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Objecting to objections: an objectionable new summary judgment requirement

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The 2nd District Court of Appeal has recently concluded that parties must oppose evidentiary objections made in connection with summary judgment or forfeit any appellate challenge to rulings on these objections. *Tarle v. Kaiser Foundation Health Plan, Inc.* 2012 DJDAR 6690 (2d Dist. May 22, 2012,). Unless this decision is overturned or corrective action is taken, trial courts and parties opposing objections will be unfairly burdened.

"[I]t has become common practice for litigants to flood the trial courts with inconsequential written evidentiary objections, without focusing on those that are critical." *Reid v. Google, Inc.* (2010) 50 Cal.4th 512. In *Tarle*, the defendants submitted 200 pages of evidentiary objections, consisting of 335 separate objections, most of which were made on multiple grounds.

Many of the objections pertained to "me too" evidence - deposition testimony from four women who claimed to have been the victim of, or observed, similar discriminatory or harassing conduct from certain defendants. The plaintiff opposed the objections to the "me too" evidence orally and in writing, but addressed only one of the hundreds of remaining objections orally in two separate hearings, although the court's tentative ruling had indicated all but 13 of defendant's objections would be sustained. The court granted summary judgment and plaintiff appealed, challenging for the first time the court's ruling on the "great bulk" of the objections.

The Court of Appeal reversed the judgment, noting that the "multiple, voluminous, and often incomprehensible, motion papers filed by the parties. ... produced a record that makes it impossible for this court to render a proper decision on the merits." In the unpublished portion of its opinion, the court discussed the motion papers' deficiencies. In the published portion of its opinion, the court stated that, "a party who fails to provide some oral or written opposition to objections, in the context of a summary judgment motion, is barred from challenging the adverse rulings on those objections on appeal." Although this pronouncement is arguably dicta because it was unnecessary to the result, trial courts and litigants will almost certainly follow the Court of Appeal's guidance.

Tarle is unsatisfactory both because it fails to solve the problem posed by parties who file multitudinous inconsequential written evidentiary objections and because it creates a new problem by requiring litigants to generate, and trial courts to consider, substantial additional material. The objections in *Tarle* (e.g., "hearsay") consumed 200 pages; any response addressing their merits could easily be twice that long. The court suggested ways to ameliorate this problem, but those suggestions are flawed because they place the burden of remedying the problem on the party opposing the objections or on the trial court, not on the party causing the problem.

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The court first suggested that litigants who lack sufficient time to file a written opposition to objections, which can be filed with reply papers, move to continue the summary judgment hearing. Such a continuance would almost certainly be necessary in cases like *Tarle* since reply papers can be filed as late as five days before a hearing (Code Civ. Proc. Section 437(c)) and a party opposing objections will have to explain why each ground for each objection is invalid. However, attorneys may well be reluctant to request a continuance, as moving the summary judgment hearing can result in postponing the trial date, particularly given the likely scarcity of civil courtrooms in the foreseeable future.

The court also noted that litigants could anticipate objections, and address them at the time evidence is submitted. However, requiring a party to anticipate objections is wasteful because it requires a party to raise and brief arguments an opponent might never advance. Moreover, requiring the party submitting evidence to do the other side's work would be unfair and might even conflict with an attorney's ethical duty to represent a client zealously.

The court suggested as a third alternative that objections could be opposed orally at the summary judgment motion hearing. It seems unlikely that trial courts would be willing to contemplate the lengthy hearings that cases such as *Tarle* would require if the proponent of evidence were to attempt to refute all of the grounds for each objection. Moreover, given the unavailability of funding for court reporters, substantial additional costs will be imposed on the party opposing the objections if that party wants to create a record for appeal.

Finally, the court noted that, "[a] trial court has the inherent power to control the proceedings before it, and is encouraged to use that power when the written submissions get out of hand." However, this course of action puts the burden on the trial court (and possibly the party opposing objections) to sort out the frivolous, oppressive objections from those that potentially have merit.

A better way to remedy the problem created by *Tarle* would be to amend the California Rules of Court to require that objections to summary judgment-related evidence explain why each particular ground for objection applies. This requirement might result in fewer and better thought out objections, and would at the very least make it easier for those opposing the objections to focus on any flaws therein, which in turn would make less onerous the trial court's task of ruling on the objections. Additionally, the summary judgment statute could be changed to extend the time period between the reply papers' filing and the summary judgment hearing. There are undoubtedly other changes that can be made, but if the Supreme Court does not overturn *Tarle*, something must be done to alleviate the burden that decision places on litigants and trial courts.