

DRUG, DEVICE AND BIOTECHNOLOGY

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This article discusses California's summary judgment statute, which precludes defendants from attributing "fault" to potentially culpable codefendants who are granted summary judgment.

California Code of Civil Procedure Section 437c: The Ghost in the Empty Chair After a Codefendant's Summary Judgment

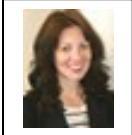
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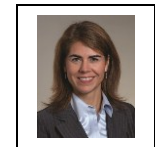


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The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.

As defenders of drug and medical device companies, we know all too well that despite starting the case as a codefendant, by the end our client is often the only defendant. Plaintiffs see the deep pocket, re-focus their theories towards the drug or device defendant, and abandon their case against the medical defendants. In California, we see a growing practice where medical defendants file a motion for summary judgment that goes unopposed by the plaintiff. That practice puts us in the position of either having to oppose the motion for summary judgment—making enemies of the medical defendants—or living with the consequences of an unopposed summary judgment in the codefendants' favor. This dilemma is heightened in California, where California Code of Civil Procedure § 437c(l) limits the extent to which a remaining defendant can attribute fault to a codefendant who gets out on summary judgment.

The California State Legislature's adoption of California Code of Civil Procedure § 437c(l), formerly (j) and (k), in 1982, changed the framework of multiple-defendant litigation by limiting remaining defendants' ability to put on an "empty chair" defense directed toward an absent codefendant granted summary judgment. In the thirty-plus years since its implementation, the subsection has been substantively analyzed in few judicial opinions, only one of which has been published. This lack of judicial interpretation, coupled with the subsection's arguably broad language, leaves the subsection's impact on California litigants unclear. This article suggests how § 437c(l) may be read narrowly in the event codefendants are granted summary judgment.

California Code of Civil Procedure § 437c(l)

California Code of Civil Procedure § 437c, subsection (l), provides:

In actions which arise out of an injury to the person or to property, if a motion for summary judgment was granted on the basis that the defendant was without fault, **no other defendant during trial, over plaintiff's objection, may attempt to attribute fault to or comment on the absence or involvement of the defendant who was granted the motion.** (Emphasis added.)

(Cal. Civ. Proc. Code § 437c(l); Stats.1982, c. 1510, p. 5855, § 1.)

Prior to the subsection's adoption, remaining defendants had the unfettered right at trial to point fingers at the "empty chair" of a codefendant who was granted summary judgment. (*Civil Procedure; summary judgment and nonsuit* in Review of Selected 1982 California Legislation (1982-83) 14 Pac. L. J. 506, 507.) The jury could see evidence regarding the former codefendant's fault and gain a complete understanding of the facts of the case. (*Id.*) This empty chair defense was disconcerting to some who saw it as an opportunity for the remaining codefendants to confuse the jury into placing the blame on a silent, defenseless, former codefendant. (*Id.*) Therefore, the Legislature enacted the predecessor to current § 437c(l) to limit the empty chair defense. (*Id.*)

Because § 437c(l) bars remaining defendants from presenting evidence of their former codefendants' responsibility for the harm,

plaintiffs may attempt to contravene § 437c(l)'s goal of fairness by not opposing a potentially culpable party's motion for summary judgment in order to strategically limit the remaining defendants' defenses.

While § 437c(l) is intended to minimize the negative effects of confusing empty chair tactics, plaintiffs have every incentive to defend those empty chairs to make sure that fault is apportioned only among the remaining defendants, *i.e.*, the parties against whom the plaintiff can receive an award. Therefore, plaintiffs are able, and have every reason, to mitigate any confusion caused by the empty chair defense. Consequently, § 437c(l) only protects plaintiffs from unlikely dangers while potentially trammeling codefendants' rights to procedural due process and exposing them to greater and more probable harm.

