2020 IL App (1st) 191351-U
No. 1-19-1351

SECOND DIVISION
February 18, 2020

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JAMES D. RICHARDSON, Plaintiff-Appellant, v. NIGHT DREAM, INC., an Illinois Corporation, and SHAUN T. SMALL, Individually, Defendants-Appellees.	))))))))))	Appeal from the Circuit Court of Cook County. No. 2018 L 542 The Honorable Moira S. Johnson, Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Coghlan concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court's judgment denying the plaintiff relief under section 2-2301 of the Illinois Code of Civil Procedure is affirmed where the plaintiff failed to present a record showing that the defendants (1) participated in their insurer's settlement negotiations with the plaintiff, or (2) agreed to be personally responsible for the settlement amount drafted by their insurer.

¶ 2 Following a settlement, the trial court denied plaintiff James D. Richardson's motion to convert a settlement agreement to a judgment pursuant to section 2-2301 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-2301 (West 2018)). On appeal, Richardson asserts that the clear language of section 2-2301 entitled him to a judgment against defendants Night Dream, Inc.

(Night Dream) and Shaun T. Small, where he and defendants executed a settlement agreement under which he waived his claims against defendants in exchange for $1,000,000, and where defendants failed to pay the settlement amount due to the insolvency of their insurer. We affirm.

¶ 3 BACKGROUND

¶ 4 Richardson filed a complaint alleging that on November 30, 2017, he drove northbound on Western Boulevard. At that time, Small, as employee or agent of Night Dream, drove southbound on Western. Small turned left onto eastbound 53rd Street, struck Richardson's vehicle in the intersection, and injured Richardson. The record reflects that Richardson suffered "several fractures, including C5-C6 fractures, non-displaced rib fracture, and a comminuted right proximal tibial fracture," and that Richardson was hospitalized for eight days and kept at a rehabilitation center for 28 days. The record also reflects that Richardson was not a candidate for surgical treatment due to his age, and that he must permanently rely on a walker and wheelchair. Night Dream and Small each asserted an affirmative defense of comparative negligence.

¶ 5 On January 3, 2019, Richardson appears to have signed a settlement agreement. That settlement, which was signed only by Richardson, provides:

> "In consideration of the sum of $1,000,000.00 ***, the claimant(s), JAMES D. RICHARDSON, hereby release(s) and discharges(s) [*sic*] NIGHT DREAM, INC., SHAUN T. SMALL, CRITERION CLAIM SOLUTIONS OF OMAHA, INC., SPIRIT COMMERCIAL AUTO RRG, INC., and all of their officers, directors, agents, servants, employees, assigns, trustees, successors in interest, heirs, executors, representatives, attorneys, insurers, reinsurers, and third party administrators (collectively, "Released Parties") from any and all claims and causes of action of any nature arising out of a motor vehicle accident that occurred on or about NOVEMBER 30, 2017 at or near 53RD

> STREET AND WESTERN BOULEVARD, CITY OF CHICAGO, COUNTY OF COOK, ILLINOIS ***."

One particular provision of the agreement provides:

> "Payment of consideration by the Released Parties does not constitute an admission of liability by them, nor is this settlement to be construed as such an admission."

Another provision, titled "FULL AND FINAL SETTLEMENT," also states:

> "The Released Parties have paid the above consideration, and the claimant(s) has/have accepted it to avoid costs, expenses, fees, risks, inconvenience, and other consequences of this dispute."

Additionally, the settlement agreement provides:

> "This Release contains the entire agreement between the claimant(s) and the Released Parties. ***
>
> This Release expressly reserves to the Released Parties and to all persons in privity or connected with them, their right to pursue their other legal remedies, if any, including but not limited to claims for indemnity, contribution, or subrogation, against any other party or that party's insurer, if any."

¶ 6 On January 11, 2019, Richardson tendered an executed settlement agreement and release to the defense, and the agreement appears to have been prepared by defendants' insurer, Spirit Commercial Auto Risk Retention Group, Inc. (Spirit). Curiously, also on January 11, 2019, the Nevada Commissioner of Insurance filed a "Petition for Appointment Of Commissioner as Receiver and Other Permanent Relief," and a "Request for Temporary Injunction," against Spirit.

