ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

LOS ANGELES

WINTER 2020

STATEMENTS OF DECISION PART DEUX

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In the Winter 2019 issue of the ABTL Report, we began this two-part primer on statements of decision, explaining what they are, when they're available, why the losing party almost always wants one, and why the winning party rarely does.

In this article, we assume that the trial court is going to issue a statement of decision. We now focus on the strategic decisions and tactical choices counsel will have to make during the surprisingly complicated and lengthy process of preparing the statement of decision.

More About The Doctrine Of Implied Findings

As we discussed in our first article, there is an important doctrine that makes the statement of decision, and what it does and doesn't include, of particular appellate significance: the doctrine of implied findings. In essence, the Court of Appeal presumes that the trial court found all facts against the appellant. As a practical matter, the only way around this presumption is to demonstrate that no substantial evidence supports some necessary factual component of the judgment. That's one of the steepest appellate hills an appellant can have to climb.

Having a statement of decision may allow the appellant to avoid that hill. By nailing down the basis of the trial court's decision, the statement of decision may reveal a dispositive legal error—such as reliance on inadmissible evidence or an inapplicable legal theory. And the Court of Appeal can't imply findings in the face of express contrary trial court findings. (*Lafayette Morehouse, Inc. v. Chronicle Publishing Co*. (1995) 39 Cal.App.4th 1379, 1384 ["When the record clearly demonstrates what the trial court did, we will not presume it did something different"].)

The Statement Of Decision Process

To repeat our advice from Part I: Read rule 3.1590 of the California Rules of Court, and read it again at every step of the statement of decision process. (Trial judges do every time they prepare a statement of decision.) The process can take multiple distinct paths, and you need to be sure you're on the right one.

The process begins with the issuance of a "tentative decision." (Rule 3.1590(a).) Regardless of what label the court uses, that's what this initial announcement of decision is—tentative. (Rule 3.1590(b) ["The tentative decision does not constitute a judgment and is not binding on the court"].) The rules of court do not dictate the content of a tentative decision—it can range from a one-line statement of who wins to many dozens of pages of exposition.

Rule 3.1590(c) allows the court to dictate what procedural path the parties will follow next in working with the court to make the tentative decision become the statement of decision:

> The court in its tentative decision may:
>
> (1) State that it is the court's proposed statement of decision, subject to a party's objection under (g);
>
> (2) Indicate that the court will prepare a statement of

decision;

(3) Order a party to prepare a statement of decision; or

(4) Direct that the tentative decision will become the statement of decision unless, within 10 days after announcement or service of the tentative decision, a party specifies those principal controverted issues as to which the party is requesting a statement of decision or makes proposals not included in the tentative decision.

The remainder of rule 3.1590 lays out what's supposed to happen in each of these situations. Unfortunately, the path isn't always clear. Sometimes one of the parties takes off in the wrong direction, or the court uses terminology that obscures which path it intends the parties to follow (for example, it titles its initial document a "tentative statement of decision" but doesn't invoke rule 3.1590(c)(1)). And occasionally a court will use its own preferred procedure, such as requesting both sides to submit proposed statements of decision before it takes the matter under submission.

But there are two steps that counsel seeking a statement of decision must always be prepared to take: Request a statement of decision, and make objections.

Requesting A Statement Of Decision

A court does not always have to issue a statement of decision. Code of Civil Procedure section 632 requires a statement of decision only "upon the request of any party appearing at the trial." Nor is it enough to just tell the court you want a statement of decision. You have to tell the court what specific issues you want it to address: "The request for a statement of decision shall specify those controverted issues as to which the party is requesting a statement of decision." (*Ibid.*; see rule 3.1590(d) [same].) So, to start the process you must make a request and it must be a proper request.

This sounds simple enough, but it isn't. At least, not judging by what many lawyers file: a lengthy set of questions probing every evidentiary detail of the decision, written like a set of interrogatories with multiple conditional subparts. A court is under no obligation to respond to such a document, so long as the final statement of decision "fairly disclose[s] its determination" of the principal controverted issues. (*In re Marriage of Williamson* (2014) 226 Cal.App.4th 1303, 1319; see *People v. Casa Blanca Convalescent Homes, Inc.* (1984) 159 Cal.App.3d 509, 524 [Appellant "would compel the trial court to make findings with regard to detailed evidentiary facts, to make minute findings as to individual items of evidence. Such a detailed evidentiary analysis is not required by law"].) In short, the request should pose high-level, ultimate-fact questions.

