

## Pa. Ruling Shows Why Term Sheet Can Be Worth The Wait

By **Brian Shaw** (November 29, 2023)

Many attorneys have been there before: The day starts out with a promise. A conference room full of attorneys, clients, a mediator, and a plethora of snacks, soda and coffee and the possibility of a free lunch. The specter of resolution and an early afternoon dance tantalizing in its potential.

Optimism may reign, at least for a while, but then come the breakout rooms and the drip, drip, drip of accumulating downtime, turning minutes into hours, and hours into a full afternoon.

Eight or nine hours later, after spending all of 45 minutes with the mediator and expensive alone time with your client in the breakout room, mediation's tedious side takes over the afternoon.

As early evening approaches, attrition sets in, movement begins and the parties edge closer to a resolution. On the turn of the tenth hour, the mediator tells the parties an agreement in principle has been reached, and that she will be back shortly to talk about a term sheet.

And with those magic words, before you can say "documentation," your client has packed his bags and is about to run out the door to fresh air and the promise of something other than the four walls and stale air of the ever-shrinking breakout room.

In no uncertain terms, your client tells you he wants to leave now, and that he has no patience to wait around for a term sheet to be drafted, reviewed and executed between the parties.

He is waiting for your blessing — do you give it to him? Or do you start singing "stay"?

As explained below, *In re: Legarde*,<sup>[1]</sup> a Chapter 13 decision, provides a litigation lesson applicable to any mediation: Start singing.

The adversaries in *Legarde* had their day of promise on March 23.<sup>[2]</sup> After 7½ hours of mediation, the parties reached a resolution of the plaintiff's defamation claim against the debtor.<sup>[3]</sup>

Despite the late hour, prior to the conclusion of the mediation, the adversaries agreed to and signed a single-spaced, two-page, 11-paragraph settlement term sheet.<sup>[4]</sup>

One day later, the mediator filed his report with the court, advising the court that a "settlement of this matter has been reached."<sup>[5]</sup>

Then, just a few days later, the debtor's counsel advised the plaintiff and the mediator that the debtor had rejected the settlement.<sup>[6]</sup> Further, the debtor's counsel advised the plaintiff and the mediator that the debtor did not consent to the filing of a motion to approve the settlement as laid out in the settlement term sheet, so he would not be doing so.<sup>[7]</sup>

Ultimately, after several weeks of frustration, the plaintiff filed a motion to enforce the settlement.<sup>[8]</sup>



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The debtor contended that there was no definitive agreement, because mediation was a nonbinding process and material terms of the alleged agreement were missing from the settlement term sheet.[9]

In turn, the plaintiff argued that the settlement term sheet was a binding contract, the terms of which were "sufficiently definite to be enforceable." [10]

On Sept. 14, the U.S. Bankruptcy Court for the Eastern District of Pennsylvania agreed with the plaintiff.[11] In doing so, it highlighted the necessity to "stay, just a little bit longer" — as sung by Maurice Williams and the Zodiacs in the 1960 song "Stay" — to complete and execute an appropriate term sheet at the conclusion of any ostensibly successful mediation.[12]

The Legarde court began its analysis by noting the application of Pennsylvania law, and that the test of enforceability "is whether both parties have manifested an intention to be bound by its terms and whether the terms are sufficiently definite to be specifically enforced." [13]

It also noted that settlement agreements reached during mediation are as binding as ones reached during litigation, and are treated as binding contracts.[14]

The court then set out the requirements necessary for it to determine that a contract existed: Namely, that (1) all parties manifested intent to be bound by the agreement, (2) the terms of the agreement are sufficiently definite to be enforceable, and (3) there was consideration.[15]

The court then relied heavily on the existence of the settlement term sheet to rule in favor of the plaintiff.[16]

First, it noted that the parties participated in approximately seven hours of mediation and then voluntarily drafted and executed the settlement term sheet — thereby "mutually assent[ing] to the terms and conditions of the settlement." [17]

Second, the court found that the settlement term sheet contained material terms regarding the time, manner and form of consideration, as well as a confidentiality provision, a nondisparagement clause and mutual releases.[18]

The court found it of no consequence that the settlement term sheet did not have a clause addressing defaults or their cure, or that the defendant wanted to back out of the agreement.[19] The intent of the parties was to settle this matter, and that intent was manifested upon the execution of the settlement term sheet.[20]

Finally, the court also determined that the required payments and other actions set out in the settlement term sheet constituted adequate consideration, and therefore, the settlement term sheet was a binding agreement.[21]

The settlement term sheet drafted and entered into at the conclusion of the mediation was the linchpin of the plaintiff's enforcement motion, as well as the court's decision regarding the same.

If the settlement term sheet was not entered into at the conclusion of the mediation, the issues before the court with the enforcement motion would have been much more factually complicated.

Witnesses, including the mediator, may have had to testify as to the existence of an enforceable oral agreement, and that would inherently give rise to confidentiality issues surrounding the mediation and other evidentiary issues related to Federal Rule of Evidence 408.

The settlement term sheet, as an authenticated document signed by both parties, neatly resolves all of those evidentiary problems.

Similarly, just as the settlement term sheet resolves evidentiary and proof issues as discussed above, it also helps resolve human issues, too. The psychology of mediation — or more accurately, of attrition — means it is not uncommon for a party, after a full day of mediation, to accept a settlement that it would not have accepted earlier that day, and may not accept later that night or the next morning.

Buyer's remorse is a very real concern, and if not properly protected against, it can blow up even the most reasonable and hard-earned settlement, and result in a monumental waste of time and effort.

That is why the terms of a mediated agreement should be put down on paper before the parties leave mediation. And that is why, at the end of a long day of mediation, it pays for you and your client to follow the cordial advice of Williams, and "stay, just a little bit longer."

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[1] In re Zipporah Legarde 654 BR 74 (Bankr. E.D.Pa. 2023).

[2] *Id.*, at 79.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*, at 80.

[8] *Id.*

[9] *Id.*, at 81.

[10] *Id.*, at 81 – 82.

[11] Id., at 92.

[12] The Legarde court also agreed that the settlement should be approved under Rule 9019, which decision is not discussed herein.

[13] Id., at 87.

[14] Id., at 84.

[15] Id., at 87.

[16] Id., at 87-88.

[17] Id., at 87.

[18] Id., at 88.

[19] Id.

[20] Id.

[21] Id., at 89.