

Drafting Settlement Agreements in Litigation

Professional Education Broadcast Network

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Overview

- Governing Law
- Traps for the Unwary
- Unforeseen Consequences
- Non-disclosure and Non-disparagement Provisions, Violations and Remedies

Settlement Agreement or Stipulation = Contract

- Needs to resolve a bona fide dispute with doubt as to the eventual result
- Definite and complete with all material terms

Strong public policy in favor of enforcement

- a. “avoids potentially costly, time consuming litigation”
- b. “preserves scarce judicial resources; courts could not function if every dispute devolved into a lawsuit”
- c. “societal benefit in recognizing the autonomy of parties to shape their own solution to a controversy”
- d. “produces finality and repose upon which people can order their affairs”
- e. “interests are advanced only if settlements are routinely enforced rather than becoming gateways to litigation”

Potential Challenges

- Lack of mutual assent
- Lack of consideration
 - “To constitute sufficient consideration ...a party need only have a good-faith belief in the merit of its position”
- Failure to follow certain statutory requirements
 - CPLR § 2104: unless made between counsel in open court, only binding if in writing and reduced to an order and entered
 - “Open Court” before judge and stenographer
- Other contract defenses: collusion, duress, fraud, etc.
- Type of dispute cannot be settled by parties
- Will Construction Proceeding

CLASS ACTIONS

- Settlement with a Class Representative:
 - Before the class is certified
 - After the class is certified

Confidentiality

- Publicly Available
- Multistate enforcement
- Private class actions
- Good Cause to Seal
- Harm to a compelling interest of the movant

Negotiating Publicity

- Is it possible?
- Requesting copy of press release in advance of public release
- Attending Government's Press Conference

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- Collateral Estoppel: Preventing the offensive use of
 - Finality: Negotiating an effective release
 - 5th Amendment: Vis a vis criminal and licensure proceedings
 - SOL: Impact of suspension of statute of limitations

Impact of Settlement Agreement Between Healthcare Providers & The Department of Public Health

- Potential impact outside of what is contained in the written agreement
 - Board Certification(s)
 - Public record
- Consider, negotiate and advise

Consideration for Confidentiality

- Possible tax consequences
- Amos v. Commissioner of Internal Revenue – T.C. Memo 2003-239 (December 1, 2003).
- Possible alternatives

Disparagement

“the publication of false and injurious statements that are derogatory of another's property, business, or product. — called also business disparagement, commercial disparagement, disparagement of property, slander of goods, trade libel. 2 : slander of title.”

<https://www.merriam-webster.com/legal/disparagement>

Nondisparagement Clause

“A provision in a contract requiring one or more parties to the agreement not to make negative statements about the other(s).”

- Nolo's Plain English Law Dictionary <http://www.nolo.com/dictionary/nondisparagement-clause-term.html>

POTENTIAL ISSUES

- IS SUCH A PROVISION LEGAL:
 - CA: ban on “contracts or proposed contracts for the sale or lease of consumer goods or services” California Civil Code §1670.8.
 - Penalties: \$2,500 for first violation; \$10,000 for willful, intentional or reckless violations
- Non-Disparagement: Evidence of Good Faith?

Enforcement

- Conclusory Allegations Insufficient
- Allege disparaging statements, to whom made and when
- Case by Case analysis

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publication, but is subject to change and does not purport to be
complete statement of all relevant issues.

