

## **MEDIATING THE COMPLEX CASE**

- **The Agreement to Mediate v. Court Ordered**
  - (Suggestion to mediate viewed as sign of weakness)
- **Timing of Mediation**
  - (Sufficient information to permit evaluation, but costs not such that parties are “pot committed”)
- **Peripheral Interests Covered**
  - (generally lienholders, structured settlement specialist)
- **Pre-Mediation Activities**
  - (meeting/conference with mediator to address issues among Defendants (i.e. allocation; blind v. double blind; and “heads-up” to the mediator)
- **Decision-Makers Physically Present**
  - (Selection of appropriate representative – “life-line” available)
- **Opening Session**
  - (Strongly encourage – only opportunity to address Plaintiff directly; avoid “absolutes” / “line in sand”)
- **Dealing with Unrealistic Demands**
  - (negotiate toward your number; trust “The Process”)
- **Mediator’s Proposal**
  - (use sparingly)
- **Mediation Agreement / Release Language**
  - (Hack it out while all present)

## **What Makes for Successful Mediation of a Construction Claim?**

### **Timing of the Mediation**

- Sufficient information on hand to permit a realistic evaluation of exposure (but costs not such that parties are “pot committed”).

### **Pre-Mediation Activities**

- Arrange for appropriate decision makers to be physically present and adequately prepared for meaningful participation.
- Identify and raise any collateral issues sufficiently in advance of the mediation (i.e., coverage, claims of additional insured status, indemnity).
- Apprise Mediator of any sensitive issues (which can be dealt with prior to the mediation).

### **Mediation Process**

- In multi-party cases (which construction cases typically are), set aside sufficient time to deal with inter-defendant issues, with Plaintiff not present.
- Agree on format (blind, double blind, etc.).

### **Mediation Agreement / Release Language**

- Hammer it out while all still present; after the fact reflection tends to add terms not agreed upon during the mediation process.

# The Mediation Agreement – Documenting the Deal

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## Introduction

Most of the hard work has been done by the time the parties finally agree to settle the case. However, it is important to draft the mediation agreement to accurately specify the various terms of the settlement. The final release that is drafted by the defense counsel, subject to approval by Plaintiff's counsel, will be drafted in much greater detail than the mediation agreement. Therefore, I feel simpler is better. However, over the last several years the parties have wanted more detailed language in the agreement.

The goal of a mediation agreement is to draft it to fit various issues that have been agreed upon. The attached provisions address common issues that arise during the negotiation phase of the mediation. It is **NEVER** the intent to draft the mediation agreement as a substitute for the release.

## Common

### 1. Confidentiality

The terms of this Settlement Agreement shall be deemed strictly confidential.

### 2. Non-Disparagement

The parties agree to refrain from any act, word, or deed tending to cast disparagement on the other.

### 3. Pro Tanto Language:

- A. Style the agreement "Pro Tanto"
- B. Continuously refer to Release as Pro Tanto
- C. State claims remain pending against Defendant(s)

### 4. Lien Language:

- A. Standard
  - i. Pay all liens and/or unpaid medical bills related to case and hold Defendant harmless.
- B. Lien Language involving:
  - i. Medicare/Medicaid
  - ii. Hospital Liens
  - iii. Insurance Liens

### 5. Multiple Defendants Settlement

Itemize what each Defendant is paying.

### 6. Mediation Costs:

Rules call for costs to be split unless (see Rules)

- A. Parties agree
- B. Moving party with the Court.

### 7. Contingent Settlement Agreement:

- A. Medicare or HCP will often refuse to negotiate until they know what is on the table.
  - i. Include language that the settlement is contingent on the lienholders accepting \_\_\_\_\_ or less.
  - ii. used often when coverage is limited.

8. Appellate Forms  
See Attached.

Bottom Line

The simpler the better. Save the more specific language for the Release.

**John Doe v. Acme**  
**In the Circuit Court of MY County, Alabama**  
**Civil Action No.: CV15-9000000**  
**Mediation Date: September 31, 2099**  
**OUR FILE NO.: 15RBW-000**

**MEDIATION AGREEMENT**

1. Defendant shall pay Plaintiff and her attorney \$\_\_\_\_\_, subject to execution of the release referenced below.
  
2. Defendant's counsel shall prepare a complete release to include among other standard terms the following:
  - a. Confidentiality; and
  
  - b. Plaintiff shall pay all subrogation liens and/or unpaid medical bills related to this case and hold Defendant harmless.

Said release shall be reviewed and approved by Plaintiff's counsel. Thereafter, said release shall be signed by Plaintiff.
  
