EVIDENCE LAW

New Rule on Evidentiary Objections at Summary Judgment

by Ian Fusselman, Column Editor

Ian Fusselman is an attorney at Thorsnes Bartolotta McGuire. His practice focuses on complex litigation, including catastrophic injury, aviation law, product liability, insurance litigation and construction law. He received his bachelor's degree in philosophy from California State University, Long Beach, and obtained his Juris Doctor degree from the University of Southern California Law School. Mr. Fusselman has been the Evidence Law column editor since 2008. He can be reached via email at: ***fusselman@tbmlawyers.com***.

It's not often that there's good news to report concerning developments in the law that might actually be favorable to consumer attorneys, but the Supreme Court recently changed the rules relating evidentiary objections at hearings on motions for summary judgment that might help us prevail on appeals of adverse rulings. This article will discuss these positive developments and will outline strategies we can employ to take advantage of them.

Old Rule: Evidentiary Objections Not Ruled on Are Waived

Code of Civil Procedure ("C.C.P.") §437c contains two waiver provisions relating to evidentiary objections. Section 437c(b)(5) states that: "Evidentiary objections not made at the hearing shall be deemed waived." Section 437c(d) provides that the failure to object to incompetent declarations and inadmissible evidence at the hearing "shall be deemed waived."

The waiver rules in Section 437c have been variously interpreted. For example, in *Biljac Associates v. First Interstate Bank* (1990) 218 Cal.App.3d 1410, the trial court refused to rule on "voluminous objections," finding that it would be "a horrendous, incredibly time-consuming task" that "would serve very little useful purpose." *Id*. at 1419, fn. 3. On appeal, the court held that express evidentiary rulings by the trial court were unnecessary because appellate review of a summary judgment determination was *de novo*, and "the parties remain free to press their admissibility arguments on appeal, the same as they did in the trial court." *Id*. at 1419.

While the Court of Appeal in *Biljac* believed that evidentiary objections were preserved, the California Supreme Court disagreed without specifically mentioning or overruling *Biljac*. In *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, plaintiff made a number of evidentiary objections to evidence but did not request rulings by the trial court. The Supreme Court held that

> **Because counsel failed to obtain rulings, the objections are waived and are not preserved for appeal. [Citations] Although many of the objections appear meritorious, for purposes of this appeal we must view the**

objectionable evidence as having been admitted in evidence and therefore as part of the record.

Id. The Supreme Court affirmed the *Ann M.* waiver principles in *Sharon P. v. Arman, Ltd.* (1999) 21 Cal.4th 1181, when the appellate court record did not contain any rulings on objections. The Supreme Court therefore deemed the objections waived and viewed the objectionable evidence as having been admitted. *Id.* at 1186-1187, fn. 1.

Until just recently, the Supreme Court's holdings on the waiver issue put attorneys arguing summary judgment motions in a precarious position. For example, in a recent opposition to a motion for summary judgment in an insurance bad faith action, I filed nine pages' worth of evidentiary objections. The objections were wide ranging and included citations to the Evidence Code, Rules of Court, and the Code of Civil Procedure.
In an introductory statement, I noted that California Courts have observed that "trial courts have the inherent power to strike proposed 'undisputed facts' that fail to comply with the statutory requirements and that are formulated so as to impede rather than aid an orderly determination whether the case presents triable material issues of fact." *Reeves v. Safeway Stores* (2004) 121 Cal.App.4th 95, 106.

I then proceeded with what I believed to be a list of substantive objections to evidence. I objected to the use of allegations in my complaint as the basis for admissible evidence because C.C.P. §431.20 only allows parties to presume the truth of uncontested allegations, but the defendant had filed a general denial in its answer. I objected to declarations that failed to affirmatively demonstrate that the affiant was competent to testify to the matters stated. C.C.P. §437c(d). I asserted objections to efforts to authenticate documents under Evidence Code §1400 et seq. and hearsay under Evidence Code §1200.

I noted the defendant's failure to comply with Cal. Rules of Ct. Rules 3.1113 and 3.1350 which require that all references to exhibits must reference the specific page and, if applicable, the paragraph or line number. I also objected to declarations that had been used in prior motions because Cal. Rules of Court Rule 3.115 requires that the caption of a declaration specifically identify the motion that it supports. I objected to facts in the body of the motion that weren't contained in the separate statement in violation of C.C.P. §437c(b)(1), and I objected that the Points and Authorities were longer than 20 pages in violation of Rules of Court, Rule 3.1113.

