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Enforceable Settlement Agreements

The settlement agreement is often one of the most important documents drafted in the litigation context

By STEVEN G. MEHTA

The specific terms of settlement agreements are often overlooked by attorneys. In fact, on many occasions, the attorneys will take it for granted that the settlement terms will be appropriate. Unfortunately, for many, those overlooked terms could be the ticket to a potential malpractice suit if the settlement falls apart. Making sure that the settlement sticks is just as important as making sure that the settlement occurs.

The concept counsel should understand about settlement agreements is that they are, similar to any other contract, subject to the law of contracts. In addition, regardless of whether the settlement agreement is oral or in writing, a court will not enforce a settlement agreement provision that is illegal, contrary to public policy, or unjust. So all settlement documents must be interpreted in the same manner as any other contract would be interpreted. And a settlement agreement does not need to be in writing to be enforceable. An oral settlement agreement entered into by the parties can be enforceable so long as it does not violate the statute of frauds. This oral agreement would be interpreted in the same manner as any other contract. The problem, however, is that the agreement would not be enforceable under summary and expedited procedures under Code of Civil Procedure §664.6.

Most parties prefer to enforce the terms of the settlement pursuant to section 664.6, so counsel needs to be aware of what is necessary to ensure a settlement agreement is enforceable under that provision. Code of Civil Procedure §664.6 provides that “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,” they can summarily seek to enter a judgment on the terms of the settlement.

To be enforceable under Code of Civil Procedure §664.6, the material terms of the settlement must be explicitly defined in the agreement. A settlement agreement, like any other contract, is unenforceable if the parties fail to agree on a material term or if a material term is not reasonably certain. The fact that the parties leave unresolved terms for future agreement is not invariably fatal, though, because a settlement may be

enforceable if the parties agree that the remaining issues will be decided by arbitration. But where the parties left the terms of the payment in dispute and agreed to a vague term of “binding mediation” as it related to the terms of payment, the courts have held that the stipulation for settlement was unenforceable because a material term was unclear. To qualify under section 664.6, the oral agreement must be spoken out loud; a nod of the head by a party is insufficient to qualify as an enforceable oral agreement under section 664.6. And an “oral agreement” must be placed on the record before the court. It is not sufficient to have the oral agreement placed before a court reporter at deposition. The oral agreement by the parties must be placed on the record during a judicially supervised hearing. An agreement entered into before an arbitrator satisfies the requirement of being a judicially supervised hearing. The same holds true for a temporary or private judge.

As to judicially appointed referees, the issue of whether the stipulation is enforceable depends on the type of referee appointment. If the referee is appointed under Code of Civil Procedure §638(a), an oral stipulation on the record in front of this type of referee is enforceable under Code of Civil Procedure §664.6. However, if the referee is appointed under Code of Civil Procedure §638(b), and is not given the ability to make a final determination, then an oral stipulation on the record in front of such referee is not enforceable under Code of Civil Procedure §664.6. Finally, for oral agreements before the court, the supervising judicial officer must have questioned the parties regarding their understanding of the material terms, and the parties must expressly acknowledge their understanding of and agreement to be bound by those terms.

On some occasions, the parties enter into an oral agreement before the court and indicate that they will also execute the terms in writing. Once the parties have orally agreed to the terms, a party may not escape its obligations by refusing to sign a written agreement that conforms to the oral terms. The oral settlement, like any agreement, imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement. To meet the requirements of summary enforcement, an out-of-court written settlement agreement must be signed by the parties themselves and not just their attorneys. In addition, all of the parties to the settlement agreement must sign the agreement and not just the party against whom enforcement is sought. But when the defendant is insured under a policy that allows the insurance company to settle without the defendant’s consent, the defendant’s signature is not necessary.

Nevertheless, counsel should have the insurance company representative’s signature. The reason for this is the rationale as stated in *Levy v. Superior Court*: Namely, the party that is being bound by the settlement agreement must be the one that signed the document. Therefore, since the insurance company is the one being bound by the settlement agreement, the adjustor’s signature or the insurance company representative’s signature is necessary.

Many settlement agreements provide that the action will be dismissed with prejudice. Counsel should note that for purposes of summary enforcement pursuant to section 664.6, this type of dismissal may cause problems with the court’s ability to retain subject matter jurisdiction. Once a party has dismissed its action, the dismissal terminates the action. A

superior court thereafter has no subject matter jurisdiction to grant relief under Code of Civil Procedure §664.6 other than awarding costs and fees as appropriate. Even if the parties insert language in the settlement agreement that purports to confer jurisdiction on the court, such language is a nullity, because subject matter jurisdiction is not something that can be conferred by stipulation or agreement of the parties.

