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Can’t stop, won’t stop

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If an appellant decides to end its own appeal, then the younger an appeal is, the easier it is to stop it in its tracks. If the record hasn't been completed yet, the appellant can abort by filing an abandonment in the superior court. Cal. Rules of Court 8.244(b); *see also* Jud. Council Form APP-005. If the record has reached the Court of Appeal, then the appellant can request a dismissal. Rule 8.244(c); *see also* Form APP-007. (Coronavirus digression: Speaking of OO7, this month's column originally was to have a James Bond theme and address a different topic altogether. The delayed release of "No Time To Die" prompted this pivot to a different article. The Bond-themed column will run in November, when the film is slated to come out.) Killing an appeal by voluntary dismissal is simple to accomplish and generally not at all costly. Depending on how early it is done, the respondent may not yet have incurred any recoverable costs at all.

Even during or after briefing, appellants sometimes decide to throw in the towel for various reasons. One common reason is settlement. Although most appeals do not settle, a small percentage do. Thus, with the "cooperation" of the respondent, the appellant can moot its own appeal through settlement. (Similarly a writ petitioner can pull the plug on a writ. *E.g.*, *Salamah v. Riverside County Superior Court* (Mar. 27, 2020, E073311).)

When that happens, it's essential (and required by rule) to alert the court to the settlement. Cal. Rules of Court 8.244(a). Failing to provide prompt notice can draw sanctions. For example, in *Huschke v. Slater*, 168 Cal. App. 4th 1153 (2008), the parties called the court before oral argument to notify it that they were working on a settlement. The clerk explained that oral notice was not acceptable and asked for written notice. Counsel claimed he sent a letter, but the court never received it, and the parties did not file a request to dismiss the case for another year. The court issued an OSC re sanctions for failing to timely inform the court of the settlement and why a request to dismiss the appeal had not then (or ever) been filed. The court imposed sanctions, rejecting counsel's position that his phone call should have sufficed. *See also In re Cellular 101, Inc.*, 539 F.3d 1150, 1154 (9th Cir. 2008) ("The obligation to inform the court of a potential settlement is of such critical importance to the maintenance of orderly proceedings and to the prevention of needless delay that a lawyer who fails to fulfill that obligation may be personally subject to sanctions"); *Gould v. Bowyer*, 11 F.3d 82, 84 (7th Cir. 1993) ("to spare busy courts unnecessary work, parties must advise a court when settlement is imminent.... The duty is implicit in the characterization of lawyers as officers of the court, and a breach of it therefore opens a lawyer to sanctions."); *DHX, Inc. v. Allianz AGF MAT, Ltd.*, 425 F.3d 1169, 1174-75 (9th Cir. 2005) (Beezer, J., concurring) ("We are engaged to decide live cases or controversies as presented by the attorneys of record, and it is not for a court to smoke out who settled with

whom"; the "failure to promptly disclose" complete and accurate settlement information is "sanctionable conduct").

But as the lifecycle of an appeal progresses, the appeal becomes less and less the property of the appellant and more and more the property of the court. Once the court has invested resources into analyzing an appeal, it becomes, well, more invested. And courts are understandably annoyed when parties try to pull the rug out from under all that work.

Pre-Argument Settlement. So what happens when parties try to cut and run just before oral argument? Often it works out, and the court is happy to have the matter removed from the docket. But that is not always the case, especially when argument is nigh. In *Black Diamond Asphalt, Inc. v. Superior Court*, 114 Cal. App. 4th 109, 115 (2003), the parties settled and requested a dismissal "on the eve of oral argument." The court insisted they appear for argument, and once there they acknowledged that the case raised "an issue of continuing public interest … likely to recur in the future." As a result, the court retained jurisdiction to resolve the matter, despite the settlement, based on the interests of public policy and the need to clarify the law.

Similarly, in *In re Marriage of Barneson*, 69 Cal. App. 4th 583, 585 n.1 (1999), the parties settled and sought dismissal on the eve of argument. The court refused to dismiss, however, noting that once the record on appeal is filed, dismissal is a matter for the court's discretion (citing *Lundquist v. Reusser*, 7 Cal. 4th 1193 (1994) and *Burch v. George*, 7 Cal. 4th 246, 253 n.4 (1994)). The court noted that the issues on appeal were important and of continuing interest (potentially affecting numerous interspousal transfers of property statewide).

Another example from about a year ago is *Huynh v. Farmers Ins. Exch.*, No. A149577, 2019 WL 1375788, *3 (Mar. 27, 2019) (unpublished), where the parties requested a dismissal two days before oral argument. But they did not provide any explanation. The court did not bite, or rather, it bit in a different way, ordering the parties to appear. The parties then explained in a letter that they had settled the day before oral argument. The court ultimately granted the request for dismissal based on the settlement because the case was "highly fact specific" and turned on an "unusual set of circumstances." But the court also emphasized the parties' obligation to notify the court when settlement occurs, and cautioned that dismissal is not guaranteed.

