DECEMBER 2020

Making good choices

Understanding the consequences your litigation strategy has on an appeal; the doctrines of waiver, forfeiture, estoppel or invited error

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Litigation is all about making the right choices: whether to assert a cause of action; under what theory to try the case; which jury instructions to use and how to phrase them; and whether to object at trial are just a few choices facing trial lawyers every day. But making good choices depends in part on understanding the risks and consequences of a particular choice. On appeal, the consequences of your choices in trial often manifest through the doctrines of waiver, forfeiture, estoppel, or invited error. This article examines each of these distinct but related doctrines to help you make informed choices in your litigation strategy – or argue on appeal that the defense made bad ones.

Fairness is at the heart of these doctrines

Fundamental fairness and judicial economy make up the common thread that link these four distinct legal theories. Understanding why the courts turn to these doctrines to foreclose argument on appeal is the first step in understanding the doctrines themselves.

As a general rule, a party cannot raise new issues or change the legal theory of a claim for the first time on appeal. (*Johnson v. Greenelsh* (2009) 47 Cal.4th 598, 603; *Franz v. Bd. of Med. Quality Assurance* (1982) 31 Cal.3d 124, 143.) "This rule is based on fairness – it would be unfair, both to the trial court and the opposing litigants, to permit a change of theory on appeal." (*American Indian Health & Services Corp. v. Kent* (2018) 24 Cal.App.5th 772, 789.) The rule also promotes judicial economy: "Bait and switch on appeal not only subjects the parties to avoidable expense, but also wreaks havoc on a judicial system too burdened to retry cases on theories that could have been raised earlier." (*Nellie Gail Ranch Owners Assn. v. McMullin* (2016) 4 Cal.App.5th 982, 997 [internal citation and quotation omitted].)

Nor will an appellate court "ordinarily consider a challenge to a ruling if an objection could have been but was not made in the trial court." (*People v. Saunders* (1993) 5 Cal.4th 580, 590.) "In our adversarial system, each party has the obligation to raise any issue or infirmity that might subject the ensuing judgment to attack." (*JRS Products, Inc. v. Matsushita Electric Corp. of America* (2004) 115 Cal.App.4th 168, 178 [citation omitted].) This rule serves "to encourage parties to bring errors to the attention of the trial court,

so that they may be corrected." (*In re S.B.* (2004) 32 Cal.4th 1287, 1293.)

Thus, in the interest of fairness to the parties and judicial economy of the courts, the appellate courts turn to waiver, forfeiture, estoppel, or invited error to preclude a party from making a particular argument on appeal.

Defining the principles: waiver, forfeiture, estoppel, and invited error

Defining waiver, forfeiture, estoppel, and invited error is rather complicated, since the first three have often been used indiscriminately in the case law. In fact, "waiver" has been used to refer to both forfeiture and estoppel, often blurring their precise delineations.

Examining these principles in relation to each other helps illuminate their differences. Intent is the crucial element distinguishing waiver from forfeiture, while the consequences of one party's conduct on another party distinguishes waiver from estoppel. Invited error is a self-inflicted form of estoppel.

Waiver vs. forfeiture

"[T]he terms "waiver" and "forfeiture" long have been used interchangeably." (*People v. Simon* (2001) 25 Cal.4th 1082, 1097, fn. 9.) But "[w]aiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." (*United States v. Olano* (1993) 507 U.S. 725, 733 [internal quotations omitted].)

Waiver is thus the result of a deliberate, informed choice to surrender a known right, be it a particular legal theory or a course of action. The party claiming waiver must prove it "by clear and convincing evidence that does not leave the matter to speculation, and doubtful cases will be decided against a waiver." (*DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 60 [internal citations and quotations omitted].)

Forfeiture is commonly the result of failing to timely object in some manner – by literally not objecting, for example, or by not raising an argument in a motion, opposition, or otherwise on the record.

Waiver/forfeiture vs. estoppel

Waiver and estoppel have also, unfortunately, sometimes been used indiscriminately. But these distinct doctrines rest upon different legal principles. As defined above, waiver is the consequence of an intentional act of one party. Importantly, waiver does not require any act or conduct by another party. (*DRG/Beverly Hills*, *supra*, 30 Cal.App.4th at p. 59.) Stated differently, "waiver . . . may be effective as a matter of law without any demonstration that the other party was caused by the waiver to expose himself to any harm." (*City of Hollister v. Monterey Ins. Co.* (2008) 165 Cal.App.4th 455, 487.)

