

**Well, Who Can Enforce The Settlement Agreement?
Court of Appeal Rules That (I) Settlement Agreement Entered Into
In Conjunction With Multiple Party Mediation Is Not Admissible
Against Any Party When One Party, Which Objects To The Agreement,
Failed To Execute It And (II) The Attorney's Fee Clause Contained In The
Settlement Agreement Will Not Be Enforceable Even Against The Losing Party
Which Had Executed The Settlement Agreement In The First Place**

By: Edward F. Morrison, Jr., Esq.
Brett C. Drouet, Esq.
Christina S. Karayan, Esq.

In an important twist in case law interpreting the admissibility, or lack of admissibility, of mediation protected settlement agreements in California, the California Court of Appeal, Second District, ruled that a settlement agreement prepared in the course of a mediation is not admissible and is not enforceable against the persons that signed it where there was at least one party that failed to execute it and a party which failed to execute the agreement objected to enforcement. The Court of Appeal also ruled that the attorney's fee provision in the settlement agreement will not be enforceable against any losing party because no admissible agreement existed in the first place.

This interesting decision occurred in Cruz Cardenas Rael v. Davis (2008) DAR 14985 ("Cruz Case"). The Cruz case concerned an action for breach of contract by the widow of Tony G. Rael, Jr. ("Rael") over the division of assets in Rael's estate. Rael passed away in 2003. Prior to passing away, Rael had participated in a mediation in 2002 between himself, Rael's widow and Rael's three adult children from a prior marriage (Rael's first wife having pre-deceased Rael). That mediation arose from a conservatorship action which had been filed by one of Rael's children and involved the post death division of Rael's assets, which were valued at in excess of \$6,330,000 at the time of Rael's death.

Although Rael executed a Settlement Agreement which was entered in conjunction with the mediation, as did his widow, and the Settlement Agreement included a waiver of confidentiality under Evidence Code section 1123 (which provides that mediation protected agreements may be admissible as evidence in a later proceeding where the parties agree in a signed writing), one of Rael's children had refused to execute the Settlement Agreement. After Rael passed away, the widow sued the executor of Rael's estate, claiming that Rael had

agreed that, under the terms of the Settlement Agreement, she would receive a greater share of Rael's estate than had been called for under a prior will and living trust that Rael had signed prior to the mediation.

The executor denied that an agreement had been formed and argued that the widow should prove that the Settlement Agreement was admissible before it could be admitted into evidence. The executor further argued that, while the widow and Rael had signed the Settlement Agreement and the Settlement Agreement provided that it would be admissible under Evidence Code section 1123, the Settlement Agreement could not be admitted into evidence because one of the parties (i.e. a son of Rael) had failed to sign it and there was conflicting evidence as to whether Rael had intended it to be enforceable without the signatures of all parties.

At trial, the Court ruled that the Settlement Agreement was not admissible and, on appeal, the Court of Appeal affirmed. In its decision, the Court of Appeal acknowledged that Evidence Code section 1123 provides that a mediation protected settlement agreement is not rendered inadmissible where the parties' agreement indicates that the agreement is admissible and is otherwise enforceable but noted that, because one of the signatories had not executed the Settlement Agreement, it could not be determined to be severable as between the signing parties and could not be enforced against any of the parties which signed the Settlement Agreement.

The Court of Appeal also distinguished Stewart v. Preston Pipeline Inc. (2005) 134 Cal.App.4th 1565 wherein the Court of Appeal enforced a Settlement Agreement entered into in a mediation of a personal injury lawsuit where the defendant had failed to execute the Settlement Agreement but the Settlement Agreement had been executed by the defendant's counsel who had been retained through the defendant's insurer.

The Court of Appeal distinguished Stewart on the basis that the party seeking to exclude the Settlement Agreement in that case had been the very party who had executed the Agreement which contained a waiver of confidentiality. Since the Court determined that the Rael Settlement Agreement was not severable, it concluded that the refusal by one of Rael's sons rendered the Settlement Agreement unenforceable given the facts of that case.

It is noted that the Court of Appeal further ruled that the executor of Rael's estate could not recover attorney's fees under the Settlement Agreement, even though it contained an attorney's fees clause which would have otherwise been enforceable under Civil Code section 1717. See, Santisas v. Goodin (1998) 17 Cal.4th 599, 602. As to this issue, the Court of Appeal recognized that the case

was one of first impression but ruled that, since the Settlement Agreement was not admissible, it could not be enforced for any purpose.

The Cruz Case provides two important rulings: (i) all parties must sign a waiver of confidentiality in order for a settlement agreement to be enforceable (at least where a party attempting to avoid enforcement did not execute it) and (ii) an attorney's fee clause under a contract dispute provision contained in a settlement agreement will not be enforceable, even against a losing party, because the settlement agreement itself is not admissible in the first instance.

About the Authors: Edward F. Morrison, Jr. is the founding partner, Brett C. Drouet is a partner and Christina S. Karayan is a senior associate of The Morrison Law Group, a professional corporation. Their biographies can be viewed at www.morrisonlawgroup.com.

Publication Note: The Morrison Law Group wishes to disseminate this publication to all clients and colleagues of the Firm who wish to receive it. Should any recipient desire to be removed from the distribution list, or wishes to have a colleague added, please contact Kameelah Hakeem at The Morrison Law Group at 213 356-5500 or hakeem@morrisonlawgroup.com.

Disclaimer Note: The legal article presented above is intended to provide general information which may be of interest or use to clients and colleagues of The Morrison Law Group and should not be construed as legal advice on any matter.