CASE NO. A145660

CALIFORNIA COURT OF APPEAL
FIRSTAPPELLATE DISTRICT, DIVISION ONE

JULIA ANNA BERTOLI,

Plaintiff and Appellant,

v.

STATE OF CALIFORNIA DEPARTMENT OF TRANSPORTATION,

Defendant and Respondent.

From a Judgment of the Sonoma County Superior Court
Hon. Gary Nadler, Presiding, Case No. SCV247619

APPLICATION FOR LEAVE TO FILE, AND SUBMISSION OF, *AMICUS BRIEF* OF CONSUMER ATTORNEYS OF CALIFORNIA IN SUPPORT OF PLAINTIFF JULIA ANNA BERTOLI

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CERTIFICATE OF INTERESTED PARTIES

Pursuant to California Rule of Court 8.208, Consumer Attorneys of California certifies that it is a non-profit organization which has no shareholders. As such, *amicus* and its counsel certify that *amicus* and its counsel know of no other person or entity that has a financial or other interest in the outcome of the proceeding that the *amicus* and its counsel reasonably believe the Justices of this Court should consider in determining whether to disqualify themselves under canon 3E of the Code of Judicial Ethics.

Dated: May 1, 2017

Sharon J. Arkin
SHARON J. ARKIN

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHERS

STATEMENT OF INTEREST OF THE *AMICUS*

The Consumer Attorneys of California ("CAOC") is a voluntary membership organization representing approximately 6,000 associated attorneys practicing throughout California. The organization was founded in 1962. Its membership consists primarily of attorneys who represent individuals subjected in a variety of ways to personal injury, employment discrimination, and other harmful business and governmental practices. CAOC has taken a leading role in advancing and protecting the rights of injured Californians in both the courts and the Legislature.

As an organization representative of the plaintiff's trial bar throughout California, CAOC is intensely interested in rulings and orders that affect the manner in which trials are conducted and the impact those rulings and orders have on the ability of all litigants to sufficiently present their case or defense.

Dated: May 1, 2017 THE ARKIN LAW FIRM

By: *Sharon J. Arkin*
SHARON J. ARKIN
Attorney for *Amicus Curie*

APPLICATION FOR LEAVE TO FILE *AMICUS* BRIEF

Consumer Attorneys of California hereby requests that the *amicus* brief submitted herewith in support of plaintiff and appellant Julia Anna Bertoli be accepted for filing in this action.

Counsel is familiar with all of the briefing filed in this action to date. The *amicus* brief addresses fundamental public policy issues not otherwise considered or argued by the parties and *amicus* believes the brief will assist this Court in its consideration of the issues presented.

No party to this action has provided support in any form with regard to the authorship, production or filing of this brief.

AMICUS **BRIEF OF CONSUMER ATTORNEYS OF CALIFORNIA**

INTRODUCTION

> "Petitioner [a judge seeking review of discipline imposed on him] argues that his 'assertive' judicial 'style' is desirable because it enables him to effect settlements in difficult cases. Petitioner's argument betrays an understanding of the judicial role that places *too much emphasis on the efficient disposition of cases and too little emphasis on the dignity of litigants*. The judicial system is *not* concerned only with the resolution of disputes. It also permits individuals and entities to participate in the process by which the state determines to exercise its power. Thus, *due process affords a litigant a right to be heard . . . .*"

(*Dodds v. Commission on Judicial Performance* (1995) 12 Cal.4th 163, 176-177.) [1]

It has recently become generally accepted that a trial court has the power, in its discretion, to impose time limits on either portions of, or the overall presentation of, the parties' case at trial. Such orders have become a means of addressing crushing case dockets and continuing budgetary cuts. While there is substantial reason to

[1] Unless otherwise indicated, all emphasis is added, footnotes, brackets, quotations and internal citations are omitted.

question the wisdom of this trend in general, challenging it is unnecessary in this case because the trial court's actions here were manifestly an abuse of that power.

