

SETTLING CASES ON APPEAL

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**Dallas/Tarrant County Bar Associations
Joint Appellate Seminar
November 6, 2003**

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The street sweepers and late night buses roam the deserted downtown streets as the parties and their attorneys leave the mediator's office building. Certainly hungry and tired, and probably frustrated and angry, they have just reached a settlement of an appeal after a twelve-hour day composed of brief moments of stressful bargaining interspersed with lengthy periods of unspeakable tedium. The parties are thinking about that pending business deal, or about who will pick up the kids from school tomorrow; their appellate counsel are thinking about that monster brief due next week. No one is thinking about the settled case; it is over. Or is it?

Settlement of a case pending appeal is incomplete without thorough consideration, before, during, and after the settlement negotiation process, of the procedural disposition of the appeal and any related litigation. There is a judgment out there, and an appeal from that judgment on the appellate court's docket. The appellate court will not want to be ignored, and the trial court's judgment often cannot safely be ignored. Rarely can the parties simply exchange releases and settlement checks without dealing in some appropriate manner with the procedural outcome of the case at both the trial and appellate level.

I. Selection of the Proper Appellate Disposition.

Obviously, where a case is settled pending appeal, the parties no longer desire (or, at least, are no longer entitled to) an appellate disposition on the merits. Nevertheless, the

appeal remains pending and must be disposed of in some manner. The choice among the various potential non-merits dispositions of an appeal turns primarily on the desired disposition of the underlying judgment; that choice must be made on an informed and thoughtful basis, taking into account the existing posture of the case and the desired posture following consummation of the settlement.

A. Affirmance.

An affirmance is just that; even when not based on the merits, it constitutes a ratification of the trial court's judgment by the appellate court. *See McWilliams v. McWilliams*, 531 S.W.2d 392, 394 (Tex. App. – Houston [14th Dist.] 1975, no writ). Affirmance is thus an appropriate settlement disposition only when the parties desire the trial court's judgment, now bearing the appellate court's imprimatur, to remain in effect, or at least when they are willing for that to happen.

A trial court judgment which awards damages will remain, so far as the record reflects, fully collectible; the clerk and sheriff will not take cognizance of a settlement agreement or release of liability which does not specifically extend to a release of the judgment or which is not filed of record and in the proper form. Hence the defendant will want to obtain and file (in the trial court) an acknowledgment of satisfaction of the judgment. *See* Tex. Prop. Code § 52.005(2) regarding the form of such an acknowledgment.

Affirmance (or alternatively dismissal of the appeal, *see* Section I.B, *infra*) is an appropriate appellate disposition where the settlement of a money judgment involves future payments, and the plaintiff wants the usual judgment enforcement mechanisms to be

available if the defendant defaults. In such a case, the settlement agreement generally provides for a release of the judgment upon completion of the payments. *See Caballero v. Heart of Texas Pizza, L.L.C.*, 70 S.W.3d 180, 180-81 (Tex. App. – San Antonio 2001, no pet.) (under post-1997 appellate rules, appellate court may dismiss appeal without vacating judgment in such a situation).

If the trial court's judgment contains injunctive relief, affirmance is unlikely to be an appropriate disposition pursuant to settlement unless the parties specifically desire the injunctive relief to remain in effect. Even if the parties contract not to enforce an injunction, violation of the injunction constitutes an infringement on the dignity and authority of the court itself, punishable as contempt on the court's own motion. *See generally* Tex. Gov't Code § 21.002.

A judgment for declaratory relief which is affirmed pursuant to settlement will remain binding on the parties, and may create consequences extending beyond the immediate dispute. Indeed, any type of agreed judgment may carry with it *res judicata* or collateral estoppel effects, *see, e.g., Brown v. Wood*, 239 S.W.2d 195, 199 (Tex. Civ. App. – Dallas 1951, writ ref'd), except to the extent that the language or spirit of the settlement agreement circumscribes or eliminates those effects, *see Coakley v. Reising*, 422 S.W.2d 502, 511 (Tex. Civ. App. – Corpus Christi 1967), *rev'd on other grounds*, 436 S.W.2d 315 (Tex. 1968).

Finally, an affirmed judgment carries bragging rights. For example, the author has been party to an appellate settlement involving affirmance coupled with acknowledgment of satisfaction, in which this appellate disposition was insisted upon by the plaintiffs' at-

torney so that he could claim to the unknowledgeable that his big judgment had been “affirmed on appeal.” From the defendant’s perspective, on the other hand, a large corporation or prominent individual may not want official records to reflect an affirmed judgment finding the defendant guilty of wrongdoing, even if that judgment is carefully deprived of any practical consequences. Conversely, the defendant may want to preserve the psychological or public relations effect of a trial court victory by arranging for the judgment to be affirmed as part of an appellate settlement.

