

IMPORTANT TERMS FOR INCLUSION IN CONFIDENTIAL SETTLEMENT AGREEMENTS FOR FINANCIAL SERVICES COMPANIES

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Introduction and Overview

In a fast-paced financial world, it is easy to understand how parties agree on a settlement figure, assume the final documents resolving the matter are worth only perfunctory consideration, and press on to the next matter. This attitude is all the more understandable in the context of the pressures on in-house counsel to keep costs down and on outside counsel to keep billing for collectable time. These pressures, among others, create opportunities for error in the context of what many refer to as a “standard” release.

This article questions the wisdom of approaching a rapidly changing financial services world armed with nothing more than a traditional “standard” release. Indeed, this is no trivial matter because the majority of disputes are resolved through settlement. David M. Trubeck, *et al.*, *The Cost of Ordinary Litigation*, 31 UCLA L. Rev. 72, 86-87 (1983) (approximately ninety percent of lawsuits are settled or abandoned without filing a claim); Erik K. Moler, *et al.*, *Punitive Damages in Financial Injury Jury Verdicts*, 28 J. Legal Stud. 283, 285 (1999) (citing Bureau of Justice Statistics, U.S. Dep’t of Justice, NCJ-154346, Special Report: Civil Justice Survey of State Courts, 1992: Civil Jury Cases and Verdicts in Large Counties (1995)). Moreover, a traditional “standard” release may be ill-suited to the types of forward-looking

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financial instruments, products, and services offered by financial services companies. The competitive pressures on financial services companies are unlikely to abate and the need for innovation will remain.

If a “standard” release does not clearly and unequivocally terminate the parties’ future rights and obligations, then is it reasonable to expect courts to “interpret” that agreement as “intending” consequences not expressed in the writing? Is it reasonable to expect courts to forbid parol evidence concerning the “intent” of the claimant, when the financial services company must offer its own parol evidence to establish intent? The premise of this article is that careful counsel, inside or outside, should look beyond “standard” or traditional release provisions in order to ensure that financial services companies receive the benefit of their settlement bargain.

An essential component of this process requires appreciation of the fundamental difference between a standard release employed in tort cases and a release needed by a financial services company offering financial products looking years, if not decades, into the future. Although cataloging the myriad financial instruments and products available in the marketplace is beyond the scope of this article, suffice it to say that annuities, fixed and variable, whole life, universal life, and variable life insurance policies, and various retirement accounts, including IRAs, 401Ks, and pension plans, are but a few examples. In contrast to these forward-looking financial instruments and products, most tort actions only concern events occurring in the past, *e.g.*, an automobile accident or an incident of alleged medical malpractice. This difference in perspective, prospective vs. retrospective, may not appear significant, but the differences are real and meaningful.

Second, a significant reason for the difference between prospective financial instruments and retrospective tort claims is based on differences in judicial application of the legal doctrine of *res judicata*. Although a dismissal with prejudice in an automobile tort claim may extinguish all claims, including potential claims, by a party, *see Schwarz v. Folloder*, 767 F.2d 125,130 (5th Cir. 1985) (finding “a dismissal with prejudice gives the defendant the full relief to which he is legally entitled and is tantamount to a judgment on the merits”); *Samuels v. Northern Telecom, Inc.*, 942 F.2d 834, 836 (2d Cir. 1991) (finding “a dismissal with prejudice has the effect of a final adjudication on the merits favorable to the defendant and bars future suits brought by the plaintiff upon the same cause of action.”); *Harrison v. Edison Bros. Apparel Stores, Inc.*, 924 F.2d 530, 534 (4th Cir. 1991) (holding that a voluntary dismissal with prejudice “is a complete adjudication on the merits of the dismissed action.”), it is not equally true that a dismissal with prejudice will resolve the future rights of an annuitant to receive and/or transfer future annuity benefits. *See Patrowicz v. Transamerica HomeFirst, Inc.*, 359 F. Supp. 2d 140, 156 (D. Conn. 2005) (finding some claims left unresolved by dismissal of a prior action). Rather, the future relations, if any, between the annuitant and the financial services company most likely will be governed by contract, meaning the settlement agreement and release executed by the parties that led to the dismissal of the pending action.

Third, financial services companies cannot realistically expect courts to assume responsibility for protecting large, sophisticated financial services institutions if they fail or neglect to protect their own rights through the express terms of a settlement agreement. Moreover, if the financial services company is compelled to offer parol evidence to support its position, then a court is likely to find the agreement ambiguous as written and construe it against the financial services company. *See Pekar v. Local Union No. 181*, 311 F.2d 628, 636 (6th Cir.

1962); *Wolfgang v. Mid-America Motorsports, Inc.*, 111 F.3d 1515, 1524-25 (10th Cir. 1997). Moreover, if the financial services company is forced to offer parol evidence of its broad intent at the time of settlement, then the court is equally likely to accept a claimant's testimony of the opposite intent. *Van Koevering v. Manufacturer's Life Ins. Co.*, 234 F. Supp. 786 (W.D. Mich. 1964) (under the parol evidence rule, the court admitted extrinsic evidence of the plaintiff's intent and ultimately ruled in favor of the plaintiff). This leaves courts free to reason that, if a large financial services company failed to fully and adequately address its future obligations in its settlement agreement, then how can it penalize the consumer by permitting a discharge of those prospective obligations? See Owen M. Fiss, Comment, *Against Settlement*, 93 Yale L. J. 1073, 1076 (1984).

