STATE OF WISCONSIN
SUPREME COURT

In the Matter of the Amendment of Creation of Wis. Stat. § 802.12(5) (Relating to Memorializing Settlements Reached By Way Of Alternative Dispute Resolution)

Petition #05-05 (Partial)

AMENDED PETITION FOR SUPREME COURT RULES

To: The Honorable Justices of the Supreme Court of Wisconsin:

Pursuant to the Court's direction on October 25, 2005, Petitioner Attorney Donald Leo Bach of DeForest respectfully amends that portion of his February 15, 2005 Petition requesting the Supreme Court of Wisconsin to issue an Order creating Wis. Stat. § 802.12(5).

History of the Petition

On February 15, 2005, Petitioner filed a formal request ("Petition") with the Supreme Court of Wisconsin to (1) amend Wis. Stat. § 807.05 relating to agreements, stipulations, and consents made at depositions and, (2) create Wis. Stat. § 802.12(5) relating to memorializing settlements reached by way of alternative dispute resolution. A copy of the Petition is attached. Notice of these rulemaking requests in the Petition was duly published in the *Wisconsin Lawyer*. Pursuant to such notice, on October 25, 2005, the Supreme Court held a hearing and an open-court administrative rule conference on the Petition. Petitioner made a presentation before the Court in support of the Petition. There was no written or

oral opposition to either rulemaking request. The Supreme Court, during its administrative rule conference, requested that internal staff conduct research within the 50 states in regard to the first proposed rule relating to agreements, stipulations and consents made and recorded during depositions. In regard to the second rule change requested, *i.e.,* the creation of Wis. Stat. § 802.12(5) relating to memorializing settlements reached as a result of the use of a dispute resolution method, the Court requested that the Petitioner amend the Petition and resubmit it as amended.

Background

The February 15, 2005 Petition proposed that Wis. Stat. § 802.12(5) be created as follows:

> (5) SETTLEMENT FINALIZATION. Any settlement reached as a result of the use of an alternative dispute resolution method shall be reduced to writing, dated, and signed by each settling party prior to concluding the dispute resolution process.

This proposed rule simply sought to require that any settlement reached as a result of the use of an alternative dispute resolution method be reduced to writing, dated, and signed by each settling party prior to concluding the dispute resolution process. The purpose of the proposed rule is to address case law which establishes that if such settlement is not so finalized, it is not binding and a settling party can simply "back-out" and disclaim the settlement even if the party previously fully agreed to the settlement.

Alternative settlement dispute resolution methods, primarily mediation, have been found to be a very good method of resolving disputes short of a full

court trial. Mediation, however, can be time-consuming and relatively expensive, especially if a professional mediator is retained. Further, in most cases, the strengths and weaknesses of a party's case are revealed in mediation. When a settlement is reached after the expenditure of time, expense, and tactical costs, that settlement should be enforceable and provide finality to the controversy.

However, Wis. Stat. § 807.05[1] and ensuing case law says that unless that settlement is in writing and is signed — even if the mediator recorded the settlement faithfully and sends a written memorialization of the settlement to all sides — it is not enforceable and binding. That is exactly what happened in *Laska v. Laska*, 2002 WI App. 132, 255 Wis. 2d 823, 646 N.W.2d 393. After mediation, the parties agreed that one party would pay $135,000 and not make other claims in regard to a will dispute. However, that party was allowed to back out because of non-compliance with the formal requirements of Wis. Stat. § 807.05.

The Court held:

> Wisconsin Stat. § 807.05 is an exception to the usual rule that oral contracts are binding. *Adelmeyer v. WEPCO*, 135 Wis. 2d 367, 400 N.W.2d 473 (Ct. App. 1986). It "seeks to prevent disputes and uncertainties as to what was agreed upon." *Id*. at 372, 400 N.W.2d 473 (citation omitted). The statute adds requirements for enforceability of an otherwise valid oral agreement when the agreement is reached in the course of a claim that is in the process of adjudication. *Kocinski v. Home Ins. Co.,* 154 Wis. 2d 56, 67, 452 N.W.2d 360 (1990). "An oral contract reached by stipulation in the course of court proceedings is unenforceable unless formalized in the way required by sec. 807.05." *Id.* at 67-68, 452, N.W.2d 360.

Id. at ¶ 9.

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[1] Wis. Stat. § 807.05 provides: "No agreement, stipulation, or consent between the parties or their attorneys, in respect to the proceedings in an action or special proceeding shall be binding unless made in court or during a proceeding conducted under ss. 807.13 or 967.08, and entered into the minutes or recorded by the reporter, or made in writing and subscribed by the party to be bound thereby or the party's attorney."

Very recent case law indicates that failure to meet the requirements of Wis. Stat. § 807.05 continues to cause problems in enforcing settlements, including those reached by way of mediation. *See Affordable Erecting, Inc. v. Neosho Trompler, Inc.*, 2005 WI App. 189, ____ Wis. 2d ____, 703 N.W. 737, *review granted*, September 8, 2005, and *Wangard Partners Inc. v. Tandem Tire & Auto Serv., Inc.*, No. 2005 AP 64 (Ct. App. Oct. 27, 2005).

