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Whose Privilege Is It Anyway?

A mediator is hired to settle a pre-litigation antitrust dispute between Plaintiff (Sony) and Defendant (HannStar) with federal and state antitrust claims. The mediator sends a Mediator's Proposal by email to counsel and proposes a \$4.1 million settlement amount, which both sides accept via emails with the mediator. Thus, the "agreement" is the email exchange. When HannStar refused to pay, Sony sued in federal court for antitrust claims and breach of contract, based upon HannStar's refusal to honor the settlement. In a motion for summary judgment for the contract claim, Sony submitted the emails exchanged with the mediator to establish HannStar's breach of the mediated settlement.

Which privilege law governs whether the settlement email exchange during mediation is admissible into evidence, the California Evidence Code, or Federal Rule of Evidence 501? According to *In re: TFT-LCD (Flat Panel) Antitrust Litigation*, ___ F.3d ___ (9th Cir. 2016), 2016 WL 4547357, federal privilege law governs admissibility of the emails because the evidence relates to both the federal and state law claims.

The district court determined that the emails exchanged at mediation were protected by mediation confidentiality, unless the agreement complied with California Evidence Code section 1123(b). This statutory exception to mediation confidentiality provides that a written settlement agreement is admissible if it contains a statement that the agreement is "enforceable or binding or words to that effect." Here, the emails did not contain that required language, and the email exchange (and the resulting agreement) was deemed inadmissible.

The Court of Appeals reversed and remanded, finding that federal privilege law applied. The panel relied on *Wilcox v. Arpaio*, 753 F.3d 872, 876-877 (9th Cir. 2014) ("Where, as here, the same evidence relates to both federal and state law claims, we are not bound by Arizona law on privilege. Rather, federal privilege law governs"). The appellate court noted facts similar to *Wilcox*: "Sony initially filed suit under both state and federal law. The settlement negotiations concerned both issues; the evidence that Sony sought to admit "relates" to both federal and state law claims. At the time of mediation, both parties would have expected to litigate both federal and state law issues. HannStar conceded . . . that the settlement negotiations related to all claims, both federal and state."

Sony ultimately dismissed the federal law claims, and only state law claims remained when Sony sought to admit evidence of the email exchange. However, the Court of Appeals found that dismissal of the federal claims did not govern whether the evidence related to federal law: "Because, here, at the time the parties engaged in mediation, their negotiations concerned (and the mediated settlement settled) both federal and state law claims, the federal law of privilege applies. Accordingly, the district court erred in applying California privilege law to resolve this dispute."