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Navigating the Settlement Agreement

I. Getting to a Written Agreement

It's down to the final seconds of the race and you're so close to a win you can feel it. After navigating some rough waters, plaintiffs have agreed to your last offer and it appears you've successfully settled the case. You have avoided months, maybe years, of protracted litigation, not to mention the expense, and the risk associated with a jury verdict or an arbitration award. You're good at this and there's a reason for it; most cases settle. In CD litigation, we dedicate a lot of time honing our skills as master negotiators because construction litigation is costly and risky and, oftentimes, the best course to take is one that results in a favorable settlement.

However, don't pop the champagne too quickly. There's still some serious negotiating to complete and there is, of course, the job of putting all of the terms and conditions of the settlement in writing. Not only that, but you had better put something in writing before you leave the course or you may not have an agreement at all, unless you're in federal court or a venue where an oral agreement stands a good chance of being upheld.[1]

It is comforting to know that, if the deal falls through, everything you talked about with the opposing parties is unlikely to be admissible and will only be considered for the purposes of settlement.[2] However, no one wants the deal to fall through. The first thing to do is get it in writing. Many states have held that settlement agreements are not enforceable unless committed to a writing, and some states even hold litigants to strict compliance with that rule.[3]

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[1] *See* Rogers v Cherokee Creek Boys School, Inc., No. 8:07-1453-HMH (D.S.C. Aug. 26, 2008).

[2] FRE 408.

[3] *See* Carpeneda v. Quayside Place Partners, LLP, No. 09-20740 (S.D. Fla. July 7, 2010) and Farnsworth v. Davis, 367 S.C. 634, 637-38, 627 S. E.2d 724, 726 (2006).

Also, get the deal approved by all who are required to provide their approval of the deal. Be sure you are talking to the decision maker for your client; he or she with the actual authority to okay the deal. Be sure they understand the deal and all of the specific terms and conditions. Having them sign the writing memorializing the deal is the optimum course. In many states, while the attorney of record *can* sign the settlement deal and the agreement may be upheld under counsel's apparent authority, if the attorney oversteps its authority, the client's remedy may be against the attorney.[4]

Remember that a settlement agreement is treated just like a contract, so treat it like one. Be sure it expresses the clear intent of the parties and demonstrates a good faith compromise and a true meeting of the minds. Good settlements can go bad if the agreement is poorly worded, ambiguous or incomplete. With that in mind, let's move on to the elements of a settlement agreement that should be frequently retrieved from your wheelhouse.[5]

II. Start Drafting - Common Parts of a Written Settlement Agreement and Release

A. The Parties

Be sure to specifically describe who is a party to the release, as well as who is not. Also be sure to reference the parties' successors, assigns, hires, affiliates, associated entities, insurers, subsequent purchasers and others where appropriate to make sure you close the loop on the finality of the settlement.

B. The Claims

Specifically reference the caption of the case if it is in suit, and describe adequately the location of the project and the nature of the litigation. Releases commonly contain "whereas provisions," also known as recitals, which identify the parties, a description of the nature of the dispute, procedural details and background.

C. Scope of the Release

This is the key part of the settlement agreement describing the settling parties' intent to release one another from the claims and end the dispute entirely. You want the language in the release sections to be both specific enough and broad enough to release every potential person and entity and

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[4] *See* O.C.G.A 15-19-5 and Rule 4 of the Uniform Superior and State Court Rules. *See also* Brumbelow v. Northern Propane Gas Co. 4.

[5] *See generally* 'Please Release Me, Let Me Go: Drafting Settlement Agreements,' South Carolina Lawyer, July 2012, by Scott Moise, referenced with the author's permission.

every potential claim, known or unknown, past present or future, which was plead or could have been plead. The plaintiffs, or claimants, must also promise to execute a Dismissal with Prejudice (without prejudice can be done but leaves an opportunity to refile the claims).[6] In cases where a settlement has been reached after a judgment has been obtained, be sure a Satisfaction of Judgment is filed with the court.

D. Consideration

The agreement must be supported by valid consideration which is, in most cases, monetary payment. The payments and other relief, if any, should be specifically outlined and clear. Oftentimes, there are timing requirement included as well. If there are time requests, read them carefully and review them with the client before agreeing to them. Also, somewhere in the Release, the parties should agree that the consideration paid is adequate. Here's an example regarding that language: Releasors understand and agree that the money now being paid to them is fair and equitable under all circumstances, and Releasors regard it as full consideration for the final settlement of all claims, rights, and damages that they have or may have against Releasees arising out of the Underlying Lawsuit. Releasors understand that this is all the money or consideration they will receive from Releasees related to the Underlying Lawsuit.

