Settlement Tactics in US Litigation

Developing an effective settlement strategy and assessing the prospect of settlement throughout the life of a dispute are as important as handling the litigation itself. To reach the optimal outcome for the client given its legal, financial, and business circumstances, counsel should understand the various considerations that factor into the decision of whether, when, and how to settle litigation proceedings.

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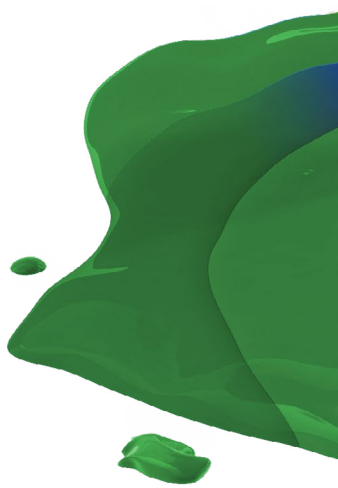

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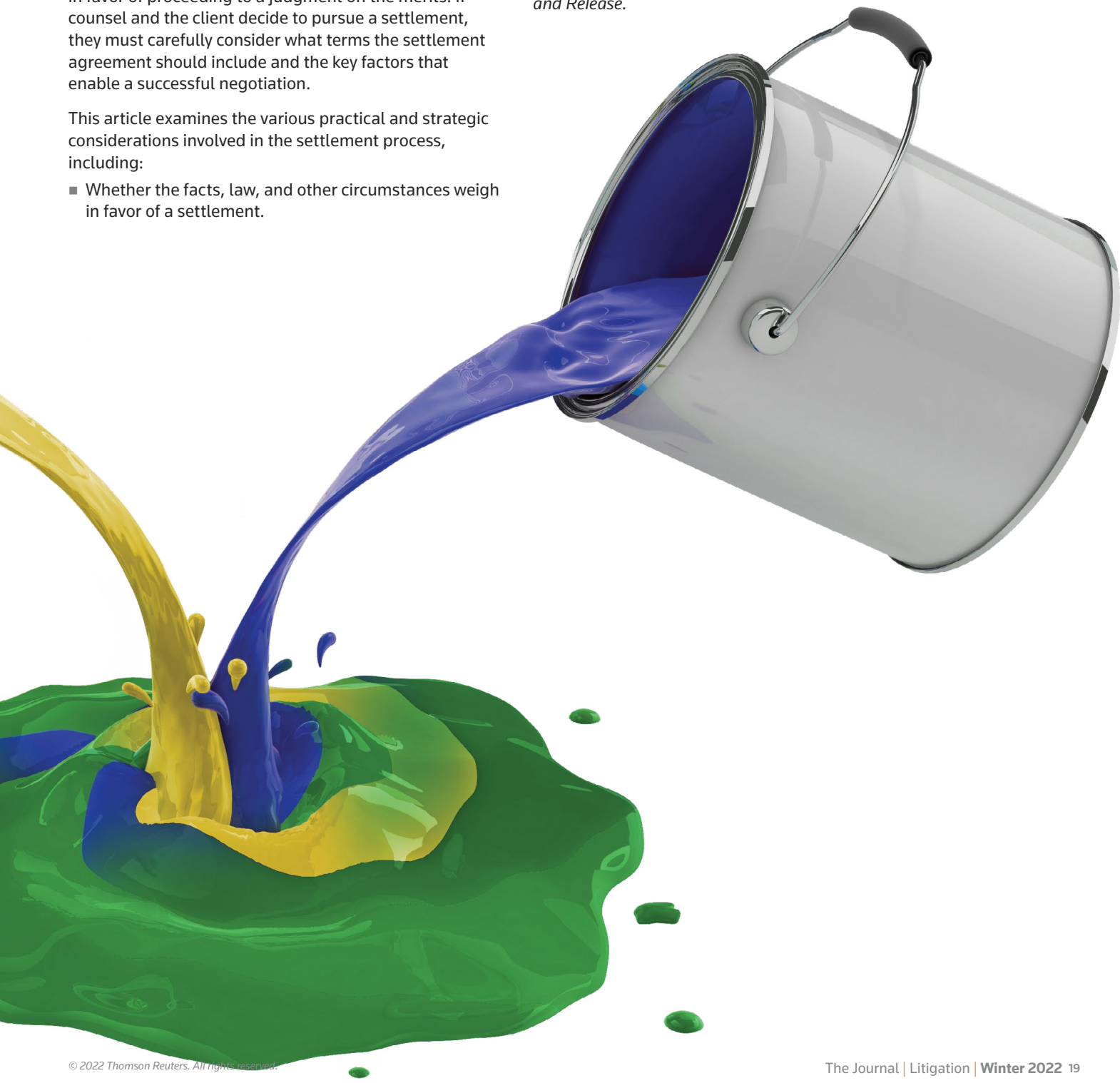
Given the significant costs and risks associated with litigating a case through trial, parties often benefit from settling their disputes. While it may be advantageous to settle early before litigation costs escalate and the parties' positions become too entrenched, doing so is not the best option for every case. In some circumstances, for example, delaying settlement discussions may increase the client's negotiating leverage. In other circumstances, the client's strong legal case and financial resources may weigh in favor of proceeding to a judgment on the merits. If counsel and the client decide to pursue a settlement, they must carefully consider what terms the settlement agreement should include and the key factors that enable a successful negotiation.

