



Preserving your client's right to enforce the settlement agreement

Counsel should always strive to ensure continuing jurisdiction to enforce the settlement remains vested with the trial court

By ERNEST A. LONG

The opposing party is threatening to ignore your settlement agreement. Payment is delayed or withheld for reasons that lead you to suspicion and doubt. After working for hours in that grinding mediation, imagine explaining to your client why the deal you both worked so hard to achieve is unenforceable despite the CCP section 664.6 language in your settlement agreement. Two recent appellate decisions highlight the potential danger awaiting counsel attempting to enforce written settlement agreements through law and motion.

All settlement agreements are contracts by nature, formed when two or

more parties reach mutual consent upon acceptable terms. When the parties all agree upon the same thing in the same sense, the law will find they have created a binding agreement. As long as the offered proposal is sufficiently definite, or calls for definite terms upon acceptance, the contract can be described as reasonably certain. When there is a basis for determining the existence of a breach and for giving an appropriate remedy, a contract is said to exist.

A settlement agreement will typically describe the amount to be paid, by whom and to whom. The recital will note the payment is in exchange for a release and request for dismissal of the suit, as well as the extinguishment of all claims. Cross-

complaints are usually included in the dismissal, as well. An indication that each side is bearing its own costs and fees is typically included. The time for payment may be noted. To the extent any liens or obligations have arisen as a result of the underlying subject of the lawsuit, the party receiving payment will usually note it is responsible and agrees to hold the settling party harmless upon payment.

The agreement may recite specific requirements particular to the case, such as confidentiality, non-disparagement, or any taxation issues related to the payment. Penalties for violation of the agreement such as a confidentiality clause, may be spelled out with reference to liquidated damages or other punishment,



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including attorney fees. Importantly, the parties should always include a reference to Code of Civil Procedure 664.6, allowing for enforcement of the settlement in the event one side fails to abide by the terms.

Enforcement language is necessary, regardless of the relationship of the parties. Just because litigants sign a settlement agreement doesn't mean they will live up to the terms. It is essential that the parties and counsel retain a legal basis upon which to act in the event of default or other failure by one party to a settlement. Provided that the parties themselves directly participate in the settlement and stipulate in writing or orally before the court to the settlement terms, the agreement will be subject to enforcement. The California Supreme Court has noted that the writing and party signature requirements to support the summary nature of the section 664.6 procedure minimize the possibility of conflicting interpretations of the settlement. (*Levy v. Superior Court* (1995) 10 Cal.4th 578.)

Notably, an insured defendant does not need to sign the agreement, as long as the insurance representative does sign. As the Supreme Court stated in *Commercial Union Assurance Companies v. Safeway Stores, Inc.* (1980) 26 Cal.3d 912, 919, "...where the insured is fully covered by primary insurance, the primary insurer is entitled to take control of the settlement negotiations and the insured is precluded from interfering therewith." In the event a client representative appears at the mediation by phone, steps should be taken to secure a scanned signature page from that individual to conclude the agreement.

Inevitably, enforcement efforts don't always proceed smoothly. In late 2017, the First District Court of Appeal recited the section 664.6 language, which includes the words: "If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of

the settlement." (*Sayta v. Chu* (2017) 17 Cal.App.5th 960.) The parties in *Sayta*, by the terms of their written and signed settlement agreement, indicated their intention and agreement that the trial court retain jurisdiction to enforce the agreement in the event any party failed to comply with the terms. Unfortunately, neither counsel nor the parties actually presented such a request to the superior court, merely noting their intentions in the written agreement. Pursuant to their request, the case was later voluntarily dismissed.

The enforcement problem arose when *Sayta*, the tenant, discovered post-settlement, that *Chu*, the landlord, had allowed information regarding the settlement and the underlying claims regarding *Sayta's* tenancy to enter the public record such that *Sayta's* status as a renter was damaged. Such disclosure was outside the scope of the deal the parties had memorialized, and *Sayta* moved to enforce the settlement agreement, which included a liquidated damages provision.

By the time of counsel's motion to enforce, the matter was no longer a "pending action." As such, the trial court had lost subject matter jurisdiction, as it so ruled. Later, on appeal, the First District stated that in order to properly ask the court to retain jurisdiction, the request must be made 1) during the pendency of the case, not after the case has been dismissed in its entirety, 2) by the parties themselves, and 3) either in a writing signed by the parties or orally before the court. (*Wackeen v. Malis* (2002) 97 Cal.App.4th 429.)

Settlement language in the written agreement purporting to vest the trial court with retained jurisdiction after the dismissal is meaningless. Jurisdiction cannot be conferred by consent, waiver or estoppel. Although section 664.6 provides a valuable tool in aid of enforcing settlement, "... it does not float in the ether to be drawn upon whenever a party seeks enforcement." (*Hagan Engineering, Inc. v. Mills* (2003) 115 Cal.App.4th

1004.) The court loses jurisdiction when the matter is voluntarily dismissed.