B. Dismissal of the Appeal.

Dismissal of the appeal leaves the judgment of the trial court in force, as though no appeal had been brought. *E.g., Robertson v. Land*, 519 S.W.2d 227, 229 (Tex. Civ. App. – Tyler 1975, no writ). It is thus a first cousin of affirmance, identical except that the trial court judgment does not have whatever psychological attributes arise from ratification by the appellate court. Since the interests of most plaintiffs in a settlement do not extend beyond the monetary settlement consideration which they are receiving, dismissal of the appeal is generally the appropriate disposition when an appeal by the plaintiff from a take-nothing judgment is settled.

C. Vacation of the Trial Court’s Judgment and Dismissal of the Cause.

The direct and collateral consequences of an extant trial court judgment can be avoided by having the appellate court vacate the judgment from which appeal has been taken. Concurrently with this relief, the appellate court can dismiss the cause, with or

without prejudice. The effect of such a disposition is the same as if the trial court had dismissed the cause, with or without prejudice. Absent special circumstances, vacation and dismissal with prejudice is the preferred disposition where a money judgment for the plaintiff is settled while on appeal.

D. Vacation of the Trial Court’s Judgment and “Dismissal of the Appeal.”

The distinction between dismissal of the *cause* and dismissal of the *appeal* is well-established. See Section I.O, *infra*. Yet it is shocking how often this distinction is overlooked by appellate courts in their haste to dispose of a settled appeal. It is inappropriate to do anything to affect the trial court’s judgment in conjunction with dismissal of an appeal, since dismissal of the appeal recreates the situation which would have existed had no appeal been filed. See Section I.B, *supra*. Nevertheless, one sometimes sees appellate judgments which vacate the trial court’s judgment and dismiss the appeal. (The author has experienced four of these in the past eighteen months.) Often this occurs in response to a motion to vacate the trial court’s judgment and dismiss the *cause*. See, e.g., *Grantham v. Peterson*, 288 S.W.2d 226, 226 (Tex. Civ. App. – Waco 1956, no writ) (motion to dismiss *cause* granted, and *appeal* dismissed). Occasionally, as in one of the author’s recently settled cases, the opinion does not match the judgment:

NO. [REDACTED]-CV
 IN THE COURT OF APPEALS
 OF APPEALS DISTRICT
 [REDACTED], TEXAS

[REDACTED] § APPEAL FROM THE
APPELLANT

V. § COUNTY COURT AT LAW

[REDACTED] § [REDACTED] COUNTY, TEXAS
APPELLEE

**MEMORANDUM OPINION
 PER CURIAM**

The Parties hereto have filed a joint motion to vacate and render judgment pursuant to settlement. That motion has been signed by the attorneys for all parties and represents that the parties' agreement disposes of all issues presented for appeal. Because the parties have met the requirements of Tex. R. App. P. 42.1(a)(2), the motion is granted, the judgment of the trial court is vacated without regard to its merits, and **the cause is dismissed with prejudice**. The costs of this appeal are taxed against Appellant.

Opinion delivered [REDACTED], 2003.
 Panel consisted of [REDACTED]

(PUBLISH)

COURT OF APPEALS
 [REDACTED] OF APPEALS DISTRICT OF TEXAS
JUDGMENT

[REDACTED], 2003

NO. [REDACTED]-CV
 [REDACTED]
 Appellant

V.
 [REDACTED]
 Appellee

Appeal from the County Court at Law No. [REDACTED]
 of [REDACTED] County, Texas. Tr. Ct. No. [REDACTED]

THIS CAUSE came to be heard on the appellate record and the joint motion of the parties to dismiss the appeal herein for the reason that all matters in controversy between the parties have been compromised, settled, and fully satisfied, and the Court having heard and considered said motion is of the opinion the same should be **GRANTED**.

It is therefore ORDERED, ADJUDGED and DECREED by the Court that the judgment of the trial court is **VACATED and the appeal be, and the same is, hereby DISMISSED WITH PREJUDICE**; and that all costs of this appeal be, and the same are, adjudged against the Appellant, [REDACTED] for which let execution issue, and that this decision be certified to the court below for observance.