This article examines the various practical and strategic considerations involved in the settlement process, including:

- Whether the facts, law, and other circumstances weigh in favor of a settlement.
- The best timing for a settlement.
- The factors to consider for drafting and negotiating a favorable settlement agreement.
- How to present a settlement offer to the opposing party.
- The additional considerations involved in a multi-party dispute.

For a sample settlement agreement, with explanatory notes and drafting tips, see *Box, Settlement Agreement and Release*.



DECIDING WHETHER THE CLIENT SHOULD SETTLE

Determining whether to pursue litigation or consider settling involves many complex issues, not all of which are known at the outset of a dispute. When assessing whether a settlement would be worthwhile for the client, counsel should consider:

- The parties' resources.
- The costs of proceeding with litigation versus settling.
- The burden on management and employees given the time and resources they must devote to the litigation.
- The merits of the case.
- The potential for negative publicity or additional litigation.
- The business relationship of the parties.
- Other commercial considerations.

THE PARTIES' RESOURCES

Counsel should evaluate whether the better and more cost-justified strategy is to either:

- Pursue or defend the client's rights with the goal of achieving a more favorable result on the merits.
- Put the client in a more favorable negotiating position by pursuing settlement with the opposing side.

As part of this analysis, counsel should consider the parties' financial resources and examine whether it may be better to settle up front, with little litigation expense. For example, different considerations apply depending on whether counsel are representing:

- **A plaintiff against a defendant with limited resources.** In these situations, it may be preferable to settle soon after the dispute arises instead of later (see below *Deciding When the Client Should Settle*), especially if counsel anticipate incurring significant costs litigating the dispute (for example, with discovery expenses). Pursuing a lawsuit may result in a Pyrrhic victory, where the client wins but at considerable cost. For example, a long, drawn out litigation may result in the opponent being unable to pay a money judgment awarded to counsel's client, including the client's legal costs (assuming fee shifting is even possible).
- **A plaintiff with limited resources against a defendant with substantial resources.** It may not be worthwhile to litigate against a defendant with extensive resources who can afford the high costs of litigation if counsel's client cannot. In these situations, counsel may want to create an incentive for speedy resolution by offering to settle for less than the full value of the claim (if the settlement value is reasonable).
- **A defendant with substantial resources against a plaintiff with limited resources.** In these situations, counsel may want to litigate and not settle.

If the client has a strong legal position but lacks the financial resources to take on a well-funded opponent, counsel should consider pursuing third-party litigation financing (for more information, search Third-Party Litigation Financing in the US on Practical Law).

COSTS OF LITIGATION

At the outset of the dispute, counsel should conduct a cost-benefit analysis that takes into account:

- The potential litigation results.
- The potential settlement outcome.
- Near-term and long-term costs.

Counsel should consider and compare the cost and likelihood of obtaining a return for the client now against the risks and anticipated return of a future settlement or verdict, taking into account both the litigation expenses the client has already incurred and the additional expenses it likely will incur. In light of how quickly litigation expenses escalate, counsel should assess whether litigation makes sense given:

- **The amount at stake.** It may be worth settling a case if the cost of litigation far exceeds the sum at stake.
- **The cost of settling versus overall cost savings.** The client may save money in the long run by settling early, even if it has to pay a large amount to end the dispute.

Counsel should review and update this cost-benefit analysis periodically, including when any relevant changes emerge concerning the client's or the opponent's bargaining position.

BURDEN ON MANAGEMENT AND EMPLOYEES

Counsel should consider the burden, expense, and opportunity costs to the client's management and employees if they must devote substantial time and other resources to support the litigation. Corporate employees involved in litigation can typically lose a significant amount of work time to locating, collecting, reviewing, and producing records requested for discovery, as well as the additional time spent preparing for depositions or trial, or both. All of these factors can have a negative impact on the company's overall productivity.

MERITS OF THE CASE

Counsel should periodically assess and report to the client the factual and legal strengths and weaknesses of the case. These analyses typically evolve over the life of a lawsuit and should include, for example:

- Findings made through discovery requests.
- Projected expenses for additional necessary investigations and document reviews.
- Deposition results.
- Witness credibility assessments.
- Rulings on any pretrial and dispositive motions.
- New court decisions related to the case's subject matter.

Counsel should determine whether there are any deficiencies in the client's case, such as:

- **Evidentiary problems.** Counsel should consider:
  - the extent of any evidentiary issues and whether they can be overcome;
  - whether the client's case is dependent on information possessed by others and, if so, whether counsel can access and obtain the information and how expensive it may be to do so;
  - any potential admissibility issues and whether they can be resolved; and
  - whether the opponent may try to bog counsel down with expensive and time-consuming motion practice over discovery and the ability to use certain evidence.
- **Discovery issues.** Counsel should consider whether there are any potentially damaging documents that they may not want to disclose but would be discoverable if the client pursues the litigation. This factor alone may provide enough reason to settle.

