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Be wary of using boilerplate provisions

By Mitchell A. Jacobs and Navid Moshtael

You recently advised your family law client to execute a stipulated judgment that contains a boilerplate waiver of all claims under Civil Code Section 1542 and a prevailing party attorney fee provision. Did you advise your client that these two provisions could result in the client not recovering statutory attorney fees in the event of future litigation between the parties?

In re the Marriage of Guilardi addresses this issue. Here, the husband and wife separated after a long-term marriage and then executed a marital settlement agreement that was incorporated into a judgment. The agreement contained a boilerplate waiver of all claims under Civil Code Section 1542 and a prevailing party attorney fee provision.

After the agreement was signed, the wife moved to set it aside, citing fraud, mistake, duress, perjury, and noncompliance with Family Code Section 1100. The trial court denied the wife's motion, holding that the agreement was entered into knowingly and willingly; that she knew she had the right to consult counsel but chose not to exercise it; that she had not met her burden of proving fraud, duress or mistake; and that she had intentionally destroyed the parties' premarital agreement.

The wife then filed a motion for attorney fees, relying in part on Family Code Sections 2030 and 2032, which provides a family law court the authority to award needs-based attorney fees determined by the ability of each party to pay, the relative financial needs of each party and the relative disparity of access to funds. She asked that her husband be ordered to pay the fees for her unsuccessful motion to set aside the marital settlement agreement. The husband moved to dismiss the fee request, arguing that he was the prevailing party on her set aside motion and that the prevailing party fee provision in the agreement precluded her request.

The trial court denied the wife's request for fees, finding that while the marital settlement agreement did not contain an express waiver of fees, its broad language (knowing waiver of "any and all past, present, and future claims") conveyed an implicit waiver of any claims other than those available to the prevailing party in the proceeding, including but not limited to, a future claim for needs-based fees. The court noted that the agreement did not have to outline every single right being waived. It also determined that even if the agreement did not preclude a claim for needs-based fees, it was "not just to award attorney's fees to wife where she unsuccessfully litigated an action to set aside the [agreement], and was found to have willfully destroyed the pre-marital agreement."

The wife appealed to the 6th District Court of Appeal, which upheld the trial court's decision. On the issue of whether the waiver of all claims under Civil Code Section 1542 and the prevailing party attorney fees provision resulted in an implicit waiver of future needs-based attorney fees, the 6th District agreed with the trial court that relinquishing "any and all past, present, and future claims" broadly encompasses claims either party might bring against each other over the agreement.

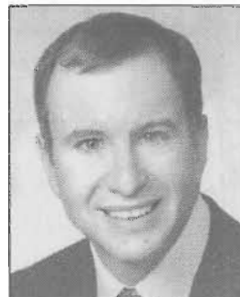
The appellate court did not address the issue of whether unsuccessful litigation of a motion to set aside and willful misconduct is a basis for the trial court to deny needs-based fees (assuming there is no waiver of needs-based fees in the marital settlement agreement), since it had already determined that the agreement resulted in a waiver by the wife of her fees.

The *Guilardi* case is important to consider when drafting a marital settlement agreement. Based on the appellate court's opinion, a boilerplate waiver of all claims under Civil Code Section 1542 alone can result in a waiver of "any and all past, present, and future claims" including but not limited to, an implicit waiver of needs-based attorney fees under Family Code Sections 2030 and 2032. And, according to the appellate court, a boilerplate prevailing party attorney fee provision alone can result in your client being barred from recovering attorney fees in connection with your client's unsuccessful bid to set aside the agreement.

If a boilerplate Civil Code Section 1542 waiver must be placed into the marital settlement agreement, and if you wish certain rights to be waived, specifically include an exhaustive list of the rights being waived.

So be wary of using boilerplate provisions. If a boilerplate Civil Code Section 1542 waiver must be placed into the marital settlement agreement, and if you wish certain rights to be waived, specifically include an exhaustive list of the rights being waived. Conversely, if you wish to preserve certain rights, specifically include the rights that are not being waived. Likewise, if a boilerplate prevailing party attorney fee provision must be placed into the agreement, consider exempting needs-based attorney fees from the provision.

Additionally, the impact of the *Guilardi* case extends to filing, or deciding whether to file, a motion to set aside a marital settlement agreement that contains a prevailing party attorney fee provision. If you intend to file such a motion, consider first filing a separate application seeking attorney fees in connection with the motion. Or in the alternative, file the motion to set aside and include a request for attorney fees within the motion, but have the issue of fees heard before the court rules on the set aside motion. In *Guilardi*, assuming the agreement had not been interpreted to include a waiver of fees, the wife may have succeeded on her fee request if she had requested the court to hear that issue before ruling on the set aside motion (thus determining "prevailing" party).



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