By *per curiam* opinion.
 Panel consisted of [REDACTED]

Vacation of the trial court's judgment and dismissal of the appeal creates a procedural conundrum, because there is no final disposition of the case and can never be one. The trial court's judgment is gone, having been vacated. The appellate court's judgment disposes of the appeal, but does not dispose of the case. In due course, the appellate court will lose plenary power. *See* Tex. R. App. P. 19. The trial court lost plenary power long ago, *see* Tex. R. Civ. P. 329b(f), and never regains it through a remand. There is no judgment, and no court with jurisdiction to render one; the case is simply lost in space.

E. Vacation of the Trial Court's Judgment and Rendition of a New Judgment.

A vacation of the trial court's judgment can be combined with relief other than dismissal, such as the rendition of a new judgment by the appellate court. This is the ap-

appropriate appellate disposition where, for example, injunctive relief, different from any which the trial court may have awarded, is to remain in effect after the settlement. It may also be appropriate where a money judgment is to be put in place without immediate satisfaction of that judgment.

F. Modification and Affirmance.F

If dismissal of the appeal is the first cousin of affirmance, modification and affirmance is the first cousin of vacation and rendition. Again the old judgment is removed and a new judgment put in its place; the only difference is that the ancestry of the new judgment extends back to the trial court proceedings instead of originating in the appellate court. This appellate disposition may therefore be appropriate where, for example, a discrete portion of the judgment (*e.g.*, punitive damages, prejudgment interest, or injunctive relief) is to be deleted as part of the settlement while leaving the rest of the judgment in place. It may also be appropriate where the priority of a judgment lien is important.

G. Vacation of the Trial Court's Judgment and Remand in Aid of Settlement.

Some settlement outcomes simply cannot be embodied in a new judgment rendered on appeal or in an old judgment modified on appeal. For example, where a minor or mentally incompetent plaintiff is involved, remand for a “proveup” hearing (and potentially for the appointment of a guardian *ad litem*, *see* Tex. R. Civ. P. 173) is required in order to render the settlement binding and conclusive on the minor or incompetent. Tex. R. Civ. P. 44(2). Settlement of a class action pending appeal will likewise require

remand for trial court approval proceedings. *See* Tex. R. Civ. P. 42(e) . Where the parties agree on a new trial of all or part of the case, remand for this purpose is required. *But see* Supreme Court Advisory Committee, Comment to 2002 Change to Tex. R. App. P. 42.1 (no new trial “merely on the agreement of the parties absent reversible error”). Finally, where the relief agreed upon between the parties brings the question of other relief, unresolved by the original judgment or the settlement, into play, remand for further proceedings is required.

H. Abatement of the Appeal.

As an alternative to vacation and remand, the parties can ask the appellate court to abate the appeal and permit proceedings in the trial court to effectuate the settlement. Tex. R. App. P. 42.1(a)(2)(C), 56.3. This course of action has a slight advantage over vacation and remand in aid of settlement in that the appeal need not be restarted from scratch if for any reason the trial court proceedings do not dispose of the case. Abatement may also be appropriate where an appellate settlement is conditioned on proceedings in parallel litigation (for example, bankruptcy court or probate court approval of the settlement) or on real-world non-litigation events.

Bear in mind that abatement and remand is a temporary resolution of the appeal, not a permanent one. Once the events pending which abatement was ordered have taken place, one of the other appellate dispositions described in this outline will be appropriate.

I. Vacation of an Appellate Opinion.

Settlements after an initial appellate opinion are sometimes driven by the desire to avoid a precedent which a party (usually the defendant) perceives as undesirable. In earlier days, this was often accomplished by asking the appellate court on rehearing to vacate its opinion as part of the disposition pursuant to settlement, or by asking the Supreme Court to vacate the Court of Appeals' opinion pursuant to settlement. *See, e.g., Borden, Inc. v. De La Rosa*, 831 S.W.2d 304 (Tex. 1992); *Texas Health Enterprises, Inc. v. Krell*, 830 S.W.2d 922 (Tex. 1992).

This practice has, however, fallen into disfavor. Now, a settlement agreement or motion for dismissal may not be conditioned on withdrawal of an appellate opinion. Tex. R. App. P. 42.1(c), 56.3. Both the Court of Appeals and the Supreme Court retain discretion to vacate an opinion pursuant to settlement, *id.*, but the Supreme Court has indicated that it will not routinely do so, *Houston Cable TV, Inc. v. Inwood West Civic Association*, 860 S.W.2d 72, 73 (Tex. 1993), and the Courts of Appeals have generally adopted a similar attitude, as has the Supreme Court of the United States, *see U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 29 (1994).