While this case involves conflicts between the parties and the court as to what actually occurred, the trial court's order requiring that time consumed in side-bars and chambers conferences discussing evidentiary issues during the plaintiff's case-in-chief to be charged to the plaintiff raises issues of grave concern to the bench and bar. Had the trial court resolved those evidentiary issues *before trial*, and thereby precluded the need for such extensive evidentiary arguments *during* trial, plaintiff's presentation on this appeal compels the conclusion that plaintiff would have had ample time to not only present her case-in-chief, but to thoroughly cross-examine defendants' witnesses and provide the jury with a sufficient closing argument.

Whether the trial court was either unable or unwilling to conduct a thorough pre-trial examination of the evidence and/or to conduct pre-trial Evidence Code section 402 hearings regarding plaintiff's need for extensive expert witness testimony is not the focus of this brief. But because the trial court did not or could not do that, it left numerous evidentiary issues unresolved. And that, in turn,

potentially left plaintiff and her counsel at the mercy of a strategy designed to exhaust plaintiff's allocated time limits. The numerous evidentiary challenges by defense counsel consumed an unwarranted amount of trial time allocated to plaintiff. And had those challenges generally resulted in orders sustaining the defense objections, it could potentially be argued that the fault lay with plaintiff's counsel for not understanding the Evidence Code or in trying to "sneak in" inadmissible evidence.

But that is not what happened. Rather, a small proportion of the side-bars and conferences resulted in rulings sustaining the defense objections. (See plaintiff's Reply Brief, Table 5.) The trial court's refusal to extend plaintiff's trial time despite the ineffectual nature of the objections resulting in time-wasting side-bars and chambers conferences ultimately stripped plaintiff of her due process rights to have her case heard.

While time limits may be appropriate as a means of forcing parties to try their cases efficiently, they cannot be so rigidly applied that they provide the opposing party an opportunity to undermine a party's ability to fairly try their claims or defenses. And this case

provides this Court with the opportunity to make that point clearly and unequivocally.

LEGAL ARGUMENT

1.

THE DECISION TO IMPOSE TRIAL TIME LIMITS MUST BE TEMPERED BY A FOCUS ON ASSURING THAT A PARTY'S DUE PROCESS RIGHTS TO PRESENT A CLAIM OR DEFENSE IS BEING PROTECTED

As noted in Rumel, *The Hourglass and Due Process: The Propriety of Time Limits on Civil Trials*, 26 Univ. of San Francisco Law Review Rev., 237, 237-238 (Winter 1992) ("Rumel"), while rarely used in the past, "the hourglass has recently found its way into the courtroom. Trial judges, exercising their role as case managers, skeptical about attorneys' willingness to streamline the presentation of evidence, and concerned that burgeoning dockets will undermine the public's right of access to the courts, have increasingly placed time limits on the evidentiary portion of civil trials. Thus, after waiting

years to get to trial, litigants and counsel may now face limited time to present their case."

And while early case law generally approved and upheld such limits (see Rumel, pp 238, 241-248), more recent cases have suggested caution. (Rumel, pp 248-250.) As even Judge Posner, of the Seventh Circuit, noted, "to impose arbitrary limitations, enforce them inflexibly and by these means turn a federal trial into a relay race is to sacrifice too much of one good--accuracy of factual determination--to obtain another--minimization of the time and expense of litigation." (*McKnight v. General Motors Corp* (7th Cir. 1991) 908 F.2d 104, 115, *cert. den.* 111 S.Ct. 1306.)

Similarly, as the Supreme Court noted in *Dodds*, quoted above, prompt and efficient trial and disposition of cases is a laudable goal. But achievement of that goal may not occur at the sacrifice of a party's due process rights under the article 1, section 7 of the California Constitution and under the United States Constitution, Amendment 14.

One of the most compelling discussions of this principle is set forth in *In re Buchman's Estate* (1954) 123 Cal.App.2d 546, 559-560:

The fundamental conception of a court of justice is condemnation only after notice and hearing. No one may be deprived of anything which is his to enjoy until he shall have been divested thereof by and according to law. Under the constitutional guaranties no right of an individual, valuable to him pecuniarily or otherwise can be justly taken away without its being done conformably to the principles of justice which afford due process of law, unless the law constitutionally otherwise provides. Due process of law does not mean according to the whim, caprice, or will of a judge (*Matter of Lambert*, 134 Cal. 626, 632-633 [66 P. 851, 86 Am.St.Rep. 296, 55.R.A. 856[); it means according to law. It excludes all arbitrary dealings with persons or property. It shuts out all interference not according to established principles of justice, *one of them being the right and opportunity for a hearing: to cross-examine, to meet opposing evidence, and to oppose with evidence*. (*Massachusetts etc. Ins. Co. v. Industrial Acc. Com.*, 74 Cal.App.2d 911 [170 P.2d 36].)

