71 8/30/71

Memorandum 71-57

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

SUMMARY

At the direction of the Commission, the tentative recommendation relating to compulsory joinder of causes of action (copy attached) was distributed for comment to various interested persons and organizations. We received comments from a number of persons, and these are attached as exhibits to this memorandum. We have not yet received comments from the Judicial Council or the California Trial Lawyers Association.

With one exception, the comments received all favored the Commission's proposed legislation. Some of the favorable comments made suggestions for revisions and these are discussed below. The one unfavorable comment suggests that the Commission consider the merits of the California definition of a cause of action and/or whether compulsory joinder should be limited to certain specified types of situations (such as personal injury and property damage litigation).

REVIEW OF COMMENTS

Section 426.10 (page 6 of Tentative Recommendation)

Mr. Jack T. Swafford (Exhibit I) suggests that subdivision (b) of Section 426.10 be amended to delete "or cross-complaint." He believes that this phrase is unnecessary in view of the definition of "complaint" in subdivision (a). The phrase may not be essential, but the staff suggests that it be retained because it makes it entirely clear that "plaintiff" includes a person who

files a cross-complaint; this might not be entirely clear if the phrase were deleted as suggested.

Mr. Swafford also suggests a revision of subdivision (c) so that the subdivision would read as follows:

> (c) "Related cause of action" means a cause of action which arises out of the same transaction or occurrence which gives rise to a cause of action which the plaintiff alleges in his complaint.

Mr. Swafford believes this is a desirable change because the present wording "does not recognize the situation where several unrelated causes of action are properly included in the same Complaint." The staff believes that the suggested revision of subdivision (c) is an improvement and should be adopted.

Section 426.20 (page 7 of Tentative Recommendation)

Mr. Swafford (Exhibit I) suggests that Section 426.20 be revised to read:

> 426.20. Except as otherwise provided by statute, if as to any cause of action alleged in his complaint, a plaintiff shall as to any person named as a defendant in such cause of action (who is served or who appears in the action) fail to allege in such complaint a related cause of action which he has against such person at the time his complaint is filed, such plaintiff may not thereafter in any other action assert such related cause of action against such person.

This suggestion is made because "it seems to me that [Section 426.20] fails to recognize the possibility that there can be more than one plaintiff in an action, and that there may be different plaintiffs and different causes of action in the same complaint with different defendants in each of the causes of action." The staff does not believe that proposed Section 426.20 is defective and believes that it is a much more clear and concise statement than that proposed by Mr. Swafford.

D. Reginald Gustaveson (Exhibit IV) suggests that the rule as to assignments and subrogations be included in the text of the statute rather than in the Comment. It would be very difficult to incorporate the substance of the

rules relating to assignment and subrogation in the statute since the rules depend on whether the assignment is a complete or partial assignment and on whether the plaintiff retains a beneficial interest in the case of a complete assignment. There is considerable danger in attempting to state the rule in statutory form. Nevertheless, if the Commission believes that this is desirable, the following is suggested:

> 426.20. (a) [text of existing section as set out in tentative recommendation].
>
> (b) For the purposes of this section, a cause of action which the plaintiff "has" at the time his complaint is filed does not include one that has been completely assigned to another, or one to which another is completely subrogated, prior to the filing of the plaintiff's complaint unless the plaintiff is still the beneficial owner of all or a portion of the assigned or subrogated cause at the time the complaint is filed.

Section 426.70 (page 11 of Tentative Recommendation)

There were no comments on this section.

Section 431.70 (page 13 of Tentative Recommendation)

Judge Stevens Fargo (Exhibit VII) comments:

> it [is] highly desirable that we have this requirement in the form proposed. My only reservation is as to proposed CCP 431.70. It seems to me the cause of action barred by Section 426.10 ought to be treated as if barred by limitation; and available for set off.

This is, of course, a question that has been considered a number of times by the Commission. It would appear desirable to expand the Comment to amended Section 431.70 to include a more informative discussion. We suggest that the Comment be revised to read as follows:

> Under Section 431.70, claims which have previously been waived by failure to plead them under Section 431.30 (compulsory cross-complaint) are not revived for the purposes of set-off in a later action. This continues what appeared to be the prior law. See Jones v. Mortimer, 28 Cal.2d 627, 170 P.2d 839 (1946)(by implication). See also Franck v. J. J. Sugarman-Rudolph Co., 40 Cal.2d 81, 251 P.2d 949 (1952), holding that former Code of Civil Procedure Section 440 did not revive claims

previously waived. Section 431.70 is amended to treat claims barred by Section 426.20 (compulsory joinder of causes in complaint) the same as those barred by Section 431.30. The rationale for not allowing a claim barred under Section 426.20 or 426.30 to be used as a set-off in a later action is that there was prior litigation between the same parties on the transaction or occurrence that gave rise to the barred claim. This distinguishes these cases from those where the claim was barred by the statute of limitations. Accordingly, Section 431.70 ameliorates the effect of the statute of limitations but does not revive claims that have previously been waived by failure to plead them in prior litigation arising out of the same transaction or occurrence.

