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ALTERNATIVE DISPUTE RESOLUTION

Tips for Enforcing Mediated Settlements

BY MICHAEL D. YOUNG

What do the Orgasmatron, the Tingler, and a contaminated property have in common? Surprisingly, a very important lesson for California litigators and mediators. With a pair of opinions—regrettably unpublished—the First Appellate District recently helped delineate when term sheets signed at the end of a successful mediation will become a binding settlement agreement—and when they will not. If learned, the lesson will protect and preserve your future mediated agreements; if ignored, it will leave you with one seriously unhappy client.

The lesson involves the case of *Tender Loving Things, Inc. v. Robbins.* (2005 Cal. App. Unpub. LEXIS 3470.) Hoping to re-create the apparent success of the Australian Orgasmatron, a pair of massage-device developers created the Tingler, described by the court as a "massage device made from copper wires that proceed out of a handle, somewhat resembling a distended whisk broom." The Tingler, explained the court, is placed over the scalp to create "pleasurable sensations similar to 'goosebumps.' " Several parties entered into a manufacturing and marketing relationship designed to bring the Tingler to the scalps of the masses. However, the electricity between them soon fizzled as they found themselves in arbitration, federal court, state court—and finally, mediation.

IF ASKED, DON'T TELL

The Tingler mediation was successful, and here is where the lesson begins. Under the mediation confidentiality structure of California Evidence Code sections 1115 to 1128, *everything* that happens in mediation, even settlement, is generally confidential and inadmissible in court.

This is not the wimpy "settlement privilege" of Evidence Code section 1152, which establishes that settlement discussions are inadmissible *to prove liability* but are admissible for all sorts of other reasons. In a California mediation, nothing "said" is admissible. (Cal. Evid. Code § 1119(a).) Under the express terms of the statute, an oral settlement can never be enforced in court because it can never be proven to exist.

The same is true for written agreements: "No writing that is prepared for the purpose of, in the course of, or pursuant to" mediation is admissible or subject to discovery. (Cal. Evid. Code § 1119(b).) And, of course, all of the settlement negotiations themselves are confidential. (Cal. Evid. Code § 1119(c).)

For a mediated agreement to be enforced, it must be in a signed writing and contain language expressing the parties' intent that the document is admissible or binding, or otherwise falls outside the mediation's protections. (Cal. Evid. Code § 1123.) Technically, oral agreements reached in mediation also can be made admissible under certain circumstances, such as when the parties have a court reporter or tape recorder handy to record the agreement and the deal is then reduced to writing within 72 hours. (Cal. Evid. Code § 1118.)

These rules are based on a recognition that mediation cannot survive without true confidentiality. Mediation works because parties can safely let down their guard: They can expose weaknesses, explore true interests and motivations, and brainstorm creative solutions. For example, without absolute confidence that a statement would never be heard inside a courtroom, no doctor would be willing to express that he or she may have accidentally left that sponge in the patient's gut and is now really sorry. And yet that apology might break the settlement impasse and lead to a lasting resolution.

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The California Supreme Court understands this, despite a flurry of challenges by parties and trial courts. In *Foxgate Homeowners Ass'n v. Bramalea California, Inc.* (26 Cal. 4th 1 (2001)) and *Rojas v. Superior Court* (33 Cal. 4th 407 (2004)), the court reaffirmed that *everything* that happens in mediation stays in mediation—even documents prepared for mediation that could be used as evidence in a subsequent lawsuit. They are inadmissible in court. And to close any loopholes, mediators are not considered legally "competent" to testify about anything that happened during the mediation process. (Cal. Evid. Code § 703.5.)

Good mediators know these rules and tend to apply subtle or not-so-subtle pressure on the parties to come up with a signed "binding" document before anyone is allowed to leave the building. However—and here is where the parties in *Tender Loving Things* ran into trouble—many mediations do not include the luxury of time to carefully draft complex written settlement agreements. Indeed, many mediated disputes—particularly those with complex facts, multiple issues, or difficult parties—do not settle until late in the day, evening, or even early morning.