Judicial absolutism is not a part of the American way of life. The odious doctrine that the end justifies the means does not prevail in our system for the administration of justice. The power vested in a judge is to hear and determine, not to determine without hearing. When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets established standards of procedure. It is not for nothing that most of the provisions of the Bill of Rights have to do with matters of procedure. Procedure is the fair, orderly, and deliberate method by which matters are litigated. *To judge in a contested proceeding implies the hearing of evidence from both sides in open court, a comparison of the merits of the evidence of each side, a conclusion from the evidence of where the truth lies, application of the appropriate laws to the facts found, and the rendition of a judgment accordingly*.

California courts have repeatedly emphasized in a variety

of contexts that limitations on jury trial proceedings cannot be arbitrary or unreasonable without violating due process. For example, in *Pence v. Industrial Accident Commission* (1965) 63 Cal.2d 48, 50-51, the Supreme Court confirmed that "[t]he law is clear that undue infringement of the right to cross-examination as well as improper restrictions on the right to present evidence in rebuttal is a deprivation of the constitutional guaranty of due process of law." There is no reason to limit application of that due process concern to cross-examination or rebuttal. A plaintiff's right to present evidence in the first instance triggers the same due process concerns, i.e., the right of the plaintiff to obtain recourse from the courts of this state when he or she has been injured by the unlawful conduct of another.

While a trial court has discretion to limit evidence in certain respects, that does not warrant a trial court's action in virtually stepping into the shoes of the litigant or his or her lawyer and deciding whether the case, as being presented, is sufficient, inefficient or likely to alienate a jury by being overly-drawn out or detailed in the presentation of evidence. A trial judge has no place in deciding

whether the attorney is trying the case the same way the judge would have tried it.

The discretion to limit a party's presentation by imposing time limits is not unfettered and must be exercised reasonably. (*Dollinger v. San Gabriel Lanes* (1962) 205 Cal.App.2d 705, 710-711.) For example, preclusion of questions on irrelevant matters, collateral matters, cumulative issues, or speculative evidence, is appropriate. (*Dollinger*, at 710; *Garcia v. Hoffman* (1963) 1412, 1415; *In re Martin's Estate* (1915) 170 C. 657, 670; *East Bay Municipal Utility District v. Kieffer* (1929) 99 Cal.App. 240, 251.) But an arbitrary time limitation that is unrelated to an evidentiary basis for preclusion is necessarily unreasonable and a violation of due process. Even limitations on voir dire must be ***reasonable*** and may not be unreasonable or arbitrary. (*People v. Wright* (1990) 52 Cal.3d 367, 419.)

Thus, as Rumel confirms, ""[w]hen properly applied, time limits undoubtedly provide substantial benefits. However, improperly-imposed trial time limits may undermine the due process rights of the parties for whom they are designed to benefit and protect." (Rumel, at 250.) Indeed, "[f]or each benefit that trial time limits may bestow, a

risk exists that due process rights and interests may be violated or undermined." (*Id*., at 253.)

For example, "reasonable time limits may force [litigants] to streamline the evidence presented in their case. This judicially-imposed clarity may benefit litigants by causing them to persuade the factfinder." But "unreasonable trial time limits, however, may prevent a litigant from presenting sufficient evidence to support a reliable judgment. Overly ambitious time limits may so restrict the evidence presented that a litigant cannot establish a prima facie case or defense, let alone a persuasive theory of the case." (*Id*., 253.)

