

Contracts on Trial

Analysis from the Bench and Bar

MODERATOR

Hon. Ioana Petrou
Alameda County Superior Court

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San Francisco Superior Court

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Topics

- Contract Formation Disputes
- Evidence - Witnesses and Documents
 - Lawyer Witnesses
- Interpretation Issues
- Breach / Performance Issues
- Damages / Causation Issues

Contract Formation

- *Pennzoil v. Texaco*
- Agreements to Agree
 - *Copeland v. Baskin-Robbins* (2002) 96 CA4th 875
- Founder's Disputes
 - *Facebook v. Pacific Northwest Software*, 640 F. 3d 1034 (9th Cir. 2011)
- Disputes arising from settlements

Evidence – Witnesses and Documents

- Lawyer as Witness
 - Transactional Colleague as Witness –
 - Old rule – *Comden* (1978) 20 Cal.3d 906
 - Rules of Professional Conduct 5-210
 - Avoiding Being Called as a Witness –
 - Barred unless: (1) no means other than deposing opposing counsel; (2) relevant and not privileged; (3) the information is crucial. *Spectra-Physics v. Superior Court* (1988) 198 Cal.App.3d 1487

Evidence – Witnesses and Documents

- Documents

- Evidentiary Stipulations

- Authenticity – Documents prepared by and produced from the files of the parties
 - Admissible / not hearsay when offered by the party that is adverse to the party that prepared and produced the document. (*Jazayeri v. Mao* (2009) 174 Cal.App.4th 301)

- How to deal with voluminous/dense contracts?

Interpretation

- Court vs. Jury
 - Ev.C 402 hearing / jury instructions
 - Phased trial considerations?
 - Direct vs. Master Calendar
- Parol Evidence Rule
 - *PG&E v. Thomas Drayage* (1968) 69 Cal.2d 33
 - *Trident Center* (9th Cir. 1988) – any Cal. PER?
 - provisionally admitted
- Extrinsic evidence – fact disputes

Interpretation

- Subjective unexpressed intentions
- Email negotiations
- Custom and practice / trade usage / course of dealing
 - Experts
- Parties' conduct / admissions (video)

Breach/Performance

- CACI 303 (4) – failed to do what contract required / did what contract prohibited
- CACI 303 (2) – did all significant things the contract required – or, excused
- Breach vs. Material Breach
- Termination
 - Who breached first?
- Breach vs. Breach of Implied Covenant

Damages / Causation

- “But for” causation
- Reasonable certainty
- Lost profits
 - Established / Unestablished business
 - *Hadley v. Baxendale* – reasonably foreseeable
- Experts – *Sargon v. USC* (2012) 55 Cal.4th 747
 - Model – interpolation / extrapolation
- Contractual Limitations

Juror Issues

- Special verdict forms
- Bay Area jurors
 - Education
 - Commercial sophistication