Other Comments

Raymond W. Schneider (Exhibit II) suggests that the statute should apply to special proceedings as well as civil actions. He would revise Section 426.60 (set out on pink sheet attached to tentative recommendation) accordingly. The proposed statute does not apply to special proceedings.

Kerry C. Smith (Exhibit VIII) is the lone objector to the tentative recommendation. His objection primarily is that the plaintiff should not be required to join causes when he brings an action for declaratory relief. He has overlooked the express exception for declaratory relief actions. See Section 426.60(c) (set out on pink sheet attached to tentative recommendation).

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memo 71-57

EXHIBIT I

JOSEPH J. BURRIS
STANLEY C. LAGERLOF
H. MELVIN SWIFT, JR.
H. JESS SENECAL
JACK T. SWAFFORD
JOHN F. BRADLEY

WILLIAM W. DAVIS
BEN A. SCHUCK, III

BURRIS & LAGERLOF
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GEORGE W. DRYER
1881-1959
RAYMOND R. HAILS
1889-1959

July 29, 1971

Mr. John H. DeMoully
Executive Secretary
California Law Review Commission
School of Law
Stanford, California 94305

Re: Tentative Recommendation Relating To
Compulsory Joinder of Causes of Action

Dear Mr. DeMoully:

I received and reviewed the Commission's recommendation No. 71 dated July 12, 1971 relating to compulsory joinder of causes of action. While I concur in the view that a revision of the Code is necessary to require compulsory joinder of causes of action on the part of plaintiffs, I have some suggestions for revising the present proposals.

Initially, with respect to Section 426.10 dealing with definitions, it seems to me that the language "or cross-complaints" in Subdivision (b) is unnecessary in view of the definition of "Complaint" in subdivision (a).

With respect to subdivision (c) of the proposed Section 426.10, it seems to me that it is somewhat awkward in that it does not recognize the situation where several unrelated causes of action are properly included in the same Complaint. Hence, I would revise the definition to read as follows:

> "Related cause of action" means a cause of action which arises out of the same transaction or occurence which gives rise to a cause of action which the plaintiff alleges in his complaint."

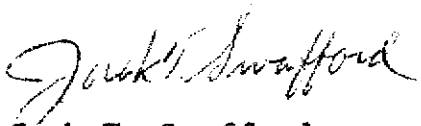
With respect to proposed Section 426.20, it seems to me that it fails to recognize the possibility that there can be more than one plaintiff in an action, and that there may be different plaintiffs and different causes of action in the

same complaint with different defendants in each of the causes of action. In other words, the bar of the statutes should arise only as between the same plaintiff and the same defendant. Accordingly, I would revise the section to read substantially as follows:

> Except as otherwise provided by statute, if as to any cause of action alleged in his complaint, a plaintiff shall as to any person named as a defendant in such cause of action (who is served or who appears in the action) fail to allege in such complaint a related cause of action which he has against such person at the time his complaint is filed, such plaintiff may not thereafter in any other action assert such related cause of action against such person.

I recognize that these suggestions are applicable to the new enactments of Chapter 244 of the 1971 Statutes but submit them at this time for consideration in any event.

Very truly yours,



Jack T. Swafford
of BURRIS & LAGERLOF

JTS:pk

Memo 71-57 EXHIBIT II

COUNTY COUNSEL

COUNTY OF HUMBOLDT

EUREKA, CALIFORNIA 95501 PHONE (707) 445-7236

July 30, 1971

Mr. John H. DeMoully, Executive Secretary
California Law Revision Commission
School of Law - Stanford University
Stanford, California 94305

Re: Tentative recommendation relating to compulsory joinder of causes of action

Dear Mr. DeMoully:

With your letter of transmittal, received July 28, 1971, you included copies of the tentative recommendation of the California Law Revision Commission relating to compulsory joinder of causes of action.

We have reviewed the tentative recommendation and wholly approve the recommendations made by the California Law Revision Commission relating to joinder of causes of action.

However, we wish to point out that even this provision would not eliminate multiplicity of actions where the plaintiff commences a special proceeding rather than a civil action. The tentative recommendation would not require the person initiating a special proceeding to join all causes that rose out of the transaction or occurrence which is the basis of his initiation of the special proceeding.

As an example, in recent years we have had a plaintiff who first initiated a proceeding in mandamus and, after the petition for mandamus was denied, commenced a civil action for damages on the same set of facts. So far, the court has refused to recognize the ruling in the mandamus action as res judicata on the civil action for damages.

We feel that the tentative recommendation makes even more sense than compulsory joinder of actions for defendants.

