



Settlement Agreement Drafting Issues Checklist

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A Checklist of some of the key issues to consider when entering into a settlement agreement.

To ensure that a settlement agreement achieves its intended purpose, counsel should tailor it to the particular circumstances of the matter being settled. At the same time, to the extent possible, settlement agreements should take advantage of and incorporate language that has been tested and approved as effective for its intended purpose (for example, the breadth of release language, and the enforceability of non-disclosure and confidentiality provisions). It is vital that the agreement addresses every pertinent detail of the proposed deal clearly and explicitly. Otherwise, the client may not end up with a resolution under the terms that it believed it had achieved.

Set out below is a checklist of some of the important issues that counsel should consider when preparing a settlement agreement:

- **Who should be the parties to the agreement?** Consider carefully who the client is and with whom your client is settling. Are there other parties or entities the settlement should bind or exclude? For example, a defendant may want to ensure that all claimants (and sometimes even potential claimants) are bound by the terms. Otherwise, the benefits of reaching a settlement may be undone when a similar claim comes in from a related, but not explicitly recognized, party or claimant. Consider also whether there is a party or entity related to the client that may not want to waive or give up its rights.
- **Third parties.** Consider the treatment of relevant third parties (for example, joint tortfeasors):
 - are they to be released from future claims or are rights preserved?
 - do any third parties need to consent to the agreement, such as insurers?
 - are there any contribution, indemnity or subrogation issues to address?
- **What is the scope of the claims to be settled?** Consider carefully which claims the settlement agreement covers. For example, consider the treatment of existing unknown claims and future claims. The scope and language of the “release” may be the most important provision in the agreement.
- **Legislative/legal limitations or restrictions.** Think about whether there are any limitations or restrictions on the relief provided by the agreement, the effective date, or the ability of a person to sign the agreement. For example:
 - does the agreement require a rescission period?
 - does a court need to approve the settlement?
 - is there any aspect of the agreement that could violate public policy and be deemed to be unenforceable at a later time?
- **Restrictions on future activity.** Should the agreement include restrictions on future activity? If so, are the terms “reasonable” and consistent with controlling law?
- **Formalities.** Consider what formal requirements are necessary to have a binding settlement. For example:
 - does the agreement need to be in writing or included in another document?
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Consider execution formalities and whether the execution clause will be effective to bind all parties. Be explicit about all “notice” requirements to the settling parties (and third parties if appropriate).

- **Disposal of court proceedings.** Deal with notification to the court (where appropriate) and consider what formalities are required to dispose of any court proceedings:
 - does the settlement require court approval?
 - is the action being dismissed, discontinued, withdrawn, or stayed on agreed terms (so that enforcement can take place within the existing court proceedings)?
 - does the court retain jurisdiction to enforce the settlement?
 - is termination of the proceedings with or without prejudice?
 - does each party bear its own costs and fees?
- **Is settlement conditional or unconditional?** For example, settlement may be conditioned on a payment such that the agreement becomes binding and effective only upon the payment of the settlement sum.
- **Payment arrangements.** Consider issues regarding the logistics, form, and timing of payment, and discuss these with the client. For example, it may take time for the paying party to raise the settlement funds or have the payment approved or both, but the timing of the payment may be critical to your client’s interests. Carefully draft the terms of payment if it is to be paid in installments over time. Consider whether payment needs to be made by way of immediately available funds or by regular business check.
- **Interest on late payments.** Consider whether to make express provision for interest on late payments. Does your jurisdiction have limits on interest rates?
- **Tax implications of the settlement.** Think about whether any tax issues arise from the settlement payment. Consider the timing of the settlement relative to tax consequences.
- **Legal costs.** Make express provision for the parties’ legal costs under the settlement, taking into account any relevant contract provisions and any orders regarding costs in the underlying proceedings.
- **Confidentiality and non-disparagement.** Consider the necessity of an express confidentiality provision in the settlement agreement, with any appropriate carve-outs, including for, among others:
 - auditors;
 - attorneys; and
 - boards of directors.

In some cases, an agreed form of joint public statement, to be issued on conclusion of the settlement, can be beneficial. Consider whether the client has the institutional capability to maintain confidentiality and whether special instructions are

needed. Consider also non-disparagement provisions - are they necessary, workable and enforceable?

- **Governing law and jurisdiction.** As with any contract, issues of the governing law of the settlement agreement (including the jurisdiction and forum for any enforcement, if necessary) should be carefully considered. Consider whether to include a provision for the recovery of attorneys’ fees and costs if a party is forced to take legal action to enforce the agreement.
- **Injunctive relief.** Consider whether enforcement of the agreement requires injunctive relief.
- **Capacity and authority to settle.** Ensure that the person(s) signing the agreement has authority to bind the entity and enter into the agreement; include a provision in the agreement addressing this authority.
- **Completion mechanics.** Think about all logistical issues and how to complete all settlement execution and performance obligations. As far in advance as possible, ensure that the practicalities of settlement are dealt with in advance of execution. These tasks may include:
 - advance circulation of relevant documents;
 - advance execution of original and counterpart agreements; and
 - the immediate exchange of monies on execution.

Ideally, you should leave as few tasks or performance obligations as possible to be completed after the agreement is executed.

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