The Case Against Dispositive Motions In Limine: Part 1

Motions in limine (literally "at the threshold" in Latin) are supposed to regulate the introduction of evidence at trial or govern other aspects of the proceedings before the jury. They were not designed to replace dispositive motions, such as those for summary judgment or judgment on the pleadings. Nonetheless, it has become increasingly common for litigants, especially defendants, to use motions in limine for that very purpose. When confronted with an overreaching motion in limine, plaintiffs' attorneys should be armed with an understanding of how to limit these motions.

IN-DEPTH ANALYSIS

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Traditionally, motions in limine were used to preclude the presentation of evidence that a party considered inadmissible or prejudicial. They were also used to limit testimony to a specific area, such as with an expert. A typical order in limine excludes the challenged evidence and directs the opposing lawyer, party, and witnesses not to refer to the excluded matters in the presence of the jury and also to preclude any information getting to the jury that the motion was filed and/or granted. (*Kelly v. New West Federal Savings* (1996) 49 Cal.App.4th 659, 669.)

Motions in limine may also be used to have the court address Evidence Code section 402 issues outside the jury's presence. Such motions are useful to prevent the defense from improperly attacking a plaintiff's or witness' character. (Evid. Code, § 787.) Motions in limine are classically used to preclude the introduction of evidence where the probative value of the evidence is "*substantially* outweighed by the probability that the admission will (a) necessitate the undue consumption of time, or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352 (emphasis added).) Motions in limine can also be used to preclude non-testifying non-party witnesses from being present in the courtroom when others are testifying. (Evid. Code, § 777.) Courts routinely grant these motions.

Courts have noted that the advantage of such motions is "to avoid the obviously futile attempt to 'unring the bell' in the event a motion to strike is granted in the proceeding before the jury." (*Stein-Brief Group, Inc. v. Home Indemnity Company* (1998) 65 Cal.App.4th 364, 369 citing *Hyatt v. Sierra Boat Company* (1978) 79 Cal. App.3d 325, 337.)

A motion in limine, under appropriate circumstances, can serve the function of a "motion to exclude" under Evidence Code section 353 by allowing the trial court to rule on a specific objection to particular evidence. However, in other cases a motion in limine may not satisfy the requirements of section 353 until the evidence is actually offered and the court is aware of its relevance in context, its probative value, and its potential for prejudice. (*Kelly v. New West Federal Savings, supra* 49 Cal.App. 4th 659, 669.)

In rare cases, a motion in limine may be used as the functional equivalent of an order sustaining a demurrer to the evidence, or nonsuit. An "objection to all evidence" is essentially the same as a general demurrer or motion for judgment on the pleadings seeking to end the trial without the introduction of evidence. (*Mechanical Contractors Assn. v. Greater Bay Area Assn.* (1998) 66 Cal.App.4th 672, 676-77; *Edwards v. Centex Real Estate Corp.* (1997) 53 Cal.App.4th 15, 26.) An objection to all evidence is properly sustained where, even if the plaintiff's allegations were proven, they would not establish a cause of action. (*Mechanical Contractors Assn., supra,* 66 Cal.App.4th at p. 677 and *Edwards, supra,* 53 Cal.App.4th at p. 26.)

Even though motions in limine are supposed to regulate the introduction of evidence at trial or govern other aspects of the proceedings before the jury, they are all too often being used as stealth dispositive motions.

A recent case, *Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582

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(*Amtower*), illustrates this growing trend. In *Amtower*, the trial court granted a motion in limine on a statute of limitations defense after conducting a minitrial that consisted of oral testimony and documentary evidence. The trial court found one of the plaintiff's claims was time-barred, essentially making a statute of limitations determination that should have been made via a defense motion for summary judgment or summary adjudication which should have been filed months earlier. The court of appeal upheld the trial court's misuse of the motion in limine.

