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LAW AND MANAGEMENT

OPEN to Interpretation

State Supreme Court to unravel knot of rulings on constitutionality of motions to reconsider

By Laurie Hepler

Confused about whether a trial court can entertain a renewed motion in the absence of any new facts or new law?

Unsure whether a party can ever seek reconsideration after the 10-day deadline imposed by Code of Civil Procedure §1008(a)?

You should be.

Disagreement over these issues has been percolating vigorously in the appellate courts for more than a decade. Those courts' answers have ranged from "no power" to "it depends on who's asking" to "plenary power."

These issues arise in all kinds of litigation, with potentially dispositive consequences for the parties. Known facts take on significance they did not seem to have when an earlier motion was denied. New counsel uncovers case law previously missed. Or a judge shows an inclination to rethink a prior ruling — in light of developments in the case or simply because he or she now believes the earlier ruling was wrong. No matter which side you represent, these situations present a procedural briar patch.

Civil Procedure

Section 1008 leaves only a small window of opportunity for the parties to revisit any issue previously decided. In unusually emphatic language added in 1992, subdivision (e) purports to make the requirement of "new or different facts, circumstances or law," as well as the 10-day reconsideration deadline, jurisdictional:

"This section specifies the court's jurisdiction with regard to applications for reconsideration of its orders and renewals of previous motions, and applies to all applications to reconsider any order of a judge or court, or for the renewal of a previous motion, whether the order deciding the previous matter or motion is interim or final. No application to reconsider any order or for the renewal of a previous motion may be considered by any judge or court unless made according to this section."

The 1992 amendment also added the current subdivision (c), permitting reconsideration of prior orders "if a court at any time determines that there has been a change of law that warrants it" to do so — but those circumstances are relatively rare.

California's appeal courts are all over the map in their appraisal of this statute's jurisdictional limits, and even within districts, precedents from different divisions conflict.

At last, the state Supreme Court is poised to settle this turmoil — though its decision is assuredly many months away. The court granted review Sept. 15 in a Sixth District case.

SECTION 1008 OR THE HIGHWAY

The First District Court of Appeal has historically hewed to the letter of the statute, deeming §1008 to be "the exclusive means for modifying, amending or revoking an order," whether that process is "initiated by a party or the court itself." *Gilberd v. AC Transit*, 32 Cal.App.4th 1494, 1499 (1995). "According to the plain language of the statute," Division Two held, "a court acts in excess of jurisdiction when it grants a motion to reconsider that is not based upon new or different facts, circumstances or law." That division of the First District has reached the same conclusion in numerous cases since *Gilberd*, and other courts have treated the amended statute with similar deference. See *Wilson v. Science Applications International*, 52 Cal.App.4th 1025 (4th Dist., Div. One, 1997); *Lucas v. Santa Maria Public Airport Dist.*, 39 Cal.App.4th 1017 (2nd Dist., Div. Six, 1995).

IT DEPENDS WHOSE IDEA RECONSIDERATION IS

Following the rule that a statute must be construed in such a way as to preserve its constitutionality if reasonably possible, the Second District Court of Appeal has held in two recent cases that §1008 does not deprive trial courts of the power to reconsider their own prior rulings *sua sponte* — since that would conflict with Article VI, Section 1, of the California Constitution, which confers the judicial power on the courts. But the statute still limits the courts' jurisdiction to conduct reconsideration on a party's motion. See, e.g., *Darling, Hall & Rae v. Kritt*, 75 Cal.App.4th 1148 (2nd Dist., 1999); *Case v. Lazben Financial Co.*, 99 Cal.App.4th 172 (2nd Dist., 2002).

ANY TIME, ANYONE

Disagreeing with the "it depends" approach, the Fourth District has colorfully explained: "Whether the trial judge has an unprovoked flash of understanding in the middle of the night or is prompted to rethink an issue by the stimulus of a motion is constitutionally immaterial to the limitation on the power of the Legislature to regulate the judiciary." *Remsen v. Lavacot*, 87 Cal.App.4th 421 (2001). Accordingly, *Remsen* held that "the court's inherent power to correct its own rulings is based on the California Constitution and cannot be impaired by statute" — regardless of whether a party or the court itself proposes reconsideration of a previous ruling. See also *Wozniak v. Lucutz*, 102 Cal.App.4th 1031 (2nd Dist., Div. 7, 2002) (following *Remsen*); *Scott Co. of California v. United States Fidelity & Guarantee Ins.*, 107 Cal.App.4th 197 (6th Dist., 2003) (subdivision (e) is "an impermissible interference with the core functions of the judiciary," as well as "a significant impediment to a court's ability to reach a fair and expeditious resolution of the issues before it"); *Nave v. Taggart*, 34 Cal.App.4th 1173 (5th Dist., 1995) ("Until entry of judgment, the court retains complete power to change its decision as the court may determine; it may change its conclusions of law or findings of fact" regardless of §1008).

Last year, Division Three of the First District published an opinion surveying the various precedents and came down in the intermediate, "it depends" camp. In *Kerns v. CSE Insurance Group*, 106 Cal.App.4th 368 (2003), that court agreed that "if interpreted to eliminate a court's jurisdiction to reconsider its interim orders on its own motion, §1008 violates the separation of powers doctrine embodied in the California Constitution" — but thought the *Remsen* line of cases went "too far toward eviscerating the clear jurisdictional language of §1008, essentially rendering the provisions of the statute meaningless."

Much is at stake in 'LeFrancois.' A ruling that the Constitution reserves to the courts the ultimate power to determine when they will revisit previous rulings would leave many trial courts cold — hostile to the inevitable increase in their workload. But that ruling would be correct.

INTO THE BREACH

In the Sixth District summary judgment case that the California Supreme Court took up on Sept. 15, the court will decide whether a trial court has "the inherent power to rule on a second motion" that does not meet the requirements of either §1008(a) or §437c(f)(2). *LeFrancois v. Goel*, 04 C.D.O.S. 8526. The appeal court, following its decision in *Scott*, held that the trial court does have such power.

The summary judgment component is unlikely to alter the Supreme Court's analysis of §1008 itself, since a summary judgment motion posing previously decided issues is subject to both statutes, and the motion under review met neither. The substantive requirements of §437c(f)(2)

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are functionally the same as those of §1008(b). However, unlike §1008, §437c(f)(2) does not purport to *deprive the trial court of jurisdiction* to entertain a second motion that does not present new facts or law — and that aspect of §1008 will form the heart of the opinion in *LeFrancois*.

Much is at stake in *LeFrancois*. A ruling that the Constitution reserves to the courts the ultimate power to determine when they will revisit previous rulings would leave many trial courts cold — hostile to the inevitable increase in their workload. But that ruling would be correct. The distinction established in the "intermediate" cases is without any legal or practical difference. As a constitutional matter, §1008's infringement on the courts' core power to "ensure the orderly and effective administration of justice" (*Walker v. Superior Court*, 53 Cal.3d 257 (1991)) — and hence its violation of the separation of powers doctrine — is the same no matter who initiates the process. And as Judges Robert Weil and Ira Brown Jr. ask in "California Practice Guide: Civil Procedure Before Trial," "What if the losing party simply asks the court (e.g., at a status conference) to reconsider the matter?"

Under a Supreme Court ruling confirming trial courts' plenary power in this area and guiding the exercise of that power, courts would, of course, remain free in appropriate instances to deny reconsideration, decline to entertain a renewed motion or deny relief on the merits. But that discretion should not be shackled by statute, and if the Supreme Court finds it is not, litigants on both sides will find themselves with many more options to consider. ❖

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