Daniel-Webster Batchelder Inns of Court

Table 3

The Santa Clause: Settlement Agreements

Is Your Settlement Agreement The Gift That Keeps On Giving?

Clients generally hire attorneys to resolve disputes, not to create them. A carefully drafted settlement agreement tailored to meet the unique needs of the parties and specific in its language is therefore necessary to ensure the successful resolution of any dispute. Indeed, the case books abound with disputes arising from loosely drafted, ambiguous settlement agreements that use imprecise language. *See, e.g., 157 Portsmouth Ave. Residential Development, LLC v. Federal Deposit Insurance Co.* No. 2011-0002, 2012 WL 12830342 (N.H. Jan. 24, 2012) (holding settlement agreement not reached concerning scope of released claims where the term "claims" used in language reserving claims against third parties was ambiguous); *Rochester Motorsports, Inc. v. Leighton's Kawasaki, Inc.* Docket No. 04-E-112, 2008 WL 11259705, (Hillsborough Superior Court, North, Aug. 4, 2008) (finding that parties had not settled dispute relating to sale of ATV dealership where they reasonably disputed the meaning of the requirement that the purchaser accept all inventory that was in "salable undamaged condition except for reasonable wear and tear consistent with new and unused vehicles"); *Linda Stalk et al. v. 119 Flagg Rd. Development et al.*, Docket Nos. 219-2014-cv-433 and 219-2015-cv-75, Order on Third Party Defendants' Emergency Motion to Enforce Settlement Agreement (Strafford County Superior Court, June 8, 2016) (parties' commitment to exchange "general releases" not sufficiently specific to find that meeting of the minds had occurred, motion to enforce settlement denied).

The process leading up to the drafting of a final settlement agreement is also fertile ground for error and dispute. What was said and agreed to in mediation may be understood differently by each party to the mediation, including the fact of whether an agreement was even reached. Thus, it is essential that, even in these preliminary dispute resolution processes, the parties understand what is meant by terms like "general release" or "confidentiality" as they are used and that the parties have a mutually certain understanding of the consideration being paid and how much of that consideration they will or will not be able to pocket. After all, settlement agreements are contractual in nature such that their enforceability depends on whether a meeting of the minds exists. *Poland v. Twomey*, 156 N.H. 412, 414 (2007). Understanding the key provisions of any settlement agreement your client may desire is therefore essential prior to undertaking to resolve the dispute on your client's behalf. Producing a specific written term sheet at the close of any dispute resolution process is also necessary to ensure that the case settles on mutually agreeable terms and future disputes are avoided. *See Hogan Famiy Enters. Ltd. v. Town of Rye*, 157 N.H. 453, 457 (2008) ("We note that the better practice for trial judges presiding over settlement conferences may be to place the essential terms of the agreement on the record, or to otherwise reduce the terms to a contemporaneous memorandum of understanding.").

The Terms

Settlement agreements generally consist of an introduction defining the parties, recitals, the basic terms of the deal, and other procedural terms. The basic terms of the deal often encompass the payment or consideration involved, a general or specific release, a confidentiality agreement, dismissal of the case, a no admission of wrongdoing clause, a non-disparagement clause (depending on the case), and other standard procedural clauses.

Payment or Consideration

Identifying and accurately drafting the payment or consideration provision is typically straightforward in traditional commercial cases such as breach of contract matters. In other areas, the payment or consideration provision may need to be more detailed and thought out, particularly in those areas where the allocation of settlement funds to certain items such as medical expenses, pain and suffering, or lost wages can have unfavorable tax consequences for one or more of the parties. Where such considerations are in play, specificity during the dispute resolution is crucial so the parties each mutually understand how much money they may or may not receive from a particular settlement.

