By Jeff Roberts and Clarissa R. Roberts

Pay Attention to the Wording of Releases

I may be the only one to do this, but occasionally, I do not think about the language in the release until after the settlement amount has been accepted. Actually, we should think about the language of the release when presenting and responding to settlement proposals. Once a release is signed, it is a valid contract. Unless there is ambiguity in the language of the release, the court only looks to the language of the release to determine the intent of the parties.[1] However, even before the release is signed, a valid and enforceable settlement agreement can be reached.[2] If after a settlement agreement is reached, one party tries to insert additional terms—like indemnity—into the release that were not agreed to in the settlement agreement, the courts enforce the settlement agreement without the additional terms.[3] Because of this, you must incorporate the terms you want included in the release into your settlement proposals. In addition, when responding to settlement proposals, it is important to specifically show what terms in the counter proposal you reject.

An improperly worded release could have severe consequences for your client and potentially, you. You must read every word of the release to ensure it reflects the settlement agreement. Any needed corrections must be resolved with the other party, and the release revised before your client signs. An improperly worded release can inadvertently prevent the client from seeking additional avenues of recovery. Frequently, the first draft of the release you receive has issues that need correcting. Below are some of the common pitfalls to avoid.

The Global Release

Before Kentucky adopted comparative fault, the rule in Kentucky was a release of one party operated to release all parties, unless the release specifically reserved the injured party's rights to proceed against other tortfeasors.[4] Shortly before Kentucky's Supreme Court adopted comparative fault,[5] the Supreme Court abandoned the concept that a release of one party releases all parties, stating: "A valid release of one tortfeasor from liability for a harm, given by the injured person, does not discharge others liable for the same harm, unless it is agreed that it will discharge them."[6] In 1988, the legislature weighed in on the subject and stated: "A release, covenant not to sue, or similar agreement entered into by an injured party and a person liable, shall discharge that person from all liability for contribution, but it shall not be considered to discharge any other persons liable upon the same claim unless it so provides."[7]

While the statute seems clear, like a lot of things in the law, things are not as clear as they seem. A release that identifies the tortfeasor as being released but also includes as released parties "all other persons, firms, or corporations liable, or who might be claimed to be liable" operates as a global release.[8] The injured party releases every claim for damages they had against other tortfeasors from that event. Also, if the release states that the injured party "has been fully compensated for all damages and the release constitutes payment in satisfaction of all claims," that release will act as a global release of every potential tortfeasor.[9]

I have never heard of a settlement proposal from the defense specifically conditioning the settlement on global release language. Therefore, it is not difficult to have that language removed from the release. However, the best practice is to show in your proposals that the settlement draft is in exchange for a release of a specifically named tortfeasor.

Vicariously Liable Defendants

If you are pursuing a claim that includes vicarious liability (such as in an employer/employee, master/servant, or principal/agent relationship), you must be cautious in settlement of those claims. A settlement and release of the negligent employee/servant operates as a release of any vicarious liability the employer/master has for the employee's/servant's negligence.[10] Furthermore, a release of the agent operates to release the vicarious liability of the principal.[11]

If you have an employee who is driving his or her personal vehicle on the job and negligently injures your client,

you cannot settle with the employee's personal car insurance unless you are also settling with the employer at the same time. The same is true in any vicarious liability situation. Therefore, any settlement proposals directed to the employee/servant/agent should indicate that the settlement is conditioned on you also settling with the employer/master/principal.

Be Wary of Indemnity Language

Conditioning settlement on indemnity language that protects the settling tortfeasor against claims by medical providers and health insurance carriers has become commonplace. However, exercise caution in agreeing to broad indemnity language in a release. There was initially some question as to whether indemnity among tortfeasors survived after the adoption of comparative fault. The Kentucky Supreme Court resolved this issue.[12] The Court held that a defendant who is only constructively or secondarily liable to the plaintiff has a right to complete indemnity from the primarily liable defendant.[13] Common law indemnity is still available to one exposed to liability because of the wrongful act of another with whom he/she is not *in pari delicto*[14] or equally liable.[15]

This becomes relevant in regard to a settlement and release of the primarily liable defendant with broad indemnity language such as:

> Therefore, I hereby covenant and agree to defend, hold harmless, and to indemnify the parties released herein and their representatives *from any and all claims,* liens, causes of action, demands or suits *of any kind* which may have been brought because of the accident referred to herein or for any amount that they or their representatives may be hereafter compelled to pay on account of any claims arising out of the accident referred to herein.

