

ENFORCING MEDIATED SETTLEMENT AGREEMENTS

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CHAPTER 8



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Gregg Weinberg has practiced law in Texas since 1982. His areas of focus are energy litigation/arbitration, professional liability matters, complex commercial litigation, financial cases and cases that other lawyers might consider “odd.” Mr. Weinberg has tried to jury verdict cases involving claims of malpractice against medical professionals, lawyers, accountants, and design professionals. His practice also includes representation of real estate brokers/agents, insurance agents/brokers/adjusters, securities brokers, financial planners, surveyors, and anyone that provides a service based on a skill set developed by experience/training or education. Mr. Weinberg’s energy practice includes representation of vendors and service providers in arbitration against the largest energy companies in the world.

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Mr. Weinberg is licensed to practice law in all State and Federal Courts located in the State of Texas. He is licensed to practice before the United States Fifth Circuit Court of Appeals and the United States Supreme Court. Mr. Weinberg handles international and domestic arbitrations with the American Arbitration Association (AAA) and other sponsoring organizations.

Mr. Weinberg is married with two children. He supports a golf habit and is responsible for the welfare of three horses.



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ENFORCING MEDIATED SETTLEMENT AGREEMENTS

I. INTRODUCTION

In the world of litigation settlement agreements are a common occurrence. But, how do you force the other side to comply with terms of the settlement agreement? This paper focuses on four scenarios that present themselves all too often with mediation agreements together with tips on what you can do before mediation and what you can incorporate into your mediation agreements to make the agreements more easily enforceable.

The first scenario is the classic unmet expectation of mediation; both parties arrive at mediation ready to negotiate. Terms fly back and forth, from room to room, throughout the day and finally both parties feel as if they reached a fair negotiated agreement—one they can at least live with. After the parties leave mediation thinking all is resolved, one party reneges on the settlement agreement. What do you do? How do you enforce the agreement?

The second scenario involves the mediator acting as an arbitrator. This occurs when a mediated settlement is entered, but a dispute arises in the drafting of the final settlement papers. In this case, the mediator acts as the arbitrator and makes a final arbitration award.

The third scenario arises when the parties decide to enter into an informal Rule 11 agreement. This paper demonstrates why these agreements are enforceable and what you need to include in your agreement to ensure enforcement pursuant to Rule 11.

The fourth scenario is every attorney's worst nightmare—a case that comes back from the dead. Just when you thought the file was closed, a party breaches a term of the settlement agreement. Now what do you do?

II. MEDIATION AGREEMENTS GENERALLY

The Texas Alternate Dispute Resolution Act passed in 1987 and codified in chapter 154 of the Texas Civil Practice and Remedies Code was designed to jump start the mediation process in Texas.¹ The passage of the act reflected public policy in favor of a peaceable resolution of lawsuits.² And, the legislature stated, in section 154.003 of the Texas Civil Practice and Remedies Code that “it is the

responsibility of all trial and appellate courts . . . to carry out the policy.”³

The Texas Civil Practice and Remedies Code section 154.023 governs mediations. Section 154.071 states that “if the parties reach a settlement and execute a written agreement disposing of the dispute, the agreement is enforceable in the same manner as any other written contract.”⁴ Section 154.071 further states that the court has discretion on whether to incorporate the terms of the settlement in the court's final decree, disposing of the case, and that a settlement agreement does not affect an outstanding court order unless the terms of the agreement are incorporated into a subsequent order. Because settlement agreements are enforced like contracts it follows that contract law governs any dispute brought for the enforcement of such agreement.⁵

III. ENFORCEMENT OF SETTLEMENT AGREEMENTS

Contract law requires the consent of all parties to a contract to be valid; therefore, a court will not enter an agreed judgment if there is not consent of all parties. Meaning that when both parties agree and consent, an agreed judgment can be entered by the court. However, once consent is withdrawn by a party the court cannot enter an agreed judgment. But, there are options for enforcement. Without consent, the written settlement agreement can be enforced in a separate breach of contract claim brought by the party seeking to enforce the agreement.

When a party withdraws consent

When both parties consent to a settlement agreement but a party later withdraws their consent or reneges, section 154.071 governs. Courts treat this situation as a breach of contract action.⁶ Recent case law evidences that a withdrawal of consent forecloses a speedy resolution for the non-breaching party.

For example, in *Cadle Co. v. Castle*, Castle executed a note payable to Deposit Insurance Bridge

³ *Id.*

⁴ Tex. Civ. Prac. & Rem. Code §154.071.

⁵ *E.P. Towne Ctr. Partners v. Chopsticks, Inc.*, 242 S.W.3d 117, 122 (Tex. App.—El Paso 2007, no pet.) (holding that “[t]he interpretation of a settlement agreement is subject to the law of contracts.”).

⁶ See *Ford Motor Co. v. Castillo*, 279 S.W.3d 656, 663 (Tex. 2009) (citing *Padilla*, 907 S.W.2d at 461); *Mantas v. Fifth Court of Appeals*, 925 S.W.3d 656, 658 (Tex. 1996). See Tex. Civ. Prac. & Rem. Code § 154.071(a) (making certain mediated settlement agreements enforceable in contract).

¹ L. Wayne Scott, *The Law of Mediation in Texas*, 37 St. Mary's L.J. 325, 327 (2006).

² *Id.*

Bank.⁷ The promissory note was later transferred to Bank One.⁸ Castle subsequently defaulted on the note and bank one sued.⁹ In late 1993, Cadle purchased the note from Bank One and substituted himself as plaintiff in the pending lawsuit.¹⁰ Pursuant to chapter 154 of the Texas Civil Practice and Remedies Code, the judge ordered the parties to mediation.¹¹ On February 5, 1994, the parties attended a mediation conference and entered into a written settlement agreement.¹² Per the terms of the agreement, Cadle would receive \$2,500 from Castle, and \$12,500 from Bank One. But the agreement was subject to approval by Bank One.¹³

On February 11, 1994, Cadle filed a “Notice of Withdrawal of Consent to Settlement Agreement” with the court.¹⁴ In addition, Cadle filed a response to Castle’s motion to enforce the settlement agreement.¹⁵ The gist of Castle’s motion to enforce was that although the parties had reached a final executed agreement, Cadle had withdrawn consent.¹⁶ Castle argued that even without consent, the agreement is enforceable under section 154.071 of the Texas Civil Practice and Remedies Code.

On February 14, 1994, the trial judge conducted a hearing on Castle’s motion to enforce the settlement agreement, and without hearing evidence or testimony, concluded that the terms of the written settlement agreement should be incorporated into the final judgment. The court subsequently entered a final judgment that stated:

[T]he parties, having been referred to mediation by Order of this Court, did appear . . . and reach[ed] a written agreement disposing of this cause . . . the terms of that agreement are enforceable under Tex. Civ. Prac. & Rem Code § 154.071 and are hereby incorporated in this Final Decree disposing of this case.

