AN ANNOTATED "MODEL" SETTLEMENT AGREEMENT

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TexasBarCLE Webcast:

Drafting Settlement Agreements

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AN ANNOTATED "MODEL" SETTLEMENT AGREEMENT[1]

After months or years of hard-fought litigation, often culminating in an all-day (and perhaps late-evening) mediation, the exhausted parties and their worn-out counsel reach a deal. The attorneys congratulate themselves and shift their focus to the next case. The only thing left for the parties to do is sign a comprehensive settlement agreement. Yet once guards are down, misfortune can befall the unsuspecting practitioner, resulting in unintended (and potentially disastrous) consequences for both the client and the attorney. This article highlights the major issues inherent in drafting a settlement agreement under Texas law, and offers possible solutions to many of those problems through the use of "model" settlement provisions. The authors acknowledge a significant limitation of this article – there is no "one-size-fits-all" settlement agreement, as each settlement presents its own unique issues.

SETTLEMENT AGREEMENT

This [Final] [Rule 11][2] Settlement Agreement and Mutual Release ("Settlement Agreement" or "Agreement")[3] is entered into effective as of (although not necessarily executed on) December 1, 2007, by and between Paul Payne ("Payne") and Don Davis ("Davis"), collectively referred to as the "Parties."

RECITALS[4]

WHEREAS, Payne filed a lawsuit against Davis styled *Paul Payne v. Don Davis*, Cause No. 000-00001-07, in the 953rd Judicial District Court of Travis County, Texas (the "Lawsuit");

WHEREAS, the Parties participated in mediation of the above-described matter, and the Parties executed a term sheet reflecting the material terms and conditions of their settlement[5];

WHEREAS, the Parties desire to fully and finally settle and compromise all claims, matters, disputes and causes of action between and among them, except as expressly described herein, and to enter into certain promises and agreements between them;

WHEREAS, to avoid the cost, uncertainty and inconvenience of further litigation, and to buy peace, Payne and Davis have agreed to resolve the Lawsuit pursuant to the terms of this Agreement.

AGREEMENT

Therefore, in consideration of the mutual agreements and releases set forth in this Agreement, which are acknowledged to be sufficient, the Parties agree:

1. Definitions

1.1 All references to Payne include his predecessors, successors, assigns, subsidiaries, affiliates, partners, insurers, estates, agents, servants, employees, receivers, administrators, directors, shareholders, officers, attorneys and legal representatives.

1.2 All references to Davis include his predecessors, successors, assigns, subsidiaries, affiliates, partners, insurers, estates, agents, servants, employees, receivers, administrators, directors, shareholders, officers, attorneys and legal representatives.

1.3 [Insert any other appropriate definitions applicable to the case]

2. Payment Provision

Davis promises to pay Payne's $1000 by December 15, 2007.

3. Dismissal of the Lawsuit[6]

Upon the full execution of this Agreement and payment of the amount set forth in Section 2, the Parties agree to execute and file a joint motion to dismiss with prejudice all claims and Parties in the Lawsuit.

4. Mutual Releases[7]

4.1 Payne's Release of Davis[8]

UPON THE EXECUTION OF THIS AGREEMENT AND PAYMENT OF THE CONSIDERATION SET FORTH IN SECTION 2, PAYNE FULLY RELEASES AND

FOREVER DISCHARGES WITH PREJUDICE DAVIS FROM ANY AND ALL CLAIMS, ACTIONS, CAUSES OF ACTION, APPEALS, SUITS, RIGHTS, OBLIGATIONS, DAMAGES, LOSSES, CHARGES, DEBTS, LIABILITIES, AND DEMANDS WHATSOEVER, WHETHER FORESEEN OR UNFORESEEN, KNOWN OR UNKNOWN, DISCLOSED OR UNDISCLOSED, MATURED OR UNMATURED, IN LAW, EQUITY OR OTHERWISE, WHICH PAYNE HAS OR HAD THAT RELATE IN ANY WAY TO THE LAWSUIT AND ANY AND ALL PRIOR DEALINGS BETWEEN THE PARTIES AS OF THE EFFECTIVE DATE OF THIS AGREEMENT, OF ANY TYPE OR CHARACTER, INCLUDING ANY CLAIMS THAT WERE ASSERTED OR COULD HAVE BEEN ASSERTED IN THE LAWSUIT, EXCEPT FOR THE OBLIGATIONS IMPOSED BY THIS AGREEMENT [AND ANY OTHER CARVE OUTS FROM THE RELEASE].

4.2 Davis' Release of Payne

UPON THE EXECUTION OF THIS AGREEMENT AND PAYMENT OF THE CONSIDERATION SET FORTH IN SECTION 2, DAVIS FULLY RELEASES AND FOREVER DISCHARGES WITH PREJUDICE PAYNE FROM ANY AND ALL CLAIMS, ACTIONS, CAUSES OF ACTION, APPEALS, SUITS, RIGHTS, OBLIGATIONS, DAMAGES, LOSSES, CHARGES, DEBTS, LIABILITIES, AND DEMANDS WHATSOEVER, WHETHER FORESEEN OR UNFORESEEN, KNOWN OR UNKNOWN, DISCLOSED OR UNDISCLOSED, MATURED OR UNMATURED, IN LAW, EQUITY OR OTHERWISE, WHICH PAYNE HAS OR HAD THAT RELATE IN ANY WAY TO THE LAWSUIT AND ANY AND ALL PRIOR DEALINGS BETWEEN THE PARTIES AS OF THE EFFECTIVE DATE OF THIS AGREEMENT, OF ANY TYPE OR CHARACTER, INCLUDING ANY CLAIMS THAT WERE ASSERTED OR COULD HAVE BEEN

ASSERTED IN THE LAWSUIT, EXCEPT FOR THE OBLIGATIONS IMPOSED BY THIS AGREEMENT [AND ANY OTHER CARVE OUTS FROM THE RELEASE].

4.3 Release and Waiver of Consumer Rights[9]

Without acknowledging that any claim or cause of action as it relates to this Agreement, the Lawsuit, or any prior dealings between the Parties could be alleged or asserted under the Texas Deceptive Trade Practices and Consumer Protection Act ("DTPA"), by signing this Agreement Payne acknowledges and states: "I WAIVE MY RIGHTS UNDER THE TEXAS DECEPTIVE TRADE PRACTICES-CONSUMER PROTECTION ACT, SECTION 17.41 ET SEQ., BUSINESS & COMMERCE CODE, A LAW THAT GIVES CONSUMERS SPECIAL RIGHTS AND PROTECTIONS. AFTER CONSULTATION WITH AN ATTORNEY OF MY OWN SELECTION, I VOLUNTARILY CONSENT TO THIS WAIVER."

5. INDEMNITY[10]

PAYNE AGREES TO INDEMNIFY DAVIS AND HOLD DAVIS HARMLESS FROM ANY AND ALL CLAIMS, DEBT, LIABILITY, DEMAND, OBLIGATION, COST, EXPENSE, ACTION, CAUSE OR ACTION BASED ON OR ARISING OUT OF OR IN CONNECTION WITH, THE LAWSUIT, REGARDLESS OF CAUSE OR OF THE SOLE, JOINT, COMPARATIVE OR CONCURRENT NEGLIGENCE OR GROSS NEGLIGENCE OF DAVIS.

6. Confidentiality[11]

The Parties shall keep the contents of this Agreement confidential and not divulge its terms (specifically including, but not limited to, the amount of money to be paid pursuant to Section 2) to any person or entity except that (1) Payne may disclose the terms of this Agreement to his legal and management level employees on a "need-to-know" basis; (2) Davis may disclose

the terms of this Agreement to his spouse and to his accountant or financial advisor to the extent necessary to render tax or financial advice; and (3) either party may disclose the terms of this Agreement in response to court order or to the extent necessary to enforce the Agreement by legal process, or in order to comply with the Agreement. Disclosure of the mere existence of this Agreement shall not constitute a breach of this provision. Anyone to whom the terms of this Agreement are disclosed pursuant to the foregoing shall sign a short statement acknowledging that they will keep this confidential. The Parties represent that they have not previously revealed the contents of this Agreement to any person or entity except as allowed herein. The Parties agree to maintain the confidentiality of any documents or information designated as confidential pursuant to any Protective Order entered in the Lawsuit.

6.1 Liquidated Damages for Breach of the Confidentiality Provisions[12]

In the event that either of the Parties violates the terms of the Confidentiality Provision set forth in Section 6, the party that violates the Confidentiality Provision shall immediately pay to the other party liquidated damages in the amount of $50,000.00, and $50,000.00 for each violation thereafter. The Parties have computed and agreed upon this sum as an attempt to make a reasonable forecast of the probable actual loss because of the difficulty of estimating with exactness the damages which will result from any violation of Section 6 by either of the Parties. The Parties further agree that this amount is not a "penalty" for violation of the Confidentiality Provision. The Parties further agree that liquidated damages in the amount of $50,000.00 for violation of the Confidentiality Provision set forth in Section 6 is a fair and reasonable amount that would compensate the party not in violation of the Confidentiality Provision for damages sustained thereby. In arriving at the settlement and stipulated amount of liquidated damages, the Parties have considered, among other factors, the difficulty that the Parties would have in

negotiating future contracts with other companies and individuals if the information contained in this Agreement were to be released to non-parties, as well as the risk of increased litigation if the information contained in this Agreement were to be released to non-parties. The Parties further agree that any disputes regarding alleged breaches of the confidentiality provision shall be resolved through the dispute resolution procedures set forth under Section 21 of this Agreement.

