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Can You Impeach With RFA Denials? Victaulic Company's $55 Million Dollar Question

A recent appellate decision confirmed that the prohibition on using Request For Admission denials or responses to contention interrogatories at trial cannot be circumvented by laying an impeachment trap for witnesses.

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Written discovery – some litigators enjoy it as an intellectual challenge, others despise it as grueling drudgery. Drafting the questions and the responses must be done carefully because both are strategically important. Expertly crafted questions are designed to be well-hidden minefields and responding to them requires extraordinary care to anticipate, diffuse, and clear them. Many litigators have declared victory when a cleverly drafted question achieves its goal of boxing in the opponent and obtaining an admission on a critical element of the case. But the more common denial camouflaged in lawyerly objections presents a trickier problem. The big question, then, is what to do next with those denials – or, rather, what not to do.

Last month, in *Victaulic Company v. American Home Assurance Company* (2018) 20 Cal. App. 5th 948, the First District Court of Appeal told litigators exactly what NOT to do: Do not try to beat up an unsuspecting witness with those brilliant denials or well-versed objections. In *Victaulic Company,* the Court of Appeal confirmed that the prohibition on using Request For Admission denials or responses to contention interrogatories at trial cannot be circumvented by laying an impeachment trap for the witness. Though the Court's ruling includes entertaining language, the result was not amusing – the Court threw out a $55 million verdict in favor of plaintiff Victaulic Company.

What Went Right in *Victaulic Company*?

Victaulic had brought an action for insurance recovery against American International Group, Inc. (AIG) asserting breach of contract and bad faith insurance denial. The case had been narrowed before trial with a favorable summary adjudication ruling for Victaulic holding that AIG, the insurer, owed a duty to defend and a duty to indemnify several product liability claims against Victaulic. The case proceeded to trial on the bad faith claim.

At trial, plaintiff's counsel called the insurer's claim handler and cross-examined her on the distinction between the handling of the underlying claims and the coverage litigation. Plaintiff's counsel made use of the insurer's responses to Requests For Admissions, one of which asked for an admission that the insurer had concluded that there was a potential for coverage for the underlying

claims. Plaintiff's counsel, and then the judge, cross-examined the claims adjuster to suggest that she lied in verifying RFA responses that denied that there was a potential for coverage under the policies while she continued to handle the claims for the insurer. After the trial judge found that the witness had perjured herself by signing the RFAs, she asserted her rights under the Fifth Amendment before the jury.

What Went Wrong in *Victaulic Company*?

The Court of Appeal found that the trial court's allowance of cross-examination regarding the RFA denials and their admission into evidence was "manifest error." Citing *Gonzalves v. Li* (2015) 232 Cal. App. 4th 1406 and *Rifkind v. Superior Court* (1994) 22 Cal. App. 4th 1255, the Court reasoned that RFA denials are akin to improper contention questions posed at a deposition because they require a party "to make a 'law-to-fact' application that is beyond the competence of most lay persons."

Although the Court of Appeal states that using denials of RFAs is improper questioning, the earlier guidance was not as clear as the Court of Appeal suggests. The issue was one of first impression in the 2015 decision in *Gonzalves v. Li*. In *Gonzalves*, the Court held that allowing contention discovery into evidence and allowing a defendant to be cross-examined with RFA responses warranted a new trial. However, the *Gonzalves* decision did not directly address the question of impeaching a witness with RFA responses.

The *Victaulic Company* Court addressed impeachment in response to the trial judge's pointed cross-examination of the claims adjuster. The Court of Appeal rejected the argument that the RFA denials were inconsistent with the witness's trial testimony and therefore admissible as a prior inconsistent statement under Evidence Code section 780(h). Notably, the Court's reasoning that RFA denials "represent legal positions, not statements of fact" does not take into account non-contention RFAs. A straightforward request for admission of a fact, untied to a legal conclusion, does not require the application of law to the facts and could theoretically be used for impeachment. Nevertheless, *Victaulic Company* does not make that distinction and instead classifies discovery denials and objections as pre-trial litigation conduct that is not appropriate for trial inquiry.

What Post-Trial Remedy Still Exists?

While the Court's reasoning in *Victaulic Company* eliminates the ability to use RFA denials as cross-examination fodder, the opinion also reminds practitioners that the Code of Civil Procedure does provide some post-trial relief for improper denials. Code of Civil Procedure 2033.420(a) provides that if a party fails to admit the truth of any matter requested by an RFA and the opposing party subsequently proves that the fact was indeed true, that party may request reimbursement of its attorneys' fees and "reasonable expenses" in proving that the fact was true.

Trial attorneys can make strategic use of this sanction power. The sanction is intended to "reimburse reasonable expenses incurred by a party in proving the truth of a requested admission…such that trial would have been expedited or shortened if the request had been admitted."[1] A party can obtain an award of fees under Section 2033.420 independent of any right to recover fees under a contract or other statutory authority. The denial of a well-crafted RFA on a key issue can provide an avenue for a substantial fee recovery where no other basis exists. But, of course, a court may deny fees if appropriate objections to the request were sustained, if the RFA was trivial, or the party denying the admission "had reasonable ground to believe that [the] party would prevail on the matter." Code Civ. Proc., § 2033.420(b)(3).

What Can Litigators Do To Stay Out of Trouble?

Whether you like written discovery or not, litigators should be careful of the urge to leverage their sharp RFA work to impeach a witness at trial. The takeaway is simple: if there is a denial to an RFA, find out exactly why long before trial gets underway – because trying to use it as an impeachment trap will hit you like a boomerang. Similarly, if there is a response to an RFA that looks like it might be fun to play with at trial, just remember that when playing that game you may have more to lose than the witness does. Doing so was a $55 million mistake in *Victaulic Company v. American Home Assurance Company.*

[1] *Brooks v. Am. Broad. Co,* (1986) 179 Cal. App. 3d 500, 509.

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