

### **Dispute Resolution:**

CHECKLIST FOR DRAFTING
AND REVIEWING
SETTLEMENT AGREEMENTS

## DISPUTE RESOLUTION: CHECKLIST FOR DRAFTING AND REVIEWING SETTLEMENT AGREEMENTS

After the drawn-out process of contesting a claim and reaching a deal-in-principle to resolve it, executing a settlement agreement can often feel like an afterthought and mere formality. Don't succumb to that type of thinking. Despite the exchange of that value settlement agreements facilitate, and the vitality they bring to the closure of time-rending disputes, all too many settlement agreements look like a mismatched cobble of copy-and-pasted parts. Don't draft or endorse such a creation. The ultimate objective of drafters and signatories should be to develop and execute a document that enables a third party, unfamiliar with the matter, to comprehend what was settled, how it was settled, and find that its provisions are compliant with applicable law.

Unfortunately, settlement agreements that aren't thoughtfully drafted to match the particulars of the matter being settled and the procedural requirements of the governing jurisdiction can leave a settling party exposed to subsequent claims and disputes that the party thought it paid to settle.

Don't let an improperly drafted settlement agreement allow unresolved matters to come back from the dead.



Whether you are self-drafting or reviewing an agreement, use the following checklist to inform the settlement agreement's development and negotiation to achieve your objectives for closing out a matter.

#### 1. Define What and How the Claims Are Settled

The fundamental first task for drafting or reviewing the settlement agreement is defining what and how the disputed claim(s) are subject to settlement. The content of these provisions informs the development of the remaining provisions of the agreement.

The first step in writing these definitions is identifying the type of claim(s) presented for resolution – ranging from a single discrete issue to multiple claims or cases. If the settlement agreement's objective is to secure finality in resolving the matter, then accurately capturing the extent of that matter is critical to defending against subsequent disputes about whether a claim(s) was finally settled or not. Ambiguous, incomplete, or conflicting descriptions of the claim(s) crack the door for a party to renew, or initiate new claim(s) that were intended to be settled and closed.

#### **Single Issue Claim** An example of this type of claim is when a project owner claims professional negligence against a design firm alleging a single standard of care breach resulting in direct damages and costs to the owner. This is the most straightforward settlement scenario and lends itself to discrete definition. **Multiple Claims or Claim with Multiple Components** An example of this type of claim is one where a project owner claims professional negligence against an architectural firm, alleging multiple standard of care breaches and design deficiencies in multiple parts of a building arising out of the firm's services on a project. The owner alleges the breaches and deficiencies caused the owner various direct damages and exposure to claims for costs and damages by third party construction contractors working on the project. In this scenario, the claims need to be parsed out into their individual components and then appropriately defined (as discussed further below) for according disposition. **Companion Claims** An example of this type of claim is when an employee of a design firm initially files a claim for workers' compensation benefits then adds further related claims or causes of action. In addition to filing the workers' compensation claim, the employee files an accompanying employment liability claim alleging the employer firm improperly handled the employee's injury, employment status, or accommodations in the course of the workers' compensation claim. The workers' compensation claim may be covered by the firm's workers' compensation policy and adjudicated through the applicable state's administrative law system. Meanwhile, the employment liability claims may be covered by the employment practices liability policy and may be adjudicated through litigation or private arbitration. While the claims are companions to each other, their separate and distinct insurance coverages and adjudication forums may dictate that the claims have separate settlement agreements, which may have to utilize a particular form agreement. It is important to consider that your outside counsel and insurance company partners will likely be different for each claim as well. Inasmuch, they are likely only familiar with their claim. For that reason, a party will need to assume a coordination role between

#### Definition

considerations.

Once a party has ascertained the type of claim(s) to be settled, focus should shift to defining those claim(s) in the agreement. A single claim is relatively simple, and once a party reduces the issue to a definition, the focus can shift to the identification of the remedy afforded.

the two camps as necessary to share information and coordinate settlement

In a multiple claim(s) scenario, the parties have to draft around the full extent of the claim(s) being settled, reserved, or qualified. If the claims were made in writing or a lawsuit was filed, consider referencing and incorporating those documents as exhibits to function as the definition. Claims are often a mix of written and verbal claims, allegations, evidence, etc... In those cases, it is often most prudent to define the claims and disputes as broadly as possible, then carve out exceptions (if any). Be prepared to confront the issues of latent claims as part of global release provisions. If the intent of the settlement agreement is to release claims whether known or unknown, then the language should include a specific waiver of those claims. Take care if introducing new defined terms into the settlement agreement. To the extent possible, the parties should reach back into the underlying contract(s) and utilize those terms.

