Making a deal

What to do when considering and entering into a settlement agreement

Most lawsuits never actually go trial, nor are they resolved by motion. Instead, they are resolved by settlements negotiated by the parties' attorneys. Unfortunately, many attorneys are not as familiar with the rules of settlement as they are with the rules of evidence.

"Written settlement agreements should reflect the parties' agreement and intent," says Timothy J. Miller, a partner at Novack and Macey LLP. "But written settlement agreements also should protect against unintended consequences."

There are significant pitfalls associated with settlement agreements, so business owners would be well served to understand what they potentially face when settling a lawsuit.

Smart Business spoke with Miller about settlement agreements and what owners should know when entering into them.

Timothy J. Miller
Partner
Novack and Macey LLP

What is one of the biggest concerns that a business owner should have when entering into a settlement agreement?

In most cases, a business owner enters into a settlement agreement thinking that a dispute is being fully and finally resolved and that he or she is 'buying peace.' Thus, any business owner contemplating a settlement should be certain that the settlement will actually end the dispute.

What is one way in which a 'settled' case can come back to life?

In settlement negotiations, parties may say or write things that they hope will lead to an agreement. A business owner who wants to make certain that a case is really over should take steps to make sure that statements made during negotiations cannot resurrect the dispute. Some negotiators lie. Sometimes they exaggerate to induce the other party to settle.

Other times, a negotiator may mistakenly say something that is not true. Even when no lies are told, parties can have different memories of statements made during negotiations. Those statements can provide fertile grounds for resurrecting disputes that a business owner thinks have been resolved.

How can you avoid having statements made during settlement discussions hurt you?

Your lawyer should made certain that everybody agrees going into the negotiations that the case has not been settled until a written settlement agreement is signed by all parties. Then, the written settlement agreement drafted to reflect the agreement should contain strong nonreliance and integration clauses.

A nonreliance clause is a provision that says that the parties are not relying on any statements made, or writings exchanged, during negotiations unless they are specifically included in the written agreement. Such a clause should also provide that the parties are relying on their own judgment and investigation and have had the advice of independent counsel. It helps to stop later claims that a business owner lied during negotiations and that the opponent relied on such alleged lies.

An integration clause says that the written agreement is the entire agreement of the parties. This clause will stop somebody from claiming that some part of the agreement is not contained in the written agreement. For example, in an employment dispute, a business owner may pay a former employee to dismiss a claim. An integration clause may protect the owner from claims that the owner also agreed to give the employee the job back.

What if a business owner is relying on statements made in the settlement negotiations?

Nonreliance and integration clauses mean that statements and promises not contained in the written agreement probably will not be considered by a court. But this applies to the business owner, too. If an owner is relying on a statement made in negotiations, that should be included in the agreement.

Are there potential problems with releases in settlement agreements?

Usually, the purpose of a settlement is for both sides to give up, or 'release' their claims against each other. Sometimes, however, releasing claims against one party may have the unintended effect of releasing claims against other unnamed parties. There is an old rule that the release of one wrongdoer releases everybody liable for the same harm. Many lawyers believe this rule has been abrogated by statute, but this is only partially correct.

Illinois has abrogated the rule that a release of one joint tortfeasor releases all tortfeasors. What many lawyers do not recognize is that this applies only to tortfeasors. As a result, the common-law rule that an unqualified release of one who caused a monetary loss precludes a claim against other parties who caused the loss continues to apply to, for example, co-obligors on a contract and claims for joint breaches of fiduciary duty. If there are other parties that a business owner does not want to release, an attorney can address this issue.

Will a release bring total peace?

Not always. A general release might not be deemed to release claims that one party claims it did not know about when it signed the release. A business may be able to protect itself by providing in the written document that the parties are aware they may have claims against each other they do not know about, and the release is intended to bring total peace and release even unknown claims.

Are there other issues to be aware of?

Certainly. If a party with whom a business owner has settled sues again on that settled claim, in blatant violation of a settlement agreement, the owner could still have to pay lawyers to defend the suit. A provision in a settlement agreement providing for attorneys' fees to be awarded to the prevailing party in a dispute wherein the settlement agreement is raised as a defense may help protect against such problems. <<

TIMOTHY J. MILLER is a partner at Novack and Macey LLP. Reach him at (312) 419-6900 or tmiller@novackmacey.com.