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Sacrificing Settlement Agreements in the Name of Mediation Confidentiality: The California Supreme Court's Narrow Holding Has Harsh Consequence

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Sacrificing Settlement Agreements in the Name of Mediation Confidentiality: The California Supreme Court's Narrow Holding Has Harsh Consequence

Fair v. Bakhtiari[1]

I. INTRODUCTION

Confidentiality is regarded as one of the primary benefits of mediation.[2] For parties who wish to avoid the public eye, mediation is often preferable to court. However, when parties reach some form of a settlement agreement during mediation, and subsequently disagree as to the terms of that agreement, the parties may find themselves in court. In court, the issue of whether the settlement agreement is admissible arises. In *Fair v. Bakhtiari*,[3] the California Supreme Court addressed the question of whether an arbitration provision listed in a settlement agreement renders the agreement admissible under the California Evidence Code.[4] The court emphasized the importance of maintaining mediation confidentiality and recognized the value of "working documents" produced during mediation sessions.[5] However, by holding that an arbitration clause cannot render a settlement agreement admissible, the court sacrificed the enforceability of such agreements for the sake of mediation confidentiality.[6] The court's narrow holding does not provide clear guidance as to how parties can draft settlement agreements that are "enforceable," and, thus, admissible in a subsequent legal proceeding. Thus, the *Fair* court has done future parties a disservice by providing a narrow and incomplete holding regarding the admissibility of settlement agreements in California.

II. FACTS AND HOLDING

Plaintiff R. Thomas Fair sued his former business partner, Karl E. Bakhtiari, and his former wife, Maryanne E. Fair, as well as several business entities ("the

1. 147 P.3d 653 (Cal. 2006).
2. *See* Foxgate Homeowners' Ass'n. v. Bramalea Cal., Inc., 25 P.3d 1117, 1126 (Cal. 2001).
3. 147 P.3d 653 (Cal. 2006).
4. *Id.* at 654-57.
5. *Id.* at 656, 659.
6. *See id.* at 660.

Stonesfair defendants").[7] Plaintiff alleged that the defendants "had wrongfully excluded him from real estate syndications, denied him compensation, misappropriated profits, and engaged in other financial misconduct."[8] Plaintiff also accused Bakhtiari of physically assaulting him on several occasions.[9] In response to Plaintiff's allegations, Bakhtiari, Ms. Fair, and the Stonesfair defendants answered separately.[10] The parties mediated their disputes during a two-day period.[11] At the conclusion of the mediation, Plaintiff's counsel drafted a handwritten memorandum which prescribed settlement terms.[12] The list of settlement terms included the following provision: "Any and all disputes subject to JAMS [Judicial Arbitration and Mediation Services] arbitration rules."[13] The parties and the mediator signed the memorandum, which was dated March 21, 2002.[14]

After signing the memorandum, the parties informed the court that the case had settled in mediation by filing case management reports.[15] On April 4, 2002, counsel for the Stonesfair defendants circulated a settlement and release agreement, "confirming the parties' intent to settle all their disputes 'as of and effective March 21, 2002.'"[16] Counsel for the Stonesfair defendants learned a few days before the case management conference that Plaintiff believed the parties' agreement for the transfer of his assets did not apply to certain business interests.[17] The attorneys also discussed unresolved tax issues at this time.[18] At the case management conference, Bakhtiari's attorney requested a continuance.[19] He told the

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7. *Id.* at 655.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* The memorandum was titled "Settlement Terms" and included the following provisions:
1. Cash payment of $5.4 MM to T. Fair w/in 60 days.
2. Payment treated as purchase of all T. Fair's stock & interests (as capital gain to Fair)[.]
3. [Defendants] will not look to Fair for reimbursement or indemnification of any phantom income paid by them to date.
4. This provision relates solely to Fair's right to indemnity and does not preclude other rights of the parties. Fair will be indemnified as a former officer, director & employee by SFC/SMC/SC [the Stonesfair defendants], according to applicable law, against all 3rd party claims, including LPs [limited partners] or IRS, arising from the operation of SFC/SMC. Fair will not make any adverse contacts with IRS [or] LPs re: SFC/SMC, at risk of loss of indemnity and will not suggest, foment or encourage litigation by LPs or any individual against defendants, at risk of loss of indemnity.
5. Maryann Fair disclaims any community prop[erty] interest in settlement proceeds.
6. Parties will sign mutual releases and dismiss with prejudice all claims. Am't of settlement will be confidential with appropriate exceptions.
7. All sides bear their own attorneys fees and costs, including experts.
8. If Fair needs to restructure cash payments for tax purposes, defendants will cooperate (at no additional cost to defendants).
9. Any and all disputes subject to JAMS [Judicial Arbitration and Mediation Services] arbitration rules.
Id. at 655 n.2.
13. *Id.*
14. *Id.* at 655.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*

court, "We've reached a settlement agreement. We are now in the process of exchanging settlement agreements. And there are some complicated taxation matters involved."[20] The trial court granted the continuance.[21]

