

# THE RECORDER

## Enforcing Settlement Agreements



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Most civil lawsuits settle before trial, resulting in a written settlement agreement typically involving the payment of a settlement sum. This piece of paper has little value to your clients, however, if there is no effective, streamlined procedure to enforce the settlement agreement after dismissal of the action.

Federal courts have a long history of exercising continuing oversight of complex matters, including settlement agreements. In federal court, settlement agreements that are not formal consent decrees continue to be enforceable after dismissal so long as a request to retain jurisdiction is made before dismissing the case.

California state courts, by contrast, did not often retain jurisdiction over settled cases. The master calendar system, which allocates judicial tasks to different departments rather than a single judge, is less amenable to the continuing oversight of settled cases than federal court, where one judge

oversees a case from start to finish. Also, federal courts are generally more comfortable with ongoing jurisdiction over cases since, much more than state court judges, their dockets feature institutional reform litigation and antitrust and securities claims, all of which are more likely to result in a post-judgment injunction.

California courts began changing their approach to assuring efficient enforcement of settlements in 1981, when the Legislature enacted California Code of Civil Procedure §664.6 to encourage settlements by creating a cost-effective remedy for failed settlement agreements. Prior to the enactment of §664.6, the predominant way to enforce a settlement was through filing a separate lawsuit alleging a breach of the settlement agreement. Alternatively, in pending litigation, a litigant could pursue a motion to amend the pleadings, which might be considered untimely, or a motion for summary judgment, which requires 75 days' notice, a separate statement of undisputed facts, and an extensive factual record. See Cal. Code Civ. Proc. §437c; Cal. Rules of Court, Rule 3.1350; see also *Levy v. Superior Court*, 10 Cal.4th 578 (1994). Lack of a simple way to enforce settlements discouraged parties from entering into settlements, requiring cases to be resolved through trial and straining scarce judicial resources.

Section 664.6 empowered courts to enter a judgment pursuant to a settlement even where its terms were in dispute. Because courts are able to make factual findings in

deciding §664.6 motions, the statute allows courts to enforce settlements even where there are material factual disputes that would defeat a motion for summary judgment. However, as originally enacted, whenever a settlement contemplated dismissal of the case, the only remedy for a breach was still to file a new lawsuit after the dismissal, as §664.6 motions could only be raised in "pending litigation." In 1993, the Legislature addressed this problem by amending §664.6 to permit the court, at the parties' request, to retain jurisdiction to enforce a settlement after dismissal.

Section 664.6 enables the court to enter a judgment pursuant to the terms of a settlement agreement on the motion of either party. However, the statute imposes several requirements that may prove to be a trap for the unwary.

For example, §664.6 does not apply unless every party knowingly and expressly agreed to the settlement's terms and asked the court to retain jurisdiction over the settlement's enforcement. Thus, the parties themselves, not their counsel or other agents, must stipulate to the settlement, either through a signed writing or orally on the record before the court. Before the case is dismissed, the parties themselves must also expressly and unambiguously ask the court to retain jurisdiction to enforce the settlement. Further, a §664.6 motion may only be raised in "pending litigation" or where the court has retained jurisdiction over the

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settlement's enforcement; a party may not bring a §664.6 motion in one lawsuit to enforce a settlement agreement reached in another.

To comply with §664.6, practitioners should take the following steps after reaching a settlement. First, always place a settlement on the record before the court or make sure that each party executes the written agreement. To ensure that even a confidential agreement can be admitted into evidence in the event of a breach, include provisions stating that the written settlement is "admissible or subject to disclosure" and "enforceable or binding or words to that effect." See Cal. Evid. Code §1123. In addition, the agreement should expressly request that the court retain jurisdiction over the parties to enforce the settlement, in clear and unambiguous language: "Pursuant to Code of Civil Procedure §664.6, the parties request and agree that the court shall retain jurisdiction over the parties to enforce this stipulated settlement until there is full performance of the terms herein." The stipulated settlement must be signed and dated by all the parties, not just by counsel.

Second, do not unconditionally dismiss the case using Judicial Council Form CM-200, as it does not allow the parties to request that the court retain jurisdiction under §664.6. Use one of two options instead. If performance of the settlement will require a period of time but you anticipate that it will be completed by a specific date, consider a conditional settlement under California Rules of Court, Rule 3.1385(c). Under this approach, the settlement agreement must condition dismissal on the satisfactory completion of terms that will not be performed within 45 days, and you must tell the court the specific date when the case will be dismissed. If

you do not dismiss the case within 45 days of that specified deadline, the court will automatically dismiss the case absent a showing of good cause. If a breach occurs before dismissal, the aggrieved party may bring a motion to enforce the settlement because the action is still pending, but not on the active docket.

However, a conditional settlement may not be an effective option where performance of the terms of the settlement will not necessarily be completed by a specific date, such as where a settlement agreement requires that a trade secret be kept confidential or prohibits disparaging remarks. Further, a conditional settlement puts the onus on the party seeking enforcement of the settlement agreement to obtain judicial relief before the deadline, making it more difficult to resolve disagreements over compliance informally.

A better alternative is to prepare a stipulation and proposed order for dismissal to file with the court, signed by all the parties, that expressly requests that the court retain jurisdiction to enforce the settlement. We recommend including the following language:

"Now, therefore, the parties stipulate and agree: that the entire action be dismissed with prejudice, but that the court retain jurisdiction to enforce the terms of the Settlement Agreement and Stipulated Judgment.

#### **[PROPOSED] ORDER**

The court, having reviewed the above stipulation of the parties, and being familiar with the record of this case, dismisses this action with prejudice. However, pursuant to Code of Civil Procedure §664.6 and any other relevant statutory provisions, and the parties' above stipulation and Settlement Agree-

ment and Stipulated Judgment, this court retains jurisdiction over this case and over the parties personally for such further orders, hearings and other proceedings as may be appropriate to enforce the terms of the parties' Settlement Agreement and Stipulated Judgment."

Because under this approach the case is immediately dismissed, the parties need not specify a date of dismissal in the future that may become a looming deadline, as can happen with a conditional settlement. Although you may need to make an ex parte appearance so that the court can sign a specially worded dismissal, this extra step will pay off in the event of a breach of the settlement agreement.

Practitioners who closely adhere to the statute should face no difficulty using §664.6 to pursue claims for unpaid settlements in state court after the dismissal of a settled case. The other ways to enforce a settlement if the requirements of §664.6 are not met — including bringing a separate lawsuit or filing a motion to set aside a dismissal because of mistake or excusable neglect, under Code of Civil Procedure §473(b) — are far more cumbersome and less effective than §664.6's expedited process. They will also cost far more. Section 664.6 offers an efficient, cost-effective method for enforcing settlements, one that relieves litigants and the judicial system of the burden of the more expensive and time-consuming alternatives. Consistent use of the statute is especially important in this time of fiscal crisis for the California courts, by likely conserving judicial resources.