The Enforceability of Rule 11 Agreements Related to Pretrial and Trial Procedure

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I. Introduction

Parties often agree on how to conduct certain aspects of pretrial and trial procedure. In Texas state courts, parties document these agreements under Texas Rule of Civil Procedure 11 by filing them or reciting them in court.[1] Broadly speaking, these "Rule 11 agreements" are simply "contracts relating to litigation."[2] Parties must put them on the record "to ensure that agreements of counsel affecting the interests of their clients are not left to the fallibility of human recollection and that the agreements themselves do not become sources of controversy."[3]

But of course, Rule 11 agreements do sometimes become a source of controversy. How likely is a Texas trial court to enforce

[1] Rule 11 states: "Unless otherwise provided in these rules, no agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record."

[2] *Trudy's Texas Star, Inc. v. City of Austin*, 307 S.W.3d 894, 914 (Tex. App.—Austin 2010, no pet.).

[3] *ExxonMobil Corp. v. Valence Operating Co.*, 174 S.W.3d 303, 309 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).

a contested Rule 11 agreement? When it comes to agreements resolving all or part of a case on the merits, the answer is clear enough: A court must summarily enforce a settlement agreement once it has entered judgment disposing of the case, but a party seeking enforcement before the court has entered judgment must sue for breach.

Less clear, however, is whether—and how—a court should enforce a Rule 11 agreement related to pretrial or trial procedures. One vein of authority suggests that courts' "ministerial duty" to enforce Rule 11 agreements commands unblinking enforcement.[4] But another vein of authority casts doubt on this result based on the principle that a party can "revoke" a Rule 11 agreement at any time before the court enters judgment, meaning that the other side can enforce it only by suing for breach of contract. This article explores these competing authorities along with the considerations facing counsel on both sides of a contested procedural Rule 11 agreement.

II. Basic framework for enforcing Rule 11 agreements

Two general principles govern courts' enforcement of Rule 11 agreements. First, "[a] trial court has a ministerial duty to enforce a valid Rule 11 agreement."[5] This principle implies that

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[4] *See Shamrock Psychiatric Clinic, P.A. v. Texas Dep't of Health & Human Servs.*, 540 S.W.3d 553, 560 (Tex. 2018) (per curiam).

[5] *Shamrock Psychiatric Clinic*, 540 S.W.3d at 560 (citing Fortis Benefits v. Cantu, 234 S.W.3d 642, 651 (Tex. 2007); *EZ Pawn Corp. v. Mancias*, 934 S.W.2d 87, 91 (Tex. 1996)).

a trial court lacks *any* discretion to alter agreed-on pretrial or trial procedures, even for good cause. In this sense, Rule 11 agreements appear to impose firmer requirements than anything parties might adopt by agreed order (or similar) in a federal district court, which always retains some discretion to control the proceedings.[6] Indeed, Texas courts have described pretrial procedures adopted by Rule 11 agreement as "controlling," according them greater weight than even "deadlines established by rule or by the court's own docket control order."[7]

Second, however, "[a] party has the right to revoke its consent to a Rule 11 agreement at any time before the rendition of judgment."[8] A party seeking to enforce a revoked Rule 11 agreement must plead and prove a breach-of-contract claim.[9] This enforcement mechanism thus "requires full resolution of the surrounding facts and circumstances,"[10] leading to either "summary judgment or trial" on the contact claim.[11]

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[6] *See, e.g., Davis v. Duplantis*, 448 F.2d 918, 921 (5th Cir. 1971) ("Rule 16, of the Federal Rules of Civil Procedure, permitting pretrial procedures, can achieve its purpose of improving the quality of justice only if the pretrial requirements entered at the discretion of the trial court are applied with intelligent flexibility, taking into full consideration the exigencies of each situation.").

[7] *See Eaton Metal Prod., L.L.C. v. U.S. Denro Steels, Inc.*, No. 14-09-00757-CV, 2010 WL 3795192, at *3 (Tex. App.—Houston [14th Dist.] Sept. 30, 2010, no pet.).

[8] *ExxonMobil*, 174 S.W.3d at 309.

[9] *Id.; see Padilla v. LaFrance*, 907 S.W.2d 454, 461 (Tex. 1995).