NEGATIVE PUBLICITY AND PRECEDENTS

The client may be highly motivated to settle if it is concerned about the publicity associated with a public trial or if there is substantial risk that an unfavorable decision may lead to additional claims. This concern also may impact the client's negotiating leverage. On the other hand, if the client is concerned that a settlement may attract more litigation, it may be less inclined to settle. If the opposing party faces these issues, however, the client may have substantial negotiating leverage.

Search Managing Litigation PR for more on handling publicity related to litigation.

RELATIONSHIP OF THE PARTIES

Counsel should:

- Consider the ongoing relationship of the parties and the relationship the client wants to maintain in the future.
- Determine whether there are commercial benefits to an amicable settlement.
- Try to devise a way to incorporate a strategic component to the settlement that considers, and perhaps even advances, the current business relationship (see below *Collateral Benefits*). This requires creativity and considerable discussion with the client.

OTHER COMMERCIAL CONSIDERATIONS

Counsel should examine whether there are other commercial reasons for settling the case. For example, the dispute may have a negative impact on the client's business that extends beyond the pending lawsuit, such as:

- A drop in stock price.
- Disruption of ongoing business relationships.
- An inability to secure funding or investors.
- A negative impact on insurability.
- A reduction in key employees' productivity.
- The loss of any potential business advantage achievable through settlement.

DECIDING WHEN THE CLIENT SHOULD SETTLE

If there is a high probability that the client may settle, it is generally better to finalize the terms quickly, before the parties incur additional legal costs and their positions become too entrenched. While counsel should evaluate the prospect of settlement throughout the life of a dispute, there are several factors to consider in connection with the timing of a settlement. In particular, different strategic considerations apply depending on whether settlement discussions occur:

- Before versus after proceedings begin.
- During discovery.
- Before trial.
- During trial.
- After trial.

BEFORE VERSUS AFTER PROCEEDINGS BEGIN

Settling the dispute as soon as it arises before formal court proceedings begin can be advantageous to both sides, mostly because of the cost savings involved in avoiding discovery and related attorney costs. An early settlement is particularly appropriate where maintaining the relationship between commercial parties is a priority because the matter is resolved before the situation becomes irreversibly adversarial.

When initiating settlement talks at this stage of a dispute, counsel should emphasize:

- The parties' long-standing business relationship if they have one and the client's interest in continuing it.
- The ongoing alignment of the parties' business interests and how the right settlement agreement can preserve the benefits they have obtained by working together and understanding each other's needs.

On the other hand, when representing a plaintiff, counsel can give their client negotiating leverage by beginning formal court proceedings before engaging in settlement discussions. Counsel may accomplish this by demonstrating through the filing of a claim that the plaintiff is serious about pursuing its rights and by articulating in clear terms:

- How it intends to advance any claims.
- What the strength of any claims may be.

From a defendant's perspective, waiting to engage in a settlement dialogue until after court proceedings begin forces the plaintiff to commit to the process and incur the expense of preparing, filing, and serving the complaint. Waiting also can clarify whether the plaintiff was bluffing about its intentions and provides the defendant with the opportunity to assess the scope, nature, and strength of the plaintiff's claims.

DURING DISCOVERY

Discovery is often the most expensive part of litigation. Each party's relative discovery burdens should be compared and factored into the settlement analysis. Counsel should assess whether there is a strategic or financial advantage to incurring the expense of discovery before settlement discussions occur. There may be no benefit to taking on the expense of discovery only to engage in a settlement dialogue immediately after completing the discovery process. Key considerations include whether the discovery process may:

- Strengthen or weaken the client's positions.
- Provide the client with additional settlement leverage.

Counsel also may want to consider proposing to opposing counsel an agreement to limit discovery and design it to aid the settlement process.

Additionally, preparing for, taking, and defending depositions as part of the discovery process are time-consuming tasks for the deponents and the legal team and can drain human and financial resources. Although engaging in initial written discovery and document exchanges may be necessary to develop a settlement strategy, counsel should consider whether it is more beneficial to the client to have a settlement dialogue before deposition discovery. However, if deposition discovery may strengthen the client's factual or legal positions, the cost of deposition discovery may be justified.

BEFORE TRIAL

Costs escalate rapidly in the period leading up to trial. Counsel should consider whether there is a strategic opportunity to advance a settlement dialogue before these costs are incurred, when both sides may feel some amount of uncertainty (for example, before preparing dispositive motions or while they are pending before the court). Once the opposing party has incurred the cost of trial preparation, the opportunity to engage in a productive settlement dialogue may be lost.

Occasionally, parties agree on a settlement immediately before the start of trial. Although many of the trial-related costs have already been incurred at this stage, last-minute pretrial rulings (for example, motions *in limine*) often affect a party's negotiating position significantly. Counsel should evaluate whether their client's position was strengthened or weakened by pretrial rulings and re-evaluate their settlement position accordingly. Substantial trial expense can still be avoided when settling "on the courthouse steps." Additionally, counsel may be able to eliminate the risk of negative publicity and precedent by not proceeding to trial.

