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## Designated hit

### EXPERT DESIGNATIONS AND HOW RECENT CASELAW AFFECTS THE ABILITY TO STRIKE “IMPROPER” EXPERTS FOUND IN DEFENDANT’S SUPPLEMENTAL DESIGNATION

Previously, *Fairfax v. Lords* (2006) 138 Cal.App.4th 1019 provided compelling authority for successfully striking an opposing party’s experts who were first identified in a supplemental designation. The basic premise for this holding was that these newly designated experts were not true supplemental experts because, at the time of initial disclosures, the party designating them knew or should have known that these experts would be needed at trial. For example, in a disputed-liability case where the parties’ speeds and directions of travel are clearly at issue, all parties should know they should designate – at a minimum – an accident reconstructionist. However, the recent case of *Du-All Safety LLC v. Superior Court* (2019) 34 Cal.App.5th 485, has significantly impacted *Fairfax*’s expansive and often-used holding and restricted motions to strike “supplemental” experts to *Fairfax*’s very specific facts.

This article provides an overview of the expert designation process, a discussion of the *Fairfax* decision, and an analysis about how *Du-All Safety LLC* could affect the expert designation process – and all challenges related thereto – for all parties moving forward.

#### **A brief summary of expert witness disclosure pursuant to Code of Civil Procedure sections 2034.210 to 2034.310**

Code of Civil Procedure sections 2034.210 to 2034.310 govern the expert demand and exchange procedure. Although many of you are undoubtedly familiar with these Code sections, this article begins with a brief summary of selected sections to outline the designation process because the success of your motion to strike will more likely

than not turn on simple compliance with these requirements.

First, section 2034.210 governs who can make the demand and reads in its pertinent part:

After the setting of the initial trial date for the action, *any party may obtain discovery by demanding that all parties simultaneously exchange information concerning each other’s expert trial witnesses to the following extent:*

(a) Any party may demand a mutual and simultaneous exchange by all parties of a list containing the name and address of any natural person, including one who is a party, whose oral or deposition testimony in the form of an expert opinion any party expects to offer in evidence at the trial....

Next, section 2034.220 governs the timing for making the demand and provides that “[a] party shall make this demand *no later than the 10th day after the initial trial date has been set, or 70 days before that trial date, whichever is closer to the trial date.*”

Once it is determined an exchange must occur, section 2034.230, subdivisions (a-b) discuss what must be contained in the demand and sets the specific parameters for properly making the demand, including the date for when the exchange must occur, which reads that it: *shall be 50 days before the initial trial date, or 20 days after service of the demand, whichever is closer to the trial date.* Section 2034.240 requires the demand be served on all parties who have appeared in the action.

Once the demand has properly been made and served, section 2034.260, subdivisions (a-c) detail what must be contained in the parties’ initial

simultaneous expert designations. It also states the demand must be served either at an in-person meeting of the attorneys on the day for the exchange, or that *it must be mailed on or before the date of the exchange.* Section 2034.270 provides that, if the demand for exchange includes a demand for production of reports, then all parties shall produce any expert reports in existence at the time of the exchange along with their initial designations.

Lastly, section 2034.280, subdivisions (a-c), govern the process and method in which experts may be supplementally designated by a party and sets the time limit for that to occur to be “*within 20 days after the initial exchange,*” and that these experts must be made available for deposition “immediately.”

#### **Striking out – the applicability of *Fairfax* after the *Du-All Safety LLC* decision**

The summary above sets the stage for the following situation that we all have experienced.

The time for initial expert disclosure comes and you diligently designate the seven experts necessary for your case. A few days later you get the defense expert disclosure and the only expert they designate is the doctor who performed your client’s defense-medical exam.

You find that surprising because it is obvious that the experts you designated would be needed for all the disputed issues in your case. You also likely revel in defendant’s seeming shortsightedness, believing it will be handcuffed at trial with its single expert against your phalanx of experts. But then, 20 days

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after the parties' initial disclosure, you receive the defendant's "supplemental expert designation." This designation now contains six more experts to match the experts you designated, all of whom you know the defense was aware at the time of initial designations would be needed for your case. Sound familiar?

This "wait and see" approach of expert disclosure is a common defense tactic and one that plaintiffs would often attack with *Fairfax v. Lords*, which held that such gamesmanship would result in those "supplemental" experts being stricken.