7. Authority and Requisite Approvals[13]

[To be used if a party to settlement is a corporation, LLP, or LLC] [insert name of entity] represents and warrants with respect only to itself and none of the other Parties that (1) its authorized representative(s) has read and fully understands this Agreement, (2) all corporate, partner, member or other approvals necessary to authorize it to enter into this Agreement have been obtained, (3) it is duly authorized to fully and completely resolve all disputes between the Parties that are the subject of this Agreement and, (4) it is fully authorized to make this Agreement and, if applicable, to bind to the terms and conditions contained in this Agreement those persons and entities on whose behalf it purports to act, (5) the representative signing this Agreement on its behalf is duly authorized to execute this Agreement on its behalf in the capacity identified below, and (6) this Agreement is its binding and enforceable obligation.

8. Best Efforts and Good Faith[14]

The Parties hereby agree to use their best efforts and good faith in carrying out all the terms of this Agreement.

9. Notices

All notices and other communications pursuant to this Agreement shall be in writing and shall be deemed given if (a) delivered personally, (b) sent by nationally recognized, overnight courier, (c) mailed by certified mail (return receipt requested), with postage prepaid, or (d) sent

by facsimile (followed by a copy sent by courier or certified mail) to the Parties at the following addresses:

To Paul Payne:

With a copy to:
Paul Payne's attorney[15]

To Don Davis:

With a copy to:
Don Davis' attorney

10. Counterparts[16]

This Agreement may be signed in any number of counterparts or copies or on separate signature pages or by facsimile transmission, which when taken together shall be deemed to be an original for all purposes.

11. No Duty[17]

None of the Parties are relying upon a legal duty, even if one might exist, on the part of any other Party (or such other Party's employees, agents, representatives, or attorneys) to disclose any information in connection with the execution of this Agreement or its preparation; it

is expressly understood and agreed that no lack of information on the part of another Party is a ground for challenging this Agreement.[18]

12. Basis For Parties' Understanding Of The Agreement

12.1 Each Party Relying on Own Judgment[19]

It is understood and agreed that the Parties hereto have carefully reviewed this Agreement, that they fully understand its terms, that they sought and obtained independent legal advice with respect to the negotiation and preparation of the Agreement, that this Agreement has been negotiated and prepared by the joint efforts of the respective attorneys for each of the Parties, and that the Parties have relied wholly upon their own judgment and knowledge (and the advice of their respective attorneys).

12.2 No Reliance on Representations or Assumed Facts[20]

THE PARTIES ALSO ACKNOWLEDGE THE CONTESTED AND ADVERSARIAL NATURE OF THE LAWSUIT AND UNDERLYING DISPUTES AND STIPULATE THAT IN EXECUTING THIS AGREMENT THEY ARE NOT RELYING ON ANY REPRESENTATION BY ANY OTHER PARTY OR ITS/HIS AGENTS, REPRESENTATIVES OR ATTORNEYS, WITH REGARD TO (1) FACTS UNDERLYING THE LAWSUIT, (2) THE SUBJECT MATTER OR EFFECT OF THIS AGREEMENT, AND (3) ANY OTHER FACTS OR ISSUES WHICH MIGHT BE DEEMED MATERIAL TO THE DECISION TO ENTER INTO THIS AGREEMENT, *OTHER THAN* AS SPECIFICALLY SET FORTH IN THIS AGREEMENT.[21]

13. Section Numbers and Headings[22]

Section numbers and section titles have been set forth herein for convenience only, and they shall not be construed to limit or extend the meaning or interpretation of any part of this Agreement.

14. Governing Law[23]

This Agreement shall be governed by and interpreted in accordance with the substantive laws of the State of Texas without regard to its conflict of law principles.

15. No Admission of Fault

This Agreement, the monies paid and other consideration given by either Party under this Agreement shall *NOT* constitute an admission of fault, wrongdoing or liability.

16. Prevailing Party[24]

In the event of any dispute that results in a proceeding under Section 21 of this Agreement to construe or enforce any provision of this Agreement or because of an alleged breach, default or misrepresentation in connection with any of the provisions of this Agreement, the prevailing Party may recover from the non-prevailing party reasonable attorneys' fees and other costs incurred (in addition to all other amounts and relief to which such party may be entitled to recover).

17. No Strict Construction

The language used in this Agreement is chosen jointly by the Parties to express their mutual intent and no rule of construction will be applied against any Party, including any rule of draftsmanship.[25] The Parties and the parties hereby expressly agree that any uncertainty or ambiguity existing herein shall not be interpreted against any of them. Except as expressly limited by this paragraph, all of the applicable rules of interpretation of contract shall govern the

interpretation of any uncertainty or ambiguity. The term "including" as used in this Agreement is used to list items by way of example and shall not be deemed to constitute a limitation of any term or provision contained herein.

18. Allocation of Amounts Paid[26]

The Parties have not made an allocation of the amount(s) being paid pursuant to this Agreement. The determination of the manner of allocation and amounts is solely the responsibility of Paul Payne and his counsel and authorized representative(s).

19. Attorneys' Fees, Expenses and Court Costs[27]

Except for the provisions of Section 16, the Parties agree to pay their own attorneys' fees, court costs and expenses incurred in relation to the Agreement.

20. Attorneys to Sign[28]

By their signatures below, counsel for each of the Parties represents that each has fully explained the meaning and effect of this Agreement to his or her client.

21. Arbitration of Disputes[29]

Any disputes concerning this Agreement shall be submitted to and decided by [insert name of arbitrator], whose decision shall be final and binding upon the Parties. The Parties agree to the following procedure to be utilized in the event of a dispute concerning this Agreement:

(i) The Parties shall mutually contact [insert name of arbitrator] by conference call to notify [insert name of arbitrator] of the dispute;

(ii) The Parties will submit simultaneous letter briefs not to exceed five pages and any accompanying exhibits on the date ordered to do so by [insert name of arbitrator];

(iii) The Parties will present oral argument only if requested by [insert name of arbitrator];

(iv) [Insert name of arbitrator] shall issue a written decision within 30 days following the simultaneous letter briefs by the Parties, or, if oral argument is held, within 30 days following oral argument;

(v) The Losing Party shall pay all of the fees charged by [insert name of arbitrator]; and,

(vi) The Parties agree that the decision by [insert name of arbitrator] is final, binding and not appealable.

(vii) [Option A] If [insert name of arbitrator] declines or is otherwise unable to serve as the arbitrator, and the Parties are unable to agree as to an alternate arbitrator, the Parties shall have five (5) business days from the date they cease direct negotiations to submit to each other a written list of three (3) individuals certified as arbitrators by the American Arbitration Association. The names of these individuals shall be placed in a hat, and one shall be randomly drawn. If able to serve, this individual shall be the arbitrator. If this individual is not able to serve, another name shall be drawn from the hat, and this process is to be repeated as necessary until a willing and able arbitrator is found.

[Option B] If [insert name of arbitrator] declines or is otherwise unable to serve as the arbitrator, and the Parties are unable to agree as to an alternate arbitrator, the Parties shall have five (5) business

days from the date they cease direct negotiations to submit to each other a written list of three (3) individuals certified as arbitrators by the American Arbitration Association. Within five (5) days from the date of receipt of such list, each party shall rank the proposed arbitrators in numerical order of preference and exchange such rankings. If one or more names are on both lists, the highest ranking person on either list and appearing on both lists shall be designated as the arbitrator. If no arbitrator has been selected under this procedure, the Parties agree jointly to request a State or Federal District Judge of their choosing (or if they cannot agree, the Local Administrative Judge for [insert appropriate county], Texas) to supply within ten (10) business days a list of ten (10) individuals certified as arbitrators by the American Arbitration Association. Within five (5) business days of receipt of the list, the Parties shall again rank the proposed arbitrators in numerical order of preference and shall simultaneously exchange such list and shall select as the arbitrator the individual receiving the highest combined ranking. If such arbitrator is not able to serve, they shall proceed to contact the arbitrator who was next highest in ranking until they are able to select an arbitrator.

