STATEMENT OF FACTS

[-short statement about the underlying case

-outline the facts/timeline leading up to the settlement- state the discussions, letters, offer and acceptance, settlement docs to Ds, njac 10 days. The facts of settlement/negotiation are critical. Underlying facts of case are not.]

FROM AN AAJ Post-

Agreed, too late to add contingencies not previously discussed. You may move to enforce settlement. See Hagrish v. Olson, 254 N.J. Super. 133, 138 (App. Div. 1992); . Once you agree to settle a case for X dollars; a release is "a mere formality, not essential to formation of the contract of settlement." Hagrish, 254 N.J. Super. at 138. No one thought that agreeing to settle for X dollars "was an intermediate step which had no legal efficacy until settlement papers were executed." Williams, 365 N.J. Super. at 234. You can seek counsel fees if the carrier withholds payment after statutory number of days, 10 days is my recall. See N.J.A.C. 11:2-17.7(f)

LEGAL DISCUSSION

I. The Court Should Enforce the Settlement of this Matter and Compel Defendant to Turn Over the Settlement Funds

A settlement between parties to a lawsuit is a contract. *Nolan v. Lee Ho*, 120 N.J. 465, 472 (1990). Public policy stands firmly in favor such settlements. *Jannarone v. W.T. Co.*, 65

N.J.Super. 472 (1961). Consequently, our courts will not vacate, or fail to enforce, settlements absent compelling circumstances. Settlement will rightly be honored "absent a demonstration of 'fraud or other compelling circumstances.'" *Pascarella v. Bruck*, 190 N.J.Super. 118, 125 (1983) (quoting *Honeywell v. Bubb*, 130 N.J.Super. 130, 136). Absent such a demonstration, courts will ordinarily refuse to even inquire into the adequacy or lack thereof of consideration underlying a compromise settlement so long as it was fairly and deliberately made. *De Caro v. De Caro*, 13 N.J. 36, 43 (1953).

In the present matter it is undisputed that a valid offer and acceptance existed between the parties both orally and on paper. This agreement was documented and then filed with and accepted by the Court on May 17, 2012. This was not some preliminary settlement with broad parameters and significant terms or provisions left to be resolved. Rather, the May 17th agreement represents a legitimate meeting of the minds intended to be the exclusive representation all parties intentions as far as the substantial terms if the settlement are concerned.

A. New Jersey Has a Strong and Well Established Public Policy that Favors the Enforcement of Settlements

Strong public policy favors settlement of litigation. *Zuccarelli v. State, Dept. of Environment Protection*, 326 N.J. Super. 372 (1999). "There is no good reason why an executory agreement between the parties, fairly arrived at, to settle pending litigation, should not be enforced." *Jannarone,* 65 N.J.Super at 476. "It is undoubtably the policy of our courts to presume that a stipulation entered into by the attorneys in open court respecting the terms of the settlement of a pending action is authorized by their clients. *Bernstein & Loubet, Inc. v. Minkin*, 118 N.J.L 203 (1937). These stipulations and their enforcement are subject to the control of the

court. *Howe v. Lawrence*, 22 N.J.L. 99 (1849); *Hygrade Cut Fabric Co. v. United State Corp*., 105 N.J.L. 324 (1929); *Martin v. Lehigh Valley R.R. Co.*, 114 N.J.L. 243 (1935). Settlements as a means of resolving lawsuits are actively promoted by the courts. *Gere v. Louis*, 209 N.J. 486, 500 (2012). The policy behind this rests on the recognition that "parties to a dispute are in the best position to determine how to resolve a contested matter in a way which is least disadvantageous to everyone." *Impink ex rel. Baldi v. Reynes*, 396 N.J.Super. 553, 563 (2007) (quoting *Isetts v. Borough of Roseland*, 364 N.J.Super. 247, 254 (2003). The promotion of this policy is clearly and frequently evidenced in our court procedures and practices. Examples can be seen in the practice of encouraging, and often requiring, pretrial settlement conferences in an effort to avoid trial. Likewise, Rule 408 of the New Jersey Rules of Evidence, where offers to settle a case are inadmissable as evidence at trial, is enforced as a method of promoting settlement negotiations. *N.J.R.E* 408. Encouraging and enforcing settlements "preserves the right of competent, informed citizens to resolve their own disputes in whatever way might suit them." *Lerner v. Laufer*, 359 N.J.Super. 201, 217 (2003).

