



LECTURE 7

NEGOTIATION & SETTLEMENT

Summary Lecture 7

Making Deals and Settlement Agreements

Negotiation is most often studied as an alternative to resolving disputes — but there is a great deal to learn by examining how negotiation plays out when parties seek not to resolve conflict, but to put together a deal that will hopefully profit both sides. This lecture explores the dynamics of deal-making negotiation and the critical legal requirements for drafting valid settlement agreements.



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Lecture 7 Making Deals and Agreements – Kahoot! Course

Deal-Making Negotiation: Zero-Sum vs. Integrative

The Artie & Charlie Hypothetical

Consider Artie, a successful attorney who dabbles in real estate and wants to invest \$100,000 he inherited, and Charlie, a contractor experienced in erecting large commercial buildings who wants to own part of what he builds. They discuss a joint venture: Artie buys the land, Charlie puts up the building. Everything is amicable — no dispute exists. Yet the finer details remain unresolved: ownership percentages, decision-making authority, tenant selection, future improvements, and rights of first refusal if one partner wants to sell.

One might assume cooperative bargaining would dominate given their friendship. However, because there is only a finite amount of "stuff" to be owned, they are necessarily in a **zero-sum scenario**. Artie believes Charlie's building costs roughly equal his \$100,000 investment, but he wants 51% ownership for final say on major decisions — any additional share granted to one party means a loss for the other. A classic distributive bargaining situation.

Competitive Tactics

Artie's lawyer hints another deal may lure Artie away unless this closes soon — creating a time crisis. Charlie's attorney counters that low interest rates mean Charlie could borrow the money and maintain full ownership.

Cooperative Instincts

Artie and Charlie have a long-standing profitable relationship neither wants to destroy. They can choose to present themselves as problem-solvers rather than adversaries, depending on what they hope to achieve and what they understand to be at stake.

The Jenny & Samantha Hypothetical: Integrative Bargaining

Now consider Jenny, who has developed a new internet business idea that depends on having plenty of computer programmers at the ready, and Samantha, an experienced HR executive at a large software company thinking about leaving for the right opportunity. Ownership splits are still zero-sum, but the underlying business is fundamentally different from Artie's finite commercial property — Jenny's internet business can continue to grow.

The parties negotiate an agreement: Jenny owns 70%, Samantha owns 30%. But Samantha also receives an additional percentage for each programmer generating over \$10,000 in monthly revenues, with even greater shares at \$20,000 and beyond. This structure could not easily emerge from purely distributive bargaining. Rather than viewing the business as having finite value, the parties recognize that Samantha's input can increase profits dramatically — the more incentive she receives, the more the business makes, and the more Jenny's share is worth. Both parties have theoretically unlimited profit to gain.

1 Distributive (Artie & Charlie)

- Finite property value
- Single tenant paying rent
- One party's gain = other's loss
- Can go competitive or cooperative

2 Integrative (Jenny & Samantha)

- Scalable business model
- Performance-based incentives
- Both parties' profits can grow
- Rewards cooperation structurally

Rethinking Negotiation Classifications

In Chapter 1, § C of *A Practical Guide to Negotiation* (National Institute for Trial Advocacy, 1997), we find reference to "cooperative adversarial," "competitive adversarial," and other hybrid labels. While many treat "competitive negotiation" as synonymous with "adversarial negotiation," this need not be the case. The hypotheticals above are clear examples of the limitations of current labels attached to negotiation styles and scenarios.

The materials in this lecture are not meant to be the final say on negotiation. Nor can we, in this limited space, lay out a comprehensive treatise on the vast array of negotiation scenarios possible in today's complex legal environment.

For Deeper Theory

Those seeking a more detailed theoretical understanding of negotiation should closely examine the sources referenced throughout these chapters.

For Practical Experience

Pay close attention when attorneys are in conference, on the phone, or corresponding in writing. Ask yourself what elements of each negotiation style and scenario you can identify. You will likely see a mix of each at every stage of the process.

Drafting a Valid Settlement Agreement



Settlement Agreement

The contract evidencing the agreement between parties, binding them to terms agreed upon through negotiation. Need not always be in writing, although a writing is preferable and sometimes required.



Validity

A settlement agreement is useless unless it is **valid**. Requirements include offer, acceptance, consideration, capacity, and legality. Settlement agreements must also meet additional special requirements.



Consideration

Something of value — a promise, act, or object — that a promisor receives from a promisee in return for a promise. Promising to give up the right to sue is a legal right sufficient as consideration.



Statute of Frauds

Originating from English Parliament in 1677, most U.S. states require written agreements for: obligations of another, contracts not performable within one year, sale of land, and sale of goods.