Cadle challenged the order from the trial court on the grounds that the court erred in entering a judgment not supported by the pleadings—as Castle did not plead a breach of contract action—and it was without evidentiary support. The court considered whether the legislature intended for section 154.071(b) to be used

to summarily enter judgment on an action to enforce a settlement agreement even over the objection of a prior-consenting party. After discussing consequences—that the objecting party lost their right to be confronted by appropriate pleadings, lost the right to conduct discovery, and lost the right to have the dispute determined by a judge and jury—the court held that section 154.071 cannot be read as to allow a summary proceeding without evidentiary considerations.¹⁷ In construing the statute, the court looked to the plain language of § 154.071 (which allows a trial judge *discretion* to add or exclude terms of the settlement agreement in the final judgment).¹⁸ The court relied on this language as evidence that the legislature did not intend for section 154.071 to be used for a summary proceeding and further looked to public policy in so holding. The public policy consideration was that while alternate dispute resolution is encouraged to peaceably resolve disputes, people will be hesitant to mediate if they know that they are bound to all of the terms forever and subject to a final judgment regardless of consent. Based on this rationale, the court in *Cadle v. Castle* held that there is no summary proceeding for the enforcement of written settlement agreements, even those negotiated in the context of mediation.

The Texas Supreme Court in *Mantas v. Fifth Ct. of Appeals* also considered what happens if a party withdraws consent before the court enters an agreed judgment. In *Mantas*, Barnett obtained a judgment against Mantas for \$209,423 in July of 1995 for an underlying suit involving a commercial dispute.¹⁹ Mantas timely perfected an appeal and filed a supersedeas bond for the amount of the judgment and interest.²⁰ The court of appeals ordered the parties to mediation, where they reached and signed a settlement agreement.²¹ On December 8, 1995, pursuant to the settlement agreement, Mantas issued a check to Barnett for \$160,000 in full satisfaction of the judgment.²² Barnett signed a release of judgment, a joint motion to dismiss the appeal, and an agreed order dismissing the appeal.²³

But, mere hours later, before any documents were filed with the court, Barnett withdrew his

⁷ *Cadle Co. v. Castle*, 913 S.W.2d 627, 629–30 (Tex. App.—Dallas 1995, writ denied).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* (holding that there is no “summary” proceeding for the enforcement of written settlement agreements, even those negotiated in the context of a mediation).

¹⁸ Tex. Civ. Prac. & Rem. Code § 154.071

¹⁹ *Mantas v. Fifth Ct. of Appeals*, 925 S.W.2d 656, 658–59 (Tex. 1996).

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

consent to settlement, revoking Mantas's authority to file the settlement documents on Barnett's behalf.²⁴ The \$160,000 was never returned to Mantas, as Barnett argued that part of the payment was for his attorney's fees in the matter and the attorney had already cashed the check.²⁵

Mantas moved to enforce the settlement agreement in the court of appeals and asked the court to declare (1) that the settlement agreement and release are valid and enforceable, (2) a dismissal of the appeal with prejudice, and (3) a release of Mantas supersedeas bond. Alternatively, Mantas asked the court to order Barnett to return the \$160,000.²⁶

Relying on *Cadle v. Castle*, the appellate court denied Mantas' motion to enforce the settlement agreement.²⁷ But, because Mantas filed a breach of contract action in the district court, Mantas also requested an abatement of the pending appeal until the district court could enter a final judgment on the issue.²⁸ The appellate court denied the abatement.²⁹ The Texas Supreme Court now faced the issue of whether the appellate court abused its discretion in denying Mantas' action to enforce the settlement agreement, and if it did not, whether the appellate court should have abated the appeal pending the outcome of the breach of contract action in district court.³⁰

The Texas Supreme Court came to the same conclusion as the court below and the Dallas Appellate Court in *Cadle v. Castle*, and held that "[a] written settlement agreement may be enforced though one party withdraws consent before judgment is rendered on the agreement.³¹ Where consent is lacking, however, a court may not render an agreed judgment on the settlement agreement, but rather may enforce it only as a written contract.³² Thus, the party seeking enforcement must pursue a separate breach-of-contract claim, which is subject to the normal rules of pleading and proof."³³ Based on this rationale, the Texas Supreme Court held that the court below should have abated the appeal pending the outcome of the district court case because Mantas followed the correct procedure for enforcing the breach of contract.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

Applicability to Rule 11 Agreements

The holding in *Mantas*, applicable when there is a lack of consent, applies to Rule 11 agreements as well. Rule 11 settlement agreements can only be enforced in a separate breach of contract claim brought by the party seeking to enforce the agreement.

Padilla v. LaFrance, evidences the applicability to Rule 11 agreements. In *Padilla*, one member of the LaFrance family was killed and two others injured after their vehicle collided with Padilla's vehicle.³⁴ The LaFrance family sued Padilla. Padilla's insurer, State Farm, assumed defense of the claims.³⁵ The parties subsequently participated in settlement negotiations.³⁶ However, the dispute before the Supreme Court dealt with the issue of whether the parties actually entered into an enforceable settlement agreement.

On April 10, 1991, LaFrance's attorney sent the following settlement demand to Padilla's attorney:

Dear Mr. Chandler:

You are quite familiar with the facts and circumstances surrounding the above referenced matter. At this time, we make demand for policy limits of \$40,000.00 for full and final settlement of this case against the insured that you represent.³⁷

The above-mentioned correspondence, also contained a provision which required payment to be sent by April 23, 1991 at 5pm. Chandler, Padilla's attorney, forwarded the settlement demand he received to Bradshaw—the State Farm adjuster handling the claim.³⁸ Bradshaw attempted to contact LaFrance's attorney but, was unsuccessful.³⁹ Bradshaw wanted to speak to LaFrance's attorney to discuss how an outstanding lien for one of the injured parties would alter the settlement agreement. Even though Bradshaw did not hear back, he still sent correspondence stating:

This will confirm our settlement agreement as of 4/18/91, whereby State Farm agreed to meet the policy limit demands set forth in your letter dated 4/10/91. The only thing holding up

³⁴ *Padilla v. LaFrance*, 907 S.W.2d 454, 461–62 (Tex.1995).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

resolution of this is the hospital lien re: Michelle. I await word from you regarding the lien so I know to whom to make drafts payable.⁴⁰

LaFrance's attorney responded:

Dear Mr. Bradshaw:

This letter will confirm that the above-referenced matter has been settled for all applicable policy limits, which have been represented to us to be \$40,000.00.⁴¹

Bradshaw saw this response on April 24th and forwarded it to Chandler, Padilla's attorney. When payment was sent to LaFrance, they rejected the checks contending that Padilla failed to timely accept the April 10th settlement offer. Padilla filed the above correspondence with the court and sought the enforcement of the "settlement agreement."

Padilla argued that the letters between the parties constitutes a written settlement agreement. LaFrance counter-argued that the parties did not have an enforceable agreement under Texas Rule of Civil Procedure 11, which requires agreements in pending suits to be in writing, signed, and filed with the papers as part of the record.⁴² After a hearing, the court ruled that there was no enforceable settlement agreement between Padilla and LaFrance. Padilla appealed and the appellate court also held that the parties did not have an enforceable settlement agreement. The case then went to the Texas Supreme Court with LaFrance arguing that the agreement did not meet the requirements of Rule 11 as he withdrew consent prior to the correspondence being filed with the court.