That appears to be precisely what happened in this case. Although it appeared that the trial judge wanted Bertoli's counsel to present a more condensed or efficient case, the unique evidentiary issues – and the need to assure that a proper foundation was laid for the specialized evidence presented – as well as ambiguous motion in limine orders required a more fulsome presentation than the trial judge expected or wanted. But that does not in any way warrant the trial court's inflexibility in refusing to extend Bertoli's time limits. Indeed, had the trial judge excluded the evidentiary side-bars and conferences from plaintiff's tally (i.e., 11 hours of trial time), plaintiff would have

met all the time estimates given and the additional 5 hours requested by plaintiff would have been available to complete here case. (See, e.g., Appellant's Opening Brief, pp 24-28, 42-44, Tables 1, 2; Appellant's Reply Brief, pp 29, 65-68.)

Unduly restrictive time limits also have an adverse effect on jurors. As Rumel notes, while reasonable time limits may be beneficial to jurors because they "may cause the parties to focus and better organize their evidence to enhance juror comprehension" and will decrease the time citizens must spend as jurors and may increase jurors' respect for and willingness to participate in the trial process," unreasonable time limits "that unduly exclude evidence will not give jurors sufficient evidence to determine the facts" and "may promote confusion and speculation rather than clarity," which, "ultimately, may lead to unreliable judgments." (Rumel, at 253-254.) That, in turn, and as evidenced by the juror comments in this case [AA 1819; 2249], may result in jurors losing "confidence in a system that deteriorates to the point where juries become the 'studio audience' in the litigants' race against the clock. This erosion of confidence would surely increase when jurors attempt to deliberate over an insufficient evidentiary record resulting from unreasonable time limits." (Rumel,

at 254.)

Finally, Rumel notes, public perception of the justice system is also subject to both benefit and detriment from trial time limits: "[R]easonable trial time limits may promote efficient and economical use of judicial resources and protect other litigants' right of access to the courts. Reasonably imposed time limits may allow courts to resolve more cases in a shorter period of time. Unreasonable time limits, however, will erode public access to the judicial system if they require appellate review and re-trial. This will lengthen, rather than shorten, the waiting period for other litigants bringing cases to trial. More importantly, although trial time limits have not yet been widely imposed, their unreasonable imposition over time may erode the public confidence they are designed to engender. Efficiency and access will be meaningless if time limits so curtail the presentation of evidence that judgments become unreliable and cause the public, litigants, and jurors to lose confidence in a civil justice system characterized more by haste and expediency, than by decorum and deliberation." (Rumel, p. 254.)

Acknowledging that trial time limits are likely to become more prevelant, Rumel recommends several guidelines to assure that they

are imposed appropriately in order to assure a proper balance between the strive for efficiency and the protection of litigants' due process rights. (Rumel, at pp 254-259.) These guidelines including assuring that:

1. The trial court is sufficiently familiar with the details of the case, the parties' claims and defenses and the nature of the evidence *before* establishing time limits in order to assure that the time limits imposed are not unduly restrictive;
2. The trial judge should understand that counsel may inflate their time estimates knowing that the court may cut them down; but by accepting the parties' estimates, the court may be more stringent in enforcing them, absent some unforeseen events which may cause hardship;
3. Time limits should be imposed on all parties;
4. The time limits and the parameters for their calculation should be established before trial;
5. The judge should inform the parties before trial that extensions will be granted only for good cause and the judge should include a "cushion" – of up to 15% - in order to assure fairness.
6. The allocation between the parties must be equitable and the

judge should "decide how or whether to charge time taken to hear and resolve evidentiary objections."

7. Appellate courts reviewing trial time limits must establish a standard of review that takes the due process concerns into consideration.

These factors, as discussed below, confirm that the trial court in this case erred and, in doing so, impaired plaintiffs' due process right to fully present her case, to cross-examine the witnesses arrayed against her, to present rebuttal evidence and to provide an adequate closing argument to the jury.

2.

