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FOCUS

'Hagan' Shows Complexity of Enforcing Client Settlements

By William M. Hensley

Imagine the sense of satisfaction. You have just settled a complicated lawsuit, with each side agreeing to dismiss its actions with prejudice. You've inked a comprehensive settlement agreement that provides that the trial court retains jurisdiction so that the settlement can be enforced under the state's Code of Civil Procedure Section 664.6, which allows settlement to be enforced through a summary law-and-motion procedure before the trial judge presiding over the case. Both sides dismiss the action.

You are relieved because you can take a vacation. After all, if something goes wrong, you can simply go back to the trial judge and ask him to enforce the settlement if the other side has the audacity to breach it. Can you go on your vacation carefree?

Not likely, according to a recent decision from the 3rd District Court of Appeal.

In *Hagan Engineering Inc. v. Mills*, 2003 WL 202816 (Cal. App. 3rd Dist. Jan. 29, 2004), the 3rd District rejected an attempt by a litigant (like the party represented by our hypothetically vacationing attorney) to summarily enforce a settlement under Section 664.6 where there was a contract clause in the settlement providing that the trial judge retains jurisdiction to enforce the settlement even though the parties dismissed the action without obtaining the trial court's agreement to retain jurisdiction. *Hagan* involved a set of facts where a trial judge granted a motion to enforce judgment, but the lower-court determination was reversed on appeal when one of the parties

to the settlement argued that the trial judge had no jurisdiction to do so where there was a dismissal and no judicial imprimatur on retaining jurisdiction.

In reaching this result, the 3rd District placed emphasis on the fact that the dismissal with prejudice of the entire case deprived the Superior Court of subject-matter jurisdiction. The contractual language in the settlement agreement was ineffective to vest the trial court with retained jurisdiction because subject-matter jurisdiction cannot be conferred by consent of the parties.

Hagan sounds like a trap for the unwary. Not at all. In fact, the appellate court suggests that alternatives were available to the party wishing to enforce the settlement.

The first alternative was that the settling party could have bargained for a conditional dismissal under state Rules of Court, Rule 225(c). Although denominated a "conditional settlement" procedure, Rule 225(c) operates so that a litigant can ask the court to extend the time for dismissal past the time for performance under the settlement agreement and set a review hearing/order to show cause re dismissal, after the designated performance date under the settlement has elapsed. (In Orange County Superior Court, litigants would ask the court to have the matter assigned to the Omni calendar, under which the matter typically goes to a commissioner who keeps the matter open pending performance of the settlement.)

This is a viable option for many courts, although it may run afoul of some judicial dockets that like to see matters dismissed

so that they stay compliant with fast-track dispositional guidelines.

The second option is to dismiss the action with prejudice but commence a new action to force the settlement, which may or may not be assigned to the same trial judge as presided over the settled action. This possible remedy is protracted and antithetical to the prior compromise bargain by which the parties envisioned that the matter could be enforced expeditiously through a summary law-and-motion before the trial judge in the settled case. Instead, the aggrieved litigant will have to file a new action and hope that the matter is ripe for summary judgment, although the new 75-day notice requirement means that the motion will not be decided for at least six months after filing the new action.

Beyond that, the party wishing to enforce the settlement will have to prove that there is no issue of triable fact — a heavy burden for all litigants to bear. Under the Section 664.6 summary enforcement procedure, the trial judge is allowed to make factual and credibility determinations unlike those made in the summary judgment/adjudication context. See *In re Marriage of Hasso*, 229 Cal.App.3d 1174 (1991). This second option is unrealistic and contrary to the expectations of the settling parties for a quick resolution.

The third avenue for exploration is to request the trial court to vacate the dismissal under Code of Civil Procedure Section 473. This approach has two problems. Initially, there is authority for the viewpoint that a dismissal cannot be vacated under this section simply because one of

the parties failed to pay under the settlement agreement. *Basinger v. Rogers & Wells*, 220 Cal.App.3d 16 (1990). Beyond that, it would be remarkable if any trial judge would allow a voluntary dismissal to be vacated because of "mistake, inadvertence, surprise or excusable neglect," now that *Hagan* has advised about the perils of dismissing an action before having the trial court agree to retain jurisdiction.

The last option is, in my opinion, the best one and the one which is tacitly recommended as preferable by the *Hagan* court. Before dismissal, parties to the settlement agreement can request the trial judge to retain jurisdiction under stipulation and then have the same trial judge agree to retain jurisdiction by a signed order. Citing "The Rutter Group Practice Guide" and *Wackeen v. Malis*, 97 Cal.App.4th 429 (2002), *Hagan*

confirmed that jurisdiction remains in the trial judge to enforce a settlement under Section 664.6 if the parties request that jurisdiction be retained and if the trial court agrees to retain jurisdiction over the parties.

Obviously, this option can be accomplished through a simple stipulation, one which should not be hard to reach because the parties have contractually agreed that the trial court will retain jurisdiction under the express wording of the compromise agreement.

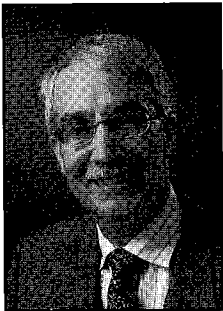
Hagan teaches a valuable lesson to our vacationing lawyer who figured that he had a settlement that could be enforced expeditiously under Section 664.6. It is not enough simply to have all sides concur in the settlement agreement that the trial court will retain jurisdiction for purposes of enforcing the settlement under Section 664.6.

Rather, the parties must present a request to the trial court and the trial court must agree to retain jurisdiction. Litigators who make sure that the trial court agrees to retain jurisdiction or who use the conditional settlement procedure can rest in peace, unlike our hypothetically vacationing attorney who figured everything was all right.

The lesson: Don't dismiss unless the other sides have agreed to a conditional settlement under Rule 225(c) or the trial court has "signed off" on a stipulation by which jurisdiction is retained to enforce the settlement under Section 664.6.

William M. Hensley is a shareholder with Jackson DeMarco & Peckenpaugh in Irvine, specializing in commercial, real estate and securities litigation, as well as appellate work.

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William M. Hensley handles general real estate litigation, bankruptcy, banking and commercial litigation at the state and federal trial and appellate levels. Mr. Hensley has considerable experience in employment, construction law, trade secrets and unfair competition, antitrust, insurance, letter of credit litigation, products liability, energy, federal securities defense, and corporate and partnership governance disputes.

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A L A W C O R P O R A T I O N

Irvine Office
2030 Main Street, Suite 1200
Irvine, California 92614
t:949.752.8585 f:949.752.0597

www.jdplaw.com

Westlake Village Office
2815 Townsgate Road, Suite 200
Westlake Village, California 91316
t:805.230.0023 f:805.230.0087