

**Presentation for  
Association of Corporate Counsel**

**Drafting Effective  
Settlement Agreements**

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# Drafting an Effective Settlement Agreement

- ◆ Introductory Provisions
- ◆ Key Settlement Provisions
- ◆ Miscellaneous Provisions
- ◆ Other Considerations

# The Elements of an Effective Settlement Agreement

## ◆ Preamble

- Introduces All Parties Who Are Bound by the Agreement (both signatories and non-signatories).
- Date – May or May Not be Defined as the “Effective Date.”

# The Elements of an Effective Settlement Agreement

## ◆ Recitals

- Provide Brief History of Parties' Relationship
- Introduce and Define Past Governing Agreements
- Introduce and Define Present Litigation
- List Third-Party Intended Beneficiaries
- Highlight Confidential Nature of Agreement
- Highlight Disclaimer of Liability

# The Elements of an Effective Settlement Agreement

## ◆ Sample Recital Clauses:

- *“WHEREAS, to avoid the costs and expenses of the Arbitration and without the Company admitting liability, the Parties desire to settle fully and finally, in the manner set forth herein, all differences between them which have arisen, or which may arise, prior to, or at the time of, the execution of this Agreement, including, but in no way limited to, any and all claims and controversies related to, in connection with, or arising out of the employment relationship between Employee and Company, and/or the cessation of Employee’s employment with Company as of the Separation Date and/or the Arbitration.”*
- *“WHEREAS, the Parties intend that this Agreement, the terms of this Agreement, and the negotiations leading to this Agreement be treated as confidential by Employee.”*
- *“WHEREAS the Parties intend that current and former members of Company’s Board of Directors (“Directors”), including, but not limited to, John and Jill Doe, are third-party beneficiaries of this Agreement.”*

# The Elements of an Effective Settlement Agreement

## ◆ Releases

- Determine Type of Release – General, Mutual, and/or Limited
- If the Company is Obtaining Release, Broadly Define the “Company”
  - *“Current and former parent, subsidiary, affiliated and related corporations, firms, associations, partnerships, and entities (collectively, ‘Company Parties’), their successors and assigns, and the current and former owners, shareholders, directors, officers, employees, agents, attorneys, representatives, and insurers of said corporations, firms, associations, partnerships, and entities, and their guardians, successors, assigns, heirs, executors, and administrators, accountants, and counsel (hereinafter collectively referred to as the ‘Releasees.’”*

# The Elements of an Effective Settlement Agreement

- Broadly Define Released Claims
  - *“Any and all claims, complaints, grievances, liabilities, obligations promises, agreements, damages, causes of action, rights, debts, demands, controversies, costs, losses, and expenses whatsoever, under any municipal, local, state, or federal law, common or statutory related to, concerning, or arising out of [BROAD DEFINITION OF DISPUTE/RELATIONSHIP].”*
- Include Release for Violation of Specific Statutes and Common Law Claims
- Include an Acknowledgment of Complete Satisfaction
  - *“Employee acknowledges that the amount being paid pursuant to Paragraph 7 of this Agreement constitutes complete satisfaction and full compensation for any alleged unpaid overtime, salary, vacation, severance, hours worked, and/or outstanding option grants, and that no other compensation, payments, or benefits are due to Employee by the Company.”*

# The Elements of an Effective Settlement Agreement

- Include Release for “Known” or “Unknown” Claims
- Specific State Statutes May Require “Magic Language” to Obtain a Release of Unknown or Other Types of Claims
  - *“All rights under Section 1542 of the California Civil Code are hereby expressly waived with respect to any of the claims, injuries, or damages described in the General Release. Section 1542 of the California Civil Code reads as follows:*  
  
*A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR.”*

# The Elements of an Effective Settlement Agreement

- Other State or Federal Statutes May Have Other Requirements for Valid Release
  - ADEA/OWBPA (EEOC 1998 Regulations)
    - Waiver Must be Supported by Additional Consideration
    - No Waiver of Future Rights
    - Must Advise of Right to Consult Attorney
    - Must Provide for 7 Day Revocation Period
    - Must Provide Specified Time for Consideration of Agreement
      - 21 (most separations) or 45 (early retirement or incentive program offered to group)

# The Elements of an Effective Settlement Agreement

## ◆ Obtain Necessary Representations and Warranties

- Close the Door to Fraudulent Inducement Claim
- Use Schlumberger Language
  - It protects a settling party from claims that they were fraudulently induced into settling.
  - Settlement agreement must disclaim reliance, thus negating an essential element for fraudulent inducement and common law or statutory fraud, OR clearly express intent to waive claims of fraud or fraudulent inducement
  - Both “the contract *and* the circumstances surrounding its formation determine whether the disclaimer of reliance is binding.”