In looking to the history of Rule 11 the Texas Supreme Court stated:

Agreements of counsel, respecting the disposition of cases, which are merely verbal, are very liable to be misconstrued or forgotten, and to beget misunderstandings and controversies; and hence there is great propriety in the rule which requires that all agreements of counsel respecting their causes shall be in writing, and if not, the court will not enforce them. They will then speak for themselves, and the court can judge their import, and proceed to act upon them with safety. The rule is a salutary one, and ought to be adhered to whenever counsel disagree as to what has transpired between them.⁴³

⁴⁰ *Id.*

⁴¹ *Padilla*, 907 S.W.2d at 461–62.

⁴² Tex. R. Civ. P. 11.

⁴³ *Padilla*, 907 S.W.2d at 460.

The court further reasoned that while Rule 11 requires the agreement to be filed with the papers in the court record, the rule fails to state when the agreement must be filed. And, it would not serve the Rule any purpose to require the writing to be filed before consent is withdrawn.

The Texas Supreme Court reversed the judgment of the court of appeals and remanded the case for a judgment consistent with its opinion.

The Texas Supreme Court's decision followed its reasoning in deciding cases with written settlement agreements procured at mediation. The court stated that "[a]lthough a court cannot render a valid agreed judgment absent consent at the time it is rendered, this does not preclude the court, after proper notice and hearing, from enforcing a settlement agreement complying with Rule 11 even though one side no longer consents to the settlement. . . . An action to enforce a settlement agreement, where consent is withdrawn, must be based on proper pleading and proof."⁴⁴

Proper Pleading and Proof

What do the "normal rules of pleading and proof" require to assert a claim for breach of a settlement agreement? Rule 47 requires a "short statement of the cause of action sufficient to give fair notice of the claim involved."⁴⁵ This generally involves pleading the elements of a breach-of-contract claim.⁴⁶

Preferably, the claim should be asserted in an amended pleading or counterclaim.⁴⁷ However, several intermediate appellate courts have found a motion to enforce a settlement agreement to be a sufficient pleading.⁴⁸ In treating these motions as pleadings, these courts have reasoned the responding

⁴⁴ *Padilla*, 907 S.W.2d at 461–62.

⁴⁵ Tex. R. Civ. P. 47(a).

⁴⁶ *Pena v. Smith*, 321 S.W.3d 755, 759 (Tex. App.—Fort Worth 2010, no pet.) (citing *Cadle Co. v. Castle*, 913 S.W.2d 627, 631 (Tex. App.—Dallas 1995, writ denied)).

⁴⁷ *Mantas*, 925 S.W.3d at 658. Although the scope of this article is limited to breaches of settlement agreements before trial, the Court also noted that when the breach arises while the underlying claim on appeal, the nonbreaching party must file a separate breach-of-contract action. *Id.* at 658–59.

⁴⁸ See *Twist v. McAllen Nat'l Bank*, 248 S.W.3d 351, 361–62 (Tex. App.—Corpus Christi 2007, no pet.); *Neasbitt v. Warren*, 105 S.W.3d 113, 117–18 (Tex. App.—Fort Worth 2003, no pet.); see also *Browning v. Holloway*, 620 S.W.2d 611, 615 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.). But see *Cadle Co. v. Castle*, 913 S.W.2d 627, 632 (Tex. App.—Dallas 1995, writ denied) (holding the defendant's "Motion to Enforce Settlement Agreement" an insufficient pleading to support entry of judgment).

party was given fair notice of the movant's breach-of-contract claim.⁴⁹ But, "proof and pleading" goes beyond just the pleadings.

Under "the normal rules of pleading and proof,"⁵⁰ the parties are generally entitled to conduct discovery on the newly asserted breach-of-contract claim, as well as any defenses asserted.⁵¹ Thus, in *Ford Motor Co. v. Castillo*, the Texas Supreme Court held that the trial court abused its discretion when it denied Ford the opportunity to conduct discovery on a claim for breach of a settlement agreement, as Ford was unable to develop facts relevant to the presentation of its defense.⁵²

"Proof and pleading" rules are applicable through summary judgment and trial as well. Generally, judgment on a claim for breach of a settlement agreement must be obtained through summary judgment or trial.⁵³ But as noted above, some courts have merely held hearings on motions to enforce settlement agreements.⁵⁴ Either way, the non-breaching party must prove the elements of the breach-of-contract claim to obtain a judgment enforcing the settlement agreement.⁵⁵

PRACTICE TIP:

Even if the jurisdiction allows you to file a "motion to enforce settlement agreement," why take the risk? An amended pleading or counterclaim takes the guesswork out of figuring out whether you filed a

"pleading," and opposing counsel will probably appreciate that you filed a familiar pleading.

Compliance with Rule 11

As illustrated by *Padilla*, compliance with Rule 11 is required for all settlement agreements. This means that there must be a written memorandum which is complete within itself in every material detail, and which contains all of the essential elements of the agreement.⁵⁶ Specifically, the agreement must be (a) in writing, (b) signed; and (c) filed with the papers as part of the record. Even though Rule 11 requires a writing, the essential terms of the parties' agreement need not be contained in a single document to be enforceable as a Rule 11 agreement.

In Writing

If a settlement agreement is not made orally in open court, it must be reduced to a writing.⁵⁷ To meet this standard, the Texas Supreme Court has referred to the Statute of Frauds, noting that although the agreement "need not be contained in one document," "there must be a written memorandum which is complete within itself in every material detail, and which contains all of the essential elements of the agreement, so that the contract can be ascertained from the writings without resorting to oral testimony."⁵⁸

Thus, in *Padilla*, the attorneys' letters to each other qualified as a written agreement because they provided payment terms in exchange for settling the case, and indicated the attorneys' mutual assent.⁵⁹ In contrast, in *Diaz v. State and County Mutual Fire Insurance Co.*, the San Antonio Court of Appeals found that the attorneys' letters did not constitute a Rule 11 agreement, but instead were "the means through which the lawyers determined the terms of the agreement," and were made merely "in contemplation of the [later-signed] settlement agreement."⁶⁰

Texas courts have held that writings such as telegrams and facsimiles are sufficient to satisfy a writing, therefore, emails should be sufficient as well. So long as the email is printed and filed in the court records.

⁴⁹ See *Twist*, 248 S.W.3d at 361–62; *Neasbitt*, 105 S.W.3d at 118.

⁵⁰ *Padilla*, 907 S.W.3d at 462.

⁵¹ *Ford Motor Co. v. Castillo*, 279 S.W.3d 656, 663 (Tex. 2009).

⁵² *Id.*

⁵³ See, e.g., *Gunter v. Empire Pipeline Corp.*, 310 S.W.3d 19, 22 (Tex. App.—Dallas 2009, pet. denied) (quoting *Staley v. Herblin*, 188 S.W.3d 334, 336 (Tex. App.—Dallas 2006, pet. denied)); *Martin v. Black*, 909 S.W.2d 192, 195–96 (Tex. App.—Houston [14th Dist.] 1996, writ denied).

⁵⁴ See *Twist*, 248 S.W.3d at 355; *Neasbitt*, 105 S.W.3d at 116; *Browning*, 620 S.W.2d at 614.

⁵⁵ *Pena*, 321 S.W.3d at 758–59 (holding that the trial court's judgment—entered after granting motions to enforce a settlement agreement—was not supported by legally sufficient evidence of a breach-of-contract claim). In addition to seeking judgment on the claim for breach of the settlement agreement, one may consider seeking judgment on the underlying claim too. See *Soon A. Song v. Alliance Laundry Sys., L.L.C.*, No. 14-07-00049-CV, 2008 WL 2261448, at *3 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (mem. op.) (affirming summary judgment after the plaintiff only responded to the defendant's summary-judgment motion on the breach-of-settlement-agreement claim, and not the underlying claim).

