

Appellate Reports

Daubert error no longer requires new trial as sole remedy. Also, federal preemption ruling

By Jeffrey I. Ehrlich

Evidence; appellate remedy for finding that district court committed *Daubert* error: *United States v. Bacon* (9th Circ.) 979 F.3d 766 (en banc)

Defendant Bacon was convicted in the district court of assault with a deadly weapon with intent to do bodily harm and assault causing serious bodily injury. At trial, the district court excluded Bacon's proposed expert on the ground that the testimony would be irrelevant. Because the court ruled on that basis, it did not evaluate the expert's reliability under *Daubert*. On appeal, a three-judge panel held that the district court had relied on the wrong legal standard when it excluded the testimony. Concluding that it was bound by Circuit precedent, the panel vacated the conviction and remanded for a new trial.

The Ninth Circuit took the case en banc to reconsider its precedent. A new trial would make little sense on remand if, for example, the district court ultimately excluded the expert again, either based on relevance or under *Daubert*. In that event, the case would have been retried on the identical evidentiary basis as the first trial, which would be a waste of judicial resources.

The en banc panel overruled its prior cases requiring a new trial in all cases when the district court commits non-harmless *Daubert* error. It held that the new rule should be, "when a panel of this Court concludes that the district court has committed a non-harmless *Daubert* error, the panel has discretion to impose a remedy 'as may be just under the circumstances.'" Circumstances may require a new trial in some instances; circumstances may dictate a limited remand in others.

Negligence; federal preemption; Federal Aviation Administration Authorization Act (FAAAA); trucking accidents; claims against freight brokers: *Miller v. C.H. Robinson Worldwide, Inc*. (9th Cir. 2020) 976 F.3d 1016.

Plaintiff Miller was rendered a quadriplegic in an automobile accident with a big-rig truck in Nevada. He sued the trucking company as well as the freight broker who hired that company to haul the load, alleging that the broker had been negligent in hiring the trucking company. The district court granted the broker, C.H. Robinson, judgment on the pleadings, finding that the preemption clause in the FAAAA preempted Miller's claim. Reversed. 49 U.S.C. § 14501(c) contains the FAAAA's preemption clause. It provides:

(1) General rule. Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of two or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier ..., broker, or freight forwarder with respect to the transportation of property;

(2) Matters not covered. Paragraph (1)-(A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles ....

District courts across the United States have split on whether the FAAAA preempts negligence claims against brokers. *Miller* is the first Circuit opinion to weigh in on that issue. The court held that Miller's claim did "relate to" a claim against brokers, and therefore fell within the scope of paragraph (1) of the preemption clause. But it also concluded that the claim was saved from preemption by paragraph (2), the so-called "safety exception," which gives states the power to regulate motor-vehicle safety.

Federal Civil Procedure; whether defendant must file a new answer to reassert affirmative defenses after an amended complaint is filed that contains the same material obligations as the prior complaint: *KST Data, Inc. v. DXC Technology Company* (9th Cir. 2020) 980 F.3d 709.

A data-services subcontractor, KST, filed its original complaint in the superior court against ES, the company who retained it. After the case was removed to federal court KST filed a first-amended complaint asserting claims for (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; (3) unjust enrichment, and (4) quantum meruit. ES filed an answer and affirmative defenses, and asserted a counterclaim against KST for breach of contract and other claims. After the district court granted ES's motion to dismiss, KST filed a second-amended complaint asserting the same four claims. ES again moved to dismiss all but the breach of contract claim. The court granted the motion without leave to amend. ES never filed an answer to the second-amended complaint. The parties later moved for summary judgment on the sole remaining claim for breach of contract.

ES argued in opposition to the motion that KST could not recover damages for breach of contract because of its affirmative defenses of unclean hands, fraud, and misrepresentation, which it had pleaded in its answer to the first-amended complaint. The district court found that, because ES had not filed an answer to the second-amended complaint, it had waived those defenses. The court then granted summary judgment for KST. Reversed.

The Ninth Circuit has not previously addressed when a defendant is required to reassert its affirmative defenses in response

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to an amended pleading. Federal Rule of Civil Procedure 8(c) requires a party to "affirmatively state any avoidance or affirmative defense" in response to a pleading. Generally, an affirmative defense that is not asserted in an answer to the complaint is waived or forfeited by the defendant. But the circumstances of this case do not allow for the simple application of this rule. Here, ES asserted its affirmative defenses – in response to the Complaint and First Amended Complaint.

The Ninth Circuit held that a defendant is not required to file a new answer to an amended complaint when the allegations in the amended complaint do not change the theory or scope of the case. Because KST's Second Amended Complaint contained the same material allegations with respect to the breach of contract claim as the First Amended Complaint, ES therefore was not required to file a new answer to preserve its previously asserted affirmative defenses. Before granting summary judgment sua sponte in favor of KST, the district court should have given ES notice and an opportunity to assert its affirmative defenses in response to KST's breach of contract claim.