Although the continuance was granted, the parties did not finalize their settlement.[22] On June 6, 2002, one of the attorneys for the Stonesfair defendants filed a case management document informing the court that the parties were ultimately unable to reach an agreement regarding the scope and subject matter of the proposed settlement terms.[23] He suggested that the case go to trial.[24] In response, Plaintiff's counsel demanded arbitration under the terms of the settlement memorandum.[25] Defendants' counsel rejected the demand, and posited that the parties had not entered into an enforceable agreement.[26] Defendants' counsel claimed the settlement memorandum was inadmissible under section 1119(b) of the California Evidence Code, which protects the confidentiality of writings "prepared for the purpose of, in the course of, or pursuant to, a mediation."[27] Indeed, under section 1119(b), documents prepared for purposes of mediation are generally *inadmissible* in civil proceedings.[28]

Plaintiff moved to compel arbitration, asserting that the parties agreed to be bound when they signed the March 21 memorandum, and, therefore, any disputes over the meaning or extent of their agreement were subject to arbitration.[29] Plaintiff argued that the March 21 memorandum was admissible because the presence of the arbitration provision made the parties' agreement "enforceable" under section 1123(b) of the California Evidence Code.[30] Section 1123(b) provides an exception to section 1119(b)'s general rule that mediation documents are inadmissible in civil proceedings.[31] Under section 1123(b), a signed settlement agreement reached through mediation is not inadmissible, if it "provides that it is enforceable or binding or *words to that effect*."[32] Defendants opposed Plaintiff's motion to compel arbitration.[33] Defendants objected to the admission of the settlement memorandum and also to descriptions of the mediation discussions, which were offered by Plaintiff's counsel.[34]

The trial court found that the requirements of section 1123(b) were not met, and thus excluded the memorandum.[35] Due to the inadmissibility of the memorandum, the court concluded that there was an "insufficient demonstration of an

20. *Id.*
21. *Id.*
22. *Id.* at 656.
23. *Id.* (quotation omitted). Said attorney for the Stonesfair defendants substituted as counsel for all defendants at this time. *Id.*
24. *Id.*
25. *Id.* The settlement terms listed in the memorandum provided, "Any and all disputes subject to JAMS [Judicial Arbitration and Mediation Services] arbitration rules." *Id.* at 655.
26. *Id.* at 656.
27. *Id.* (citing CAL. EVID., CODE § 1119(b) (West 1997)).
28. *Id.* at 654 (emphasis added); *see also* CAL. EVID. CODE § 1119(b).
29. *Id.* at 656. Plaintiff noted that Defendants' counsel had told the court the case had settled. *Id.*
30. *Id.*
31. *Id.* at 654; *see also* CAL. EVID. CODE § 1123(b) (West 1997) .
32. *Id.* (emphasis added) (citing CAL. EVID., CODE § 1119(b)).
33. *Id.* at 656.
34. *Id.*
35. *Id.*

arbitration agreement."[36] Thus, the court denied Plaintiff's motion to compel arbitration.

The Court of Appeal reversed, holding that the memorandum included "words to that effect" as provided in section 1123(b), and therefore, the memorandum was admissible under said section.[37] The court found that the memorandum manifested a valid arbitration agreement.[38] The California Supreme Court granted Defendants' petition for review.[39]

In reversing the Court of Appeal's decision, the California Supreme Court held that when an arbitration clause listed in a settlement agreement does not evidence the parties' intent to be bound, the arbitration clause does not render the agreement admissible under section 1123(b).[40]

III. LEGAL BACKGROUND

A. Statutory Interpretation

The California Supreme Court has declared that, when engaged in statutory interpretation, it is necessary to ascertain the Legislature's intent.[41] First, courts look to the words themselves, because legislative intent is generally indicated by the statutory language.[42] The words should be given their ordinary and usual meaning and should be construed in their statutory context.[43] Thus, judicial construction that renders part of the statute "meaningless or inoperative" is generally precluded.[44] Related statutes are interpreted so as to harmonize their requirements and avoid anomaly.[45]

