Daily Journal

VERDICTS & SETTLEMENTS

www.dailyjournal.com FRIDAY, JULY 20, 2012

Enforcement of mediated settlement agreements

By Steven H. Kruis

Because mediation is a voluntary dispute resolution process, any settlement agreement results from the parties' direct participation. What steps can counsel take in drafting a settlement agreement in mediation to enhance the ability to enforce it thereafter?

Get it in writing signed by the parties to the settlement. California Code of Civil Procedure Section 664.6 provides that if parties agree to a settlement in writing or orally before the court, the court can enter judgment pursuant to the terms of settlement upon motion. Thus, parties should sign a stipulation for settlement or settlement agreement.

Principals must sign, not their agents. The parties themselves must sign the settlement agreement. *Elnekave v. Via Dolce Homeowners Association*, 142 Cal.App.4th 1193 (2006). In-house counsel and an employee of a corporation specifically authorized to settle and compromise a claim may properly sign. In that instance, he or she is executing the agreement on behalf of the corporation, not as an attorney-agent. *Provost v. Regents of the University of California,* 201 Cal.App.4th 1289 (2011).

Reference to arbitration clauses, forum selection clauses, choice of law provisions and the like that are commonly negotiated in settlement discussions are insufficient.

Make the settlement agreement admissible in light of confidentiality. A settlement agreement prepared in mediation is confidential. Proof of the settlement is inadmissible unless certain criteria are met.

California Evidence Code Section 1119(b) bans all writings prepared during the mediation from discovery and makes them inadmissible to encourage the parties to freely and candidly discuss the dispute. *Rojas v. Superior Court* (Coffin),33 Cal. 4th 407 (2004). Communications are stifled if parties fear that what they say may come back to haunt them. On the other hand, if the parties reach an agreement, they normally want to rely upon and, if necessary, enforce it. Accordingly, California Evidence Code Section 1123 makes a specific exception for a settlement agreement if it "is signed by the settling parties and ... provides it is admissible or subject to disclosure or words to that effect."

Make sure the settlement agreement expresses an intent to make it admissible. In *Fair v. Bakhtiari*, 40 Cal. 4th 189 (2006), the parties signed a handwritten, single-page memorandum titled "Settlement Terms." The final provision provided, "Any and all disputes subject to JAMS arbitration rules." The trial court found the "term sheet" inadmissible, and denied a motion to compel arbitration. The Court of Appeal reversed, holding that the memorandum was admissible because the arbitration provision constituted "words to [the] effect" that the settlement terms were "enforceable or binding."

Reversing, the state Supreme Court concluded that the terms of a settlement agreement reached must make clear that it is binding, and not simply be a memorandum of terms. The agreement must be signed by the parties and include a direct statement to the effect that it is enforceable or binding. Reference to arbitration clauses, forum selection clauses, choice of law provisions and the like that are commonly negotiated in settlement discussions are insufficient.

Make sure all parties sign. In *Rael v. Davis,* 166 Cal.App.4th 1608 (2008), the plaintiff sought to enforce the terms of a settlement agreement signed by her and her late husband. The settling parties included the husband's three adult children. One of the children had not signed the agreement. The trial court found the agreement unenforceable and the appellate court affirmed. The plaintiff argued that the agreement was severable and enforceable against the parties who signed it. However, for an agreement to be severable, it first must be admissible.

If a party is not present, make arrangements to scan and email, or even fax, the agreement to them. Consider including a clause in the agreement authorizing any valid copy, as well as counterpart and facsimile signatures, which shall be treated as originals for all purposes.

Provisions authorizing disclosure may be in a mediation agreement signed at the outset of the mediation. In *In Re Estate of Thottam*, 165 Cal. App.4th 1331 (2008), a dispute arose between decedent's three adult children who were co-trustees and beneficiaries of her trust. The co-trustees mediated the dispute. At the outset of the mediation they signed a "mediation and facilitation confidentiality agreement" under which matters discussed would not be used in future litigation except as necessary to enforce any agreements resulting from the mediation. They reached an agreement, and initialed a chart that distributed various pieces of real estate to them.