⁵⁶ *Green v. Midland Mortg. Co.*, 342 S.W.3d 686, 691–92 (Tex. App.—Houston [14th Dist.] 2011, no pet.).

⁵⁷ See Tex. R. Civ. P. 11.

⁵⁸ *Padilla*, 907 S.W.2d at 460 (quoting *Cohen v. McCutchin*, 565 S.W.2d 230, 232 (Tex. 1978) and citing *Adams v. Abbott*, 254 S.W.2d 78, 80 (1952)).

⁵⁹ *Padilla*, 907 S.W.2d at 460–61.

⁶⁰ *Diaz v. State and County Mutual Fire Insurance Co.*, No.04-06-00373-CV, 2007 Tex. App. LEXIS 3935 (Tex. App.—San Antonio 2007, no pet.).

Signed

The writing must also be signed to be enforceable.⁶¹ In *Sylva v. Donisi*, the Houston Court of Appeals [1st District] held that fax communications between the parties' attorneys were not enforceable under Rule 11 as a matter of law because they were not signed.⁶²

Filed with the Court

Finally, the settlement agreement must be "filed with the papers as part of the record."⁶³ However, the agreement need not be filed before the other party withdraws consent. In *Padilla*, the Texas Supreme Court held that the agreement merely has to be filed before a party seeks to enforce it.⁶⁴ Many times settlement agreement are confidential, in which case the actual agreement will not be filed with the court. But, if a party reneges, the other side may then file the prior agreement.

IV. THE TEXAS TWO STEP

Step one: obtain an enforceable mediated settlement or Rule 11 agreement.

Step two: if someone reneges, file the Rule 11 agreement and assert breach of contract counterclaim/cross claims in the pending suit when one party withdraws consent.

This step is required even in the situation where the parties have settled, the parties have signed the final settlement agreement and the case has been resolved. In some instances, a settlement agreement may contain provisions that a settling party is required perform at some time in the future or on or by a specified date. In the event that a party breaches a provision of a settlement agreement post-termination of the lawsuit, a party must bring a separate breach of contract action in a new suit to enforce the settlement agreement.

A breach of contract claim requires that you prove (1) the existence of a valid contract, (2) performance or tendered performance by the plaintiff, (3) breach of the contract by the defendant, and (4) resulting damages to the plaintiff. When bringing suit under breach of contract for the enforcement of the settlement agreement, seek specific performance. Specific performance is the remedy of requiring exact performance of a contract in the specific form in which it was made. A party seeking specific

performance must plead and prove: (1) compliance with the contract including tender of performance unless excused by the defendant's breach or repudiation; and (2) the readiness, willingness, and ability to perform.

Don't forget about your attorneys' fees. Always seek attorneys' fees under CPRC section 38.001 regardless of whether you are the plaintiff or defendant.

In this type of action, typical contract defenses apply. Meaning, a party against whom a claim for breach of contract has been asserted is entitled to be confronted by appropriate pleadings, assert defenses, conduct discovery, and submit factual disputes to the fact finder.⁶⁵

V. THE FRAUD DEFENSE**Agreements Can be Avoided Because of Fraudulent Inducement**

As has been thoroughly explained above, mediated settlement agreements are subject to contract law.⁶⁶ Therefore, mediated settlement agreements are subject to the same defenses disputing their validity. That is why mediated settlement agreements are subject to avoidance on the ground of fraudulent inducement.⁶⁷

Fraudulent inducement "is a particular species of fraud that arises only in the context of a contract and requires the existence of a contract as part of its proof."⁶⁸ It is a well established in Texas that parties negotiating a contract should "abstain from inducing [one] another to enter into a contract through the use of fraudulent misrepresentations."⁶⁹ If a party has been fraudulently induced into a contract, the party can seek to avoid the contract.⁷⁰

However, if the parties sign a contract that contains a disclaimer of reliance on representations that is clear and specific, the disclaimer may "negate a fraudulent inducement claim."⁷¹

⁶⁵ *Staley v. Herbin*, 188 S.W.3d 334, 336 (Tex. App.—Dallas 2006, pet. denied).

⁶⁶ Tex. Civ. Prac. & Rem. Code §154.071.

⁶⁷ *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of America*, 341 S.W.3d 323, 331 (Tex. 2011).

⁶⁸ *Haase v. Glazner*, 62 S.W.3d 795, 798 (Tex. 2001).

⁶⁹ *Id.* (citing *Formosa Plastics Corp. U.S. v. Presidio Eng'Rs & Contrs.*, 960 S.W.2d 41, 46 (Tex. 1998)).

⁷⁰ *Williams v. Glash*, 789 S.W.2d 261, 264 (Tex. 1990) (court likened a release to a contract, which is subject to avoidance if entered into by fraud).

⁷¹ *Forest Oil Corp. v. McAllen*, 268 S.W.3d 51, 56 (Tex. 2008) (citing *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 179 (Tex. 1997)).

⁶¹ See Tex. R. Civ. P. 11.

⁶² *Sylva v. Donisi*, No. 01-03-00855-CV, 2004 WL 1848191, at *3 (Tex. App.—Houston [1st Dist.] Aug. 19, 2004, no pet.) (mem. op.).

⁶³ Tex. R. Civ. P. 11.

⁶⁴ *Padilla*, 907 S.W.2d at 461.

But what language is “clear” enough and “specific” enough to satisfy a proper disclaimer of reliance?

Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of America

In 2011, the Texas Supreme Court answered this question when it directly analyzed whether a certain disclaimer of reliance was clear and specific enough in order to defeat a fraudulent inducement claim that would have avoided a negotiated lease agreement.

Factual Background

In *Italian Cowboy*, Jane and Francesco Secchi (the “Secchis”) owned and operated various restaurants for over twenty years.⁷² Looking to open a new restaurant, Italian Cowboy, the Secchis identified a shopping center as a potential location.⁷³ The Secchis began negotiating with Fran Powell (“Powell”) a lease agreement for a vacant restaurant building in the shopping center.⁷⁴ During the negotiations Powell represented that the building was “in perfect condition” and there was “never a problem whatsoever.”⁷⁵

After negotiations the Secchis and Power agreed to a lease agreement that contained the following merger clauses, Sections, 14.18 and 14.21 respectively:

“Tenant acknowledges that neither Landlord nor Landlord’s agents, employees or contractors have made any representations or promises with respect to the Site, the Shopping Center or this Lease except as expressly set forth herein.”⁷⁶

“This lease constitutes the entire agreement between the parties hereto with respect to the subject matter hereof, and no subsequent amendment or agreement shall be binding upon either party unless it is signed by each party . . .”⁷⁷

While remodeling the property, the Secchis heard that the previous tenant had been “plagued” by a severe odor.⁷⁸ The Secchis asked Power if she knew about any odor, but Powell denied any knowledge. A few

months later, and shortly before the opening of the restaurant, a strong unpleasant odor became present inside the restaurant.⁷⁹ The Secchis tried to remedy the odor to no avail.⁸⁰

Thereafter, the Secchis spoke with the previous tenant, who informed them that the odor had been present during their tenancy and that Powell had been aware of the odor.⁸¹ Upon learning this information, the Secchis closed Italian Cowboy, and among other claims, sued for fraud in the inducement.⁸²

The trial court awarded judgment in favor of the Secchis. On appeal, however, the judgment was reversed. The Secchis appealed and the Texas Supreme Court took the case for review.

