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Federal Judge Gone Wild? Seeking Rescission, Producer Francis Claims His Mediated Settlement Was Coerced by Jail Time

BY MICHAEL D. YOUNG

This should come as no surprise to anyone who has heard the story. Joseph Francis, soft-porn king, and now accidental poster child for mediation confidentiality, has filed suit to undo a mediated settlement agreement that he claims was signed under duress.

He has a good point, too.

After all, he was thrown in jail in Florida for his mediation conduct, and—at least in his mind—could only get out if he agreed to sign a multimillion dollar settlement agreement to resolve a civil lawsuit. Jail can be a pretty good motivator in that sense. If only all mediators had that power—settlement rates would be at 100%.

The suit's ultimate merits remain to be seen. It was filed in August in Los Angeles Superior Court accompanied by a press conference, a web video setting Francis in front of an American flag, and plenty of media coverage. Still, the allegations put an exclamation point on Francis's oft-repeated protestation that he felt coerced—by jail time!—into settling a suit he never wanted to settle.

NOT INTERESTED IN SETTLING

As reported in these pages in June 2007, Joe Francis, the 35-year-old founder of the multimillion dollar *Girls Gone Wild* franchise, found himself on the receiving end of a civil suit in Florida filed by the parents of underage girls.

The suit asserted that Francis, and his *Girls Gone Wild* companies and

associates, rented houses and condominiums in Panama City, Fla., during the 2003 spring break, and then enticed young women, including the underage plaintiffs, to drink alcohol, bare their breasts, and engage in sexual acts for the cameras.

COURT ADR

Francis, for his part, defended the case on the grounds that he always checked the IDs of the young women he filmed. If the plaintiffs used fake identification falsely portraying themselves as older than 18 or 21, Francis contended, then he was the victim of fraud.

Regardless of the merits of the claims or the defense, Francis made it clear that he was not interested in settling the dispute with the young women and their parents. Indeed, even after Francis was ordered to mediation by Panama City, Fla., U.S. District Court Judge Richard Smoak—who happened to be the former law partner of the plaintiffs' attorney—Francis was steadfast in his desire to take the dispute to trial.

This was not lost on the plaintiffs or their counsel. In a subsequent motion for sanctions, the plaintiffs filed papers that reiterated Francis' mediation "mantra" that he did not want to settle.

Francis's mantra was more like an eruption. "Don't expect to get a fucking dime—not one fucking dime!" This was repeated about 15 times during his tantrum, according to the plaintiffs' filing. "I hold the purse strings. I will not settle this case, at all. I am only here because the court is making me be here!"

And if this settlement reticence wasn't clear enough, Francis continued in his own colorful style to make his

point at the mediation session. Again, as described by the plaintiffs themselves:

As plaintiffs' attorneys were leaving, Francis' threats escalated. "We will bury you and your clients!" *** Francis then made the only offer he was to make that day, "Suck my dick," Francis shouted repeatedly, as plaintiffs' counsel left the mediation room.

If there was any doubt going into the mediation that Francis did not want to settle, all doubt was erased by the first three minutes of the mediation session. Nevertheless, the mediation continued for the next 13 hours, without success.

SETTLE OR JAIL?

What followed, as described in the *Alternatives* article last year, was a series of court filings and hearings in which Judge Smoak was asked to issue sanctions against Francis for purportedly violating the court's order to mediate—that is, for not mediating.

The judge made it clear that he did not consider monetary sanctions sufficient, and he would consider a sanction that included incarceration. In the end, after receiving testimony about what transpired at the mediation, including testimony from the attorneys who were present and Francis himself, the judge sent the parties away to discuss settlement one more time, saying: "We will break for lunch. And if you can't resolve this at lunch, I will issue my sanction award at 1:30." Smoak then concluded with this ominous, and not very subtle, warning:

If you come back this afternoon, somebody is going to be real unhappy, probably, with my ruling. That's fair warning, and I think that you need to put a dollar figure in your mind on what it's worth to you to avoid what may be a sanction that you weren't counting on.

The author is a partner in the Los Angeles office of Alston & Bird. He wrote the first *Alternatives* story on the Francis case, "Mediation Gone Wild: How Three Minutes Put an ADR Party Behind Bars," 25 *Alternatives* 97 (June 2007); coverage of the case earned *Alternatives* an award earlier this year from the Specialized Information Publishers Association in Vienna, Va. See last month's CPR News at 26 *Alternatives* 150 (September 2008).

In the context of the previous discussion of jail time as a possible “coercive sanction,” there can be no mistaking the court’s message here: “Put a dollar figure” on what it is worth to avoid going to jail, and pay that to the plaintiffs, because if this case is not settled after lunch, Francis will be imprisoned.

