What's Different About Mediating On Appeal

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What's Different About Mediating On Appeal

Mediating after trial or on appeal is a lot like mediating in any other context. And, it is not.

Like any mediation, parties have to objectively evaluate the merits of their claims, likely outcomes, the cost involved, their appetite for risk, and what might motivate the other side. But a verdict or judgment changes the situation. No longer are there unresolved, conflicting factual narratives. No longer are there unknown future trial court rulings. And, there now may be a collateral effect from the judgment.

Factors unique to post-trial mediation.

Standard of Review. At trial, each party's facts have equal standing subject to evaluation as to credibility, available inferences, and confirming or clashing with other evidence. In preparing for a mediation, a party need only consider the likelihood that its view of the facts will be accepted.

That changes after verdict or judgment. Typically, on appeal all facts and inferences are construed in favor of the prevailing party. (An exception is where the claim is instructional error, in which case the facts and inferences are construed in favor of the party requesting an instruction.) Sometimes it is hard for parties (or even counsel) to let go of their factual narrative even though that narrative has been rejected at trial and cannot, because of the standard of review, be resurrected on appeal. This inability to let go can be a hurdle to an effective mediation.

Likewise, a party or counsel may believe that the trial court's ruling was wrong, even though that ruling may be reviewed for an abuse of discretion—that is, whether it is a result within the broad spectrum of those that *a* reasonable judge might have made in that situation, not just one an appellate court might disagree with. The arguments that are likely to prevail as an appellant—and thus are likely to be effective at mediation—are ones premised on success *despite* adverse factual or inference assumptions. That generally means issues of law.

When evaluating likely outcomes on appeal, two other factors merit consideration: (1) whether any error was preserved (e.g., was there a timely, ruled upon, objection—not just a nonfinal motion in limine ruling; were rule 50(a) and 50(b) motions made) and (2) whether prejudice—a substantial

likelihood of a more favorable result—be demonstrated. The failure to take a hard, disinterested look at these procedural hurdles can lead to a miscalculation of a party's likelihood of appellate victory, and thereby impede the chances of resolving the case at mediation.

Anchoring. Before trial, most parties believe in their case, even if they recognize that things can go wrong. After trial, typically one party has won and one party has lost. Sometimes one party has won big. Studies show that plaintiffs more often than not mistakenly decline a defense pre-trial offer (i.e., the defense offer exceeds what plaintiff recovers after trial) *but* that when plaintiffs hit, they recover, on average, nearly three *times* their mean demand. *See* R. Kiser, et al., *Let's Not Make a Deal: An Empirical Study of Decision Making In Unsuccessful Settlement Negotiations*, 5 J. of Empirical Legal Stud. 551 (2008). That means that, after trial, one party often has in hand an unexpected windfall.

Attorneys and clients, but especially clients, tend to fall in love with the trial result. It validates their best hopes about the case. They cannot imagine ever doing worse. They become entrenched in their position. There is such a thing as winning too big and becoming the victim of reinforced unreality. While before trial the other side may believe in their case, after judgment the phenomenon is more pronounced. This is especially true if the judgment is the result of a jury or bench trial rather than a dispositive legal ruling. This anchoring can be a strong impediment to resolution on appeal.

Appeal Cost. Pursuing an appeal costs money and time. Both sides need to take that into account. But an existing judgment likely earns interest. The rate of interest varies greatly by jurisdiction. See attached chart. For example, a federal judgment earns interest at the weekly average one-year federal Treasury Bill rate on the date the judgment is entered, compounded annually. 28 U.S.C. § 1961. As of April 7, 2019, for example, that rate is 2.41% per annum. *See* https://www.federalreserve.gov/releases/h15/ (current); www.federalreserve.gov/datadownload/Choose.aspx?rel=H15 (historic). The rate does not change. It is set as of the date the judgment is entered. That's typically a good deal for a defendant and disadvantageous to the plaintiff. By contrast, in California a judgment earns 10% per annum, simple interest, which in recent years has been advantageous to judgment creditors. See Cal. Const., art. XV. Postjudgment (and prejudgment) interest can vary significantly by state. See Cozen O'Connor, Jurisdictions Comparative Chart: Pre/Post Judgment Interest (2018), attached. Accruing interest (or lack

thereof) can be a significant factor in the economics of a settlement on appeal. *Cf.* Conn. Gen. Stat. § 37-3b (no interest accrues during appeal or pending post judgment motions in negligence actions).

Potential Outcomes. The outcomes pre-trial are pretty much liability, no liability, and a range of damages, compensatory, punitive, or otherwise, and the prospect of an appeal. On appeal, there are a range of outcomes as well. Sometimes, the potential is binary—either the judgment, with accrued interest, is affirmed or it is reversed with directions that a contrary judgment be entered.

But those are not always the only options.