Post-Argument Settlement. Then there are parties who push their luck even further, and settle *after* oral argument. In *Kinda v. Carpenter*, 247 Cal. App. 4th 1268, 1272 n. 1 (2016), the appellants filed a notice of settlement (with dismissal conditional on the fulfillment of specified terms) two weeks after oral argument. This did not fly. Finding the appeal presented issues of public interest that would recur, the court denied dismissal and decided the merits. *See also Bay Guardian Co. v. New Times Media LLC*, 187 Cal. App. 4th 438, 445 n.2 (2010) (although post-argument settlement mooted the appeal, dismissal "at this extraordinarily late stage of the proceedings" is discretionary; court addressed merits because appeal presented issues of continuing public interest, likely to recur); *Stephen v. Enter. Rent-A-Car*, 235 Cal. App. 3d 806, 819 n.7 (1991) (citing *Okuda v. Superior Court*, 144 Cal. App. 3d 135, 137 n.1 (1983)).

Taking this a step further, in *Rosales v. Thermex-Thermatron, Inc.*, 67 Cal. App. 4th 187, 191 n.1 (1998), the court recounted how: "After we published an opinion and granted a rehearing in this

matter, the parties filed with the court a … Stipulation for Dismissal of Appeal. Because this action involves issues of continuing public interest which are likely to recur, we exercise our inherent discretion to resolve those issues although the parties' stipulation would normally render this action moot."

Late settlements and dismissal requests can happen in writ petitions too. But having bothered to take a writ petition and consider granting extraordinary relief, courts may be even less inclined to let the parties (or more accurately, the issues) evade a merits determination. *E.g.*, *Oaks Mgmt. Corp. v. Superior Court*, 145 Cal. App. 4th 453, 458 n.1 (2006) (denying request to withdraw writ petition based on settlement several weeks after oral argument because the law needed to be developed; citing *DuBarry Int'l v. SW Forest Indus.*, 231 Cal. App. 3d 552, 556 n.2 (1991)); *Castro v. Superior Court*, 116 Cal. App. 4th 1010, 1014 n.3 (2004).

Supreme Settlements? Ratcheting discretionary review up a notch leads us to the Supreme Court. To get this far in litigation, you'd think parties would be settled into their positions and disinclined to settle with each other. And yet sometimes it happens: Perhaps litigation fatigue breaks the last straw, or the risk analysis somehow spits out "flight" rather than "fight."

Regardless of the parties' motivations, once the Supreme Court takes the case the balance tilts decidedly differently: The case is no longer just a dispute between the parties. Granting review is a public pronouncement that the case has significance beyond the mere concerns of the litigants. The line is crossed and the dispute becomes a matter of statewide import, the People's business. The Supreme Court's mission is to develop the law, not help parties find closure.

Hence, we have cases like *Abbott Ford, Inc. v. Superior Court*, 43 Cal. 3d 858, 868 n.8 (1987), where the parties settled while the matter was pending in the Supreme Court (which could definitely happen given that some cases spend several years "pending in the Supreme Court"). The parties, however, noted "the importance of the issue" and thus urged the court to decide it, which it did. The same thing happened in *Burch*, 7 Cal. 4th at 253 n.4: The parties requested the court not dismiss their settled case because it implicated public policy and the law needed clarification — which the court provided.

Similarly, in *State of Cal. ex rel. State Lands Com. v. Superior Court*, 11 Cal. 4th 50, 62 (1995), settlement was reached after the Supreme Court granted review. But the court refused to dismiss, noting: "Here, either the judgment or the stipulation would bind the State, which is acting as the public's trustee of the land whose ownership is in dispute. Thus, the public interest in the legal issue presented and in the outcome of this case is a compelling reason for our refusal to accept the parties' stipulation." *See also Lundquist*, 7 Cal. 4th at 1202 n.8 (parties alerted the Supreme Court to a settlement two weeks before oral argument; court did not dismiss so it could reach issues of continuing public importance and reconcile disparate lines of authority).

A recent example of the Supreme Court "ignoring" a settlement is *ZB, N.A. v. Superior Court*, 8 Cal. 5th 175 (2019), which the parties settled about as late as possible — on the eve of an opinion, months after oral argument and supplemental briefing. The plaintiff requested a dismissal, but respondent (and amici) opposed. The Supreme Court apparently saw no reason to

even mention this kerfuffle in its opinion. Obviously it was moving forward with a merits opinion.

The Supreme Court's ignoring settlements is equally (maybe doubly) true when the Supreme Court takes a certified question: It's going to answer that question, regardless of the parties' wishes. Thus, in *Cadence Design Systems v. Avant! Corp.*, 29 Cal. 4th 215, 218 n.2 (2002), the Supreme Court took a certified question of law from the Ninth Circuit (to clarify an aspect of a California trade secrets statute). The parties settled after oral argument in the Supreme Court and shortly before the Court was to file its opinion. You can guess what happened: Obviously when the Supreme Court exercises its discretion to take a case to answer an important legal issue of continuing public interest likely to recur, and is poised to issue its opinion, it is not going to just stop at the parties' request. *See also People v. Eubank*s, 14 Cal. 4th 580, 584 n.2 (1996).

So, in exceptional cases an appellant may desire to drop its own appeal, and can typically do so. But as an appeal progresses, it can take on a life of its own, and escape the appellant's control. Once a court has devoted attention to an appeal, especially after doing so as a matter of discretion, it may not want to let go. At that point, the signs reverse, and it would be exceptional indeed for the court to grant a dismissal without addressing the merits. The Exceptional Lawyer is ever cognizant of that moment when the case enters the realm of really belonging to the court.

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