Understanding this background is essential to permanently resolving prospective claims against financial services companies. Moreover, by recognizing the differences, it is easy to understand how a standard release that may be routinely and effectively employed to resolve tort claims is likely to be woefully insufficient to protect a financial services company in connection with the settlement of a forward-looking financial instrument and/or product.

This article highlights important considerations and issues that a financial services company or a lawyer representing a financial services company should consider before executing a settlement agreement and release. Notably, as outlined in greater detail below, this author submits the better practice is to enter into a settlement agreement and release as a fully integrated document. Although this article does not purport to dictate specific language for inclusion in a settlement agreement and release, which may vary from state to state based on historical considerations, it does provide the reader with sample language and highlights points for

consideration and inclusion in a settlement agreement and release involving a financial services company.

1. Recite And Acknowledge Receipt Of The Consideration In The Agreement

Although mutual promises may be sufficient consideration for a release, *see, e.g., City Nat'l Bank of Fort Smith v. First Nat'l Bank and Trust Co of Rogers*, 732 S.W.2d 489, 493 (Ark. Ct. App. 1987), the better practice is to include the amount paid in settlement and to acknowledge receipt of that consideration in the settlement agreement. The argument against including the amount paid in settlement generally is expressed in terms of a desire to keep the price of peace outside the public domain. The counter-points, however, are that this information will become public anyway because (i) the agreement may not be confidential; (ii) the financial services company may be required to disclose it in financial or regulatory filings; and (iii) the claimant may disclose it in an action to set aside the agreement because the consideration was too low. Although this last point may be disquieting, the disclosure under such circumstances generally should not prove harmful to a financial services company.

Additional reasons exist for including the amount of consideration paid in the settlement agreement and release for a financial services company. First, as the world moves increasingly toward electronic transactions, including wire transfers, locating the documentation necessary to verify settlement payments made years in the past will be difficult. If an agreement was reached ten years ago concerning termination of an annuity, and the allegation was made today that the consideration was never paid, then imagine the difficulty in locating a copy of the canceled check to prove the consideration was paid.

Second, if the financial services company is obligated to offer evidence outside the four corners of the settlement agreement and release in support of its motion for summary disposition,

then the other side is better positioned to argue that it likewise can offer extrinsic rebuttal evidence. *See Outland v. Heritage Custom Constr.*, 2002 Ohio 6595, at ¶¶ 39-40 (Ohio Ct. App. 2002) (holding it was error to allow one side to introduce parol evidence, but not the other). A financial services company wants to present a case for summary disposition, not suggest through its own evidence that discovery and an evidentiary hearing are necessary. *See, e.g., Hensley v. Alcon Laboratories, Inc.*, 277 F.3d 535, 540-541 (4th Cir. 2002). By including all relevant terms in the settlement agreement and release, including the consideration paid and an acknowledgement of receipt of good and valuable consideration, the financial services company increases the chances that a simple motion has a substantial chance of disposing of the entire matter.

2. The Preamble Should Be Part Of The Agreement

After reciting the names of the settling parties, it is common to see a brief synopsis of the facts and circumstances leading to the settlement. Many parties fail to realize, however, that the preamble may not be part of the agreement. *See Fassler v. Okemo Mountain, Inc.*, 536 A.2d 930, 933 (Vt. 1987); *Trustees of Canandarqua Academy v. McKechnie*, 90 N.Y. 618, 626 (1882). Although this is not a problem if the draftsman appreciates this point, it can become a problem. If, for example, the denial of liability appears in the preamble, but not in the agreement, then is liability still in dispute after the agreement is signed? This could raise difficult questions about whether the settlement agreement might be relevant and discoverable in a future action based on the contention that the company admitted liability. *See Doe v. Methacton School District*, 164 F.R.D. 175, 176-77 (E.D. Pa. 1995) (confidential settlement agreement not discoverable if not relevant). A simple solution to this problem is to incorporate the preamble into the agreement. Consideration should be given to adding language stating that

the preamble is an integral part of and forms a basis for the parties' agreement. This should avoid any future contention that the preamble was unimportant, not integral, and not part of the settlement agreement.

3. The Need For A Broad Release Of Claims

Standard release language often exculpates a party from any liability to the other up through and including the date of the agreement and in regard to the claims stated or that could have been stated in a specific lawsuit. The impact of this standard language on the cash value in a whole life insurance policy may be unclear, at best, and the party's rights and obligations may be equally unclear. In fact, if the release only purports to release rights through the date of the settlement, then it is debatable whether future accruing rights and obligations were intended to constitute a part of the agreement.

The careful practitioner should consider crafting the release to cover not only past but also future benefits, rights, and obligations that the parties intend to resolve through the release. If, for example, the intent is to have the releasing party release all right, title, and interest in the cash value of a whole life insurance policy, then include specific language addressing this point in the release provision. Similarly, if the intent is that the claimant will relinquish all rights to future annuity, disability, and/or pension plan benefits, then include language specifically releasing those rights in the release.