22. Bankruptcy

The Parties agree that the stipulations and settlement embodied in this Agreement shall be binding on the Parties even if one or more of them shall become Debtors in a bankruptcy

proceeding. To the extent permitted by applicable law, this Agreement shall bind any trustee or representative appointed for a Debtor's estate.[30] Such binding effect is an integral part of this Agreement. Payne and Davis agree that in the event either should file for bankruptcy, then to the extent allowed by law (a) Payne shall have an allowed claim against Davis in the amount of [insert amount pled in lawsuit or otherwise agreed to by the parties];[31] and (b) Davis will not dispute that (i) this Agreement has been entered into in the ordinary course of business and (ii) all payments made to Payne under this Agreement have been made in the ordinary course of business.[32]

23. Agreed Judgment[33]

As consideration for the mutual promises and covenants contained within this Agreement and the releases set forth in Section 4 of this Agreement, and to secure Davis' obligations to Payne under this Agreement, the Parties irrevocably consent to the entry of the Agreed Judgment attached as Exhibit "C" (the "Judgment"); provided however, that Payne shall not file or request entry of the Judgment except as specifically permitted in this Agreement.

a. Covenant Not to File or Execute. Payne agrees not to file, abstract, record or execute on the Judgment as long as Davis has complied with the terms of this Agreement.

b. Covenant to Destroy Judgment Upon Davis' Full Performance. Upon Davis' full performance of all obligations imposed upon Davis under this Agreement, Payne agrees to immediately destroy the Judgment. [use only if future performance over time as opposed to simple payment of money as part of the settlement][34]

23.1. Default[35]

There shall occur a Default under this Agreement if:

23.1.1 any representation or warranty of any Party contained in this Agreement is materially false in any respect;

23.1.2 any Party fails to perform any covenant of such Party contained in this Agreement;

23.1.3 Payne's rights or benefits under this Agreement are nullified or materially impaired (including, without limitation, classification of the consideration paid to Payne hereunder or any of the rights of Payne set forth in Section 2 hereof in connection with this Agreement as either a preference or a fraudulent conveyance) by the application of any bankruptcy or other debtor relief law now or hereafter in effect;

23.1.4 The consideration set forth in Section 2 and all subsections thereof is not received by Payne in accordance with the terms hereof; or

23.1.5 Davis fails to comply with terms of this Agreement.

23.2. **Notice of Default and Right to Cure**

If and when a Party alleges that another Party is in default of this Agreement, that Party shall send a notice of default in accordance with the notice provision of this Agreement and the other Party shall have fifteen (15) days to cure such default.

23.3. Remedies upon Default[36]

If Davis defaults under this Agreement and fails to cure same within fifteen (15) days after notice is provided in accordance with this Agreement, Payne shall be entitled to file, request entry of, record, abstract and execute on the Judgment. Davis agrees that it cannot and will not withdraw its prior consent to this Consent Judgment, and that any attempt to withdraw consent will be null and void and without force and effect. [Do not include the following sentence if the Agreement contains an alternative dispute resolution provision such as Section 21, *supra*] Without being forced to elect remedies, Payne will be entitled to exercise all rights and remedies allowed in equity and under the applicable law, including pursuing a lawsuit to enforce this Agreement or in the alternative, reinstate his claims and causes of action [the parties may elect to insert a provision waiving limitations for a specified period of time in the event of default].[37]

24. Forum Selection and Mandatory Venue[38]

[Use only if the Agreement does not contain an alternative dispute resolution provision such as Section 21, *supra*] The Parties acknowledge and agree that any and all disputes arising from or related to this Agreement, or the obligations contained herein, shall be brought only in _____ County, Texas.

25. Prior Agreements Superseded[39]

This Agreement supersedes all prior agreements, written or oral, between the Parties, including but not limited to the Rule 11 Agreement executed at mediation [or, provide that the Rule 11 Agreement executed at mediation governs in the event of conflicting terms]. It is understood and agreed that all future rights and obligations of the Parties as to each other shall be governed solely by this Agreement.

26. Invalidity[40]

If any term or provision of this Agreement shall be determined to be unenforceable or invalid or illegal in any respect, the unenforceability, invalidity or illegality shall not affect any other term or provision of this Agreement, but this Agreement shall be construed as if such unenforceable, invalid or illegal term or provision had never been contained herein.

27. Non-Assignment of Claims[41]

The Parties hereby represent and warrant that they each are the only and lawful owner of any and all claims that were asserted or could have been asserted in the Lawsuit and that no portion of any claim being released pursuant to this Agreement has been assigned or conveyed to any other person, party or entity. The Parties further agree that the obligations imposed by this Agreement are not assignable.

28. Taxes[42]

The Parties understand and agree that none of the Parties or their attorneys have made any representations or warranties regarding the taxability or non-taxability of any of the consideration exchanged pursuant to this Agreement.

29. Multiple Originals

This Agreement may be executed in a number of identical counter-parts, each of which shall be deemed an original for all purposes and facsimile or copies of this Agreement and the signatures hereto will be deemed an original for all purposes.

30. No Oral Modifications[43]

This Agreement may not be modified, amended or terminated orally. No modification, amendment or termination, or any waiver of any of the provisions of this Agreement, shall be

binding unless same is in writing and signed by the person against whom such modification, amendment or waiver is sought to be enforced.

31. No Waiver[44]

The failure of any of the Parties to enforce at any time any provision of this Agreement shall not be construed to be a waiver of such provision, nor in any way affect the validity of this Agreement or any part thereof or any right of any person thereafter to enforce each and every provision. No waiver of any breach of this Agreement shall be held to constitute a waiver of any other breach.

32. Execution of Necessary Documents[45]

The Parties further covenant and agree to execute any and all documents reasonably necessary to effectuate the provisions of this Agreement, including but not limited to (a) a joint motion to dismiss with prejudice all claims and Parties in the Lawsuit; (b) an agreed order dismissing all claims and Parties in this Lawsuit. The joint motion to dismiss with prejudice and agreed dismissal order shall be filed within five (5) days after the full execution of this Agreement and payment of the amount set forth in Section 2.

AGREED AND ACCEPTED:

Paul Payne

Agreed and Accepted

Don Davis

State of Texas

County of _____

Before me, a Notary Public, on this date personally appeared Paul Payne, known to be the person and officer whose name is subscribed on the foregoing instrument and acknowledged to me the same was the act of Paul Payne and that he executed the same on behalf of himself for the purpose of consideration therein expressed in the capacity stated therein.

Given my hand and seal of office this _____ day of _____, 2007.

Notary Public, State of Texas

[seal]

State of Texas

County of _____

Before me, a Notary Public, on this date personally appeared Don Davis, known to be the person and officer whose name is subscribed on the foregoing instrument and acknowledged to me the same was the act of Don Davis and that he executed the same on behalf of himself for the purpose of consideration therein expressed in the capacity stated therein.

Given my hand and seal of office this _____ day of _____, 2007.

Notary Public, State of Texas

[seal]

Accepted to and agreed by counsel for Paul Payne and Don Davis solely for the purpose of Section _____.

Attorney for Paul Payne Date

Attorney for Don Davis Date

George Parker Young serves as Of Counsel in the Business Litigation Practice Group of Haynes and Boone, LLP in Fort Worth. Mr. Young argued two landmark cases on HMO liability to the U.S. Supreme Court in March, 2004: CIGNA HealthCare of Texas, Inc. v. Calad (No. 03-83); Aetna Health Inc. v. Davila (No. 02-1845) [consolidated]. Todd Baker is an associate in the Business Litigation Practice Group of Haynes and Boone in Dallas. Mr. Baker represents clients in all facets of commercial litigation, including matters involving fraud, breach of contract, breach of fiduciary duty, commercial lending disputes, franchise disputes and real estate disputes. Josh Borsellino is an associate in the Business Litigation Practice Group of Haynes and Boone in Fort Worth. Mr. Borsellino served as a clerk for the Honorable Walter S. Smith, Jr., Chief United States District Judge, Western District of Texas, from 2004-2006.

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[1] The authors wish to thank Haynes and Boone Bankruptcy associate Ian Peck and Appellate associate Kendyl Hanks for their valuable contributions to this article.

[2] Texas Rule of Civil Procedure 11 simply requires an agreement "touching any suit pending" must "be in writing," "signed" by counsel or the parties and "filed with the papers as part of the record," or "made in open court and entered of record." Tex. R. Civ. P. 11 ("Rule 11). Since this Agreement meets the former requirements of being in writing and signed by the parties (as long as later filed), adding the phrase "Rule 11" to the document appears to add little, if anything. *See* endnote 3 for a discussion of the option of setting up expedited enforcement in the event of breach by having the trial judge "render" the settlement as a judgment. Absent more, simply meeting the requirements of Rule 11 entitles the parties to enforce their settlement as any written contract is enforced, typically by summary judgment motion if the agreement is not ambiguous. Not meeting the requirements of Rule 11 means that even if there is a meeting of the minds and a written memorial of the relevant terms, the parties settlement cannot be enforced at all. *See Kennedy v. Hyde*, 682 S.W.2d 525, 529-30 (Tex. 1984)(material terms dictated into court reporter's record at deposition, and on the record all parties indicated their consent to the terms, yet parties' uncontroverted agreement did not meet the requirements of Rule 11 when one party later withdrew consent, since not "signed by" the attorneys or parties, and not "made in open court and entered of record"). Significantly, Rule 11 does not address the manner of enforcement of a binding settlement agreement which meets the Rule's requirements.