General or Specific Release

A general or specific release is often the most important term in the settlement agreement. A general release should be drafted broadly enough to extinguish any and all claims that exist or may exist between the parties. Keep in mind that the parties may not agree about what it means to execute a "general release," and that term has been held to be ambiguous in our Superior Courts as recently as June of this year. *See Stalk, supra.* It is therefore as good practice to try to reach agreement on the specific scope of a general release at the negotiating table. The following is an example:

> In consideration of the mutual promises set forth in this Agreement, Party X and Party Y, on behalf of themselves, and together with their _____, hereby release and forever discharge each other of and from any and all actions, causes of action, appeals, suits, fees, sums of money, attorneys' fees, accounts, controversies, promises, damages of any nature or kind, judgments, claims, and demands whatsoever, in law or equity, whether known or unknown, asserted or unasserted, direct or indirect, which the Parties have ever had, now have or hereafter can, shall or may have against each other.

Special attention should be paid to the scope of the parties being released (e.g., successors, heirs, assigns, agents, etc.). *See Balamotis v. Hyland*, 159 N.H. 802, 808 (2010).

A specific release should be drafted narrowly enough to extinguish only those claims at issue in the case. For example,

> In consideration of the mutual promises set forth in this Agreement, Party X and Party Y, on behalf of themselves, and together with their _____, hereby release and forever discharge each other of and from any and all actions, causes of action, appeals, suits, fees, sums of money, attorneys' fees, accounts, controversies, promises, damages of any nature or kind, judgments, claims, and demands whatsoever, in law or equity, whether known or unknown, asserted or unasserted, direct or indirect, which were raised in the matter of X v. Y, Docket No. _____, in Hillsborough County Superior Court, or which may later arise regarding the work performed by Y on the XYZ Project.

Parties that have had and continue to have ongoing business dealings with one another should use specific releases over general releases lest they risk waiving meritorious claims they have in transactions unrelated to the disputed transaction.

Confidentiality

Confidentiality provisions are often important to the parties as well. There is no such thing as a "standard confidentiality agreement" in a hotly contested case, so again it is important to reach a clear and specific agreement about who can say what about the case, and its resolution, and to clarify whether that information may be volunteered or, alternatively, what information can only be provided if asked. One of the authors of this presentation was involved in a case where settlement included a commitment to include "standard confidentiality language" in a formal settlement agreement—and the settlement nearly fell apart because the parties disputed whether the plaintiff could volunteer the fact that the settlement of the case had involved the payment of money by the defendant.

Even when confidentiality terms are understood the same way by both parties, exceptions may be needed so the terms of the settlement agreement can be shared with other professionals, such as accountants, tax advisors, and attorneys. Similar care should be taken in drafting these

exemptions to ensure all persons who may need to see and use the agreement are able to do so. The following is an example of a confidentiality provision that could be used in a settlement agreement:

> The terms of this Agreement and the negotiations leading up to it shall remain confidential and shall not be disclosed to any person or entity except as permitted in this paragraph. The terms of this Agreement may only be disclosed as follows: (i) by the Parties to their attorneys, accountants, financial advisors, and _____, and (ii) by the Parties to their affiliates, and its and their officers, directors, and/or _____ who need to know of its terms. The Parties shall advise those persons or entities identified in the preceding sentence about this confidentiality provision. If the Parties or their representatives, as detailed above, or permitted assigns are asked about this Agreement or the legal action this Agreement resolves, then the Parties or their representatives or permitted assigns shall respond that "the Parties were involved in a dispute and the Parties have resolved their dispute and the terms of the settlement are confidential."

Like a release, a confidentiality agreement should be tailored to meet the needs of the settling parties.