DURING TRIAL

The prospect of settlement does not necessarily end once trial begins. Counsel must evaluate the strength of their client's position objectively when a judge or jury is involved. The strength of the client's case may be affected by:

- How well the opening statements went.
- How effective opposing counsel are.
- How the evidence is entered into the record.
- Any new information that has come to light during the trial.
- The reactions from the judge or jury, or both, to the witnesses' testimony and evidence.

Counsel also should consider the following factors when deciding whether to engage in further settlement discussions during trial:

- The temperament of the judge.
- The length of the trial.
- The makeup of the jury.
- The substance and form of the anticipated points for charge (jury instructions).
- The verdict form.

AFTER TRIAL

After the trial has concluded, the parties may choose to reach a settlement:

- **Before the judge or jury makes a decision.** This outcome may be desirable where both parties are concerned that the case is not going to be properly decided. For example, a party may want to settle if it appears that the judge may misapply the law or the jury appears to be confused about the facts or how to apply the law. These circumstances may make an appeal (and the associated costs) appear inevitable and unattractive. A settlement at this point may be especially desirable if the trial went poorly for one party who wants to avoid an unfavorable judgment and the publicity associated with it.
- **After the trial court has entered judgment but before the filing of an appeal or a ruling by an appellate court.** If the trial court judgment is plainly vulnerable on appeal, a party may want to settle for a compromised amount. Often, the quality of the trial judge's opinion or consistency of the jury's findings on the evidence, both of which are beyond the parties' control, play a significant role in settlement discussions during this stage of litigation.

ACHIEVING A FAVORABLE SETTLEMENT

Regardless of when parties have settlement talks, the primary objective is usually to end the dispute. To achieve this in the most favorable way for their client, counsel should assess the strengths and weaknesses of all of the parties' positions accurately. In addition to an analysis of the material facts and controlling law, there are many other factors to consider, including:

- The specific individuals involved in the settlement negotiations.

- Collateral business benefits that can be realized through the settlement.
- Payment terms.
- Insurance issues.
- Legal costs.
- Which side should prepare the initial draft of the settlement agreement.
- The potential for similar claims against other parties, if counsel are representing the plaintiff.

PEOPLE AND PERSONALITIES

Counsel should understand and assess the individuals involved in the settlement decision-making process and determine whether they are the right people to be involved in the negotiation. For example, counsel should consider:

- The individuals' primary objectives.
- Whether the individuals have:
  - the necessary authority to reach a settlement; and
  - sufficient knowledge of the facts and legal issues.
- Whether any individuals are fact witnesses to the underlying dispute and, if so, whether they are too close to the issues to be effective in the settlement process.

In both domestic and international disputes, sensitivity to the cultural, ethnic, and local expectations of the individuals involved can be beneficial. Counsel also should consider whether a principal of the client or counsel should be the primary representative in the settlement process.

COLLATERAL BENEFITS

Occasionally, new business relationships can be tied into a settlement so that the agreement can be viewed (and publicized) as a win-win situation. Examples of this type of arrangement include:

- Having one of the parties become the distributor or supplier for certain products that were in dispute.
- Having one of the parties become a licensee or licensor of intellectual property that was in dispute.
- Creating a joint venture relative to the matter in dispute.
- Creating a new employment arrangement for a former or prospective employee.

PAYMENT TERMS

Achieving a favorable settlement involves negotiation of payment terms. During these discussions, counsel should consider addressing:

- **Whether to allow installment payments.** Where a settlement most likely will result in financial payments to the plaintiff, installment payments may achieve an overall greater recovery if the defendant cannot pay the entire judgment up-front.
- **The tax implications of a financial payment.** Counsel must discuss with the client the tax implications of a financial payment to settle a claim, regardless of whether the client is paying or receiving the settlement proceeds. Counsel should consult a tax specialist if counsel do not fully understand the tax implications of a potential settlement. The timing of a settlement payout, as well as the jurisdiction in which the payment is made, may impact the way tax authorities treat it. Keeping these issues and local laws in mind, counsel may want to delay, accelerate, or split up the settlement payment, or arrange for a specific country or state for payment transmittal, to avoid any unwanted tax consequences.
- **Non-cash alternatives to settle the dispute.** If the parties cannot agree on a cash payment to settle the dispute, counsel should consider non-cash alternatives to provide value to the opposing party. This type of arrangement can be accomplished by offering non-cash assets (for example, free or discounted goods that the opposing party needs) or by agreeing to engage or refrain from engaging in certain conduct, or both.

RELEVANT INSURANCE

The availability of insurance coverage for a liability can help or impede a settlement. The party that pays to settle a dispute must fully:

- Understand the extent to which insurance will provide coverage for the payment.
- Inform its insurance carrier about the imminent demand for coverage.

If insurance information has not already been discovered in the underlying litigation, counsel should consider whether it benefits the client's position to disclose this in the settlement discussions. A party must be careful about disclosing the existence or amount of insurance coverage for a claim because these types of disclosures can imply that it is prepared to settle up to a certain amount (and may put the party at risk of breaching its insurance policy terms).

Additionally, if and when settlement is discussed with insurers, it is necessary to seek the guidance of an attorney experienced in dealing with insurance carriers. No matter how well the underlying settlement is handled, all of that effort and work can be undone if the insurance carrier funding the litigation denies coverage.