Companion claims should be defined individually for each separate case or cause of action. If required to use separate agreements, those agreements should cross-reference each other to the extent possible. If companion claims involve multiple parties in a contractual chain (e.g. project owner vs. architect and architect vs. civil design subconsultant), the agreements need to be coordinated.

#### Remedy

Working hand-in-hand with the definition provisions are the remedy provisions. These are the commitments of value that one party, or perhaps both parties, commit to the deal, forming the legal consideration for the agreement. Again, if the objective is finality and closure, then the parties should take care to define the exchange of value(s) in consideration of settlement of the disputes. Here are best practices:

- Narrate the provision as if you are a sports play-by-play announcer conveying the
  action of a sporting event to an audience. For example... "In consideration of the
  mutual promises herein, Party A pays to Party B, and Party B accepts from Party A, the
  sum of \$XXXX.XX to forever and completely settle the Claims and any other
  Controversy ever arising, connected to known or unknown, from the Project."
- If the value conveyed includes concession of a claim of a quantifiable value, spell that claim and its quantity out.
- If the value includes contribution of value-in-kind (i.e. service credits, or services at a discounted rate) then prescribe and quantify the type and value of those contributions in detail.
- Narrate the process by which the value is exchanged. This can be as straightforward
  as stipulating that the payor will draft a check, convey by mail service to payee's
  attorney, signature of receipt required from payee's attorney, within a certain number
  of days from receipt of fully executed copies of the settlement. In more complicated
  scenarios that involve mutual exchanges of concessions of value or
  contributions-in-kind, the parties should go to specific lengths to dictate the
  mechanics of how the values are documented, accounted for, and recognized.
- Whenever attainable, include reciprocal indemnity, release, waiver, and hold harmless provisions as a component of the remedy. Some parties feel that these provisions are "overkill" for small claims. But their inclusion greatly improves the probability of finality as a deterrent against exposure to re-litigation of ostensibly settled claims and new third party claims relating back to the claim(s) and dispute(s) between the parties.

#### 2. Comply With Applicable Procedural Requirements

The old law school adage of "read the rule" is especially instructive when drafting or reviewing the settlement agreement. An otherwise well-drafted agreement may be rendered unenforceable by neglecting to verify that the settlement agreement meets applicable procedural requirements.

#### ☐ Form Agreement

Claims adjudicated by an administrative law system or government agency often require use of a special settlement agreement form as a prerequisite to a judge or agency officer's approval of the agreement. A party also needs to understand how to incorporate non-form provisions (e.g. indemnity and hold harmless provisions are often not included in agency forms, but can be added by an addendum that is approved by the judge) so that the agreement is enforceable.

#### Statutory, Regulatory or Common Law Requirements

Based on the type of claim, there may be requirements applicable to the form and content of the settlement agreement that arise out of statutory, regulatory, or common law. This is most often true of settlement agreements for labor and employment claims. Examples of such requirements can include: (1) waiting or revocation periods for the settlement or related actions to become effective or be withdrawn; (2) forms (i.e. cash vs. wages), structure (i.e. lump sum or structured installment) and timing of payments; (3) "magic" language or acknowledgment statements; (4) document formatting requirements (e.g. size of typeface, bold, italic or other "conspicuity" requirement).

#### Rules of Civil Procedure

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Finally, "reading the rule" is important for firms that operate in multiple jurisdictions. What a party may be accustomed to in its home jurisdiction may be wildly inconsistent with the requirements of another. For instance, to obtain a binding settlement for a litigated matter in South Carolina, counsel must: (1) have a draft consent order or written stipulation, signed by counsel, and entered in the record; (2) note the settlement in open court; or (3) have an agreement in writing signed by the parties and their counsel. Illinois has an even more detailed procedural requirement. By contrast, other states have only perfunctory obligations, or none at all.