ANALYSIS OF THE RELEVANT FACTORS CONFIRMS THAT PLAINTIFF'S DUE PROCESS RIGHTS WERE IMPAIRED AND THAT A NEW TRIAL SHOULD BE REQUIRED

Even assuming that *reasonable* trial time limits are**,** in general, fair and appropriate, each case must still be examined on its merits. And where due process concerns are raised, that examination must be

particularly stringent, even if the exercise of discretion is fundamentally at issue. This is because a party's due process interests must be protected irrespective of a court's right to exercise discretion. (*In re Matthew P.* (1999) 71 Cal.App.4th 841, 851; *In re Mark Smith* (2003) 109 Cal.App.4th 489, 503.) Put another way, an order that violates a party's due process interests necessarily constitutes an abuse of discretion. (*Conservatorship of Becerra* (2009) 175 Cal.App.4th 1474, 1482 ["Inherent in our review of the exercise of discretion in imposing monetary sanctions is a consideration of whether the court's imposition of sanctions was a violation of due process."].)

There is no question that the application of the trial time limits in this case precluded plaintiff from presenting her case in full, prevented her from cross-examining many of the defense witnesses and prevented her from effectively cross-examining others and prevented her from being able to present an effective closing argument. (Appellant's Reply Brief, p. 62.) If the application of the time limits imposed on plaintiff were unreasonable, those effects constituted a violation of plaintiff's due process rights. (*Pence v. Industrial Accident Commission* (1965) 63 Cal.2d 48, 50-51.)

Examination of the issues in this case, in light of Rumel's guidelines, demonstrates that, indeed, the allocation of the time consumed in side-bars and chambers conferences needed to resolve evidentiary issues against plaintiff's time demonstrates that the time limits, as applied, were unreasonable and, as such, improperly impaired plaintiff's due process rights.

An analysis of the facts in light of Rumel's proposed guidelines compels this conclusion:

Rumel Factor No. 1: Judge's familiarity with the case.

As Rumel notes, "to establish a 'realistic and fair' trial time limit, a trial judge "must possess sufficient knowledge about the claims and issues in the case and "adequate information regarding the nature and extent of the proposed evidence," and "before setting time limits, trial judges must immerse themselves in the case by becoming involved in the pretrial proceedings." (Rumel, 255-256.)

And as summarized in plaintiff's briefing, numerous pre-trial conferences and hearings on the parties' motions in limine occurred during which the trial judge was made aware of the complexity of the evidentiary issues. (Appellant's Reply Brief, pp 14-29.)

Unfortunately, it appears that despite its extensive knowledge of the complex foundational and other evidentiary issues likely to come up at trial, the trial court simply "punted" on those issues, leaving them to be resolved during the course of the trial, while manifestly failing to allocate sufficient time to resolve those issues during the course of trial.

This is evidenced by the fact that, had the evidentiary issues raised during side-bars and conferences been resolved prior to trial, plaintiff's time estimates would easily have been met and plaintiff would not have been forced to forego testimony from a critical witness in her case-in-chief, would have had ample time to cross-examine the defense witnesses and would have still had more than sufficient time for closing argument. (See, e.g., Appellant's Opening Brief, pp 24-28, 42-44, Tables 1, 2; Appellant's Reply Brief, pp 29, 65-68.)

Rumel Factor No. 4: Establish the ground rules before trial starts.

As Rumel confirms, "[e]stablishing time limits before trial not only prevents inequities and potential discrimination caused by

changing the rules in the middle of trial, but also gives all parties sufficient opportunity to determine the best use of their time before presenting their case." (Rumel 256-257.)

But the trial court in this case did precisely the opposite: It did not inform plaintiff's counsel that the time for side-bars and chambers conferences that resulted from defense objections would be charged to her. Moreover, even if informed of that fact, it would have been extremely difficult for plaintiff to anticipate that so much time would be consumed in addressing the objections asserted by defendants.

There is another important aspect to this issue. Not only could plaintiff not anticipate or control the number of objections and could not anticipate the time to address them, the fact that the vast majority of the defense objections which triggered the side-bars and conferences *were not simply sustained* (see Appellant's Reply Brief, Table 5) confirms that plaintiff was not "drawing" those objections, i.e., by ineptly or improperly seeking the admission of evidence that should have been excluded.

Rumel Factor No. 5: Include a cushion and be flexible.

