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REPORT

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“IT’S A WRAP”: USING CODE OF CIVIL PROCEDURE SECTION 664.6 TO BOLSTER YOUR SETTLEMENT

“Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.”

— Abraham Lincoln



Philip Cook

Your client has agreed to compromise and settle the case. Given the effort and expense required to litigate to a point where settlement is reached, the last thing your client wants to hear is that more litigation will be required if the other party fails to perform their side of the settlement

agreement—whether you amend your pleadings to add a breach of contract cause of action or file a new lawsuit. California Code of Civil Procedure section 664.6 provides an alternative, summary procedure to enforce the settlement agreement and have judgment entered on its terms. (See *Hernandez v. Board of Education* (2004) 126 Cal.App.4th 1161, 1175-1176.) Section 664.6 provides as follows:

If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. 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.

A court considering a motion under section 664.6 must determine whether the parties have entered into a valid and binding settlement. (*Hines v. Lukes* (2008) 167 Cal. App.4th 1174, 1182.) However, “[a]lthough a judge hearing a section 664.6 motion may receive evidence, determine disputed facts, and enter the terms of a settlement agreement as a judgment [citations], nothing in section 664.6 authorizes a judge to *create* the material terms of a settlement, as opposed to deciding what terms *the parties themselves* have previously agreed upon.” (*Machado v. Myers* (2019) 39 Cal. App.5th 779, 790, original italics.)

What is required for enforcement under section 664.6?

Although courts deciding motions to enforce settlements under section 664.6 initially focused on the strong public policy in favor of settling litigation and liberal enforcement of settlement agreements (e.g., *Casa de Valley View Owner’s Assn. v. Stevenson* (1985) 167 Cal.App.3d 1182, 1190 [relying upon the “public policy of this state” which “supports pretrial settlement of lawsuits and enforcement of judicially supervised settlements” to affirm judgment entered pursuant to section 664.6]), more recent cases

emphasize the importance of compliance with the statute's requirements and whether settlement agreements are binding and enforceable. A few of the more important requirements, with some practical suggestions for counsel, are discussed below.

- ***For now, the parties themselves must sign the settlement agreement.*** In *Levy v. Superior Court* (1995) 10 Cal.4th 578, the California Supreme Court considered whether a court could enter judgment under section 664.6 where a written stipulation to settle had been signed by a litigant's attorney but not by the litigant personally. Because section 664.6 expressly "requires the 'parties' to stipulate in writing . . . that they have settled the case[.]" the Court concluded that "the term 'parties' as used in section 664.6 . . . means the litigants themselves, and does not include their attorneys of record." (*Id.* at pp. 585-586.) Traditional agency analysis has been rejected as a means of satisfying the party signature requirement of section 664.6. (See *Gauss v. GAF Corp.* (2002) 103 Cal.App.4th 1110, 1119; *Murphy v. Padilla* (1996) 42 Cal.App.4th 707, 716.)

However, the Legislature recently changed that. On September 29, 2020, Governor Newsom signed Assembly Bill No. 2723 (2019-2020 Reg. Sess.) § 1, amending section 664.6 to provide that a written settlement agreement may also be signed by an attorney who represents a party, or, if the party is an insurer, by an agent who is authorized in writing by the insurer to sign on the insurer's behalf. The amendment takes effect on January 1, 2021; until then, for a written settlement agreement to be enforceable under section 664.6, the parties must sign it.

- ***A settlement must contain all material terms, even if you contemplate a more formal settlement agreement.*** As a general proposition, a settlement agreement, like any other contract, cannot be enforced if the parties fail to agree on a material term or if a material term is not reasonably certain. (See Civ. Code, § 3390, subd. (e).) What constitutes a "material term" of any specific settlement agreement will vary from case to case. (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 813, citing 1 Williston on Contracts (4th ed. 1990) § 4:28, pp. 602-605 [analyzing circumstances in which "minor matters" in elaborate contracts are left for future agreement and analyzing requirements for inclusion

of all material terms in order to give rise to an enforceable contract].) You should consider preparing a draft agreement that includes all material settlement terms and bringing it to the mediation.

Even where the parties contemplate and express an intent to enter into a more formal agreement to document their settlement, an initial settlement agreement or term sheet can itself be the basis of a motion to enter judgment enforcing the settlement under Code of Civil Procedure section 664.6, as long as it: (i) reflects an intent to be bound, and (ii) includes all material terms of the settlement. (See, e.g., *Blix Street Records, Inc. v. Cassidy* (2010) 191 Cal.App.4th 39, 48 ["When parties intend that an agreement be binding, the fact that a more formal agreement must be prepared and executed does not alter the validity of the agreement"].) And to avoid having an agreement deemed unenforceable because of mediation confidentiality imposed by Evidence Code section 1119 (e.g., *Simmons v. Ghaderi* (2008) 44 Cal.4th 570, 578-582), you should include a statement like the following in order to have the agreement qualify for a statutory exception to confidentiality (Evid. Code, § 1123, subs. (a) & (b)): "This agreement is intended by the parties to be admissible and subject to disclosure, and to be binding and enforceable."