B. Mediation in California

The California Legislature recognizes the importance of utilizing alternative dispute resolution methods.[46] Since 1986, implementing such methods has been a strong legislative policy in California.[47] The Legislature has stated that, in appropriate cases, mediation provides a simplified and economical procedure for resolving disputes.[48] The process is prompt and gives parties the opportunity to obtain fair results.[49] Furthermore, mediating parties participate directly in the resolution

36. *Id.*
37. *Id.* The Court of Appeal stated that the arbitration clause in the parties' list of settlement terms satisfied section 1123(b), because the clause could only reflect an intent that the document would be "enforceable or binding." *Id.* at 658.
38. *Id.* at 656.
39. *Id.*
40. *Id.* at 660.
41. Hassan v. Mercy Am. River Hosp., 74 P.3d 726, 729 (Cal. 2003).
42. *Id.*
43. *Id.*
44. *Id.*
45. Coachella Valley Mosquito & Vector Control Dist. v. Cal. Pub. Employment Relations Bd., 112 P.3d 623, 634 (Cal. 2005).
46. Rojas v. Superior Court, 93 P.3d 260, 264-65 (Cal. 2004).
47. *Id.*
48. *Id.* at 265 (citing CAL. CIV. PROC. CODE § 1775(c) (West 1993)).
49. *Id.*

of their disputes.[50] Mediation also benefits the judicial system by reducing the backlog in the courts.[51] Therefore, it is in the public interest for courts to promote and use mediation programs.[52]

The California Legislature has encouraged mediation by enacting "mediation confidentiality provisions."[53] In *Foxgate Homeowners' Association v. Bramalea California, Inc.*,[54] the California Supreme Court analyzed such a provision: section 1119 of the California Evidence Code.[55] Section 1119(c) provides: "All communications, negotiations, or settlement discussions by and between participants in the course of a mediation . . . shall remain confidential."[56] The court declared that the statute is clear, that it prohibits any person, both mediator and participants, from revealing any written or oral communication made during mediation.[57] The court also discussed the legislative intent underlying the mediation confidentiality provisions of the California Evidence Code.[58] Specifically, the purpose of confidentiality provisions is to promote a candid exchange regarding past events.[59] This exchange is only possible if participants know that what is said during the mediation will not be used against them in later adjudicatory processes.[60] In summary, the court stated that confidentiality is essential to effective mediation.[61] To encourage mediation by ensuring confidentiality, section 1119 bars disclosure of communications made during mediation absent an express statutory exception.[62]

Exceptions to mediation confidentiality do, however, exist. For example, section 1123(b) of the California Evidence Code provides that a written settlement agreement prepared in the course of a mediation is not inadmissible if the agreement is signed and the agreement provides that it is "enforceable or binding or words to that effect."[63] Thus, section 1123(b) is an exception to the confidentiality rule expressed in section 1119. Due to the requirement that the agreement must provide that "it is enforceable or binding or words to that effect[,]" section 1123(b) is a limited provision. A written list of terms on which the parties have tentatively agreed, but which is not yet intended to be enforceable or binding, remains confidential.[64]

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50. *Id.*
51. *Id.*
52. *Id.*
53. *Rojas*, 93 P.3d at 265 (citing Foxgate Homeowners' Ass'n. v. Bramalea Cal., Inc., 25 P.3d 1117, 1126 (2001)).
54. 25 P.3d 1117 (2001).
55. *Id.* at 1125-26.
56. *Id.* at 1124.
57. *Id.* at 1125. Because the language of section 1119 is unambiguous, judicial construction of the statute is not permitted unless the statute cannot be applied according to its terms or doing so would lead to absurd results. *Id.* at 1126.
58. *Id.*
59. *Id.*
60. *Id.* (citing Nat'l. Conference of Comm'rs. on Unif. State Laws, Unif. Mediation Act (May 2001) § 2).
61. *Id.* at 1126.
62. *Id.*
63. CAL. EVID. CODE § 1123(b) (West 1997).
64. *See* Opening Brief on the Merits for Defendants and Respondents at 14-15, Fair v. Bakhtiari, 147 P.3d 653 (2006) (No. 5129220).