Search Minimizing Litigation Costs by Maximizing the Value of Insurance Coverage for more on insurance coverage of litigation costs.

LEGAL COSTS

Commercial contracts occasionally provide the prevailing party with the right to recover its legal costs. If counsel's client must pay the opposing party's legal costs, counsel should request detailed breakdowns of the fees so that the client can assess their reasonableness and possibly negotiate a lower amount to be reimbursed. If paying the

opposing party's legal costs becomes a sticking point for the client, counsel should structure the settlement terms in a way that reduces or eliminates their impact. The attorneys involved in settlement negotiations are often the only participants in the settlement process who can diffuse the parties' emotions tied to these issues.

PREPARATION OF THE SETTLEMENT AGREEMENT

Counsel should consider whether they want to have primary control of the structure and format of the settlement agreement. If it is important to the client, counsel should seize the opportunity to prepare the initial draft from which the parties will further negotiate the terms. (For a sample settlement agreement, with explanatory notes and drafting tips, see *Box, Settlement Agreement and Release*.)

SIMILAR CLAIMS AGAINST ADDITIONAL PARTIES

When representing a plaintiff who may have similar future claims against other parties, counsel should ensure that the settlement agreement is not drafted so broadly that these potential future claims are also released. It may be appropriate to include an express reservation of rights against all non-parties to the agreement (for an example of this type of provision, see *Box, Settlement Agreement and Release*).

FORM OF THE OFFER

In addition to engaging in traditional confidential settlement discussions, there are several ways for parties to present a settlement offer to exert more pressure on the opposing party. For example, a party may make:

- An offer of judgment under Federal Rule of Civil Procedure (FRCP) 68.
- An open offer before the court.

Regardless of where or how a settlement offer is made, counsel should keep in mind that in federal actions, Federal Rule of Evidence 408, which prohibits the use of settlement negotiations at trial to prove liability, applies regardless of whether it is expressly referenced in a settlement-related communication (such as an offer or a counteroffer).

FRCP 68 OFFER OF JUDGMENT

FRCP 68 provides that a party defending against a claim may serve on an opposing party an offer that will allow judgment on specified terms. Tendering a settlement offer under FRCP 68 places the offeree at risk of incurring the offeror's litigation costs if the offeree does not accept the offer and the judgment ultimately is not more favorable than the unaccepted offer. These costs can sometimes include attorneys' fees (see *Marek v. Chesny*, 473 U.S. 1, 9 (1985), superseded on other grounds by statute, Civil Rights Act of 1991, Pub. L. No. 102-166).

Several states have similar procedural rules, including:

- New York (N.Y. C.P.L.R. §§ 3219-3221).
- Pennsylvania, where plaintiffs are precluded from obtaining delay damages for the time the offer was pending (Pa. R. Civ. P. 238).
- Tennessee (Tenn. R. Civ. P. 68).

Search FRCP 68 Offers of Judgment for more on FRCP 68 settlement offers.

OPEN OFFER BEFORE THE COURT

To the extent the judge or another judicial officer oversees the settlement discussions, making a formal offer in a court setting can have a positive impact for a party in that it:

- Can demonstrate to the court the reasonableness of its position.
- Forces the opposing party to engage in the dialogue or risk appearing unreasonable.

However, counsel must balance these potential positives against the risk of the court construing a party's offer as a sign of weakness.

MULTIPLE PARTIES

All of the above considerations apply whether there are two or more parties to a dispute. However, several additional considerations are worth noting in multi-party disputes involving related parties or divisions of liability for multiple defendants.

RELATED PARTIES

Counsel should determine whether any of the parties to the dispute are connected. If so, counsel should:

- Consider whether their relationship is significant to the dispute.
- Determine each party's potential liability exposures and obtain details on their financial resources.
- Find out whether their interests are aligned so that they are likely to coordinate their strategies and pool their ideas, information, and resources.

DIVISIONS OF LIABILITY

There is often a tension between focusing on the total amount the client may want to recover and negotiating individually with opposing parties to establish their individual share of liability. Picking off and settling with individual defendants (commonly known as the "divide and conquer" strategy) can be effective because it can:

- Put additional pressure on defendants who are unwilling to engage in a meaningful settlement dialogue.
- Result in a more favorable outcome overall than trying to achieve a single net result by negotiating collectively with all of the parties simultaneously.

If the case involves personal injuries, counsel should consider whether a joint tortfeasor release is appropriate or necessary.

Settlement Agreement and Release

This [Confidential] Settlement Agreement and Release (this "**Agreement**") is entered into as of [DATE] by and between (a) [NAME OF PARTY A] (["**DEFINITION OF PARTY A**"]) and (b) [NAME OF PARTY B] (["**DEFINITION OF PARTY B**"]). Collectively, [PARTY A] and [PARTY B] shall be referred to as the "**Parties**."

BACKGROUND

WHEREAS [DESCRIBE ORIGIN OF DISPUTE AND/OR LITIGATION BETWEEN THE PARTIES].

