

**DISCOVERY LAW**  
**March 2006**

**Settlement Agreements and Discovery**

**by Dick A. Semerdjian, Column Editor**

*Dick A. Semerdjian received his Bachelor of Arts degree in Biochemistry and Cell Biology from the University of California, San Diego, in 1981 and his Juris Doctor degree from the University of San Diego in 1985. He is a partner in the law firm of Schwartz Semerdjian Haile Ballard & Cauley, LLP, where he practices in the areas of business and commercial litigation, personal injury, products liability, and employment litigation. He is the Vice Chairman of the American Bar Association Business Litigation subcommittee and a Master of the Enright Inn of Court. Mr. Semerdjian has edited the Discovery Law Column of the **Trial Bar News** since 1996, and is a frequent lecturer for CEB. He may be reached by e-mail at: **das@sshbclaw.com**.*

In *Stewart v. Preston Pipeline, Inc.* (December 20, 2005) 2005 *Daily Journal D.A.R.* 14681, plaintiff Darren Stewart sustained injuries when the automobile he was driving collided with a backhoe that fell off a truck owned by Preston Pipeline, Inc. After a suit for personal injuries was initiated by Stewart, the parties entered into mediation. Mediation concluded with a settlement agreement signed by plaintiff, plaintiff's attorney, and defendant's attorney, but not signed by defendant Preston Pipeline, Inc. The settlement agreement stated: "[T]he parties agree that this Confirmation of Settlement is exempt from the confidentiality provisions of Evidence Code Section 1152, et seq." *Id.*

In relevant part, Evidence Code §1152 states:

**Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or will sustain or claims that he or she has sustained or will sustain loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his or her liability for the loss or damage or any part of it.**

Shortly after the mediation, Stewart refused to accept the settlement check from defendant Preston. Defendant brought a motion to enforce the agreement and a motion for summary judgment. As evidence of settlement, defendant relied on the settlement agreement as signed by the parties. The court entered summary judgment in favor of defendant.

On appeal, Stewart argued that the settlement agreement, under California Evidence Code §1119, was inadmissible as evidence for a summary judgment. Pursuant to California Evidence Code §1119 (b):

**No writing . . . that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative**

**adjudication, civil action, or other non-criminal proceeding in which, pursuant to law, testimony can be compelled to be given.**

Stewart further argued that the settlement agreement, because it was not signed by all parties, was unenforceable under *Levy v. Superior Court* (1995) 10 Cal.4th 578. In *Levy*, the California Supreme Court “held that a written settlement agreement not signed by all settling litigants could not be enforced under the summary procedure specified in Code of Civil Procedure section 664.6.” *Stewart v. Preston Pipeline, Inc.*, 2005 *Daily Journal D.A.R.* 14681, citing *Levy v. Superior Court, supra*.

The appellate court granted summary judgment for defendant Preston, holding that under California Evidence Code §1123, the settlement agreement was admissible. California Evidence Code §1123 provides:

**A written settlement agreement prepared in the course of, or pursuant to, a mediation, is not made inadmissible, or protected from disclosure . . .if the agreement is signed by the settling parties and any of the following conditions are satisfied:(a) The agreement provides that it is admissible or subject to disclosure, or words to that effect. (b) The agreement provides that it is enforceable or binding or words to that effect. (c) All parties to the agreement expressly agree in writing, or orally in accordance with Section 1118, to its disclosure. (d) The agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.**

The court found that the agreement was expressly to be binding under Code of Civil Procedure §664.6, thus satisfying the requirement in Evidence Code §1123(b) above. The appellate court further held that the language that the agreement is exempt from confidentiality provisions of Evidence Code §1522 satisfied the requirement in Evidence Code §1123(a) above that the agreement provide it was admissible or subject to disclosure.

Finally, the court found that the settlement agreement was not rendered unenforceable just because one party failed to personally sign it. The court distinguished the Supreme Court decision in *Levy* on three grounds: (1) *Levy* was decided under a section of the Code of Civil Procedure and not mediation statutes; (2) the party in *Levy* that contested the admissibility of the settlement agreement was the party that had not signed agreement (in the instant case Stewart had signed the agreement and contests its admissibility), and (3) an effective waiver of mediation confidentiality is made when the waiver is signed by each of the parties **or** their respective attorneys.

The court felt that the broad mediation confidentiality statute could not be used as a shield to prevent the enforcement of a settlement achieved by mediation and signed at the conclusion of the mediation. Therefore, the court concluded there was no triable issue of material fact that the parties had settled the dispute and granted summary judgment in favor of defendant Preston.

**PRACTITIONER’S POINT:** Review potential mediation settlement agreements for language that would make the agreement discoverable at a later point. Should an agreement contain a waiver of confidentiality, your signature on the agreement alone may stipulate to the waiver.