Analysis of Disclaimer of Reliance

On appeal, the Court analyzed whether the lease agreement’s merger clause actually disclaimed reliance of representations made by Powell.⁸³ The Court held it did not because: (1) a standard merger clause does not disclaim reliance; and (2) the disclaimer of reliance was not “clear and unequivocal.”⁸⁴

Turning to the issue of whether the merger clause precluded a fraudulent inducement claim, the Court began by analyzing the history of case law regarding whether parties can contract out of fraud.

The Court stated that “[f]or more than fifty years, it has been the rule that a written contract even containing a merger clause can nevertheless be avoided for antecedent fraud or fraud in its inducement.”⁸⁵ Thus, it was an established rule, grounded in “sound public policy,” that parties could not contract out of fraud.⁸⁶

This rule, however, had an exception that was recognized in 1997 by the Court in *Schlumberger Technology Corp. v. Swanson*. In that case the Court held “when sophisticated parties represented by counsel disclaim reliance on representations about a specific matter in dispute, such disclaimer may be binding” and would “conclusively negat[e] the

⁷⁹ *Italian Cowboy Partners, Ltd.*, 341 S.W.3d at 329.

⁸⁰ *Id.*

⁸¹ *Id.* at 330.

⁸² *Id.*

⁸³ *Id.* at 331 (the case says the representations were made by “Prudential” instead of “Powell,” but Powell was the manager for the company that managed the property was owned by Prudential, which would make Powell’s representations Prudential’s representations).

⁸⁴ *Id.*

⁸⁵ *Id.* (citing *Dallas Farm Mach. Co. v. Reaves*, 307 S.W.2d 233, 239 (Tex. 1957) (omitted quotation marks and brackets)).

⁸⁶ *Id.* (citing *Reaves*, 307 S.W.2d at 239).

⁷² *Italian Cowboy Partners, Ltd.*, 341 S.W.3d at 328.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 329.

element of reliance in a suit for fraudulent inducement.”⁸⁷ The Court recognized this exception was created in order to address the concern that parties should be allowed to “fully and finally resolve disputes.”⁸⁸ By allowing this exception, the Court was furthering Texas’ policy of encouraging peaceable resolution for disputes.⁸⁹

In 2008, the Court confirmed the exception in *Forest Oil Corp. v. McAllen*. In that case, the Court acknowledged that “an all-embracing disclaimer of any and all representations. . . shows the parties’ clear intent.”⁹⁰ In *Forest Oil*, however, the Court did caution that it was a “per se rule that a disclaimer automatically precludes a fraudulent-inducement claim.”⁹¹

After analyzing the rule and exception as set forth in *Schlumberger* and *Forest Oil*, the Court turned to the Secchis’ lease agreement to determine if a proper disclaimer of reliance was present.

First, the Court explained that Section 14.18 was only a “standard merger clause,” which does not disclaim reliance.⁹² Instead, standard merger clauses only invalidate and supersede previous agreements and negate the apparent authority of an agent to modify the contract.⁹³ “Pure merger clauses, without an expressed clear and unequivocal intent to disclaim reliance or waive claims for fraudulent inducement, have never had the effect of precluding claims for fraudulent inducement.”⁹⁴

Next, the Court distinguished the merger clauses in *Schlumberger* and *Forest Oil* from that in *Italian Cowboy*. In *Schlumberger*, the merger clause stated, “None of us is *relying* upon any statement or representation . . . each of us is *relying* on his or her own judgment . . .”⁹⁵ In *Forest Oil*, the merger clause stated, “in executing the releases contained in this Agreement, the parties are not *relying* upon any statement or representation of any agent of the parties being released hereby. We are *relying* on our own

judgment . . .”⁹⁶ The Court found that both these merger clauses clearly demonstrated that the parties intended to disclaim reliance on the others’ representations and rely only on their own judgment.⁹⁷

Looking at the merger clause in *Italian Cowboy*, the Court noted that Section 14.18 did not clearly and unequivocally disclaim reliance.⁹⁸ To support its holding, the Court pointed to the fact that unlike *Schlumberger* and *Forest Oil*, the *Italian Cowboy* merger clause never used the word, or any variation thereof, “rely.”

Because a disclaimer of reliance requires clear and unequivocal language and *Italian Cowboy* only contained a standard merger clause, which did not explicitly disclaim reliance, the Court found the Secchis’ fraudulent inducement claim was valid.⁹⁹

Takeaway from *Italian Cowboy*

Italian Cowboy presents a good lesson for properly drafting a mediated settlement agreement in order to make it enforceable—know what your merger clause actually means.

It is easy to copy-and-paste a merger clause into an agreement, but do you know what your merger clause is saying? If you are not paying attention, you may be pasting a standard merger clause into your next agreement and end up like the landlord in *Italian Cowboy*. Remember, a standard merger clause only supersedes previous agreements and negates an agent’s apparent authority; it does not disclaim reliance.¹⁰⁰

Therefore, take time to carefully draft a merger clause that clearly and unequivocally disclaims reliance under *Italian Cowboy* standards. Include language that disclaims reliance and affirmatively states the only reliance is on one’s own judgment. For example:

“X expressly warrants and represents that no promise, inducement, pledge, or agreement which is not herein expressed has been made to X in executing this Release, and that X is not relying upon any statement or representation, oral or written, of Z, or any agent of Z, including its attorneys and/or insurers, and that X is relying solely on X’s own judgment in executing this release, and

⁸⁷ *Id.* (citing *Schlumberger*, 959 S.W.2d at 179).

⁸⁸ *Id.* (citing *Schlumberger*, 959 S.W.2d at 179).

⁸⁹ *Id.* (quoting Tex. Civ. Prac. & Rem. Code § 154.002).

⁹⁰ *Id.* at 333 (citing *Forest Oil*, 268 S.W.3d at 60).

⁹¹ *Id.* (quoting *Forest Oil*, 268 S.W.3d at 61).

⁹² *Id.*

⁹³ *Id.* (citing Restatement (Second) of Contracts § 216 cmt. e (1981); 11 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 33.21 (4th ed. 1999)).

⁹⁴ *Id.* at 334–35 (citing *Reaves*, 307 S.W.2d at 239; *Edward Thompson Co. v. Sawyers*, 234 S.W. 873, 873–75 (Tex. 1921)).

⁹⁵ *Italian Cowboy Partners, Ltd.*, 341 S.W.3d at 335 (citing *Schlumberger*, 959 S.W.2d at 180)(brackets omitted) (emphasis added)).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 336 (side-by-side-by-side comparison of merger clauses shows the language in *Italian Cowboy* was not clear and unequivocal).

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 333.

that X is specifically waiving any fraudulent-inducement claims and/or claims of reliance.”

By taking time to draft a custom merger clause, you will be more likely to defend against a fraudulent inducement claim, and enforce your next mediated settlement agreement.