As experienced mediators and attorneys know well, the momentum gained from a full day of difficult negotiations—combined with fatigue, hunger, and often a locked restroom door—all can help create the dynamics necessary to bring some disputing parties to a resolution. It is *then* that the settlement agreement must be drafted and signed, before "settlor's remorse" can creep in. The risk of losing a settlement explodes exponentially if the parties leave the mediation room without a signed document in hand. And yet, a complex settlement agreement, addressing multiple issues and having long-term consequences, cannot be drafted with heavy eyelids and a full bladder. It takes time and attention.

So after the handshakes and smiles, the parties—sometimes with the help of the mediator—will often prepare a "term sheet," or "summary of settlement terms," or some similar outline of the essential terms they have addressed, often in longhand on lined paper, replete with edits and maybe even a coffee stain or two. And because experienced parties want the court to enforce the agreement and avoid filing a new breach of contract action should subsequent enforcement become necessary, they will include an express adoption of California Code of Civil Procedure section 664.6.

That statute states: "If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement."

THE DEVILISH DETAILS

Which brings us back to *Tender Loving Things (TLT)*. When the parties finally struck their complicated deal in mediation, they put the main points in a multipage term sheet that, the court noted, "extensively listed numerous detailed terms of the agreement regarding manufacturing and marketing of the Tingler" and contained an express section 664.6 adoption. However, the term sheet also contemplated preparing and executing "a more formal 'final agreement' that would contain additional incidental terms"—an agreement that was never completed despite months of additional negotiations.

So the table was set for the court. Under section 664.6, Tender Loving Things moved to enforce the settlement as reflected by the term sheet the parties signed at the mediation. Defendant Robbins objected, claiming the items on the term sheet were too uncertain to form an enforceable contract. Moreover, the parties expressly desired a number of contract provisions, such as a dispute resolution clause, but had not negotiated or agreed upon them when the mediation term sheet was prepared.

Meanwhile, in the case of *Goodrich Corporation v. Autoliv ASP, Inc.* (2005 Cal. App. Unpub. LEXIS 2109), a near parallel tale was unfolding, with a more mundane contaminated commercial property substituting for the Orgasmatron and Tingler. In *Goodrich* the parties settled their dispute after an all-day mediation, signing "a handwritten memorandum of settlement" that stated it was intended to be "binding and admissible for purposes of a motion to enforce this agreement pursuant to Code of Civil Procedure, Section 664.6." As in *TLT,* the parties intended, following the mediation, to draft and execute a more comprehensive settlement document. And similarly, that future never arrived as the parties, left to their own devices outside the mediation, were unable to agree on the more formal terms. Finally, like the plaintiff in *TLT,* the *Goodrich* plaintiffs moved to enforce the terms of the mediated settlement reflected in the handwritten memorandum.

In both cases the trial courts granted the motions, enforced the settlement agreements as reflected by the term sheets, and dismissed the lawsuits. And in both cases the defendants appealed to the First Appellate District. But here, the parallelism ends. In *TLT* the appellate court enforced the term sheet as a binding contract of settlement, while in *Goodrich* the appellate court held the agreement to be too uncertain to constitute an enforceable agreement and sent the matter back to the trial court.

The differing results may lie in the lawyering. First, as both courts recognized, a settlement is nothing more than a contract to be analyzed under standard contract principles. Whether a term sheet is an enforceable contract depends both on the intent of the parties and on whether the terms contain the necessary certainty and definiteness to be enforced.

For instance, there is no reason a term sheet, even one to be later memorialized in a formal writing, cannot in and

of itself be a binding agreement—or the reflection of a binding agreement. Indeed, case law is replete with examples of agreements being enforced once the terms are definitely understood, "even though the parties intended that a formal writing embodying these terms was to be executed later." (1 Witkin, Summary of Cal. Law, Contracts (10th ed), ¶133.)

