

## How To Avoid Fumbling Your Settlement On The 1 Yard Line

By Robert J. Kaplan, Esq.

You are plaintiff's counsel in a hotly contested business fraud case that you've worked on for nearly 2 years. You scheduled a full-day mediation several months earlier; and, you and your client arrive at 8:30am loaded for bear. At 7pm the President of the defendant corporation has to bolt to catch a plane back East. At nearly 8pm – defense counsel gets a hold of his client at the airport and obtains his approval of the final number – and, the case is settled (or so everyone thinks.)

The mediator pulls out his standard 1 page form entitled, Stipulation for Settlement, which expressly states: “The parties intend that this settlement is enforceable pursuant to the provisions of Code of Civil Procedure Section 664.6”. He then writes in the 4 essential terms of the settlement -- Defendant shall pay Plaintiff the lump sum of \$X as full and complete “global settlement”; §1542 waiver; confidentiality; each side to bear own attorney fees and costs – and checks the box indicating that defense counsel will prepare the formal Settlement and Release Agreement within the next 7 days. You and your client sign the Stipulation for Settlement and defense counsel signs it “on behalf of” the defendant corporation. You and your client head off to the nearest bar.

Do you have a settlement that is enforceable under CCP §664.6? The short answer is “no”.

As most attorneys know, the statutory procedure under §664.6 provides the most efficient way to enforce settlement agreements. However, it is important to keep in mind that when there is a settlement agreement outside of Court -- in order to avail oneself of 664.6, the agreement must be *in writing* and it must be signed by *both* the party seeking to enforce the agreement and the party against whom it is to be enforced.

In 1995, the California Supreme Court was called upon to decide whether the term “parties” as used in 664.6 means the litigants themselves; or, whether it should be construed to include the parties’ attorneys or other agents. In *Levy v. Superior Court* (1995) 10 Cal.4th 578 the court held that a written settlement agreement had to be signed by the litigants themselves in order to be enforceable under the summary procedure specified in Code of Civil Procedure §664.6.

Since the defendant didn’t sign the settlement agreement, §664.6 would not be available if one of the parties suffered from *settlor’s remorse* and decided to back out of the deal. Note that even if a settlement is not enforceable under 664.6, settlements signed by counsel alone may be enforceable in separate proceedings – e.g., by motion for summary judgment (after amending the pleading to allege a settlement defense); prosecuting an action for breach of contract; or, in a separate suit in equity. See *Levy, supra*, 10 Cal. 4<sup>th</sup> at 586, fn. 5; *Harris v Rudin, Richman & Appel* (1999) 74 Cal.App.4<sup>th</sup> 299, 306.

Bear in mind that there is an exception to the litigants themselves must sign rule. When a liability insurer is providing a defense without any reservation of rights, there are adequate coverage limits (i.e., the defendant has no personal liability at stake) and the carrier has the unfettered right to settle without the insured’s consent – the insurance carrier (but not the defense counsel) has the power to settle on defendant’s behalf and it’s signature on the settlement agreement (or agreement when a settlement is being put on the record in court) suffices for purposes of 664.6. *Fiege v. Cooke* (2004) 125 Cal.App.4<sup>th</sup> 1350, 1353-1355; *Robertson v. Chen* (1996) 44 Cal.App.4<sup>th</sup> 1290, 1295-1296.

If the parties themselves sign the settlement agreement (or, if the plaintiff and the claims adjuster in a case where there is ample coverage without any reservations sign the settlement agreement) -- are you home free? Not necessarily.

The recent Sixth Appellate District decision in *Stewart v. Preston Pipeline Inc.* 134 Cal.App.4th 1565, 36 Cal.Rptr.3d 901 (12/20/2005) grappled with whether the extremely broad mediation confidentiality statute (Evidence Code §1119) may be used as a shield to prevent the admission of a purported settlement document signed at the conclusion of a mediation in subsequent proceedings to enforce the settlement.

In *Stewart* the court held that the trial court correctly determined that the agreement was admissible under section 1123 (an exception to section 1119) which provides: “A written settlement agreement prepared in the course of, or pursuant to, a mediation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if the agreement is signed by the settling parties and any of the following conditions are satisfied: [9] (a) The agreement provides that it is admissible or subject to disclosure, or words to that effect...”

In *Stewart*, it was the Plaintiff that was trying to undo the settlement. One of Plaintiff’s main arguments was, that because the settlement agreement was not signed by the defendants themselves or by their insurance carrier—but instead was signed only by defense counsel—it did not meet the requirements of section 1123 that the waiver be “signed by the settling parties.”