"Ideally, the trial judge's initial time allocation should include a cushion--perhaps ten to fifteen percent above the actual time estimate--for contingencies that may arise during trial. By so doing, the trial court may avoid mid-trial requests for extensions. Also, a cushion avoids unfairness to the party who complied with the court's initial time limits. Based on experience with similar cases and knowledge of the present case, the trial judge may accurately estimate the amount of time necessary for trial. However, estimating reasonable time limits is not an exact science. Issues may take on unanticipated significance after a few days of trial, more evidence than anticipated may be necessary to prove or rebut a point, or witnesses and counsel may be unduly hostile or obstructionist. Moreover, even when a trial proceeds as anticipated, the most informed time estimate may become unreasonable." (Rumel, at 257.)

Furthermore, "the trial judge must be willing to grant extensions to accommodate the necessary expansion of issues and proof, protect against hostility or delay from witnesses or opposing counsel, and correct mistaken initial time estimates. Accordingly, and notwithstanding the legitimate desire to avoid changing the rules mid-

trial, trial judges must be willing to grant reasonable extensions to ensure due process." (*Ibid.)*

The trial judge failed in both these respects in this case. First, as evidenced in plaintiffs' briefing, had plaintiff not been charged with the time consumed in side-bars and chambers conferences necessitated by the trial court's ambiguous motion in linine rulings and its decision to delay evidentiary rulings until trial, plaintiff would have easily met the time limits imposed on the basis of the parties' respective time estimates. (See, e.g., Appellant's Opening Brief, pp 24-28, 42-44, Tables 1, 2; Appellant's Reply Brief, pp 29, 65-68.) The reasonable inference from these facts is that the trial court did not include the recommended 15% "cushion."

Alternatively, if the trial court did include such a "standard" cushion, it should have added additional time just for evidentiary disputes, given that it "punted" on resolving the complex evidentiary issues raised pre-trial and in the motions in limine

Second, the trial court's refusal to provide additional 5 hours requested by plaintiff was unwarranted. This is most compellingly evidenced by the fact that doing so *would not have caused any prejudice*. Indeed, the case would still have been concluded well prior

to the trial court's planned vacation, there is no evidence that a mistrial would have been required because of the unavailability of a juror and the additional 5 hours requested would have not impaired any interest [16 RT 2497; 44 RT 6499–6500; 55 RT 8190, 8193, 8333 8343; 56 RT 8525–8526; 59; RT 8906; 16 RT 2497; 55RT 8190, 8343; 56 RT 8625; 59 RT 8906] – while the refusal to grant that additional time manifestly impaired plaintiff's ability to adequately present her case.

Rumel Factor No. 6: Fairly allocating time for evidentiary issues.

Rumel includes an extensive discussion of the most critical issue in this case, i.e., how to allocate time consumed in resolving evidentiary issues: "The trial judge must also decide how or whether to charge time taken to hear and resolve evidentiary objections. One approach--adopted by Judge Bertelsman in *Reaves*--would be to deduc[t] the time spent arguing an overruled objection from the objecting party's time allotment. Although Judge Bertelsman declined to do so, the time spent arguing a valid objection could be charged to the proponent of the evidence. However, not all evidentiary rulings

have a clear-cut winner or loser and such intricate time-keeping invites the same criticism that Judge Posner levied in *Flaminio.* Most objections will take only seconds of trial time to resolve. Thus, although the party conducting the examination will lose some of its allocated time, the time spent hearing most objections should not be charged to any party. On the other hand, *if the trial judge allows lengthy argument on an objection or believes that counsel has interposed objections to delay, the judge should retain the discretion to charge the time against the obstructionist party or extend the time of the non-offending party*." (Rumel, at 258.)

This is where the trial judge in this case most egregiously failed in his duty to protect the due process interests of the plaintiff. As confirmed in the record, only a small minority of the side-bar and chamber conferences regarding evidentiary issues resulted in orders simply sustaining the defense objections. (Appellant's Reply Brief, Table 5.) While it *may* have been appropriate to charge that time to plaintiff, it was wholly inappropriate to charge plaintiff with the time involved in discussing evidentiary challenges that *did not result in an order fully sustaining the defense objection*.

