

The Case Against Dispositive Motions In Limine: Part 2

In the last issue of *The Gavel*, part one of this article discussed traditional uses for motions in limine, followed by a comprehensive overview of the recent decision in *Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582. As set forth previously, despite criticizing the use of a motion in limine as substitute for a motion for summary judgment or adjudication, the *Amtower* court nevertheless upheld the trial court's authority to grant a motion in limine brought regarding a statute of limitation to find one of plaintiff's claims time-barred. (*Id.* at 1588.) This second installment will analyze the questionable authority upon which the *Amtower* court relied and provide readers with suggestions on opposing dispositive motions disguised as motions in limine.

The Questionable Authority Relied upon by *Amtower*

In *Amtower*, the court relied upon a list of shaky authority to support its holding—citing cases where motions in limine were used as shortcuts to reach a desired result. For example, in *Coshov v. City of Escondido* (2005) 132 Cal.App.4th 687, the trial

IN-DEPTH ANALYSIS



SOLANGE E. RITCHIE, ESQ.

In *Stem-Brief Group, Inc. v. Home Indemnity Company* (1998) 65 Cal.App.4th 364, the trial court ordered the plaintiff to file a pre-trial motion in limine setting forth its "best case scenario" in favor of coverage. In ruling on the motion, the trial court concluded there was no potential for coverage and entered judgment for the defense. In essence, the trial court was permitting the defendant to bring a summary judgment motion on the eve of trial, without any of

proof of recoverable damages after the defendant had filed a pretrial motion in limine. The *Michelson* court rationalized its determination by finding that the plaintiff's offer of proof as tantamount to an opening statement and granted nonsuit.

Amtower further relied on *Atkinson v. Elk Corp.* (2003) 109 Cal.App.4th 739, 748–749, a case in which the trial court granted nonsuit on its own motion after studying the law and inviting stipulations concerning the contractual relationship between the parties.

Each of these cases ultimately allowed for the bypass of the stringent statutory and notice requirements of summary judgment and adjudication motions and other dispositive motions, which can be detrimental to a plaintiff's case and invite attention and scrutiny from the court of appeal. However, each of these cases arose out of very unique sets of facts, and it should be vehemently argued that the holdings of each should be limited to such unique facts.

The cause of action that the trial court ruled on in *Amtower* was a claim for

“*Plaintiffs’ attorneys must be prepared to argue for a very narrow interpretation of Amtower...*”

court construed a motion in limine as a motion for judgment on the pleadings and dismissed the entire action—notwithstanding the danger of doing so, especially in light of case authority holding that motions for judgment on the pleadings are disfavored unless leave to amend is given to the plaintiff.

Solange Ritchie practices law with Steve Young, a civil justice attorney. She has experience in complex fraud and contract-related matters. She can be reached at solangeritchie@hotmail.com.

the statutory notice and procedural protections that Code of Civil Procedure § 437c provides. The appellate court found that since the issue of coverage was a matter of contract interpretation by the court, the trial court's unorthodox procedure was not to be criticized as long as the plaintiff had a full opportunity to present its position.

Amtower also relied on *Michelson v. Camp* (1999) 72 Cal.App.4th 955, in which the trial court dismissed an action when the plaintiff was unable to make an offer of

breach of fiduciary relationship. The plaintiff argued that a statute of limitations defense normally presents a question for the jury, and that the plaintiff would be denied his right to a jury trial if the motion were granted. The Court of Appeal nevertheless found the trial court's determination in *Amtower* to be harmless. So taken to its illogical conclusion, *Amtower* stands for the proposition that it is acceptable to deny a plaintiff the right to a jury trial through the use of a motion in limine as a dispositive motion.

Not only does such a ruling improperly deny a plaintiff his or her right to trial on one or more issues (or entirely), but it arguably invites certain scrutiny on appeal.

Motion in Limine Misuse Invites Reversal on Appeal

Motion in limine misuse can result in a reversal on appeal. The risk of reversal rises when appellate courts are required to review a dispositive ruling on an in

limine motion as if it were the product of a motion for nonsuit after opening statement. "[G]ranting of a nonsuit after an opening statement is a disfavored practice; it will be upheld only when it is clear that counsel has undertaken to state all of the facts which he expects to prove and it is plainly evident that those facts will not constitute a cause of action." (*Uccello v. Laudenslayer* (1975) 44 Cal.App.3d 504, 509; *John*

Norton Farms, Inc. v. Todagco (1981) 124 Cal.App.3d 149, 161.) The standard of review in such cases requires that all inferences and conflicts in the evidence be resolved in favor of the losing party and against the judgment. (*Panico v. Truck Ins. Exchange* (2001) 90 Cal.App.4th 1294, 1296.) By contrast, on appeal from a judgment following trial, appellate review favors the judgment. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) This creates a situation where the determinations in some cases will be subject to reversal where, had the trial court just taken the time to hold a trial, reversal would not be warranted. (*Panico v. Truck Ins. Exchange, supra*, 90 Cal.App.4th at p. 1296.) The misuse of motions in limine as shortcuts can lead to more reversals on appeal, all other things being equal, because the governing standard of review is less deferential in cases involving the dispositive use of motions in limine.