[3] The principles of contract law apply to settlement agreements; the requirements of contract law must be met to have an enforceable settlement agreement. *Cothron Aviation, Inc. v. Avco Corp.*, 843 S.W.2d 260, 263-265 (Tex. App.--Ft. Worth 1992, writ denied). The terms of a settlement agreement can be enforced as contractual rights (assuming the requirements of Rule 11 are met), regardless of whether or not the terms of the settlement are incorporated into a judgment rendered by the trial court. *McFarland v. Bridges*, 2003 WL 2004350 at *9-10 (Tex. App.--El Paso 2003, no pet.). To expedite the enforcement process, the parties have the option of incorporating the key terms of the settlement into a judgment entered by the court (especially if confidentiality of the settlement's material terms is not a factor). When and whether the trial court has actually "rendered" judgment incorporating the terms of settlement has been the focus of much litigation, chiefly due to the ability to "revoke" consent to a

judgment before rendition by the trial court, even when the material settlement terms are otherwise in the form of a binding document conforming with the requirements of Rule 11 (in which case, of course, the settlement is still enforceable as a contract). *See e.g. Walkner v. Walkner*, 71 S.W.3d 364, 367 (Tex. App.--Corpus Christi 2001, no pet.)(party may revoke consent to judgment any time before judgment is "rendered"). The problem seems to arise from confusion about what magic language is required for a trial court to "render" judgment from the bench on the record. For example, in *Able Cabling Services v. Aaron Carter Elec., Inc*., 16 S.W.3d 98 (Tex. App.—Houston [1st Dist. 2000, pet denied), a trial court's statement that a judgment "will be" rendered in accordance with the settlement agreement was ineffective in immediately rendering the settlement's terms into judgment, but instead merely expressed an intent to enter a judgment in the future. *See also Intercoastal Warehouse Corp. v. Clear Lake National Bank*, 795 S.W.2d 294 (Tex. App.—Houston [14th Dist.] 1990, writ dism'd w.o.j.)(holding judge merely indicated intent to render judgment in the future so subsequent repudiation of judgment by one party was effective). If the parties do not expressly agree that a judgment rendered on a settlement agreement is enforceable by contempt, one court holds it is not. *Reppert v. Beasely*, 943 S.W.2d 172, 174-75 (Tex. App.—San Antonio 1997, no writ). A mere docket entry may not be sufficient to constitute entry into the minutes of the court. *Hamilton v. Empire Gas & Fuel Co*., 110 S.W. 561 (Tex. Civ. App. 1937); *but see Aetna Ins. Co, v. Dancer,* 215 S.W. 962 (Tex. Civ. App. 1919) (holding a docket entry is sufficient). *See also In re Fuentes*, 960 S.W. 2d 261 (Tex. App.—Corpus Christi 1997); *Ranier v. Brown*, 623 S.W.2d 682 (Tex. Civ. App.—Houston [1st. Dist.] 1981, orig. proceeding).

[4] Some jurisdictions have mandatory recitals which are required in certain types of settlement agreements. *Huddleston v. Huddleston*, 14 A.D. 3d 511, 788 N.Y.S.2d 411 (Sup. Ct. of New York, Appellate Division, 2nd Dept. 2005); *see also* Tex. Fam. Code. Ann. Sec. 6.602(b), (c) (if a mediated family law settlement meets requirements of this rule, it is binding and one is entitled to judgment on the mediated settlement agreement, but agreement must recite ("provide") in a prominent statement that is in boldfaced type or capital letters or underlined that it is not subject to revocation). Silence in otherwise specific recitals has been used to interpret the scope of a settlement and release to find certain tort claims were not included in a written settlement agreement. *Baty v. Protech Ins. Agency*, 63 S.W.3d 841, 854 (Tex. App.--Houston [14th Dist.] 2001, pet. denied)("This silence [in the recitals] supports an inference that the parties did not intend to include tort claims in the settlement agreement"). Recitals of fact in a settlement agreement can later be contradicted by parol evidence. *Sterquell v. Archer*, 1997 Tex. App Lexis 199 at *17 (Tex. App.--Amarillo 1997, writ denied)(unpublished)(*citing Muhm v. Davis*, 580 S.W.2d 98, 101 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ ref'd n.r.e.) and *Restatement (Second) of Contracts* Sec. 218(l)(1981)) (noting the recital remains evidence of the fact mentioned, but it is denied the status of indisputability). And one Texas case holds that "self-serving" recitals are inadmissible to explain the nature of the settlement agreement in a later trial against other defendants, where plaintiff sought to introduce self-serving statements about the settling defendant being innocent of any negligence and stipulation as to minimum amount of damages. *Brown v. Gonzales*, 653 S.W. 2d 854, 865 (Tex. App.--San Antonio 1983, no writ). Given these rules, and absent a statutorily mandated recital, the recitals should be kept to a minimum, be concise, and not create inferences that omissions from the recitals limit the scope of the settlement or attendant releases. Whatever usefulness recitals may offer in terms of later judicial interpretation of unclear or ambiguous terms, the energy spent on drafting the "Recitals" section may be better expended on drafting the operative portions of the agreement with clarity to avoid later confusion or worse, ambiguity.

[5] Often the parties contemplate later drafting of a more comprehensive settlement document, but reduce the material terms to a Rule 11 memorandum of settlement or term sheet which is signed at the mediation by either counsel the parties or both. Failure to agree on all of the material terms in this later document is not uncommon, so that the parties are forced to rely on their "bare bones" mediation agreement as the only written record of their settlement. The practitioner should consider taking this form settlement agreement to every mediation (along with an electronic version) to use as a checklist of material terms that can be quickly dropped into the mediator's standard form.

[6] A nonsuit pursuant to TEX. R. CIV. P. 162 operates as a dismissal without prejudice. *Mokkala v. Mead*, 178 S.W.3d 66, 74-75 (Tex. App.--Houston [14th Dist.] 2005, pet. denied). However, plaintiff cannot avoid the effects of a partial summary judgment by subsequently filing a nonsuit, and any issues decided in the partial summary judgment are dismissed with prejudice. *Hyundai Motor Co. v. Alvarado*, 892 S.W.2d 853, 854 (Tex. 1995) (per curiam).

[7] As in any contract, consideration is an essential element to the formation of a valid settlement agreement. Mutual releases exchanged in an effort to avoid the cost of litigation will generally serve as adequate consideration. *See Shield Co. v. Williamson,* 355 S.W.2d 811, 813 (Tex. Civ. App.--Fort Worth 1962, no writ). However, past

consideration or the payment of amounts indisputably due have been found insufficient consideration for release provisions. *Franks v. Brookshire Bros., Inc*., 986 S.W.2d 375, 378 (Tex. App.--Beaumont 1999, no pet.); *Parr v. Duval County,* 304 S.W.2d 957, 959 (Tex. Civ. App.--Eastland 1957, ref. n.r.e.). Accordingly, practitioners should keep in mind the mutuality requirement in drafting release provisions.

[8]Release provisions often seek to relieve each party for their own negligence *in advance of liability*. In such cases, courts have created heightened standards to evaluate the efficacy of release provisions. Practitioners drafting release clauses should therefore focus on two primary areas: (1) parties covered by the release; and (2) the subject matter of the release. *Victoria Bank & Trust Co. v. Brady*, 811 S.W.2d 931, 938 (Tex. 1991) (questioned on other grounds in *Wardlaw v. Inland Container Corp.*, 76 F.3d 1372, 1378-79 (5th Cir. 1996)); *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 419 (Tex. 1984). As to the first prong, Texas courts have held that releases are only effective against named parties to the release, or parties that are described in the release with such descriptive particularity that their identity is not in doubt. *Duncan*, 665 S.W.2d at 419. Regarding the subject matter prong, the Texas Supreme Court has held that "as broadly written as a release may be, a claim must be "mentioned" to be effectively released." *Victoria,* 811 S.W.2d at 938. In addition, release provisions are subject to fair notice requirements, which include: (1) the express negligence doctrine; and (2) the conspicuous requirement. *Id.* The express negligence doctrine states that a party to release potential claims against another party for the other party's negligence must express that intent in unambiguous terms within the four corners of the agreement. *Storage & Processors, Inc. v. Reyes,* 134 S.W.3d 190, 192 (Tex. 2004). The conspicuous requirement mandates "that something must appear on the face of the [contract] to attract the attention of a reasonable person when he looks at it." *Id.* To allay concerns regarding enforcement, practitioners should express the terms of a release as clearly as possible. Practitioners should also draft release provisions in, for example, ALL CAPS, bold faced or colored type to comply with the conspicuous requirement. **Pre-injury releases** Texas courts will on occasion uphold the validity of a pre-injury or pre-accident release, though these pre-event clauses will be read more narrowly. *Sydlik v. REEIII, Inc. D/B/A Curves for Women, Curves Int'l., Inc., & Ecological Servs. Int'l.*, 195 S.W.3d 329 (Tex. App—Houston [14th Dist.] 2006, no pet.); *see also Dresser Indus., Inc. v. Page Petroleum, Inc*., 853 S.W.2d 505, 507 (Tex. 1993).

[9] Waivers are invalid under the Texas Deceptive Trade Practices Act ("DTPA"), unless the waiver agreement complies with the requirements of Tex. Bus. Comm. Code. § 17.42(a). In short, § 17.42(a) requires that: (1) the waiver be in writing and signed by the consumer; (2) the consumer is not in a significantly disparate bargaining position; (3) the consumer is represented by ***independent*** legal counsel. Tex. Bus. Comm. Code. § 17.42(a). Moreover, a waiver must be conspicuous, in bold-face 10-point type or more, identified by the heading "Waiver of Consumer Rights" or words of similar meaning, and substantially in the form set forth in § 17.42(b). A waiver is not a defense to an action brought by the attorney general under § 17.47. *Id*. at § 17.42(e).