Very truly yours,

Raymond W. Schneider
County Counsel

RWS:mfs

MUSICK, PEELER & GARRETT
ATTORNEYS AT LAW
ONE WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA 90017
TELEPHONE (213) 629-3322
CABLE "PEELGAR"

August 2, 1971

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Dear Mr. DeMoully:

This letter is to indicate my approval of the Tentative Recommendation relating to Compulsory Joinder of Causes of Action, dated July 12, 1971.

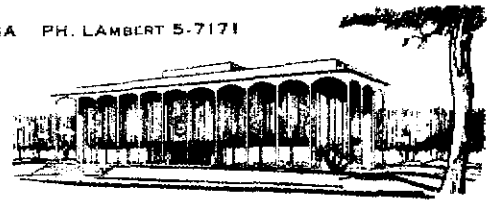
Very truly yours,

James E. Ludlam
for MUSICK, PEELER & GARRETT

JEL:k

Item 71-57 EXHIBIT IV

CITY HALL 303 WEST COMMONWEALTH AVENUE FULLERTON, CALIFORNIA PH. LAMBERT 5-7171



August 2, 1971

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
School of Law - Stanford University
Stanford, California 94305

Dear Mr. DeMoully:

The tentative recommendations for compulsory joinder of causes of action by Plaintiffs appears to be well considered; however, it seems that a subrogation should be treated the same as an assignment where both occur prior to filing suit. Rather than leave either to judicial interpretation, it would help to add a provision that clearly stated the meaning of "which he has" as applicable in cases of assignment or subrogation.

Yours very truly,

D. Reginald Gustaveson
Fullerton City Attorney

d

Memo 71-57 EXHIBIT V

J. H. PETRY
ATTORNEY AT LAW
574 COURT STREET
SAN BERNARDINO, CALIFORNIA 92401
AREA CODE 714
TURNER 9-9545

August 4, 1971

California Law Revision Commission
School of Law - Stanford University
Stanford, Calif. 94305

Gentlemen:

With reference to your Commission's "Tentative Recommendation" on "Compulsory Joinder of Causes of Action", I hereby express my approval of those recommendations.

Very truly yours,

J. H. Petry

JHP:js

Memo 71-57 EXHIBIT VI

LAW OFFICES

REID, BABBAGE & COIL

ENOS C. REID
JOHN D. BABBAGE
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AREA CODE 714
CABLE ADDRESS "REBCO"

August 11, 1971

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Re: Recommendation and Study Relating to Counterclaims and Cross-Complaints, etc.

Dear John:

This will acknowledge your Letter of Transmittal regarding the above-captioned subject.

We have examined the tentative recommendation and are in favor of it.

Best personal regards.

Very truly yours,

REID, BABBAGE & COIL

John D. Babbage

JDB:ml

Memo 71-57

EXHIBIT VII

CHAMBERS OF
The Superior Court
LOS ANGELES, CALIFORNIA 90012
STEVENS FARGO, JUDGE

Aug 11th 1971

Calif Law Revision Comm —

Gentlemen: atty Mr DeMaully —

Re Compulsory Joinder C/C —
CCP 426.10 - 20 etc —

I think it highly desirable that we keep this requirement in the form proposed. My only reservation is as to proposed CCP 431.70. It seems to me the cause of action barred by 426.10 ought to be treated as if barred by limitations; and available for set-off —

Sincerely

Stevens Fargo

Memo 71-57 EXHIBIT VIII

LAW OFFICES OF

CHICKERING & GREGORY

ONE ELEVEN SUTTER STREET

SAN FRANCISCO 94104

CODE ADDRESS "CHICGREG"

TELEPHONE 421-3430 AREA CODE 415

August 13, 1971

California Law Revision Commission
School of Law - Stanford University
Stanford, California 94305

Attention: Mr. John H. DeMoully

Gentlemen:

I would like to take this opportunity to comment upon the tentative recommendation of the California Law Revision Commission relating to compulsory joinder of causes of action. I question the following conclusion contained in the recommendation:

> "And the possibility that plaintiffs will be encouraged to press causes of action they would not ordinarily pursue is minimal in view of the common practice of joining all related causes as a matter of course. Any burdens added to the litigation will be outweighed by benefits the compulsory joinder rule will provide."

The examples used in the recommendation deal solely with personal injury and property damage litigation. I am having a difficult time finding other examples that would support the conclusions. For example, why should a plaintiff shareholder, when suing the corporation for declaratory relief, be required to assert a derivative cause of action and possibly a class cause of action when those causes of action very likely could arise out of the same transaction or occurrence as the declaratory relief action. The burdens confronting a plaintiff in having to bring a derivative action (e.g., security for expenses) or a class action (e.g., notice requirements, court administration and supervision) might very well severly handicap and discourage a plaintiff from bringing the declaratory relief action. As you know, there is a strong policy in the law toward eliminating impediments that may prevent a plaintiff from having his day in court.

Similarly in the foregoing example, the defendants might very well not want to be put to the trouble and expense of defending a derivative or class action.

