# Case Furthers Trend Limiting Post-Appeal Judge Challenges

By Jens B. Koepke

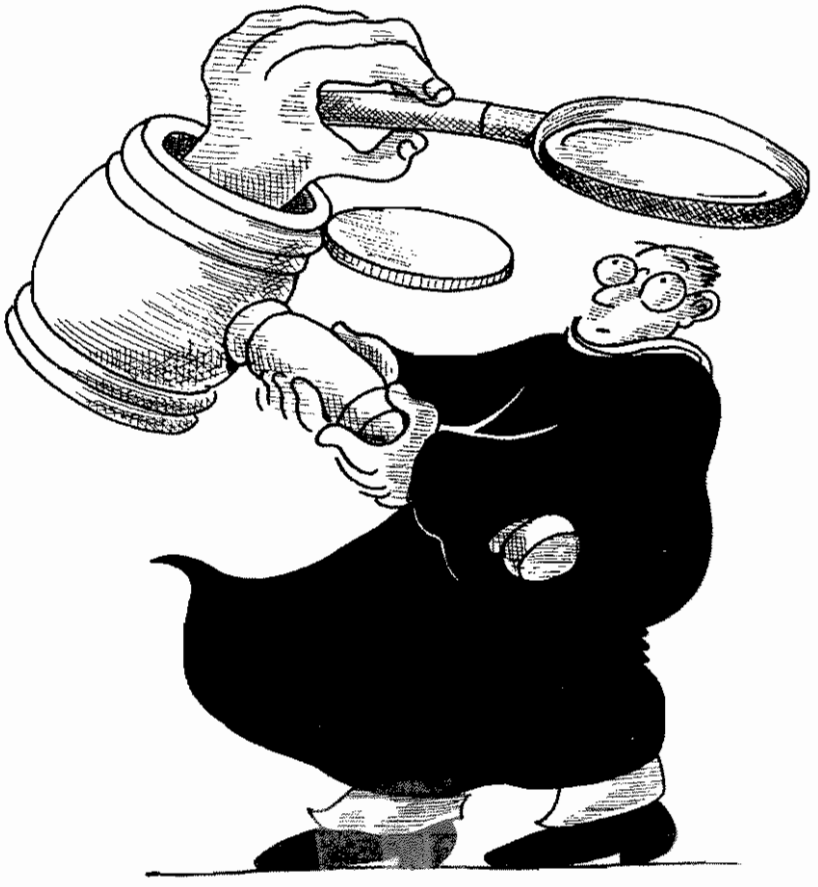

Section 170.6(a)(2) of the Code of Civil Procedure provides that a peremptory challenge "may be made following reversal on appeal of a trial court's decision, or ... of a trial court's final judgment, if the trial judge in the prior proceeding is assigned to conduct a new trial on the matter." Code of Civil Procedure Section 170.6(a)(2). Although this statute seems straightforward enough, what constitutes a "new trial" has been the subject of great confusion and varying court interpretation.

The 2nd District Court of Appeal's recent opinion in *Burdusis v. Superior Court*, 133 Cal.App.4th 88 (2005) took direct aim at trying to divine the meaning of "new trial," and in doing so added a voice for curtailing the applicability of post-appeal challenges. In short, *Burdusis* limits the use of the post-appeal peremptory challenge to when the trial court's decision addressed the merits of, or terminated, the case. However, other precedent takes a broader view of what "new trial" means, and until the Supreme Court settles the issue in civil cases, practitioners remain free to argue either line of cases.

In *Burdusis* the plaintiff appealed the trial court's refusal to certify his wage claim class action. The Court of Appeal reversed and remanded with direction that the trial court reconsider its ruling in light of a recent Supreme Court decision and an appellate court opinion.

On remand, the plaintiff filed a peremptory challenge to the trial judge under Section 170.6(a)(2), which the judge rejected. The plaintiff sought writ relief. The Court of Appeal agreed to hear the writ, but affirmed the denial of the peremptory challenge.

The Court of Appeal held that, to avoid encouraging judge-shopping, the statute should not be liberally construed. Instead, it concluded that the post-appeal peremptory challenge could only be used if "the remand was from review of a decision that either addressed the merits or otherwise terminated the case." Since a trial court is barred from considering the merits of a case on a class certification motion, the court reasoned the challenge should not apply there.



In arriving at its relatively narrow construction of what a "new trial" is under the statute, the Court of Appeal relied on the only Supreme Court decision in this arena, *Peracchi v. Superior Court*, 30 Cal.4th 1245 (2003), noting that *Peracchi* "broke the pattern of appellate decisions advancing ever more generous interpretations of the term 'new trial'" (internal quotes omitted.)

In *Peracchi*, the Supreme Court determined that a remand solely for resentencing did not fit under the definition of "new trial" in criminal cases, and thus Section 170.6 did not apply. *Peracchi* expressly limited its discussion to the unique "context of criminal proceedings," looking to the narrower definitions of new trial in the Penal Code and specifically distinguishing the broader interpretation of "new trial" that the courts and the Legislature had crafted in civil cases. It remains to be seen how far *Peracchi* can be extended into the civil arena.

Other Court of Appeal decisions, in the civil context, have held that the statute must "be liberally construed in favor of allowing a peremptory challenge and a challenge should be denied only if the statute absolutely forbids it." (*Davcon Inc. v. Roberts & Morgan*, 110 Cal.App.4th 1355 (2003); accord *Hendershot v. Superior Court*, 20 Cal.App.4th 860 (1993).