¶ 7 On January 18, 2019, the Eighth Judicial District Court of Nevada executed an order that appointed a receivership for Spirit, "immediately enjoined" Spirit from "wasting or disposing of

any [of its] assets or property," and enjoined "all persons other than the Receiver or as directed by the Receiver *** from the withdrawal of any funds from [Spirit's] accounts or the removal of other property from [Spirit]." The order additionally stated:

> "[A]ll persons are immediately enjoined from the commencement or prosecution of any actions by or on behalf of [Spirit], or against [Spirit], and the receivership court will have exclusive jurisdiction over any actions involving the Receiver or [Spirit]. Further, all persons shall be restrained from obtaining any preferences, judgments, attachments, or other liens as to any property of [Spirit] or making any levy against [Spirit] or against their assets or any part thereof."

¶ 8 Then, on January 22, 2019, the Illinois circuit court entered an order stating that the parties had reached a settlement agreement, that the case was dismissed with prejudice, and that the circuit court retained jurisdiction to "effectuate the settlement, including enforcement, adjudication of liens, approval where necessary and any other pendant matters." The record reflects that defense counsel was present when this order was entered, as defense counsel signed the order. However, there is no indication from the order that Richardson's counsel was present.

¶ 9 On February 15, 2019, Richardson brought a motion to convert the settlement to a judgment pursuant to section 2-2301 (see 735 ILCS 5/2-2301 (West 2018)), alleging that he and defendants agreed to the terms of a settlement, under which he released his claims against defendants in exchange for $1,000,000. Because he had not received a settlement payment for 35 days, Richardson asserted he was entitled to a judgment on the settlement amount. Richardson's motion further alleged that on February 1, 2019, after the circuit court dismissed his action with prejudice, defense counsel told Richardson about the Nevada court's January 18th receivership order that prohibited defendants' insurer, Spirit, from paying the settlement.

¶ 10 Attached to Richardson's motion was an email dated February 12, 2019, in which a representative for defendants' insurer informed Richardson's counsel that (1) Spirit could not issue any payments prior to a trial on February 28, 2019, and (2) if the receivership order was made permanent, the insurer would have a "finite pool of funds available" and Richardson would possibly be unable to collect his settlement. The insurer's representative further noted that Illinois and Nevada are "reciprocal states," and so Illinois courts must give effect to the Nevada's court's orders regarding Spirit's receivership status.

¶ 11 In their response, Night Dream and Small asserted that the circuit court should stay Richardson's motion pending the resolution of the Nevada proceedings, since Richardson was attempting to collect insurance proceeds from defendants, but those proceeds "derive from Spirit['s] funds."

¶ 12 On February 27, 2019, the Nevada court entered a permanent injunction order. The order appoints a permanent receiver for Spirit's assets, and vests Spirit's special deputy receiver with "exclusive title both legal and equitable" over Spirit's property. The order also states that "no action or proceeding in the nature of an attachment, garnishment or execution shall be commenced or maintained in the courts of this state against [Spirit] or the Property." Moreover, "all claims against the Property must be submitted to the Receiver as specified herein to the exclusion of any other method of submitting or adjudicating such claims in any forum, court, arbitration proceeding, or tribunal subject to the further Order of this Court."

¶ 13 On March 7, 2019, the circuit court placed the case on the insurance stay calendar and held that Richardson's motion would "remain pending." Richardson then entered a motion to lift the stay and enforce the settlement. According to Richardson, the case was stayed pursuant to the Illinois Insurance Guaranty Fund Act (see 215 ILCS 5/551 (West 2018)). However, because Spirit

was a risk retention group (RRG), state guaranty fund laws did not apply to it.[1] Richardson therefore requested that the court enforce the settlement agreement against defendants. Richardson observed that the settlement agreement never specified that defendants' insurer must pay the settlement proceeds or that defendants could not do so. Richardson asserted that "[i]f they so choose, the Defendants could pursue reimbursement from their insurer after performing their contractual obligation."