J. Public Policy Limitations on Permissible Appellate Dispositions.

The appellate court's judgment belongs to the court, and not to the parties. While appellate courts are generally amenable to disposing of appeals pursuant to settlement in the manner desired and specified by the parties, public policy considerations place an

outer bound on the parties' ability to craft an appellate disposition. A court will not, for example, render an agreed declaratory judgment that Texas never rejoined the Union after the Civil War, or a Draconian agreed injunction which shocks the appellate court's conscience. And, it should go without saying, settling parties cannot insist on an appellate disposition which prejudices the rights of non-settling parties or of non-parties to the appeal. *Elizondo v. Northeast Independent School District*, 853 S.W.2d 862, 863 (Tex. App. – San Antonio 1993, no writ); Tex. R. App. P. 42.1(b).

K. Partial Disposition of an Appeal.

Although the courts obviously prefer complete settlements which remove cases from their dockets, the rules accommodate partial settlement of severable parties and/or issues. *See* Tex. R. App. P. 42.1(b), 56.3. The parties who remain in the appeal should take special care that the settlement does not cause unexpected procedural or substantive consequences with respect to the parties and issues not settled.

L. Costs.

Lawyers who draft agreed trial court judgments are sensitized to the need to make disposition of costs; lawyers who request specific appellate relief pursuant to settlement often are not. Costs on appeal (primarily filing fees and the cost of the clerk's record and reporter's record) must always be addressed in an appellate settlement; where the appellate court is to render a new judgment, trial court costs are also an issue to be resolved. Typically the appellate court will grant whatever relief regarding costs the parties jointly

ask for. Absent agreement of the parties, costs will be taxed against the appellant. Tex. R. App. P. 42.1(d).

M. Disposition of Appellate Security.

As with costs, the proposed appellate disposition should specify what is to happen to the liability of the surety on the supersedeas bond, if any. Where deposits of cash or securities have been made in lieu of a supersedeas bonds, *see* Tex. R. App. P. 24.1(c), the appropriate disposition of these deposits should be specified. Often, a cash deposit can be used to fund the settlement.

N. Disposition of Cases in the Supreme Court.

Settlement of a case during the pendency of a petition for review in the Supreme Court involves, practically speaking, fewer options for disposition than those available at the Court of Appeals level. The Court can dismiss a petition pursuant to settlement, with the effect that the judgment of the Court of Appeals stands. *See, e.g., Metzger Dairies, Inc. v. Olguin*, 38 Tex. Sup. Ct. J. 319 (Mar. 2, 1995) (before grant of application); *Huckabay v. Irving Healthcare Authority*, 38 Tex. Sup. Ct. J. 130 (Dec. 22, 1994) (after grant). Although it has the power to do so, the Supreme Court will generally not affirm or modify a judgment pursuant to settlement, or vacate and render a new judgment; instead, the Court will typically grant an application without regard to its merits, vacate the judgments below, and remand to the trial court for proceedings in aid of settlement. Tex. R. App. P. 56.3. Vacating the Court of Appeals' opinion is generally not an option. *See*

Section I.I, *supra*.

O. Appellate Disposition in the Absence of an Agreement Regarding Disposition.

The appropriate appellate disposition following a settlement may be obvious under the circumstances, or it may not. In any event, the settlement documentation (including any informal memorandum of settlement terms signed at a mediation or settlement conference) should specify the agreed-upon disposition. Failure to agree in advance on the appellate disposition, and to write that agreement down, can lead to needless, time-consuming, and expensive satellite litigation; the appellate court is apt to tell parties who have settled but cannot agree on a disposition to go away and come back after they have made up their minds.

Where a settlement has been consummated except for disposition of the appeal, it is possible that the appeal has become moot. If this is so, the law supplies the appropriate appellate disposition: where a case becomes moot while on appeal, all previous orders and judgments should be set aside (without regard to their merits), and the *cause*, not merely the *appeal*, should be dismissed. *E.g.*, *City of Garland v. Louton*, 691 S.W.2d 603, 604-05 (Tex. 1985); *Guajardo v. Alamo Lumber Co.*, 159 Tex. 225, 317 S.W.2d 725, 726 (1958); *Texas Foundries, Inc. v. International Moulders & Foundry Workers' Union*, 151 Tex. 239, 248 S.W.2d 460, 461 (1952); *Freeman v. Burrows*, 141 Tex. 318, 171 S.W.2d 863, 863 (1943). Dismissal of the appeal alone would be highly improper, inasmuch as it would have the effect of affirming the judgment below without consider-

ing the appellant's points of error. *Texas Foundries*, 248 S.W.2d at 461.