Further, although motions in limine may seek the same result as summary judgment motions, they do so without the procedural and constitutional notice and due process protections afforded from the Code of Civil Procedure Section 437c. This provides another ground for reversal on appeal (despite the *Amtower* decision).

While *Amtower* suggests that using motions in limine as a dispositive device may save time, it creates issues because it denies the non-moving party of their fundamental right to a jury trial. In the author's opinion, it takes motions in limine out of their normal role. It denies a litigant the right to proper notice of a defendant's arguments, instead springing dispositive issues on plaintiff just prior to trial, when litigants are in "trial mode" and may be least able to deal with a "surprise" motion. It offers none of the notice and procedural safeguards of proper and timely filed motions for summary judgment or summary adjudication motions. It allows trial courts to potentially clear their

(Continued, see Motions, page 12)

patrickfarber.com

STRUCTURED SETTLEMENT BROKERS



"CAOC and myself thank Pat for his years of support for our organization and for this year's Platinum Business Friend sponsorship. His commitment to creating the best structured settlements for injured parties is commendable."

Christopher B. Dolan
CAOC Immediate Past President

- ▶ Structured Settlements for:
 - ▶ OCTLA Premier Sponsor
 - ▶ Proud ABOTA Supporter
 - ▶ CAOC Platinum Business Friend
 - ▶ Proud CAALA Supporter
- ▶ Physical Injury Cases
- ▶ Non-physical Injury Cases:
 - Class Actions, Employment Litigation, Disability Claims under 104 (a), Punitive Damages
- ▶ Medicare Set-Aside, Special Needs, Asset Protection Trusts
- ▶ Annuities for Attorney Fees

Services Provided
At No Cost To
OCTLA Members



We are dedicated to protecting you and your clients.

Toll Free: **800-734-3910**

PAT@PATRICKFARBER.COM
CA INSURANCE
LICENSE CA04077

Motions

(continued from page 11)

dockets, while at the same time creating a nightmare for the Court of Appeal. For all of these reasons, motion in limine misuse should be curtailed by defense firms and frowned upon by the trial courts. Motions in limine should be used only for their original purpose—to challenge evidence that is so inadmissible and prejudicial that its mere mention in the presence of the jury would lead to an unfair trial.

Fighting Dispositive Motions in Limine after *Amtower*

A few cases have been critical of the holding of *Amtower*, and rightfully so. One such case, *Pellegrini v. Weiss* (2008) 165 Cal.App.4th 515, involved a real estate transaction. In the case, Weiss, raised as an affirmative defense the fact that Califor-

nia had disqualified Pellegrini & Associates from doing business in the state. Pellegrini filed a motion in limine to exclude the evidence of disqualification and offered a Certificate of Revivor from the state to show that the plaintiff had cured any defects and had been in good standing during the time that the real estate transaction occurred. The trial court took judicial notice of the Certificate of Revivor on motion in limine, ruling that evidence of the plaintiff's disqualification was not relevant for trial. On appeal, this ruling of the trial court was affirmed. The court again stated its dissatisfaction with this use of motions in limine as case-dispositive motions:

Generally speaking, in limine motions are disfavored in cases in which they are used not to determine in advance the court's projected ruling if presented with an evidentiary objection during trial, but instead to serve as a substitute for a dis-

positive statutory motion. The increasing prevalence of the practice of using in limine motions in this way produces substantial risk of reversal, particularly in situations in which the constitutional rights to jury trial and confrontation are implicated. As we stated in the recent case of *Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582, 1594, 71 Cal.Rptr.3d 361: "The disadvantages of such shortcuts are obvious. They circumvent procedural protections provided by the statutory motions or by trial on the merits; they risk blindsiding the non-moving party; and, in some cases, they could infringe a litigant's right to a jury trial. The better practice in nearly every case is to afford the litigant the protections provided by trial or by the statutory processes." (*Pellegrini, supra.*, 165 Cal.App.4th at 530, citations omitted.)

