

## Memorandum 71-34

Subject: Study 71 - Pleading

Senate Bill 201 (general pleading revision) has passed the Senate. Attached is a copy of the bill as it passed the Senate. Two significant changes were made in the Commission recommended legislation:

(1) The separate statement revision was deleted and existing law was restored by the Commission in the hope that the bill would be otherwise acceptable.

(2) The requirement that plaintiff join related causes in his complaint was deleted.

These deleted provisions are to be presented, if the Commission so determines, in a separate bill. We have a "spot bill" available into which the recommended provisions can be amended.

This memorandum considers various technical changes that are suggested for Senate Bill 201 and discusses the separate statement and plaintiff's compulsory joinder and related provisions that might be included in the other bill.

Senate Bill 201

There are a number of technical changes in Senate Bill 201 and revisions in the Comments that have been suggested for Commission consideration:

Section 428.10. Section 428.10 was amended to restrict cross-complaints in eminent domain actions to those arising out of the same transaction or affecting the same property. Mr. Elmore of the State Bar suggests that the Comment to Section 428.10 include a paragraph pointing out the effect of this amendment. The following is suggested:

Section 428.10 restricts cross-complaints in eminent domain actions to those that assert a cause of action arising out of the same transaction or occurrence or that involve the same property or controversy. Subdivision (a) which permits assertion of unrelated causes of action is made specifically not applicable to eminent domain actions; but subdivision (b), which permits assertion of related causes, is applicable.

Section 430.30. Mr. Elmore of the State Bar has suggested an addition to the Comment to Section 430.30. The following is recommended:

Where a ground for objection to the complaint or cross-complaint appears on the face of the pleading and no objection is taken by demurrer, the objection is waived except as otherwise provided in Section 430.80. See 2 B. Witkin, California Procedure Pleading § 487 at 1474 (1954). In this respect, Section 430.30 continues prior law.

Section 431.70. Mr. Elmore of the State Bar suggests the following clarifying revision of one sentence of Section 431.70 (second sentence from end of section):

The defense provided by this section is not available if the cross-demand is barred for ~~previous~~ failure to assert it in a prior action under Section 426.30.

Family Law Act. Jon Smock of the Judicial Council has expressed concern that the pleading revision might limit the power of the Judicial Council to provide by rule for the practice and procedure under the Family Law Act. We suggest that the following section be added to Senate Bill 201:

429.40. Nothing in this title affects the authority of the Judicial Council under Section 4001 of the Civil Code.

The following Comment is suggested:

Section 429.40 makes clear that nothing in this title affects the authority of the Judicial Council to provide by rule for the practice and procedure under The Family Law Act, notwithstanding that former Code of Civil Procedure Sections 426a and 426c are continued as Sections 429.10 and 429.20 of the Code of Civil Procedure.

New Bill

Separate statement requirement. Mr. Elmore has set out suggested language for a revision of the present separate statement requirement which is continued as Section 425.20 of Senate Bill 201. For his suggestion, see Exhibit I attached (page 2 of his suggested legislation).

The staff is concerned that, if the suggested language were adopted, the courts would still be concentrating on technicalities--whether the section required a separate statement--without regard to what we believe the issue should be: Whether a separate statement is required in order that the opposing party may prepare a responsive pleading or is needed for a clear presentation of the issues. Accordingly, we recommend that the Commission approve the following (revisions from Commission's original recommendation shown by underscore and strikeout):

425.20. Causes of action need not be separately stated unless separate statement is necessary to ~~avoid confusion~~ permit the opposing party to prepare a responsive pleading or for a clear presentation of the issues .

If this is approved by the Commission, we suggest the following Comment:

Comment. Section 425.20 supersedes the portion of former Code of Civil Procedure Section 427 that related to the separate statement of causes of action. Section 425.20 requires separate statement of causes of action where separate statement is necessary for a clear presentation of the issues or where the opposing party needs a separate statement in order to demur to one or more causes of action stated in the complaint or to answer.

