

# **MEDIATION RELEASE AND SETTLEMENT AGREEMENT ISSUES IN CONSTRUCTION CASES**

by  
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## **Introduction:**

Many lawyers have been in the following situation: You're at the end of a long day, after mediating a difficult case. You've spent many hours—both in preparation and in mediation—focusing on the legal and factual issues in the case. However, you probably did not consider all the unique issues that relate to the release and settlement agreement that gets signed at the mediation itself. As such, the feeling of a job well done at mediation could turn into depression when you spot a flaw in the mediation settlement agreement that may be enforceable against your client.

The purpose of this paper is to provide a practical guide to issues surrounding mediation settlement agreements—especially those involving construction cases. First, this article will examine the terms that ought to be present in any document that gets signed at mediation. Second, this article will address the issues surrounding the descriptions of what is released and the indemnification for future claims. Last, the methodology for enforcing a settlement agreement that is signed at mediation will be discussed.

## **Practical Tips and Essential Clauses for Mediation Settlement Agreements:**

This section is intended to provide practical tips for clauses that ought to be present in any mediation settlement agreement, which you or your client sign at a mediation. Since many of these documents are “form” agreements that the mediator provides, if possible, ask the mediator to fax you the standard settlement form before the

mediation. This way you can familiarize yourself with the form without any time pressures.

The mediation settlement agreement should state that it is a Rule 11 agreement pursuant to the Texas Rules of Civil Procedure. It should also reference Section 154.071 of the Texas Civil Practice and Remedies Code, which states that any mediation agreement signed at a court ordered settlement conference is a contract, and is enforceable as a contract. The presence of these clauses will make the outcome of any necessary enforcement action more predictable.

However, the small print of the agreement demands attention on this point. Because if the document does state that it is a “written settlement agreement” as contemplated by §154.071 of the Texas Civil Practice and Remedies Code, you may in fact be signing a “final” release and settlement. Thus, in a possible later dispute, this document and this document alone could become the “final” release and settlement agreement.

Mediation settlement agreements should describe how and when the case will be dismissed, including times for exchange of checks and an order of non-suit with prejudice. The agreement should also reference, in as much detail as possible, any indemnity clauses, which will be addressed more fully below.

The document should note that each party has had an opportunity to confer with counsel regarding the terms of that document, that each party has entered into the agreement freely and without duress, and that the mediation settlement agreement is not subject to revocation. This ensures that objections like reliance, duress, or mistake are not grounds for a repudiation of the agreement. A clear provision regarding attorney’s fees in the event of enforcement should also be in place.

The document should be abundantly clear about identifying the parties that are settling, being released, and those to be dismissed. In the case of an architect or engineer, not only should the corporate entity be released, but so should the architect or engineer of record who signed the drawings. For owners and general contractors, all named defendants, officers, employees and agents should be released.

The attorneys should also be certain that those with the requisite authority to settle the case are present. This seems obvious, but in a recent mediation the corporate officer signed a blank agreement and told the mediator that his lawyer could finish the settlement conference because he had a plane to catch. Subsequently, the lawyer negotiated an exhibit to the mediation settlement agreement, which was only signed by the lawyer. Later, during enforcement proceedings, the corporate party denied that the attorney had authority to sign the exhibit and make it part of the mediation settlement agreement.

As a last note, the mediation settlement agreement should contain a clause that references a methodology for ironing out disputes that might arise in a later attempt to finalize a more formal release and settlement document.

### **What is released? The impact of future personal injury claims, and indemnities in construction disputes:**

Most construction lawyers probably have not given a great deal of thought to this area, but with the increasing rise of toxic mold claims relating to construction cases, it is vital that the mediation settlement agreements properly describe the actual claims which are released. Typically, any form that is signed at a mediation settlement conference will probably be a “one size fits all” form, or one that is used in personal injury cases. With such a form, beware of a clause which says something to the effect that “this is an agreed full release and hold harmless agreement, and plaintiff hereby agrees to completely release, discharge and forever hold defendants harmless from any and all claims, demands, suits known or unknown, fixed or contingent, liquidated or unliquidated, whether or not asserted in the referenced case, as of this date, arising from or related to the events and transactions which are the subject matter of this case.” In the scenario of a construction or design defect case which is related to water intrusion into the building envelope, a release like this could be interpreted as a full indemnity given by the plaintiff to the releasee for any future personal injury claims brought by the occupants or the users of the building. This is fine, if that is in fact what the parties intended. However, if the

parties merely intend that the defendant be released from the actual remedial and repair costs that relate to that construction or design error, the parties should identify that very clearly at the time the mediation release and settlement document is signed. Conversely, the defense lawyer should push for as broad a release and indemnity as possible, so that his or her client will not have to revisit the alleged errors and omissions in the event of a future personal injury claim—especially insofar as the Plaintiff is receiving consideration to correct the alleged errors.

Indemnity clauses are shrouded in mystery, as this is a complex area of Texas law. Even seasoned practitioners can mistake the prohibition against indemnities for a party's own negligence as they relate to past or future acts. In most instances in Texas law, an indemnity agreement signed in a contract before work is begun that releases the indemnified party for its own acts of negligence, is subject to very strict requirements. The agreement must be in writing, and the party's intent to be released or indemnified for its own negligence should be clear and unambiguous. *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508 (Tex. 1993).