The court addressed *Levy* and distinguished between the types of rights that can be affected by a stipulation entered into by an attorney on behalf of his or her client and categorized those rights into two groups – i.e, rights that are procedural in nature and rights that are substantial in nature. Those that are procedural in nature can be stipulated to by an attorney without his or her client’s signature. However, stipulations involving “substantial rights” require the client’s own signature. On this point, the *Stewart* court stated:

We conclude from a review of the foregoing authorities that a stipulation waiving mediation confidentiality is not one that impacts the substantial rights of the party litigant. The circumstances before us bear little resemblance to those presented in *Levy*. Such a mediation-confidentiality waiver—as contrasted with a settlement stipulation as addressed in *Levy*—is clearly procedural in nature; it is a strategic stipulation allowing for the admissibility of certain evidence.

The pragmatic impact of *Stewart* is that every lawyer participating in memorializing a settlement reached in connection with a mediation should make sure that the Stipulation for Settlement expressly provides something along the lines that:

“the parties agree that this Stipulation for Settlement is admissible pursuant to Evidence Code section 1123”

The Stipulation for Settlement should likewise contain language that “it is fully binding and enforceable pursuant to California Code of Civil Procedure section 664.6”; and, as stated above, you should make sure that ALL counsel and ALL parties (or if the insurance exception applies – that the insurance representative) sign the writing that is used to document the settlement following your mediation.

As you can see, it is easy to fumble your settlement from an enforceability standpoint, if you don’t keep the above do’s and don’ts in mind.

It is even easier to fumble your settlement if you fail to address the following issues *before* you get to the 1 yard line:

1. Consent: If you are handling a legal, medical or broker malpractice case in which the defendant lawyer, doctor or broker has E & O insurance – you should – if possible -- make sure before you go to the mediation that the defendant is not withholding his or her consent to settle (which they have the right to do under such policies); or, at the very least, if you are unable to resolve this issue prior to the mediation, you should address it early in the process.
2. Other Conditions: When you are filling out your Stipulation for Settlement at the end of an exhausting mediation, don’t forget to expressly include any material condition(s) precedent or subsequent – eg., “this settlement is expressly conditioned upon the Board of Director’s approval; or upon City Council’s approval; or, upon Court approval of the minor’s compromise; or upon Bankruptcy court’s approval; or upon a good faith finding...”

3. Confidentiality: This should be addressed *before* you get to your final number. Failure to do so could torpedo all of your efforts. If confidentiality is going to be a material term of a settlement, make sure that you address the scope and breadth of what the defendant wants and what the plaintiff is willing to give. Is the Confidentiality clause that is going to be in the formal Settlement and Release Agreement going to be a “plain vanilla” clause; or, is it going to be an extraordinarily broad clause with a prevailing party attorney fee clause and/or a liquidated damage provision.
  
4. Non-Disparagement: In certain business, employment and other tort cases the parties want (or should consider having) a non-disparagement provision. If such a provision is a material term of a settlement – as with confidentiality clauses, it should be addressed before you get to your final number; and you should address the scope and breadth of what both sides have in mind and are willing to agree to or not agree to. Failure to do so before everyone signs off on the Stipulation for Settlement may very well upset the applecart.
  
5. Liens & Taxes: If there are actual or potential liens and/or tax-related concerns – responsibility for said liens and/or taxes; and any potentially applicable defense obligation, indemnification and hold-harmless in connection with those liens and taxes should be spelled out.
  
6. Payment: In most cases, a single lump sum payment is made anywhere between 10 – 30 days following execution of the formal Settlement and Release Agreement. However, if your case is anything other than a standard case – be careful! For example, if there is no insurance – terms may be necessary (and, if that is the case, that is something that should be addressed *long before* you get to the final number.) If it is an employment case, you should address whether taxes are going to be withheld from the settlement payment or not. Another *caveat* to be aware of is that there are certain insurance companies who (on cases exceeding a certain dollar amount) will not fund any settlement sooner than 90 days after execution of the formal settlement agreement and will not agree to contribute to any settlement unless some portion of their contribution is structured by an

annuity company on their approved list. Again, this is something that, whenever possible, should be addressed *before* a final number is reached. Lastly, (although it rarely happens) if plaintiff maintains that “time is of the essence” (i.e., she is willing to forego the entire settlement unless she receives the settlement payment by a certain date) – all deadlines, details and ramifications should be spelled out before everyone leaves.

## **Conclusion**

Getting to a mutually agreeable number doesn't necessarily guarantee that you will cross the goal line. As we all know, the devil is in the details; and, those details can cause you to fumble your settlement on the 1 yard line if they are not addressed before everyone walks out the door.

*The information in this article is intended to be informational only and does not constitute legal advice. Please shepardize all case law before using.*

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