Proposed rule 812.05(5) addresses Wis. Stat. § 807.05 and case law to provide the following benefits:

1. It puts everyone on notice that settlement reached in mediation is not final and binding until reduced to paper and signed;
2. It tells professional mediators that ensuring the settlement is so finalized is a minimum standard of their jobs;
3. It provides the parties another opportunity to clarify, confirm, and potentially change their agreement through the final step of formalizing the agreement in writing;
4. It greatly limits the ability to "back-out" of a negotiated agreement.

Supreme Court Request for Amendment of the Petition Relating to Proposed Wis. Stat. § 802.12(5)

During the Court's administrative rule conference, concerns were expressed as to the scope and coverage of the proposal to create Wis. Stat. § 802.15(5) in the following areas:

1. What is a "settlement" under the proposed rule?

2. Is it the intent of the proposed rule to cover all alternative dispute resolution methods? If so, how does that comport with the binding arbitration alternative outlined in Wis. Stat. § 802.12(1)(a) and its formal requirements and the definition of "settlement alternative" in Wis. Stat. § 802.12(1)(i)?

3. Should language be added that to be binding any settlement agreement must be reduced to writing and signed?

Discussion

1. What is a settlement?

Concern was expressed by one member of the Court as to what Petitioner meant by the words "settlement" in the proposed rule and that the Petition did not include any definition of "settlement."

The proposed rule is simply an amendment to Wis. Stat. § 802.12, the section of the statutes providing for alternative dispute resolution. This section was first enacted by the Supreme Court in 1993 as a result of a petition by the Judicial Council and has been in place for about twelve years. The section also appears to have been amended three times since. However, § 802.12 itself does not contain any definition of "settlement," and there does not appear to have been any difficulty carrying out the goals and intent of the section as a result. Settlement is also not defined in Wis. Stat. § 990.01, a list of definitions used in construction of Wisconsin law, nor elsewhere in the statutes. This suggests "settlement" is one of those concepts that is self-explanatory.

To the extent it is felt necessary that "settlement" must be defined in order to carry out the intent and purpose of proposed rule 802.12(5), the following definition could also be created by adding a definition of "settlement" to § 802.12(1)(i) (and renumbering current § 802.12(1)(i) and (1)(j) to 802.12(1)(j) and (k) respectively):

> (i) "Settlement" means the agreement of the parties to resolve their dispute entirely or in part.[2]

2. Was it the intent of the proposed rule to cover all alternative dispute resolution methods; if so, how does that comport with the binding arbitration alternative outlined in Wis. Stat. § 802.12(1)(a) and its formal requirements and the definition of "settlement alternative" in Wis. Stat. § 802.12(1)(i)?

Because Wis. Stat. § 801.12(1)(i) lists binding arbitration as a "settlement alternative," a concern was raised that the proposed rule did not make sense if such "settlement alternative" were chosen as an alternative dispute resolution between the parties, because binding arbitration does not result in a "settlement," but instead in a formal decision rendered by a neutral third-person.

It is the case that Wis. Stat. § 802.12 recognizes that binding arbitration is not a negotiated compromise under the statute. Wis. Stat. § 802.12(4) states:

> (4) ADMISSIBILITY**. Except for binding arbitration**, all settlement alternatives are compromise negotiations for purposes of s. 904.08 and mediation for purposes of s. 904.085. [Emphasis supplied]

However, the language of the proposed rule stating that "any *settlement*" reached as a result of the use of an alternative dispute resolution method …" is

[2] "In part" is included to allow parties to reach a final settlement as to a portion of their dispute and yet allow other portions to be decided through the course of litigation. For example, the parties may agree as to liability but not damages or vice-versa.

broad enough to cover any *negotiated compromise reached during* the binding arbitration process. Thus, it was and is the intent of the proposed rule to cover all voluntary settlements reached as a result of the use of any dispute resolution method.

If it is felt ambiguity still remains, the proposed rule could be modified as follows:

> (5) SETTLEMENT FINALIZATION. Any settlement reached as a result of the use of an alternative dispute resolution method, including a settlement voluntarily reached by the parties during binding arbitration, shall be reduced to writing, dated, and signed by each settling party prior to concluding the dispute resolution process.

3. Should language be added that to be binding any settlement must be reduced to writing and signed?

This is the current state of the law and, in fact, is the situation that the proposed rule addresses.

If necessary to "reconfirm" the requirements of Wis. Stat. § 807.05 and to provide notice of the same in the alternative dispute resolution section of the statutes itself (Wis. Stat. § 802.12), language could be added to the proposed rule as follows:

> (5) SETTLEMENT FINALIZATION. <u>To be binding</u>, any settlement reached as a result of the use of an alternative dispute resolution method, including a settlement voluntarily reached by the parties during binding arbitration, shall be reduced to writing, dated, and signed by each settling party prior to concluding the dispute resolution process.

or

> (5)) SETTLEMENT FINALIZATION. Any settlement reached as a result of the use of an alternative dispute resolution method, including a settlement voluntarily reached by the parties during binding arbitration, shall be reduced to writing, dated, and signed by each settling party prior to concluding the

dispute resolution process. Compliance with these requirements satisfies Wis. Stat. § 807.05 and binds the parties to their settlement.

Respectfully submitted this ____ day of _____, 2006.

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