

# The Marin Lawyer

An Official Publication of the Marin County Bar Association



## JUSTICE MORENO TO SPEAK AT MARIN COUNTY BAR ASSOCIATION GENERAL MEETING ON “DIVERSITY AND THE ART OF DISSENTING.”

The MCBA is thrilled to announce that California Supreme Court Justice Carlos R. Moreno will speak at the **August 26** general membership meeting, to be held at the Four Points Sheraton Restaurant in San Rafael.

The topic will be “Diversity and the Art of Dissenting.” Justice Moreno will take questions at the end of the presentation (subject, of course, to ethical limitations).

Justice Moreno, who earned a B.A. from Yale and a J.D. from Stanford Law School, has been on the California Supreme Court since 2001. Before that, he served as a federal district court judge for the Central District of California, and a judge of the municipal and superior courts in Los Angeles. As an attorney, he worked for the Los Angeles City Attorney’s office and in private practice.

He was the lone dissenter in *Strauss v. Horton*, the recent state supreme court decision upholding Proposition 8, which banned same-sex marriages in California. According to press reports, he was on President Obama’s short list for an appointment to the United States Supreme Court to replace retiring justice David Souter.

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## Calendar of Events

**Aug 26<sup>th</sup>**  
General Membership Meeting  
12 – 1:30 pm

**Aug 19<sup>th</sup>**  
Probate & Estate Planning Section Meeting  
12 – 1:30 pm

**Aug 20<sup>th</sup>**  
Real Property Section Meeting  
12 – 1:30 pm

**Aug 24<sup>th</sup>**  
Probate & Trusts Mentor Group  
12 – 1:30 pm

Look for details each month in *The Marin Lawyer*

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Jordan A. Lavinsky was Guest Editor of this issue of *The Marin Lawyer*. Philip R. Diamond is Series Editor for 2009.

## STIPULATIONS FOR ENTRY OF JUDGMENT: PLAINTIFFS BEWARE

By Jordan A. Lavinsky

Stipulations for entry of judgment, pursuant to which a judgment will be entered for a larger amount if the defendant fails to timely pay a lesser agreed upon amount, are commonly used to facilitate settlement. This seemingly effective tool is not, however, without risk as illustrated by the recent decision in *Greentree Financial Group, Inc. v. Execute Sports, Inc.* (2008) 163 Cal.App.4<sup>th</sup> 49. Consider the following scenario:

Tenant enters into a retail lease with a 10-year term and then fails to pay rent for the last two months



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of year two in the total sum of \$20,000. After landlord serves the tenant with a notice to pay or quit, tenant turns over the keys, which terminates the lease. As of the date of termination, the tenant owes past due rent in the amount of \$20,000. Future rent damages through the remaining eight years of the lease are an additional \$960,000.

The lease provides that landlord is entitled to the Civil Code § 1951.2 remedies, including past due rent due as of the date of termination of the lease, in addition to rent that would come due through the term of the lease for the total sum of \$980,000, minus rent the landlord would receive through reasonable mitigation efforts – i.e., leasing the space to a new tenant.

Months later, landlord and tenant's negotiations have failed to yield a settlement of tenant's lease liability and the space sits vacant despite landlord's reasonable efforts to find a new tenant. Landlord files a complaint for breach of lease seeking an award of past due rent in the amount of \$20,000, future rent damages in the amount of \$960,000, for a total sum of \$980,000. Thereafter, the parties agree to mediate.

With no tenant prospects, and vacancies on the rise, landlord has a solid claim for past due rent of \$20,000 and at least a year of future rent damages of an additional \$120,000, and maybe more. Tenant has no viable defense to the action but tenant's financials show little hope of landlord collecting a sizable judgment any time soon. After hours of fist pounding about the merits on one side and poverty on the other, the parties settle. Landlord agrees to accept, in the event tenant pays in full and on time, payment from tenant of past due rent in the amount of \$20,000 within 30 days, and six months future rent damages in the amount of \$60,000 payable in equal monthly installments over the next year, for the total settlement sum of \$80,000.

Understandably concerned about tenant's history of non-performance, landlord wants some mechanism to (1) encourage full and timely payment of the settlement, and (2) avoid further litigation if tenant once again fails to make payment. Therefore, landlord proposes a stipulated judgment to be entered immediately, with a stay of execution. Tenant resists because of the impact a judgment might have on tenant's credit.

Ultimately the parties execute a stipulation for entry of judgment pursuant to which, judgment will be entered only if tenant fails to make the agreed upon settlement payments in full and on time. The parties agree to a judgment for \$80,000 (past due rent and six months future damages), plus an additional six months future damages in the amount of \$60,000, for a total judgment of \$140,000, with a credit for any amounts paid under the settlement. Landlord insists on the larger judgment because that provides incentive for the tenant to pay the lower settlement amount. Tenant agrees

that the additional \$60,000 is reasonable because landlord's actual damages are much higher; landlord would recover far more than that at trial, including attorney fees.

This is a good settlement, right - solid outcome all around? On the one hand, although landlord would likely have recovered more at trial, landlord will still recover significant damages, and potentially more if tenant breaches the settlement. On the other hand, tenant will avoid a judgment if it performs under the settlement and escape greater damages for which it would have otherwise been liable. Both parties avoid potentially expensive and time-consuming litigation, and the court has one less case to burden its busy docket.

But is the stipulation enforceable? It may not be, according to the recent opinion in *Greentree Financial Group, Inc. v. Execute Sports, Inc.* (2008) 163 Cal.App.4<sup>th</sup> 495, in which the Court held that a judgment for \$40,000 more than the total \$20,000 due under the parties' stipulation, constituted an unenforceable penalty because it did not bear a reasonable relationship to the range of actual damages the parties could have anticipated from a breach of the stipulation.