Although language extending the release to "heirs, successors, and assigns" may seem common, this language is absolutely essential for a financial services company. Indeed, this language may serve as a bar to claims asserted, for the first time, after the death of the claimant. *Cf. Kelley v. Burnsed*, 805 So.2d 1101, 1104 (holding heirs and assigns were bound by contract after death of the original contracting party). A financial services company should not count on

the courts to broadly construe a settlement agreement that is not broadly written and that does not explicitly or by necessary implication clearly contemplate the release of the asserted claim. *See Bernstein v. Kapneck*, 430 A.2d 602, 606 (Md. 1980).

4. Advice Of Counsel Provision Is Important

Although the law encourages the settlement of disputes and generally presumes a release is valid, *Schmitt-Norton Ford, Inc. v. Ford Motor Co.*, 524 F. Supp. 1099, 1102 (D. Minn. 1981), the key for a financial services company is making certain that resolved matters stay resolved. A provision essential to keeping matters resolved is one providing that the settlement agreement was executed with the benefit of and on the advice of independent counsel. *Id.*

If a settlement agreement and release is challenged based on allegations that it was “obtained by fraud, deception, misrepresentation, duress, or undue influence,” *Skrbina v. Fleming Cos., Inc.*, 45 Cal. App. 4th 1353, 1366 (1996); *Bennett v. Coors Brewing, Co.*, 189 F.3d 1221, 1231 (10th Cir. 1999), then the advice of counsel provision, coupled with the integration clause, may be important tools for the defense. Assuming a challenge is made based on fraud or other similar grounds, then the inclusion in the settlement agreement and release of a provision expressly reciting that the document was executed with the benefit of and on the advice of independent counsel will be important. *Fonseca v. Columbia Gas Sys., Inc.*, 37 F. Supp. 2d 214, 229 (W.D.N.Y. 1998).

Absent the most egregious circumstances, it is hard to imagine a lawyer alleging he or she was duped into settling on unfavorable terms. *See Creamer v. Helferstay*, 448 A.2d 332, 333-35 (summarizing circumstances). At most, a lawyer claiming to be “duped” might be able to allege he or she was unaware of material facts at the time of settlement. Absent fraud, an essentially unilateral mistake of settling on unfavorable terms generally is not grounds for setting

aside a settlement agreement. *See id.* at 339-42 (explaining that absent fraud, duress, or undue influence, a unilateral mistake usually is not grounds for setting aside a settlement).

Assuming counsel alleged a lack of full knowledge of the material facts, it is hard to imagine a court holding that opposing counsel had some affirmative duty of disclosure to an adversary in litigation. *See Spiegel v. Cont. Ill. Nat. Bank*, 609 F. Supp. 1083, 1088 n.11 (N.D. Ill. 1985) (finding no duty to disclose in context of adversarial litigation). Moreover, settlement discussions frequently involve what is referred to as “puffery,” which is a far cry from fraud. *See Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 981 (6th Cir. 2003); 1995 U.S. App. LEXIS 9830, at *2-3 (4th Cir. Apr. 6, 1995); *Promotion in Motion v. Kenny’s Candy Co.*, 1999 U.S. Dist. LEXIS 22174, at *10 (D.N.J. Nov. 29, 1999).

Indeed, relatively few settlements are achieved without both sides engaging in some degree of puffery as to the quality of their evidence, witnesses, trial skills, prospects at trial, and rulings on dispositive motions and motions *in limine*. *See Addo v. Globe Life and Accident Ins. Co.*, 230 F.3d 759, 764 (5th Cir. 759); *Gwyn v. Wal-Mart Stores, Inc.*, 955 F. Supp. 44, 46 (M.D.N.C. 1996). Puffery between counsel in the course of the settlement negotiations will rarely, if ever, rise to the level of actionable fraud. This is particularly true when the agreement makes clear that the parties each had separate and independent counsel and advice at the time they entered into the agreement.

The provision regarding the advice of separate and independent counsel also may be important in determining whether the purported reliance was “reasonable.” *Felix v. Lucent Tech.*, 387 F.3d 1146, 1164-65 (10th Cir. 2004) (reasonable reliance on misrepresentations is required to prove fraud). The point could be argued that the attorneys were posturing (puffing) to each other, both were experienced counsel, and both understood what they were doing. Since

each side had independent counsel of their own choosing, which was not limited to the negotiating counsel, the claim of “reasonable” reliance on opposing counsel is inherently unreasonable. *See Finn v. Prudential-Bache Sec. Inc.*, 821 F.2d 581, 586 (11th Cir. 1987).

5. Integration And Advice Of Counsel – Better Together

No settlement agreement is complete without an integration clause. Indeed, an integration clause, coupled with an advice of counsel clause, are a powerful combination against any attempt to set aside the settlement agreement based on fraud, duress, or undue influence. *See Vigortone AG Prods., Inc. v. AG Prods, Inc.*, 316 F.3d 641, 644 (7th Cir. 2002) (explaining parol evidence rule); *Bennett*, 189 F.3d at 1231 (finding that a transaction generally is not induced by duress where a party was advised by counsel). A typical integration clause might read as follows:

This Agreement constitutes the entire Agreement between the parties, and no representations, agreements, or understandings of any kind, either written or oral, shall be binding upon the parties unless expressly contained herein. This Agreement is a complete and exhaustive statement of the terms of the parties’ agreement, which may not be explained or supplemented by evidence of consistent additional terms or contradicted by evidence of any prior or contemporaneous agreement. No modification of this Agreement shall be effective unless it is in writing and signed by each of the parties. *Id.*

In addition to helping defeat any misrepresentation claims, this provision should bar any party from (i) offering extrinsic evidence to interpret the terms of a fully integrated unambiguous agreement; (ii) claiming the agreement was not what the parties intended; and/or (iii) claiming the agreement was modified, amended, or rescinded by oral agreement. *See generally Nigrelli v. Catholic Bishop of Chicago*, 1995 U.S. App. LEXIS 28271 (7th Cir. Oct. 11, 1995) (unpublished).