# The Elements of an Effective Settlement Agreement

- Factors Analyzed by Courts in the Application of Schlumberger Language
  - Language indicates that the Agreement has been specifically bargained for and is not hidden in a standard agreement
  - Language indicating that the Agreement has the specific purpose to end a dispute
  - Lack of knowledge or sophistication of parties
  - Lack of counsel
  - Lack of arm's length negotiation

# The Elements of an Effective Settlement Agreement

## ◆ Sample Representations and Warranties:

*“Representations and Warranties by the Consumers. The Does hereby further represent and warrant that (i) they are not relying upon any statements, understandings, representations, expectations, or agreements other than those expressly set forth in this Settlement Agreement, (ii) they have had the opportunity to be represented and advised by legal counsel in connection with this Settlement Agreement and General Release, which they make voluntarily and of their own choice and not under coercion or duress, (iii) they have made their own investigation of the facts and are relying upon their own knowledge and the advice of their counsel, (iv) they have no expectation that any of the other Parties will disclose facts material to this Settlement Agreement and General Release, and (v) they knowingly waive any and all claims that this Settlement Agreement and General Release was induced by any misrepresentation or non-disclosure and knowingly waive any and all rights to rescind or avoid this Settlement Agreement and General Release based upon presently existing facts, known or unknown. The Does agree and stipulate that each Party is relying upon these representations and warranties in entering into the Settlement Agreement and General Release. Furthermore, the Parties agree that these representations and warranties are a material inducement to Defendants entering into this Settlement Agreement. These representations and warranties shall survive the execution of this Settlement Agreement indefinitely without regard to statutes of limitations.”*

# The Elements of an Effective Settlement Agreement

## ◆ Confidentiality

- Cover the Negotiations, Terms, and the Agreement
- Consider Liquidated Damages for Breach of Confidentiality Agreement
- Carve-outs: Limit to Lawyer, Financial/Tax Advisor, and Spouse
- Recite that Confidential Nature of Agreement Was Material Inducement to Settle and that Breach Will Result in Irreparable Harm
- Provide that Defendants (Not Parties) May Resort to Court to Enforce (equitable) with No Bond

# The Elements of an Effective Settlement Agreement

## ◆ Sample Confidentiality Clause:

*“Employee acknowledges and agrees that he will keep the negotiations leading to this Agreement, as well as the terms, amount, and fact of this Agreement STRICTLY AND COMPLETELY CONFIDENTIAL, and that he will not communicate or otherwise disclose to any employee of Company (past, present, or future), or to any member of the general public, the terms, amounts, copies, or fact of this Agreement, except as may be required by law or compulsory process; provided, however, that Employee may make such disclosures to his tax/financial advisors and spouse as long as they agree to keep the information confidential. Employee understands any breach of this provision is a material breach of this Agreement. The Parties agree that this Paragraph is a material inducement to Company entering into this Agreement. Additionally, the Parties agree that Company may seek a temporary restraining order to enforce this Paragraph without posting a bond.”*

# The Elements of an Effective Settlement Agreement

## ◆ Covenant Not to Sue

- Prevent Opposing Party From Commencing or Assisting, Directly or Indirectly, with Any Lawsuit, Action, Claim, Arbitration, Regulatory Action, or Other Proceeding Against Released Parties
- Include Material Inducement Language
- Include Carve-out for Breach of Settlement Agreement
- Include Carve-out for Response to Regulatory/Governmental Agency Subpoena
  - Require Specified Period of Notice