VI. THINKING OUTSIDE THE BOX MAY BACKFIRE

You have been there before – mediation has dragged on late into the night and now both you and your client are exhausted. During your exhaustion, you start to think outside the box in order to reach a settlement agreement. Sometimes your exhaust driven brilliant idea works out for the best. Other times, you and your client are left hanging out to dry.

IQ Holdings, Inc. v. Villa D’Este Condominium Owner’s Assoc., Inc.

Learn from *IQ Holdings, Inc. v. Villa D’Este Condominium Owner’s Assoc., Inc.*, where an eleventh-hour deal took an unforeseen turn that left both parties wishing they had thought about the repercussions of thinking outside the box.

Factual Background

In *IQ Holdings*, IQ Holdings and Yohane and Saroj Gupta (collectively the “Guptas”) sued Villa D’Este Condominium Owner’s Association (“Association”).¹⁰¹ In response, the Association countersued the Guptas.¹⁰²

Thereafter, on January 31st, the parties began mediating the lawsuit.¹⁰³ It was not until the early morning hours of February 1st that the parties executed a one-page Rule 11 settlement agreement.¹⁰⁴ In relevant part, the Rule 11 settlement agreement stated that the parties agreed to the material terms of a settlement and the settlement agreement would be drafted by the Association’s attorney. The Rule 11 settlement agreement went on to expressly state:

“The Parties agree to return to the mediator to Arbitrate and resolve any disputes regarding the drafting of the agreement and

interpretation of the intent of the Parties. The arbitrator’s decisions shall be final.”¹⁰⁵

Afterwards, a dispute arose regarding the drafted proposed settlement agreement.¹⁰⁶ Per the Rule 11 settlement agreement, the parties submitted the dispute to the mediator, who would now serve as an arbiter.¹⁰⁷

For approximately one month, the arbiter heard evidence and received proposed settlement agreements from the parties.¹⁰⁸ Finally, the arbiter issued an arbitration award incorporating portions from both of the Guptas’ and the Association’s proposed settlement agreements.¹⁰⁹ The Guptas, however, were not pleased with the award and asked the arbiter to modify the award.¹¹⁰ The arbiter did make some minor modifications, but in most part left the arbitration award alone.¹¹¹ After making the minor modifications, the arbiter ordered the parties to sign the settlement agreement by a set date and time, to which the Guptas refused.¹¹²

In response to the Guptas refusal to sign the settlement agreement, the Association asked the trial court to confirm the arbitration award.¹¹³ Also, the Association amended its pleadings to add a claim that the Guptas breached the Rule 11 agreement.¹¹⁴ Immediately thereafter, the Association moved for summary judgment on their breach of contract claim, seeking specific performance and attorneys’ fees.¹¹⁵

The Guptas, in response to the Association’s motions, asked the trial court to vacate or modify the arbitration award.¹¹⁶

After conducting a hearing on the various motions, the trial court denied the Gupta’s motion to vacate or modify the arbitration award and granted the Association’s motion to confirm the arbitration award.¹¹⁷ In regard to the Association’s motion for summary judgment on their breach of contract claim, the trial court granted the motion, but refused to award attorneys’ fees.¹¹⁸ The trial court explained that the

¹⁰⁵ *Id.* at 3–4.

¹⁰⁶ *Id.* at 4.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 4–5.

¹¹¹ *Id.* at 5.

¹¹² *Id.*

¹¹³ *Id.* at 5–6.

¹¹⁴ *Id.* at 6.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 6–7.

¹⁰¹ *IQ Holdings, Inc. v. Villa D’Este Condominium Owner’s Assoc., Inc.*, No. 01-11-00914, 2014 WL 982844, at *3 (Tex. App.—Houston [1st Dist.] March 13, 2014, no pet.).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

Guptas “timely sought judicial review” of the arbitration award.¹¹⁹

The Guptas appealed.¹²⁰

Analysis of Finality of an Arbitration Award

Before analyzing the arguments, the court of appeals noted that the “review of an arbitration award is extraordinarily narrow” and “[a]rbitration is favored as a means of dispute resolution; therefore, courts indulge every reasonable presumption to uphold an award, and none against it.”¹²¹ Under the Federal Arbitration Act (“FAA”) and Texas Arbitration Act (“TAA”), an arbitration award is only vacated “where the arbitrators exceeded their powers.”¹²² Both the FAA and the TAA require confirmation of an arbitration award unless there are grounds for vacatur.¹²³ Lastly, citing the United States Supreme Court case of *Sutter*, the court noted that, the potential for an arbiter’s mistake “is the price of agreeing to arbitration.”¹²⁴

Moving to the Guptas first argument, the court explained that the Guptas incorrectly argued that the issue before the court was whether the arbiter incorrectly interpreted the Rule 11 agreement when deciding what was to be included in the settlement agreement.¹²⁵ The appellate court reasoned that when reviewing an arbitration award, the only issue before a court is whether an arbiter was authorized to act, and if so, did the arbiter do so arguably.¹²⁶ Thus, in this case, the question was whether the arbiter was authorized to interpret the Rule 11 agreement when determining the contents of the settlement agreement, and if so, did the arbiter do so arguably.¹²⁷

Turning to the Rule 11 agreement, which created the scope of the arbiter’s authority, the court found that the arbiter was indeed authorized to interpret the Rule 11 agreement and any disputes regarding what should be included in the settlement agreement.¹²⁸ The

Rule 11 agreement expressly stated the arbiter could resolve any disputes regarding the final settlement agreement and interpretation of the parties’ intent.¹²⁹ For this reason, and because the arbiter interpreted the Rule 11 agreement, the court found the arbitration award was valid.

Next, the court rejected the Guptas’ argument that the arbitration award should be vacated or modified because the arbitration award was a “manifest disregard of the law.” The court pointed to its past rulings that relied heavily on the United States Supreme Court case of *Hall St. Assocs., L.L.C. v. Mattel, Inc.*¹³⁰ In a previous decision, the court had found that a manifest disregard of the law is not ground for vacating or modifying an arbitration award under the FAA.¹³¹

By rejecting the Guptas arguments, the appellate court affirmed the trial court’s denial of the Guptas’ motion for vacatur and modification.

Analysis of Attorneys’ Fees for Arbitration Dispute

Having denied all of the Guptas arguments for reversing the arbitration award, the court turned to the issue of whether the Gupta’s breached the Rule 11 agreement, and subsequently entitling the Association to attorneys’ fees.

In its analysis, the court noted that the Association’s breach of contract claim was solely based on the Guptas’ refusal to sign the final settlement agreement as ordered by the arbiter.¹³² Further, the court observed that the Rule 11 settlement agreement itself did not require the execution of the final settlement agreement by a certain time.¹³³ Therefore, because the Rule 11 settlement agreement was the only contract in this case, and it did not require the Guptas to sign the final settlement agreement by a certain time, the Guptas could not be liable for breach of contract.¹³⁴ Instead, the Guptas rightfully sought judicial review of an arbitration award, as allowed by the FAA.¹³⁵ Under the FAA, a party has 90 days to appeal an arbitration award, which is what the Guptas did in this instance.¹³⁶

¹¹⁹ *Id.* at 7.

¹²⁰ *Id.* at 1 (Guptas are the appellants).

¹²¹ *Id.* at 10.

