

New Jersey Law Journal

VOL. CXCVII - NO.8 - INDEX 659

AUGUST 24, 2009

ESTABLISHED 1878

IN PRACTICE

REAL ESTATE LAW

The Science of the General Release

Crafted to serve its purpose of final repose

BY STEPHEN HANKIN

Practitioners are regularly confronted with the need to settle disputes, ultimately memorialized in either a “settlement agreement,” a “mutual” or “general release.” Although these instruments intend final repose, due to thoughtlessness and drafting errors — many times the result of anxiousness in “closing the file” — they spawn rather than prevent or conclude litigation. This article briefly reviews the principles governing the construction of general releases and then suggests drafting techniques and critical terms they should include.

Construction Principles

The interpretation of general release is governed by traditional contract principles. As such, the terms of a release will be given their plain and ordinary meaning and parole evidence will not be permitted except where terms are ambiguous. *Atlantic Northern Airlines v. Schwimmer*, 12 N.J.

Hankin is a member of Hankin Sandman & Palladino of Atlantic City and Cape May Court House, and concentrates in complex commercial transactions, real estate, land use, environmental law and related trial and appellate practice.

293, 302 (1953). Thus, a party’s unexpressed, subjective or secret intent is meaningless. *Hagrish v. Olson*, 254 N.J. Super. 133, 138 (App. Div. 1992). Nor will a court rewrite a release to provide either party with a better bargain. *Christifano v. N.J. Mfrs. Ins. Co.*, 361 N.J. Super. 228, 237 (App. Div. 2003).

If freely entered into, a general release normally will be enforced. *Pascarella vs. Bruck*, 190 N.J. Super. 118, 124-125 (App. Div.), cert. denied, 94 N.J. 600 (1983). To be relieved, a party to a general release must provide clear and convincing proof of fraud or other compelling circumstances because public policy strongly promotes the resolution of disputes. *Nolan v. Lee Ho*, 120 N.J. 465, 472 (1990). Although courts “strain to give effect to the terms of a settlement agreement wherever possible,” *Dep’t. of Pub. Advocate v. N.J. Bd. Of Pub. Util.*, 206 N.J. Super. 523, 528 (App. Div. 1985), dependent upon equitable considerations classic contract defenses may apply such as duress, mutual mistake, undue haste and other incidents of involuntariness. *Smith v. Fireworks by Girone, Inc.*, 380 N.J. Super. 273, 291-92 (App. Div. 2005), cert. den. 186 N.J. 243 (2005).

Critical Techniques and Essential Terms

Negotiating the Release: Unsigned executory agreements to settle are enforceable so long as they recite the essentials of the resolution. *Hagrish v. Olson*, 254 N.J. Super. 133 (App. Div. 1992). Counsel should thus be careful to state in all communications that execution of a written agreement is essential, rather than a mere formality, to the formation of a binding settlement.

The Parties: The name of every person or entity intended to be obligated under or benefited from the general release should be set forth, together with a generic provision including their spouses (where a consortium claim is possible), attorneys, agents, servants, employees, members, directors, representatives, officers, heirs, successors, affiliates, subsidiaries or other related entities.

The Scope of the Release: An unconstrained general release ordinarily covers all potential causes of action existing at the time it is signed. Therefore, if a party wishes to preserve the right to assert a particular claim it must be expressly reserved. *Bilotti v. Accurate Forming Corp.*, 39 N.J. 184, 203-304 (1963). If a release broadly provides it “release[s] and forever discharge[s] the defendant from any and all causes of action,” parole evidence will not be admitted to except any particular claim. *Falkenstein v. Gibson*, 154 A.2d 876, 878 (E. & A. 1931).

If the release is intended to discharge obligations limited to a specific litigation, transaction, dispute or other

circumstance, it should so provide by clear language such as "This release is specifically limited to the parties' rights and obligations arising out of and relating to [state the circumstance] and shall not be construed as a general release or discharge of any other right or claim." However, counsel has the obligation of disclosing his client's intention to press any undisclosed claims. *Garde v. Wasson*, 251 N.J. Super. 608, 612 (App. Div. 1991).