# The Elements of an Effective Settlement Agreement

## ◆ Indemnification

- Consider Requesting for Any Contemplated Future Loss
- Indemnification Language Should be in ALL CAPS
- Obtain Indemnification for Taxes if Settling with an Individual
  - *“Employee agrees to pay any taxes found to be owed by him, if any, from the Settlement Pay and TO DEFEND, INDEMNIFY, AND HOLD COMPANY HARMLESS FROM ANY CLAIMS, ASSESSMENTS, DEMANDS, SETTLEMENTS, PENALTIES, AND INTEREST IT MAY OWE, OR THAT ARE FOUND TO BE OWED BY EMPLOYEE AS A RESULT OF ANY PAYMENT MADE PURSUANT TO THIS AGREEMENT.”*
- Consider Indemnification for Bankruptcy
  - Bankruptcy Warranty and Indemnity. The Does expressly represent and warrant that they have not filed for bankruptcy and that no bankruptcy action is pending at the present time involving the Does in any fashion. **THE DOES agree to indemnify, defend, and hold harmless all of the Released Parties from any liability and/or damages that might occur to any of the Released Parties, including costs and attorneys’ fees, if this instrument or this settlement is void, voidable, or held invalid as a result of any bankruptcy proceeding, action, order, or law INITIATED AS TO THE DOES.** The Does further represent and warrant that they are the sole parties in interest to any claims arising out of the Litigation, the Disputes, the Terminated Obligations, and the incident(s) described in this Settlement Agreement, and that all claims, known and unknown, arising from the Does’ dealings with the Released Parties are fully and finally settled and released in exchange for the consideration shown above. This representation and warranty survives the execution of this Settlement Agreement indefinitely without regard to statutes of limitations.

# The Elements of an Effective Settlement Agreement

## ◆ Require Surrender/Return of Company's Documents/Property

- Obligation Upon “Execution,” Not “Effective Date”
- Include a Defined (and Broad) List of Materials
- Include Any Non-Work Product Litigation Documents – Including Depositions (with exhibits)
- Try to Resist Agreement to Destroy – Get Documents Back
- Some Governmental Authorities May Not Agree to Return Provision

# The Elements of an Effective Settlement Agreement

## ◆ Sample Return of Documents Provision:

*“Surrender and Return of All Documents. Upon execution of this Settlement Agreement, the Company’s Legal Counsel shall surrender and return to Defendants copies of all documents and/or recordings, if any, obtained from Defendants or the Third-Party Beneficiaries in the Litigation. This includes, but is not limited to, any documents and/or recordings produced by Defendants pursuant to a stipulation or order of confidentiality as may be the case or which pertain to, regard, or reference any of the Defendants or any of their current or former agents, enrollers, or employees, including identical copies, or non-identical copies, of the following items: advertisements; agreements; communications, including intercompany and intracompany communications; transcripts; reports; confirmations; correspondence; faxes; telegraphs or telegrams; cables; telexes; memoranda; records; books; calendars; summaries, notes, or records of personal conversations or interviews; diaries; datebooks; graphs; charts; computer disks; email; computer records; spreadsheets; computer software; voicemail records or transcripts; diagrams; notebooks; notecharts; plans; pictures; recordings; tapes; accounts; analytical records; summaries, notes, or records of meetings or conferences; opinions or reports of consultants or others; appraisals; reports or summaries of negotiations; market studies; corporate minutes or resolutions; photographs; motion picture film; video or audio tape recordings and transcripts thereof, including records of telephonic communications; brochures; pamphlets; bulletins; advertisements; circulars; advertising literature; press releases; drafts; letters; projections; working papers; checks (front and back); check stubs; receipts; deposit slips or other records; any information contained in any computer or information retrieval devices; any marginalia or other comments appearing on or affixed to any paper or writing; and other matter constituting a ‘document’ or ‘tangible thing.’”*

# The Elements of an Effective Settlement Agreement

## ◆ Arbitration Provision

- Agree that Any and All Future Disputes Regarding the Agreement Shall be Arbitrated
- Require *Confidential* Arbitration
- Request a Final and Binding Ruling in a Single Written Decision
- Generally Provide for Three Neutral Arbitrators Licensed to Practice Law in Relevant Jurisdiction for at Least 10 Years
- Try to Fix Location Near Client
- Provide that Administrative Fees/Expenses Shall be Borne Equally – Exception is Consumer Dispute

# The Elements of an Effective Settlement Agreement

- Blue-Pencil Provision to Reform Arbitration Agreement
  - *“Should a court of competent jurisdiction determine that the scope of the arbitration and related provisions of this Agreement are too broad to be enforced as written, the Parties intend that the court reform the provision in question to such narrower scope as it determines to be reasonable and enforceable.”*
- Before Signature Line, Bold and ALL CAPS – ***“THIS AGREEMENT CONTAINS A PROVISION REQUIRING THE PARTIES TO RESOLVE ANY DISPUTES BY ARBITRATION.”***
- Include Carve-out for Injunctive Relief
  - *“As the sole exception to the exclusive and binding nature of the arbitration commitment set forth above, the Parties agree that the Company shall have the right to initiate an action in a Dallas, Texas court of competent jurisdiction in order to request temporary, preliminary and permanent injunctive or other equitable relief, including specific performance, to enforce the terms of paragraphs 3, 4, 6, 7, 8, 9, 14, 16, and 17 of this Agreement without the necessity of proving inadequacy of legal remedies or irreparable harm or posting bond. However, nothing in this paragraph should be construed to constitute a waiver of the Parties’ rights and obligations to arbitrate regarding matters other than those specifically addressed in this paragraph.”*