In my opinion, the tentative recommendation is a good faith attempt to attack the symptoms rather than the problem itself. It appears that the principal problem is California's definition of a cause of action.

In my opinion, the Commission should give further study to this matter along two lines, as follows:

1. A study directed at the merits of the California definition of a "cause of action"; and/or

2. A study directed toward determining limits to the compulsory joinder of causes of action to those situations, e.g., personal injury and property damage litigation, where it indeed has merit.

Very truly yours,

Kerry C. Smith

KCS:llw

Memo 71-57 EXHIBIT IX

PACIFIC GAS AND ELECTRIC COMPANY

PG&E 77 BEALE STREET • SAN FRANCISCO, CALIFORNIA 94106 • (415) 781-4211

FREDERICK T. SEARLS
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JOHN C. MORRISSEY
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WILLIAM B. KUDER
WILLIAM E. JOHNS
MALCOLM H. FURBUSH
CHARLES T. VAN DEUSEN
JOHN A. SPROUL
MALCOLM A. MACKILLOP
PHILIP A. CRANE, JR.
ASSISTANT GENERAL COUNSEL

NOEL KELLY
HENRY J. LAPLANTE
RICHARD A. CLARKE
GILBERT L. HARRICK
EDWARD J. MCGANNEY
JOHN S. COOPER
JOHN B. GIBSON
GLENN WEST, JR.
SENIOR COUNSEL

ARTHUR L. HILLMAN, JR.
CHARLES W. THISSELL
ROBERT DILBACH
SANFORD M. SKAGGS
STANLEY T. SKINNER
W. BURTON GOLDEN
DANIEL E. GIBSON
J. BRADLEY BURNIN
GERHARD J. DELLABANTA
JACK F. FALLIN, JR.
DONALD L. FREITAS
JAMES C. LOGSDON
JOSEPH S. ENGLERT, JR.
ATTORNEYS

August 12, 1971

Mr. John D. DeMoully
Executive Secretary
California Law Revision Commission
School of Law - Stanford University
Stanford, California 94305

Re: Tentative Recommendation Relating to Compulsory Joinder of Causes of Action

Dear Mr. DeMoully:

Thank you for sending me the copies of the above referenced tentative recommendation.

I approve of the tentative recommendation as contained in the proposal dated July 12, 1971.

Please retain my name on your mailing list for future recommendations.

Thank you.

Very truly yours,

Sanford M. Skaggs

SANFORD M. SKAGGS

SMS:nw

Memo 71-57

EXHIBIT I

SHELDON MILLIKEN
ATTORNEY AT LAW
774 EAST GREEN STREET
PASADENA, CALIFORNIA 91101
TELEPHONE 795-9393

August 17, 1971

California Law Revision Commission
School of Law - Stanford University
Stanford, California 94305

Re: Compulsory joinder of causes of action

Gentlemen:

I have studied the tentative recommendation.

My response must be subject to two limitations:

1. My practice, confined solely to our own real estate transactions, does not encompass litigation.

2. I haven't heard any opposing arguments.

Nevertheless the logic of the recommendation seems so inescapable that I approve it.

Sincerely,

Sheldon Milliken

Sheldon Milliken

SM/ps

Memo 71-57

EXHIBIT XI

GRAY, CARY, AMES & FRYE
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2100 UNION BANK BUILDING
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LA JOLLA OFFICE
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LA JOLLA, CALIF. 92037
TELEPHONE (714) 459-4321

August 26, 1971

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
Stanford University School of Law
Stanford, California 94305

Dear Mr. DeMoully:

Thank you for your recent letter of transmittal regarding your Commission's tentative recommendation relating to compulsory joinder of causes of action. While it would be possible to enter into a long discussion considering each and every point touched upon in the Commission's comments, it would seem to serve no useful purpose. Suffice it to say that I have closely reviewed the recommendations and the underlying reasons therefor and entirely agree with every point made. I believe the language set forth in the proposal is as concise as reasonably possible and the effect of the enactment of your proposals would be of substantial benefit to the litigation oriented practitioner in California.

I thank you for the opportunity of commenting on your proposal and hopefully it will receive warm acceptance in the 1972 legislature.

Sincerely,

Terry D. Ross

Terry D. Ross
For
GRAY, CARY, AMES & FRYE

TDR/klc

Memorandum 71-57

EXHIBIT XII

LAW OFFICES
WALKER, SCHROEDER, DAVIS & BREHMER

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GEORGE L. SCHROEDER
G. GERVAISE DAVIS III
GEORGE W. BREHMER, JR.

POST OFFICE BOX LAW
PROFESSIONAL BUILDING
MONTEREY, CALIFORNIA 93940
(408) 375-5161
CABLES LAW
ALSO
CARMEL, CALIFORNIA

August 30, 1971

John H. DeMoully, Executive Secretary
California Law Revision Commission
Stanford, California 94305

RE: Recommendation concerning
Compulsory Joinder of Causes of Action

Dear Mr. DeMoully:

My partners and I have reviewed the tentative recommendation of the Commission concerning the above subject, and believe that the suggestion of the Commission is sound and should be encouraged by the active bar.