¶ 14 On April 2, 2019, the circuit court removed the case from the insurance stay calendar and reassigned the case for a ruling on Richardson's section 2-2301 motion. In response, Night Dream and Small argued they were not parties to the settlement agreement, did not agree to pay any amount in settlement of Richardson's claims, and thus could not be "settling defendants" subject to a judgment pursuant to section 2-2301. According to defendants, "[t]he funds comprising the $1,000,000.00 payment of Defendants' insurance policy limits were controlled by Spirit and Criterion, not Defendants," and those funds were under a receiver's "exclusive possession and control." Thus, defendants asserted that they could not be responsible for any untimely payments of the settlement funds.

¶ 15 Attached to defendants' response was a purported notice sent from Spirit's special deputy receiver to defense counsel on March 12, 2019, stating:

> "[Defense counsel] should immediately contact [defendants] (*i.e.*, as to those litigation matters you are defending) to determine if they would be willing to undertake payment of the defense costs for their insured claims, and if [defendants] agreed to this undertaking, they would be entitled to submit claims for those paid defense costs *** to

[1] As further discussed in our analysis, see 15 U.S.C. § 3902(a)(2) (1986) (which exempts RRGs from any state law that would "require or permit [an RRG] to participate in any insurance insolvency guaranty association to which an insurer licensed in the State is required to belong").

> the Receiver. [Defendants] may also pay money to settle claims that were covered by Spirit's insurance policy, and [defendants] would also be entitled to submit those paid claims to the Receiver as a claim against Spirit."

The notice further stated in bold:

> "Please note that Spirit was formed and operated as a Risk Retention Group ("RRG") insurance company, and there is no insurance guaranty association coverage provided for RRG claims in the U.S. Thus, there is no insurance guaranty association coverage available in any state jurisdiction for Spirit's claims."

¶ 16 On June 6, 2019, the circuit court denied Richardson's motion to convert the settlement to a judgment. The court reasoned that "[t]he settlement agreement was for an insurance policy," which "does not transcend into a money judgment against the individuals." The court then observed that there was a pending liquidation in Nevada, and instructed Richardson "to make whatever claims they have with that court or that venue." The court concluded that "as far as enforcing the settlement, I will enforce it and it remains settled." When asked for clarification from Richardson's counsel, the court stated that it was not ruling on whether section 2-2301 applies to defendants. Rather, the court stated:

> "What I am ruling is that there was a settlement, that there was a liquidation involved. There is a stay of a proceeding in Nevada and *** what Plaintiff needs to do is make your claim in Nevada and see if you can get that court to allow you to get the million dollar policy that you bargained for."

¶ 17 Richardon's counsel asked to certify a question for interlocutory appeal under Illinois Supreme Court Rule 308 (eff. July 1, 2017), and the circuit court responded, "I don't know if you need to. It's a final judgment as far as I'm concerned." This appeal followed.

¶ 18 ANALYSIS

¶ 19 On appeal, Richardson argues that the circuit court erred in denying his motion to convert the settlement to a judgment. According to Richardson, he had executed a settlement agreement with defendants Night Dream and Small, in which he released his claims against them in exchange for $1,000,000, but he never received payments pursuant to said agreement. Richardson therefore asserts that under section 2-2301, he is entitled to a judgment against defendants, who are "settling defendants" under the plain language of the statute. In response, Night Dream and Small assert that Richardson should not be able to convert the settlement into a judgment against them because they neither negotiated nor executed the agreement, and their insurer, Spirit, was to pay the settlement amount out of Spirit's funds.

¶ 20 A. Risk Retention Groups

¶ 21 Before analyzing the issue on appeal, we note that these circumstances pose a great unfairness to Richardson. Richardson is unable to obtain relief from a state guaranty fund due to the fact that Night Dream and Small obtained a liability insurance policy from an RRG: an alternative source of insurance coverage that is prohibited from gaining any benefit from a state guaranty fund. RRGs and its members are protected by federal law. 15 U.S.C. § 3902(a)(4) (1986). However, an explanation of RRGs is in order regarding why state guaranty funds are unavailable to potentially resolve this matter.

