SIX QUESTIONS YOU SHOULD ALWAYS ASK YOUR ATTORNEY WHEN SETTLING A COMMERCIAL DISPUTE

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It happens often. A company spends years and a small fortune on attorney fees battling an adversary in a commercial dispute and finally – *at last* – a compromise is reached. The war is over! But wait. The issue of *documenting* the parties' resolution remains. The documentation of the settlement of a commercial dispute is too often an afterthought. It shouldn't be. The terms of the written settlement should be carefully considered to ensure that the document (1) accurately captures the agreed upon terms of the settlement, (2) is enforceable and (3) will not lead to unintended consequences. To these ends, always ask your attorney the following questions when settling a dispute with a business adversary:

1. **Have we included all necessary parties?**

Of course the opponents in a dispute will need to sign the agreement or other document memorializing the terms of the settlement. But other parties may also need to be included. For example, if the agreement requires an individual litigant to transfer real estate, his or her spouse should sign the agreement to indicate that the non-litigant spouse will agree to release his or her dower rights in the property.

2. **Is a settlement agreement enough?**

Traditionally, a settlement agreement is used to capture the terms of the parties' agreed-upon resolution. But in some cases where litigation is pending it may make sense to also have the agreement (or parts of it) encompassed in an agreed order issued

by the court. An agreed order may specify that the court retains jurisdiction over the matter in the event one of the parties doesn't hold up its end of the bargain in a settlement that requires multiple transactions over an extended period of time.

3. Should the terms of the settlement be kept confidential?

A corporate litigant paying money to settle a dispute will often have a strong interest in keeping the terms of the settlement – especially the amount being paid to settle the case – secret. Where secrecy is a concern, the settlement document should contain a strong confidentiality provision.

4. Where will disputes regarding the settlement be litigated?

In many cases, courts will defer to the forum for litigation selected by the parties in their agreement. Make sure the forum selected is one where you actually would want to litigate a controversy concerning the agreement. Ask your attorney if there is a more favorable forum to resolve a disagreement concerning the settlement.

5. Is the scope of the release too broad (or too narrow)?

Almost all settlements will include a release provision where the parties agree to release certain legal claims. Always ask which claims are being released. Is it the parties' intention to release all of the claims they have (or may have) against each other or just some of them?

6. Should the signatures on the agreement be notarized?

With some very limited exceptions, there is generally no legal requirement that a settlement agreement be signed in the presence of a notary public. But having a notary acknowledge the signatures on the agreement should reduce the opportunity for forgery. Moreover, under the rules in most jurisdictions, acknowledged documents are self-authenticating which may make introducing the document as evidence in future litigation easier.