### **Fairfax v. Lords**

*Fairfax* was a medical malpractice case. Defendant there served a demand for the exchange of expert-witness information, and plaintiff timely designated a retained expert. On the same date of plaintiff's proper designation, defendant served a document that purported to be an expert-witness designation, but it contained none of the information required by the Code. Rather, the "disclosure" stated that defendant "hereby gives notice that he is not designating any retained experts for the first exchange of expert witness information," and that he "expressly reserves the right to designate experts in rebuttal to [plaintiff's] designations." (*Id.*, 138 Cal.App.4th at p. 1022.)

Then, weeks later, defendant served a second designation of expert witnesses, naming an expert designed to counter plaintiff's expert. Over plaintiff's objection, defendant's expert was allowed to testify at trial. The jury returned a defense verdict.

In reversing and ordering a new trial, the *Fairfax* court began its analysis by stating that "[w]hen it comes to issues that both sides anticipate will be disputed at trial, a party cannot merely 'reserve its right' to designate experts in the initial exchange, wait to see what experts are designated by the opposition, and then name its experts only as purported 'rebuttal' witnesses." (*Id.* at p. 1021.) The *Fairfax* court continued, "[t]he effect of [defendant's] expert

designation was to delay his own list of 'expected' witnesses until after he had seen the list put forth by [plaintiff]." (*Id.* at p. 1026.) "[Plaintiff] designated only one retained expert, to address the only real disputed issue in this case.... Because [defendant] had every reason to anticipate such a designation, he had a corresponding obligation to designate whatever expert he expected to have testify on the issue *at the same time.*" (*Id.* at p. 1027.) The *Fairfax* defendant "had no right to simply delay his designation of retained experts until after he had the opportunity to view the designation timely served by [plaintiff]." (*Ibid.*)

At bottom, *Fairfax* held that what defendant did was improper because its effect "was to delay his own list of 'expected' witnesses until after he had seen the list put forth by [plaintiff]. [Defendant] *does not deny that this was his express intent....*" (*Id.* at p. 1026 (emphasis added).)

The *Fairfax* court found "two significant problems" with defendant's supplemental designation.

First, the assumption that a party could not determine what claims are at issue in a particular case until the other party reveals their expert witness list was erroneous. There are other sources of information that pre-date the disclosure. For example, "the complaint specifies a claim for medical malpractice. That should set defendant's mind at rest concerning the potential need for an accident reconstructionist." The *Fairfax* court also stated that "ordinary discovery" is available to determine plaintiff's claims and to retain appropriate experts to render opinions regarding issues in dispute. "Reasonably competent defense counsel is not at risk of expending large amounts on issues like these because he cannot ascertain the nature of plaintiff's claims." (*Id.* at p. 1026.)

The second "and more fundamental problem" with the supplemental expert designation was that it violated the "clear statutory requirement" for a "simultaneous" exchange of information. (*Id.* at pp. 1026-27.) Even though the reviewing court could see the logic with defendant's tactic, it could not ignore the

Code requirements. The *Fairfax* court summed up the issue as follows:

To be clear, this is not a situation in which Lords was somehow surprised by the content of Fairfax's expert designation. Fairfax designated only one retained expert, to address the only real disputed issue in this case – i.e., whether Lords' treatment of Fairfax complied with the standard of care. *Because Lords had every reason to anticipate such a designation, he had a corresponding obligation to designate whatever expert he expected to have testify on the issue at the same time.* The fact that Fairfax designated a medical doctor, rather than a podiatrist, to testify on the issue is of no significance. Parties presumably designate the expert they believe best qualified to opine on the applicable standard of care; if Lords believed there was a significant difference between a medical expert and a podiatric expert for purposes of this case, he could have designated one of each, as he subsequently attempted to do. (*Id.* at p. 1027 (emphasis added).)

Ultimately, the *Fairfax* court held defendant would have to re-try the matter with his initial designated medical experts and that his supplementally designated podiatrist would be precluded. In addition to clearly violating the Code, the appellate court ruled that allowing defendant's supplemental designation was prejudicial because "[the] case turned on the issue of whether the jury believed Lords' treatment of Fairfax had fallen below the applicable standard of care." (*Id.* at p. 1027.) The fact that the jury could rely on the supplemental expert's opinion and find in favor of defendant was sufficient to find good cause for a new trial.