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and intending to be legally bound hereby, [PARTY A] and [PARTY B] hereby agree as follows:

AGREED TERMS

1. Payment by [PARTY B]. [PARTY B] will pay [PARTY A] the total sum of [AMOUNT IN WORDS] dollars (US$[NUMBER AMOUNT]) (the "**Settlement Payment**") as provided herein. The Settlement Payment shall be paid by [DESCRIBE MANNER OF PAYMENT] not later than [NUMBER] business days after counsel for [PARTY A] delivers an executed copy of this Agreement to counsel for [PARTY B]. [PARTY B] shall provide an executed copy of this Agreement to counsel for [PARTY A] not later than the date that [PARTY B] must pay the Settlement Payment.

The Parties acknowledge and agree that they are solely responsible for paying any attorneys' fees and costs they incurred and that neither Party nor its attorney(s) will seek any award of attorneys' fees or costs from the other Party, except as provided herein.

2. Taxes. [PARTY A] shall be solely responsible for, and is legally bound to make payment of, any taxes determined to be due and owing (including penalties and interest related thereto) by it to any federal, state, local, or regional taxing authority as a result of the Settlement Payment. [PARTY A] understands that [PARTY B] has not made, and it does not rely upon, any representations regarding the tax treatment of the sums paid pursuant to this Agreement. Moreover, [PARTY A] agrees to indemnify and hold [PARTY B] harmless in the event that any governmental taxing authority asserts against [PARTY B] any claim for unpaid taxes, failure to withhold taxes, penalties, or interest based upon the payment of the Settlement Payment.

3. Mutual Release. Each Party, on behalf of itself, its predecessors, successors, direct and indirect parent companies, direct and indirect subsidiary companies, companies under common control with any of the foregoing, affiliates, and assigns, and its and their past, present, and future officers, directors, shareholders, interest holders, members, partners, attorneys, agents, employees, managers, representatives, assigns, and successors in interest, and all persons acting by, through, under, or in concert with them, and each of them, hereby release and discharge the other Party, together with its predecessors, successors, direct and indirect parent companies, direct and indirect subsidiary companies, companies under common control with any of the foregoing, affiliates and assigns and its and their past, present, and future officers, directors, shareholders, interest holders, members, partners, attorneys, agents, employees, managers, representatives, assigns, and successors in interest, and all persons acting by, through, under, or in concert with them, and each of them, from all known and unknown charges, complaints, claims, grievances, liabilities, obligations, promises, agreements, controversies, damages, actions, causes of action, suits, rights, demands, costs, losses, debts, penalties, fees, wages, medical costs, pain and suffering, mental anguish, emotional distress, expenses (including attorneys' fees and costs actually incurred), and punitive damages, of any nature whatsoever, known or unknown, which either Party has, or may have had, against the other Party, whether or not apparent or yet to be discovered, or which may hereafter develop, for any acts or omissions related to or arising from:

(a) the [DESCRIPTION OF SUBJECT OF DISPUTE] (the "**Dispute**");

(b) [the action captioned [TITLE OF THE ACTION], pending in [COURT] (the "**Litigation**");]

(c) an agreement between the Parties;

(d) any other matter between the Parties; and/or

(e) any claims under federal, state, or local law, rule, or regulation [IDENTIFY SPECIFICALLY IF NECESSARY].

This Agreement resolves any claim for relief that is, or could have been alleged, no matter how characterized, including, without limitation, compensatory damages, damages for breach of contract, bad faith damages, reliance damages, liquidated damages, damages for humiliation and embarrassment, punitive damages, costs, and attorneys' fees related to or arising from the Dispute.

DRAFTING NOTE

MUTUAL RELEASE

Counsel should use the Mutual Release clause for two or more corporate parties. Counsel should revise the clause if any party is an individual. The mutual release is drafted broadly, and the parties may modify the scope of the release. For example, the parties may wish to:

- Not release each other from any and all claims but rather limit the release to the claims that serve as the basis for the dispute that this agreement is settling.
- Limit the parties that may be released.

Additionally, the parties may wish to supplement the release language as appropriate, including adding any statutory requirements required by the state law that governs the settlement agreement. For example, if the parties are settling a bodily injury claim, they should include release language that acknowledges compliance with Medicare and other applicable federal regulations.

4. No Outstanding or Known Future Claims/Causes of Action. Each Party affirms that it has not filed with any governmental agency or court any type of action or report against the other Party [other than the Litigation], and currently knows of no existing act or omission by the other Party that may constitute a claim or liability excluded from the release in paragraph 3 above.

5. Acknowledgment of Settlement. Each Party, as broadly described in paragraph 3 above, acknowledges that (a) the consideration set forth in this Agreement, which includes, but is not limited to, the Settlement Payment, is in full settlement of all claims or losses of whatsoever kind or character that it has, or may ever have had, against the other Party, as broadly described in paragraph 3 above, including by reason of the Dispute and (b) by signing this Agreement, and accepting the consideration provided herein and the benefits of it, each Party is giving up forever any right to seek further monetary or other relief from the other Party, as broadly described in paragraph 3 above, for any acts or omissions up to and including the Effective Date, as set forth in paragraph [NUMBER], including, without limitation, the Dispute.

DRAFTING NOTE

ACKNOWLEDGEMENT OF SETTLEMENT

Similar to the Mutual Release clause, the Acknowledgement of Settlement clause is worded broadly. If the parties wish to limit the scope of the settlement for the parties and claims being released, they may do so if this limitation is consistent with the state law governing the settlement.

