Is It Too Late to Settle? Problems with Settlement After Adjudication

"Great news!" exclaims Young Hotshot Lawyer, calling you from an appellate settlement conference. "Not only did Sally Plaintiff accept our number, but she's agreed to stipulate to having the appellate court reverse the judgment!"

You breathe a sigh of relief. The problem wasn't the amount of Sally's judgment. It was the risk that Joe Claimant, the plaintiff in a related and much bigger case against your client Ogre Corp., would be able to use the judgment as collateral estoppel. You get ready to call Ogre Corp.'s president to tell him that the prospects for *Claimant v. Ogre Corp.* are a lot brighter.

Stop. They're not.

If Joe Claimant's lawyer knows what she's doing, you should be very worried about the prospect of explaining to your client after the *Claimant v. Ogre Corp.* trial why, in spite of the stipulated reversal of *Plaintiff v. Ogre Corp.*, you couldn't stop the judge from applying collateral estoppel. The fact is, it may have been too late to prevent that result long before you reached the Court of Appeal.

Adverse rulings in cases like Ogre Corp.'s, where the result can reach beyond the specific dispute, create a strong urge to settle in a way that avoids collateral estoppel. But this seemingly simple goal is not at all simple to achieve. And, perhaps most problematic, the parties may not know whether they've achieved the goal until a later lawsuit tests the effectiveness of the settlement.

The Fluid Concept of Finality

Young Hotshot Lawyer is confused by all this. Didn't he learn in law school that collateral estoppel requires a "final judgment" under *Bernhard v. Bank of America*, 19 Cal.2d 807, 813 (1942)? And didn't the California Supreme Court recently direct Courts of Appeal to honor the parties' stipulated reversals of judgments (*Neary v. Regents of the University of California*, 3 Cal.4th 273, 277 (1992))? And won't the reversal eliminate the only arguable "final judgment" in *Plaintiff v. Ogre Corp.*?

Well, yes — sort of. But "finality" in the sense in which lawyers frequently use it — meaning that the adjudicatory process has been carried all the way to the end — is not what counts. Section 13 of the Restatement (Second) of Judgements states the rule this way:

> "The rules of res judicata are applicable only when a final judgment is rendered. However, for purposes of issue preclusion (as distinguished from merger and bar), 'final judgment' includes *any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect.*" (Emphasis added.)

Federal courts frequently use a comparable formulation: "'Finality' in the context here relevant [issue preclusion] may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again.'" *Lummus v. Commonwealth Oil Refining Co., Inc.*, 297 F.2d 80, 89 (2d Cir. 1961), cert. denied, 368 U.S. 986 (1962).

In short, "finality" is not a bright line, but rather a danger zone whose boundaries are vague.

"I understand all that," says Young Hotshot Lawyer, "but we're talking about a *settlement*. Can't we just eliminate the problem by stipulating to have the court vacate any prior rulings?"

Maybe — but then again, maybe not. The rules of the game aren't clear.

Problems with Appellate Settlements

Parties face substantial obstacles in crafting an appellate settlement that avoids collateral estoppel. The task is complicated by the fact that California and federal courts follow diametrically opposite philosophies on what appellate courts should accede to when parties ask them to reverse or vacate a trial court judgment.

One thing is clear: The parties cannot just dismiss the appeal and then stipulate to vacate the trial court judgment or dismiss the case. Dismissing the appeal simply makes the trial court judgment final and immune to any kind of alteration. At that point, regardless of what the parties may agree to, it is highly unlikely that the trial court has the legal power to vacate the judgment or dismiss the case. *See Nave v. Taggart*, 34 Cal.App. 4th 1173, 1177 (1995) ("Once a trial court makes a decision after regular submission, it has no power to set aside or amend its ruling for judicial error except under appropriate statutory proceedings"); *McClain v. Rush*, 216 Cal.App.3d 18, 26 (1989).

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The minimum necessary procedure is to persuade the Court of Appeal to vacate or reverse the trial court judgment. Counsel should be aware, however, that the propriety of stipulated reversals is a highly controversial topic that has generated strong sentiments in both articles and decisions. The philosophical debate is beyond the scope of this article; for some extensive discussions and collections of citations see *Norman I. Krug Real Estate Inv., Inc. v. Praszker*, 22 Cal.App.4th 1814 (1994); Howard Slavitt, *Selling The Integrity Of The System Of Precedent: Selective Publication, Depublication And Vacatur*, 30 Harv. Civ. R.-C.L.L.Rev. 109 (1995); Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the 20th Century*, 41 U.C.L.A. L.Rev. 1471 (1994).

