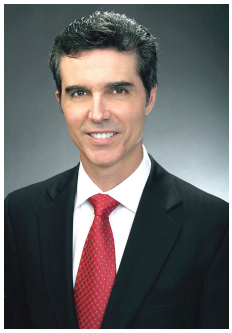

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Is It Safer In Vegas?

What happens in mediation stays in mediation, right? Yes, according to Evidence Code section 1119 and the California Supreme Court. However, a United States District Judge recently held that mediation statements were admissible at trial to allow an insurance company to present a defense to a bad faith claim. (*Milhouse v. Travelers Commercial Ins. Co. (C.D.Cal. 2013)* 982 F.Supp.2d 1088.)

Background: Homeowners lost their entire home in a tragic wildfire. Attempts to settle the claim at mediation were unsuccessful. A two-week trial followed, where the homeowners argued that Travelers' "unreasonable refusal to settle the claim was bad faith." Both sides presented evidence of statements made before, during, and after the mediation.

Travelers initially thought they were only $500,000 apart, and offered a "couple hundred thousand dollars" to settle the claim. However, at the mediation, the homeowners made a $7.0 million demand and asked for nearly $1.0 million of attorney's fees, though their attorney had only worked on the case for a few weeks. Homeowners later insisted that Travelers commit to paying in a range between $1 million and $5 million. Following the mediation, and throughout the trial, the parties remained several millions of dollars apart.

The jury found no bad faith, determining that homeowners had contributed to delay in the adjustment process. It awarded damages for breach of contract, which the court reduced to less than $1.1 million. Post-trial, homeowners sought a new trial for bad faith, and argued that California's mediation privilege barred admission of the mediation statements.

The court disagreed, finding that homeowners had waived their right to claim any privilege. The court also found that the jury needed to hear all about what happened during and after the mediation so it could determine whether Travelers did in fact act unreasonably, maliciously, fraudulently, or oppressively by refusing to settle the claim. "To exclude this crucial evidence would have denied Travelers' due process right to present a defense." The court concluded that "[i]t was not Travelers who acted unreasonably in settling the claim. Sadly, it was the [homeowners]. They demanded way too much money to settle their claim."

Critique: The ruling is counter to mediation confidentiality statutes and case law. This was a diversity action, so under Federal Rule of Evidence 501, "state law governs privilege." California's mediation privilege, California Evidence Code section 1119, subdivision (a) states that "No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation . . . is admissible . . . in any . . . civil action." The California Supreme Court, starting with *Foxgate Homeowners' Association, Inc. v. Bramalea California, Inc*. (2001) 26 Cal.4th 1, to *Cassel v. Superior Court* (2011) 51 Cal.4th 113, has clearly stated that there are no exceptions to that rule.

Aside: The California Supreme Court in *White v. Western Title Ins. Co.* (1985) 40 Cal.3d. 870 held that in a first party action against the insurer by its insured for breach of the covenant of good faith and fair dealing, evidence of settlement offers made by the insurer are admissible under California Evidence Code section 1152 and Code of Civil Procedure section 998, as long as the statements are offered to prove issues other than liability, such as the bad faith of the insurer to investigate and resolve the claim. After *White*, the California legislature amended Evidence Code section 1152, subdivision (b) to allow opposing or rebuttal evidence regarding such settlement offers to also be admitted. As a result, many insurers request a "White" waiver before discussing settlement so that offers cannot be used against them later at trial.

Status: Both parties in *Milhouse* have appealed to the Ninth Circuit Court of Appeals. Will the Court of Appeals address the conflict between California Evidence Code section 1119, applied through Federal Rule of Evidence 501, and Federal Rule of Evidence 408, which allows evidence of settlement negotiations to be admitted where offered not to prove liability, but to refute a claim of undue delay or bad faith? Was the reasoning of *White* correctly applied? Stay tuned.