Remaining Provisions

The remaining provisions of settlement agreements are usually straightforward to draft, but should be scrutinized and carefully crafted to suit the situation of the parties involved. A dismissal-of-the-case clause typically requires the parties to cooperate in securing the dismissal of the case with prejudice within a certain number of days of the payment or consideration being fully made. A no-admission-of-wrongdoing clause is often sought as a matter of good practice, though the settlement negotiations and resulting agreement itself are generally inadmissible. N.H. R. Evid. 408; Fed. R. Civ. P. 408. A non-disparagement provision may be appropriate to end negative commentary, but should be carefully drafted to foreclose the possibility of future lawsuits based on a breach of the provision, for example, by the inclusion of liquidated damages provisions for breach of the non-disparagement clause or the shifting of

attorneys' fees to the prevailing party if its terms must be enforced. Other standard procedural clauses include a forum selection clause, choice of law and venue clauses, clauses relating to attorneys' fees and costs, clauses shifting attorneys' fees and costs to the prevailing party in disputes under the settlement agreement, and other important standard clauses that may take on roles of varying importance depending on the dispute being resolved.

Special Considerations in Employment Cases

Tax Allocation of Settlement Amount

Every settlement involving an employment related dispute carries with it a number of tax considerations – and a variety of traps for the unwary. Just when it seems the hard part is done – the parties have agreed upon payment of some amount – questions relating to allocation and taxes have the ability to turn any deal. Whether you represent the former employee or employer, every attorney should be aware of the tax implications – and the potential consequences for not getting it right. Here are some of considerations:

- Generally speaking, any payment/resolution made in the context of an employment dispute will involve some taxable event. It is important to discuss with your client before agreeing upon an amount what portion will be considered wages or other taxable income, and the tax consequences that will have on the bottom line of what your client receives.

- Attorneys' fees may (and likely will) be included as taxable income, necessitating a 1099-MISC to the attorney. However, there are a number of exceptions that should be explored that may remove some or all of the fees from taxable income.

- The settlement agreement may give rise to differing reporting requirements, which may include both a W-2 and 1099 to the plaintiff.

    - The settlement agreement may not be last word on tax or related issues, such as unemployment benefit related liens, but it helps to have any allocations, such as portions for wages, "other compensation," or a tax exempt payment, to be expressly stated in the agreement.

- Be aware of potential penalties for the failure to take appropriate tax actions or misclassifying payments in order to avoid a taxable event (i.e. 1099'ing the whole

amount instead of properly classifying wages) this may include penalties for failing to withhold applicable amount of payroll taxes, and other additional fees and interest.

Unemployment Liens

Please see attached summary provided by Attorney Lon E. Siel, counsel for New Hampshire Employment Security.

Releasing Age Discrimination Claims

The Age Discrimination in Employment Act ("ADEA") covers any employee 40 years of age or older. Take-aways from relevant case law and federal regulations concerning releases and covenants not to sue under the ADEA:

- Releases of liability must be made "knowingly and voluntarily." The employer bears the burden of proving that any waiver/release is valid.
- The release must be written in language that can be understood by the employee.
- The release must specifically reference releasing all ADEA claims.
- The release cannot waive his/her rights for any acts that "arise" after the effective date of the agreement.
- The release must advise the employee to consult with an attorney before signing.
- The employee must be given at least 21 days to consider the release.
- The release must contain a provision allowing the employee seven (7) days to revoke the release after signing it.

The Older Workers Benefit Protection Act ("OWBPA") is an amendment to the ADEA. It amended the ADEA to allow for non-discriminatory voluntary early retirement plans. Employers need to be very careful when advertising, discussing, drafting, and implementing voluntary early retirement plans. Employees are allowed to bring suit under the ADEA claiming that the voluntary early retirement plan was discriminatory or coercive. Further, employees can bring suit alleging that their agreement to voluntarily retire was not valid.

Take-aways from relevant case-law and federal regulations concerning voluntary retirement plans:

- The burden of proving that a voluntary early retirement program is valid will rest with the employer.
- In order to be valid, the agreement (at a minimum) must meet the following requirements:
    - The agreement must be in clear and readily understandable terms for the average employee.
    - The agreement must make clear the participation is optional.
    - The agreement must advise and encourage the employee to seek out legal advice before signing.
    - The employee must have sufficient time to consider the proposed agreement.

