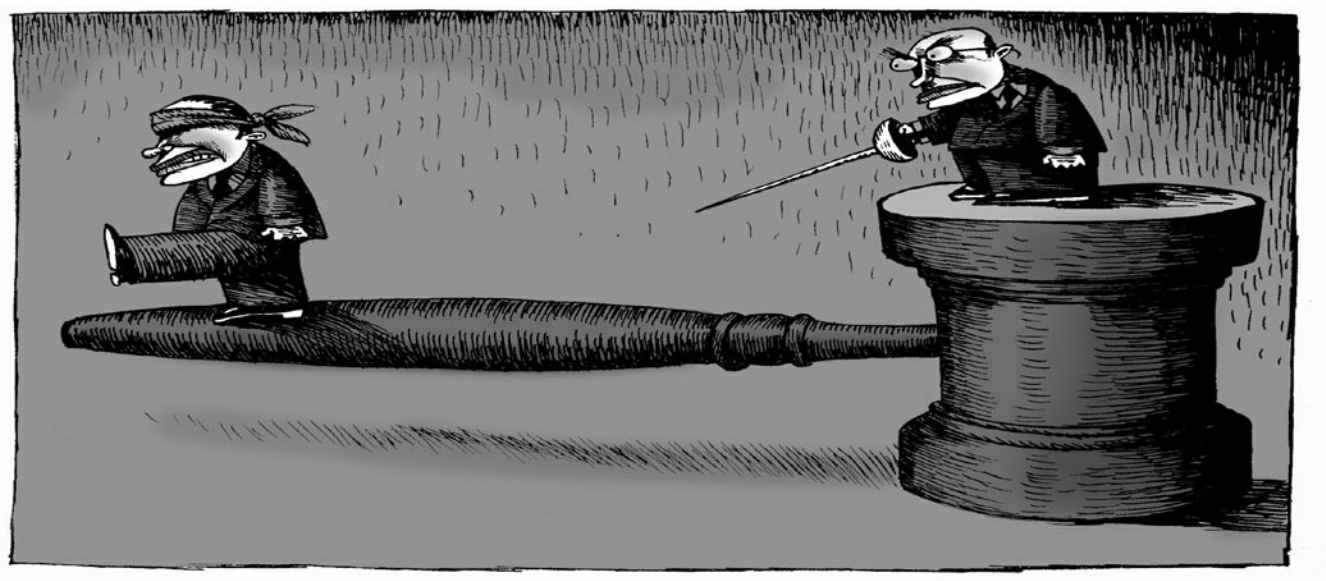
APPELLATE PRACTICE

OBTAIN A RULING, OR ELSE?



By Gary A. Watt

For those following the continuing evidentiary dilemma posed by *Biljac Associates v. First Interstate Bank*, 218 Cal.App.3d 1410 (1990), last year was a very curious year. *Biljac*, like the beast in some late-night horror flick, was ostensibly killed but may not be dead. What *Biljac's* apparent demise means for lawyers trying to preserve their evidence objections for purposes of appeal remains uncertain. Appellate courts differ on whether failure to obtain rulings below waives evidence objections such that the evidence is coming in on appeal but not the objections.

Like Frankenstein, *Biljac's* executioner was its creator, the 1st District Court of Appeal. In April, that court repudiated *Biljac*, confessing that the decision "was wrong." *Demps v. San Francisco Housing Authority*, 149 Cal.App.4th 564 (2007). *Biljac* "held that a trial judge need not rule on each evidentiary objection, but could preserve the record by simply … 'disregard[ing] all those portions of the evidence … consider[ed] to be incompetent and inadmissible.'" *Biljac* rested on the premise that "we review summary judgments de novo and the parties remain free to press their admissibility arguments, on appeal."

Biljac created problems for any party, moving or opposing, that objected to evidence in a summary-judgment motion. Rather than roll up their sleeves, grab the evidence bench book and dig in to the objections, trial judges had *Biljac's* blessing to avoid making written rulings. Instead (picture your favorite judge's tapping heels together three times), judges could inform the parties that "only admissible evidence" was considered, citing *Biljac*.

The real problem, however, was not so much *Biljac's* process but that appellate courts found that a waiver of objections occurred when rulings weren't made below. The Supreme Court was the source, stating in a footnote, "defendants made a series of objections, … [but] the trial court did not rule. … Because counsel failed to obtain rulings, the objections are waived and *are not preserved for appeal*." *Ann M. v. Pacific Plaza Shopping Center*, 6 Cal.4th 666 (1993) (emphasis added). If *Biljac* was a trial judge's blessing, after *Ann M.*, it became a practitioner's curse. Because of the Supreme Court's footnote, it turned out the parties were not as "free to press their admissibility arguments" on appeal as *Biljac*'s authors envisioned.

Victim of circumstances or not, *Biljac* was not well-received by other appellate courts. The 3rd District rejected the concept that a *Biljac* ruling meant that any objections had been sustained. *Laird v. Capital Cities/ABC, Inc.*, 68 Cal.App.4th 727 (1998). Rather, the trial court's failure to make express rulings meant there was an "implied overruling of any objection not specifically sustained" such that the evidence is "admissible and [the appellate court] may not consider … renewed objections thereto."

Noting the harshness of such a result, the 2nd District agreed that, under *Biljac,* objections are impliedly overruled, but the panel refused to make a court's tactic a party's punishment. *City of Long Beach v. Farmers & Merchants Bank*, 81 Cal.App.4th 780 (2000). "In this case, there was nothing further defense counsel could be expected to do in terms of seeking rulings … beyond personally raising the issue on two separate occasions in the presence of the trial court. … It would have been a fruitless or idle act to have interposed a third oral request for rulings." *City of Long Beach* held that, although the objections were impliedly overruled, there was no waiver, and the objections were also preserved for appeal.