II. Disposition of Satellite Litigation.

Often the settlement of an appeal will also dispose of related contemporaneous trial court litigation between the parties, such as a severed cause of action, a bad faith suit awaiting appeal of a judgment regarding insurance coverage, or a bill of review filed ancillary to an appeal or writ of error proceeding from a default judgment. Usually this is trial court litigation, but there may be companion appeals or mandamus actions pending at the time an appellate settlement is reached. Regardless of the nature of the satellite forum, care must be taken in the settlement documentation to provide for appropriate disposition of this related litigation.

III. Settlement of Interlocutory Appeals and Mandamus Actions.

Sometimes the parties reach agreement regarding the outcome of a discovery dispute, temporary injunction, or other dispute which has become the subject of an interlocutory appeal or mandamus action. The usual procedure for implementing such a settlement is to submit an agreed order to the trial court, and then to move to dismiss the interlocutory appeal or mandamus petition pursuant to settlement. If a stay of trial court proceedings has been issued (or arises by operation of law, *see* Tex. Civ. Prac. & Rem. Code § 51.014(b) (as amended 2003)), it may first be necessary to move the appellate court to lift the stay to permit an agreed order to be issued. In the case of mandamus, an alternative procedure is to move to dismiss the mandamus action (and to vacate any asso-

ciated stay orders) without prejudice to its renewal should the settlement not be implemented.

Dismissal of an interlocutory appeal or mandamus action may also become appropriate when the underlying trial court litigation is settled. In this case, dismissal of the appeal or mandamus action is usually the appropriate relief.

IV. Procedure for Appellate Disposition.

Tex. R. App. P. 42.1 governs the disposition of appeals on a voluntary basis. It provides two procedural options for such disposition:

The appellate court may dispose of an appeal as follows:

(1) *On Motion of Appellant.* In accordance with a motion of appellant, the court may dismiss the appeal or affirm the appealed judgment or order unless disposition would prevent a party from seeking relief to which it would otherwise be entitled.

(2) *By Agreement.* In accordance with an agreement signed by the parties or their attorneys and filed with the clerk, the court may:

(A) render judgment effectuating the parties' agreements;

(B) set aside the trial court's judgment without regard to the merits and remand the case to the trial court for rendition of judgment in accordance with the agreements; or

(C) abate the appeal and permit proceedings in the trial court to effectuate the agreement.

Tex. R. App. P. 42.1(a)(1). An agreement for appellate disposition is best filed as an exhibit to a motion requesting specific appellate relief; the filing of a stand-alone agreement may not alert the appellate court to the fact of settlement and the desire for a specific appellate disposition.

V. Timing of Appellate Disposition.

Appeals can be and are settled at every conceivable stage of the appellate process. The procedural considerations governing appellate settlement differ among these stages.

A. Settlement Before the Record Is Filed.

The 1997 revision to the appellate rules deleted the special procedures applicable to voluntary disposition of an appeal before the record is filed. Now, as long as a docketing statement has been filed, *see* Tex. R. App. P. 32, the Court of Appeals should have the information it needs to consider a voluntary disposition. It is still a good idea, however, to attach a copy of the trial court judgment, and perhaps the notice of appeal, to any motion seeking voluntary disposition before the record is filed.

B. Settlement Before the Briefs Are Filed.

Settlement between the filing of the record and the briefs presents no special timing considerations, except that an extension of time for briefing may be appropriate to afford time for settlement negotiations to take place, or for settlement documents to be drafted and a dispositive motion submitted to the court. Since settlement of appeals is strongly favored, courts generally regard this as the requisite reasonable explanation of the need for an extension. *See* Tex. R. App. P. 38.6(d), 10.5(b)(1)(C). Any such motion should clearly demonstrate that there is a genuine and significant prospect for settlement and indicate the expected form and timing of further settlement exploration.

C. Settlement Before Oral Argument.

Courtesy and professionalism dictate that a settlement reached between briefing and oral argument be communicated promptly to the appellate court, and in any event well in advance of a scheduled oral argument. While the court will likely be sympathetic to a last-minute settlement announced at the last minute, it will likely be highly unsympathetic to the delayed revelation of a settlement reached substantially earlier. Where settlement is reached before oral argument but cannot be documented before the scheduled argument date, a joint motion to vacate the oral argument setting will generally be granted, but will usually result in a lengthy delay if the settlement is not thereafter consummated.