Former Section 427, which required that each cause of action be separately stated but provided exceptions for certain types of frequently occurring causes of action, was criticized as tending to "encourage prolixity and uncertainty in the statement of the facts constituting the cause or causes of action." 2 B. Witkin, California Procedure Pleading § 497 at 1486 (1954). Section 425.20, on the other hand, requires that a party objecting to the pleading must show not only that the causes of action are not separately stated, but also that the failure to separately state the causes of action confuses the issues or precludes him from demurring or answering the pleading. This new requirement is intended to avoid the prolixity and uncertainty that sometimes resulted under the former rule.

Compulsory joinder by plaintiffs. Mr. Elmore has suggested a revision of Sections 426.20 and 426.30 (page 1 of draft attached to Exhibit I). The staff suggests that the definition of "related cause of action" in Section 426.10 be narrowed to read (changes shown by strikeout and underscore):

(c) "Related cause of action" means a cause of action which arises out of the same transaction or occurrence ~~or series of transactions or occurrences~~ as the cause of action which plaintiff alleges in his complaint.

The advantage of this revision is that it uses narrower language than Section 428.10 which deals with permissive cross-complaints and thus permits the court to develop narrower rules under the compulsory joinder provisions than under the permissive cross-complaint provisions. Also, the rules dealing with permissive joinder of plaintiffs and defendants (Sections 378 and 379 use the broader "series of transactions or occurrences" language and thus can be construed more liberally than Sections 426.20 and 426.30. By using language in Sections 426.20 and 426.30 that is narrower than in the other provisions, we permit the court to develop narrower rules than under the other provisions. The court can thus take the purpose of the provisions into account in determining the scope of the various sections. We would put this point into the Comment to Section 426.10.

Inter-company insurance arbitration. If a compulsory joinder of causes provision is approved for plaintiffs, the staff suggests that a new section be added to the bill to make clear the effect of inter-company insurance arbitration. A suggested section and Comment are set out as Exhibit II.

Respectfully submitted,

John H. DeMouilly  
Executive Secretary

# THE STATE BAR OF CALIFORNIA

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April 21, 1971

John H. DeMouilly, Esq.  
Law Revision Commission  
Stanford School of Law  
Stanford, California

Re: Senate Bill 201, as amended

Dear Mr. DeMouilly:

Pursuant to our various conversations I am summarizing briefly the present status before the Committee on Administration of Justice of S.B. 201, as amended.

1. Mandatory Joinder of Causes of Action by Plaintiff. After the action of the Senate Judiciary Committee, both the Northern Section and the Southern Section of the CAJ further reviewed the (majority) position in the light of a staff suggestion that a narrower joinder requirement be considered. This would be particularly in the area of compelling plaintiffs joinder of causes of action arising out of the same tort or other breach of obligation. The wording would be in contrast to the wording of S.B. 201. As to this it was explained that problems connected with the practice of arbitrating property damage claims between insurers would be covered by an amendment to be drafted by the Commission staff. A second proposal suggested was that the compulsory cross complaint wording be narrowed as follows: "if it arises out of the transaction or occurrence that is the subject of plaintiffs cause of action against the defendant".

On these suggestions both the Northern and Southern Section voted to re-affirm their prior positions but authorized the committee staff to continue discussions with you and your group.

John H. DeMouilly, Esq.

April 21, 1971

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2. Separate Statement of Causes of Action. In like manner, the writer suggested to the two Sections as a possibility that a "middle ground" might be taken as follows: "causes of action based upon the same or closely related facts need not be separately stated where there are numerous causes of action or parties, unless separate statement is required to enable the opposing party to prepare his defense or for a clear presentation of the issues". On this phase the Northern Section and the Southern Section re-affirmed their prior position (which is reflected by the present text) but authorized staff to continue discussions with you and your group. However, it should be stated that the Southern Section did not feel that the "separate statement" requirement should be relaxed at this time.

In addition to the foregoing the following changes of detail in the statute or the official comments have been suggested to you: Sec. 430.30(b) - the comment should indicate that there is no intent to change the decisional law on waiver of certain objections by failing to file a special demurrer. Sec. 431.70 - the word previous should be deleted and reference made to a "prior action". Sec. 428.10 - the comment should refer to the fact there is no intent to affect the present decisional law as to a cross complaint in an eminent domain action.