Another form of consideration that can also form part of a deal is specific performance. For example, a window manufacturer might agree to ship the claimant new windows or an engineer may agree to provide a detail for effective parapet flashing. Include language in the agreement that specifies the who, what, where and when as to what has been agreed. Provide contact names and information and a system for confirming that the performance has been completed to satisfaction. Consider language that upholds the remaining terms and conditions of the settlement agreement even if the specific performance is unsuccessful and provide a separate method for resolving disputes about specific performance.

III. Let's Keep Talking About Best Practices When Drafting Settlement Agreements

A. No Admission of Wrongdoing

Some iteration of this clause should be included in every settlement agreement: This settlement is a compromise of doubtful and disputed claims, and that the payment of any sums herein mentioned is

[6] *See generally* 'Please Release Me, Let Me Go: Drafting Settlement Agreements,' South Carolina Lawyer, July 2012, by Scott Moise, referenced with the author's permission.

not to be construed as an admission of liability on the part of the persons, firms and corporations who are hereby released, by whom liability is specifically and expressly denied.

Here's another version: Releasors understand and agree that this Agreement, any consideration given or accepted in connection with it, and the covenants made in it are all made, given, and accepted in settlement and compromise of disputed claims and to avoid litigation, and are not an admission of liability by any person or entity and shall not be construed as an admission by any of the Parties hereto of any kind or nature.

B. Non-disparagement

While litigation may have ended for the client, the negative impact may not be ended without a non-disparagement agreement. Here's an example: Releasors (Plaintiffs) agree not to make or publish, or induce or cause others to make or publish, communications of any form to any person or entity that denigrates, disparages, criticizes, defames, or is derogatory of Releasees (Defendants), including, without limitation, print, electronic or social media communications, including, but not limited to forums, logs, chatrooms, Twitter, and/or Facebook.

C. Forum Selection and Dispute Resolution Provisions

Declare what law applies to interpreting the agreement should any disputes arise over the agreement or its meaning. Next, decide in what forum you would prefer to be litigating if the contract for settlement becomes the subject matter of "round two" of litigation. Some courts will uphold a clause that says disputes over the terms and conditions of this agreement will be subject to arbitration. Here is a typical forum selection clause: Releasor declares and represents that this Agreement was negotiated, made and entered into in the State of Bliss, and that this Agreement shall be construed and interpreted in accordance with laws of the State of Bliss for the purposes of enforcing this Agreement and adjudicating and resolving any matters or disputes arising from this Agreement. Consider whether or not you want to include mediation as a condition precedent. Also contemplate whether or not you'd prefer to arbitrate disputes as opposed to litigating in a judicial forum.

D. Plaintiffs Own the Claims

Believe it or not, circumstances have arisen where a Plaintiff wasn't an actual owner of the claim. It's a good idea to put the burden on the Plaintiff(s) to rectify any situation where it comes to bear they really didn't own or have standing to bring the claims. So, for example, include language in your agreement indicating that Plaintiffs have the authority and capacity to enter into the agreement and are the owners of the claims being released. You may also want to include a statement that the

Plaintiffs will hold your insured/client harmless and defend & indemnify it should any party in the future claim that the allegations belonged to it and not to Plaintiffs.

E. Other Clauses to Consider Adding to the Release:

1. Plaintiffs understand the settlement and have not been coerced or forced to accept terms and conditions that they don't understand.

2. The settlement is free from fraud or collusion.

3. The agreement is not one-sided or unfair to either party.

4. The settlement is being entered into in good faith by the parties.

5. The agreement can be modified in writing only.

6. Each party is responsible for its own fees, costs and expenses associated with the underlying litigation and the execution of the Release.

7. Return of or destruction of documents.

8. No prior assignment of rights.

9. Severability; one bad clause doesn't ruin the whole agreement.

IV. Exercise Caution When Including Specific Terms and Conditions

As with any contract, consider the implications of every clause included in the settlement agreement. Ask yourself: what are the basic terms I need and have I included them; how do I ensure successful performance of the terms; how can I protect my client if issues arise; have I used clear language; can my client meet the expectations of the agreement; does the agreement buy my clients' peace? Let's discuss a few issues that commonly cause concern.

A. Timing of Payment

Be wary of agreeing to send settlement checks within a short time period or before a release is reviewed and / or executed by the parties. Parties with buyer's remorse can use a late check to back out of the settlement agreement or increase the monetary amount of the settlement terms by arguing the additional time and costs associated with protracted litigation and release negotiations. Timing restrictions can be further used as grounds for structuring a Motion to Compel Settlement or even a Bad Faith claim against the client and/or insurance carrier using similar arguments. These Motions often include demands for costs and fees to be assessed against the client by the Court.