C. Enforceability of Settlement Agreements and Arbitration Clauses

Mediators strive to produce written terms by the end of the mediation session.[65] However, the parties may not intend such terms to be enforceable or binding.[66] If an agreement is intended to be enforceable or binding, then the standard rules of contract interpretation govern the interpretation of the settlement agreement.[67] A contract is enforceable and binding when the parties to the contract had the capacity to consent and agreed on the material terms regarding the exchange of consideration.[68] A party's intent to contract is judged from an objective standard, by looking at the party's outward manifestations of intent.[69]

In California, a written arbitration agreement is "valid, enforceable, and irrevocable."[70] Furthermore, public policy favors arbitration; thus, a party seeking an order compelling arbitration must simply establish that an agreement to arbitrate the controversy has been made.[71]

IV. INSTANT DECISION

In *Fair v. Bakhtiari*,[72] the California Supreme Court analyzed whether a settlement agreement, which contained an arbitration clause, was admissible upon a motion to compel arbitration.[73] Initially, the court asserted that the mediation confidentiality provisions of the California Evidence Code were enacted to encourage mediation.[74] The confidentiality provisions allow parties to engage in candid discussions without fear that disclosures might be used against them in later proceedings.[75] According to the court, the statutory scheme embodied in the Evidence Code "unqualifiedly bars disclosure of communications made during mediation absent an express statutory exception."[76]

First, the California Supreme Court interpreted section 1123(b) of the California Evidence Code.[77] The court analyzed section 1123(b) as follows: section 1123(b), which pertains to written settlements, is an exception to the general bar against disclosures of communications made during mediation.[78] This section

65. JUDGE H. WARREN KNIGHT ET AL., CAL. PRACTICE GUIDE: ALTERNATIVE DISPUTE RESOLUTION (2003).
66. MARK D. BENNETT & MICHELE S.D. HERMAN, THE ART OF MEDIATION 68 (1996).
67. Vaillette v. Fireman's Fund Ins. Co., 18 Cal. App. 4th 680, 686 (1993).
68. *See generally* CAL. CIV. CODE § 1550 (West 1872).
69. King v. Stanley, 32 Cal. 2d 584, 591 (1948).
70. *See* CAL. CIV. PROC. CODE § 1281 (West 1961).
71. *See* CAL. CIV. PROC. CODE § 1281.2 (West 1978); *see also* Coast Plaza Doctors Hosp. v. Blue Cross of Cal., 83 Cal. App. 4th 677, 687 (2000).
72. Fair v. Bakhtiari, 147 P.3d 653 (2006).
73. *Id.* at 654-55.
74. *Id.* at 656.
75. *Id.*
76. *Id.*
77. *Id* at 656-58.
78. *Id.* Section 1123(b) 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 . . . [T]he agreement provides that it is *enforceable or binding or words to that effect.*

Id. at 657 n. 5 (emphasis added).

provides that a written settlement agreement is not protected from disclosure if the parties sign the agreement and the agreement provides that it is enforceable or binding or words to that effect.[79] To begin its discussion, the court provided background information regarding section 1123(b).[80] The California Law Revision Commission issued a Recommendation on Mediation Confidentiality.[81] The Commission recommended statutory mediation reforms to clarify the application of mediation confidentiality to settlements.[82] The court stated that section 1123(b) is indeed one of the reforms recommended by the Commission.[83] The Commission stated that the reforms should "enhance the effectiveness of mediation in promoting durable settlements."[84] The court deemed the Commission's official comments as expressions of the Legislature's intent.[85]

The court noted that mediation confidentiality and the disclosure of settlement agreements are treated separately in the California Evidence Code.[86] Section 1119 states the general rule that writings prepared for mediation are inadmissible, and section 1123 states the exceptions applicable to written settlement agreements.[87] Section 1123 is the provision at issue in the instant case.[88] Specifically, section 1123(b) provides that a written settlement agreement is not made inadmissible if the agreement is signed by the settling parties, and "the agreement provides that it is enforceable or binding or words to that effect."[89] The court cited the Commission's comments regarding section 1123, which provided that "[t]he proposed section on settlements would explicitly make an executed written settlement agreement admissible if it provides that it is 'enforceable' or 'binding' or words to that effect."[90]

The California Supreme Court then addressed the decision reached by the Court of Appeal.[91] According to the Supreme Court, the appellate court was correct in its reasoning that the "words to that effect" clause of 1123(b) reflects the Legislature's interest in parties using terms that unambiguously signify their intent to be bound.[92] However, the Supreme Court found that the appellate court erred "by concluding that the inclusion of an arbitration clause in the parties' list of settlement terms satisfied section 1123(b)."[93]