The only question which we have, and believe should be clarified further, is whether or not this statute will apply in domestic relations actions. We realize that your comments to the statute refer to §4001 of the Civil Code, but we do not believe that a matter of this nature should be determined by the Judicial Council rules but should be covered by statute. Either the Compulsory Joinder of Action should apply, or they should not, in domestic relations actions, as a matter of law.

As usual the Commission has done a thoroughly workmanlike job of the matter and should be commended.

Very truly yours,

G. Gervaise Davis III

3:jp

STATE OF CALIFORNIA RONALD REAGAN, Governor

CALIFORNIA LAW REVISION COMMISSION
SCHOOL OF LAW—STANFORD UNIVERSITY
STANFORD, CALIFORNIA 94305
(415) 321-2300, EXT. 2479

LETTER OF TRANSMITTAL

Chapter 244 of the Statutes of 1971 modernizes certain aspects of California pleading practice. This legislation was enacted upon recommendation of the Law Revision Commission. See Recommendation and Study of the California Law Revision Commission Relating to Counterclaims and Cross-Complaints, Joinder of Causes of Action, and Related Provisions (October 1970).

Although the 1971 statute effectuates substantially all of the Commission's recommendations for pleading reform, one significant recommendation--compulsory joinder of causes of action by plaintiffs--was deleted from the recommended legislation before it was enacted. The Senate Judiciary Committee asked the Law Revision Commission to give this matter further study.

The attached tentative recommendation is the result of the Commission's further study of compulsory joinder by plaintiffs. Also attached (pink sheet) is the pertinent portion of the 1971 statute relating to compulsory joinder of causes of action.

This tentative recommendation is being sent out now so that interested persons and organizations can review it and submit statements of their views to the Commission. The comments and suggestions we receive will be reviewed by the Commission before the Commission determines what, if any, recommendation it will submit to the 1972 legislative session on this subject. It is just as important to indicate that you approve the tentative recommendation as it is to indicate you disapprove of it or to suggest revisions.

We request that your comments be in our hands not later than August 30, 1971, so that they can be given careful consideration by the Commission before decisions are made. We need and will appreciate your assistance in this project.

Sincerely,

John H. DeMoully
Executive Secretary

#71

July 12, 1971

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

relating to

COMPULSORY JOINDER OF CAUSES OF ACTION

COMMENTS SHOULD BE IN HANDS OF LAW REVISION COMMISSION NOT LATER THAN AUGUST 30, 1971.

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford University
Stanford, California 94305

NOTE: This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be considered when the Commission determines what recommendation it will make to the Legislature.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

This tentative recommendation includes an explanatory Comment to each section of the recommended legislation. For the most part, the Comments are written as if the legislation were enacted. They are cast in this form because their primary purpose is to undertake to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

LETTER OF TRANSMITTAL

To: HIS EXCELLENCY, RONALD REAGAN
Governor of California and
The Legislature of California

The California Law Revision Commission was authorized by Resolution Chapter 224 of the Statutes of 1969 to study various aspects of pleading. The Commission submitted a recommendation on this subject to the Legislature at its 1971 session. See Recommendation and Study Relating to Counterclaims and Cross-Complaints, Joinder of Causes of Action, and Related Provisions (1970), reprinted in 10 Cal. L. Revision Comm'n Reports 501 (1971).

Most of the recommended legislation was enacted in 1971. See Cal. Stats. 1971, Ch. 244. However, before the bill introduced to effectuate the Commission's recommendation was enacted, a section providing for limited compulsory joinder of causes of action by plaintiffs was deleted. This deletion was made so that this matter could be given further study. After further study, the Commission makes this recommendation.

Respectfully submitted,

Thomas E. Stanton, Jr.
Chairman

TENTATIVE

RECOMMENDATION OF THE CALIFORNIA

LAW REVISION COMMISSION

relating to

COMPULSORY JOINDER OF CAUSES OF ACTION

BACKGROUND

Since 1872, a defendant in a civil action in California has been required to assert by counterdemand any cause of action he has against the plaintiff that arises out of the same transaction or occurrence alleged in the complaint.[1] This requirement is continued in legislation enacted by the 1971 Legislature upon the recommendation of the Law Revision Commission,[2] along with added provisions to protect the defendant against unjust forfeiture of a cause of action.[3] There is at present no comparable requirement that a plaintiff join all causes of action that arise out of the same transaction or occurrence as the cause he alleges in his complaint.[4]

---

1. See former Code of Civil Procedure Section 439:

   439. If the defendant omits to set up a counterclaim upon a cause arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, neither he nor his assignee can afterwards maintain an action against the plaintiff therefor.

