Focus

An Agreement Does Not A Stipulated Reversal Make

By Jens B. Koepke

Your client, after losing a contentious trial, has been hit with a $1.5 million judgment. The case is now on appeal, but before you spend the money on filing an opening brief, you take advantage of the Court of Appeal's mediation program and settle the case.

Because one of your client's key requirements is that the judgment be vacated, the settlement is contingent on a stipulated reversal of the judgment. No problem, right? A simple, joint request to the Court of Appeal will secure the stipulated reversal and finally end this unfortunate litigation.

Not so fast.

A recent appellate decision shows how daunting it can be to obtain a stipulated reversal of a judgment, even when all sides want it. Parties and their counsel should wisely choose only those types of cases well suited for a stipulated reversal, and they should take great care to satisfy the statutory prerequisites in seeking the reversal.

Until recently, the appellate courts had a laissez-faire attitude toward stipulated reversals. The Supreme Court held that there was a "presumption" that "the parties should be entitled to a stipulated reversal to effectuate settlement absent a showing of extraordinary circumstances that warrant an exception to this general rule." *Neary v. Regents of University of California*, 3 Cal.4th 273 (1992).

But the Legislature disagreed. A 1999 amendment to Section 128 of the Code of Civil Procedure now enshrines essentially a presumption against stipulated reversals.

The code states that "[a]n appellate court shall not reverse or vacate a duly entered judgment upon an agreement or stipulation of the parties unless the court finds that: there is no reasonable possibility that the interests of nonparties or the public will be adversely affected by the reversal — and that the reasons the parties are requesting reversal outweigh both 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." Code of Civil Procedure Section 128(a)(8).

Very recently, in an attorney fees dispute between previous and successor attorneys, a court denied the parties' joint motion to reverse a judgment because it did not "affirmatively demonstrate a basis for each of the three findings required by the statute." *Hardisty v. Hinton & Alfert*, 124 Cal.App.4th 999 (2004).

The court ruled that a nullification of the judgment could adversely affect the public interest and erode the public trust, particularly given the potentially illegal or unethical conduct of the attorney parties. The trial court had found that the successor attorney had falsely represented that he had a written fee agreement, and that one previous attorney was not entitled to fees because he had an unwaived conflict of interest.

In addition, the parties failed to describe the extent of pretrial settlement efforts and whether any unexpected post-trial event made settlement possible; thus, the parties could not establish that a stipulated reversal would not reduce the incentive for pretrial settlement.

The court summed up its concerns in saying that the parties "are in effect asking us to ignore the possibility that their purpose is to protect some of them from professional discipline or legal claims."

The parties' attempt to avoid collateral estoppel and the potential damage to the public interest also underlay the court's rejection of a stipulated reversal in *Muccianti v. Willow Creek Care Center*, 108 Cal.App.4th 13 (2003).

In that case, after a jury returned a verdict of more than $5 million against a nursing home in a wrongful death case, the parties reached a settlement during the appeal and sought a stipulated reversal. The court held that the judgment's verification of the nursing home's negligent treatment was "relevant to the public in deciding future placement for its citizens," that it could be important "in future licensing and/or disciplinary proceedings against the facility" and that it would affect "the availability and cost of insurance" for the facility — all of which showed that nullifying the judgment would adversely affect the public interest.

In fact, parties should be cautioned that even if they can obtain a stipulated reversal, it may not avoid the possible collateral estoppel effects of the judgment. See "Is It Too Late To Settle? Problems With Settlement After Adjudication," ABTL Report (February 1996).

By contrast, in *In re Rashad H.*, 78 Cal.App.4th 376 (2000), the failure to notify a father of a hearing terminating his parental rights was acknowledged by both sides to be reversible error, one that contributed heavily to the court's decision to approve a stipulated reversal. Given this "actual judicial error," the public trust would be buoyed because the matter could be returned expeditiously (without unnecessary appellate briefing) to the juvenile court for a properly noticed decision on the merits, and would benefit affected nonparties — namely potential adoptive parents, because it "advance[d] the pace of the decision-making process."

Similarly, a public benefit supported the approval of a stipulated reversal in *Union Bank of California v. Braille Institute of America Inc.*, 92 Cal.App.4th 1324 (2001). The comprehensive settlement of two probate orders on appeal — and one pending in the superior court in a dispute between a trustee and the charitable organizations that were the beneficiaries under the trust — would benefit the public because it would direct charitable money away from litigation and into the charities' missions.

The fact that the agreement also resolved a pending probate petition showed it did not reduce the incentive for pretrial settlement. The court noted that there was no showing of reversible error, but held that its absence "is not a bar to the acceptance of a stipulated reversal so long as the appellate court makes the three findings listed in Section 128."

Hence, the type of case in which a stipulated reversal will be approved is limited. On one end of the spectrum is a case that affects only the parties, involves clear reversible error and provides a public benefit by early resolution. This is a prime candidate for stipulated reversal.

On the other end of the spectrum is a case whose stipulated reversal would adversely affect the public interest or a specific third party. Indeed, any stipulated reversal that will "cover up" illegal or unethical acts by a party, particularly in a regulated industry, will make a stipulated reversal almost impossible.

Because most industries and professions are regulated, this eliminates many cases from qualifying for a stipulated reversal. The average case will probably not fall on the extremes of this spectrum, so careful analysis must be undertaken to decide whether a stipulated reversal is realistically attainable.

In addition, even in an appropriate case, the parties must make a comprehensive showing aimed at establishing that a stipulated reversal satisfies all three conditions in Section 128. As *Hardisty* admonishes, "[t]he parties must now submit memoranda of points and authorities and declarations and other documentary evidence persuasively demonstrating that reversal of the judgment in question will not adversely affect nonparties or the public, erode public trust, or reduce the incentive for pretrial settlement."

This showing will be much easier if it can be established that the trial court committed clear, reversible error.

In fact, the 1st District Court of Appeal has issued a Local Rule — Rule 8 — requiring that parties seeking a stipulated reversal submit a joint declaration of counsel, describing the parties and factual and legal issues, and indicating what public interests could be affected as well as any collateral estoppel effects a reversal could have. If any third parties might be prejudiced, Rule 8 even mandates that those parties receive notice of the motion.

The failure to comply with Rule 8 was another ground for the rejection of a stipulated reversal in *Hardisty* and in another recent 1st District case, *In re Estate of Regli*, 121 Cal.App.4th 878 (2004). Even in cases not pending before the 1st District, Rule 8 provides a helpful starting block for counsel to leap over the high hurdles placed before approval of a stipulated reversal.

A stipulated reversal may seem like a convenient and simple way to end unfortunate litigation. But parties and counsel should not be lulled into thinking it will be easy to get the Court of Appeal to accept it.

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