March 18, 2019

Projected Admissibility

Curtis E.A. Karnow

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Curtis E.A. Karnow, Judge of the Superior Court (San Francisco)

> *Retrocausality … is a concept of cause and effect where the effect precedes its cause in time, so a later event in time can affect an earlier event in time.*
> -Wikipedia

A July 2017 paper on quantum mechanics suggests the future influences the present.[2] Our Supreme Court appears to have to come to the same conclusion last month.

Typically when we look at summary judgment and anti-SLAPP motions we decide if the proffered evidence is admissible. If not, we toss it, and decide the motions based on only admissible evidence. In the summary judgment context we do this because the statute says that the "supporting and opposing affidavits or declarations shall be made by a person on personal knowledge, shall set forth admissible evidence…." CCP § 437c(d). The rule for offering evidence in support of the showing required on the second prong of an anti-SLAPP motion—where the plaintiff has to make some showing of merit—is similar. *Sweetwater Union High Sch. Dist. v. Gilbane Bldg. Co.*, __C.5th__, 2019 WL 962324, at *7–9 & n.9 (Feb. 28, 2019). So it is that judges routinely examine declarations and treat authentication, hearsay, and other objections to the various sections of the declarations and appended documents.

But the recent *Sweetwater Union* case suggests the analysis may be more nuanced. The mere fact that the evidence offered at the motion is not admissible may not be the end of the inquiry.

Sweetwater Union was an anti-SLAPP case. Prong two evidence included grand jury transcript and plea forms which as such were arguably inadmissible. But the Supreme Court didn't stop there. It focused instead on whether evidence *could* be admitted at trial. Quoting *Fashion 21 v. Coal. for Humane Immigrant Rights of Los Angeles*, 117 Cal. App. 4th 1138, 1147 (2004), the Court compared the issue to the admissibility of an unauthenticated videotape: inadmissible at the moment perhaps, but "capable of being admitted at trial, i.e., evidence which is competent, relevant and not barred by a substantive rule." "Given the high probability [plaintiff] would succeed in offering the videotape into evidence at trial," the *Fashion 21* court—and our Supreme court in *Sweetwater Union*—relied on what was at the moment inadmissible evidence to decide the anti-SLAPP motion. It appears that only evidence which can "*never* be admitted" would be excluded from consideration, such as that subject to a privilege, or otherwise if it "suffers from 'the sort of evidentiary problem a plaintiff will be incapable of curing by the time of trial.'" *Sweetwater Union*, 2019 WL 962324, at *8, quoting *Gallagher v. Connell*, 123 Cal.App.4th 1260, 1269 (2004). It seems that unless there is a "categorical bar" to the admission of evidence at trial, it ought to be considered in the anti-SLAPP motion. *Sweetwater Union*, 2019 WL 962324, at *8.

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[1] This article first appeared in a different format in *The Daily Journal*, March 18, 2019, at p.5.

[2] Matthew S. Leifer, et al., "Is a time symmetric interpretation of quantum theory possible without retrocausality?" *Proceedings of The Royal Society A* (21 June 2017), <https://doi.org/10.1098/rspa.2016.0607>.

And the Supreme Court's invocation of a summary judgment case, *Perry v. Bakewell Hawthorne, LLC*, 2 Cal. 5th 536, 538 (2017), as well as *Sweetwater Union's* note 9, suggests the rule is the same in the context of summary judgment motions. I am reminded of language in our state's key summary judgment opinion, to the effect that the party moving for summary judgment must show not only that the other side doesn't have requisite evidence, but also "cannot reasonably obtain" that evidence. *Aguilar v. Atl. Richfield Co.*, 25 Cal. 4th 826, 854–55 (2001). Again, this seems to have us evaluate not only the current evidentiary record, but perhaps also estimate it for trial.

Even where there seems to be a good objection that evidence is potentially inadmissible, *Sweetwater Union* suggests trial judges might allow discovery to "overcome" that "hurdle" in at least in the context of an anti-SLAPP motion. 2019 WL 962324, at *8.

This case shifts our attention in making and considering evidentiary objections in these motions. It appears to be no longer sufficient to make a valid objection to documents such as declarations or other materials. Parties should, as well, forecast admissibility of the facts at trial. Sometimes this will be simple: a privilege or obviously inaccessible witness may decide the matter.

But many situations will not be simple, at all. Facially valid objections may be met with arguments that the problem can be fixed by the time of trial—perhaps another witness, or a better presentation of the elements under the business records rule, or a beefed-up expert declaration which presents a better foundation for the opinion—all these will be offered as future options to moot the current evidentiary objection.

It's not just the past that affects the present. It's the future, too.