2. Cal. Stats. 1971, Ch. 244. See Code of Civil Procedure Section 426.30. Cf. Recommendation and Study Relating to Counterclaims and Cross-Complaints, Joinder of Causes of Action, and Related Provisions (1970), reprinted in 10 Cal. L. Revision Comm'n Reports 501 (1971).

3. See Code of Civil Procedure Sections 426.30(b) and 426.50. See also Code of Civil Procedure Sections 426.40 and 426.60.

4. For a discussion of the existing California law, see Friedenthal, Joinder of Claims, Counterclaims, and Cross-Complaints: Suggested Revision of the California Provisions, 23 Stan. L. Rev. 1, 11-14 (1970).

The reasons that a defendant is required to assert all causes of action that arise out of the transaction or occurrence upon which he is sued are clear. It is desirable in the interest of judicial economy that parties to a lawsuit dispose of all related claims in one action. In addition to limiting multiple lawsuits, the requirement also minimizes trial expenses, for causes of action arising out of the same transaction or occurrence will ordinarily involve the same witnesses if not identical issues. And the defendant is prevented from harassing the plaintiff by bringing a separate suit to recover for damages arising out of the same transaction or occurrence.

The reasons that support the requirement that a defendant assert all related causes of action apply with equal or greater force to a plaintiff. The plaintiff, because he initiates the action, is normally in a better position than the defendant to determine the possible causes of action that arise out of the same transaction or occurrence. Often the plaintiff has more time and opportunity to determine the facts before he files his complaint than the defendant has before he must file his cross-complaint. In some cases, as where an employer is sued for the act of an employee, the defendant may not even be aware of the occurrence that gave rise to the plaintiff's action. Moreover, the disparate treatment of joinder requirements gives the plaintiff a possible tactical advantage in litigation over the defendant without apparent justification. For example, in a vehicle accident case, the plaintiff may first bring an action for property damage in the hope that it will not be vigorously defended. A judgment in the plaintiff's favor in that action will then be conclusive on the issue of liability in a subsequent action brought by the plaintiff for his personal injuries since collateral estoppel will preclude relitigating the issue of liability in the second action if the same factual issues are involved in both actions.[5]

---

5. See 3 B. Witkin, California Procedure Judgment §§ 62-64 (1954).

Moreover, it is sometimes possible to bring the property damage suit in one county and the personal injury suit in another, thus unjustifiably inconveniencing the defendant and unnecessarily increasing the cost of defending the suits. At the same time, an unwary plaintiff may not realize that collateral estoppel will bar the personal injury action where the property damage suit is tried first and results in a judgment for the defendant. This can happen where the plaintiff fails to prosecute vigorously the property damage suit because of the small amount involved. Finally, as a practical matter, the requirement of compulsory joinder of related causes will not impose an undue burden on the plaintiff; the plaintiff seldom fails to plead all causes arising out of the same transaction or occurrence both for the sake of convenience and because he fears that the rules of res judicata or collateral estoppel may operate to bar any causes he does not plead.[6]

RECOMMENDATION

The Commission recommends that the plaintiff in a civil action be required to join all causes that arise out of the transaction or occurrence that is the basis of his complaint. The same provisions designed to prevent unjust forfeiture of a related cause of action of a defendant should apply

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6. For a discussion of the existing California law, see Friedenthal, Joinder of Claims, Counterclaims, and Cross-Complaints: Suggested Revision of the California Provisions, 23 Stan. L. Rev. 1, 11-14 (1970).

to the plaintiff.[7] Adoption of these rules will have several beneficial consequences. The litigation positions of plaintiffs and defendants will be equalized. Court time and expense will be economized. The law governing compulsory joinder of causes of action will be clarified, thus eliminating the need to rely on the uncertain rules of res judicata and collateral estoppel to determine whether a cause is barred by failure to assert it in a prior action.

While adoption of these rules will clarify and improve the law, they will not impose any substantial new burdens on litigants or on the court system. The courts have adequately handled problems arising under the defendant's compulsory joinder requirement. And the possibility that plaintiffs will be encouraged to press causes of action they would not ordinarily pursue is minimal in view of the common practice of joining all related causes as a matter of course. Any burdens added to the litigation will be outweighed by benefits the compulsory joinder rule will provide.

The Commission also recommends that somewhat narrower language be used to describe those actions which must be joined.[8] The compulsory joinder provisions should not be broadly interpreted to bar unpleaded causes. In addition, it is recommended that a section be added to the pleading statute to make clear that the compulsory joinder of causes requirement has no effect on intercompany insurance arbitration.

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7. E.g., Code of Civil Procedure Sections 426.40 (compulsory joinder not required where cause of action not pleaded requires for its adjudication the presence of additional parties over whom the court cannot acquire jurisdiction, where both the court in which the action is pending and any other court to which the action is transferrable pursuant to Section 396 are prohibited by the federal or state constitution or by a statute from entertaining the cause of action not pleaded, or where, at the time the action was commenced, the cause of action not pleaded was the subject of another pending action), 426.50 (relief for party who acted in good faith in failing to plead related cause of action), 426.60 (compulsory joinder not required in special proceedings, in actions in small claim court, or where only relief sought is declaratory relief).