[10] *ExxonMobil*, 174 S.W.3d at 309.

[11] *In re Build by Owner, LLC*, No. 01-11-00513-CV, 2011 WL 4612790, at *6 (Tex. App.—Houston [1st Dist.] Oct. 6, 2011, no pet.) (internal quotation marks omitted).

III. Courts' conflicting treatment of Rule 11 agreements on procedural matters

These two principles do not always produce an obvious result when a party resists a Rule 11 agreement on pretrial or trial procedures. By definition, the parties would have to perform such an agreement before the court enters judgment. So in theory, it is "revocable" at any time. Take an agreement setting a pleading-amendment deadline of 30 days before trial. A defendant that amends its answer to raise a new affirmative defense two weeks before trial clearly has withdrawn its consent well before entry of judgment, suggesting that enforcement of the deadline would require "proper pleading and proof."[12] Yet it is likely impossible to fully litigate a breach-of-contract claim based on the Rule 11 agreement in the two weeks remaining before trial, especially if the claim involves contested factual issues requiring their own discovery and trial.[13]

So it is no wonder that courts have reached conflicting decisions on procedural Rule 11 agreements. In *In re Build by Owner*, for example, the court upheld an order transferring the case to Harris County, effectively relieving the defendant of his Rule 11 agreement to litigate in Galveston County.[14] The

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[12] *See Padilla*, 907 S.W.2d at 461.

[13] *See Build by Owner*, 2011 WL 4612790, at *6 (noting that a party that has revoked consent to a Rule 11 agreement enjoys a "right to be confronted by appropriate pleadings, assert defenses, conduct discovery, and submit contested fact issues to a judge or jury" (internal quotation marks omitted)).

[14] *See id.* at *6-7.

court observed that the defendant had revoked his consent to the agreement by renewing his venue motion and arguing for venue in Brazoria or Harris County.[15] Because consent did not exist when the trial court decided the issue, "the court could not have rendered an agreed decision on venue."[16] And because the plaintiff "never attempted to enforce the Rule 11 agreement by pursuing a separate breach of contract claim," the trial court did not abuse its discretion in refusing to enforce the agreement.[17]

In *Eaton Metal Products*, by contrast, the court overlooked the pleading-and-proof requirement, striking an amended petition filed past the deadline set by a Rule 11 agreement.[18] The plaintiff argued, among other things, that a continuance of the trial date had implicitly extinguished the agreed-on pretrial deadlines.[19] Pointing to the "controlling" nature of Rule 11 agreements, however, the court held that the agreement bound the parties despite the continuance.[20] It thus summarily enforced the agreement, although the plaintiff had clearly withdrawn its consent by filing its amended petition.[21]

[15] *Id*. at *6.

[16] *Id*. at *7.

[17] *Id*.

[18] *See* 2010 WL 3795192, at *2-3.

[19] *Id*. at *2.

[20] *Id*. at *3.

[21] *Id.; see also GTE Commc'n Sys. Corp. v. Telecoin Commc'ns, Inc*., No. 05-96-00430-CV, 1998 WL 548763, at *12-13 (Tex. App.—Dallas Aug. 31, 1998, pet. denied) (affirming the exclusion of an expert witness based in part on a Rule 11 agreement providing that the witness would not be called, although the plaintiff had revoked his consent to the agreement by trying to call the witness in rebuttal).

IV. Considerations for advocates facing a contested Rule 11 agreement

On the one hand, if a party has revoked a procedural Rule 11 agreement, then it can insist—as a prerequisite to enforcement—on appropriate pleading, a chance to take discovery and assert defenses, and either a trial or summary-judgment proceeding. No court has held that the right to revoke consent up until judgment does not apply to procedural agreements requiring full performance before judgment. And although cases like *Eaton* summarily enforced "revoked" Rule 11 agreements related to pretrial procedures, they did not expressly address the pleading-and-proof requirement, presumably because the parties did not raise the issue. Thus, a party resisting a Rule 11 agreement might argue that because it would be impracticable to fully litigate a contract claim without derailing the merits trial, the best option is to simply set the agreement aside.