This type of indemnity language operates to extinguish liability on the part of the defendant that is constructively or secondarily liable.[16] The secondarily liable defendant is entitled to complete indemnity from the primarily liable defendant.[17] Therefore, any amounts the secondarily liable defendant became obligated to pay to the injured party results in the secondarily liable defendant being entitled to recover, through indemnity, that same amount from the primarily liable defendant. The broad contractual indemnity in the release obligates the injured party to reimburse the primarily liable defendant for any amount it must pay to the secondarily liable defendant. In effect, the injured party would have to pay his or her own damages. This is referred to as "circuity of litigation," which the courts seek to avoid.[18]

These indemnity clauses in releases have been used to terminate an injured party's claim in the following situations:

1. An injured party's claim against a business for failing to protect an invitee from assault when the injured party settled with and agreed to indemnify the person committing the assault;[19]
2. An injured party's claim against an employer when the injured party settled with and agreed to indemnify the negligent employee that caused the injury;[20]
3. An injured party's claim against

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a bar for overserving a patron in a dram shop liability claim when the injured party settled with and agreed to indemnify the intoxicated driver;[21] and,

4. An injured party's claim against a business for not preventing the theft of its dynamite when the injured party settled with and agreed to indemnify the bomb maker.[22]

Even if the release specifically provides that you are preserving your claims against the secondarily liable defendant, a release with broad indemnity language still extinguishes the claim against the secondarily liable party.[23] Therefore, the best practice is to specifically state you are only agreeing to indemnify against claims made by medical providers and health insurance carriers that have paid medical bills on the injured party's behalf. If the primarily liable defendant will not agree to that language, then you cannot settle until you reach a settlement with both the primarily liable defendant and the secondarily liable defendant.

The Insurance Company Being Identified as a Released Party

When a claim is resolved with an insurance company, many form releases include the insurance company as a released party in addition to the name of the insured. Allowing your client to sign a release that includes the name of the insurance company as a released party operates to release any third-party bad faith claims the injured party may have. If you asserted a bad faith claim against the insurance company, and there is separate additional compensation negotiated for that claim, the insurance company included as a release party would be appropriate. However, if there is no additional compensation paid and no mention of releasing any potential bad faith claim during negotiations, a liability insurer's insistence its name be included as a released party is inappropriate. In fact, it could potentially be an act of bad faith. While I am unaware of any Kentucky cases specifically addressing this issue, other states have indicated it is bad faith for an insurance carrier to condition payment of an insurance claim upon release of a bad faith claim against the carrier.[24]

Confidentiality Clauses

While confidentiality clauses are not usually included in the settlement of your normal car wreck case, there are several situations where confidentiality clauses are sought either by the defendant or the injured party. If a confidentiality clause is included in a release, take care to avoid or limit the tax consequences of such clauses.[25] To lessen the tax consequences, the release should recite a specific nominal amount is being paid as consideration for the confidentiality agreement. Taxes would be owed on the amount specified as payment for the confidentiality clause. However, you can likely avoid any tax consequences if the release states that both parties want the settlement amounts to remain confidential. The consideration for the mutual confidentiality is then identified as each party's mutual promise to keep the settlement confidential. Since there is no monetary compensation being paid for the confidentiality agreement, there should be no tax consequences.

Preserving PIP

Automobile cases have some issues specific to them, especially concerning personal injury protection (PIP) and underinsured motorists claims (UIM). When settling with the tortfeasor in an auto case, it is always best to include in the release that the settlement is "exclusive of PIP." However, in Kentucky, settlement by the injured party with the at-fault driver's liability carrier is always "exclusive of PIP" unless the release specifically says that the injured party was responsible for reimbursing PIP."[26] Even a release that includes global language that you are releasing: "all other persons, firms, and corporations from all claims and demands" does not release the injured party's right to future PIP benefits.[27]

Preserving UIM Claims

If you represent an injured party in a car accident and wish to settle with the at-fault driver and preserve the underinsured motorist claim, there are requirements you must follow other than just preserving the claim in the release. Of course, the release should not contain broad indemnity language for the reasons stated above. Further, it should specifically state that nothing in the release should be taken as a release of the UIM claim. However, before you execute the release, follow the *Coots* procedure. The Kentucky

Supreme Court initially set forth this procedure in *Coots v. Allstate Insurance Company*.[28] The *Coots* procedure has now been statutorily adopted.[29]

When you have agreed to settle with the liability insurer, provide written notice of the proposed settlement to all underinsured motorist insurers providing coverage. This notice must be sent by certified or registered mail.[30] Upon receipt of the notice of the proposed settlement, the underinsured motorist carrier has 30 days to consent to the settlement with the liability carrier or pay the injured party the amount of the settlement with the liability carrier.[31] If the UIM carrier consents to settlement, the injured party can accept the settlement funds from the liability carrier and execute a release with the tortfeasor and still pursue the UIM claim. If the UIM carrier substitutes payment, the injured party does not execute the release with the tortfeasor. However, the *Coots* procedure operates as a release of the injured party's claim against the tortfeasor. While the UIM carrier would retain its rights to pursue a claim against the tortfeasor for amounts it pays out in UIM benefits, the injured party cannot recover any excess judgment against the tortfeasor.[32]

Strict compliance with the *Coots* procedure is required.[33] The courts have held that providing an incorrect amount of the liability settlement does not comply with the *Coots* procedure and the UIM claim is not preserved.[34] In addition, the courts have indicated that a *Coots* letter that merely says that the injured party is *considering* accepting the liability offer is insufficient under the *Coots* procedure. The notice should say the injured party has "agreed to settle" with the liability carrier.[35] The injured party can agree to settle with the liability insurer for less than the policy limits and still pursue the underinsured motorist claim if the *Coots* procedure is followed. However, the underinsured motorist carrier is entitled to a credit in the amount of the total policy limits against the total damages obtained by the injured party.[36]

While the release is executed at the end of the claim against a specific party, the language in the release is important. The language could have unintended consequences, as outlined above. Therefore, lay the foundation to include the terms you want included and exclude the terms you want excluded

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during the settlement negotiations. Confirm these negotiations in writing in case there is a later disagreement. This gives you the leverage needed to have the objectionable language removed from the proposed release or to enforce the agreement reached if that becomes necessary.

