

Mediation Confidentiality Development

Progressive Casualty Insurance Company, Inc. v. Noland, 2nd District No. B253986, 2016 WL 335961 (Jan 27, 2016) – Trial court did not err in excluding parol or extrinsic evidence of statements made at mediation, which plaintiff sought to introduce to show unilateral mistake as a grounds to avoid the contract – once again demonstrating the “super contract” nature of mediated settlement agreements.

A mediation was held in a personal injury lawsuit in which a passenger sued the driver of the vehicle in which he was traveling for injuries sustained in an accident that occurred in Arizona. The driver defendant was insured by Progressive Casualty Insurance Company. Attorney Noland represented the plaintiff passenger. The matter was settled at mediation, and a “stipulation for settlement” was signed by the parties and their counsel. Under the terms of the stipulation plaintiff was paid the sum of \$200,000, with the proviso that he and his attorney were responsible for “all liens” and would indemnify Progressive and hold it harmless in the event any liens were asserted.

After the settlement payment was disbursed to the passenger plaintiff, St. Joseph’s sued Progressive to enforce its medical lien for services provided to the plaintiff at one of its hospitals in Arizona. Progressive tendered the defense of the hospital’s lawsuit to Attorney Noland, who declined the tender. The hospital provider then moved for summary adjudication, citing the indemnification language of the settlement stipulation. Attorney Noland opposed the motion, claiming that the “all liens” indemnification provision in the settlement stipulation was the product of a drafting error and that the settlement stipulation should have specified that he and his client would indemnify Progressive only for “all *California* liens.” In support of his opposition, Attorney Noland sought to introduce evidence of communications, negotiations and settlement discussions had during the mediation process, which the trial court determined was inadmissible under Evidence Code section 1119. Accordingly, the trial court granted Progressive’s motion. Because Attorney Noland could not offer admissible evidence to support his claim of unilateral mistake, the trial court determined that he failed to raise a triable issue with respect to his duty to indemnify Progressive for “all liens” as stated in the settlement stipulation.

The Court of Appeal affirmed, noting that per the California Supreme Court’s decision in *Cassel v. Superior Court*, 51 Cal. 4th 113 (2011), “the mediation confidentiality statutes must be applied in strict accordance with their plain terms” and that judicially crafted exceptions “are permitted only where due

process is implicated, or where literal construction would produce absurd results, thus clearly violating the Legislature’s presumed intent.” This case further illustrates the “super contract” nature of mediated settlement agreements because such agreements are not subject to the same formation and interpretation defenses as general contracts where the supporting evidence consists of communications had during the course of a mediation process. The evidence exists and can be the subject of pleading and discovery, but when the matter reaches the court, it is inadmissible in accordance with Evidence Code section 1119.



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.