The California Rule: Policy Favors Stipulated Reversals

In *Neary v. Regents of the University of California*, 3 Cal.4th 273 (1992), the California Supreme Court held:

> "[A]s a general rule, 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." *Id.* at 277.

Despite this strong language, parties seeking to avoid collateral estoppel should not assume they can automatically get that result, for several reasons:

- The Supreme Court took pains to emphasize that *Neary* did not present collateral estoppel implications. The Court expressly did "not decide...whether potential collateral estoppel should be a factor in deciding whether to depart from the strong presumption in favor of allowing the parties to settle their dispute by seeking a stipulated reversal." *Neary*, 3 Cal.4th at 284. The First District Court of Appeal has decided that collateral estoppel *is* a relevant factor; it requires parties seeking a stipulated reversal to file a joint declaration of counsel "disclos[ing] whether the judgment sought to be reversed may have collateral estoppel or other effects in potential future litigation and, if so, whether any

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third parties who might be prejudiced by stipulated reversal of the judgment have received notice of the motion therefor." (First Dist. Court of Appeal, local rule 8.)

- *Neary's* strong philosophical support for stipulated reversals has not found widespread support. The Supreme Court itself has retrenched somewhat. In *State of California, ex rel. State Lands Comm'n. v. Superior Court*, 11 Cal.4th 50 (1995), the court distinguished *Neary*, refusing a stipulation for dismissal of an appeal because of the importance of the opinion's subject matter. And the Courts of Appeal seem to be in open rebellion, often finding reasons (at least in published opinions) to avoid full compliance with stipulations. *See Lucich v. City of Oakland*, 19 Cal.App.4th 494, 500-03 (1993) (refusal to dismiss appeal when court notified of settlement the day after argument and settlement not concluded until after opinion issued); *People v. Barraza*, 30 Cal.App.4th 114, 116-21 (1994) (in criminal case, court refused to implement stipulated change in judgment); *Praszker*, 22 Cal.App.4th 1814 (stipulated reversal denied as to one defendant on public interest ground; extended discussion regarding stipulated reversals); *Lara v. Cadag*, 13 Cal.App.4th 1061, 1065-66 (1993) (opinion published notwithstanding dismissal pursuant to stipulation). (In yet another case, since depublished, the Court of Appeal published an opinion despite a request for dismissal, because it believed the issue involved was important. *Wicker v. Oosten*, 37 Cal.App.4th 331, 342 (1995), depublished 11/2/95.) At one point there was even a legislative movement to overrule *Neary*.
- There is little likelihood of relief if a Court of Appeal refuses to comply with a request for a stipulated reversal. *Neary* does not suggest that the Supreme Court is willing to devote any resources to reviewing Court of Appeal denials. And since most Court of Appeal decisions are not published and most rulings on stipulated reversals are unlikely even to generate opinions, there is no way to monitor how the courts are implementing Neary or to predict how a particular panel will respond to a stipulation.

The Federal Rule: Policy Disfavors Stipulated Reversals

The federal counterpart to a stipulated reversal is "vacatur": The reviewing court typically vacates (rather than reverses) the lower court's judgment. Although the Circuit Courts evidently used to grant this sort of relief somewhat routinely, the Supreme Court severely curtailed the practice in U.S. *Bancorp Mortgage Co. v. Bonner Mall Partnership*, ____ U.S. ____, 115 S. Ct. 386 (1994). Reaching exactly the opposite conclusion from the California Supreme Court in *Neary*, the Court held:

> "[M]ootness by reason of settlement does not justify vacatur of a judgment under review. This is not to say that vacatur can never be granted when mootness is produced in that fashion. As we have described, the determination is an equitable one, and *exceptional circumstances* may conceivably counsel in favor of such a course. It should be clear from our discussion, however, that *those exceptional circumstances do not include the mere fact that the settlement agreement provides for vacatur....*" 115 S.Ct. at 393 (emphasis added).