To minimize the potential unfairness, § 437c(l) should be read narrowly. An "attempt to attribute fault" should be limited to an attempt to establish that the codefendant violated the legal standard upon which a finding of liability could be found; defendants should still be allowed to argue that the former codefendant caused the plaintiffs' injury (without commenting on the standard of care). The term "comment on the absence or involvement of the defendant who was granted the motion" should be interpreted to limit remaining defendants from informing the jury that former codefendants had been named in the lawsuit but are no longer parties. Such an interpretation allows the jury to be fully informed as to potential causes of plaintiffs' injuries while avoiding issues that may prejudice either plaintiffs or defendants.

Case Law Interpreting § 437c(l)

Since its adoption, § 437c(l) has been mentioned in only a handful of cases and

substantively discussed in just one published opinion, *Knowles v. Tehachapi Valley Hosp. Dist.* (1996) 49 Cal.App.4th 1083. There, the appellate court reviewed a trial court's order allowing the defense to introduce evidence relating to a dismissed codefendant's causation of the decedent's death. (*Id.* at 1094-95.) Since the contested evidence went to causation, which the jury had not reached, the court did not address whether the trial court's admission had defied § 437c(l); the court reasoned that evidence of causation does not inherently influence a jury's determination of negligence—the relevant question implicated through the empty chair defense. (*Id.* at 1095.)

In *Knowles*, the decedent's family brought a medical malpractice claim against Tehachapi Valley Hospital and its surgeon as well as Bakersfield Memorial Hospital and its anesthesiologist. (*Id.* at 1087.) During the course of the litigation, the trial court had granted Bakersfield Memorial and its anesthesiologist's unopposed motions for summary judgment, finding that both parties were without fault. (*Knowles* 49 Cal.App.4th at 1088.) After the trial, the jury found that Tehachapi's surgeon was not negligent. (*Id.*) Consequently, the jury did not reach the second question of whether the surgeon's actions proximately caused the decedent's death. (*Id.*) The plaintiffs raised on appeal whether the trial court had violated § 437c(l) by permitting the defense counsel to cross-examine the plaintiffs' expert with evidence relating to the decedent's failure to receive supplemental oxygen at Bakersfield Memorial. (*Id.* at 1094.)

Since the evidence at issue went to causation, which the jury never reached, the appellate court declined to decide whether the trial court's admission of causation evidence violated § 437c(l). (*Knowles* 49 Cal.App.4th

at 1095.) However, the appellate court rejected the plaintiffs' contention that causation evidence inevitably affects a jury's determination of the remaining codefendants' negligence.

The jury was not asked to decide "who was negligent." Instead, it was asked to determine whether [the surgeon] was negligent, a very different question. In answering that question, there was no danger the jury would decide that [the surgeon] was not negligent because the [anesthesiologist] was negligent. The two matters were wholly unrelated.

(*Id.*) This language from *Knowles* is consistent with an interpretation of § 437c that allows remaining defendants to point to dismissed codefendants as the cause of plaintiffs' injuries—without arguing that those codefendants were negligent when they caused such harm.

The Constitutionality of § 437c(l)

Procedural due process ensures fair play, protects an individual from arbitrary encroachment, and minimizes unjust deprivations of property. (*In re FairWageLaw* (2009) 176 Cal.App.4th 279, 286.) The state must comply with procedural due process requirements before it deprives a citizen of any right. (*People ex rel. Dept. of Transp. v. Lucero* (1980) 114 Cal.App.3d 166, 171.) These requirements include notice and an opportunity to be heard. (*Alviso v. Sonoma Cnty. Sheriff's Dept.* (2010) 186 Cal.App.4th 198, 209.) Arguably, § 437c(l) denies codefendants' the opportunity to have their arguments heard to the extent it bars them from presenting causation evidence or broadly prohibits them from "comment[ing] on the absence or involvement of the

defendant who was granted the motion [for summary judgment]." (Cal. Civ. Proc. Code § 437c(l).)

