

Party Can Waive Right to Mediation Confidentiality Through Delay

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A California court of appeal has held that where a party spends 15 months litigating whether a settlement had been consummated at a mediation, she cannot later seek to argue that what occurred at the mediation must remain confidential based on the broad scope of mediation confidentiality under California law.

Simmons v. Ghaderi, 2006 WL 2787408 (Cal. Ct. App. Sept. 27, 2006).

After a wrongful death action was filed against a doctor, she submitted a written consent to her insurer to settle the matter for an amount up to \$125,000. Under the policy, that consent could only be withdrawn in writing.

The doctor, plaintiffs and the insurer participated in a mediation. After the insurer and the plaintiffs advised the doctor that they had reached a settlement for \$125,000, the doctor orally withdrew her consent. The next day, the parties appeared in court and advised the court of their agreement. Shortly thereafter, the doctor withdrew her consent in writing. The claimants filed suit to enforce the settlement agreement against the insurer and the doctor. The doctor responded to the claimants' allegations by asserting that she had revoked her consent to the settlement amount, thus rendering the agreement unenforceable. She argued that the mediation confidentiality bar in the California Evidence Code precluded the claimants from establishing the existence of an enforceable agreement.

According to the court, when an insurance policy does not require the policyholder's consent to settlement, California law permits an insurer to settle within the terms of the policy and to take full control of settlement negotiations without interference from the insured. *Fiege v. Cooke*, 125 Cal. App. 4th 1350 (2004). In ruling for the claimants, the court noted that while California requires the policyholder's consent to settlement under professional liability policies, once that consent is in writing, the principles of *Fiege* apply. Absent an effective revocation of a written consent to settlement prior to a settlement agreement, a professional liability policyholder may not refuse to accept a settlement agreement between the claimant and the insurer. The court, in siding with the claimants, found that the doctor's consent to settlement was in force and applicable when the insurer offered the settlement terms to the claimants, who then agreed to settle.

The court rejected the doctor's argument that the mediation confidentiality bar under the California Evidence Code precluded the claimant and insurer from establishing that an enforceable oral contract had been reached. The court noted that the doctor had spent 15 months arguing about the significance of what occurred at the mediation, without ever "challeng[ing] the admissibility of the facts or the trial court's authority to receive such evidence and to determine its legal effect." The court reasoned that a party cannot ask a court to decide the significance of what happened at the mediation and subsequently argue that the court lacks the authority to decide what happened at the mediation. The court also noted that the doctor's efforts to challenge this settlement on the grounds of mediation confidentiality were "particularly egregious" since she had executed a written consent to settle.

The court said that its holding did not reflect disagreement "with the principle that mediation confidentiality rights cannot be waived impliedly by merely raising a claim about an agreement reached through mediation. [The court] simply held that once a party voluntarily declares certain facts to be true, stipulates that she does not dispute them and extensively litigates the legal effect of such facts, she is estopped to later claim that the court must disregard those facts based upon a belated assertion of mediation confidentiality."

One of the three judges on the panel wrote a lengthy dissent, reasoning that, as a result of the mediation confidentiality bar, "there was no admissible evidence of an oral contract."