This restrictive language would seem to eliminate stipulated reversals as a settlement option in most cases. Nevertheless, the Supreme Court left the door slightly open:

> "Of course even in the absence of, or before considering the existence of, extraordinary circumstances, a court of appeals presented with a request for vacatur of a district-court judgment may remand the case with instructions that the district court consider the request, which it may do pursuant to Federal Rule of Civil Procedure 60(b)." *Id.*

Either by this mechanism or by finding "exceptional circumstances," courts continue to allow vacatur. *E.g., Motta v. District Director of I.N.S.*, 61 F.3d 117, 118 (1995); *Nahrebeski v. Cincinnati Milacron Mktg. Co.*, 41 F.3d 1221, 1222 (8th Cir. 1994); *Alexander v. Perrill*, 872 F.Supp. 722 (D.Ariz. 1995). For its part, the Ninth Circuit recently reaffirmed its decision in *Ringsby Truck Lines, Inc. v. Western Conference of Teamsters*, 686 F.2d 720 (9th Cir. 1982), stating:

> "[W]hen an appellant renders his appeal moot by his own act [which includes settlement], our established procedure is not to vacate the district court's decision automatically, but to remand so the district court can decide whether to vacate its judgment in light of 'the consequences and attendant hardships of dismissal or refusal to dismiss' and 'the competing values of finality of judgment and right to relitigation of unreviewed disputes.'" *Dilley v. Gunn*, 64 F.3d 1365, 1370-71 (9th Cir. 1995) (reviewing non-settlement mootness), quoting *Ringsby*, 686 F.2d at 722.

The Unpredictable Effect Of A Stipulated Reversal

If the parties are fortunate enough to be able to obtain a stipulated reversal or vacatur, will it protect them against collateral estoppel? The limited case law on the subject provides little comfort or predictability. For example, while *Neary* directed California Courts of Appeal generally to honor stipulated reversals, it did not express any views on the *effect* of a stipulated reversal. Rather, the Court said:

> "[A] stipulated reversal is not an attempt to erase or rewrite the record of a trial. Everything that has happened to date in this litigation — including the jury verdict against defendants — is and will remain a matter of public record, even after a stipulated reversal. No one is proposing that the record in this case be destroyed or sealed. The record will reflect that the reversal was pursuant to a settlement and stipulation. There will be no inference that the jury or trial court erred. Whatever conclusions the public wishes to draw from the litigation can still be drawn after the reversal. To remove any possible doubt in a case of a stipulated reversal, the appellate court can explicitly state in its order that the reversal is pursuant to settlement and does not constitute either approval or rejection of the trial court's judgment." *Neary*, 3 Cal.4th at 282-83.

See also Praszker, 22 Cal.App.4th at 1825 (in reversing pursuant to stipulation, court noted that "[s]aid reversal does not represent a considered rejection by this court of the judgment below").

Those cases that have addressed the question raise serious doubts about whether a stipulated reversal can ever provide infallible protection against collateral estoppel. The seminal case in California is *Louie Queriolo Trucking, Inc. v. Superior Court*, 252 Cal.App.2d 194 (1967), which, although it involved a trial-level rather than an appellate settlement, has provided the analytical framework for both arenas. *Queriolo* involved a truck that fell into an excavation. In Case 1 the truck driver sued the excavating company and prevailed on liability in a bifurcated trial. The company then settled with the driver, who agreed to set aside the jury's verdict and to dismiss his lawsuit with prejudice. In Case 2, the truck's owner sued the excavating company for damage to the truck, seeking to use the liability verdict in Case 1 as collateral estoppel. The trial court refused, but the Court of Appeal disagreed. It found the necessary "final judgment" in the dismissal of Case 1, even though the dismissal *favored* the excavating company. Combining the dismissal with the fact that the excavating company had paid to settle the case, the court concluded that collateral estoppel was appropriate.

Querlolo Gains General Acceptance

Although *Lea v. Shank*, 5 Cal.App.3d 964, 973 (1970), disagreed with this result, *Queriolo* appears to have gained general acceptance as other cases have built upon it. Most significantly, *Sandoval v. Superior Court*, 140 Cal.App.3d 932 (1983), found

collateral estoppel without the need for *Queriolo's* tortured efforts to find a "final judgment." In Case 1, a jury found a product defectively designed and awarded $262,500 in damages. The manufacturer, Deere, appealed. The case settled during the appeal for $218,837. In the settlement agreement Deere expressly disclaimed liability, and both the appeal and the underlying action were dismissed. Case 2 involved the same product, and the plaintiff urged collateral estoppel against Deere on the basis of the judgment in Case 1.