Where a case is settled pending disposition of a petition for review by the Supreme Court, it is best to notify the Supreme Court clerk's office by letter (with or without a contemporaneous telephone call), even if it will be some time before a dispositive motion can be filed. So long as the Court's patience is not unduly imposed upon, it will cooperate with settling parties by withholding a decision pending completion of the settlement process.

D. Settlement After Oral Argument.

Where settlement is reached after oral argument, prompt notification to the court is essential, even if a dispositive motion cannot yet be submitted. Appellate judges have plenty of opinions waiting to be written in other cases, and are apt to be ungrateful upon

learning that they have wasted time and effort on a case after it has been settled without timely notice to the court. Such prompt notification serves the litigants' interests as well: without it, an unexpectedly rapid decision may alter the balance of power and torpedo an advantageous settlement, or create a bad appellate precedent which deprives the settlement of some or all of its value. Following notification to the court, the settlement should be documented and a dispositive motion filed before the court loses patience.

E. Settlement After Appellate Opinion and Judgment.

Until the court of last resort denies a motion for rehearing, it is never too late to settle a case. A settlement after appellate opinion and judgment may be as simple as a cash payment in exchange for the losing party's forbearance from filing a motion for rehearing or petition for review, or may involve an agreed motion to vacate the appellate judgment (but generally not the opinion, *see* Section I.I, *supra*!) followed by affirmance, dismissal of the appeal, vacation and dismissal, vacation and rendition, modification and affirmance, or vacation and remand. Move rapidly: the deadlines for motions for rehearing or petitions for review are short. While the court retains plenary power over its judgment for a short time after these deadlines have run, *see* Tex. R. App. P. 19, it is not bound to exercise that power to help settling parties out of a self-imposed procedural quandary.

VI. "High-Low" Agreements on Appeal.

Q: When is the "settlement" of an appeal not really a settlement? A: When it is a

“high-low” agreement. Just as trial court cases can be partially “settled” by an agreement that the plaintiff will receive no less than \$X and the defendant will pay no more than \$Y, so appeals can be settled on this basis. Such an agreement can provide that the litigation will proceed until the bitter end, or can provide that the Court of Appeals’ result will be final. (Provision must be made in the latter case for what happens if the court remands the case.) Particular appellate contingencies or outcomes can be specifically addressed if desired.

As long as real-world tangible consequences turn on the outcome of the appeal, an appeal under a “high-low” agreement does not constitute an impermissible experiment of the parties to obtain an advisory opinion. Nevertheless, it is good practice to notify the appellate court of the existence (but generally not the details) of the agreement. This is particularly the case when discretionary review is sought in the Supreme Court, lest the Court think that it is granting review of a much larger dispute than is in fact the case.

The “high-low” agreement may involve only an agreement about the amounts which will eventually be paid, or may involve immediate payment of the “low” amount. The latter is often an attractive option to both parties, because the plaintiff receives immediate funds and the defendant cuts off post-judgment interest on the “low” amount, and can potentially shift payments into a more desirable fiscal year.

A redacted “high-low” agreement used by the author in a recent appeal appears in an appendix.

VII. Conclusion.

The case isn't over when the parties shake hands. It isn't over when they sign the settlement memorandum. It isn't even over when the release is signed and the check is delivered. Only when the final order comes in from the appellate court, or perhaps when the agreed judgment following remand comes in from the trial court, has the fat lady sung and the opera ended. Care taken early in the settlement process can make the last act of the opera short and sweet, enabling appellate counsel to take a well-deserved curtain call.

APPENDIX I

Tex. R. App. P. 42.1

RULE 42. DISMISSAL; SETTLEMENT

42.1 Voluntary Dismissal and Settlement in Civil Cases

(a) *On Motion or By Agreement.* The appellate court may dispose of an appeal as follows:

(1) *On Motion of Appellant.* In accordance with a motion of appellant, the court may dismiss the appeal or affirm the appealed judgment or order unless such disposition would prevent a party from seeking relief to which it would otherwise be entitled.

(2) *By Agreement.* In accordance with an agreement signed by the parties or their attorneys and filed with the clerk, the court may:

(A) render judgment effectuating the parties' agreement;

(B) set aside the trial court's judgment without regard to the merits and remand the case to the trial court for rendition of judgment in accordance with the agreement; or

(C) abate the appeal and permit proceedings in the trial court to effectuate the agreement.

(b) *Partial Disposition.* A severable portion of the proceeding may be disposed of under (a) if it will not prejudice the remaining parties.

(c) *Effect on Court's Opinion.* In dismissing a proceeding, the appellate court will determine whether to withdraw any opinion it has already issued. An agreement or motion for dismissal cannot be conditioned on withdrawal of the opinion.

