The Retraxit Trap

by Barry A. Drucker

If you are at the point of preparing to sign a dismissal, chances are the case is drawing to a close, as are your responsibilities and duties to your client. The settlement check has been received or is on the way, and the dismissal, although a necessary detail, is treated more as a nuisance than anything else. Particularly, the form of the dismissal is frequently given little or no consideration.

However, as some lawyers have discovered, the manner in which the dismissal is prepared may have a detrimental impact on your client. Since you have an ongoing duty to your client to consider his legal interests not only in the matter for which he has retained you, but all other derivative matters, the common law concept of retraxit should always be considered.

Retraxit is defined as "equivalent to a verdict and judgment on the merits of the case and bars another suit for the same cause between same parties." *Black's Law Dictionary* (5th ed. 1979). As stated in *Torrey Pines v. Superior Court of San Diego*, (1989) 216 Cal.App.3d 813, 265 Cal. Rptr. 217, "A dismissal with prejudice is the modern name for a common law retraxit. Dismissal with prejudice under Code of Civil Procedure section 581 'has the same effect as a common law retraxit and bars any future action on the same subject matter.' The term 'with prejudice' clearly means that the plaintiff's right of action is terminated and may not be revived." *Id*. at 820.

Filing a dismissal with prejudice, even though there was no trial, has the same force as having a court render a final judgment on the merits as to the rights of the parties and their privies, and as to them, constitutes an absolute bar to a subsequent action involving the same claim or cause of action. The corollary is that filing a dismissal without prejudice is not an absolute bar to a subsequent action involving the same parties.

While the definition of retraxit is straightforward, application becomes a tricky and sometimes complex double-edged sword that arises in a plethora of situations and leaves those who are unaware of the concept at a severe disadvantage. For example, the attorneys for one of the defendants in *Torrey Pines* never considered the impact of the form of the dismissal of their client's separate claim and unwittingly lost their defense. The *Torrey Pines* case is just one illustration of the many facets of the "retraxit trap."

In *Torrey Pines*, the bank brought an action against the guarantors who had guaranteed payment of a company's debts to the bank. The guarantors filed a separate action against the bank for breach of fiduciary duty, breach of the covenant of good faith and fair dealing, negligent misrepresentation and negligence. Subsequently, one of the guarantors filed a dismissal with prejudice of his action against the bank, after entering into a stipulation that the guarantor could answer the bank's complaint without the need for a cross-complaint or crossclaim. Based upon the dismissal with prejudice, the bank moved for summary judgment against the guarantors contending that the affirmative defenses the guarantor had raised in the answer were already determined as to that guarantor by virtue of the doctrine of retraxit and could not be re-litigated, since they constituted a decision on the merits, thereby invoking the principles of res judicata.

On appeal from the trial court ruling denying the bank's summary judgment as to several of the affirmative defense, the Court of Appeals issued a writ of mandate directing the trial court to enter judgment in favor of the bank against the guarantor. The Court held that when the guarantor dismissed his separate action with prejudice, his affirmative defenses in the present action were barred under principles of res judicata since those defenses asserted the same nucleus of operative facts and raised the same legal issues as those alleged in the separate action.

The potential "retraxit trap" reared its ugly head again in the recent case of *Lama v. Comcast Cablevision*, (1993) 93 D.A.R. 3255. In *Lama*, plaintiff Barry Lama filed a complaint for personal injuries in a claim arising out of an automobile collision, naming as defendants the driver of the other vehicle and the registered owner of the vehicle. In addition, he named DOE defendants whom he alleged employed the defendant driver who was operating her vehicle in the course and scope of her employment.

Lama then settled with the driver and registered owner only for the policy limits, executed a "Release of All Claims" and filed a dismissal of his complaint with prejudice as to the "entire action."

Subsequently, Lama, represented by another attorney, filed a complaint against the employer of the defendant driver. The defendant employer filed a motion for summary judgment on the grounds that the release and the dismissal with prejudice of the original complaint was a common law retraxit of the complaint against the employer. The trial court agreed and granted the motion for summary judgment. The Appellate Court affirmed the ruling of the trial court. Lama also filed a malpractice action against his former attorney, which settled.

While the *Torrey Pines* and *Lama* cases demonstrate examples of the hazards of filing a dismissal with prejudice, other dangers arise when filing a dismissal without prejudice. Upon settlement, you may have been sent a Request for Dismissal, without prejudice, with the sentence typed-in, "this dismissal shall not act as a retraxit." At first blush, you may think to yourself that the insurance carrier or defense attorney is foolish, since the dismissal is without prejudice and, at least in theory, your client could sue again on the same matter. But think again, because if you sign the dismissal and it gets filed, you have not even noticed the wind whizzing by your ears as you fell through the retraxit trap-door.

What may happen next, is that while your former client is enjoying a mint julep on the veranda of his new home which you were instrumental in securing the down payment for, the friendly neighborhood marshal will present your former client with a summons and complaint– with your former plaintiff client being a present defendant. The next day, your former client will call asking for an explanation. The worst part is, you could have prevented the client from being involved in the lawsuit– if you had only filed the dismissal, with prejudice.

Solutions. First, be aware of the traps. Red flags should leap out at you when you are asked to sign a dismissal. If signing the dismissal may leave your client in a situation where they may be subsequently sued, do not sign the dismissal. If you have already received the settlement check, simply prepare and file a dismissal with prejudice. If representing the plaintiff, you are in the fortunate position of having the power to do so. And, although its been threatened, I have yet to have a defendant actually file a motion to set aside the dismissal of the action against them.

However, this is sometimes easier said than done. Some insurance carriers refuse to send the settlement check until they receive an executed dismissal without prejudice. This leads to the second solution: check the statute of limitations. If you had to file a lawsuit and the case was litigated, chances are that the defendant would be barred from filing a subsequent lawsuit against your client by the applicable statute of limitations anyway so there are no rights of the defendant worth protecting. Point this out to defense counselor the carrier.

Another solution is to get the settlement agreement in writing, signed by the defendant, his attorney or other representative, i.e., the insurance carrier. Generally, when discussing settlement, no discussions take place with regard to whether the dismissal is going to be with or without prejudice and thus, is not part of the settlement agreement. If the defendant refuses to hand over the check until a dismissal without prejudice is signed, take the letter signed by both parties or their representatives and file a motion to enforce the settlement under California Code of Civil Procedure section 664.6 which provides:

> "If parties to pending litigation stipulate, in writing... for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of settlement."

It should be noted that the terms "parties" and "writing" have enjoyed loose interpretations. In preparing a settlement letter which will be enforceable under section 664.6, see, *Haldeman v. Boise Cascade* (1985) 176 Cal.App.3d 230, 221 Cal.Rptr. 412 and *Gallo v. Getz*, (1988) 205 Cal. App.3d 329, 252 Cal.Rptr. 193.

In sum, although retraxit may be an antiquated term, its application is far from obsolete. Knowing its definition, being aware of its application and knowing how to provide solutions will undoubtedly prevent anyone from falling into the "retraxit trap."

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