¶ 22 The United States Congress encouraged the creation of RRGs with the Product Liability Risk Retention Act of 1981 in order to " 'reduce the problem of the rising cost of product liability insurance by permitting product manufacturers to purchase insurance on a group basis at more favorable rates or to self-insure through insurance cooperatives called risk retention groups.' " *Ophthalmic Mutual Insurance Co. v. Musser*, 143 F. 3d 1062, 1064 (7th Cir. 1998) (quoting

H.R.Rep. No. 190 at 4 (1981), reprinted in 1981 U.S.C.C.A.N. 1432, 1432). This statute "permitted manufacturers to pool their resources into risk retention groups to provide those members of the group with insurance coverage." *Id.* In 1986, Congress enacted the Liability Risk Retention Act to broaden the 1981 statute to other professional groups and to "effectively attempt*** to preclude most state regulation of risk retention groups." *Id.*; see 15 U.S.C. § 3901, *et seq.* (1986). As we have previously referenced, this 1986 statute exempts RRGs from a wide range of state laws and orders, including any rule that would "otherwise, discriminate against a risk retention group or any of its members," with the exception of "State laws generally applicable to persons or corporations." 15 U.S.C. § 3902(a)(4) (1986).

¶ 23 A December 2011 study conducted by the United States Government Accountability Office to address "concerns with the adequacy of RRG regulation" observed that as of 2011, RRGs comprised only 3% of commercial liability coverage. United States Government Accountability Office, *Report to Congressional Requesters, Risk Retention Groups: Clarifications Could Facilitate States' Implementation of the Liability Risk Retention Act* (2011), https://www.gao.gov/assets/590/587531.pdf. The study observed that while RRG representatives "opined that RRGs have expanded the availability of commercial liability insurance," they "differed in their opinions of whether RRGs have improved its affordability." *Id.* Since the time of that study, the National Association of Insurance Commissioners reported that the number of active RRGs dropped from 261 in 2012 to 239 in 2018. National Association of Insurance Commissioners, https://content.naic.org/cipr_topics/topic_risk_retention_groups.htm (last visited Jan. 14, 2020).

¶ 24 Significantly, an RRG cannot join, contribute to, or benefit from a state insurance guaranty fund. See 15 U.S.C. § 3902(a)(2) (1986) (exempting RRGs from any state law that would "require

or permit [an RRG] to participate in any insurance insolvency guaranty association to which an insurer licensed in the State is required to belong"); see also *Onyx Insurance Company, Inc. v. New Jersey Department of Banking and Insurance Division*, 704 Fed. Appx. 110, 113-14 (3rd Cir. 2017) ("[I]n exchange for limited State regulation, risk retention groups are not permitted membership in insolvency guaranty associations ***." (Internal quotation marks omitted.)). As federal courts have observed, Congress has justified the prohibition of RRGs from participating in state insurance guaranty funds as follows: "[R]isk retention groups are not full-fledged multi-line insurance companies, but limited operations providing coverage only to member companies, and only for a narrow group of coverages." (Internal quotation marks omitted.) *Mears Transportation Group v. State of Florida*, 34 F. 3d 1013, 1017 (11th Cir. 1994).

¶ 25 In accordance with federal laws, section 123B-5(A) of the Illinois Insurance Code (215 ILCS 5/123B-5(A) (West 2018)) provides:

> "No risk retention group shall be required or permitted to join or contribute financially to the Illinois Insurance Guaranty Fund, or any other plan, pool, association or guaranty or insolvency fund or any similar mechanism, in this State, nor shall any risk retention group, or its insureds or claimants against its insureds, receive any benefit from any such fund or any such plan, pool, association or guaranty or insolvency fund for claims arising under the insurance policies issued by such risk retention group."

Nevada, where Spirit is domiciled, has a similar provision, providing that an RRG shall not "[j]oin or contribute financially to the Nevada Insurance Guaranty Association, or to any similar organization or fund in this state." NRS 695E.200(5) (1995). The Illinois Insurance Code further mandates that every application for insurance from an RRG not organized in this state must include a notice that provides:

> "This policy is issued by your risk retention group. Your risk retention group is not subject to all of the insurance laws and regulations of your state. State insurance insolvency guaranty fund protection is not available for your risk retention group." 215 ILCS 5/123B-4(G) (West 2018).

We note that this notice carries little benefit to a plaintiff who will eventually need to seek relief from a defendant who is covered by an RRG. The settlement agreement that Richardson signed also provided no disclaimer that Richardson would not be able to receive any funds from a guaranty fund if defendants' insurer went insolvent.