¹²² See *IQ Holdings, Inc.*, 2014 WL 982844, at *7 (citing 9 U.S.C. § 10(a)(4) and Tex. Civ. Prac. & Rem. Code Ann. § 171.088(a)(3)(A) (West 2011)).

¹²³ *Id.* (citing 9 U.S.C. § 9 and Tex. Civ. Prac. & Rem. Code Ann. § 171.087 (West 2011)).

¹²⁴ *Id.* at 10. (quoting *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2070 (2013)).

¹²⁵ *Id.* at 16.

¹²⁶ *Id.* (citing *Oxford Health*, 133 S. Ct. at 2068 (“The sole question for us is whether the arbitrator (even arguably) interpreted the parties’ contract, not whether he got its meaning right or wrong.”)

¹²⁷ *Id.*

¹²⁸ *Id.* at 17–18.

¹²⁹ See *id.* at 17.

¹³⁰ *Id.* at 18 (citing *Ancor Holdings, LLC v. Peterson, Goldman & Villani, Inc.*, 294 S.W.3d 818, 829 (Tex. App.—Dallas 2009, no pet.) (citing *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 584 (2008))).

¹³¹ *Id.*

¹³² *Id.* at 27.

¹³³ *Id.*

¹³⁴ *Id.* at 27–28.

¹³⁵ See 9 U.S.C. § 12.

¹³⁶ *Id.*

For this reasoning, the appellate court found that when a party seeks judicial review of an arbitration award, attorneys' fees are unrecoverable under a breach of contract claim.

Takeaway from *IQ Holdings*

The takeaway from *IQ Holdings, Inc.* is simple: when you are in the eleventh hour of mediation, think twice before agreeing to an outside-the-box compromise.

In *IQ Holdings*, both the Guptas and the Association were burned by the arbitration agreement they entered into. First, the Guptas were stuck with an arbitration standard of review, which is next to impossible to overcome. Second, the Association lost out on a considerable amount of attorneys' fees because the court of appeals held a party can have 90 days to dispute an arbitration award, which meant there can be no breach of contract for at least 90 days.

Instead of rushing into a creative quick-fix, do yourself and your client a favor, stop and think about the long-term repercussions. If the other side asks you to agree to something you are not well versed in—such as arbitration law—you should hesitate before agreeing.

Also, remember, sometimes it is okay to walk away without a deal. If you were close enough to enter into an outside-the-box agreement, you were probably close enough to step away and come back another day.

Lastly, do not include arbitration clauses in your mediated settlement agreements. You expose your client to the ruling of an arbiter that may or may not disregard the law. Also, if the opposing side refuses to comply with the arbitration award and seeks a judicial review, you may not be entitled to attorneys' fees for trying to enforce the arbitration award under a breach of contract claim.

VII. FAMILY LAW

Up until this point, we have been talking about mediated settlement agreements under the Texas Civil Practice & Remedies Code. But, unlike other civil cases, family law cases have their own unique set of rules for mediated settlement agreements under the Texas Family Code.

Under the Texas Family Code, the “Texas Two-Step” does not necessarily exist. Instead, Section 153.0071(d) makes family law mediated settlement agreements immediately binding and enforceable if the “magic” language is used. This helps prevent lengthy and costly litigation.

Texas Family Code § 153.0071

Under Rule 153.0071 of the Texas Family Code, a mediated settlement agreement is immediately binding on the parties if the agreement:

- (1) conspicuously states that the agreement is not subject to revocation;
- (2) is signed by each party to the agreement; and
- (3) is signed by each party's attorney, if any, who is present at the time the agreement is signed.¹³⁷

Rule 153.0071 gives specific examples of what will be considered conspicuous: boldfaced type; capital letters; or underlined.¹³⁸ Therefore, any three of the following examples would satisfy the conspicuous prong of the three-prong test:

THE PARTIES AGREE THAT THIS MEDIATION AGREEMENT IS BINDING ON BOTH OF THEM AND IS NOT SUBJECT TO REVOCATION BY EITHER OF THEM.

The parties agree that this mediation agreement is binding on both of them and is not subject to revocation by either of them.

The parties agree that this mediation agreement is binding on both of them and is not subject to revocation by either of them.

Though Rule 153.0071 does not require a combination of boldfaced type, capital letters, or underlining, it is highly recommended that parties do so in order to avoid any dispute.¹³⁹ Further, any statement disclaiming revocation should be made in a stand-alone paragraph. Even though it is not required, it helps make the statement “prominent” as required by Rule 153.0071.¹⁴⁰

In re Stephanie Lee

In *In re Lee*, Stephanie Lee (“Stephanie”) and Benjamin Redus (“Benjamin”) were the divorced

¹³⁷ Tex. Fam. Code § 153.0071(d).

¹³⁸ *Id.* at § 153.0071(d)(1).

¹³⁹ See *In re Lee*, 411 S.W.3d 445, 448 (Tex. 2013) (emphasis in original) (disclaimer of revocation is a combination of all three typefaces that are considered “prominent”).

¹⁴⁰ Tex. Fam. Code § 153.0071(d)(1) (“prominently displayed”).

parents and joint managing conservators of their minor daughter.¹⁴¹ Stephanie had the exclusive right to designate the child's primary residence under an order adjudicating parentage.¹⁴² Benjamin, however, petitioned the court to modify the order because Stephanie had relinquished primary care and possession of their daughter for six months and because Stephanie made poor parenting decisions that endangered their daughter.¹⁴³ In addition, Benjamin petitioned the court to modify the terms and conditions of Stephanie's access to the child because Stephanie had married a registered sex offender, Scott Lee ("Scott").¹⁴⁴

Before this lawsuit could go to trial, Stephanie and Benjamin—both represented by counsel—successfully mediated a settlement agreement ("MSA").¹⁴⁵ The MSA gave Benjamin the exclusive right to establish the child's primary residence and allowed Stephanie periodic access to their daughter.¹⁴⁶ Among other terms, the MSA placed restrictions on Scott's access to their daughter.¹⁴⁷ Specifically, Scott could not be within five miles of their daughter at any time.¹⁴⁸

When executing the MSA, the parties included the following statement:

THE PARTIES ALSO AGREE THAT THIS MEDIATION AGREEMENT IS BINDING ON BOTH OF THEM AND IS NOT SUBJECT TO REVOCATION BY EITHER OF THEM.¹⁴⁹

After executing the MSA, Benjamin asked the trial court to enter a judgment on the MSA.¹⁵⁰ At the hearing the judge asked about the injunction on Scott, to which Benjamin informed the court Scott was a registered sex offender who violated his probation and slept naked in the bed with Stephanie and the daughter. The court refused to enter a judgment on the MSA.¹⁵¹

Shortly thereafter, Stephanie filed a motion to enter a judgment on the MSA.¹⁵² In the subsequent hearing for entering judgment on the MSA, Stephanie

and Benjamin had conflicting testimony on whether the MSA was in the best interest of their daughter.¹⁵³ Both parties testified that Benjamin (the party seeking to withdraw consent) was not a victim to family violence.¹⁵⁴

After the hearing, the court denied the motion to enter judgment on the sole reasoning that the MSA was not in the best interest of the child.¹⁵⁵ Stephanie filed a writ of mandamus claiming the trial court lacked discretion to refuse judgment based on the interest of the child alone.¹⁵⁶ The appellate court affirmed the trial court and Stephanie appealed to the Texas Supreme Court.¹⁵⁷