But what if the court's initial document is its "proposed statement of decision" (rule 3.1590(c)(1)), or states that its tentative decision "will become the statement of decision" (rule 3.1590(c)(4))? Do you still need to request a statement of decision? You certainly do if the initial document doesn't address what you consider to be all of the principal controverted issues. Subdivision (c)(4), under which the initial document "will become the statement of decision," expressly contemplates doing this. Subdivision (c)(1), under which the initial document is the "proposed statement of decision," is less clear—it contemplates "objections." But since the court has no obligation to address any principal controverted issue without a request to do so, the proper vehicle would seem to be a request rather than an objection. The path is even less clear if the court issues some kind of hybrid like a "tentative statement of decision."

We believe that regardless of what the initial document says, it's prudent to request a statement of decision that lists all of the principal controverted issues you want the court to address. At worst, it will be redundant; at best it will preserve an issue that might otherwise be lost. This is true even if the court's initial document expressly addresses some of the principal controverted issues you're interested in. Although it seems illogical to ask the court to answer a question it appears to have already answered, prudence dictates that you do so. Much digital ink has been spilled in appellate briefs over whether a request for statement of decision was required or sufficient. Again, redundancy is better than waiver.

Chances are you'll end up filing a hybrid document that objects to any inconsistencies with rule 3.1590; states what you believe the court intended; requests a statement of decision on principal controverted issues, regardless of whether the initial document addresses them; and objects to any omissions or ambiguities.

Objecting To The Tentative Decision

Note we are not saying that your objections will dispute the *correctness* of the court's findings. This is another common mistake attorneys make in the statement of decision process: As we discussed in Part I, lawyers often use the process to re-argue the case, filing what looks much more like a new trial motion (or a statement of disqualification of the trial judge for cause) than a short list of principal controverted issues. Don't

reargue the case or criticize the trial judge. Assume the ultimate decision isn't going to change, and focus on ensuring that the reasons for that decision are stated as clearly and completely as possible and in a way that may help you make errors clear for the Court of Appeal. If the trial court changes its mind in light of what you file, great—but don't count on it. Save that for your new trial motion, which the statement of decision process may help you fortify with sufficient details to reveal an obvious error.

So why object? This brings us back to the doctrine of implied findings and Code of Civil Procedure section 634. Section 634 states: "When a statement of decision does not resolve a controverted issue, or if the statement is ambiguous *and the record shows that the omission or ambiguity was brought to the attention of the trial court* either prior to entry of judgment or in conjunction with a motion under Section 657 or 663, it shall not be inferred on appeal or upon a motion under Section 657 or 663 that the trial court decided in favor of the prevailing party as to those facts or on that issue." (Italics added.) Thus, if the trial court fails to address an omission or ambiguity that a party calls to its attention, the doctrine of implied findings won't apply to that issue. (Of course, once you identify the omission or ambiguity, the court is likely to address it—at least if it's something that really matters—and thereby eliminate whatever advantage you might have gained. But at the end of the day, it's best to get the trial court's specific reasoning. And recognize that if the process resolves issues in a way that causes the appeal to evaporate, it may well have saved the client a substantial investment in a doomed appeal.)

Your objections must be specific to avoid the doctrine of implied findings. (See *Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475, 498 ["The alleged omission or ambiguity must be identified with sufficient particularity to allow the trial court to correct the defect"].) And your first round of objections may not be enough. If revisions to the statement of decision don't resolve your objections, you need to object again, and continue to object if the problem isn't resolved. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1132.) It's never too late: The court has the power to amend a statement of decision in ruling on a new trial motion (Code Civ. Proc., § 662) or motion to vacate (Code Civ. Proc., § 663).

Preparing The Statement Of Decision

Although trial judges often prepare statements of decision, rule 3.1590(c)(3) allows the court to order one of the parties to prepare it, and under rule 3.1590(e) parties may respond to a request for statement of decision by proposing language. For the non-requesting party—presumably the prevailing party—this is a valuable opportunity to present your client's case to the Court of Appeal through the trial court's eyes.

Some practice pointers:

1. If the trial court has already drafted something or stated its tentative ruling orally on the record in court, use as much of the trial court's language as you can, but don't hesitate to improve and clarify, and of course correct mechanical errors. Add some cases; provide additional reasons the court was right. Don't cheat by including rulings the court did not make, but make the judge look good. Consider providing a redline or using Word's "Track Changes" to show any deviations from the court's language.