A recent case exemplifies this broader interpretation of "new trial." In *Pfeiffer Venice Properties v. Superior Court*, 107 Cal.App.4th 761 (2003), the court held Section 170.6 applied after the appellate court reversed the trial court's denial of attorney fees under the anti-SLAPP statute, and remanded for reconsideration of the attorneys' fees motion.

The court held that what constitutes a "new trial" under the statute "'does not turn on whether the issue(s) to be resolved on remand are limited, but what the court must do to resolve them. If the court's function is merely a ministerial act (such as the recalculation of interest), the [statute] does not apply. If, however, the court must conduct an actual retrial, even if that trial involves only one issue, the court may be disqualified.'" *Pfeiffer*; see also *Hendershot*. The Court of Appeal

ruled that since "the trial court must make factual findings" on remand of the attorneys' fees motion, "[i]t will be acting in more than a ministerial manner," and thus section 170.6 applied. *Pfeiffer*. Other courts have taken an equally broad view of what constitutes a "new trial":

- Partial reversal of a summary judgment and remand for further factual proceedings. *Stubblefield Construction Co. v. Superior Court*, 81 Cal.App.4th 762 (2000).
- Partial reversal of a judgment and remand for resolution of factual issues regarding restitution of moneys already paid by the victorious judgment debtor. *Hendershot*.
- Judgment in partnership dissolution case was partially reversed and remanded for re-consideration of a single evidentiary issue. *Stegs Investments v. Superior Court*, 233 Cal.App.3d 1991.

By contrast, some other recent court decisions, like *Burdusis*, have taken a narrower view of the meaning of "new trial":

- Reversal of the trial court's ruling on choice of law with direction to apply Illinois law as the case proceeded requires no re-examination of factual issues. *State Farm Mutual Automobile Insurance Co. v. Superior Court*, 121 Cal.App.4th 490 (2004).

**If one's concern is about any potential bias by a reversed trial judge upon remand, one will take a broad view of what rulings constitute a 'new trial.' If one's concern is that upon remand, the parties will engage in judge-shopping, one will take a more narrow view.**

- Reversal of defense judgment with direction to enter judgment for plaintiffs and remand for further proceedings to determine the plaintiffs' damages was not covered, since only new factual damages issues would be resolved on remand, rather than a re-examination of the factual liability issues that supported the erroneous judgment. *Paterno v. Superior Court*, 123 Cal.App.4th 548 (2004).
- Reversal of summary judgment with directions to specifically state the factual and legal reasons for granting judgment, but not addressing the merits of the trial court's conclusion. *Geddes v. Superior Court*, 126 Cal.App.4th 417 (2005).

What all these cases tell us about when the post-appeal peremptory challenges apply is not entirely clear. In criminal cases, *Peracchi* reigns and calls for application of the narrow definition of "new trial" in the Penal Code.

And, obviously, if the appellate court reverses a termination of a civil case on the merits, i.e., a summary judgment, this will trigger the statute. On the other end of the spectrum, if the reversal only requires a ministerial act by the trial court, i.e., entering judgment for the victorious party, the statute will not apply. But as to all the civil cases that fall in between these poles, practitioners are left to sort out the differing approaches of the courts.

*Burdusis* and its predecessors would focus on whether the trial court's original decision addressed the merits — as opposed to some procedural aspect — of the case or whether it terminated the case. By contrast, *Pfeiffer Venice* and its forebears focus on whether, upon remand, the trial court would have to make discretionary or factual determinations, rather than simply execute some ministerial task.

And although *Burdusis* seems right that the trend appears to be toward a narrower interpretation of "new trial," until the Supreme Court rules in a civil case, litigants remain free to argue the cases that have taken a broader view of the term.

One clue as to why courts have taken these differing approaches may lie in how they define the purposes behind the post-appeal peremptory challenge, which the Legislature added to the statute in 1985.

*Burdusis* emphasized that limits on peremptory challenges "are vigorously enforced," because of "the dangers presented by judge-shopping." *Pfeiffer Venice*, on the other hand, opined that the statute was amended "out of concern that a judge who had been reversed might be biased against the party who successfully appealed that judge's decision."

If one's concern is about any potential bias by a reversed trial judge upon remand, one will take a broad view of what rulings constitute a "new trial." If one's concern is that upon remand, the parties will engage in judge-shopping, one will take a more narrow view.

A common situation provides a helpful example of how these differing approaches could play out. A trial court, as an evidentiary discovery sanction in a private figure defamation case, orders that the jury will be instructed that the reporter's negligence should be presumed.

The reporter appeals, and the Court of Appeal reverses with direction that the trial court first issue monetary sanctions, before considering evidentiary sanctions. Does this trigger a "new trial" by the trial court, and thus allow a peremptory challenge?

If the focus is on whether the reversed trial court might harbor some animus toward the scofflaw reporter, then one would lean toward allowing a challenge. And indeed, if one applies the *Pfeiffer Venice* test — are discretionary or factual findings going to have to be made — one could argue that since the trial court is going to have to use its discretion to re-evaluate whether monetary sanctions are appropriate and whether any further compliance is enough to avoid evidentiary sanctions, the challenge should be allowed.

If the focus is on whether there is judge-shopping, one would lean away from permitting a challenge. And applying the *Burdusis* test — did this address the merits or result in termination — one could argue that since this only dealt with one element of the plaintiff's defamation case, and re-trial would not deal with the merits at all, but rather monetary discovery sanctions, use of a challenge is not warranted.

Given the dicey strategic considerations always present when deciding whether to risk making a peremptory challenge against a judge, the choice to attempt one after reversal on appeal should be approached carefully. *Burdusis* provides helpful analysis and good ammunition for those advocating a more narrow construction of the provision, but it by no means settles when the challenge applies and when it doesn't.

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