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Subrogation & Recovery Alert
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COZEN O'CONNOR

Enforcing Confidential Mediation Settlements

It's the morning of your big mediation and you are fully prepared to resolve your case without sacrificing key positions. You and your attorney have set your expectations as to what will happen, who will speak, what the mediator should do, and what your attorney will say on your behalf. The mediation begins with a mediator's own opening statement about the mediation process and all parties are asked to sign a confidentiality agreement. As the facts and dispute loom large in your mind, you half pay attention to the mediator's words and you sign the confidentiality statement agreement without a second thought. The confidentiality provision makes anything said at the mediation confidential and privileged and, thus, cannot be shared with anyone outside of the mediation for any purpose.

Your case may settle that day, and if it does, it will be because the process employed at mediation has proven to be successful. However, any settlement you reach that day will only be as good as the paper it is written on, due to a case out of New Jersey's Supreme Court that has made it perfectly clear: What happens in mediation, stays in mediation.

The Confidential Nature of Mediations

The November 6, 2007 mediation in *Willingboro Mall, Ltd. v. 240/242 Franklin Avenue, LLC.*, likely started out in much the same way as described above. The case was pending in the Superior Court of New Jersey and had been referred to a retired judge for mediation pursuant to New Jersey's Uniform Mediation Act. During the mediation, the mediator conveyed a series of demands and counter-offers, and the parties orally agreed to settle the matter. However, the terms of the settlement were not put in writing before everyone left the mediation that day. Three days later, on November 9, 2007, the attorney for Franklin sent a letter to the court and Willingboro's attorney confirming the terms of the settlement. Franklin then took steps to effectuate its obligations under the settlement and asked that Willingboro do the same. On November 30, 2007, Willingboro's attorney sent a letter to Franklin's attorney indicating that Willingboro rejected the settlement terms set forth in his November 9, 2007 letter.

Franklin filed a motion to enforce the settlement agreement and provided certifications from its attorney and the mediator that the parties "voluntarily entered into a binding settlement agreement with full knowledge of its terms, without any mistake or surprise and without any threat of coercion." Willingboro requested the opportunity to conduct discovery regarding the mediation, which included depositions of the mediator and others to defend against the motion. It further agreed that it was waiving its confidentiality privilege associated with the mediation. Even so, the mediator refused to answer questions regarding the mediations because New Jersey's Mediation Act specifies that all communication in mediation are confidential and cannot be disclosed to anyone outside the mediation. Ultimately, the trial court ordered the mediator to testify and the mediator provided the details of the mediation and settlement before him.

After completing discovery regarding what occurred at the mediation, the parties went forward with a four-day hearing before the trial court to determine whether there was a settlement. During the hearing, the mediator was called to testify and again he refused to do so because of the confidential nature of mediation. With encouragement from Willingboro's counsel, the court ordered the mediator to testify because the parties had already agreed that the confidentiality provision associated with the mediation had been waived. Again, the mediator testified as to the details of the mediation, including the fact that the parties had reached an agreement in his presence. In a sudden about face, Willingboro's attorney then sought to assert the confidentiality provision and exclude all testimony related to what occurred during the mediation. This request was denied because the court ruled that it was untimely. Willingboro then offered testimony from its representative who attended the mediation, who testified that he believed the mediation was

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non-binding and that he was coerced to the terms of its settlement by its attorney. He further testified that there was no signed agreement and that he would not have signed one had it been presented to him during the mediation.

The trial court agreed that there was a binding agreement and the New Jersey Court of Appeals affirmed the trial court's decision. Willingboro appealed to the New Jersey Supreme Court to review the matter and the Supreme Court also affirmed the ruling, finding that there was sufficient evidence presented to demonstrate that there was a binding agreement and that Willingboro had waived the confidentiality protections associated with the mediation. However, the Supreme Court noted Franklin's original motion contained certifications from Franklin's attorney and the mediator, which violated the confidentiality provision associated with the mediation. Had Willingboro simply sought to strike those certifications contained in Franklin's original motion to enforce the settlement agreement, there would have been no admissible evidence as to the settlement agreement. As the Supreme Court stated, "In the absence of a signed settlement agreement or waiver, it is difficult to imagine any scenario in which a party would be able to prove a settlement was reached during the mediation without running afoul of the mediation-communication privilege. The Supreme Court in Willingboro concluded with these words of caution:

> "[I]f parties to mediation reach an agreement to resolve their dispute, the terms of the settlement must be reduced to writing and signed by the parties before the mediation comes to a close …. To be clear, going forward, a settlement that is reached at mediation but not reduced to a signed agreement will not be enforceable."

Mediation Confidentiality Can Protect Settlements

The New Jersey Supreme Court's warnings taken from Willingboro are not unique and unsurprising. In recent years, other courts have reached similar conclusions. For instance, the 9th Circuit Court of Appeals affirmed a trial court's ruling enforcing a mediation settlement between Facebook, Inc. and Pacific Northwest Software, Inc. in a case widely known from the movie "The Social Network." In that case, twin brothers, Cameron and Tyler Winklevoss, sued Facebook and its creator, Mark Zuckerberg alleging that Zuckerberg stole their idea for Facebook. Facebook countersued the brothers' website, ConnectU. The parties proceeded to mediation and signed a mediation agreement that contained a confidentiality provision. Ultimately, the parties settled with a short written agreement and the brothers received shares of Facebook stock as part of the settlement. Thereafter, the Winklevosses sought to avoid the settlement agreement claiming that Facebook lied to them at the mediation about the value of the Facebook stock. The court upheld the settlement based on the written agreement and further ruled that anything Facebook may have said about the value of its stock during the mediation was not admissible because the disclosure of such information would violate the confidentiality provision in the mediation agreement.

