

### Settle-and-Sue Case Development

*Biller v. Faber*, 2nd District No. B244232, 2016 WL 1725185 ( Apr 27, 2016) – Settlement malpractice lawsuit properly dismissed because the attorney defendant is precluded from presenting a defense due to the inadmissibility of confidential communications during the mediation that resulted in the settlement agreement forming the basis for plaintiff’s claim. Another “settle and sue” case.

In the inaugural Recent Developments program presented by the ADR Section of the Orange County Bar Association in 2013, we looked at *Filbin v. Fitzgerald*, 211 Cal. App. 4th 154 (1st Dist., Nov. 12, 2012) as an example of a developing trend of cases where parties settled with their adversary and then sued their attorney for “negligent” or “inadequate” settlement. Following a bench trial, the trial court in *Filbin* entered judgment in plaintiffs’ favor on the malpractice claim. The First District Court of Appeal reversed, explaining that in a “settle and sue” malpractice action, the plaintiff must prove that *but for* the malpractice she would *certainly* have received more money. Simply showing that the attorney erred is not enough. The Court noted that the requirement that a malpractice plaintiff prove damages to a “legal certainty” is difficult to meet in “settle and sue” cases because claims of inadequate settlement are often inherently speculative since settlement involves a wide spectrum of considerations and broad discretion. Importantly, however, the Court did not flatly prohibit liability against former counsel for less favorable settlement, and simply concluded that based upon the facts before it, plaintiffs had failed to prove causation or damages as a matter of law.

It is even more difficult for parties to prove settlement malpractice when the settlement is the product of mediation, because there are the additional hurdles of (1) mediation confidentiality protection under Evidence Code section 1119 making inadmissible as evidence any communications, negotiations or discussions had during a mediation, and (2) that fact that there presently is no exception to the broad scope of confidentiality protection provided by Section 1119 for claims of fraud or professional malpractice during a mediation. *Cassel v Superior Court*, 51 Cal. 4<sup>th</sup> 113 (2011) is the landmark decision from the California Supreme Court that spotlighted this issue in 2011. Similar cases have been reported almost every year since. See, e.g., *Filbin v. Fitzgerald*, supra; *Roldan v. Callahan & Blaine*, 219 Cal. App. 4th 87 (2013); *Moua v. Pittullo Howington Barker Abernathy LLP*, 228 Cal. App. 4th 107 (2014); *Syers Properties III, Inc. v. Rankin*, 2014 WL 1761923 (2014); *Amis v. Greenberg Taurig LLP*, 235 Cal. App. 4<sup>th</sup> 331 (2015).

Settle and sue cases are generally disfavored, because the “problem with allowing the proposed post-settlement litigation is that it would deprive the settling parties of a major advantage of settlement: namely, closure and finality concerning the underlying dispute.

In *Biller v. Faber* case, plaintiff had been employed in an in-house legal position for Toyota and sued Toyota for various employment law claims. The parties agreed to submit the matter to mediation and both sides accepted a “mediator’s proposal” that was issued by the mediator after the conclusion of the mediation. The settlement provided for Biller to receive \$4 million from Toyota. Biller’s attorney advised him to accept the mediator’s proposal and, as part of those discussions, offered to reduce his contingency fee from 40% to 25%. The settlement was then reduced to a further written severance agreement. Both the severance agreement and the mediator’s proposal included terms that provided for confidentiality and a liquidated damages clause should the confidentiality clause be breached.

After resigning from Toyota, Biller established a legal consulting business and created a website on which information about Toyota was posted. Upon learning of these and other disclosures, Toyota sued Biller for alleged breaches of the confidentiality provision of the settlement / severance agreement. Biller countersued, and both the claims and counterclaims were submitted to binding arbitration under the terms of the severance agreement. Toyota was the prevailing party in the arbitration and was awarded \$2.5 million in liquidated damages, plus \$100,000 in punitive damages. Toyota had the arbitration award confirmed and judgment was thereafter entered in Toyota’s favor. Biller then initiated the current proceeding complaining that his attorney had committed malpractice by advising him to accept the settlement that begot the severance agreement with the confidentiality provisions that led to the later dispute with Toyota and the \$2.5 million arbitration award and resulting judgment.

In an effort to develop evidence to prove up his defense, Biller’s attorney requested documents in Biller’s possession pertaining to the underlying employment dispute. Toyota – a non-party – filed an ex parte application to stay production of documents containing its confidential information on various grounds, including mediation confidentiality. The trial court sealed various documents and ordered a stay of any production. In light of these developments, Biller’s attorney moved for dismissal of the malpractice complaint, arguing that due to Toyota’s assertion of mediation confidentiality, he was incapable of obtaining or using evidence he needed to defend himself at trial. A referee was appointed to evaluate the evidentiary problems and make a recommendation with

respect to the motion to dismiss. The referee found that neither party could proceed with the action due to the inadmissibility of necessary evidence; that in the referee's view, all of the privileged or confidential information and documents Biller had obtained were inadmissible. The referee recommended dismissal based on the attorney-client privilege and mediation confidentiality statutes. The trial court adopted the referee's recommendation and dismissed Biller's malpractice action. Biller appealed.

On appeal, the Court of Appeal affirmed, citing *Cassel* and noting that an unavoidable consequence of mediation confidentiality is the increased difficulty in proving attorney malpractice in the mediation context. The Court held that a confidential communication made during mediation remains private and confidential unless *all* participants in the communication agree to its disclosure, and even after a mediation ends, communications and writings exchanged during the process remain confidential. In light of Toyota's refusal to waive confidentiality of its mediation-related communications, both sides would be missing necessary evidence. The Court of Appeal reasoned that in order for Biller's attorney to explain his mediation strategy, he would have to present evidence of confidential communications received during mediation regarding Toyota's views on sensitive topics – such as its evaluation of Biller's performance, his future earning potential, and his right to a disability leave. Because the attorney was precluded by Evidence Code section 1128 from relying on Toyota's confidential mediation communications at trial, and doing so in violation of the confidentiality statutes would provided a basis for a new trial, the Court held that the trial court was correct in granting dismissal,



Rebecca Callahan, Esq. is a recognized expert in the field of dispute resolution. She teaches Arbitration and Mediation as an adjunct professor at Pepperdine School of Law / Straus Institute, and is also on the Faculty of the American Arbitration Association University where she presents skills training courses on various arbitration and mediation topics. Ms. Callahan received her JD from the Cal Berkeley (Boalt Hall) and her undergraduate degree from USC. In 2007, she earned an LLM in Dispute Resolution from Pepperdine University School of Law / Straus Institute. Ms. Callahan is available to serve as a mediator, arbitrator or consultant on a statewide basis. Engagements can be booked directly through her office.