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Appeal Risk Is Big When Opting Out of New Trial

If outsized awards call for retrial, plaintiffs can accept a remittitur—and limit their future options.

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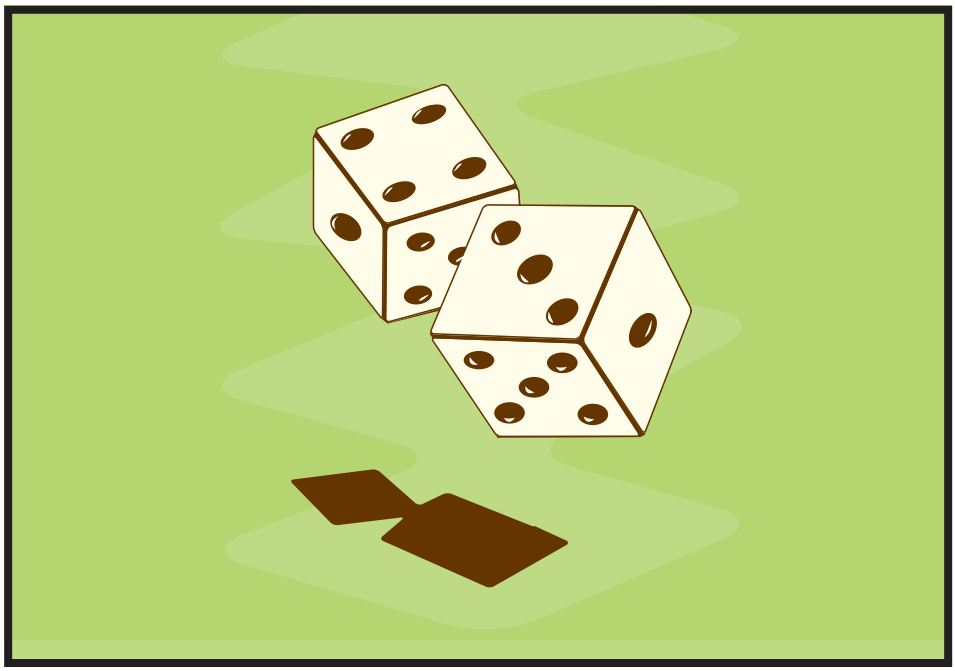

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The requirement of the Seventh Amendment that "no fact tried by a jury shall be otherwise re-examined" limits what a court can do to reduce a jury's excessive award of damages. One option, known as a conditional remittitur, is to offer the plaintiff the choice of accepting a reduced damages award in lieu of a new trial. A remittitur order, however, presents formidable barriers to appellate review.

The rule barring appeal of an accepted remittitur. If the plaintiff rejects the remittitur and a new trial is ordered, appellate review of the remittitur order must await a final judgment at the conclusion of the new trial. If the plaintiff instead accepts the remittitur, there is a final judgment, but it has long been the rule that by accepting a remittitur a plaintiff waives the right to appeal the remittitur order.

In Donovan v. Penn Shipping, 429 U.S. 648, 650 (1977), the U.S. Supreme Court made it clear that this bar on appellate review of an accepted remittitur order applies even if the plaintiff accepts the remittitur "under protest" or otherwise attempts to preserve the right to appeal. And the bar on appellate review applies as a matter of federal law in a diversity case, even if state law would permit the appeal.

The rule also bars a plaintiff from challenging an accepted remittitur in a cross-appeal. See, for example, *Rangolan v. County of Nassau*, 370 F.3d 239, 243-44 (2d Cir. 2004); *Republic Tobacco Co. v. North Atl. Trading*, 381 F.3d 717, 739 (7th Cir. 2004).

Scholars have criticized the rule because it has the unfair effect of allowing the appeals courts to consider the defendant's arguments that the remittitur was too low, while preventing the court from considering the plaintiff's argument that the remittitur was improper and that the original verdict should be reinstated.

Can the rule be circumvented by short-circuiting a new trial? If a new trial would be too long and costly, a plaintiff can reject the remittitur and take a "pratfall" at the second trial—that is, do little or nothing to prosecute its claims in the second trial, in order to expedite entry of final judgment and the opportunity to appeal the remittitur and seek reinstatement of the original verdict.

A pratfall, of course, comes with a significant downside risk: If the appellate court agrees that the original damages award was excessive and upholds the original remittitur, the plaintiff is stuck with whatever damages the jury awarded at the pratfall trial, presumably little or nothing.

In an unusual decision, the U.S. Court of Appeals for the Second Circuit suggested a way around this dilemma. In *Thomas v. iStar Fin.*, 652 F.3d 141 (2d Cir.) (per curiam), the trial court found a $1.6 million punitive damages award unconstitutionally excessive and offered the plaintiff the option of accepting a reduced award of $190,000 in lieu of a new trial.