Another important aspect of the integration clause pertains to what is generally referred to as the parol evidence rule. *Vigortone*, 316 F.3d at 644 (explaining parol evidence rule). The

parol evidence rule generally bars oral testimony about antecedent or contemporaneous conversations, negotiations, agreements, or understandings between the contracting parties, if offered to vary or contradict the terms of a fully integrated contract. *See id.* The parol evidence rule, in fact, is a matter of substantive state law, not a rule of evidence. *See id.* (noting the need to inquire whether the parole evidence rule applies in Illinois). This point may be particularly noteworthy in terms of what law will apply to the agreement and whether an action is filed in state or federal court. *See Patton v. Mid-Continent Sys., Inc.*, 841 F.2d 742, 749-50 (7th Cir. 1988). A federal court sitting in diversity jurisdiction will look to the relevant state law to determine the applicability of the parol evidence rule. *See Vigortone*, 316 F.3d at 644 (looking to Illinois law).

The parol evidence rule, not surprisingly, has exceptions. If an agreement “appears to incompletely express the parties’ agreement,” then the court may permit the introduction of extrinsic evidence. *See Wolt v. Sherwood*, 828 F. Supp. 1562, 1566 (D. Utah 1993) (the release did “not contain an integration clause to indicate that its [sic] sets forth all of the terms of the settlement”). An example of this exception is an agreement referring to an attached exhibit A never, in fact, attached to the agreement. *Condrey v. Suntrust Bank of Ga.*, ___ F.3d ___, 2005 U.S. App. LEXIS, at *12-13 (5th Cir. Nov. 1, 2005). The Court may permit parol evidence to establish what exhibit A was supposed to be. If the court finds the agreement ambiguous, then extrinsic evidence may be allowed to resolve any ambiguity. *See Wolt*, at 1565.

An additional benefit of the integration clause is that it carries great weight that the final agreement is exactly what the parties intended. *Blackledge v. Allison*, 431 U.S. 63, 75 n.6, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977). The inclusion of an integration clause reduces the chances that the court will find the agreement ambiguous.

Whether an integration clause will be considered sufficient to bar a later claim for fraudulent inducement may depend on whether the language in the integration clause is broad enough to cover the representations forming the basis for the fraud claim. *Mfrs. Hanover Trust Co. v. Yanakas*, 7 F.3d 310, 316 (2d Cir. 1993). The language quoted above is the kind of language found to be sufficient to bar a releasor's claim of fraudulent inducement. Indeed, this language expressly disclaims the existence of any representations upon which plaintiff could rely and further suggests that any alleged reliance on such representations would be unfounded. Thus, the claimant may be unable to prove two of the elements of a typical fraud claim: misrepresentation and reasonable reliance.

Although the parol evidence rule may serve some of the same purposes as an integration clause, they are not redundant. Given the exceptions to the parol evidence rule, the strong desire to avoid re-litigation of settled issues, the inability to anticipate all possible future court actions, all possible future forums, and all possible future legal theories, including an integration clause and a favorable choice of law provision, will increase the chances of prevailing in or averting any subsequent challenge to the validity of the settlement agreement and release.

6. Ownership Of Claims And The Financial Instrument

A well-drafted settlement agreement should include a provision confirming the claimant's ownership of the claims alleged and released in the settlement agreement. In the context of forward-looking financial instruments, however, the settlement agreement should go one step further and include a representation and warranty that the releasing party is the owner of the pertinent financial instrument. The careful practitioner should also take care to confirm that the releasing party is, in fact, what he or she purports to be – the owner of the relevant financial instrument. If more than one owner is identified, or if more than one person may have an

ownership interest (*e.g.* co-trustees), then all potential parties must verify ownership and sign the settlement agreement and release. Although a trustee may be authorized to sign the settlement agreement, from a practical perspective, a financial services company is not interested in litigating this issue and should not be exposed to this risk. The better practice is to ensure that the proper parties all sign and verify ownership of both the claims and the financial instrument.

7. The Importance Of Surrender, Return, Cancellation, And Relinquishment Of All Rights Under The Financial Instrument

Regardless of whether the financial instrument is a life insurance policy, annuity, stock, investment account, or some other vehicle, it is critical that the financial services company obtain the benefits of its bargain. If this means the insurance policy, annuity, or stock owned by the releasing party is to have no further value, then the prudent practitioner should insist on provisions in the settlement agreement and release (i) obligating the releasing party to surrender the original policy, stock certificate, annuity, or other like documents; and (ii) confirming that the policy, stock, annuity, or other like documents are canceled; all rights and obligations incident thereto are void and of no further force and effect; and all rights, duties, and obligations are extinguished as of the date of the settlement agreement and release.

