

#71

6/7/71

First Supplement to Memorandum 71-42

Subject: Study 71 - Pleading (Compulsory Joinder of Causes)

The staff believes it might be desirable to make clear that inter-company insurance arbitration is not affected by the requirement that the plaintiff join related causes of action. Attached as Exhibit I is a section designed to make this clear.

Also a technical amendment is needed in Section 431.70. See Exhibit II.

Respectfully submitted,

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Executive Secretary

EXHIBIT I

§ 426.70. Inter-company insurance arbitration

426.70. (a) 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.

(b) 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) 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.

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.

§ 426.70

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.

EXHIBIT II

Sec. 4. Section 431.70 of the Code of Civil Procedure is amended to read:

431.70. Where cross-demands for money have existed between persons at any point in time when neither demand was barred by the statute of limitations, and an action is thereafter commenced by one such person, the other person may assert in his answer the defense of payment in that the two demands are compensated so far as they equal each other, notwithstanding that an independent action asserting his claim would at the time of filing his answer be barred by the statute of limitations. If the cross-demand would otherwise be barred by the statute of limitations, the relief accorded under this section shall not exceed the value of the relief granted to the other party. The defense provided by this section is not available if the cross-demand is barred for failure to assert it in a prior action under Section 426.20 or 426.30. Neither person can be deprived of the benefits of this section by the assignment or death of the other.

Comment. Section 431.70 ameliorates the effect of the statute of limitations; it does not revive claims that have previously been waived by failure to plead them under Section 426.20.