[10] Broad indemnification provisions involve a significant shifting of risk. "Because indemnification of a party for its own negligence is an extraordinary shifting of risk, this Court has developed fair notice requirements which apply to these types of agreements." *Dresser Industries,* 853 S.W.2d at 508. Under Texas law, as is the case with releases (discussed supra), indemnification provisions are subject to fair notice requirements (discussed supra), which include: (1) the express negligence doctrine; and (2) the conspicuous requirement. *Id.* In the indemnity context, the express negligence doctrine requires that a party seeking indemnity from the consequences of its own negligence must express that intent in specific terms within the four corners of the contract. *Ethyl Corp. v. Daniel Const. Co.,* 725 S.W.2d 705, 707-08 (Tex. 1987). Similar to releases, practitioners should also draft indemnity provisions in, for example, ALL CAPS, bold faced or colored type to comply with the conspicuous requirement. *See e.g.*, *Dresser.,* 853 S.W.2d at 511 (stating that "language in capital headings, language in contrasting type or color, and language in an extremely short document, such as a telegram, is conspicuous."; *see also Tynes v. Nations Rent of Tex. L.P.,* 2006 Tex. App. LEXIS 7488, No. 10-05-0372-CV, 2006 WL 2438683, at *2 (Tex. App.--Waco Aug. 23, 2006, no pet.) (noting provision in bold type-face with heading in capital/lower-case form was conspicuous). Even when the fair notice requirements may not otherwise be met, proof of actual notice of an indemnity provision will satisfy the above requirements. John J. Smither, *A Primer on Indemnity*, 41 Houston Lawyer 26, 27-28 (March/April 2004). Accordingly, practitioners should consider a face to face signing meeting where feasible, including a discussion of the indemnity provision and insistence that signatories read the entire agreement in the presence of the parties.

Circular Indemnity Especially in cases involving multiple parties, practitioners should be wary of the pitfalls of circular or circuitous indemnity. A "circuit of indemnity" exists where an otherwise prevailing party would be nonetheless obligated to pay its own damages based upon contractual or statutory indemnification of the party that committed the wrong. *See Wolfenberger v. Houston Lighting and Power Co*., 73 S.W.3d 444, 447-48

(Tex.App.- Houston [1st Dist.] 2002, pet. denied). In *Young v. Kilroy Oil Co. of Texas,* the Houston Court of Appeals affirmed a take nothing judgment entered in favor of the defendant after the plaintiff settled with two other co-defendants, and despite the fact that the plaintiff had in fact proved his right to recovery against the remaining defendant. "[A]fter these circuitous obligations have been satisfied,….the Plaintiff is ultimately entitled to take nothing from Cities Service." *Young v. Kilroy Oil Co. of Texas*, 673 S.W.2d 236, 246 (Tex. App. Houston [1st Dist.] 1984, writ ref'd n.r.e.). *See also Martinez v. Gulf States Utility Co*. 864 S.W.2d 802 (Tex. App. Houston [14th Dist.] 1993, writ denied) (upholding summary judgment based upon assertion of circuit of indemnity). However, Texas courts have held that circular indemnity cannot prevent a *judgment* because the right to indemnity does not arise until the judgment is rendered or paid). *See Bayoud v. Bayoud*, 797 S.W.2d 304, 317 (Tex.App.- Dallas 1990, writ denied); *see also Johnston Investments, Inc. v. Christiansen*, 952 S.W.2d 12 at 14 (Tex. App. – Texarkana 1997, writ denied) (finding that circularity cannot extinguish a cause of action because right to indemnity does not arise until the judgment is paid). Accordingly, practitioners should carefully advise their clients of the potential consequences of indemnity provisions.

Contribution. Two points are worth mentioning in the context of contribution, which is governed by Chapter 33 of the Texas Civil Practice and Remedies Code: (1) Defendants have no right to contribution against settling defendants; and (2) settling defendants have no right of contribution against non-settling defendants. George C. Hanks, Jr., *Contribution and Indemnity After HB4*, 67 Tex. B.J. 288, 292 (April 2004) Practitioners must be mindful of the consequences of settlement and advise clients that payments made in settlement can almost never be recovered from non-settling defendants, regardless of culpability.

[11] Failure to abide by a confidentiality provision, even when the agreement was filed as part of an action to enforce its terms has resulted in sanctions which included a reduction in plaintiff's attorneys' contingent fee. *Toon v. Wackenhut Corrections Corp*., 250 F.3d 950 (5th Cir. 2001).

[12] As with typical contractual liquidated damages clauses, courts will enforce these provisions in settlement agreements if the court finds: (1) the harm resulting from a breach is difficult to estimate; and (2) the amount provided as liquidated damages is a reasonable forecast of just compensation. *See Rio Grande Valley Sugar Growers, Inc. v. Campesi*, 592 S.W.2d 340, 342 (Tex. 1979) (citing to *Stewart v. Basey*, 150 Tex. 666, 245 S.W.2d 484 (1952)).

[13] It is hornbook "Agency" law that the statements of the agent as to the scope of the permitted agency can never establish the scope of the agency, absent apparent or implied authority. *Huynh v. Nguyen*, 180 S.W.3d 608, 622-23 (Tex. App.--Houston [14th Dist.] 2005, no pet.) (when determining the scope of agent's authority, representations made by the agent have no effect). Yet the authors found this provision or similar provisions in almost every settlement agreement examined. If the settlement agreement is being signed by a President or CEO, the authority to bind the corporation can probably be inferred ("implied authority"). See *Polland & Cook v. Lehmann*, 832 S.W.2d 729, 738 (Tex. App.--Houston [1st Dist.] 1992, writ denied) ("An agent's authority is presumed to be coextensive with the business entrusted to his care. He may perform such acts as are necessary and proper to accomplish the purposes for which the agency was created."). If the practitioner has the slightest doubt about the scope of the authority held by person signing for the opposing party to enter into binding settlements for the corporation and release what may be valid, a corporate board resolution by the corporate secretary should be obtained. In these cases, practitioners should consider adding the following certificate as an exhibit to the settlement agreement:

GENERAL CERTIFICATE OF **[Name of Entity]**

I, the Secretary of _____, a _____(the "Company"), being duly authorized to execute this certificate on behalf the Company, and having, in the capacity of Secretary of the Company, personal knowledge of the matters referred to herein, do hereby certify, with respect to the _____("Agreement") dated as of _____, 20__, between the Company, and_____, as follows:

1. The Company is a _____duly organized, and validly existing under the laws of the State of_, has the power and authority to own its properties and carry on its business as now being conducted, and has full legal right, power and authority to execute, and deliver the Agreement.

2. The individual listed below is qualified and acting officer of the Company as set forth in the right column opposite his/her name and the signature appearing in the extreme right column opposite the name of such

officer is a true specimen of the genuine signature of such officer and such individual has the authority to execute the Agreement on behalf of the Company:

Name	**Title**	**Signature**
_____	_____	_____

3. The Agreement has been properly and duly executed and delivered by the Company. It has not been not been amended or rescinded and due performance thereof has been authorized by the Company and approved by the [Board of Directors] of the Company. The Agreement is in the form approved by the [Board of Directors] of the Company.

4. Attached hereto as **Exhibit A** is a true, correct, and complete copy of resolutions duly adopted at a meeting of the [Board of Directors]of the Company held on _____, which resolutions evidence the approval of the Agreement by the Board of Directors. Such resolutions have not been amended, modified, annulled, rescinded or revoked and remain in full force and effect as of the date hereof.

IN WITNESS WHEREOF, the undersigned has delivered this Certificate on behalf of the Company this _____, 20____

[**Entity Name**]

By: _____
Name:
Title: _____

EXHIBIT A

RESOLUTIONS

[Insert appropriate board resolutions]

[14] Under certain circumstances, such as a settlement that contemplates an ongoing business relationship or continuing settlement obligations, the parties may wish to create a mutual duty of good faith among themselves. In these cases, this provision should be included in the settlement agreement, as Texas does not imply a common-law duty of good faith and fair dealing in all contractual relationships. *Subaru of Am. v. David McDavid Nissan, Inc*., 84 S.W.3d 212, 225 (Tex. 2002). The duty arises only when a contract creates or governs a "special relationship" between the parties. *Id*. (citing *Arnold v. National County Mut. Fire Ins. Co*., 725 S.W.2d 165, 167 (Tex. 1987)). However, contracts governed by the Texas UCC are subject to an obligation of good faith. TEX. BUS. & COM. CODE ANN. § 1.203 (Vernon 1994). Good faith is defined as "honesty in fact in the conduct or transaction concerned." TEX. BUS. & COM. CODE ANN. § 1.201(19) (Vernon 1994). Honesty in fact is determined by the actual belief of the party in question and not the reasonableness of that belief. *La Sara Grain Co. v. First Nat'l Bank of Mercedes*, 673 S.W.2d 558, 563 (Tex. 1984). In order to be actionable under the UCC (and presumably under contracts governed by the common law containing a good faith provision), the bad-faith conduct must relate to some aspect of performance under the terms of the contract. One Texas court has stated that "lack of good faith exists when a party has actual knowledge of facts that when acted on constitute a dishonest disregard of the contractual rights of another party." *Commercial Nat. Bank. v. Batchelor*, 980 S.W.2d 750, 753 (Tex. App.--Corpus Christi 1998, pet. denied).