Medicare Lien/Reimbursement

Some things to consider regarding reimbursement to Medicare (CMS - Centers for Medicare and Medicaid Services) when settlement is likely or imminent with regard to an injury case or case where medical expenses were paid by Medicare or might be paid by Medicare in the near future related to the injuries: You can expect these events to occur somewhat chronologically.

You must take care to include these steps in your process:

❖ **Identification - Who is Eligible(see below for who qualifies):** You must identify whether the injured party is a Medicare eligible person (or will be within the next 30 months) If your party is or will be 62.5 years old at the time of settlement you must comply with the requirements of CMS. (62.5 relates to the fact that there may be future

medical payments made on behalf of the injured party for injuries sustained in the cause of action but the case is already settled)

- **Notification/Reporting:** Notify CMS that there is a possibility of a liability or workers comp recovery. This will trigger CMS to issue you a conditional payment letter.
- **Determine Lien Amount:** Medicare has an absolute lien on all money recoverable for liability or workers comp claims by an injured party for all payments made on behalf of the beneficiary for medical treatment related to the injury in the cause of action. You must factor in these payments when considering settlement.
- **Conditional Payment Letter from Medicare:** The conditional payment letter will come to you within 65 days of your notice to CMS of the likelihood of settlement. It will estimate the amount of money Medicare paid on behalf of the injured party to medical providers and it will contain a spread sheet of treatment dates and ICD codes, which will give you ballpark of the amount necessary to recover from the liable party to reimburse to Medicare. If you represent the injured party you must review this with them to determine whether all the payments made were for treatment related to the cause of action. If you find treatment items that are unrelated you must dispute these items to CMS.
- **Conditional Payment Notice:** Medicare will send you a Conditional Payment Notice if they are informed that you have already settled the case, this is essentially the same as the Conditional Payment Letter. *** CPN: After the CPN has been issued, the BCRC will allow up to 30 days for a response.

  A response to the CPN should include:

  – All proof of representation documentation, if not already submitted.

  – Proof of any items and/or services that are NOT related to your case, if applicable.

– All settlement documentation if you are providing proof of any items and/or services not related to your case.

– Procurement costs and fees paid by the beneficiary, if not already submitted.

– Documentation for any additional or pending settlements, judgments, awards, or other payments related to the same incident.

- **Final Settlement Detail Document:** You must complete the final settlement detail document and return it to CMS: (See attached sample)
- **Final Conditional Payment Amount/Final Demand Letter:** CMS should send you a final demand letter after they receive the final settlement detail document at which time you will have 60 days to reimburse Medicare.
- **Reimbursement**: Medicare must be reimbursed within **60 days** of receipt of payment by Medicare beneficiary. If a liability insurance settlement is made and Medicare is not reimbursed, the third party payer must reimburse Medicare *even if it has already paid the beneficiary!*

  Applies regardless of how amounts are designated in settlement (i.e. pain & suffering).

You qualify for full Medicare benefits under age 65 if:

- You have been entitled to Social Security disability benefits for at least 24 months (which need not be consecutive); or
- You receive a disability pension from the Railroad Retirement Board and meet certain conditions; or
- You have Lou Gehrig's disease (amyotrophic lateral sclerosis), which qualifies you immediately; or

- You have permanent kidney failure requiring regular dialysis or a kidney transplant — and you or your spouse has paid Social Security taxes for a certain length of time, depending on your age.

You qualify for full Medicare benefits at age 65 or older if:

- You are a U.S. citizen or a permanent legal resident who has lived in the United States for at least five years; **and**
- You or your spouse has worked long enough to be eligible for Social Security or railroad retirement benefits — usually having earned 40 credits from about 10 years of work — even if you are not yet receiving these benefits; or
- You or your spouse is a government employee or retiree who has not paid into Social Security but has paid Medicare payroll taxes while working.