Amtower criticized using a motion in limine as a dispositive motion, stating:

"Plaintiff maintains that the trial court's use of an in limine motion to adjudicate his section 11 claim deprived him of the right to a jury trial on the statute of limitations issue. Plaintiff's argument highlights a procedure that has become increasingly common among litigants in our trial courts, which is the use of in limine motions as substitutes for summary adjudication motions, motions for judgment on the pleadings, or other dispositive motions authorized by statute. *We have certified this case for publication in order to express our concerns surrounding the proliferation of such shortcut procedures.* The better practice in nearly every case is to afford the litigant the protections provided by trial or by the statutory processes. In the present case, however, although we would have preferred that the statute of limitations issue be decided by a proper summary adjudication motion or motion for nonsuit, the trial court's unorthodox procedure does not warrant reversal because plaintiff could not have prevailed under any circumstances." (*Id.* at p. 1588, emphasis added.)

The *Amtower* court noted with approval Justice Rylaarsdam's concurring opinion in *R&B Auto Center, Inc. v. Farmers Group, Inc. v. Farmers Group, Inc.* (2006) 140 Cal.App.4th 327, where he noted that the use of a motion in limine to determine the sufficiency of the pleading or the existence of a triable issue of fact was a "perversion of the process." (*Id.* at p. 462.) In fact, *Amtower* referred to motions in limine used for dispositive purposes as "shortcuts" noting they circumvent the procedural protections that statutory motions provide. (*Amtower, supra,* 158 Cal.App.4th at p. 1594.) The *Amtower* court acknowledged that these motions risk blindsiding the non-moving party and may infringe on a litigant's right to a jury trial, as guaranteed by the California Constitution. (*Id.*)

Yet, despite this criticism, the *Amtower* court nevertheless, allowed the "shortcut" motion in limine that the trial court approved. A cursory reading of *Amtower*

(Continued, see Motions, page 10)

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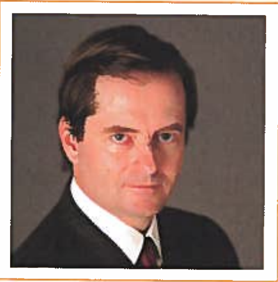

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Motions

(continued from page 9)

may therefore lead lawyers to think motion in limine "shortcuts" are perfectly acceptable as a substitute for summary judgment or other dispositive motions. The *Amtower* court set forth this argument:

> "In spite of the obvious drawbacks to the use of in limine motions to dispose of a claim, trial courts do have the inherent power to use them in this way.... Courts have inherent power, separate from any statutory authority, to control the litigation before them and to adopt any suitable method of practice, even if the method is not specified by statute or by the Rules of Court.... But when the trial court utilizes the in limine process to dispose of a case or cause of action, we review the result as we would the grant of a motion for nonsuit after opening statement, keeping in mind that the grant of such a motion is not favored, that a key consideration is that the nonmoving party has had a full and fair opportunity to state all the facts in its favor, and that all inferences and conflicts in the evidence must be viewed most favorably to the nonmoving party." (*Amtower, supra,* 158 Cal. App.4th at p. 1576, citations omitted.)

The *Amtower* case and other cases like it undoubtedly lead to local rules limiting the scope of motions in limine, such as Rule 8.92(b) of the Los Angeles Superior Court:

> "A motion in limine shall not be used for the purpose of seeking summary judgment or the summary adjudication of an issue or issues. Such motions may only be made in compliance with Code of Civil Procedure Section 437c and court rules pertaining thereto."

Such local rules recognize that the problem with using motions in limine in this way include circumventing procedural protections provided by the statutory motions or by trial on the merits, blindsiding the nonmoving party, and, in some cases, infringing on a litigant's right to a jury trial. (Cal. Const., art. I, § 16.)

Trial courts using these nontraditional methods of disposing of cases on the eve of trial create problems and can actually make litigation more expensive. Therefore, it is absolutely crucial that plaintiffs' attorneys vehemently oppose any such efforts by the defense and argue for a strict and narrow interpretation of the *Amtower* case to the facts presented therein.

The next installment of this article will discuss why *Amtower* is based on questionable authority and how to fight dispositive motions disguised as motions in limine.

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