# The Elements of an Effective Settlement Agreement

## ◆ Non-Disparagement Provision

- Prevent Opposing Party From Making or Assisting Others in Making *Any* Negative, Disparaging, Detrimental, or Derogatory Remarks or Statements by Any Method, Including in Writing, Orally, Telephonically, or Electronically
- Generally Should Not Agree if Representing Company; Companies Can't Effectively Police
  - Possible Mutual Clause if a Control Group is Used
- Provide for the Right for Company to Obtain *Ex Parte* Relief to Enforce Provision Without Need to Post Bond

# The Elements of an Effective Settlement Agreement

## ◆ Dismissal of Lawsuit

- Provide for Dismissal of Pending Litigation/Arbitration After Payment
- Attach Proposed Order as an Exhibit
- Build in Time for Any Revocation Periods
- Sample:

*“Dismissal of the Litigation with Prejudice. Upon the Effective Date of this Settlement Agreement, the Parties shall immediately file with the District Court of Tarrant County, Texas, 10th Judicial District, an Agreed Motion to Dismiss Lawsuit with Prejudice and Agreed Judgment of Dismissal with Prejudice in the form of the attached Exhibit C, which is made a part hereof and incorporated herein by reference.”*

# The Elements of an Effective Settlement Agreement

## ◆ Include Integration/Merger Clause

- Agreement Supersedes All Other Oral or Written Agreements Between the Parties
- Carve-out for Other Prior or Continuing Agreements
- Sample:

*“Entire Agreement. This Agreement constitutes the entire Agreement of the Parties, and supersedes all prior and contemporaneous negotiations and agreements, oral or written. All prior and contemporaneous negotiations and agreements are deemed incorporated and merged into this Agreement and are deemed to have been abandoned if not so incorporated. No representations, oral or written, are being relied upon by either party in executing this Agreement other than the express representations of this Agreement. This Agreement cannot be changed or terminated without the express written consent of the Parties that is executed by the Parties and that unequivocally indicates the Parties’ intention to modify this Agreement.”*

# The Elements of an Effective Settlement Agreement

## ◆ Disclaimer of Liability Provision

### ▪ No Admission of Liability or Wrongdoing

- *“The Agreement has been entered into in release and compromise of claims as stated herein and to avoid the expense and burden of litigation.”*
- *“By entering into this Agreement, the Parties do not admit, and do specifically deny, any violation of any contract, local, state, or federal law, common or statutory. Neither the execution of this Agreement nor the consideration provided for herein shall constitute or be construed as an admission by either party (or any party’s agents, representatives, attorneys, or employers) of any fault, wrongdoing, or liability whatsoever, and the Parties acknowledge that all such liability is expressly denied. This Agreement has been entered into in release and compromise of claims as stated herein and to avoid the expense and burden of dispute resolution.”*

# The Elements of an Effective Settlement Agreement

## ◆ Miscellaneous

- Cooperation Clause
  - Cooperate fully with any pending or future litigation, arbitration, business or investigatory matter
  - Consider requesting payment of reasonable expenses of cooperation
- Covenant Regarding Third Party Claims
  - No related claim has been assigned or otherwise transferred in any way.
  - Sample:

*“COVENANT REGARDING THIRD PARTY CLAIMS. THE DOES REPRESENT AND COVENANT THAT THEY HAVE NOT ASSIGNED OR OTHERWISE TRANSFERRED IN ANY WAY TO ANY OTHER PARTY, INCLUDING, BUT NOT LIMITED TO, ANY ATTORNEY, FORMER SPOUSE, SPOUSE, CHILD, HEIR, OR EXECUTOR (BE THEY MINOR OR ADULT), AND THAT NO SUCH PARTIES OWN OR HAVE ANY RIGHT TO ASSERT, ANY CLAIM RELATED TO OR ARISING FROM THE TERMINATED OBLIGATIONS, THE LITIGATION OR THE DISPUTES, OR ANY CLAIM RELEASED BY THIS SETTLEMENT AGREEMENT. ”*