#### 3. Verify That Boilerplate Clauses Are Viable and Applicable

Like the trap of overlooking jurisdiction-specific procedural requirements for enforceability, reliance on boilerplate provisions to draft settlement agreements is fraught with peril. Don't rely on the wholesale copy-and-paste of provisions from an old agreement to a new one. Reconsider your boilerplate for each of these key provisions in light of the type of claim, remedy, and requirements of the applicable jurisdiction:

	Changes in Law It seems so basic that it goes without saying, but parties need to verify that the state of the
	law applicable to each provision is still good and reliable.
	Agreement and Procedure for Dismissal of Litigation
	Parties to litigated claims often assume that the parties will take mutual steps necessary to dismiss the pending case(s) as a "matter of practice." A better approach is to expressly define the procedural obligations, sequence, and timeline for dismissal (and any contingent obligations) of the case(s). Having defined procedural steps in place is invaluable when dealing with a recalcitrant counterparty that seeks to delay or frustrate final resolution wherever possible.
	Integration and Merger Clauses and/or Preservation of Underlying Contracts
	Settlement agreements almost universally contain an integration/merger clause(s) for the intended purpose of making the settlement agreement the complete and exclusive statement of the terms of the settlement deal. However, integration and merger clauses are some of the most arcane and misunderstood of contractual clauses, and without the right language (respecting the governing jurisdiction), the intent of the parties to achieve completeness and exclusivity may be undermined, potentially introducing prior or contemporaneous agreements into the settlement agreement.
	Closely related is an oft-overlooked or omitted consideration, particularly for design and construction claims, is how or whether the settlement agreement should address the underlying contract(s) between the parties. Some practitioners argue that the settlement agreement should remain silent on the status of such contracts, leaving those agreements to survive or perish on their own terms. Others advocate for expressly addressing the survival and preservation (or the demise) of the underlying contracts. Practitioners should think critically about the latter approach in every settlement agreement because expressly preserving the viability of such contracts would keep their provisions viable in the event of future disputes involving the services or project(s) in the underlying contracts. A preservation clause can also avoid arguments about whether the settlement agreement operated to integrate, merge, or extinguish such contracts.

#### Subsequent Disputes

Although the settlement agreement's objective is usually closure and liquidation of disputes between the parties, the potential for subsequent claims and disputes cannot be overlooked. Consider how the parties may handle future claims and disputes, arising out of the underlying contract(s) or the settlement agreement itself. To promote the idea of the claim "being over" (particularly for a party that pays money or concedes value as a remedy), party needs to critically weigh the merits of specifying a dispute resolution process or forum that may have a deterrent effect on initiation of such claims.

# Confidentiality and Publicity This provision is a classic copy-and-paste candidate and most drafters regard it as "standard." But, in the context of the deal, consider whether the "standards" are really applicable, or the nature of the deal or the value paid dictates bespoke terms. Also, a party must review for compliance with recent changes in law and public policy, especially as applicable to claims involving employment, human rights, and social justice issues.

**Third-Party Claims and Indemnity** 

Even when the parties intend for a settlement agreement to resolve all claims between them, subsequent third party claims are beyond their control. Therefore it is important to weigh the inclusion of additional indemnity provisions to address the procedures and obligations the parties will employ in the event of third party claims. The inclination of the parties is often to resort to boilerplate mutual indemnity provisions. However, the parties, especially the payor, should consider whether that sort of arrangement really makes sense, or whether a broad indemnity arrangement that shifts risk to one of the parties is warranted based on the relative exchange of value.

Rules of indemnity (and often referred to as "anti-indemnity") can vary significantly between jurisdictions, particularly regarding whether indemnity against a party's own negligence or fault is enforceable. The same goes for limitation of liability provisions. Accordingly, parties need to weigh whether/how their boilerplate clauses need to be adjusted to meet applicable rules.

#### ☐ Attorneys' Fees

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If not addressed as part of the "remedies" portion of the settlement agreement, the attorneys' fees provision is stock-in-trade for the "miscellaneous" portion of most settlement agreement boilerplate. But, not always. In alignment with the objective of finality, make sure your agreement defines how responsibility for attorneys' fees are allocated as part of the deal.

If your firm is confronted with any of these risk issues, please don't hesitate to contact us for a solution.

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