2. To the extent you can do so consistently with what the court has already written, tell a compelling story. Make it interesting and readable. Remember, the statement of decision may be the first thing an appellate judge reads.

3. Although you should address all of the principal controverted issues the other side identifies (assuming that they really are principal controverted issues), you don't have to do any more than a judge would have to do. You need not answer every question in a set of interrogatories—you just need to show how the court reached its decision. Less is generally better, because the Court of Appeal must imply all findings in your client's favor. But don't hesitate to lay out key reasoning if it makes the statement of decision more understandable and persuasive. And don't ignore any question unless you're confident it's not appropriate. (That you don't like the answer doesn't make a question inappropriate. Use the opportunity to frame the question as less important and frame the bad answer as favorably as you can, consistent with the evidence and law.)

4. Write like a judge, not an advocate. You should always avoid invective, but particularly in a document you want the court to sign and the Court of Appeal to find persuasive. Be even-handed—be judicial.

5. To avoid any possible confusion, do not include language that sounds like an actual judgment. The judgment should be a separate document. (See *Alan v. American Honda Motor Co., Inc.* (2007) 40 Cal.4th 894, 901.) For example, instead of saying that "Plaintiff shall recover $xxx," say "The judgment shall provide that plaintiff shall recover $xxx."

6. If in response to your proposed language the other side identifies an omission or ambiguity, don't fight it—you'll only help preserve the other side's rights under Code of Civil Procedure section 634. Instead, take the opportunity to improve the proposed statement of decision by addressing the point as positively as you can.

7. Even if the court has issued a comprehensive tentative decision, the requesting party will likely pose questions—perhaps many questions—that the tentative decision doesn't directly answer. Unless you feel there is no basis at all for requesting a statement of decision that addresses those questions, it's prudent to provide answers. But rather than rewriting the entire tentative decision to incorporate the answers, consider ending the proposed statement of decision with something like this: "The Court intends the foregoing narrative to explain the factual and legal basis for the Court's decision on all of the principal controverted issues that [the requesting party] has properly identified in its request for statement of decision. Nevertheless, to avoid any misunderstanding, the Court further states: [Respond question by question, with page/line references to existing text in the statement of decision or additional text as appropriate]."

Does Any Of This Matter?

You bet it does. Maybe not often—but when it does matter, it matters a lot.

Exhibit A is *Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42 (*Fladeboe*). There, a car dealer sought a declaration that a manufacturer unreasonably withheld consent to transfer a dealership. Following the bifurcated trial on this issue, the trial court found the plaintiffs lacked standing to seek declaratory relief, and (as far as the opinion reveals) made no findings on the consent issue. (*Id*. at pp. 53-54.) But no one requested a statement of decision. (See Cal. Rules of Court, rule 3.1591 [statement of decision in bifurcated trials].)

The Court of Appeal found that some plaintiffs did have standing—but that in the absence of a statement of decision, the doctrine of implied findings nevertheless required affirmance. "Plaintiffs neither requested a statement of decision on their declaratory relief cause of action nor informed the trial court of any ambiguities or omissions in its findings in the minute order. . . . [¶] Given this record, we must infer the trial court, after giving Plaintiffs a full and fair opportunity to try their declaratory relief action, made every factual finding necessary to support its decision. Because the judgment is presumed correct, and because Plaintiffs bore the burden of affirmatively proving error, the doctrine of implied findings instructs us to infer the trial court made every implied factual finding necessary to support the conclusion that [the manufacturer] reasonably withheld consent . . . ." (*Fladeboe*, *supra*, 150 Cal.App.4th at pp. 61-62.) Finding that this conclusion was "legally sound and supported by substantial evidence" (*id*. at p. 62), the court affirmed.

The takeaway: It's possible, given its no-standing finding, that the *Fladeboe* trial court didn't even think about the consent issue. But the Court of Appeal nevertheless *had to presume* that the trial court not only thought about the issue but decided it for to the manufacturer. That's a big leap, but the failure to request a statement of decision required it.

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Understanding what the statement of decision process is and isn't can be crucial to preserving your client's appellate rights. Our two articles aim to promote that understanding, but it will be worth your while to revisit the details every time you have a bench trial.

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