¶ 26 The very purpose of an insurance guaranty fund is "to place claimants in the same position that they would have been in if the liability insurer had not become insolvent. (Internal quotation marks omitted.) *Skokie Castings, Inc. v. Illinois Insurance Guaranty Fund*, 2013 IL 113873, ¶ 29. However, because Night Dream and Small are covered by an RRG, they have no access to an insurance guaranty fund, and Richardson cannot enjoy any benefits from such fund. All parties suffer in this scenario. Night Dream and Small now lack the insurance coverage they thought they would have entering into this lawsuit. On the other hand, Richardson did not select the insurance policy of the party with whom he was allegedly in an automobile accident, and his receipt of the settlement amount would have been more likely had Night Dream and Small been covered by a fully regulated, traditional insurer.

¶ 27 B. Insureds' Lack of Involvement in Settlement Proceedings

¶ 28 Having addressed this factor underlying the issue on appeal, we also note the amount of discretion typically given to insurers in defending an insured.

¶ 29 In Illinois, an insurer is obligated to defend an action against an insured where the claims against the insured are covered "actually or potentially" by the insured's policy. *Illinois Masonic*

Medical Center v. Turegum Insurance Co., 168 Ill. App. 3d 158, 162 (1988). An insurer's "duty to defend includes the right to control the defense so as to allow insurers to protect their financial interest in the outcome of the litigation and to minimize unwarranted liability claims." *Id.* at 163. Our supreme court has moreover recognized that an insurance contract generally "gives the insurer the right to 'make such investigation, negotiation, and settlement of any claim or suit as it deems expedient.' " *Haddick ex rel. Griffith v. Valor Insurance*, 198 Ill. 2d 409, 414 (2001) (quoting 14 Couch § 203:7). Under such a contract, an insurer will typically have "exclusive control over settlement negotiations." *Id.*

¶ 30 Given this context, we recognize that Night Dream and Small likely played an insignificant role, if any role at all, in negotiating the settlement agreement that Richardson wishes to enforce. Moreover, the settlement agreement appears to have been prepared by Spirit. If defendants in fact directly participated in settlement negotiations, such participation is not reflected in the record presented to us on appeal. Significantly, the record also does not clearly reflect whether Richardson, Night Dream, or Small were aware of Spirit's impending receivership during settlement negotiations. See *Murphy v. Chestnut Mountain Lodge, Inc.*, 124 Ill. App. 3d 508, 510 (1984) (stating that an appellant must "furnish a record which *** presents all evidence pertinent to the issues on appeal [citation] and sufficiently preserves for review all matters necessary for a disposition thereof," and "any doubts arising from the inadequacy of the record will be resolved against the appellant" (internal quotation marks omitted)).

¶ 31 C. Enforceability of the Settlement Agreement against Night Dream and Small

¶ 32 Having recognized the difficulties faced by all parties, however, we ultimately find Richardson requests relief that we cannot allow. We find the case *Hopkins v. Holt*, 194 Ill. App. 3d 788 (1990), instructive.

¶ 33 In *Holt*, the plaintiff brought a medical malpractice action against multiple defendants and dismissed the action after reaching a settlement. *Id.* at 791. The settlement as to one particular defendant doctor provided that the doctor's insurer would pay the plaintiff $100,000 "for and on behalf of" the doctor. *Id.* at 791. After dismissing the action, however, the plaintiff learned that the defendant doctor's insurer "was in liquidation and that no settlement payment would be made." *Id.* The plaintiff thus filed a declaratory judgment action seeking a judgment against the doctor for $100,000. *Id.* The doctor filed a summary judgment motion, arguing that "an attorney could not bind a client to a settlement unless the client knew of and specifically agreed to the terms of the settlement." *Id.* at 792. The trial court granted the doctor summary judgment, and the plaintiff obtained a vacatur of the dismissal of his malpractice action. *Id.*