Again, by charging plaintiff with all the time consumed in resolving objections, in court, at side-bar or in chambers, and by refusing to be flexible with the time limits and affording plaintiff the additional time needed to complete her case, cross-examining the defense experts and provide a meaningful closing argument, the trial court handed the defense a powerful strategic and tactical weapon – which undermined the plaintiff's trial presentation and abrogated her due process rights.

Rumel Factor No. 7: The standard of review.

Last, but not least, Rumel confirms that the standard of appellate review of trial time limit challenges is not mere abuse of discretion in the usual sense; rather, appellate courts must utilize a standard of review for trial time limits that takes into account the due process rights at stake. As Rumel confirms: "Ordinarily, a trial judge is entitled to substantial deference in supervising litigation or controlling the presentation of evidence and appellate courts review a trial judge's decisions on such matters under an abuse of discretion standard. Appellate courts, reviewing time and witness limitations, have applied that deferential standard. However, as discussed above,

the propriety of trial time limits is not merely a question of a court's ability to control its docket, but also a question of due process. *As such, appellate courts should take a 'hard look' at a trial judge's imposition of trial time limits and thereby apply a standard of review falling somewhere between the deferential abuse of discretion standard and the non-deferential de novo standard applicable to pure questions of law*." (Rumel, at 258-259.)

Even under the abuse of discretion standard of review, the trial court's allocation against plaintiff of the time necessary to resolve all of the complex evidentiary issues – which the trial court should have resolved *before* trial in the context of actually resolving and deciding the motions in limine or through the auspices of an Evidence Code section 402 hearing with respect to the foundation for the plaintiff's experts' testimony – was manifestly unreasonable, unfair and an abuse of discretion. And given the due process implications of the trial court's rulings, its actions unfairly limited plaintiff's ability to present her case. That due process component warrants reversal and new trial.

CONCLUSION

Trial time limits are not only here to stay, their use will likely expand in the future. Although experienced trial counsel will always be in favor of efficiency in trial presentation, it is equally true that there will always be cases involving complex issues or cutting-edge technology – and the resulting foundational and other evidentiary issues concomitant with them – that will expand the time needed to fully and fairly present the case. If time limits are to be fair, they must be well thought-out and flexible. Where they are not, they provide counsel with a powerful and strategic weapon that can be used to undermine an opposing party's case. As such, appellate courts must establish fair parameters for their use in order to assure that *all* litigants' due process rights are protected.

Dated: May 1, 2017 THE ARKIN LAW FIRM

By: *Sharon J. Arkin*
SHARON J. ARKIN
Attorney for *Amicus Curie*

CERTIFICATE OF LENGTH OF BRIEF

I, Sharon J. Arkin, declare under penalty of perjury under the laws of the State of California that the word count for this Brief, excluding Tables of Contents, Tables of Authority, Proof of Service and this Certification is less than 5,014 words as calculated utilizing the word count feature of the Word for Mac software used to create this document.

Dated: May 1, 2017

Sharon J. Arkin
SHARON J. ARKIN

PROOF OF SERVICE

I declare that I am over the age of eighteen (18) and not a party to this action. My business address is 1720 Winchuck River Road, Brookings, OR 97414

On May 1, 2017, I served the foregoing document described as:

APPLICATION FOR LEAVE TO FILE, AND SUBMISSION OF, *AMICUS BRIEF* OF CONSUMER ATTORNEYS OF CALIFORNIA IN SUPPORT OF PLAINTIFF JULIA ANNA BERTOLI

on all interested parties in this action not otherwise served by way of TrueFiling by placing a true copy of the document(s), enclosed in a sealed envelope, addressed as follows:

(X) **BY MAIL** as follows: I am "readily familiar" with the firm's practice of collection and processing of correspondence for mailing with the United States Postal Service. I know that the correspondence was deposited with the United States Postal Service on the same day this declaration was executed in the ordinary course of business. I know that the envelope was sealed and, with postage thereon fully prepaid, placed for collection and mailing on this date in the United States mail at Pasadena, California.

The envelope was addressed as follows:

Sonoma County Superior Court (Appellate Clerk)
Main Courthouse
Hall of Justice
600 Administration Drive, Room 110J
Santa Rosa, CA, 95403

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on May 1, 2017 at Brookings, OR.

Sharon J. Arkin
SHARON J. ARKIN