The plaintiff rejected the remittitur, opting for a new trial. Before the new trial began, the parties jointly requested that the court "directly" reduce the damages award to $190,000 as a matter of

law and without providing an option of a new trial. The court agreed and entered judgment on that basis.

Declining to decide whether the trial court had authority to reduce punitive damages without offering another conditional remittitur, the Second Circuit construed the parties' joint request "as a stipulation to the effect that the result of a new trial is a jury award of $190,000 in punitive damages."

On that basis, the Second Circuit allowed the plaintiff's appeal and then, on the merits, upheld the original remittitur, leaving the plaintiff with the stipulated result of the second trial—$190,000 in punitive damages.

As a practical matter, the approach blessed in *iStar* differs little from the prohibited approach of accepting the original $190,000 remittitur "under protest" and appealing it. It also conflicts with precedent in other circuits. The Seventh Circuit, for example, has held that the prohibition on appeals of accepted remittiturs may not be "circumvented by simply stipulating that a second trial would result in a judgment equal to the remitted award." *Republic Tobacco*, 381 F.3d at 739 (noting that a "pratfall" is the only option for expediting appeal from a second trial).

It is also difficult to square *iStar* with earlier Second Circuit precedent. In *Evans v. Calmar S.S.*, 534 F.2d 519, 522 (2d Cir. 1976), during a second trial the plaintiff was allowed to reconsider and accept a previously rejected remittitur.

The court of appeals considered this "tantamount to a settlement" of the second trial, which could not be appealed, noting that the "plaintiff has thus eaten his cake by agreeing to the remittitur during his second trial." Since both cases involve the effective acceptance of a previously rejected remittitur, the distinction between them seems formalistic.

What claims are barred by accepting a remittitur? Accepting a remittitur bars appellate review of all claims related to the causes of action covered by the remittitur, including claims concerning evidentiary rulings and discovery rulings. Similarly, an accepted remittitur of either compensatory or punitive damages on the same cause of action bars appeal of any claims related to either type of damages. *Denholm v. Houghton Mifflin*, 912 F.2d 357, 360 (9th Cir. 1990); *Foam Products v. Upjohn*, 154 F.3d 1212, 1216 (10th Cir. 1998).

"A REMITTITUR ORDER PRESENTS FORMIDABLE BARRIERS TO APPELLATE REVIEW."

Accepting a remittitur, however, does not bar review of any "separate and distinct" causes of action. Following this principle, courts have held that accepting a remittitur of damages on a breach-of-contract claim does not bar an appeal challenging the dismissal of a related tortious breach-of-contract claim, *Denholm*, 912 F.2d at 359-61. Similarly, an accepted remittitur of damages on a fraud and deceit claim does not bar appeal on a related antitrust claim, *Call Carl v. BP Oil*, 554 F.2d 623, 627 (4th Cir. 1977).

Even where a single type of legal claim is involved, there may be factual claims that are separate and distinct. For example, a plaintiff that accepted a remittitur of breach-of-contract damages for goods that had already been shipped was not precluded from appealing a summary judgment ruling that barred relief for breach of contract as to goods that had not yet been shipped. *Aaro v. Daewoo Int'l (Am.)*, 755 F.2d 1398, 1399-1401 (11th Cir. 1985). Determining which claims are "separate and distinct" and therefore not covered by a remittitur is a question of federal law. *Denholm*, 912 F.2d at 359.

WHEN APPEALS ARE NOT PRECLUDED

When is a remittitur not a remittitur? Sometimes a purported remittitur is not really a remittitur, and therefore accepting it does not preclude an appeal.

For example, when a court issues a remittitur order setting aside an entire damages award, rather than just the excessive portion of the award, the court may be deemed to have granted judgment notwithstanding the verdict, and the order therefore can be appealed even if it was accepted by the plaintiff. *Hill v. Marshall*, 962 F.2d 1209, 1216 (6th Cir. 1992).

Similarly, a conditional remittitur that reduces a damages award indirectly—by increasing the plaintiff's percentage of contributory negligence—is not a proper remittitur order because it improperly adjusts the underlying liability determination, invading the jury's authority to apportion negligence. *Akermanis v. Sea-Land Serv.*, 688 F.2d 898, 907 (2d Cir. 1982). Arguably a plaintiff who accepted such an order would not be barred from challenging it on appeal, although that issue was not directly addressed in *Akermanis*.

Finally, in some circumstances a court may reduce a damages award as a matter of law—eliminating a portion of damages for which there is no supporting, legally competent evidence in the record.

Such an order—in which the court did not reweigh any evidence or exercise its discretion in recomputing damages—is not a remittitur and does not require an offer of a new trial, and is subject to review on appeal. *Tronzo v. Biomet*, 236 F.3d 1342, 1350-51 (Fed. Cir. 2001).

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