Although *Sandoval* involved a settlement during appeal, the court found it necessary to discuss the conflict between *Lea* and *Queriolo* because of the California rule that a judgment is not final for collateral estoppel purposes if an appeal is pending (in other words, for analytical purposes, the pendency of the appeal in Sandoval meant that the judgment was no more "final" than it was in *Lea* and *Queriolo*). *Id.* at 936-40. Rejecting Lea in favor of Queriolo, the court adopted Section 13 of the Restatement (Second) of Judgments as the test of finality for collateral estoppel:

> "The requirement of finality of judgment is interpreted strictly, as indicated above, when considered for purposes of appellate review or application of bar or merger. Issue preclusion, however, is a different matter. 'But to hold invariably that kind of carry-over is not to be permitted until a final judgment in the strict sense has been reached in the first action can involve hardship — either needless duplication of effort and expense in the second action to decide the same issue,...' (*Id.*, § 13, com. g.) The Restatement cautions: 'Before [giving carry-over effect], the court should determine that the decision to be carried over was adequately deliberated and firm, even if not final in the sense of forming a basis for a judgment already entered. Thus preclusion should be refused if the decision was avowedly tentative. On the other hand, that the parties were fully heard, that the court supported its decision with a reasoned opinion, that the decision was subject to appeal or was in fact reviewed on appeal, are factors supporting the conclusion that the decision is final for the purpose of preclusion.' (Ibid.)"

Id. at 936.

Although for various reasons *Sandoval* ultimately did not apply collateral estoppel, its Restatement test has been adopted by other California courts. *E.g., Producers Dairy Delivery Co. v. Sentry Ins. Co.*, 41 Cal.3d 903, 911 (1986); *Stonewall Ins. Co. v. City of Palos Verdes Estates* (1992) 34 Cal.App.4th 244, 278; *McClain v. Rush*, 216 Cal.App.3d 18, 28 (1989). Under this line of authorities, the intervention of a settlement while an appeal is pending will ordinarily not prevent the judgment from being treated as "final" for collateral estoppel purposes.

Federal authority is comparable. In *Bates v. Union Oil Co.*, 944 F.2d 647 (9th Cir. 1991), *cert. denied*, 503 U.S. 1005 (1992), the parties settled Case 1 while the appeal was pending, and the Court of Appeal vacated the trial court judgment in an order that said nothing about issue preclusion. In Case 2, the trial court applied collateral estoppel and the Court of Appeal affirmed. The court said that, in order for the parties to avoid collateral estoppel, the trial court in Case 1 must balance the *Ringsby* factors in deciding whether to vacate the judgment, but the *Bates* trial court had not done so. *Bates*, 944 F.2d at 651-52. Since the Court of Appeal order vacating the judgment in Case 1 said nothing about issue preclusion, it was within the discretion of the trial court in Case 2 to apply collateral estoppel.

Although *Estate of Portnoy v. Cessna Aircraft Co.*, 612 F.Supp. 1147, 1150-53 (S.D. Miss. 1985), came out the other way, the court nevertheless clearly believed that collateral estoppel is available even if the judgment in Case 1 has been vacated. In *Portnoy*, Case 1 settled after judgment, while the defendant's appeal was pending. The defendant dismissed its appeal and — in a proceeding obviously structured to avoid collateral estoppel — the trial court granted a new trial (it "reconsidered" its original denial of a new trial motion). The trial court in Case 2 refused to give collateral estoppel effect to the findings in the vacated judgment in Case 1. It did so under orthodox collateral estoppel principles, applying the factors in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330-31 (1979) (a decision frequently cited in both California and federal courts) to conclude that applying collateral estoppel would be unfair. The court also did not feel it should second-guess the trial court's determination in Case 1 that it was appropriate to grant a new trial. But the important feature of *Portnoy* is not the court's ultimate refusal to apply collateral estoppel, but rather the way the court reached its result: It assumed that, as an general proposition, collateral estoppel *could* apply, notwithstanding the prior settlement and the order vacating the prior judgment.