*Fairfax* provided plaintiffs' attorneys with a seemingly powerful tool against defendant's "slow play" tactic with expert disclosure. But then the court of appeal published *Du-All Safety LLC v. Superior Court* (2019) 34 Cal.App.5th 485, which limited *Fairfax* to its specific facts and thereby greatly limits a party's ability to strike supplemental experts.

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### ***Du-All Safety LLC v. Superior Court* (2019) 34 Cal.App.5th 485**

While *Fairfax* is still good law, and a motion to strike experts first disclosed improperly in a supplemental designation is still a viable tool, *Du-All Safety LLC v. Superior Court* has significantly limited the utility of such a motion and restricted the applicability of *Fairfax* to the specific facts of that case.

In *Du-All Safety*, defendant timely filed its expert witness disclosure identifying two experts it expected to call at trial. Plaintiffs' expert disclosure identified two similar experts but also identified five more experts on other subjects. Defendant then timely filed a supplemental disclosure identifying five experts in those same fields. Plaintiffs successfully moved to strike the supplemental disclosure and exclude the experts. In granting the plaintiffs' motion, the trial court found that defendant "had to have known" it needed experts on these subjects at the time of the initial disclosures, thus its supplemental disclosure was improper under *Fairfax*.

Defendant then filed a petition for a writ of mandate, which the reviewing court granted. In so doing, the *Du-All Safety* court went to great lengths to explain what specifically must occur before a trial court should strike a party's supplementally designated experts.

The first and most critical step is analyzing whether the party attempting to supplement its experts timely complied with the statutory obligations of initial and supplemental disclosures. In other words, did the party who disclosed experts in a supplemental designation timely disclose at least one expert in its initial disclosure and then timely designate experts they expect will rebut the other party's experts that were disclosed initially? (*Id.* at 496-97.) In *Du-All Safety*, it was without dispute this occurred. Yes, defendant only disclosed two experts (while plaintiff disclosed seven), but it did so on time and in accordance with Section 2034.260, subdivision (b)(1). Then, defendant timely served its supplemental designation identifying its additional five experts pursuant to Section 2034.280.

For the *Du-All Safety* court, this would have been the end of the analysis: "[i]n short *Du-All* complied with the express language of the expert designation statutes. *That ends it.*" (*Id.* at p. 497 (emphasis added).) In so holding, the court distinguished the facts of *Fairfax*. In *Fairfax*, instead of complying with the requirements of initial disclosures, defendant merely said he "hereby gives notice that he is not designating any retained experts for the first exchange of expert witness information," and that he "expressly reserves the right to designate experts in rebuttal to [plaintiff's] designations." (*Id.* at p. 500.) In other words, the *Fairfax* defendant's "initial disclosure" was nothing more than intentional "wait to see" strategy not allowed under the Code.

Thus, according to *Du-All Safety*, so long as there is a timely designation of a single expert when initial disclosures are due, then a party can properly designate as many rebuttal experts it needs in response to the other party's initial disclosure so long as the supplemental designation is also done timely.

But the *Du-All Safety* court did not stop here. It went on to address many additional arguments often found in *Fairfax*-based motions to strike.

The *Du-All Safety* court then addressed prejudice. Put simply, the court found that the plaintiffs had showed none. The appellate court dismissed the claim that the supplemental designation was "inherently prejudicial," since not a single expert deposition had yet occurred at the time of the supplemental designation. (*Id.* at p. 501.)

The court then focused on the prejudice the *defendant* would face if its supplemental experts were struck. To be sure, the court emphasized the net effect of striking these experts was akin to a terminating sanction as it could "eviscerate[] [defendant's] case." (*Ibid.*) As terminating sanctions are typically only available when a party "fails to obey an order compelling discovery," the reviewing court found defendant at no time failed to comply with a court order or otherwise did anything in violation of the Code of Civil Procedure at any time

prior to trial. (*Id.* at pp. 499-500 (citation omitted).)

