



PIECES OF THE PUZZLE

A Newsletter from Arnold & Porter's Private Client Services Team

August 2014

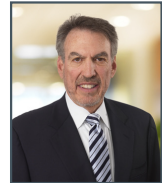
Limiting Your Liability: Protect Yourself with a Well-Written General Release

By *Kenneth G. Hausman and Ellen Kaye Fleishhacker*

Our clients sometimes find themselves in actual or threatened disputes that expose them to liability. In many situations, clients prefer to settle such disputes amicably, rather than asking an arbitrator, judge or jury to decide the matter for them. In order for a settlement to offer protection from liability, it is crucial that it is documented by a signed "general release" (meaning a release from all claims) from the other party. We dissect a simple General Release Agreement below to reveal its essential elements. The text of our sample General Release Agreement is at the end of this article.

- **The Payment.** The first sentence of this General Release Agreement (reference ***A*** in the text below) recites the "consideration," or the amount of money that the released party will pay to the releasing party to secure the release. In addition to or in lieu of monetary consideration, the settlement can include non-monetary aspects such as return of property or promises to do or not do a specified act. Often, the consideration includes mutual general releases in which each party agrees to release the other from liability. The consideration for the release normally is the key issue in settlement negotiations.
- **Who Will Provide the Release?** Disputes can be among individuals or entities, or a combination of both. Obtaining a release from only the specific individual or entity with whom you have a dispute may be insufficient. From an individual, you may want to obtain a release on behalf of his or her successors, heirs and assigns in the event the individual dies or has assigned the claim. With an entity, you may want a release from the entity's owners, subsidiaries, affiliates, officers, directors, employees, agents and/or other related individuals or entities. The language in ***B*** and/or ***C*** in the text below provides examples addressing these issues. These lists are not exhaustive, and should be tailored to the specific circumstances. Note that if you are receiving the release, you would prefer to have all parties giving the release sign the General Release Agreement. If that is not feasible, you can include in the General Release Agreement a representation and warranty from the person signing the General Release Agreement: "The person signing below represents and warrants he or she has the power and authority to enter into this General Release Agreement and provide the releases set forth herein." While this isn't as good as having all Releasors sign, it will give you a claim for breach and indemnity from the person signing the General Release Agreement if one of the non-signing Releasors sues you. If you are giving the release, it is preferable to limit the persons providing the release (the Releasor) to you alone. If you are receiving a release (the Releasee), you would like it from the broadest group possible.
- **Who Will Receive the Release?** The rationale that applies to defining the "Releasor" as described above also applies to the definition of the "Releasee" – the persons and entities

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being released. If the person being released is an individual, he or she will want to include their related parties listed in *D* below in the release, and if it is an entity, it would want to include its related parties listed in *E* below. Again, if you are giving the release, you would like to limit the persons being released to the fewest possible, and perhaps only to the individual or entity involved.

- What Claims Will Be Released? If you are the “Releasee,” you will want the description of the claim to be released to be as broad as possible. In this sample the “release” shown in *F* below is “of and from any and all claims . . . which Releasors or any of them own or hold or have owned or held” – a release of all claims existing as of the date the Release is signed. The sample language at *G* provides examples of claims that are released with the introductory language of “including, but not limited to,” but those are only examples and are not limitations of the overall general release. Examples of descriptions of such claims include: “the accident that took place on March 13, 2014 at 123 Elm Street, San Francisco, California” or “all of Releasee’s obligations under that certain contract entitled Supply and Distribution Agreement and dated January 1, 2014” or “any claims of easement onto, across or over that certain property located at 456 Maple Drive, New York, NY.” If you are the “Releasor,” then you would like the release as narrow as possible, and you would substitute the word “arising out of” for the words “including, but not limited to, all matters constituting, concerning, in connection with, relating to, and/or arising out of” in the sample and put in a precise description of the claim released. In that case the release might end like this: “. . . which Releasors or any of them own or hold or have owned or held, arising out of the accident that took place on March 13, 2014 at 789 Birch Street, Washington, D.C.” Temporally, a general release normally covers only claims that exist as of the date of signing the General Release Agreement, and not future claims that arise from events after that date.
- Representations and Warranties From the Releasor. The provisions referenced as *H* below outline some basic representations and warranties a person or entity being released would want: that the Releasor owns the claims, has the power and authority to release them, has not assigned the claims, and will not sue on the claims, as well as that the Release Agreement contains the entire agreement between the parties concerning the matter.
- Agreements Concerning the Release and Claims Released. The provisions referenced as *I* below represent some basic agreements a person being released would want: that the

Releasor will withdraw or dismiss with prejudice any claims or reports that have been made as to the released claims, and will keep the claims, release and all facts involved in strictest confidence, and that providing the release is not an admission of liability. Other agreements that sometimes are included are an agreement to arbitrate disputes related to the Release Agreement, a reference to a specific state’s law that will apply in interpreting the Release Agreement, an agreement not to assist others in bringing any released claims, and an agreement to keep the Release Agreement confidential. These clauses and the Release Agreement need to be crafted carefully based on the specific fact situation. For example, an entity that will be fundraising might not be able to give a blanket confidentiality clause since it will need to disclose material information to potential investors.