Here, the plaintiff and defendant are both on record as having agreed to the proposed settlement terms. The stipulations were filed with the court with the understanding that the matter was resolved and the intent that full force was to be given to its terms and conditions. As such, the law dictates and public policy overwhelmingly favors that the dispute be considered settled as of, at the absolute latest, the defendant's April 11, 2012 filing parties

B. Defendant Must Abide by All Pertinent Rules and Regulations Pertaining to the Satisfaction of the Settlement of This Claim

This case was settled on May 12, 2012 when counsel for both Plaintiff and Defendant

signed a Stipulation of Dismissal. Despite this, the plaintiff, Robin Carter, has still not been paid. Defendant's conduct here runs afoul of the New Jersey Insurance Unfair Settlement Claims Practices Regulations, 11:2-17.7 "Rules for prompt investigation and settlement of claims", which provides that:

(f) Unless otherwise provided by law, every insurer shall pay any amount finally agreed upon in settlement of all or part of any claim not later than 10 working days from either the receipt of such agreement by the insurer on the date of the performance by the claimant of any conditions set by such agreement, whichever is later.

N.J. Admin. Code Tit. 11, § 2-17.7.

Furthermore, New Jersey courts imply a duty of good faith and fair dealing in all contracts. *Polito v. Continental Casualty Co.,* 689 F.2d 457, 463 (3d Cir. 1982) citing to *Palisades Properties, Inc. v. Brunetti*, 44 N.J. 117, 207 (1965). The court in *Polito* recognized:

The doctrine of an implied covenant of fair dealing is fully applicable to insurance contracts. Thus we conclude that the New Jersey courts will recognize that casualty insurers will undertake an implied contractual duty, as fiduciaries to parties with whom they have a contractual relationship, to act in good faith and deal fairly in the settlement of claims.

Polito, 689 F.2d at 463. Applying these standards, when an agreement has been reached to settle a claim, the insurance company becomes bound, "absent a demonstration of 'fraud or other compelling circumstances.'" *Pascarella*, 190 N.J.Super. at 125. Absent these exigencies, the insurance company has "10 working days" to deliver payment. *N.J. Admin. Code* Tit. 11, § 2-17.7. The burden of showing these exigencies, instances of 'fraud or other compelling circumstances', lies with the insurer. *Griggs v. Bertram*, 88 N.J. 347 (1982), ("Since we are dealing with rights that derive from a contract of adhesion, which the insurer, as the dominant party, must honor as a fiduciary, it is entirely appropriate that the ultimate burden of persuasion rest with the insurer." *Id*. at 367, citing to *Cooper v. Government Emp. Ins. Co.*, 51 N.J. 86

(1968)).

[Insert demand for satisfaction of settlement plus interest as governed by Rule 4:42. Judgment; Orders; Damages; Costs.]

II. The Court Should Reject Defendant's Refusal to Pay the Settlement Unless Plaintiff Agrees to After-the-Fact Unfair Terms

A. The Inclusion Of Any After-the-Fact Terms Are Enforceable Only When Deemed Appropriate and Permissible By The Court

A settlement agreement between parties to a lawsuit is a contract. *Nolan*, 120 N.J. at 472. New Jersey courts will honor and enforce settlement agreements "absent a demonstration of fraud or other compelling circumstances. *Id.* The fact that a settlement agreement has not been memorialized in writing, or when, as in our case, a general release has not been signed by all the parties, makes it no less a contract where the parties concluded agreement by which they intend to be bound. *Pascarella* 190 N.J.Super. at 126. Once it is determined that a binding settlement has been formed, traditional principles of contract law will apply for the purposes of enforcement. *Id*., See Also *JM Agency, Inc. v. NAS Financial Services*, Inc., 2007 WL 2215393 (N.J. Super. Ct. App. Div. 2007). Guided by these principles, when non-essential terms cannot be agreed upon, "the just result is to address and resolve the 'gaps' in the context of a fair and reasonable implementation of the court settlement under the court's agreed upon supervision." *Bistricer*, 231 N.J.Super. at 149.