The 4th District joined in bludgeoning *Biljac*. *Sambrano v. City of San Diego*, 94 Cal.App.4th 225 (2001). In a lengthy exposé of *Biljac*'s blemishes, *Sambrano* derided Biljac as a trial judge "labor saving device" creating work for the appellate courts. *Sambrano* also recognized the waiver conundrum, "under *Ann M.*, … we would consider the evidence to be deemed admitted to the record on appeal, absent a ruling otherwise on the objections. Under *Long Beach*, … we could consider the objection preserved for appellate review, if it was pursued energetically enough (although it was not here)."

Ironically, given its *Biljac* bashing, recognition of the waiver rule and counsel's failure to push for rulings, *Sambrano* indulged *Biljac,* anyway. *Sambrano* refused to find that evidence of other similar accidents created triable issues by concluding that, "if the *Biljac* theory is accepted, the evidence was not admitted, and summary judgment should be upheld. We believe that is the only appropriate approach on this record."

Like Frankenstein, *Biljac* continued to roam the judicial countryside and was met with horror and abuse by the local, black-robed inhabitants. The 2nd District again took up arms, describing *Biljac* as an "unacceptable circumvention of the [trial] court's obligation to rule on the evidentiary objections presented." *Swat-Fame Inc. v. Goldstein*, 101 Cal.App.4th 613 (2002), disapproved on other grounds in *Zamos v. Stroud*, 32 Cal.4th 958 (2004). Noting that the trial court failed to make any rulings and counsel failed to request them, *Swat-Fame* considered all of the evidence as admitted into the record. Joining *City of Long Beach*, however, *Swat-Fame* concluded that objections need not be deemed waived on appeal so long as counsel "specifically requests a ruling on evidentiary objections" (noting that "Nothing in the record … suggest[s] this exception should apply [here]").

Joining its critics, *Demps* turned on *Biljac*, striking the final blows: "Today, seemingly wiser, we reject [*Biljac*'s] holding, and hold instead, … consistent with all published, post-*Biljac* appellate court opinions, that a trial judge's failure to rule on properly presented objections results in their being impliedly overruled, the effect of which is that the objected-to evidence is in the record for purposes of appellate review." *Demps* acknowledged *City of Long Beach's* exception to the waiver rule but refused to enter the fray because, though all the evidence was coming in on appeal, the party that made the objections on which the trial court never ruled, prevailed.

Nonetheless, as the published cases demonstrate, the 1st and 3rd Districts appear to be strictly adhering to the waiver rule, and the 2nd, 4th and 6th Districts probably will deem objections preserved if rulings were requested. Waiver, as Justice Miriam A. Vogel of the 2nd District put it, is particularly unfair given that "the objector must yell and scream and stamp his feet, or do whatever else it takes to force the trial court to rule on those objections. If he doesn't, his objections are waived." *Gallant v. City of Carson*, 128 Cal.App.4th 705 (2005) (Vogel J., dissenting).

Was *Biljac* really a monster worthy of such approbation and repudiation? Does failure to obtain rulings mean they are waived? At least one appellate court says no to both questions. Just when *Biljac* seemed dead and buried, the 6th District tried to exhume it or at least save its reputation. *Reid v. Google Inc.*, 155 Cal.App.4th 1342 (2007). In *Reid*, the 6th District reversed a motion for summary judgment in a case in which the trial judge relied on *Biljac*. Along the way, the 6th District defended *Biljac*, calling it "substantially correct" and, pointedly, "more nearly correct than its critics have been."

Reid avoids citing a single case attacking *Biljac* or naming a single justice making the attack. Yet *Reid* goes on to observe that, contrary to *Biljac's* critics, Code of Civil Procedure Section 437c (c) does not mandate express rulings but, rather, express objections. The code "reinforces the requirement of express objections, by directing the court to consider all evidence, objectionable or not, unless it finds that a meritorious objection has in fact been made." Better yet, *Reid* concludes that the waiver rule is not only unfair but unjustified, stating that, even if the statute mandates express rulings, "it does not mandate that in the absence of express rulings the underlying objections are forfeited on appeal. … The fact that a trial court does not expressly rule on [a properly made] objection should not be interpreted as a waiver of the party's objection." Rather, "the entire record is … before the appellate court, and the burden is on the objecting party to show that evidence … should instead be disregarded."

So is *Biljac* still wandering around in the judicial night, and if so, what should practitioners do? As *Reid* states, make objections in proper form. See, California Rules of Court Rule 3.1354. And, just in case, take the proactive approach, even pointing out in your papers that *Biljac* has been disowned by its creators in *Demps*. Make your record, requesting rulings on your objections.

Of course, the Supreme Court can and should put an end to the waiver debate, eliminating the ambiguity that exists in the courts of appeal and any need for "kicking and screaming" to avoid waiver of objections. Those courts refusing to find a waiver when an attorney makes proper objections and requests rulings have the better of it. Nothing in either Section 437c (b) or (c) should be read to be a legislative mandate of waiver of properly made objections. And the Supreme Court will finally have the last word, having granted review of *Reid* on Jan. 30. In the end, reports of *Biljac*'s monstrous nature and demise may turn out to be greatly exaggerated. Until then, whether confronted with the specter of *Biljac* or local, black-robed inhabitants, have no fear, and above all, request rulings.

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