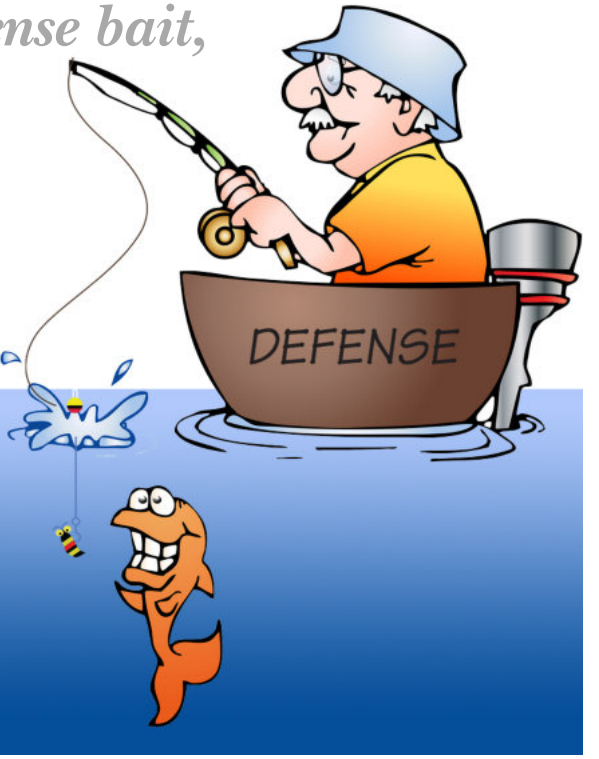
Motions in limine misused and abused

More trial judges are taking the defense bait, granting motions on the eve of trial that effectively gut your case



By Solange E. Ritchie

Over the past few months, I notice more and more that defense firms are misusing motions in limine (literally "at the threshold" in Latin) at the beginning of trial as a substitute for summary judgment/adjudication motions or other dispositive motions which should have been filed much earlier than on the eve of trial. More and more, trial judges appear to be "taking the bait," so to speak, granting these motions on the eve of trial, all to the prejudice of plaintiffs and their attorneys. This is a misuse of motions in limine that is improper and prejudicial.

Motions in limine are meant to be used to preclude the presentation of evidence that a party considers inadmissible or prejudicial. They may also be 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 §402 issues outside of the presence of the jury. Such motions are useful when the defense is trying to improperly attack the character of a plaintiff or a witness in a civil trial which may be prejudicial or confuse the jury. See Evidence 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." (See Evid. Code, § 352.) But even under Evidence Code section 352, defense firms routinely file motions in limine ignoring the words "substantial" and "substantially." Motions in limine can also be used to preclude non-testifying non-party witnesses from being present in the courtroom when others are testifying. (See Evid. Code, § 777.) Courts routinely grant these motions.

Courts have noted that "[t]he advantage of such motions is to avoid the obviously futile attempt to un-ring the bell in the event a motion to strike is granted in the proceeding before the jury." (*Hyatt v. Sierra Boat Co.* (1978) 9 Cal.App.3d 325, 337; *Stein-Brief Group, Inc. v. Home Indem. Co.* (1998) 65 Cal.App.4th 364, 369.)

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 (but note that 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, all being matters related to the state of the evidence at the time an objection is made, then the court cannot intelligently rule on admissibility. An objection at the time the evidence is offered serves to focus the issue and to protect the record. (*Kelly v. New West Federal Savings* (1996) 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,* at 677 and *Edwards, supra,* at 26).)

Thus, motions in limine 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.

Amtower v. Photon

Amtower v. Photon Dynamics, Inc. (2008) 158 Cal.App.4th 1582 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 1588.)

Despite this criticism, the court nevertheless, blessed the "shortcut" motion in limine that the trial court approved. A cursory reading of *Amtower* may therefore lead lawyers to think that motion in limine "shortcuts" are perfectly acceptable as a substitute for summary judgment or other dispositive motions.

This is problematic for a variety of reasons. The appellate court in *Amtower* cited with approval Justice Rylaarsdam's observation in a concurring opinion in *R&B Auto Center, Inc. v. Farmers Group, Inc.* (2006) 140 Cal.App.4th 327, 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."

Amtower referred to motions in limine used for dispositive purposes as "shortcuts," noting that they circumvent the procedural protections that statutory motions provide. The court of appeal found 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.

In *Amtower*, the court found shaky authority to support its questionable holding in cases where motions in limine were used as shortcuts to reach a desired result. In *Coshow v. City of Escondido* (2005) 132 Cal.App.4th 687, the trial 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.

In *Stem-Brief Group, Inc. v. Home Indemnity Company* (1998) 65 Cal.App.4th 364, the trial court ordered the plaintiff to file a pretrial 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 the statutory notice and procedural protections that Code of Civil Procedure section 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 relied on *Michelson v. Camp* (1999) 72 Cal.App.4th 955. In that case, the trial court dismissed an action when the plaintiff was unable to make an offer 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 also 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. All of these cases improperly bypass the significant statutory and notice requirements of summary judgment motions and other dispositive motions which can be detrimental to a plaintiff's case and

invite the attention and scrutiny from the court of appeal.

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

> 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.

Trial courts using these nontraditional methods of disposing of cases on the eve of trial create problems and can actually make litigation more expensive.

The disadvantages of 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.)

Unnecessary reversals

Motion in limine misuse can also result in unnecessary reversals. The risk of reversal arises 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; and see *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.

Authority now exists for the proposition that trial courts have the inherent power to use the motions in limine with relatively few procedural safeguards. 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.

(*Id.* at 1576 (citations omitted))

The cause of action that the trial court ruled on in *Amtower* was a claim for breach of fiduciary relationship. The plaintiff had 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 found the trial court's determination in *Amtower* to be harmless. So taken to its illogical conclusion, *Amtower* stands as 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.

While *Amtower* shows 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 my perspective, it takes motions in limine out of their normal role. It denies a litigant the right to proper notice of a defendant's arguments, 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 dockets, while at the same time creating a nightmare for the Court of Appeal. It denies litigants due process notice of defense arguments and strategy. For all these reasons, motion in limine misuse should be curtailed by defense firms and frowned on 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.

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 California 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. On appeal, the court of appeal 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 dispositive 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 nonmoving party; and, in some cases, they could infringe a litigant's right to a jury trial. (Cal. Const., art. I, § 16.)" (*Ibid.*) "The better practice in nearly every case is to afford the litigant the protections provided by trial or by the statutory processes."

(*Id.* at p. 1588, 71 Cal.Rptr.3d 361; see also *Miller v. Campbell, Warburton, Fitzsimmons, Smith, Mendel & Pastore* (2008) 162 Cal.App.4th 1331 [76 Cal.Rptr.3d 649].)

Miller v. Campbell, Warburton, Fitzsimmons, Smith, Mendel & Pastore (2008) 162 Cal.App.4th 1331 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. 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. Campbell Warburton appealed 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. (*Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582 [71 Cal.Rptr.3d 361.]) As 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 p. 1595.)

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 through 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, plaintiff should be entitled after surviving to trial, to have their day in court. *Amtower* and its progeny cases must not be used as a means to offset 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.

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 authority upon which *Amtower a*nd its progeny cases rest, it should not be considered valid authority for motion in limine misuse. Plaintiff's attorneys must be prepared to rebut its

holdings and its findings. Trial courts must also be careful not to fall into the trap that *Amtower* creates, only to have their misuse of motions in limine reversed on appeal.

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