

## ON ENFORCEABLE MEDIATED SETTLEMENT AGREEMENTS

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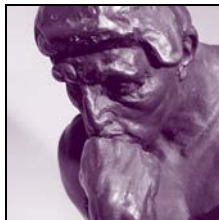
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You have worked intensely all day exchanging information, positions, building value all in the quest for settlement. The sun has met its daily destiny with the horizon seemingly hours ago. At last, the deal points have been reached, but everyone is too tired to effectively “write it up”. Your pesky mediator, however, does not want anyone to leave the room until there are signatures on the proverbial dotted line.

How many times have you been there, even in the less-marathon like sessions? Are you confident that the deal points memo that is prepared and signed is sufficient – read, binding and enforceable? The California Supreme Court in the closely watched case of *Fair v. Bakhtiari* (40 Cal.4<sup>th</sup> 189 (2006)) has given us some guidance.

We know from prior case law and from the Code, that documents prepared for Mediation are generally inadmissible. [Ev. Code §1119(d); *Rojas v. Superior Ct.* 33 Cal.4<sup>th</sup> 407 (2004); see <http://www.appropriatedisputeresolution.com/pg24.cfm>] *Fair* deals with what wording is required in a “signed settlement agreement” to satisfy the exemption from inadmissibility where the agreement “provides that it is enforceable or binding or words to that effect.” [Ev. Code §1123(b) as quoted in *Fair*.]



The case arose from suit filed by Mr. Fair against his former wife and a business partner, including various business entities. Mr. Fair claimed that the defendants had wrongfully excluded him from real estate syndication profits. They mediated their dispute over the course of two days. At the end, Mr. Fair’s counsel drafted a handwritten memorandum of settlement terms. The parties signed this memorandum. The settlement terms included an

agreement to sign mutual releases, and a key term for the purposes of the appeal: “Any and all disputes subject to JAMS arbitration rules.”

What wording is required in a mediated settlement agreement memo to make it admissible and subject to enforcement?

Because of tax complications, the “formal settlement agreement” language became a source of debate; ultimately they could not agree on acceptable wording for the “formal” agreement. When Mr. Fair’s counsel tried to invoke the arbitration clause from the Memorandum, he was met with opposition and an assertion that the Memorandum was inadmissible as having been “prepared for the purpose of, in the course of, or pursuant to, a mediation.”

Mr. Fair filed his motion to compel arbitration, which not surprisingly was met with the same opposition now formally argued to the court. The trial court excluded the Memorandum; given its exclusion, there was insufficient evidence of an enforceable arbitration agreement, and the motion was denied. The Court of Appeal, however, reversed, finding the arbitration language sufficient under §1123(b)’s “to the effect” language.

According to the Supreme Court, the Court of Appeal gave §1123(b) an unduly expansive reading. That section’s purpose “...is to allow parties in mediation to draft enforceable agreements without requiring the use of a formulaic phrase.” The arbitration clause in the *Fair* settlement agreement failed to meet the minimum threshold.

The Supremes reviewed the statutory and case law history of mediation confidentiality and the admissibility of settlement agreements. In doing so, it explained that §1123 was created as “an

important addition” to the statutory scheme because it explicitly makes a signed settlement agreement admissible if it includes language that it is enforceable, binding, or uses “words to that effect”. The key, according to the Court, is that the parties have unambiguously expressed their intent to be bound by the settlement terms, as the Court of Appeal had suggested. The Court could not get its arms around the Memorandum’s arbitration language as equating to the requisite expression of intent to be bound.

“... [T]he writing must make clear,” the Court said, “that it reflects an agreement and is not simply a memorandum of terms for inclusion in a future agreement. *The writing need not be in finished form to be admissible* under section 1123(b), *but it must be signed by the parties and include a direct statement to the effect that it is enforceable or binding.*” [Emphasis added.]

From the Court’s view, there must be a balance between upholding the fundamental pillar of confidentiality and the requirements of flexibility and clarity. To assure durable settlement agreements, the Court wrote that §1123(b) must be “...applied to require language directly reflecting the parties’ awareness that they are executing an “enforceable or binding agreement.” Despite Mr. Fair’s efforts to have the Court look to the circumstances following the signing of the Memorandum – including defendants’ representation to the trial court that the matter had been settled – the Court would not examine extrinsic evidence. Rather, it said that §1123 “is designed to produce documents that clearly reflect the parties’ agreement that the settlement terms are ‘enforceable or binding.’” The Court was so adamant about this view that it would not even buy Mr. Fair’s strong public policy favors arbitration argument.

To pass muster, then, “... a settlement agreement must include a statement that it is ‘enforceable’ or ‘binding,’ or a declaration in other terms with the same meaning. The statute leaves room for various formulations. However, 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 do not qualify an agreement for admission under section 1123(b).”

Make your settlement agreement memo admissible and enforceable:

- have it signed by all parties
- state directly that it is binding *and* enforceable
- consider waiving confidentiality for the purpose of admissibility and enforceability of the settlement agreement



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