[15] According to the Restatement, "following termination of a representation, a lawyer must…take reasonable steps to convey to the former client any material communication the lawyer receives relating to the matter involved in the representation." RESTATEMENT (THIRD) OF LAW, THE LAW GOVERNING LAWYERS, § 33(2)(c) (West 2007). While the former attorney has a duty to forward the notice to the former client, notice acquired by the attorney after the termination of the attorney-client relationship will not be imputed to the former client. *Cannon v. ICO Tubular Services, Inc.*, 905 S.W.2d 380, 387 (Tex. App.--Houston [1st Dist.] 1995, no writ). Because of this, it is important to send notice to the party as well as the party's counsel, and to confirm the party's receipt of the notice.

[16] This provision is probably unnecessary under Texas law, as "[a] written transaction, such as a contract, lease, deed, or the like may be evidenced by several counterparts, or identical copies of the written terms, all of them being signed, or at any rate, designed to be considered as of equal force as embodying the transaction. . . Each of these counterparts is admissible as an 'original' without producing or accounting for the others. . ." *Dickerson v. Mack Financial Corp.*, 452 S.W.2d 552, 557 (Tex. App.—Houston [1st Dist.] 1970, writ ref'd n.r.e.) (quoting McCormick and Ray, Texas Law of Evidence, Ch. 29, § 1564, p. 406).

[17] Where a person is under a duty to disclose material information, refrains from doing so, and thereby leads another to contract in reliance on a mistaken understanding of the facts, the resulting contract is subject to rescission due to the intentional nondisclosure. See *Smith v. Nat'l Resort Communities, Inc.*, 585 S.W.2d 655, 658 (Tex. 1979). Whether this duty exists is a question of law. *Bradford v. Vento*, 48 S.W.3d 749, 754-55 (Tex. 2001).; *Ralston Purina Co. v. McKendrick*, 850 S.W.2d 629, 633 (Tex. App.-San Antonio 1993, writ denied). A duty to disclose "may arise in four situations: (1) when there is a fiduciary relationship; (2) when one voluntarily discloses information, the whole truth must be disclosed; (3) when one makes a representation, new information must be disclosed when that new information makes the earlier representation misleading or untrue; and (4) when one makes a partial disclosure and conveys a false impression." *Alcan Aluminum Corp. v. BASF Corp*., 133 F. Supp. 2d 482, 498-99 (N.D. Tex.), aff'd, 51 Fed. Appx. 482, 2002 WL 31319307 (5th Cir. 2002); *Ralston Purina Co*., 850 S.W.2d at 635-36. This provision should negate the non-disclosure problem.

[18] *Boyd v. Boyd*, 67 S.W.3d 398, 404-405 (Tex. App.—Fort Worth, 2002, no pet.) provides an illustration of the problem of enforcing a settlement agreement that lacks a fraud by omission disclaimer. Three months after the parties reached a mediated settlement agreement, Ms. Boyd moved to set it aside, claiming that her ex-husband had not made a fair and reasonable disclosure of the parties' marital property and financial obligations. The trial court found that the ex-husband's nondisclosure of a significant asset was sufficient to support a finding of fraud by omission, rendering the settlement agreement unenforceable. The Fort Worth Court of Appeals found that the fiduciary duty between a husband and a wife does not continue when each hires counsel to represent them in a contested divorce proceeding. However, the court found that the husband had a duty to truthfully disclose all assets known to him at the time of the settlement, particularly given that the "parties to a mediated settlement agreement have represented to one another that they have each disclosed the marital property known to them." Going one step further, the court reasoned that since the ex-husband had made a partial disclosure regarding his marital assets, he was under a duty to disclose the entire truth, and his failure to do so voided the settlement agreement. Given the nature of litigation, the authors question whether this rationale could serve as grounds to set aside virtually every settlement agreement not containing a fraud by omission disclaimer.

[19] In Texas a writing is generally construed most strictly against its author. *Lumbermens Mut. Cas. Co. v. Carter*, 934 S.W.2d 912, 914 (Tex. App.--Beaumont 1996, no writ). In *ASI Technologies v. Johnson Equipment Co*., 75 S.W.3d 545, 548-549 (Tex. App.--San Antonio 2002, pet. denied), the San Antonio Court of Appeals reasoned that because the defendant's counsel drafted the high-low agreement, the defendant could easily have included a provision preserving the defendant's right to statutory indemnity. Because this provision was not included in the agreement, the court inferred that the defendant intended to relinquish this right. Thus, courts have used this doctrine not only to interpret the meaning of provisions that are included in a contract, but also to extrapolate the intent of the drafting party for provisions that are excluded – drafter beware indeed!

[20] A party may waive subsequent fraud claims through a settlement agreement. *See, e.g., Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 181 (Tex. 1997) (holding that release provision disclaiming reliance on other party's representations conclusively negated element of fraudulent inducement claim); *Atl. Lloyds Ins. Co. v. Butler*, 137 S.W.3d 199, 218 (Tex. App.--Houston [1st Dist.] 2004, pet. denied) (same). Texas courts give effect to waivers because "[p]arties should be able to bargain for and execute a release barring all further dispute." *Schlumberger*, 959 S.W.2d at 179. However, not all agreements are binding. Id. at 181. Instead, Texas courts look to the agreement itself and the circumstances surrounding its formation to properly determine whether the waiver is binding. See *id*.; *Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd*., 940 S.W.2d 587, 591 (Tex. 1996). Several factors influence this determination, including whether both parties were represented by counsel, whether the parties negotiated and dealt with each other at arm's length, and whether the parties were knowledgeable and sophisticated. See *Schlumberger*, 959 S.W.2d at 180.

[21] Texas courts have held that "an attorney does not have a right of recovery, under any cause of action, against another attorney arising from conduct of the second attorney engaged in as part of the discharge of his duties in representing a party in a lawsuit in which the first attorney also represented a party. *Bradt v. West*, 892 S.W.2d 56,

71-72 (Tex. App.—Houston [1st Dist.] 1994, writ denied); *see also In re Marriage of Walston*, 2007 Tex. App. LEXIS 3609, at *10 (Tex. App.—Waco, May 9, 2007) (citing *Alpert v. Crain, Caton & James, P.C.*, 178 S.W.3d 398, 405-06 (Tex. App.--Houston [1st Dist.] 2005, pet. denied). As a general rule, a party cannot sue opposing counsel for the attorney's conduct in the course of the litigation. The Texas Supreme Court has recognized an exception to this rule. A cause of action exists "against an attorney who knowingly commits a fraudulent act outside the scope of his legal representation of the client." *Walston*, 2007 Tex. App. LEXIS 3609, at *11. The Texas Supreme Court stated, "If a lawyer participates in independently fraudulent activities, his action is 'foreign to the duties of an attorney.' A lawyer cannot shield his own willful and premeditated fraudulent actions from liability simply on the ground that he is an agent of his client." *Id*. at *11-12 (citing *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787, 793-94 (Tex. 1999) (citations omitted).

[22] Parties want their settlement agreement to be interpreted by the specific terms contained in the agreement. The Texas Supreme Court has affirmed a trial court's admission of parol evidence to resolve ambiguity between a contract's heading and terms. *See e.g. Neece v. A.A.A. Realty Co*., 322 S.W.2d 597, 602 (Tex. 1959). In order to avoid potential ambiguity due to the headings, practitioners should include this provision.

[23] Choice of law provisions offer contracting parties the opportunity to contractually agree to the law that will govern the enforcement and interpretation of an agreement. Courts considering choice of law provisions use the "Most Significant Relationship Test" set forth in the Restatement (Second) of Conflict of Laws § 188. *Minnesota Min. and Mfg. Co. v. Nishika Ltd*., 952 S.W.2d 733, 735-736 (Tex. 1997). The factors considered under § 188 include: (1) the place of contracting; (2) the place of negotiation; (3) the place of performance; (4) the location of the contract's subject matter; and (5) the domicile, residence, nationality, place of incorporation, and place of business of the parties. These "contact" factors are viewed in light of the "public policy" factors contained in the Restatement (Second) of Conflict of Laws § 6. The "public policy" factors include: (1) the needs of the interstate and international systems; (2) the relevant policies of the forum; (3) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue; (4) the protection of justified expectations; (5) the basic policies underlying the particular field of law; (6) certainty, predictability, and uniformity of result; and (7) ease in the determination and application of the law to be applied. While the Restatement lists a multitude of factors, the reality is that a choice-of-law provision in a settlement agreement negotiated between two parties represented by counsel will be enforced unless there is virtually no connection between the chosen jurisprudence and the facts of the case.

[24] Texas courts have defined the "prevailing party" as "one of the parties to a suit who successfully prosecutes the action or successfully defends against it, prevailing on the main issue even though not to the extent of its original contention." *City of Amarillo v. Glick,* 991 S.W.2d 14, 17 (Tex. App.—Amarillo 1997, pet. denied) (finding appellees were the prevailing party despite not receiving all requested relief).