¶ 34 On appeal, this court noted that "[w]here attorneys negotiate settlements containing terms their clients did not approve, Illinois courts hold that the clients are not bound by those terms." *Id.* at 793 (citing *City of Des Plaines v. Scientific Machinery Movers, Inc.*, 9 Ill. App. 3d 438, 444 (1972) (stating it is an "established rule of law that an attorney employed to defend a suit has no authority to compromise, to give up any right of his client, or to consent to judgment against his client without the express consent or authorization of that client"). We further noted that "the settlement agreement clearly stated that the action would be dismissed in exchange for the payment by the insurer." *Id.* The agreement also did not state that the doctor would pay the amount personally, or that the doctor would serve as a guarantor under the agreement. *Id.* We therefore

affirmed the judgment of the circuit court. *Id.* 797. While, *Holt* was decided prior to the enactment of section 2-2301, we nonetheless find its principles instructive: that a settlement agreement does not necessarily bind a defendant where the terms do not clearly hold the defendant responsible, and where there is no indication that the defendant agreed to the terms. *Id.* at 793.

¶ 35 Here, as we have noted, Richardson's counsel has presented no clear indication in the record that Night Dream and Small took part in the settlement negotiations. As in *Holt*, there is also no clear indication from the language of the settlement agreement that the parties intended to bind Night Dream and Small personally, as we now explain.

¶ 36 Settlement agreements are construed and enforced under principles of contract law. *Swiatek v. Azran*, 359 Ill. App. 3d 500, 503 (2005). Our primary objective when construing a contract is to give effect to the parties' intent. *Gallagher v. Lenart*, 226 Ill. 2d 208, 232 (2007). "When the language of a contract is clear, a court must determine the intent of the parties solely from the plain language of the contract," which "must be given its plain and ordinary meaning." *Premier Title Co. v. Donahue*, 328 Ill. App. 3d 161, 164 (2002). "[B]ecause words derive their meaning from the context in which they are used, a contract must be construed as a whole, viewing each part in light of the others." *Gallagher*, 226 Ill. 2d at 233.

¶ 37 The settlement agreement at issue provides that "[i]n consideration of the sum of $1,000,000.00," Richardson is to discharge his claims against Night Dream, Small, and their insurer. However, as Richardson notes, the settlement agreement in no way sets forth any detail as to who must pay the consideration, or how the consideration is to be paid.

¶ 38 To the contrary, if this court interpreted the settlement agreement's plain language literally, Richardson *already received* the settlement amount. The settlement agreement specifically states that "[t]he Released Parties have paid the above consideration, and [Richardson] has/have accepted

it to avoid costs, expenses, fees, risks, inconvenience, and other consequences of this dispute." Nonetheless, we also recognize the parties do not dispute that Richardson did not receive any payment, as the settlement agreement expressly states. Because the record contains no details of the settlement negotiations, we cannot determine what the parties intended by this term, whether the defense intended to send the payment at the time the settlement was being tendered, or whether Richardson's counsel was present when Richardson signed such an agreement.

¶ 39 The lack of contractual terms regarding how the settlement amount is to be paid, by itself, raises concerns as to the enforceability of the settlement agreement. See *Midland Hotel Corp. v. Reuben H. Donnelley Corp.*, 118 Ill. 2d 306, 314 (1987) ("[A] contract is sufficiently definite and certain to be enforceable if the court is enabled from the terms and provisions thereof, under proper rules of construction and applicable principles of equity, to ascertain what the parties have agreed to do." (Internal quotation marks omitted.)); see also *Shults v. Griffin-Rahn Insurance Agency, Inc.*, 193 Ill. App. 3d 453, 458 (1990) ("It is basic contract law that in order for a contract to be binding and enforceable, its terms must be definite and certain.").

¶ 40 We also recognize that the curious timeline apparent from the record raises additional concerns regarding the agreement's enforceability. Namely, Richardson tendered his settlement agreement to the defense on January 11, 2019—the exact same day that the receivership proceedings against Spirit began. Eleven days later, on January 22, 2019, Richardson's claims against Night Dream and Small were dismissed in the presence of defense counsel—just a few days after a Nevada court order was entered placing Spirit under receivership, on January 18, 2019. Given the minimal record before us on appeal, we cannot conclude whether counsel for defendants' insurer in Illinois was aware of the receivership proceedings, or had any knowledge regarding the ability of the defense's insurer to pay the settlement amount. However, if counsel

for defendants' insurer negotiated the settlement under the knowledge that defendants' insurer would likely be unable to pay the settlement, such knowledge could suggest that a material fact was concealed from both Richardson and defendants. See *Hassan v. Yusuf*, 408 Ill. App. 3d 327, 353 (2011) (providing that an "innocent party may prevent enforcement of a contract induced by fraud by seeking rescission," provided that the rescission is sought "promptly after learning of the fraud or misrepresentation").