(d) *Costs.* Absent agreement of the parties, the court will tax costs against the appellant.

APPENDIX II

Sample Appellate “High-Low” Agreement

RISK LIMITATION AGREEMENT

This Risk Limitation Agreement (“Agreement”) is made this ___ day of [month/-year of agreement], by and between [plaintiffs] (collectively the “Plaintiffs”), and [defendant] (“[defendant]”).

WHEREAS, on [date of trial court judgment], the Plaintiffs recovered an amended Final Judgment (the “Amended Judgment”) against [defendant] in the action styled [style], No. [number] in the [court] (the “Litigation”), and

WHEREAS, [defendant] and the Plaintiffs have given notice of their respective intentions to pursue appeals from said judgment to the Court of Appeals for the [# of Court of Appeals] District of Texas (the “Appeals”), and

WHEREAS, it is possible that the Appeals may result in further appellate review of the Court of Appeals’ judgment, or in trial or appellate court proceedings subsequent to a remand of the case (the Appeals and any such further review or proceedings being collectively referred to in this Agreement as the “Further Litigation”), and

WHEREAS, the outcome of the Further Litigation is uncertain, and the Plaintiffs and [defendant] desire to limit the monetary risks arising from such uncertainty while maintaining a live justiciable controversy between them,

NOW, THEREFORE, in consideration of the mutual rights and obligations of the parties under this Agreement, the Plaintiffs and [defendant] agree as follows:

1. **Initial Payment by [defendant].** On or before the 14th day after the date of this Agreement, [defendant] will pay to the Plaintiffs the sum of [amount of “low” payment] (This payment is referred to in this Agreement as the “Initial Payment.”) [defendant] will use its best efforts to make the Initial Payment on or before [date]. The Initial Payment will be apportioned among the Plaintiffs as follows: [apportionment]. The Initial Payment will not be refundable to [defendant], irrespective of the outcome of the Further Litigation.

2. **Retention of Procedural and Substantive Rights.** Notwithstanding the Initial Payment, [defendant] will retain all procedural and substantive rights to contest the validity and amount of the Amended Judgment, to the same extent as such rights would have existed in the absence of this Agreement. Notwithstanding their acceptance of the Initial Payment, the Plaintiffs will retain all rights to defend the validity of the Amended Judgment and to defend or contest the amount of the Amended Judgment, to the same extent as such rights would have existed in the absence of this Agreement. It is the intention and belief of the Plaintiffs and [defendant] that the Further Litigation will continue to constitute a *bona fide* justiciable dispute notwithstanding the execution and performance of this Agreement.

3. **Final Judgment.** The Plaintiffs and [defendant] will continue to litigate the issues in dispute between them in the Further Litigation until such litigation results in a final judgment from which no further appeal may lawfully be taken (the “Final Judgment”).

ment”).

4. **Final Payment by [defendant].** On or before the 30th day after the rendition of the Final Judgment, [defendant] will, subject to the credits set forth in Paragraphs 5 and 6 of this Agreement, the limitations set forth in Paragraphs 7 and 8 of this Agreement, and the exception set forth in Paragraph 9 of this Agreement, pay to the Plaintiffs the amount due under the Final Judgment. (This payment is referred to in this Agreement as the “Final Payment.”) The Final Payment will be apportioned among the Plaintiffs as follows: **[percentage apportionment].**

5. **Credits for Codefendants’ Settlements.** [defendant] will receive the following credits (the “Settlement Credits”) against the Final Judgment, to be deducted from the amount of the Final Judgment prior to the Final Payment:

a. A credit of **[amount of co-defendant #1’s settlement]**, plus interest on that amount, from and after **[date of trial court judgment]**, at the rate of postjudgment interest applicable to the Final Judgment. This credit shall apply only against the portion, if any, of the Final Judgment allocable to damages (plus prejudgment and postjudgment interest thereon) for which **[defendant]** would have been jointly and severally liable with **[co-defendant #1]**, but for the settlement between the Plaintiffs and **[co-defendant #1]**

b. A credit of **[amount of co-defendant #2’s settlement]**, plus interest on that amount, from and after **[date of trial court judgment]**, at the rate of postjudgment interest applicable to the Final Judgment. This credit shall apply only against the portion, if any, of the Final Judgment allocable to damages (plus prejudgment and post-

judgment interest thereon) for which [defendant] would have been jointly and severally liable with [co-defendant #2], but for the settlement between the Plaintiffs and [co-defendant #2]

6. **Credit for Initial Payment.** [defendant] will receive a credit (the “Initial Payment Credit”) against the Final Judgment, to be deducted from the amount of the Final Judgment prior to the Final Payment. The Initial Payment Credit will be in the amount of the Initial Payment plus interest on the Initial Payment, from and after (but not prior to) the date of the Initial Payment, at the rate of postjudgment interest applicable to the Final Judgment. The Initial Payment Credit will be applied against [defendant]’s aggregate liability under the Final Judgment after the application of the Settlement Credits, irrespective of the allocation of the Initial Payment among the Plaintiffs pursuant to Paragraph 1 of this Agreement.