- Future Attorneys’ Fees. The American Rule on attorneys’ fees is that each side bears its own attorneys’ fees in litigation or arbitration, unless a contract or statute provides otherwise (in the English Rule, the loser pays the winner’s attorneys’ fees regardless). The provisions referenced in *J* below provide for the loser to pay the winner’s attorneys’ fees if there is a dispute over the release. This is especially important if you are receiving the release. For example, if you pay US\$1000 to settle a fender bender using the sample Release below, and the Releasor sues you anyway, or assigns his or her claim to another who sues you, you can have the claim dismissed and recover your attorneys’ fees as well.
- General Release. Under some states’ laws (New York and Delaware), a general release of claims will release all covered claims, even those that are unknown or unsuspected by the Releasor. Other states’ laws (California) provide that a general release only releases claims that the Releasor knows or suspects exist in his or her favor. In order for the Releasor to grant a “general release” of known *and unknown* claims and suspected and *unsuspected claims* in California, the Releasor must expressly waive the provisions of Section 1542 of the California Civil Code. In California and other states with similar statutes, it is important that the General Release Agreement contain at least the language as referenced in *K* below. Laws on Release Agreements vary from state to state, and counsel in the relevant state(s) should be consulted to assure compliance.

In summary, while every situation is different, and requires a careful analysis of the appropriate type of release language to use, we have found that the simple General Release Agreement below is a useful starting point.

GENERAL RELEASE AGREEMENT

- *A*** In consideration of the payment of \$ _____, receipt of which is hereby acknowledged, _____ (“Releasor”), on behalf of Releasor,
- *B*** and Releasor’s family, employees, employers, agents, heirs, successors, assigns, attorneys and insurers **[OR]**
- *C*** and Releasor’s principals, members, partners, shareholders, officers, directors, affiliates, employees, agents, successors, assigns, attorneys and insurers (collectively with Releasor, “Releasors”), now and forever releases and discharges _____ (“Releasee”), and
- *D*** Releasee’s past and present family, parents, heirs, successors, assigns, attorneys and insurers **[OR]**
- *E*** Releasee’s past and present principals, members, partners, shareholders, officers, directors, affiliates, employees, agents, successors, assigns, attorneys and insurers
- *F*** (collectively with Releasee, “Releasees”), of and from any and all claims (including, without limitation, claims for attorneys’ fees, costs, damages or restitution), debts, liabilities, demands, obligations, costs, fees, expenses, actions and causes of action whatsoever, of every nature, character and description, known, unknown, discovered, undiscovered, suspected or unsuspected which Releasors or any of them own or hold or have owned or held,
- *G*** including, but not limited to, all matters constituting, concerning, in connection with, relating to, and/or arising out of _____ (“Claims”).
- *H*** 1. Releasor represents and warrants that Releasor owns and/or has the power and authority to release the Claims, that none of the Claims has been assigned or transferred, that this document contains the entire agreement of the parties concerning the Claims and their release, and that no action, suit or other proceeding will be brought on or concerning any of the Claims.
- *I*** 2. Releasor promptly shall withdraw and cause to be filed dismissals with prejudice of all legal, administrative, disciplinary, consumer, arbitration or other actions, proceedings, complaints or reports (if any) filed or made as to any of the Claims and agrees to cause and keep the Claims and this General Release and all facts and matters involved therein, arising out of or relating thereto in strictest confidence and not to disclose them to others. Nothing contained herein shall be deemed an admission of liability by any or all Releasees.
- *J*** 3. In the event of any legal, administrative or arbitration action or proceeding arising out of or relating to this General Release, the prevailing party shall be entitled to recover its costs, attorneys’ fees and expert witness fees from the non-prevailing party. If any portion of this General Release is unenforceable, the remainder shall be enforced to provide Releasees the broadest release possible.
- *K*** 4. Releasor on behalf of Releasor and Releasors expressly waives the provisions of Section 1542 of the California Civil Code and Releasor understands that such section provides:

“A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.”

Initials

DATED: _____, _____, at _____, _____.

Releasor