In an unpublished opinion, the California Court of Appeal held that a remaining defendant did not meet its burden to establish a due process violation in the trial court's order barring evidence of a former codefendant as a cause of the plaintiff's injury, under 437c(l). (*Huber v. Richard Wolf Medical Instruments Corp.*, No. D058956, 2012 WL 1451145, *3 (Cal. Ct. App. Apr. 27, 2012).) The court did not address the factors relevant to a due process analysis, however. The court noted: "California's constitutional due process provision does not require a deprivation of property." (*Id.*, citing *Ryan v. California Interscholastic Federation-San Diego Section* (2001) 94 Cal.App.4th 1048, 1069; *People v. Ramirez* (1979) 25 Cal.3d 260, 263-264.) The court did "not address, the established multiple-factor analysis for determining whether there is a procedural due process violation under the United States or California Constitutions" because the parties had not raised that analysis. (*Id.*, citing *Ryan* at 1059-1076; *Oberholzer v. Commission on Judicial Performance* (1999) 20 Cal.4th 371, 390-391.) The court concluded that the defendant "has not carried its burden on appeal to show that a proper analysis of those factors shows its due process rights were violated by the trial court's granting of [the plaintiff's] section 437c(l) motion." (*Id.* at *14-15.)

Arguably, the defendant's failure to present its due process argument within the established framework led the Court of Appeal to affirm the trial court's order in *Huber*. (See 2012 WL 1451145 at *7 ("On this record, Wolf has not carried its burden on appeal to persuade us the term 'fault,' as used in section 437c(l), is limited to legal 'fault' or

liability and cannot be construed as also including ‘fault’ in the form of nonnegligent conduct that may have caused Huber’s injuries.... Wolf does not present any evidence or argument showing the Legislature intended *section 437c(l)* to be interpreted or applied in this restrictive manner. [Footnote omitted.] For purposes of this opinion, we need not decide whether the term ‘fault,’ as used in *section 437c(l)*, means only legal ‘fault’ or liability *or* also includes ‘fault’ in the form of nonnegligent conduct of another defendant that may have caused the plaintiff’s injuries.”.)

The Court of Appeal in *Ryan v. California Interscholastic Federation-San Diego Section* outlined the four relevant due process factors: (1) “the private interest that will be affected by the individual action”; (2) “the risk of an erroneous deprivation of this interest through the procedures used and the probable value, if any, of additional or substitute safeguards”; (3) “the dignitary interest of informing individuals of the nature, grounds and consequences of the action and of enabling them to present their side of the story before a responsible governmental official”; and (4) “the government interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.” (25 Cal.3d at 1071.) The *Ryan* court further noted that “procedural due process under the California Constitution is ‘much more inclusive’ and protects a broader range of interests than under the federal Constitution [citations]. According to our Supreme Court, it ‘has expanded upon the federal analytical base by focusing on the administrative process itself.’” (*Id.*, citing *Saleeby v. State Bar* (1985) 39 Cal.3d 547,

564.) In *People v. Ramirez*, the Supreme Court held that due process “must be determined in the context of the individual’s due process liberty interest in freedom from arbitrary adjudicative procedures.” (*People v. Ramirez, supra*, 25 Cal.3d at 263-264.)

Presenting a due process argument within this framework may help convince a court that barring a remaining defendant from presenting evidence of causation—which was not necessarily at issue in a codefendant’s motion for summary judgment—is an arbitrary adjudicative procedure.

Conclusion

To overcome a codefendant’s motion for summary judgment, evidence would have to be presented to support that the codefendant both caused the injury and breached the standard of care. This is a greater burden than the remaining defendants would bear at trial, where they would only need to establish that the codefendant caused the harm in order to exonerate themselves. While § 437c(l) was enacted in an effort to ensure due process and fair play, the statute must be read reasonably to ensure that these principles are not contravened by an overly broad interpretation. At most, § 437c(l) should be interpreted to prevent remaining defendants from seeking to have the jury find that the codefendants violated the standard of care such that they should be held liable for damages. Any broader interpretation would contravene the purpose of the statute and the Constitution. While codefendants who get out of a case on summary judgment are gone, they should not be entirely forgotten.

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