The Value of Confidential Mediations

At the heart of the courts' decisions in the *Willingboro* and *Facebook* decisions was the confidentiality provision under New Jersey law and the mediation agreement. New Jersey is one of eight states that has adopted the Uniform Mediation Act; the others include Nebraska, Illinois, Ohio, Iowa, Washington, Indiana and the District of Columbia. Several other states have adopted revised versions of the Uniform Mediation Act, including Delaware, Montana, Nevada, Oregon and Wyoming. Many other states, while not adopting the Uniform Mediation Act, have developed similar confidentiality provisions. Lastly, virtually every private mediation agreement today includes this same confidentiality provision.

The drafters of the Uniform Mediation Act believed the key for mediations to be effective was to include confidentiality provision as this would encourage the parties to actively participate in the mediation without feeling constraint. This confidentiality provision potentially allows the parties to tactically disclose to the mediators strengths and weaknesses in their case without concern if the case does not settle. It also allows parties to share with the mediator concerns they have that may not be legally relevant but are no less important when trying to resolve a case. So while the confidentiality provision is crucial for the mediation process to work, proving a settlement occurred during a mediation when you cannot discuss what was said during the mediation would be nearly impossible. For this reason, the drafters of the Uniform Mediation Act, created a specific exception to the confidentiality rule that allows the parties to create a written instrument to document a

settlement reached at mediation. In states where there is no explicit mediation statute, the confidentiality provision is solely a creature of contract and the privilege is only as strong as the language of the mediation agreement.

The Importance of Your Settlement Documents

At the end of a long mediation, very often the last thing parties want to do is prepare a long and detailed settlement agreement, but that very document is the only way you may be able to enforce what you worked so hard to achieve. It is not a document that should be done cavalierly as settlements can still fall apart if the document is not drawn up precisely enough. For example, in another matter involving a class action lawsuit against Comcast, the class action group and Comcast agreed to mediate the lawsuit before a mediator in Massachusetts while the U.S. Supreme Court was deciding whether to take up the issue of whether the class was properly certified. At the end of the mediation, the mediator sponsored a settlement term sheet, which served as his recommendation for settlement. The settlement term sheet contained at least four points that required additional discussion, such as that the parties agreed to develop a release "in a form acceptable to all counsel." The next day, counsel for the class action group and Comcast confirmed by email that they had authority to accept the terms of settlement contained in the mediator's term sheet.

Over the next few weeks, the parties worked on putting together a release that all parties could agree to and other documents needed for the settlement to be complete. As the parties exchanged drafts of these documents, the Supreme Court agreed to hear the matter. Comcast's attorney then sent correspondence to the class action group's attorney indicating that it intended to continue to pursue the appeal and that it did not wish to engage in any further settlement discussions. The class attorneys then sought to enforce the settlement agreement. The trial court denied the motion ruling that the settlement agreement was nothing more than an agreement to agree, which was not enforceable.

Lessons Learned: Protecting Your Settlements

The lessons from *Willingboro*, *Facebook*, and *Comcast* are many. An oral settlement agreement reached during mediation, but not committed to writing, will be difficult, if not impossible, to enforce. Any agreement reached must be reduced to writing with the specific terms of the settlement spelled out. Many times settlement agreements at mediation will reference releases or other documents that are to be created at a later date. These post-settlement documents can often create issues that were not discussed at mediation. If these documents are pre-conditions to effectuating the settlement, then the agreement may not be enforceable. If they are an extension of the settlement agreement, then the settlement agreement will likely stand. A frank discussion of what terms will be included in these documents should take place before the parties sign any mediation settlement agreement. Likewise, courts will often enforce a settlement agreement if the material terms of the agreement were in place, even if the less essential details were not. Like anything, the devil is in the details. Parties wishing to sneak a term into a document following a mediation do so at their own peril.

Complex mediations often produce complex settlements, and many times a simple agreement at the end of a long mediation is not possible. The New Jersey Supreme Court in *Willingboro* suggested that the parties agree to continue the mediation so that the settlement paperwork can be completed properly, or that the parties record by video or audio the terms of the settlement agreement before they leave the presence of their mediator. The parties may also consider entering into a short settlement agreement that provides the essential terms of the agreement and also provides that the parties agree to waive the confidentiality requirement in the event that a dispute arises to the precise terms of the agreement that were reached during the mediation.

Mediations often end with a mediator's proposal and the mediator continues to work with the parties to achieve a settlement even after the mediation has concluded. Case law is not clear whether a settlement agreement arrived at with the mediator's assistance after the mediation has concluded will be enforced in the same manner as those arrived at during the mediation or whether the confidentiality provision of the mediation extends to settlement discussions sponsored by a mediator after a mediation has ended.

Mediation is intended to end litigation, not produce more. A good mediator works hard to bring the parties together, and often times the mediator is the only thing that can keep a settlement from coming apart. Failing that, if you reach a settlement agreement at mediation, make sure it is in writing in case you ever have to enforce it. Make sure the written agreement is signed at the mediation by you and contains all the settlement terms that are important to you.

To discuss any questions you may have regarding mediation rules, or how the issues discussed in this Alert may apply to your particular circumstances, please contact: Anthony Morrone at (312) 382-3163 or amorrone@cozen.com.