Smook was true to his word. The case did not settle at lunch, nor did it settle after yet another mediation session the next day. Smook threw Francis in jail for “disobeying” the court’s order to mediate.

Francis, in his prison jumpsuit and living behind bars, “agreed” to settle his dispute with the young women and their parents, paying the plaintiffs an undisclosed amount that was rumored to be in the many tens of millions of dollars. With the whisk of his pen, Francis was released from his civil contempt. (He remained in jail for other reasons, including a criminal contempt charge and an indictment for tax fraud—a related but different story.)

Smook later defended his decision in an opinion rejecting Francis’s recusal motion, noting that he was sanctioning threatening violent conduct.

RESCIND THE SETTLEMENT!

Which brings the tale to the Los Angeles Superior Court, where in August Francis filed two suits seeking to rescind his settlement agreement on the grounds of duress. At press time, no action had been scheduled in case.

Francis argues that he was forced to settle the Florida civil case against his will simply in order to get out of jail. It is not clear why two suits were filed; they appear identical in all respects. Perhaps it is a poorly disguised and ultimately unsuccessful effort to judge shop?

In an often rambling, grammatically challenged, and poorly-alliterated 10-page “Introduction” to the Los Angeles complaint—written in a “voice” that reads suspiciously like Francis’ own, which is on vivid display at a website detailing his life and legal times, www.meetjoefrancis.com—Francis begins his latest legal escapade this way:

This story is a new version of an old

classic—a story of southern justice gone awry. Nina Simone sang about it; William Faulkner wrote about it; historians teach about it. A young man in his late 30’s imprisoned in a Florida jail cell in 2003, for what? Not giving millions of dollars to deceitful plaintiffs and dishonorable lawyers in a civil suit to satiate the avaricious appetite of a cavernous court, a court that rewarded the

Settle or Else

The whine: The *Girls Gone Wild* founder now says settling was the only way he could get out of jail.

His argument: Somehow, Joe Francis has become an advocate for the sanctity of mediation. At least, the way he believes mediation should be conducted.

The concern: Does the federal judge’s actions mean mediation negotiation is less sacrosanct when, say, a company producing something other than boozy soft porn, and a better-behaved corporate officer, resist settlement conferences?

licentious acts of the wayward plaintiffs and their lawyers with illicit imprisonment and a coerced settlement under duress, perpetrating a continuous perversion of justice.

The document appears to be drafted more for Hollywood and the court of public opinion than for any court of law. The introduction continues, painting a rather stark and jaundiced picture of Southern justice and culture, and one that will not win Francis new Deep South friends anytime soon:

Southern injustice, sadly symbolic for centuries as a land without law, where guns and gavels too easily replaced law and logic, where the rope and the tree too often substituted

for the rule of law and the Bill of Rights, reared again. It’s an attitude where many of the powers-that-be would prefer women dress in Muslim-like tunics, but then, they’d have no money to line their pockets from their fortunate location by the sugary sands of the Gulf Coast.

Eventually, Francis sets out his primary claim—that the link between the plaintiffs’ attorneys and the judge led to Francis’ wrongful imprisonment, and the imprisonment forced Francis to settle the civil claims then pending against him:

Since such southern injustice is never concluded without a friendly judge, the lawyers file, dismiss, then re-file their civil claim in federal court on behalf of the women and their parents, then affirm a stay, while secretly awaiting a new federal judicial appointment. After that appointment, they move to lift the stay. Who was this new judge they waited on? Their long time friend and decade-long former law partner, Richard Smook . . . , with a visceral bias against Francis’ business, likely known to them. Of course, neither they nor the judge disclose this history of close personal and professional relationship. . . . In an incestuous nest of internecine conflicts, inherent and actual throughout, the women, the parents and their lawyers never made notice in the record of the judge’s long-standing intimate professional and personal relationship, as his long-time ex-law partner and close personal friend, with other members of the [plaintiffs’ counsel and his law firm]. Nor did the court disclose the details on the record itself.

FRANCIS HAS A POINT

The melodramatic prose notwithstanding, the summary above suggests that Francis’s allegation that he was coerced to settle the Florida civil suit is not wholly without merit.

Enough was said by the judge in open court and in the court’s written orders to raise at least a question as to

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Judge Gone Wild?

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whether Francis's contractual assent was free and voluntary.

As set forth in the California Civil Code, a contracting party's consent is not "free" where it is obtained by duress, and duress is defined to include "unlawful confinement of the person of the party" or "confinement of such person, lawful in form, but fraudulently obtained, or fraudulently made unjustly harassing or oppressive." Civil Code Section 1569.

