

Litigation Alert

Settlement Agreements Executed During Mediation Are Only Admissible If They Include Clear Language Demonstrating the Parties' Intent to be Bound

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On December 14, 2006, the California Supreme Court ruled in *Fair v. Bakhtiari*, No. S129220, ___ Cal.4th ___ (Dec. 14, 2006), that under California Evidence Code section 1123(b), parties who mediated their dispute and signed a settlement memorandum did not clearly demonstrate their intent that the memorandum be enforceable, even though it contained an arbitration clause. As a result, the terms of the settlement memorandum, including the arbitration clause, were held to be unenforceable by the Court.

Practical Impact

Settlement agreements produced as a result of mediation are not admissible unless they indicate on their face whether or not the parties intended that the agreement be binding or otherwise enforceable. Although the California Legislature in enacting Evidence Code section 1123(b) did not require parties in mediation use a formulaic phrase, there must be some writing signed by the parties that indicates the agreement is enforceable and binding. Terms related to the eventual enforcement of the settlement agreement, like arbitration or forum selection clauses, are inadequate. Failing to clearly express the parties' intent will render the agreement inadmissible, and hence unenforceable, under Evidence Code sections 1119 and 1123(b).

Background of the Case

Plaintiff R. Thomas Fair sued a group of former business partners and his ex-wife for wrongfully excluding him from a real estate deal. After filing suit, the parties mediated the dispute for two days and drafted a signed memorandum of settlement terms. The memorandum was handwritten, appeared to resolve most of the dispute, and contained an arbitration provision. However, the settlement memorandum did not address a variety of complicated tax issues. After the mediation the parties exchanged a

formalized settlement and release agreement while also continuing negotiations on the tax issues. During a case management conference counsel for one of the defendants told the court that the parties had reached a settlement agreement, but were still negotiating the outstanding tax issues.

The negotiations then broke down and counsel for the defendants informed the court that an agreement had not been reached and that the case should proceed before the court. Plaintiff then moved to compel arbitration under the settlement memorandum. Defendants opposed, citing that the memorandum was not admissible evidence as it was a document prepared during the course of mediation and therefore should be excluded under Evidence Code section 1119. California Evidence Code section 1119 protects the confidentiality of documents prepared for, used in, or created during mediation sessions by barring their admission into evidence, discovery or compelled disclosure. This policy is intended to promote frank discussions during mediation without penalizing parties if it ultimately fails.

Plaintiff's position was that the inclusion of the arbitration clause indicated the parties' intent to be bound by its terms, thereby falling within the admissibility exception of Evidence Code section 1123(b). Evidence Code section 1123(b) carves out an exception to this policy for settlement agreements drafted during mediation, signed by the parties, which contain a clear indication of the parties' intent to be bound by the terms of the agreement.

While the trial court agreed with the defendants, the California Court of Appeal found the inclusion of an arbitration provision allowing for "[a]ny and all disputes [to be] subject to JAMS [] arbitration service" demonstrated the parties' intent to be bound by the agreement. The Court of

Appeal subsequently found the memorandum reflected a valid arbitration agreement.

The California Supreme Court reversed as the inclusion of the arbitration provision did not amount to a clear indication of the parties' intent. To give it such effect would require courts to infer from the parties' language and subsequent behavior, including the statements made at the case management conference, whether or not they intended the settlement memorandum to be enforceable. While the Court refrained from providing "magic words" for use in enforceable settlement agreements arising out of mediation, it held that "arbitration clauses, forum selection clauses, choice of law provisions, terms contemplating remedies for breach, and similar commonly employed enforcement provisions typically negotiated in settlement discussions" were not sufficient indicators, without more definitive language, as to the parties' intent under section Evidence Code section 1123(b).

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