The settlement agreement should specifically provide that the parties agree the releasing party shall have no right to receive any past, present, or future rights or benefits of any kind or nature under the specific instrument. Conversely, the settlement agreement should provide that the financial services company has no further obligations of any kind or nature, either past, present, or future, under the financial instrument.

If the financial instrument could be returned to the company, then the prudent practitioner should require the formal surrender of the original and all copies of the policy, annuity, or bond. If the financial instrument could be returned to the company but the claimant is unable to locate

it, then the prudent practitioner should consider asking for a representation and warranty that the document cannot be located and, if it is located, will be destroyed immediately and cannot be returned to the financial services company for any reason. A related provision stating that the policy, annuity, or bond is canceled and of no further force, effect, or value of any kind or nature, even if located in the future, should also be included.

The language outlined above, in conjunction with a broad release, should avoid situations where the releasing party claims the right to receive cash value in a whole life policy, death benefits, disability benefits, or future annuity payments. Indeed, even if the releasing party is unquestionably trustworthy, his or her descendants may not be; this provision will help guard against such prospective claims.

8. Confidentiality Clause – Its Necessity And Extent Of Inclusion

Although most financial services companies prefer settlement agreements to include confidentiality clauses, this is an increasingly contentious issue. From the financial services company's perspective, the benefits are obvious. The financial services company wants to avoid adverse publicity, which may tarnish the reputation of the company and precipitate additional claims. Although some releasing parties may not wish to keep a settlement agreement confidential, if the releasing party makes clear from the beginning that confidentiality is a part of the agreement, then obtaining this type of provision is often easier than it would be if the issue is not broached until late in the drafting process.

Two related points about confidentiality are worth mentioning. As a threshold matter, consider including a statement in the settlement agreement that both parties agree not to violate the confidentiality agreement. The parties could agree that they may disclose only the following:

“Plaintiff and ABC Worldwide Financial Services agree to resolve this matter upon terms mutually acceptable terms without either party’s admitting liability.”

If a confidentiality provision permits disclosure in response to a court order or for good cause, then this may expose the “confidential” settlement agreement to discovery in subsequent actions involving different parties. *Brant v. CCG Financial Corp.*, 1989 U.S. Dist. LEXIS 15269, *8-9 (D. Ore. Dec. 14, 1989). Although the majority view is that courts should encourage settlements by employing a heightened standard of review before ordering production of a confidential settlement agreement (*see, e.g., Young v. State Farm Mut. Auto Ins. Co.*, 169 F.R.D. 72, 79 (S.D.W.Va. 1996)), other courts have found no additional scrutiny is necessary or appropriate. *See Merrill v. Waffle House, Inc.*, 227 F.R.D. 475, 478 (N.D. Tex. 2005).

A secondary consideration is whether to seek to impose stipulated consequences for a breach of the confidentiality provision. A provision stipulating to liquidated damages equal to 50% of the settlement amount if plaintiff breaches the confidentiality provision may be particularly appropriate if confidentiality is a critical component of the settlement agreement. If a liquidated damages provision is included, then care should be given to setting the right amount. In Maryland, for example, liquidated damages cannot be penal and must fairly approximate the damages likely to be suffered by the non-breaching party. *United Cable Television of Baltimore LP v. Burch*, 732 A.2d 887, 899-900 (Md. 1999). Moreover, it should be noted that, if the court orders disclosure of the confidential terms of a settlement agreement, then the court may not enforce the liquidated damages provision in the confidential settlement agreement. *See Kalinauskas v. Wong*, 151 F.R.D. 363 (D. Nev. 1993).

The question of the effectiveness of the confidentiality clause also may turn on such mundane variables as whether the second action seeking the discovery is pending in federal or

state court. In a federal court action in Florida, the court denied a sex discrimination plaintiff's request to discover confidential settlement agreements in other sex discrimination cases against the employer absent a showing that the information was relevant. *Walker v. Prudential Prop. & Cas. Ins. Co.*, 286 F.3d 1270, 1280 (11th Cir. 2002). Contrast this with a state court action in Florida, where plaintiffs sought to depose a plaintiff from an earlier case that had resulted in a settlement agreement including a confidentiality clause prohibiting responding "in any way to any inquiry of any kind whatsoever with regard to the facts surrounding the case/claim." *Scott v. Nelson*, 697 So.2d 1300 (Fla. Dist. Ct. App. 1997). The 'common defendant' sought a protective order to prevent the deposition from taking place. *Id.* The trial court ordered that the earlier plaintiff could testify to factual matters concerning the allegations in the earlier lawsuit but not to procedural aspects. *Id.* On appeal, the order was affirmed based on (i) the trial court's broad discretion in handling discovery; (ii) public policy considerations that encouraging settlements is less important than the suppression of evidence; and (iii) the relevance of the evidence sought. *Id.* at 1301. Contrast this with a case where the settlement agreement contained a strict confidentiality clause that had no such exception for disclosure pursuant to a court order or judicial process. *Hasbrouck v. BankAmerica Hous. Servs., Inc.*, 190 F.R.D. 42, 43 (N.D.N.Y. 1999). The court upheld the magistrate judge's decision to grant a full protective order precluding disclosure of the facts and circumstances surrounding the settlement agreement. *Id.* at 45.

