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**SEVENTH CIRCUIT UNITED STATES COURT OF APPEALS BINDS PARTY
TO A MEDIATION AGREEMENT WITHOUT SIGNATURE**

In *Bauer v. Qwest Communications Co., LLC*, 743 F.3d 221 (2014), the Seventh Circuit of the United States Court of Appeals affirmed the U.S. district court decision that a party can be bound to an mediation agreement without signing the document. The court based their decision on the parties' lengthy litigation relationship, amongst other factors. Prior to the mediation, the lawyers were involved in a class action settlement involving multiple parties that resolved ten years of litigation. The issue arose between the lawyers in the case when the district court awarded attorney's fees and expenses. The attorneys were unable to reach a division of attorney's fees on their own. In an effort to resolve the dispute, they agreed to pursue mediation.

After years of attempts to resolve the division of fees beginning in 2006, the lawyers were able to reach an agreement in 2012 via a final "mediator's proposal" that was distributed to the parties and accepted by all. The agreement was later memorialized and put into a formal writing, with the addition of enforcement language meant to keep any further disputes out of litigation. The written agreement was circulated to all the parties, the parties made recommendations to change the document, and were in agreement in regards to the final language of the document. All parties quickly signed except for one, Authur T. Susman. Lawyers and mediators tried to persuade the lone holdout to sign, but to no avail. The other lawyers who did sign filed a motion asking the district court to hold that Susaman be bound to the agreement. After reviewing the evidence, the court ruled that Susaman should be bound to the agreement, despite the absence of his signature.

Courts of this country have ruled that alternative dispute resolution is a matter of contract. A contract is dependent on mutual agreement or consent, and on the intention of the parties. In order for a contract to form, there must be a "meeting of the minds." The court does not look to the subjective intent of the parties, but to the objective manifestation of intent. The court must look to the evidence offered to determine whether a meeting of the minds occurred. The Court of Appeals felt that the district court was in the best position to determine whether a contract was formed.

One way a party shows consent to be bound to a contract is by their signature. Additionally, a party can be bound to a contract by their acts and conduct under a number of contract theories. The Seventh Circuit analyzed the acceptance of a contract based on the silence of the party. Generally, the law does not treat silence as acceptance, but rather as a rejection of an offer. This general rule has its own exception if the circumstances make it "reasonable" for a party to believe silence is acceptance. The court will look at previous dealings to determine whether it is reasonable; if the court finds that it is, the offeree then has the duty to notify the offeror that they do not intend to accept. In the present case, the Seventh Circuit found that silence was acceptance.

The appellate court found this determination reasonable due to a number of factors. The court first looked at the relationship of the parties during the course of the litigation. In this case, the parties worked together for more than a decade in a class action suit. Subsequent to the litigation, the parties mediated the fee arrangement for

several years. The court believed that “[b]y this time, the lawyers were a sort of community of interest, working together toward a final resolution of the fee dispute and an end to the litigation.”

In addition to the relationship of the parties, the court examined the actions of the parties. The court cites examples of Susman’s behavior to show why silence should be seen as acceptance, including that Susman was known throughout the litigation to make an objection if he found something objectionable. In fact, during the mediation process, Susman raised two minor points to the initial draft after its circulation. The agreement was quickly amended to address those concerns and re-circulated. The enforcement provision of which he complains in the present case was not a focus of these objections. Given Susman’s reputation and previous actions, the court did not accept that his objections to the enforcement provisions were genuine. If so, he would have made an objection when they were introduced, and not in court.

The court looked not only at the actions and relationships of one party, but took into account the position of all the parties. The “mediator’s proposal” was a last-ditch effort for the mediators to end the fee dispute. The court looked to the mindset of the other parties, who knowingly took less of a fee distribution than they thought they deserved in order to put an end to future litigation and bring about the prompt distribution of the attorney’s fees in question. When it was time to sign the agreement, all of the parties, including Susman, were put on notice about the finality of the draft and were asked to make any objections; if there were no objections, the document was considered to be final. The lack of objections from anyone, including Susman, was seen as an acceptance by all the parties involved and led to all the other parties signing the document.

Here, the court viewed Susman’s belated objections as “buyer’s remorse”, and his refusal to sign the agreement as a tactic to reopen the process after a final agreement had been reached. The court was careful not to create a bright-line rule in which parties can be bound to a contract even if they do not sign the document. Instead, the court reached a decision that should be applied on a case-by-case basis after a thorough review of the evidence.

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