Clients and carriers often require different documentation and information before payment can be authorized and distributed. Effective counsel should coordinate with his or her client and/or adjuster prior to agreeing to specific payment terms to ensure that all parties are aware of the procedure needed before the settlement check can be issued. Many carriers require a fully executed Release before checks are issued. As noted above, the settlement negotiations associated with the Release can take time and may often extend beyond 30 days from the date of the original settlement agreement among counsel. Counsel should consider drafting a letter to all counsel involved in the settlement that documents the steps required before a settlement check can be issued. A detailed letter to all counsel that outlines the terms and conditions of the client's settlement protocol will help to ensure that the client and carrier are properly protected from false claims of undue delay.

B. Indemnity

Indemnification is often a sticking point when negotiating settlement involving complex construction defect claims. Some carriers and clients will wisely request an indemnification clause to protect the insured and the carrier from future claims by contractually obligating the opposing party to pay fees and expenses incurred if they are forced to re-litigate the issues. Savvy counsel will pursue an indemnity clause to protect their clients, but it can be difficult to convince opposing counsel to consent. Opposing counsel may push for additional consideration to secure a hold harmless clause. If the client is forced back into litigation, it should immediately place the indemnifying party on notice of its contractual obligation to defend and indemnify it.

C. Tolling Agreements

Tolling Agreements can present complications for the client and carrier that should be considered prior to agreeing to the same. While beneficial, tolling agreements do not end the possibility of litigation for the insured. A “Tolling Agreement” often accompanies a Stipulation of Dismissal without prejudice that allows the carrier and insured to escape the typical costs and fees associated with on-going litigation. This is an attractive option in complex construction claims that often involve a labor-intensive discovery process that is costly and time-consuming. Tolling Agreements allow the Plaintiff to continue litigation and discovery with the remaining parties while preserving the right to rekindle litigation against the insured should they discover additional information that justifies bringing the insured back into the case.

While the insured and the carrier avoid the cost and fees involved in the on-going litigation as a result of the Dismissal, the Tolling Agreement allows the Plaintiff to bring the insured back into the case at any time. This tactic can result in a scenario in which the insured and the carrier are reintegrated into

the case long after key depositions and testimony have been secured. Once brought back into the file, you could be faced with making a last minute evaluation of the potential exposure without the full context of the claim that could only be gathered through repeated review of the file and the cross-examination of witnesses as they are deposed. Additionally, there could be a need to re-open depositions and engage in costly discovery to protect the interests of the client and prepare your defense.

Effective counsel will ensure that the Tolling Agreement protects the insured and the carrier from rekindling litigation against the insured immediately prior to trial or mediation. You may also want to bargain for a requirement that all of the established Case Management and Scheduling Order deadlines still apply to any potential claims against the client. Drafting language that requires protection from trial or mediation for 60 to 90 days after being brought back into the claim will ensure that the client is not caught off-guard by looming deadlines. This will also ensure that the carrier has enough time to property evaluate the insured's exposure before being thrust into negotiations at mediation or the threat of trial. Counsel should similarly structure the Tolling Agreement such that it provides a cutoff date that extinguishes the tolling upon the filing of a Stipulation of Dismissal that resolves the case.

D. Confidentiality Agreements

Confidentiality agreements regarding settlements can be tricky territory. Some parties don't want them because they want to advertise their "wins." Some parties want them because they don't want non-settling parties to know what others have paid. In class actions, it's not feasible because court approval is required. Think through whether or not a confidentiality provision is a good idea for your client or not in each situation. Also, don't forget to consult the jurisdictional rules of procedure or statutes. Some states restrict confidentiality agreements.[7]

Here's an example of a provision from an agreement: To the extent permitted by law, the Parties agree that they will not disclose (or cause or allow to be disclosed) the terms of this Settlement Agreement and Release or the Parties' settlement without the prior written consent of all of the Parties. Notwithstanding the foregoing, the Parties may disclose the existence and/or terms of this Settlement Agreement and Release: 1) to tax advisors and/or representatives of the IRS to the extent that such disclosure is necessary in the preparation or explanation of tax returns, provided that they first inform any individuals to whom the disclosures are made of the confidentiality provisions of this Settlement Agreement and Release and those individuals agree to abide by the provisions of the Settlement

[7] See S.C. R. Civ. P 41.1; Tex. R. Civ. P. 76a; Fla. Stat. Ann. 69.081.

Agreement and Release; 2) to their attorney(s); 3) pursuant to subpoena or other legal process; or 4) to enforce their rights under this Agreement and Release.

E. Contingencies

Making the settlement deal contingent on some event, condition or on a party's (or parties') performance is tricky. For example, let's say the settlement is contingent on getting the permits for repairs, or the delivery of replacement products, or the delivery of stamped plans. So many things can occur that might impede the necessary activity. Be especially cautious, again, of settlement contingent on payment within a short window of time. Be wary of agreeing that the conduct of someone outside of your control might have the ability to make or break and settlement. If it's not your client being asked to perform or on whom the contingency depends, make it clear that the breach of the contingent condition does not abrogate the settlement as to your client.