Problems with Trial-Level Settlements

Robert Olson

Young Hotshot Lawyer is now thoroughly despondent. "We should have just settled at trial, shouldn't we? Then we would have been OK."

Well, maybe. But, as *Queriolo* shows, avoiding collateral estoppel is not necessarily easier just because the case is still in the trial court. Under *Queriolo*, if there has been even a partial adjudication, the settlement may come too late.

Federal authority also recognizes the possible collateral estoppel effect of trial court determinations where a case is settled before judgment. The leading decision is *Chemetron Corp. v. Business Funds, Inc.*, 682 F.2d 1149, 1187-94 (5th Cir. 1982). There the parties settled Case 1 after findings but before judgment, stipulating to an order withdrawing the findings and dismissing the action with prejudice; the court in Case 2 refused to apply collateral estoppel, but the Court of Appeal reversed. (Although the decision was later vacated in connection with other issues, see 460 U.S. 1007 (1983), it is nevertheless frequently cited on collateral estoppel questions.) *See also Zdanok v. Glidden Co.*, 327 F.2d 944, 955 (2d Cir. 1964), *cert. denied*, 377 U.S. 934 (1964) (liability determination was collateral estoppel even though damages had not been ascertained, following Restatement rule); *Aetna Casualty & Sur. Co. v. Jeppesen & Co.*, 440 F. Supp. 394, 402-05 (D. Nev. 1977) (applied collateral estoppel to settlement reached after determination of liability in bifurcated trial, citing and following *Queriolo*).

If collateral estoppel can be triggered by a jury verdict on a bifurcated issue, why not after summary judgment, summary adjudication, or other pretrial ruling that involves a dispositive determination — perhaps even an issue-preclusion sanction in a discovery dispute? There are few guideposts, beyond the basic principle that there should be some factual adjudication before collateral estoppel will operate. *See Clovis Ready Mix Co. v. Aetna Freight Lines*, 25 Cal.App.3d 276, 282-83 (1972) (dismissal with prejudice pursuant to a pre-adjudication settlement did not support collateral estoppel).

For instance, the Ninth Circuit recently rejected partial summary judgment as a basis for collateral estoppel, saying that "[w]e do not view the partial summary judgment on the same plane

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with the exhaustive decision, after full trial, given collateral estoppel effect in *Borg-Warner v. Avco Corp.*, 850 P.2d 628 (Alaska 1993)." *St. Paul Fire & Marine Ins. Co. v. F.H.*, 55 F.3d 1420, 1425 (9th Cir. 1995) (applying Alaska law). (In *Borg-Warner*, the Alaska Supreme Court upheld application of collateral estoppel where the parties settled Case 1 after trial, at a point where the trial court had issued its decision but had not yet entered judgment.) In contrast, in *McClain*, 216 Cal.App.3d 18, summary judgment in Case 1 was sufficient for collateral estoppel even though the case was later settled and purportedly dismissed during the appeal. *See also Harris Trust & Sav. v. John Hancock Mut. Life Ins. Co.*, 970 F.2d 1138, 1146 (2d Cir. 1992), *aff'd*, 114 S.Ct. 517 (1993) (collateral estoppel denied where partial summary judgment was withdrawn pursuant to settlement and the withdrawal order stated partial summary judgment was to have no preclusive effect); *Hartley v. Mentor Corp.*, 869 F.2d 1469, 1471-73 (Fed. Cir. 1989) (collateral estoppel allowed as to summary judgment followed by settlement before entry of judgment); *Ossman v. Diana Corp.*, 825 F.Supp. 870, 875-78 (D. Minn. 1993) (collateral estoppel allowed as to partial summary judgment followed by settlement, where district court refused to vacate partial summary judgment despite parties' request that it do so). Other types of adjudications are of equally uncertain effect. *See, e.g., Wellons, Inc. v. T.E. Ibberson Co.*, 869 F.2d 1166, 1168-69 (8th Cir. 1989) (arbitration award that was neither confirmed nor vacated given preclusive effect despite settlement; "collateral estoppel applies when the issues have been fully adjudicated regardless of a subsequent settlement agreement").