The Georgia Court of Appeals has taken yet another position holding that there is an implied term in any confidentiality clause in a settlement agreement that a party can "testify or otherwise comply with a subpoena, court order, or applicable law." *Barger v. Garden Way, Inc.*, 499 S.E.2d 737, 741 (Ga. App. 1998). In *Barger*, plaintiff injured his hand in a wood chipper

and sued the manufacturer. He sought details of other persons injured by the same product and the disclosure of any relevant information purportedly subject to confidentiality agreements. *Id.* at 724. The defendant opposed this request, contending the trial court had no authority to make the defendant surrender rights freely bargained for. *Id.* The trial court accepted this position, but was subsequently overturned and defendant was required to answer the discovery. *Id.* Significantly, however, the precise language of the relevant confidentiality clause was never provided to the Court.

These cases demonstrate the need for careful consideration of the language to be included in a confidentiality clause. Although there is no “one size fits all” solution, careful consideration of the benefits and burdens of various confidentiality provisions is appropriate and the provisions should be tailored to the needs of the specific financial services company.

9. Deny Liability

By including a paragraph specifically denying liability for the claims asserted and stating that the settlement agreement is intended to resolve disputed claims, the party paying the consideration is accomplishing two goals. First, the paying party is not conceding the existence of grounds for imposing liability, which could have important consequences in terms of reporting obligations (accounting, securities, Sarbanes-Oxley, or otherwise). Although the compromise of a disputed claim may be reportable under certain circumstances, the disclosure of the compromise of a disputed claim rarely rises to the level of a significant corporate event with prospective and adverse consequences. Second, the paying party is laying the foundation for the argument to exclude the settlement agreement in any future cases. Although a “confidential” settlement agreement may be discoverable in subsequent litigation, *Doe v. Methacton School District*, 164 F.R.D. 175, 176 (E.D. Pa. 1995) (recognizing that relevant settlement agreements

are discoverable); *Porter Hayden Co. v. Bullinger*, 350 Md. 452, 466 (1998) (“[T]he relevant portions of ... settlement agreements are discoverable.”), it may not be admissible at trial because it is only evidence that the parties compromised a disputed claim and, therefore, is not relevant in future actions. *See, e.g.*, Fed. R. Evid. 408.

10. Choice Of Law And Choice Of Forum – Important Decisions With Important Impact

Forum selection and choice of law provisions are presumptively valid. *The Bremen v. Zapata Off-Shore, Co.*, 407 U.S. 1, 92 S.Ct. 1907, 513 L.Ed.2d 513; *Tjontveit v. Den Norske Bank ASA*, 997 F. Supp. 799, 805 (S.D. Tex. 1998). Although choices of law and forum generally are considered on a state-by-state basis, if the underlying claims are predicated on federal law, then careful consideration should be given to whether state law will apply under any circumstance. *See Maynard v. Durham and Southern Railway Co.*, 365 U.S. 160 (1961) (validity of a release under the Federal Employers’ Liability Act presents question of federal law, not state law).

In order to ensure the courts give effect to the parties’ choice of forum, consider including mandatory terms such as “exclusive,” “shall,” and “only.” *Cable Tel. Servs., Inc. v. Overland Contracting, Inc.*, 574 S.E.2d 31, 34-35 (N.C. App. 2001). A relatively typical forum selection and choice of law provision might be the following:

Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of _____ without regard to Choice of Law principals. This Agreement shall be enforced only in a court of competent jurisdiction and venue within the State of _____.

The obvious advantage to this clause is convenience, assuming forum is something the parties are willing to agree on. If a party negotiating from a dominant position imposes an unreasonable forum, then the choice of law clause may not be given effect where the chosen

state has no reasonable relation to the parties or the nature of the agreement. *Robinson v. Robinson*, 778 So.2d 1105, 1117-18 (La. 2001) (North Carolina choice of law provision in settlement agreement is against public policy because one party would unfairly benefit and no significant connection was present); *Lang Tendons, Inc. v. Great Southwest Mktg. Co., Inc.*, 1994 WL 159014, *4 (E.D. Pa. 1994). This is not to suggest, however, that it would be inappropriate to consider how a particular state law might construe and/or enforce the settlement agreement.

Although the presumptive validity of a choice of law or choice of forum provision can be rebutted, the burden is on the party challenging that provision. *See, e.g., Weiss v. La Suisse, Societe D'Assurances Sur La Vie*, 154 F. Supp. 2d 734, 736 (S.D.N.Y. 2001). Moreover, the party challenging the provision has the burden of showing the clause is unreasonable because (1) it was induced by fraud or overreaching; (2) of the grave inconvenience or unfairness of the forum selected; (3) the choice of law is fundamentally unfair; or (4) enforcement contravenes a strong public policy of the forum state. *Id.* at 12-13.

11. Waiver Of Jury Trial – The Benefit And The Burden

Although most financial services companies might prefer to have a dispute concerning the validity of any settlement agreement determined by the court as opposed to a jury, the careful practitioner should take note of the legal issues inherent in including a waiver of jury trial provision in a settlement agreement. In Maryland, for example, it seems settled that “parties can contractually waive their right to a jury trial,” *Walther v. Sovereign Bank*, 386 Md. 412, 442 (2005), and that they can do so before any dispute or litigation arises, *e.g., ST Sys. Corp. v. Md. Nat’l Bank*, 112 Md. App. 20, 33-35 (1996) (loan agreement documents). Pennsylvania courts likewise enforce prelitigation waivers of the right to jury trial. *Eighth-Val, Inc. v. Parkinson*, 773 A.2d 1248, 1256 (Pa. Commonw. 2001); *Academy Indus., Inc. v. PNC Bank, N.A.*, 54 Pa.

