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# Claims Management

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## Fraud Squad. How to Structure a Settlement Agreement in a Civil Fraud Case

By Frank S. Goldstein, Esq.

You just received word that opposing counsel has agreed to a settlement relative to the civil fraud case you filed or were going to file. Now you have to switch gears and draft the settlement agreement. Where do you start?

The timing of a settlement offer usually is an important factor.

Did it come pretrial? During the trial? Post-trial? As a general rule of thumb, the later in the process a settlement offer is made by the defendants, the tougher the terms tend to be. For example, if the defendants force your clients to heavily litigate a civil fraud case or force you to go to trial, their chances of getting any breaks on settlement terms dwindle considerably.

Before starting anything else, it's beneficial to take a step back and ask yourself, "What should the settlement terms look like?" Getting the answer to that question involves resolving several additional queries:

- What is my client's primary motivation for getting the case resolved?
- What primary provisions must be included in the agreement?
- What settlement terms are most meaningful for the client?
- What are my client's deal-breaker items?
- And what items are most likely to be seen as deal-breakers by opposing counsel?

As you might suspect, the place to begin is with a straightforward attorney-client conference. Will monetary terms be front and center; e.g., will you be requesting financial payment? Or might it be a nonmonetary settlement in which the defendants agree to walk away from any further payments, withdraw all pending claims, and dismiss any individual suits pending against your client?

When you do secure a monetary payment, make certain you consider whether you want to ask that all monies be paid in a lump sum or whether payment terms are acceptable. If the defendants request a payment plan, take into account what additional terms must be put into place, such as interest on payments, penalties for untimely payments, and whether you will require the defendants to pledge assets to secure all future payments.

There are certain precautionary steps to take when the opposition claims it has no available assets for making financial

payment. You can have them execute a financial affidavit under oath, in which they swear they have no money with which to make payment. To place more weight behind this affidavit, include language that states you reserve the right to recover any and all monies due to your client should you discover the party does indeed have assets.

So, why wouldn't you always ask for money? Sometimes the opposing side has absolutely no available assets. You can't get what they don't have. Or it could be more expensive to track down the other party's assets than the value of the judgment you expect to receive. When faced with those prospects, you may choose to forgo a financial payment and seek favorable nonmonetary terms.

Experience in representing insurance companies that are fraudulently billed millions of dollars for treatment of alleged injuries in staged auto accidents has shown that, when faced with a settlement agreement, the clinics and their owners routinely claim that they

have no assets. That's only partially true. Most fraudulently obtained money is funneled to the ring organizers and kingpin runners, but it's not always easy to find the people behind these rings, much less their money. And even if they are found, their assets usually are stashed in another country where they can't be touched.

In cases like these, we often prepare settlements that allow our clients to walk away without having to pay any of the millions of dollars in fraudulent claims that have been filed by these clinics. But, if the opportunity presents itself, don't stop there. Many fraudsters and their families do business in more than one state. Your settlement agreement should include a permanent moratorium provision that precludes them from ever submitting other claims to you, in any state, in the future.

Many insurance companies work with lawyers who might not have solid experience drafting settlement agreements. If that speaks to you, keep these reminders handy because you may have to lead the process. **CM**

*Frank S. Goldstein, Esq., is the founder and managing partner of Goldstein Law Group in Ft. Lauderdale, Florida. He has been a CLM member since 2012 and is an active member of the Insurance Fraud Committee. He may be reached at [FSG@mydefenselawyers.com](mailto:FSG@mydefenselawyers.com).*