8. See the discussion, infra, in the Comment to Section 426.10 of the recommended legislation.

PROPOSED LEGISLATION

The Commission's recommendation would be effectuated by the enactment of the following measure:

An act to amend the heading for Article 2 (commencing with Section 426.10) of Chapter 2 of Title 6 of Part 2 of, to amend Sections 426.10 and 431.70 of, and to add Sections 426.20 and 426.70 to, the Code of Civil Procedure, relating to pleading.

The people of the State of California do enact as follows:

Section 1. The heading for Article 2 (commencing with Section 426.10) of Chapter 2 of Title 6 of Part 2 of the Code of Civil Procedure is amended to read:

Article 2. Compulsory Joinder of Causes of Action; Compulsory Cross-Complaints

§ 426.10. Definitions (amended)

Sec. 2. Section 426.10 of the Code of Civil Procedure is amended to read:

426.10. As used in this article:

(a) "Complaint" means a complaint or cross-complaint.

(b) "Plaintiff" means a person who files a complaint or cross-complaint.

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

Comment. The definition of Section 426.10 of "related cause of action" provides a convenient means for referring to a cause of action which arises out of the same transaction or occurrence. Subdivision (c) adopts substantially the same language as was used in former Code of Civil Procedure Section 439 (compulsory counterclaims). As to the interpretation given this language, see Brunswig Drug Co. v. Springer, 55 Cal. App.2d 444, 130 P.2d 758 (1942); Sylvester v. Soulsburg, 252 Cal. App.2d 185, 60 Cal. Rptr. 218 (1967). The language used in subdivision (c) of Section 426.10 is not as broad as the somewhat similar language used in subdivision (b) of Section 428.10(b)(permissive cross-complaints) since the two provisions serve different purposes and should be interpreted accordingly. Subdivision (c) defines a term used in sections which operate to bar an unpleaded cause of action and these sections should not be broadly interpreted to bar unpleaded causes; Section 428.10(b), on the other hand, permits but does not require the joinder of causes in a cross-complaint and should be liberally interpreted to permit joinder.

§ 426.20. Compulsory joinder of related causes (new)

Sec. 3. Section 426.20 is added to the Code of Civil Procedure, to read:

426.20. Except as otherwise provided by statute, if the plaintiff fails to allege in his complaint a related cause of action which (at the time his complaint is filed) he has against any party named as a defendant in his complaint who is served or appears in the action, the plaintiff may not thereafter in any other action assert such related cause of action against such party.

Comment. Section 426.20 requires a party to join all causes of action arising from the transaction or occurrence pleaded in his complaint or cross-complaint. (See Section 426.10 defining "complaint," "plaintiff," and "related cause of action.")

This requirement results normally under the rule in those jurisdictions which follow the so-called operative facts theory of a cause of action for res judicata purposes. However, in the past, California has followed the "primary rights theory" of a cause of action, and res judicata has applied only where the cause not pleaded is for injury to the same primary right. See 3 B. Witkin, California Procedure Pleading §§ 22, 23 (2d ed. 1971); 3 id. Judgment §§ 59-60 (1954). Nevertheless, even where different primary rights are injured, collateral estoppel makes a determination in a prior action conclusive in a suit on the unpleaded cause of action if precisely the same factual issues are involved in both actions. See 3 B. Witkin, California Procedure Judgment §§ 62-64 (1954).

Only related causes of action that exist at the time the party files his complaint or cross-complaint must be joined. Thus, for example, although Section 426.20 may operate to bar an unpleaded related cause of action for damages accrued at the time of filing a complaint, it does not bar a later action for recovery of damages accruing thereafter for which the party did not have a cause of action existing at the time the complaint was filed. Cf. Chavez v. Carter, 256 Cal. App.2d 577, 64 Cal. Rptr. 350 (1967)(compulsory counterclaims); Babb v. Superior Court, 3 Cal.3d 841, Cal. Rptr. , P.2d (1971) (permissive cross-complaint).