What these cases suggest — and what should give counsel pause in assembling settlements — is that Case 2 courts will decide whether to apply collateral estoppel on a case-by-case basis, second-guessing the decision-making process in Case 1. For instance, one can envision a partial summary judgment in Case 1 that would address the Ninth Circuit's concerns in *St. Paul Fire & Marine* — such as a ruling after extensive discovery and a full presentation of the facts, so that further litigation would not yield further information — and that therefore could serve as a proper basis for collateral estoppel.

Possible Strategies

"But if any adjudication increases the risk of collateral estoppel, can you ever settle safely?" asks Young Hotshot Lawyer, now seriously — and properly — concerned about the settlement he's negotiated. The only accurate answer is, "Maybe." The decisions suggest that the courts will probably look at several variables:

The nature of the adjudication. A trial court judgment, a jury verdict, or an arbitrator's award will probably support collateral estoppel, because these are determinations that both trial and appellate courts have only limited power to overturn. On the other hand, a judge's decision on an early motion for summary adjudication or partial summary judgment may be given less weight because the court would have been able to revisit that determination *de novo*. *But see* Cal. Code Civ. Proc. § 1008 (limiting circumstances in which trial courts may revisit issues decided in pre-trial motions).

Whether the adjudication was vacated as a part of the settlement. Although vacating the adjudication is no guarantee of avoiding collateral estoppel, *failing* to do so will almost certainly permit collateral estoppel.

Whether the parties intended to avoid collateral estoppel. Several cases indicate that courts may treat collateral estoppel as a matter of contract interpretation, denying collateral estoppel if that goal appears to have been an element in the parties' settlement. *E.g., Hughes v. Santa Fe Int. Corp.*, 847 F.2d 239, 241-42 (5th Cir. 1988); *Estate of Portnoy*, 612 F.Supp. 1147. This conclusion, however, seems questionable.

The amount of the settlement as a proportion of the amount sought or previously awarded. If the settlement after adjudication in Case 1 closely approximates the damage award or the plaintiff's demand, the court in Case 2 may be more likely to find collateral estoppel. *See Sandoval*, 140 Cal.App.3d at 940 & n. 5. On the other hand, if the settlement is for twenty cents on the dollar, the court may view the initial adjudication as more tentative or weak.

In approaching settlement, counsel should consider the following:

- Seek an order granting a new trial on all issues, but dismiss the case before the trial court rules (unless it is clear the trial court will grant the motion for reasons other than just the parties' agreement). The ideal setting would be for the losing party to move for a new trial and then settle the case before the trial court rules — in other words, at a time when the sufficiency of the adjudication remains unclear and the court has the full power to grant a new trial. (Note that a motion for a new trial is available in a variety of contexts, not just after an actual trial. *See* 8 B.E. Witkin, *California Procedure*, Attack on Judgment in Trial Court §§ 21-23, pp. 422-425 (3d ed. 1985).)
- In seeking vacatur in federal court, be sure the trial court explicitly evaluates the Ringsby factors and relies on its conclusions in vacating the adjudication.
- Build language into the settlement agreement that recites the nature and strength of arguments that the "losing" party might have marshalled to attack the adjudication. This language could help convince a later court not to apply collateral estoppel because the adjudication is questionable.

Although collateral estoppel will usually be a defense concern, there are some strategic considerations for plaintiffs as well:

- Discovery should elicit not just other judgments against the defendant in similar fact situations, but also cases that may have been settled in a way that leaves the defendant exposed to offensive collateral estoppel.
- Settlement strategy should take into account whether the defendant has a collateral estoppel concern that the plaintiff can — for a price — address.
- Settlement considerations may also influence the plaintiff's efforts at early adjudication. For example, if the defendant is very concerned about the impact of collateral estoppel, the plaintiff might find it *harder*, rather than easier, to settle after an adverse adjudication, since then the defendant may be forced to pursue the case to the end. For the same reason, however, a highly persuasive summary adjudication motion might open a settlement door, because the defendant cannot afford the collateral estoppel risk of losing that motion.

Of course, litigants can rarely choose the timing of settlement. But if collateral estoppel is a concern, the litigation game plan must take into account the fact that the risk increases as the case progresses. For both defendants and plaintiffs, it is important for counsel to identify and discuss with their clients the impact of possible collateral estoppel on the conduct of the case and on their settlement posture.

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