. Pa. 2011).
8. 795 F. Supp. 2d 604 (W.D. Ky. 2011).
9. *Id*. at 607.
10. 2006 Tex. App. LEXIS 2055 (Tex. App. 2006).
11. 2008 U.S. Dist. LEXIS 89880 (E.E. Cal. 2008).
12. *Sipler v. Trans Am Trucking, Inc.,* U.S.D.C., Dist. NJ Civ. No. 10-3550, July 24, 2012; *see also, Finke v. Hunter's View, Ltd. and Wal-Mart Stores, Inc.,* Civ. No. 07-4267 (WRW/RLE), 2009

WL 6326944 D. Minn. Aug. 25, 2009).

13. cms.hhs.gov/MandatoryInsRep/07_NGHP_Transcripts.asp#TopOfPage
14. francosignor.com/wp-content/uploads/2012/07/CMS-Town-Hall-Section-111-Transcript-10.22.2009.pdf.
15. 42 C.F.R. §411.24(e).
16. gpo.gov/fdsys/pkg/FR-2012-06-15/html/2012-14678.htm.
17. *Amatuzzo v. Kozmiuck*, 305 N.J. Super. 469, 474-75 (App. Div. 1997).
18. *Nolan by Nolan v. Lee Ho*, 120 N.J. 465, 472 (1990).
19. *See Honeywell v. Bubb*, 130 N.J. Super. 130, 136 (App. Div. 1974); *Willingboro Mall, Ltd. V. 240/242 Franklin Ave.*, 421 N.J. Super. 445, 451 (App. Div. 2011).
20. *Thompson v. City of Atlantic City*, 190 N.J. 359, 379 (2007).
21. *Id.*
22. *Hagrish v. Olsen*, 254 N.J. Super. 133, 137 (App. Div. 1992).
23. *Id.* at 138.
24. *Id. See also, Jennings v. Reed*, 381 N.J. Super. 217, 229, 232 (App. Div. 2005) (when there is no disagreement with the bargain struck, the settlement should be upheld even when there is no release document or formalization of the terms on the court record). *See also Lahue v. Pio Costa,* 263 N.J. Super. 575, 596 (App. Div. 1963) (stating that where the parties agree upon the essential terms of a settlement, so that the mechanics can be fleshed out in a writing to be executed thereafter, the settlement will be enforced notwithstanding the fact that the writing does not materialize because a party later reneges).
25. *Id.* at 136-137.
26. *Id.* at 135.
27. *Id.* at 138-39.
28. *See Amos v. Commissioner*, 86 T.C.M. (CCH) 663 (Tax Ct. 2003).
29. *Id.* at *15-16.
30. ABA Action Commission to Improve the Tort System, Report #23, 1987, See also New Hampshire Bar Association, Ethics Op. #2009-10/6; D.C. Opinion 335, Adopted May 16, 2009.
31. *Asbury Park Press v. County of Monmouth*, 201 N.J. 5 (2010). *See also; Burnett v. County of Gloucester*, 415 N.J. Super. 506 (App. Div. 2010) ("We have no hesitation in concluding that agreements settling claims between claimants and governmental entities such as Gloucester County constitute government records, made in the course of the official business of the County," and must be disclosed under OPRA).
32. Unpublished, A-4581-10T2.

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