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PERSPECTIVE

Complex civil appeals: making the case for settlement

By Jerome Falk

More than 90 percent of civil cases are settled without trial. By contrast, most civil appeals are briefed, argued and decided by the court. In complex cases in which large amounts of money are at stake, settlements pending an appeal seem to be the exception: such appeals frequently go forward to decision without a serious attempt to settle.

There are many reasons for this. Lawyers and litigants who were unable to settle their case before trial express pessimism that a settlement could be reached pending an appeal. A successful plaintiff holding a large judgment, or a defendant who obtained summary judgment, may point to the general statistic that approximately 80 percent of civil judgments are affirmed in the California appellate courts; in the 9th U.S. Circuit Court of Appeals, the rate is about 85 percent. Moreover, both sides will recall their unsuccessful mediation attempts and settlement conferences before the trial, and conclude that settlement after the judgment is even less likely. Unless the appellate court lures them into a court-supervised mediation program (which the 1st District Court of Appeal has discontinued), the case will move inexorably through an appeal process in which at least one party (and perhaps both) will be disappointed in the outcome.

Litigators and litigants should not assume that this is inevitable. There are reasons to consider a serious discussion of settlement before putting the parties' fate in the hands of an appellate panel. To begin with, that 80 to 85 percent affirmance figure is a gross statistic based on all civil appeals. No data is available for well-lawyered complex civil appeals in which the stakes are high enough to permit comprehensive exploration of every possible legal issue. Based on first-hand experience and anecdotal evidence from seasoned appellate specialists, that reversal rate could be more than 50 percent. So there is a real risk for the happy litigant who prevailed in the trial court.

Moreover, once the judgment is entered, some of the obstacles to settlement before trial will disappear. The most obvious, of course, is that the facts have been resolved by a jury or judge and — except in rare cases in which there is no substantial evidence to support the findings — that will be that for the fact disputes. In addition, if there is a plaintiff's verdict, the price tag will have been established. With those uncertainties out of the way, the appeal will focus on legal issues that the lawyers (including experienced appellate specialists that in larger cases are often added to the legal teams) will be able to evaluate with greater confidence than attorneys making pre-trial outcome predictions.

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Other factors put additional weight on the scale in favor of exploring settlement. From the plaintiff's point of view, a settlement accelerates the payday. A state court appeal in California can take two years from the date of judgment to the denial of review by the state Supreme Court, or even longer. This can be further extended if review is granted. On the other hand, a three-year delay in resolution exposes the defendant to a 30 percent surcharge on the judgment amount (10 percent simple interest per year on judgments).

Often, litigants who engaged in mediation shortly before trial will return (sometimes at the invitation of the mediator) immediately after a verdict or judgment to discuss possible settlement. Those efforts are sometimes successful. Frequently, however, the prevailing party, flush with victory, is not especially interested in compromise and the loser expresses confidence that the appellate court will straighten out the mess created by the trial court. Everyone walks away more convinced than ever that the case can't be settled.

However, there may be another opportunity for consideration of settlement: a settlement discussion or mediation after the appeal has been briefed. To be sure, a full course of appellate briefing adds legal fees to the tab; but in complex cases, those legal fees are likely to be a small fraction of the total litigation cost. And once the case is briefed, those are sunk costs, whether the case is settled at that point or proceeds to decision by the appellate court. The several months between the close of briefing and a notice of oral argument could well be an ideal point to revisit the issue of settlement. For one thing, all of the uncertainties about the case other than how the court will resolve the appeal will be known. Each side will have put its arguments in the best possible way, and those arguments can be evaluated by the parties and by a mediator with greater precision than would have been possible pre-trial, or even immediately after the judgment.

Settlement discussions at this stage necessarily will focus on the likely outcome of the appeal, which in turn depends upon a prediction of how the appellate court will resolve the legal issues presented. The parties may want — and need — a more evaluative mediation than would customarily be provided prior to trial. The mediator may also assist the parties by pointing out the range of possible dispositions, including affirmance, modification of the judgment, partial reversal, a retrial on some issues, or a retrial of the entire case. That could be facilitated by use of a "decision tree" in which the parties identify and estimate the likelihood of every possible outcome as a way of determining the settlement value of the case. This kind of analysis can be revelatory. For example, suppose an appeal has a 40 percent chance of achieving a reversal for a new trial. That prospect may give an appellant substantial hope. But if the respondent has an 80 percent chance of getting the same outcome before a new jury, the case should have a settlement value of more than 90 percent of the present judgment: 40 percent chance of reversal times 20 percent chance of improved result equals 8 percent chance of a successful outcome for the appellant.

Settlement discussions at this stage can explore a range of outcomes that better fit the parties' personal and commercial needs than adjudication would. In addition, the parties can consider resolutions such as a "high-low" settlement in which the appeal goes forward, with the amount paid to the plaintiff capped by an agreed limit but secured by a minimum or "floor" amount to be paid even if the judgment is reversed.

Trial lawyers know the value of a good settlement. Considerations similar to those that lead to settlements before or during trial should cause counsel to seriously consider exploring the possibility of settlement after verdict and judgment.

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