Estoppel, in contrast, focuses on the causal relationship between one party's action with another's. "[E]stoppel is applicable where the conduct of one side has induced the other to take such a position that it would be injured if the first should be permitted to repudiate its acts." (*Brookview Condominium Owners' Assn. v. Heltzer Enterprises-Brookview* (1990) 218 CalApp.3d 502, 512.) In other words, what matters is the causal effect Party A's conduct had on Party B: because Party A took this action, Party B took that action, so allowing Party A to "take back" its action would be unfair to Party B.

Estoppel may arise from statute or equity. Evidence Code section 623 states, "Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it." (Evid. Code, § 623.)

While statutory estoppel under the Evidence Code is limited to situations amounting to fraud, the elements of equitable estoppel have been applied more broadly. Equitable estoppel may be found when: "(1) The party to be estopped has engaged in blameworthy or inequitable conduct; (2) that conduct caused or induced the other party to suffer some disadvantage; and (3) equitable considerations warrant the conclusion that the first party should not be permitted to exploit the disadvantage he has thus inflicted upon the second party." (*City of Hollister*, *supra*, 165 Cal.App.4th at pp. 487-488.)

The importance of the causal nature of one party's conduct on another is also illustrated by one potential consequence of estoppel: "Causation is essential to estoppel, and where it is present the estoppel may arise involuntarily, and may effect the loss of rights the actor did not know he possessed." (*Id.*, at p. 487.) For example, "[e]stoppel to contest jurisdiction does not require the party know or understand the legal consequences of its action. Estoppel in this context is more akin to acquiescence or a forfeiture, which is 'a failure to object or to invoke a right,' not the 'express relinquishment of a right or privilege.'" (*Mt. Holyoke Homes, LP v. California Coastal Com.* (2008) 167 Cal.App.4th 830, 844 [citation omitted].)

Estoppel vs. invited error

"Under the doctrine of invited error, where a party, by his conduct, induces the commission of an error, he is estopped from asserting it as grounds for reversal." (*Redevelopment Agency v. City of Berkeley* (1978) 80 Cal.App.3d 158, 166 [internal citations omitted]; see also, *Mozezetti v. City of Brisbane* (1977) 67 Cal.App.3d 565, 572-573 [appellants estopped from raising invited error on appeal].)

Invited error is self-inflicted estoppel: whereas estoppel focuses on Party A causing Party B to rely and act on Party A's conduct, invited error occurs when Party A's conduct caused an error. Since Party A's own conduct induced the error, Party A is estopped from claiming the

decision, verdict, etc., should be overturned because of that error.

Mesecher v. County of San Diego: The importance of making good choices

The opinion in *Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, helps illustrate these principles. The defendants in *Mesecher* learned the hard way how a trial strategy can go wrong, both at trial and on appeal.

Facing both battery and 42 U.S.C. § 1983 civil rights charges by a criminal defense attorney visiting a client in jail, defendants the County of San Diego and a Deputy Sheriff (collectively referred to as "County") made a tactical decision to submit two questions directed at the same issue on the jointly prepared verdict form. (*Id*., at p. 1685.) Although the plaintiff's counsel pointed out the potential for an inconsistent verdict, County's counsel explained County intentionally wanted the questions on the verdict form: if the jury answered "yes" to battery, but "no" to the Section 1983 claim, County could avoid liability for statutory attorney fees. (*Id*., at pp. 1686-1687.) County did not dispute Mesecher's characterization of its strategy in its new trial motion. (*Id*., at p. 1687.)

Although the court of appeal found the verdict was inconsistent, the reviewing court refused to overturn the verdict for Mesecher on the grounds of waiver. *Mesecher* first recognized the importance of permitting trial counsel to develop and implement their trial strategies. "[A]ppellate courts generally are unwilling to second guess the tactical choices made by counsel during trial." (*Id.*, at p. 1686.)

> The adversarial nature of our judicial system appreciate[es] that lawyers in civil litigation must be given adequate breathing room to select whatever trial strategies they deem appropriate. . . . [T]here is considerable judicial deference to attorney creativity in civil cases. Admittedly the results of such creativity can be mixed with the lawyer and his or her client being rewarded in some cases and not in others. Nonetheless our adversary system requires that we allow counsel the right to maximize the use of his or her trial skills so that the fairness of the result will not be questioned because the court curtailed the lawyer's role. (*Ibid*.)