6. No Admission of Liability. The Parties acknowledge that the Settlement Payment was agreed upon as a compromise and final settlement of disputed claims and that payment of the Settlement Payment is not, and may not be construed as, an admission of liability by [PARTY B] and is not to be construed as an admission that [PARTY B] engaged in any wrongful, tortious, or unlawful activity. [PARTY B] specifically disclaims and denies (a) any liability to [PARTY A] and (b) engaging in any wrongful, tortious, or unlawful activity.

7. [Special Relief Provided. [DESCRIPTION OF ANY SPECIAL RELIEF].]

8. [Dismissal of Litigation. [PARTY A] and its counsel shall take whatever actions are necessary to ensure that the Litigation is dismissed in its entirety as to all defendants named therein, with prejudice and without costs or fees, within [NUMBER] days of its receipt of the Settlement Payment. [PARTY B] will cooperate with [PARTY A] in securing the dismissal of the Litigation as appropriate.]

DRAFTING NOTE

DISMISSAL OF LITIGATION

Parties should include the Dismissal of Litigation clause if settling litigation. If the parties are already in litigation, they must take the appropriate procedural steps to dismiss the lawsuit in addition to signing the settlement agreement. For example, under certain circumstances, the plaintiff in a federal lawsuit may voluntarily dismiss a case after settlement under FRCP 41(a) by filing a notice or stipulation of dismissal with the court (for a sample stipulation of dismissal, with explanatory notes and drafting tips, search Stipulation of Dismissal (Federal) on Practical Law). Counsel also should review the FRCP, the court's local rules, and governing statutes to determine if they must take additional steps to voluntarily dismiss the case, such as obtaining court approval of the settlement.

9. [Confidentiality of Agreement. [Subject to the permissible disclosures set forth in paragraph [NUMBER] of this Agreement, the/The] Parties expressly understand and agree that this Agreement and its contents (including, but not limited to, the fact of payment and the amounts to be paid hereunder) shall remain CONFIDENTIAL and shall not be disclosed to any third party whatsoever, except the Parties' counsel, accountants, financial advisors, tax professionals retained by them, any federal, state, or local governmental taxing or regulatory authority, and the Parties' management, officers, and Board of Directors, and except as required by law or order of court. Any person identified in the preceding sentence to whom information concerning this Agreement is disclosed is bound by this confidentiality provision and the disclosing party shall be liable for any breaches of confidentiality by persons to whom it has disclosed information about this Agreement in accordance with this paragraph. Nothing contained in this paragraph shall prevent any Party from stating that the Parties have "amicably resolved all differences," provided, however, that in so doing, the Parties shall not disclose the fact or amount of any payments made or to be made hereunder and shall not disclose any other terms of this Agreement or the settlement described herein. If any subpoena, order, or discovery request (the "**Document Request**") is received by any of the Parties hereto calling for the production of the Agreement, such Party shall promptly notify the other Party hereto prior to any disclosure of same. In such case, the subpoenaed Party shall: (a) make available as soon as practicable (and in any event prior to disclosure), for inspection and copying, a copy of the Agreement it intends to produce pursuant to the Document Request unless such disclosure is otherwise prohibited by law; and (b) to the extent possible, not produce anything in response to the Document Request for at least ten (10) business days following such notice. If necessary, the subpoenaed Party shall take appropriate actions to resist production, as permitted by law, so as to allow the Parties to try to reach agreement on what shall be produced. This paragraph is a material part of this Agreement.]

DRAFTING NOTE

CONFIDENTIALITY OF AGREEMENT

The Confidentiality of Agreement clause prohibits disclosure of the settlement agreement except to the affiliates and governmental authorities this paragraph identifies and to the extent required by law or court order. It also requires the parties to notify each other if they receive a subpoena, order, or discovery request asking for the settlement agreement, and to do so before providing it under those circumstances. Parties who wish to keep the terms of the settlement agreement confidential may use this clause and adapt it to their preferences.

Employers settling any claim alleging sexual harassment or abuse should be aware that if the settlement agreement includes a confidentiality or nondisclosure provision, they cannot take a tax deduction for that settlement payment or related attorneys' fees (26 U.S.C. § 162(q)). Employers therefore must decide whether the settlement amount or attorneys' fees are significant enough that the deduction is worth more than the benefit of a confidentiality provision. (For a sample settlement and release of claims agreement in a single plaintiff employment dispute, with explanatory notes and drafting tips, search Settlement and Release of Claims Agreement: Single Plaintiff Employment Dispute on Practical Law.)

10. Non-Disparagement. The Parties agree that, unless required to do so by legal process, both Parties[, including all officers and directors,] will not make any disparaging statements or representations, either directly or indirectly, whether orally or in writing, by word or gesture, to any person whatsoever, about the other Party or the other Party's:

(a) spouse, attorneys, or representatives;

or

(b) affiliates, or any of its directors, officers, employees, attorneys, agents, or representatives.

For purposes of this paragraph, a disparaging statement or representation is any communication which, if publicized to another, would cause or tend to cause the recipient of the communication to question the business condition, integrity, competence, good character, or product quality of the person or entity to whom the communication relates.