¶ 41 In light of these enforceability concerns, however, the record also does not show that Richardson's attorneys ever attempted to vacate the settlement agreement between the parties. On appeal, Richardson's counsel again does not challenge the validity or enforceability of the settlement. Rather, Richardson seeks to enforce the agreement against Night Dream and Small, who likely had little to do with the negotiation of the agreement. We find that, in light of the issues we have enumerated, Richardson has failed to present a record showing that Night Dream and Small took part in settlement negotiations and agreed to be personally responsible to pay the settlement amount. See *Murphy*, 124 Ill. App. 3d at 510. Thus, Richardson has not shown that the settlement agreement is enforceable against Night Dream and Small personally.

¶ 42 Night Dream and Small suggest we essentially conclude that enforcing a settlement agreement against a defendant in the form of a judgment constitutes a violation of due process, where the defendant's insurer becomes insolvent. However, we find no need to set such precedent, particularly in light of the general rule of constitutional avoidance. *In re E.H.*, 224 Ill. 2d 172, 178 (2006) ("We have repeatedly stated that cases should be decided on nonconstitutional grounds whenever possible, reaching constitutional issues only as a last resort."). We will not determine whether converting the settlement agreement to a judgment against Night Dream and Small is

constitutional, when on appeal Richardson's counsel has not shown that the agreement personally bound Night Dream and Small to begin with.

¶ 43 D. Applicability of Section 2-2301

¶ 44 Having determined that Richardson's counsel failed to preserve a record showing that Night Dream and Small are personally obligated to pay the settlement agreement, we now turn to the central issue on appeal: whether section 2-2301 of the Code (735 ILCS 5/2-2301 (West 2018)) applies to Night Dream and Small. Section 2-2301 provides:

> "(a) In a personal injury, property damage, wrongful death, or tort action involving a claim for money damages, a release must be tendered to the plaintiff by the settling defendant within 14 days of written confirmation of the settlement. Written confirmation includes all communication by written means.
>
> ***
>
> (d) A settling defendant shall pay all sums due to the plaintiff within 30 days of tender by the plaintiff of the executed release and all applicable documents in compliance with subsections (a), (b), and (c) of this Section.
>
> (e) If, after a hearing, the court having jurisdiction over the parties finds that timely payment has not been made by a defendant pursuant to subsection (d) of this Section, judgment shall be entered against that defendant for the amount set forth in the executed release, plus costs incurred in obtaining the judgment and interest ***, calculated from the date of the tender by the plaintiff under subsection (d) of this Section." *Id.*

¶ 45 While the parties cite aspects of legislative history indicating whether the legislature intended this provision to apply to named defendants or insurers, we will not resort to such history. The plain language of section 2-2301 provides that a defendant must pay all sums due pursuant to

a settlement agreement within 30 days, or a judgment may be entered against that defendant. *People ex rel. Illinois Department of Corrections v. Hawkins,* 2011 IL 110792, ¶ 23 ("[W]hen the language of the statute is clear and unambiguous, it *must* be applied as written without resort to extrinsic aids or tools of interpretation." (Emphasis added.)).

¶ 46 However, as we have acknowledged, Richardson's counsel on appeal has not clearly presented a record showing that Night Dream and Small were personally bound to pay any amount under a settlement agreement. The record is devoid of any showing that Night Dream and Small were involved in the settlement negotiations, or that they personally approved of the settlement terms. Moreover, as we have noted, the settlement agreement sets forth no clear terms as to how Richardson was to receive his consideration and, to the contrary, provides that Richardson had already received payment of the settlement amount. Thus, because we cannot conclude that Night Dream and Small accepted personal responsibility for the settlement amount, we also cannot determine that section 2-2301 applies to them.

¶ 47 We affirm the circuit court's judgment declining to enforce the settlement agreement against Night Dream and Small.

¶ 48 CONCLUSION

¶ 49 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 50 Affirmed.