# The Elements of an Effective Settlement Agreement

## ◆ Miscellaneous

### ▪ Amendment or Modification

- Agreement Cannot be Amended or Modified Orally
- No Waiver of any Breach Shall be Construed as an Implied Amendment or Agreement to Modify

### ▪ Severability

- If any provision of the Agreement is held invalid, illegal or unenforceable in any respect by a court, then, **to the fullest extent permitted by law**, such invalidity, etc., shall not affect the validity of any other provision of the Agreement
- In lieu of each such invalid clause, there shall be added automatically another provision or term similar that is legal, valid, and enforceable

# The Elements of an Effective Settlement Agreement

## ◆ Miscellaneous

- No Waiver
  - Failure to enforce at any time any one or more terms or conditions shall not constitute waiver of right to later enforce
  - Course of dealing does not constitute waiver of any right
- Beneficiaries/Successors and Assigns Clause
  - Agreement and exhibits are binding and shall inure to the benefit of the parties, their heirs, respective successors and assigns
  - Third-Party Beneficiary Clause

# The Elements of an Effective Settlement Agreement

## ◆ Miscellaneous

- No Assignment
  - Notwithstanding foregoing clause, the plaintiff cannot assign any of his rights or obligations hereunder without written consent of all other parties
- Costs and Fees
  - Agreement that each party shall bear his or its own costs and attorneys' fees

# The Elements of an Effective Settlement Agreement

## ◆ Miscellaneous

### ▪ Notice Provisions

- Include a notice provision so that it is clear who is notified in case of a breach of the agreement and when notice is effective
- Courtesy copy to counsel, but specify that this copy does not constitute notice

### ▪ Governing Law

- Exclusively governed and construed in accordance with
- Without regard to its conflicts of law, except where preempted

### ▪ Venue/Forum Selection

- Exclusive venue
- Due process concerns

# The Elements of an Effective Settlement Agreement

## ◆ Miscellaneous

### ▪ No Publicity Clause

- Press release – consider attaching agreed press release as an exhibit
- Inquiries from prospective employers
- Inquiries from public – “the matter has been resolved to the parties’ satisfaction”

# The Elements of an Effective Settlement Agreement

## ◆ Miscellaneous

- Facsimile Signatures
  - Facsimile signatures shall be deemed to be valid as original
- Execution in Counterparts
  - Agreement may be executed in one or more originals, photocopies or telecopied or electronic counterparts
  - Each counterpart shall be as binding and enforceable as the original

# The Elements of an Effective Settlement Agreement

## ◆ Miscellaneous

- Scribner's Clause
  - No Party deemed to be the Drafter
- Construction
  - Words shall be construed to include any other gender where appropriate (male, female, neuter gender)
  - Words that are singular/plural shall be construed to include the other where appropriate
- Headings
  - For convenience only, does not limit, expand, affect, or alter meaning

# The Elements of an Effective Settlement Agreement

## ◆ The Closing

- Signature introduction and signature lines
  - Caution block – **“CAUTION! READ BEFORE SIGNING”**
  - Notarized
  - Attorney signatures (waiver of fee claims)

# Special Considerations When Drafting an Effective Settlement Agreement

## ◆ Special Considerations

- What happens if a party breaches its obligation under the Agreement to pay?
  - Check case law. In some states, the Agreement is treated as a contract, so failure to fulfill obligations under the Agreement equal a breach of contract; however, this is not the case in all states.
- Class action settlements
  - As of 2003, Federal Rule 23 requires court approval before any *certified* class action is settled or dismissed.
  - Some states follow the pre-amended Rule 23, under which court approval is required for settlement or dismissal of any *purported* class action.
  - Specific preliminary approval, notice, and final approval standards apply.
- Court approval also may be required in other settings – *e.g.*, bankruptcy.

# Special Considerations When Drafting an Effective Settlement Agreement

- Ethical issues in negotiating and drafting settlement agreements
  - ABA Model Rules of Professional Conduct applies to the settlement context. For instance, consider Rule 4.1(a) which provides: “In the course of representing a client, a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person.”
  - When sending drafts to the other party, be aware that meta-data containing information on earlier drafts may be accessible to the other party if the document is not “scrubbed” of meta-data.
  - For representation of multiple clients, keep in mind ABA Model Rules of Professional Conduct 1.7 (concerning conflict of interest) and other ethical guidelines.