Given that the objectionable evidence was both obvious and ubiquitous, I actually thought I had a decent chance of having the court deny the motion based solely on evidentiary and procedural grounds. Instead, the court responded to my objections with just one line at the closing line of the tentative ruling: "All objections to evidence are overruled." Nice.

The tentative ruling was in my favor and the court didn't seem particularly moved by any of the defense attorney's arguments at the hearing. At the close of argument, the court indicated that it would take the matter under submission. Based on the state of the law at the time of the hearing, the failure to take issue with the erroneously overruled objections at the hearing might prove fatal on appeal. I, like many others faced with the same situation in the past, had to balance between making a focused and compelling argument on the

merits, or potentially delaying the hearing and perhaps angering the judge by taking the court's time to specifically rule on each objection in order to avoid the risk of waiver.

Because the court's only concern was over a new legal argument raised by the defense attorney for the first time at the hearing, I believed that the court would not reverse the tentative without requesting additional briefing. Consequently, I decided that I would defer making an issue of the objections to evidence. However, I was cognizant that there was still a chance the court might reverse the tentative without further briefing, leaving me with the need to appeal the ruling with the possibility that the Court of Appeal would refuse to consider my evidentiary objections due to C.C.P. §437c's waiver provisions.

Thankfully, the trial court confirmed the tentative and the case resolved favorably soon thereafter. But based on the law at the time, the reality was that anyone in a similar situation was taking a calculated risk by failing to raise evidentiary objections at hearing.

New Rule: *Reid v. Google, Inc.*

In *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, the Supreme Court engaged in a relatively exhaustive review of both case law and the legislative history behind the waiver rules in C.C.P. §437c. It focused on proposed legislative amendments attempting to delineate how parties should raise written (versus oral) objections, and the final revision that simply required that "objections" be made at the hearing to avoid waiver.

Based on its review of the legislative history, the Supreme Court offered the following conclusion:

> **At the summary judgment hearing, the parties have the opportunity to persuade the trial court and respond to its inquiries. At that hearing, the court considers the motion, any opposition to the motion, any reply, and all supporting papers submitted before the hearing, as well as arguments and evidentiary objections made at the hearing. Therefore, written evidentiary objections made before the hearing, as well as oral objections made at the hearing are deemed made "at the hearing" under section 437c, subdivisions (b)(5) and (d), so that either method of objection avoids waiver. The trial court must rule expressly on those objections. If the trial court fails to rule, the objections are preserved on appeal.**

Id. at 531-532 (internal citations and footnotes omitted).

The Supreme Court recognized "that it has become common practice for litigants to flood the trial courts with inconsequential written evidentiary objections, without focusing on those that are critical," specifically mentioning the case of *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 248, in which a party filed 324 pages of evidentiary objections. The Court of Appeal characterized the *Nazir* case as the "poster child" for abusive objections. In light of this increasingly common practice, the *Reid* court provided the following cautionary warning:

> **To counter that disturbing trend, we encourage parties to raise only meritorious objections to items of evidence that are legitimately in dispute and pertinent to the disposition of the summary judgment motion. In other words, litigants should focus on the objections that really count. Otherwise, they may**

> **face informal reprimands or formal sanctions for engaging in abusive practices. At the very least, at the summary judgment hearing, the parties - with the trial court's encouragement - should specify the evidentiary objections they consider important, so that the court can focus its rulings on evidentiary matters that are critical in resolving the summary judgment motion.**

Reid v. Google, supra, 50 Cal.4th at 532-533.

PRACTICE POINTERS

It is important to note that the *Reid v. Google* decision did not absolve attorneys of the need to actually raise objections to evidence when opposing summary judgment motions. To the contrary, the waiver rules contained in C.C.P. §437c are still in place. However, the *Reid* court did remove the requirement that attorneys must actually obtain rulings on those objections in order to preserve them for appeal.

When making your objections, it is also important to bear in mind not only the Supreme Court's firm advice concerning abusive evidentiary objections, but also the workload of our courts. Avoid objecting to every single piece of evidence regardless of importance (and especially if the issue is undisputed). Any particularly important objections will likely be overlooked or ignored by the trial court if they are imbedded within a tome of repetitive boilerplate objections.

I strongly recommend submitting written objections rather than raising the issue for the first time at the hearing. When you submit your written objections, be sure to comply with Rules of Court, Rules 3.1252 – 3.1354, which address the format of the objections and the proposed order for use by the court.

Finally, keep in mind that just as you can object to the defense's evidentiary support, they can do the same to yours. Make sure your supporting evidence is admissible when you're raising those triable issues!