Consideration in Settlement Agreements

The consideration requirement has traditionally been summarized as "a bargained-for benefit" and can include forfeiting a legal right. **Compromise of even a doubtful claim is sufficient consideration.** In *Vulgamott v. Perry*, 154 S.W.3d 382, 390 (Mo. Ct. App. 2004), the court cited *Holt v. Jamieson*, 847 S.W.2d 194, 197 (Mo. Ct. App. 1993), holding that "consideration based on the forbearance of a valuable right exists although the right later is determined to be invalid, provided that plaintiff had a reasonable, honest belief in its validity."

1 Greg & Melissa (Valid)

Greg sues Melissa for breach of a cost-sharing agreement. He offers to settle for \$1,000 and forego future claims. Melissa agrees but changes her mind, arguing lack of consideration. Because Greg is promising to give up a legal right, adequate consideration exists — the contract is valid.

2 Greg & Melissa Post-Marriage (Invalid)

After marrying, Melissa has no legal obligation to share household expenses regardless of any agreement. Greg knows this. By settling based on an unenforceable agreement, he is not giving up any valuable right — the settlement is unenforceable for lack of consideration. See *Mallory v. Eyrich*, 922 F.2d 1273, 1279 (6th Cir. 1991).

3 Neil's Boat (Valid — Doubtful Claim)

Norman slips on Neil's boat. His attorney says liability is unclear — state courts haven't decided the issue. They offer to settle for \$5,000. Because the claim *might* be valid, the promise not to sue is adequate consideration for a valid settlement contract.

Court Oversight of Settlements

Because settlement agreements involve disputes already in the court system, courts exercise oversight over their content. When plaintiffs may not fully represent their own interests — cases involving **minor plaintiffs**, plaintiffs who lack capacity, and **class-action lawsuits** — judges must often approve the agreement before it can be finalized. Criminal cases and antitrust cases, which affect the public at large, also garner increased scrutiny.

Criminal Settlement

Hank, a career criminal arrested for armed robbery, negotiates with the DA to reduce the charge to assault in exchange for a guilty plea. Before the settlement can be finalized, a court must approve the terms.

Minor Plaintiff

Hank, Jr., age sixteen, is injured in a car accident. The other driver's insurer offers \$500,000 to settle. Before the agreement can go through and the court case dropped, the judge may review the settlement to ensure Hank, Jr. is being treated fairly.

Contract Defenses: Fraud, Duress & Unconscionability

Traditional contract defenses apply to settlement agreements and must be considered during both negotiation and drafting. Excessively strong negotiation tactics might later serve as evidence of **duress**, rendering the agreement unenforceable. If a party secures a settlement through **fraud or coercion**, that settlement will be unenforceable. Similarly, if the agreement is too one-sided, it might be deemed **unconscionable**.



Fraud: Alex & Irwin

Irwin presents a fake \$500 carpet cleaning bill during settlement negotiations over a security deposit. Alex agrees to settle for \$250 of his \$1,000 deposit based partly on the fraudulent bill. The actual cleaning cost was only \$50. Because Irwin fraudulently induced Alex to enter the agreement, it is **unenforceable**.



Duress: Sharon & Irwin

Irwin intentionally blocks Sharon's moving company with his car, then presents a \$50 settlement offer for an outstanding lawsuit. He tells her he'll move the car only if she signs. Because of the undue pressure exerted on Sharon, the settlement agreement she signed is **unenforceable**.

Unconscionability: A High Hurdle

Unconscionability is a fairly high hurdle to clear. Simply realizing one has agreed to a bad bargain does not make a contract unconscionable — some showing of **fundamental unfairness** is required. See *Pursley v. Pursley*, 144 S.W.3d 820, 827 (Ky. 2004). A contract that is "so outrageous or immoral that it shocks the sensibilities of the courts" may qualify.

Not Unconscionable

Terry Cleese and John Gilliam co-own MPFC Inc., worth ~\$400M. Terry impulsively accepts John's \$100,000 offer for his half. The mere fact that the price is incommensurate with value is **insufficient** to render the contract unenforceable.

Potentially Unconscionable

Instead, imagine Terry is at his mother's hospital bedside. She needs a \$100,000 operation and Terry is broke. Overhearing this, John offers \$100,000 for Terry's half of the \$400M company. Terry agrees on the spot. This contract **might be unenforceable** based on unconscionability — John exploited Terry's desperate circumstances.

- ❏ **Key Takeaway:** When drafting settlement agreements, ensure all requirements for a valid contract are met — offer, acceptance, consideration, capacity, and legality. Be mindful that aggressive negotiation tactics can later be used as evidence of duress, fraud, or unconscionability, potentially rendering the entire agreement unenforceable.