Sometimes, there is a chance that some, but not all, of the liability theories or attendant damages will be affirmed. Likewise, certain types of errors (e.g., evidentiary, instructional, misconduct) can result in a remand for a retrial, which can generate a better or worse result than originally achieved. *Compare Licudine v. Cedars–Sinai Med. Ctr.,* 208 Cal.Rptr.3d 1700 (Cal.App. 2016) (affirming new trial order as to $1,045,000 judgment because $730,000 in lost future earnings unsupported and noneconomic damages too small) *with Licudine v. Cedars-Sinai Med. Ctr.,* 242 Cal.Rptr.3d 76 (Cal.App. 2019) ($5,600,000 judgment on retrial affirmed on appeal). In seeking a retrial on appeal, appellants have to recognize that they can do worse and factor in what the expected result of a retrial might be. Similarly, a prevailing party has to consider that it can do worse in the event of a reversal, remand, and retrial.

Collateral Estoppel/Issue Preclusion Considerations. A consideration unique to settling after trial is the question of issue preclusion/collateral estoppel. Generally, before trial starts, this is not a problem. *See In re Pintlar Corp.*, 124 F.3d 1310, 1312 (9th Cir. 1997) (applying Idaho law); *St. Paul Fire & Marine Ins. Co. v. F.H.*, 55 F.3d 1420, 1425 (9th Cir. 1995) (settlement after partial summary judgment; applying Alaska law); *Hancock v. Pioneer Asphalt, Inc.*, 369 P.3d 1188, 1193 (Or. Ct.App. 2016); *Boswell v. Celluloid Envtl. Tech. Co.*, 236 F.R.D. 682, 689-90 (D.Wyo. 2006) (applying Wyoming law); *Hoover v. Prudential Secs., Inc.*, 285 F.Supp.2d 1073, 1076-77 (S.D. Ohio 2003) (applying Ohio law); *Clovis Ready Mix Co. v. Aetna Freight Lines*, 101 Cal.Rptr.3d 820, 823-24 (Cal. Ct.App. 1972) (dismissal with prejudice pursuant to a pre-adjudication settlement did not support collateral estoppel).

But a *judgment* rendered in a first action can preclude an unsuccessful party from relitigating the same question in a later action. Courts have "long recognized that 'the determination of a question directly involved in one action is conclusive as to that question in a second suit.' The idea is straightforward: Once a court has decided an issue, it is 'forever settled as between the parties . . . .'" *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S.Ct. 1293, 1302 (2015), citations omitted.

For example, if a product is found defective and judgment is entered thereon, a later plaintiff may successfully argue that the defective nature of the product is established. This principle may apply as much to judgments entered in cases later settled on appeal as to judgments affirmed on appeal. *See Bates v. Union Oil Co. of California*, 944 F.2d 647 (9th Cir. 1991), *cert. denied,* 503 U.S. 1005 (1992) (case settled on appeal with appellate court vacating judgment; issue preclusion applied because district court never evaluated whether first judgment should be vacated for preclusion purposes); *McClain v. Rush*, 264 Cal.Rptr.3d 563, 566-68 (Cal Ct.App. 1989); *Sandoval v. Superior Court*, 190 Cal.Rptr.3d 29 (Cal. Ct.App. 1983) (vehicle manufacturer settled on appeal for just under 85% of judgment, expressly disclaiming liability; held, prior judgment was issue preclusion as to product defect); Restatement (Second) of Judgments § 13 ("for purposes of issue preclusion . . . 'final judgment' includes any prior adjudication of another issue in an action that is determined to be sufficiently firm to be accorded conclusive effect").

Indeed, the doctrine may apply to cases settled after a liability determination but before damages are decided. *See Disimone v. Browner*, 121 F.3d 1262, 1266-68 (9th Cir. 1997); *Chemetron Corp. v. Bus. Funds, Inc.*, 682 F.2d 1149, 1187-94 (5th Cir. 1982) *vacated on other grounds* 460 U.S. 1007 (1983) (parties settled after liability findings but before judgment, stipulating to order withdrawing findings and dismissing the action with prejudice; held, issue preclusion applied); *Abbott v. U.S.*, 41 Fed.Ct. 553, 562-63 (1998); *Zdanok v. Glidden Co., Durkee Famous Foods Division*, 327 F.2d 944, 955 (2d Cir. 1964), *cert. denied,* 377 U.S. 934 (1964) (liability determination was issue preclusion/collateral estoppel even though damages had not been ascertained); *Borg-Warner, Corp. v. Avco Corp. (Lycoming Div.),* 850 P.2d 628 (Alaska 1993) (settlement after full trial and decision but before entry of judgment); *Nestle Co., Inc. v. Chester's Market, Inc.*, 596 F.Supp. 1445, 1453 (D. Conn. 1984); *Aetna Cas. & Sur. Co. v. Jeppesen & Co.,* 440 F. Supp. 394, 402-05 (D. Nev. 1977) (same); *Hartley v. Mentor Corp.*, 869 F.2d 1469, 1471-73 (Fed. Cir. 1989) (issue preclusion based on summary judgment where case

settled before entry of judgment); *Ossman v. Diana Corp.*, 825 F. Supp. 870, 875-78 (D. Minn. 1993) (issue preclusion where parties settled after partial summary judgment and district court refused to vacate partial summary judgment despite parties' request that it do so).