Attached are the texts substantially as submitted to the two Sections of the CAJ as above outlined. However, it should be made clear this was by way of idea only and the Sections have not approved them in principle or form.

The committee appreciates the consideration which the Commission and you have given on this bill.

Yours very truly,

  
Garrett H. Elmore

GHE:jc

Encls.

cc: Mr. Horton, Mr. Hopkins  
Mr. Bradford, Mr. Eades

Illustrative Wording -- 4/21/71

Mandatory Joinder of Causes of Action by Plaintiff

Sec. 426.20. Except as otherwise provided by statute, if the plaintiff fails to allege in his complaint all causes of action which (at the time the complaint is filed) he has against any party who is served or who appears in the action growing out of the same tort or the same breach of duty, the plaintiff may not thereafter in any other action assert against such party the cause of action not pleaded. [Exception to be made for the insurance company arbitration practices and any other problems in re subrogation. Appropriate comment to be made.]

Mandatory Cross Complaint

Sec. 426.30. Except as otherwise provided by statute, if a party against whom a complaint has been filed and served fails to allege in a cross complaint a cause of action against ~~the party~~ the party by whom the complaint was filed which arises out of the transaction or occurrence that is the subject of the complaint, such party may not thereafter in any other action assert against the party who filed the complaint the cause of action not pleaded.

Note: Appropriate exceptions and "comments" to be made.

Separate Statement

Sec. 425.20. (a) Except as otherwise provided by law (statute?), causes of action shall be separately stated.

(b) In any action brought by the husband and wife, to recover damages caused by injury to the wife, all consequential damages suffered or sustained by the husband alone including loss of the services of his wife, money expended and indebtedness incurred by reason of such injury to his wife, may be alleged and recovered without separately stating such cause of action arising out of such consequential damages suffered or sustained by the husband.

[Note: To be shortened.]

(c) Causes of action for injuries to person and injuries to property, growing out of the same tort, need not be separately stated.

(d) Where there are numerous causes of action or parties, causes of action based upon the same or closely related facts need not be separately stated unless separate statement is required to enable the opposing party to prepare his defense or for a clear presentation of the issues.

[This wording is subject to revision.]



EXHIBIT II

§ 426.70. Inter-company insurance arbitration

426.70. (a) Where an insurer who has paid a claim under a policy of insurance is subrogated to any extent to the rights of an insured against a person causing injury and the person causing the injury is insured against all or a portion of his liability for such injury:

(1) Except to the extent the insurer is subrogated to the rights of the insured, the fact that the rights between the two insurers are determined by agreement between them or by arbitration does not affect the right of the insured to maintain an action against the person who caused the injury.

(2) Except to the extent the insurer is subrogated to the rights of the insured, no agreement between the insurers or award in an arbitration proceeding between the insurers or a judgment confirming such an award shall be deemed res judicata or collateral estoppel on any party in an action between the insured and the person who caused the injury.

(b) As used in this section:

(1) "Injury" includes injury, damage, or death.

(2) "Insured" includes the insured or other beneficiary under a policy of insurance, his legal representative, or his heirs.

Comment. Section 426.70 is included to make clear that this article does not preclude or affect the determination of the rights between insurers by agreement or arbitration in a case where an insurer is subrogated to any extent to the rights of an insured. Thus, this article has no effect on inter-company arbitration.

Section 426.70 also makes clear that settlement between insurers of a dispute by agreement or arbitration may not adversely affect the right of the insured to maintain an action against the person who caused the injury, damage, or death.

Section 426.70 does not make this article inapplicable where an insurer is subrogated to rights of the insured and brings an action in the name of the insured against the person who caused the damage, injury, or death. In such a case, except as otherwise provided by statute, the compulsory joinder provisions of this article are applicable. However, in some cases, statutory provisions permit separate actions by the insurer and the insured. See, e.g., Govt. Code §§ 21451-21453 (state retirement fund), Labor Code §§ 3852, 3853, 6115, 11662 (workmen's compensation). These special statutory provisions are not affected by this article.