On the other hand, many trial courts would likely view the "ministerial duty to enforce a valid Rule 11 agreement"[22] as a formidable hurdle to setting one aside. A party seeking enforcement might argue that it would invite gamesmanship to allow parties to revoke agreements related to pretrial and trial procedure. Revocation could force courts to either (i) continue a merits trial to allow for full litigation of the Rule 11 agreement; or (ii) simply set the agreement aside to avoid derailing the litigation. The former would be wasteful and inefficient. And

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[22] *Shamrock Psychiatric Clinic*, 540 S.W.3d at 560.

the latter would largely defang procedural Rule 11 agreements, as parties could escape them by waiting until the last minute to revoke them.

Even if a court is inclined to require pleading and proof to enforce a revoked Rule 11 agreement, a party seeking enforcement could point to cases relaxing the necessary procedural formality in this context.[23] These cases hold that a "motion to enforce" may give the other side adequate notice of the breach-of-contract claim.[24] Because enforcing a revoked Rule 11 agreement means deciding the merits of a breach-of-contract claim, a court should—strictly speaking—allow for 45 days' notice before hearing the motion,[25] or at least 21 days' notice if it enters summary judgment on the motion.[26] Yet urging these notice periods may accomplish little more than a few weeks' delay for a party resisting enforcement. And, again, a court may be disinclined to derail a merits trial even long enough to accommodate these notice periods as a prerequisite to enforcing agreed-on pretrial or trial procedures.

Lastly, a party resisting a Rule 11 agreement might consider

[23] *See, e.g., Neasbitt v. Warren*, 105 S.W.3d 113, 117-18 (Tex. App.—Fort Worth 2003, no pet.); *Browning v. Holloway*, 620 S.W.2d 611, 615 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.); *Scott v. Am. Home Mortg. Servicing, Inc.*, No. 03-14-00322-CV, 2015 WL 8593622, at *3 (Tex. App.—Austin Dec. 8, 2015, pet. denied).

[24] *Id.*

[25] *See* Tex. R. Civ. P. 245 (providing that a court may set a contested case for trial "with reasonable notice of not less than forty-five days").

[26] *See* Tex. R Civ. P. 166a(c) (providing that a summary-judgment motion "shall be filed and served at least twenty-one days before the time specified for hearing").

whether the court could interpret the agreement in a way that lets the party prevail even if the court "enforces" it. To illustrate, in *ExxonMobil Corp. v. Valence Operating Co.*, the parties filed a Rule 11 agreement providing (i) that the pleading-amendment deadline (set by an earlier Rule 11 agreement) was a date that had already passed; and (ii) that ExxonMobil would not oppose an amendment by Valence to correct a defendant's name.[27] Valence filed the anticipated correctional amendment but, after the court continued the trial, filed a substantive amendment.[28] The trial court refused to bar the substantive amendment based on the Rule 11 agreements, and the court of appeals affirmed.

The court of appeals noted that enforcement of a revoked Rule 11 agreement requires pleading and proof but bypassed that issue, instead interpreting the agreement not to the bar the amendment anyway.[29] The court observed that the parties' agreements raised the question whether they had intended for the agreed-on deadlines to survive a continuance.[30] It also noted that although the second Rule 11 agreement stated that ExxonMobil would not oppose the correctional amendment, it expressly addressed neither Valence's right to make later amendments nor ExxonMobil's right to oppose them.[31] *ExxonMobil* thus suggests that—especially when the equities otherwise favor relieving a party of its agreement—a plausible argument rooted

[27] 174 S.W.3d at 308.

[28] *Id.*

[29] *See id.* at 309.

[30] *Id.* at 310.

[31] *Id.*

in "interpretation" may allow a court to rule in that party's favor while avoiding the harder issues discussed above.

V. Conclusion

Texas law is not entirely clear on whether a trial court should enforce a contested Rule 11 agreement related to pretrial or trial procedures. A party resisting the agreement should assert its right to be confronted with pleading and proof, should raise any defenses to enforcement, and should demand a trial or summary-judgment proceedings with sufficient notice. A party seeking enforcement should point to the court's ministerial duty to enforce the agreement and should highlight the practical problems with allowing its opponent to demand a full trial on procedural stipulations. Until the Texas Supreme Court clarifies the issue, however, outcomes will be difficult to predict and will likely turn on case-specific factors.