[25]This paragraph is designed to avoid the hornbook rule of contract interpretation, especially in the case of alleged confusing or ambiguous meaning, that a contract is contrued and interpreted against the drafter. *Gonzalez v. Mission American Ins. Co.*, 795 S.W.2d 734, 737 (Tex. 1990)(citing *Republic Nat. Bank of Dallas v. Northwest Nat. Bank of Fort Worth*, 578 S.W.2d 109 (Tex. 1978). The last sentence of the paragraph is designed to avoid application of the presumption in Texas (and other jurisdictions) that a term not included in the contract was intentionally omitted. *See, e.g.*, *Pioneer Chlor Alkali Co. v. Royal Indemnity Co.*, 879 S.W.2d 920, 938 (Tex. App.-Houston [14th Dist.] 1994, no writ).

[26] There may be circumstances where the Plaintiff wants to allocate some significant portion of a Defendants settlement payment to a particular category of damages, or even to punitive damages (even where this probably creates taxable income where the payment might not otherwise be included in gross income). For example, if there are non-settling defendants and the case will likely get tried, the amount allocated to punitive damages is arguably not included in any Chapter 33 settlement credit the other Defendants can claim for actual damages awarded by the jury. *See* Tex. Civ. Prac. & Rem. Code 33.012(b) ("If the claimant has settled with one or more persons, the court shall further reduce the amount of damages to be recovered by the claimant with respect to a cause of action by the sum of the dollar amounts of all settlements.").

[27] This simple provision (and the language contained in the releases) should effectively preclude a party seeking to enforce a settlement agreement from "going back" to seek attorneys' fees incurred in connection with the initial dispute.

[28] Counsel should be aware of the potential liability created for the practitioner and his or her firm by this representation, in the event the client later claims no such explanation was made, claims confusion, claims

misunderstanding of the material terms, or similar troublesome assertions. At a minimum the lawyer should consider having the client sign a separate letter placed in the lawyers files affirming that counsel has fully explained the meaning and effect of the settlement agreement to the client, but as a practical matter is the explanation required to be in the same detail as, say, this article?

[29] Both Texas and Federal law favor arbitration. *In re FirstMerit Bank*, 52 S.W.3d 749, 753 (Tex. 2001). Where an arbitration agreement does not specify arbitration under the Federal Arbitration Act ("FAA") or the Texas Arbitration Act ("TAA"), both acts will govern if the agreement involves interstate commerce. If both Acts govern, the FAA will trump the TAA to the extent they conflict under classic pre-emption principles. If the agreement does not involve interstate commerce, the TAA will apply. The example above is a streamlined approach designed to achieve timely and low-cost dispute resolution. Practitioners should bear in mind the wide latitude available when drafting arbitration provisions, as there is no requirement in either the FAA or TAA to use the American Arbitration Association, or similar organizations, for arbitration proceedings. This public policy permits practitioners to be creative in crafting arbitration provisions.

[30] Case law holds that the Bankruptcy Code provides a bankruptcy trustee with no greater rights under an executory contract (i.e. a contract in which both the debtor and nondebtor each have unperformed obligations, which would necessarily include a settlement agreement with material unperformed obligations) than the debtor had prepetition. *See, e.g., In re Crossman*, 259 B.R. 301, 307 (Bankr. N.D. Ill. 2001) (citing *In re Sanders*, 969 F.2d 591, 593 (7th Cir. 1992).

[31] 11 U.S.C. section 365(e)(1) renders contractual *ipso facto* clauses (provisions that make the filing of bankruptcy an event of default or grounds for termination) unenforceable. However, the Bankruptcy Court for the Southern District of New York recently clarified that 365(e)(1) does not prevent the enforcement of a provision in a pre-bankruptcy settlement agreement that the failure to make a settlement payment resulted in liability to the counterparty for the ***full*** amount of the lawsuit. *See In re Margulis*, 323 B.R. 130, 135 (Bankr. S.D.N.Y. 2005). This clause can be enforced against the debtor even if the payment were due post-petition because, pursuant to Bankruptcy Code section 365, the debtor could assume the settlement agreement and perform thereunder. *See id.*

[32] Bankruptcy trustees often seek to avoid "preferential" transfers made in the ninety days prior to a bankruptcy filing pursuant to 11 U.S.C. § 547, including payments in respect of pre-petition settlement agreements. If the defendant can show that the preferential transfer was made in the ordinary course of business and according to ordinary business terms, the defendant can defeat the trustee's attack. See 11 U.S.C. § 547(c)(2). It is doubtful whether a bankruptcy court would elevate form over substance and conclude that the mere statement that the settlement agreement was entered into in the ordinary course was sufficient to prevail in a preference lawsuit. This language is often included, however, based upon the possibility of gaining advantage in preference litigation.

[33] While a party can enter into a valid and binding settlement agreement pending disposition of the case, a trial court cannot enter into a consent judgment which incorporates the terms of that agreement if one of the parties thereto withdraws consent prior to entry of the judgment. "This does ***not*** render the settlement agreement or its enforceability invalid." *Stewart v. Mathes*, 528 S.W.2d 116, 118 (Tex. Civ. App.--Beaumont 1975, no writ) (emphasis in original). See also *Quintero v. Jim Walter Homes, Inc*., 654 S.W.2d 442, 444 (Tex. 1983) (reversing judgment entered on joint motion to dismiss because one of the parties had withdrawn consent, "without prejudice to the rights [of the other party] in its attempt to plead and prove an enforceable settlement agreement under the release"); *Burnaman v. Heaton*, 240 S.W.2d 288, 292 (1951) ("the reversal of the [consent] judgment should be without prejudice to the right of defendants to plead the [settlement] agreement in bar of plaintiff's suit"). Although revocation of consent prior to entry of an agreed judgment has the effect of voiding the judgment under Texas law, it does not affect the enforceability of the underlying settlement agreement. See, e.g., *Quintero*, 654 S.W.2d at 444. If a party revokes its consent to an agreed judgment prior to the entry of judgment, the other party should submit a motion for summary judgment, requesting that the Court enforce the terms of the settlement agreement as a contract.

[34] When the parties' agreement calls for payments over time, the payee will occasionally insist on being given an agreed judgment equal to or greater than the future payments over time as a "hammer" to create an added incentive to meet the payment schedule. This can create a host of problems, not the least of which is the questionable enforceability of the judgment as a "penalty," and usury problems. See *Phillips v. Phillips*, 820 S.W.2d 785, 788 (Tex. 1991) (holding that a liquidated damages provision is an unenforceable penalty unless the actual damages are difficult to estimate and the liquidated damages are a reasonable forecast of just compensation); see also Restatement (Second) of Contracts § 208 cmt. e (1981) (stating that unreasonably large liquidated damages are not recoverable because they are unconscionable).. Also problematic is the payor's desire not to have the judgment filed

of record and abstracted as long as the payment schedule is met; sometimes an "escrow" arrangement is included in the settlement agreement. However, as the foregoing cases indicate, unless the trial court "renders" the judgment, consent to the judgment can be withdrawn any time before it is "rendered" by the trial judge. *Compare Dunn v. Dunn*, 439 S.W.2d 830 (Tex. 1969) (written judgment signed by trial judge is not a prerequisite to finality; entry of trial judgment is only a ministerial act); *Kelly v. Pirtle*, 826 S.W.2d 653 (Tex. App.--Texarkana 1992, writ denied) (trial court held to have "rendered judgment orally" in open court after settlement agreement dictated into the record and before it was repudiated by one of the parties, where court used the words, "it is judgment of this court and will be binding.") *See also Knox v. Long*, 257 S.W.2d 289, 293 (1953) ("Rendition of a judgment is different from entry of a judgment."). Rendition of a judgment occurs when a trial judge officially announces decision either orally in open court or by written memorandum filed with the clerk. Entry of a written judgment is a purely ministerial act. *Skidmore v, Glenn*, 781 S.W.2d 672, 673 (Tex. App.—Dallas 1989, no writ). Consent to a judgment must exist at the very moment the court undertakes to make an agreement the judgment of the court. *Murnamon v. Henton*, 240 S.W. 2d 288, 291 (1951*). See also Formby's KOA v. BHP Water Supply Corp*, 730 S.W.2d 428 (Tex. App.—Dallas 1987, no writ); *Carter v. Carter*, 535 S.W.2d 215 (Tex Civ. App.—Tyler 1976, writ ref'd n.r.e.). A signed judgment must not alter the settlement agreement's terms, or it is unenforceable. *Tinney v. Willingham*, 897 S.W.2d 543, 544 (Tex. App.—Fort Worth 1995); *see also Nuno v. Pulido*, 946 S.W.2d 448 (Tex. App.--Corpus Christi, 1997, no writ). An judgment which simply recites "approved as to form and substance" is not a consent judgment; the body should state that the judgment is entered by consent. *Chang v. Linh Nguyen*, 81 S.W.3d 314, 316 (Tex. App.--Houston [14 Dist.] 2001, no pet.). As the foregoing cases and discussion suggests, escrowing an agreed judgment which is not actually rendered and entered in the minutes of the court record is problematic, to say the least.