The Supreme Court interpreted the phrase "words to that effect" more narrowly than the appellate court.[94] The Supreme Court stated that its guide for statutory interpretation is the ordinary meaning of the words themselves, the statute's

79. *Id.* at 657-58.
80. *Id.*
81. *Id.* at 658.
82. *Id.*
83. *Id.*
84. *Id.* at 657
85. *Id.*
86. *Id.* at 657.
87. *Id.*
88. *Id.* at 654-656.
89. *Id.* at 657 n.5.
90. *Id.*
91. *Id.* at 658.
92. *Id.*
93. *Id.*
94. *Id.*

context, and legislative intent.[95] According to the Supreme Court, the Legislature's goal was to provide parties with the opportunity to express their intent to be bound in their own words, rather than in a legalistic formulation.[96] The Supreme Court determined that to preserve the confidentiality required in the mediation process, a writing must explicitly communicate the parties' agreement to be bound by the document they sign in order to satisfy the phrase "words to that effect" contained in section 1123(b).[97] The court reasoned that a "working document may include an arbitration provision, without reflecting an actual agreement to be bound."[98]

Next, the court disposed of Plaintiff Fair's argument that Defendants' conduct—circulating a formal agreement—proves that an enforceable settlement was intended.[99] The court found that it is inappropriate to "examine extrinsic evidence to resolve competing claims over the parties' intent."[100] Rather, the court held that intent must be evident from the written agreement itself.[101] The court also dismissed Plaintiff's argument that the arbitration clause is severable from the settlement agreement, and is independently enforceable.[102] The court stated that a settlement agreement must be admissible before the issues of severability and enforceability can be reached.[103] The court interpreted section 1123(b) as providing parties with the opportunity to create a working document without fear that such document could later be used against them.[104] In the instant case, the court determined that the settlement agreement was a "work in progress" and was not admissible; thus, enforceability was not an issue.[105]

Finally, the court reiterated that "to satisfy section 1123(b), a settlement agreement must include a statement that [the agreement] is 'enforceable' or 'binding,' or a declaration in other terms [that has] the same meaning."[106] The court concluded that arbitration clauses and other enforcement provisions typically negotiated in settlement discussions do not qualify an agreement for admission under section 1123(b).[107] The California Supreme Court held that the arbitration clause in the list of settlement terms drafted by the parties did not evidence an intent to be bound by such terms and, therefore, reversed the Court of Appeal's order to compel arbitration.[108]

95. *Id.* (citing Hassan v. Mercy American River Hospital, 74 P.3d 726 (Cal. 2003); Rojas v. Superior Court, 93 P.3d 260 (Cal. 2004)).
96. *Id.*
97. *Id.* at 659.
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.* at 660.
103. *Id.*
104. *Id.*
105. *See id.*
106. *Id.*
107. *Id.*
108. *Id.*

V. COMMENT

As the California Legislature has recognized, promoting mediation is in the public's interest.[109] Assurance of confidentiality serves to facilitate mediation.[110] Parties are more likely to be honest about their positions and underlying interests if disclosures made during the mediation session remain confidential, than if such information can be used against either party in a later legal proceeding. *Fair v. Bahktiari* furthers the policy of maintaining mediation confidentiality.[111] In *Fair*, the California Supreme Court recognized the usefulness of "working documents" produced during mediation sessions.[112] If each tentative agreement reached during a mediation session were subject to later disclosure, the parties would likely accomplish little in their discussions. Instead, if courts view a tentative "working document" as what the term implies—a work in progress—parties will be freer to brainstorm, record different ideas, and formulate an array of possible solutions.

In the instant decision, certain facts support interpreting the settlement memorandum as a binding agreement, while other facts support interpreting the memorandum as a working document. Facts in favor of finding a binding agreement include the arbitration provision itself, which clearly provides, "Any and all disputes subject to JAMS arbitration rules."[113] This statement suggests that from the time of the mediation forward, any disputes would be arbitrated. Furthermore, the mediator and the parties signed the memorandum.[114] One's signature on a document is generally seen as a commitment to what is expressed therein. However, the memorandum was handwritten, which suggests informality. Such informality points in favor of finding a "working document." Additionally, the memorandum was drafted at the end of the second day of a two-day mediation period, which suggests that the parties' goal may have simply been to put their thoughts on paper before the session ended.[115] The California Supreme Court did not address the fact that the memorandum was signed, nor the fact that it was handwritten. If the court had addressed these facts, future parties would have benefited from better guidance regarding how to draft settlement agreements.