The key is intent. If the parties intend the term sheet to reflect their agreement, a contract exists, and the subsequent understanding that the contract will be formally transformed to a piece of paper is immaterial to the accepted obligations. (*See, Stephan v. Maloof,* 274 Cal. App. 2d 843 (1969).) On the other hand, if the parties intend the agreement to be incomplete until subsequently reduced to writing and signed, then the term sheet is not a binding agreement until a signed writing exists. (Witkin, Contracts, at ¶134.)

But a term sheet intended to reflect the parties' agreement is not sufficient by itself to render that summary of terms a binding contract. Rather, as recognized in both *TLT* and *Goodrich,* to be enforceable a term sheet must reflect the parties' agreement on all material terms, leaving none of them for future consideration. And all terms must be identified with such certainty and definiteness that the court can clearly ascertain "the precise act which is to be done." (*Elite Show Serv., Inc. v. Staffpro, Inc.,* 119 Cal. App. 4th 263 (2004).) In other words, when material terms such as the price of property being purchased are not yet agreed upon, or when it is not clear what obligation a party has undertaken—such as building an "undesigned area in the future for a specified maximum sum"—there is no mutual assent and hence no agreement. (*See, Robinson & Wilson, Inc. v. Stone,* 35 Cal. App. 3d 396 (1973).)

However, the real difference in the cases discussed here was not in the subtle presentation of law or the spinning of public policy, but in the detail of the deal points set out in the term sheets. In *TLT* the court was struck by the specificity of the eight-page written document executed by the parties, noting that it contained key elements of the licensing arrangement—including price per unit, royalty amount, trademark assignment, and licensing details. Just as significantly, the appellate court noted that the terms that were not yet agreed upon, such as the ADR clause, were merely "incidental details" that did "not go to the heart of the settlement agreement, or impair its enforceability." As a result, the court upheld the term sheet as a settlement contract binding on the parties.

By contrast, the appellate court in *Goodrich* noted that while the parties had set out specific terms in the summary sheet, at least one of the terms—the amount of money plaintiffs would contribute to the costs of the environmental remediation—was arguably ambiguous. Because the language used was "susceptible to the interpretations advanced by both parties," the court determined that "the parties had not agreed to the 'same thing' "—so there was no mutual assent to a critical term of the deal, and thus no settlement.

> **"The real difference in the cases was in the detail set out by the parties in their term sheets."**

PRACTICAL LESSONS TO BE LEARNED

First, to ensure that mediated settlements stay settled, a wise lawyer will bring to every mediation a laptop containing a form settlement agreement. Even with complicated disputes involving many nonmonetary issues, you can often anticipate a framework for a workable agreement and prepare draft language in advance. When a settlement is finally reached, the parties can then document the deal with much greater specificity than they could through a term sheet scrawled on the back of a donut-encrusted napkin.

Second, if you are relying on a term sheet, take the time to identify all essential elements to an agreement and ensure that each is specifically addressed in the writing. Indeed, this is not a bad exercise for the parties and mediator to undertake together before any drafting takes place. The written term sheet will be enforced, but only if there is mutual assent to all elements essential for the deal.

Third, if the parties cannot reach agreement on terms they consider minor or incidental—or more likely, they run out of time or energy to address them at all—think long and hard before putting the *lack of agreement* on those terms in writing. For example, a term sheet that states "the parties will negotiate and agree upon a mutually acceptable alternative dispute process," raises a red flag to any court reviewing it that the parties have not yet agreed upon terms they believe are material.

Fourth, as required by section 1123 of the California Evidence Code, to break free from the protective cloak of the mediation statutes, make sure the settlement document states that the parties intend the agreement to be binding and the settlement document be admissible in court.

Finally, forget not the power of California Code of Civil Procedure section 664.6. By specifically referencing this potent code section in the term sheet or settlement agreement, the parties can adopt a quick, easy, and effective process for enforcing the agreement they created. It allows the parties to get before a judge quickly to enforce settlement terms, without filing a new enforcement action. Indeed, its ease of use even serves as a deterrent to otherwise recalcitrant opponents who might be considering shirking their settlement duties, or engaging in minor breaches that, while annoying, do not justify bringing a new lawsuit. CL