7. **Limitation on Final Payment.** Notwithstanding anything in the Final Judgment or in this Agreement to the contrary, the Final Payment will not exceed [difference between “high” and “low” settlement amounts]

8. **Court Costs.** Notwithstanding anything in the Final Judgment or in this Agreement to the contrary, each party will bear its own costs in the trial and appellate courts.

9. **Exception to Final Payment.** Notwithstanding anything in the Final Judgment or in this Agreement to the contrary, no Final Payment will be due and payable if the Further Litigation results, without retrial, in [specified appellate outcome].

10. **Acknowledgments of Satisfaction.** At the time [defendant] makes the

Final Payment pursuant to Paragraph 4 of this Agreement (or, if no Final Payment is due, then on or before the 30th day after the rendition of the Final Judgment), the Plaintiffs will deliver to **[defendant]** one or more acknowledgments of satisfaction of the Final Judgment, executed and acknowledged by each Plaintiff, in the form attached to this Agreement as Exhibit A.

11. **Modification by Mutual Agreement.** Nothing in this Agreement shall be construed to prevent the parties, by mutual agreement, from settling the Further Litigation for a sum agreeable to all parties.

12. **No Admission of Liability or Non-Liability.** Nothing in this Agreement or the performance thereof shall be construed as an admission by **[defendant]** of any of the Plaintiffs' claims in the Litigation, that the Amended Judgment is or is not proper in any respect, or that **[defendant]** is liable to the Plaintiffs in any amount other than as set forth in this Agreement. Nothing in this Agreement or the performance thereof shall be construed as an admission by the Plaintiffs of any of **[defendant]**'s defenses in the Litigation, that the Amended Judgment is or is not proper in any respect, or that **[defendant]** is not liable to the Plaintiffs in the amounts claimed by the Plaintiffs.

13. **Notices.** All notices, requests, demands, and other communications under this Agreement shall be in writing and shall be delivered in person, by electronic facsimile with copies sent by mail, or by certified or registered mail, postage prepaid, return receipt requested. Delivery to a party shall be to the party's attorney at the address specified in this Agreement. Delivery shall be effective upon personal delivery, electronic transmission, or certified or registered mailing, as the case may be. Any party may

change the attorney or address to which notification is to be given by notice to all other parties given in the manner specified in this paragraph.

14. **No Oral Modifications.** This Agreement may be amended or modified by, and only by, a written document executed by all of the parties.

15. **Integration.** This Agreement constitutes the entire understanding among the parties with respect to the subject matter, superseding all negotiations, prior discussions, and preliminary agreements.

16. **Binding Effect.** This Agreement is binding upon and inures to the benefit of the parties, their heirs, personal representatives, successors, and assigns.

17. **Execution of Documents.** The parties agree for themselves, their heirs, personal representatives, successors, and assigns to execute any instrument and to perform any acts which may be necessary or proper to carry out the purposes of this Agreement, including without limitation any instrument necessary to discharge liability under the supersedeas bond following the delivery of acknowledgments of satisfaction of the Final Judgment pursuant to Paragraph 10 of this Agreement.

18. **No Third-Party Beneficiaries.** There are no intended third-party beneficiaries of this Agreement.

19. **Choice of Law.** This Agreement shall be construed in accordance with the laws of the State of Texas.

20. **Venue.** Any suit to enforce or construe this Agreement shall be filed in a state district court in [county] County, Texas.

21. **Titles.** The titles of the sections of this Agreement are for convenience of

reference only and are not to be considered in construing this Agreement.

22. **Construction.** This Agreement shall not be construed strictly against any party, but only in accordance with its language and expressed purposes.

23. **Counterparts.** This Agreement may be executed in any number of counterparts, which collectively constitute a single original.

24. **Authority.** Each individual executing this Agreement represents and warrants that he or she is authorized to do so in the capacity stated.

[signature blocks and attached form acknowledgments of satisfaction omitted]