The California Supreme Court focused on whether the arbitration provision satisfies the language in section 1123(b): "words to that effect."[116] The court determined that the arbitration clause does not qualify the entire agreement for admission under section 1123(b).[117] Thus, the *Fair* decision provides future mediating parties with some guidance as to how they should draft settlement agreements if they intend them to be enforceable and, thus, admissible. Mediating parties in the state of California are now on notice that arbitration clauses negotiated in settlement discussions do not render a settlement agreement admissible under

109. Rojas v. Superior Court, 93 P.3d 260, 265 (Cal. 2003) (citing CAL. CIV. PROC. CODE § 1775(c) (West 2007)).
110. *Id.* (citing Foxgate Homeowners' Ass'n. v. Bramalea Cal., Inc., 25 P.3d 1117 (Cal. 2001)).
111. 147 P.3d 653 (Cal. 2006).
112. *Id.* at 659.
113. *Id.* at 655.
114. *Id.* at 654-55.
115. *See id.* at 655.
116. *Id.* at 657-60.
117. *Id.* at 660.

section 1123(b).[118] As a result of this decision, mediating parties who intend to make their settlement agreements binding and enforceable are advised to explicitly express that intent in their agreements. Parties need to include a provision stating that the entire agreement is "enforceable or binding or words to that effect" rather than relying on an arbitration provision as evidence of such intent.

Problematically, the *Fair* court does not provide adequate guidance regarding how parties should draft their settlement agreements in order to satisfy section 1123(b). The court offers the narrow holding that an arbitration provision does not constitute "words to that effect" under section 1123(b).[119] The court requires clear evidence of an intent to be bound.[120] However, the court does not specify what language, other than the provided terms "enforceable" or "binding," will satisfy section 1123(b).[121] Thus, future parties are left without knowing what alternative terms California courts will find satisfactory under section 1123(b). Parties who do intend their agreements to be "enforceable" or "binding" risk a judicial finding to the contrary, unless the parties include those exact terms. Due to the court's narrow holding, the "words to that effect" clause is rendered meaningless. Reasonable parties will not take the aforesaid risk and, thus, will simply use the provided terms: "enforceable" or "binding." Parties who are unaware of the *Fair* decision, and instead rely on section 1123(b) for guidance, may be disadvantaged if they find themselves litigating the enforceability and admissibility of a settlement agreement which does not contain these exact terms. The court misstepped in its statutory interpretation by effectively rendering the "words to that effect" clause meaningless.

VI. CONCLUSION

In *Fair v. Bakhtiari*, the California Supreme Court underlined the importance of mediation confidentiality.[122] The court recognized the importance of "working documents" and the flexibility required for a successful mediation session.[123] The court avoided instituting a policy where terms reached during a mediation session could be used against a party in a later legal proceeding, unless the terms are *clearly* enforceable.

After *Fair*, parties may not rely on arbitration provisions contained in settlement agreements as evidence of their intent to be bound by the agreement. Instead, parties must express their intent to be bound in a separate provision, a provision clearly applicable to the entire agreement. If parties abide by this rule, their settlement agreement will likely be admissible in a subsequent legal proceeding regarding the agreement.

Unfortunately, the *Fair* court does not provide adequate guidance to future parties who seek to satisfy section 1123(b). The *Fair* court stated that the Legislature's goal was to allow parties to express their intent to be bound in their own

118. *Id.* at 659-60.
119. *Id.* at 658.
120. *Id.* at 658-59.
121. *Id.* at 660.
122. *Id.* at 656, 658.
123. *Id.* at 658.

words, rather than by using a legalistic formulation.[124] However, the court left unanswered the question of what terms, other than "enforceable" or "binding," California courts will likely accept as satisfactory under section 1123(b).[125] Thus, parties are required to draft their settlement agreements using a legalistic formulation. Parties who do not utilize the provided terms have little security that a California court will find their settlement agreement admissible under section 1123(b). The harsh consequence of the court's narrow holding is to render the "words to that effect" clause of section 1123(b) meaningless. This result is contrary to the California rules of statutory interpretation. Indeed, judicial construction that renders part of a statute meaningless is generally precluded. The California Supreme Court's narrow holding will most likely lead to more confusion and litigation regarding what terms provide sufficient evidence that the parties intended a settlement agreement to be enforceable and, thus, admissible.

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124. *Id.*
125. *See id.* at 657-58, 660.