3. The above-styled case shall be dismissed with prejudice; each to bear his/her/its own costs.

Dated this \_\_\_\_\_.

\_\_\_\_\_  
Plaintiff

\_\_\_\_\_  
Counsel for Plaintiff

\_\_\_\_\_  
Counsel for Defendant

## **MULTI-DEFENDANT SETTLEMENT**

1. Defendants shall pay Plaintiff and his attorney a total amount of \$\_\_\_\_\_ to settle this case. The breakdown of the settlement proceeds are as follows:
  - a. Defendant One, \$\_\_\_\_\_;
  - b. Defendant Two, \$\_\_\_\_\_; and
  - c. Defendant Three, \$\_\_\_\_\_.

Also, all parties agree to release any and all claims of any nature against each other regarding the occurrence made the basis of this lawsuit and any coverage issues. \_\_\_\_\_ Insurance Company and \_\_\_\_\_ Insurance Company and/or \_\_\_\_\_ Insurance Company agree to waive all claims regarding indemnity and/or defense as to their respective insureds.

## **STRUCTURED SETTLEMENT**

Defendant, \_\_\_\_\_'s, insurance carrier shall pay Plaintiff, and her attorney \$\_\_\_\_\_. Prior to issuance of drafts, Plaintiff will have the right to structure a portion of the funds and Defendant's carrier agrees to cooperate with Plaintiff's structure broker, \_\_\_\_\_, in establishing the structure.

## **PRO TANTO SETTLEMENT**

### **PRO TANTO MEDIATION AGREEMENT**

1. Defendant \_\_\_\_\_ shall pay Plaintiffs the sum of \$ \_\_\_\_\_, subject to execution of the release set forth below.
2. Defendant's counsel shall prepare a pro tanto release as to all claims against Brasfield & Gorie which will include among other standard terms the following:
  - a. Confidentiality; and
  - b. Plaintiffs shall be responsible for all medical liens/subrogation claims (including but not limited to Medicare) and will indemnify Defendant in connection with same.

Said *pro tanto* release shall be reviewed and approved by Plaintiffs' counsel. Thereafter, said *pro tanto* release shall be signed by Plaintiffs.

3. As to Defendant(s) \_\_\_\_\_ the case shall be dismissed with prejudice; each to bear his/her/its own costs, with the exception of the mediation costs which will be paid by Defendant. The case shall remain pending against all other defendants.

## **SETTLEMENT AGREEMENT INCLUDING CROSS-CLAIMS**

1. Defendants shall pay Plaintiffs the total sum of \$ \_\_\_\_\_, in full and final settlement of all claims asserted or which could have been asserted in the referenced civil action. Plaintiffs shall execute a complete release in favor of all Defendants (including Third Party Defendants).
2. Defendants' counsel shall prepare a mutual release as to all claims, cross claims, and third party claims. Said release shall be reviewed and approved by all counsel. Thereafter, said release shall be signed by all parties.
3. The above-styled case shall be dismissed with prejudice; each to bear his/her/its own costs.

## SETTLEMENT REQUIRING COURT APPROVAL

### BANKRUPTCY

1. Defendant(s) shall pay \$\_\_\_\_\_ to \_\_\_\_\_, as Trustee of the Bankrupt Estate of \_\_\_\_\_ Case No: \_\_\_\_\_ to settle all claims in this case, subject to the Bankruptcy Court approval.
2. Defendant's counsel shall prepare a complete release of all claims as to all parties to include, confidentiality as a provision of the settlement, except as is necessary to obtain Bankruptcy Court approval.
3. If the settlement is approved by the Bankruptcy Court, the above-styled case shall be dismissed with prejudice; each to bear his/her/its own costs.

### PRO-AMI

1. The insurance carrier for Defendant shall pay a global settlement in the amount of \$\_\_\_\_\_ to settle this case, subject to Court approval. The breakdown of the settlement proceeds shall be as follows:
  - a. Plaintiff One \$\_\_\_\_\_
  - b. Plaintiff Two, a minor, \$\_\_\_\_\_
  - c. Plaintiff Three, a minor, \$\_\_\_\_\_.
2. The parties and all counsel acknowledge that the proposed settlement of the claims of the minor children require Court approval and counsel will petition the Court for a hearing for such purpose.
3. Upon obtaining the Court's approval of the settlements involving the minor children, the case will be dismissed, with prejudice, each to bear his/her/its own costs, with the exceptions that the mediation costs which will be paid by Defendants and the Guardian ad Litem fees will be paid by Defendant(s).