The point was recently emphasized again. In March of this year, the Second District Court of Appeal published *Mesa RHF Partners, L.P. v. City of Los Angeles* (2019) 33 Cal.App.5th 913. In that case, the City had previously created a business improvement district which resulted in various assessments to plaintiff developers. The agreement provided that the City of Los Angeles would make plaintiffs whole for any such assessments against their properties so long as they remained the owners. When the business districts expired by operation of statute, the City informed plaintiffs it would no longer be required to make reimbursement payments to them. Counsel for the developers then sought to enforce their previous settlement agreement pursuant to Code of Civil Procedure section 664.6.

On plaintiffs' motion to enforce, the Second District Court of Appeal recited the language of *Wackeen v. Malis*, setting forth the requirements post settlement for the trial court to retain jurisdiction for enforcement purposes. For 664.6 jurisdiction, the request must 1) take place during the pendency of the action, 2) be made by the parties, 3) in a writing signed by the parties or orally before the court. The DCA clarified that the written request may not be made by the parties' attorneys of record, their spouses, or other such agents; it must be made by the parties themselves. Typically, this is accomplished by stipulation or by including the language in the settlement agreement which is filed with the court along with a request by counsel referring to the parties' application for retention of subject matter jurisdiction.

Despite the parties' arguments and an "impassioned plea," the Justices indicated the parties:

...could have easily invoked section 664.6 by filing a stipulation and proposed order either attaching a copy of the settlement agreement and requesting that the trial court retain jurisdiction



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under section 664.6 or a stipulation and proposed order signed by the parties noting the settlement and requesting that the trial court retain jurisdiction under section 664.6.

The process need not be complex.

(Mesa RHF Partners, L.P. v. City of Los Angeles (2019) 33 Cal.App.5th 913.)

Plaintiffs in *Mesa* were unable to secure the enforcement they sought because the trial court had never been asked to retain jurisdiction over the settlement, despite the defendants' agreement that both sides would have appropriate rights and remedies under 664.6.

A motion requesting a court order of enforcement is rarely required to ensure compliance with a settlement agreement. When it is necessary, counsel must have taken the necessary steps to preserve jurisdiction. Whether by informal settlement, mediated agreement or formal resolution during a settlement conference or trial, there will always be a written memorialization of the deal. The parties will be required to sign that agreement to conclude the settlement. The Appellate Courts of California make it clear that this is the ideal time to also create a stipulated request to preserve jurisdiction pending compliance with the settlement agreement.

The parties can agree that the settlement agreement itself, recording their

concurrence that the trial court will retain jurisdiction to enforce, is admissible in court during an enforcement proceeding. Or, they have the option of preparing a short, separate agreement specifically to provide for preservation of jurisdiction. As long as the document is made 1) during the pendency of the case, not after the case has been dismissed in its entirety, 2) by the parties themselves, and 3) either in a writing signed by the parties or orally before the court, and submitted to the court, subject matter jurisdiction will be retained and the court will have the power to rule on a later motion to enforce the agreement.

The Justices in *Mesa RHF Partners* made it clear that a different remedy to enforce the settlement agreement might be present in the form of a new lawsuit for breach of the settlement agreement, but the obvious and fairly protracted timetable for bringing such an action to successful conclusion relegates that option to a poor second choice. Taking the time to secure jurisdiction at the time the parties sign the settlement agreement will assure a smooth step to enforce if the case requires.

Whether drafting the agreement yourself, arriving at a bargain in mediation with the agreement drafted by the mediator, or settling a case in court on the record, counsel should always strive to

ensure continuing jurisdiction to enforce the settlement remains vested with the trial court. The best practice is a direct request to the court asking that it retain jurisdiction to enforce, accompanied by a properly executed stipulation or agreement to that effect, signed by the parties, made well before counsel files a dismissal. Only then will you have the assurance that your hard-fought deal will survive any misbehavior or malfeasance, preserving your agreement until all agreed settlement obligations are discharged.

Ernie Long has over 30 years of experience in alternative dispute resolution, serving as a mediator, arbitrator, and settlement conference judge pro tem in most California venues. In the last 12 years he has mediated well over 2,000 disputes involving a broad range of civil litigation, including personal injury and wrongful death, business litigation, professional malpractice, probate, real estate, employment disputes, property damage, habitability, farming and ranching claims, partnership disputes, and public entity liability. He has been A-V Rated by Martindale-Hubbell since 2003, and is a member of the Sacramento Valley Chapter of ABOTA. ErnestALongADR.com.



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