As a result, a motion to enforce a settlement pursuant to section 664.6 is not allowed when the parties have dismissed the lawsuit. One alternative that may be available to the parties if the action is dismissed is to first seek a motion to set aside the dismissal pursuant to Code of Civil Procedure §473, and then seek to enforce under Code of Civil Procedure §664.6. Another option would be to make sure that the case has not been dismissed until all of the terms of the agreement are met.

It is also important to note that the courts have not decided whether section 664.6 applies to settlements that become effective during the pendency of an appeal. Under that circumstance, the courts have indicated that if a case is settled while an appeal is pending, the judgment that is the basis of the appeal is vacated, and the settlement agreement supersedes the judgment. Any dispute regarding the settlement agreement must be enforced by means outside of Code of Civil Procedure §664.6.

While section 664.6 is not the exclusive means of enforcing a settlement agreement, it is the preferred means to enforce a settlement once the foregoing prerequisites are satisfied. Even when the summary procedures of section 664.6 are not available, a settlement agreement might be enforceable by summary judgment, a suit for breach of contract or a suit in equity. It may even be raised as an affirmative defense.

The fact that many cases are being settled at mediation also complicates the issue of whether a settlement agreement is enforceable. The reason for this complication is the issue of confidentiality, which is integral to the mediation process and the documents associated with it. Indeed, the confidentiality aspect of the mediation process can create a major obstacle to enforcing the settlement agreement because the settlement agreement may not be admissible to prove the settlement. Evidence Code §1119 expressly provides that subject to exceptions “all communications, negotiations or settlement discussions by and between participants in the course of the mediation or mediation consultation shall remain confidential.” Often, this Evidence Code prohibition is called the “mediation privilege.”

However, Evidence Code §1123 provides exceptions to the confidentiality of mediation. A written settlement agreement prepared in the course of, during or pursuant to mediation is not made inadmissible if the agreement is signed by the settling parties and any of the following conditions are satisfied:

- The agreement provides that it is admissible or subject to disclosure or words to that effect;
- The agreement provides that it is enforceable or binding or words to that effect;

- All parties to the agreement expressly agree in writing or orally in accordance with Evidence Code §1118 to the disclosure of the settlement agreement; or

- That the agreement is used to show fraud, duress or illegality that is relevant to the issue in dispute.

Oral agreements arising from mediation are admissible in court under certain conditions. The following conditions must be met to have an enforceable oral agreement in mediation:

- the oral agreement has to be recorded by a court reporter, tape recorder or other reliable means of sound recording.

- the terms of the oral agreement must be recited on the record in the presence of the parties and the mediator, and the parties must express on the record that they agree to the terms recited.

- the parties to the oral agreement must expressly state on the record that the agreement is enforceable or binding or words to that effect.

- the recording must be reduced to writing and the writing must be signed by the parties within 72 hours after it is recorded.

If the oral agreement does not meet all the requirements of Evidence Code §1118, it can still be admissible and subject to disclosure if it has been recorded, the parties have stated their agreement on the record, the agreement is reduced to writing within 72 hours and the parties expressly agree in another writing or oral agreement in accordance with Evidence Code §1118 to disclosure of the agreement.

Counsel should be cognizant of other issues regarding settlement agreements arising from mediation as well. For example, where the parties have signed two different versions of the document and counterparts, the courts have held that the contract was uncertain because the parties could not agree upon which term of payment was the appropriate term.

Additionally, the issue of who is authorized to waive the confidentiality of the mediation privilege is a procedural one. Signature by counsel waiving the mediation privilege is enough to comply with the requirement of Code of Civil Procedure §1123 for the admissibility of a mediation agreement. *Stewart v. Preston Pipeline* illustrates the subtle difference between settlement enforcement under Code of Civil Procedure §664.6 versus other procedures.

The plaintiff in *Stewart* was an injured motorist who attended a mediation. The plaintiff ultimately signed a document that indicated that the settlement agreement was intended to be enforceable. However, the defendant did not sign the settlement agreement itself,

which was signed only by counsel. Thereafter, the defendant sought to enforce the settlement by way of a motion for summary judgment.

Plaintiff contended that the agreement was not admissible because neither the defendant nor the insurer, as “settling parties,” had signed the settlement agreement. The plaintiff’s argument was based on the fact that the parties are required to sign the settlement agreement in order to be enforceable under Code of Civil Procedure §664.6.