Without attempting to pass judgment on the merits of Francis's latest civil proceeding, a few points warrant mentioning:

First, despite 13 hours of mediation that followed the initial three minutes of uncivil behavior, Judge Smoak threatened Francis with a "coercive" sanction that might involve "jail time" if, after receiving live testimony, the court determined that Francis violated the court order to mediate. But compelling parties to mediate who have clearly expressed their unwillingness to settle, and who have instead insisted on their right to resolve their dispute by trial, would certainly appear to run antithetical to the entire notion of mediation and "voluntary" settlement.

Indeed, one would hope that most judges faced with a party obviously unwilling to settle would rescind the mediation order, addressing any bad behavior with monetary sanctions to compensate for any financial damage caused by the behavior. And then get on with the litigation, perhaps keeping an eye out for an appropriate time down the road when all parties may be more receptive to settlement.

Second, with the sword of Damocles hanging over Francis's head, the judge recessed the sanctions hearing and ordered the parties to participate in a second mediation session over the lunch hour, saying he would issue his sanctions order at the afternoon court session. And in case it was not clear enough already, Smoak reiterated as the parties were leaving the courtroom that "somebody" would be "real unhappy" with the sanctions ruling that afternoon, and this "somebody" should "put

a dollar figure" on the value of avoiding "a sanction you weren't counting on."

With perhaps some justification, Francis has pointed to these comments as an example of the court's directive to him to "settle or go to jail."

Third, after returning from the emergency lunchtime mediation, which proved unsuccessful in reaching settlement, Francis was ordered to jail for "failing to mediate," which was the court's rationale, or for "failing to settle," which is Francis's interpretation.

Judge Smoak thereafter held the incarceration order in abeyance, giving Francis one more chance to "participate in mediation." This third mediation session ended, according to the Court and following a report by the parties and the mediator, with "an unconditional offer" by the plaintiffs and "an unconditional acceptance" by Francis. A final written agreement, however, was never prepared and consummated because Francis later wanted to discuss payment terms.

After a renewed objection by the plaintiffs, who claimed that Francis was trying to "game" the process, the Court ordered Francis to jail for failing to mediate—not for mediating in bad faith, but for failing to mediate at all.

Again, this incarceration order is open to criticism. Had there truly been an "unconditional offer" and an "unconditional acceptance," then under basic contract law, there was an enforceable contract. Why send Francis to jail for not mediating when the court could have simply enforced the settlement agreement?

Or, short of that, the court could have done what most any other tribunal likely would have done: Send the parties back to mediation to resolve the payment terms and get the deal on paper, signed by the parties . . . or get on with the litigation.

BUT . . . LOS ANGELES?

Whether Francis's latest foray into the judicial system will reap him any redress from the Florida settlements remains to be seen. In typical Francis fashion, he has chosen an unorthodox manner for proceeding.

For instance, how does Francis get jurisdiction in the Los Angeles Superior Court over the young women and their parents, who are residents of Florida

and Alabama? And where the parties were involved in a settlement agreement negotiated and "entered into" in Florida (prison, to be precise) resolving a federal suit filed in Florida's Northern District?

Where are the connections to Los Angeles, other than the fact that Francis and his attorney reside there?

Francis's complaint does not shed much light on the jurisdictional problem. It justifies Los Angeles venue on the grounds that "[t]he actions of the defendants in this case were deliberately aimed at a Californian and the California plaintiffs in this case, knowing the effect the actions would have on the California business and California resident. Hence, personal jurisdiction over the defendants is Constitutional and proper."

That's not very convincing. Indeed, "the actions" that appear to be most problematic—the jailing—were not even undertaken by "the defendants in this case," i.e., the young women and their parents. If anything, the actions were undertaken by the Florida federal judge.

Along the same lines, does Francis even have the right parties named in the action? Can a duress claim sufficient to rescind a settlement agreement be premised on the conduct of a nonparty judicial officer?

MEDIATION'S POSTER CHILD

Whether Francis ultimately will be successful in his effort to undo his settlement agreement remains to be seen. Indeed, whether he even serves the complaint on the defendants is a question that has yet to be answered.

Nevertheless, the suit's filing brings to light the dangers that can arise when courts attempt to take an overly intrusive approach to mediation—when judges seek to impose their own authority and will into a process that was never meant to be controlled by a judicial decision maker. The still-continuing Francis mediation saga is a reminder to all that mediation is best left as it was originally intended—as an alternative to the compulsory dispute resolution process of our government-sponsored courts. ■

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