Section 426.20 operates to bar only those related causes of action which the plaintiff "has . . . at the time his complaint is filed." Where the plaintiff fails to join a related cause of action which is required to be joined under Section 426.20 and later purports to assign it to another, suit on the assigned claim is clearly barred under Section 426.20. Where there has been a complete assignment of a cause of action prior to the time the assignor sues on one or more related causes arising out of the same transaction of occurrence, Section 426.20 does not bar an action by the assignee on the assigned cause, since the assigned cause is not one that the assignor "has" at the time he commenced his action. (Where there has been a complete assignment of the beneficial interest in a cause of action, the assignee takes legal title and sues alone in his own name; the assignor cannot sue. See 3 B. Witkin, California Procedure Pleading § 100 (2d ed. 1971).) However, where there has been a complete assignment for collection or for collateral security, for example, the assignor is still the beneficial owner of the assigned cause of action and his failure to join the assigned cause when he sues on related causes arising out of the same transaction or occurrence would bar a later

suit on the assigned cause. (The assignor is permitted to bring suit on the assigned claim in such a case if he joins the assignee. See 3 B. Witkin, California Procedure Pleading § 100 (2d ed. 1971).) If the assignor has made only a partial assignment, he remains beneficially interested in the claim and hence the claim is one he "has" at the time he commences his action. He cannot split his cause of action by a partial assignment and subject the defendant to two suits by different plaintiffs. See Stein v. Cobb, 38 Cal. App.2d 8, 10, 100 P.2d 358, (1940); Potter v. Lawton, 118 Cal. App. 558, 560, 5 P.2d 904, (1931). Accordingly, the plaintiff's failure to join the assigned cause when he sues on related causes arising out of the same transaction or occurrence would bar a later suit on the assigned cause. (The partial assignor may sue on the assigned claim if he joins the partial assignee. Id.) The same rules as to complete and partial assignments apply to cases where there is a total or partial subrogation. See 3 B. Witkin, California Procedure Pleading §§ 101-102 (2d ed. 1971).

Service on or appearance of a particular party determines whether a related cause of action against that party is required by Section 426.20 to be alleged in the complaint or cross-complaint. Thus, if a particular party is not served at all and makes no appearance, Section 426.20 does not bar a related cause of action against him. Moreover, Section 426.20 does not apply under certain circumstances because of jurisdictional considerations. See Section 426.40.

Section 426.20 is inapplicable to special proceedings, actions in small claims court, or where only declaratory relief is sought. See Section 426.60. See also, e.g., Civil Code Section 4001 (Judicial Council rule governing proceedings under Family Law Act). Specific statutes may allow the splitting of

causes, and these statutes prevail over Section 426.20. See, e.g., Civil Code Section 1951.4. Section 426.20 has no effect on the independent application, if any, of the rules of res judicata (including the rule against splitting a cause of action) and collateral estoppel.

It is important to note that a court must grant a party who acted in good faith leave to amend his complaint to assert a related cause of action not pleaded. See Section 426.50.

§ 426.70. Intercompany insurance arbitration (new)

Sec. 4. Section 426.70 is added to the Code of Civil Procedure, to read:

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 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 intercompany 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. Of course, to the extent the insurer is subrogated to the rights of the insured, the determination of the subrogated matter between the insurers is binding on the insured.

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. As to the effect of the assignment of a cause of action on the compulsory joinder requirement, see the Comment to Section 726.20.

§ 431.70. Set-off (amended)

Sec. 5. 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.

CODE OF CIVIL PROCEDURE PROVISIONS DEALING WITH COMPULSORY JOINDER OF CAUSES OF ACTION

(As enacted by Chapter 244, Statutes of 1971, which become operative on July 1, 1972)

Article 2. Compulsory Cross-Complaints

426.10. As used in this article:

(a) "Complaint" means a complaint or cross-complaint.

(b) "Plaintiff" means a person who files a complaint or cross-complaint.

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

426.30. (a) 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 any related cause of action which (at the time of serving his answer to the complaint) he has against the plaintiff, such party may not thereafter in any other action assert against the plaintiff the related cause of action not pleaded.

(b) This section does not apply if either of the following are established:

(1) The court in which the action is pending does not have jurisdiction to render a personal judgment against the person who failed to plead the related cause of action.

(2) The person who failed to plead the related cause of action did not file an answer to the complaint against him.

426.40. This article does not apply if any of the following are established:

(a) The cause of action not pleaded requires for its adjudication the presence of additional parties over whom the court cannot acquire jurisdiction.

(b) Both the court in which the action is pending and any other court to which the action is transferrable pursuant to Section 396 are prohibited by the federal or state constitution or by a statute from entertaining the cause of action not pleaded.

(c) At the time the action was commenced, the cause of action not pleaded was the subject of another pending action.

426.50. A party who fails to plead a cause of action subject to the requirements of this article, whether through oversight, inadvertence, mistake, neglect, or other cause, may apply to the court for leave to amend his pleading, or to file a cross-complaint, to assert such cause at any time during the course of the action. The court, after notice to the adverse party, shall grant, upon such terms as may be just to the parties, leave to amend the pleading, or to file the cross-complaint, to assert such cause if the party who failed to plead the cause acted in good faith. This subdivision shall be liberally construed to avoid forfeiture of causes of action.

426.60. (a) This article applies only to civil actions and does not apply to special proceedings.

(b) This article does not apply to actions in the small claims court.

(c) This article does not apply where the only relief sought is a declaration of the rights and duties of the respective parties in an action for declaratory relief under Chapter 8 (commencing with Section 1060) of Title 14 of this part.