Here, the Court is faced with choosing between the language included in the defendants proposed General Release and that in the plaintiff's proposed Release. The relevant language included in the defendant's proposed release stipulates:

> "*For and in consideration of the above sum, the undersigned hereby agrees to satisfy all liens or encumbrances which may apply to the above sum, including but not limited to, medical providers, Workers' compensation liens and any and all subrogation claims, and* ***hereby agrees to indemnify*** *all of the above named Releasees and their respective insurance carriers against any further liability for the satisfaction of any such liens or encumbrances*." [Emphasis added.]

The relevant language included in the plaintiff's proposed release stipulates:

> "***Liens****: For and in consideration of the above sum, the undersigned hereby agrees to satisfy all valid liens or encumbrances which may apply to the above sum, including but not limited to, medical providers, medical insurance companies, HMOs, Medicare, Medicaid, Workers' Compensation liens and any and all subrogation claims, and hereby* ***agrees to hold harmless*** *all of the above named Releasees and their respective insurance carriers against any further liability for the satisfaction of any such liens or encumbrances.*" [Emphasis added.]

Back's Law Dictionary defines **Hold harmless agreement** as "*Agreement or contract in which one party agrees to hold the other party without responsibility for damage or other liability arising out of the transaction involved*." **Indemnify** is defined as "To restore the victim of a loss, in whole or in party, by payment, repair, or replacement... to secure against loss or damage; to give security for the reimbursement of a person in case of an anticipated loss falling upon him."

The rightful purpose of including either the plaintiff or the defendants proposed references to "the satisfaction of any such liens or encumbrances" is to ensure that the plaintiff has done their due diligence and is acting in good faith regarding the settlement as well as to ensure that the defendant is not unduly burdened. It is more than reasonable for the defendant's

insurance company to be given assurance that, once payment is made, they will not be subject to future direct claims from the plaintiff regarding the satisfaction of payments relating to the same occurrence. The plaintiff's proposed "hold harmless" language provides adequate protection from this prospect. An inclusion of the defendant's proposed "indemnify" language, however, seemingly opens the plaintiff up to the potential for endless liability. In agreeing to include this specific language, the plaintiff is essentially saying that he will be financially responsible to the defendant's insurance company for any third-party claims relating to this matter, no matter how frivolous and baseless they may be. The inclusion of the defendants after-the-fact, not agreed upon nor account for, terms are impracticable, unreasonable, and bordering on downright immoral. It stands entirely contrary to the plaintiffs very purpose for agreeing to the settlement. The inclusion of the defendants proposed terms would amount to usury and must not be tolerated. As a result of the foregoing, the Court should enforce the plaintiff's proposed release, which adequately protects the interests of all the parties, rather than the defendant's proposed release, which unfairly exposes the plaintiff to the potential for endless liability.

B. *Requiring the Law Firm Itself to Give Assurance That All Liens and Encumbrances Will Be Satisfied Runs Afoul of The Rules of Professional Conduct* [this subsection assumes that D insists upon the inclusion of such language]

Rule 1.8 of the New Jersey Rules of Professional Conduct provides that "A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client". *RPC 1.8(a)*. "By its very terms, the rule is *mandatory*." [Emphasis added.] Petit-Clair v. Nelson, 344 N.J.Super. 538 at 542 (2001). "An attorney in his relations with a client is bound to the highest degree of fidelity

and good faith. The strongest influence of public policy require strict adherence to such a role of conduct." *In re Nichols*, 95 N.J. 126 at 131 (1984). Here, requiring both the plaintiff and their attorney to each separately guarantee the satisfaction of such liens and encumbrances clearly amounts to a transaction which has the potential to evolve into a situation where their respective interests become diametrically opposed. Furthermore, even if plaintiff's counsel were to agree to indemnify plaintiff against such future claims, such an agreement would run afoul of these same rules which prohibit "financial assistance to a client in connection with pending or contemplated litigation." *RPC 1.8(e)*.

III. Fee Shifting

CONCLUSION

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