In subsequent litigation, the trial court held that the chart was inadmissible. The appellate court reversed. The chart was admissible as an exception to mediation confidentiality under Section 1123(c), which authorizes admissibility if "[a]ll parties to the agreement expressly agree in writing to its disclosure." The mediation and facilitation confidentiality agreement expressed the parties' intent to make the chart admissible to enforce the settlement agreement. Thus, the language required to make a settlement agreement admissible and therefore enforceable may be included in the settlement agreement, or the mediation agreement signed at the outset of the mediation, or both. Prudence would dictate always including the clause in the settlement agreement so that reference to only one document is necessary.

Mediators may not testify. Evidence Code Section 703.5 prohibits mediators from testifying in subsequent civil proceedings. In *Radford v. Shelhorn*, 187 Cal.App.4th 852 (2010), the parties reached a settlement in mediation that was reduced to a two-page agreement signed by both parties. The first page contained a waiver of confidentiality, and the second page included the substantive provisions of the settlement.

Later, Radford claimed she was not bound by the agreement, and argued that the first page was not a part of the agreement. Shelhorn filed a Section 664.6 motion to enforce the settlement agreement, and submitted declarations, including one signed by the mediator, in support of the motion. The trial court found that page one was a part of the settlement agreement, and granted the motion. Radford appealed, arguing that the mediator's testimony was barred by Evidence Code Sections 703.5 and 1121. The appellate court agreed that the trial court erred in admitting the testimony, but concluded the error was harmless since the court also considered the declarations of Shelhorn and her attorney.

In short, utilize declarations from counsel and the parties, not the mediator, to support a Section 664.6 motion.

Liquidated damage considerations in settlements with payment terms. A settlement agreement may not contain a liquidated damages provision. In *Greentree Financial Group, Inc. v. Execute Sports, Inc.*, 163 Cal.App.4th 495 (2008), the plaintiff sued for breach of contract arising from the defendant's failure to pay $45,000 for financial services rendered. Before trial, the parties settled for $20,000 payable in two installments. The terms provided that if defendant failed to make a payment, the plaintiff could file a stipulation for entry of judgment for $45,000 plus prejudgment interest, costs and attorney fees.

After defendant failed to make the first payment, the trial court entered judgment for $61,232.50. The appellate court reversed and remanded with directions to reduce the judgment to $20,000 plus post-judgment interest and costs. Because the judgment constituted an unenforceable penalty, it had no reasonable relationship to the range of actual damages that would flow from breach of the settlement agreement.

Careful drafting of the settlement agreement can minimize this practice. If the settlement agreement reflects that a claim is for a larger sum, but the plaintiff will accept a discounted amount if timely paid, the court may be less inclined to construe the difference between the full amount and discounted sum as liquidated damages.

Reserving jurisdiction to bring motion. Section 664.6 allows parties to request that the court retain jurisdiction over the parties to enforce the terms of the settlement. This request must be made before filing a dismissal with prejudice. In *Hagan Engineering, Inc. v. Mills*, 115 Cal. App.4th 1004 (2003), the parties reached a settlement agreement and dismissed their claims with prejudice. Hagan then accused Mills of breaching the agreement, and sought to enforce the settlement. The trial court granted Hagan injunctive relief, and the appellate court reversed. Because the parties did not request the court to retain jurisdiction, the dismissal with prejudice deprived the trial court of subject matter jurisdiction.

Alternatively, if the entire case has been settled, and performance will require time, consider a conditional settlement under California Rules of Court Rule 3.1385, and use Judicial Council Form CM-200. In that instance, the case is not dismissed until performance is complete. If a breach occurs, the aggrieved party may bring a motion to enforce the settlement since the action is still pending, even though it in no longer on the active docket.

Conclusion. By following these suggestions, counsel can make their settlement agreements reached in mediation admissible and enforceable.

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