

Heads Up!
A California Civil Code Section 1542 Waiver May Be Lurking!
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Occasionally when one writes a law column one must actually discuss the law.

Recently I was reviewing an insurance release from a contractor client. It was not something relating to a case - just routine paperwork that popped up as part of the payment protocol.

This simple insurance document contained a “Section 1542 **waiver**” – the emphasis on “waiver” is mine. This is a waiver of known and unknown claims.

California Civil Code Section 1542. The law being waived – Section 1542 - allows a creditor/party to try to collect from a debtor/party even after a lawsuit/dispute has been settled. If there is a circumstance or claim which exists without the creditor's knowledge at the time of the settlement that materially affects him or her, the debtor can still be possibly liable to provide additional restitution.

The language of Section 1542 in its entirety is simplicity itself and reads as follows:

Section 1542: A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.

Section 1542 waivers are common. Indeed, the eye tends to skip over it; such a term is often seen as simply more boilerplate legalese.

Lawyers of course see them frequently. In fact, we often include them when we prepare our own settlements and releases. Below is just such a waiver.

“Unknown Claims

“(a) Each party acknowledges and agrees that the release it gives to the other party upon executing **this Agreement applies to all claims** for injuries, damages, or losses to that party’s person and property, real or personal (whether those injuries, damages, or losses are known or unknown, foreseen or unforeseen, or patent or latent) **which that party may have against the other party. Each party waives application of the California Civil Code Section 1542.**

“(b) Each party certifies that it has read the following provisions of California Civil Code Section 1542:

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

(c) Each party understands and acknowledges that the significance and consequence of this waiver of California Civil Code Section 1542 is that even if it should eventually suffer additional damages arising out of the facts referred to in

Paragraph 2 it will not be able to make any claim for those damages. Further, each party acknowledges that it intends these consequences even as to claims for damages that may exist as of the date of this release but which it does not know exist, and which, if known, would materially affect its decision to execute this release, regardless, of whether its lack of knowledge is the result of ignorance, oversight, error, negligence, or any other cause.”
(Again, the emphasis in bold is mine.)

What It Means. The intent of Section 1542 is to prevent a party from inadvertently waiving unknown claims merely by signing a general release. But California courts make clear that unknown claims can be released, so long as the waiver is conscious. However, to waive such claims, a settlement agreement must include verbiage to clearly indicate that the parties specifically intended to release unknown claims. This can usually be achieved by including a provision such as stated above.

When You Want It, Having the injured party sign a release of unknown claims can be very important – and frankly, worth a lot of money to the party released. Without having such a release, the dispute/litigation may never end. However, by signing and releasing claims that are unknown at the time you signed the settlement agreement, the other party will usually not be able to bring another lawsuit if it becomes aware of a condition that had not yet been known at the time it signed the settlement release.

An example of when you might want it would be as part of a termination of a project that you started, but then continued by a second contractor. As part of foregoing the ability to finish the project, and check and correct any work that may be deficient, you likely want to be released from any and all liability arising out of the project. Of course, the homeowner may want something in return (most likely money or discount). The reason you might want the Section 1542 waiver by the homeowner is that without having completed the project, there may be a lot of unknowns regarding the work performed.

For example, you finished 90% of the framing before being terminated. There is an error in the framing that affects the ability to install a window, as designed in the plans and drawings. This isn't discovered until much later in the project when the windows are about to go in. This is a problem that could be fixed, but the cost could vary widely. Since you parted ways almost a year ago, the owner is not going to want to give you the opportunity to fix it and might sue. Without such a waiver, a claim that was unknown by the homeowner at the time of the settlement and release is likely to remain a valid claim. A Section 1542 waiver should protect you in this instance and helps to bring finality to the resolution of the dispute.

When You Don't Want It. If specific rights and/or claims need to be preserved, you might not want the waiver.

An example. As the general contractor on a project that is almost complete, a subcontractor is terminated before completion. However, the general contractor wants to be sure that the subcontractor's warranty on its work stays in place. So a settlement presented by the

subcontractor should not include a 1542 waiver. Such a waiver would probably (almost certainly) release the warranty requirement.

Moral: Look For Them. Now that you have a layperson's notion of what such a waiver is, look for them and consider whether you want them as a part of the agreement you are signing. A party should only waive Section 1542 protections after careful evaluation of the possibility and value of unknown claims.

Concerns? Uncertain? Check with your counsel.

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