Many "form" releases initially recite the intent to discharge "any and all claims followed by language discharging a particular claim." Although the recitation of a particular discharged claim does not control preceding language more generally discharging any and all claims, *Van Slyke v. Van Slyke*, 80 N.J.L. 382, 387 (E. & A. 1910), to dispel any such notion counsel should modify such a provision to clarify that such a discharge of any and all "includes but is not limited to" the more specifically described claim which may follow. To assure summary judgment, the best practice is to provide the release discharges all of the parties' legal and equitable rights, claims, causes of action and obligations under our federal and state constitutions, our Rules of Court, by name and citation any federal or state statute or regulation in issue and the common law, all to the date of execution, whether accrued or unaccrued, liquidated or contingent, known or unknown, including but not limited to the specifically-described dispute which triggered the release in the first instance.

Voluntariness Criteria and Statutory Requirements: An enforceable release may require compliance with a federal or state statute or regulation. This is particularly so in the context of an employment or independent

contractor dispute. These statutory requirements are not merely based upon public policy but as well assure a knowing and voluntary waiver. Because duress and the absence of voluntariness are potential defenses to enforceability, even where these requirements are not statutorily mandated, every general release should contain compliantly acknowledged provisions.

The late Judge Kleiner, in *Kee-lan v. Bell Communications Research*, 289 N.J. Super. 531, 541 (App. Div. 1996), summarized a number of nonexclusive, "totality of the circumstances" factors to consider in evaluating the existence of a voluntary waiver under the Conscientious Employee Protection Act ("CEPA"), N.J.S.A. 34:19-1 to 8: (1) an employee's education and business experience, (2) the time an employee has retained possession of and thus had time to consider the terms of the release (at least eight days was held sufficient in *Swarts v. Sherwin-Williams Company*, 244 N.J. Super. 170,179 (App. Div. 1990) for a claim under the New Jersey Law Against Discrimination), (3) the fact of an employee's negotiation of terms, (4) the clarity of the release, including grammatical structure and sentence length, (5) actual representation by or the encouragement for the use of an attorney, (6) whether the consideration received exceeds any contract right or legal entitlement, and (7) whether the release specifically mentions the title of the statute or regulation under which rights are being discharged. In fact, under the Older Workers Benefit Protection Act ("OWBPA"), 29 U.S.C. §621-634, an employee cannot waive any rights under the Age Discrimination and Employment Act of 1967 ("ADEA"), 29 U.S.C. § 626 unless specific criteria are satisfied, including providing 21 days for an individual to consider sign-

ing the agreement and 7 days to revoke it once signed. 29 U.S.C. §626(f)(1). The satisfaction of such criteria needs to be acknowledged in the language of the release.

Remedies: Depending upon what relief the client wishes in the event of a breach of the release there should be provision for specific performance, injunctive relief, and the ability to insist upon the reinstatement of pre-release status such as the re-institution of any simultaneously dismissed litigation or the reinstatement of any waived noncompetition covenant. Because the "American Rule" requires each party to bear his or her own counsel fees and R.4:42-9 does not provide otherwise, in breach of contract cases, it is especially important to provide for the indemnification of and the recovery of reasonable counsel fees and costs for the prevailing party.

Nonassignability: If the release requires special, or personal performance rather than merely payment, insert a provision prohibiting the assignability of that obligation. If an assignment is permitted, provide that it nonetheless shall not relieve the original parties of their stated obligations.

Incorporation into a Consent Order: Whenever possible, attempt to incorporate the release into a consent order in any pending litigation in order to avail the client of Relief to Litigant provisions under R.1:10-3.

Counsel should avoid potentially confusing, generic "form" type releases absent careful language manicure. Remember, the purpose of a general release, like any contract, should be tailored to specific needs which are rarely identical. The release, being counsel's end product, should be carefully considered and crafted to serve its purpose of final repose. ■