Where future performance is contemplated, how do you ensure the trial court will keep jurisdiction to enforce the settlement agreement under section 664.6?

Where a settlement agreement states that it may be enforced under section 664.6, the court may retain jurisdiction and, in the event of a breach, enforce the agreement by entering it as a judgment. However, as the court in *Mesa RHF Partners, L.P. v. City of Los Angeles* (2019) 33 Cal.App.5th 913, 917 (*Mesa*) makes clear, the statute includes certain requirements you must follow if you want the court to retain jurisdiction.

- ***The parties must stipulate that the court will retain jurisdiction before dismissal.*** In *Sayta v. Chu* (2017) 17 Cal.App.5th 960, 963, the parties resolved their dispute in a confidential settlement agreement, and the litigation was dismissed on that basis. Ten months later, after one of the parties breached the agreement, the nonbreaching party filed a motion to enforce the agreement under section 664.6.

(*Ibid.*) On appeal from the trial court’s ruling on the motion, the Court of Appeal noted that although the settlement expressly provided that the parties would ask the trial court to retain jurisdiction to enforce the settlement under section 664.6, neither party did so. (*Id.* at pp. 964-965.) As a result, “the court lost subject matter jurisdiction when the parties filed a voluntary dismissal of the entire cause. Since subject matter jurisdiction cannot be conferred by consent, waiver, or estoppel, the court cannot ‘retain’ jurisdiction it has lost.” (*Id.* at p. 966, quoting *Viejo Bancorp, Inc. v. Wood* (1989) 217 Cal.App.3d 200, 206-207.)

- **You must follow the statute.** In *Mesa*, the parties agreed in their settlements that the “‘Court shall retain jurisdiction pursuant to Code of Civil Procedure section 664.6 to enforce the terms of the Settlement Agreement.’” (*Mesa, supra*, 33 Cal.App.5th at pp. 915-916.) Plaintiffs’ counsel filed requests for dismissal and inserted in the dismissals that the “‘Court shall retain jurisdiction to enforce settlement per C.C.P. § 664.6.’” (*Id.* at p. 916.) The clerk entered the dismissals “‘as requested.’” (*Ibid.*)

When the plaintiffs tried to enforce the settlements by filing motions under section 664.6 years later, the Court of Appeal held that the trial court lost jurisdiction to enforce the settlements because *the parties* did not sign the requests for retention of jurisdiction, as required by section 664.6. Where parties strictly comply with section 664.6, the court can retain jurisdiction to enforce a settlement, even after an action has been dismissed. (*Wackeen v. Malis* (2002) 97 Cal.App.4th 429, 439 [“We construe the second sentence of section 664.6 to mean, and we so hold, that even though a settlement may call for a case to be dismissed, or the plaintiff may dismiss the suit of its own accord, the court may nevertheless retain jurisdiction to enforce the terms of the settlement, until such time as all of its terms have been performed by the parties, *if the parties have requested this specific retention of jurisdiction,*” original italics].)

The *Mesa* court offered two ways that parties could invoke section 664.6: (i) where the settlement agreement is not confidential, file a stipulation and proposed order attaching a copy of the settlement agreement (which presumably is *signed by the parties*), requesting that the trial

court retain jurisdiction under section 664.6; or (ii) where the settlement agreement is confidential (or you would rather not file it publicly), file a stipulation and proposed order *signed by the parties* noting the settlement and requesting that the trial court retain jurisdiction under section 664.6. (See *Mesa, supra*, 33 Cal.App.5th at p. 918.) Another option might simply be to have all of the parties sign the Request for Dismissal form, requesting that the trial court retain jurisdiction under section 664.6.

Assembly Bill No. 2723 does not appear to change the *Mesa* rule, as the statute allows continuing jurisdiction to enforce the settlement where “requested by the parties” while the statutory amendment adding subdivisions (b) through (d) to section 664.6 appear to affect only the statute’s requirement of “a writing signed by the parties.” Without case law clarifying this issue, the safest approach will be to continue to follow *Mesa*.

A Few Practical Suggestions

When settling pending litigation, do not leave your client exposed to further litigation in the event another party fails to perform its obligations under a settlement agreement. **First**, include an enforcement clause allowing access to section 664.6’s summary procedure for entry of judgment on the terms of the agreement if it is breached. **Second**, make sure all of the parties to the settlement sign the agreement, including officers for corporate litigants. **Third**, expressly state in the settlement agreement the parties’ intent that it be admissible and subject to disclosure, as well as binding and enforceable, even where you are contemplating a more formal agreement. **Fourth**, make sure the settlement agreement includes all necessary material terms. **Finally**, if future performance is to take place after dismissal, ensure that the court retains jurisdiction to supervise such performance by submitting a request in writing to the court before dismissal, signed by all of the settling parties.

Philip Cook is a principal at The Cook Law Firm and Cook Mediation in Los Angeles. He is a Past President of the Los Angeles Chapter of the ABTL (2012-2013).