The court held that the requirement of Evidence Code §1123 that the written settlement agreement be “signed by the settling parties” does not require that a waiver of mediation confidentiality “be signed by each of the parties litigant, so long as that written waiver is signed by each of the settling parties or their respective counsel.” The court further explained that waiving the mediation privilege was a procedural issue, not a substantive right, and that was something an attorney could do.

Additionally, plaintiff contended that the settlement was also not enforceable because both parties had not signed the agreement. The court held that the requirement of the party specifically signing the settlement agreement is only necessary for Code of Civil Procedure §664.6. The court further held that the settlement agreement could be enforced in alternative procedures to the expedited procedure of Code of Civil Procedure §664.6 such as by motion for summary judgment, a separate suit in equity or an amendment of the pleadings.

The court also explained that just because the party had not signed the settlement agreement did not mean that it was not an enforceable settlement document. The insurance company, which was not opposing the settlement, had authorized its attorney to sign a settlement agreement and therefore the settlement was enforceable. Counsel should note that had the insurer specifically signed the settlement agreement, and not just the attorney, then the summary procedures of section 664.6 would have been available as a method of enforcing the settlement.

How to make the agreement enforceable is a critical issue that all attorneys should know. The settlement agreement is often one of the most important documents drafted in the litigation context. This document governs the relationship of the parties for the future and closes a chapter in the litigation book. A well-drafted settlement agreement does not need to be long, complex or typed; it simply needs to make sure it addresses the material terms and ensures that the parties have agreed to those terms.

As a matter of practice, it is advisable to ensure that the settlement agreements meet the requirements of Code of Civil Procedure §664.6. This procedure is the most efficient means to enforce a settlement agreement. However, if the agreement’s terms do not meet the requirements of section 664.6, then counsel must understand what is necessary to ensure that the settlement will be enforceable through other means.

The most prudent route for counsel to take is to make sure that all parties sign the settlement agreement, that it provides for the material terms that are really at issue, and

that it states on its face that it is enforceable and admissible as evidence of the settlement.

■ *Steven G. Mehta is a full-time independent neutral who can be reached at 661/284-1818. Or visit stevemehta.com.*

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- 1.** An oral settlement agreement is not enforceable.
- 2.** A settlement agreement that fails to state all material terms will be enforceable if there is a provision in the settlement agreement for a binding mediation or binding arbitration of all the issues.
- 3.** An oral agreement in front of the court and before a court reporter cannot be made by a nod of the head by the party.
- 4.** If a party leaves ambiguity in the contract and sets forth that the disputes between the parties will be settled by arbitration, the settlement is enforceable.
- 5.** A settlement placed on the record before an arbitrator is enforceable for purposes of Code of Civil Procedure §664.6.
- 6.** A settlement agreement need be signed by only one of the parties to be enforceable under Code of Civil Procedure §664.6.
- 7.** The court can enforce a settlement pursuant to Code of Civil Procedure §664.6 if the parties state in the settlement agreement that the court will reserve jurisdiction.
- 8.** Evidence Code §1119 expressly provides that, subject to exceptions, “all communications, negotiations or settlement discussions by and between participants in the course of the mediation or mediation consultation shall remain confidential.”
- 9.** The only way a settlement agreement prepared in mediation is admissible is if it is signed by the settling parties and the agreement provides that it is admissible or subject to disclosure or words to that effect.
- 10.** Counsel cannot waive the mediation privilege.
- 11.** Where the parties sign two different versions of the settlement agreement, there is no enforceable settlement.
- 12.** Any settlement agreement signed by the parties at the mediation is enforceable regardless of the language on the settlement document.
- 13.** If the settlement agreement is not enforceable under Code of Civil Procedure §664.6, then it is not enforceable at all.
- 14.** The courts have not addressed what effect, if any, Code of Civil Procedure §664.6 has

on a settlement during the pendency of an appeal.

15. Oral agreements arising from mediation can be enforceable under some circumstances.

16. Parties in pre-litigation can still use Code of Civil Procedure §664.6 to enforce a settlement.

17. Parties in arbitration can use Code of Civil Procedure §664.6 to enforce a settlement.

18. If an insurance company represents a party that does not require consent of the insured to settle, then the insured does not need to sign a settlement agreement to be enforceable under Code of Civil Procedure §664.6.

19. If the parties enter an oral settlement agreement on the record before the judge who is the trial judge and the judge does not question the parties, the settlement is still enforceable under Code of Civil Procedure §664.6.

20. Once the parties have orally agreed to the terms, a party may not escape its obligations by refusing to sign a written agreement that conforms to the oral terms. The oral settlement, like any agreement, imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.

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