In that case, Greentree sued Execute for breach of contract. The complaint alleged Execute failed to pay \$45,000 due under the contract in consideration of financial advisory services provided by Greentree. On the day of trial, the parties settled and memorialized their agreement in a stipulation for entry of judgment pursuant to which Execute would pay \$20,000 in two installments. If Execute defaulted on either installment, Greentree would be entitled to immediate judgment against Execute for all money paid as set forth in the complaint, including interest, attorney fees and costs, less any amounts already paid by Execute.

Execute defaulted on the first installment of \$15,000. Correctly anticipating that Greentree would seek entry of judgment, Execute filed an opposition to entry of an excessive judgment (the judgment to which it had stipulated). On the same day, Greentree submitted to the trial court a proposed judgment for \$61,232.50, consisting of \$45,000 in damages, \$13,912.50 in interest, \$2000 in attorney fees, and \$320 in costs. The court entered judgment as requested. Execute appealed arguing that the \$61,232.50 judgment entered after Execute failed to make the \$15,000 installment payment under the terms of the stipulation, constituted enforcement of an illegal penalty. Greentree contended that the amount was a valid liquidated damages provision in a contract between the parties.

In determining whether the stipulation amounted to an illegal penalty, the Court of Appeal started with the language of Civil Code § 1671(b): "[A] provision in a

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contract liquidating damages for the breach of the contract is valid unless the party seeking to invalidate the provision establishes that the provision was unreasonable at the time the contract was made.” Interpreting this language, the Supreme Court has noted: “A liquidated damages clause will generally be considered unreasonable and hence unenforceable under section 1671(b) if it bears no reasonable relationship to the range of actual damages that the parties could have anticipated would flow from the breach. The amount set as liquidated damages must represent the result of a reasonable endeavor by the parties to estimate a fair average compensation for any loss that may be sustained.” *Greentree*, 163 Cal.App.4<sup>th</sup> at 499, citing *Ridgley v. Topa Thrift & Loan* (1998) 17 Cal.4<sup>th</sup>, 970, 977.

Greentree argued the amount set forth in the stipulation was reasonably related to the damages it suffered as a result of Execute’s breach of the underlying contract. But the breach the Court analyzed was the breach of the *stipulation*, not the breach of the underlying contract. And as to that breach, the court held that the judgment for \$61,232.50 had no reasonable relationship to the range of actual damages the parties could have anticipated from a breach of the stipulation to settle the dispute for \$20,000. Damages for the withholding of money are easily determinable – i.e., interest at prevailing rates. The judgment, however, was more than triple the amount for which the parties had agreed to settle the case. The Court of Appeals reversed the judgment and remanded the matter to the trial court with directions to reduce the judgment against Execute to \$20,000, plus post judgment interest and costs.

Greentree is concerning because it calls into question the enforceability of a valuable settlement tool that benefits plaintiffs, defendants, and the system. Plaintiffs agree to settle for less because a stipulation for entry of judgment provides more certainty that defendant will indeed perform and finality of a judgment for more if the defendant once again breaches. Defendants benefit from stipulations for entry of judgment because without them, plaintiffs might not otherwise settle. A stipulation gives a defendant collateral of sorts, without the adverse impacts that entry of judgment might carry.

Greentree is also concerning to the extent it suggests that after parties enter into a settlement agreement, it is that obligation owed under the settlement agreement, and not defendant’s underlying liability, that defines plaintiff’s damages in the event of a breach. Does that also mean that plaintiff’s conditional release of underlying claims, conditioned upon defendant’s payment on time and in full, is unenforceable and that the only remedy in the event defendant breaches a settlement is to enforce the settlement agreement itself?

In other words, according to *Greentree*, once parties settle, the liability under the settlement forever replaces defendant’s liability that gave rise to the case in the first place. Taking this proposition one step further, a party can reduce its own liability by breaching and then settling for less than their original liability, even if they had no intention to perform the settlement, because now the plaintiff’s damages are limited to the settlement amount rather than the original liability. That result does not seem balanced considering it was the defendant’s original breach that triggered the underlying litigation. Indeed, if a defendant agrees to have judgment entered based on the original liability in the event defendant fails to make good on settlement payments, that agreement should be respected. The plaintiff is agreeing to forebear a larger claim on the condition that defendant actually pays the lesser amount. The larger judgment amount is consideration for plaintiff’s release of defendant’s liability in excess of the stipulated judgment amount, and for assuming the risk that defendant may not perform. If the defendant fails to pay, the plaintiff should be entitled to the larger judgment. Plaintiff should not as a matter of law be compelled to release the defendant’s underlying liability in excess of the settlement amount, unless and until defendant makes good on the settlement. Otherwise defendant’s conduct is without consequence, while plaintiff bears the burden of defendant’s breach yet again.

So what can be learned from *Greentree*? For one, bigger is not necessarily better. The larger a stipulated judgment amount is, compared to the settlement amount, the more likely the court is to consider the difference an unenforceable penalty. The judgment amount should bear a reasonable relationship to the damages the parties can anticipate by virtue of a breach of the settlement. Include interest and potential attorney fees that plaintiff may incur to obtain and enforce the judgment. Craft the stipulation with an eye towards justifying the judgment amount. Also, consider a stipulated judgment instead of a stipulation for entry of judgment. Judgment would be entered immediately but plaintiff will file a satisfaction of judgment if and when defendant pays the lesser settlement amount. It is true a stipulated judgment is less advantageous to a defendant, but plaintiff’s options are limited, and ironically, the seemingly defendant-friendly *Greentree* decision (and similar cases before it) is to blame for that.

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