Then, addressing gamesmanship, the *Du-All Safety* court sharply pointed out plaintiffs' arguments that defendant somehow took advantage of plaintiffs by not designating these experts initially were patently false. Again, distinguishing *Fairfax* where defendant's "express intent" was to purposely wait to see who plaintiff designated before he designated anyone, the reviewing court found "there is no indication *Du-All* and its counsel were anything but professional, civil, and cooperative in all they did, necessitating not one motion to compel to be filed by plaintiffs. In sum, neither *Du-All* nor [its] counsel engaged in actions that can be characterized as gamesmanship, nor did they engage in a 'comprehensive attempt to thwart the opposition from legitimate and necessary discovery,' justifying exclusion of evidence." (*Id.* at pp. 501-02.)

The take-away from this part of the analysis is that, unless your opposing counsel is so kind as to confess in writing that their express intent with their supplemental designation was a *Fairfax* "wait and see" plan, or that there is a well-documented history of bad conduct, then your motion will be denied for yet another reason.

The *Du-All Safety* court then further distinguished *Fairfax* and emphasized "perhaps most importantly," that *Fairfax* was a simple medical malpractice action, i.e., "essentially a one-issue case – whether defendant committed malpractice; this was 'the only real disputed issue in the case.'" (*Id.* at pp. 502-03.) Because of this, the *Fairfax* defendant "had to know" what expert he "expect[ed] to call." (*Ibid.*) Making the same argument, plaintiffs claimed defendant actually knew it would need experts in these fields long ago based on actual notice of plaintiffs' injuries, actual notice that certain injuries could be worth multiple millions, and actual notice of other contested issues as detailed in prior discovery responses. (*Id.* at pp. 503.)

This did not matter because plaintiffs apparently failed to "demonstrate that *Du-All* always expected to retain experts in the various fields of expertise set for in plaintiffs'

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initial disclosure.” (*Id.* at p. 503 (emphasis added).) “[T]he mere fact that Du-All *may have known, expected, or even anticipated* that plaintiffs would designate experts *does not*, under the requirements set forth in the Code of Civil Procedure, place *any responsibility* on Du-All to anticipate what experts plaintiffs might designate and in anticipation of that designation designate rebuttal experts in its initial disclosure.” (*Id.* at p. 503 (emphasis added).)

Accordingly, unless the contested issues in your case are so obvious, simple, and seemingly singular as they were in *Fairfax*, the often-used argument that defendant should have known it needed these experts at the time of initial disclosures is now a dead letter.

Notably, the *Du-All Safety* court discussed the dearth of published cases that actually applied *Fairfax* offensively. “We have found only one published opinion that has applied *Fairfax*: *Osborne v. Todd Farm Service* (2016) 247 Cal.App.4th 43....” (*Id.* at p. 501 n.4.) In *Osborne*, the trial court struck (among other things) plaintiff’s untimely and improper supplemental expert designation. This ruling, however, was not challenged on appeal, thus the *Osborne* court did not address whether this was actually a proper ruling. (*Ibid.*)

## Conclusion

The *Du-All Safety* opinion has significantly limited the efficacy of attempting to strike a defendant’s supplemental expert designation to the very specific and unique facts of *Fairfax*. The joy you used to feel when you received defendant’s initial expert witness disclosure that failed to list experts it certainly knew were needed in your case is now all but gone. At the same time, to the extent your failure not to designate particular experts with your initial disclosure was strategic or an inadvertent oversight, you have a legally based explanation when your new experts are first disclosed in a supplement designation.

Regardless, the first and most important question to answer before filing a motion to strike should be this: Did defendant timely disclose at least one expert with its initial disclosure? If so, the *Du-All Safety* message is clear: your motion to strike will be denied.

If this is the case, focus your attention on pressing defendant to present these “supplemental” experts for deposition “immediately.” (Code Civ. Proc. § 2034.280, subd. (c).) By so doing, you will likely reap several benefits

including (1) avoiding the time and effort spent drafting a losing motion, (2) avoiding having to go in ex parte on the motion as there will likely be no dates for a regularly noticed hearing, (3) keeping your current trial date as judge’s often sua sponte continue the trial date so the motion can be heard on regular notice, and (4) potentially getting the best expert testimony you could hope for from defense experts who genuinely are not prepared, have an insufficient grasp of the facts of your case, and who more likely than not will offer concessions that whatever work they performed was rushed or last-minute.

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