11. Agreement is Legally Binding. The Parties intend this Agreement to be legally binding upon and shall inure to the benefit of each of them and their respective successors, assigns, executors, administrators, heirs, and estates. Moreover, the persons and entities referred to in paragraph 3 above, but not a Party, are third-party beneficiaries of this Agreement.

12. Entire Agreement. The recitals set forth at the beginning of this Agreement are incorporated by reference and made a part of this Agreement. This Agreement constitutes the entire agreement and understanding of the Parties and supersedes all prior negotiations and/or agreements, proposed or otherwise, written or oral, concerning the subject matter hereof. Furthermore, no modification of this Agreement shall be binding unless in writing and signed by each of the Parties hereto.

13. New or Different Facts: No Effect. Except as provided herein, this Agreement shall be, and remain, in effect despite any alleged breach of this Agreement or the discovery or existence of any new or additional fact, or any fact different from that which either Party now knows or believes to be true. Notwithstanding the foregoing, nothing in this Agreement shall be construed as, or constitute, a release of any Party's rights to enforce the terms of this Agreement.

14. Interpretation. Should any provision of this Agreement be declared or be determined by any court to be illegal or invalid, the validity of the remaining parts, terms, or provisions shall not be affected thereby and said illegal or invalid part, term, or provision shall be deemed not to be a part of this Agreement. The headings within this Agreement are purely for convenience and are not to be used as an aid in interpretation. Moreover, this Agreement shall not be construed against either Party as the author or drafter of the Agreement.

DRAFTING NOTE

INTERPRETATION

The Interpretation clause incorporates a standard severability provision that allows the remainder of the settlement agreement to remain in effect even if a court finds one or more of the agreement's provisions to be invalid. This clause also seeks to modify the general common law rule of contract interpretation that any ambiguities in the agreement are construed against the drafter.

15. [Choice of Law. This Agreement and all related documents [including all exhibits attached hereto][, and all matters arising out of or related to this Agreement, whether sounding in contract, tort, or statute] are governed by, and construed in accordance with, the laws of the State of [STATE], United States of America [(including [its statutes of limitations] [and] [APPLICABLE STATE CHOICE OF LAW STATUTE(S)])] [, without giving effect to the conflict of laws provisions thereof to the extent such principles or rules would require or permit the application of the laws of any jurisdiction other than those of the State of [STATE]].

[In the event of any litigation, the prevailing party will be entitled to recover its reasonable attorneys' fees and other costs of collection.]]

16. [Choice of Forum. The state or federal courts of [STATE] located in [COUNTY/OTHER JURISDICTION DESIGNATION] shall be the exclusive forums for litigation concerning this Agreement. All parties to this Agreement consent to personal jurisdiction in such courts as well as service of process by notice sent by regular mail to [ADDRESS FOR EACH PARTY] or by any means authorized by [STATE] law.]

DRAFTING NOTE

CHOICE OF LAW AND CHOICE OF FORUM

Parties may include the optional:

- Choice of Law clause, which allows parties to choose the substantive law of an appropriate state to apply to the settlement agreement.
- Choice of Forum clause, which allows parties to agree that the selected forum is the exclusive forum for bringing any claims related to the settlement agreement.

Search Settlement Agreement and Release for the complete online version of this Standard Document, which includes more on the Choice of Law clause.

Search Choice of Law and Choice of Forum: Key Issues for more on choice of law and choice of forum provisions.

17. Reliance on Own Counsel. In entering into this Agreement, the Parties acknowledge that they have relied upon the legal advice of their respective attorneys, who are the attorneys of their own choosing, that such terms are fully understood and voluntarily accepted by them, and that, other than the consideration set forth herein, no promises or representations of any kind have been made to them by the other Party. The Parties represent and acknowledge that in executing this Agreement they did not rely, and have not relied, upon any representation or statement, whether oral or written, made by the other Party or by that other Party's agents, representatives, or attorneys with regard to the subject matter, basis, or effect of this Agreement or otherwise.

18. Counterparts. This Agreement may be executed by the Parties in counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

19. Authority to Execute Agreement. By signing below, each Party warrants and represents that the person signing this Agreement on its behalf has authority to bind that Party and that the Party's execution of this Agreement is not in violation of any by-law, covenants, and/or other restrictions placed upon it by its respective entities.

20. Effective Date. The terms of the Agreement will be effective when an executed copy of this Agreement is delivered to said counsel for [PARTY A] as described in paragraph 1 above (the "**Effective Date**").

READ THE FOREGOING DOCUMENT CAREFULLY. IT INCLUDES A RELEASE OF KNOWN AND UNKNOWN CLAIMS.

IN WITNESS WHEREOF, and intending to be legally bound, each of the Parties hereto has caused this Agreement to be executed as of the date(s) set forth below.

[SIGNATURE BLOCK]

DRAFTING NOTE

SIGNATURE BLOCK

The parties' counsel may wish to have the parties' signatures notarized to avoid the possibility that one of the parties will claim that it never received or signed the agreement.

Search Settlement Agreement and Release for the complete online version of this Standard Document, which includes a sample signature block and attestation.