Arbitration; PAGA waivers; viability of *Iskanian v. CLS Transportation Los Angeles* in light of *Epic Systems, Corp. v. Lewis*: *Olson v. Lyft, Inc.* (2020) 56 Cal.App.5th 862 (First Dist., Div. 2)

In *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, the California Supreme Court recognized that the Federal Arbitration Act (FAA) preempted a state's refusal to enforce an arbitration agreement including a class-action waiver based on unconscionability or violation of public policy. But the Court further held that this rule did not apply to PAGA claims. In *Epic Systems Corp. v. Lewis* (2018) ___ U.S. ___, 138 S.Ct. 1612, the U.S. Supreme Court held that the National Labor Relations Act (NLRA) does not confer a right to proceed on a class basis, and therefore the NLRA did not create any exception to the FAA. In this action, Olson, a driver for Lyft, signed an employment agreement stating that he could not bring a PAGA claim in court and requiring that all disputes with Lyft be resolved by arbitration. In response to Olson's suit, Lyft filed a petition to compel arbitration, which the trial court denied based on *Iskanian*. Lyft appealed, arguing that *Epic Systems* functionally overruled *Iskanian*. Affirmed.

The Court of Appeal rejected Lyft's position based on *Correia v. NB Baker Electric, Inc.* (2019) 32 Cal.App.5th 602, an opinion that rejected the identical argument made by Lyft in this case. Other post-*Epic Systems* cases have agreed, including the only two other published Court of Appeal decisions and numerous California federal cases. Accordingly, the court affirmed the order denying arbitration. The essence of the court's analysis was that PAGA claims, unlike private arbitration claims, are not bringing the action on their own behalf or on behalf of other employees; a PAGA claim is fundamentally a qui tam claim asserted on behalf of the State, not the other employees. "In sum, *Epic Systems* addressed the question whether the NLRA renders unenforceable arbitration agreements containing class action waivers that interfere with workers' right to engage in "concerted activities." (*Epic Systems*, *supra*, 138 S.Ct. at pp. 1624-1628.) It did not address private attorney general laws like PAGA or qui tam suits.

References under Code Civ. Proc. § 638; trial court's power to set aside referee's decision: *Yu v. Superior Court* (*Bank of the West*) 56 Cal.App.5th 636 (Second Dist., Div. 3.)

Yu filed a lawsuit against Bank of the West and Commercial Loan Solutions LLC (CLS), asserting claims arising from a nonjudicial foreclosure of his property. The defendants moved the trial court to assign all issues in the case to a referee pursuant to a reference clause in certain forbearance agreements. The trial court granted the motion and assigned the matter to a retired trial judge as referee. The referee tried the case in phases and ultimately issued a 53-page decision in favor of Yu, awarding him over $2 million in compensatory damages, equitable relief, and $6 million in punitive damages. The referee then filed his final decision in the trial court pursuant to section 638 of the Code of Civil Procedure.

Defendants moved in the trial court to set aside the referee's decision. The trial court found legal errors in the decision. The trial court declined to adopt the referee's findings and award. Instead, it set the matter for a new trial on all issues. Yu sought a writ, which the Court of Appeal granted, but which effectively affirmed the trial court's decision.

Section 644 of the Code of Civil Procedure, which governs the effect of a referee or commissioner's decision, states in subdivision (a): "in the case of a consensual general reference pursuant to Section 638, the decision of the referee or commissioner upon the whole issue must stand as the decision of the court, and upon filing of the statement of decision with the clerk of the court, judgment may be entered thereon in the same manner as if the action had been tried by the court." Section 645 of the same code states, "The decision of the referee appointed pursuant to Section 638 or commissioner may be excepted to and reviewed in like manner as if made by the court. When the reference is to report the facts, the decision reported has the effect of a special verdict."

Viewing section 644, subdivision (a) harmoniously in the context of modern civil procedure, all parties agree that the first clause – "the decision of the referee or commissioner upon the whole issue must stand as the decision of the court" – means that the referee's decision becomes the trial court's decision when the referee files it.

However, use of the word may in the second clause – "upon filing of the statement of decision with the clerk of the court, judgment *may* be entered thereon in the same manner as if the action had been tried by the court" – cannot mean that the *trial court* has discretion *whether* to enter judgment. This second clause is directed at the clerk, as use of the word "entered" indicates. Entry of judgment is a ministerial act done by the clerk. Section 664 specifies that when, such as here, "the trial has been had by the court, judgment *must be entered by the clerk*, in conformity to the decision of the court, *immediately upon the filing of such decision*." (§ 664, italics added.) That is, once the

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referee's statement of decision is filed, it becomes the decision of the court and "the clerk enters judgment 'in the same manner as if the action had been tried by the court," i.e., immediately.

Hence, "the general, consensual referee's decisions here were binding and stood as the decision of the court when issued, with the result judgment should have been entered thereon immediately by the clerk. (§§ 644, subd. (a) & 664.) The aggrieved party's remedy for any error committed by the referee was by a post-judgment proceeding or appeal."

"Under the parties' agreement here, the referee's powers were exhausted when he filed his decisions with the trial court. Real parties sought a new trial by the court, effectively objecting to the reference. In the absence of mutual consent for a new reference, therefore, the trial court properly ruled that the new trial be conducted before the court."

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