But *Mesecher* also noted that the attorneys must accept the consequences of this somewhat laissez-faire approach of the courts. "[W]here a deliberate trial strategy results in an outcome disappointing to the advocate, the lawyer may not use that tactical decision as the basis to claim prejudicial error." (*Id*., at p. 1686.) Thus, *Mesecher* found, "[i]n light of its deliberate choice to avoid the gamble of an all-or-nothing verdict in favor of a compromise verdict, we hold County waived its right to assert error on the ground the ensuing verdicts were inconsistent." (*Id*., at p. 1687.)

Analyzing *Mesecher* illustrates why the court found that the County waived its right to claim error due to an inconsistent verdict, as opposed to refusing to consider County's argument pursuant to the doctrine of invited error. Clearly, County's decision was a deliberate, intentional choice – waiver – as opposed to failing to object on the grounds of an inconsistent verdict, or forfeiture. Because the verdict form was *jointly* drafted by the parties, estoppel could not apply: County's conduct – i.e., proposing two questions directed to the same issue – did not cause Mesecher to act in reliance on that conduct, since Mesecher herself was a joint drafter of the verdict form. For the same reason, the doctrine of invited error could not technically apply, as the inconsistent verdict was a result of both parties' drafting errors.

All hope is not lost: Common exceptions to "waiver"

The importance of preserving your arguments on appeal at the trial court level cannot be overstated. Think through the consequences of your litigation strategy. When in doubt, object! Make your objections complete, timely, and unambiguous – and preferably in writing, when possible.

But what happens if the cat got your tongue, your head was in the clouds, or you simply decided not to object, and the moment to state your objection for the record passed you by? Game over?

The answer, unfortunately, is maybe, but not necessarily. Although a thorough discussion of the various exceptions to waiver is beyond the scope of this article, a few common exceptions include:

- **Exemptions under Code of Civil Procedure section 647**: "All of the following are deemed excepted to: the verdict of the jury; the final decision in an action or proceeding; an interlocutory order or decision, finally determining the rights of the parties, or some of them; an order or decision from which an appeal may be taken; an order sustaining or overruling a demurrer, allowing or refusing to allow an amendment to a pleading, striking out or refusing to strike out a pleading or a portion thereof, or refusing a continuance; an order made upon ex parte application, giving an instruction, refusing to give an instruction, or modifying an instruction requested; an order or decision made in the absence of the party or an order granting or denying a nonsuit or a motion to strike out evidence or testimony; a ruling sustaining or overruling an objection to evidence; and any statement or other action of the court in commenting upon or in summarizing the evidence. If the party, at the time when the order, ruling, action or decision is sought or made, or within a reasonable time thereafter, makes known his position thereon, by objection or otherwise, all other orders, rulings, actions or decisions are deemed to have been excepted to." (Code Civ.Proc., § 647.) Note, however, that numerous exceptions apply to this statute, and relying on it requires careful research.
- **Pure questions of law**: The rule that on appeal a litigant may not argue theories for the first time does not apply

to pure questions of law. (*Carman v. Alvord* (1982) 31 Cal.3d 318, 324.)

- **Constitutional issues**: "Constitutional issues raised on appeal, particularly where the issue presented is a pure question of law turning on undisputed facts or when important issues of public policy are at issue." (*In re Spencer S.* (2009) 176 Cal.App.4th 1315, 1323 [internal citations and quotations omitted].)
- **Important questions of public policy or public concern**: "As an exception to the general rule, the appellate court has discretion to consider issues raised for the first time on appeal where the relevant facts are undisputed and could not have been altered by the presentation of additional evidence. Moreover, appellate courts are most likely to consider an issue involving undisputed facts for the first time on appeal where the issue involves important questions of public policy or public concern." (*American Indian Health & Services Corp.*, *supra*, 24 Cal.App.5th at 789 [internal citations and quotations omitted].)
- **When the asserted error fundamentally affects the validity of the judgment**: (*Hale v. Morgan* (1978) 22 Cal.3d 388, 394 [superseded by statute on other grounds]; *De Anza Santa Cruz Mobile Estates Homeowners Assn. v. De Anza Santa Cruz Mobile Estates* (2001) 94 Cal.App.4th 890, 907.)
- **Futility**: appellate review not forfeited where counsel's objections would have been futile. (*People v. Hill* (1998) 17 Cal.4th 800, 821-822).

Creative litigation strategy at trial can be a boon for your client. But failing to think through the consequences of those decisions can be fatal on appeal. Considering how appellate courts might apply these foreclosure doctrines will help you make good choices in the trial court.

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