Waiver of Objections Revisited

By now it is well settled that when an attorney files written objections in connection with a summary judgment motion, he "must yell and scream and stamp his feet, or do whatever else it takes to force the trial court to rule on those objections" (*Gallant v. City of Carson*, 128 Cal. App. 4th 705, 714 (2005) [dissenting opn. of J. Vogel]) or he forever waives them. According to the courts, this result is compelled by the summary judgment statute, Code of Civil Procedure section 437c, which states that objections not made at the hearing are waived. Section 437c also states that the court must consider all evidence submitted in connection with the motion "except that to which objections have been made and sustained by the court."

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This rule is as important to the winning party as to the losing party. Whether a summary judgment is won or lost depends on the evidence that is considered "admitted," regardless of who introduced it. A judgment may be affirmed or *reversed* on appeal based on waiver of objections. So, what happens when an attorney makes the proper objections, repeatedly asks for rulings on them, and still the trial judge refuses to rule?

That was exactly the case in *City of Long Beach v. Farmers and Merchants Bank* , 81 Cal. App. 4th 780 (2000). In response to the plaintiff's motion for summary judgment in that case, the defendants filed a 16-page set of evidentiary objections that set forth the objection, the basis for the objection, and a space for the court to rule on each objection (by checking a box marked "sustained" or a box marked "overruled"). The hearing took place over two days and the defendants asked for a ruling on their objections each day, yet the trial court did not rule on the objections.

The court of appeal concluded that defense counsel did all that he "could be expected to do in terms of seeking rulings on the previously filed objections." (*Id.* at 784.) But this conclusion begs the question: Just how far must a practitioner go to preserve the issues for review? Most hearings do not continue over two days — must the objection be raised at least twice at a single hearing? More important, is counsel required to do everything in his power in every case, or is there some lesser minimum that will achieve the same result?

The question has yet to be explicitly answered. In *Sambrano v. City of San Diego*, 94 Cal. App. 4th 225 (2001), the trial court relied on the dubious holding of *Biljac Associates v. First Interstate Bank*, 218 Cal. App. 3d 1410 (1990), stating that it was only considering admissible evidence, without actually disclosing what that evidence was. The courts of appeal are naturally troubled by the *Biljac* rule, the primary problem being that it does not tell the court of appeal what evidence was admitted or what evidence the trial court considered. The rule that summary judgments are reviewed *de novo* "presupposes there is an established record on which appropriate legal conclusions can be drawn de novo." (*Sambrano, supra*, 94 Cal. App. 4th at 235.) Many evidentiary rulings require the trial court to exercise discretion — such as where the court must decide whether two accidents were sufficiently similar to the case at bar to allow them into evidence, or when the objection is that the evidence is cumulative or unduly prejudicial. Answering these questions is not a suitable task for "a three-judge panel committed to reviewing issues of law, not fact." (*Id.* at 236.) In these situations, the trial court's failure to rule explicitly on the objections leaves the appellate court "with the nebulous task of determining whether the ruling that was purportedly made was within the authority and discretion of the trial court and was correct." (*Id.* at 235.)

But, of course, when the trial court relies on *Biljac*, the court of appeal is not even certain what the purported rulings were. This leaves the court in a difficult position. In *Sambrano*, for example, the court of appeal concluded that the defendant's objection to plaintiff's evidence was well taken, but because the trial court had not expressly ruled on the objection, the appellate court was left with the problem of determining whether the evidence must be "deemed to be part of the record because of the waiver rule" or, in the alternative, whether the court should deem that the evidence was not considered on its merits under *Biljac*. (*Id.* at 238.) The court ultimately concluded that the latter rule applied — *i.e.*, that the evidence was not admitted by the trial court — but the court offered little in the way of guidance in terms of the legal analysis that led to this conclusion. Instead, the decision appears to be result-driven — *i.e.*, the court concluded the evidence was not considered by the trial court because that conclusion allowed the court to affirm the summary judgment. (*Id.* at 241.) However, the court could have just as easily determined that the waiver rule applied and, therefore, the evidence was admitted and created a triable issue of material fact, which would have required reversal of the judgment.

That is what happened in *Gallant v. City of Carson, supra*, 128 Cal. App. 4th 705, where a majority of the court of appeal held that the failure to obtain rulings on objections operated as a waiver of those objections, which in turn required reversal of the judgment. The interesting thing about *Gallant*, however, is that it did not involve summary judgment. Rather, it was an appeal from an order on an anti-SLAPP motion. One justice dissented on the ground that the summary judgment waiver rule should not apply to other motions unless expressly stated in the relevant statutes. Code of Civil Procedure section 437c expressly states that the court must consider all evidence except that to which objections have been sustained. But the anti-SLAPP statute contains no such limitation.

The dissenting opinion expressed dismay at the appellate courts imposing procedural hurdles rejected by the Legislature, but was also concerned that "lawyers ought not to be put in the position of haranguing the very judges whose favorable rulings they seek." (*Id.* at 715.) This is a sentiment with which many practitioners, no doubt, would agree. But until it appears in a majority opinion, lawyers and their clients are stuck with having to do everything in their power to obtain rulings on objections in any context to avoid waiver of those objections on appeal. The Supreme Court has recently twice ducked review of the issue — in *Sav-on Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319 (2004) (where the issue was raised in the petition for review, but ignored) and in *Gallant v. City of Carson, supra*, 128 Cal. App.4 th 705 (in which the Supreme Court recently denied review).

In the June 1999 issue of *abtl Report*, attorney Robin Meadow and Justice Paul Turner suggested steps that an attorney might take to avoid waiving objections. Those suggestions remain prudent today. Attorneys should make sure their evidence conforms to the rules of evidence so that their opponents will be less inclined to object. When making objections to an opponent's evidence, discretion is more likely to get results: Object only to the critical evidence. Over inclusiveness in this context might hurt

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more than it will help. Remember that a trial judge rules on numerous motions every day: Smart, focused objections on only the critical issues will serve the client better than a shotgun approach. Request a ruling and make sure there is a reporter at the hearing to record the request. At the very least, this may persuade the court of appeal to excuse any failure to obtain a ruling — which may be as important to the prevailing party as to the losing party. Finally, if you cannot get rulings at the hearing on the motion, try to incorporate rulings in any written order.

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