A trial court's "approval" of a settlement agreement does not constitute rendition of judgment. *Patel v. Eagle Pass Pediatric Health Clinic*, 985 S.W.2d 249, 252 (Tex. App.—Corpus Christi 1999, no pet.).
The writing need not be filed before consent is withdrawn to be enforceable under Rule 11, but must be filed before enforcement is sought. *Padilla v. LaFrance*, 907 S.W.2d 454, 461 (Tex. 1995).

If consent is withdrawn before entry of judgment, than the suit becomes one for breach of contract. *See* Dan Sciano, "Settlement Agreements and Releases," State Bar of Texas 23rd Annual Litigation Update (2007). A simple motion to enforce, where not rendered as a judgment of the court, is not effective. *Quintero v. Jim Walter Homes, Inc*. 654 S.W.2d 442, 444 (Tex. 1983).

"Approval" of a settlement by the trial court does not equate to a "rendition" of judgment. *S&A Rest. Corp. v. Leal*, 892 S.W.2d 855, 857 (Tex. 1995).

A very recent case offers some encouragement that consent cannot be withdrawn, and the settlement agreement can be enforced by motion, where the parties included language in their written agreement expressly prohibiting either party from being able to challenge or contest the settlement agreement. *Richter v. Tafferello*, 186 S.W.3d 182 (Tex. App.—Fort Worth 2006, pet. denied).

The issue of whether or not a Rule 11 Agreement fails due to lack of an essential term is a question of law, making enforcement by summary judgment somewhat easier where that is the issue. *Charle Properties, Inc. v. Law, Snakard and Gambill, P.C.,* 985 S.W.2d 262 (Tex. App.—Fort Worth 1999, no pet.).
To preclude repudiation or withdrawal of consent, Dan Sciano recommends the following language: "This settlement is binding on the parties and not subject to revocation, repudiation or withdrawal of consent. This agreement is binding whether or not filed with other pleadings in this case." Dan Sciano, "Settlement Agreements and Releases," State Bar of Texas 23rd Annual Litigation Update (2007) at p. 4.

[35] The Default, Cure and Default Remedies provisions (Sections 23.1, 23.2 and 23.3) are designed to facilitate compliance with the agreement, while at the same time providing a defaulting party a reasonable opportunity to cure. Practitioners often must be realistic, however, when considering whether to exercise remedies and execute on a judgment. Many settling parties lack the resources to satisfy a judgment, and patience may be a virtue. The inclusion of the reservation of rights language is critical in these situations, although it may be better practice to include a separate "No Waiver" provision, similar to Section 31.

[36] A contract will not be construed to limit remedial rights of the parties unless such an intent is clear. *See, e.g., Vandergriff Chevrolet Co., Inc. v. Forum Bank*, 613 S.W.2d 68, 70 (Tex.Civ.App.-Fort Worth 1981, no writ). Moreover, where the provisions affording the remedy are merely permissive and not exclusive, the provision will not prevent a resort to other remedies. *Bifano v. Young*, 665 S.W.2d 536, 539 (Tex.App.-Corpus Christi 1983, writ ref'd n.r.e.).

[37] Parties may agree to waive the statute of limitations either before or after the expiration of the prescribed time limit. *Duncan v. Lisenby*, 912 S.W.2d 857, 858 (Tex. App.--Houston [14th Dist.] 1995, no writ h.); *American Alloy Steel, Inc. v. Armco, Inc.*, 777 S.W.2d 173, 177 (Tex. App.--Houston [14th Dist.] 1989, no writ). The agreement, however, must be specific and for a pre-determined length of time. *Duncan*, 912 S.W.2d at 859; *American Alloy*, 777 S.W.2d at 177.

[38] When the parties to an arms-length, private transaction freely negotiate to include a forum-selection clause in an agreement, the clause is prima facie valid and enforceable unless the opponent establishes a compelling reason not to enforce it. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10-11, 15 (1972). Under Texas law, enforcement of forum selection clauses is mandatory unless enforcement of the clause would be unreasonable or unjust, or the clause is otherwise invalid. *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 793 (Tex. 2005).

[39] Practitioners should consider the effect of any merger provision purporting to "terminate" all prior contractual obligations, particularly when the proposed settlement contemplates a continuing business relationship between the parties or where the parties seek to terminate or rescind contractual obligations. The Fifth Circuit has stated that "the law of Texas is ambiguous concerning the retroactive effect of a settlement agreement purporting to 'terminate' all prior agreements between the parties." *Sid Richardson Carbon & Gasoline Co. v. Interenergy Resources*, 99 F.3d 746, 754 (5th Cir. 1996).

[40] "The purpose of a severability clause is to allow a contract to stand when a portion has been held to be invalid. However, when the severed portion is integral to the entire contract, a severability clause, standing alone, cannot save the contract." *John R. Ray & Sons, Inc. v. Stroman*, 923 S.W.2d 80, 87 (Tex. App. -- Houston [14th Dist], 1996, writ denied)

[41] The obvious purpose of a non-assignment provision is to ensure that the parties entering into a settlement agreement "own" the claims that are the subject of the agreement. Attorneys that have accepted the case on a contingency basis should insist on an exception that acknowledges assignment of part of the plaintiff's claims to the plaintiff's attorney, as "a properly worded contingent fee contract may effect an assignment of part of the recovery and a part of a cause of action to the attorney." *Valley Ranch Dev. Co. v. Federal Deposit Ins. Corp.*, 960 F.2d 550, 556 (5th Cir. 1992); *see also Dow Chemical Co. v. Benton*, 163 Tex. 477, 357 S.W.2d 565, 568 (1962) (same).

[42] "The tax treatment of a compromise and settlement depends on the nature of the transaction out of which the settlement grew. Settlement of a dispute arising our of a capital asset transaction will lead to an adjustment of capital gain or loss, not ordinary income or loss." *Nichols Cyclopedia of Legal Forms Annotated*, Ch. 184, Releases and Settlements, Sec. 8.314 (2006). The IRS audit guidelines allow it to challenge allocations made in a settlement if the allocations do not reflect the economic substance of the settlement; the nature of a payment for federal tax purposes is a question of fact reviewed on appeal under the standard of clear error. *Id.*

Inclusion of confidentiality provisions can create an inference of taxable income where none would otherwise exist with the payment of consideration. *Amos v. Commissioner of Internal Revenue*, 86 T.C.M. (CCH) 663 (2003)(the "Dennis Rodman case"). *See also* Randall Sorrells and Nee Choudary, "Plaintiffs' Attorneys Beware: Little-Known Tax Consequences Associated with Confidentiality Provisions," 69 Tex. B. J. 120,122 (2005). It might be prudent to recite that neither party is giving or receiving consideration for the inclusion of the confidentiality provision, though this might not be binding on the Service. For purposes of Internal Revenue Code Sec. 104(a)(2) it is the "nature" and "character" of the claim settled and not its characterization in a settlement agreement or even the claim's validity which determines inclusion in gross income. And if the payment is taxable income, there is no pre-tax deduction from gross income allowed for a contingent fee paid to a litigant's attorney. *Comm'er of Internal Revenue v. Burkes*, 543 U.S. 426, 437 (2005) (citing I.R.C. § 104(a)(2)).

[43] In Texas, even an agreement that contains a no-oral-modification clause ***can*** be orally modified as long as it is not subject to a statute of frauds. *Mar-Lan Industries, Inc. v. Nelson*, 635 S.W.2d 853, 855 (Tex.App.--El Paso 1982, no writ). Courts have allowed oral modification in spite of the parties' no oral modification clause, reasoning that the written agreement is of no higher legal degree than an oral one, and either may vary or discharge the other. *Id.*; *see also Lone Star Steel Co. v. Scott*, 759 S.W.2d 144, 153 (Tex.App.--Texarkana 1988, writ denied); *Group Hosp. Srvcs., Inc. v. One and Two Brookriver Center*, 704 S.W.2d 886, 890 (Tex.App.--Dallas 1986, no writ); *Hyatt Cheek Builders v. Board of Regents of the Univ. of Texas System*, 607 S.W.2d 258, 265 (Tex.Civ.App.--Texarkana 1980, writ dism'd).

[44] In order to avoid the waiver of any rights or remedies, practitioners should include the "No Waiver" provision. These provisions have been upheld by Texas courts as permitting a party latitude in asserting its rights, without the risk of waiver. *Bluebonnet Sav. Bank, F.S.B. v. Grayridge Apartment Homes, Inc.*, 907 S.W.2d 904, 911 (Tex. App.-

Houston [1st Dist.] 1995, writ denied) (finding no evidence of intended waiver where the agreement contained a "No-waiver" provision).

[45] Texas courts generally uphold parties' obligations to execute "necessary" documents. See e.g., *Eikon King Street Manager, L.L.C. v. LSF King Street Manager, L.L.C,* 109 S.W.3d 762 (Tex.App.-Dallas 2003, pet. denied). In *Eikon*, the Court of Appeals enforced a necessary documents clause in connection with construction project. Interestingly, the contract in *Eikon* contained not only a necessary documents clause, but also an automatic transfer of power attorney in the event a party failed to execute the required documents. Practitioners should consider the insertion of a power of attorney clause; although unlikely in many contexts, this provision could provide ultimate security to ensure the purposes of a settlement agreement are effectuated.