(Continued, see Motions, page 43)

OCTLA FOUNDATION CLUB

CORNERSTONE MEMBERS

Aitken*Aitken*Cohn

Bisnar | Chase

Brown & Charbonneau, LLP

Chambers, Noronha & Kubota

The Cooper Law Firm, PC

DiMarco, Araujo & Montevideo

Hodes Milman, LLP

Howard Law, PC

Robinson, Calcagnie & Robinson

Law Offices of Douglas W. Schroeder

The Foundation Club provides generous financial support for OCTLA educational programs, membership benefits and organizational growth. To become a member, contact Janet Thornton at 949.916.9577 or janet@OCTLA.org.

Motions

(continued from page 12)

Miller v. Campbell, Warburton, Fitzsimmons, Smith, Mendel & Pastore (2008) 162 Cal.App.4th 1331, which was cited by the *Pellegrini* court, illustrates motion in limine misuse. In *Miller*, defendant was a law firm that had represented plaintiff Reiko Miller in connection with her duties as the executor of her mother's estate. At the conclusion of that matter, Campbell Warburton requested its attorneys' fees from the probate court and was awarded all but one category of the fees it sought. The probate court's major reason for denying that one category of fees was its finding that the fees had been generated by services rendered to Miller personally, not as the executor of the estate. (*Id.* at 1334-1336.) Campbell Warburton did not appeal the probate court's decision but initiated an action for quantum meruit to recover the fees directly from Miller. The trial court granted Miller's motions in limine to exclude all evidence, which resulted in dismissal of the case. There were two grounds for the trial court's ruling. First, the trial court held that the claim was barred by the final judgment in the probate case. Second, the trial court concluded, based upon the evidence submitted in connection with motions in limine, that Campbell Warburton could not prove its quantum meruit claim. (*Id.* at 1336-1337.) Campbell Warburton appealed from the trial court's judgment. The court of appeal reversed, having issues with the use of motions in limine in the case.

In reversing the trial court, the court of appeal held that the standard of review was the same as the one applied to a grant of a nonsuit after an opening statement. The court felt that the lack-of-expectations motion was, in effect, a motion for summary judgment or for nonsuit. The court expressed its disfavor of these substitutes

for trial or for statutory motions that test the factual basis for a claim, noting the risk they pose to fair adjudication of factual issues:

As we stated in *Amtower*, "when the trial court utilizes the in limine process to dispose of a case or cause of action for evidentiary reasons, 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. (*Id.* at 1337-1338, citations omitted.)

The court in *Miller* refused to use the substantial evidence or the abuse-of-discretion standard used in *Pellegrini*. After reviewing the law on an executor's personal liability for fees, the court of appeal found the trial court erred in ruling that the evidence was insufficient as a matter of law.

Amtower is the perfect example of bad facts make bad law. In *Amtower*, the trial court overstepped its boundaries trying to get at a result which apparently best suited the trial judge and his docket, as opposed to the parties. In doing so, the trial court forgot the system which it is meant to serve, a judicial system where all parties to a case are supposed to have their day in court, regardless of how much money one might have or how slick or high priced one's lawyers are. It is not the American way, when a plaintiff makes it though expensive discovery and case-dispositive motions under the Code of Civil Procedure, only to be blind-sided either in trial or just before trial by a slick motion in limine being misused for purposes other than its original purpose. All parties should play by the same rules—rules which avoid such gamesmanship and "surprise" at trial.

Further, after surviving to trial, the plaintiff should have his or her day in court. *Amtower* and the cases relied upon the *Amtower* court must not be used as a means to off-set procedural safeguards provided by the Code of Civil Procedure. Nor should a plaintiff have to incur the stress and costs associated with preparing for trial on multiple causes of action, only to have some, or all of those causes of action, evaporate just before trial through motion in limine misuse.

Conclusion

Misusing motions in limine creates an unfair and biased system, where random determinations of a trial judge using *Amtower* can totally derail a case just before trial. Given the shaky (and factually specific) authority upon which *Amtower* rests, it should not be considered valid authority for the blanket use of motions in limine as dispositive motions, but must be strictly limited to the facts presented therein. Plaintiffs' attorneys must be prepared to argue for a very narrow interpretation of *Amtower*, limited strictly to its facts, and rebut its holding by relying on *Pellegrini* (and any future authority recognizing the importance of procedural safeguards for any dispositive motions, no matter what they are labeled). Plaintiffs' counsel must also carefully articulate for the trial court the true danger of inefficiency created by *Amtower*, as any interpretation of case law approving a blanket substitute of motions in limine for dispositive motions provides ripe grounds for reversals on appeal.

While *Amtower* provides yet a further obstacle to plaintiffs getting their day in court, informed and well-reasoned oppositions to dispositive motions disguised as motions in limine that reinforce the historical development of procedural safeguards for dispositive motions, and a careful analysis of the narrow facts out of which *Amtower* arose, should go a long way toward limiting the misuse of motions in limine. ☞