Additionally, the clause must be "conspicuous" as defined under the Uniform Commercial Code (bold or different color print, larger font, all capitals, etc.). *Dresser*, 853 S.W.2d at 508-11; (Tex. Bus. & Comm. Code §1.201) (10). Typically, this arises in the instance, as previously mentioned, of a contract negotiated prior to the commencement of work or prior to the occurrence of the claim that gave rise to the allegations of negligence. However, these distinctions are easily confused. It is easy to contemplate how an attorney, as a negotiation strategy, would not make an objection to a clause that releases a party for its own negligence, due to a belief that the clause is invalid. The result from such a strategy could be serious if, in fact, the clause later is determined to be valid.

In the case of a mediated settlement agreement, several public policy distinctions allow for the signing of a release that releases a party from all future claims, even those due to that party's own negligence. In reviewing an indemnity provision releasing all liability claims caused by a party's future negligence, the Texas Supreme Court has

determined that such extraordinary risk shifting must meet the fair notice requirements described above. However, where the acts that give rise to the allegations of negligence have occurred, the *Dresser* case does not apply. The Texas Supreme Court's holding in *Dresser* is explicitly limited to indemnity clauses in which one party exculpates itself from its own future negligence. *Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 387 (Tex. 1996). More simply put, the express negligence rule applies only to indemnifications against future acts of negligence, not past acts, *Transcontinental Gas Pipeline Corp. v. Texaco, Inc.*, 35 S.W.3d 658, 669 (Tex. App.—Houston, 2000, no pet. h.). (See also Tex. Civ. Prac. & Rem. Code, § 130.002, which only prohibits contractual indemnities and hold harmless agreements in favor of an architect or engineer “who is to perform work.”)

In summary, the attorney at a settlement conference cannot be focused only on the issues surrounding damages and allocation of liability in the lawsuit itself, but must be focused on the terms and conditions of the document that is being signed at the close of a successful mediation. The parties should not leave the settlement conference until the scope of claims being released and the scope of any indemnity for future claims related to that past act are clearly identified in the document that is being signed at that settlement conference.

### **Enforcement:**

It is a practical reality that at some point an intractable dispute will occur between the parties to a claim or lawsuit regarding the finalization of “formal” settlement documents, after mediation. This will lead to enforcement action. In this scenario, the parties have successfully (they thought) mediated a case, only to be unable to agree on more formal release and settlement terms. In another scenario, the plaintiff could refuse to enter a non-suit with prejudice, leading to the need for court intervention. A multitude of other likely scenarios, such as a failure of a defendant to perform remedial work contemplated at the mediation conference or the failure of the plaintiff to provide the contractual indemnity, could also result in the need for enforcement.

As previously mentioned, if the mediation settlement agreement referred to Rule 11 and §154, you are a step ahead. Section 154.071 of the Texas Civil Practice and Remedies Code, which falls under alternative dispute resolutions, states as follows:

- a. 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.
- b. The court, in its discretion, may incorporate the terms of the agreement in the courts final decree disposing of the case.
- c. The settlement agreement does not affect an outstanding court order unless the terms of the agreement are incorporated into a subsequent decree. Tex. Civ. Prac. & Rem. Code §154.041.

The procedure for enforcing a mediation settlement agreement is to move for summary judgment. *David v. Wickham*, 917 S.W.2d 414, 416 (Tex. App.—Houston, 1996, no writ).<sup>1</sup> (But see *Stevens v. Snyder*, 874 S.W.2d 241, 243 (Tex. App.—Dallas, 1994, writ denied.) “once a party accepts the agreement, enforcement is by suit upon the contract either for breach or for specific performance). A party who has reached a settlement agreement disposing of a dispute through alternative dispute resolution procedures may not unilaterally repudiate the agreement. *In the matter of Marriage of Ames*, 860 S.W.2d 590, 592 (Tex. App.—Amarillo, 1993, no writ). A party to a mediation settlement agreement may obtain a judgment by providing proper pleading and proof to support enforcement of that judgment, under contract law. *Stevens v. Snider*, 874 S.W.2d 241, 243 (Tex. App.—Dallas, 1994, writ denied). If the settlement document signed at mediation references §154 and disposes of the dispute, the fact that the parties failed to reach agreement on the terms and conditions of a more formal settlement agreement at a later date does not preclude entry of a final judgment by the court where the essential terms of the agreement are available. *Hardman v. Dault*, 2 S.W.3d 379, 380 (Tex. App.—San Antonio, 1999, no pet). Pursuant to § 154, the “consent” necessary for

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<sup>1</sup> Review the mediation settlement agreement carefully, to determine whether any conditions precedent, such as mediator intervention, are necessary prior to enforcement.

a enforcement or entry of a judgment need not be present at the time of the entry of that judgment, but must have been present only at the time the accord was reached. *In the matter of the marriage of Ames*, 860 S.W.2d at 592. Thus, a party seeking to enforce such an agreement may do so, even when the other party to the agreement repudiates that consent. *Stevens v. Snyder*, 874 S.W.2d 241, 243 (Tex. App.—Dallas, 1994, writ denied.) This is because the enforcement action is not to enforce an agreed judgment, but rather one enforcing a binding contact. *Padilla v. LaFrance*, 907 S.W. 2d 454, 461 (Tex. 1995).

### **Conclusion:**

As the practice shifts to mediation as the preferred method for claims resolution it is important to be well versed in the mechanics of settlement. Familiarity with all clauses in a negotiated release and settlement agreement and with the scope of the release is essential. Before going into mediation identify what your goals are so that the details do not get lost in the exhaustion at the end of mediation.

Finally, do not sign the agreement until you can answer all the questions raised by potential future issues, and have fully explained them to your client before they sign.