And, there is another problem. In at least some jurisdictions an appellate settlement, or at least a last-minute appellate settlement, will not foreclose an appellate opinion. *E.g., State ex rel. State Lands Comm'n v. Superior Court,* 1900 P.2d 648 (Cal 1995); *Lucich v. City of Oakland*, 23 Cal.Rptr.2d 450, 453-55 (Cal. Ct.App. 1993) (refusal to dismiss appeal when court notified of settlement the day after argument and settlement not concluded until after opinion issued); *Lara v. Cadag*, 16 Cal.Rptr.2d 811, 813-14 (Cal.Ct.App. 1993) (opinion published notwithstanding dismissal pursuant to stipulation).

Issue preclusion is an equitable doctrine, so it will not automatically apply (e.g., if the settlement is for nuisance value), but it is a substantial risk that has to be considered and potentially addressed in any postjudgment or even post-partial-adjudication settlement context.

That does not mean that there are not mechanisms to address the concerns. There are. Simply asking the appellate court to vacate the trial court judgment because the case settled on appeal, however, may not be one of those mechanisms. In federal circuit courts, vacating a district court judgment based on nothing more than an appellate settlement is improper except for extraordinary circumstances. *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 1829 (1994). One solution is as part of the appellate settlement to ask the Court of Appeals to remand the matter to the district court for it to entertain a Federal Rules of Civil Procedure rule 60 motion. *Id.*; *Nahrebeski v. Cincinnati Milacron Mktg. Co.,* 41 F.3d 1221, 1222 (8th Cir. 1994); *Pressley Ridge Schs. v. Shimer*, 134 F.3d 1218, 1222 (4th Cir. 1998); *Ringsby Truck Lines, Inc. v. W. Conference of Teamsters,* 686 F.2d 720 (9th Cir. 1982) (noting factors for district court to weigh). But just because a district court *can* vacate a prior judgment does not mean that it *will* do so. *E.g.*, *Garrett v. Albright*, 2008 WL 2872206 at *2 (W.D. Mo., July 22, 2008, No. 4:06-CV-4137-NKL); *Evans v. Mullins*, 130 F. Supp. 2d 774, 775 (W.D. Va. 2001).

After much controversy about stipulated reversals, California, by statute, now requires that before an appellate court accede to a stipulated reversal (e.g., upon the parties' settlement), the court must determine that

"[t]here is no reasonable possibility that the interests of nonparties or the public will be adversely affected by the reversal" and "[t]he reasons of the parties for requesting reversal outweigh the erosion of public trust that may result from the nullification of a judgment and the risk that the availability of stipulated reversal will reduce the incentive for pretrial settlement." Cal. Civ. Proc. Code, § 128(a)(8). Similar rules, whether statutory or judicially imposed, may apply in other jurisdictions. The debate about whether judgments should be vacated or denied issue preclusive effect because of a post-judgment settlement is fulsome, to say the least. *See generally* Note, *The Benefits Of Applying Issue Preclusion To Interlocutory Judgments In Cases That Settle* 76 N.Y.U. L. Rev. 874 (2001); J. Resnik, *Whose Judgment? Vacating Judgments, Preferences For Settlement, And The Role Of Adjudication At The Close Of The Twentieth Century*, 41 UCLA L. Rev. 1471 (1994); R. Deyling, *Dangerous Precedent: Federal Government Attempts To Vacate Judicial Decisions Upon Settlement*, 27 J. Marshall L. Rev. 689 (1994); S. Makar, *Vanishing Precedents: Settlements Vacatur On Appeal*, 68-NOV Fla. B.J. 18 (1994); Note, *Erasing The Law: The Implications Of Settlements Conditioned Upon Vacatur Or Reversal Of Judgments*, 50 Wash. & Lee L. Rev. 1229 (1993); Jill E. Fisch*, Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur*, 76 Cornell L.Rev. 589 (1991)*;* Note, *Settlement Pending Appeal: An Argument For Vacatur*, 58 Fordham L. Rev. 233 (1989); Note, *Avoiding Issue Preclusion By Settlement Conditioned Upon The Vacatur Of Entered Judgments*, 96 Yale L.J. 860 (1987).

Good faith settlement and indemnity rights. Several states (e.g., California, Florida, Hawaii, Illinois) have adopted the Uniform Contribution Among Joint Tortfeasors Act. Under that act, a "good faith" settlement by one tortfeasor may bar indemnity claims that otherwise might be brought against the settling party by co-tortfeasors. At least one state's statute, California's, references a settlement both in good faith and *before trial*. Cal. Civ. Proc. Code, § 877.6. Thus, a post-trial settlement may not cut off indemnity rights, although that has not been definitively litigated. Likewise, the judgment that is being settled may provide a clear benchmark as to what a "good faith" settlement range may be. A post-judgment settlement, thus, may impact an indemnity-barring good faith determination.