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1 *Abney v. Nationwide Mutual Insurance Company*, 215 S.W.3d 699, 703 (Ky. 2006).
2 *Frear v. P.T.A. Industries, Inc.*, 103 S.W.3d 99, 106 (Ky. 2003).
3 *Frear v. P.T.A. Industries, Inc.*, 103 S.W.3d 99, 107 (Ky. 2003).
4 *Kingins v. Hurt*, 344 S.W.2d 811, 812 (Ky. 1961).
5 *Hilen v. Hays*, 673 S.W.2d 713 (Ky. 1984).
6 *Richardson v. Eastland, Inc.*, 660 S.W.2d 7, 9 (Ky. 1983), quoting Restatement (Second) of Torts, Sec. 885(1).
7 KRS 411.182(4).
8 *Abney v. Nationwide Mutual Insurance Company*, 215 S.W.3d 699 (Ky. 2006).
9 *Richardson v. Eastland, Inc.*, 660 S.W.2d 7, 9 (Ky. 1983).
10 *Commonwealth Labor Cabinet v. Morris*, 215 S.W.3d 49 (Ky. App. 2006).
11 *Waddle v. Galen of Kentucky, Inc.*, 131 S.W.3d 361 (Ky. App. 2004).
12 *Degener v. Hall Contracting Corporation*, 27 S.W.3d 775 (Ky. 2000).
13 *Degener v. Hall Contracting Corporation*, 27 S.W.3d 775, 780-781 (Ky. 2000).
14 *In pari delicto* is defined as "In equal fault; equally culpable or criminal" Black's Law Dictionary, 4th Edition.
15 *York v. Petzl America, Inc.*, 353 S.W.3d 349, 353 (Ky. App. 2010).
16 *Butt v. Independence Club Ventures, Ltd. d/b/a The Electric Cowboy*, 453 S.W.3d 189 (Ky.App. 2014), *citing* DeStock #14 v. Logsdon, 993 S.W.2d 952 (Ky. 1999).
17 *Degener v. Hall Contracting Corporation*, 27 S.W.3d 775, 780-781 (Ky. 2000).
18 *Copeland v. Humana of Kentucky, Inc.*, 769S.W.2d 67 (Ky. App. 1989).
19 *Crime Fighters Patrol v. Hiles*, 740 S.W.2d 936 (Ky. 1987).
20 *Commonwealth Labor Cabinet v. Morris*, 215 S.W.3d 49 (Ky.App. 2006).
21 *Butt v. Independence Club Ventures, Ltd. d/b/a The Electric Cowboy*, 453 S.W.3d 189 (Ky. App. 2014); *DeStock #14, Inc. v. Logsdon*, 993 S.W.2d 952 (Ky. 1999).
22 *Degener v. Hall Contracting Corporation*, 27 S.W.3d 775 (Ky. 2000).
23 *Butt v. Independence Club Ventures, Ltd. d/b/a The Electric Cowboy*, 453 S.W.3d 189, 195 (Ky. App. 2014).
24 *National Ins. Ass'n v. Sockwell*, 829 So.2d 111, 136 (AL. 2002); *Athey v. Farmer's Insurance Exchange*, 234 F.3d 357,362 (8th Cir. 2000); and *Etter v. Safeco Insurance Company of Illinois*, 192 F.Supp.2d 1071, 1074-1075 (D. Mont. 2002).
25 *Amos v. Commissioner of Internal Revenue*, 2003 WL 22839795, T.C.M. 2003-329.
26 *Coleman v. Beeline Courier Service, Inc.*, 284 S.W.3d 123 (Ky. 2009).
27 *Ohio Casualty Insurance Company v. Ruschell*, 834 S.W.2d 166 (Ky. 1992); *Holzhauser v. West American Insurance Company*,772 S.W.2d 650 (Ky. App. 1989).
28 *Coots v. Allstate Insurance Company*, 853 S.W.2d 895 (Ky. 1993).
29 KRS 304.39-320.
30 KRS 304.39-320 (3).
31 KRS 304.39-320 (3) and (4).
32 *True v. Raines*, 99 S.W.3d 439, 447 (Ky. 2003).
33 *Kentucky Farm Bureau Mutual Insurance Company v. Young*, 317 S.W.3d 43 (Ky. 2010).
34 *Kentucky Farm Bureau Mutual Insurance Company v. Young*, 317 S.W.3d 43 (Ky. 2010).
35 *Malone v. Kentucky Farm Bureau Mutual Insurance Company*, 287 S.W.3d 656 (Ky. 2009).
36 KRS 304.39-320 (5).