D. & C. 4th 424, 427-428 (Pa. Commonw. 2001; *Mesne Props., Inc. v. Penn Mut. Life Ins. Co.*, 2001 Phila. Ct. Com. Pl. LEXIS 105, *14-*17 (April 6, 2001).

In *Grafton Partners L.P. v. Superior Court of Alameda County*, 36 Cal. 4th 944 (2005), the California Supreme Court held that prelitigation jury trial waiver agreements are unenforceable. 36 Cal. 4th at 952-61. The Georgia Supreme Court reached the same conclusion eleven years earlier, in *Bank South, N.A. v. Howard*, 444 S.E.2d 799 (Ga. 1994).

If the decision is made to include a provision waiving jury trial, then consider including the provision in all capital letters in order to avoid any claim that it was inconspicuous and was slipped by both claimant and counsel. Another reason to employ capital letters is the possibility of a reviewing court's determination that the releasor was giving up a fundamental constitutional right. (U.S. Const., Amend. VII, preserving inviolate the common law right to a jury trial for legal claims.) Although including this provision in all capitals runs the risk that claimant's counsel may object to its inclusion, if the provision is included after an objection is made, then the provision unquestionably was accepted by the claimant as part of the compromise necessary to achieve a settlement. Although this would not overcome any constitutional deficiency, if any, found by a reviewing court, it should weigh heavily in favor of the released parties in any other context.

An example of language that might be appropriate for inclusion in a settlement agreement seeking a waiver of the right to jury trial is as follows:

Waiver of Jury Trial. ALL PARTIES TO THIS AGREEMENT HEREBY WAIVE TRIAL BY JURY IN ANY ACTION, PROCEEDING, SUIT, COUNTERCLAIM, CROSS-CLAIM, OR THIRD-PARTY CLAIM BROUGHT BY ANY OF THE PARTIES HERETO ON ANY MATTERS WHATSOEVER ARISING OUT OF OR IN ANY WAY RELATED TO OR CONNECTED WITH THIS AGREEMENT.

Putting aside the constitutional question, this provision is construed under basic contract law (*Cantor Fitzgerald, Inc. v. Cantor Fitzgerald, L.P.*, 2001 WL 589028, *2 (Del. Super.) (unpublished)), and parties to a contract generally are entitled to waive their right to a jury trial (*Seaford Assoc. v. Hess Apparel, Inc.*, 1993 WL 258723 *2 (Del. Super.) (unpublished); *see also Fleet Nat. Bank v. Hartstone*, 1997 WL 557564, *14 (D. Mass.) (striking jury demand by a party to a settlement agreement containing an express waiver of the right to a jury trial)). So long as there is clear, unambiguous waiver of a jury trial, the waiver should be enforceable. *Bonnie-Lassie Sportswear, Inc. v. Century Factors, Inc.*, 127 N.Y.S.2d 740, 741 (N.Y. App. Div. 1954); *cf. Browning v. Holloway*, 620 S.W.2d 611, 618 (Tex. Civ. App. 1981) (rejecting defendant's argument that language in settlement agreement gave court fact-finding power and was therefore a waiver of right to jury trial).

A careful practitioner including a waiver of jury trial provision almost without exception should include a severability provision in the settlement agreement. The reason to do so is to avoid giving a claimant grounds to attack the entire settlement agreement based on the alleged constitutional invalidity of one provision – waiver of jury trial. Indeed, even if this one provision is determined to be invalid, it seems likely that in most cases the paying party will continue to desire judicial enforcement of the remaining settlement terms.

12. Severability – Generally A Necessary Provision

“Whether a contract is entire or severable generally is a question of intention, to be determined from the language employed by the parties, viewed in the light of the circumstances surrounding them at the time they contracted.” *Christian v. Christian*, 365 N.E.2d 849, 856 (N.Y. 1977); *accord, Barden & Robeson, Corp. v. Timmerman*, 497 N.Y.S.2d 196, 197 (N.Y. App. Div. 1986). The District Court of Appeals in Florida found error in the lower tribunal's

decision not to apply the severability clause and, in failing to do so, setting aside the entire settlement agreement. The appeal court found the severability clause to be sufficiently broad that the solitary invalid term could be struck, leaving the rest of the agreement effective. *Brevard County Bd. of Comm'rs v. Williams*, 715 So.2d 1100 (Fla. App. 1998). There are instances, however, when an entire agreement will be deemed invalid despite a severability clause. If the questionable term is at the heart of the agreement, and striking that term would render the rest of the agreement mere “rhetoric,” then the entire agreement may be void. *In re United States Brass Corp.*, 277 B.R. 326, 330, 332 (E.D. Tex. 2002).

A typical severability clause provides:

If any portion or portions of this Agreement are held by a court of competent jurisdiction to conflict with any federal, state, or local law, and as a result such portion or portions are declared to be invalid and of no force or effect in such jurisdiction, all remaining portions of this Agreement shall otherwise remain in full force and effect and be construed as if such invalid portion or portions had not been included herein.