On review, the Court analyzed whether a trial court can deny a validly executed MSA based solely on the best interest of the child.¹⁵⁸ Turning to Subsection (d) of Section 153.0071 of the Texas Family Code, the Court found that an MSA under this section is binding.¹⁵⁹ Further, subsection (e) states parties are "entitled to judgment" on an MSA if the three requirements of subsection (d) are satisfied.¹⁶⁰

Next, the Court moved to Subsection (e-1), which reads in its entirety:

"Notwithstanding Subsections (d) and (e), a court may decline to enter a judgment on a mediated settlement agreement if the court finds that: (1) a party to the agreement was a victim of family violence, and that circumstance impaired the party's ability to make decisions; *and* (2) the agreement is not in the child's best interest."¹⁶¹

The Court found that the Subsection (e-1) creates a "narrow exception" to an MSA created under Section 153.0071.¹⁶² The exception requires all three elements that : (1) a party to the MSA was a victim of family violence; (2) the family violence impaired the victim's ability to make decisions; and (3) the agreement was not in the best interest of the child.¹⁶³

The Court explicitly rejected Benjamin's argument that the element of family violence is not required for a trial court to refuse entry of judgment

¹⁴¹ *In re Lee*, 411 S.W.3d at 447 (emphasis in original).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 447–48.

¹⁴⁸ *Id.* at 447.

¹⁴⁹ *Id.* at 448 (emphasis in original).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 449.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 450.

¹⁵⁹ *Id.* at 452 ("Subsection (d) provides that an MSA is binding . . .").

¹⁶⁰ *Id.* at 452.

¹⁶¹ Tex. Family Code § 157.0071(e-1) (emphasis added).

¹⁶² *In re Lee*, 411 S.W.3d at 452.

¹⁶³ *Id.* at 453.

on an MSA that is not in the best interest of the child.¹⁶⁴ The Court found that Subsection (e-1) clearly demonstrates the legislative intent that a statutorily compliant MSA can only be denied if all three elements are satisfied, including the presence of family violence.¹⁶⁵

In light of the Court's analysis of Section 153.0071 and the fact that the MSA signed by both Stephanie and Benjamin contained a prominent disclaimer of revocation as required by Subsection (d), the Court remanded the case back to the trial court for compliance with the Court's opinion.¹⁶⁶

Takeaway from *In re Stephanie Lee*

If you are ever mediating a family law dispute, in order to protect your client and help enforce the mediated settlement agreement you need to remember the simple lesson from *In re Stephanie Lee*: Include a prominent disclaimer of revocation in your mediated settlement agreement, and have both parties, and both attorneys, where applicable, sign the mediated settlement agreement.

Further, if a party attempts to withdraw their consent from the mediated settlement agreement, just remember they have to show three things:

- (1) The mediated settlement agreement is not in the best interest of the child;
- (2) The party withdrawing the consent was a victim of family violence; and
- (3) The family violence impaired the withdrawing party's ability to make decisions.

If you are able to remember this information, you are well on your way in enforcing a family law mediated settlement agreement.

VIII. TIPS FOR DRAFTING

Anticipate the Issues

When getting ready to mediate a dispute, only you, your client, and the opposing side know the issues that are involved. Take time to think about the issues you are going to face in the mediation. Come prepared to draft language that will cement a "deal" you have worked hard to obtain.

¹⁶⁴ *Id.* ("Allowing a court to decline to enter judgment on a valid MSA on best interest grounds without family violence findings would impermissibly render the family violence language in subsection (e-1) superfluous (citation omitted)).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 461.

Have a Working Draft

You should always attend mediation with at least a working draft of a mediated settlement agreement. Much of a mediated settlement agreement can be prepared before mediation even begins. For example, you can draft standard provisions, such as releases, disclaimers, definitions, etc.

The reason you want to have a working draft is two-fold. First, it makes you think about issues that may be related to settlement early. Second, once the parties agree to the terms of an oral settlement agreement, you want to get that agreement down in writing and signed by all the parties before someone has a change of heart. The last thing you want to do at the end of a long hard-fought mediation is type the definitions or the standard disclaimer of reliance language.

But remember, the working draft is just that—a working draft. Depending on the facts of your case and what happens during mediation, you may have to make alterations to that working draft, which brings us to our next tip.

Edit the Working Draft During Mediation

Some mediations are very straightforward in that one party is asking for money and the other party is asking for a standard release of all claims. Other mediations, however, may be more complicated. Instead of money, a party may want some form of specific performance, or an injunction. In the latter mediations, it is a good idea to bring the working draft of the mediated settlement agreement to mediation with you. That way, once the parties begin discussing the terms and obligations for settlement, you can keep incorporate them in your working draft.

This is good for two reasons. First, a working draft that is updated during the course of mediation is a great reference tool. Many times parties say one thing and forget what they said. If, however, you have a working draft, you can quickly reference your notes to confirm what the parties have agreed upon. Second, having a working draft that is updated throughout mediation can reduce the time frame from agreement to the terms of a settlement to signatures on the mediated settlement agreement. Basically, the more legwork you do in updating your working draft during mediation, the less work you have to worry about at the end. Also, it gives parties less time to change their minds and back out of an oral agreement.

Include the Necessary Terms and Language

Though it may sound like common sense, it is very important that you take time to include all the necessary terms and appropriate language in a mediated settlement agreement. Remember, a

mediated settlement agreement must comply with Rule 11 of the Texas Rules of Civil Procedure. If one material term is not included in the agreement, the agreement may be unenforceable.

Also, when drafting the settlement agreement, make sure to use the present tense instead of the future tense. This demonstrates the parties’ agreement to perform the acts immediately, instead of an uncertain time in the future.

Include the Necessary Provisions

Make sure your mediated settlement agreement incorporates all of the necessary provisions you want it to include. Below is a list of the most common provisions you may want to include:

- Definitions
- Recitals
- Release
- Disclaimer of Reliance
- Disclaimer of Revocation
- Merger Clause
- Confidentiality Clause

Remember, though, this is just a helpful list of common provisions. Every mediated settlement agreement is different and may require different provisions than those listed here.

Signatures

The last thing you want to make sure is included in every mediated settlement agreement is a place for the parties to sign. Remember, a Rule 11 agreement is not enforceable unless signed. Further, for family law mediated settlement agreements, both the parties and the parties’ attorneys must sign the settlement agreement.

There should be clearly designated spots for each party to sign the settlement agreement. These placeholders should include places for the signature, the signatory’s printed name, the signatory’s title if a representative or attorney, and the date. For example:

Defendant ACME, Inc.

Signature: _____
 Printed Name: _____
 Title: _____
 Date: _____

By including the additional information, it ensures each responsible party to the agreement has signed the agreement. And, it helps a third-party identify each

signatory without having to decipher an illegible signature.

IX. CONCLUSION

Getting the opposing party to sign a mediated settlement agreement is only half of the battle; you still need to enforce the agreement. As discussed above, most of the pitfalls in enforcing settlement agreements are created before or during the drafting of a settlement agreement. If you take the time to prepare and draft a well thought out mediated settlement agreement, you reduce the chances of having a court declare the agreement unenforceable.