**JUDICIAL ESTOPPEL AND SETTLEMENTS**

Basis Technology Corporation v. Amazon.com, Inc., __ Mass.App.Ct.__ (No. 06-P-1048) (January 7, 2008).

Recently the Appeals Court through Sikora, J. have ruled on judicial estoppel and explained its doctrine in regard to **settlement proceedings**. This is a case of first impression and precedent in this issue. (It is an issue we are currently arguing before the Plymouth Superior Court in the Phillips case).

The **facts** of the case involved the settlement between the parties at the time of trial before Judge Nonnie S. Burnes, J. Judge Burnes has since become the insurance commissioner. There was a motion to enforce the settlement agreement which was allowed by Nonnie Burnes. The parties now come to the Appeals Court, one of them arguing that there should be no enforcement. The Appeals Court affirmed Judge Burnes' decision that there was a settlement.

The background of this case is where the parties entered into a Services Agreement. Page 1. Basis rendered technical service enabling Amazon to create an electronic commerce system in Japan for the sale of books and other products. Payment was through stock transfers. Basis in an action against Amazon for claims of breach of fiduciary duty, *quantum meruit* and 93A violations for nonpayment of out of scope work. At trial, the parties through email settled the case and reported the case to the court. The complication came out of a further transaction between Basis and another company who was a part of a central intelligence agency. The transaction of a third-party company would deprive Amazon of common shares of the value of Basis. Basis wished to enforce the settlement agreement and Amazon did not because of this transaction.

**The court discusses** this enforcement of settlement agreement under two grounds: (1) Amazon asked if the judge correctly ruled that the e-mail exchange created a complete and ambiguous agreement and (2) the judge as a matter of fact finding incorrectly determined that Amazon had intended to be bound by e-mail terms at the time of the exchange.

1. The court begins by looking at the standards of review. Interpretation of one unambiguous contract is a question of law. The question of the existence of an ambiguity in an agreement is a question of law also. The court therefore has to examine the determination that the e-mail transaction is a sufficient and complete agreement. Page 4.

2. The interpretation of the e-mail communication is a matter of law. The court examines the text of the terms for incompleteness and indefiniteness charged by one party (Amazon). Provisions are not ambiguous simply because the parties have developed different interpretations of them. Page 5. genuine ambiguity requires language susceptible of more than one meaning so that reasonably intelligent persons would differ at to which meaning is the proper one. Page 5.

The "Subcontract Purchase Order" sent to the Subcontractor 15 days post-accident was merely a confirmation of the pre-existing oral contract. Numerous prior contracts had been entered into by the General and Subcontractor following the same process; an oral contract followed by a Purchase Order serving as a "Confirming Subcontract." Moreover, the contractors had previously discussed indemnification in forming similar contractual arrangements.

a. The references to further writings and action. As indication of completeness, Amazon argues that the parties were to take reasonable steps to memorialize the agreement.

The court says that they must interpret the document as a whole. Page 5.

b. The alleged indefiniteness of the stock conversion term as a matter of law. The court looks at Meehan, 404 Mass. 419 (1989) (professional norms can supply meaningful definition to the term fair charge in a law firm partnership agreement. They furnish an objective standard beyond the partisan desires of the contracting parties).

3. The intention to be bound as an issue of fact. The court knows that to create an enforcement contract, the parties must have had the intention to be bound by their agreement at the moment of its formation. Page 6. Intention to be bound is the controlling fact according to McCarthy, 429 Mass. 84 (1999).

a. Further writings. A deferred document is not conclusive of a deferred intent. A present agreement upon material facts could reduce the later document to mere memorialization of an existent agreement.

b. The conversion ratio.

c. Post e-mail proposals by Basis.

d. Amazon's change of mind.

e. The report of settlement to the court. Here the court discusses judicial estoppel. To ascertain intent, a court considers the words, used by the parties, the agreement taken as a whole and surrounding facts and circumstances.Massachusetts Mun. Wholesale Elec. Co. v. Danvers, 411 Mass. 39 (1991). Page 7. By reporting the case settled, defendants have signaled that they have gone beyond deciding whether to give up the right to trial in exchange for the plaintiff's offer; the integrity of the judicial process would be ill served if those intimately involved in the process, litigants, attorneys and judges could not rely on declarations of settlement made to the court. Correia v. DeSimone, 34 Mass.Appt.Ct. 601 (1993). Dominick v. Dominick, 18 Mass.App.Ct. 85 (1984). Page 7. See also Innis v. Innis, 35 Mass.App.Ct. 115 (1993) "counsel was not at liberty to let the judgment enter with the client's apparent approval and later invite a battle of affidavits about why the judgment should not have entered".

The court discusses Correia in particular. In that case the important reliability of reported settlement requires the application of doctrine of judicial estoppel. At 1993, there was an uncertain status of this doctrine. Page 8. The reason for judicial estoppel is (1) at the brink of trial the parties and their counsel have progressed through an extensive process of pleading, discovery, motion practice, and preliminary conferences and this process should produce prudent and firm settlement decisions; (2) the immediacy of the consequences of a settlement report usually concentrates the minds of clients and counsel; (3) most importantly, litigants and litigators negotiating settlement on the eve of trial or in the course of trial are dealing not only with their own interests but also with the institutional reliance of the trial court. The court will have invested its preparation and work in the trial. A settlement sets aside such work. It should not go to waste by reason of repudiated settlement agreements.

The court notes that the trial counsel reporting a settlement agreement are not taking out an option to settle. (This differs from the Phillips case currently being litigated in our office where no report has been made and no trial has yet been done). Page 8.

It should be noted in Footnote 7 that under the principle of judicial estoppel a party may not successfully maintain a position in one court and thereafter repudiate or contradict that position in the same proceeding or in separate proceedings in that or other courts. Paixao v. Paixao, 429 Mass. 307, 308-311 (1999). Page 9 of Decision.

(In a case in our office currently, Phillips, the plaintiff Jones will argue with some clarity that it is not taking an alternative position where at the very beginning it believes that it did not have to resolve or pay the subcontractor while it litigated it).