Although the purpose of this clause is largely self-explanatory, for some of the reasons discussed above with respect to waiver of jury trial, the provision may become important for unanticipated and prospective reasons. If, for example, a court holds that a certain provision in a settlement agreement is contrary to a particular state’s public policy, then the paying party may prefer to have the offending provision declared invalid without voiding the entire settlement agreement.

13. Tax Consequences Provision Is Absolutely Essential

An issue that frequently arises during settlement negotiations is the tax consequences of the payment being made as part of the settlement. Plaintiff, of course, wants as much of the recovery as possible to be non-taxable income. The settling defendant generally is interested

only in making clear that it has no responsibility for reporting or paying any tax. An example of such a clause follows:

Tax Consequences. The undersigned parties acknowledge that no party to this Agreement has made representations concerning, nor shall any party be responsible in any manner for, any income tax consequences to any other party arising out of this Agreement and/or the above-mentioned consideration. Any tax liability of Releasor to any federal, state, or local taxing authority shall be Releasor's exclusive responsibility. Releasor agrees to make no claim against the Releasing Party regarding the reporting, if any, to taxing authorities of any payment made pursuant to this Agreement or for the payment or reimbursement of any tax consequences resulting to Releasor as a result of any payment made pursuant to this Agreement.

This is not to say that settlement agreements are written without either party's consideration of tax implications. Indeed, certain contract and tort personal injury damages and consequential damages arising from these claims may be excludable from income for tax purposes. 26 U.S.C.A. § 104; *see also Lane v. U.S.*, 902 F. Supp. 1439, 1443 (W.D. Okl. 1995) (acknowledging certain insurance "contract damages are excludable from income ..."); *C.I.R. v. Schleier*, 515 U.S. 323, 327 *et seq.*, 115 S.Ct. 2159, 132 L.Ed.2d 294 (1995) (amounts received in settlement for Age Discrimination in Employment Act claim did not fall within exclusion from gross income as damages received on account of personal injuries or sickness). "When the settlement agreement allocates clearly the settlement proceeds, ... the allocation is generally binding for tax purposes." *Robinson v. C.I.R.*, 102 T.C. 116, 127 (1994), *aff'd in part, rev'd in part*, 70 F.3d 34 (5th Cir. 1995). In determining whether the income is excludable, generally speaking, the "express language in a settlement agreement is the most important factor," but a court is not "bound by express allocations in a written settlement agreement if the parties did not engage in *bona fide*, arms-length adversarial negotiations." *McKay v. C.I.R.*, 102 T.C. 465, 482 (1994), *vacated on other grounds*, 84 F.3d 433 (5th Cir. 1996) (unpublished). This is

particularly true when the correct allocation can be determined from other evidence, which reveals that the payment represented something other than that stated in the agreement. *Millenbach v. C.I.R.*, 318 F.3d 924, 933-34 (9th Cir. 2003).

If the financial services company is asked to consider allocating payment in a manner intended to receive favorable tax treatment for the plaintiff, then the financial services company might consider asking for similar favorable terms. If plaintiff wants to allocate the settlement amount to a particular claim in order to seek favorable tax treatment, then the financial services company should consider asking plaintiff to acknowledge that any and all other claims (for which settlement payment might be considered for tax purposes) have no absolutely no merit, or at the very least are factually and legally deficient in this case. Even if the financial services company agrees to some sort of allocation language in the settlement agreement, however, it still should insist on a provision providing that no tax consequence is assured or in any way relevant to the validity of the settlement agreement.

14. Further Assurances Provision Is Often Worth Including

A further assurances provision can be particularly appropriate in the context of financial instruments. Either party may need the assistance of the other in connection with tax or record-keeping issues. For this reason, and to avoid unreasonable and unprincipled refusals to cooperate absent a payment in tribute, consider including a further assurance provision.

The parties agree to execute such further and additional documents, instruments, and writings as may be necessary, proper, required, desirable, or convenient for the purpose of fully effectuating the terms and provisions of this Agreement.

15. Consider Inclusion Of Provision Regarding Attorneys' Fees

Including a provision for the payment of attorneys' fees in the event of a breach of a settlement agreement can be a contentious issue, particularly if the provision is unilateral. For

this reason, if such a provision is desired, it makes sense to propose a mutual provision, meaning either party could recover attorneys' fees if there is a breach of the agreement. From the perspective of the payor party, such a provision often is viewed favorably because it helps to discourage frivolous challenges to the validity of the settlement agreement.

Conclusion

This article is not intended to anticipate every possible adverse consequence arising from a settlement agreement or to suggest that all future litigation concerning settlement agreements is avoidable. Rather, the point is that careful negotiation and drafting should avoid many future disputes and should keep most matters forever resolved. From a transactional viewpoint, it is cost effective to negotiate a carefully crafted and definitive settlement agreement. Even if only one lawsuit is avoided or summarily dismissed, then the settlement agreements' effectiveness is affirmed. In addition, by consistently employing a thorough and complete agreement, the vast majority of agreements will go unchallenged. Mounting a collateral attack on a carefully crafted and definitive settlement agreement is difficult and will impose high barriers to any potential challenge. In the small fraction of cases where a challenge is made, the court likely will be in a position to summarily dispose of the matter without permitting discovery or admitting any extrinsic evidence.